

**The Legal Justification for an International Tribunal for Corporate Violations: Lessons from Nuremberg**  
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There is strong legal justification for a tribunal against corporate impunity drawing on the standards that individuals were held to by the Nuremberg war crime tribunals. Corporate social responsibility is largely accepted as a mechanism to hold private corporations responsible for their actions. However, given the voluntary nature of this standard, the failure to comply or reckless and negligent actions by transnational corporations does not result in significant legal consequences (Collier, 2010). The Deepwater Horizon Oil Spill by BP in the Gulf coast is reflective of this negligent and reckless action by transnational corporations to secure profit. It is worth noting that despite the CSR measures taken by BP, and the monetary compensation, the effects of the oil spill continue in different parts of the shoreline, adversely impacting communities and the environment. This shows the limitation of corporate social responsibility, and calls for stronger binding legal measures.

Corporate accountability is also beleaguered with many legal limitations. A major drawback in holding corporations legally accountable has often been a reliance on the corporate veil; as courts have held that there is a clear distinction between the corporations and their directors and hence exempted them from responsibility. Not being bound to legal consequences has in practice served as a loophole. International human rights law remains largely state-centered and also, does not adequately account for abuses of human rights by transnational corporations, directly or indirectly. Even though there are quite a number of human rights lawsuits at the domestic level, national jurisdictions are insufficient in preventing abuses and in offering remedies to victims. Both nationally and internationally, thus there are very little legal safeguards to ensure compliance with social responsibility by corporations such as taking measures to conserve the environment or mitigating the effects of climate change, and also, bringing accountability in cases of human rights violations.

Additionally, this also points to the absence of a uniform system of enforceability, through a universal legal mechanism, despite the growth in international trade. The closest example to a universal mechanism is the World Trade Organization's dispute settling tribunal, but this system is beset by bias and conflict of interest. Thus, the vacuum in legal mechanisms to hold transnational corporations accountable, demonstrates the need for having an International Corporation Tribunal. My paper argues that the solution for corporate impunity and how to handle "who is accountable?" is to create an International Corporation Tribunal, similar to the post-World War II tribunals that were set up in order to bring to justice the individuals who had the greatest responsibility in the atrocities. Mirroring the criminal justice system in equivalence to the International Criminal Court, it has been noted that crimes against humanity have decreased in part because of the existence of the Court.

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Similarly, the reckless and negative activities of transnational corporations on the community will reduce if an International Corporation Tribunal is established. The establishment of an International Corporation Tribunal will allow for the hearing and determining of corporate human rights violations globally, because it will not have geographic limitations as domestic law, so long as the state is a signatory to the convention. The tribunal will thus have global jurisdiction over all cases of corporate violations, as long as they have merit and the domestic courts lack the capacity to prosecute them satisfactorily. The institution will have the sovereign mandate to ensure that the activities by corporations in the transnational arena are in compliance with international human rights standards, and also, protect and preserve the integrity of every concerned stakeholder.

The institution of the tribunal will result in corporations placing a greater value on socially responsible businesses. Corporations that take proactive and diligent measures to ensure that their activities are conflict-sensitive will be rewarded in the long-term by escaping expensive litigation and punishments in the international corporation tribunal; in doing so, they will build a reputation as responsible commercial actors, gaining access to the most profitable markets in the world.

### **Historical Context**

The origin of institutional mechanisms to address human rights violations by private actors in international law can be traced to the war crimes tribunals of post-World War II period: following the war, an International Military Tribunal (IMT) was created in Nuremberg, Germany. The main objective of this tribunal was to hold both high-ranking military officials and civilians accountable for systematic human rights violations committed by the Nazi regime; this had been significant in trying and in bringing justice to the victims. It is worth noting that the prosecutors of the trials at Nuremberg recognized that directors and shareholders of big German companies played a critical role, both in facilitating and supporting the Nazi administration and the crimes it committed (Jescheck, 2004).

After the Nuremberg trials, there were other tribunals often referred to as the *Subsequent Nuremberg Trials* that were conducted before British and U.S. Military Tribunals. The United States military tribunal tried owners and high-ranking corporate officials of Krupp firm, Flick trust, and IG Farben trust. They were accused for aiding and abetting inhumane acts committed by the Nazi regime, including crimes against humanity, such as torture and slave labor, war crimes, such as pillaging and slave labor, connivance in the crime of aggression and mass murder. In 1946, the British Military Tribunal was created to hear the *Zyklon B* case, which convicted Bruno Tesch and Karl Weinbacher, owner and general manager of Tesch and Stabenow respectively, for aiding and abetting murder. This company supplied a pesticide called Zyklon B to the Nazi regime, which was used to annihilate Jews held in the gas chambers of concentration camps. Weinbacher and Tesch were found guilty, despite the fact that they were not physically present at the concentration camps, for supplying the pesticide used to kill prisoners in the concentration camps (The United Nations War

Crimes Commission, 1947). The military tribunals made a significant contribution to international law, primarily by demonstrating that companies are bound by international criminal law, in as far as crimes against humanity and war crimes are concerned. Before the Nuremberg Tribunal, international law was believed to concern states only. However, the Nuremberg and *Subsequent* Nuremberg Trials made it clear that international law imposes duties not just on states, but also on individuals (Lauterpacht, 1970).

### **Social Contract and Private Entities**

The notion of social contract can be traced to the 16<sup>th</sup>-17<sup>th</sup> century liberal philosophy and is foundational to modern notions of democracy and the relationship between government and its people. Philosophers of this era such as Thomas Hobbes, John Locke, and Jean Rousseau, argued that government was the result of a mutually accepted contract between citizens and the state. Hobbes claimed that man in the state of nature lived under perpetual condition of civil war and insecurity, where individuals could act as they please in the absence of a strong higher governing body. Hence, they entered into a social contract, in which the people gave all their power to one sovereign, called the Leviathan, to manage the affairs of the state and provide security (Williams, 2016). According to Locke, power belongs to the citizenry who, on their own will, delegate part of their power to the state so that participation in the sharing of resources among all members of a community may occur. Although, they differ on the nature of social contract, the core foundations of the concept as a mutual agreement between individuals and the government are clear.

This spirit of the social contract dominates state society relationship in our modern and highly complex and industrialized global economy (Walsh et al., 2003, p. 860). To move away from a state of undefined rights and perpetual conflicts in the struggle to control shared assets like water and land, citizens must agree to respect the rights of others in exchange for assurance that their rights too will be protected. Those who are found to have violated the rights of others, such as by trespassing, are punished (Hilty & Henning-Bodewig, 2014). Whereas the scope of rights continues to expand, especially with continual progression in human rights, the protection of individual rights through the transfer of authority to the state remains an integral component of the social contract. Over the years, the rights that the state protects have significantly expanded, including the right to property ownership and the right to associate (Hilty & Henning-Bodewig, 2014). Because citizens have given authority to the state, the institution performs the role of mediator between the society and its individuals, as well as among individuals. In the U.S., the Bill of Rights offers a framework within which the rights and obligations of citizens and the state are elucidated.

However, issues dealing with corporate-citizen relations are outside the realm of rights, despite corporation's vast economic and political influence, and have been left to judicial and legislative procedures (Walsh et al., 2003). In the United States, numerous court decisions have strengthened the position of the corporation as an entity with numerous privileges and protections that only natural persons enjoy. For example, a corporation also enjoys the freedom of

speech and the freedom to participate in a political process by making political contributions.

The rise of the corporation as a new actor in society, at par with the citizens or the state, began in the 19<sup>th</sup> century, with the first state-chartered company- Dutch East India and the British East India Company. They were trade monopolies that enjoyed significant influence, resources, and power backed by royal mandate. As companies expanded their trade operations, the need for capital grew while the state's dominant control became subordinate. During this time, entrepreneurs significantly expanded their enterprises, transforming their relationship with the state from mercantile to competitive. Although companies still relied on government to issue their operating license through the charter process, the emergence of the corporation effectively challenged the sovereignty of the citizenry (Walsh et. ales, 2003, p. 865). Unlike the state, in which the citizenry have authority to set up or remove those in power, no similar accountability was defined in the relationship between corporations and citizens.

Additionally, given the scarcity of capital and the need to expand operations, firms allowed stock options. This introduced commitment to investors as a key factor in defining a company's obligations to the society, recognizing the primary obligation to stockholders to maximize their returns (Walsh et al., 2003, p.870). But this changed in the early 1900s; the supremacy of stockholders was softened (but it never received any serious challenges), workplace standards were enacted to protect the rights of employees, and anti-trust laws controlled monopoly behavior. The SEC was created in the 1930's to supervise the capital markets; these actions were aimed at promoting confidence and transparency among investors (Binney, 2006).

Even so a regulatory environment stipulated change in the early 20<sup>th</sup> century, the authority of capital in shaping corporate-societal relations was still maintained. The next important phase of restrictions was the spate of environmental regulations carried through the 1960's and 70's (Lydenberg, 2005). This emerging movement indirectly considered the environment as an authentic stakeholder in defining obligations of companies, and firms were required to operate within specific limits in relation to the environmental commons. Regulations setting a ceiling on how corporations used resources in order to safeguard public health and the environment was a major development in the advancement of business-societal relations. To comply with these rules, companies had to allocate a percentage of their economic resources separate from dividends and earnings, resulting in a reduced return to stockholders. This notion of social contract between society and business weakened of stockholder supremacy, at least temporarily (Lydenberg, 2005, p.47). The politics of Prime Minister Thatcher and President Reagan changed this culture through their support for absence of government control, privatization, trade liberalization, and reduced taxes. Unchecked capitalism, they argued, was the only practical economic system in the globalization era. As a result, governments took a back seat and civil society emerged as a watchdog, exerting limits on corporate behavior. However, without governmental support, civil society actors had limited legal capacity to bring change, allowing corporate impunity in cases of human rights violations. For example, Rio Tinto Plc.'s operations in Papua New

Guinea and the ensuing rights violations point to the absence of legal accountability of corporate actors. It is alleged that Rio Tinto's copper mining operations in Panguna, Bougainville led to the displacement of villagers, with a significant portion of rainforest in the country destroyed (Joseph, 2004, p. 113). The waste generated from the copper and gold mines damaged the country's forests, polluted its rivers, and affected residents living around the mines. The local government supported the mining operations as they received 19.1% of mining profits from Rio Tinto Plc. Rio Tinto, with the local government, used blockade to curtail local resistance against the mining operations; approximately 15,000 people were murdered, while many more were tortured and died because they could not access medicine because of the blockade.

In the absence of legal relief in domestic legal systems, a class action lawsuit was initiated in the U.S. District Court against the multinational company Rio Tinto Plc., under the Alien Tort Claims Act, an old statute that allows foreign nationals to litigate in US courts for gross human rights violations, when the defendant is present in the US. The plaintiffs alleged that they were victims of human rights violations and they provided evidence that the MNC's operations damaged their villages, their environment, affected the health of inhabitants, and discriminated against the villagers based on their race. Additionally, they claimed that the MNC encouraged a civil war and a military blockade that led to the torturing, murdering, and bombing of innocent civilians, with women raped and villages burned (Joseph, 2004). In this case, although the U.S. District Court established that human rights abuses occurred, it dismissed the case on the grounds that the proceedings included political questions and state actions that could not be appropriately addressed by the U.S. courts (Joseph, 2004, p. 115).

This case brings into question corporate responsibility and how can communities hold MNCs such as Rio Tinto accountable, given their significant political and economic strength and the backing they receive from influential governments? The people of Bougainville did not approach their own domestic courts for justice because they knew too well that it was impossible to prevail, considering that the government was directly involved in the criminal action. Because of this, the citizenry decided to seek remedy in an international forum, yet their efforts were unsuccessful. Thus it appears logical that if companies abuse human rights and commit crimes in search for profit, they must be effectively held responsible for their conduct. Thus, for companies to be socially responsible, there must be sufficient domestic oversight and legally enforceable international regulations to ensure responsibility.

### **Corporate Social Responsibility: Potential and Limitations**

In light of human right violations, mechanisms of corporate social responsibility have been instituted to underscore social obligations of private actors. Even though this is a relatively new idea, the key principle that companies have a responsibility to society beyond the objective of maximizing profits, gained traction many centuries ago. For example, around 1700 B.C.E., King Hammurabi of Ancient Mesopotamia introduced a code under which farmers and builders would be put to death if their negligence resulted in the inconvenience or death of other citizens (Asongu, 2007). Similarly, in Ancient Rome, senators protested

against the failure of companies to contribute sufficient taxes to finance military campaigns. However, in more modern context, this is balanced with shareholders interest. For instance, in 1622, dissatisfied stockholders in the Dutch East India Company issued pamphlets expressing anger about management secrecy and self-enrichment at the expense of shareholders (Hickey, 2009). Companies that were involved in CSR activities were critiqued for spending money that belonged to shareholders. In 1917, Ford's decision to increase wages and decrease working hours for workers, incited criticism by the Wall Street Journal as "blatant immorality" promoting a culture of rewards for no offered value (Lewis, 1976).

Although CSR is commonly viewed as a threat to the autonomy of the free market, it has gained traction in the works of scholars and practitioners as an effective mechanism of corporate responsibility. Theodore Krep defined this as 'social audit,' referring to the action of businesses reporting on social responsibilities (Blowfield, 2007). One of the most detailed analyses of CSR is by Archie B Carroll. Carroll has proposed a pyramid approach to understanding social responsibility of corporations, which includes economic, legal, ethical, and philanthropic responsibilities (1991, p. 39-48).

**Economic Responsibility.** It recognizes profit as the primary motive of business. Buchholtz & Carroll contend that while economic responsibilities may not include social component, businesses cannot survive if not socially responsible (Carroll & Buchholtz, 2014, p. 56). For instance although many activities that businesses undertake are economically based, few of these activities involve only economic interest; for example, compliance with international accounting standards is both an economic and a legal responsibility. Additionally, they argue that businesses are required to give back to communities in the form of services and labor, demonstrating an economic responsibility to both survive and to give back to society (Carroll & Buchholtz, 2014).

**Legal Responsibility.** It includes compliance with regulations and laws in the host countries or states where they operate. It incorporates compliance (passive, restrictive, and opportunistic), avoiding civil litigation, and anticipating the law (Schwartz & Carroll, 2003). Passive compliance implies compliance with the law without being aware of it. For example, if a company offered child support, and later this turned out to be a legal requirement, the company did not anticipate the law, but still acted as the law required, coincidentally being lawful. Similarly, restrictive compliance suggests that a company may wish to pursue a particular course of action, but it cannot because it is restricted by legislation. For example, a company would wish not to give out part of its profits as taxes, but the law states that taxes have to be paid. The company has to comply with the law, and therefore must pay. The third type of compliance, opportunistic compliance, is exemplified by a company selecting a particular jurisdiction due to particular actions being regarded as legal, even as they may not be legal in the company's country of origin. For example, a company may move its base to Asia to benefit from tax exemptions or because the requirements on labor standards are lower (Schwartz & Carroll, 2003). Apple's employees in the U.S. may be earning

more than their counterparts in China, due to local laws and protections in place for working standards in the US. This may be regarded as unethical behavior if employees in China are working under more severe conditions but are being paid much less. However, in both instances, the company is complying with the laws of the countries in which it operates. The second form of legal responsibility following compliance is the act of avoiding civil litigation. Here, a company decides to discontinue particular activities, which may turn out to be illegal in the future. For example, a product may be recalled from the market because there is a high risk of harm to children, while there also might be a high probability that the government will eventually compel the company to withdraw it from the market. Another example is a business that stops the production of particular products because of an adverse impact on the environment, in correspondence with legal standards. The final form of legal responsibility is the anticipation of the law, regarded as perhaps the most proactive business strategy. Under this method, businesses expect particular legislation; however, because the process may be lengthy, the business commences the implementation of particular standards that will likely be a requirement of a forthcoming updated law.

**Ethical responsibilities.** Unlike the legal and economic responsibilities, ethical responsibilities are not expressly defined. Ethical responsibilities are largely determined by the society in which the business operates; these expectations include values, norms, standards, and expectations that the stakeholders and the society consider to be just and fair (Schwartz & Carroll, 2003). Besides, values and ethics come first before laws, acting as the driving force, which necessitates the creation of new laws and regulations (Schwartz & Carroll, 2003, p. 515). For instance, in the United States, the Civil Rights Movement of the 1960s emerged in response to the nation's shifting values and ethics, ultimately inspiring changes to laws.

**Philanthropic responsibilities.** This involves societal expectations that businesses give back to the community. These responsibilities make companies 'corporate citizens'. (Schwartz & Carroll, 2003, p. 519) Nonetheless, businesses are often reluctant to commit to philanthropic responsibility because they consider it voluntary, and as such, a business does not have an actual responsibility to give back to the community (Schwartz & Carroll, 2003).

Despite the detailed analysis of the nature of responsibilities and commitment, there is equivocality on why companies should engage in CSR, with the response being twofold. One response has been that businesses engage in CSR because of enlightened self-interest, while others, mostly scholars, argue that since businesses operate within a society, the use of CSR is necessary for companies need to commit to the larger good of society (Blowfield, 2007, p. 685). The enlightened self-interest view holds that incorporation of CSR in business practices eventually results in a competitive advantage (Davis, 1973). One of the best examples to demonstrate competitive advantage is the case of cheap labor employed by corporations in the developing world. Multinational corporations

recognize that cheap labor comes at a beyond-financial cost. Because of the sweatshop campaigns in the mid-1990s, demonstrations at the 1999 World Trade Organization meeting, and the continuous demand for CSR, many multinationals, as part of their CSR initiatives, have adopted codes of conduct, which govern their suppliers' operations. More specifically, codes of conduct are private instruments that permit companies to self-regulate and respond to the increasing demands from consumers, which may otherwise result in more stringent regulations. Through codes of conduct, companies are able to create a marketable brand image of social consciousness: as investors and consumers make shopping decisions based on conscience, they are very much interested in labor practices. For corporations that depend on brand, success relies on the positive emotional response from their customers (Locke et. al, 2007). Such as in the apparel industry, brand image is an important asset. For example, in the 1990s, Nike's branding issues demonstrate the negative economic effects a company may experience in dismissing human rights violation allegations. When Nike's CEO, Phil Knight, was faulted for running sweatshops in Indonesia, he refused to take responsibility for the practices of Nike's contractors in Indonesia. However, the corporation's position changed when the company was widely linked to the exploitation of woman and child labor. This led to a decline in the company's market capitalization and brand reputation, forcing Nike to introduce a series of public relations campaigns and establish a code of conduct in 1992. The negative reputation that Nike acquired was difficult to shake: as late as 1998, Nike's merchandise was still associated with low wages, arbitrary abuse, and forced overtime labor. Through a number of CSR initiatives, Nike has emerged as a leading industry player in CSR and now uses the strength of their brand as a source of competitive advantage.

Others believe that business that takes into account the needs of the community will develop a better community for doing business (Galbreath, 2010). There are numerous examples indicating that an improved community leads to increased profits for businesses in the long-term. For example, employees will be more willing to work for an organization that cares for its workers, investing in social improvements in the community may lead to reduced crime rates, lessening the need for protection and also, enhance positive publicity. Maignan & Ralston, note that in the United States, CSR is used as a tool for marketing or managing impressions to influence stakeholders' perception of the business (2002). Additionally, CSR measures help companies avoid governmental regulation and receive incentives through proactive approaches (Carroll & Shabana, 2010). Lesser regulations is a positive outcome for businesses as it provides the freedom to make independent decisions, an important requirement for a business to remain competitive and in sustaining their market initiatives (Davis, 1973, p. 322). From a pragmatic standpoint, a point that Davis emphasizes is that it is better to prevent rather than to cure, stemming from the notion that businesses have the opportunity to either implement programs within society, or to leave everything to the state (1973, p. 325). Leaving the entire burden to the state can benefit businesses in the short-term by limiting costs, however, if the execution of these programs is poor due to limited financial and human resources, the quality of lives and wellbeing of the



society will diminish, making it difficult for businesses to run their enterprises as smoothly as they wish. Besides, it might be the case that businesses are better endowed with resources to innovate, as compared to the government, resulting in higher quality and efficiency of social projects.

Supporters of the social role of business, emphasize the value of paying attention to society's interest on the basis that businesses have specific, inherent obligations to the society as part of a social contract thus directing business actions to conform to social values (Wartick & Cochran, 1985; Wood, 1991). This view holds that the role of business in society is far greater than the provision of goods and services and making profits. They maintain that businesses are social institutions whose responsibility is not only to their shareholders, but also to the larger society (Klonoski, 1991). Some scholars even argue that businesses exist at society's pleasure (Weaver, Trevino, & Cochran, 1999).

The main argument against CSR can be found in the works of Milton Friedman and other conservative scholars, being that the primary goal of any business organization is to maximize shareholder returns, having no responsibilities to the larger society. As Friedman's criticism of CSR standards indicate, the best way companies can benefit society is by ensuring profits are effectively distributed to shareholders, who in turn can make charitable contributions or engage in other socially responsible initiatives which they may consider socially and financially appropriate. Other critics hold that weak CSR initiatives limit ability of CSR's to bring corporate accountability: for instance, "green washing" by companies, whereby substantial resources are spent in advertising being 'green' (that their operations take environmental concerns into account) instead of allocating these resources to real environmentally sound practices. Opponents of CSR consider such actions misleading, aiming only at shaping public opinion about their business without actually benefiting the environment or the society at large (Idowu, 2009).

Both the rationale for CSR and the discussion on its limits points that despite its growing presence to commit corporations to provide socially beneficially services, only CSR measures cannot bring legally binding accountability.

### **International Law and Corporate Accountability**

The rapid expansion of the global marketplace has overtaken the instruments of governance, permitting companies to profit in the short-term, through cheap, unregulated labor, with little regulation since in many instances transnational companies fall outside the territorial jurisdiction of states. Despite numerous measures in various international forums, there is no universal legally binding measure to hold corporations accountable. For instance, the International Labor Organization has formulated comprehensive labor standards through its recommendations and conventions, but the institution lacks the capacity to enforce these regulations. The World Trade Organization can impose economic sanctions for noncompliance, but has refused to accept linkages between labor standards and trade conditions, noting that the ILO is the most appropriate oversight agency. Other channels of international law, such as bilateral and multilateral trade agreements imposed on foreign trading partners,

have equally failed to strengthen human rights standards because they recommend policies to foreign states, failing to take into account the specific economic and social conditions in those economies. Similarly, the application of the U.S. law is confined to its domestic borders unless an express legislation by Congress creates an extraterritorial application of federal statutes. Even then, American law with extraterritorial application can only apply to American citizens and not the citizens of foreign countries. The most notable exception to this rule is the Alien Tort Claims Act, permitting foreign country nationals to file suits against U.S. companies in American courts for injuries caused outside of the United States. All of these institutional mechanisms suggest that both domestic and international protections against corporate impunity are weak. The following sections outline the effectiveness of international law standards.

### ***International Legal System***

At the international level, there are several treaties in place, which attempt to establish minimum standards for civil and criminal liability for corporate behavior. For instance the Anti-Bribery Convention by the OECD, member countries are required to criminalize all acts of bribery involving foreign public officials and create liability for legal persons (Marketwire, 2005). Similarly, the United Nations' Convention Against Corruption requires all parties to issue administrative, civil, or criminal penalties for the private sector, establish liability of legal persons, and recognize the rights of individuals to launch legal proceedings for compensation for the damage suffered due to corruption. Other examples of international treaties that provide legal protection from harm include UN Convention against Transnational Organized Crime, Council of Europe Convention on Cybercrime, and the Basel Convention on the Control of Transboundary Movements of Hazardous Waste. Although these treaties exist to help victims of corporate misbehavior, the treaties have inherent limitations. To begin with, their scope is narrow and provides common standards only on a few issues, including pollution, corruption, and bribery. Secondly, they do not generally address human rights and do not offer liability standards related to globally recognized human rights.

### ***ILO Standards***

ILO standards include guidelines for multinational corporations to respect human rights and comply with particular labor and environmental standards. For example, the ILO has developed safety and health codes of practice for various industries including agriculture, coalmines, iron, and steel industries. The OECD guidelines include recommendations for combating bribery and strategies for employment and industrial relations. However, the main weakness of these standards is that they do not have the binding charter, and as such, they are referred to as "soft law" (Simons, 2012). One of the most important environmental standards that have been used to hold corporations accountable is the 'polluter pay principle': under this principle, companies that cause harm and pollute bear responsibility and pay for the damage. For example, in the 1989 *Exxon Valdez* accident where the company's oil tanker poured crude oil into Alaskan waters, the U.S. government and the state of Alaska fined the company

\$125 million. The company was also required to provide an additional \$900 million to finance environmental projects and clean up the shoreline, forcing Exxon to engage in a broad and costly clean up exercise (Etkins, 1999).

### ***International Criminal Court (ICC)***

Because international law primarily concerns states, the UN system lacks a specific mandate to monitor the activities of non-state entities, including companies. Apart from the International Criminal Court (ICC), there is no platform internationally that can hear cases against individual corporate executives. However, because the court has limited capacity, it can only handle a small percentage of international criminal cases. Since corporate employees only perform a supportive role and are distantly located from the scene of the crime, they are not considered a priority by the ICC prosecutor's office (Gjølberg, 2010). An important weakness of the ICC is that the U.S. is not a signatory; it is worth noting that to date, no major case involving corporate human rights violations has been heard and determined by the ICC. However, in Rwanda, two directors of the RTLM radio station were successfully convicted for their role in inciting genocide within the country.

### ***Accountability at the Domestic Level***

Corporate legal accountability for human rights violations in domestic courts falls under criminal and civil law. Gross human rights violations, including crimes such as torture, forced disappearance, slavery, and killings are both a violation of national and international criminal laws (Lajoux & Martel, 2013). While criminal accountability is only applicable to individual persons, civil liability is much broader and applies to both individuals (company management and officials) and corporate entities. Complicity of a multinational corporation in gross violation of human rights may either be considered a civil or criminal liability based on three factors. The factors critical in determining whether or not a corporation has been complicit in the violation of human rights, include: it must be established beyond any doubt that the conduct of the company facilitates, exacerbates, or enables the abuse of human rights. Second, it should be proven that the corporation knew that its conduct would lead to a violation of human rights (Pak & Nussbaumer, 2009). Finally, proximity to principal perpetrator of abuse of human rights must be considered.

**Criminal liability.** In most of the cases, domestic legal systems have some limitations, often focusing on cases of aiding or abetting commission of a crime. A prime example is the *Monsanto* case in which the court tried to say that even a corporation is capable of committing a crime, and thus there is criminal liability even in regard to corporations (International Monsanto Tribunal, 2017). It is important to note that different countries have different thresholds and requirements for establishing complicity of an individual or of an entity (Pak & Nussbaumer, 2009). In some countries, proving the aider's knowledge of the perpetrator's ill intention while still offering help makes the aider criminally responsible for the human rights abuses of the perpetrator.

The trial of Frans van Anraat, a Dutch national in the District Court of Hague for assisting Saddam Hussein shows the working of criminal law. In this

trial, the prosecution was able to prove to the court that Anraat was complicit with the crime of genocide that was committed by the Saddam Hussein against the Kurdish population (*Public Prosecutor v. Frans Cornelis Adrianus van Anraat*, 2005). It was established that Anraat supplied thiodiglycol, a dangerous chemical that is often used in producing mustard gas, to the Iraqi government: it was this chemical that the government used to commit the mass murder of innocent Kurdish civilian population. Anraat, it was established, had full knowledge of the Iraqi government's plans for genocide and hence, the Court ruled that Anraat was responsible for committing crime against humanity in Iraq, sentencing him to a 17-year jail term. Such cases have been a reminder to TNCs and their top leadership that if their behavior can be linked to acts of human rights abuse, then the law shall hold them individually and collectively responsible. In some other jurisdictions, it must be proven that the aider and the perpetrator had the same intention and acted collectively to violate human rights, which makes it difficult to prove. In such instances, TNCs' officials often go without being punished or get very light punishments despite having participated in activities which led to serious violations of human rights.

**Civil liability.** Civil litigation, as opposed to criminal litigation, is always seen to be a more appropriate means of providing justice to victims of human rights violations. In civil litigation, the primary goal is to provide remedies such as compensation, restitution, or a guarantee of non-repetition of a specified criminal act. One of the biggest advantages of civil litigation is that the victim can initiate action independent of the state, as human rights will effectively be evoked. It is often said that civil litigations have a major impact on the responsible companies due to the associated economic loss and damage of reputation that may harm operations, as firms will avoid instances leading into civil litigation because of the potential economic consequences (Pak & Nussbaumer, 2009). Like criminal liabilities, civil claims within a given domestic jurisdiction have standards and peculiarities for admissibility. In most of the cases, the interest of the court is often to establish whether a given conduct passes the test of negligence and intent. In some jurisdictions, the prosecution needs only to prove that the TNC ought to have foreseen the consequences of their actions but effectively failed to do so, through the negligence of ignoring relevant precautionary measures. While these tests can be effective in prosecuting ill-intentioned and negligent TNCs, the burden of proof is not easy and the process cannot be adapted to a wide range of actors and contexts. Sometimes, dealing with companies that have subsidiaries operating autonomously or semi-autonomously is challenging (Hoffman & Stephens, 2013). For instance, if a parent company has subsidiaries overseas and one of the subsidiaries is engaged in activities in violation with human rights law, then it may not be easy to conjoin the parent company in the case against their subsidiary, meaning that the liability will be limited to the subsidiary. This occurs as the law recognizes each of the subsidiaries as independent legal entities responsible individually for their actions, also indicating that victims cannot demand larger compensations from the parent company unless such a company can be proven directly responsible for ill-intent or negligence.

Another problem of civil litigation is that claims are often subject to limitations of statute, with many jurisdictions operating under the 'loser pays' principle, demanding that the losing party pays all of the legal fees (Pak & Nussbaumer, 2009). This principle often discourages financially challenged individuals from pursuing cases against TNCs, which have financial resources for fear of losing the cases and being subjected to further consequence in paying all associated costs.

The United States *Alien Tort Claims Act* is considered one of the best legal mechanism that allow the victims of human rights abuse to file cases against TNCs, irrespective of the nationality of the victims or the companies, if the perpetrator is present in the US. The statute grants American federal courts the jurisdiction over civil actions filed by aliens for tort, committed in direct violation of treaties with the United States (Pak & Nussbaumer, 2009, p. 42). It is widely believed that the statute was enacted in response to frequent attacks targeting diplomats, with the limited jurisdiction of the Continental Congress to offer redress of harm inflicted upon them by local companies. This statute largely draws its authority from customary international human rights law, which prohibits torture. Although an old statute of 1898, Alien Torts Claim Act gained attention in the 1980s with the case of *Filaritiga v. Irala-Pena* in the Second Circuit of the United States Courts. In this case, the Second Circuit court using the ATCA, held that federal courts had jurisdiction to hear cases of violations of international law that occurred outside the jurisdiction of the US; since then, many cases relating to violations of international law have been heard, with the ATCA having been applied to hold states, corporations, and private actors accountable for human rights violations (Kaleck & Saage-Maass, 2010).

The statute allows victims to sue corporations for violations, irrespective of their geographic area of operations in the United States if it is proven that their actions violate international human rights law and the corporate actor is registered or is legally present in the US. In cases where domestic courts have been weak in pursuing violators, victims from various parts of the world have used this forum to sue TNCs. Many victims consider these courts as their only option to receive compensations for the injuries they have suffered.

The United States courts have been very receptive to international human rights cases. Considering that the justice system in this country is not easily corruptible, as is the case in many developing nations, it can be seen that a high number of victims come from developing countries to the United States in order to sue large corporations for abuse of their rights. This trend has forced U.S. courts to set high standards for admissibility of these claims, ensuring that only those that are highly justified are accepted for trial, often applying the policy of *forum non conveniens* to weigh facts and to determine if they have jurisdiction over such cases before allowing their admission (Hoffman & Stephens, 2013). This policy seeks to determine if there are other alternative forums where such cases can be satisfactorily addressed without trying them within the United States; if other forums exist where cases against TNCs can be addressed, then federal courts may consider referring the cases back to such forums. Based on this high threshold, the cases selected for trial are often those, which cannot be fairly addressed in other forums.

Another principle, which may be evoked by U.S. courts to dismiss applications of foreign complainants, is the *acts of state doctrine*, which holds that the U.S. courts should not act in a manner that may suggest the making of foreign policies, as they are not internationally entrusted with this role (Cherry, 2012). These limitations mean that although the U.S. *Alien Tort Claims Act* may offer the best forum where plaintiffs from all over the world can seek justice against TNCs, the United States courts often dismiss such cases on legitimacy grounds. For example, in the case of *Wiwa v Royal Dutch Shell*, in which Shell was alleged to have been involved in supporting Nigeria's military in operations against the Ogoni people, as the company made sure that nine people were convicted and executed, including the bribing of witnesses to testify against them. In 2009, the Royal Dutch Shell agreed to a settlement of US\$15.5 million, donating \$5 million of these funds to a trust that would benefit the people of Ogoni (Kaleck & Saage-Maass, 2010). These cases provided hope that multinational corporations could be held accountable for their human rights violations. However, in September 2010, the decision in the Second Circuit Courts in *Kiobel v Royal Dutch Petroleum Co.* brought a completely new dimension to the issue. The court held that the liability of companies is not recognized under customary international human rights law, and as such, multinational corporations cannot be held to account under ATCA (Kaleck & Saage-Maass, 2010). Furthermore, on February 4, 2011, the Second Circuit court rejected the request to reconsider the September ruling in *Kiobel*, emphasizing that the ATCA jurisdiction does not cover civil actions brought against companies (Simons, 2012). This indicates that ATCA has its own inherent weaknesses and it cannot be relied upon as the only tool to address corporate human rights violations.

### **Market Mechanisms for Corporate Accountability**

**Voluntary Codes of conduct.** From the 1970s, corporate behavior and its negative impacts on human rights and communities has generated much debate. Nonetheless, at the time, the response from companies was that human rights belong to the jurisdiction of the states as opposed to private entities (Kinley & Tadiki, 2004). With the absence of a concrete legal framework to compel multinational corporations, numerous market-based efforts have materialized, including consumer initiatives and NGO campaigns targeting specific company brands. This has compelled companies to modify their policies in a manner that allows them to demonstrate compliance with globally recognized human rights standards. As a result, companies have rolled out various self regulatory measures and also, participated in international initiatives including the ILO Tripartite Declaration of Principles, UN Global Compact, Kimberly Process Certification Scheme, SA 8000, and the Extractive Industries Transparency Initiative, among many others (Toffel et. al, 2012).

Voluntary codes of conduct differ from one company to another, and are influenced by many factors, including but not limited to, the industrial sector in which the company operates and the commitment to human rights. While voluntary initiatives by corporations have resulted in a more conscious behavior among corporations, it has various fundamental weaknesses (Hoffman &

Stephens, 2013). Many company codes include ambitious commitments, and even though they sometimes explicitly refer to globally recognized human rights norms, no mechanism exists to legally enforce such commitments. Consequently, numerous industries and companies end up adopting weaker or stronger codes with different levels of seriousness (Hoffman & Stephens, 2013). Additionally, practical evidence indicates that in many instances, companies have shown that they are not effective in monitoring their own compliance. An additional problem associated with the prevalence of voluntary codes of conduct is that such codes may be treated as actual legal responsibilities of companies and considered substitutes for such responsibilities (Toffel et. al, 2012).

Examples of effective voluntary mechanism can be found in the following two cases: *Ocean Trawlers* and *Walmart*. A Swedish and Norwegian Television documentary accused Ocean Trawlers a Norwegian company of engaging in illegal fishing in 2004. The documentary generated a heated debate in public forums about the company's practice to the extent that non-governmental organizations urged consumers to boycott the company's products. Although the allegations were later proved to be false, they had an adverse impact on the brand, in conjunction with the company's inability to sufficiently defend itself (Richardson, 2006). This however led to a complete shift in the company's practices to be more sustainable and they have since collaborated with WWF to develop a traceability program that tracks their sourcing and entire supply chain, from the point when the fish is caught to the point when the final product is delivered to consumers (Cherry, 2006). Because of these initiatives, Ocean Trawlers has made significant strides in meeting public expectations in terms of transparency and to demonstrate its business practice whenever malpractice is suspected.

Following a lawsuit by female workers in 2001 on the use of child labor in Bangladesh (Marketwire, 2005), *Wal-Mart* created a Standard for Suppliers guideline, and also, terminated its contractual relationship with 141 factories that used child labor. Wal-Mart's Standard for Suppliers states that the company has a zero-tolerance policy with child labor; it set 14 years as the minimum age at which subcontractors and suppliers can employ workers (Backer, 2007). It also stipulated non-discrimination based on gender, beliefs, or any other personal characteristics, yet it is important to emphasize that gender discrimination was never given specific acknowledgment in the 2005 code of conduct. Further, despite stringent corporate code of conduct, enforcement is a challenge and *Walmart* lacks the capacity to enforce its code in developing economies. Additionally, Walmart has initiated many other CSR initiatives to promote social good. In 2009, Wal-Mart transitioned its CSR commitment to a higher level through the incorporation of an Advisory Board on Gender Equality and Diversity, which is responsible for offering equal and improved opportunities for all employees in top management positions. This shift has led to a significant increase in the number of female employees and managers in the company from 23,873 in 2005 to 25,246 in 2010 (Walmart, 2010). In 2012, the company made a commitment to ensure that its Sustainability Report achieves three objectives: the use of 100% renewable energy, zero waste, and manufactured products that sustain both the environment and people. For example, in its effort to create zero

waste, the company has committed to eradicate landfill waste from its stores in the United States by 2025 (Backer, 2007). Even though the company does not use the Global Reporting Initiative (GRI) guidelines, its audits use measurable targets. For instance, its suppliers who manufacture toys in China must sign up to the ICTI CARE process, which was developed by the international toy industry, with the goal to ensure that safe and humane working conditions for their workers in toy factories around the globe. Additionally, through its Ethical Sourcing team, Wal-Mart undertakes internal validation inspections to ensure that all of its suppliers comply with the ICTI CARE process and the stringent requirements contained in its Standards for Suppliers (Backer, 2007). The market mechanisms have introduced change in how market operates and their commitment to social justice no doubt. But these measures are voluntary and do not allow binding commitment.

**OECD mechanisms.** Other than the measures that corporations undertake, intergovernmental organizations have also tried to develop codes and recommendations for companies, as least as far as human rights are concerned. In this regard, the OECD procedures for multinationals are very significant. The Organization for Economic Cooperation and Development (OECD) is an exclusive forum in which governments from 34 different countries that operate market economies collaborate with one another and non-OECD members in promoting prosperity, economic growth, and sustainable development. The organization equally provides a platform where countries can seek solutions to common problems and achieve coordination of local and international policies. The OECD procedures represent a transnational agreement which includes a series of recommendations for multinational companies, offering voluntary standards and principles for conducting responsible business in line with applicable laws to human rights, employment, environment, corruption: these guidelines have been approved of member countries and non-member countries alike (Hoffman & Stephens, 2013). In terms of human rights, the OECD procedures are considered to be complimentary, non-legal standards since they stipulate that companies should endeavor to respect the human rights of all individuals affected by their activities in a manner that is consistent with the host country's commitment and obligations. The procedures are implemented through the National Contact Points, who determine if the accusation warrants further investigation, provides conciliation, or mediates between the parties, and when necessary, issues recommendations (Skudiene & Auruskeviciene, 2012). Through the determination that a corporation has contravened the guidelines, the corporation is required to make changes to its conduct based on the recommendations provided by the National Contact Points. If the company fails to comply with the recommendations, the National Contact Points may publish information relating to its non-compliance: the assumption is that public scrutiny will eventually exert pressure on the corporation. The OECD guidelines appear to be the most effective non-legal mechanism in promoting corporate responsibility as far as human rights are concerned, providing a specific code of conduct, which universally applies to all companies from all member countries. Furthermore, the codes apply not just within OECD countries, but also across the globe since OECD companies that operate in non-OECD countries are still subject.



However, these guidelines also have setbacks, considering they are voluntary and non-guiding. Multinational Corporations do not assume any legal liability if they fail to comply, making them less effective, particularly for corporations that are not substantially affected by public blame (Pak & Nussbaumer, 2009). Another weakness is that in cases regarding human rights violations committed by multinational companies, the primary mandate of the National Contact Points is to promote investment and trade, therefore lack a strong background in addressing complaints. Furthermore, the guidelines of the OECD lack a recourse mechanism for victims, whereas the National Contact Points fails to achieve reconciliation.

The above discussion shows that there are a number of mechanisms-both voluntary and legal, which can be used to ensure that any abuse of human rights by a TNC is adequately prosecuted, with compensation properly awarded. However, each of these interventions has unique drawbacks, which make them weak in addressing some of the cases in a way that satisfies the needs of the complainants. Self-regulatory techniques introduced by Transnational Corporations are commonly not sufficient in addressing human rights abuses at the corporate level. International treaties have been blamed for their narrow scope in addressing corporate misconduct, making them insufficient in addressing human rights abuses committed by TNCs (Pak & Nussbaumer, 2009). ATCA has widely been considered promising because of its specificity in addressing corporate misbehavior in any part of the world; however, it has many hurdles for individuals who are seeking justice, especially if they are citizens of other countries. Therefore, it means that there is need to have better mechanisms which can be used to deal with gross violations of human rights by transnational corporations.

### **Holding TNCs Accountable Through International Tribunal with Special Jurisdiction**

The violation of human rights by transnational companies is an issue of concern, and the need for a universal forum through which these abuses can be addressed is growing. Currently, the international community has no tribunal specifically designed to address such human rights abuses committed by corporations, as well as lacking the faculties to provide satisfactory redress to the victims of these violations. As of now, litigation against these corporations on human rights violations is only possible at the domestic level through jurisdiction of the domestic courts or extraterritorial jurisdiction in foreign courts. When local courts are inadequate or weak, justice to the victims may forever remain a dream, even if the violation is very gross. In most of the developed countries around the world, justice systems have been trying to come up with ways of addressing this problem. However, even highly effective domestic legal systems may not offer the most appropriate solutions in addressing human rights violations of TNCs at an international level due to aforementioned jurisdictional restrictions. It is, therefore, necessary to construct an international forum through which these issues can be addressed without the concern for legitimacy restrictions or territorial jurisdiction: through this forum, domestic courts may be

complemented on a global scale, by addressing cases of human rights violations committed by transnational corporations.

### **Policy Recommendation: Creation of an International Corporate Tribunal**

Review of the existing systems and structures used in addressing human rights abuses by TNCs suggests the need to create a more effective legal mechanism. By minimizing the burden that exists upon domestic courts, the responsibility of such transnational cases will be placed solely upon the proposed tribunal, doing nothing more than focusing on the special issues brought forward, having special jurisdiction over violations of human rights and other corporate crimes in establishing issues of criminal liability, without any fears or favors. This will help tide over the limitation of existing systems, which lack the means of enforcing human rights laws in the context of transnational corporations' global operations (Pak & Nussbaumer, 2009).

Creating this tribunal will specifically help in addressing the inadequacies of the domestic courts in addressing the issue of human rights violations committed by transnational corporations, enhancing the accountability of such companies in upholding human rights. To ensure that the tribunal has legitimacy to prosecute cases in any part of the world, it should be established by the United Nations, particularly assigned to the United Nations Security Council, based on examples such as the former Criminal Tribunal for Yugoslavia (ICTY) and Criminal Tribunal for Rwanda (ICTR) (Bernhard, 2008). Both the ICTY and ICTR were created as *ad hoc* tribunals for a limited duration, with the sole purpose to address atrocious crimes committed by individuals on particular territories. An alternative approach would be to create such a tribunal by adopting an international treaty. An example of such a tribunal is the International Criminal Court (ICC), which has jurisdiction over war crimes, genocide perpetrated by individuals, and crimes against humanity. An additional example is the International Tribunal for the Law of the Sea (ITLOS), a permanent court, which has jurisdiction over disputes involving both states and juridical persons, on all matters relating to ocean space, its resources, and its use. By creating the tribunal along these lines and following the tribunal models mentioned above, the creation of an international Corporate Tribunal is highly recommended.

The jurisdiction of this tribunal should cover issues such as the displacement of local populations, environmental degradation, and child and forced labor, corporate fraud, and corruption (Bernhard, 2008). Additionally, the applicable standards on which the tribunal can be based are already in place, that is, as United Nation norms (titled Norms on the Responsibility of Transnational Corporations) (Barnali, 2005). Even though the United Nations norms lack the status of an international treaty, they incorporate a list of obligations and duties that multinational corporations should comply with. Specifically, they recognize the general obligations of multinational corporations and governments in promoting universal respect for fundamental freedoms and human rights (Barnali, 2005, p. 47). In addition, it is the responsibility of states to ensure human rights are respected and protected and provide the requisite

administrative and legal framework to ensure that TNCs and other companies incorporate the norms and other international and national laws. The United Nations norms already have important provisions for human rights and multinational corporations, yet it is vital that an international body establishes a firm legal mechanism to monitor TNCs' compliance with these norms, possibly operating in the same way as the International Criminal Court in The Hague, Netherlands (Barnali, 2005, p. 56). The jurisdiction of this tribunal should not be geographically limited, but it may have a mandate to refer a case to the home country, and if it is perceived a fair trial, it can be granted in the domestic courts, as well as hearing appeals from various countries or cases that cannot be effectively tried in domestic courts.

Although laws and regulations exist that define how business entities should operate in relation to the environment and society, these laws are disjointed and do not offer a clear focus on how these corporations should be held responsible in cases of possible abuse. The international human rights bodies also lack definite structures that can be used to protect the environment and people from some of the abuse, due to the ambiguity of the law. The United Nations can develop new norms, which should be adhered to by these companies, especially given that the world is now struggling to fight environmental degradation. Under Rome Statute's Article 17, there is a provision that whenever a country is unable or unwilling to prosecute a case genuinely, the International Criminal Court automatically assumes jurisdiction in prosecuting the case.

If implemented effectively, this policy will provide a number of advantages beyond other existing mechanisms used in addressing human rights abuses by multinational corporations. The main advantage of this tribunal is that it will not have geographic limitations as other systems, which are currently in place. Cases from whichever part of the world can be prosecuted in this court, as long as they have merit and the domestic courts lack the capacity to prosecute them satisfactorily. The tribunal will have a well-founded legitimacy, having the shared mandate of sovereign states in the UN system. As a United Nations' agency, it will have a team of highly skilled employees from various parts of the world, vastly impervious to corruption, bribery, and other ill-intentioned techniques often employed by TNCs when litigating in developing nations.

Conversely, it is also important to realize that this tribunal may have a number of weaknesses affecting its ability to operate properly. The primary weakness is a possible conflict of interest between the tribunal and domestic courts, as it may be difficult to determine when jurisdiction shifts from domestic courts to the international tribunal. It is also possible that it may take a long time before such a tribunal can be established as an organ within the United Nations, considering the internal involvement of numerous stakeholders. Lack of corporations among the member countries, as is the case faced by International Criminal Court, may also hinder the ability of this tribunal to undertake its duties. For instance, in the case of the ICC, the most influential players, such as the United States, are not members, raising doubts to the universality and viability of an international corporate tribunal. These challenges can be overcome if all sovereign states become signatories of the Statute, with each member state committing to the policies and principles set to govern this proposed tribunal.

## **Conclusion**

It is clear that transnational companies should be held accountable for their actions in the various countries in which they operate. Even so most companies are actively committed to corporate social responsibility, as a way of compensating for some of the negative impact of their activities, this does not allow for legal redress mechanism for victims. Sometimes the harm committed by transnational corporations is so destructive that accountability beyond corporate social responsibility should be required: this accountability can be enforced and monitored through the creation of an International Corporation Tribunal. The tribunal will have a global jurisdiction to enable and address issues relating to operations of transnational companies in any part of the world. It will not be focused on punishment, but rather finding a solution by which all stakeholders will approve as sufficient and provide victims justice.

Fundamentally, corporations are tasked with the duty to offer the society in which they function a service, beyond the simple, financial goal to 'make business'. The social justice, as well as the injustice, achievable through corporations is immense, entailing the necessity for transnational corporations to be responsible. Through the implementation of a transnational corporate tribunal, such companies can be measured to global standards, in alignment with norms already in place around the world, ensuring accountability and the equal protection of the rights of all peoples in the world. Ultimately, we are becoming an increasingly interconnected global society: we must recognize the obligation to hold corporations to the same standards that we do for individuals or sovereign states around the world, understanding that if we stand for the equal protection of rights, we must also stand for the equal accountability of violations to our rights.

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