DO WE NEED A WORLD COURT OF HUMAN RIGHTS?
FILLING THE GAPS FOR TNC RESPONSIBILITY

Masterproef van de opleiding
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A map of the world that does not include Utopia is not worth even glancing at, for it leaves out the one country at which Humanity is always landing.

(Oscar Wilde)

The World Court of Human Rights has taken me on an exciting journey from philosophical foundations of human dignity to cynical minds who refuse to accept utopia. When I first read about the proposal of such a Court, the possibility of opening up its jurisdiction to corporate actors was an interesting notion that immediately struck me as a daunting endeavour, a challenge in exercise of thought I gladly accepted.

I would like to thank my promotor, prof. dr. Yves Haeck, and commissaris, Andy Van Pachtenbeke, for their patience, understanding and support this year as I tried to fit writing a master thesis and taking part in the Jessup moot court in one year.

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Finally, I dedicate this thesis to my grandfather, Nikolaas de Jaeger, who suddenly passed away three months ago. He has taught me many things, from science and fine particles, the history of the world, Belgium and his beloved Ghent, to a love for fine foods, music, travel, literature and the importance of young critical minds. Above all, he taught me about the inherent value and worth of every human being, not through his words, but his acts. He will always be the biggest supporter of my achievements.

- Ghent, 15 June 2016
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INTRODUCTION

We are the people, nameless pawns in the game of diplomacy, human sacrifices in the rite of war. We are the people, permanent victims of the abuse of public power and economic power – shackled in serfdom and slavery, herded like cattle into mines and factories and slums, into concentration camps and refugee camps, driven at gunpoint from our families and our homes, dehumanized by poverty and famine and disease, by the new slavery of consumerism and the mindless hedonism of popular culture.¹

People are subject to the whims and strife for personal gain of public authorities and private powers. A world court of human rights responds to the fundamental belief that the international framework of human rights calls for recourse to effective remedy to come full circle, by virtue of the nature of rights inherently holding enforceable obligations for any actor capable of exercising authority and power over individuals. The idea of a world court of human rights has recently been set back on the agenda at the initiative of the Swiss Government as part of the new Swiss Agenda for Human Rights: “One future step which seems to us essential in addressing many of these issues is the establishment of a fully independent World Court of Human Rights. Such a court, which should complement rather than duplicate existing regional courts, could make a wide range of actors more accountable for human rights violations.”² This initiative has resulted in a consolidated Draft Statute by the hands of Julia Kozma, Manfred Nowak and Martin Scheinin.³ This proposal will serve as the basis for this thesis. What struck me most in the proposal is the inclusions of other actors than states as respondents in its jurisdiction *ratione personae*. Given the highly topical issue of business and human rights, and more precisely the lack of accountability for transnational corporations, the prevalent purpose of this thesis purports to analyse on a conceptual basis if these two topics are a match made in heaven, or doomed to stay in limbo. The objective thus is to address the question of whether or not there is need for a comprehensive world court of

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² Protecting Dignity: An Agenda for Human Rights, Swiss Initiative to commemorate the 60th anniversary of the Universal Declaration of Human Rights.
³ J. Kozma et al., *A World Court of Human Rights: Consolidated Statute and Commentary*, (Vienna/Graz, Neuer Wissenschaftlicher Verlag, 2010).
human rights. Special attention will be given to the role of transnational corporations (TNCs) and their possible accountability before such a Court.

In the quest towards these objectives several questions present themselves. Firstly, what is the current state of international human rights law? To answer this question Chapter I will provide a moral and legal basis for international human rights law. Human rights is founded in human dignity and equality. From this perspective it is sensible that several actors hold duties as a response to these rights, even though International Human Rights Law (IHRL) is traditionally constructed as a set of obligations of states vis-à-vis individuals.

Secondly, is the international legal order adapted to TNCs as duty bearers under international human rights law? Chapter II will discuss the changing international legal order. Human rights have become an essential ingredient of the structural foundations of the international legal order. This means that the focus has shifted from states as the sole ‘subjects’ of international law and towards a rights-centred approach. Factual global changes, such as economic globalisation, privatization of the public sector and fragmentation of states have resulted in the emergence of international and regional organizations, transnational non-governmental organisations and transnational corporations, with increased power in the global order. With increased power comes increased influence over individuals which may include a lack of respect for human rights by these actors. Consequently, this results in an alleged lack of accountability for human rights violations, which presents the need for imposing human rights obligations upon non-state actors.

A brief insight in the position of TNCs under international law is offered in Chapter III. Examples of TNC involvement in human rights violations is abundant. Recall in this regard the case of *Kiobel v. Royal Dutch Petroleum Company*, which involved alleged torture and killings of Nigerian activists who organised peaceful protests against Shell in Ogoniland,

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Nigeria because the company forced them to relocate. Recourse is taken to the international forum to address the accountability for human rights violations because of an unwillingness or inability of states to address these issues on the one hand and the very nature of TNCs acting on an international level in ways covered by the corporate veil. In the case of Kiobel, filed by amongst others the widowed wife of Mr. Kiobel, the victims sought redress in the US on the basis of the Alien Torts Claims Acts, but were ultimately disappointed. The company was able to successfully employ forum non conveniens which left the victims without remedy.

The third questions that comes to mind is: what are the shortcomings of the current framework for human rights enforcement? Already touched upon in the case of TNCs, this will be further examined in Chapter IV with a specific focus on recourse to justice by individuals directly at the international level. This chapter seeks to discover what the international mechanisms of oversight and enforcement are and examining if it is effective and sufficient in providing justice for the victims of human rights violations. At the same time this title seeks to uncover if the elements of a changing legal order are noticeable at the international enforcement level, by addressing the question of a rights-centred perspective through individual complaint mechanisms and the question of non-state-actor accountability at the international level, with a specific focus on TNCs. An in depth discussion of the lacunae of national systems for accountability of non-state actors, although briefly touched upon in the previous chapter, is beyond the scope of this thesis.

Finally, the lacunae unravelled in answering the previous questions form the basis of the need for a World Court of Human Rights. This will be discussed in Chapter V from a fundamental moral perspective as to why the need arises, followed by a normative discussion on how these aims would be achieved by the draft statute and ending with a short notion on the need for political momentum for the establishment of the Court.

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6 <business-humanrights.org/en/shell-lawsuit-re-nigeria-kiobel-wiwa>
8 Supreme Court (US), Judgment, 2013, Kiobel v. Royal Dutch Petroleum Co., 133 S.Ct. 1659.
The questions here presented are predominantly analysed on a conceptual basis, resulting in what some may call a utopian vision. The methodology applied is therefore mostly based on scholarly literature of a legal-philosophical nature. A normative approach is applied to the state of the art of human rights enforcement and to the Draft Statute of the World Court. Difficulties on a practical level inherently arise in this discussion but do not form the focal point of this thesis. Ultimately, a Statute for a World Court will have to be negotiated by states taking into account the visions of other actors, amongst which TNCs. This thesis purports to examine what is fundamentally right and what is conceptually possible.

You may say I’m a dreamer,
but I’m not the only one.

(John Lennon)
CHAPTER I.
A BRIEF INTRODUCTION TO INTERNATIONAL HUMAN RIGHTS LAW

In order to discuss a system where both states and non-state actors can be held accountable for human rights violations it is important to go back to the basics and first delineate what is understood by ‘human rights’ for the purpose of which I hold and follow the opinion that these are rights that people have by virtue of being ‘human’. Second I will consider how these rights have been institutionalised and structured on an international level. For this purpose, we will keep in mind that it is not because in the course of history human rights obligations have mostly been considered in relation to states that they are the only ones holding obligations under international law. Indeed, I will finally explain that the international legal order is in a process of change, even more so the international human rights legal order is undergoing a constant evolution, a view which is completely in line with the view taken by the ECtHR, which regards the ECHR as a ‘living instrument’ to be interpreted ‘in the light of present-day conditions’.9

1. What Are ‘Human Rights’?

Even though historically the specific phrase ‘human rights’ is mostly traced back to modern times, the idea is as old as humanity itself, inevitably intertwined with the history of justice and law.10 Human rights are rights that individuals have by virtue of being human.11 The essence of human rights revolves around the question of what it is about being “human” that gives rise to rights.12 We thus support the ‘bottom-up’ approach to human rights, starting

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9 ECtHR (Merits), 25 April 1978, Tyrer v United Kingdom, App no. 5856/72, para. 31; ECtHR (Preliminary Objections) 23 February 1995, Loizidou v Turkey, App. no 40/1993/435/514, para. 71.
11 For a detailed account of the philosophical foundation of human rights see J. Griffin, On Human Rights (Oxford University Press, 2008).
from the essence of being human.\textsuperscript{13} We can discuss human rights as moral principles and as legal principles rooted in morality.

Two overarching and interrelated principles lie at the moral foundation of human rights: ‘human dignity’ and ‘equality’.\textsuperscript{14}

Human dignity as a concept is twofold, on the one hand it serves as the foundational premise of human rights and on the other hand as a legal term, for instance serving as a tool for interpretation. This last strand is often criticized for its use in methods of interpretation and application of specific human rights because of its lack of clear content or meaning.\textsuperscript{15} For present purposes of human dignity in the context of international human rights law refers to the foundational premise of human rights.\textsuperscript{16} In this sense “human dignity is understood as an affirmation that every human being has an equal and inherent moral value or status”,\textsuperscript{17} a view shared by Immanuel Kant who derives from this that no human being can be used merely as a means, but must always be used at the same time as an end in his classical work \textit{The Metaphysics of Moral}.\textsuperscript{18}

Human dignity also has value as a true legal proposition.\textsuperscript{19} It serves as one of the most fundamental concepts of international human rights law, exemplified by its widespread

\begin{itemize}
\item[\textsuperscript{13}] Griffin \textit{supra} n. 11, p. 29.
\item[\textsuperscript{14}] Shelton \textit{supra} n. 12, p. 7.
\item[\textsuperscript{16}] Shelton \textit{supra} n. 12, p. 7.
\item[\textsuperscript{17}] \textit{Ibid}.
\item[\textsuperscript{19}] Tomuschat \textit{supra} n. \textit{Fout! Bladwijzer niet gedefinieerd,} p. 117.
\end{itemize}
appearance in almost all human rights instruments and regular application by human rights bodies.\textsuperscript{20}

It is a principle recurring in binding human rights treaties\textsuperscript{21} as well as in jurisprudence. The ECtHR for instance affirmed that “the very essence of the convention is respect for human dignity”,\textsuperscript{22} which is easily imagined for instance with application of article 3 ECHR. Human dignity is also explicitly present in the other regional human rights documents.\textsuperscript{23} The concept of dignity not only provides for a measuring or interpretational tool in application of civil rights but also has a role to play in respect of economic and social life in answering the question on the benefits needed for a dignified life.\textsuperscript{24}

The concept of equality is inherently linked with human dignity as exemplified by reading of article 1 of the UDHR: “All human beings are born free and equal in dignity and rights.”\textsuperscript{25} The moral principle underlying human rights is that we are all moral persons and therefore deserve equal respect, fittingly named ‘the principle of equal respect’.\textsuperscript{26} The consequence of

\begin{itemize}
\item Shelton \textit{supra} n. 12, p. 7.
\item ECtHR (Merits), 29 April 2002, \textit{Pretty v. The United Kingdom}. App. No. 2346/02, para. 65; ECtHR (Judgment) 8 November 2011, \textit{VC v Slovakia}, App 18968/07, para. 105.
\item Universal Declaration of Human Rights(UDHR), 1948, UNGA res 217 A, article 1.
\item J. Griffin \textit{supra} n. 11, p. 39.
\end{itemize}
equality as a foundational principle is that rights most of the time must be balanced against rights of others. Equality holds in it a right of non-discrimination which is perceived as “the most fundamental of the rights of man… the starting point of all other liberties”.\textsuperscript{27} Such a reasoning indeed lies at the foundation of the international concept of human rights which is found for instance in the abolition of slavery and minority rights and the right to self-determination.

When considering human rights in legal terms we imagine that ‘rights’ exist as a counterpart of duties. Classically states are seen as the main duty holders in this regard since they exercise authority over persons and have the power to exercise a great degree of influence on them. However, when we keep the moral foundations of human rights in mind we may imagine that states are not the only actors in the international sphere which have the power to exercise authority over individuals and the scope of duty bearers may thus be expanded towards a more horizontal nature, an argument traced back to the moral foundation of human rights. In a more elaborate argument on human dignity, following up on Kant’s views, Dworkin indeed stipulates that human dignity has two faces, the intrinsic value of every human being, and the moral responsibility to realize a successful life, which confirms the close interrelation of moral rights and moral duties. “Based on this moral conception of human dignity, it leads us to the argument that human rights constitute the legal face of human beings. That is, human rights are not only the relational aspect of human dignity that justifies the interrelation of moral rights and moral duties; they are also the institutional aspect of implementing human moral rights and duties and the legitimate aspect to enforce a remedy for moral rights violation.” \textsuperscript{28}

It may thus be concluded, as Shelton does, that:

“human rights exist because human beings exist with goals and the potential for personal development based upon individual capacities which contribute to that personal development. This can only be accomplished if basic needs which allow for existence are met and if other

\begin{itemize}
  \item \textsuperscript{27} H. Lauterpacht, \textit{An International Bill of the Rights of Man}, (Columbia University Press 1945), p. 115.
  \item \textsuperscript{28} Shih-Tung Chuang in M. Nowak, “Roundtable On the Creation of World Court of Human Rights”, \textit{7 NTU L. Rev.} (2012), p. 276.
\end{itemize}
persons refrain from interfering with the free and rational actions of the individual. Recognition of the fact that there are rational and legal limits to individual, corporate or state conduct that would interfere unreasonably with the free aims and life projects of others is a basic idea underlying contemporary understanding of human rights.”

Deriving from the moral foundation of human dignity, the main characteristics of human rights as we know them today stipulate that they are inherent, interdependent, and indivisible. This means first that they are of such a nature that they cannot be granted or taken away, a concept rooted in human dignity. Second, interdependence means that the enjoyment of one right influences the enjoyment of another right. This holds true not only when considering the rights of one person, but also when balancing the rights of one against the rights of another, a promulgation of the principle of equality. And third, human rights are indivisible which means that they must all be respected without exception.

The notion of human rights throughout history is founded in a social contract between individuals and the state. It is only since the second world war that human rights became a part of the realm international law and thus forming the ‘international human rights law’ branch of international law.

2. **Characterization of International Human Rights Law**

International Human Rights Law is the structuration of human rights in the international legal order. The great leap of said structuration became apparent in the post-WWII period (2.1). International human rights law has become an area of international law that encompasses a set of individual entitlements of persons against governments (2.2.1). These entitlements, human rights, range from civil to political rights such as the rights to be free from arbitrary deprivation of life, torture and other ill-treatment or to freedom of thought, conscience and religion, to social and economic rights such as the rights to health and to education. Substantive IHRL can be found in many different sources, either conventional or customary, and binding or non-binding, so called ‘soft’ law (2.2.2). IHRL has evolved both on the

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29 Shelton *supra* n. 12, p. 7.

international and regional plane through several binding treaties, centred around state obligations and rights for individuals. Nowadays, a change in the international legal order can be perceived and the involvement of other actors is increasingly recognized (infra).

2.1. **The Introduction of Human Rights in the International Legal Order**

Human Rights as part of the law have evolved since the dawn of time as a product of a constant “struggle by individuals concerned with justice and human well-being.”\(^{31}\) Gradually human rights became a part of the legal structure of nations, proof of which can be found in several legal texts throughout history.\(^{32}\) Human rights law was mainly concerned as the law of sovereign states vis-à-vis their citizens and did not have a place in international law. An idea famously postulated by Oppenheim: “Law of Nations or International Law (*Droit des gens, Völkerrecht*) is the name for the body of customary and conventional rules which are considered legally binding by civilised States in their intercourse with each other.”\(^{33}\) Since the end of the second world war the individual has however undeniably conquered a place in the international law framework.

The second world war fuelled an international outrage in the lack of respect for fundamental human rights and human dignity of the atrocities committed by Nazi Germany. This served as a momentum for a great leap in the evolution of international human rights law with the establishment of the United Nations at the core of this revolution. The UN Charter makes ample reference to human rights and it is indeed part of the very purposes of the United Nations.

“The purposes of the United Nations are: … to achieve international co-operation… in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion”\(^{34}\)

\(^{31}\) Shelton *supra* n. 12, p. 15.

\(^{32}\) Shelton *supra* n. 12, p. 16-31.


\(^{34}\) Article 1 UN Charter.
The Charter thus fittingly already holds a duty to respect and a positive duty towards this aim in article 55 and 56:

“With a view to the creation of conditions of stability and well-being which are necessary for peaceful and friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, the United Nations shall promote:

... c. universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion.”35

“All Members pledge themselves to take joint and separate action in co-operation with the organization for the achievement of the purposes set forth in Article 55”36

Human Rights indeed form the ‘golden thread’ throughout the Charter and finally place them at the centre of international law as a limit to state action.37 The argument that issues of human rights are matters of exclusive jurisdiction was still omnipresent at the time, especially with the beginning of the Cold War which diminished the evolution of effective protection, nevertheless international human rights law took its place and the sovereignty argument became increasingly implausible over time.38

The central role of the state was furthermore called into question and fundamentally impacted by the introduction of regional organisations concerned with respect for the rights of the individual.39 This change was certainly picked up by the most renowned international legal

35 Article 55 UN Charter.
36 Article 56 UN Charter.
38 Shelton, supra n. 12, p. 34.
39 In Europe specifically, as the place where the greatest atrocities of the second world war were conducted. A system for European regional human rights protection was initiated in 1949 by the creation of the Council of Europe. Since 1950 membership to the Council is conditioned upon
scholars such as Sir Hersh Lauterpacht: “The sovereign national state, whether or not in the permanent form of political organization of man, is not an end unto itself but the trustee of the welfare and of the final purpose of man”.\textsuperscript{40} International law has evolved in such a way that ‘the individual human being’ is accorded a central role. Accordingly, human rights, “have at the same time advanced to the highest level of the rules and principles making up the international legal order”.\textsuperscript{41}

2.2. **The Law of Human Rights**

Now that the importance of human rights has been widely recognised, the next question is: what is the law? Cassese identifies three steps towards legal positivism.\textsuperscript{42} These steps are: identifying the substance of the rights, establishing binding duties for the protection of those rights and finally enforce those duties.\textsuperscript{43} The first step has been taken by the Universal Declaration, the second by the emergence of binding human rights treaties at the United Nations, the first of which was the Convention on the Elimination of All Forms Racial Discrimination (CERD)\textsuperscript{44} in 1965, closely followed by the International Covenant on Civil and Political Rights and (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR) in 1966.\textsuperscript{45} An overview of the sources of binding obligations follows under 2.2.2.1 (infra). When establishing binding rules, the association is made of rights with duties and accordingly rights-holders and duty-bearers must be identified (2.2.1.). The last stage of enforcement is the most difficult one to take in the realm of international law and was made difficult by the polarisation of the international community during the cold adherence to the ECHR, the first human rights document in the post-war period containing legally binding human rights provisions.

\textsuperscript{40} Lauterpacht, *supra* n. 27, p. 50.
\textsuperscript{41} Tomuschat, *supra* n. 5, p. 2.
\textsuperscript{43} Tomuschat, *supra* n. 5, p. 30.
war. An account of Human Rights enforcement by means of individual access to justice will be discussed later on (infra CHAPTER IV).

2.2.1. **Nature of International Human Rights Law**

International Human Rights Law is a part of public international law, which is traditionally governed by and for sovereign states. The role of other actors and the individual at the centre of international human rights law is undeniable. Indeed it is a field of law that is subject to constant evolution. “However one conceives human rights law, it is surely not static. Human rights law is driven, not by the steady accretion of precedents and practice, but rather by outrage and solidarity.” Nevertheless the international legal system remains primarily governed by states.

Founded in the outrage after the second world war, international human rights law was conceived as a protection of certain fundamental rights against the whims of sovereign governments. The nature of international human rights law is thus such that it constitutes of a set of obligations for states that ensure rights for their citizens and which is subject to the principles of state responsibility. In a changing legal order the scope of actors under international human rights law is somewhat more nuanced.

2.2.1.1. **Right Holders**

By the very nature of human rights as such and the construction of international human rights law, human beings are the primary right holders. The rights of individuals become apparent in the sources of international human rights law. Most universal treaties use language in

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47 See infra CHAPTER II.
49 Shelton, supra n. 12, p. 74.
50 D. Shelton, supra n. 12, p. 13.
51 See infra 2.2.2.
accordance with Article 2 UDHR and bestow rights on ‘everyone’.\textsuperscript{52} Treaties directed as specific groups of persons naturally adjust the scope \textit{ratione personae} to those specific persons (women, children, disabled persons, etc.).\textsuperscript{53}

When considering who holds a substantive right under IHRL it is imperative to examine the criteria for holding a substantive right.\textsuperscript{54} Certainly, when there is a possibility of enforcement, the substantive right must exist.\textsuperscript{55} However, standing legal theory, based on the vision of Lauterpacht, suggests that the existence of a substantive right is not dependent on its procedural enforceability.\textsuperscript{56} While some human rights treaties are enforceable under international law, treaties are not the only sources of international human rights law. For instance, many rights are embedded in custom.\textsuperscript{57} The evolution of international law does however seem to increasingly accord a legal position to individuals as a holder of enforceable rights,\textsuperscript{58} a trend to be epitomized with the creation of a World Court of Human Rights.\textsuperscript{59}

In addition to individuals, corporations are accorded a selective form of human rights protection.\textsuperscript{60} The ECHR was quick to acknowledge this and included corporations in its scope \textit{ratione personae}.\textsuperscript{61} The political climate at the time did unfortunately not allow for the ICCPR do the same.\textsuperscript{62} However, evolution of the international legal order points to a shift on this matter. By virtue of their nature they are not eligible to hold the full scope of rights

\textsuperscript{52} Tomuschat, \textit{supra} p. 112.
\textsuperscript{53} Ibid.
\textsuperscript{54} Tomuschat, \textit{supra} p. 115.
\textsuperscript{55} Tomuschat, \textit{supra} p. 115.
\textsuperscript{57} Tomuschat, \textit{supra} p. 114.
\textsuperscript{58} See \textit{infra} CHAPTER I.2.
\textsuperscript{59} See \textit{infra} CHAPTER V.
\textsuperscript{60} See \textit{infra} CHAPTER I.3
\textsuperscript{61} ECHR, Art. 34.
\textsuperscript{62} Tomuschat, \textit{supra} p. 117.
identified for individuals, such as the right to life and prohibition of torture. There are other rights, however that do apply to the workings of corporations, such as freedom of speech.  

Finally, mention must be made of ‘peoples’ as holders of human rights. This characterization is founded in the principle of self-determination, a concept present in common Article 1 of the ICCPR and the ICESCR, further elaborated upon in the Friendly relations Declaration, and clarified by the HRC and the ICJ.

2.2.1.2. Duty Bearers

In line with the inception of the IHRL framework as an armour against abusive whims of sovereign authorities, states are the primary addressees of human rights obligations. In this sense ‘states’ must be regarded as broad concepts and include any instances that exercise sovereign authority, guided by the principles on state responsibility drafted by the International Law Commission. The nature of states’ duties is described by Asbjorn Eide as comprising of the duty to respect, protect, promote and fulfil human rights. The obligations of states thus entail both a negative and positive side. The Velasquez-Rodriguez case is often quoted in relation to the positive obligations of states which holds that the duty of the State “is

63 ECtHR, Sunday Times case, Series A No 30, 26 April 1979.
64 Tomuschat, supra n. Fout! Bladwijzer niet gedefinieerd., p. 118.
68 Tomuschat, supra n. Fout! Bladwijzer niet gedefinieerd., p. 119.
71 Shelton, supra n.12, p. 190.
to organize the governmental apparatus and, in general, all the structures through which public power is exercised, so that they are capable of juridically ensuring the free and full enjoyment of human rights".\(^ {72}\) This means that the government must organize itself in such a way that the full and free enjoyment of human rights is guaranteed.\(^ {73}\) This is an inherent part of international human rights law and is codified in many treaties\(^ {74}\) and corroborated by authoritative interpretations by (quasi-)judicial bodies.\(^ {75}\) In addition to negative and positive obligations, states must also implement a horizontal application of human rights in domestic legislation.\(^ {76}\)

The state as solitary subject of international law is no longer reflective of current circumstances.\(^ {77}\) There are other participants in the international legal order who have obligations under human rights law. This is also an appropriate reflection of a rights-centred approach, cognisant of the fact that there are multiple actors exercising authority over individuals and thus hold the power to abuse their human rights. Other duty bearers include international organisations, such as the European Union\(^ {78}\), the United Nations\(^ {79}\) and the World Trade Organisation.\(^ {80}\)

\(^{72}\) IACtHR (Merits), 29 July 1988, *Velasquez-Rodriguez v Honduras* Ser C No 4.

\(^{73}\) Shelton, *supra* n.12, p. 191.

\(^{74}\) Art. 2 ICCPR, art. 2 ICESCR, ICERD, article 2(d).


\(^{76}\) Shelton, *supra* n.12, p. 191.

\(^{77}\) See *infra* CHAPTER II.


Individuals holding rights inherently also bear duties not to infringe on the rights enjoyed by others, embedded in the principle of equality, which is present in the UDHR.\textsuperscript{81} The binding human rights treaties are more careful or silent on this matter, except for the AfChHPR which stipulates obligations for individuals in articles 27 to 29.\textsuperscript{82} The true obligation of individuals mostly remains under domestic law with the principle responsibility for states to implement human rights standards, the well-known exception being under international criminal law where individuals may be tried for the most serious crimes before the international criminal court.\textsuperscript{83}

Except for enforceability before the ICC, a similar reasoning holds for the obligations of private corporations under international human rights law. Traditionally their obligations are of an indirect nature.\textsuperscript{84} There is however increasing attention to the direct obligations of corporate actors, a more detailed account of which is provided under Chapter III.

2.2.1.3. **Territorial Limits to Human Rights Obligations**

Since the primary responsibility for human rights protection lies with the state, the scope of obligations is accordingly limited to instances where the state can exercise its authority. Traditionally this is confined to the territory of the state.\textsuperscript{85} Human Rights treaties refer to obligations towards individuals “within the territory and subject to the jurisdiction”. The Human Rights Committee has interpreted this as situations where the persons involved reside under effective control of the state.\textsuperscript{86} The ECtHR employs a narrow interpretation of ‘control and authority’, which is confined to situations where there is an element of physical control or authority over individuals such as in the cases of a military presence abroad.\textsuperscript{87} This already


\textsuperscript{82} Tomuschat, supra n. **Fout! Bladwijzer niet gedefinieerd.**, p. 129.

\textsuperscript{83} Ibid.

\textsuperscript{84} Tomuschat, supra n. **Fout! Bladwijzer niet gedefinieerd.**, p. 131.

\textsuperscript{85} Shelton, supra n. 12, p. 194.

\textsuperscript{86} HRC GC 31 para 10.

touches upon one of the lacunae in human rights judicial protection and an argument as to why regional protection is not sufficient.\textsuperscript{88} Moreover, this shows that in a globalized world, the central position of states as sole direct holders of obligations under international law is outdated, since there are many actors who operate beyond territorial borders.

\textbf{2.2.2. Sources of International Human Rights Law}

What follows is a brief overview of the different sources which hold human rights obligations. Clapham suggests a characterization of human rights on the basis of their legal characteristics rather than a historical or philosophical typology for the purpose of examining obligations for non-state actors.\textsuperscript{89} These types consist of: Customary international law, rules of \textit{jus cogens}, treaty law, international crimes, \textit{erga omnes} obligations, and inter-governmental standards.\textsuperscript{90} All of these types are of course interrelated. Treaty law may for instance evolve into customary law or vice versa. In this sense obligations for non-state actors may be deduced from the whole framework of substantive human rights law.\textsuperscript{91}

\textbf{2.2.2.1. Human Rights Treaties}

Entering into binding agreements through consent is part of the exercise of sovereignty by states. Human rights treaties codify many rights and delineate obligations directed at states. At the global level substantive human rights have crystallised into an International Bill of Human Rights comprised of nine core human rights treaties: the Convention on the Elimination of all forms of Racial Discrimination (CERD); the International Covenant on Civil and Political Rights (CCPR); the International Covenant on Economic, Social and Cultural Rights (CESCR); the Convention on the Elimination of all forms of Discrimination Against Women (CEDAW); the Convention Against Torture, and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT); the Convention on the Rights of the Child (CRC); the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (CMW); the Convention on the Rights of Persons with

\textsuperscript{88} See \textit{infra} CHAPTER IV.

\textsuperscript{89} Clapham, \textit{supra} n. 48, p.85.

\textsuperscript{90} This is of a soft law nature and will be discussed with regards to transnational corporations in Chapter III.

\textsuperscript{91} Clapham, \textit{supra} n.48, p. 100.
Disabilities (CRPD) and the International Convention for the Protection of all Persons from Enforced Disappearance (CED).

Human rights treaties perform two important functions in international human rights law. On the one hand they are a means of codifying existing human rights obligations and on the other hand they assist in the development of those obligations. Clapham discusses several legal effects of human rights treaties.  

Most importantly, the treaties create rights for individuals and legal obligations for the parties to the treaty. Classically states are the only parties to a treaty but we can see a slight change in this state of being through the European Union as a non-state party to the ECHR despite the 2014 CJEU opinion on this matter. We might thus envisage that it is possible to have non-state actors as parties to international human rights instruments. Any party has the possibility to complain about violation by another party. The point is that human rights treaties create a multilateral regime where parties have the possibility to insist on compliance by other parties. As such, human rights treaties may also form the basis of claims of other states parties on grounds of state responsibility. In their rights-creating capacity treaties may in some instances have the legal consequence of direct effect in national systems when they are precise and clear enough.

Additionally treaties may hold implementation or enforcement mechanisms. This includes for instance reporting obligations, a process that has however reached its breaking point since they are too many reports too consider and insufficient resources to do so.

\[\text{92}\] Clapham, supra n. 48, p. 91.  
\[\text{93}\] CJEU (Opinion of the Court) 18 December 2014, Opinion 2/13, para. 258.  
\[\text{94}\] Clapham, supra n. 48, p. 91.  
\[\text{95}\] ARSIWA, supra n. 69, art 48; Clapham, supra n. 48, p. 94.  
\[\text{96}\] See PCIJ, Pecuniary Claims of Danzig Railway Officials who have passed into the Polish Service, against the Polish Railway Administration. Advisory Opinion no. 15, 3 March 1928, series B, pp. 17-18.  
\[\text{97}\] See infra CHAPTER I.1.
2.2.2.2. CUSTOMARY INTERNATIONAL LAW

Clapham urges for renewed attention to customary international law standards in the field of international human rights law, for several reasons amongst which a heightened relevance towards ensuring responsibility at the national level for non-state actors.\textsuperscript{99} Rules of customary international law require two elements: consistent state practice and \textit{opinio juris}.\textsuperscript{100} In Human Rights law, rules that are considered universal and present in several treaties are considered as of customary nature, amongst which many enshrined in the Universal Declaration of Human Rights (UDHR)\textsuperscript{101}. There is no consensus however on the extent to which the declaration have achieved customary law status.\textsuperscript{102} Nevertheless, an increasing list of rights and obligations has been recognized before national and international judicial bodies as customary law.\textsuperscript{103} These include: the prohibition of the crime of genocide, torture and prolonged arbitrary detention; the guarantee of equality and non-discrimination, and the right to life.\textsuperscript{104} Certain social and economic rights are also considered CIL candidates, subject to a state’s available resources\textsuperscript{105}, including the right to free choice of employment, to form and join trade unions and the right to free primary education.\textsuperscript{106}

Customary human rights obligations are candidates for obligations on non-state actors because, according to Clapham, “the international legal order considers these rights and

\begin{itemize}
\item \textsuperscript{99} Clapham, \textit{supra} n. 48.
\item \textsuperscript{100} See ICJ (Judgment) 27 June 1986, \textit{Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)}, paras. 183-86.
\item \textsuperscript{101} See \textit{supra} n.25.
\item \textsuperscript{102} Clapham, \textit{supra} n. 48, p. 86.
\item \textsuperscript{103} Shelton, \textit{supra} n.12, p. 77.
\item \textsuperscript{104} Shelton, \textit{supra} n.12, p. 77.
\item \textsuperscript{106} Clapham, \textit{supra} n. 48, p. 86.
\end{itemize}
obligations as generally applicable and binding on every entity that has the capacity to bear them”.

2.2.2.3. **Peremptory Norms, Erga Omnes Obligations and International Criminal Law**

Peremptory norms (*jus cogens*) of international law do not require *opinio juris* to be legally binding by virtue of their nature. For instance, when applied to human rights, the prohibition of torture has been accepted as a rule of *jus cogens* without the requirement of the sense of legal obligation of states. The International Law Commission and the Human Rights Committee have both aided in pinpointing rights which reach this standard. Examples recognized by these bodies and international courts include the prohibition of genocide, torture and arbitrary deprivation of life; the right to self-determination and the right to fair trial. To fall within this scope of peremptory norms of international law, the violations must be “a gross or systemic failure by the responsible State to fulfil the obligation”.

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107 Clapham, *supra* n. 48, p. 87.
110 ICJ (Judgment) 19 December 2005, *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v Rwanda)*, para. 64.
113 ARSIWA, *supra* n. 69, art. 40(2).
means that the infringement must be organized and deliberate and of a flagrant nature which amounts to a direct and outright assault on the values protected by the rule.\textsuperscript{114}

\textit{Erga omnes} obligations are obligations not owed to a specific state or right holder but to the international community as a whole.\textsuperscript{115} These obligations are thus of such an imperative importance which call for specific and broad procedural consequences.\textsuperscript{116} ICJ examples of such obligations include the prohibition of genocide\textsuperscript{117} and the protection from slavery and racial discrimination. It is furthermore imperative to note that “while all \textit{jus cogens} obligations have an \textit{erga omnes} character, the reverse is not necessarily true.”\textsuperscript{118} Human rights are clearly designed to “protect a general common interest”, and thus fall under this category if they reach a certain level of universality and significance.\textsuperscript{119}

Similarly to \textit{erga omnes} obligations, some attacks on human dignity are so outrageous that they are elevated to the category of international crimes.\textsuperscript{120} International crimes and obligations \textit{erga omnes} are not new sources of law in the traditional sense, they are created by treaty and custom.\textsuperscript{121} Their separate characterization because of their important nature are however interesting as sources of obligations for non-state actors.\textsuperscript{122} Under international criminal law for instance, individuals can also be tried before the ICC.

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\textsuperscript{116} Shelton, \textit{supra} n.12, p. 88.


\textsuperscript{118} Shelton, \textit{supra} n.12, p. 88.

\textsuperscript{119} Shelton, \textit{supra} n.12, p. 89.

\textsuperscript{120} Shelton, \textit{supra} n.12, p. 89

\textsuperscript{121} Shelton, \textit{supra} n.12, p. 89

\textsuperscript{122} Clapham, \textit{supra} n. 48, p. 87.
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CHAPTER II.
A ‘CHANGING’ INTERNATIONAL LEGAL ORDER

The international human rights framework have been institutionalised in such a way that it is mainly comprised of state obligations vis-à-vis individuals. Such a state-centric approach to international law is outdated (1). Keeping in mind the foundational principle of human dignity, the focus of international human rights law now lies with the individual (2). It is indeed so that human rights have become an essential ingredient of the structural foundations of the international legal order. A final important change in the international legal framework is the increasing role of non-state actors (3). An account of the implications of the increasing role of transnational corporations follows in Chapter III.

The factual and legal changes in the scope of human rights obligations must be met with an equal change in enforcement mechanisms (infra Chapter IV). This thesis will propose that an appropriate recourse may be found in direct accountability of non-state actors before a World Court of Human Rights (infra Chapter V).

1. FROM STATES AS THE SOLE ‘SUBJECTS’ OF INTERNATIONAL LAW TO A LEGAL ORDER BASED ON PARTICIPATION

Under traditional international law, the sole duty bearers are states, the true and sole ‘subjects’ of international law. It has however been argued that such a system “is incapable of serving as the normative framework for present or future political realities. . . new times call for a fresh conceptual and ethical language”124, and must thus respond to the increasing role of non-state actors (infra 3). We have come to the situation where the international legal order without doubt admits to the existence of actors other than states as subjects of international law.125 In that sense, the ICJ has attempted to broaden the scope of the definition ‘subjects’ of international law. The landmark case is the Reparation for Injuries case in which was examined what the legal personality of the United Nations, an international organization, was

123 Tomuschat, supra n. Fou! Bladwijzer niet gedefinieerd., p. 2.
125 Clapham, supra n. 48, p. 68.
vis-à-vis a (then) non-member state, Israel. In this case the Court came to the infamous ‘capacity’ argument, from which it can be concluded that a subject of international law can be defined as ‘an entity capable of possessing international rights and duties and having capacity to maintain its rights by bringing international claims’, a circular reasoning as pointed out by Brownlie.\(^{126}\) The object/subject divide thus does not seem useful and, as elaborately argued, is clearly an outdated approach.\(^{127}\) Indeed, as Rosalyn Higgins notes, “the whole notion of ‘subjects’ and ‘objects’ has no credible reality, and, in my view, no functional purpose. We have erected an intellectual prison of our own choosing and then declared it to be an unalterable constraint.”\(^{128}\)

Different actors have different influences and we must accept a layered approach to participation in the international legal order.\(^{129}\) Lauterpacht already recognised this in 1947 and acknowledged that “we should adjust our intellectual framework to a multi-layered reality consisting of a variety of authoritative structures . . . [in which] what matters is not the formal status of a participant . . . but its actual or preferable exercise of functions.”\(^{130}\) An alternative approach, for instance suggested by McCorquodale, is based on ‘participation’ in the international legal system, which is much broader than states alone.\(^{131}\) This view is also founded in opinions of the ICJ which have stated that: “Throughout its history, the development of international law has been influenced by the requirements of international life, and the progressive increase in the collective activities of states has already given rise to

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131 McCorquodale, *supra* n. 129, p. 481.
instances of action upon the international plane by certain entities that are not states.” 132 A theory based on participation is linked to the capacity approach proposed by O’Connel, which stipulates that there are a variety of international capacities to enjoy rights and obligations which are exercised by a variety of actors. 133 Clapham subsequently postulates that when such a reasoning is followed it is not difficult to imagine that non-state actors can be held accountable for their obligations under international law, in addition to the traditional state responsibility. 134

It can thus be properly concluded that the current international legal framework must be based on participation, and legal personality must be accorded as such. States as the centre of international law is outdated, a concept already reflected in the UN Charter as noted by Kofi Annan: “For even though the United Nations is an organization of states, the Charter is written in the name of ‘We the Peoples’ . . . Ultimately, then, the United Nations exists for, and must serve, the needs and hopes of peoples everywhere.” 135 Both states and non-states actors thus have a place to fill in the international legal order, such a belief would indeed form a more appropriate analysis of the international legal system. 136 As concluded by Robert McCorquodale in his argument for an inclusive international legal order, “such an interpretation will enable non-state actors to be heard as active participants in a more inclusive and decentralized international legal system which ‘exists for, and serves, the needs and hopes of people everywhere’.” 137 Undoubtedly, the international human rights framework has played an important role leading the way to address ‘the needs and hopes of people everywhere’, and this framework in turn is also undergoing a process of change away from the state as the focal point.

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134 Clapham, supra n. 48, p. 71.


136 McCorquodale, supra n. 129, p. 504.

137 Ibid.
Kotaro Tanaka, in his dissenting opinion in the *South West Africa* case ties this evolution back to the core of human rights, stating that:

“The principle of the protection of human rights is derived from the concept of man as a person and his relationship with society which cannot be separated from universal human nature. The existence of human rights does not depend on the will of a State; neither internally on its law or any other legislative measure, nor internationally on treaty or custom, in which the express or tacit will of a State constitutes the essential element. A State or States are not capable of creating human rights by law or by convention; they can only confirm their existence and give them protection. Human rights have always existed with the human being. They existed independently of, and before, the State.”

**2. A RIGHTS-CENTERED APPROACH TO INTERNATIONAL HUMAN RIGHTS LAW**

With a multitude of actors on the international plane, there are a number of possible duty holders imaginable under international human rights law. When looking at other actors we must not appeal to a top-down approach, but rather bottom-up. We place the people who are the holders of rights at the centre of our attention and consequently analyse which actors on the international plane have the capacity to exercise influence over the enjoyment of these rights. Indeed, referring back to Kofi Annan:

“What is not always recognized is that ‘We the Peoples’ are made up of individuals whose claims to the most fundamental rights have too often been sacrificed in the supposed interests of the state or the nation . . . In this new century, we must start from the understanding that peace belongs not only to states or peoples, but also to each and every member of those communities. The sovereignty of states must no longer be used as a shield for gross violations of human rights. Peace must be made real and tangible in the daily existence of every

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139 Clapham, *supra* n. 48, p. 57.
individual in need. Peace must be sought, above all, because it is the condition for every member of the human family to live a life of dignity and security.”

The international legal framework of today does not include a direct horizontal approach to human rights, it is however included in the positive obligation of the state to implement the international human rights framework. It is certainly imperative that every right holds a duty and thus a duty-bearer. Increasingly, the position of the individual has become recognised, especially when it comes to accountability for human rights violations. A more elaborate discussion will follow in Chapter IV. However, may I here already point to the recent Diallo case by the ICJ in which the Court has adopted the rights-centred approach to international law by analysing violations not from the perspective of the State but from the perspective of the individual, Mr. Diallo. 141

3. INCREASING ROLE OF NON-STATE ACTORS

Non-State actors have an increasingly important role to play in international law. In human rights law specifically, non-state actors have been included as rights holders. 142 In many human rights treaties, other actors than individual human beings have indeed been noted as the addressees of certain rights. 143 Non-State actors as duty-bearers under international human rights law is a different question. Certain factual changes in the international sphere, such as rapid globalisation, have resulted in increased power of other actors than states. As discussed above, States do not hold a monopolistic place in the international legal order any longer. Factual global changes have resulted in the emergence of international and regional organizations, transnational non-governmental organisations and transnational corporations,

142 McCorquodale, supra n. 129, p. 486
143 E.g., the Preamble to the International Covenant on Civil and Political Rights 1966 recognizes that ‘these rights derive from the inherent dignity of the human person’, and the Preamble to the African Charter of Human and Peoples’ Rights 1981 provides that ‘fundamental human rights stem from the attributes of human beings’
which form the focal point of this study. With increased power comes increased influence over individuals which may include a lack of respect for human rights by these actors. Consequently, this results in an alleged lack of accountability for human rights violations, which presents the need for imposing human rights obligations upon non-state actors.

3.1. FACTUAL CHANGES IN THE INTERNATIONAL SYSTEM

3.1.1. GLOBALISATION OF WORLD ECONOMY

After the Second World War there was a rapid expansion of trade and capital across borders, a process accelerated with the end of the cold war. This process goes hand in hand with a proliferation of direct foreign investment often accompanied by bilateral investment treaties and multilateral treaties aimed at removing barriers to transnational trade. This is exemplified in the context of the General Agreement on Tariffs and Trade (GATT), the WTO, the Organisation for Economic Co-Operation and Development (OECD), and the creation of several regional free trade organisations, such as the European Union (EU), The North American Free Trade Agreement (NAFTA) and the Association of South East Asian Nations (ASEAN). Many actors play an important role in the process of globalisation. States evidently play a large role as active partners to remove trade barriers and promote free trade. At the same time globalisation also restricts the power of states due to privatisation.

150 Established by Association of South-East Asian Nations (ASEAN), Bangkok Declaration, 6 ILM 1233 (1967); see also: Association of Southeast Asian Nations (ASEAN), Charter of the Association of Southeast Asian Nations, 20 November 2007, entered into force on 15 December 2008.
Non-State actors have increasingly important roles in the process of globalisation, such as international financial institutions, NGOs and corporations involved in international trading, which have acquired immense economic power.\(^{151}\)

The effects of globalisation on human rights have thus been both positive and negative. Positive in the sense that the effects of globalisation result in economic growth a situation which may increase the resources for the realisation of human rights.\(^{152}\) On the negative side the process of liberation of trade has not been accompanied by an adequate policy to prevent multinationals from abusing their newfound position of power.\(^{153}\) Indeed, the adverse effects of globalisation on human rights have been brought to light in an extensive manner, for instance by the Human Development Reports of the United Nations Development Program (UNDP).\(^{154}\) The UN Committee on Economic, Social and Cultural Rights notes that:

“(…) If not complemented by appropriate additional policies, globalisation risks downgrading the central place accorded to human rights by the United Nations Charter in general and the International Bill of Rights in particular. This is especially the case in relation to economic, social and cultural rights. Thus, for example, respect for the right to work and the right to just and favourable working conditions of work is threatened where there is an excessive emphasis upon competitiveness to the detriment of respect for the labour rights contained in the Covenant. The right to form and join trade unions may be threatened by restrictions upon freedom of association, restrictions claimed to be ‘necessary’ in a global economy, or by the effective exclusion of possibilities for collective bargaining, or by the closing off of the right to strike for various occupational and other groups. The right of everyone to social security

\(^{151}\) Jägers, *supra* n. 144, p. 5-6.

\(^{152}\) Jägers, *supra* n. 144, p. 6.


might not be ensured by arrangements which rely entirely upon private contributions and private schemes.\textsuperscript{155}

A large role in the negative effects of globalisation is played by transnational corporations in several ways. First, TNCs may exercise pressures on states to lower standards of protection at the national level. “Corporations have a presence in the vital sectors and are thus in a position to block any moves towards the respect for and protection of human rights.”\textsuperscript{156} Secondly, corporations themselves may be involved in human rights violations, either directly or complicit to violations with other actors, such a states.\textsuperscript{157} Infamous cases include the activities of Shell in Nigeria\textsuperscript{158}, British Petroleum in Colombia\textsuperscript{159} and Nike in Indonesia.\textsuperscript{160} The quest for international human rights obligations for transnational corporations is thus founded in the many negative effects of corporate activities on the promotion and protection of human rights.

3.1.2. Privatisation of Public Sector

In great part due to globalisation, in the form of global trade liberalization, many functions which traditionally belonged to the sovereign state, are now being performed by private actors. Examples of sectors increasingly becoming privatized are sectors such as health, education, prisons, water and communications.\textsuperscript{161} One of the most problematic examples is when private actors take over the functions of peacekeeping, security and the running of detention facilities in post-conflict situations.\textsuperscript{162} This issue especially becomes apparent in

\textsuperscript{155} Statement by the Committee on Economic, Social and Cultural Rights, 11 May 1998.

\textsuperscript{156} Working document on the impact of the activities of transnational corporations on the realization of economic, social and cultural rights, UN Doc., E/CN.4/Sub2/1998/6, 10 June 1998, para. 7.

\textsuperscript{157} Jägers, supra n. 144, p. 9.


\textsuperscript{159} Human Rights Watch, Colombia; Human Rights concerns raised by the Security Arrangements of Transnational Oil Companies, 1998.

\textsuperscript{160} C. L. Avery, Business and Human Rights in a Time of Change, Amnesty International UK section, 2000, pp. 65-68.

\textsuperscript{161} Clapham, supra n. 48, p. 3.

armed conflict and occupation situations when states hire private military or security companies (PMSCs). Those PMSC’s perform many functions which traditionally are within the exclusive realm of power of the state military. Human rights violations which would normally easily be traced back to the state now face more difficulty. The difficulty lies on the one hand in the characterisation of state functions for the application of state responsibility and on the other hand the question of attribution.

Finally, it is not only delegated powers which become privatized. Indeed as Clapham notes, “new entities or powerful associations spring up to exercise power without any sort of delegated authority or state regulation.” As a consequence of inaction, private corporations have taken up functions traditionally performed by local governments. Privatization whether gradually delegated or de facto taken up by private actors, thus eventually results in an accountability gap to the detriment of victims of human rights abuses.

3.1.3. Fragmentation of States

In a similar vein, fragmentation of states can lead to questions of attribution and accountability. These questions especially arise in times of armed conflict and when there is no government available to exercise public authority. Such a situation may include the

164 Ibid.
166 Clapham, supra n. 48, p. 11.
phenomenon of 'failed' states, a discussion of which is beyond the scope of this thesis. In these instances it is clear that a sole reliance on ‘state’ responsibility for human rights violations is insufficient and even perverse. For the worst kind of violations the accountability gap has been partly closed by the recognition of the responsibility of non-state actors under the Rome Statute in article 8(2)(c) and (e). The prohibition of such violations has furthermore been recognized as forming part of customary international law by a report of the Secretary-General. The scope of jurisdiction ratione materiae of the ICC remains limited however, and an accountability gap remains.

3.2. ACCOUNTABILITY GAP

In light of the above-mentioned factual changes in the international system it has become apparent that reliance on classical state responsibility for human rights violations leaves us with a significant accountability gap. The question thus presents itself what normative consequences should be attached to the factual changes. In international legal scholarship it is argued that this gap may be ‘filled’ either through the direct imposition of legal obligations on non-state actors or by strengthening the state to take on its responsibilities. Arguing

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170 Clapham, supra n. 48, p. 13.


172 Infra’ The International Criminal Court’ p. 74.

173 De Brabandere, supra n. 168, p. 71.


175 See De Brabantere supra n. 168.
from a rights-centred perspective, where the rights of the individual comes first, it is important however to consider both obligations simultaneously.

In any event, it may be concluded that the role of non-state actors is undeniable in the international legal order. For the purpose of this thesis we will limit ourselves to the role of transnational corporations in the human rights framework and the quest of filling the accountability gap in this context, possibly through the establishment of a World Court of Human Rights.
CHAPTER III.
TRANSNATIONAL CORPORATIONS AND INTERNATIONAL HUMAN RIGHTS

Recourse is taken to the international forum to address the accountability for human rights violations because of an unwillingness or inability of host states to address these issues on the one hand and the very nature of TNCs acting on an international level in ways covered by the corporate veil. An important question presents itself: do TNCs have the legal capacity to hold obligations under human rights law and can they be held accountable for these obligations before an international judicial body? It is therefore necessary to examine the legal status of TNCs under international law (infra 2.). International legal personality results from the capacity of the subject to hold rights or to be imposed with duties under international law, and to exercise those rights or to be held accountable to such duties in the international legal process. It is not difficult to envisage TNCs as holder of rights under the human rights framework, although limited. The same reasoning goes for the exercise of these rights before a court. The difficulty lies with the duties of TNCs under IHRL (infra 4 and 5).

1. TRANSNATIONAL CORPORATIONS: A DEFINITION

For a definition of transnational corporations (TNCs) I refer to the UN Sub-Commission on the Promotion and Protection of Human Rights, Economic, Social and Cultural Rights: “The term “transnational corporation” refers to an economic entity operating in more than one country or a cluster of economic entities operating in two or more countries - whatever their legal form, whether in their home country or country of activity, and whether taken

176 Amao, supra n.7, p. 70.
178 Tomuschat, supra n. Fout! Bladwijzer niet gedefinieerd., p.216.
179 See ECtHR (Merits) 26 April 1979, Sunday Times v. The United Kingdom, App. No. 6538/74.
individually or collectively.” The consequence of operating in different countries is that different laws may apply, TNCs may not fall under laws applicable in their home country. TNCs increasingly take a central role, and a powerful one at that, in the global economy. With such power comes an increased influence on many individuals and their interests protected under international human rights law. It has consequently been extensively argued that TNCs should be the direct addressees of human rights obligations under international human rights law (infra 5).

2. ILLUSTRATIONS OF TNC INVOLVEMENT IN HUMAN RIGHTS VIOLATIONS

In what follows I will give a brief, non-exhaustive list of possible human rights infringements by TNCs, illustrating the need for regulation.

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2.1. **Failing to Respect Labour Rights**

The link between TNCs and respect for labour rights is evident. That explains the relative early initiative of the ILO to include them ILO declarations.¹⁸³ TNCs breach labour rights through serious mistreatment and substandard conditions for workforce, for instance the criticism faced by Nike or the conditions in Asian supplier factories.¹⁸⁴ Recent examples of labour right violations include allegations of deplorable working conditions in garment factories in Bangladesh by Auchan¹⁸⁵ and a case of forced labour and international human trafficking which was brought against Curaçao Drydock Company.¹⁸⁶ This last case involved a successful attempt of bringing claims under the US Alien Torts Claims Act (ATCA) and the company failed to invoke *forum non conveniens*, which is a figure invoked by defendants claiming that a certain Court is not the most appropriate to deal with the case because the acts take place outside of the US case of the ATCA.

2.2. **Environmental Damage and Land Grabbing**

In the extraction sector and agricultural sector companies have been known to, sometimes forcefully, cause large scale resettlements, infringing on peoples’ property rights. This becomes evident in abundant ‘land-grabbing’ cases such as the recent Ugandan farmers from Lake Victoria’s Bugula Island, Kalagala District, who filed a lawsuit against Oil Palm Uganda in Masaka, Uganda.¹⁸⁷ The problem with many of these cases is that in many rural

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communities in the African continent, property rights are not fully embedded in the legal system or formally recognised.

Activities of TNCs often implicate the environment, which consequently holds possible infringements of human rights obligations.\textsuperscript{188} Environmental damage has TNCs have been heavily criticised for egregious environmental damages, for instance in the case of oil extractions by Royal Dutch Shell in Nigeria and British Petroleum in Colombia. The direct impact of this environmental damage results in violations of the right to health, life, minority rights, and the right to self-determination.\textsuperscript{189}

2.3. **LAX SAFETY REGULATIONS**

Lax safety regulations may harm the right to health and in the worst cases the right to life of workers and people in the vicinity. Disastrous consequences of a lack of adequate safety regulations have been evidenced in the case of a gas leak from a Union Carbide plant in Bhopul, India, where 2000 people were killed and over 200,000 injured.\textsuperscript{190} A recent example is furthermore the death of several people at Villaggio Mall in Qatar in 2012, allegedly due to negligence of the company.\textsuperscript{191}

2.4. **TORTURE AND KILLINGS BY PRIVATE SECURITY FORCES**

Often private security forces are hired by TNCs to guard TNC installations or to clear land. An example is the case of oil company Royal Dutch Shell in Nigeria which employed repressive security forces against locals. This even resulted in violent action against peaceful protesters.\textsuperscript{192}

\begin{itemize}
\item \textsuperscript{189} Joseph, *supra* n. 184, p. 76.
\item \textsuperscript{190} Joseph, *supra* n. 184, p.76.
\item \textsuperscript{191} Business & Human Rights Resource Centre, Villaggio mall lawsuit (re fatal fire Qatar), <business-humanrights.org/en/villaggio-mall-lawsuit-re-fatal-fire-qatar>.
\end{itemize}
2.5. **ILLEGITIMATE INFLUENCE ON DOMESTIC POLITICS**

The democratic rights of people can be undermined by the illegitimate influence of TNCs on the political process. Allegedly, an American corporation, ITT, engineered the overthrow of the democratically elected government of Salvador Allende in Chile in 1972. Similarly, bribery can be used to pressure governments to diminish stringent human rights regulations.

3. **THE LEGAL STATUS OF TNCs UNDER INTERNATIONAL LAW**

Traditional international law does not deem corporations to be subjects of international law, such a state-centric view is however outdated, as argued above. International legal personality now goes beyond states, as examined by the ICJ in the context of international organisations. International legal personality can thus be conferred upon different actors, the standard of which can be applied through the proposed definition by the ICJ in the reparation for injuries case: International legal personality results from the capacity of the subject to hold rights or to be imposed with duties under international law, and to exercise those rights or to be held accountable to such duties in the international legal process.\(^{193}\) Applying this definition to TNCs I will first demonstrate that TNCs, specifically in the context of international human rights law as part of international law, certainly have rights under international law and can exercise and claim these rights before international judicial bodies. In accordance with the definition TNCs already have some form of international legal personality. I will show in subsequent paragraphs that TNCs also have duties under international law, and more specifically international human rights obligations, although their accountability on the international legal plane remains a rather unresolved issue.

TNCs as important players in a globalised world have rights under international law. This is first exemplified by international contracts between states and corporations which point to ‘general principles of law’, ‘general principles of the law of nations’ or principles of the law of the concessionary state not inconsistent with international law’ as the applicable law governing the agreement between the state on the one hand and the corporation on the

\(^{193}\) ICJ (Advisory Opinion), 11 April 1949, *Reparation for Injuries suffered in the service of the United Nations*, p.178
other.\textsuperscript{194} Often disputes arising from such agreements are dealt with by means of international arbitration, an obligation imposed by a specific clause in the agreement.\textsuperscript{195} Such clauses inevitably result in the assumption that corporations have a place on the international legal playing field.\textsuperscript{196}

Secondly, when it comes to human rights, we can imagine that corporations enjoy the benefits of certain rights.\textsuperscript{197} These benefits are in fact elevated to the level of rights under international law because of their enforceability on the international plane, which has been addressed frequently by the ECHR.\textsuperscript{198} Indeed article 34 of the ECHR provides a right for corporations to file a complaint for human rights violations:

“The Court may receive applications from any person, non-governmental organisation or group of individuals claiming to be the victim of a violation by one of the High Contracting Parties of the rights set forth in the Convention or the protocols thereto …”

In the Sunday Times case for instance\textsuperscript{199}, the ECtHR has established that corporations do have rights under international human rights law. The cases concerned mostly relate to property and freedom of expression.\textsuperscript{200} The Human Rights Committee did not follow suit,


\textsuperscript{195} Jägers, \textit{supra} n. 144, p. 29.

\textsuperscript{196} See Higgins, \textit{supra}, n.128, pp.54-55.

\textsuperscript{197} Jägers \textit{supra} n. 144, pp.29-30.


\textsuperscript{199} ECtHR (Merits) 26 April 1979, \textit{Sunday Times v. The United Kingdom}, App. No. 6538/74.

\textsuperscript{200} Shelton, \textit{supra} n. 12, p. 205.
since the drafters of the ICCPR did not intend for its provisions to apply to legal persons. \(^{201}\) This is a consequence of the political atmosphere at the time, calling for a compromise when it comes to actors seen as ‘agents of the capitalist system’. \(^{202}\)

It is clear that not all human rights are transposable to transnational corporations, for example for the reason of the simple fact that transnational corporations have no physical body and torture may for that reason not be exercised upon them. \(^{203}\) It is a common view however, that at least in the situation where economic activities are placed under international human rights protection, that corporations should be included. \(^{204}\)

For the purpose of international legal personality of TNCs we must discern whether they have legal standing in international proceedings to enforce their rights. When it comes to human rights this certainly does seem to be the case. In the broader context of international law generally there is also ample proof that TNCs are in a position to enforce their rights under international law, examples of which include standing before the Iran-United States Claims Tribunal of 1981, the United Nations Compensation Commission\(^{205}\), the Seabed Disputes Chamber under the United Nations Convention on the Law of the Sea (UNCLOS)\(^{206}\), the jurisdiction of the International Centre for the Settlement of Investment Disputes (ICSID)\(^{207}\), and the 1995 Energy Charter Treaty which provides direct access for corporations to

\(^{201}\) HRC (View) 9 April 1981, Hartikainen v Finland, Case No. 40/1978, para 3 (NGO); HRC (View) 6 April 1983, J. R. T. & the W. G. Party v Canada, Case No. 104/1981, para 8(a) (political party); HRC (View) 14 July 1989, A newspaper publishing company v Trinidad and Tobago, Case No. 360/1989, para 3.2 (company); HRC (General Comment No. 31 The Nature Of The General Legal Obligation Imposed On States Parties) 26 May 2004, UN Doc. CCPR/C/21/Rev.1/Add.13, para 9.

\(^{202}\) Tomuschat, supra n. FouT! Bladwijzer niet gedefinieerd., p. 117.

\(^{203}\) Ibid.

\(^{204}\) Ibid.


international arbitration against states.\textsuperscript{208} Consequently, it may be concluded that corporations hold material rights and enforcement rights under international law and international human rights law specifically.\textsuperscript{209}

The scope of international legal personality of TNCs can even further be broadened when we look at their duties under international law and whether or not they can be held accountable for the disregard of those international law obligations. International regulations directly aimed at regulating the conduct of corporations are mainly of a ‘soft law’ nature. This nevertheless at least indicates an assumption that corporations are the addressees of international law obligations.\textsuperscript{210} The same is true for the direct obligations under international human rights law, which will be dealt with in more detail in section 5.

An appropriate tool of measurement to determine whether TNCs hold direct obligations under international law is to examine whether these are enforceable on the international plane. This means that when a corporation is subject to international enforcement mechanisms this must mean that it does indeed have obligations under international law. Consequently, when a corporation voluntarily subjects itself to the jurisdiction of an international court it follows that it is subjected to direct responsibility for the ratione materiae of the jurisdiction.

Legal personality is thus not a prerequisite for the imposition of obligations but rather a consequence of existing rights and duties under international law.\textsuperscript{211} Legal personality is achieved when both states and TNCs accept and authorize punishment for HR violations because this in itself imposes strict obligations to refrain from violating.\textsuperscript{212} For the current state enforcement of international human rights obligations, I refer to Chapter IV.

\begin{itemize}
\item \textsuperscript{208} Energy Charter Treaty (ECT) 17 December 1994, 2080 UNTS 95, entered into force 16 April 1998, Article 26.
\item \textsuperscript{209} Jägers supra n. 144, p. 32.
\item \textsuperscript{210} Jägers supra n. 144, p. 32.
\item \textsuperscript{212} Ratner, \textit{supra} n. 4, p. 467.
\end{itemize}
In sum, corporations have legal personality in international law, albeit limited since the rights and duties are dependent on the evolution of the needs of the international community, an insight confirmed by the ICJ in the *Reparations for injuries* case: “The subjects of law in any legal system are not necessarily identical in their nature or in the extent of their rights, and the nature depends on the needs of the community.”213 There is thus no conceptual barrier as to the direct imposition of international human rights obligations to corporations.

4. **TNCs as Addressees of Human Rights Obligations**

As stated above, states are the primary duty-bearers in international human rights law. The scope of duty bearers has somewhat extended due to privatization of government functions and the increased power and influence of corporations in our day-to-day lives (i.e. the globalisation argument).214 There are two options for TNC accountability: a focus on state responsibility with indirect corporate accountability, or imposing direct international human rights obligations on TNCs. A compelling argument is made by Eric De Brabandere for the strengthening of state responsibility, instead of bypassing them by imposing direct corporate responsibility.215 For the purposes of this paper, however we will instead mainly focus on the second option of direct corporate responsibility for human rights violations, keeping in mind the aim of bringing transnational corporate actors to justice before a world court of human rights. It is exactly this, enforcement of corporate obligations, that has been the most difficult hurdle to overcome in the human rights framework.216 In order to do so we will establish that TNCs are suitable candidates to be the addressees of human rights obligations, due to their legal status under international law (see *supra*) and due to mushrooming of voluntary initiatives, which have the potential of becoming binding if both states and TNCs agree thereto, by virtue of accepting the jurisdiction of a world court for human rights.

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214 Clapham, *supra* n. 48, p. 3.
A broadening of our understanding of duty bearers under international human rights law relates back to the basic foundations of human rights, human dignity.\textsuperscript{217} In addition, the Universal declaration of Human rights may be read to include the corporation as duty holder.\textsuperscript{218} The preamble indeed states that: “Every individual and every organ of society, keeping this declaration constantly in mind, shall strive by teaching and education to promote respect for these rights and freedoms and by progressive measures, national and international, to secure their universal and effective recognition and observance.” It thus seems that ‘every organ of society’ could include corporations,\textsuperscript{219} especially since globalisation have increased their impact on society. Granted, the UDHR is not of a binding nature, many of its provisions are of a \textit{jus cogens} nature and/or have been crystallised in later binding treaties.

In the same vein, there is also an increasing mention of actors other than states in international human rights treaties.\textsuperscript{220} This may call for the belief that human rights law has evolved in such a way as to include a multitude of duty holders. Private actor liability, which includes transnational corporations, is for instance included in article 4 of the Genocide Convention\textsuperscript{221} and Common article 3 of the Geneva Conventions. Furthermore, the European Court of Justice applies certain discrimination principles directly to private actors.\textsuperscript{222} In Germany, for example, it has also since long been accepted that horizontal effect of constitutional norms is

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\begin{itemize}
\item \textsuperscript{217} Ratner, \textit{supra} n.4, p. 545.
\item \textsuperscript{218} Amao, \textit{supra} n.7, p. 27.
\item \textsuperscript{220} Shelton, \textit{supra} n. 12, p. 202.
\item \textsuperscript{221} Convention on the Prevention and Punishment of the Crime of Genocide (Genocide Convention), 9 December 1948, 78 UNTS 277, entered into force,12 January 1951, Article 4.
\end{itemize}

The most recent and most elaborately global research into accountability for TNCs was performed by John Ruggie, which resulted in the UN Guiding Principles. “From a human rights standpoint, the key obstacle of the Guiding Principles remains convincing states and corporations that there exists a need for legally binding legislation regulating business conduct when human rights issues arise.”\footnote{J. R.-M. Wetzel, \textit{Human Rights in Transnational Business. Translating Human Rights Obligations into Compliance Procedures}, (Springer International Publishing Switzerland, 2016), p. 194.} Ruggie himself concedes on this point but took a pragmatic approach acknowledging that at this moment in time businesses and states are not ready for this development.\footnote{J. Ruggie, “Business and human rights: together at last? A conversation with John Ruggie”, \textit{The Fletcher Forum of World Affairs} 35 (2011), p. 117 et seq.} However, Ratner offers a strong argument to the contrary.\footnote{Ratner, \textit{supra} n.4.} In his infamous theory on legal responsibility,\footnote{Ratner, \textit{supra} n.4.} Ratner comes to a framework from which legal responsibility of TNCs can be derived, on which we will base ourselves.\footnote{The framework can be summarized as follows:

(1) All other things being equal, the corporation's duties to protect human rights increase as a function of its ties to the government. If the corporation receives requests from the government leading to violations, knowingly and substantially aids and abets governmental abuses, carries out governmental functions and causes abuses, or, in some circumstances, allows governmental actors to commit them, its responsibility flows from that of the state.

(2) All other things being equal, the corporation's duties to individuals increase as a function of its associative ties to them. These connections may, for example, emanate from legal ties (as with employees), physical proximity, or possession of de facto control over a particular piece of territory. As these connections dissipate, the duties do as well. For certain severe abuses, the corporation's duties will not turn on such ties.}

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227 Ratner, \textit{supra} n.4.  
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A strong counter-argument to direct human rights duties is rooted in the liberal theory, which fears that stringent regulations will undermine the liberal commercial rights and even human rights of TNCs. A response to this however does lie with a balancing test performed by a judicial body, for instance in the form of a World Court for Human Rights. An example of a ruling in favour of the corporation rather than the individual can be found in the recent, although controversial, ECJ Advocate General Kokkot’s opinion that a ban on wearing headscarves in companies may be admissible, which constitutes a balancing of the rights of the company against those of the individual. Moreover, from a historical point of view, this argument also seems ill-founded. Early attempts at recognizing human dignity, the foundation of human rights, have been aimed at private actors, predominantly in the abolition of slavery and counter-piracy efforts.

The underlying purpose of human rights law, founded in equal respect of the worth of every human being, guaranteeing inalienable rights, logically results that they are applicable to all

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(3) In situations not involving cooperation with the government in its own human rights violations, the enterprise's duties turn on a balancing of the right at issue with the corporation's interests (and in some cases, rights), except for certain nonderogable human rights. The nexus factor will need to be taken into account in determining any derivative duties. The company's derivative duties will not extend to duties to promote observance of the rights generally.

(4) The attribution of responsibility within the corporate structure depends upon the degree of control exercised by the corporation over the agents involved in the abuses, not simply financial or contractual links with them.

(5) The extent to which the corporation must have some fault to be responsible will depend upon the particular sanction envisioned. It is not a required element of responsibility with respect to corporate agents acting under corporate authority, but should be an element regarding the duty of the corporation to prevent violations by actors not connected with it.

230 Joseph, supra n. 184, p. 90.
231 CJEU (Opinion of Advocate General Kokott), 31 May 2016, Samira Achbita and Centrum voor gelijkheid van kansen en voor racismebestrijding v G4S Secure Solutions NV, Case C-157/15, para 114.
232 Shelton, supra n. 12, p. 209
international actors, both states and non-state actors amongst which especially TNCs. Nevertheless, when it comes to enforcement of human rights under international law, only the effective protection directed against states is provided for. A call for change does not seem a bridge too far in respect of what is needed in the international society. The position of TNCs as duty bearers under international human rights law is not an unresolved issue. However, when we come to a situation where the international community agrees on an effective accountability mechanism for human rights violations for TNCs, this undoubtedly leads to the conclusion that TNCs are in fact legally obliged under international law to comply with at least certain international human rights standards. The duties and expectations of TNCs highly depend on their involvement. Participation of all actors in the field of human rights, specifically TNCs, is thus required in prescribing and applying the law.

5. ACCOUNTABILITY FOR TNC INVOLVEMENT IN HUMAN RIGHTS VIOLATIONS

5.1. SELF-REGULATION

The debate on business and human rights has triggered several voluntary commitments to human rights in the form of voluntary codes of conduct. Indeed, every self-respecting transnational corporations subjects itself to a voluntary code of conduct which holds elements of respect for human rights. However, these ‘codes’ are heavily criticised because they lack oversight, implementation and enforcement. The current framework for international

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234 Ibid., p. 249.
236 Clapham, *supra* n. 48, p.82.
237 Ratner, *supra* n.4, p. 530.
239 Kamminga, *supra* n.153, p. 11.
regulation of human rights ‘obligations’ for corporations is thus left to non-binding instruments without recourse to supervision.\textsuperscript{241} Such an approach is also embedded in so-called instruments of soft law attempting to regulate corporate activity. These include the International Labour Organisation’s Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy (Tripartite Declaration),\textsuperscript{242} the OECD Guidelines for Multinational Enterprises,\textsuperscript{243} and the United Nations Global Compact.\textsuperscript{244}

The Global Compact is successful in the sense that it is a UN-led initiative which involves non-state actors directly, its outcome documents are not instrument cocked up by states.\textsuperscript{245} The purposes of this initiative was however not to create implementation mechanisms, it is described by Kofi Annan as an initiative created to “safeguard sustainable growth within the context of globalisation by promoting a core set of universal values which are fundamental to meeting the socio-economic needs of the world's people now and in the future”\textsuperscript{246} It is thus rather an instrument of advocacy and awareness and a forum of exchange of best practices.

5.2. INTERNATIONAL OVERSIGHT

There are several international standards related to corporate performance regarding human rights, the most relevant of which are the OECD Guidelines and the ILO Tripartite Declaration, which are of a non-binding nature.\textsuperscript{247} Attempts at the international level for human rights complaint mechanisms of directed at corporations is not very hopeful.

\textsuperscript{241} Ibid.


\textsuperscript{243} OECD, OECD Guidelines for Multinational Enterprises, 15 ILM. 9 (1976).

\textsuperscript{244} See <www.unglobalcompact.org>.


\textsuperscript{246} Ibid.

\textsuperscript{247} Kaleck and Saage-MaaB, supra n. 240, p. 710.
The ILO Tripartite Declaration holds a similar procedure, which consequently is also unable to address the accountability gap. Every member of the ILO can petition a complaint against another member state or against a corporation for non-compliance with the ILO Constitution. Such a complaint may be met with a report of a Commission of Inquiry which holds recommendations and a timeframe for implementation. The value of this procedure is however of limited value for victims of human rights violations since they can not directly initiate or be involved in the proceedings, such a privilege is reserved for ILO member states and representatives of employers and employees.

The OECD Guidelines likewise hold a procedure of complaint. Access by individuals is possible here since the first step of the procedure is open to individuals at National Contact Points. These institutions, tasked with reviewing the complaints, are however not competent to establish a violation of the guidelines by a specific corporations, they merely tasked with interpretation of the guidelines. This procedure is thus not a proper procedure elevating voluntary guidelines to binding obligations which may be punishable. Furthermore, the practice faces severe scepticism since the proceedings lack coherence, transparency and impartiality.

251 Kaleck and Saage-MaaB, supra n. 240, p. 711.
253 Ibid.
255 Kaleck and Saage-MaaB, supra n. 247, p. 712.
5.3. **State Responsibility**

Accountability for human rights violations is primarily the responsibility of the host state under national law. Such a duty is mentioned in human rights treaties and confirmed in international jurisprudence. The principle of state responsibility has accordingly been confirmed in the most recent attempt at a framework for human rights accountability of transnational corporations, resulting in the Guiding Principles on Business and Human Rights: Implementing the United Nations “Protect, Respect and Remedy” Framework (Guiding Principles). Paragraph one of these principles reads as follows:

“States must protect against human rights abuse within their territory and/or jurisdiction by third parties, including business enterprises. This requires taking appropriate steps to prevent, investigate, punish and redress such abuse through effective policies, legislation, regulations and adjudication.”

This principle does not create new international law; it is a mere restatement of the existing state of affairs of the human rights framework. Indeed, as mentioned above, every state has the positive obligation to ensure respect for human rights which entails an implementation of horizontal human rights law under domestic law. Difficulties arise in jurisprudence in attributing responsibility for private conduct to the state and the standard of care which must be applied. This was examined for instance in the case of *Oneryildiz v Turkey*, where the

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256 ICERD, article 2(d); positive obligations confined in article 2(1) ICCPR and article 1 ECHR.
260 See *supra* CHAPTER I.2.2.1.2.
ECtHR stated that the right to life “must be construed as applying in the context of any activity, whether public or not, in which the right to life may be at stake, and *a fortiori* in the case of industrial activities, which by their very nature are dangerous, such as the operation of waste-collection sites”.

Examples can be found for instance under articles 22 of the ICCPR and article 11 of the ECHR by virtue of which corporations cannot refuse employees to join trade unions. An argument can be made for increased address of ‘host state liability’ under the existing human rights treaty bodies. The Guiding Principles also include the principle that host-states must provide for adequate remedy by means of effective judicial mechanisms.

Difficulties with host state liability arise because of the great economic power of TNCs making them virtually immune for domestic sanctions, or may even lead them to bribe domestic governments or simply relocate to a more ‘corporate-friendly’ state. Indeed a state may be ‘deliberately engaged on a path of human rights violations’ either directly or in complicity with the state. It is also possible that some states might lack the expertise to monitor and regulate corporate activities which extends from lack of knowledge about environmental safety regulations to a lack of legal capacity “to unravel the corporate veil which may shield an asset-rich parent company behind an asset-poor local subsidiary”.

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261 ECtHR (Judgment) 30 November 2004, ÖNeryildiz V. Turkey, App. no. 48939/99, para. 71.
262 Joseph, *supra* n. 184, p.78.
263 *Ibid*.
264 *Ibid*.
267 Joseph, *supra* n. 184, p. 79.
This might be the case in situations where the state urgently needs foreign investment for the purpose of economic growth.\textsuperscript{268}

Keeping these problems in mind, liability of the home state is offered as a possible solution since the home state is often a developed nation with sufficient expertise and legal capacity. However, under general international law the home state is not responsible for its nationals operating abroad.\textsuperscript{269} Under general rules of state responsibility we again face the problem of attribution. The only option for home state responsibility is when the state de facto controls the activities of the corporation abroad, under application of the effective control test,\textsuperscript{270} or when the corporate actor is engaged in activities of governmental authority.\textsuperscript{271} TNCs are not subject to one, but several national jurisdictions. They are in a position to benefit from the weakest parts of human rights protection of different legislations. TNCs also employ meticulous juridical constructions to escape accountability for the mother corporations, commonly referred to as the corporate veil.\textsuperscript{272}

Finally notion must be made of the Alien Tort Statute (ATS).\textsuperscript{273} Today codified under 28 U.S.C. § 1350, the Alien Tort Statute grants “jurisdiction of any civil actions by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States.” This statute provides standing for non-American nationals to bring a claim in the United States for a tort committed in violation of international law or the law of nations.\textsuperscript{274} This is seemingly an

\begin{itemize}
\item \textsuperscript{268} De Schutter (2000), p. 49.
\item \textsuperscript{269} De Schutter (2000), p. 50.
\item \textsuperscript{270} ARSIWA, \textit{supra} n. 69, art. 8; ICJ (Judgment) 27 June 1986, \textit{Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)}, para. 115.
\item \textsuperscript{272} Kamminga, \textit{supra} n. 153, p. 10.
\item \textsuperscript{274} C. Köster, \textit{Die völkerrechtliche Verantwortlichkeit privater (multinationaler) Unternehmen für Menschenrechtsverletzungen. Schriften zum Völkerrecht Band}, vol 191, (Berlin, Duncker & Humblot, 2010), p. 49.
\end{itemize}
appropriate way to bring human rights claims against corporations. However, with the recent Kiobel decision in mind\(^{275}\), it is again confirmed that the Supreme Court of the United States lacks bravery to give full effect to the ATS.\(^ {276}\) Until that time, victims of human rights violations by corporations will need to find recourse through other channels.\(^ {277}\) In effect, foreign individuals who failed to secure relief in their home state due to inability or unwillingness of the state or its judicial system, now don’t have any other place to go.\(^ {278}\)

The difficulty of bringing TNCs to justice for human rights violations, and by virtue thereof provide effective remedies for victims of human rights violations, is the territorial limitation of national jurisdiction, which is evidenced by invoking *forum non conveniens* by corporate actors and use of the *corporate veil*. A discussion of the difficulties underlying the national frameworks for human rights accountability of TNCs goes beyond the scope of this thesis.\(^ {279}\) It suffices to say that an accountability gap remains and individuals are consequently deprived of their rights by not being able to claim them before an independent body. The UN Guiding Principles also fail to effectively address these issues.\(^ {280}\)

“We are thus confronted with a void: the international law does not directly reach the corporate actor; it does not impose an obligation on the home state to control the activities of corporations of its “nationality” abroad,…; finally, even when international law imposes on


\(^{276}\) Wetzel, *supra* n. 225, p. 70.


\(^{278}\) Wetzel, *supra* n. 225, p. 70.

\(^{279}\) See Ratner, *supra* n. 4.

the State hosting the investment to protect its population from human rights violations – and thus to impose on all actors operating within its national territory to respect these rights -, the host State will in the typical case lack the incentive or the resources to adopt effective measures in that respect.”

CHAPTER IV.
A SELECTIVE ANALYSIS OF INTERNATIONAL HUMAN RIGHTS ENFORCEMENT, IMPLEMENTATION AND MONITORING – TOWARDS INDIVIDUAL JUSTICE

From the above characterization of international human rights law, we can deduce that the primary responsibility for the enforcement and implementation of human rights lies with states, who have the positive duty to implement horizontal application of human rights standards in their national legislation. This title seeks to discover what the international mechanisms of oversight and enforcement are and examining if it is effective and sufficient in providing justice for the victims of human rights violations. At the same time this title seeks to uncover if the elements of a changing legal order are noticeable at the international enforcement level, by addressing the question of a rights-centred perspective through individual complaint mechanisms and the question of non-state-actor accountability at the international level, with a specific focus on TNCs. An in depth discussion of the lacunae of national systems for accountability of non-state actors, although briefly touched upon in the previous chapter, is beyond the scope of this thesis.

1. THE UNITED NATIONS HUMAN RIGHTS TREATY SYSTEM

Geopolitical altercations and bipolarisation, in large part attributable to the Cold War, have resulted in a meagre output when it comes to monitoring and enforcement of human rights through the UN treaty system. The main avenue of monitoring and enforcement lies with the ten treaty bodies connected with the nine core human rights treaties\textsuperscript{282}, with a mandate to ensure implementation and oversight of compliance for the specific treaty to which they are attributed, with the exception of the Committee on Economic, Social and Political Rights which is responsible not to the treaty parties, but to the ECOSOC.\textsuperscript{283}

\textsuperscript{282} supra
\textsuperscript{283} ...
The application of the human rights treaties is monitored by the following committees:

1. The Committee on the Elimination of Racial Discrimination
2. The Committee on Economic, Social and Cultural Rights
3. The Human Rights Committee.
4. The Committee on the Elimination of Discrimination against Women
5. The Committee against Torture
6. The Subcommittee on Prevention of Torture,
7. The Committee on the Rights of the Child
8. The Committee on Migrant Workers
9. The Committee on the Rights of Persons with Disabilities
10. The Committee on Enforced Disappearances

The treaty bodies’ main functions serve the purpose of assessing how the treaties are being implemented by the States parties. All treaty bodies, with the exception of the Subcommittee on Prevention of Torture (SPT), are mandated to receive and consider periodical state reports detailing how they are applying the treaty provisions domestically. All but one (the SPT) of the treaty bodies may in principle receive and consider individual complaints or communications, provided that the state violator latter has accepted this procedure. Six of those (two not yet in force) have the competence to conduct independent country inquiries and/or visits, including the SPT.

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285 Ibid.

286 Ibid.

287 CMW, CRC and CESCR will have the mandate to consider individual communications only once the respective optional procedure has entered into force.
1.1. REVIEW STATE REPORTS

The primary mandate of all the committees, except the Subcommittee on Prevention of Torture, is to review the reports submitted periodically by State parties on how the rights are being implemented.\(^{289}\) The conventions of the International Labour Organization have served as a source of inspiration.\(^{290}\) The report is mainly a tool for the state parties to make an assessment of the state of human rights protection within their jurisdiction.\(^{291}\)

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289 Ibid., p. 21.
system is however majorly inadequate. As noted by human rights scholar Julie Mertus: “Treaty reporting and monitoring processes are often neither efficient nor effective. The national reporting mechanisms (requiring States Parties to report on their implementation of obligations) frequently receive reports that are inaccurate, incomplete, late, or not submitted at all. Even when adequate reports are received, under-resourced treaty-monitoring bodies may be forced into hasty and superficial reviews of reports”.\textsuperscript{292} This statement is supported by quantitative research by Bayefsky in 2001\textsuperscript{293} and the UN Secretariat in 2006\textsuperscript{294}, from which it seems noncompliance with the system has only gotten worse. In order to address this issue the OHCHR has initiated a process to develop harmonised guidelines on reporting to serve the purpose of “strengthening the capacity of States to fulfil their reporting obligations in a timely and effective manner, including the avoidance of unnecessary duplication of information”.\textsuperscript{295} In this way the state reporting system becomes an important tool for implementation at the domestic level and monitoring.\textsuperscript{296}

\section*{1.2. Complaint Mechanisms}

\subsection*{1.2.1. Individual}

Nine of the ten human rights treaty bodies accept some form of individual complaint mechanism under particular conditions. The mechanism for the Committee on Migrant Workers has not yet entered into force. The complaint procedures are also not universally applicable; they only apply to states who have accepted them. At the end of May 2016, 115

States (out of 168 States parties to the International Covenant On Civil and Political Rights, ICCPR) were bound under the procedure governed by the Optional Protocol to the ICCPR, 57 States had given the declaration under Article 14 of CERD (177 States parties), 66 had given the declaration under Article 22 of CAT (158 States parties), and 102 had adhered to the Optional Protocol to CEDAW (189 States parties).\footnote{297}

The individual complaint procedures seek to provide victims with a right to remedy The Human Rights Committee also increasingly addresses the need for effective remedy for victims under application of article 2 paragraph 3(a) of the Covenant. This has been recognized in the Committee’s case law in \textit{Rodriguez v Uruguay}\footnote{298} and \textit{Zelaya v. Nicaragua}\footnote{299}. In \textit{Rodriguez v Uruguay} the Committee also specifically pointed to the domestic laws at issue which resulted in impunity for human rights violations.\footnote{300} Remedy for the violations in these cases thus includes reparation in the form of compensation for the victim and also holds positive obligations for the state to install a framework of remedy through investigation of human rights abuses. In other cases the Committee also included other forms of reparation, such as restitution of property.\footnote{301} The Committee on the Elimination of Racial Discrimination holds a similar procedure and has also pointed out that human rights protection involves the right to remedy and that this should entail appropriate legislative and judicial measures.\footnote{302} Although the ‘views’ or ‘communications are not binding, they do form a crucial role in the interpretation and development of the positive obligations of states to implement human rights standards and effective remedies for their violations.\footnote{297 Source: Chart disclosng the status of ratifications of human rights treaties, available at <www.ohchr.org/EN/HRBodies/Pages/TreatyBodies.aspx>.
At the level of implementations of the outcome of individual complaint procedures there is a positive trend since 1990 lead by the Human Rights Committee.\(^303\) It has involved a follow-up mechanism to in Optional Protocol. Follow-up is based on States’ obligation to submit a follow-up report.\(^304\) Just as with the state reporting mechanism, often states fail to do so (e.g. Equatorial Guinea or the Democratic Republic of the Congo (DRC)).\(^305\) To address this shortcoming, the Committee may engage in a follow-up mission. Unfortunately, the Committee has only employed this once.\(^306\)

1.2.2. **INTER-STATE**

The possibility of states to interstate communications procedures is, to put it euphemistically, seriously underutilized.\(^307\) This is a definite argument that the current systems for enforcement of human rights under binding treaties is lacking, a notion picked up by Nowak in his argument for a World Court of Human Rights:

“Despite the fact that Article 11 of the Convention on the Elimination of Racial Discrimination 1966 (CERD) even provides for a mandatory inter-State communication procedure which had entered into force already in 1970, not one of the 169 States Parties to CERD has so far availed itself of this opportunity vis-à-vis any of the other States Parties where systematic racial discrimination and ethnic cleansing had even led to genocide. The same holds true for the optional inter-State communications procedures under the International Covenant on Civil and Political Rights 1966 (CCPR) and the Convention


1.3. CONCLUSION

De Zayas indicates that the procedure under Optional Protocol to the ICCPR for individual complaint constitutes an encouraging step in the direction of the creation of an international Court of human rights, one that contrary to the views issued by the Human Rights Committee would have binding legal force. “The HRC is the closest the world has ever come to an international court of human rights. In order to arrive there, it would be necessary to strengthen the OP by amendment or to establish a new judicial body by treaty. Following the creation of the Office of the High Commissioner for Human Rights in December of 1993 (GA Resolution 48/141), the prospect of an international court of human rights no longer appears an impossible dream. With its 30-year experience, the HRC provides a good foundation.”

While the Human rights Committee may have contributed elaborately to the implementation of human rights, other procedures under the other treaty bodies have not reached the same result and remain underused.

The possibility for individual complaints is definitely a major improvement and proof of the willingness of states to offer individuals remedies for human rights violations. The process to do so however raises serious barriers for actual possibilities to issue complaints.

clear need for improvement on this front, a concern shared by a report of the UN Secretariat: “A major weakness of the current system is the absence of effective, comprehensive follow-up mechanisms...lack of awareness or knowledge among national constituencies about the monitoring procedures and their recommendations, renders these invisible at the national level”312.

In sum, the promise of effective remedy has not been reached by the UN Treaty System due to problems of structure and procedure.313 In addition, the procedure does not recognize other violators of human rights, nor does it recognize other actors than individuals as rights holders.314 Finally, the greatest deficit of the system is the impossibility of effective enforcement due to the unbinding nature of treaty body decisions.

2. **The Human Rights Council and the Universal Periodic Review Process**

The Human Rights Council’s Universal Periodic Review (UPR) established in 2006 by UNGA resolution signifies a first step towards holding states accountable for human rights violations.315 The process “involves a review of the human rights records of all UN Member States” and “provides the opportunity for each State to declare what actions they have taken to improve the human rights situations in their countries and to fulfil their human rights obligations”.316 The process is a state-driven peer-review process which does not provide for individual complaint possibilities.317


314 HRC (General Comment No. 31 on the nature of the general legal obligation imposed on States Parties) 26 May 2004, UN Doc CCPR/C/21/Rev 1/Add 13, para 9.

315 UNGA, Resolution 60/251 (3 April 2006), UN Doc A/RES/60/251.


317 Kirkpatrick, *supra* n. 307, p. 239.
Such a process can therefore not be viewed as a proper effective human rights enforcement mechanism but rather, as Nowak indicates, should be “understood as a follow-up mechanism similar to the one practiced in the Council of Europe in relation to the European Convention on Human Rights”.

3. THE INTERNATIONAL COURT OF JUSTICE

The International court of Justice was established as the primary judicial organ of the United Nations at the time of its inception. It is entrusted with resolving inter-state disputes. Consequently, individuals have no standing before the Court. Dealing with human rights issues is not excluded from the court’s jurisdiction. Moreover, some international human rights treaties specifically hold a provision with reference to the International Court of Justice for the settlement of disputes after the exhaustion of the pre-condition to resort to the treaty-specific dispute settlement procedure, which is the case for instance in article 22 CERD, Article 29 CEDAW, article 92 Migrant worker convention. Where other treaties foresee an optional complaints procedure to the relevant committee, other recourses to dispute settlement are of course not excluded, such include recourse to the International Court of Justice.

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319 UN Charter, Art. 1.
320 See Article 22 International Convention on the Elimination of All Forms of Racial Discrimination 1965, 660 UNTS 195, which states: “Any dispute between two or more States parties with respect to the interpretation or application of this Convention, which is not settled by negotiation or by the procedures expressly provided for in this Convention, shall, at the request of any of the parties to the dispute, be referred to the International Court of Justice for decision, unless the disputants agree to another mode of settlement.” See ICJ (Preliminary Objections) 1 April 2011, Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v Russian Federation).
States are rather reluctant to put these issues before the Court.\textsuperscript{322} This in line with states’ reluctance to make use of inter-state complaint mechanisms of the UN Human rights Treaty Bodies.

The Court has nevertheless had the opportunity to address human rights issues and has done so on several occasions. For instance, the ICJ lifted the concept self-determination from a political claim to the level of a legal right through its pronouncements in the \textit{South West Africa, Namibia} and \textit{Western Sahara} cases.\textsuperscript{323} The principle of non-discrimination was already meticulously discussed in the case law of the ICJ’s predecessor, the Permanent Court of International Justice (PCIJ) in many cases amongst which the \textit{Polish Upper Silesia} case.\textsuperscript{324} Here the Court “insisted that what the minority was entitled to was equality in fact as well as in law; and that, while the claim to be a member of a national minority should be based on fact, self-identification was the only acceptable method of association”.\textsuperscript{325} This principle has lasting relevance in human rights law,\textsuperscript{326} proof of which may be found in the fact that the Human Rights committee General comment 18 has its roots in the jurisprudence of the PCIJ.\textsuperscript{327}

\begin{itemize}
\item \textsuperscript{324} Certain German Interests in Polish Upper Silesia (Germany v. Poland), PCIJ Rep. Series A No. 7.
\item \textsuperscript{326} Ibid.
\item \textsuperscript{327} HRC (General Comment No. 18: Non-discrimination) 10 November 1989. U.N. Doc. HRI/GEN/1/Rev.1 at 26 (1994).
\end{itemize}
There is a noticeable trend of increasing co-dependency between human rights treaty bodies and the jurisprudence of the ICJ, which must be looked upon favourably in light of the universality and certainty of international law, of which human rights law has become an intrinsic part. In the *Advisory Opinion on the Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, the Court made reference to the work of the Human Rights Committee in its evaluation of restrictions on the right of freedom of movement provided for under Article 12(3) of the ICCPR, agreeing with the view that restrictions ‘must conform to the principle of proportionality’ and ‘must be the least intrusive instrument amongst those which might achieve the desired result’.

Human rights and humanitarian law furthermore formed the centre of three recent cases before the ICJ: the Advisory Opinion on the *Palestine Wall*, *Congo v. Uganda*, and *Bosnia and Herzegovina v. Serbia and Montenegro*. Thus, the Court has had ample opportunity to contribute to the international law of human rights in such diverse fields as: genocide, race discrimination, self-determination, immunities of experts, consular access, belligerent occupation and nuclear weapons. At the very least there is a noticeable trend of increased application of human rights standards by the ICJ, which is proof of human rights law taking centre stage in international law.

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329 ICJ (Advisory Opinion) 9 July 2004, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*.
331 ICJ (Advisory Opinion) 9 July 2004, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*.
332 ICJ (Judgment) 19 December 2005, *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v Rwanda)*.
Other cases before the ICJ have specifically involved rights of individuals invoked by state means of the principle of diplomatic protection, a principle confirmed by the Court in the *Mavrommatis Palestine Concessions* case: “It is an elementary principle of international law that a State is entitled to protect its subjects, when injured by acts contrary to international law committed by another State, from which they have been unable to obtain satisfaction through ordinary channels. By taking up the case of one of its subjects and by resorting to diplomatic protection or international judicial proceedings on his behalf, a State is in reality asserting its own rights - rights to ensure, in the person of its subjects, respect for the rules of international law.”

In the *LaGrand* and *Avena* cases, both cases concerning capital punishment in the United States, the Court availed itself from rendering judgment on whether or not violations of the Vienna Convention on consular relations amounted to an infringement of the human rights of the individuals concerned, since this was not a necessary consideration in order to decide in the context of the case. It must be noted that the principle of diplomatic protection is also employed in favour of corporations such as in the *Barcelona Traction* case.

The most recent case pertaining to human rights protection before the ICJ is the *Ahmadou Sadio Diallo* case, a ground-breaking judgment. It must be noted that the ICJ is not a 'human rights court' as such. Nevertheless, the *Diallo* case stands out because “as the arguments developed, it is clear that they centred on the rights of Mr Diallo as an individual and that the case became transformed in substance into a human rights protection case instead of one involving the diplomatic protection of a national under the law of state responsibility for the treatment of aliens.” In addition, the Court confirmed a progressive definition of

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335 PCIJ (Judgment No. 2) 1924, *Mavrommatis Palestine Concessions*, Series A 2, 12.
339 Ibid.
diplomatic protection of article 1 ILC Draft Articles on Diplomatic Protection. In paragraph 39 the Court states: “diplomatic protection consists of the invocation by a State, through diplomatic action…of the responsibility of another State for an injury caused by an internationally wrongful act of that State to a natural or legal person that is a national of the former State with a view to the implementation of such responsibility.” The Court thereby confirms the direct legal status of individuals under international law, as well as that of corporations.

It is thus clear that the International Court of Justice has a role to play in the sphere of international human rights law, at least by virtue of human rights law forming an indivisible part of international law generally.

However broad its mandate and jurisdiction according to article 38 of its statute, the ICJ does face some limitations when it comes to effective enforcement of international human rights. The Court is limited in its jurisdiction ratione personae, as it is unable to accept complaints by individuals and is solely aimed at disputes between states. Its jurisdiction is moreover not compulsory, meaning that it is optional and voluntary. According to Crook, “only about a third of U.N. members accept compulsory jurisdiction based on Article 36(2) of the Statute. Many of these have significantly conditioned their acceptances. Even some States usually seen as law-abiding paragons have limited their acceptances of jurisdiction”.

Moreover, as established by the principle of diplomatic protection, when it comes to the protection of human rights of individuals specifically, the individual does not have a right of

342 ICJ Statute, art. 34(1).
recourse to the ICJ, it remains a privilege of the State. If and when a state wishes to exercise this right, the human rights enforcement is only of an indirect nature. “The discretionary nature of diplomatic protection rests uneasily with the principles underlying the international law of human rights, which create directly enforceable rights by the individual against his own State. Accordingly, the conceptual foundations of diplomatic protection are anachronistic and redolent of an age where the State was the sole subject of international law.”

4. **The International Criminal Court and Ad Hoc Tribunals**

The development of international human rights and international criminal justice goes hand in hand. The positive obligation of states to investigate became apparent in several cases of regional human rights courts. Grave atrocities in the Balkan and Rwanda have furthermore triggered international outrage and the development of international criminal justice in the form of *ad hoc* tribunals. This development has taken an enormous leap with the establishment of an International Criminal Court, a post WWII promise finally coming to fruition due to the improved atmospheric conditions at the end of the Cold War. The importance of the ICC for the human rights movement lies in the recognition that human rights abuses are not limited to states. Other actors are also responsible and their international responsibility has been accordingly acknowledged for the most severe crimes. A shortcoming of the Rome Statute is however that the State parties ICC finally did not include TNC

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344 Ghandhi, *supra* n. 141, p. 553.
accountability in addition to individual accountability.\textsuperscript{349} There is however no conceptual objection to international criminal law conferring binding obligations on legal persons.\textsuperscript{350} The difficulties arose over complexities of legal persons standing trial.\textsuperscript{351} For reasons of jurisdiction \emph{ratione personae} it thus becomes clear that the scope is still limited in addressing human rights.\textsuperscript{352}

By its very nature the ICC is limited in its jurisdiction \emph{ratione materiae} to international criminal law. The scope of application is purposely narrowed down to genocide, crimes against humanity, war crimes, and crimes of aggressive war.\textsuperscript{353} In sum, the importance of the ICC can not be denied but a vast number of human rights cases remain beyond its competence by virtue of its statute.\textsuperscript{354}

Ad Hoc tribunals are even further limited in their nature and therefore the scope of their material, personal, temporal and territorial jurisdiction are very narrow.\textsuperscript{355} Additionally these tribunals are set up after the facts and pertain to specific stipulated crimes.\textsuperscript{356} Effective human rights adjudication would also need to serve a function of prevention due to its permanent nature.

\begin{flushright}
\footnotesize
350 \textit{Ibid.}, p. 191.
351 \textit{Ibid.}
352 Rome Statute, Art. 25(1).
356 Kirkpatrick, \textit{supra} n. 307, p. 238.
\end{flushright}
5. **Regional Courts**

Currently there are three regional human rights instruments tasked with monitoring compliance with a human rights convention: The African Court for Human and Peoples’ Rights (ACHPR) overseeing the African Charter on Human and Peoples’ Rights,\(^{357}\) the Inter-American Court for Human Rights (IACtHR) protecting human rights under the American Convention on Human Rights and the European Court for Human Rights (ECtHR) enforcing human rights under the European Convention for Human Rights (ECHR). The limits of regional courts become apparent here already, their jurisdiction only pertains to the rights contained in the corresponding regional treaties, which are more limited than the wide scope of human rights globally.\(^{358}\)

The African system is restrictive in the sense that it is only open to individuals when the State has made a specific declaration accept the court’s competence to hear individuals.\(^{359}\) The IACtHR and ECtHR both do accept individual complaints. None of the systems provide for options to hold other actors than stats accountable.

Finally, the jurisdiction of regional courts is limited in territorial application. For instance, the ECtHR applies the ECHR extraterritorially in limited situations only, where the ‘effective control’ of the State is apparent, such as in the case of military occupation.\(^{360}\) Possible home state responsibility for corporate actions outside the territory of member states can thus not be addressed by this Court.\(^{361}\)

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\(^{357}\) For an account, see Amao, *supra* n.7, pp. 170-206.


\(^{359}\) African Charter on Human and Peoples’ Rights, Art. 34(6); Protocol on the Statute of the African Court of Justice and Human Rights (1 July 2008) 48 ILM 314, Art. 8(3); Statute of the African Court of Justice and Human Rights, Art. 30(f).


\(^{361}\) O. De Schutter, *supra* n. 281, pp. 52-64.
Nevertheless, the ECtHR must be commended for its great success, it is probably the most thriving system for human rights protection and implementation in the world. This success is exemplified by the great number of cases but also and most importantly by a functioning implementation system entrusted in the Committee of Ministers, which is lacking in the other regional courts. Commendable trends in ECtHR judgments also aid to better implementation and effective remedy since they increasingly included specific recommendations for reparation. This has resulted in the “pilot judgment procedure” aimed at addressing several cases which are founded in the same structural problems. The purpose of the procedure is to “identify the dysfunction under national law that is at the root of the violation, give clear indications to the Government as to how it can eliminate this dysfunction, bring about the creation of a domestic remedy capable of dealing with similar cases (including those already pending before the court awaiting the pilot judgment), or at least to bring about the settlement of all such cases pending before the Court.”

6. CONCLUSION

On a positive note, the evolution of human rights protection mechanism match the theoretical trend towards individual justice. There are several avenues for individuals to file complaints about human rights violations. These mechanisms however face several structural issues and lack an effective implementation system. Aside from regional courts there is no body at the international level capable of hearing individual complaints to which it can respond with a binding decision. This entails that although individuals can be heard, violations of their rights are not met with an effective remedy. Finally, it becomes abundantly clear from this chapter and considerations in chapter III that there is no international recourse for violations by transnational corporations.

In sum, the current human rights legal framework lacks meaningful and effective remedy. Therefore, in the subsequent chapter a solution for this impasse is considered in the form of a

364 Ibid.
World Court of Human Rights (WCHR) as an effective means of ensuring the implementation of human rights in all levels of society and for all the actors involved. Before such a Court all violators of human rights should be held responsible, including TNCs. The establishment of this court is fully in line with a rights centred approach to IHRL envisioning protecting the victim of a violation of human rights no matter who is the violator and no matter what is the cause or place of the violation.

366 For the most elaborate proposal see Kozma et al., supra n. 3.
CHAPTER V.

A WORLD COURT OF HUMAN RIGHTS

The above discussions painfully expose a number of deficiencies in the current human rights framework. A world court of human rights responds to the fundamental belief that the international framework of human rights calls for recourse to effective remedy to come full circle. The idea of a world court of human rights has recently been set back on the agenda at the initiative of the Swiss Government as part of the new Swiss Agenda for Human Rights: “One future step which seems to us essential in addressing many of these issues is the establishment of a fully independent World Court of Human Rights. Such a court, which should complement rather than duplicate existing regional courts, could make a wide range of actors more accountable for human rights violations.” This initiative has resulted in a consolidated Draft Statute by the hands of Julia Kozma, Manfred Nowak and Martin Scheinin.

While this thesis has already pointed to several reasons in favour of the establishment of a World Court, this chapter will proceed to summarize the arguments in favour and against (1), resulting in the conclusion that there is a fundamental need for a World Court of Human Rights. We will then go on to normatively discuss the proposed Draft Statute and pinpoint several necessary features of the WCHR which would responded to its purported aims (2). Finally, I will summarily acknowledge the need for political momentum in order to establish the WCHR in practice (3).

1. WHY DO WE NEED A WORLD COURT OF HUMAN RIGHTS?

In what follows under this title, this thesis offers an analysis of the views of the visionaries and sceptical towards the establishment of a WCHR.

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368 Protecting Dignity: An Agenda for Human Rights, Swiss Initiative to commemorate the 60th anniversary of the Universal Declaration of Human Rights

369 Kozma et al., supra n. 3.
1.1. THE VISIONARIES: IN FAVOUR OF A WORLD COURT OF HUMAN RIGHTS

The vision for a WCHR has its foundations in the post-WWII momentum which will be delineated first. Consequently, the fundamental aims of effective remedy and universality will be addressed.

1.1.1. HISTORICAL ROOTS OF THE WORLD COURT OF HUMAN RIGHTS

1.1.1.1. GLIMPSES OF VISION THROUGHOUT THE HISTORY OF INTERNATIONAL HUMAN RIGHTS LAW

a) The post-WWII prophecy

One of the pillars of the foundation of the United Nations is “to reaffirm faith in fundamental human rights, (...) and to establish conditions under which justice and respect for the obligations arising from treaties and other sources of international law can be maintained (...).”

The UN Human Rights Commission, established in 1946, was the UN’s principal body concerned with the promotion and protection of human rights. To this end the Commission in its second session in 1947 envisaged a plan of work towards a Bill of Human Rights consisting of three instrumental steps. In the report of its second session the Commission on Human Rights elaborated on the three steps, being an international declaration of human rights, an international covenant of human rights and the question of implementation, creating working groups for each step. The first step was achieved in 1948 with the adoption of the Universal declaration of Human Rights by the UN General Assembly. The second step, to draft a binding convention, finally resulted in what we now call the “International Bill of Human Rights,” comprised of the UDHR, the International Covenant on Civil and Political Rights and its two Optional Protocols, and the International Covenant on Economic, Social and Cultural Rights. During the second session of the Human rights Commission no

370 UN Charter, Preamble.
371 The Commission was replaced in 2006 by the UN Human Rights Council, pursuant to UN General Assembly Resolution 60/251 (3 April 2006), UN Doc A/RES/60/251
373 Kirkpatrick, supra n. 307, p. 231.
decision was made on the report submitted by the working group on implementation\textsuperscript{374}, rather it was included in full in the report by the Commission for consideration and comments by the governments of the various states and the Economic and Social Council.\textsuperscript{375}

In the report of the working group on implementation it is first mentioned that there was a discussion as to whether or not the working group could even consider any principles without the establishment of a declaration or covenant, since there is no implementation without a rule, this was the particular opinion of Ukraine which subsequently retreated from the working group. However, other members of the working group, in particular Belgium, took the stance that the question can nevertheless be considered “since it concerned the creation, description, and working of institutions and machinery”\textsuperscript{376}. In the report of the working group on implementation the question of ‘international machinery for the effective supervision and enforcement of the convention on human rights’ was thus considered accordingly.\textsuperscript{377}

The group could agree that there should be a possibility of complaints by individuals, associations or groups when it comes to human rights violations, in addition to the right of States to petition.\textsuperscript{378} “It appeared that if the right to petition were confined to states alone this would not furnish adequate guarantees regarding the effective observance of human rights. The victims of the violation of these rights are individuals. It is therefore fitting to give them access to an international organ (to be determined), in order to enable them to obtain redress (…)”.\textsuperscript{379} Due to time constraints this issue was not addressed in detail. It is however clear that that for the full and effective functioning of an international framework of human rights there should be a possibility for individuals, as rights holders to petition complaints with an international institution.

\textsuperscript{374} Made up of Australia, Belgium, Iran and India.
\textsuperscript{375} Report E/600, supra n.372, Annex C.
\textsuperscript{376} Ibid., para 11.
\textsuperscript{377} Ibid., para 31-52.
\textsuperscript{378} Ibid., para 36.
\textsuperscript{379} Ibid.

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The idea of an international court was also considered. The working group could in any event already agree on a recommendation of an establishment of a committee composed of experts (non-governmental) to precede judicial proceedings. The working group also foresaw a possibility of the establishment of a united nations specialized organ for the enforcement of human rights obligations motu proprio and suggested that this organ could act to guarantee the execution of decisions by an International Court of Human Rights. The Commission then went on to consider the proposal tabled by the Australian delegation on the establishment of an International Court of Human Rights.

b) The Australian proposal

The scourge of the war still smouldering, Australia committed itself as the most prominent and committed advocate for the establishment of an International Court of Human Rights. The Australian proposal is rooted within the framework of the Paris Peace Conference of 1946. The purpose of the conference was to negotiate and settle on the terms of the final peace treaties between the Allied powers and the axis states, which included several human rights provisions and clauses within the peace arrangements. “In Paris, Australia argued that if human rights clauses were included in the peace arrangements, there needed to be a Court of Human Rights (sometimes named a Court of Civic Rights) to hear complaints from individuals to enforce the clauses” In Paris, the Australian view was rejected by the other delegations. Debate on an International Court of Human Rights was referred to the meeting of the Commission on Human Rights.

A discussion on a possible International Court of Human Rights was thus also included in the report of the working group on implementation in paragraph 49 fuelled by the Australian

380 Ibid., para 39.
381 Ibid., para 46.
382 Kirkpatrick, supra n. 307, p. 231.
384 Kirkpatrick, supra n. 307, p. 231.
385 Devereux, supra n. 383, p. 180.
draft. This was based on the clear legal logic that ‘[...] where there is a right there ought to be a judicial remedy’. It was considered that “the general machinery for the protection of human rights should be supplemented rounded off, so to speak, by the institution of a right to appeal to an International Court”. Here the Chairman already included an important remark by the representative of the United States opposing such an institution. The main argument raised was that such an institution when included in the covenant would limit or make more difficult the ratification by several states and would thus be counter productive. The representative did not envisage this possibility in the foreseeable future. Many other divergent views on the workings of a new court or amendment to the existing International Court of Justice subsequently emerged and no final decision could be reached.

In the working group the following arguments emerged against the establishment of an International Court of Human Rights:
(1) There was a fear of an endless increase of international organizations of a judicial character.
(2) The risk of states reluctant to accept such far reaching obligations and thus hampering the ratification of the convention.
(3) The risk of insufficient ratification would be even higher when all parties having right to petitions, thus including individuals, would have access to this Court.
(4) It is not necessary to create a new Court, instead the jurisdiction of the existing International court of Justice could be widened. “However, the whole question is whether, at the present time, a large number of States would be prepared to accept the principle of final and binding decisions in the field of the violation of human rights”.

A response was offered by the parties present in favour of an International court of Human Rights:

387 Kirkpatrick, supra n. 307, p. 231.
(1) It was stipulated that compulsory judicial decisions must be accepted as a consequence of the goal of full and effective observance of human rights. Proponents recognise that not all states may be in favour but those who are must set the example which will induce others to join.

(2) The Statute of the present Court, the ICJ was deemed insufficient to achieve this aim.

(3) The suggestion of some states to include this power in the ICJ is not logical since it would face the same ratification problems as would the establishment of a new Court and it is better to have a separate specialized body.

(4) Modern civilisation is subject to specialisation and consequently fragmentation to a certain extent. Human Rights would be adjudicated more authoritatively by a specialised court than judges with only general qualifications.

(5) The proponents recognised the difficulties at the time of opening up the Court to other actors and did not want the list of cases to become unduly large.

The working group on implementation was largely in favour of the creation of a new Court which then resulted in an elaboration of the Australian Draft Statute\(^\text{389}\) of such a Court (infra \textit{2.1}).

However, early efforts to set up an effective international machinery for the enforcement of human rights proved to be a failure due to the persistence of large nations to uphold a strong degree of non interference in their domestic jurisdiction, such as the United States, Russia, Great Britain and France.\(^\text{390}\) In the same vein the Australian proposal of 1984 was destined to fail, strengthened by the beginning of the Cold war in 1984.

Discussion continued during the commission third session with counterproposals by other states, including the United States and China. A main argument in these objections was that the time was not yet there for a new institution and the central judicial role of the ICJ should

\(^{389}\) Australia tabled the draft resolution for an international court of human rights: Draft Resolution for An International Court on Human Rights, submitted by the Representative of Australia (5 February 1947) UN Doc E/CN.4/15.

be upheld.⁴⁹¹ In addition to the time argument another major concern was the intrusion on national sovereignty,⁴⁹² an opinion strongly reflected in the then Soviet Union’s perspective that an international court of human rights would represent an “inadmissible interference in the domestic affairs of any State”⁴⁹³.

The question of implementation of a forthcoming covenant on human rights was subsequently presented to States in the form of a questionnaire which included questions on the establishment of an international court of human rights. The responses were examined for review at the commission’s 6th session in 1950 but the time argument⁴⁹⁴ and sovereignty argument persisted. A number of states, namely India, the Philippines, Denmark and the Netherlands, did however look favourably upon the establishment of an international judicial mechanism.

The question of implementation of human rights by virtue of the establishment of an international court became a background notion as the international community turned its efforts towards the second step of the post WWII vision for human rights, namely a set of legally binding human rights standards. A daunting task which was undoubtedly slowed down by the Cold War.

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⁴⁹² See, e.g., comments made by Mrs. Mehta, Representative of India, E/CN.4/SR.81 Third Session of the Commission on Human Rights, summary record of the 81st meeting, Friday 18 June 1948. P. 11.

⁴⁹³ Comment made by Mr. Pavlov, Representative of the USSR, E/CN.4/SR.81 Third Session of the Commission on Human Rights, summary record of the 81st meeting, Friday 18 June 1948. P. 14.

⁴⁹⁴ The time argument was specifically reiterated by the representative of the United Kingdom, see Compilation of comments of governments on measures of implementation. E/CN.4/366, 22 March 1950. P. 10
c) A very Cold War: freezing progressive development of international human rights law

Since 1948 the Cold War resulted in a bipolarisation of the international community. The political climate was counterproductive towards a progressive development of international human rights. It is in this climate that the focus was turned away from implementation and the drafting of legally binding human rights instruments were prioritized. It is then that amongst other instruments the ICCPR and ICESCR were concluded. The Western countries were in favour of a strong division between civil and political rights on the one hand, and economic, social and cultural rights on the other. They did recognize the need for complaint mechanisms but only with respect to the ICCPR. Socialist countries underlined the indivisibility and interdependence of human rights, but were fundamentally against implementation of enforcement mechanisms as a breach of state sovereignty. The UN at that time could thus only agree on a state reporting system and an individual complaint mechanism for the ICCPR.

d) Later developments

When effective judicial protection of human rights failed at the international level, new efforts emerged at the regional level. Regional organisations were not tied by the same bounds of the UN at the global level because they were able to discard the political polarization of the international community at the time and focus on legally binding rules for like minded states. Three large regions supported the idea of establishing a court with jurisdiction over human rights treaties, with the establishment of the European Court of Human Rights under the ECHR as the frontrunner. The Inter-American Court of Human Rights and most recently the African Court on Human and People’s Rights followed suit. Under the UN system a progressive development also took place later on with the emergence of more optional procedures for individual complaint.

395 Shelton, supra n.12, p. 121.
396 Nowak (2007), supra n. 308, p. 252.
399 See supra CHAPTER I.1.
Besides regional efforts and increased acceptance of individual complaint mechanisms there were still a number of human rights proponents defending the idea of an international mechanism for enforcement and implementation in the form of an international court, noticeable for instance by the efforts of the International Commission of Jurists. During its first world conference in Tehran in 1986 the establishment of a World Court on Human Rights was one of the central advocacy objectives.\footnote{UN Conference on Human Rights, Tehran, April 22 to May 13, 1968, Proclamation of Tehran. 63 \textit{Am. J. Int’l L.} 674 1969. Para. 4} The then secretary general of the international commission of jurists and future Nobel Prize winner, Sean Macbride, addressed this question continuously stating that:

“The great defects of present efforts of the United Nations to provide implementation machinery are that it is piecemeal and disjointed and that it is likely to be political rather than judicial. Effective implementation machinery should conform to judicial norms, it should be objective and automatic in its operation, and it should not be ad hoc nor dependent on the political expediency of the moment... If we are serious about the protection of Human Rights, the time has surely come to envisage the establishment of a Universal Court of Human Rights... The reasons for the need of international judicial machinery in the field of human rights are many, the most important is to ensure objectivity and independence... We all know only too well that often the political authorities – particularly in periods of stress – are not above using patronage, pressures and even coercion against judges to secure their subservience.”\footnote{Sean MacBride, “The Strengthening of International Machinery for the Protection of Human Rights”, Nobel Symposium VII: The International Protection of Human Rights (Oslo, 25-27 September 1967), p. 16-17.}

1.1.1.2. **The Resurgence of the World Court on the International Agenda**

In 2008 the idea of an international court of human rights gained momentum again at the 60th birthday of the UDHR at the initiative of the Swiss Government as part of the new Swiss Agenda for Human Rights: “One future step which seems to us essential in addressing many of these issues is the establishment of a fully independent World Court of Human Rights. Such a court, which should complement rather than duplicate existing regional courts, could make a wide range of actors more accountable for human rights violations.”

To this end a panel of experts was established amongst which Manfred Nowak who took the lead on the topic of a World Court of Human Rights. Together with Martin Scheinin and Julia Kozma an elaborate draft statute was proposed in 2010, endorsed by the panel in the same year.

Since 2014 there is a second Draft Statute of a WCHR which also goes by the name of the Treaty of Lucknow. This project is directed by a renowned American Attorney, Mark Oettinger, who constructed the Draft with the assistance of the Design Team.

The Treaty of Lucknow was named after the annual World Judiciary Summit, which takes place in Lucknow, India.

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403 Protecting Dignity: An Agenda for Human Rights, Swiss Initiative to commemorate the 60th anniversary of the Universal Declaration of Human Rights.


405 Kozma et al., *supra* n. 3.


408 The World Court of Human Rights Development Project, Project Overview, at: <http://www.worldcourtofhumanrights.net/project-overview>.
For the purpose of this thesis we will primarily consider and comment on the Consolidated Draft by Kozma, Nowak and Scheinin, since it includes the possibility of jurisdiction over violations by non-state actors.

1.1.2. FUNDAMENTAL ARGUMENTS ROOTED IN EFFECTIVE AND UNIVERSAL HUMAN RIGHTS PROTECTION

The Australian proposal already held fundamental considerations in favour of the establishment of a World Court of Human Rights, the arguments of which still hold today. The central aim of a World Court is to finish what we’ve started and complement the international human rights framework with an effective remedy mechanism (1.1.2.1.). The nature of the Court as a truly global Court is furthermore in a position to respond to the promise of indivisible and truly universal human rights standards (1.1.2.2.).

1.1.2.1. EFFECTIVE REMEDY AS ICING ON THE CAKE

It is a fundamental principle of law and logic that rights are complemented with duties. Nowak describes this as follows:

“The very idea of a right means that somebody has a claim against somebody else, and the other one has a duty to meet this claim. If the duty-bearer does not live up to his or her obligations, the rights-holder has a remedy to hold the duty-bearer accountable. Otherwise, the right would be meaningless.”

It is thus an intrinsic part of the rule of law that the judiciary ensure that breaches are met with reparations. This already formed the foundation of the Australian proposal: “[T]he remedy is to us as important as the right, for without the remedy there is no right. Our basic thesis is that individuals and associations as well as states must have access to and full legal standing before some kind of international tribunal charged with supervision and enforcement.

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411 Ibid., p. 82.
of the [proposed covenant on human rights]. In our view, either a full and effective observance of human rights is sought, or it is not.”

The body the clothed with the power to adjudicate complaints of human rights violations and order remedies must comply with the characteristics of independence and impartiality and must have the capacity to issue binding decisions.\(^{413}\) The requirement of a right to reparation pertaining to human rights is inherent in international law as it is prescribed in several human rights instruments such as the UDHR, and universal and regional treaties, as well as in jurisprudence of the treaty body mechanisms and regional courts.\(^{414}\)


Additionally, the principle of the right to remedy has been reaffirmed by all states at the UN General Assembly in 2005, when the Basic Principles and Guidelines on the Right to Remedy and Reparation were adopted, which affirm that “the obligation to respect… and implement international human rights law… includes… the duty to provide those who claim to be victims of a… violation with equal and effective access to justice… and… to provide effective remedies to victims…” 415 The Guidelines provide for the following types of reparation: restitution, rehabilitation, compensation, satisfaction and guarantees for non-repetition.

In the Commentary to the Draft Statute by Kozma, Nowak and Scheinin416 it is underlined that the idea of a WCHR is a response to the urgent need for the further development in international case law of the right of victims of human rights violations to adequate reparation.417 A first step in this direction is already taken in case law of the IACtHR418 and the former Human Rights Chamber for Bosnia and Herzegovina.419

Of course, the primary responsibility to provide effective remedy for human rights violations forms an inherent part of the state’s obligations vis-à-vis its citizens. There are however situations conceivable (supra) where a state is unable or unwilling to do so and the people

416 Kozma et al., supra n. 75.
418 See D. Cassel, “The Expanding Scope and Impact of Reparations awarded by the Inter-American Court of Human Rights” in K. de Feyter et al. (eds), supra n. 417, pp. 191-223.
419 See decision of the Human Rights Chamber for Bosnia and Herzegovina in Ferida Selimovic et al. v the Republika Srpska ('Srebrenica cases'), 7 March 2003, Case nos. CH/01/8365 et al., 14 IHRR 250 (2007). See M. Nowak, “Reparations by the Human Rights Chamber for Bosnia and Herzegovina” in K. de Feyter et al. (eds), supra n. 417, pp. 245-288.
cannot be the victim of that on top of the victim of other violations of their most fundamental rights.

In Chapter IV it has been concluded that the current framework for implementation of human rights does not provide sufficient protection and does not include effective options for individual complaint. The fact that many treaties have incorporated an optional protocol of individual complaint is a positive development and serves as an argument countering the proposition that the political climate is not ready for a world court. The importance of the communications procedures cannot be denied and enjoy broad legitimacy and a justifiable expectation of compliance, reiterated by the Human Rights Committee:

“While the function of the Human Rights Committee in considering individual communications is not, as such, that of a judicial body, the views issued by the Committee under the Optional Protocol exhibit some important characteristics of a judicial decision. [...] The views of the Committee under the Optional Protocol represent an authoritative determination by the organ established under the Covenant itself charged with the interpretation of that instrument. These views derive their character, and the importance which attaches to them, from the integral role of the Committee under both the Covenant and the Optional Protocol.”

However, treaty bodies such as the human rights committee do not reach the expected level of effectiveness in terms of the provision of remedy for human rights violations. It is argued that due to their nature and limited resources they do not in reality possess the ability to deliver enforceable decisions. The views issued are not legally binding and they have no power to

421 HRC, (General Comment No 33: The Obligations of States Parties under the Optional Protocol to the International Covenant on Civil and Political Rights), 25 June 2009, UN Doc CCPR/C/GC/33 paras. 11, 13-15.

Chapter II and III have furthermore indicated that the growing role of non-state actors leaves the world with an accountability gap which may be filled by a World Court for Human Rights. Indeed a sole focus on states as duty bearers is outdated in a world where non-state actors such as financial institutions and transnational corporations for instance have increasing power that influence the livelihoods of individuals in a manner that is not limited by state borders, and therefore possess “the capacity to affect or even deny the enjoyment of human rights by people.”\footnote{M. Scheinin, “Towards a World Court of Human Rights”, Research report within the framework of the Swiss Initiative to commemorate the 60th anniversary of the Universal Declaration of Human Rights (2009), p. 8.} Therefore the Draft Statute of the WCHR includes ‘entities’ as possible respondents.\footnote{\textit{Infra} p. 103.}

1.1.2.2. \textit{Defragmentation through Systemic Integration at the World Court}

A World Court of Human Rights also has an important role to play to counter fragmentation of international law and human rights law specifically through the principle of systemic integration, a lesson learned from the ECtHR. In the words of McLachlan this principle “furnishes the interpreter with a master key which enables him, working at a very practical level, to contribute to the broader task of finding an appropriate accommodation between conflicting values and interests in international society, which may be said to be the fundamental task of international law today”.\footnote{C. McLachlan, “The Principle Of Systemic Integration And Article 31(3)(C) Of The Vienna Convention”, 54 ICLQ (2005), p. 319.}

\begin{footnotesrc}
\footnote{Nowak (2009), \textit{supra} n. 409, p. 699.}
\footnote{M. Scheinin, “Towards a World Court of Human Rights”, Research report within the framework of the Swiss Initiative to commemorate the 60th anniversary of the Universal Declaration of Human Rights (2009), p. 8.}
\footnote{\textit{Infra} p. 103.}
\footnote{C. McLachlan, “The Principle Of Systemic Integration And Article 31(3)(C) Of The Vienna Convention”, 54 ICLQ (2005), p. 319.}
\end{footnotesrc}
It is a much-voiced concern that the specialization of subsections of law will lead to fragmentation and will result in a loss of an overall perspective.\textsuperscript{428} The fragmentation concern in public international law can be extrapolated to the field of human rights law. The human rights framework is indeed characterized by a large number of sources diversified in nature by the governance level, material scope, personal scope and legal force.\textsuperscript{429} There are several negative side-effects to fragmentation of international law, such as erosion of general international law, emergence of conflicting jurisprudence, forum shopping and loss of legal security.\textsuperscript{430} On the other hand these issues can be deemed mere technical problems that can be solved through streamlining and coordination.\textsuperscript{431} At the judicial level this can be achieved through the principle of systemic integration.

The ECtHR acknowledges the importance of interpreting the rights formulated in the ECHR in light of a broader normative context in international law.\textsuperscript{432} The interpretation of the ECHR standards in accordance with surrounding social and legal influences allows for a dynamic instrument that maintains relevance to current evolutions in international law.\textsuperscript{433} The Court

\begin{footnotesize}
\begin{enumerate}
\item \textsuperscript{429} E. Brems, ‘We need to look at International Human Rights Law (Also) as a Whole’, 17 October 2014, http://www.ejiltalk.org/we-need-to-look-at-international-human-rights-law-also-as-a-whole/#more-12329.
\item \textsuperscript{431} \textit{Ibid.} para 9.
\item \textsuperscript{432} ILC Report para 161-163, \textit{See for example} ECtHR (Grand Chamber), 12 December 2001, \textit{Bankovic et al. v. Belgium and 16 other States}, App. No. 55207/99, para. 57.
\end{enumerate}
\end{footnotesize}
draws from other sources of expertise, for instance the provisions of the Convention on the Rights of the Child (CRC).\textsuperscript{434}

This method of interpretation adopted by ECtHR is defined as systemic integration, codified in Article 31(3)(c) VCLT.\textsuperscript{435} The very nature of international human rights law which is in constant development and where one right has no intrinsic priority over another requires the body of rights to be approached as a coherent whole.\textsuperscript{436} Article 31(3)(c) VCLT has several promising functions expressed by Gardiner of which these two of are specific importance for the defragmentation of international law: resolving conflicting obligations arising under different treaties and taking account of international law developments.\textsuperscript{437} It is exactly through specialization of different subparts of human rights law that the human rights framework can adapt to new developments. A World Court is best placed to use this principle to provide for a holistic approach when specific conflicts between the rights of several subjects arise. The establishment of the World Court thus not only provides for effective remedy, but also allows for a higher level of protection of the rights of all right holders involved, taking into account international law generally and other human rights treaties and interpretations by specialized bodies.\textsuperscript{438}

Finally, it must be noted that in this sense the Court would not only be beneficial for victims but to the international community as a whole and specifically provide for better implementation at the domestic level through the issuance of authoritative interpretations in its case law which would improve predictability and consistency.\textsuperscript{439}

\begin{footnotes}
\item[434] See for example with relation to art. 19 CRC Z. And Others v. UK., Judgment of 10 May 2001, ECHR 2001-V.
\item[436] ILC report para 414; E. Brems(2014).
\end{footnotes}
1.2.  **THE SCEPTICAL: AGAINST A WORLD COURT OF HUMAN RIGHTS**

Some of the arguments of the post-WWII ideal are still present today and must not be reiterated here to avoid needless repetition.\footnote{440}{See supra CHAPTER I.1.1.1.1.b).} It is however important to note that the Cold War is definitely over. It is time to leave the winds of winter behind and fulfil the dream of spring. We can not sustain the meagre compromises of the cold war and we must move on to full implementation of human rights.

One of the major scholars arguing against the creation of a World Court of Human Rights today is Philip Alston.\footnote{441}{P. Alston “Against a World Court for Human Rights”, (2014) Ethics & International Affairs, 28.} He bases his argumentation mainly on the draft proposal established by Nowak, Scheinin and Kozma. There are also two distinct types of arguments discernible, arguments of a fundamental nature and arguments related to more practical obstacles, which that are more practical in nature, which are better discussed under the discussion of the Statute of the World Court.\footnote{442}{See infra CHAPTER I.2.}

1.2.1. **ISSUES OF LEGALISM AND HIERARCHY**

“Courts do not function in a vacuum. To be seen as legitimate and to aspire to effectiveness they must be an integral part of a broader and deeper system of values, expectations, mobilizations, and institutions. They do not float above the societies that they seek to shape, and they cannot meaningfully be imposed from on high and be expected to work.”\footnote{443}{P. Alston, “A World Court for Human Rights is Not A Good Idea”, November 1, 2013, <www.justsecurity.org/2796/world-court-human-rights-good-idea/>.}

Alston opposes a WCHR on the fundamental basis of critique on legalism in international human rights law. Legalism is described by Judith Shklar as an “ethical attitude that holds moral conduct to be a matter of rule following”\footnote{444}{J. Shklar, *Legalism: Law, Morals And Political Trials* (Cambridge, MA, Harvard University Press, 1986), p. 1.} or “the preference for case-by-case treatment of all social issues, the structuring of all possible human relations into the form of
claims and counter-claims under established rules, and the belief that the rules are ‘there’.\footnote{445} Some scholars oppose the view that a global human rights regime will solve the problem of implementation at its roots.\footnote{446} Alston claims, and rightly so, that the establishment of a WCHR must be preceded by the general acceptance of values and expectations. He rejects the idea that there is a general understanding that every ‘right’ should be met with a right to claim its enforcement before a Court.\footnote{447}

Related to the first argument is the argument if hierarchy. Alston fears that the WCHR would vest and undue amount of power in the hands of a select group of people, the judges. Some scholars believe that international law and \textit{a fortiori}, international human rights law do not require centralized enforcement to perform its functions and influence behaviour. As Seyla Benhabib states, “many critics of cosmopolitanism view the new international legal order as if it were a smooth ‘command structure,’ and they ignore the \textit{jurisgenerative} power of cosmopolitan norms.”\footnote{448} According to this view, the power of human rights law lies in advocacy and campaigning that defy crusted government networks.\footnote{449} Alston states that the vesting of so much power in one single global court “defies any understandings of systemic pluralism, diversity, or separation of powers.”\footnote{450}

\begin{flushright}
\footnote{445}\textit{Ibid.}, p. 10.
\end{flushright}
It is true that the WCHR can not exist in the void, therefore, the principle of complementarity is of the outmost importance in the establishment of the Court.\textsuperscript{451} This means that the WCHR will work ‘in tandem’ with national and regional mechanisms.\textsuperscript{452} In this sense the World Court does not aim to take away from the responsibility of states, but rather offer support and an appropriate, specialised and detailed interpretation of the existing rules and at the same time serve as winds in the sails of evolution.\textsuperscript{453}

1.2.2. The framework is not adapted to the introduction of non-state ‘entities’

The creation of a World Court of Human Rights and more specifically according to the design by Nowak, Scheinin and Kozma attempts to respond to a so-called gap in international human rights law when it comes to its inability to regulate the activities of what the statute calls “entities”. Alston offers a criticism to this idea one the one hand by the broad definition of what is thus included “any inter-governmental organization or non-State actor, including any business corporation” including according to the commentary “transnational corporations, international non-profit organizations, organized opposition movements, and autonomous communities within States or within a group of States.”

Alston considers that this broad range of non-state actors is placed on virtually the same footing as states and argues that the implications of doing so are not thought through, since it may include for instance armed opposition groups.\textsuperscript{454} Alston’s criticism is rooted in the ongoing discussion on the status of non-state actors in human rights law. The World Court would be a precarious jump to conclusions in a framework that is “notoriously incapable of

\textsuperscript{451} See infra CHAPTER I.2.2.1.


\textsuperscript{453} Evolution of international human rights law is a key purpose of the establishment of the WCHR according to Scheinin; see M. Scheinin in “A public debate: 'A world court for human rights?''' organized by the Oxford Martin Programme on Human Rights for Future Generations, 9 May 2016.

\textsuperscript{454} P. Alston “Against a World Court for Human Rights”, (2014) Ethics & International Affairs, 28, p. 207.
dealing adequately with the differences in status and obligation among such entities.”

Indeed, the status of non-state actors, such as TNCs remains unresolved at the current time. The WCHR could however ignite enlightenment in this regard.

Alston’s commentary seems mainly directed at the statute for blurring the lines between states and other “entities” and disregarding any consequences of doing so. Therefore, Alston is not convinced of the desirability of this part of the proposal but nevertheless admits that the rationale is not unconvincing. This counterargument thus does not seem insurmountable.

1.2.3. **Universality and Cultural Relativism**

Universality is proclaimed as one of the goals of the international human rights framework, and accordingly so, the establishment of the WCHR. Alston fears strict uniformity and commends diversity to accord to different ways in which national systems implement international standards. He recognizes that this is not applicable nor commendable in cases of mass atrocities; violations of physical integrity rights through disappearances, killing, torture, or violence against women; or various other violations. It seems that Alston is thus proposing a divide in some rights that are universal and some rights that are not universal in their application. This seems to follow the vision of cultural relativism, i.e. the postulation that an international system of human rights is inappropriate because of the fact that human rights are relative to each society or culture. Such a theory can not be upheld at present times. Even though the establishment of the human rights framework was at the time lead by western states, the 1993 Vienna Declaration and Programme of Action clearly showed global commitment to achieving universal rights, further exemplified by the recent the 2004 Arab Charter on Human Rights and the 2012 ASEAN Human Rights Declaration. Furthermore, as Tomuschat puts it, “the notion that cultures constitute monolithic blocs that resist all the winds and waves of the change of times seems to be over-simplistic.”

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455 Ibid.
456 See supra CHAPTER I.3.
457 Alston, p. 208.
458 Ibid.
459 Tomuschat supra n. 19, p. 68.
globalisation also influences cultural aspects of life which evolve and interact.\textsuperscript{460} As Kofi Annan sees it: “It was never the people who complained of the universality of human rights, nor did the people consider human rights as a Western or Northern imposition. It was often their leaders who did so.”\textsuperscript{461}

1.2.4. PRACTICAL CONSIDERATIONS

Both Philip Alston\textsuperscript{462} and Sarah Cleveland\textsuperscript{463} voice practical concerns which were already raised when the Australian proposal was introduced, which are mainly arguments of time, money and unwillingness of states.\textsuperscript{464} The argument of time is dealt with later on in Chapter V.3. The establishment of the WCHR would be a challenging financial endeavour, that is undisputed. With the current framework already lacking funding and resources, the WCHR seems utopian.\textsuperscript{465} Scheinin in response indicates that we must think in the long run and that a process which is uniform will create legal certainty and eventually will be financially beneficial.\textsuperscript{466}

The high cost associated with this establishment and the conferral of power to it are arguments that foster the improbability of the willingness of states to subject themselves to the jurisdiction of the Court.\textsuperscript{467} Alston and Cleveland note that that time, energy and money would be better spent at mending the cracks in the current framework, “these complex

\textsuperscript{460} \textit{Ibid.}


\textsuperscript{462} P. Alston “Against a World Court for Human Rights”, (2014) Ethics & International Affairs, 28, p. 204.


\textsuperscript{464} See \textit{supra} CHAPTER I.1.1.1.1.b).

\textsuperscript{465} P. Alston “Against a World Court for Human Rights”, (2014) Ethics & International Affairs, 28, p. 204.


\textsuperscript{467} P. Alston “Against a World Court for Human Rights”, (2014) Ethics & International Affairs, 28, p. 204.
challenges cannot be dealt with in a meaningful way by seeking to bypass them all and create a WCHR as if it were some magical panacea.  

It is my view however that an initial proposal needs to be very ambitious since finally, as noted by Scheinin, the final statute will have to be concluded by states and they are likely to diminish intrusive powers, but never will they increase them.

1.3. THE ENLIGHTENMENT: THE NEED FOR A WORLD COURT OF HUMAN RIGHTS

The post-WWII revolution of IHRL has left us with a clear vision for the future: full and universal protection of human rights of all people. Such a vision can only be achieved through an enforcement mechanism where individuals have access to effective remedy. Since current mechanisms do not have the competence to achieve these aims, the WCHR suggests a true path to comprehensive implementation and enforcement of international human rights standards. It also responds to the pressing social need to incorporate non-state actors as addressees of human rights obligations. Finally, the WCHR may serve to counter fragmentation of the law and achieve the aim of universal rights. Through the principle of complementarity, the Court will be integrated in the current framework as icing on the cake aiming to achieve improved application of current regional and domestic systems.

In sum, there are no conceptual barriers to the creation of a World Court of Human Rights, therefore the need for completion of the post-WWII vision for an effective global human rights framework may be entrusted in this novel institution.

2. HOW CAN THE WORLD COURT ACHIEVE ITS PURPORTED AIDS?

Now that the need for the establishment of a world court has been established will proceed to examine what form such a world court may take through an analysis of the consolidated draft statute by Kozma, Nowak and Scheinin. A non-exhaustive list of necessary features to achieve the aims discussed above will be presented under this title, primarily based the

commentary by the authors, critical commentaries by Treschel\textsuperscript{469} and Alston\textsuperscript{470}, and the sketch of a global court of Human Rights offered by Kirkpatrick.\textsuperscript{471} The analysis will be complemented by a personal interpretation of the features necessary to achieve the aims discussed above. Finally, I will briefly elaborate on the question of incentives for TNCs to subject themselves to the jurisdiction of the Court (\textit{infra} 2.4.)

The Consolidated Draft Statute envisions a World Court of Human Rights as a permanent standing institution.\textsuperscript{472} In what follows I will highlight certain aspects of the statute which are aimed at realizing the purpose and function of the World Court. The purpose and function as described by the international commission of jurists, consists of: providing access to justice and effective redress to victims of human rights violations by means of an independent and impartial international judicial mechanism in order to reach the ultimate objective of realizing the promise of universal adherence to international human rights standards.\textsuperscript{473} Kirkpatrick considers three necessary characteristics for a Global Court of Human Rights “that would make a GCHR one of the most effective institutional changes in the current international human rights regime”\textsuperscript{474}:

- Establishment: No Need for Amendment and Increased Jurisdiction \textit{Ratione Materiae}
- Increased Scope of Jurisdiction \textit{Ratione Personae} and Complementarity.
- Standing Court with Uniformity Across Regions.

I will restructure these arguments and add on to them by means of discussing the jurisdiction of the Court (2.1.), the principles to achieve integration of the broad international human rights framework (2.2.) and finally discussing features needed to achieve the central purpose of effective remedy (2.3.).

\textbf{2.1. \textit{Controversial Jurisdiction}}

\textsuperscript{470} Alston (2014), \textit{supra} note no. 441.
\textsuperscript{471} Kirkpatrick, \textit{supra} n. 307.
\textsuperscript{474} Kirkpatrick, \textit{supra} n. 307.
The Jurisdiction of the World Court should make it possible for individuals and groups of individuals to bring complaints for violations of human rights (2.1.1.1.). As established above the scope of violators goes beyond States so other ‘entities’ may also be included as respondents, this is probably the most controversial provision of the draft statute (2.1.1.2.). In order to do so it is also recommended to consider a flexible jurisdiction ratione materiae (2.1.2.).

2.1.1. RATIONE PERSONAE

Article 7: Individual complaints by applicants 475

[1] The Court may receive and examine complaints from any person, non-governmental organization or group of individuals claiming to be the victim of a violation by one of the States Parties to the present Statute of any human right provided for in any human rights treaty to which the respective State is a Party.

[2] The Court may also receive and examine complaints from any person, non-governmental organization or group of individuals claiming to be the victim of a violation of any human right provided for in any human rights treaty by any Entity, which has made a declaration under Article 51 that it recognizes the jurisdiction of the Court in relation to human rights enlisted in such treaties.

2.1.1.1. APPLICANTS

To respond to insufficient possibilities in the international sphere for individual complaint, a key feature of the WCHR is the possibility of individuals to bring claims for human rights violations. 476 Judges would be competent to decide on complaints brought by individuals, groups or legal entities alleging a violation of any human right found in an international human rights treaty binding on the State. 477 Such a provision is modelled after the rules applicable before the ECtHR and the ACHR. 478 In this sense the international protection of

475 Consolidated Draft Statute, Article 7.
478 Articles 34 and 44 respectively.
human rights will finally come full circle, where a right is inevitably met by an enforceable duty.\(^{479}\)

2.1.1.2. **RESPONDENTS**

The Draft Statute of the Court would be conceived as a treaty between states. State parties thereby subject themselves to the jurisdiction of the Court.\(^{480}\) The revolutionary nature of the Draft Statute however lies in the inclusion of ‘entities’ in the group of respondents.\(^{481}\)

**Article 4: Definitions**\(^{482}\)

For the purposes of the present Statute:

[1] The term “Entity” refers to any inter-governmental organization or non-State actor, including any business corporation, which has recognized the jurisdiction of the Court in accordance with Article 51.

Scheinin has elaborated that such ‘entities’ may include international organisations, including financial institutions, multinational corporations and minority groups who have a degree of autonomy.\(^{483}\) He further clarifies that such an inclusion offers a response to globalisation and the relative weakening of nation states as duty-bearers.\(^{484}\)

Inclusion of other actors is thus dependent on their voluntary subjection to jurisdiction in accordance with article 51 of the Draft Statute. Doing so might be difficult, but not impossible.\(^{485}\) In any event, in the words of Kirkpatrick, “the opportunity for such a variety of

\(^{479}\) see *supra* p. 89. Effective remedy


\(^{482}\) Consolidated Draft Statute, Article 4(1).


\(^{484}\) Ibid.

\(^{485}\) For an account on TNCs see *infra* 2.4.
international actors to be held accountable for potential human rights violations could lead to a watershed moment in the history of international human rights.\textsuperscript{486}

2.1.1.3. \textit{Remarks}
A possible criticism here is that such a broad jurisdiction may result in a flood of cases. Alston for instance, attacks the WCHR Draft for its wide admissibility powers, and limits himself to state that every national decision with which the victim is ‘not satisfied’, could be overthrown.\textsuperscript{487} This is however a limited reading of the Draft Statute, it does provide for more stringent admissibility criteria that would limit its workload.\textsuperscript{488}

Scheinin furthermore counters this in a recent debate at the Oxford Martin Programme on Human Rights for Future Generations.\textsuperscript{489} He postulates that first there is a degree of subsidiarity to be applied. Also in respect to corporations he expects that they will design their own internal grievance mechanisms. He concludes that “by encouraging and rewarding compliance the establishment will result in improvement and better function of internal remedies”, whereby the World Court functions as a last resort. Indeed, the Court must be based on the principle of complementarity.\textsuperscript{490} Additionally, petitions are subject to a screening process of admissibility.\textsuperscript{491}

2.1.2. \textit{Ratione materiae}
The Consolidate Draft Statute is strictly jurisdictional in nature; this means that it comprises of acceptance of a right of complaint for obligations of pre-existing human rights treaties. The

\begin{footnotesize}
\textsuperscript{486} Kirkpatrick, supra n. 307, p. 243.
\textsuperscript{488} Consolidated Draft Statute, Article 10 ‘Other Admissibility Criteria’; Kirkpatrick, supra n. 307, p. 243.
\textsuperscript{490} See infra p. 5; Kirkpatrick, supra n. 307, p. 243.
\textsuperscript{491} Consolidated Draft Statute, Article 10 ‘Other Admissibility Criteria’; Kirkpatrick, supra n. 307, p. 243.
\end{footnotesize}
Statute does not entail a new set of binding norms, which will make it easier to implement. Kirkpatrick offers a compelling argument in favour of such an approach. Other reform proposals would in his words be ‘contentious, long and arduous’. Likewise Treschel agrees that in his idea of a ‘sibling model’ to the ICJ, amendment to the UN Charter would be required, possibly a ‘torturous process’. The option proposed in the Draft Statute thus seems a good solution and will be briefly discussed in what follows.

2.1.2.1. Applicable Law for State Parties

Article 5 enlists existing UN human rights treaties as pertaining to the jurisdiction *ratione materiae* of the WCHR complemented by Article 5(2) foreseeing a possible extension of the list upon approval through an official procedure. All of the UN treaties

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492 See Nowak (2009), *supra* n. 409, p. 703.
supervised by the treaty bodies are enlisted in Article 5. Some commentators expressed their concerns about a possible fragmentation flowing from such an extensive Court’s jurisdiction, which may possibly clash with other types of remedy available. However, the Statute sought to remedy fragmentation by introducing Article 7(3), which requires suspending the operation of the individual communications procedure:

[3] The ratification of accession to this statute by a State shall be treated by the Secretary-General of the United Nations as a notification by a State of the suspension of the operation of complaint procedures accepted by the State in question under the human rights treaties covered by the Court’s jurisdiction. The suspension shall take effect on the day of entry into force of this Statute in respect of the State in question and remain effective as long as the State remains subject to the Court’s jurisdiction under the treaty in question.

In response to the scenario of states withdrawing from the Court’s jurisdiction under Article 52, ‘[…] its earlier acceptance of optional complaints procedures under existing human rights treaties would automatically be “reactivated”’.

The Draft Statute holds that States accept the jurisdiction of the Court in relation to all treaties listed in article 5(1). Nonetheless, state parties are left with an ‘opting-out’ procedure,
providing for in Article 50 (1), providing for an element of selectivity whereby state parties may make declarations of reservations at the time of ratification or accession either to certain treaty provisions or to an entire treaty. On the other hand, since the list of article 5(1) is not exhaustive, states have the possibility to ‘opt-in’ in accordance with article 50(4).

2.1.2.2. **OPT-IN PROCEDURE FOR ‘ENTITIES’**

Since Human Rights Treaties by virtue of their nature only have state parties and thus are only binding for states the draft statute foresees in an opt-in procedure for other actors with regards to applicable rules. This is provided by Article 51 of the Draft statute:

**Article 51: Declaration by Entities**

[1] Any Entity may at any time declare under this Article that it recognizes the competence of the Court to receive and examine complaints from any person, non-governmental organization or group of individuals claiming to be the victim of a violation by the respective Entity of any human right provided for in any human rights treaty listed in Article 5 (1).

[2] When making such a declaration, the Entity may also specify which human rights treaties and which provisions thereof shall be subject to the jurisdiction of the Court.

[3] Such declaration shall be deposited with the Secretary-General of the United Nations.

In sum, Entities may accept the jurisdiction of the Court in relation to human rights treaties listed in Article 5 (1). Because of the fact that these human rights treaties are traditionally directed at states, not all of the treaties or provisions might be easily transferable to to ‘entities. They will have to specify in the declaration which human rights treaties and which

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500 Nowak(2014), supra n. 499, p. 84.

provisions thereof shall be subject to the jurisdiction of the Court. These specifications are finally subject to decision by the Court which can decide in a given case which provisions can be applied in relation to an inter-governmental organization, a transnational corporation or other non-State actor.

2.1.2.3. **Remarks**

Kirkpatrick notes that the selective approach adopted here will lead to different applicable rules for different parties. This might even lead to a distorted situation where enforcement is bifurcated between the World Court and the treaty bodies. It does seem more attractive to states and might be the stretch needed to gain acceptance, although it is not without scrutiny in international legal scholarship. Solutions offered by Kirkpatrick include deletion of the opt-out procedure or more expansively that the WCHR has jurisdiction over all of the core human rights instruments. When considering a more inclusive jurisdiction *ratione personae* however, a flexible approach seems to be the most viable solution.

2.2. **Principles to achieve integration**

2.2.1. **Complementarity**

The World Court is not a substitute for for domestic or regional courts. The principle of complementarity applies, similar to ECHR and ACHR’s articles 35 and 44 respectively, which holds the obligation for applicants to exhaust domestic remedies. If domestic remedies do not result in appropriate relief for the victim, he or she would have the right to seize an international human rights court, either at the regional or global level, at the discretion of the

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victim, should a choice present itself. There could be no appeal from a regional human rights court to the World Court.508 The principle of complementarity is phrased as follows:

**Article 9: Exhaustion of domestic remedies**

[1] The Court may only deal with any individual complaint if the complaint has first been submitted to the highest competent domestic court in the respective State Party and the applicant is not satisfied with the judgment of this court, including the reparation afforded. Each State Party has an obligation to ensure that all applicants have access to effective judicial remedies in relation to all human rights enshrined in the applicable human rights treaties. Each State Party may identify, in its instrument of ratification, in relation to the applicable human rights treaties the judicial remedies which applicants must exhaust under their domestic system before they can lodge a complaint with the Court. Any subsequent changes in the required domestic remedies shall be notified to the Court.

The principle is modelled after Articles 1 and 17 of the Rome Statute.509 A person can only be tried before the ICC if the respective State authorities are either unwilling or unable to prosecute the person concerned. Such a principle provides an an incentive for the domestic criminal justice authorities to prosecute persons suspected of having committed crimes punishable under the Rome Statute.510 Similarly in the case of the WCHR, states would be encouraged to put in place a domestic system of effective enforcement of human rights.511 It is a pity that article 9(1) uses the soft phrase ‘may’ instead of ‘shall’ for the obligation of states to identify all relevant judicial remedies which applicants must exhaust under their domestic system before they can lodge a complaint to the Court. Such an obligation was

509 Commentary to the Draft Statute, supra note no., p. 69.
deemed too burdensome on the states parties at the Berkeley conference.\textsuperscript{512} The suggestion still remains though and is aimed at strengthening domestic judicial systems.\textsuperscript{513}

The Draft Statute goes on to establish criteria which must be for a domestic mechanism to be deemed ‘effective’\textsuperscript{514}:

\begin{itemize}
\item [2] This admissibility requirement does not apply if, in the view of the Court, the relevant domestic remedy is not available or effective or does not afford due process of law for the protection of the right or rights that have allegedly been violated. In exercising its discretion, the Court shall pay particular attention to the following criteria:

[a] Whether the competent domestic courts have the competence to order interim measures necessary to avoid irreparable damage to a victim or victims of an alleged human rights violation.

[b] Whether such courts when finding a human rights violation, can afford the victim adequate reparation for the harm suffered, including restitution, rehabilitation, compensation and satisfaction.
\end{itemize}

The Article finally holds a similar suggestion at strengthening human rights remedies for ‘entities’, and thus also TNCs.\textsuperscript{515}

\begin{itemize}
\item [3] Without prejudice to the application of paragraphs 1 and 2, an Entity may in its declaration submitted pursuant to Article 51 identify what internal remedies exist within its own structures.
\end{itemize}

\textsuperscript{512} conference at the University of Berkeley on 8 and 9 November 2009, at which also three members of the Panel of Eminent Persons (Theodor Meron, Bertrand Ramcharan and Manfred Nowak) participated

\textsuperscript{513} Commentary to the Draft Statute, \textit{supra} note no. 480, p. 70.

\textsuperscript{514} Consolidated Draft Statute, Article 9(2).

\textsuperscript{515} Consolidated Draft Statute, Article 9(3).
Scheinin believes that corporations will be compelled to install internal remedy frameworks. It must be noted that such a provision is not aimed at diminishing the obligation of states to provide for a domestic remedy framework.

Finally, the principle of complementarity not only applies with regard to its relation with national and regional courts. The Court is also set up in such a way as to complement the treaty body system, and as the required judicial counterpart to the existing political international human rights framework.

2.2.2. ADDRESSING FRAGMENTATION OF INTERNATIONAL LAW

International Human Rights law is characterised by a multitude of sources and corresponding attempts at compliance. By an ‘emergence of specialised and relatively autonomous spheres of social action and structure’, a general view on the law may be lost. This is called ‘fragmentation’. As a part of international law generally it is thus important to interpret human rights standards in such a way that it forms a part of the overall international legal framework. The WCHR, rooted in a desire for effective human rights

517 Commentary to the Draft Statute, supra note no. 480, p. 71.
518 Supra p. 105.
520 supra
521 supra
enforcement and founded in human dignity and equally, must counter the negative consequences of specialization through adoption of an inclusive interpretation (2.2.2.1.) and keeping in mind the goal of universality of the human rights framework (2.2.2.2.).

2.2.2.1. AN INCLUSIVE SYSTEM

In applying international law the Court shall be guided by human rights law and vice versa. For achieving full inclusivity the Court shall also be guided by the jurisprudence of other international and regional Courts, which is already applied by for instance the ICJ\(^{524}\) and the ECtHR\(^{525}\). Article 6 of the Draft Statute provides for the foundations of applying an inclusive interpretation, or as referred to above, systemic integration.\(^{526}\)

**Article 6: General principles**

[1] In exercising its jurisdiction, the Court shall determine whether an act or omission is attributable to a State or Entity for the purposes of establishing whether it committed a human rights violation. In so doing, the Court shall be guided by the principles of the international law of State responsibility which it shall apply also in respect of Entities subject to its jurisdiction, as if the act or omission attributed to an Entity was attributable to a State. The Court shall determine the wrongfulness of an act or omission by a State or Entity through the interpretation of international human rights law.

[2] In exercising its jurisdiction, the Court shall be guided by the principles of universality, interdependence and indivisibility of all human rights, by general international law, general principles of law and by the jurisprudence of other international and regional courts.

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\(^{524}\) ICJ (Judgment) 30 November 2010, *Ahmadou Sadio Diallo (Guinea v. Democratic Republic of the Congo)*, para. 68.

\(^{525}\) See for example Bankovic v. Belgium and others, Decision of 12 December 2001, Admissibility, ECHR 2001-XII, p. 351, para. 57

\(^{526}\) Supra p. 93.
Scheinin finally posits that evolution is one of the most important functions of the World Court. “By encouraging and rewarding compliance the establishment will result in improvement and better function of internal remedies so the world court is needed in pilot cases needed for evolution of Human Rights Law.” There will always be new challenges, new technologies, or a scarcity of resources. The factional reality will be in constant change. For this reason, there is a need for authoritative determination of what constitutes a violation and what not.

2.2.2.2. **Universality**

The World Court will be a permanent standing body. Permanence has the advantage of predictability and it may act as a deterrent for possible human rights violators. Contrary to what Treschel stipulates, regional courts will not reach the same results as a world Court does. As Kirkpatrick puts it “Uniformity would move towards the aspirational goal of universalizability of rights, and perhaps the third pillar that was articulated so long ago – implementation, and by extension equal access to remedy – would finally begin to take hold.”

Alston develops the fundamental critique that human rights standards are not universal, and a margin of appreciation of states must be taken into account. Through a principle of systemic integration, as explained above, the Court will not only be able to integrate the general framework of law, but also form a cultural sensitive judgment. It is however imperative that human rights remain at the centre of attention. As Alston himself concludes in the context of the CRC, culture "must not be accorded the status of a metanorm which trumps rights" Finally, it would be wrong to state that human rights and the enforcement thereof

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528 Kirkpatrick, *supra* n. 307, p. 243-44.
529 Treschel, *supra* n. 469, p. 18.
530 Kirkpatrick, *supra* n. 307, p. 244.
531 Kirkpatrick, *supra* n. 307, p. 244.
532 Alston, p. 208.
would corset societies into identical ways of life. Bearing in mind the fundamental principle of human dignity and equality, human rights law is not a creation, it is inherent to human life.

“The existence of human rights does not depend on the will of a State; neither internally on its law or any other legislative measure, nor internationally on treaty or custom, in which the express or tacit will of a State constitutes the essential element. A State or States are not capable of creating human rights by law or by convention; they can only confirm their existence and give them protection. Human rights have always existed with the human being. They existed independently of, and before, the State.”

2.3. ACHIEVING THE CENTRAL AIM OF EFFECTIVE REMEDY

At the heart of the inception of the idea of a World Court of Human rights lies the aspiration of implementing an effective remedy mechanism for human rights violations, the necessary counterpart to the existence of ‘rights’. I will highlight the necessary features to achieve this goal.

2.3.1. INCREASED SCOPE OF JURISDICTION RATIONE PERSONAE

It has been extensively argued in the preceding pages that in order to achieve effective human rights protection, there must be an individual complaints mechanism and the accountability gap for non-state actors must be closed. Inevitably a broad scope of jurisdiction *ratione personae* forms an inherent part of the World Court of Human Rights, which has already bee discussed under title 2.1.1. I merely mention it here for the sake of comprehensiveness.

2.3.2. BINDING JUDGMENTS

**Article 17: Judgments of the Court**


535 Supra p. 89.

536 Consolidated Draft Statute, Article 17(1).

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[1] The Court shall decide by a written judgment whether or not the respondent party has violated an obligation to respect, fulfil or protect any human right provided for in any applicable human rights treaty.

It becomes apparent from this provision that there is heightened attention to the positive obligations of states\(^{537}\) and the ‘due diligence test’.\(^{538}\) This thus involves increased scrutiny of the actions by TNCs and entails a tightening of the supervision of human rights compliance by host states. The broad scope of jurisdiction \textit{ratione materiae} of the Court provides for an excellent opportunity for the WCHR to elaborate on the principle of due diligence in the sphere of economic, social and cultural rights.\(^{539}\)

“The lack of binding force of final and provisional decisions on human rights complaints and the lack of any effective supervision of State compliance with such decisions represents one of the most serious shortcomings of the present human rights treaty monitoring system of the United Nations. To narrow the wide implementation gap and to strengthen State compliance with their legally binding obligations under UN human rights treaties is, therefore, one of the principle reasons for demanding the establishment of a World Court of Human Rights.”\(^{540}\)

An indispensable feature of the WCHR is thus the capacity to issue binding judgments. For the purpose of effective remedy such a binding judgment includes adequate reparation for the victim. The binding nature of the judgments is provided for under article 18 of the Draft Statute:


\(^{538}\) i.e. failed to take the necessary legislative, administrative, judicial or political measures that can reasonably be expected for the domestic fulfilment of the human rights concerned or for the protection of the victim against undue interference by private parties. See Commentary to the Draft Statute, supra note no., p. 75.

\(^{539}\) Commentary to the Draft Statute, supra note no., p. 75. Precedented by IACtHR (Merits), 29 July 1988, \textit{Velasquez-Rodriguez v Honduras} Ser C No 4, para. 172.

\(^{540}\) Commentary to the Draft Statute, supra note no., p. 75.
**Article 18: Binding force, execution and supervision of judgments**

[1] The judgments of the Court shall be final and binding under international law.

[2] The States Parties and all other respondent parties are bound to abide by the judgment of the Court in any case to which they are parties. In particular, they are bound to grant the victim adequate reparation for the harm suffered, as decided by the Court, within a period of no longer than three months from the delivery of the judgment, unless the Court specifies a different deadline.

Judgments of the Court are thus binding under international law on States Parties and all other respondent parties and that the States Parties must directly enforce the judgments of the Court by the respective bodies. In addition, it is specified that the victim must be granted reparation for the harm within three months from judgment delivery, which heightens the effectiveness of the remedy mechanism.

2.3.3. **Specific remedies**

Effective remedies can only be achieved when the Court is competent to award specific, appropriate and adequate reparation.\(^{541}\) The competences of the Court are very broad with regard to awarding remedies for the injured party. Article 17(2) of the Statute reads:

> [2] If the Court finds a human rights violation, it shall also order the respondent party, *ex officio* or upon request, to afford the victim adequate reparation for the harm suffered, including restitution, rehabilitation, compensation, guarantees of non-repetition, or any other form of satisfaction.

As stated above there is a time limit to the implementation by the respondent, the authors even include that the implementation is subject to payment of interest.\(^{542}\) Such a specific approach is an implementation of lessons learnt from regional human rights mechanisms and treaty body systems.\(^{543}\) It is also obliged for the Court to give reasons for its judgment.\(^{544}\)

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\(^{541}\) See *supra* p.89-93.

\(^{542}\) Commentary to the Draft Statute, *supra* note no., p. 75.

\(^{543}\) For example, specification of remedies was requested by states in HRC follow-up on case Svetik 927/2000, *A/61/40* (Vol. II), 696.
comprehensive analysis of the violation may provide an insight in specific ways of addressing the ways in which the violation can be countered.\textsuperscript{545}

2.3.4. Enforcement
The three-step scheme provided in the Draft Statute provides for an elegant and effective way of enforcing binding judgments.\textsuperscript{546} Article 18 specifies that:

[3] The States Parties undertake to directly enforce the judgments of the Court by the respective bodies.

[4] Any judgment of the Court shall be transmitted to the UN High Commissioner for Human Rights who shall supervise its execution. The States Parties, other respondent parties and the applicants shall report to the High Commissioner within a time limit specified by the Court all measures taken to comply with the judgment and to enforce its execution.

[5] If the High Commissioner concludes that any State Party or other respondent party fails to abide by or enforce any judgment of the Court, he or she shall seize the Human Rights Council or, if he or she deems it necessary, through the Secretary-General the Security Council with a request to take the necessary measures that will bring about the enforcement of the judgment.

The High Commissioner for Human Rights is thus tasked with supervision over the implementation of the judgment rendered and may receive reports from the states on all measures taken to comply with the judgment. If the state party fails to do so, the Human Rights Council, or if necessary, the Security Council, may be seized to take the necessary measures for enforcement.

\textsuperscript{544} Article 17 (3).
\textsuperscript{546} Kirkpatrick, \textit{supra} n. 307, p.243.
In addition to Article 18, the Statute’s Article 41 provides with regard to compliance with and enforcement of judgments that the States parties must ensure direct enforcement of judgments by domestic authorities and must pass special laws for the implementation of their obligations under the Statute.\textsuperscript{547}

**Article 41: Compliance with and enforcement of judgments and provisional measures**

[1] States Parties shall fully comply with any judgments and orders for interim measures in any proceedings to which they are a party. States Parties shall ensure that any judgments and orders for interim measures of the Court can be directly enforced by their domestic authorities in the same way as any judgments and binding decisions of any domestic court.

The Draft Statute places the obligation to enforce judgments against entities also with the State:\textsuperscript{548}

[2] With respect to the enforcement of binding judgments against any Entity, States Parties shall provide full cooperation and judicial assistance, as requested by the Court.

[3] States Parties shall enact special laws for the implementation of their obligations under this Statute.

In addition, article 42 entails an obligation of compliance by entities:\textsuperscript{549}

**Article 42: Compliance by Entities**

Any Entity, which has made a specific declaration recognizing the jurisdiction of the Court in accordance with Article 51, shall fully cooperate with the Court in any

\textsuperscript{547} Consolidated Draft Statute, Article 41(1).

\textsuperscript{548} Consolidated Draft Statute, Article 41(2).

\textsuperscript{549} Consolidated draft Statute, Article 42.
proceedings to which it is a party and shall comply with any judgment and order for interim measure issued by the Court.

One of the reasons why TNCs would be directly held accountable before a World Court is when a State is unable or unwilling to enforce compliance with human rights obligations. For the purpose of the victim of human rights violations by TNCs this system may offer a method of compensation, but the structural defaults might not be remedied. It is thus my submission that whenever such a case is petitioned before the World Court of Human Rights the Court must also address the structural deficits underlying the violation, which may be due to a particular ‘weak’ situation in a state. In this way the problem may be uncovered and brought to the attention of the High Commissioner on Human Rights and the State may be assisted in solving the problem or may also be bound by the judgment depending on whether the authorities were unable or unwilling respectively.

2.4. Why Would TNCs Accept the Jurisdiction of the Court?

The willingness of private corporate actors to commit to human rights is already seen through the mushrooming of company codes of conduct and voluntary initiatives at the regional and international level. This is the consequence of increased international scrutiny and pressure of corporate insensitivities with relation to human rights. The most successful international initiative so far is the Global Compact. The same incentives that lie at the heart of corporate social responsibility (CSR) initiatives apply here, which include loyalty, commitment and productivity.

551 M. Scheinin, “Towards a World Court of Human Rights”, Research report within the framework of the Swiss Initiative to commemorate the 60th anniversary of the Universal Declaration of Human Rights (2009), p. 27.
552 https://www.unglobalcompact.org
Business corporations are increasingly involved as actors who commit to Human Rights and also as agents of Human Rights promotion.\textsuperscript{554} Their actions are scrutinized but at the same time they have “no say in the formulation of human rights treaties and no way of subjecting themselves to professional and external human rights review.”\textsuperscript{555}

The voluntary nature of this involvement can be seen as a problem to infer direct obligations upon business corporations.\textsuperscript{556} It is here that the World Court of Human Rights can play an intrinsic role. If both TNCs and states authorize punishment of IHRL violations, this in itself directly imposes strict obligations to refrain from violating.\textsuperscript{557}

3. \textbf{When will the time be right for the establishment of the World Court of Human Rights?}

Ultimately, a Statute will have to be negotiated by states and needs a political momentum. The proposal by Kozma, Nowak and Scheinin had the ‘Obama momentum’ of 2008 in mind, the drafters were indeed cognisant of the fact that such a bold proposal needs sufficient political backbone.\textsuperscript{558} To create the right momentum a full-blown debate must be started by all stakeholders.\textsuperscript{559} It is important to keep in mind that other efforts in this field where also received with much scepticism but eventually came through, such as the OHCHR and ICC. Finally, it is impossible to pinpoint a moment in time when this Court would come into being. “While the process of elaborating, negotiating, adopting, gaining sufficient ratifications, and bringing into operation a World Court would take place over the period of a number of years,

\textsuperscript{554} For a detailed argument see Deitelhoff and Wolf.
\textsuperscript{555} M. Scheinin, “Towards a World Court of Human Rights”, Research report within the framework of the Swiss Initiative to commemorate the 60th anniversary of the Universal Declaration of Human Rights (2009), p. 27.
\textsuperscript{556} Deitelhoff and Wolf, p. 238.
\textsuperscript{557} Ratner, \textit{supra} n.4, p.467.
\textsuperscript{558} M. Scheinin, debate
serious and concentrated discussions by States, civil society, academics, experts and all concerned persons should commence presently.\textsuperscript{560}
CONCLUSION

The great defects of present efforts of the United Nations to provide implementation machinery are that it is piecemeal and disjointed and that it is likely to be political rather than judicial. Effective implementation machinery should conform to judicial norms, it should be objective and automatic in its operation, and it should not be ad hoc nor dependent on the political expediency of the moment... If we are serious about the protection of Human Rights, the time has surely come to envisage the establishment of a Universal Court of Human Rights... The reasons for the need of international judicial machinery in the field of human rights are many, the most important is to ensure objectivity and independence... We all know only too well that often the political authorities – particularly in periods of stress – are not above using patronage, pressures and even coercion against judges to secure their subservience.\(^{561}\)

Legal scholarship and practice have presented us with several ‘problems’ in the international human rights framework, amongst which an accountability gap for corporate human rights violations. A common thread in the insufficiencies of the current framework is the lack of effective remedy for the victims of human rights violations, most certainly when it is linked to the acts or omissions of said corporations and their host state. The history of the international human rights framework and legal scholarship have presented us with a particular ‘solution’: an ambitious vision for a World Court of Human Rights. What this thesis has attempted to do is see if this particular problem and this particular solution complement each other, cognisant that there might be other solutions for the problem and touching upon the other contemporary issues in international human rights law to which the proposed solution might also provide an answer.

The need for a World Court of Human Rights is founded in the pure logic that human rights are rights that individuals have by virtue of being human. When considering human rights in legal terms we imagine that ‘rights’ exist as a counterpart of duties. Traditionally, the

perception is that states are the main duty holders in this regard since they exercise authority over persons and have the power to exercise a great degree of influence on them. However, when we keep the moral foundations of human rights in mind we may imagine that states are not the only actors in the international sphere which have the power to exercise authority over individuals. The scope of duty bearers may thus be expanded towards a more horizontal nature, an argument traced back to principles of human dignity and equality. The evolution of international law does indeed increasingly accord a legal position to individuals as a holder of enforceable rights, a trend to be epitomized with the creation of a World Court of Human Rights.

To the question ‘do we need a World Court for Human Rights’ my answer is a simple ‘yes’. The post-WWII revolution of international human rights law has left us with a clear vision for the future: full and universal protection of human rights of all people. Such a vision can only be achieved through an enforcement mechanism where individuals have access to effective remedy. Current mechanisms do not have the competence to achieve these aims since they often lack standing for individuals, issue decisions of a non-binding nature and don’t foresee appropriate reparation or enforcement. The World Court suggests a true path to comprehensive implementation and enforcement of international human rights standards. It also responds to the pressing social need to incorporate non-state actors as addressees of human rights obligations. The establishment and jurisprudence of the Court may also serve to counter fragmentation of the law and achieve the aim of universal rights.

For this purpose, this thesis has put forward a set of necessary features the Court must correspond to in order to achieve its full potential. Obviously, this must involve an extension of the jurisdiction *ratione personae* to include individuals and groups of individuals as applicants and to widen the scope of respondents beyond states. The principle of complementarity requires an exhaustion of domestic remedies and includes the obligation for states and ‘entities’ to provide the Court with the internal mechanisms to which individuals may have recourse. This will ultimately positively impact human rights implementation and enforcement generally. Through the principle of complementarity, the Court will be integrated in the current framework as icing on the cake aiming to achieve improved application of current regional and domestic systems. The request for adequate implementation is furthermore fulfilled by the very nature of decisions of a Court, which are
binding on all parties. Finally, the World Court must employ an effective enforcement mechanism that obliges parties to dispute to implement the judgment, a role set aside for the Office of the High Commissioner for Human Rights.

Clearly, this vision for a World Court of Human Rights to include jurisdiction over transnational corporations responds to the accountability gap for corporate human rights violations. The nature of the obligations of corporations under international human rights law might be unsure for some. By authorizing punishment of human rights violations before a world court however, it becomes clear that corporations acting on a transnational level are directly responsible for their acts under international law. Participation in the framework of the Court is based on consent, for states and other entities alike. The opt-in procedure for ‘entities’ which corporations can apply will also further the development of international human rights law in the sense that it will provide clarity in the substance of human rights obligations for corporate actors. Finally, the involvement of private actors in devising the *ratione materiae* of the jurisdiction of the Court applicable to them will increase general adherence thereto and by virtue thereof the protection of human rights.

In sum, there are no conceptual barriers to the creation of a World Court of Human Rights, nor are there fundamental objections for creating direct corporate accountability for human rights violations. Therefore, the need for completion of the post-WWII vision and response to the accountability gap of TNCs towards a global human rights framework that offers effective remedy for violations may be entrusted in this novel institution.
1. **INTERNATIONAL CONVENTIONS AND RESOLUTIONS**


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Convention on the Settlement of Investment Disputes Between States and Nationals of Other States (18 March 1965, entered into force 14 October 1966), 575 UNTS 159


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2. JURISPRUDENCE

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ICJ (Judgment) 30 June 1995, East Timor (Portugal v Australia)
ICJ (Judgment) 5 February 1970, Barcelona Traction Light and Power Company Limited (Belgium v Spain)
ICJ (Judgment) 27 June 1986, Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)
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ICJ (Judgment) 30 November 2010, Ahmadou Sadio Diallo (Guinea v. Democratic Republic of the Congo)
ICJ (Judgment) 27 June 2001, LaGrand (Germany v. United States of America)
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2.5. **NATIONAL**


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3. **DOCTRINE**

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Deze thesis heeft als doel de vraag te beantwoorden of er nood is aan een alomvattende *World Court of Human Rights* (WCHR). In het bijzonder tracht dit onderzoek na te gaan of een WCHR soelaas kan bieden aan de obstakels van verantwoordelijkheid van transnationale ondernemingen op gebeid van mensenrechtenschendingen. Met grondslagen in de nasleep van de tweede wereldoorlog werd het idee recent nieuw leven ingeblazen door de Zwitserse regering als onderdeel van de “Nieuwe Zwitserse Agenda voor Mensenrechten”. Dit initiatief heeft geleid tot een geconsolideerd ontwerp Statuut opgesteld door Julia Kozma, Manfred Nowak en Martin Scheinin. Dit statuut zal gebruikt worden als onderzoeksobject in deze thesis.

Verschillende vragen dienen onderzocht te worden om een antwoord op deze vraag te formuleren.

Om te beginnen, wat is de huidige status van internationaal recht inzake de rechten van de mens? In deze thesis wordt kort de morele en wettelijke basis voor mensenrechten toegelicht. Mensenrechten zijn rechten die mensen hebben omdat ze mens zijn. Deze logica is gestoeld op de fundamentele principes van menselijke waardigheid en gelijkheid. Vanuit dit perspectief bekeken is het logisch dat verschillende al dan niet staatsgebonden actoren, verantwoordelijkheden hebben met betrekking tot deze rechten, ook al is internationaal mensenrecht traditioneel opgesteld als een verzameling verplichtingen van staten tegenover personen. Onder invloed van globalisering is de internationale orde inderdaad aan een evolutieproces onderhevig waarin individuele rechten centraal komen te staan en er een brede waaier van plichtsdragers tegenover staat. Deze veranderingen zijn alsnog niet gebetonneerd in het internationaal juridisch raamwerk wat resulteert in een gebrek aan een aangepast afdwingingsmechanisme voor niet-staatelijke actoren zoals transnationale ondernemingen.

Een tweede vraag die zich bijgevolg opwerpt is het juridisch statuut van de transnationale ondernemingen in het internationaal recht om tegemoet te komen aan deze impasse. Voorbeelden van de betrokkenheid van dergelijke bedrijven in schendingen van mensenrechten zijn legio. Denken we maar aan de zaak *Kiobel v. Royal Dutch Petroleum*
Company, die handelde over martelingen van en moorden op Nigeriaanse activisten die vreedzaam protest organiseerden tegen Shell in Ogoniland, Nigeria, omdat de firma hen dwong om te verhuizen. In dergelijke gevallen wordt een internationaal forum gezocht om de schending van mensenrechten aan te kaarten, vanwege de onwil of het onvermogen van staten om deze kwesties aan te pakken enerzijds en anderzijds de aard van transnationale bedrijven, actief op internationale schaal, die een inherente afscherming inhoudt.

De volgende vraag is: wat zijn de tekortkomingen van het huidige kader voor het afdwingen van mensenrechten waar de WCHR een oplossing voor moet bieden? Deze thesis houdt een kort onderzoek in van de juridische mechanismes op internationale schaal met bijzondere aandacht voor de mogelijkheid tot individuele aanspraken. De conclusie die hieruit getrokken wordt is dat de huidige structuur onvoldoende efficiënt is en niet voldoet aan de verwachtingen van een efficiënt rechtssysteem voor de rechten van de mens.

Tenslotte, vormen de lacunes die blootgelegd werden door het beantwoorden van de voorgaande vragen vormen de basis van de noodzaak voor een WCHR. Dit wordt besproken vanuit een fundamenteel moreel perspectief met betrekking tot waarom de noodzaak bestaat, gecentreerd rond de lacunes van het huidige systeem en tegemoet te komen aan de evolutie van de aard en substantie van de rechten van de mens. Een WCHR stelt ook het doel voorop fragmentatie tegen te gaan. Het is belangrijk om na te gaan welke kenmerken de WCHR moet vertonen om aan deze doelstellingen tegemoet te komen. Het ontwerp statuut houdt logischerwijs een uitgebreide bevoegdheid _ratione personae_ in. Bovendien voorziet het complementariteitsbeginsel erop toe dat de WCHR wordt geïntegreerd in het huidige systeem en het versterkt in plaats van afbreekt. Om tegemoet te komen aan het tekort aan afdwijing wordt ook voorzien in een speciale procedure van opvolging van de uitspraken.

Mijn antwoord op de vraag “Do we need a World Court of Human Rights?” is een” ja”. Ik geloof ook dat de Wereld Rechtbank een belangrijke rol kan spelen bij het dichten van de kloof in de aansprakelijkheid van schending van mensenrechten. Er zullen zeker praktische en politieke uitdagingen zijn die de oprichting van deze Rechtbank bemoetijken. Het is echter belangrijk de discussie levend te houden, ontwerp statuten en toepasbare regels te verfijnen,
zodat we een wel doordacht statuut en functionaliteit van de rechtbank hebben, klaar voor gebruik wanneer het momentum aanwezig is.