Multinational Corporations

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1. Introduction

Emerging robustly in the 1990s as a global *tour de force* in the globalisation process, 'multinational corporations' (MNCs), also referred to as 'multinational enterprises' (MNEs) or 'transnational corporations' (TNCs) introduced complex international structures connected to states, but at the same time transcending national boundaries.[1] According to Shaw, MNCs 'constitute private organisations comprising several legal entities linked together by parent corporations and are distinguished by size and multinational spread'.[2] The operations of multinational corporations raise important questions of shared responsibility,[3] because of the globalised nature of their operations and the impact of their activities. As Clapham correctly pointed out, a single actor by its action can generate multiple violations by a range of actors, thereby raising the question of shared responsibility and allocation of liability.[4] In other words, an MNC through its global transactions with other actors may set in motion a chain of activities that may lead to multiple harmful outcomes and subsequent claims. The situation is further complicated by the structure of international law and the fact that at present there is no international tribunal or court that has jurisdiction over MNCs.[5] It is argued in this chapter that despite the conceptual difficulties in applying shared responsibility to MNCs under international law, there are significant developments at the international level which may

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[1] J.G. Ruggie, *Just Business: Multinational Corporations and Human Rights*, Norton Global Ethics Series (New York: W.W. Norton & Company, Inc., 2013), 1.

[2] M.N. Shaw, *International Law*, 6th edn (Cambridge University Press, 2008), 249–250.

[3] P.A. Nollkaemper and D. Jacobs, 'Shared Responsibility in International Law: A Conceptual Framework' (2013) 34 MIJIL 359.

[4] A. Clapham, 'The Subject of Subjects and the Attribution of Attribution', in L. Boisson de Chazournes and M. Kohen (eds.) *International Law and the Quest for its Implementation: Liber Amicorum Vera Gowlland-Debbas* (Leiden: Brill, 2010), 44.

[5] With the exception of the Seabed Disputes Chamber of the International Tribunal for the Law of the Sea, in its strictly limited area of jurisdiction.

facilitate allocation of shared responsibilities between MNCs and other entities implicated in a violation of international law.

This chapter starts by contextualising the situations that may lead to shared responsibility between MNCs and other parties under international law (section 2). The chapter thereafter discusses the state of international law on the responsibility of states for the actions of MNCs (section 3). The chapter also examines situations that may lead to shared responsibility in the interaction between home states, host states and MNCs, especially in the context of investment treaties (section 4). The chapter further examines existing soft law rules on the international responsibility of MNCs and their potential implication (if any) for the concept of shared responsibility (section 5). Attention is paid to the United Nation's Framework for Business and Human Rights (Framework) and the Guiding Principles on Business and Human Rights (Guiding Principles) developed by the former United Nations (UN) Special Representative for Human Rights and Business, John Ruggie, because of their currency and possible potential for the future. The chapter also discusses the relevant case law (section 6) and conceptual difficulties posed by the current structure of international law to shared responsibility of MNCs (section 7).

2. Contextualising shared responsibility and MNCs

It is pertinent to contextualise situations in which MNCs activities may implicate the concept of shared responsibility. A case in point is activities of MNCs in Nigeria. The typical structure of MNCs in the oil industry in the country is as follows: a parent company usually based in Europe or the United States (US), with subsidiaries incorporated as Nigerian corporations, engage in joint venture partnership with the Federal Government of Nigeria through the Nigerian National Petroleum Corporation (NNPC),[6] typically in a ratio of 55-60 per cent to the government and 40-45 per cent to the corporation. The shareholders of the parent company are predominantly in the home countries.[7] The MNCs usually maintain managerial control of the

[6] The corporation is constituted by the Nigerian National Petroleum Corporation Act (No. 33 of 1977), Chapter 20, Laws of the Federation of Nigeria, 1990.

[7] For example, Exxon Mobil is owned by NNPC (60 per cent) and Mobil Oil (40 per cent). The Shell Petroleum Development Corporation shareholding structure comprises NNPC (55 per cent); Shell International (30 per cent); Elf Petroleum (10 per cent); and Agip Oil (5 per cent). Chevron Nigeria Limited is owned by NNPC (60 per cent) and Chevron Texaco (40 per cent). Nigeria Agip Oil Company is owned by NNPC (60 per cent); Agip Oil (20 per cent); and Phillips Petroleum (20 per cent). Elf Nigeria Ltd. is owned NNPC (60 per cent) and TotalElfFina (40

enterprise. The government contributes proportionately to the cost of carrying out the oil operations and receives a share of the production in the same proportion. A key question arising from this scenario is as follows: in a situation where an MNC operates in partnership (e.g. joint venture) with the state owned corporation, and it is alleged that the MNCs, the state corporation, and the Nigerian government have caused injury to a plaintiff/claimant, can the state and the MNC be held jointly responsible and liable under international law? Assuming that this is possible, how is the responsibility/liability to be allocated? A related question is that where the operations of an MNC are done within the framework of an investment treaty, could there be a situation of shared responsibility arising from the investment framework?

The following domestic and international judicial decisions illustrate some of the issues. The first case is *Jonah Gbemre* v. *Shell Petroleum Development Corporation of Nigeria Ltd. and others*.[8] This case was instituted against Shell Petroleum Development Company Nigeria Ltd., the NNPC, and the Attorney General of the Federation of Nigeria. The multiple defendants therefore include a sovereign state, a state owned corporation, and a multinational corporation. The case was brought under the fundamental rights enforcement procedure in the Nigerian Constitution,[9] alleging violations of both constitutional provisions and the African Charter.[10] The plaintiffs claimed that the oil exploration and production activities of Shell, which led to incessant gas flaring, had violated their right to life and the dignity of the human person under sections 33(1) and 34(1) of the Nigerian Constitution, and Articles 4, 16 and 24 of the African Charter. The plaintiffs alleged that the continuous gas flaring by the company had led to poisoning and pollution of the environment which exposed the community to the risk of premature death, respiratory illnesses, asthma and cancer. They also alleged that the pollution had affected their crop production, thereby adversely affecting their food security. They claimed that many of the natives had died and many more were suffering from various illnesses. It must be noted that the allegations were not only directed against the multinational corporations, but also against the Nigerian government as joint venture partner to Shell through the NNPC, and also for being complicit as regulators.

per cent). Texaco Overseas (Nigeria) Petroleum Company is owned by the NNPC (60 per cent); Chevron (20 per cent); and Texaco (20 per cent).

[8] *Jonah Gbemre* v. *Shell Petroleum Development Corporation of Nigeria Ltd. and others*, Suit No: FHC/B/CS/53/05, Federal High Court, Benin Judicial Division, 14 November 2005 (*Jonah Gbemre*).

[9] Constitution of the Federal Republic of Nigeria, 1999, s. 46.

[10] African (Banjul) Charter on Human and Peoples' Rights, Nairobi, 27 June 1981, in force 21 October 1986, (1982) 21 ILM 58 (African Charter).

A similar approach was taken before the Community Court of Justice of the Economic Community of West African States (ECOWAS) in *The Registered Trustees of the Socio-Economic Rights & Accountability Project (SERAP)* v. *President of the Federal Republic of Nigeria and others*.[11] The other defendants are the Attorney-General of the Federation (as the Chief Law Officer of the Federation of Nigeria); the NNPC (as majority stakeholder in all joint ventures); and six subsidiaries of multinational corporations. The complaints that formed the basis of the proceedings were similar to the *Jonah Gbemre* case. The plaintiffs alleged failure and/or complicity and negligence of the defendants individually and/or collectively in causing injury to the plaintiffs. The plaintiffs also claimed compensation on an individual and/or collective basis. In making a case for the liabilities of the multiple parties, the claimant relied on international instruments including the African Charter and the International Covenant on Civil and Political Rights (ICCPR).[12] We shall return to these two cases at a later stage in this chapter.

In the above examples, the Nigerian government would appear to be the marginal player in the events constituting the alleged violations. This is because the activities complained of were carried out by MNCs, and the government was implicated indirectly. However, there are cases in which the MNCs are the marginal players, while the state is the principal actor, because the alleged violations were carried out by the state. An example of such a situation is the recently settled South African Apartheid era case of *In re South African Apartheid Litigation*,[13] where the plaintiffs brought an action before a US Federal Court against 20 banks and corporations for complicity, by encouraging and furthering abuses by the South African government against the black Africans. Similarly, in the well-known case *Wiwa* v. *Royal Dutch Shell Corporation et al.*,[14] the allegations were that the defendant corporation acted in concert or complicity with the Nigerian government's conduct which included torture, cruel, inhuman and degrading treatment and crimes against humanity. The two cases mentioned above were brought under the Alien Tort Claims Act (ATCA or Act) and alleged a violation of international law under domestic laws of South Africa, Nigeria and the US.[15] It is observed however that in these two

[11] *The Registered Trustees of the Socio-Economic Rights & Accountability Project (SERAP)* v. *President of the Federal Republic of Nigeria and others*, ECOWAS Community Court of Justice, Judgment No. ECW/CCJ/APP/07/10, 10 December 2010 (*SERAP* v. *Federal Republic of Nigeria*).
[12] See n. 10; and International Covenant on Civil and Political Rights, New York, 16 December 1966, in force 23 March 1976, 999 UNTS 171 (ICCPR).
[13] *In re South African Apartheid Litigation*, 617 F. Supp. 2d 228, 269 (S.D.N.Y. 2009).
[14] *Wiwa* v. *Royal Dutch Shell Corporation et al.*, 226 F. 3d 88 (2d Cir. 2000), 532 US 941 (2001).
[15] The Alien Tort Claims Act is also called Alien Tort Statute (28 USC, section 1350) (ACTA or Act). There is a vast literature on the ATCA case law. See for example: S. Coliver, J. Green and P. Hoffman, 'Holding Human

cases, the states involved were not made parties because of the law on state immunity in the US (discussed in the next paragraph).

Following on from the foregoing, it is pertinent to elaborate briefly on the controversial ATCA case law in the United States. This is because seemingly the Act allows cases alleging tort in 'violations of the law of nations'[16] or international law to be brought before the federal courts in the US. It should be noted that the Act is procedural in nature, and the allocation of responsibility for violation of international law derives from national law. The most controversial aspect of the case law is the application of the law by the courts to MNCs for their conduct on a global scale. The cases that have been brought under the ATCA are usually based on the allegations that MNCs have been complicit with a state, or state actor, in the violation of international law; that MNCs aided and abetted foreign governments; or that they were joint actors with state entities. Such allegations potentially raise issues of shared responsibility under international law. However, an important and significant limitation on the ATCA process is the barring of proceedings against sovereign states in the US under the Foreign Sovereign Immunity Act of 1976.[17] This effectively means that even though the allegations brought before the courts under the ATCA implicate states and MNCs, the state cannot be sued as a joint actor. The courts are thus confined to examining only allegations against MNCs under international law. It is worth noting that in 2013, the US Supreme Court significantly restricted the situations in which the ACTA can be used, potentially diminishing its importance.[18]

The above examples have shown that MNC activities are increasingly raising questions of shared responsibility that an international tribunal or court may need to address in the future. The key questions are thus: first, where an MNC is one of multiple defendants, how does an adjudicator apportion responsibility and liability? ('Liability' here means the consequence

Rights Violators Accountable by Using International Law in U.S Courts: Advocacy Efforts and Complementary Strategies' (2005) 19 EILR 169; J. Kurlantzick, 'Taking Multinationals to Court: How the Alien Tort Act Promotes Human Rights' (2002) WPJ 60; J.M. Sweeney, 'A Tort in Violation of the Law of Nations' (1995) 18 HICLR 445; K.C. Randall, 'Federal Jurisdiction over International Claims: Inquiries into the Alien Tort Statute' (1985) 18 NYUJILP 1; B. Stephens, 'Translating Filartiga: A Comparative and International Law Analysis of Domestic Remedies for International Human Rights Violations' (2002) 27 YJIL 1; B. Jacek, 'Alien Invasion: Corporate Liability and Its Real Implications Under the Alien Tort Statute' (2013) 43(1) SHLR 273.

[16] S9 Judiciary Act of 1989, now codified as 28 USC, section 1350.

[17] Foreign Sovereign Immunities Act of 1976, 28 USC sections 1330, 1391(f), 1441(d), 1602–11.

[18] *Esther Kiobel et al.* v. *Royal Dutch Petroleum Co., et al*., 621 F 3d 111 (S. C.t, 17 April 2013) (*Kiobel*).

arising from being found legally responsible for a violation.) Second, what will be the basis of liability? Third, what guidance is available to the adjudicator?

3. State responsibility and multinational corporations

At present, MNCs do not usually bear international obligations.[19] This is because the predominant view is that states are primarily the subject of international law.[20] This essentially means that states regulate corporations through national laws, on the basis of the international obligations of states. Generally, international law requires states to put in place laws that apply to corporations (including MNCs), and to enforce those laws.[21] However, the general law of state responsibility makes it possible to attribute to the state the acts committed by private entities (including MNC's) in violation of international law.[22] A good starting point for the discussion in this section are the Articles on Responsibility of States for Internationally Wrongful Acts (ARSIWA) prepared by the International Law Commission (ILC).[23] This is because the instrument addresses the implication of the violation of international norms by private entities, such as MNCs, for state responsibility. It is observed that rather than establishing shared responsibility, the law on state responsibility attributes private entities' violations of international law to states. Under Article 2 of the ARSIWA, state responsibility would arise where two elements are established: first, the existence of conduct consisting of an act or omission which is attributable to the state under international law; and second, that the conduct constitutes a breach of an international obligation of the state. These two elements are well established by international judicial decisions as principles of international law.[24] Therefore, in order for a state to be held responsible for a wrongful act of an MNC, the MNC

[19] See generally C.M. Vazquez, 'Direct vs. Indirect Obligations of Corporations under International Law' (2005) 43 CJTL 927; I. Bantekas, 'Corporate Social Responsibility in International Law (2004) 22 BUILJ 309, 313.
[20] R. Jennings and A. Watts, *Oppenheim's International Law*, 9th edn (London: Longman, 1996), 16–23.
[21] See Vazquez, 'Direct vs. Indirect Obligations of Corporations', n. 19.
[22] R. McCorquodale and P. Simons, 'Responsibility Beyond Borders: State Responsibility for Extraterritorial Violations by Corporations of International Human Rights Law' (2007) 70(4) MLR 598, 606.
[23] Articles on Responsibility of States for Internationally Wrongful Acts, ILC *Yearbook* 2001/II(2) (ARSIWA); P.J. Kuijper and E. Paasivirta, 'EU International Responsibility and its Attribution: From the Inside Looking Out', in M. Evans and P. Koutrakos (eds.), *The International Responsibility of the European Union: European and International Perspectives* (Oxford: Hart Publishing, 2013), 35.
[24] See *Treatment of Polish Nationals and Other Persons of Polish Origin or Speech in the Danzig Territory*, Advisory Opinion, PCIJ, Ser. A/B, No. 44 (1932), 4; *S.S. 'Wimbledon'* (*United Kingdom and others* v. *Germany*), PCIJ, Ser. A, No. 1 (1923); *Greco-Bulgarian 'Communities*', Advisory Opinion, PCIJ, Ser. B, No. 17 (1830), 32; *Reparation for Injuries Suffered in the Service of the United Nations*, Advisory Opinion, ICJ Reports 1949, 174, at 180. See also Kuijper and Paasivirta, 'EU International Responsibility and its Attribution', n. 23, at 67.

conduct must breach positive international law in a manner that is attributable to the state, or the state must have violated one of its own obligations in relation to the regulation or supervision of MNC conduct.[25] The attribution rule under Article 5 ARSIWA is important in the context of state responsibility and MNCs. The Article provides as follows:

> The conduct of a person or entity which is not an organ of the State under article 4 but which is empowered by the law of that State to exercise elements of the governmental authority shall be considered an act of the State under international law, provided the person or entity is acting in that capacity in the particular instance.

According to the ILC Commentary on the ARSIWA, the term 'entity' in the provision may include public corporations, semi-public entities, public agencies of various kinds and private companies, provided that they are empowered by national law to exercise elements of governmental authority.[26] It has been suggested that governmental authority appears to include public functions such as 'running prisons, health and education facilities', exercise of delegated or quarantine powers by a private airline, and private corporations participating alongside the state in the identification of property for expropriation.[27] In addition to the provision in Article 5, Article 8 ARSIWA provides that:

> The conduct of a person or group of persons shall be considered an act of a State under international law if the person or group of persons is in fact acting on the instructions of, or under the direction or control of, that State in carrying out the conduct.

Under this Article, the conduct of private persons (natural or legal persons including MNCs) would be imputed to a state where private persons or legal entities are acting on the instructions of the state in carrying out a wrongful act, and where private persons or legal entities act under the state's directions and control.

A conclusion that can be reached from the preceding discussion on state responsibility and MNCs is that under international law, violations by non-state actors such as MNCs can be attributed to states. It is therefore plausible to argue that international law at least forbids states from allowing the infraction of its norms by MNCs and other private entities.[28]

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[25] J. Brunnee, 'International Legal Accountability through the Lens of the Law of State Responsibility' (2005) 36 NYIL 21, 42.
[26] Commentary to the Articles on Responsibility of States for Internationally Wrongful Acts, ILC *Yearbook* 2001/II(2) (ARSIWA Commentary), Commentary to Article 5, para. 2.
[27] McCorquodale and Simons, 'Responsibility Beyond Borders', n. 22, at 606.
[28] A. McBeth, *International Economic Actors and Human Rights* (London and New York: Routledge, 2010), 250.

A relevant question in the context of this chapter, and more specifically in situations like the Nigeria scenario described above, is as follows. Assuming that it is established that an MNC's conduct is in violation of international law, does the ownership by a state or involvement of a state in the ownership structure of a corporation simpliciter lead to, or should lead to, attribution of the MNCs conduct to the state? Stretching the question further, could this scenario potentially lead to shared responsibility between the MNC and the state?

It is suggested that this depends on a number of factors including how the particular entity is constituted, its powers, and whether or not the entity is sufficiently distanced from municipal laws.[29] For the purposes of this chapter, distinctions can be made between what Shaw called 'international public companies' and other state owned enterprises (SOEs). International public companies are 'characterised in general by an international agreement providing for co-operation between government and private enterprises'.[30] The way such entities are constituted varies widely, but may involve the application of more than one national law. Their powers also vary. Shaw gave the examples of 'Intelsat', 'Eurofima', and the 'Bank for International Settlement'. Intelsat was established in 1973 as an intergovernmental consortium to manage global commercial telecommunication satellite systems. The company Eurofima was established in 1955 by a treaty of fourteen European states for the purpose of leasing rail equipment to rail systems of member states; and the Bank for International Settlement was created by treaty between six states. In Shaw's view, if the international public company is sufficiently distanced from municipal law and is given a range of powers transcending municipal law, the entity may be regarded as having international personality.[31]

While there is no authoritative definition of SOEs, the concept generally refers to legal entities that are created and/or controlled by governments for the purpose of participating in commercial activities. The Organisation for Economic Co-operation and Development (OECD) defines SOEs as 'enterprises where the state has significant control, through full, majority, or significant minority ownership'.[32] The position of international law on the question of the attribution of conduct of an SOE to states appears to be that the ownership interest of the

[29] Shaw, *International Law*, n. 2, at 249.
[30] Ibid.
[31] Ibid.
[32] Organisation for Economic Co-operation and Development (OECD), *Guidelines on Corporate Governance of State-Owned Enterprises* (Paris: OECD Publishing, 2005), at 11.

government does not automatically mean that the act of an SOE can be attributed to the state. According to Crawford, under the ARSIWA,

> [t]he fact that the State initially establishes a corporate entity, whether by special law or otherwise, is not a sufficient basis for the attribution to the State of the subsequent conduct of that entity. Since corporate entities, although owned by and in that sense subject to the control of the State, are considered to be separate, *prima facie* their conduct in carrying out their activities is not attributable to the State unless they are exercising elements of governmental authority within the meaning of article 5.[33]

Therefore, under the current position of international law on state responsibility, the ownership of a corporation by the government is not crucial to determining state responsibility for the conduct of a state owned corporation. However, what is not clear and has not been addressed under the ARSIWA, is whether government involvement should trigger shared responsibility between the corporation and the SOEs, if a violation by the SOE is established. Pentikäinen has suggested that the prevailing state of affairs appears to enable states to use the SOEs to escape for instance international human rights obligations.[34]

4. Shared responsibility between home state, host state, and a multinational corporation

The term 'home state' generally refers 'to the State from which an enterprise's operations are directed' while the term 'host states' refers to 'all States where an enterprise operates other than its home State'.[35] Host states have the jurisdiction to put in place standards to govern the operations of corporations operating within their territory, whether domestic or MNCs. Home states rarely exercise jurisdiction over their corporations' operations abroad. There are exceptions, such as in the case of competition or anti-trust laws and export control laws.[36] The exception exists because public international law allows each state a level of extraterritorial jurisdiction, including the regulation of the conduct of corporations.[37] This is based on established customary international law principles including the nationality principle (derived from the territorial principle, and applicable where activities taking place abroad have an

[33] J. Crawford, *The International Law Commission's Articles on State Responsibility: Introduction Text and Commentary* (Cambridge University Press, 2002), 112.
[34] M. Pentikäinen, 'Changing International "Subjectivity" and Rights and Obligations under International Law – Status of Corporations' (2012) 8(1) ULR 145, at 146, 148.
[35] McBeth, *International Economic Actors and Human Rights*, n. 28, at 248.
[36] J. Zerk, *Multinational and Corporate Social Responsibility: Limitations and Opportunities in International Law* (Cambridge University Press, 2006), 107.
[37] Ibid., at 133.

adverse effect within the regulating state); the effects doctrine (regulating activities that produce prohibited effect in the regulating state); and to a lesser extent, the universality principle.[38] The idea of extraterritorial jurisdiction has led to the controversial question whether home states have an obligation to regulate MNC operations abroad. While some scholars have argued in favour of such a position,[39] the law is not settled on this question.[40]

The relevant question here is whether a situation of shared responsibility can arise between home states, host states and MNCs. There are no cases in which such an issue has arisen as at yet, but the question is whether or not the jurisdiction of states to regulate or facilitate the operations of an MNC can potentially lead to the allocation of responsibility between two or more parties. An example of a potential area where this could arise is in the contemporary practice of implementing social accountability in international investment agreements (IIAs), such as bilateral investment treaties (BITs). IIAs are agreements between home and host states. However, the direct beneficiaries, which are usually MNCs, are not party to the agreements, but they can enforce the provisions of the agreement through arbitration. Of particular relevance to this chapter is the emerging tendency to condition key benefits of the agreement upon social issues.[41] One can imagine a scenario where the host state and home state of MNC X enter into a BIT that conditioned the operations of MNC X to conformity with certain social and environmental issues, for example maintaining a certain higher standard of containing oil spillage. Assume that MNC X failed to meet these conditions, and this has led to damages and financial loss for the host state (in containing the damage or paying compensations to victims). Furthermore, assume that the home state has a financial stake in the MNC X and it is also supportive of the mode of its operations. The question that arises in this scenario is whether or not the host state may be able to claim against MNC X and the home state in a joint proceeding before an arbitral panel under the BIT. Generally, the answer to this question is that there is no reason why such a claim cannot be made. In theory, an arbitral panel would be entitled to assess the involvement of the home state in the MNC and its possible contribution to the damages. The consequence of this scenario is that the home state and the MNC would contribute to any

[38] McBeth, *International Economic Actors and Human Rights*, n. 28, at 282.
[39] See for example S. Deva, 'Acting Extraterritorially to Tame Multinational Corporations for Human Rights Violations: Who should Bell the Cat' (2004) 5 MJIL 37, 50–51.
[40] Report of the Task Force on Extraterritorial Jurisdiction (International Bar Association, 2009), 6.
[41] M.E. Footer, 'BITs and Pieces: Social and Environmental Protection in the Regulation of Foreign Investments' (2009-2010) 18(1) MSJIL 34.

award of damages. This scenario presents a classic case of shared responsibility between an MNC and a state.

Another example are conditions in a BIT that require the fulfilment of development related objectives, such as development of employment opportunities for the local population. Assume that the provision is operable; failure to fulfil such an objective may result in the host state withdrawing benefits of the agreement with adverse consequences for the investor.[42] In such a situation, assume that the host state and home state wrongfully interpreted or applied the condition, and the interpretation or application has led to the loss of the preferential treatment, theoretically the MNC should be able to proceed against the two states for a remedy, and an arbitral panel should be able to allocate responsibility between the host and home state based on the agreement. Conversely, the host state should be able to enforce the operable condition against the MNC and its home state before an arbitral panel.

5. Informal/soft law rules on the international responsibility of MNCs and their (shared) responsibility

Because of the inability to hold MNCs directly responsible under international law, attention has been turned to soft law instruments to address the responsibility of MNCs at the international level. Given that some of the principles contained in these instruments have the potential of developing into hard law in the future,[43] it is relevant to examine any implications they may have for the concept of shared responsibility. The key relevant instruments are the International Labour Organization's (ILO) Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy;[44] the United Nation's Global Compact;[45] the OECD Guidelines for Multinational Enterprises;[46] and the United Nation's Framework for Business and Human Rights (Framework) and the Guiding Principles on Business and Human

[42] Zerk, *Multinational and Corporate Social Responsibility*, n. 36, at 281.
[43] H.M. Morais, 'The Quest for International Standards, Global Governance vs. Sovereignty' (2001-2002) 50 KLR 779, 781; B.H. Oxman, 'The Duty to Respect Generally Accepted International Standards' (1991) 24 NYUJILP 109, 119.
[44] Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy, (1977) 17 ILM 422.
[45] United Nations' Global Compact, see www.unglobalcompact.org/.
[46] OECD, *Guidelines for Multinational Enterprises* (Paris: OECD Publishing, 2011) (OECD Guidelines).

Rights (Guiding Principles).[47] These instruments are regarded as the 'international standard on CSR [corporate social responsibility]' by the European Union.[48]

Perhaps the most relevant and arguably the most significant of these instruments to date are the Framework and Guiding Principles on Business and Human Rights. These instruments identify global standards of expected behaviour for MNCs which exists independently of states' human rights obligations. The standards are designed to go beyond what is prescribed by domestic laws. It is plausible to assert that the Framework and the Guiding Principles have created non-binding obligations on MNCs, independent of states' obligations.[49]

The overarching idea behind the Framework and the Guiding Principles is the notion that MNCs should share human rights responsibilities with states.[50] This notion is in contrast to the traditional view that places these responsibilities solely on states. The possibility of shared responsibility in this context thus has two dimensions. The first is in respect of the multiple states in which MNCs operate (home and host states), and their responsibility to prevent and remedy human rights violations by MNCs. The second is in relation to the shared responsibility of one or more states and MNCs to respect and remedy human rights violations. The Framework's purpose is to clarify the roles and responsibilities of governments and companies in relation to the human right impact of business activities.

The Framework emphasises the shared nature of the responsibilities of the actors by declaring that it 'rests on differentiated but complementary responsibilities'.[51] These complementary responsibilities are encapsulated in its three core principles: first, the state duty to protect against human rights abuses by third parties, including businesses; second, a separate and independent corporate responsibility to respect human rights; and third, the need for the

[47] 'Protect, Respect and Remedy: A Framework for Business and Human Rights', Report of the Special Representative of the Secretary General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, John Ruggie, UN Doc. A/HRC/8/5 (7 April 2008) (Framework); Human Rights Council, 'Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework', UN Doc. A/HRC/17/31 (21 March 2011) (advance edited version) (Guiding Principles).
[48] Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee of the Regions: 'A renewed EU strategy 2011-14 for Corporate Social Responsibility', COM(2011) 681 final, 25 October 2011, at 6.
[49] G. Teubner, 'Self-Constitutionalizating TNCs? On the Linkage of "Private" and "Public" Corporate Codes of Conduct' (2011) 18(2) IJGLS 617, 634.
[50] See paras. 11–15 of the Guiding Principles, n. 47.
[51] See the Framework, n. 47, para. 9.

provision of effective access to (judicial and non-judicial) remedies.[52] The principles are complimentary in the sense that they are designed to support each other.

On the part of states, it recognises the settled position in international law that the state has a duty to protect human rights and prevent abuses by private entities, including MNCs. It is notable that in spite of this duty, abuse of human rights by MNCs remains a problematic issue in several states.[53] This situation underscores the need to revisit the responsibility framework under international law. The Framework pinpoints certain innovative approaches which may be relevant to the achievement of the state's duty to protect. The first is that governments should foster a corporate culture which embeds respecting rights as an integral part of business operations.[54] This can be achieved through sustainability reporting, redefining fiduciary duties of company officers, and strengthening the use of shareholder proposals at the annual general meetings of companies.[55] It is also significant to note that states are required to examine the organisational corporate culture in determining potential corporate criminal liability. The implication of this is that rather than focusing on individual acts of officers or employees for the purpose of determining corporate criminal liability, the focus is on company policies, rules and practices. The second approach is for (host and home) states and companies to jointly coordinate to develop better means of achieving a balanced outcome between all parties in the context of international investment and dispute resolution.[56]

On the part of corporations, the Framework seeks to advance the responsibility recognised in key international soft law instruments – i.e. the Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy, and the OECD Guidelines for Multinational Enterprises – that MNCs have the duty to obey domestic laws and respect the principles recognised in the instruments. According to the Framework (except in situations where companies perform a public function or where they have voluntarily undertaken additional responsibility), the duty to respect means that companies 'should act with due diligence to avoid infringing on the rights of others and to address adverse impacts with which they are involved'.[57] What is also significant is the notion that the scope of the responsibility here is not just about complying with legal obligations, but 'is defined by social expectations – as part of

[52] Ibid.
[53] Ruggie, *Just Business: Multinational Corporations and Human Rights*, n. 1, 3–36.
[54] See the Framework, n. 47, para. 29.
[55] Ibid., para. 30.
[56] Ibid., para. 38.
[57] See the Guiding Principles, n. 47, introduction at 4; the Framework, n. 47, para. 24.

what is sometimes called a company's licence to operate'.[58] The Framework prescribes that MNC responsibility can be achieved by due diligence. It is notable that the concept of due diligence was originally established and applied to state responsibility to protect human rights.[59] The principle is also found in legal tools used by states to shape the behaviour of corporations.[60] The Framework has thus adapted the concept in defining the responsibility of MNCs. According to the Framework, the substantive content of due diligence obligations is contained in the international bill of human rights and the ILO core conventions.[61] These are instruments that are traditionally addressed to states.

The third principle provides that states and companies have the responsibility to provide remedies, legal and non-legal, to victims of corporate abuse or misconduct. On the part of the states, the responsibility is to provide effective judicial mechanisms both in host and home countries. States should also facilitate credible and effective non-judicial mechanisms, such as the established national human rights institutions system and the National Contact Points under the OECD framework. On the part of companies, the Framework suggests that providing an effective grievance mechanism is part of the corporate responsibility to respect. The mechanism initiated by a company may be provided directly by the company, or it may use external resources such as expert mediators. For effectiveness and credibility, the mechanism is required to comply with the minimum requirements laid down in the Framework.[62] The mechanism may be a joint effort of several companies, but the design and oversight should involve representatives of groups who may seek to use the mechanism.

The Framework has not provided guidance directly as to how to allocate or distribute responsibility in cases where host states, home states and MNCs are alleged to have jointly contributed to an outcome in violation of international law. However, a practical implication of the Framework may be that it has delineated a principled basis for corporate responsibility

[58] Ibid., Framework, para. 54.
[59] See the decision of the Inter American Court of Human Rights in *Velásquez Rodríguez* v. *Honduras*, IACtHR, (Ser. C) No. 4 (1988); *Alabama claims of the United States of America against Great Britain*, Award, (1872) 1 MIA 495; *Corfu Channel (United Kingdom of Great Britain and Northern Ireland* v. *Albania)* Merits, ICJ Reports 1949, 4; O. Martin-Ortega 'Human Rights Due Diligence for Corporations: From Voluntary Standards to Hard Law at Last?' (2013) 31 (4) NQHR 44, 52.
[60] Examples include environmental assessment tools, see O. De Schutter, A. Ramasastry, M.B. Taylor, and R.C. Thompson, 'Human Rights Due Diligence: The Role of States', Human Rights Due Diligence Project, December 2012.
[61] The Framework, n. 47, para. 58.
[62] Ibid., para. 92.

in the human rights sphere.[63] The responsibility is rooted in the obligation to respect human rights and to provide remediation where it may be required. The provision of remediation is in addition to states' provisions. The Framework has moved the discourse from a position where MNCs have no direct responsibility for preventing or remediating human rights abuse to a position where they share responsibility with states on these issues, albeit voluntarily. The overarching implication of this is that as a legal matter, there is allocation of responsibility, but only states are obliged to act.

The Framework and the Guiding Principles are already showing positive influence on the corporate responsibility discourse at the international level. An important example of its influence is the way it has advanced the work of the OECD on the responsibility of MNCs.[64] The OECD Guidelines for Multinational Enterprises (OECD Guidelines or Guidelines) recognise the responsibility of MNCs in an aspirational way alongside the state. The Guidelines recognise the importance of MNCs in the global investment process and the complexities of MNC cross border activities. They therefore attempts to identify the responsibilities of MNCs, and home and host states in the investment process. The Guidelines are in the form of recommendations from adhering states. These recommendations are addressed to MNCs operating in or from adhering states' territories, and they provide guidance on the standard of behaviour expected from MNCs in their global operations. It is notable that while the Guidelines impose no binding obligation on the part of MNCs, there is a binding commitment on the part of adhering states to implement these recommendations. In describing its approach, the Guidelines provide:

> The *Guidelines* clarify the shared expectations for business conduct of the governments adhering to them and provide a point of reference for enterprises and for other stakeholders. Thus, the *Guidelines* both complement and reinforce private efforts to define and implement responsible business conduct.[65]

Even though, the language used was 'shared expectations for business conduct', it is notable that a significant number of these expectations are derived from international law and went beyond compliance with domestic law, similar to the United Nations' Framework. However,

[63] According to Ruggie, the United Nations' Framework has provided 'a common global platform of normative standards and authoritative policy guidance for states, businesses and civil society'. See Ruggie, *Just Business: Multinational Corporations and Human Rights*, n. 1, at xxii.
[64] P. Muchlinski, 'The 2011 Revision of the OECD Guidelines for Multinational Enterprises: Human Rights, Supply Chains and "Due Diligence" Standard for Responsible Business', A41D Series on Responsible Business, November 2011, 3; OECD Guidelines, n. 46, at 7.
[65] See OECD Guidelines, ibid., at 3.

MNCs are enjoined to honour the principles to the fullest extent, but in a way that does not violate domestic laws.[66]

The recently updated version of the Guidelines was put in place to, among other things, introduce a new chapter on human rights consistent with the Framework.[67] MNCs are required to provide or co-operate in the provision of remedy for adverse human rights impact, where they have caused or contributed to such outcomes. The responsibility of MNCs under the Guidelines is to 'avoid causing or contributing to adverse impacts on matters covered by the Guidelines, through their own activities, and address such impacts when they occur'.[68] Furthermore, the Guidelines provide that in situations where the MNC has not directly contributed or caused an adverse impact, but the impact is linked to the MNC's operations, products or services from a business relationship, the company should use its position or influence, acting by itself or in co-operation with other entities, to prevent or mitigate the adverse impact.[69]

The Guidelines therefore enjoin MNCs to share certain responsibility with states which are traditionally the remit of states. Similar to the United Nation's Framework, in identifying the responsibilities of MNCs in relation to human rights matters, the Guidelines make reference to important international instruments which are traditionally addressed to states. These include the international bill of human rights (the Universal Declaration of Human Rights; the ICCPR; and the International Covenant on Economic, Social and Cultural Rights),[70] and the fundamental rights and principles set out in the ILO'S Declaration on Fundamental Principles and Rights at Work.[71] The Guidelines also require corporations to carry out human rights due diligence as a means of fulfilling their obligations.[72]

6. Relevant case law

[66] Ibid., at 17.
[67] Ibid., at 3.
[68] Ibid., at 31, para. 2.
[69] Ibid., paras. 3 and 6.
[70] Universal Declaration of Human Rights, Paris, 10 December 1948, UN Doc. A/RES/217A (III)(1948) ; ICCPR, see n. 12; International Covenant on Economic, Social and Cultural Rights, New York, 16 December 1966, in force 3 January 1976, 999 UNTS 3 (ICESCR).
[71] ILO Declaration on Fundamental Principles and Rights at Work, Geneva, June 1998, available at www.ilo.org.
[72] OECD Guidelines, n. 46, at para. 5.

The impact of the Ruggie process has already featured in the adjudication before an international court. In the case of *The Registered Trustees of the Socio-Economic Rights & Accountability Project (SERAP)* v. *President of the Federal Republic of Nigeria and others*,[73] the ECOWAS Community Court of Justice considered whether it had jurisdiction to hold the Nigerian state, its state owned corporation, the NNPC, alongside six subsidiaries of MNCs, accountable for human rights violations in the Niger Delta region of Nigeria. The case arose from the adverse human rights, social and environmental impact of MNCs operations. In that case, the plaintiff alleged that the defendants 'individually and/or collectively' inter alia violated international law. References were made to the ICCPR, ICESCR, and the African Charter. The remedy sought included an order compelling the defendants 'individually and/or collectively' to pay adequate compensation of USD 1 billion to the victims, and other forms of reparation the Court may deem fit.[74] The plaintiff thus invited the Court to hold the multiple defendants jointly or severally responsible, and in consequence of such finding allocate liability to the multiple defendants.

However, at the preliminary stage of the case, one of the key issues that the Court had to consider was whether it had jurisdiction to pronounce on the responsibility and liability of the defendant corporations for alleged human rights violations alongside that of the state. It was argued on behalf of the plaintiffs that:

> Multinational corporations like the Third Defendant have obligations under international law not to be complicit in human rights violations. Multinational corporations must not perform any wrongful act that would cause human rights harms; must be aware of their role not to provide assistance or any support that would contribute to human rights violations; and must not knowingly and substantially assist in the violation of human rights.[75]

It was further argued that the violations of human rights by the corporations arose from a lack of due diligence and proper planning, and also from a failure to observe the minimum requirement to respect human rights.[76] To support this contention, the plaintiff counsel referred to the United Nations' Framework, and especially in relation to the concept of due diligence as

[73] *SERAP* v. *Federal Republic of Nigeria*, n. 11.
[74] Ibid., para. 23 of the Ruling.
[75] *The Registered Trustees of the Socio-Economic Rights & Accountability Project (SERAP)* v. *President of the Federal Republic of Nigeria and others*, Plaintiffs' Brief of Argument (on file with author), at 10.
[76] Ibid.

a mechanism for discharging the responsibility to respect human rights. The plaintiff's counsel quoted with approval the following passage from the Framework:

> To discharge the responsibility to respect requires due diligence. This concept describes the steps a company must take to become aware of, prevent and address adverse human rights impacts.[77]

The Court acknowledged the fact that the accountability of corporations, and especially for violations of human rights or complicity in human rights abuses, is one of the most controversial issues in international law.[78] The Court further acknowledged the widely held international concern on the apparent inability to hold MNCs accountable under international law.[79] Commenting on the United Nations' Framework, the Court observed:

> This need to make corporations internationally answerable has led to some initiatives, namely the nomination of Special Representative of the Secretary General of the United Nations whose Report titled 'Protect, Respect and Remedy: A Framework for Business and Human Rights' (The Ruggie Report) is one of the greatest reference on the accountability of multinationals for Human Rights violation in the world.[80]

However, the Court concluded that despite these developments, 'the process of codification of international law has not yet arrived at a point that allows the claim against corporations to be brought before International Courts'.[81] One curious point from the ruling was the decision to exclude the NNPC from the jurisdiction of the Court, which is a state owned corporation and constituted by national law. It is posited that if the Court had called in aid Article 8 of the ARSIWA, it should have assumed jurisdiction on the NNPC in order to determine whether or not the corporation was acting on the instruction of, or under the direction or control of the state. Such an approach would have enabled the Court to explore whether or not the corporation should share responsibility with the Nigerian state for the alleged violations. It is pertinent to note that in the judgement of the ECOWAS Court on the substantive suit, the Nigerian state was found liable for its failure to enforce legislation, and to have regulation in force that could have prevented the violations that were the subject matter of the case.[82]

[77] See the Framework, n. 47, para. 56.
[78] *SERAP* v. *Federal Republic of Nigeria*, n. 11, para. 66.
[79] Ibid., paras. 66–68.
[80] Ibid., para. 68.
[81] Ibid., para. 69.
[82] *SERAP* v. *Federal Republic of Nigeria*, ECOWAS Court of Justice, Judgment No. ECW/CCJ/JUD/18/12, 14 December 2012.

On balance, this decision underscores the future potential of the United Nations' Framework. The plaintiff sought to employ the Framework in making a case for international human rights obligations of MNCs. In particular, the plaintiff emphasised the duty of MNCs to respect human rights which should be discharged through the practice of due diligence.[83] The Court recognised the significance of this development, but concluded that the Framework has not (yet) created a binding international obligation.[84]

The decision of the ECOWAS Court of Justice can be contrasted with the approach of the Nigerian Federal High Court in the *Jonah Gbemre* case.[85] The multiple defendants were similar, a sovereign state, a state owned corporation, and the subsidiary of a multinational corporation. The alleged violations of human rights included violations of provisions of the African Charter. The defendants had contested inter alia that the African Charter, a regional instrument, did not create enforceable rights under the Nigerian fundamental rights enforcement procedure. There was no disputation as to the jurisdiction of the Court over the corporations, because the Court is a domestic court and corporations (domestic or foreign) are subject to the jurisdiction of domestic courts. The Court however disagreed with the contention that the African Charter did not create enforceable rights. It applied the provision of the African Charter and held that certain rights of the plaintiffs had been violated by the defendant's collective action. It made orders which were directed against the MNC and the state, without having to address the issue of joint or shared responsibility. This was because the claim itself was for declaration and an injunction, which may not necessarily require having to allocate responsibility. The Court consequently restrained the subsidiary of the MNC from further flaring gas in the plaintiff's community, and ordered specific steps that the state should take to prevent future violations.

7. Conclusion

The rapid growth and expansion, both in size and influence, of MNCs continues to increase their significance as global actors. The consequence of this development for international law is that the activities of MNCs increasingly impact on rights and duties at the international level. There is a consensus that corporations possess rights under international law (for example

[83] Plaintiffs' Brief of Argument, n. 75, at 20.
[84] *SERAP* v. *Federal Republic of Nigeria*, n. 11, para. 69.
[85] *Jonah Gbemre*, n. 8.

under international investment law and human rights law).[86] Nevertheless, the question of the obligations/duties of MNCs under international law continues to revolve around the theoretically complex, but related, questions as to whether MNCs are subjects of international law, and whether MNCs have international legal personality and international legal capacity.[87] However, as correctly pointed out in *Oppenheim's International Law* '[i]t is a matter for inquiry in each case whether – and if so, what – rights, powers and duties in international law are conferred on any particular body'.[88]

It is notable that the subjects of international law, and the entities having international legal personality, have expanded over the years. It has expanded to include non-state actors, such as intergovernmental organisations and individuals. Still, MNCs are not currently regarded as primary subjects of international law, and neither are they considered as having an international legal personality. As far as international law experts such as the late Antonio Cassese are concerned, corporations are merely secondary subjects of international law.[89] Thus while individuals, states and intergovernmental organisations can potentially be held responsible and liable under international law, MNCs cannot. In recent times, there are suggestions that private and public corporations 'may to a limited extent, be directly subject to rights and duties under international law'.[90] Nonetheless, this notion is not clearly supported as at yet by practice. MNCs regulation has remained largely confined to the domestic forums.

It is worth mentioning that with regard to recognising and imposing binding and enforceable legal obligations on MNCs before an international court, practice can be found in the negotiations of the Statute of the International Criminal Court (ICC).[91] Some states, especially France, argued for vesting the ICC with jurisdiction to entertain cases involving legal entities, including MNCs, and presented a proposal to this effect.[92] This proposal fell through because it failed to garner sufficient support. Part of the reasons for the failure was the fact that some states do not provide for corporate criminal liability in their domestic law. Therefore, introducing such a concept at the international level was problematic for such states. However,

[86] See Pentikäinen, 'Changing International "'Subjectivity"', n. 34.
[87] Ibid.
[88] Jennings and Watts, *Oppenheim's International Law*, n. 20, 16.
[89] A. Cassesse, *International Law*, 2nd edn (Oxford University Press, 2005), 1.
[90] R.P. Alford, 'Apportioning Responsibility Among Joint Tortfeasors for International Law Violations' (2011) 38(2) PLR 233, 234.
[91] Rome Statute of the International Criminal Court, Rome, 17 July 1998, in force 1 July 2002, 2187 UNTS 3 (ICC Statute).
[92] O.K. Fauchald and J. Stigen, 'Corporate Responsibility before International Institutions' (2009) 40 GWILR 1025, 1038.

potentially, the United Nations' Framework may have paved the way for internationalising a theoretical basis for international corporate criminal liability through its concept of corporate culture, discussed earlier. A widespread use of the concept may provide an acceptable principled basis for international criminal liability. This development may make it easier in future attempts to expand the jurisdiction of the ICC to corporations. The growing consensus that corporations may have direct responsibility under international law for violations of international crimes such as torture, slavery, genocide and crimes against humanity is also worth noting. It has been observed that the absence of an international mechanism for enforcing such rights does not preclude the emergence of direct responsibility.[93]

The consequence of the failure to make MNCs subjects of international law or confer on them an international personality, is that it has made it difficult to establish duties and obligations in a formal sense for MNCs at the international level. This makes it extremely difficult to talk of shared responsibility for MNCs at the international level. As the ECOWAS decision demonstrates, even though a plausible case of shared responsibility has been made against an MNC, the structure of international law allows the MNC to escape trial for its (potential) shared responsibility. It may therefore be instructive to follow Clapham's suggestion that the use of the concept 'subjects of international law' is unhelpful and often useless on the balance.[94] He suggested focusing on the rights and obligations of corporations, rather than theoretical debates on the subjects of international law and international legal personality. This would appear to be the approach that the Framework has taken.

Undoubtedly, MNCs expanding activities at the global level has made it possible for them to contribute (as one of multiple entities) to a single harmful outcome in violation of international law. This essentially means that MNCs are capable of creating, or participate in the creation of, situations that involve allocation of responsibility on a shared basis. This raises the question of how to distribute or allocate responsibility between MNCs and other entities, especially states. It has been shown in this chapter that providing answers to this question is made difficult by the current structure of international law with regard to MNCs, and also because there is no international court or tribunal with jurisdiction over MNCs. Furthermore, the identification of

[93] *Kiobel*, n. 18, No. 10-1491, Brief Amici Curiae of former UN Special Representative for Business and Human Rights, John Ruggie; Phillip Alston; and the Global Justice Clinic at NYU School of Law in support of neither party. All available at www.cja.org/section.php?id=509.
[94] Clapham, 'The Subject of Subjects and the Attribution of Attribution', n. 4; See also A. Clapham, 'Extending International Criminal Law beyond the Individual to Corporations and Armed Opposition Groups' (2008) 6 JICJ 899, 901.

international responsibility of MNCs has proved difficult. The consequence of this state of affairs is that MNCs have largely succeeded in avoiding responsibility at the international level. However, there are developments at the international level which may have a bearing on this discourse in the future. These include the practice of implementing social accountability in the international investment framework, and the creation and implementation of soft law standards. These developments are in their early stages, but as the chapter has shown, may potentially have implications for the concept of shared responsibility in the future.