'Navigating Corporate Accountability: Addressing Regulatory Challenges in the Face of Human Rights and Environmental Violations"

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Abstract

The impact of Multinational Corporations (MNCs) on the environment and human well-being has reached a critical point. Instances of environmental degradation caused by these corporations have led to severe violations of human rights, resulting in complex challenges. Despite numerous cases brought to light through legal battles and media coverage, existing international and domestic regulatory frameworks have struggled to comprehensively address the extensive harm caused by MNCs. Regulations attempting to manage the damage caused by these entities are insufficient and inconsistently enforced globally. The absence of a binding universal treaty specifically designed to tackle these interconnected ecological and human rights issues has made seeking justice for victims an arduous task. Victims are forced to navigate complex international instruments, often encountering corruption within judicial and political systems, hindering their pursuit of redress for serious rights violations. In light of these shortcomings, this discussion underscores the intrinsic link between human rights and the environment, emphasizing the limitations of current regulatory measures. By examining global literature, international legal sources, and specific national case studies, this thesis aims to demonstrate the inadequacy of existing regulations in protecting and addressing the victims of environmental harm. Additionally, it will propose alternative remedies and preventive measures to rectify these transgressions. The conclusions will provide for why a binding treaty tailored to address these intertwined concerns stands as a possible solution toward protecting both the environment and human rights.

Methodology

The methodology employed in this thesis integrates both doctrinal and non-doctrinal approaches to comprehensively address the research question, objectives, and scope of the study. This choice of methodologies aims to present a multifaceted analysis that combines theoretical frameworks with practical insights.

The doctrinal research aspect involves an in-depth study, analysis, and interpretation of legal rules, principles, and provisions derived from existing legal sources such as statutes, regulations, case laws, treaties, and legal commentaries. Using the doctrinal method, the thesis analyses and synthesizes these legal materials to discern their implications, meanings, and applications within the study's context. Additionally, it critically assesses legal principles to identify inconsistencies, contradictions, and gaps in the law, thereby proposing reforms or improvements based on this analysis. The study primarily relies on library-based research and involves critical analysis of human rights and environmental law instruments, literature and relevant norms and codes governing MNCs' accountability at regional and international levels. Primary sources include international and regional human rights instruments governing MNCs' activities and judgments from international and domestic courts. Secondary sources encompass journal articles, law textbooks, government agency records, reports, and electronic sources pertinent to the study.

In contrast, the non-doctrinal aspect of the research extends beyond legal texts, delving into the broader social, political, economic, and philosophical dimensions of law's impact on society. Given the multifaceted nature of the topic involving corporations, humans, and the environment, this dimension critically examines legal systems, institutions, and practices to identify societal implications, inequalities, and impacts on marginalized groups. Furthermore, it incorporates ethical and normative considerations, exploring questions of justice, fairness, and human rights within the aforementioned legal frameworks. This approach complements doctrinal analysis by offering a more comprehensive understanding of the societal context in which legal rules function.

Acknowledging the constraints of being a desk-based study without fieldwork, the research relies heavily on primary and secondary data as well as other established frameworks. However, despite these limitations, the study aims to offer comprehensive insights into the subject matter. The conclusion will consolidate the research findings and evaluate the effectiveness of the chosen methodologies in addressing the research questions and achieving the specified objectives. Based on the study's outcomes, recommendations for future improvements to existing legal systems and frameworks will be proposed to contribute to further exploration in this area. These recommendations aim to suggest enhancements for legal structures and implementations based on the insights gathered from this research.

Chapter 1: Introduction

As companies have grown in size and power, they have come under greater scrutiny for their impact on human rights and the environment[1]. Over the last couple of decades, there has been an unprecedented expansion of Multinational Corporations (MNCs) with reports showing that approximately 100,000 MNCs account for about a quarter of the global gross domestic product, generating a turnover that greatly exceeds the public budget of many countries.[2] For example, In the United States, which boasts the world's largest economy, MNCs make a disproportionate contribute to the national economy. Although they represent less than 1% of the total number of American firms, they contribute significantly to the GDP, exports, imports, research and development, and private-sector employee compensation.[3] Similarly, MNCs hold a dominant position in both the global economy and their respective national economies worldwide. According to the Organisation for Economic Co-operation and Development (OECD) in 2018, MNCs are responsible for half of global exports, approximately one-third of world GDP (28%), and almost a quarter of global employment.[4] These corporations also earn a significant portion of their revenue from foreign markets, such as through their operations in developing nations. Consequently, the activities of MNCs that span across borders have greatly influenced international trade, investments, and technology transfers in the era of globalization.[5] This is due to the widespread use of global value chains in the world economy, which have been largely shaped by how MNCs structure their global operations through outsourcing and offshoring activities. [6] As a result, the decisions made by MNCs can have significant implications for various policy issues, including taxation, investment protection, and immigration, across numerous countries with diverse political and economic systems.[7] Additionally, MNCs may have significant political power within their home countries. These key players continue to grow and influence the global economy with their operations, however, their operations that

[1]Parliament Joint Committee on Human Rights. (2009). "Any of our business? Human rights and the UK private sector." Available at: https://publications.parliament.uk/pa/jt200910/jtselect/jtrights/5/5i.pdf, also see Harvard Business Review. (2020). "A More Sustainable Supply Chain." Available at: https://hbr.org/2020/03/a-more-sustainable-supply-chain, also see Office of the United Nations High Commissioner for Human Rights. (n.d.). "The Corporate Responsibility to Respect Human Rights." Available at: https://www.ohchr.org/sites/default/files/Documents/publications/hr.puB.12.2_en.pdf

[2] It was reported in 2019 that, the global flows of foreign direct investment amounted to $1.3 trillion. Mikler, John. (2013). "Global Companies as Actors in Global Policy and Governance." In John Mikler (Ed.), *The Handbook of Global Companies* (Wiley-Blackwell).

[3] Kim, Y., & Milner, H. V. (2019). Globalization, domestic politics, and regionalism: The ASEAN Free Trade Area (AFTA) in comparative perspective. Brookings Institution Press. https://www.brookings.edu/wp-content/uploads/2019/12/Kim_Milner_manuscript.pdf

[4] OECD. 2018. "Multinational Enterprises in the Global Economy: Heavily Debated but Hardly Measured." https://www.oecd.org/industry/ind/MNEs-in- the-global-economy-policy-note.pdf. Also see, Kim & Milner Multinational Corporations and their Influence Through Lobbying on Foreign Policy available at: https://www.brookings.edu/wp-content/uploads/2019/12/Kim_Milner_manuscript.pdf

[5] Ibid

[6] Ibid

[7] Kim, Y., & Milner, H. V. (2019). Globalization, domestic politics, and regionalism: The ASEAN Free Trade Area (AFTA) in comparative perspective. Brookings Institution Press. https://www.brookings.edu/wp-content/uploads/2019/12/Kim_Milner_manuscript.pdf

often spread over many different jurisdictions, have evoked environmental and human rights concerns amongst experts, scholars, activists, and the general public.[8] This expansion of power of MNCs and the issues that emerge as a result is seen as partly due to globalization, as Shelton stated that globalization has created "powerful non-state actors that may violate human rights in ways that were not contemplated during the development of the modern human rights movement".[9] It is therefore not surprising that regulations have historically fallen short in effectively managing any violations that are brought on by MNCs.

As global players, MNCs operations can lead to transboundary incidents that have detrimental environmental consequences and tangible human rights violations.[10] Such incidents have led to the emergence of the concept of corporate accountability as a critical issue in the contemporary international business landscape, based on the principle that businesses should be held responsible for their actions and decisions that impact society and the environment. While 'corporate accountability' is occasionally used as a substitute for 'corporate responsibility', it's essential to note that the idea of corporate accountability isn't identical to corporate responsibility. [11] Corporate responsibility emphasizes voluntary methods for addressing social and environmental concerns[12], whereas corporate accountability centres on a confrontational or enforceable structure to impact corporate conduct.[13] Corporate accountability, which is the main focus of this thesis, prioritizes the establishment of institutional mechanisms that ensure companies are answerable, rather than solely encouraging voluntary socially beneficial actions.[14]

The call for corporate accountability concerning human rights and the environment has gained more momentum due to several significant trends, reflecting changing societal expectations, ethical concerns, and environmental consciousness.[15] Heightened global awareness and advocacy efforts by various stakeholders, including NGOs, activists, consumers, and investors, have raised concerns about human rights abuses and environmental degradation linked to corporate activities. [16] Growing attention to supply chain practices has

[8] Gonzalez, Carmen. (2015). "Environmental Justice, Human Rights, and the Global South." *Santa Clara Journal of International Law*, 13, 151. Available at: https://digitalcommons.law.seattleu.edu/faculty/631

[9] Shinsato, Alison. (2005). "Increasing the Accountability of Transactional Corporations for Environmental Harms: The Petroleum Industry in Nigeria." *Northwestern Journal of International Human Rights*, Also see Muchlinski, Peter. (2010). "Multinational Enterprises as Actors in International Law: Creating 'Soft Law' Obligations and 'Hard Law' Rights." In Math Noortmann and Cedric Ryngaert (Eds.), *Non-State Actor Dynamics in International Law: From Law-Takers to Law-Makers?*)

[10] Silverman, Jana, & Orsatti, Alvaro. (2009). "Holding transnational corporations accountable for human rights obligations: the role of civil society."

[11] Min Yan & Daoning Zhang, 'From Corporate Responsibility to Corporate Accountability' (2020)

[12] Davis, Keith. "The Case for and against Business Assumption of Social Responsibilities." The Academy of Management Journal 16, no. 2 (1973): 312–22. https://doi.org/10.2307/255331.

[13] Min Yan & Daoning Zhang, 'From Corporate Responsibility to Corporate Accountability' (2020) also see Kate Macdonald, *The Meaning and Purposes of Transnational Accountability*

[14] Ibid, also see Carmen Valor, *Corporate Social Responsibility and Corporate Citizenship: Towards Corporate Accountability*

[15] Ann Marie McLoughlin, 'International Trend of Multinational Corporate Accountability for Human Rights Abuses and the Role of the United States' (2007)

[16] OHCHR. (n.d.). "Business and Human Rights: A Progress Report." Available at: https://www.ohchr.org/sites/default/files/Documents/Publications/BusinessHRen.pdf also see; Harvard Business Review. (2021). "What Supply Chain Transparency Really Means." Available at: https://hbr.org/2019/08/what-supply-chain-transparency-reallymeans#:~:text=The%20reasons%20for%20this%20increased,these%20demands%20can%20be%20high.

further led to increased demands for transparency and accountability from corporations.[17] Stakeholders increasingly expect companies to monitor and address human rights violations and environmental harm throughout their supply chains and requested to prioritize Environmental, Social, and Governance (ESG) criteria when making investment decisions.[18] Furthermore, heightened public awareness and consumer consciousness have influenced purchasing decisions. Consumers prefer products and services from companies committed to ethical practices and environmental sustainability and as consumer preferences drive market demand, companies are more compelled to adopt ethical and environmentally friendly practices to maintain their market share and reputation. [19] Technological advancements and the widespread use of digital platforms further facilitate the dissemination of information about corporate activities, allowing greater visibility into human rights abuses and environmental impacts and enhanced information accessibility fosters public scrutiny, pushing corporations to be transparent and accountable for their actions. As a result governments and international bodies are put under more pressure to enact and reinforce laws and regulations aimed at holding corporations accountable for human rights abuses and environmental damage. These trends collectively underscore the increasing importance of corporate accountability for human rights and environmental rights. They emphasize the need for companies to operate responsibly, prioritize ethical considerations, and actively address social and environmental impacts to build trust, manage risks, and ensure sustainable business practices.

Despite the growing trend on corporate accountability, historically, the development of social and legal norms to address the issues relating to human rights and the environment have been slow. Regulatory frameworks aimed at controlling the activities of these MNCs and holding them accountable for the environmental degradation and human rights violations resulting from their operations exist, but their efficacy remains questionable. It is important to acknowledge that given the complexity of the topic, the problems that arise in relation to this area in the legal sense are not simple to resolve. The international community has debated and continues to debate the different ways in which regulation can be implemented at the international level for the oversight of multinational companies for around fifty years. [20] It is widely known in this area of law, that

[17] *ibid*
[18] ibid
[19] Deloitte. (n.d.). "The Sustainable Consumer." Available at: https://www2.deloitte.com/uk/en/pages/consumer-business/articles/sustainable-consumer.html/#:~:text=Most%20consumers%20say%20the%20commitment,by%20an%20independent%20third%20party.
[20] Ruggie, John Gerard. 2015. "Regulating Multinationals: The UN Guiding Principles, Civil Society, and International Legalization." Regulatory Policy Program Working Paper RPP-2015-04. Cambridge, MA: Mossavar-Rahmani Center for Business and Government, Harvard Kennedy School, Harvard University.

there is no single international legal instrument imposing direct human rights or environmental rights onto non-state actor's, including MNCs. As a result, it has been a significant task trying to reach a consensus in the global governance system on the international legal accountability and responsibility of corporations. Despite the resistance to develop an internationally legally binding regulation on the matter, there have been developments, mainly in the form of soft law initiatives with inter-governmental support over the years.[21]

The thesis will illustrate the reasons why the current regime, which is led by soft law initiatives, are inefficient in achieving the necessary environmental and human rights justice when faced with problems such as pollution, health related issues and forced migration caused directly or indirectly by MNCs. It will examine the extent to which corporations are held legally accountable for violations of human rights and environmental standards, and how legal frameworks can be improved to ensure greater accountability. Relevant international and domestic laws and cases of corporate abuse of human rights and environmental degradation will be reviewed and analysed to present the need for further reform in this area. It also considers the role of stakeholders, such as civil society organizations and affected communities, in promoting legal accountability. Although advancements have been achieved in holding corporations accountable, the thesis asserts the need for further measures to secure complete accountability. The conclusion draws upon these findings to propose recommendations and presents the case for why a binding treaty may be the best solution to fortify corporate accountability, ensuring the upholding of human rights and environmental standards.

In this context, this paper will first discuss the importance of the link between human rights and the environment in Chapter two. This initial section will analyse the nexus between human rights and the environment which holds paramount significance for several compelling reasons. Firstly, recognizing the intrinsic value of the environment is pivotal for safeguarding ecological systems that support life on earth. Acknowledging protection as a fundamental human right reflects the understanding that a healthy environment is essential for the dignity, quality of life as well as the survival of present and future generations. Reason being environmental conditions directly impact human health, livelihoods and socio-economic well-being. Clean air, water and a stable climate are prerequisites for thriving societies. Degradation of these

[21] C. Streck, 'The World Summit on Sustainable Development: Partnerships as the New Tool in Environmental Governance' (2003)

environmental components can lead to health issues, displacement and socio-economic disparities. In order to analyse these rights in the legal arena, this section delves into the discourse surrounding environmental rights, and probes the question of whether they should fall within the purview of the existing human rights framework or necessitate the creation of a completely new environmental human right. The chapter posits that there is an intimate and inextricable bond between the environment and human rights and contends that a safe and healthy environment is an indispensable prerequisite for the realization of fundamental human rights.[22] Presenting the interconnected nature of these two separate areas therefore is important in the wider discussion on how the MNCs impact these rights.

After establishing the vital connection of these two areas, Chapter Three will analyse the impact of MNCs on the environment and human rights, which will provide for the reasons why these types of corporations require specific attention in this context, as given their global reach, economic influence and extensive operations MNCs possess the capacity to significantly shape and affect both the ecosystems and societies. This chapter from the outset will provide a discussion on the structure of MNCs, in order to fully comprehend the regulatory frameworks surrounding these entities later in the thesis. In essence, MNCs are defined as economic entities that operate in multiple countries, either individually or as a cluster of entities. Despite being established in one country, MNCs have a presence in various host states, allowing them the flexibility to move their places of production and assets between countries. Therefore, MNC can be described as an entity that has a presence, such as offices/factories and operations in different countries (host states) despite being established in a single country (their home country). Wouter and Chane state that MNCs distinctively have the "capacity and flexibility to move places of production and assets between countries" and they can structure their management "independently of national borders and lose every tie to a nation-state except for the formal nexus of incorporation".[23] This characteristic, along with their ability to structure their management independently of national borders, has resulted in a detachedness from domestic bounds, making it difficult for national legislators to enforce adequate checks on the power of MNCs.[24] The multi-jurisdictional nature of MNCs poses significant complications in the prevention of violations and access to justice for victims. In order to enforce obligations, local governments in the relevant countries must exert pressure on the MNCs.

[22] Knox, J. H., & Pejan, R. (2018). Introduction to The Human Right to a Healthy Environment. In J. H. Knox & R. Pejan (Eds.), The Human Right to a Healthy Environment (pp. 1-14). Cambridge University Press
[23] Wouters, Jan, & Chané, Anna-Luise. (2015). *Multinational Corporations in International Law*.
[24] ibid

However, since MNCs primarily operate in third world nations where the environmental agenda may not be a priority, local communities in these developing countries are often left unprotected. This chapter will examine the corporate structures and legal personalities of MNCs under international and domestic laws to identify the loopholes that allow them to circumvent liability for environmental and human rights harms that they cause or contribute to. This analysis will contribute to the thesis' understanding of why it is challenging to regulate such private actors under international and domestic laws. It is an important part of the discussion, as presenting the way in which MNCs operate and how they affect the rights in question will enable the thesis to explore the current and possible future regulatory mechanisms to resolve the issues created through MNCs operations.

Upon establishing the foundational understanding of the interconnection between human rights and environmental law, as well as scrutinizing the corporate structures and accountability concerns surrounding multinational corporations (MNCs), Chapter Four will delve into the current state of international and domestic regulations, laws, and soft laws and discusses the efficacies of current regulatory frameworks in order to later provide an assessment on how these can be improved. This chapter will reveal the limitations of these mechanisms and the reasons why they are inadequate in addressing the problems caused by MNCs in order to be able to provide for better frameworks and mechanisms in the penultimate chapter. Notably, the environmental issues arising from MNC activities do not align with traditional conceptions of human rights violations, making them especially challenging to remedy.[25] The discussion in Chapter Two holds particular relevance to this chapter, as this section presents a more details analysis of the regulations that involve violations of both human rights and environmental aspects, in turn evidencing the interlinking nature of these two separate issues further. The chapter will highlight the necessity of effective regulations to prevent the negative impacts of MNCs. Prior to the discussion on regulatory mechanisms in this chapter, it is perhaps important to acknowledge from the outset that historically, international law has primarily considered states as the only subjects capable of bearing legal rights and duties.[26] However, there has been a recent shift in perception towards recognizing non-state actors as potential duty-bearers under certain circumstances. Despite this development, victims of environmental harm caused by MNCs are still struggling to establish liability for such harms. The intersection between the human rights violations caused by environmental harm

[25] Dr. Jennifer Zerk, 'Corporate Liability For Gross Human Rights Abuses Towards A Fairer And More Effective System Of Domestic Law Remedies' (Ohchr.org, 2011) <https://www.ohchr.org/documents/issues/business/domesticlawremedies/studydomesticelawremedies.pdf> accessed 17 June 2021.
[26] Jonathan I. Charney, Transnational Corporations and Developing Public International Law

and the actions of MNCs presents a complicated legal landscape that further complicates holding these entities accountable.[27] While there are some mechanisms in place, most international and regional regulations and frameworks are non-binding on MNCs. As further argued and examined in this paper, these non-binding provisions pose significant challenges in regulating the operations of MNCs, holding them accountable for environmental and human rights violations, and creating access to justice for victims at the international level. Consequently, domestic regulations have been crucial in the fight against environmental and human rights violations caused by MNCs. However, each country's different mechanisms to address these issues brought on by MNCs further complicates the issue. As will be examined in this chapter, the regulatory mechanisms generally fall short and ineffective. As a result, the United Nations has been working to create a binding treaty on corporate accountability, which would establish new international standards for corporate behaviour and provide a mechanism for holding corporations accountable for violations. This chapter will further analyse the components of this proposed treaty. The proposed binding treaty on corporate accountability would have several key components. First, it would require corporations to respect human rights and environmental standards in all of their operations, including those in foreign countries where they may be subject to less regulation. The treaty would also establish a framework for monitoring corporate behavior and enforcing compliance with these standards. This would include mechanisms for reporting violations and conducting investigations, as well as penalties for non-compliance. One of the main challenges in creating a binding treaty on corporate accountability is ensuring that it is effective and enforceable. Many corporations have vast resources and are skilled at navigating complex legal frameworks and may be able to evade penalties for violations. In order to address this challenge, the treaty would need to establish clear standards and penalties and provide mechanisms for monitoring and enforcement.

Despite the challenges, there are many reasons to be optimistic about the potential impact of a binding treaty on corporate accountability. Many civil society organizations and affected communities have also been advocating for the treaty, which could help build momentum and support for its adoption. Ultimately, a binding treaty on corporate accountability has the potential to make a significant impact on global corporate behaviour, and to help ensure that multinational corporations are held accountable for their actions. By establishing clear standards and mechanisms for monitoring and enforcement, the treaty could help prevent

[27] Ibid

human rights violations, protect the environment, and promote sustainable development. While there are challenges that must be addressed, the potential benefits make the pursuit of a binding treaty on corporate accountability a crucial endeavour for the UN and the international community as a whole.

Following the exploration of regulatory mechanisms and their limitations, this penultimate chapter aims to showcase how these mechanisms could be enhanced to improve corporate accountability and create more effective legal systems and remedies. To this end, the chapter will undertake a comparative analysis of regulatory approaches that were previously discussed in the research, highlighting their weaknesses and strengths. Specifically, the chapter will scrutinize the state-centric approach under international law and the failure of indirect duties on MNCs. Moreover, the proposed binding treaty will be further examined to determine its potential to address the issues outlined in the thesis. The chapter will also provide alternative measures to resolve issues related to burden of proof and strengthen non-judicial mechanisms. By presenting these various regulatory measures and their potential benefits, the chapter aims to provide a roadmap for crafting more effective mechanisms to hold MNCs accountable for their environmental and human rights violations.

Lastly, conclusions will be presented based on the research and findings. It is observed that corporate accountability for human rights and environmental rights violations remains a pressing issue. Despite the development of international and domestic laws aimed at regulating corporate conduct, many multinational corporations continue to act with impunity in their operations, causing harm to people and the environment. As such, there is a need for increased efforts to hold corporations accountable for their actions. Efforts to address corporate accountability for human rights and environmental rights violations must involve the participation of all stakeholders, including governments, civil society organizations, and the corporations themselves. Governments and international bodies must ensure that their regulatory frameworks are robust and enforceable, while civil society organizations must continue to advocate for the rights of affected communities. MNCs, on their part, must take a more proactive approach to corporate social responsibility and human rights due diligence in their operations. There is also a need for continued research and analysis in this area to understand the complexities of corporate accountability and to develop effective strategies to hold corporations accountable for their actions.

Chapter 2: Human Rights & The Environment

The intersection of environmental jurisprudence and human rights law represents a dynamic and contentious nexus, full of multifaceted legal, ethical, and policy considerations. This chapter aims to clearly outline the specific human and environmental rights that are central to this thesis. It will explore how these different legal areas, which are considered to be separate, are actually connected and interact with each other. The chapter will look into the reasons, both in theory and practice, for why these areas are coming together and/or working alongside each other. Central to this inquiry is the premise that environmental degradation and human rights violations often intermingle, necessitating an integrated legal approach. The legal mechanisms and theoretical underpinnings that facilitate or impede this integration will be dissected and by doing so, the thesis will provide a comprehensive understanding of how environmental and human rights law, both as separate areas and together, operate within the legal landscape. The purpose of the discussion on environmental and human rights law at the beginning of the thesis is to create a solid theoretical and legal foundation. This structure is intended to underpin the critical examination of thematic issues in subsequent chapters, with a particular emphasis on corporate behavior. Understanding both environmental and human rights law deeply, not just as separate areas but also in how they interact, is important for this analysis. The chapter will thus interrogate the legal doctrines, judicial interpretations, and policy initiatives that have shaped the intersection of human rights and environmental law, setting the stage for a thorough examination of corporate responsibility in later discussions. In essence, this chapter is not merely a descriptive overview but a critical analysis, seeking to present the complexities and nuances inherent in the intersection of environmental and human rights law, and setting a foundation for the thesis's central arguments regarding corporate accountability.

2.1 – Background

Historically, the domains of human rights law and environmental law have evolved separately, each focusing on distinct subjects: human rights law centers on the rights and freedoms of individuals, whereas environmental law is concerned with the conservation and protection of nature. This historical separation has, in the past, led to a lack of clarity in their intersection. However, over the last two decades, it has become increasingly recognized that human rights and environmental protection are deeply interconnected, evidenced across various levels of legal systems globally, from international treaties to domestic courts.[28] The United Nations Environment Programme (UNEP) highlights this interdependence, noting that environmental degradation can lead to significant human rights issues, especially in the context of climate change and pollution. This connection is crucial, as a healthy environment is fundamental to the enjoyment of many human rights.[29] The Food and Agriculture Organization of the United Nations (FAO) supports this view, pointing out that the exercise of certain human rights—such as access to information, participation in decision-making, and seeking remedy—is critical to effective environmental governance and protection.[30] This interconnectedness has been acknowledged at various levels within the global legal system. A pivotal moment in acknowledging this interrelationship was the 1972 Stockholm Declaration and Conference.[31] The first principle of the Stockholm Declaration notably states, "man has the fundamental right to freedom, equality, and adequate conditions of life, in an environment of quality that permits a life of dignity and well-being, and he bears a solemn responsibility to protect

[28] Knox, J. H., & Pejan, R. (2018). Introduction to The Human Right to a Healthy Environment. In J. H. Knox & R. Pejan (Eds.), *The Human Right to a Healthy Environment* (pp. 1-14). Cambridge University Press.
[29] United Nations Environment Programme, 'Summary Brief: Human Rights and the Environmental Rule of Law' (UNEP 2021) https://wedocs.unep.org/bitstream/handle/20.500.11822/35408/SDG16.pdf.
[30] Knox, J.H. and Morgera, E. 2022. *Human rights and the environment – The interdependence of human rights and a healthy environment in the context of national legislation on natural resources.* FAO Legal Papers No. 109. Rome, FAO. https://doi. org/10.4060/cb9664en
[31] United Nations Conference on the Human Environment, 'Declaration of the United Nations Conference on the Human Environment' (Stockholm Declaration, 16 June 1972), also see, The Environment and Human Rights: Introductory Report to the High-Level Conference Environmental Protection and Human Rights, Strasbourg, 27 February 2020' (Council of Europe, 2020) https://rm.coe.int/report-e-lambert-en/16809c827f.

and improve the environment for present and future generations."[32] This declaration marks a significant shift in understanding the connection between human rights and environmental protection. Further reinforcing this relationship, the International Court of Justice (ICJ) in its 1997 Gabčíkovo-Nagymaris judgment acknowledged the environment as integral to human well-being, stating that it represents "the living space, the quality of life, and the very health of human beings, including generations unborn." [33] Human rights scholars like B. G. Ramcharan support the contention that environmental harm can directly threaten large groups of people, emphasizing the link between the right to life and environmental integrity.[34] The Paris Agreement on climate change, serves as another high-profile recognition of this linkage.[35] The agreement's preamble stipulates that when addressing climate change, parties should respect, promote, and consider their respective obligations concerning human rights, including the rights of indigenous peoples, local communities, migrants, children, persons with disabilities, and people in vulnerable situations, as well as gender equality, empowerment of women, and intergenerational equity.[36] Additionally, the Council of Europe's application of human rights principles to environmental issues through its legal standards and the rulings of the European Court of Human Rights further illustrates this relationship. The Court has applied concepts like the right to life and free speech to environmental cases, such as those involving pollution and access to environmental information, thereby reinforcing the integration of human rights in environmental matters.[37] Non-Governmental Organizations such as the Human Rights Watch, also documents instances where environmental issues directly impact human rights, demonstrating the necessity of integrating human rights considerations into environmental policy-making.[38] These developments across different legal frameworks underscore the emerging

[32] Ibid, Maguelonne Déjeant-Pons and Marc Pallemaerts, 'Human rights and the environment: Compendium of instruments and other international texts on individual and collective rights relating to the environment in the international and European framework' (Council of Europe 2012) https://rm.coe.int/1680489692.
[33] Human Rights and the Environment Reference Paper (https://www.ohchr.org/Documents/Issues/ClimateChange/Submissions/Asia_Pacific_Forum_of_NHRIs_2_HR_and_Environment_Reference_Paper_2007.pdf)
[34] Shinsato, "Increasing the Accountability of Transnational Corporations for Environmental Harms: The Petroleum Industry in Nigeria" ,Ofiice of the united nationas high commissioner for human rigths Mapping Human Rights Obligations Relating to the Enjoyment of a Safe, Clean, Healthy and Sustainable Environment
[35] Paris Agreement, opened for signature 22 April 2016, 55 UNTS 6 (entered into force 4 November 2016).
[36] Knox, J. H., & Pejan, R. (2018). Introduction to The Human Right to a Healthy Environment. In J. H. Knox & R. Pejan (Eds.), The Human Right to a Healthy Environment (pp. 1-14). Cambridge University Press
[37] Council of Europe, 'Human Rights and the Environment' https://www.coe.int/en/web/portal/human-rights-environment
[38] Human Rights Watch, 'Environment' https://www.hrw.org/topic/environment, Human Rights and the Environment Reference Paper (https://www.ohchr.org/Documents/Issues/ClimateChange/Submissions/Asia_Pacific_Forum_of_NHRIs_2_HR_and_Environment_Reference_Paper_2007.pdf)

recognition of the essential relationship between human rights and environmental law, suggesting a need for a holistic and integrated approach to address these intertwined issues.

The difference between the two areas of law can be, from a very simplistic view, seen as; human rights law by nature is anthropocentric meaning that the focus is on individual humans rather than the environment whereas environmental law is or "should" be eco-centric and based on the intrinsic value of nature.[39] Issues arise as this may create normative conflicts between legislation which is designed to protect nature and on the other hand constitutional/treaty-based human rights. However, these concerns are not completely incompatible as environmental law is also concerned with the well-being of humans for example[40] the rights to life and health depend upon ensuring the absence or, at the least a safe level of hazardous or toxic substances in the human environment. The rights to food, safe drinking water, housing, and sanitation are also increasingly recognized in international and domestic law as dependent upon the quality of the environment.[41] As the former United Nations rapporteur, J. H. Knox, puts it, although the two areas developed separately, their interdependence has become more evident in the last two decades.[42]

There are a few approaches when discussing the intersection of these two areas. The first approach is to expand the already existing human rights texts to encapsulate environmental rights within these instruments. This is an approach that has been utilized in many cases to bring an environmental element into the substantive right to life, health as well as procedural rights which some may call "greening" of human rights. The second debated approach has been the creation of new rights to the environment in the context of human rights. An overarching debate in this area is regarding the social justice aspect which ties in with the theme of this research as the allocation of

[39] A Boyle, 'Relationship between International Environmental Law and Other Branches of International Law' in D Bodansky et al (eds), Handbook of International Environmental Law(OUP, Oxford 2006) 125.
[40] Shelton, Dinah, 'Resolving Conflicts between Human Rights and Environmental Protection: Is there a Hierarchy?', in Erika De Wet, and Jure Vidmar (eds) Hierarchy in International Law: The Place of Human Rights (Oxford, 2012; online edn, Oxford Academic, 24 May 2012
[41] Hall RP, Van Koppen B, Van Houweling E. The human right to water: the importance of domestic and productive water rights. Sci Eng Ethics. 2014
[42] The Environment And Human Rights Introductory Report To The High-Level Conference Environmental Protection And Human Rights Strasbourg, 27 February 2020 (https://rm.coe.int/report-e-lambert-en/16809c827f)

environmental resources is typically reserved for the rich and powerful players such as MNCs/States. The less fortunate and marginal communities suffer the burden of environmental pollution and natural resource degradation with very few and at times complex avenues to access remedy when faced with a violation of their rights. Often, they suffer outright "violations" by way of expropriation of land, forests, and other natural resources and as the rights of the poor receive the least protection, they are more vulnerable to such violations by more powerful institutions.[43] Exploring the linkages between these two distinct yet interconnected legal spheres will lead to finding possible remedial or preventative avenues that are most appropriate for this kind of harm suffered by victims through the actions of private actors. In this context issues such as the interpretation of existing human rights, the reliance on procedural rights and the emergence of a standalone right to a healthy environment will be explored below.

2.2 – Right to a Healthy Environment?

Just as a healthy environment can contribute to the enjoyment of human rights, it is accepted that environmental degradation and climate change have "generally negative effects on the realization of human rights."[44] The recent landmark UN General Assembly (UNGA) resolution has now acknowledged this idea of a right to a healthy environment by officially recognizing the human right to a safe, clean, healthy, and sustainable environment and has supported the broad recognition of the link between human rights and the environment.[45] To further analyse the impact of Multinational Corporations on the environment & human rights, it is important to discuss these two separate areas of law and the way in which they interlink. Although the links between human rights, health and environmental protection were apparent even from the first international Conference on

[43] Zarsky, Lyuba (Ed.). (2001). *Human Rights and the Environment: Conflicts and Norms in a Globalizing World.* Taylor & Francis Group.
[44] Rebecca Bratspies, Do We Need a Human Right to a Healthy Environment? 13 Santa Clara J. Int'l L. 31 (2015). Available at: http://digitalcommons.law.scu.edu/scujil/vol13/iss1/3
[45] 'Declaration Of The United Nations Conference On The Human Environment - Main Page' (Legal.un.org, 2022) <https://legal.un.org/avl/ha/dunche/dunche.html> accessed 24 June 2022, 'A Universal Right To A healthy Environment' (https://www.europarl.europa.eu/RegData/etudes/ATAG/2021/698846/EPRS_ATA(2021)698846_EN.pdf) Accessed Jan 2022

the Human Environment in Stockholm in 1972[46], generally the area of human rights law and environmental law developed in isolation from each other. Principle 1 of the Stockholm Declaration on The Human Environment first established a foundation for linking human rights, health, and environmental protection, declaring that "man has the fundamental right to freedom, equality, and adequate conditions of life, in an environment of a quality that permits a life of dignity and well-being".[47] This was followed by a call for enhanced efforts to ensure a better and healthier environment at the 1992 Rio Conference on the Environment and Development with the adoption of Agenda 21[48] and the UNGA resolution 45/94 which seemed to suggest support for the term of a stand-alone right to healthy environment recognizing that "all individuals are entitled to live in an environment adequate for their health and wellbeing."[49] Although no reference to such a right exists in international human rights treaties including UDHR, the International Covenant on Civil and Political Rights (ICCPR)[50] and the International Covenant on Economic, Social and Cultural Rights (ICESCR)[51], the right to a healthy environment has been included in a few regional human right treaties that were drafted after the 1970s.[52] Similarly, The right to a healthy environment has found recognition in numerous regional treaties, including the African Charter on Human and Peoples' Rights, which provides that "all peoples shall have the right to a general satisfactory environment favourable of their development"[53], American Convention on Human Rights in the Area of Economic, Social and Cultural Rights[54], The Arab Charter on Human Rights[55] and the Human Rights Declaration adopted by the Association of Southeast Asian Nations[56] have comparable references to such a right. Additionally, it is referenced in a multitude of other non-binding documents. These developments

[46]Declaration of the United Nations Conference on the Human Environment (Stockholm Declaration, 1972) https://docenti.unimc.it/elisa.scotti/teaching/2020/22646/files/stockholm-declaration
[47]Declaration of the United Nations Conference on the Human Environment (Stockholm Declaration, 1972) https://docenti.unimc.it/elisa.scotti/teaching/2020/22646/files/stockholm-declaration Stockholm Declaration, Principle 1, U.N. A/Conf.48/14,
[48] Agenda 21 outlines a detailed strategy for global, national, and local entities—including the United Nations, governments, and various stakeholders—to address environmental impacts caused by human activities across all sectors, https://sustainabledevelopment.un.org/content/documents/Agenda21.pdf
[49] United Nations General Assembly. (1983). "Resolution adopted by the General Assembly: Charter of Economic Rights and Duties of States." Available at: https://documents-dds-ny.un.org/doc/RESOLUTION/GEN/NR0/564/83/IMG/NR056483.pdf?OpenElement

[50] United Nations General Assembly. (1966). "International Covenant on Economic, Social and Cultural Rights."
[51] United Nations General Assembly. (1966). "International Covenant on Economic, Social and Cultural Rights."
[52] Only ICESCR, Article 12(b) mentions "the improvement of all aspects of environmental and industrial hygiene".
[53] African Charter on Human and Peoples' Rights (adopted 27 June 1981, entered into force 21 October 1986) 21 ILM 58 (African Charter) art 24
[54] Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights (adopted 16 November 1988, entered into force 16 November 1999) OAS Treaty Series No. 69 (Protocol of San Salvador) art 11(1).
[55] Arab Charter on Human Rights (adopted 15 September 1994, entered into force 15 March 2008) <https://digitallibrary.un.org/record/551368?ln=en> art 38.
[56] Association of Southeast Asian Nations (ASEAN). (2012). "ASEAN Human Rights Declaration (adopted 18 November 2012)

highlight the increasing emphasis on environmental considerations within the framework of human rights.

Thus, there has been a growing sense that the goal of upholding human rights necessarily entails protecting the environment. Most recently in 2022, the UNGA passed a resolution (A/76/L.75)[57](Resolution) recognizing the right to a clean, healthy, and sustainable environment as a human right. The published Resolution recognises the right to a healthy environment as a human right and notes that it is related to other rights and existing international law. The Resolution further states that the promotion of the human right to a clean, healthy, and sustainable environment requires the full implementation of the multilateral environmental agreements under the principles of international environmental law; and calls upon States, international organisations and businesses to adopt policies in order to enhance cooperation, strengthen capacity-building and continue to share good practices to scale up efforts to ensure a clean, healthy and sustainable environment for all. [58]

The Resolution, although a landmark decision as Dr David Boyd (the Special Rapporteur on human rights and the environment) stated *"has the potential to be a turning point for humanity, improving the life and enjoyment of human rights of billions of individuals as well as the health of our extraordinary planet*" & affirms the right to a healthy and sustainable environment, criticisms have been made.[59] Firstly, the Resolution is a non-binding political instrument, rather than a legal affirmation by the UNGA.[60] Some countries adopting this position such as New Zealand and the UK have expressed concern at the way the proposed right was emerging, and that it should not be a

[57] United Nations. (2016). "Report of the Special Rapporteur on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment, John H. Knox." Available at: https://digitallibrary.un.org/record/3982508?ln=en#record-files-collapse-header

[58] "UNGA Recognizes Human Right to Clean, Healthy, and Sustainable Environment." Available at: https://sdg.iisd.org/news/unga-recognizes-human-right-to-clean-healthy-and-sustainable-environment/

[59] United Nations. (2016). "Report of the Special Rapporteur on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment, John H. Knox." Available at: https://digitallibrary.un.org/record/3982508?ln=en#record-files-collapse-header

[60] UN, Meetings Coverage and Press Release "With 161 Votes in Favour, 8 Abstentions, General Assembly Adopts Landmark Resolution Recognizing Clean, Healthy, Sustainable Environment as Human Right"
https://press.un.org/en/2022/ga12437.doc.htm

substitute for international law.[61] Countries such as Norway on the other hand expressed disappointment that the Resolution did not extend further, specifically due to the fact that political recognition of this kind would not have any legal effect.[62] The US, while expressing support for the Resolution, stated that as there is no legal relationship between a right to a healthy environment and existing international law, therefore it would not recognise any change to international law.[63] On the contrary Sri Lanka, where the right is already recognized by their constitution stated that it would interpret the Resolution within that framework.[64] Belarus stated that it considered recognising a special category of human rights can only be done through a universal legally binding instrument.

Secondly, One of the main criticisms directed at the recognition of a human right to a healthy environment has been based on the difficulty to define the exact parameters of this right. it has been observed that certain terms such as "clean", "healthy", "sustainable", "unsustainable" and the Resolution itself lack internationally agreed definitions. Indeed, Japan voiced concerns that the right to a healthy environment has the potential to be “extremely broad” in scope and must be clearly defined. It is a concern that nations will be unwilling to recognize a novel human right in this context if the meaning, content and scope appear unclear.[65] Having said that this “new” right is not so new as over the last 45 years, the meaning, content and scope of this right as well as its relationship with other human rights have been progressively defined and clarified by national tribunals and regional human rights courts.[66] The contents of the right to a healthy environment and States’ responsibilities were discussed in the *Ogoniland* case before the African Commission of Human and Peoples Rights as it recognized the substantive as well as the procedural aspect of this right as prescribed by Article 24 of the African Charter. It was stated that Article 24 ‘requires the State to take reasonable and

[61] UN, Meetings Coverage and Press Release “With 161 Votes in Favour, 8 Abstentions, General Assembly Adopts Landmark Resolution Recognizing Clean, Healthy, Sustainable Environment as Human Right”
https://press.un.org/en/2022/ga12437.doc.htm
[62] Ibid
[63] Ibid, also see US Mission to the UN “Explanation of position on the Right to a Clean, Healthy & Sustainable Environment Resolution”
https://usun.usmission.gov/explanation-of-position-on-the-right-to-a-clean-healthy-and-sustainable-environment-resolution/
[64] UN General Assembly adopts landmark resolution on a right to a healthy environment https://www.cliffordchance.com/insights/resources/blogs/business-and-human-rights-insights/2022/08/un-general-assembly-adopts-landmark-resolution-on-right-to-a-healthy-environment.html
[65] Special Rapporteur 2018 Report (n 63) para 38.
[66] Cima, E. The right to a healthy environment: Reconceptualizing human rights in the face of climate change. *RECIEL*. 2022; 31(1): 38- 49. doi:10.1111/reel.12430

other measures to prevent pollution and ecological degradation, promote conservation, and secure ecologically sustainable development and use of natural resources.[67] This means that States have a duty to adhere to the environmental principle of prevention which requires each country to behave with due diligence to prevent environmental harm to another nation which includes areas beyond the limits of their national jurisdiction in order to comply with Article 24.[68] The African Commission also specified the particular duties of States in order to respect and fulfil this right which included 'ordering or at least permitting independent scientific monitoring of threatened environments, requiring and publicizing environmental and social impact studies before any major industrial development, undertaking appropriate monitoring and providing information to those communities exposed to hazardous materials and activities and providing meaningful opportunities.[69] After the *Ogoniland* case, the content of the right to a healthy environment was further defined and clarified on several other occasions.[70]Such as the Male Declaration which includes a short explanation of this overarching environmental right would require of States as well as of any other international actor that is subject to human rights obligations.[71]

Finally, it was observed that the Resolution could have been strengthened through the inclusion of common but differentiated responsibilities, as enshrined in Principle 7 of the Rio Declaration on Environment and Development. This Principle states that countries contribute to global environmental degradation in different ways and therefore have common but varying responsibilities and that states "shall co-operate in a spirit of global partnership to conserve, protect and restore the health and integrity of the Earth's ecosystem".[72] It further states that "The developed countries acknowledge the responsibility that they bear in the international pursuit of sustainable development because of the pressures their societies place on the global environment

[67] *Ogoniland* (n 8) para 52.
[68] Rio Declaration on Environment and Development in 'Report of the United Nations Conference on Environment and Development' UN Doc A/CONF.151/26 (vol I) (12 August 1992) Principle 2
[69] *Ogoniland*
[70] Cima, E. The right to a healthy environment: Reconceptualizing human rights in the face of climate change. *RECIEL*. 2022; 31(1): 38- 49. doi:10.1111/reel.12430
[71] 'Elena Cima The right to a healthy environment: Reconceptualizing human rights in the face of climate change' also see Knox and Pejan, 'Introduction to a Human Right to A Healthy Environment'
[72]UN General Assembly 1992, Report of the UN Conference on Environment and Development, Rio Declaration on Environment and Development https://www.un.org/en/development/desa/population/migration/generalassembly/docs/globalcompact/A_CONF.151_26_Vol.I_Declaration.pdf

and of the technologies and financial resources they command".[73] This point about differentiated responsibilities was raised by a few countries namely Brazil, Syria, China and Pakistan whilst Nicaragua emphasized that in order to have a right to a healthy environment developed countries must fulfil their duties to offer support and development assistance to developing nations. These opinions from different states imply that although there is an overarching consensus on the need to recognize the right to a healthy environment there are still differences in options as to how this right should be implemented, defined, and enforced particularly on a state-specific basis. Any divergence in approach will likely emerge based on the differences between the rights articulated under domestic laws and policies among States in the future rather than the generality of the UNGA resolution.

Even if non-binding, the resolution may influence the scope and shape of laws in the Member States. In a press release, the UN Special Rapporteurs (including Dr Boyd) stated that a UN General Assembly resolution on the right to a healthy environment would "reinforce the urgency of actions to implement the right".[74] This is due to the fact that deciding environmental issues under human rights law, are only relevant to the extent that they interfere with the sphere of rights guaranteed by human rights treaties to individuals and communities.[75] Without the express recognition of a right to a healthy environment, human rights courts have often stated that they are not 'specifically designed to provide general protection to the environment as such' as presented in the case of *Kyrtatos v Greece*.[76] The actions of the Council are therefore an important step in the right direction.

2.3 - The "Greening" of Existing Human Rights

[73] UN General Assembly 1992, Report of the UN Conference on Environment and Development, Rio Declaration on Environment and Development https://www.un.org/en/development/desa/population/migration/generalassembly/docs/globalcompact/A_CONF.151_26_Vol.I_Declaration.pdf
[74] "Environment: Millions of Lives at Stake amid Unprecedented Challenges – UN experts" 2022 https://www.ohchr.org/en/press-releases/2022/05/environment-millions-lives-stake-amid-unprecedented-challenges-un-experts
[75] F Francioni, 'International Human Rights in an Environmental Horizon' (2010) 21 European Journal of International Law 41, 50.
[76] *Kyrtatos v Greece* App No. 41666/98 (ECtHR, 22 May 2003) para 52.

Environmental rights or the eco-centric approach in the wider literature refer to rights enjoyed by or on behalf of the environment, however, in the context of judicial practice such rights may refer to a clean or healthy environment.[77] This approach is more apocentric as the relevant right is reserved for people. Although the environment may indirectly benefit from the enforcement of such rights the right is focused on the human right to a clean or healthy environment.[78] The appropriateness of including environmental rights as a human rights issue has been highly debated. Since the Stockholm Conference in 1972, many courts enforcing national and international human rights cases have concluded that a safe and healthy environment is in fact a prerequisite to the enjoyment of many human rights.[79] In particular, the rights that have been used in the context of environmental rights can be seen as the rights to life, health, private and family life and procedural rights.[80] The inclusion of environmental rights within the ambit of human rights may enable the law to directly address environmental impacts on the life, health, private life and property of individuals rather than on other states or the environment in general. This may create higher standards of environmental quality as states will have to take measures to control environmental issues affecting the health and private life of their citizens. [81] Furthermore, achieving an environment of "quality" that is consistent with health and well-being depends on the legal protection and exercise of procedural rights, especially the rights to information, participation in decision-making, and access to justice.[82] Whereas substantive rights, place limits on the outcome of the process, ensuring that those in power do not abuse their dominant position to discriminate or cause environmental degradation at a level that infringes on the enjoyment of guaranteed human rights.[83]

The way environmental claims have been brought from a human rights perspective, the complaints have not been based on a specific right to a safe and healthy environment but rather based on the

[77] Human Rights and the Environment: Conflicts and Norms in a Globalizing World, edited by Lyuba Zarsky, Taylor & Francis Group, 2001.
[78] T Hayward, Constitutional Environmental Rights (Oxford, OUP, 2005).
[79] ibid
[80] Anton, Donald K., and Dinah L. Shelton. *Environmental Protection and Human Rights*, Cambridge University Press, 2011.
[81] Alan Boyle, Human Rights and the Environment: Where Next?, *European Journal of International Law*, Volume 23, Issue 3, August 2012, Pages 613–642, https://doi.org/10.1093/ejil/chs054
[82] The Environment And Human Rights Introductory Report To The High-Level Conference Environmental Protection And Human Rights Strasbourg, 27 February 2020 (https://rm.coe.int/report-e-lambert-en/16809c827f)
[83] The Environment And Human Rights Introductory Report To The High-Level Conference Environmental Protection And Human Rights Strasbourg, 27 February 2020 (https://rm.coe.int/report-e-lambert-en/16809c827f)

rights to life, property, healthy, information, family, and private life. [84] The underlying claims are however based on instances of pollution, deforestation, and other types of environmental harm. Interpretations of existing treaty provisions to include environmental protection in existing frameworks such as in the Urgenda[85] case where the Court found that Article 2 [86], "right to life" and Article 8 [87] "right to respect for private life" required states to undertake necessary actions for the prevention of climate change. This is an important decision that recognizes the severe impact environmental issues can have on individuals' fundamental rights. Furthermore, The Human Rights Committee has concluded that Article 6 right to life of the ICCPR creates obligations for states to take appropriate measures to address "environmental degradation and to protect the environment against harm, pollution and climate change".[88]

There is also a practical reason why human rights law is emphasized in this context as for the victims of environmental degradation, human rights law may be the only set of international legal procedures that provide redress for harm that is the consequence of an act or omission attributable to a state.[89] This is an important point as most of this type of environmental harm results from non-state actors such as MNCs and human rights laws primary objective is to protect individuals from harm and are obliged to exercise due diligence to ensure that human rights are not violated by non-state actors. Such due diligence requires measures to "prevent abuses where possible, investigate violations that occur, prosecute the perpetrators as appropriate, and provide redress for victims".[90] Therefore although international human rights law procedures do not allow for direct actions against private actors who cause environmental violations if a state allows them to behave in such a manner, the State may be held accountable. [91] This idea in theory is straightforward and should be effective however complex issues arise when the perpetrator is a powerful private actor, and the

[84] Such as ; International Covenant on Civil & Political Rights (1976) and ECHR
[85] Urgenda Foundation v. State of the Netherlands
[86] European Convention on Human Rights, Article 2
[87] European Convention on Human Rights, Article 8
[88] Arcari M, Papanicolopulu I, Trends and Challenges in International Law: Selected issues in Human Rights, Cultural Heritage, Environment and Sea (pg 20)
[89] Cima, E. The right to a healthy environment: Reconceptualizing human rights in the face of climate change. *RECIEL*. 2022
[90] Dinah Shelton, 'Human Rights and the Environment: What Specific Environmental Rights Have Been Recognized' (2006) 35 Denv J Int'l L & Pol'y 129
[91] Dinah Shelton, 'Human Rights and the Environment: What Specific Environmental Rights Have Been Recognized' (2006) 35 Denv J Int'l L & Pol'y 129

violation occurs in a state where the state may be unwilling or unable to uphold the rights of its citizens. Having said that including environmental claims under the human rights sphere may be the only avenue as that there are very few alternatives once domestic remedies are completely used. Although there have been considerable efforts from NGOs and activists there has been resistance from States to create specific environmental monitoring and enforcement bodies. [92]The Aarhus Compliance Committee is usually stated as an exception however this generally relates to procedural rights such as enforcing human rights of information, public participation, and access to justice in regard to environmental matters at the national level and can ensure the rule of law by forcing states to enforce environmental laws, yet they are not generally enforcing international environmental laws.[93]

Although the expansion or reinterpretation of existing human rights proved insufficient to protect a wider environmental agenda in some cases, this approach was seen as useful as a transitional stage that paved the way to the future recognition of a distinct right to a healthy environment.

2.4 - Right to Life

The right to life is expressly protected under the, International Covenant on Civil and Political Rights (ICCPR) as well as the Convention on the Rights of the Child and ECHR Article 2 .[94] Article 6 of ICCPR prescribes that every human being has a "right to life" and that this right must be protected by law. It further provides that 'no one shall be arbitrarily deprived of life".[95] An early case involving Article 6 rights in an environmental context that were presented before the Human Rights Committee was the case of *EHP v Canada*[96] where it was alleged that the radioactive remains around Port Hope

[92] Jasanoff, S. (1997). NGOs and the Environment: From Knowledge to Action. *Third World Quarterly*, *18*(3), 579–594. http://www.jstor.org/stable/3993270
[93] Brown R, "Invoking International Environmental Norms Through Treaty Interpretation", (2021) Brill
[94] International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976), Convention on the Rights of the Child, The European Convention on Human Rights Article 2
[95] Article 6, International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976),
[96] E.H.P et al v Canada (1892)

amounted to a violation of the right to life of the residents including future generations. The Environmental Group of Port Hope submitted a complaint against Canada on behalf of the present and future generations of Port Hope where it claimed that the "current state of affairs is a threat to the life of present and future generations of Port Hope, considering that excessive exposure to radio activity is known to cause cancer and birth defects"[97]. The Committee dismissed this petition on the grounds that local remedies have not been exhausted however recognized that environmental harm can impact the right to life. [98] It also recognized that this communication from the Environmental Group of Port Hope raised serious points regarding the obligation of states to protect human life under Article 6 of the Convention.

The ECtHR is restrictive when interpreting the Right to Life (Article 2)[99] for environmental issues. There is only a handful of cases where the Court decided there has been a violation of Article 2 in this context mainly in instances where the claimants have been in contact with dangerous activities or natural disasters. *L.C.B v United Kingdom* is an early example of the discussion of the recognition of the link between the right to life and the environment and the complexities in establishing a right to live in this context. The Court in this case did not find a breach of Article 2 due to the lack of a causal link between the father's exposure to radiation and the leukaemia suffered by his child.[100] This is important to note as in cases where the environment has been compromised, the subsequent impact on the right to life may not be immediately present and by the time it poses a serious risk it may already be too late to provide relief to the victims.

The case of *Oneryildiz* further involved Article 2 (as well as Articles 8 and 13) where the claimants argued that the state authorities were responsible for the deaths of their relatives and the

[97] Human Rights & Environment: Key Issues,k also see E.H.P et al v Canada
[98] E.H.P et al v Canada (1892)
[99] European Convention on Human Rights (ECHR), Article 2
[100] ECrtHR, L.C.B. v. The United Kingdom, 9 June 1998, On the discussion regarding the causal link between pollution and health the noteworthy Bacila v. Romania case, breach of Article 8 was established as the claimant showed a causal link between the plant pollution and her health deterioration.

destruction of property due to a methane explosion at a rubbish centre near Istanbul.[101] It was uncovered by an expert group that was appointed by the District Court that the rubbish tip in fact did not meet the technical standards and posed an array of threats, which could amount to major health risks to the nearby residents and other environmental issues.[102] It was concluded that the rubbish tip did not contain the necessary systems to prevent methane explosions (because of decomposing waste) and would amount to severe environmental damage in the event of an explosion in addition to the health risks that occurred even without an explosion. As a result, the Environment Office made a request to the Istanbul Governor's office to take necessary precautions to prevent an explosion from happening and subsequently requested to prohibit the use of the tip and for it to cease operations. These efforts were opposed by the City Council and unsurprisingly an explosion happened in 1993, resulting in the death of 39 people and destroyed property. The Court reiterated the fact that protection of Article 2 must come from a positive obligation from States to "safeguard the lives of those within their jurisdiction".[103] The court also further deliberated the issue of whether the act in question was public or not (and referred to cases such as Guerra and LCB) and highlighted that the positive obligation to take all necessary precautions to safeguard life entails a predominant duty to implement administrative and legislative measures. These frameworks must be designed to "provide effective deterrence against the right to life."[104] Furthermore, this case is noteworthy in the discussion of identifying what constitutes a violation of Article 2 and the relevant tests that need to be applied to determine whether such violation had occurred. The principle that was established by the Court was that Article 2 creates an 'affirmative duty to the states whether the violation occurred under the operation of a public or a private body and that the procedural right to access information may be used to prevent a violation of Article 2. There is no requirement to prove intent in this context, as international legal liability that creates severe risks to the right to

[101] Öneryildiz v. Turkey, 41 EHRR (2005)
[102] ibid
[103] Also see ECrtHR, Kolyadenko and others v. Russia, 28 February 2012,
[104] Atapattu & Schapper 'Human Rights and the Environment: Key Issues' pg 114

life should "arise irrespective of whether the act or omission in question is deliberate, reckless or negligent."[105]

2.5 – Right to Privacy and Family Life

The ICPPR and other regional treaties include provisions on the right to privacy and family life. A great number of cases brought before the European justice system contain proceedings in violation of this right (included under Article 8 of the Convention stating 'Everyone has the right to respect for his private and family life, home and his correspondence).[106] In the case of *Kyrtatos v Greece* where the case revolved around the illegal draining of a wetland, the court pointed out that Article 8 (or any other Articles of The Convention) specifically protect the environment and that other international instruments and domestic legislations are more effective in combatting this particular issue whilst accepting that there is an indirect recognition of environmental issues when protecting fundamental rights. [107] The court did not establish a violation of the claimants' right to private life or enjoyment of property in relation to the destruction of the environment in this instance and decided that although they lived in close proximity to the area in question their rights were not affected. It was stated that they were "not entitled to live in any specific environment or to have the surrounding environment indefinitely preserved."[108]

On the contrary, another significant case in relation to this right that upheld a violation was *Lopez Ostra v Spain*. In this case, toxic fumes from a waste treatment facility near the claimant's house caused her daughter to fall ill as the facility failed to comply with environmental measures.[109] As a

[105] Also right to health discussed in the case of Yanomami v Brazil Comunidad (1985), Atapattu & Schapper 'Human Rights and the Environment: Key Issues' pg 114
[106] Atapattu & Schapper 'Human Rights and the *Environment*: Key Issues' pg 114

[107] ECrtHR, Kyrtatos v. Greece, 22 May 2003, 41666/98,. The Court in this case decided that there was no breach of Article 8 of the Convention.
[108] ibid
[109] Lopez Ostra v. Spain, 20 EHRR (1994), Atapattu & Schapper 'Human Rights and the Environment: Key Issues' pg 116

result of a fault in the facility, fumes, gasses, and smells were released into the area contaminating the area and causing health problems and nuisance to the residents of the area.[110] It was detailed in an expert report that the gas concentrations near the facility surpassed the permitted limits resulting in the residents displaying chronic gas absorption signs which can be said to have created a causal link between the two.[111] Strangely, despite this evidential link being established, it was stated by the Court that "severe environmental pollution may affect individuals' well-being and prevent them from enjoying their homes in such a way as to affect their private and family life adversely without however seriously endangering their health.[112] However, the court did find a violation of Article 8 as whilst the authorities in Spain were not directly responsible for the toxic nuisance in question, the facility was built with the permission of such authorities, and they failed to strike a fair balance between the town's economic well-being and the applicant's private life. [113] It has been observed that the Court's interpretation of the right to privacy is narrow and anthropocentric as it does not necessarily permit the emergence of a distinct environmental human right.[114] In the case of *Fadeyeva v Russia,* it was reiterated by the ECtHR that "no right to nature preservation is as such included among the rights and freedoms guaranteed by the Convention … Thus, in order to raise an issue under Article 8 the interference must directly affect the applicant's home, family or private life." [115] It is further observed that the right to privacy and other rights in the Convention have limitations when it comes to resolving environmental issues as was clarified in the case of *Kyrtatos* by the ECtHR. It was stated that "[n]either Article 8 nor any of the other Articles of the European Convention are specifically designed to provide general protection of the environment as such; to that effect, other international instruments and domestic legislation are more pertinent in dealing with this particular aspect."[116] In the absence of substantive environmental rights, the interpretation

[110] Atapattu & Schapper 'Human Rights and the Environment: Key Issues'
[111] Atapattu & Schapper 'Human Rights and the Environment: Key Issues'
[112] Atapattu & Schapper 'Human Rights and the Environment: Key Issues'
[113] Ibid
[114] Leib "The Conceptualisation and Development of Environmental Issues As Human Rights" also see *Fadeyeva v. Russia*
[115] Fadeyeva v. Russia , App. No. 55723/00, 45 Eur. H. R. Rep. 10, par. 68 (2005), Also See Leib, Linda Hajjar. Human Rights and the Environment : Philosophical, Theoretical and Legal Perspectives, 2010
[116] Kyrtatos v. Greece , App. No. 41666/98, 40 Eur. H. R. Rep. 16(2003).

of existing human rights will be subject to whether the judiciary adopts a proactive or a traditional approach.[117]

2.6 – Right to Health & Adequate Standard of Living

A strong link can be made between the right to an adequate standard of living and the inhabitants' environment as a decent and healthy environment is a prerequisite for human health and well-being.

According to Article 11 of the ICESCR, Party States recognise "the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing and to the continuous improvement of living conditions." As well as 'the right of everyone to be free from hunger.'[118] This Article refers to the right to an 'adequate standard of living" which includes the right to food however omits the right to water which was later included with the adoption of General Comment No 15 (the General Comment) in the 51st meeting of the 29th session, in November 2002.[119] The document provides guidelines for states on the interpretation of the right to water where this right to water is deducted from two articles of the ICESCR (namely Article 11 the right to an adequate standard of living and Artcle 12 the right to health). [120]

The General Comment affirms the legal basis for this right specifically that the human right to water "entitles everyone to sufficient, safe, acceptable, physically accessible and affordable water for personal and domestic uses".[121] The Committee concluded that Articles 11 & 12 should include the right to water for humans. While the standard of a right to water was welcomed, many states were

[117] Leib, Linda Hajjar. Human Rights and the Environment : Philosophical, Theoretical and Legal Perspectives, 2010
[118] International Covenant on Economic, Social and Cultural Rights , art. 12(1).
[119] Committee on Economic, Social and Cultural Rights General Comment No 15 United Nations Committee on Economic, Social and Cultural Rights (CESCR), General Comment No. 15: The Right to Water (Arts. 11 and 12 of the Covenant), 20 January 2003, E/C.12/2002/11, available at: www.refworld.org/docid/4538838d11.html
[120] General Comment No. 15 on the Right to Water (2002) von Nina Reiners
[121] https://www.un.org/waterforlifedecade/pdf/human_right_to_water_and_sanitation_media_brief.pdf

generally concerned that an "adequate standard of living will be further deconstructed into an all-encompassing concept containing several novel rights."[122] This concern is developed due to the view that the treaty bodies are overusing their mandate of the general comments in order to create new legal norms instead of interpreting the content of the existing obligations. Such as in regards to the right to water, certain countries denied the existence of such a right altogether – such as USA. In their view submitted to the OHCHR, USA presented its criticisms of the General Comment stating that they do not view the right to water to "exist under human rights law".[123] This is remarkable as they are a signatory state who never ratified the treaty, it can be viewed as a reflection of the provision of matters such as healthcare and food as a matter of private effort and not the duty of the state thus the general comment does not apply to them. The effect of the General comment nevertheless was far reaching as it opened debates and had an impact on international law and the recognition of the eight to water at an international level.[124] The General Assembly adopted resolution 64/292, titled "The human right to water and sanitation" which referred to the General Comment as its basis for the resolution.[125] Thereafter a human right to water was recognized by 122 states.

Furthermore, the right to health is embodied in many human rights conventions and cannot be limited to medical care and assistance but includes protection from environmental hazards which may be radioactive contamination, food pollution or water pollution. These include Article 12 of the ICESCR, Article 24 of the UN Convention on the Rights of the Child and Article 10 of the Protocol of San Salvador. Article 12 of the ICESCR provides that States it "recognises the right of everyone to the enjoyment of the highest attainable standard of physical and mental health."[126] One of the preconditions advanced for the realisation of this standard is 'the improvement of all aspects of

[122] General Comment No. 15 on the Right to Water (2002) von Nina Reiners
[123] Views of the United States of America on Human Rights and Access to Water, submitted to the Office of the United Nations High Commissioner for Human Rights, June 2007. URL: www2.ohchr.org/english/issues/water/contributions/UnitedStatesofAmerica.pdf
[124] General Comment No. 15 on the Right to Water (2002) von Nina Reiners
[125] The human right to water and sanitation : resolution / adopted by the General Assembly https://digitallibrary.un.org/record/687002
[126] Leib, Linda Hajjar. Human Rights and the Environment: Philosophical, Theoretical and Legal Perspectives, 2010

environmental and industrial hygiene.'[127] The obligations concerning this "right to health" have been clarified by the Committee on Economic, Social and Cultural Rights in the No 14 General Comment (2000) which emphasized that the right to health includes a variety of socio-economic factors that enables individuals to live a healthy life.[128] This extends to "the underlying determinants of health, such as food and nutrition, housing, access to safe and potable water and adequate sanitation, safe and healthy working conditions and a healthy environment."[129] This Comment clearly indicates that the enjoyment of the right to health is inextricably dependent on environmental conditions. The Committee on Economic, Social and Cultural Rights has referred to environmental issues in its General Comment on the Right to Adequate Food and its General Comment on the Right to Adequate Housing and interpreted Article 11 of the Convention, particularly the phrase "free from adverse substances". They interpreted that states must adopt food safety and other protective measures to prevent contamination through "bad environmental hygiene". [130]Further to this, the General Comment on housing states that 'housing should not be built on polluted sites nor in proximity to pollution sources that threaten the right to health of the inhabitants". [131]

Regional and national tribunals often come across the use of the right to health in relation to environmental protection and pollution issues. In the case of the Yanomami Indians where they filed a claim with the IACHR against Brazil regarding the construction of the trans-Amazonian highway that crosses their homelands and forced them to resettle without any compensation.[132] The discovery of mineral deposits attracted mining companies to their lands which lead to further issues such as displacement and the spread of epidemics, including influenza and tuberculosis.[133] The community claimed that these developments and commercial projects infringed on their "basic

[127] International Covenant on Economic, Social and Cultural Rights, art. 12(2)
[128] Committee on Economic, Social and Cultural Rights General Comment No 14, also see Office of the High Commissioner for Human Rights General Comments No 14 (1984)
[129]Office of the High Commissioner for Human Rights General Comments No 14 (1984) which further states that right to health is an inclusive right that extends to underlying issues related to health.
[130] General Comment No 12 1991
[131] General Comment No 4, 1991
[132] Yanomami Community v. Brazil
[133] ibid

human rights as embedded in the American Declaration of the Rights and Duties of Man, including the right to life, to liberty and personal security; the right to residence and movement; and the right to the preservation of health and well-being".[134] The Commission ruled in favour of the Yanomami Indians in their struggle with the Brazilian authorities and recommended the Brazilian government take appropriate measures to protect Indigenous peoples' health and life. [135] However, the outcome of the litigation did not compel the government to halt or reverse the environmental degradation that occurred on the Yanomami lands.[136]

2.7 – States Obligations: Procedural Rights

Procedural or 'access" rights can be described as rights relating to access to information, participation in the decision-making process and access to remedies.[137] These are established rights under international human rights law, as discussed further below, and the Rio Declaration on Environment and Development included these rights within the scope of environmental protection. [138] The procedural rights are now part of various environmental treaties as well as procedural components of sustainable development initiatives whereby including human rights in the sustainable development sphere.[139] Environmental procedural rights such as the rights to participation, remedies and access to justice are necessary to empower citizens, communities, and civil society groups to challenge industrial projects and influence public environmental decisions and policies. Procedural rights, an essential part of international human rights law are already embedded in the UDHR.[140] Similarly, the ICCPR recognises general procedural rights such as the right to a fair and public hearing, the right to freedom of expression, the right to seek information and the right to

[134] Leib, Linda Hajjar. Human Rights and the Environment : Philosophical, Theoretical and Legal Perspectives
[135] Yanomami Community v. Brazil
[136] ibid; also see Atapattu & Schapper 'Human Rights and the Environment: Key Issues' pg 129
[137] Dejeant-Pons M & Pallemaerts M, "Human Rights and the Environment" (2002)
[138] Atapattu & Schapper 'Human Rights and the Environment: Key Issues' pg 129
[139] Ibid
[140] Universal Declaration of Human Rights, arts. 8, 19, 21, and 26.

participate in public affairs.[141] Principle 10 of the Rio Declaration articulates the link between procedural rights and environmental issues.[142]

When discussing human rights in an environmental context, it is essential to take into account the development of specific environmental rights in other treaties and potentially interpret and apply human rights treaties bearing this in mind.[143] A notable example of this is the Aarhus Convention on Access to Information, Public Participation in Decision Making and Access to Justice in Environmental Matters.[144] The Aarhus Convention is an environmental treaty that grants citizens access to environmental information, participation in decision making in environmental matters and judicial redress where the two previous rights or other environmental provisions have been violated.[145] This convention, however, is not a traditional environmental agreement as it also deals with the intricate and complex relationship between people and governments where it links environmental rights and human rights, government accountability and environmental protection together. The former Secretary General of the UN stated that although the convention is regional in scope the significance of the "Aarhus Convention is global; It is the most ambitious venture in the area of "environmental democracy" so far undertaken under the auspices of the UN".[146] He viewed the Convention as somewhat a global framework for 'strengthening citizens; environmental rights."[147] The convention's preamble reinforces the Stockholm declaration and recognizes that adequate protection of the environment is "essential to human well-being and enjoyment of basic human rights including the right to life itself."[148] Boyle argues that these general statements however are misleading in nature as the focus of the Convention is strictly procedural and is limited to public participation in environmental decision-making, access to information and justice.[149] The convention is significant for example Article 9 reinforces access to justice and the obligation of public authorities to enforce

[141] International Covenant on Civil and Political Rights, arts. 14, 19 and 25.
[142] Dinah Shelton, "What Happened in Rio to Human Rights?" Yearbook of International Environmental Law 3(1992)
[143] See Demir v Turkey, Soering v UK, Ocalan v Turkey, also see Vienna Convention on the law of Treaties 1969
[144] The Aarhus Convention – An Implementation Guide (2000).
[145] EEN Briefing for Members Introducing the Aarhus Convention on Access to Information, Public Participation in DecisionMaking and Access to Justice regarding Environmental Mattershttps://www.env-health.org/IMG/pdf/EEN_Briefing_for_Members_the_Aarhus_Convention.pdf
[146] Boyle
[147] Ibid
[148] Dejeant-Pons M & Pallemaerts M, "Human Rights and the Environment" (2002)
[149] Boyle

existing law such as enabling applicants to participate in decision-making as well as giving the right to seek administrative or judicial review of the standing of the resulting decision. Article 9(4) requires that adequate, effective, and fair remedies are provided which reflects the decisions in *Lopez Ostra* and *Guerra* under Article 8 of the ECHR. [150] In the case of *Anna Maria Guerra and others v Italy*, the claimants' complaints related to pollution from the operation of a chemical factory based near their town as well as the risk of major accidents at the plant and the absence of regulation by the public authorities.[151] ECtHR although confirmed that Article 8 was violated declined to consider whether there was a violation of Article 2 (right to life). The reasoning behind this decision stemmed from the fact that the court found it unnecessary in the light of their decision on Article 8.

Participatory rights have a preventive and proactive role in managing and protecting the environment. [152]By participating in environmental policymaking, citizens can influence decisions that have potential implications for the environment and propose effective ways of dealing with polluting activities.[153] Procedural rights are arguably the most important environmental addition to human rights law since the 1992 Rio Declaration on Environment and Development. Any attempt to codify the law on human rights and the environment would necessarily have to take this development into account.

Access to environmental information is now considered to be an established right.[154] The States have an obligation to inform the public about any possible environmental risks that may occur because of natural disasters or human activities that can affect the citizens' right to life (Article 2) and right to private life (Article 8).[155] As the Court observed in the case of *Oneryildiz v Turkey*[156], this duty portrays a specific aspect of the aforementioned articles where in this case State was aware of the

[150] Lopez Ostra v. Spain, 20 EHRR (1994) 277; Guerra v. Italy, 26 EHRR (1998) 357
[151] Dejeant-Pons M & Pallemaerts M, "Human Rights and the Environment" (2002)
[152] Dinah Shelton "A Rights Based Approach to Public Participationand Local Management of Natural Resources"
[153] Ibid
[154] Regulatory Framework Citizens Right to access environmental information https://ec.europa.eu/environment/archives/seis/citizens_rights.htm
[155] Mapping Human Rights Obligations Relating to the Enjoyment of a Safe, Clean, Healthy and Sustainable Environment Individual Report on the European Convention on Human Rights and the European Union (2013)
[156] Oneryildiz v Turkey [2004] 11 WLUK 785

possible severe health risks from the toxic emissions but failed to inform the residents who were affected by this risk.[157] It was stated that in instances where such dangerous activities fall within the responsibilities of the state a particular emphasis should be made on the public's right to information and that relevant regulations "must also provide for appropriate procedures, taking into account the technical activity in question, for identifying shortcomings in the processes concerned and any errors committed by those responsible at different levels."[158]

Access to information is closely linked to public participation and can cover a wide range of rights. This procedural right under Article 8 was emphasized in the case of *McGinley and Egan v United Kingdom* where the court stated that "respect for private and family life under Article 8 requires that an effective and accessible procedure be established which enables such persons to seek all relevant and appropriate information in the event where States are involved in dangerous activities which may have negative impacts on individual's health". [159]Access to information is also closely linked to public participation and can cover a wide range of rights.

2.8 Final Remarks

As discussed, there is a very distinct link and dependency between these two separate areas of law and environmental protection in certain circumstances depending on the exercise of existing human rights measures. The seemingly straightforward link between human rights and the environment however is a complex legal problem as characterizing environmental harm to humans is not all that simple especially when it comes to individuals seeking redress after having their rights violated. It has been argued that it is practically not possible to wholly incorporate such environmental

[157]Mapping Human Rights Obligations Relating to the Enjoyment of a Safe, Clean, Healthy and Sustainable Environment Individual Report on the European Convention on Human Rights and the European Union (2013)ECrtHR, also see Öneryildiz v. Turkey, 30 November 2004
[158] Mapping Human Rights Obligations Relating to the Enjoyment of a Safe, Clean, Healthy and Sustainable Environment Individual Report on the European Convention on Human Rights and the European Union (2013) ECrtHR, also see Öneryildiz v. Turkey, 30 November 2004
[159] Ibid; ECrtHR, McGinley and Egan v. United Kingdom, 9 June 1998; also see Krstic, Ivana & Čučković, Bojana. (2015). Procedural aspects of article 8 of the ECHR in environmental cases: The greening of human rights law. Anali Pravnog fakulteta u Beogradu..

protection into the human rights agenda without “deforming the concept of human rights and distorting its program”. [160]

If a right to the environment becomes widely accepted as part of the human rights sphere, the problem of balancing it with other rights remains.

[160] Joseph S, “Protracted Lawfare: The Tale of Chevron Texaco in the Amazon”, Journal of Human Rights and the Environment, volume 3, issue 1, (2012)

Chapter 3 – Multinational Corporations

The intersection of environmental issues, human rights, and corporate responsibilities, particularly concerning Multinational Corporations (MNCs), remains a complex and critical topic. The current global landscape is characterized by a range of environmental challenges, including pollution, climate change, and biodiversity loss. These environmental issues are not isolated; they have profound implications for human rights, impacting fundamental rights such as the right to life and the right to a private, healthy environment. Multinational Corporations often play a significant role in these issues. Their operations, both direct and indirect, can contribute to environmental degradation. This involvement extends down their supply chains and through their intricate corporate structures.[161]

The previous chapter's analysis focused on delineating the relationship between human rights and environmental issues as separate legal areas. This chapter aims to delve into how these domains intersect with corporate obligations, particularly examining how corporations may violate the aforementioned rights. A key objective is to provide a comprehensive overview of the corporate structures of MNCs. Understanding these structures is crucial for grasping why regulating these entities in the context of environmental and human rights is particularly challenging. Additionally, the chapter will explore the operational mechanisms of MNCs, shedding light on the reasons behind the difficulty in regulating them in this context. The United Nations Guiding Principles on Business and Human Rights[162] provide a framework for understanding these complexities, emphasizing the duty of businesses to respect human rights and the environment in their operations. Finally, the

[161] The United Nations Human Rights Council emphasizes the link between business activities and environmental harm, noting that corporate actions can have severe implications for a wide range of human rights in the report authored by the Special Rapporteur Mr. John H. Knox. It outlines 16 principles connecting human rights and the environment. It emphasizes the role of States in ensuring a safe, clean, and sustainable environment to respect, protect, and fulfill human rights. The principles cover various aspects, including non-discrimination, public participation in environmental decision-making, access to information, and remedies for environmental harm. This report represents a culmination of five years of work by the Special Rapporteur and was submitted to the 37th session of the Human Rights Council John H Knox, 'Framework Principles on Human Rights and the Environment' (UN Human Rights Council, 2018) UN Doc A/HRC/37/59.

[162] Office of the United Nations High Commissioner for Human Rights. (2011). Guiding Principles on Business and Human Rights: Implementing the United Nations 'Protect, Respect and Remedy' Framework. OHCHR.

chapter will briefly outline the impact of MNCs on environmental and human rights. This includes examining case studies and reports that highlight the extent of environmental degradation and human rights abuses linked to corporate activities.[163] This chapter seeks to provide a nuanced understanding of the intricate relationship between MNCs, the environment, and human rights, highlighting the challenges and the need for effective regulation in this sphere.

3.1- What is a Multinational Corporation?

A Multinational Corporation (MNC) or Transnational Corporation (TNC) is an entity with substantial economic operations in multiple countries, regardless of its legal form or structure. This includes various business entities operating internationally, whether they are based in their home country or abroad, and irrespective of whether they are considered individually or as a group. [164] The fundamental characteristic of MNCs is their presence across national borders, typically through facilities like offices or factories. The concept of "extraterritoriality," as noted by scholars such as Baylis & Smith, is intrinsic to the structure of all MNCs. This term implies that these corporations function beyond the territorial jurisdiction of their home country, creating complexities in legal and regulatory oversight.

MNCs, primarily driven by profit-maximization unlike non-profit organizations, have traditionally been outside the direct purview of international law, which has historically recognized states as the primary subjects bearing legal rights and duties.[165] Although now there is increased awareness and

[163] For instance, the Carbon Majors Report by CDP (formerly Carbon Disclosure Project) illustrates how a small number of fossil fuel producers are responsible for a significant share of global greenhouse gas emissions, underlining the environmental impact of corporate activities. The Carbon Majors Report, published by CDP (formerly known as the Carbon Disclosure Project) in 2017, is a significant study that highlights the impact of corporate activities on global greenhouse gas emissions. Although climate change is not the focus of this thesis it is an important environmental issue and therefore is noteworthy that this report is often used to emphasize the role that a relatively small number of large fossil fuel companies play in contributing to climate change.

[164] UN Sub-commission on the Promotion and Protection of Human Rights, 'Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with regard to Human Rights'

[165] Kopnina, H., & Blewitt, J. (2018). *Sustainable Business: Key Issues in Environment and Sustainability* (2nd ed.). Routledge.

attempts to hold MNCs accountable for their actions this is a more recent development. Traditionally, international law viewed states as the sole entities capable of bearing legal responsibilities and entitlements, with other organizations, including businesses, interacting with international legal frameworks indirectly through their national governments. This perspective has led states to enter into various international agreements addressing environmental issues like climate change, ozone depletion, transboundary air pollution, marine pollution, and biodiversity conservation.[166] However, the direct legal obligations of MNCs under international law remain limited. In the absence of specific, binding international legal instruments, MNCs are primarily accountable to the laws of the jurisdictions in which they operate. This creates a complex legal landscape where the environmental impacts of MNCs' operations may not always align with international environmental standards or goals. Today MNCs still do not have direct obligations under international law and ultimately in the absence of a specific legally binding international instrument, they are only responsible to adhere to the relevant law in the jurisdiction of their operations. It is also worth noting that, environmental harm to individuals is not a cause of action under current international law; such harm must be connected to a substantive right and this requirement leads courts and commissions into an even more complicated and undefined area of law.

3.2 Influence of Multinational Corporations

The evolving role of Multinational Corporations (MNCs) in the global economy, particularly post-World War II, reflects their significant influence on both economic and political spheres. As governments shifted from command-and-control [167] regulations to more market-based approaches[168], MNCs have become central to global commerce, often wielding economic power that

[166] Jonathan I. Charney, Transnational Corporations and Developing Public International Law
[167] Command and control regulations can be defined as the regulation of an industry or activity by legislation which states what is permitted and what is not.
[168] Market based approach controls companies, prices and production naturally by the supply and demand for goods and services rather than by the governments.

surpasses the GDPs of less developed nations. This economic influence of corporations in shaping global policy is substantial and cannot be overlooked.

After World War II, MNCs emerged as publicly listed or for-profit privately owned corporations that were in search of new markets and raw materials across the globe.[169] Gaining access to international capital markets allowed MNCs to fund significant investments in the search for resources as well as the research and development that was necessary to maintain and reinforce their position in the energy and technology industries.[170] This in turn accelerated their growth in other industries. However, with the rapid technological changes, research and developmental costs increased resulting in companies seeking other markets abroad in an effort to make more profits and to "amortize their investments in order to compete with the competitors when the next technological advance comes."[171] Until the 1980s MNCs were only legally accountable to their shareholders for the financial performance of the company. This set up displayed MNCs as solely a profit driven organization that did not have any legal obligations in taking societal interest in their operations. With the documentation of a series of environmental disasters linked to such corporations after the 1980s this structure began to change. These changes concerned the perception of non-state actors on the international stage with international law undergoing some transformation with the understanding that under certain circumstances other entities besides states owe some duties to uphold the law. Despite this shift, there remains a significant gap in effectively holding MNCs accountable, with victims often struggling to establish liabilities. The role of MNCs in environmentally destructive activities has led scholars, lawyers, and activists to advocate for regulatory frameworks that enforce a more sustainable and responsible operational structure for these corporations. Such regulations aim to balance economic interests with environmental and

[169] Laffiteau A., C. 2008. Environmental Rights Agreements between Non-Governmental Organizations and Multi-National Corporations: A Paper Alliance or A Marriage of Mutual Interest? Available at: http://userpage.fu-berlin.de/ffu/akumwelt/bc2008/papers/bc2008_10_Laffiteau.pdf
[170] Digdowiseiso, K. and Sugiyanto, E. (2020). The Effects of Multinational Companies on Deforestation: The Building Block or Stumbling Block. Journal of Environmental Management and Tourism, (Volume XI, Spring), 1(41): 5 - 11. DOI:10.14505/jemt.v11.1(41).01
[171] Stubbs & Underhill, 1993, also see Laffiteau A., C. Environmental Rights Agreements between Non-Governmental Organizations and Multi-National Corporations: A Paper Alliance or A Marriage of Mutual Interest? Available at: http://userpage.fu-berlin.de/ffu/akumwelt/bc2008/papers/bc2008_10_Laffiteau.pdf

societal responsibilities, reflecting a growing recognition of the need for sustainable development and corporate accountability.

The influence of MNCs extends beyond mere economic dimensions; it permeates political realms, shaping policies and regulations. Their financial power and global reach position them uniquely in influencing both domestic and international policies, often in ways that serve their interests. This influence can sometimes lead to regulatory environments that favor corporate interests, potentially at the expense of environmental and social considerations. Mainstream economists argue that the role of MNCs in economic development is vital in the way they utilize technology, capital, and know-how to generate wealth and employment in countries they operate[172]. In other accounts however, MNCs exploit workers and destroy local cultures as well as widening the gap between the rich and the rest of society. Regardless of which side one agrees with, it is a fact that investments from MNCs is highly sought after by most developing countries as an investment from an MNC mean not only a large sum of capital and jobs but the integration into the global economy.[173] Thus, the need for a robust and enforceable international regulatory framework is imperative to ensure that MNCs contribute positively to sustainable development and adhere to environmental and human rights standards. The evolution of MNCs from post-World War II entities focused solely on expansion and profit to actors with significant global influence highlights the need for comprehensive regulatory frameworks. These frameworks must balance economic growth with environmental sustainability and social responsibility, acknowledging the substantial role these corporations play in the global economy and the impacts they have on societies and the environment. To analyse the challenges in regulation of MNCs, it is important to first establish the way in which MNCs operate and the role they play in environmental and social issues.

[172] Helen Kopnina & John Blewitt, "Sustainable Business, Key Issues in Environment and Sustainibility", 2nd Edn, 2018
[173] ibid

3.3 – Problems with the Structures of Multinational Corporations

3.3.1- Separate Legal Personality

The significant regulatory problem posed by MNCs institutional structures is twofold. The first structure relates to the fact that MNCs operate through complex and discreet corporate units that make up the MNC group and global production networks. [174] MNCs may have several subsidiary and parent companies as well as being connected to many small and medium sized businesses around the world via supply chains (such as by way of supplying or subcontracting). In the case of an MNCs parent and subsidiary companies, even though decision making usually occurs within a vertically integrated command structure, each company possesses separate legal personalities and therefore must be subject to independent systems of regulation. [175] This further means that these companies under the MNC group are not subject to shared liability based on the principle in *Salomon v Salomon*. [176] Having said that the separation of parent and subsidiary liability was achieved in some jurisdictions (such as the USA via statute.[177]

This concept of limited liability applies to any private individual or parent corporations meaning that the global corporations are able to hide behind legal principles of separate legal personality or the ”corporate veil” to “avoid taking responsibility for the actions of a subsidiary that it owns and controls”.[178] When examining real cases of environmental damage, it can be observed that more often than not, decision making is based in the country where the parent company is incorporated, and the environmentally degrading activity occurs abroad where structures for legal and public accountability is insufficient. The environmental damage caused by the activities of MNCs is one of

[174] Michael Anderson, 'Transnational Corporations and Environmental Damage: Is Tort Law the Answer' (2002) 41 Washburn LJ 399
[175] ibid
[176] The House of Lords decision in Salomon has been followed in most common law jurisdictions.
[177] See Briggs v James Hardie & Co
[178] Ibid

such threats that almost all countries have discrepancy in their laws**.**[179] For example, in the Texaco cases although Texaco was the initial defendant in this lawsuit, Chevron took over as the defendant when Texaco and Chevron merged in October 2001.[180] Moreover, as a result of its joint venture with Petroecuador and the changes in entity name and form, the actual source of contamination became a vital issue in establishing the facts of this case.[181] Chevron, Texaco and Texpet made attempts to evade their liability by shifting the blame on the Ecuadorian entity Petroecuador. [182] The plaintiffs on the other hand sought to establish liability on Chevron & Texaco. Meanwhile, today's entities blamed entities of the past namely Texaco and Texpet. Chevron refused to assume any liability of Texaco while Texaco claimed it was not responsible for the liabilities of Texpet which was a separate entity. In the absence of a clear regulation that target such issues, this made it even more challenging for the claimants to hold any of these corporations accountable and seek redress. Similarly in the case of Bhopal, despite the claimant demonstrating that UCC was actively involved in building and management of the waste disposal systems, the UCC contested that the factory was owned operated by a separate entity.[183] The claims that were filed in the US courts were either dismissed or redirected to Indian courts since UCIL was a different entity in India and UCC therefore cannot be liable for the disaster. [184] This presents extreme difficulties for the victims who most often than not already lack access to funds and may be struggling with ill health because of the actions of the corporations as seen in these cases. They are faced with the challenge of finding the right perpetrator to bring the claims against which drains communities' resources in fighting an unfair legal battle with giant corporations.

[179] Morimoto, T. 2005. Growing Industrialization and Our Damaged Planet: The Extraterritorial Application of Developed Countries: Domestic Environmental Laws to Transnational Corporations Abroad.
[180] Owusu, E. S. (2021). Environmental degradation and human rights violation: A cursory overview of the potential of the existing frameworks to hold multinational corporations accountable. *Groningen Journal of International Law, 9*.
[181] Aguinda v Texaco
[182] ibid
[183] The Associated Press, 'Company Defends Chief in Bhopal Disaster', The New York Times
[184] Owusu, E. S. (2021). Environmental degradation and human rights violation: A cursory overview of the potential of the existing frameworks to hold multinational corporations accountable. *Groningen Journal of International Law, 9*.

The issue of legal personality can only be dealt with through domestic law where the international regime can exercise some influence to a certain degree. Although a global standard on due diligence has yet to emerge, domestic laws of certain nations have imposed obligation on shareholders on the conduct of their business activities. An example of this could be the French Corporate Duty of Vigilance Law that was adopted in 2017.[185] This legislation requires certain French companies to take measures regarding the operation of their subsidiaries. The failure to do so may create a responsibility for the company to compensate for the harm that could otherwise be avoided. There are also international efforts in trying to alleviate the environmental and human rights issues caused by corporations and impose binding regulations on corporations via the Open-Ended Intergovernmental Working Group (OEIGWG) draft treaty. This requires states to impose due diligence obligations on companies in their domestic legislations which will be discussed further below.

3.3.2 – Jurisdiction

The second issue relates to jurisdictional matters. A distinctive feature of an MNC was described as the "capacity and flexibility to move places of production and assets between countries" and they can structure their management "independently of national borders and lose every tie to a nation-state except for the formal nexus of incorporation". [186] Therefore, it is not surprising that this "operational flexibility and ensuing detachedness from domestic bounds are one of the main reasons why national legislators fail to put adequate checks on the power of MNCs and why MNCs have moved into the focus of international law".[187] The various subsidiaries within the MNC operate in different sovereign jurisdictions and are subject to different regimes. There is not a single court in any part of the world that excises jurisdiction over all components of an MNC however many of

[185] ibid
[186] Math Noothman et al, 'Non-State Actors in International Law'
[187] ibid

these enterprises conduct their businesses in a way that resembles a sole entity. [188] MNCs have very limited legal personality under international law and are generally not subject to treaty or customary international law obligations. Due to their private legal personality international law rules only apply indirectly via the mediating structures of the states. Which creates the challenge in regulation as this entity is not controlled by international law or the legal norms of a single nation. This creates an anomaly in the legal system as the parent company which is based in the 'home" nation lacks territorial jurisdiction to regulate the activities of its subsidiaries that are based abroad while the "host" states where the subsidiaries locate lack jurisdiction over the parent company where important decisions are made.[189] This enables the MNC to enjoy a degree of autonomy from national jurisdictions.

Therefore, it can be observed that the consequences and causes of global environmental issues are difficult to be addressed via the exercise of national jurisdiction alone. Although the international bodies have made significant progress in developing new treaty regimes, the coverage and implementation of international law in national systems in relation to the regulation of MNCs remains insufficient.[190] Further to the jurisdictional problems observed because of MNCs multi-jurisdictional structures, it is perhaps worth to briefly note that there is also an element of the jurisdictional challenge of the environmental violations itself. It can be said that most environmental law enforcement takes place at the national level however; some national infrastructures are poorly equipped to adequately address the environmental issues at hand, these issues are particularly challenging to resolve when MNCs are involved the violations.[191] The challenge is not only that the pollution and environmental degradation cross national borders but also that decision making in one country may affect the environment in another and as MNCs are often multijurisdictional and have complex corporate structures, it is difficult to ascertain liabilities for the violations. The growing

[188]

[189] Michael Anderson, 'Transnational Corporations and Environmental Damage: Is Tort Law the Answer' (2002) 41 Washburn LJ 399

[190] ibid

[191] ibid

awareness of these complex systems emphasizes the subtleness and widespread ecological consequences of human activity.

MNCs monetary and political power enables them to influence policies in their home states as well as policies of countries where they operate (or consider operating). Legal disputes over which nations laws should apply further adds to the complications in the regulation of environmental practices of MNCs and their subsidiaries. MNCs with their arguably endless monetary resources and power are able to pick and choose the most favourable legal system.

3.4 – Impact of Multinational Corporations on the Environment and Human Rights

With increased global awareness on the impacts of corporations on environmental & human harm, MNCs have come under fire regarding their unsustainable and harmful business practices. MNCs have been accused of polluting and environmentally degrading activities through their subsidiaries particularly in developing nations. Human rights advocates and local communities have voiced their concerns regarding pollution or resource exhaustion by MNCs and allege that these activities further infringe human rights[192] Although they have can significant positive impacts through a host of socio-economic benefits, they can create an array of environmental problems not only for the current communities but also for future generations. *Silverman and Orsatti* notes that "proliferation of investments by multinational enterprises in developing countries over the last decades has had a profound social and environmental impacts, to the point where some multinationals have been complicit in gross violations of fundamental human, social, labor and environmental rights" which is evidenced in many case laws.[193] The enjoyment of human rights can be adversely affected because of a polluted environment perpetrated by these private actors in several ways. These harms are especially prominent in small & indigenous communities of less developed nations. Such as in

[192] Human Rights Watch, The Price of Oil " Corporate Responsibility and Human Rights Violations in Nigeria's Oil Producing Communities"
[193] Silverman and Orsatti "Holding Transnational Corporations Accountable For Human Rights Obligations: The Role Of Civil Society'

Nigeria's Niger Delta region (which is rich in oil and frequently hosts MNCs for this reason) have experienced "a wide range of environmental pollution, degradation, human health risks and socio economic-problems as a result of activities associated with petroleum exploration, development and production".[194] Due to negligence, poor health, safety and environmental, oil spills are a regular occurrence in this region and many others as the select cases will present.[195] These types of actions by MNCs are devastating on the socio-economic life and well-being of such communities as they often depend on the local farmlands and water sources for domestic day to day sustenance purposes (such as fishing, drinking water etc.) as documented by cases of *Texaco*[196] & *Shell*[197]. Pollution and environmental degradation can further force these local communities to become "environmental refugees" as when their source of livelihood is polluted and destroyed, they have no choice but to abandon their home for a more habitable environment.

It was highlighted by the office of High Commissioner on Human Rights (OHCHR) that while human rights treaties do not have specific references to "the right to a healthy and safe environment", all the UN human rights treaty bodies "recognize the intrinsic link between the environment and the realization of a range of human rights, Such as the right to life, to health, to food, to water and to housing."[198] Environmental issues created by MNCs that lead to human rights violations include but not limited to; pollution, displacement of communities, seizure of communal lands, natural resource exploitation have been associated with environmental injustice that leads to human rights abuses.[199] Further environmental threats that are of a planetary scale most notably climate change, which will inevitably lead to human harm is also linked to the activities of corporate entities.[200] Particularly case law by the ECrHR has examined environmental issues in relation to 'Right to Life' (Article 2), and 'The

[194] Owusu, E. S. (2021). Environmental degradation and human rights violation: A cursory overview of the potential of the existing frameworks to hold multinational corporations accountable. *Groningen Journal of International Law, 9*.
[195] Ibid
[196] Aguinda v Texaco Inc
[197] Esther Kiobel v Royal Dutch/Shell 621 F3d 111 (2d Cir 2010); Esther Kiobel v Royal Dutch Petroleum Co, 133 SCt 1659 (2013).
[198] UN Human Rights Council, Report of the Office of the United Nations High Commissioner for Human Rights on the relationship between climate change and human rights, 15 January 2009, A/HRC/10/61, available at: https://www.refworld.org/docid/498811532.html, para 18; Also see Literature and Human Rights: The Law, the Language and the Limitations of Human Rights Discourse (Law & Literature)
[199] Adeola, F. (2001). Environmental Injustice and Human Rights Abuse: The States, MNCs, and Repression of Minority Groups in the World System. Human Ecology Review, Accessed June 14, 2021, http://www.jstor.org/stable/24707236
[200] 'Climate Business | Business Climate' (Harvard Business Review, 2021) <https://hbr.org/2007/10/climate-business-_-business-climate> accessed 17 June 2021.

Right to Respect Private and Family Life' (Article 8) alongside procedural rights such as the right to an effective remedy (Article 6 and 13). Noteworthy cases such as *Lopez, Guerra, Budayeva and Oneryildiz* present the way in which these rights can be utilized to pressure States to manage environmental threats and enforce environmental laws and exhibit the governments positive obligation to take necessary steps to secure these rights.[201] This is the reason why certain cases such as *Lopez* and *Guerra* concern the failure of governments to enforce the law and some focus specifically on procedure of decision making however the objective of protection of the environment does not specifically fall within the ambit of human rights law.[202]

Generally environmental threats caused by MNCs activities that generate human implications can be seen as;

- Atmospheric emissions that lead to climate change, air pollution and ozone-layer depletion due to increased human activity
- Land degradation, deforestation and desertification which can have effects on a global level although violation happens on a regional level.
- Degradation in water quality, freshwater scarcity which can lead to prevalent human rights implications
- Hazardous waste, chemical contamination and pollution as seen in case law; waste disposal of such toxic materials is not always carried out adequately adhering to safety protocols which leads to chemicals being released to the environment. Although States and international bodies are implementing stricter measures in their regulation in this matter, the efficacy is still questionable when faced with MNCs.
- Loss of biodiversity which has a significant effect on populations that rely on the environment for their livelihoods.

[201] Lopez Ostra v. Spain, 20 EHRR (1994); Guerra v. Italy, 26 EHRR (1998) Öneryildiz v. Turkey, 41 EHRR (2005) 20; Budayeva v. Russia [2008] ECtHR.
[202] Boyle, A "Human Rights and the Environment: Where Next?", The European Journal of international Law Vol 23 no 3, OUP 2012

Taking the oil industry as an example, the extreme pollution that the extractive industry operations create such as unlawful gas flaring practices that release toxic chemicals in the air has been linked to cancer and other respiratory illnesses.[203] Oil spillages and inappropriate disposal of waste can lead to the pollution of farmlands and rivers which in turn negatively impact human life because of the dilapidation of the environment. [204] This is can create life or death situations especially in rural and indigenous communities where the pollution not only adversely affect the environment but also the socio-economic life and health of the residents as evidenced by cases such as *Royal Dutch Petroleum/Shell.*[205] The *Chevron/Texaco* oil contamination cases further exhibit the way in which environmental damage perpetrated by corporations' activities affect local communities as the pollution caused between 1964-1994 in the Ecuadorian Amazon rainforest affect the lives of inhabitants to this day. The legal claims, which will be discussed further in the thesis, were based on three fundamental issues in the Ecuadorian rain forest lands where Texaco conducted its drilling operations. The first issue related to the fact that Texaco created around 1,000 waste pits into the jungle floor around the well sites. Each pit was used to dispose of drilling waste that contained toxic and carcinogenic materials such as chromium 6 and benzene.[206] It should have been evident that this type of action by the operators would be problematic for the residents. Unsurprisingly, the pits caused pollution to the site with the pipes running from the pits straight into streams and rivers that the nearby communities on for fishing, bathing and the fish that made up the primary source of their diet.[207] The second problem was that the design of the production sites deliberately discharged large amounts of toxic produced water into the surrounding waterways. This extremely toxic wastewater was being poured into the river systems at a volume of four million gallons per day at the height of the operation which was "invisible" contamination that made the drinking water in certain areas

[203] Shinsato, "Increasing the Accountability of Transnational Corporations for Environmental Harms: The Petroleum Industry in Nigeria" ,Ofiice of the united nationas high commissioner for human rigths Mapping Human Rights Obligations Relating to the Enjoyment of a Safe, Clean, Healthy and Sustainable Environment
[204] ibid
[205] Wiwa v Royal Dutch Petroleum/Shell. (2000)
[206] Chevron vs. human rights — big consequences for the man who fought big oil https://medium.com/wedonthavetime/chevron-vs-human-rights-big-consequences-for-the-man-who-fought-big-oil-2a0b4b3b04ed
[207] How a company got away after committing the worst oil spill in history https://eandt.theiet.org/content/articles/2021/01/lasting-effects-from-the-rainforest-oil-spill-in-ecuador/

toxic enough to kill.[208] The third prominent issue that was addressed in litigation was the damage caused by the flaring of natural gas at the well sites which contained "cancer-causing dioxins". The air pollution as a result of this was so severe that it created the phenomenon of "black rain" during the rainstorms in the region.[209] The residents were left with health problems as a result for many years after Texaco ceased its operations in the region and had to endure further challenges to access justice.

It can be observed in the Texaco case and others that MNCs large operations and lack of accountability in the domestic and international fora permit these corporations to operate in a way that is not only damaging to the environment but to humans.[210] Factors that contribute to this pattern partially stems from their corporate structures in which decisions are taken in MNCs home state, yet the effects of these decisions are experienced abroad in the country of their operation. Similarly, environmentally appropriate plans may be put in place on paper however these are not implemented in practice due to the lack of supervision by host states.[211] It must also be highlighted that there are instances where MNCs have made explicit decisions in order to maximize profits by conducting environmentally unsound practices. There has even been instances evidently hazardous activities were transported to a host developing nation to specifically avoid regulations in their home state. [212]

The cases surrounding the devastating effects of environmental degradation are prominent examples of the human rights violations caused by environmental degradation and the tremulous judicialization process of environmental conflict.[213] As a result of similar cases such as the oil spills

[208] Chevron vs. human rights — big consequences for the man who fought big oil https://medium.com/wedonthavetime/chevron-vs-human-rights-big-consequences-for-the-man-who-fought-big-oil-2a0b4b3b04ed Judith Kimerling, 'Transnational Operations, Bi-National Injustice: Indigenous Amazonian Peoples and Ecuador, ChevronTexaco, and Agunda v. Texaco', (2008).
[209]Chevron vs. human rights — big consequences for the man who fought big oil https://medium.com/wedonthavetime/chevron-vs-human-rights-big-consequences-for-the-man-who-fought-big-oil-2a0b4b3b04ed
[210] Michael Anderson, 'Transnational Corporations and Environmental Damage: Is Tort Law the Answer' (2002) 41 Washburn LJ 399
[211] Michael Anderson, 'Transnational Corporations and Environmental Damage: Is Tort Law the Answer' (2002) 41 Washburn LJ 399
[212] Sitole Others v Thor Chem Holdings
[213] Anna Berti Suman, 'Human Rights Violations In The ChevronTexaco Case, Ecuador: Cultural Genocide?' <https://repository.gchumanrights.org/bitstream/handle/20.500.11825/429/04_art._GC_%20Journal_2017_2.pdf?sequence=1&isAllowed=y> accessed 24 August 2021.

caused by BP in 2010[214] and Exxon Valdez in 1989 [215], there are now greater expectations for corporate social responsibility and increased demand for scrutiny in corporate accountability, yet issues in relation to accountability remain.[216] Next section will analyse the ways in which domestic and international regulation addresses these issues outlined in this section.

3.5 – Problems with Regulatory Mechanisms in Addressing Environmental and Human Rights Issues Caused by Multinational Corporations

The international legal regime governing the human victims of environmental harm is not a unified one and the problems in human rights violations that are caused by environmental harms through the actions of MNCs lie at a complicated legal intersection which creates ambiguity in holding MNCs accountable.[217] There are many challenges when attempting to hold an MNCs accountable for violations of environmental and human rights abuses as exhibited previously. The regulatory response to address these challenges have been largely inadequate.[218]

Human rights and environmental law often aim to address issues that go further than national jurisdiction to safeguard common concerns regarding natural resources and human dignity, relying purely on domestic legislations to combat these issues are challenging. The multi-jurisdictional nature of MNCs means that the variable regulations in different states cause significant complications in both prevention of violations and access to justice for victims. As well as the difficulty of navigating different domestic regimes, when an MNC exploits a host states natural resources or harms its land and citizens, developing nations are not equipped to address these

[214] Beyond Profit: Rethinking Corporate Social Responsibility and Greenwashing After the BP Oil Disaster
[215] David G Shaw, The Exxon Valdez Oil-spill: Ecological and Social Consequences
[216] Corporate Social Responsibility in the Oil and Gas Industry: The Importance of Reputational Risk
[217]
[218] Davies, P., Francis, P., & Wyatt, T. (2014). Introduction. In P. Davies, P. Francis, & T. Wyatt (Eds.), Invis- ible crimes and social harms Basingstoke, Hampshire: Palgrave Macmillan.

issues sufficiently. In this context, the governments in the relevant countries at local levels must put pressure on the MNCs to enforce certain obligations. However, since MNCs largely operate in third world nations where the environmental agenda may not be a priority, the local communities in the developing countries are still largely left unprotected.[219] On the outset the country may have established environmental regulations, however, the reality is that the enforcement of them is often minimal. Despite some success achieved by the existing accountability regulations, it can be seen from cases and literature that they are not sufficient in holding MNCs accountable or effectively providing victims with remedies.

The variation in regulation is not a unique concept between developed and developing nations. The differences in societal and regulatory norms can be observed even in similar industrialized countries such as the US and Germany. These economic and societal gaps however are largest between the 30 developed nations of the OECD as a whole and the rest of the world. Generally, OECD countries are run through a democratic government with integration of civil and political rights as well as the rule of law[220]. Many developing nations on the other hand do not have a well-functioning democratic structure or are ruled by an authoritarian elite. These broad socio-economic differences are mirrored in gaps in social and environmental regulation. Systems of environmental regulation were not established in most developing countries until the 1990s which was around 20 years after the OECD countries.[221]

Of course, however, domestic laws are an important tool to uphold international environmental and human rights standards such as the USA's Clean Water Act[222] and EU's Ambient Air Quality Directive[223] which may be successfully enforced in developed countries. A noteworthy domestic law

[219] Watts MJ, 'Righteous Oil? Human Rights, The Oil Complex, And Corporate Social Responsibility' (2005) Annual Review Of Environment And Resources
[220] Purvis, B., Mao, Y. & Robinson, D. Three pillars of sustainability: in search of conceptual origins. *Sustain Sci* **14**, 681–695 (2019). https://doi.org/10.1007/s11625-018-0627-5
[221] Purvis, B., Mao, Y. & Robinson, D. Three pillars of sustainability: in search of conceptual origins. *Sustain Sci* **14**, 681–695 (2019). https://doi.org/10.1007/s11625-018-0627-5
[222] Clean Water Act 1972
[223] Ambient Air Quality Directive 2008

in this context is the US Alien Tort Claims Act (ACTA) which provides district courts with jurisdiction for any civil actions by 'an alien for tort only, committed in violation of the law of nations or a treaty of the United States".[224] This legislation was a powerful instrument that entitled US courts to rule on human rights violations despite of the location of the defendants or the claimants.[225] However, its use has been restricted by the Supreme Court in 2013 as will be discussed further in this research.

Over the years, in order to resolve some of these issues there has been a number of soft law initiatives via the creation of guidelines and codes of conduct. Soft law has been described as a transnational stage in the development of norms where their content is vague and their scope imprecise.[226] These instruments can obtain legal force and give rise to harder edged legal duties in particular through legislative developments at the domestic level. Such as the International Labour Organization Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy [227] The United Nations Global Compact[228] and the OECD Guidelines on Multinational Enterprises.[229]

Arguably, the most mentioned instrument in this area when discussing MNC's accountability is the *2011 United Nations Guiding Principles*[230], one of the first UN-endorsed instruments that apply to businesses as well as states, has the aim of promoting respect for human rights and the environment. The UNGP emerged in 2011 because of extensive stakeholder consultation organized by the former Special Representative on Business and Human Rights John Ruggie and constituted the first authoritative global standard on business and human rights that aims to directly address the negative impacts of MNCs operations as well as States and other businesses.[231] The UNGP is a non-binding instrument that is an example of a soft law that promotes respect for the environment and

[224] The Alien Tort Claims Act (ATCA) of 1789
[225] Silverman and Orsatti, Douglas M Branson, 'Holding Multinational Corporations Accountable? Achilles' Heels in Alien Tort Claims Act Litigation' (2011)
[226] Macchi and Bright "Hardening Soft Law: the Implementation of Human Rights Due Diligence Requirements in Domestic Legislation"
[227] Tripartile Declaration of Principles Concerning Multinational Enterprises and Special Policy, (1978),
[228] The U.N. Global Compact
[229] Organization for Economic Co-operation & Development (OECD), The OECD Guide- lines for Multinational Enterprises,(2001)
[230] Office of the United Nations High Commissioner for Human Rights. (2011). Guiding Principles on Business and Human Rights: Implementing the United Nations 'Protect, Respect and Remedy' Framework. OHCHR.
[231] UNHRC 'Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and other Business Enterprises, John Ruggie: Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework'

human rights and stipulates a requirement for States to provide effective access to justice through judicial means.[232] Guiding Principle 13(a) affirms the companies' responsibility to avoid causing or contributing to human rights abuses.[233] Human rights due diligence in this context encompasses the means through which a company may fulfil such responsibility and internalize respect of human rights in its corporate culture. Guiding principle 13(b) refers in turn to companies' responsibility for the conduct of third parties, which is a qualified responsibility to exercise due diligence to prevent or mitigate adverse human rights impacts that are directly linked to their operations, products or services by their business relationships.[234] Since its emergence in 2011, noteworthy legislative developments have taken place in several jurisdictions, pointing to a process of the continuous hardening of the UNGP through the development of domestic legislation on human rights due diligence.[235]

The International Labor Organization Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy (1977) which was adopted by the *International Labor Organization* has been a significant development as well with one of its key goals being the enjoyment of human rights.[236] In the context of regulatory mechanisms, a noteworthy organization is *The Organization of Economic Cooperation and Development (OECD)* which although mainly focuses on the promotion and protection of the interests of foreign investment, has some guidelines aimed at curtailing the mass operations of MNCs.[237] These guidelines (OECD Guidelines for Multinational Enterprises) that have been adopted by all OECD member, states contain measures on human rights, wages as well as climate change and reiterates the importance of MNCs to operate ethically.[238]

[232] Hardening Soft Law: the Implementation of Human Rights Due Diligence Requirements in Domestic Legislation Chiara Macchi and Claire Bright*
[233] Ungp art 13 (a)
[234] Ungp art 13 (b)
[235] i.e French duty of vigilance law
[236] Corporate Codes of Conduct: Self Regulation in a Global Economy
https://www.unrisd.org/80256B3C005BCCF9/(httpAuxPages)/E3B3E78BAB9A886F80256B5E00344278/$file/jenkins.pdf
[237] OECD Guidelines for MNCs
[238] OECD, Guidelines for Multinational Enterprises

Soft law can be advantageous in some circumstances as it is a more flexible structure than hard law by allowing governments to respond to problems and changing circumstances on an as need basis. In dealing with issues where changes are be rapid, soft law instruments can be seen as useful tools with the way they can be easily altered.[239] Despite these positive aspects of soft law there are instances where this may not be a suitable option for regulation. Binding measures prevents states from engaging in opportunistic behaviour as it can be observed in the context of their dealings with MNCs for the problems at hand. [240] Hard law also enhances the legitimacy of duties which may heighten compliance and based on these advantages scholars prefer hard law in instances where "the benefits of cooperation are great but the potential for opportunism and its costs are high".[241]

3.6 – Mandatory Due Diligence

As previously examined international law regimes only apply to MNCs indirectly through domestic laws. Thus, it has mainly been the duty of national regulations and voluntary initiatives of MNCs to address grievances against MNCs activities. Before examining the draft treaty, it may be beneficial to outline what would constitute a successful international treaty. Characteristics of a successful treaty in this context may include the requirement for collective and effective action by states. However, regarding this complex area this could pose problems in implementation where the private and public sector collide.

The idea of an international binding treaty to regulate the activities of businesses has been discussed for many years. A multitude of scholars and even some states have recognised that having voluntary corporate measures are insufficient in the prevention of human rights in their transnational activities. [242] It has been long suggested that there needs to be legal mechanisms in place to

[239] The European Union as Hardening Agent: Soft Law and the Diffusion of Global Financial Regulation
[240] Barnali Choudhry, "Balancing Soft and Hard Law for Business and Human Rights"
[241] ibid
242 Macchi and Bright "Hardening Soft Law: the Implementation of Human Rights Due Diligence Requirements in Domestic Legislation", also see "Multinational corporations' economic and human rights impacts on developing countries: a review and research agenda", Parella, K. (2020). Hard and Soft Law Preferences in Business and Human Rights. AJIL Unbound, 114, 168-173. doi:10.1017/aju.2020.33

implement mandatory human rights due diligence at national and regional levels. Recently, there has been progress in the establishment of a binding international instrument to regulate the conducts of private enterprises such as MNCs. In 2014 The UN Human Rights Council (UNHRC) set up an open-ended intergovernmental working group (IGWG) to create an internationally legally binding treaty to 'regulate, in international human rights law, the activities of transnational corporations and other business enterprises. "The first three session of the IGWG revolved around debate regarding key concepts and elements of the treaty followed by a Zero Draft published in 2018.[243] The release of the Treaty marks a significant milestone for the evolving global business and human rights framework, aiming to ensure corporate accountability and reduce the culture of impunity.

Further improvements and changes made to this draft with the publication of a Revised Draft. [244] Since its creation, the IGWG has issued several draft documents in relation to these issues. Issues that have been covered include business conduct in prevention and remediation, purpose of the treaty, legal liability of businesses, the protection of victims, UN oversight mechanisms and judicial processes. [245] Draft Treaty attempts to maintain a complementary approach with the UNGPs which is a necessary requirement for the continuation of a unified universal approach in combating corporate abuses. It would also be complementary to the emerging laws such as in Germany, France and Norway [246]and signal progression in resolving related issues after decades of failed attempts in holding corporations accountable through soft laws.

Upon examination it can be seen that the provisions in this draft would be a substantial advantage for the affected communities in all jurisdictions and its current provisions do indeed provide a forward movement and a potential alternative avenue for individuals, communities and peoples

[243] OHCHR, 'IGWG Chairmanship Zero Draft, Legally Binding Instrument to Regulate, in International Human Rights Law, the Activities of Transnational Corporations and Other Business Enterprises' (16 July 2018), https:// www.ohchr.org/Documents/HRBodies/HRCouncil/WGTransCorp/Session3/DraftLBI.pdf
[244] OHCHR, 'IGWG Chairmanship Revised Draft, Legally Binding Instrument To Regulate, In International Human Rights Law, The Activities Of Transnational Corporations And Other Business Enterprises' (16 July 2019), Https://Www.Ohchr.Org/Documents/Hrbodies/Hrcouncil/Wgtranscorp/OEIGWG_Reviseddraft_LBI.Pdf
[245] López Latorre, A. (2020). In Defence Of Direct Obligations For Businesses Under International Human Rights Law. Business And Human Rights Journal
[246] These New Laws Require Corporations To Assess And Mitigate Risks They Pose To Human Rights.

affected by corporate abuses, especially in the less developed areas.[247] From the outset it is an advancement in helping to bridge the governance gap as it requires companies to undertake due diligence to prevent human rights violations within their business, imposes liability on parent companies what their subsidiaries and even suppliers do and it allows corporations to be sued both where they operate and where they are based.[248]

The treaty process has had conflicted opinions from the start with the US and the EU advocating for the implementation of UNGPs or explore other legal options in order to increase access to justice. The UK criticized the legal liability measures for "creating unrealistic burdens on business, far beyond the standards of due diligence".[249] Business organizations also voiced concerns over adhering to a burdensome treaty.[250]

The general purpose of the draft treaty is to have stricter measure in activities of businesses in relation to human rights and environmental obligations. These can be measures are mainly:

- Accountability and regulation of MNCs is one of the main purposes of the proposed treaty as the 'nature of the operations of transnational enterprises, their size and their corporate structures'[251] enables the corporations to escape liabilities. It's been argued that in order to achieve this the focus should be on multinationals and not all businesses.
- Protecting of human rights is another purpose of this proposal as some of the business-related violations are a due to the lack of national legislation and enforcement.

[247] The Zero Draft Treaty, Is it Sufficient To Address Corporate Abuses is Conflict Affected Areas? ttps://Www.Business-Humanrights.Org/Pt/Blog/The-Zero-Draft-Treaty-Is-It-Sufficient-To-Address-Corporate-Abuses-In-Conflict-Affected-Areas/
[248] Ibid
[249] Subasinghe, R. (2021). A Neatly Engineered Stalemate: A Review Of The Sixth Session Of Negotiations On A Treaty On Business And Human Rights. Business And Human Rights Journal, 6(2), 384-391. Doi:10.1017/Bhj.2021.17 Https://Www.Cambridge.Org/Core/Services/Aop-Cambridge-Core/Content/View/41c60f9b95188d54de2c68acf5e75451/S2057019821000171a.Pdf/A-Neatly-Engineered-Stalemate-A-Review-Of-The-Sixth-Session-Of-Negotiations-On-A-Treaty-On-Business-And-Human-Rights.Pdf
[250] Icc, Joint Business Response To The Revised Draft Legally Binding Instrument To Regulate, In International Human Rights Law, The Activities Of Transnational Corporations And Other Business Enterprises
[251] Radu Mares The United Nations Draft Treaty On Business And Human Rights Forthcoming In Marx, Van Calster & Wouters (Eds), Research Handbook On Global Governance, Business And Human Rights (Edward Elgar, 2022)

- Access to remedies – soft laws and the UNGPs are restricted however the proposed draft seems to not have progressed very far in the recent developments regarding this issue. Addressing the remedial issues.
- Adopting a broad concept of jurisdiction – puts forwards a concept of jurisdiction that proposes a principle whereby the victim will be able to choose the forum and law. Addressing the jurisdictional issues in these cases.
- Environmental violations
- Advancing international co-operation between states.
- Discussions as to how to 'lift the corporate veil'

Despite the progression of the proposed Draft treaty, it is still being critiqued as being unclear at times and falls short in several key areas. An uncertain area of the Treaty's scope is its exclusive focus on "business activities of a transnational character."[252] While this conception is a welcome widening of scope from the previous exclusive focus on transnational corporations, it falls short of the coverage suggested by the UNGP, which apply to "all businesses". Carlos Lopez from the International Commission of Jurists stated that such a restrictive definition will risk denying access to remedy for victims of human rights abuses committed by national companies.[253] It has been reported that allegations of corporate abuse are made against both national and international companies and national laws currently provide no adequate protection or remedy from either source of abuse. Further issues arise upon closer inspection that the treaty does not appoint direct obligations for businesses corporations, failing to go beyond existing principles of public international law which is contrary to suggestions made during earlier consultations.[254] The treaty is being discussed as to placing obligations on to the states rather than companies with a monitoring expert Committee in place where individual complaints may be directly filed. It is evident that a

[252] ibid
[253] Another step on the road: What does the zero draft treaty mean for the business and human rights movement?" URL: https://www.business-humanrights.org/en/blog/another-step-on-the-road-what-does-the-zero-draft-treaty-mean-for-the-business-and-human-rights-movement/
[254] Zero Draft Blog https://media.business-humanrights.org/media/documents/files/documents/Zero_Draft_Blog_Compilation_Final.pdf

familiar human rights template was used rather than the creation of a novel way in which direct obligations would be imposed on corporations or the creation of an international court with jurisdiction over private actors.[255] There is no significant departure from the UN Guiding Principal framework of states duty to protect and a corporate responsibility to respect.

There is also mention of issues when states are unwilling to react to such relevant abuses that is within the scope of the treaty, however, there is no mention of those who are unable to do so such as those with weak or non-functioning legal systems. Such as, the need for parent company liability, is driven as much by the inability of the state to hold local subsidiaries to account as it is by the inability of those subsidiaries to adequately compensate victims.[256] For example, in the case of Shell, the efforts of the federal high court in Nigeria has declared Shell's gas flaring to be a violation of human rights and demanded that the company stop their activities. Shell has not adhered to this order, and it has been reported that in the following year the judge that was in charge of the case had been removed and the case file could no longer be located.[257] These, instances are already present in the current regulatory measures and the draft treaty does not seem to sufficiently address his major problem.

Given the gravity of corporate abuse that is recorded regularly, it is clear that human rights protections currently available under many regional and national instruments are not sufficient.[258] Emergence of treaties is a lengthy process, and the Draft Treaty is a long way from the final instrument where it needs to be ratified by nations so that affected communities and victims could use it to protect themselves and find remedy for corporate abuse. While this process is ongoing, advocates for human rights and business need to strategically identify where improvements can be

[255] Nowak M. (2018) A World Court of Human Rights. In: Oberleitner G. (eds) International Human Rights Institution, Tribunals, and Courts. International Human Rights
[256] The zero draft legally binding instrument on business and human rights: small steps along the irresistible path to corporate accountability." URL: https://www.business-humanrights.org/de/blog/the-zero-draft-legally-binding-instrument-on-business-and-human-rights-small-steps-along-the-irresistible-path-to-corporate-accountability/
[257] ibid
[258] ibid

made. The research aims to follow up on the progress and provide further analysis as progress continues.

3.7 – Final Remarks

It can be observed that government policy making has changed over the decades due to the growth of corporate power. Beside the fact that none of the legal and non-legal avenues so far appear sufficient in resolving the issues outlines, corporations are now involved in policy making and have guided states' involvement in the international sphere including how international human rights law is implemented. This amount of corporate power seems to have created a governance gap which has been well-documented, with an unfortunate number of examples to choose from. These range from businesses avoiding enforcement due to their transnational character to the imbalance of power with the host state where they operate. Cases such as the *Trafigura*[259] may be a good example in exhibiting corporate power and the difficulty in finding redress for the victims. The next chapter will anaylyse how this governance gap can be closed. It appears as though the evidence is suggesting that the best way to remedy would be through legal binding measures as in the absence of a mandatory due diligence process and remedial system, affected communities rarely receive adequate remedies and only a small portion of responsible companies make efforts from their failure to comply with environmental and human rights standards and incorporate it in their due diligence process. As a result, civil society organisations in this context have been eager to explore and push for the business and human rights approach, encompassing the UN Guiding Principles on Business and Human Rights (UNGPs) and to create a legally binding instrument, in order to ensure corporate accountability, and end the ongoing disregard for international law, environmental human rights standards.[260] However, there has been resistance from businesses and some nations as a

[259] Trafigura
[260] Olawuyi, D. (2021). Corporate Accountability for the Natural Environment and Climate Change. In I. Bantekas & M. Stein (Eds.), The Cambridge Companion to Business and Human Rights Law(Cambridge Companions to Law, pp. 234-259). Cambridge: Cambridge University Press.

binding treaty will impose stricter regulations on the operations of business in different states. It is observed in this chapter that the current situation enables corporations to behave in ways that damage the environment and health of citizens and does not operate in a well-balanced manner with keeping the interest of the citizens and the environment with the interest of businesses.

Chapter 4: Environmental & Human Rights Duties of MNCs/Limitations of Frameworks

4.1 – Limitations of Regulatory Mechanisms Under Domestic and International Law

The previous sections have explored how human rights law and environmental law are connected, highlighting the growing recognition of a healthy environment as essential to human rights. This includes the right to clean water, air, and soil, free from toxins and hazards that could harm human health. The discussion focused on two main ideas for incorporating and evolving human rights doctrine to support victims of environmental harm and prevent future violations.

The first idea suggests linking environmental damage directly to existing fundamental human rights within the international legal framework of human rights. The second idea proposes adding a specific right to a healthy environment to international human rights law. If the right to a healthy environment is acknowledged as part of human rights, either as a new right or by integrating environmental aspects into current laws, victims of environmental harm could seek appropriate remedies.[261] However, there are challenges in making this work in practice. Environmental issues are complex and cross national borders, which makes regulation difficult. Even with these ideas, the differences in laws, economies, and politics between countries add another layer of complexity. These challenges mean that while these theories are a step in the right direction for combining environmental concerns with human rights, effectively implementing and enforcing these rights requires flexible and strong legal frameworks that can handle the complexity of environmental issues on a global scale.

[261] Lauren A Mowery, "Earth Rights Human Rights: Can International Environmental Human Rights Affect Corporate Accountability", *Fordham Environmental Law Journal*,

When we dive into the complex world of trying to make MNCs accountable for their impact on human rights and the environment, we are faced with an array of complications. Breaking down these issues, we find ourselves facing two significant hurdles.

First off, the language and framework of international law in this arena are frustratingly vague. There's no all-encompassing rulebook or guide that clearly outlines how to address the overlap between human rights violations and environmental harm caused by MNCs. The current approach often requires linking environmental damage directly to a human rights issue to make a case. This link isn't always clear or easy to establish, making the process of seeking justice or reparations a daunting task. It can be likened to trying to solve a puzzle where half the pieces are missing. The primary hurdle lies in the intricate web of causality that characterizes the relationship between corporate actions and their impacts on human rights and the environment.[262] Environmental degradation unfolds in diffuse, long-term impacts that do not adhere to political or geographical boundaries, complicating the direct attribution of corporate responsibility for human rights violations.[263] Establishing this connection requires navigating a complex array of indirect effects, contributory factors, and intervening variables, a task made challenging by the global scale of multinational corporations' operations. Activities initiated in one part of the world can trigger a domino effect, causing environmental and human rights repercussions thousands of miles away.

The absence of a unified legal framework specifically addressing the intersection of environmental harm and human rights violations compounds the challenge. Although international human rights law and environmental law have advanced over time, they have primarily progressed independently, lacking adequate mechanisms to tackle the challenges that emerge when they intersect. This regulatory gap means that efforts to seek redress often have to grapple with a range of legal principles and navigate through a multitude of jurisdictions, each with its own sets of rules,

[262] Martin-Ortega, O.; Dehbi, F.; Nelson, V.; Pillay, R. Towards a Business, Human Rights and the Environment Framework. *Sustainability* **2022**, *14*, 6596. https://doi.org/10.3390/su14116596
[263] ibid

regulations, and enforcement capabilities. The jurisdictional challenges are further exacerbated by the principle of sovereignty and non-interference, which underpin international law and limit the ability of international bodies to directly intervene.[264] As a result, the task of linking MNCs' environmental damages to human rights violations is remains unclear, where the legal, political, and geographical complexities intertwine to obscure the path to accountability.

Moreover, gathering the necessary evidence to establish such a link presents its own set of challenges. Scientific and technical expertise is often required to trace the direct effects of environmental harm on human communities, yet access to relevant data can be obstructed by the corporations involved or dispersed across different legal jurisdictions. This difficulty is compounded in countries where legal systems may be underdeveloped or lack the independence to effectively adjudicate cases against powerful foreign corporations. In such environments, the political will to enforce regulations against these entities may be lacking, further diluting the efficacy of legal recourse for affected communities.[265]

The global operations of MNCs add another layer of complexity, as their activities span across multiple countries, each with its own legal and regulatory framework. This dispersion across jurisdictions presents significant obstacles to establishing a cohesive and consistent approach to holding these corporations accountable. The variability in legal standards, combined with the challenge of coordinating enforcement efforts across borders, means that seeking justice for environmental and human rights violations becomes a fragmented and often ineffectual process. Furthermore, the economic and cross-jurisdictional influence of MNCs positions them as significant players in the design and implementation of international norms. Their activities, particularly when outsourced to developing nations, can lead to a "disproportionate impact of lawful pollution" linked

[264] Makinda, Samuel M. "Sovereignty and International Security: Challenges for the United Nations." *Global Governance* 2, no. 2 (1996): 149–68. http://www.jstor.org/stable/27800134.
[265] Dr Jennifer Zerk "Corporate liability for gross human rights abuses, towards a fairer and more effective system of domestic law remedies, A report prepared for the Office of the UN High Commissioner for Human Rights"
https://www.ohchr.org/sites/default/files/Documents/Issues/Business/DomesticLawRemedies/StudyDomesticeLawRemedies.pdf

to their operational decisions, policies, and production activities. Developing countries, with their lower production costs and abundant raw materials, offer attractive business prospects for MNCs, enabling them to maximize profits.[266] However, the regulatory flexibility found in some of these countries, stemming from weak or non-existent protections for human and environmental rights, allows MNCs to operate in ways that best suit their interests.

In this context, the quest to link environmental damage and human rights violations to the actions of multinational corporations emerges as a deeply challenging endeavor. The intricacies of establishing causality, the gaps in the legal framework, jurisdictional hurdles, and the challenges of evidence collection all converge to make the path to accountability and reparations a perplexing task.

Secondly, there's a gap in how the law deals with MNCs as private entities. Since international law doesn't directly hold these corporations accountable, it falls on the countries hosting these businesses to step up and enforce their own laws. While international guidelines and principles, like the UN Guiding Principles on Business and Human Rights (UNGPs)[267], the UN Global Compact [268], and the UN Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights[269], are well-intentioned, they fall short in practice. These frameworks rely on voluntary participation and lack the weight needed to enforce compliance.

This is where the importance of robust domestic laws comes into play. Strong, enforceable laws at the national level can be a game-changer in ensuring that MNCs contribute positively to environmental, cultural, social, and economic sustainability and uphold human rights. Governments in host countries need to prioritize the well-being of their environment and citizens over the interests of investors. However, this is easier said than done. Without a genuine commitment to

[266]Katz, Dylan T., "The Interstate Highway System and Environmental Justice: Disproportionate Environmental Impacts on Low Income and Minority Communities" (2015). Student Theses 2015-Present. 6. https://fordham.bepress.com/environ_2015/6, also see https://www.unpri.org/pri-blog/exporting-pollution-where-do-multinational-firms-release-co2/5592.article

[267] *United Nations Human Rights Office of the High Commissioner, Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework (United Nations 2011) https://www.ohchr.org/sites/default/files/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf.*

[268] United Nations Global Compact, *UN Global Compact Annual Report 2021* (2021) https://www.unglobalcompact.org/library/5741

[269] United Nations Sub-Commission on the Promotion and Protection of Human Rights, *Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights* (E/CN.4/Sub.2/2003/12/Rev.2, 2003)

protecting their citizens' rights and interests, even the most well-crafted domestic policies can't succeed. For this system to work, local laws and regulations need to be part of a larger, globally recognized framework dedicated to safeguarding human rights and environmental protection. It's about creating a supportive web of accountability that spans from the local level all the way up to the global stage. Only then can we hope to see real progress in holding MNCs accountable for their actions.

As previously discussed, the intricate relationship between MNCs and international law reveals a complex landscape where the environmental and human rights impacts of corporate activities present significant challenges. While MNCs have become central actors in the global economy, often generating revenues surpassing the GDPs of substantial economies, their governance through domestic and international regulations remains a contentious issue. This chapters discussion delves deeper into the mechanisms of accountability for MNCs, especially in the context of their environmental and human rights obligations, and explores the efficacy of existing legal frameworks while suggesting pathways for more robust regulation. This analysis critically examines the frameworks and regulations aiming to hold MNCs accountable for their human and environmental rights violations, highlighting the limitations of current regulations and frameworks. By identifying these gaps, the discussion opens the door to alternative mechanisms of regulation that could offer more effective oversight of MNC operations. To truly protect human and environmental rights, local regulatory mechanisms must be supported by an international framework dedicated to promoting and enhancing these rights, ensuring that MNCs operate responsibly across all jurisdictions.

4.2 – International Law

The international legal mechanisms that govern the aforementioned issues relating to MNCs can be separated in two ways. The first is through binding treaties in which nations are party to and are the

direct addressees of rights and obligations these may directly affect and have domestic implications on MNCs operations.[270] These include, if ratified by member states, as discussed in previous chapters such as ILO conventions, and other international instruments. [271] The second way is through "soft law" mechanisms that directly addresses MNCs.[272] While, examples of soft law include the UNGPs, OECD Guidelines, the Un Global Compact and the UN Norms on the Responsibilities of Transnational Corporations and other Business Enterprises with regard to Human Rights, the Preamble to the 1948 Universal Declaration of Human Rights, the Rio Declaration on Environment and Development.[273] Although, typically, these guidelines are not directed at corporations themselves (rather, they are directed at states whose task it is to apply them to the corporations within their jurisdiction). The OECD's 1976 Guidelines for Multinational Enterprises, which was amended in 2000, recommend that businesses respect the human rights of those affected by their activities consistent with the host government's international obligations and commitments.[274] However, the guidelines are not legally mandatory to OECD government or to OECD based Company and can be seen as lacking in enforcement power as it is voluntary in nature.[275] Similarly, the UN Global Compact, another soft law instruments that are directed at MNCs, although is not strictly a code of conduct, it encourages businesses to "embrace and enact" ten core principles[276] relating to respect for human rights, labour rights, and protection of the environment, both through their individual corporate practices and by supporting complementary public policy initiatives.[277] However, again, the lack of independent monitoring and enforcement[278] via sanctions highlights the limited ambition, and therefore the much needed force of this initiative in providing protection against corporate abuse of

[270] Veronika Bilkova, Anne Peters, Pieter van Dijk "Report on the Implementation of International Human Rights Treaties in Domestic Law" https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2014)036-e
[271] Edwin C. Mujih, "Co-Deregulation of Multinational Corporation Operating in Developing Countries: Partnering Against Corporate Social Responsibility?"
[272] Neil.A.F Popovic, "In Pursuit of Environmental Human rights Commentary on the Draft Declaration of Principle on Human Rights and the Environment"
[273] Ilias Bantecas, "Corporate Social Responsibility in International Law", *Boston University of International Law Journal*
[274] Rebecca Kathleen Atkins, "Multinational Enterprises and Workplace Reproductive Health: Extending Corporate Social responsibility", also see Surya P Subedi " International Investment Law: Reconciling Policy and Principle"
[275] Edwin C. Mujih, "Co-Deregulation of Multinational Corporation Operating in Developing Countries: Partnering Against Corporate Social Responsibility?"
[276] Sean D Murphy, "Taking Multinational Code of Conduct to the Next Level", *Columbia Journal of Transnational Law*
[277] The Ten Principles of the UN Global Compact https://www.unglobalcompact.org/what-is-gc/mission/principles These principles were generally based on the well-accepted standards of human rights, labour rights, and environmental issues, derived from the UN Declaration of Human Rights, the International Labour Organization Declaration on Fundamental Principles and Rights at Work, and the Rio Declaration on Environment and Development: To support and respect the protection of internationally proclaimed human rights; To avoid complicity in human rights abuses; To uphold freedom of association and the effective recognition of the right to collective bargaining; To eliminate all forms of forced and compulsory labour; To abolish effectively child labor; To eliminate discrimination with respect to employment and occupation; To support a precautionary approach to environmental challenges; To promote greater environmental responsibilities; and To encourage the development and diffusion of environmentally friendly technologies.
[278] Rebecca Kathleen Atkins, "Multinational Enterprises and Workplace Reproductive Health: Extending Cor- porate Social responsibility"

human rights and the environment.[279] It is true that the UN expressly acknowledges that it has neither the mandate nor the capacity to monitor and verify corporate practices.[280]Yet, there is some concern as to the credibility of the Global Compact given that it is quite possible for MNCs to continue to violate human and environmental rights while enjoying the status of being signatory to the Global Compact whereby presenting themselves to be conscious of human and environmental rights.[281] In 2005, the UNCHR requested the Secretary-General to appoint a special representative on the issue of human rights and transnational corporations and other business enterprises to submit advice and further clarifications on the issue.[282] Professor John Ruggie was assigned with this task who later, in 2008, created the UN Framework on Business and Human Rights and the set of 'Guiding Principles' on business and human rights in 2011 which was discussed in more detail in Chapter 2.[283] These two initiatives were accepted unanimously by the Human Rights Council.[284] The main objectives were separated into three pillars which are to 'Protect, Respect and Remedy' human rights.[285] Despite a diverse range of opinions, it could be said that today, the UNGP and the OECD Guidelines for Multinational Enterprises, are the most prominent soft-law instruments that bring corporations and governments together to respect human rights.[286]

It is a fact that international human rights law has established mechanisms to safeguard rights to life, liberty and physical integrity of humans by way of prohibition of such actions that are known to cause injury to the inherent dignity and security of a human being. These actions include war crimes, crimes against humanity, genocide, arbitrary killing, torture and other inhuman or degrading treatment/punishment. Although under international law these obligations to not commit such acts are not directly imposed on corporations such as MNCs, they may still be implied to their employees/officers and they can be imposed indirectly by way of states passing on their obligations

[279] Surya Deva, "Global Compact: A Critique of the U.N's 'Public Private' Partnership for Promoting Corporate Citizenship", *Syracuse Journal of* International Law & Comparative See also, Lisbeth Segerlund, "Thirty Years of Corporate Social Responsibility within the UN: From Code of Conduct to Norm"
[280] Evaristus Osheonebo, "The UN Global Compact and accountability of Transnational Corporations Separating Myth from Reality"
[281] ibid
[282] Un Office Of the High Commissioner For Human Rights. Human Rights And Transnational Corporations And Other Business Enterprises.
[283] John RUGGIE. *Guiding* principles on business and human rights: implementing the United Nations "protect, respect and remedy" Framework.
[284] ibid
[285] Ruggie 'Just business: multinational corporations and human rights"
[286] Ruggie 'Just business: multinational corporations and human rights"

through domestic law and policy. [287] This is the way in which the UN's Norms for Corporations state that MNCs and other businesses including their officers and individuals working for them are obliged to respect the generally recognized responsibilities and norms that are contained in UN treaties and other instruments.[288] In most cases, these duties would focus on the matter of corporate complicity because businesses are more likely to be complicit (with their state partner) in the commission of war crimes, genocide, and crimes against humanity. As the UN Norms stipulate MNCs should have the obligation to avoid complicity in supplying products or services or providing financial or other material support, when they are aware that such conduct would further the enable war crimes, genocide, and crimes against humanity.[289] Perhaps it could be explored whether it would be feasible to extend this obligation to human rights and environmental violations.

4.2.1 – Limitations of Regulating Multinational Corporations Under International Law

A corporation can be seen as a "legal fictional abstraction" that is detached from the personality of its members and shareholders and is created generally for the purpose of "conducting profit seeking business activity." [290] MNCs are large corporations with presence in multiple countries through subsidiaries driven by profit.[291] In such cases where the corporations violate human and environmental rights victims are often unable to obtain effective remedy in their home country due to issues such as lack of personal jurisdiction over the corporation, corruption, and underfunded judicial systems.[292] The regulations and rules relevant to MNCs corporate accountability vary from jurisdiction to jurisdiction which creates ambiguity and perhaps this is the reason why many favour international legal norms, specifically soft laws, which in some cases are becoming reference points in domestic courts. Although states are increasingly no longer the exclusive subject of international

[287] Carlos M. Vazquez, "Direct Vs. Indirect Obligations of Corporations under International Law"
[288] Kendra Magraw, Universally Liable? Corporate-Complicity Liability under the Principle of Universal Jurisdiction", *Minnesota Journal of International Law*
[289] Tracy M. Schmidt, "Transnational Corporate Responsibility for International Environmental and Human Rights Violations: Will the United Nations Norms Provide the Required Means?"
[290] Markos Kriavias "Corporate Obligations Under International Law" 2013.
[291] Malcolm Shaw. International Law.
[292] Lawrence Hurley , US Corporations Winning Fight Over Human Rights Lawsuits, also see https://www.somo.nl/wp-content/uploads/2020/07/Mind-the-Gap-summary.pdf - Corporations often use a range of judicial procedures to avoid liability for harms they have caused or contributed to, often leaving victims without proper remedy for the ongoing harms they are facing.

rights and duties (as this has been the traditional view under international law), most treaties still only indirectly regulate corporations as States are the primary targets of such treaties.[293]

Furthermore, with MNCs outsourcing their operations to less developed countries they are able to benefit from less stringent regulatory standards which yield profit not solely due to the low operational costs but also from the guarantees of Bilateral Investment Treaties (BIT) which in some cases consider "human rights and the environmental domestic law as a risk for foreign investments".[294] A main form of MNCs economic activities can be seen as "investments" and the main body of international investment law consists of BITs which are agreements for promoting foreign investment in a specific country. In the event that the interests of foreign investors clash with the human rights of the individuals residing in the host state, the host state should be able to justify measures based in its human rights obligations in order to not avoid liability for breaching its obligations under the BITs.[295] There is increasing consensus that there needs to be a greater degree of balance in BITs between the interests of investors and host countries.[296] It was observed that BITs can be very narrow in its formulation by assigning substantive rights to investors, however they do not give corresponding duties or obligations.[297] It was suggested that an innovative way to ensure compliance with human rights and environmental standards would be to include such obligations into BITs, whereby this would potentially be an efficient way to impose obligations directly upon corporations through international law.[298]

One of the main problems with regulation of MNCs in this context has been discussed as the issue of imposing direct liability on MNCs. However, before embarking on further discussions in relation to

[293] Bilchitz, David. "Corporations and the Limits of State-Based Models for Protecting Fundamental Rights in International Law." *Indiana Journal of Global Legal Studies*, vol. 23, no. 1, 2016, pp. 143–70. *JSTOR*, https://doi.org/10.2979/indjglolegstu.23.1.143.
[294] Auz, Juan. (2018) "The Environmental Law Dimensions Of An International Binding Treaty On Business And Human Rights", See Also Fiona Macleay, "Corporate Codes Of Conduct And The Human Rights Accountability Of Transnational Corporations: A Small Piece Of A Larger Puzzle", Also See Megan Wells Sheffer, Bilateral Investment Treaties: A Friend Or Foe To Human Rights, 39 Denv. J. Int'l L. &
Pol'y 483 (2011)
[295] Huaqun Zeng, Balance , Sustainable Development and Integration: Innovative Path for BIT Practice.
[296] Klein, Human Rights and International Investment Law: Investment Protection as Human Right?
[297] Peterson & Gray, International Human Rights in Bilateral Investment Treaties and investment treaty arbitrations
[298] Al Faruque, Mapping the relationship between investment Protection and human rights, also see Jun Zhao Human Rights Accountability of Transnational Coproations a potential response from biletaral investment treaties.

this, we must take a step back to examine MNCs status under international law. The general position sees MNCs as an “object” of international law rather than a subject.[299] This viewpoint is derived from the traditional notion of the way in which international law was developed and sees that “individual has no inherent capacity under international law.”[300] The distinction between "subjects" and "objects" of international law is foundational to understanding how entities are recognized and interact within the legal framework governing international relations and law. Traditionally, the "subjects" of international law are those entities that possess international legal personality, meaning they have the capacity to bear rights and obligations under international law and the ability to assert their rights on the international stage. Historically, states have been considered the primary subjects of international law due to their sovereignty and ability to engage in relations with each other. The assertion that the "subject of law" is intrinsically linked to the concept of statehood highlights the traditional perspective that only states, as sovereign entities, are fully capable of being subjects under international law. This view posits that non-state actors, such as MNCs, international organizations (outside of states themselves), non-governmental organizations (NGOs), and individuals, are not primary subjects of international law because they do not possess the same degree of sovereignty or the comprehensive legal capacities that states do. However, the international legal system has evolved significantly, and the distinction between subjects and objects of international law has become more nuanced. Non-state actors, while traditionally viewed as "objects" of international law—meaning they are regulated by international law but do not have the full suite of rights and obligations that states do—have increasingly been recognized as having certain rights and obligations under international law. For example, international organizations such as the United Nations have been granted international legal personality, allowing them to enter into treaties and be held accountable under international law.[301] Similarly, multinational corporations

[299]Patricia Rinwigati “The Legal Position Of Multinational Corporation In International Law” Https://Pdfs.Semanticscholar.Org/9bde/C9d31524d790b431084cf97924e9d561ff03.Pdf
[300] Patricia Rinwigati “The Legal Position Of Multinational Corporation In International Law” Https://Pdfs.Semanticscholar.Org/9bde/C9d31524d790b431084cf97924e9d561ff03.Pdf
[301] United Nations Office of Legal Affairs. (n.d.). Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations. Retrieved from https://legal.un.org/avl/ha/vcltsio/vcltsio.html.

and individuals are increasingly recognized as having specific legal responsibilities and rights, particularly concerning human rights and environmental standards. This evolution reflects a broader understanding of international law, acknowledging that the complex global interactions of the 21st century require a more inclusive approach to who can participate and be held accountable within the international system. While states remain the central subjects of international law, the roles and responsibilities of non-state actors are increasingly being recognized and codified, challenging the traditional dichotomy between subjects and objects of international law. This shift is particularly relevant in discussions around environmental protection and human rights, where non-state actors play crucial roles in both upholding and violating international norms.

Although there are different viewpoints, bar a few specific instances, to this day international law has not been able to provide a uniform definition as to where corporations such as MNCs should be placed.[302] This gap in the international legal system that the ICJ discussed in the case of Barcelona Traction where it was stated that domestic law should "supplement any absence of definition in international law".[303] Domestic laws however can't make a decision as to if an MNC can obtain personhood or not under international law.[304] Despite MNCs being vital actors in the ever-evolving international law making process as well as being able to stand before specific international tribunals, this is indeed one of the big issues when attempting to regulate a private actor in the international fora.[305] Furthermore, even if direct obligations were to be imposed on MNCs, this idea contradicts with the established doctrine where states are seen as the only legitimate duty bearers of such obligations and not private entities.[306] This doctrine is still widely supported by academics.[307] Overall, it can be said that international law is currently insufficient in holding MNCs directly

[302] Ibid, Also See Herbert W Briggs The Position Of Individuals In International Law
[303] Case about The Barcelona Traction, Light And Power Co. Ltd (New Application: 1962) (Belgium V. Spain) , [1970], Also See Lucius C. Caflisch, "The Protection Of Corporate Investments Abroad In The Light Of The Barcelona Traction Case"
[304] José E.Alvarez "Are Corporations "Subjects "Of International Law?"
[305] Peter Muchlinski "Corporations In International Law"
[306] Justine Nolan "The Corporate Responsibility To Respect Human Rights: Soft Law Or Not Law?"
[307] Meinhard Schroder "Precautionary Approach/Principle"

accountable and even in cases where these corporations can be seen as subject of international law, their complex corporate structures allow them to evade responsibilities.

4.3 – Domestic Law

The state centric nature of international human rights law means that the obligations fall upon states to promote human rights thus enabling MNCs to avoid direct accountability under such frameworks. [308] It is therefore vital to encourage and enhance the role of the host state governments to strictly enforce the law on to MNCs that violate human rights and related rights for citizens to live in a healthy environment. However, as observed previously, in many cases the governments of developing nations often reluctant or simply unable to (due to lack of power when faced with an MNC) enforce their domestic laws onto MNCs.

When observing the protection of human rights and environmental rights, MNCs should be able to prevent or actively support the protection of human rights in host nations due to the great financial and political influence MNCs have, yet this is seldom the case. In practice, MNCs have shown to not materially support the protection of human rights and the environment. In some instances, they completely disregard or even conspire with local governments to advance their monetary interests at the expense of citizens' rights whether directly or indirectly.[309] Furthermore, MNCs usually select where to conduct their business of several factors including manufacturing and operational costs and are inevitably drawn to countries that offer inexpensive labour and other such incentives. Depending on the industry, there are select few countries in which MNCs favor and it is no surprise that these countries lack the necessary regulatory capacities to handle such powerful players. The violations of human rights by MNCs may occur in a variety of ways, such as directly violating human rights, assisting in violations, failing to prevent violations, remaining silent about violations, or even

[308] Jernej Letnar Cernic, Crossing the Rubicon: How to Construct the International Legal Responsibility of Transnational Corporations for Ius Cogens Human Rights Violations" https://lup.lub.lu.se/luur/download?func=downloadFile&recordOId=1554901&fileOId=1563481
[309] Joshua P.Eaton, "The Nigerian Tragedy, Environmental Regulation of Transnational Corporations, and the Human Rights to A Healthy Environment"

operating in a state that has a proven track record of violations of human and environmental rights.[310]

The dire consequences of inadequate corporate accountability are vividly illustrated by several incidents. For instance, the 2013 collapse of the Rana Plaza building in Bangladesh underscored the catastrophic neglect of worker safety standards by MNCs, leading to over 1,100 deaths. Similarly, the environmental devastation wrought by oil extraction in Nigeria's Niger Delta has spotlighted the severe impact of MNCs on environmental rights and local communities. These examples highlight the complex interplay between corporate operations and human rights violations, whether through direct actions or complicity with local governments to prioritize profits over people's rights.

In response to such challenges, soft law mechanisms like the OECD Guidelines and the UNGPs have emerged, aiming to establish human rights standards for MNCs. While their non-binding nature has limited their effectiveness, initiatives like the Bangladesh Accord on Fire and Building Safety demonstrate the potential for soft law mechanisms to effect real change.[311] This legally binding agreement, signed by over 200 global apparel brands in the wake of the Rana Plaza tragedy, has led to significant safety improvements in the Bangladeshi garment industry. Similarly, the Extractive Industries Transparency Initiative (EITI) has made strides in promoting transparency and accountability in managing natural resources, showcasing how voluntary commitments can enhance corporate responsibility towards human rights and environmental sustainability.[312]

After reviewing soft law instruments such as the OECD, UNGPs & UN norms, it may seem that in practice these mechanisms have achieved very little as a result of their largely non-binding nature and the lack of effective implementation and enforcement mechanisms in developing states. [313] However, these non-binding mechanisms have demonstrated an increased willingness on the part

[310] Rebecca M. Bratspies, "Organs of Society: A Plea for Human Rights Accountabilityfor Transnational Enterprises and Other Business Entities"
[311] https://www.just-style.com/features/10-years-since-rana-plaza-the-accord-has-some-bold-expansion-plans/
312 Environmental Impact of Extractive Industries https://eiti.org/guidance-notes/environmental-impact-extractive-activities
[313] David Kinley, Justine Nolan and Natale Zerial, "The Politics of Corporate social Responsibility: Reflections on the United Nations Human rights Norms for Corporation", see also Klaus M. Leisinger, "Bussiness and Human Rights"

multilateral institutions to formulate some human rights standards against which the conduct of MNCs can be measured. Indeed, there is a possibility that such soft-law initiatives may be elevated to hard-law through the formation of customary international law. However, it may be time-consuming process in a world of diverse interests to recognise soft law international instruments to be hard law (as it can be observed with the current process of the zero draft). [314] Having said that, a binding international law that targets MNCs may not be practicable. It is a tough balancing exercise to uphold the law and protect the citizens and the environment on one hand and to also enable economic growth and further the advancement of businesses as many provide essential services to humans. Even the new binding treaty being discussed, which aims to address the issues highlighted in this paper, no direct obligations are to be placed on the corporations. Despite the critiques this new binding treaty is a very welcome advancement in this field with the addition of a monitoring expert Committee in place where individual complaints may be directly filed. The treaty is based on a familiar template of international human rights law with states imposing obligation onto MNCs which once again stresses the importance of enforcing national laws properly to somewhat seal off the legal lacuna in international law.

In establishing a binding instrument to alleviate the issues, academics have generally identified two main obstacles. Firstly, traditionally states have sole responsibility concerning human rights and some, therefore, maintain the view that imposing direct duties on private corporations' changes "the very foundations of human rights".[315] Some researchers have argued that universal binding legislation is not required, and the strict enforcement of the current non legally binding measures will be sufficient in holding MNCs accountable. Amadou[316] suggests that rather than demanding MNCs to take on the government responsibility for the protection of communities, there should be more pressure on the governments of host states to protect the communities and implement

[314] Su ping Lu, "Corporate Codes of Conduct and the FTC: Advancing Human Rights Through Deceptive Advertising Law", Columbia Journal of Transnational Law
[315] Muchlinski, 2001
[316] Amodu N, "Regulation and Enforcement of Corporate Social Responsibility in Corporate Nigeria", Journal of African Law (2017)

adequate measures. Similarly, Krajewski[317] was pessimistic in his conclusion that any new international human rights treaty is unlikely to contain directly binding obligations on business entities. On the other hand, it has been argued that when corporations exercise "ultimate authority" on individuals, they should be treated as duty bearers under human rights law. This is usually the case when states fail to regulate private actors due to weak government and corruption.[318]

These developments indicate a gradual but significant transformation in the approach to regulating MNCs, highlighting the intricate balance between fostering economic development and ensuring the protection of fundamental human and environmental rights. As the international community grapples with these challenges, the discourse around corporate accountability continues to evolve, underscoring the need for a concerted effort to bridge the gap between voluntary initiatives and binding legal obligations.

4.4 – Enforcement of Laws in Host States

It is imperative for the host states to enforce domestic regulation of human and environmental laws in order to effectively deal with the conducts of MNCS. Perhaps that the enforcement of national laws by host nations is still the most feasible and appropriate method of regulating MNCs activities however, it poses many issues in developing nations.

It can be observed that many of the international instruments and soft law initiatives are insufficient to effectively handle the protection of human and environmental rights when faced with MNCs and it is essential to use domestic regulations in order to convey liabilities to MNCs. Every state has

[317] Krajewski M, A Nightmare or a Noble Dream? Establishing Investor Obligations Through Treaty-Making and Treaty-Application, Business and Human Rights Journal 5 (2020)
[318] Sinden, 'Power and Responsibility: Why Human Rights Should Address Corporate Environmental Wrongs'

jurisdiction over crimes committed in its territory[319], however, it should be taken into account that the exhaustion of national regulations in order to protect human rights and the environment is not as straightforward as it initially may appear. It could be that the host states government may be themselves be abusers of human and environmental rights whereby allowing or being complicit with MNCs in violations against their citizens. It could also be the case that states possess very little or no power against the MNCs due to their power. [320] Furthermore, in some instances it was observed that the host state was actually the beneficial owner of a partner operating in a joint venture with the MNC, thereby compromising the host state's real ability to hold the MNC accountable for any violations of human rights.[321] Finally, the host state may simply lack the resources to engage in any action against the MNC, either because of lax environmental or labour standards which contributed to the incident at hand, or the lack of legal or judicial infrastructure to adequately try a MNC.[322] The case of Texaco[323] in Ecuador, as discussed in previous chapters, is an example of the extent of damage an MNCs extractive activities can cause (poisoned ecosystems and endangered the welfare of indigenous people) and the limitations/complexities of legal avenues in this area.[324] It appears to be common practice that MNCs conduct activities that most commonly identified as causing environmental issues as well as the exportation of harmful by establishing highly-polluting industries away from their home countries. [325] This creates potential problems with pollution control, disposal of hazardous wastes, workers' health and safety, and the risk of major accidents, such as the previously discussed Bhopal Union Carbide Chemical Disaster. This deliberate act from MNCs may be caused by the aforementioned economic benefits however it cannot be denied that there is a more sinister reason, and the citizens of developing countries require assistance in tackling these issues at international, regional and domestic levels. The host states must empower the national laws and

[319] David Kinley, Justine Nolan and Natale Zerial, "The Politics of Corporate social Responsibility: Reflections on the United Nations Human rights Norms for Corporation"
[320] Viljam Emstrong, "Who is Responsible for Corporate Human Rights Violation?"
[321] Danwood Mzikenge Chirwa, "The Doctrine of State Responsibility as a Potential Means Holding Private Actors Accountable for Human Rights"
[322] ibid
[323] *AGUINDA V. TEXACO, Kimerling, Judith, 'Lessons from the Chevron Ecuador Litigation: The Proposed Intervenors' Perspective' Stanford Journal of Complex Litigation, Vol 1:2, 2013*
[324] Lauren A. Dellinger, "Corporate Social Responsibility: A Multifaced Tool to Avoid Alien Tort Claims Act Litigation While Simultaneously Building A Better Business Reputation"
[325] Judith Kimmerling, "International Standard in Equador 's Amazon Oil Field"

must change their behaviour in economic development. Sustainable development principles and international human and environmental regulations need to be continuously enforced especially when dealing with MNCs activities in their countries.

The importance of public participation and awareness of the citizens of the host state must not be forgotten, as equipping citizens with knowledge of human and environmental rights may assist in pressuring governments and international bodies to take notice and action and may be an incentive to enhance human and environmental protection.

Although will not be discussed in detail it is worth mentioning that in many countries including the UK and European Union as a whole,[326]criminal law was an avenue in combating environmental degradation.[327] In most jurisdictions, criminal redress is in the form of court-based restitution orders imposed as a part of a sentence against environmental offenders following conviction.[328] This approach can be particularly challenging for the specified victims of environmental harm as this entails proving causation to a high criminal standard between a polluting act or omission and harm. O'Hear highlights the fact that even when a conviction is achieved for an environmental offence, it is often difficult to establish culpability for the full range of wider consequences. [329] Therefore, it can be said that the criminal courts are arguably not well equipped to calculate the degree of harm incurred by environmental victims to restore them effectively given that the nature of such harms could be related to several things ranging from health, monetary, social, or cultural.[330] Although the criminal justice system may assisted in responding to victims of environmental harm in select cases, further problems are faced by criminal justice systems when presented with environmental offenders and victims which is beyond the scope of this research.

[326] EU Directive 2008/99/EC
[327] Bell S, McGillivray D and Pedersen O (2013) Environmental Law, 8th Edition. Oxford: Oxford University Press
[328] Matthew Hall, Criminal Redress in Cases of Environmental Victimisation: A Defence
[329] O'Hear M (2004) Sentencing the green-collar offender: Punishment, culpability, and environmental crime. The Journal of Criminal Law and Criminology
[330] Skinnider E (2011) Victims of Environmental Crime – Mapping the Issues. Vancouver, Canada: The International Centre for Criminal Law Reform and Criminal Justice Policy

4.5 – Forum Non Conveniens

One of the major problems in environmental law is that pollution may not be confined to state boundaries such as airborne radioactivity from the Chernobyl nuclear power station that travelled thousands of kilometers and polluted international rivers do not suddenly stop being polluted when they cross state boundaries. Litigation involving transboundary environmental harm presents difficult questions about the jurisdiction of national courts and regarding the choice of applicable law. As with the jurisdictional problems faced by the plaintiffs in the Texaco cases, similar cases have come across familiar issues. Such as in the case of Bhopal in India where the victims of a major gas leak sued Union Carbide in its home state of Massachusetts. However, the court concluded it lacked jurisdiction and the case had to be reverted to the Indian courts.[331] As demonstrated in previous chapters, MNCs have been able to exploit the doctrine of corporate personality in ways that negatively impact the interest of citizens and states. Such as in cases where a subsidiary company engages in abusive practices in a foreign jurisdiction the parent company could avoid prosecution as the parent and subsidiary are distinctly separate entities. [332] The Bhopal disaster was a perfect example of such a scenario where the case was transferred to the US courts as this was the place in which the parent company responsible for the disaster resided.[333] Even though the doctrine of corporate personality has limitations such as in certain instances the corporate "veil" can be pierced", this exceptions did not apply in the case of Bhopal thus allowing the parent company to evade prosecution for the actions of the subsidiary.[334] It was further stated by the Indian Government before the US court that the Indian tort law system did not possess the necessary competency to evaluate MNCs abuses as the law was not sufficiently developed.[335] Despite this, the

[331] Re Union Carbide Corp Gas Plant Disaster at Bhopal (India, December 1984) 643 F. Supp. 842 (S.D.N.Y. 1986).
[332] attempts to circumvent this position in Chandler v Cape that if the main company assumes responsibility there could be the implication that it owes a duty of care; Kiobel v Royal Dutch Petroleum
[333] Re Union Carbide Corp Gas Plant Disaster at Bhopal (India, December 1984) 643 F. Supp. 842 (S.D.N.Y. 1986).
[334] Adams v Cape Industries [1990] Ch. 433 CA (Civ Div) 548 at 549, 560 (Slade LJ); for further discussion on an instance of piercing the corporate veil, see Bowoto v Chevron 312 F. Supp. 2d 1229, 1237, 1245 (N.D. Cal. 2004); FG Films, Re [1953] 1 W.L.R. 483 Ch D at 486 (Vaisey J); Amaeshi, Osuji and Nnodim, "Corporate Social Responsibility in Supply Chains of Global Brands" (2008)
[335] Re Union Carbide Corp Gas Plant Disaster at Bhopal (India, December 1984) 643 F. Supp. 84, 849 (S.D.N.Y. 1986).

case was struck our on the grounds of *forum non conveniens* as it was decided that India was a more suitable alternative forum with the reasoning that the evidence and the parties came from India. Eventually the Indian court ordered the company to pay $470 million[336] which appeared to be a victory for the claimants however academics argue that the Indian legal and public system failed to efficiently examine the disaster or reimburse the victims sufficiently.[337] This viewpoint is supported by Jayaprakash Sen, who described the compensation given to the victims as "outrageous", especially since the Indian Government stipulated that $3 billion was needed to cover the damages.[338] Considering that the compensation paid to the victims was wholly insufficient to cover the costs of the disaster in this case and in many other notable cases, it can be argued that some developing states lack the capacity to hold powerful MNCs accountable for abuses, therefore justifying the introduction binding international laws.

It has been exhibited in the cases discussed and many several others that jurisdictional problems remain in preventing access to justice for the victims. Due to the international nature of the operations of these corporations that commit environmental crimes that in turn affect communities' rights, it is often the case that corporations will avoid liability by "forum shopping". [339]A practice of choosing the court or jurisdiction that has the most favourable rules or laws for the position being advocated.[340] In cases such as Bhopal and Texaco, the corporations usually will try to opt for jurisdictions that they are aware will bring a more favourable outcome for them as a result of their lax human rights/environmental practices.[341]

In cases where an environmental and human rights violations are linked and the parties are both private actors such as MNCs and another private actor, the jurisdiction on which the case will be

[336] Union Carbide Corp v Union of India (1991) 4 S.C.C. 584.
[337] Joe Jackson and Maeve McLoughlin, "Bhopal disaster: still waiting for the clean up" (2008) 406 E.N.D.S. 32, 33, 35.
[338] Chrispas Nyombi Tom Mortimer 'Is a multilateral treaty on business and human rights justified?'
[339] Submission To The Office Of The High Commissioner For Human Rights the Responsibilities Of Transnational Corporations And Related Business Enterprises With Regard To Human Rights
[340] https://core.ac.uk/download/pdf/216908585.pdf
[341] Texaco/Cevron case where the MNC insisted in the case being heard in the Ecuadorian courts

heard will depend on the jurisdictional rule of a specific legal system.[342] Meaning that there is a possibility that the case will be resolved either in the home or host state.[343] Although it appears to be simple, the choice of jurisdiction as discussed previously presents issues in holding an MNC accountable as it makes "forum shopping" a possibility.[344] The plaintiffs therefore must choose the jurisdiction and the recourse carefully, as there may be many different avenues such as tort litigation, administrative avenues or who to bring the claim to (As the MNC may not be directly responsible for the actions that resulted in the violation but its subsidiaries or related corporations).[345] Furthermore, even if the plaintiffs are able obtain favourable judgement, the defendant may evade liability due to the lack of assets or presence in the said country to fulfil the judgement such as in the case of Texaco.[346] It is not uncommon for wealthy MNCs to use their power, money and influence to hire elite law firms to benefit from these legal loopholes and limitations to circumvent liability.[347]

As a result, plaintiffs increasingly started to seek redress in MNCs home countries such as the USA, most notably under the Alien Tort Claim Statute (ACTA) which is an 18th century legislation that gives the Federal District Courts "original jurisdiction over any civil action by an alien for a tort only committed in violation of the law of nations."[348] In the case of *Kiobel*, the second Circuit Court of the USA determined that corporations are not liable to human rights law and jurisprudence.[349] When this decision was reconsidered the US Supreme Court held that the presumption against extraterritorial jurisdiction extends to ACTA due to the "danger of unwarranted judicial interference in the conduct of foreign policy." The Decision in *Kiobel* & its impact on human rights law and

[342] Danwood Mzikenge Chirwa, "The Doctrine of State Responsibility as a Potential Means Holding Private Actors Accountable for Human Rights"
[343] Alan Boyle "Globalising Environmental Liability: The Inter- Play Of National And International Law" Journal Of Environmental Law,
[344] Andrew Clapham "Human Rights Obligations Of Non-State Actors"
[345] ibid
[346] Auz, Juan. (2018) "The Environmental Law Dimensions Of An International Binding Treaty On Business And Human Rights"
[347] Mcconnell"Establishing Liability For Multinational Oil Companies In Parent/Subsidiary Relationships"
[348] Alien Tort Statute0 https://www.law.cornell.edu/wex/alien_tort_statute
[349] Kiobel V Royal Dutch Petroleum Co. 642 F 3d 111(2nd Cir. 2010)

jurisprudence has been much discussed.[350] There are however very few cases where the determination of proper redress is examined as most settle out of court. [351]

4.5.1 – Problems with "Forum Shopping"

Scholars argue that there is nothing "wrong" with forum shopping as litigants merely avail themselves of legal opinions that arise from the relevant jurisdictional rules and any lack of decisional uniformity that may result from this is not only unavoidable but even considered desirable. [352] These scholars state that it is a lawyer's legal duty towards a client to explore all jurisdictional options for the most advantageous outcome for their client.[353] On the other hand, other authors state that even uniform law conventions have been unable to eliminate the practice of forum shopping, implying that it is undesirable. [354] Franco Ferrari stated that one of the "asserted advantages and goals of the unification of substantive law lies in the prevention of forum shopping and that the entry into force of international contract law conventions cannot prevent forum shopping".[355] Some scholars on the topic are less unconditional in their approval of forum shopping where they argue that depending on the case, forum shopping could be a positive or a negative practice. [356] These diverging opinions reveal that there seems to be no agreement on the exact meaning of the concept of forum shopping. It can be seen in related cases that generally this concept of forum shopping is detrimental to the plaintiffs who already have a less favourable standing in the litigation process whether it is due to access to funds, lack of knowledge or political power. Allowing large influential corporations to effectively select a forum that is more favourable to them detriments the victims in a way that prevents their access to justice. During the U.S stage of the litigation in the Texaco case, Chevron submitted 14 sworn affidavits presenting the fairness and

[350] See Anna Grear And Burns H Weston, 'The Betrayal Of Human Rights And The Urgency Of Universal Corporate Accountability: Reflections On A Post-Kiobel Lawscape' (2015) Also See Jordan J Paust, 'Human Rights Through The ATS After Kiobel: Partial Extraterritoriality, Misconceptions, And Elusive And Problematic Judicially-Created Criteria' (2014)
[351] Lubbe And Ors V. Cape Plc., The Bodo Community And Others V Shell Petroleum Development Company Of Nigeria Ltd.
[352] Fredrich K Juenger, What's wrong with forum shopping? (1994)
[353] Fredrich K Juenger, What's wrong with forum shopping? (1994)
[354] Franco Ferrari, 'Forum Shopping' Despite International Uniform Contract Law Conventions (2002)
[355] Franco Ferrari, 'Forum Shopping' Despite International Uniform Contract Law Conventions (2002)
[356] Maloy

adequacy of Ecuadorian courts.[357] The corporations further drafted a letter which was signed by the Ecuadorian ambassador to the US who happened to be a former Chevron lawyer requesting the case to be moved to Ecuador. [358] Chevron agreed to subject itself to jurisdiction in Ecuador for the purposes of the claims and promised to abide by any judgement from the courts[359]. This calculated move was indeed from their side can be seen as the most favourable forum, as Chevron was fully aware of its influence and network it had in Ecuador meaning that the case would either disappear altogether or would be an endless litigation battle.[360] The pursuing of environmental litigation in Ecuador presented several legal challenges relating to accountability for human rights violations. It was stated that this was in fact a textbook example of "abusive litigation" to forestall the resolution of vital legal claims on which the survival of thousands of people depended.[361]

Courts in common law countries such as the UK for example have been cautious about handling claims against a foreign party due to the knowledge that the proceedings become very costly and could potentially interfere with the sovereignty of the country where the trial should ordinarily have taken place. [362] The process in the UK according to the Civil Procedure Rules (CPR, 6.20 & 6.21)[363] & The Supreme Court suggest that permission to start proceedings against a foreign party will be granted only if the claimant can convince the court that the issue that is to be tried is exceptionally serious and that the UK courts are the most appropriate forum in determining the matter. [364] However, it was seen in the case of *Owusu v Jackson*[365], after the Brussels Regulation and later with Brexit[366], there has been some changes to the court's discretion. The changes that brought on by

[357] Chevron in Ecuador. (n.d.). *Affidavit packet part 2*. Retrieved from https://chevroninecuador.org/assets/docs/affidavit-packet-part2.pdf
[358] Donziger, S., Garr, L., & Marr Page, A. (n.d.). Rainforest Chernobyl revisited: The clash of human rights and BIT investor claims: Chevron's abusive litigation in Ecuador's Amazon. Retrieved from https://www.corteidh.or.cr/tablas/r24170.pdf
[359] Ibid
[360] Ibid
[361] ibid
[362] Zerk, J. (2014). *Corporate liability for gross human rights abuses: Towards a fairer and more effective system of domestic law remedies*. A report prepared for the Office of the UN High Commissioner for Human Rights. Retrieved from https://www.ohchr.org/Documents/Issues/Business/DomesticLawRemedies/StudyDomesticeLawRemedies.pdf
[363] Civil Procedure Rules. (n.d.). Retrieved from https://www.justice.gov.uk/courts/procedure-rules/civil
[364] Seaconsar Far East Ltd v Bank Markazi Jomhouri Islami Iran, [1994] 1 AC 438 (HL).
[365] In the case of Owusu; Vedanta Resources PLC and another v Lungowe and others (2019) UKSC 20, over 1,800 impoverished Zambian residents from rural farming areas, who depend on local water sources for drinking and irrigation, brought a lawsuit. The claimants argued that their health and agricultural activities had been adversely affected by the release of toxic substances into the waterways by the defendants, Vedanta and its subsidiary KCM, since 2005.
[366] After the Brexit transition period concluded, the UK is no longer bound by the Brussels Regulation and Brussels Recast. Despite this, the Trade and Cooperation Agreement between the UK and the EU did not establish a substitute framework for legal proceedings initiated in English courts thereafter. The Brussels Regulation and Brussels Recast remain applicable to courts within EU member states.

Brussels Regulation meant that if a defendant is resident in another EU member state and the matter falls within the scope of one or more of the Brussels regime then it was stated that the service of process on that party is a matter of right and not the court's discretion.[367] The Brussels regime also has removed the UK Court's ability to decline jurisdiction based on *forum non-conveniens* in the case where one of the defendants is domiciled in the UK.[368] For example in the case of *Vedanta*[369], the Supreme Court approved jurisdiction on the grounds that *Vedanta* was incorporated and domiciled in the UK although the UK did not appear to be the ideal place where the claim should be brought the court was convinced that there was a real risk that the claimants would not obtain justice in the Zambian jurisdiction.[370] On the contrary, in the Texaco cases, as discussed previously, the action that was filed in the USA was dismissed based on *forum non-conveniens*. [371]

Litigation involving transboundary environmental harm presents difficult questions about the jurisdiction of national courts and regarding the choice of applicable law as well as other practical issues such as that pollution may not be confined to state boundaries. [372] Jurisdictional issues aside, when laws are violated by a private actor that amounts to human and environmental violations this is usually there usually is a conflict of values that create tension between the rights to pursue economic aims on one side and the rights of the people on the other. [373] This can be observed in many cases globally.

[367] Poon, A. (2021). Determining the place of performance under Article 7(1) of the Brussels I Recast. *International and Comparative Law Quarterly, 70*(3), 573-600.
[368] Zerk, J. (2014). *Corporate liability for gross human rights abuses: Towards a fairer and more effective system of domestic law remedies*. A report prepared for the Office of the UN High Commissioner for Human Rights. Retrieved from https://www.ohchr.org/Documents/Issues/Business/DomesticLawRemedies/StudyDomesticeLawRemedies.pdf
[369] Vedanta Resources PLC and another v Lungowe and others, [2019] UKSC 20.
[370] ibid
[371] Aguinda v Texaco Inc. (1999). Maria Aguinda v Texaco Inc: Defining the limits of liability for human rights violations resulting from environmental degradation. *Contemporary Issues in Law, 4*(2), 188-209.
[372] such as airborne radioactivity from the Chernobyl nuclear power station that travelled thousands of kilometers and polluted international rivers do not suddenly stop being polluted when they cross state boundaries International Atomic Energy Agency. (2006). *Environmental consequences of the Chernobyl accident and their remediation: Twenty years of experience*. Retrieved from https://www-pub.iaea.org/mtcd/publications/pdf/pub1239_web.pdf
[373] Boer, B. (2015). Environmental dimensions of human rights. In S. Alam, J. H. Bhuiyan, D. J. Razzaque, & T. M. R. Chowdhury (Eds.), *International environmental law and the global south* (pp. 203-218). Cambridge University Press.

4.6 – Final Remarks

When discussing business, human rights and the environment, in order to overcome the challenges and limitations of frameworks, it is important to move forward from the state centred regulation of the traditional human rights ideology. It is important to impose liabilities on certain non-state actors whilst also not severely restricting corporations in their activities as to prevent economic growth. As it can be seen with emerging laws such as the French Duty of Vigilance and the new German Supply Chain Act there are many attempts at filling in the gaps of regulation and addressing limitations of international and domestic laws in this area. However, although these provide some clarification it appears that further developments are required as prevention and compensation in relation to environmental violations that lead to human rights violations remains a vague area.

Chapter 5: Improving Corporate Accountability

Throughout this research, the aim has been to exhibit the different ways in which large corporations can have an impact on the individuals' human rights and the environment and to analyse the effectiveness of current remedial and preventative mechanisms. One way to measure the effectiveness of remedial or preventative measure would be through case laws and their outcomes as well as progression in regulations when consensus has been reached that a regulation is not serving its purpose of protecting or remedying. Another way in which it can be measured is through publications and media resources where the general public is made aware of a related issue and the way in which it has been dealt with. There are elements where such a regulation can be measured at international, regional, domestic and even at a general public level.

At the international level, the United Nations (UN) has provided guidance for states and corporations, and the Council of Europe has issued recommendations in relation to the discussed issues. Furthermore, the Organisation for Economic Co-operation and Developments[374] (OECD) has contributed significantly by establishing mechanisms and instruments related to business and human rights.[375] The OECD's updated guidelines state that enterprises should respect human rights obligations of every country in which they operate and have due diligence processes in place as well as participating in the provision of remedies in cases of adverse impacts, which they have caused or contributed to.[376] Other key instruments include the International Labour Organisation (ILO) and the International Organization for Standardization (ISO). Most importantly, as discussed in more detail in the previous chapters, the 2011 United Nations Guiding Principles on Business and Human Rights, which the EU works to have an increasingly active role in implementation such as by way of adopting

[374] Organisation for Economic Co-operation and Development. (n.d.). *About the OECD*. Retrieved from https://www.oecd.org/about/
[375] Organisation for Economic Co-operation and Development. (2018). *OECD due diligence guidance for responsible business conduct*. Retrieved from https://mneguidelines.oecd.org/OECD-Due-Diligence-Guidance-for-Responsible-Business-Conduct.pdf
[376] Organisation for Economic Co-operation and Development. (n.d.). *International investment*.; European Union Agency for Fundamental Rights. (2020). *Fundamental rights report 2020*. Retrieved from https://fra.europa.eu/sites/default/files/fra_uploads/fra-2020-fundamental-rights-report-2020_en.pdf

strategies, policies, guidance, and legislation, plays a vital role. EU Member states and other countries have obligations related to access to justice under international treaties, as observed, which also have implications in this context.

Throughout the research, the findings suggest that the existing relevant instruments do not take sufficient account of the reality and complexity of disputes involving large corporations such as MNCs. In the majority of cases, as exhibited, the multinational entities have complex structures and networks of subsidiaries and supply chains, which creates issues in prevention of harm and remedial measures on international and domestic levels.[377] Most of the scholarly discussions, including this thesis, regarding this area of law focuses on instances where MNCs are unregulated bad actors. Therefore, the proposals to improve protections in the context of corporate activity generally revolves around the need to regulate companies through stringent regulation by governments. In this argument, if governments are to cooperate in closing the regulatory gaps and ensuring effective enforcement of those regulations with their borders and across, the human rights and environmental violations by private actors would be minimized.[378] Most recent push within the United Nations to adopt a "legally binding instrument to regulate, in international human rights law, the activities of transnational corporations and other business enterprises"(the Draft Treaty) reflects this viewpoint. [379]

The discussions to alleviate the issues and provide better regulatory systems generally can be split into two categories. On one hand, the discussions revolve around maintaining a system of human rights and environmental protection centred on the classic approach of state responsibility and on the other side there are those who push for the creation of legally binding obligations on corporations and other non-state actors under international law. [380] This chapter will present that

[377] Trusgnach, S., & Ortega, M. (2022). Remedy for human rights violations in global supply chains: Essential elements.
[378] Olaizola Rosenblat, M. (2023). Emancipating human rights protection from the state's stronghold: The need for multi-stakeholder solutions. *Penn State Journal of Law & International Affairs, 11*(1), 145. Available at https://elibrary.law.psu.edu/jlia/vol11/iss1/7
[379] Open-ended Intergovernmental Working Group on Transnational Corporations and Other Business Enterprises with Respect to Human Rights, U.N. Human Rights Council. (n.d.). Retrieved from https://www.ohchr.org/en/hr-bodies/hrc/wg-trans-corp/igwg-on-tnc
[380] Carrillo-Santarelli, N. (2020). A defense of direct international human rights obligations of (all) corporations. In J. J. A. Zerk & S. Deva (Eds.), *The future of business and human rights: Theoretical and practical considerations for a UN treaty* (pp. 145-163). Cambridge University Press.

neither of these approaches create a suitable remedy for the protection of human rights and the environment in cases where the state actors are unable to protect such rights. It will analyse the suitable prevention and remedial methods in this context and specifically analyse the avenues for victims to access remedy in cases where prevention fails. Multi-stake holder regimes will be examined as an increasingly diverse category of non-state initiatives, which aim to fill gaps in regulation where the governments fail to address the relevant issues at hand.[381] Although there has been criticism regarding this approach it appears to be a promising initiative in closing the gaps in regulation.

5.1 - State Centric Approach under International Law & Failure of Indirect Duties

By now, the thesis has discussed the obligations of states and private actors in this context and presented that the non-state actors at international level do not have direct obligations.[382] Despite the early recognition of various types of actors as subject of human rights standards, the relevant treaties that codified the UDHR's standards into treaties specifically address state parties as the primary duty bearers of human rights obligations.[383] Where any responsibilities were mentioned regarding individuals and others this was limited to the preambles of treaties making those duties purely declaratory and legally ineffective.[384] The process of human rights instruments being codified by states and addressed specifically to them created an international human rights mechanism that revolves around state responsibility. [385] As discussed in previous chapters, this doctrine states that governments are responsible for breaches of their obligations under international law which include not only the obligation to refrain from actively committing human rights violations but also the

[381] Olaizola Rosenblat, M. (2023). Emancipating human rights protection from the state's stronghold: The need for multi-stakeholder solutions. *Penn State Journal of Law & International Affairs, 11*(1), 145. Available at https://elibrary.law.psu.edu/jlia/vol11/iss1/7
[382] d'Aspremont, J., Nollkaemper, A., Plakokefalos, I., & Others. (2015). Sharing responsibility between non-state actors and states in international law: Introduction. *Netherlands International Law Review, 62*(1), 49–67. https://doi.org/10.1007/s40802-015-0015-0
[383] European Union Agency for Fundamental Rights. (2020). *Fundamental rights report 2020*. Available at https://fra.europa.eu/sites/default/files/fra_uploads/fra-2020-fundamental-rights-report-2020_en.pdf
[384] For example, the International Covenant on Civil and Political Rights states in the preamble that "the individual, having duties to other individuals and to the community to which he belongs, is under a responsibility to strive for the promotion and observance of the rights recognized in the present Covenant" (International Covenant on Civil and Political Rights, 1966). The binding provisions impose legal obligations explicitly only on states.
[385] Deva, S. (2021). Multinationals, human rights and international law: Time to move beyond the "state-centric" conception. *Journal of Business Ethics*, 160, 69-89. https://doi.org/10.1007/s10551-018-3932-

obligation to prevent and punish violations committed by private actors under their jurisdiction. Oppenheim described these obligations as "original and vicarious" responsibilities of states.[386] The latter "vicarious" liabilities are often seen as the obligation of due diligence. This idea has been widely accepted by both UN treaty bodies and regional human rights courts.[387] As a result of treaty law and judicial decisions, the consensus is that human rights at international level is only directly binding on states and private parties only subject to obligations through downstream state regulations.[388]

Influential international legal experts have cautioned against broadening the scope of international human rights obligations to include non-state actors as parties directly bound by those obligations.[389] These experts adhere to this idea of the "classical approach" and they have fought to keep the focus of international human rights legislation on state accountability, saying that imposing direct duties on private enterprises without a strong international enforcement mechanism would seriously undermine the authority of states.[390] The implication appears to be that by giving non-state actors direct accountability, state would no longer have total control over them.[391] One of the primary proponents of this viewpoint, Vazquez, stated that this "suggestion should be addressed with caution" however does not elaborate as to why such a change would be harmful.[392]

The question of capacity is another issue raised by the supporters of this classical method. According to Knox, it will not be possible for international law to replicate the huge number of domestic resources devoted to regulating "private invasions of interest denominated as human rights by

[386] Jennings, R., & Watts, A. (Eds.). (2008). *Oppenheim's International Law (9th Edition): Volume 1 Peace* (pp. 501-502). Oxford University Press.
[387] Velásquez Rodríguez v. Honduras, Inter-Am. Ct. H.R. (Ser. C) No. 4, 172 (1988) Where The Inter Amercian Court Noted "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 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.' See Also Soc. and Econ. Rts. Action Ctr. v. Nigeria, 155/96, Afr. Comm'n on H.P.R., 57 (2001). Retrieved from https://www.escr-net.org/sites/default/files/serac.pdf ("Governments Have A Duty To Protect Their Citizens, Not Only Through Appropriate Legislation And Effective Enforcement, But Also By Protecting Them From Damaging Acts That May Be Perpetrated By Private Parties.")
[388] Vázquez, C. M. (2020). Direct vs. indirect obligations of corporations under international law.
[389] Cedric Ryngaert Imposing international duties on non-State actors and the legitimacy of international law
[390] Olaizola Rosenblat, M. (2023). Emancipating human rights protection from the state's stronghold: The need for multi-stakeholder solutions. *Penn State Journal of Law & International Affairs, 11*(1), 145. Available at https://elibrary.law.psu.edu/jlia/vol11/iss1/7
[391] d'Aspremont, J., Nollkaemper, A., Plakokefalos, I., & Others. (2015). Sharing responsibility between non-state actors and states in international law: Introduction. *Netherlands International Law Review, 62*(1), 49-67. https://doi.org/10.1007/s40802-015-0015-0
[392] Vázquez, C. M. (2020). Direct vs. indirect obligations of corporations under international law, also see Olaizola Rosenblat, M. (2023). Emancipating human rights protection from the state's stronghold: The need for multi-stakeholder solutions. *Penn State Journal of Law & International Affairs, 11*(1), 145. Available at https://elibrary.law.psu.edu/jlia/vol11/iss1/7

international law.[393] In this sense, both Knox and Vazques caution that establishing new responsibilities without offering a suitable means for enforcement would result in the sense of "responsibility" under international law being diminished.[394] Although this is a legitimate worry, the situation appears to be manageable and merits a thoughtful response.[395] Further to this, academics have recently debated, whether the answer to filling the gaps of enforcement against private actors lies in strengthening states power and responsibility. As Van Ho suggested, this would consist of expanding governments ''civil responsibility over MNCs".[396] One of the suggested model provisions that was put forward with this viewpoint was to oblige states to the Draft Treaty to establish "civil jurisdiction over the corporations accused of human rights impacts" in instances where the damage happens in the relevant states territory or where the perpetrators (such as the parent company) or the victims are its nationals.[397] However, in practice this does not always seem to be feasible and currently under the Guiding Principles (Principle 2), the bar is set below the level of international human rights law where it provides that "States should set out clearly the expectation that all business enterprises domiciled in their territory and/or jurisdiction respect human rights throughout their operations.'[398] Even though this includes operations of corporations abroad, the principle includes a commentary that states: "At present States are not generally requires under international human rights law to regulate the extraterritorial activities of businesses domiciled in their territory and/or jurisdiction. Nor are they generally prohibited from doing so, provided there is a recognized jurisdictional basis. Within these parameters some human rights treaty bodies recommend that home States take steps to prevent abuse abroad by business enterprises within their jurisdiction. There are strong policy reasons for home States to set out clearly the expectation that businesses respect human rights abroad, especially where the State itself is involved in or supports those

[393] Knox, J. H. (2008). Horizontal human rights law. *American Journal of International Law, 102*(1), 1-19.
[394] *Roeben, V. (2015). Responsibility in international law. In A. Nollkaemper & I. Plakokefalos (Eds.), Principles of Shared Responsibility in International Law: An Appraisal of the State of the Art (pp. 139-166). Cambridge University Press. https://doi.org/10.1017/CBO9781107300733.010*

[396] Van Ho, T. L. (2020). "Band-Aids don't fix bullet holes": In defence of a traditional state-centric approach. In J. J. A. Zerk & S. Deva (Eds.), *The future of business and human rights: Theoretical and practical considerations for a UN treaty*. Cambridge University Press. Retrieved from https://www.cambridge.org/core/books/abs/future-of-business-and-human-rights/bandaids-dont-fix-bullet-holes-in-defence-of-a-traditional-statecentric-approach/362ACB30391A7B0D92850B4D859FAD21
[397] Ibid, also see Olaizola Rosenblat, M. (2023). Emancipating human rights protection from the state's stronghold: The need for multi-stakeholder solutions. *Penn State Journal of Law & International Affairs, 11*(1), 145. Available at https://elibrary.law.psu.edu/jlia/vol11/iss1/7
[398] Ibid

businesses. The reasons include ensuring predictability for business enterprises by providing coherent and consistent messages and preserving the State's own reputation."[399] On the other hand, the UN treaty bodies have provided the view that states should take measures to prevent human rights contraventions outside of their jurisdiction by corporations that are incorporated under their laws or that have their main place of business in their state.[400] Specifically, the Committee on Economic, Social and Cultural Rights concurs that States should prevent third parties from violating the right protected under the International Covenant on Economic, Social and Cultural Rights in other countries, if they are able to influence these third parties by way of legal or political means, in accordance with the Charter of the United Nations and applicable international law."[401]

Strengthening domestic responsibility to address extraterritorial violations is, of course, beneficial in certain situations.[402] Having said that, including such provisions in an international instrument may not sufficiently resolve the issues at hand, especially in developing nations where accountability is needed the most. As firstly, the existence of a treaty provision does not guarantee implementation or effective enforcement.[403] Countries such as Venezuela and Syria, for example, are parties to human rights treaties such as the ICCPR, ICESCR, The International Convention on the Elimination of All Forms of Racial Discrimination (CERD), The Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment and the Convention on the Rights of the Child to name a few, yet, it has been reported that these states are ineffective at enforcement of their human rights obligations. The failure of the international human rights system stems from the fact that it is based on the presumption that states are well-behaved bodies however, for example, it has been reported

[399] United Nations. (2011). *Guiding principles on business and human rights: Implementing the United Nations "Protect, Respect and Remedy" framework*. Retrieved from https://www.ohchr.org/sites/default/files/documents/publications/guidingprinciplesbusinesshr_en.pdf, also see De Schutter, O. (2016). Towards a new treaty on business and human rights. *Business and Human Rights Journal, 1*(1), 41-67. https://doi.org/10.1017/bhj.2015.5

[400] Ibid

[401] Committee on Economic, Social and Cultural Rights. (2000). *General Comment No. 14: The right to the highest attainable standard of health (Art. 12)*. Adopted at the Twenty-second Session of the Committee on Economic, Social and Cultural Rights, on 11 August 2000 (Contained in Document E/C.12/2000/4). Retrieved from https://www.refworld.org/pdfid/4538838d0.pdf , also see De Schutter, O. (2016). Towards a new treaty on business and human rights. *Business and Human Rights Journal, 1*(1), 41-67. https://doi.org/10.1017/bhj.2015.5

[402] Extraterritorial Jurisdiction as a tool for improving the Human Rights Accountability of Transnational Corporations

[403] Olaizola Rosenblat, M. (2023). Emancipating human rights protection from the state's stronghold: The need for multi-stakeholder solutions. *Penn State Journal of Law & International Affairs, 11*(1), 145. Available at https://elibrary.law.psu.edu/jlia/vol11/iss1/7

that at least one third of the worlds' states today are engaged in systematic repression.[404] Unfortunately, even states that are considered to be human rights compliant, at times fall short in respecting their treaty obligations, therefore, the inclusion of a treaty provision that strengthens states' extraterritorial jurisdiction would not ensure that such jurisdiction is successfully implemented.[405]

5.2 – Binding Treaty

As briefly examined a Draft Treaty[406] is being discussed by the UN Member States which aims to impose legally binding obligations on UN Member States to require businesses within their jurisdiction, territory or under their control to implement mandatory human rights due diligence throughout a company's general operations.[407] The Draft Treaty[408] on business and human rights is an important development as the process to develop this treaty appears to stem from the very fact that a legally binding instrument was seen as a need to regulate the obligations of private entities and assist victims in accessing justice. The primary obligations and principles that is at the heart of the proposed treaty, once again, include the responsibility of the states to protect against human rights violations within their territory or jurisdiction by third parties such as MNCs. In principle, an international treaty should go beyond jurisdictional restrictions of states and provide for a more uniform and better remedial and/or preventative measures. However, this cannot be done without state participation, where they must also take measures at the domestic level to strengthen their regulations and improve their existing legislations as well as developing public policies to make sure

[404] Freedom House. *Countries and territories*. Freedom in the World. Retrieved from https://freedomhouse.org/countries/freedom-world/scores
[405] Olaizola Rosenblat, M. (2023). Emancipating human rights protection from the state's stronghold: The need for multi-stakeholder solutions. *Penn State Journal of Law & International Affairs, 11*(1), 145. Available at https://elibrary.law.psu.edu/jlia/vol11/iss1/7
[406] In 2014 the UN's Human Rights Council established an intergovernmental working group on transnational corporations and other business enterprises with respect to human rights with the aim of creating a legally binding treaty. The intergovernmental working group and participating UN Member States have met eight times since the establishment of the group and in October 2022, they deliberated on the third revised draft of the treaty which was published in August 2021. United Nations. (2020). *Legally binding instrument to regulate, in international human rights law, the activities of transnational corporations and other business enterprises*. Retrieved from https://www.ohchr.org/sites/default/files/Documents/HRBodies/HRCouncil/WGTransCorp/Session6/LBI3rdDRAFT.pdf
[407] Business & Human Rights Resource Centre *Binding treaty: A brief overview*. Retrieved from https://www.business-humanrights.org/en/big-issues/binding-treaty/
[408] Legally Binding Instrument To Regulate, In International Human Rights Law, The Activities Of Transnational Corporations And Other Business Enterprises, Third Revised Draft, also see https://www.ituc-csi.org/un-business-and-human-rights

there are effective measures in place to protect human rights. Companies also must be part of this equation where they must respond appropriately to improve their practices. The negotiated treaty, although it addresses states, it appears to be intended as a complementary package.

The third draft of the treaty is still being discussed and it has been stated that the scope has now been clarified, however many issues remain. It has been stated that the main issues at hand are more political than technical with some countries and the private sector objecting to the treaty's text claiming that it is too prescriptive and rigid. Whereas civil society requires further clarifications such as the issue of burden of proof remains contentious. As a result of some countries maintain reservations about the treaty, negotiations are expected to last several more years. Further to this lengthy negotiation process, once the treaty is adopted, the process of ratification must begin. The ratification process is anticipated to be a challenging one as international treaties only enter into force when a certain number of countries ratify them and only they legally bind the ratified states. In order for this to be a smooth process, civil society must also advocate for the states to ratify the treaty and it is anticipated to be a complicated and long process. It is therefore, to be seen how effective this treaty will be in practice.

5.2.1 – Is a Binding Treaty Sufficient?

On October 28 2022, the UN Member States concluded their negotiations on the third revised draft of the treaty where the UN High Commissioner for Human rights reiterated the fact that the Draft Treaty is "complementary" to the UNGPs. [409] The third draft does not appear to significantly deviate from the Second published draft as it was exhibited in a comparison table published by the OEIGW.[410] Upon observation it can be seen that there is similar language used in the stated purposes

[409] UNGPs include "a smart mix of measures" meaning both national and international as well as voluntary and mandatory measures to enhance business respect for human rights & OCHR and the treaty should be mutually "reinforcing & complimentary."
[410] Comparison of third and second revised drafts of a legally binding instrument to regulate, in international human rights law, the activities of transnational corporations and other business enterprise shttps://www.ohchr.org/sites/default/files/Documents/HRBodies/HRCouncil/WGTransCorp/Session6/igwg-comparing-third-and-second-revised-drafts.pdf

in both the Draft Treaty and UNGPs framework and it is not surprising to see that as complementary documents, there are many other similarities between the two.[411] The importance of the Draft Treaty is that it mainly focuses son corporate legal liability & provisions for victims to access remedy as well as provisions on the prevention of human rights violations.[412] The treaty claims to fill in international law gaps and provide clarity (particularly regarding access to justice for victims) where other non-binding provisions were incapable of achieving. As previously discussed however, the Draft Treaty again does not impose direct obligations onto MNCs but rather follows the state-centric approach of providing arguably more stringent measures for the party states to follow and enforce onto MNCs that operate in their jurisdiction. It is worth noting that the obligations under this treaty would only come into force if and when the treaty is in final form, adopted and ratified by party member states. This process however is lengthy and not without controversy as the UNGPs for example have received much more support than the Draft Treaty as member states continue to voice their concern in such a binding treaty.[413]

The Draft treaty on the outset appears to address many of the issues outlined in this research, in the form of a binding treaty however it can be said that it is lacking in environmental aspects. A main question in relation to business and human rights concerns the legal liability of corporations through their operations/related activities they are involved in, as imposing liability for harm is not only an incentive for prevention but also relevant in terms of access to remedies as it may provide for compensatory measures.[414] As examined, although it is possible to impose some sort of liability for the acts of MNCs that cause human rights and environmental violations, the type of liability, causation, burden of proof and compensation amount may be vary depending on the jurisdiction.[415]

[411] Draft Treaty Article 2 states that the treaty's purpose is to "clarify and facilitate the obligation" of States to "respect, protect, fulfil & promote human rights" & businesses to clarify & ensure their "respect and fulfillment" of human rights obligations – is similar in language to the "protect, respect, remedy" in the UNGPs framework
[412] "Summary: Third Revised Draft of the Binding Treaty on Business and Human Rights" https://www.business-humanrights.org/en/big-issues/binding-treaty/summary-third-revised-draft-of-the-binding-treaty-on-business-and-human-rights/
[413] The Future of Human Rights Due Diligence: UNGPs and the Draft Treaty on Business and Human Rights https://www.lw.com/admin/upload/SiteAttachments/Alert%203035.pdf
[414] O. De Schutter, International Human Rights Law – Cases, Materials, Commentary
[415] The Future of Human Rights Due Diligence: UNGPs and the Draft Treaty on Business and Human Rights https://www.lw.com/admin/upload/SiteAttachments/Alert%203035.pdf

Furthermore, due to the difficulty in establishing liability for human rights and environmental violations it is of particular interest to see how the Draft treaty addresses these issues.
One of the main stated purpose of this treaty is in fact access to justice and "effective, adequate and timely" remedy for victims of human rights abuses in relation to business activities. Article 8 addresses one of the key questions in this context as it provides that States are obliged to ensure that the domestic law has comprehensive and adequate systems of legal liability of both legal and natural persons in the course of business activities. It clarifies the idea that businesses can be liable for their own business activities and for activities in their business relationship particularly if one company controls or manages the other entity. However, improvements could be made in clarification to address presumption of control and joint liability.[416] Article 9 attempts to clarify the complex position of jurisdiction whereby providing that jurisdiction for claims should be based where "the alleged human rights abuse occurred" or "where the act of omission contributing to the abuse occurred" or "where the legal or natural persons alleged to have committed the abuse is domiciled" or "where the victim is a national of is domiciled".[417] As complimentary key documents, by way of comparison, although there are some differences between the two texts, there are many similarities.[418] The importance of human rights due diligence is embedded in both documents where it can be observed in the UNGPs human rights due diligence is used as a tool to "identify, mitigate and account for adverse human rights impacts." The Draft treaty provides similar provisions where human rights due diligence is utilized as a function of fulfilling States duties of ensuring businesses respect international human rights and prevent and mitigate human rights violations. [419]

Although there has been international discontent and pushback regarding the Draft treaty, perhaps the discussions of a binding treaty on human rights due diligence is prompting nations to consider

[416] Ibid
[417] "Report on the Eighth Session of the Open-Ended Intergovernmental Working Group on Transnational Corporations and Other Business Enterprises With Respect to Human Rights"
[418] For example a difference in the Draft Treaty is that it obligates States Parties to ensure public reporting of non-financial matters, while the UNGPs required only public reporting where "risks of severe human rights impacts exist."
[419] The Future of Human Rights Due Diligence: UNGPs and the Draft Treaty on Business and Human Rights https://www.lw.com/admin/upload/SiteAttachments/Alert%203035.pdf

their own domestic practices. As a recent example, on September 13 2022 Japan published "Guidelines on Respecting Human Rights in Responsible Supply Chains" and although not legally binding it provides guidance to all businesses engaging in business activities in Japan which also makes specific mention of the environmental aspects of businesses.[420] Furthermore, a notable development in this areas is the German Supply Chain Act (thereafter the Act in this section) which came into force on January 1 2023, which imposes human rights and environmental obligations on companies with at least 3,000 employees [421] that have "their head office, administrative seat or statutory seat in Germany" or companies that have a branch in Germany that employ at least 3,000 employees in this branch. This appears to be a welcome development even though there is a restriction on the size of the company for the act to apply, companies with fewer employees may still be indirectly affected as the companies who are directly obliged would need to require compliance to the best of their ability with human rights in their supply chain.[422] In accordance with the act the companies that fall within the Act must take measures to identify, prevent, minimize and remedy echoing the UNGPs and the draft treaty. The Act further imposes fines and exclusion from public tenders (up to 3 years) to promote compliance. Circling back to the Draft Treaty, although it incorporates and attempts to clarify many issues in the human rights arena, it makes very limited references to environmental issues to the right to a safe, clean, healthy and sustainable environment following the mandate of the OEIGWG. This may prove to be insufficient in tacking environment related issues discussed in this chapter if the Draft treaty is adopted. [423]

[420] Japanese companies (1) establish a human rights policy; (2) conduct human rights due diligence, and (3) establish a grievance mechanism for individuals to seek remedies for adverse impacts cause by the company. https://www.meti.go.jp/english/policy/economy/biz_human_rights/1004_001.pdf

[421] As of January 1 2024 this will be reduced to companies with at least 1000 companies

422 Supply Chain Act - Act on Corporate Due Diligence Obligations in Supply Chains https://www.csr-in-deutschland.de/EN/Business-Human-Rights/Supply-Chain-Act/supply-chain-act.html, also see German supply chain law gives human rights a voice https://www.dw.com/en/german-supply-chain-law-gives-human-rights-a-voice/a-64007455

423 Analysis of the Third Draft of the UN Treaty on Business and Human Rights Prof. Dr. Markus Krajewskihttps://www.misereor.de/fileadmin/publikationen/study-on-UN-binding-treaty-2021.pdf

5.3 – Addressing Problems at EU level

In the instance of cross border disputes, the EU seems to have harmonised the rules on choice of court through the Brussels Regime.[424] This clarifies which court has jurisdiction over a certain case. Similarly, the Rome regime harmonised the conflict law rules in the EU to determine which country's laws are applicable for non-contractual obligations. [425] Regarding activities in third countries by an entity linked to EU companies such as subsidiaries of companies that have their headquarters in an EU Member state or activates of their suppliers, it is very challenging for third country nationals harmed by a company based in the EU to hold that said corporation accountable.[426] Furthermore, the harm may occur in a country where the judicial system is not functional or independent, has weak enforcement mechanisms or lacks measures to protect victims and witnesses from threat and reprisals. In this context, claimants may seek justice before an EU court.

As exhibited in previous chapters, it is challenging to establish jurisdiction in an MNCs home state due to jurisdictional hurdles. It has been highlighted in a report (the FRA Report) by the European Union for Fundamental Rights that litigation to determine European jurisdiction alone could take up to 10 years without even discussing the merits of the case.[427] Further obstacles can be observed in relation to access to remedy when discussion applicable law. The EU Rome II regulations state that the applicable law, by default, is the law of the country where the damage occurs such as the country where the injury was sustained or damage to property occurred. Having said that, the EU Rome regulation has an exception for cases of environmental damage, in specific situations, where the individual seeking remedy is allowed to choose the law of the country where the harm originated from as applicable law, rather than the law of the country where the damage occurred.[428]

424 A Step Forward In The Harmonization Of European Jurisdiction: Regulation Brussels I Recast

425 Regulation (Ec) No 593/2008 Of The European Parliament And Of The Council Of 17 June 2008 On The Law Applicable To Contractual Obligations (Rome I) Https://Eur-Lex.Europa.Eu/Lexuriserv/Lexuriserv.Do?Uri=Oj:L:2008:177:0006:0016:En:Pdf, Also See Regulation (Ec) No 864/2007 Of The European Parliament And Of The Council Of 11 July 2007 On The Law Applicable To Non-Contractual Obligations (Rome Ii)

426 Regulation (Ec) No 864/2007 Of The European Parliament And Of The Council Of 11 July 2007 On The Law Applicable To Non-Contractual Obligations (Rome Ii)

427 Fundamental rights report 2020 Available at:https://fra.europa.eu/sites/default/files/fra_uploads/fra-2020-fundamental-rights-report-2020_en.pdf, also see The Brussels I Regulation (No 44/2001) http://www.dutchcivillaw.com/content/brusselsone011.htm

428 Pérez Adroher, A. (2020). Rome II Regulation and Liability of Multinationals for Human Rights Violations in Third Countries: Irreconcilable Differences? The Public policy exception to the application of the "host countries" legislation under Rome II Regulation.

This is particularly relevant in instances where the damage occurred in developing nations in which the domestic law has limited liability or low level of damages.

Addressing these problems through EU regulations would be a positive way forward as this enables companies to establish more legal certainty regarding jurisdiction and choice of law; with governments harmonizing their laws and claimants to have better protection and easier access to remedy within the EU.[429] It could be recommended that the Rome II Regulation be amended to include further exceptions for choice of law in business related human rights abuses, similar to the exceptions provided in environmental harm cases.[430] This would allow victims of business-related human rights abuses to bring claims for redress against EU established companies before the court.[431]

5.4 – Resolving Issues Related to Burden of Proof

Accessing justice for victims in situations where MNCs have violated citizens' human rights and/or environmental rights, as exhibited many times, is a massive challenge. While there are some formal judicial procedures are in place, they are seen to be not sufficiently functional or accessible to victims due to difficulties such as high court fees, and lengthy proceedings.[432]

As discussed in more detail in chapter 2 the obstacles for victims usually begin early on at the level of identification of the defendant company. The complex corporate structures in MNCs makes it challenging or even impossible at times to assign liability to a particular company. When trying to hold a parent company responsible for the acts or omissions of its subsidiary's victims are required

[429] Fundamental rights report 2020
[430] Human rights in global supply chains: Do we need to amend the Rome II-Regulation?
[431] Fundamental rights report 2020
[432] Fundamental rights report 2020

to establish a specific relationship between the entities.[433] The obstacle of burden of proof is a challenging issue to overcome for victims seeking remedy.[434] The research of the European Union Agency for Fundamental Rights on access to justice presents that the effectiveness of judicial remedies are generally faced with challenges such as restrictive rules on legal standing, high legal costs, evidence barriers and the lengthy proceedings.[435] The research also found that non-judicial remedies lack effectiveness or unknown altogether and courts remain the main avenue for redress.[436] However, when victims chose to utilize the courts to seek remedy, depending on the legal system different types of proof are required such as the requirement to establish a company's liability, as well as various levels of causality and link to the damage that the company's operations caused them.[437] Such burden of proof is notoriously difficult to present as in most legal systems in order to bring such a claim victim are required to prove that they are directly affected by the actions of the company.[438] Furthermore, establishing a company's liability including parent and subsidiaries is a challenging task especially in cross-border situations as it the case with most relevant situations in this context. Most European legal systems provide for some degree of reversal in burden of proof (such as in cases in relation to labour laws).[439] Directive 2006.54. EC states, "The adoption of rules on the burden of proof plays a significant role in ensuring that the principle of equal treatment can effectively be enforced." [440] It would be effective to reverse the burden of proof in these cases to address the high threshold placed on victims to prove the damage caused by companies as in reality the information necessary to prove such a claim usually lies with the defendants.[441] Furthermore, it has been suggested by experts that in order to reduce obstacles faced due to lack of evidence, the required level of proof should be lowered. Such as, providing a certain level of evidence that could shift the burden of proof from the victim to the company whereby facilitating a presumption of

[433] See chapter 3 on corporate structures and the piercing of the corporate veil
[434] ibid
[435] ibid
[436] Fundamental Rights Report 2020:Https://Fra.Europa.Eu/Sites/Default/Files/Fra_Uploads/Fra-2020-Fundamental-Rights-Report-2020_En.Pdf
[437] Ibid
[438] ibid
[439] Options for Legal Presumptions and Burden of Proof reversals Syndicate European Trade Union
[440] Directive 2006/54/Ec of The European Parliament And Of The Council Of 5 July 2006 On The Implementation Of The Principle Of Equal Opportunities And Equal Treatment Of Men And Women In Matters Of Employment And Occupation (Recast)
[441] Mariana Olaizola Rosenblat, Emancipating Human Rights Protection From The State's Stronghold: The Need For Multi-Stakeholder Solutions, 11 Penn. St. J.L. & Int'l Aff. 145 (2023). Available At: Https://Elibrary.Law.Psu.Edu/Jlia/Vol11/Iss1/7

liability that the company then should provide proof to the contrary.[442] Furthermore, it was suggested that it would be helpful to oblige companies to disclose all documents that are relevant to the harmful act especially as the victims have the burden of proof.[443] It was stated by the Justice of European Union that in cases where a defendant refuses to disclose, this has the potential effect of preventing a claimant from establishing initial facts of the case.[444]

5.5 – Strengthening Non-Judicial Mechanisms

Most experts agree that access to remedy leading to financial compensation through the court systems remains largely ineffective for alleged victims of business-related abuses.[445] This is due to the accumulation of practical and procedural obstacles, including high financial risk and costs, rules on the burden of proof and a lack of specialised support, or a lack of effective collective remedy.[446] Experts' views on non-judicial complaint mechanisms vary depending on the country and the type of mechanism, but, in general, experts describe such mechanisms as also ineffective in providing remedy. All EU Member States have non-judicial mechanisms; however, their authority and reach differ substantially. Some mechanisms have quasi-judicial authority, whereas others so not have such authority to make decisions that are legally enforceable but has the potential to mediate disputes or defend victims' interests in court.[447] Although the non-judicial mechanisms do not provide for enforceable decisions, it was reported that some consider their voluntary character to be a strength that facilitates negotiation. Some currently available mechanisms have been praised although their full potential is seen to be not exploited. Of particular note, The Organisation for Economic Cooperation and Development (OECD) complaint mechanism is seen as an alternative access mechanism for third-country nationals and as an opportunity for negotiation however, it is

[442] Fundamental Rights Report 2020 Https://Fra.Europa.Eu/Sites/Default/Files/Fra_Uploads/Fra-2020-Fundamental-Rights-Report-2020_En.Pdf
[443] Ibid
[444] Ibid
[445] Fundamental Rights Report 2020 Https://Fra.Europa.Eu/Sites/Default/Files/Fra_Uploads/Fra-2020-Fundamental-Rights-Report-2020_En.Pdf
[446] "Improving Access to Justice through Collective Actions" Developing a More Efficient and Effective Procedure for Collective Actions https://www.judiciary.uk/wpcontent/uploads/JCO/Documents/CJC/Publications/CJC+papers/CJC+Improving+Access+to+Justice+through+Collective+Actions.pdf
[447] Fundamental Rights Report 2020 Https://Fra.Europa.Eu/Sites/Default/Files/Fra_Uploads/Fra-2020-Fundamental-Rights-Report-2020_En.Pdf

considered of little or no relevance to financial compensation.[448] This can be seen as an appropriate mechanism that has the potential to be strengthened.

The OECD Guidelines have been described as the only multilaterally endorsed and comprehensive code for that the governments are committed to promoting. Governments commit to adhering to the guidelines and are required to set up National Contact Points (NCPs).[449] The main role of these NCPs is to help companies to take necessary measures to adhere to the guidelines, provide awareness for non-judicial grievance procedures and deal with any enquires.[450] NCPs have a vital role as they provide a mediation and conciliation platform to resolve practical issues that can arise when trying to implement the guidelines. It is also an important tool for individuals as they can file a complaint with the NCP if they believe that a company is in violation of the guidelines. [451]

Advantages	Disadvantages
Lack of publicity	Lack of Enforceability
Mediation	Lack of Transparency
Accessibility	Lack of Awareness

If the disadvantages of this mechanism can be sufficiently addressed to further enforceability, transparency and awareness, this mechanism could be utilized further. As the NCPs are separate

[448] Providing access to remedy 20 years and the road ahead https://mneguidelines.oecd.org/NCPs-for-RBC-providing-access-to-remedy-20-years-and-the-road-ahead.pdf, Structurs and procedures of national contact points for the OECD Guidelines for Multinational Enterprises https://mneguidelines.oecd.org/Structures-and-procedures-of-NCPs-for-the-OECD-guidelines-for-multinational-enterprises.pdf
[449] The OECD Guidelines for Multinational Enterprises and non- adhering countries Opportunities and Challenges of engagement Halina Ward
[450] Non judicial grievence mechanisms https://globalnaps.org/issue/non-judicial-grievance-mechanisms/, also see Fundemental Rights Report
[451] The EU supports the guidelines as an observer - see the OECD's webpage on the Guidelines for multinational enterprises and the OECD's webpage on NCPs.

bodies that are created by party states, it could provide for a more impartial guidance to uphold the rights in question.

5.6 – Direct Corporate Obligations

Given the fact that state obligations alone seem to be insufficient in guaranteeing human rights when dealing with private actors, other avenues should be considered, such as creation of responsibilities for non-state actors.[452] Vazquez states that if international law imposes obligations on corporations "only indirectly, then managers and directors only concern themselves, as a legal matter, with the domestic law of the states in which they operate."[453]

In order to create such obligations on corporations and MNCs, it is essential that a consensus be made as to the fact that corporations should have more direct obligations regarding human rights and the environment, regardless of jurisdiction.[454] This is a rather utopian approach; however, strong arguments have been made in relation to imposing legally binding obligations on MNCs. In this context, the discussion revolves around direct legally binding obligations onto corporations themselves, rather than the currently negotiated Draft Treaty – as this does not impose direct legally binding obligations onto companies. The recognition of human rights under international entities individuals to basic protections for their human interests "simply by virtue of the fact that they are human beings."[455] Furthermore, both non-state actors as well as states have the capacity to violate such rights; therefore, these actors with the capacity to infringe should be obliged to uphold and at the very least respect such rights.[456] This could be seen as a compelling argument to impose direct

[452] John H. Knox, Horizontal Human Rights Law, 102 AM. J. INT'L L. 1, 19 (2008). Also see The Doctrine Of State Responsibility As A Potential Means Of Holding Private Actors Accountable For Human Rights State Responsibility, Private Actors And Human Rights Danwood Mzikenge Chirwa
[453] Carlos M. Vázquez, Direct vs. Indirect Obligations of Corporations Under International Law
[454] Bilchitz, D. (2013) *A Chasm Between 'Is' and 'Ought'? A Critique of the Normative Foundations of the SRSG's Framework and Guiding Principles.* In: Deva, S. and Bilchitz, D. (eds.) Human Rights Obligations of Business: Beyond the Corporate Responsibility to Respect? Cambridge University Press, Cambridge, pp. 107-137
[455] David Bilchitz, A Chasm Between "Is" and "Ought"? A Critique of the Normative Foundations of the SRSG's Framework and the Guiding Principles, also see Joel FEINBERG, SOCIAL PHILOSOPHY, see also Nicolás Carrillo-Santarelli, A Defense of Direct International Human Rights Obligations of (All) Corporations.
[456] Harrison, J., & Wielga, M. (2023). Grievance Mechanisms In Multi-Stakeholder Initiatives: Providing Effective Remedy For Human Rights Violations? Business And Human Rights Journal,1-23. Doi:10.1017/Bhj.2022.37 ,Sandra Moog, André Spicer And Steffen

obligations on to corporations such as MNCs. However, questions remain as with the current regulatory regime, although states are obliged to uphold the rights at hand, there are still issues with enforcement. Would imposing similar obligations on to private actors prove to be effective?[457] Moreover, if so, how should this mechanism be formulated to ensure that its enforcement is more effective? Bodansky suggests that enforcement is a separate issue than a regulatory mechanism being 'legally binding' as not all legally binding mechanisms provide for effective enforcement. As enforcement it is not a necessary condition for an instrument to be binding. It is further suggested that enforcement involves "the application of sanctions to induce compliance." [458] When discussing the question of enforcement in order to create an effective mechanism, proponents of direct obligations once again point to the need for domestic regulations.

There is an assumption that by creating internationally binding obligations, corporations would naturally become more compliant. However, this may not be the case in practice. Bilchitz argues that having an internationally binding regulation on corporations does not automatically guarantee that international bodies will be able to hold corporations accountable.[459] This has been observed throughout the research as without enforcement; the issues persist in holding MNCs accountable for their operations under the current regimes. Thus, the creation of such direct obligations on corporations requires specific explanations of the way in which these obligations would produce desired outcomes In terms of protecting individuals from human rights and environmental abuses. Carrillo-Santarelli suggests that a new mechanism could be created to "supervise non-state compliance with duties of their own" which would operate at multiple levels of governance, where complementary protection of human rights will be provided in corporate obligations strengthened

[457] Mariana Olaizola Rosenblat, Emancipating Human Rights Protection From The State's Stronghold: The Need For Multi-Stakeholder Solutions, 11 Penn. St. J.L. & Int'l Aff. 145 (2023). Available At: Https://Elibrary.Law.Psu.Edu/Jlia/Vol11/Iss1/7

[458] Bodansky, Daniel, Legally Binding Versus Non-Legally Binding Instruments (August 31, 2015). Forthcoming In: Scott Barrett Carlo Carraro And Jaime De Melo, Eds., Towards A Workable And Effective Climate Regime, Voxeu Ebook (CEPR And FERDI) , Available At SSRN: Https://Ssrn.Com/Abstract=2649630

[459] David Bilchitz, A Chasm Between "Is" And "Ought"? A Critique Of The Normative Foundations Of The SRSG's Framework And The Guiding Principles, In Human Rights Obligations Of Business: Beyond The Corporate Responsibility To Respect?, Also See Mariana Olaizola Rosenblat, Emancipating Human Rights Protection From The State's Stronghold: The Need For Multi-Stakeholder Solutions, 11 PENN. ST. J.L. & INT'L AFF. 145 (2023). Available At: Https://Elibrary.Law.Psu.Edu/Jlia/Vol11/Iss1/7

under international law.[460] Such a multi layered mechanism that operates in a complementary fashion would be useful for the effective enforcement of corporate obligations.

5.7 – Multistakeholder Initiatives

The Multi-stakeholder initiatives (MSI) were founded as important transnational governance mechanisms as a measure to many of the major global business-related human rights and environmental crises of the 90s and 2000s. [461]They collate a range of corporate and non-corporate steak holders 'as formally defined coequals in sustained forms of interaction' and create rules which members are required to follow which could fill regulatory gaps where states have been unwilling or unable to regulate. [462] It essentially is any governance structure managed by non-state actors such as the private sector, civil society or a combination of both. [463] This generally non-binding and voluntary public/private partnership employs a range of strategies such as third-party monitoring, certification, reporting and rely on public awareness, boycotts, and social pressure as their ultimate enforcement tool.[464] Although there are some shortcomings of some multi-stakeholder instruments, it remains a valuable aspect of the efforts in combatting human rights and environmental violations perpetrated by corporations as the MSIs attempt to address governance gaps and improve business performance to evolve corporate responsibility.[465]

Several notable MSIs such as the Voluntary Principles on Security and Human Rights[466], the Extractive Industries Transparency Initiative (EITI) and the Kimberly Process Certification Scheme

[460] Nicolás Carrillo-Santarelli, A Defense Of Direct International Human Rights Obligations Of (All) Corporations, In The Future Of Business And Human Rights: Theoretical And Practical Considerations For A Un Treaty
[461] Https://Www.Msi-Integrity.Org/Not-Fit-For-Purpose/Background/, Also See Baumann-Pauly, D., Nolan, J., Van Heerden, A., & Samway, M. (2017). Industry-Specific Multi-Stakeholder Initiatives That Govern Corporate Human Rights Standards: Legitimacy Assessments Of The Fair Labor Association And The Global Network Initiative. *Journal Of Business Ethics*, *143*(4), 771–787. Http://Www.Jstor.Org/Stable/45022148
[462] BöHm,'Thepoliticsofmulti-Stakeholderinitiatives:Thecrisisofthe Forest Stewardship Council' (2015) 128:3 Journal Of Business Ethics 469.
[463] Fabrizio Caffaggi, New Foundations Of Transnational Private Regulation
[464] Mariana Olaizola Rosenblat, Emancipating Human Rights Protection From The State's Stronghold: The Need For Multi-Stakeholder Solutions, 11 PENN. ST. J.L. & INT'L AFF. 145 (2023). Available At: Https://Elibrary.Law.Psu.Edu/Jlia/Vol11/Iss1/7
[465] MSI Integrity, *Not Fit-for-Purpose: The Grand Experiment of Multi-Stakeholder Initiatives in Corporate Accountability, Human Rights and Global Governance*, July 2020.
[466] Voluntary Principles on Security and Human Rights https://www.voluntaryprinciples.org

(the diamond industry)[467] were created due to the lack of corporate accountability in jurisdictions with weak governance and violent conflict.[468] As a result of their operational activities and the location of their operations, certain industries face specific challenges such as the extractive industry. [469]As a response to the challenges, possibly driven by criticism from stakeholders, sectoral standards in relation to a wide range of corporate social responsibility have emerged.[470] These are collective initiatives and are generally reflected in the form of a framework to respect issues ranging from social to environmental. Taking the EITI as an example, this initiative aims to encourage more transparency and accountability in resource rich developing nations that are largely dependent on revenues from gas, oil and mining.[471] This initiative emphasizes reporting and tracking of payments and public disclosure of the details of financial flows whereby enabling citizens to be in a better position to hold government accountable.

It is essential to enforce clear industry specific standards where companies can be reviewed for the issues discussed in this thesis.[472] These standards should advocate for public accountability and create an equal playing field amongst common industries to prevent an actor from diminishing human rights activities and gaining unethical competitive advantage as a result.[473] Standards such as the MSIs are important tools to provide guides for corporations and it is sensible to build such standards at a sectoral level. The industry specific focus on issues could be more effective as the core activities of the same industry are usually similar whereby harms can be predicted, and specific measures can be put in place. Such as in the extractive sector the focus should be on human rights and environmental standards of supply chains whereas in the communication sector this focus could be shifted to issues such as freedom of expression.

[467] The Kimberly Process https://www.kimberleyprocess.com
[468] S. Jerbi – Assessing The Roles Of Multi-Stakeholder Initiatives In Advancing The Business And Human Rights Agenda
[469] S. Jerbi – Assessing The Roles Of Multi-Stakeholder Initiatives In Advancing The Business And Human Rights Agenda
[470] Ibid
[471] Alan S Gutterman 'Business And Human Rights Initiatives Of Governmental And Intergovernmental Bodies'
[472] Alan S Gutterman 'Business And Human Rights Initiatives Of Governmental And Intergovernmental Bodies'
[473] Https://Ethicalsystems.Org/Content/Human-Rights.

5.8 – Sustainable Development Goals

The world leaders adopted the 17 Sustainable development goals (SDGs) of the 2030 Agenda for Sustainable Development on September 2015 (taking effect on January 2016). The intended aim was that over a fifteen-year period up to 2030, the SDGs would be universally applied and that states would take action to end all forms of poverty, tackle climate change and fight inequalities.[474] Again, these goals are not legally binding, however states are expected to establish relevant domestic mechanisms in order to achieve the 17 SDGs.[475] There are measures in place for the monitoring and review of the SDGs through a set of global indicators created by the UN Statistical Commission. The 17 aims of the SDGs are[476]

1. End to Poverty
2. Zero Hunger
3. Good Health and Wellbeing
4. Quality of Education
5. Gender Equality
6. Clean Water and Sanitation
7. Affordable Clean Energy
8. Decent Work and Economic Growth
9. Industry, Innovation and Infrastructure
10. Reduced Inequalities

[474] Sustainable Development Goals https://sdgs.un.org
[475] Europe's approach to implementing the Sustainable Development Goals: good practices and the way forward https://www.europarl.europa.eu/cmsdata/160360/DEVE%20study%20on%20EU%20SDG%20implementation%20formatted.pdf
[476] https://sdgs.un.org/goals, S. Jerbi – Assessing the roles of multi-stakeholder initiatives in advancing the business and human rights agenda

11. Sustainable Cities and Communities
12. Responsible Consumption and Production
13. Climate Action
14. Life below Water
15. Life on Land
16. Peace, Justice and Strong Institutions
17. Partnerships for the Goals

Although the goals do not impose specific obligations onto corporations, it should be understood that businesses cannot thrive in a setting where poverty, inequality and environmental distress is prevalent.[477] Therefore, it's been discussed that companies should make conscious efforts by upholding recognizes standards and principles of human rights and the environment (amongst other relevant standards on labour, transparency and anticorruption) and embrace the SDGs as an opportunity to re develop the social contract between different layers of the society.[478] As such, they should collaborate with governments, consumers, workers and civil society to achieve the intended aims of the SDGs by implementing sustainable business practices.

5.9 – Access to Justice, Remedy and Prevention

There are various different aspects to access to remedy, as expressed in instruments such as the UNGPs. These range from compensation for victims to fines for corporations and businesses and the main goal is to 'counteract or make good any human rights harms that have occurred".[479] According

[477] https://sdgs.un.org/goals, S. Jerbi – Assessing the roles of multi-stakeholder initiatives in advancing the business and human rights agenda
[478] "Better Business Better World" also see Alan S Gutterman 'Business and Human Rights Initiatives of Governmental and Intergovernmental bodies'
[479] UN, OHCHR (2011), Guiding principles on business and human rights, June 2011

to the ECtHR, an effective remedy is either when it prevents a violation and/or its continuation or when it provides sufficient redress for any violation that has already occurred. [480]

Establishing appropriate rules for access to justice is of vital importance for victims of corporate abuse, however, preventing from harm to occur is also crucial. UNGPs, in its first and second pillars aim to prevent future harm via state's duty to protect and the corporate responsibility to respect human rights, while the third pillar provides for remedy in instances where abuse occurs.[481] An effective remedy could include injunctions or guarantees of non-repetition.[482] Furthermore, some sectors provide for enhanced access to injunctive relief such as in the context of environmental protection the Aarhus Convention requires party states to make necessary provisions in order for public authorities at regional, national and local levels to making these rights effective.

As such, preventative measures are also vital in access to remedy as it can strengthen measures and provide for structures to deal in cases when harm does happen. However, as discussed, the voluntary nature of the UNGPs leave room for improvement in the context of prevention. A more suitable prevention method can be seen as the implementation of judicial and or administrative sanctions by way of serving as a deterrent for unlawful or abusive behaviour. [483]

Reporting obligations are also an important aspect of prevention as well as access to remedy. As by way of an example, documents that a company may produce as part of its due diligence obligations could be beneficial for victims as evidence of the company's wrongdoing in any court proceedings as well as have a deterring effect on the company to not be involved in harmful acts.[484]

[480] Kudla v. Poland, No. 30210/96, also see Guide to Good Practive in Respect og Domestic Remedies https://www.echr.coe.int/documents/pub_coe_domestics_remedies_eng.pdf
[481] UN Guiding Principles, principle 25
[482] Fundamental Rights Report 2020 Available At:Https://Fra.Europa.Eu/Sites/Default/Files/Fra_Uploads/Fra-2020-Fundamental-Rights-Report-2020_En.Pdf
[483] Human Right Due Diligence Legislation in Europe – Implications for Supply chains to India and South Asia https://www.dlapiper.com/en-ae/insights/publications/2021/03/human-rights-due-diligence-legislation-in-europe
[484] France: French High Court allows case in Total Uganda oil case to go on https://www.business-humanrights.org/en/latest-news/france-french-high-court-allows-case-in-total-uganda-oil-case-to-go-on/, also see Fundamental Rights Report 2020 Available At:Https://Fra.Europa.Eu/Sites/Default/Files/Fra_Uploads/Fra-2020-Fundamental-Rights-Report-2020_En.Pdf

5.10 – Case Law Developments

In the EU level, recently, court cases relating to corporate due diligence measures and corporate duty of care have been publicized based on existing or newly enacted due diligence laws.[485] Previous chapters have touched upon some of these cases and legislations however further analysis will be provided as to see if these cases provide for appropriate measures to tackle the issues at hand. Few examples of these will be discussed below.

Firstly, France's relatively new legislation on due diligence has provided that citizens can have the opportunity to start court proceedings if a company doesn't comply with its obligations and several cases are currently pending. For example, local authorities and NGOs have started judicial proceedings against the oil company Total in 2020 for its lack of measures to mitigate the implications of its actions on climate change. [486] A further case was brought against Total concerning its oil related projects in Uganda as the claimants stated that Total's vigilance plan was inadequate in identifying potential adverse human rights implications of its projects as well as lacking in mitigatory measures. In January 2020 however, the French court decided that it was not suitable to deal with the case where it referred the case to a commercial court.[487] Later, in 2021, France's Supreme Court ruled in favour of the claimants and recognized the jurisdiction of the civil court.[488]

The Urganda[489] case was brought against the government of the Netherlands for failing to take sufficient measures to meet the requirements set under the Paris Agreement to limit greenhouse gas emissions and in December 2019, the Supreme Court decided that the Dutch state must reduce

[485] Jonathan Bonnitcha, Robert McCorquodale, The Concept of 'Due Diligence' in the UN Guiding Principles on Business and Human Rights, *European Journal of International Law*
[486] Fundamental Rights Report 2020 Available At: Https://Fra.Europa.Eu/Sites/Default/Files/Fra_Uploads/Fra-2020-Fundamental-Rights-Report-2020_En.Pdf
[487] Fundamental Rights Report 2020 Available At:Https://Fra.Europa.Eu/Sites/Default/Files/Fra_Uploads/Fra-2020-Fundamental-Rights-Report-2020_En.Pdf
[488] Total lawsuit (re failure to respect French Duty of vigilance law in operations in Uganda) https://www.business-humanrights.org/en/latest-news/total-lawsuit-re-failure-to-respect-french-duty-of-vigilance-law-in-operations-in-uganda/
[489]Urgenda Foundation v. State of the Netherlands, see Landmark Decision by Dutch supreme Court https://www.urgenda.nl/en/themas/climate-case/ , also see Backes, C. (., & van der Veen, G. (. (2020). Urgenda: the Final Judgment of the Dutch Supreme Court, *Journal for European Environmental & Planning Law*, *17*(3), 307-321. doi: https://doi.org/10.1163/18760104-01703004

its greenhouse gas emissions by 25% by the end of 2020.[490] There are several cases currently pending in the United Kingdom regarding parent company liability and duty of care. It was established in the well-known case of *Chandler v Cape*[491] that the parent company has a duty of care towards the employees of a subsidiary. [492] This issue was the focal point oof the case of *Lungowe v Vendeta*[493], where 2000 local Zambian villagers sued Vedenta for environmental damage that its subsidiary caused. It was decided by the Supreme Court in 2019 that the applicants had a right to sue Vedata in the UK courts which was a significant step towards enabling victims to access justice. Furthermore, the case of Okpabi v Shell[494] is of significance as it surrounds the deliberations as to whether and under what circumstances the UK established parent company of an MNC may owe a common law duty of care to individuals who suffer serious harm as a result of health, safety and environmental failures of one of its overseas subsidiaries as the operator of a joint venture operation. This case is pending before the United Kingdom Supreme Court, where the claimants have appealed to reverse the previous decision that Royal Dutch Shell does not have obligations for the environmental damage that its subsidiary Shell Petroleum Development Company of Nigeria caused.[495]

[490] Fundamental Rights Report 2020 t:Https://Fra.Europa.Eu/Sites/Default/Files/Fra_Uploads/Fra-2020-Fundamental-Rights-Report-2020_En.Pdf
[491] Chandler v Cape plc [2012]
[492] Fundamental Rights Report 2020 Available At:Https://Fra.Europa.Eu/Sites/Default/Files/Fra_Uploads/Fra-2020-Fundamental-Rights-Report-2020_En.Pdf
[493] Vedanta Resources PLC and another (Appellants) v Lungowe and others (Respondents)
[494] Okpabi and others (Appellants) v Royal Dutch Shell Plc and another (Respondents)
[495] ibid

Chapter 6: Conclusion

This thesis explored the multifaceted and complex issue of corporate accountability and the regulatory challenges in relation to human rights and environmental violations. The findings of the thesis have highlighted the significant gaps in the existing regulatory frameworks and the challenges faced in enforcement. Corporate accountability in this context is a difficult challenge that historically hadn't been effectively dealt with through the existing non-binding methods or frameworks.

Throughout this research, was observed that there is a common theme, where corporate sector's pursuit of profit prioritizes short-term gains over long-term sustainability, the wellbeing of humans and the environment.[496] Increasing globalization and the complex corporate structures of MNCs has further exacerbated these issues.[497] It was presented that, in the absence of a uniform international system, whereby MNCs are subject to specific regulations dealing with such environmental and human rights issues, the effectiveness of the mechanisms to hold corporations accountable for their actions remain insufficient.

It was analysed that this insufficiency in holding corporations accountable is particularly challenging in the discussion of human rights and the environment. The intersection of human rights and the environment as discussed in chapter represents a critical area of concern that demands further attention from scholars, policymakers, and society at large. The research findings and related case law have displays inextricable link between the enjoyment of human rights and a healthy environment.[498] It is now well recognized that environmental degradation, climate change, and

[496] Boffo, R., and R. Patalano (2020), "ESG Investing: Practices, Progress and Challenges", OECD Paris, www.oecd.org/finance/ESG-Investing-Practices-Progress-and-Challenges.pdf; also see Haessler P. Strategic Decisions between Short-Term Profit and Sustainability. Administrative Sciences. 2020

[497] Kim, Y., & Milner, H. V. (2019). Globalization, domestic politics, and regionalism: The ASEAN Free Trade Area (AFTA) in comparative perspective. Brookings Institution Press. https://www.brookings.edu/wp-content/uploads/2019/12/Kim_Milner_manuscript.pdf

[498] A Boyle, 'Relationship between International Environmental Law and Other Branches of International Law' in D Bodansky et al (eds), Handbook of International Environmental Law(OUP, Oxford 2006), also see Dinah Shelton 28 Stan. J. Int'l L. 103 (1991-1992)
Human Rights, Environmental Rights, and the Right to Environment, also see Human Rights and the Environment UNDG guidance Note https://unsdg.un.org/sites/default/files/2020-03/Human-Rights-and-the-Env

unsustainable resource exploitation directly undermine the fundamental rights and well-being of individuals and communities.[499] Moreover, certain groups, such as indigenous people, marginalized communities, and vulnerable populations, bear disproportionate burdens and face heightened vulnerabilities in the face of environmental harm.[500] The analysis has further demonstrated the challenges and limitations of current approaches to addressing human rights and environmental issues. Main problems stem from unclear legal systems, weak enforcement mechanisms, and power imbalances, which hinder the effective implementation of environmental and human rights laws around the globe. Additionally, the increasing complexity of environmental challenges necessitates a multidisciplinary and transboundary approach that transcends national borders that current regulatory mechanisms cannot adequately deal with.

Weak implementation and enforcement in different countries combined with complex corporate structures of MNCs create a more corporate friendly environment, where corporations at times can avoid accountability for human and environmental obligations or violations. Their expansive operations, spanning multiple jurisdictions and sectors, present both opportunities and challenges in the global world. The structure of MNCs, often characterized by complex networks, subsidiaries, and offshore entities, can lead to a lack of transparency and accountability, and social and environmental exploitation.[501] These complex global supply chains of MNCs can involve numerous subcontractors and suppliers, making it challenging to monitor and address human rights abuses, labor violations, and environmental degradation.[502] As a result, the analysis aimed to present the importance of effective regulatory mechanisms to govern the behavior of MNCs and ensure corporate accountability. As mentioned throughout, national governments play a crucial role in developing,

[499] United Nations Development Programme. (2022). *The critical connection between human rights and our natural world.* United Nations Development Programme. https://www.undp.org/blog/critical-connection-between-human-rights-and-our-natural-world
[500] See Chapter 4, section 4.4
[501] Olaizola Rosenblat, M. (2023). Emancipating human rights protection from the state's stronghold: The need for multi-stakeholder solutions. *Penn State Journal of Law & International Affairs, 11*(1), 145. Available at https://elibrary.law.psu.edu/jlia/vol11/iss1/7
[502] Owusu, E. S. (2021). Environmental degradation and human rights violation: A cursory overview of the potential of the existing frameworks to hold multinational corporations accountable. *Groningen Journal of International Law, 9*.

implementing and enforcing legislation that aligns with international standards and effectively regulates MNCs' activities. However, as regulations vary, it is essential to address the regulatory gaps that arise from differing legal systems, weak enforcement capacities, and regulatory competition between countries. Strengthening international cooperation and coordination is vital to overcome these challenges and establish a level playing field for MNCs. Implementing due diligence practices and transparency initiatives can further enhance accountability and promote more responsible business practices throughout the supply chain.

One of the topics of discussion in relation to improvement in this thesis has been the analysis of the content and the potential efficacy of the proposed binding treaty. It was discussed that the treaty needs to encompass comprehensive provisions that address a range of issues, including human rights, environmental protection, labor standards, and business ethics. It should establish clear obligations for corporations, outline mechanisms for monitoring and enforcement, and provide avenues for redress and remedy for affected individuals and communities. Which the proposed treaty aims to achieve, however, the ratification and effective implementation of the treaty by nation-states are essential. For a binding treaty to be effective, it requires widespread adoption and commitment from a significant number of countries. Ratifying states should incorporate treaty provisions into their national legislation and establish robust enforcement mechanisms. Further to this state governments must allocate adequate resources for monitoring, reporting, and enforcing compliance with treaty obligations. Effective coordination and cooperation among states are crucial to address the transnational nature of many of the discussed corporate activities that affect human and environmental rights.

However, regardless of the comprehensiveness of the proposed treaty, it is important to acknowledge that a binding treaty alone may not be sufficient to improve corporate accountability. It should be seen as part of a broader approach that encompasses multiple strategies. Voluntary

initiatives, industry-specific standards, corporate governance reforms, and regulatory frameworks at the national level all contribute to enhancing corporate accountability. A binding treaty can complement these efforts by providing a common baseline and setting higher standards for corporate behaviour. While a binding treaty can be a crucial tool in improving corporate accountability, its effectiveness depends on various factors. The design and content of the treaty, widespread ratification and implementation by nation-states, active participation of civil society, and the willingness of corporations to adopt responsible practices all contribute to its success. Access to justice, including access to effective judicial and non-judicial grievance mechanisms, should always be promoted by governments and related institutions to address violations and provide remedies to affected individuals and communities.

The overall research presents that, although there are some judicial and non-judicial mechanisms are available, these generally lack the necessary elements to be effective when faced with MNCs.[503] Victims are left to struggle to overcome a range of systematic and/or procedural challenges. The cases are severe ranging from serious violations of the right to life and health and are inherently formulated with gaps in regulation which create obstacles for victims to access justice. Regulatory mechanisms ranging from international, regional, domestic to non-judicial and voluntary initiatives provide for various different complex structures that attempts to resolve the issues in relation to this area of law however each framework comes with strengths and weaknesses. In the majority of cases, obstacles are greater due to the lack of power balance between parties. This means that even in the face of a well-functioning system they would struggle to find redress. Existing appropriate remedies do not take into account such challenges (such as access to evidence, lack of finances etc) whereby lacking effectiveness. Furthermore, enforcement as seen is a vital element in having

[503] European Parliament. (2021, March 10). *European Parliament resolution of 10 March 2021 with recommendations to the Commission on corporate due diligence and corporate accountability* (2020/2129(INL)). https://www.europarl.europa.eu/doceo/document/TA-9-2021-0073_EN.html

effective structural mechanisms that address the concerns brought on by corporations. Without enforcement even the most comprehensive frameworks will be rendered ineffective.

By addressing the gaps in the regulatory frameworks, fostering partnerships, promoting transparency, and empowering affected communities, it is possible to hold corporations accountable for their actions and mitigate the negative impacts they have on society and the environment. While this research has attempted to make valuable contributions to the understanding of corporate accountability and regulatory challenges in respect of human rights and environmental issues, there are several areas that warrant further investigation. Future studies should explore the role of emerging technologies, such as artificial intelligence, could enhance transparency and traceability in supply chains of MNCs. This can provide insights into more innovative solutions. Moving forward, it is crucial for policymakers to build upon similar research and continue exploring innovative strategies for promoting human rights and environmental sustainability. This includes continuing to develop and implement comprehensive legislation, enhancing enforcement mechanisms, promoting education and awareness, and encouraging sustainable practices across sectors. By prioritizing the protection of human rights and the environment in a mutually reinforcing manner, it will be possible to work towards a future where the rights and dignity of all individuals are upheld, and the natural world is preserved for generations to come.