Voices from Below—Africa's Contribution to the Development of the Norm of Corporate Responsibility to Respect Human Rights

By

Akinwumi Olawuyi Ogunranti

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Dedication

This thesis is dedicated to:

- God for his grace to accomplish this task
- My wife for her love and commitment.
- My Parents for their unlimited support
- Schulich School of Law, Dalhousie University, for its boundless kindness to me

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Abstract

The long conversations about corporate responsibility predominantly take place in forums and conferences in the Global North. Yet, the majority of the human rights abuses and their impacts are felt by peasants, farmers, children, and women in local communities in the Global South who do not have a voice in the institutionalized governance systems that animate global affairs. This thesis answers the question of how norms and human rights institutions in Africa can influence the corporate responsibility to respect (CR2R) norm as embedded in pillar II of the United Nations Guiding Principles on Business and Human Rights. Through the theory of social constructivism, this thesis examines how the CR2R norm is changing the dominant narrative that MNCs do not have human rights responsibilities in international law. In light of the CR2R norm's status as a social and (growing) legal norm, this thesis asks how norms and human rights institutions in Africa can contribute to the interpretation and application of the CR2R norm. The central argument is that international law-making, especially in human rights, should be an inclusive process that promotes an exchange of norms and ideas between the Global North and South divide. The ultimate goal of this thesis is to generate conversations about the potential role that norms and human rights institutions in Africa can play in the development of the CR2R norm. As a start, this thesis puts Africans at the center of the CR2R norm development discussion in terms of the inclusion of their views to affect the prescriptive and policy implications of emergent human right norms and principles.

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Chapter 1: General Introduction

1.0. Problem Statement

Globalization in the 21st century is changing the world in many ways. One of these is growth in the economic power of multinational corporations (MNCs).[1] Multinational corporations are difficult to define. However, they

> usually comprise companies or other entities established in more than one country and so linked that they may coordinate their operations in various ways. While one or more of these entities may be able to exercise a significant influence over the activities of others, their degree of autonomy within the enterprise may vary widely from one multinational enterprise to another.[2]

MNCs are often expressed in a corporate structure where a company is incorporated in a country but has operational branch(es) called subsidiaries or groups in foreign countries for different reasons, including administrative convenience and transnational capital flows.[3] The economic capital and growth of MNCs make them as powerful as states; in

[1] See Gralf-Peter Calliess, "Introduction - Transnational Corporations Visited" (2011) 18:2 Indiana Journal of Global Legal Studies 601.

[2] OECD, *Guidelines for Multinational Enterprises* (Paris, OECD Publishing, 2011) at 17. See also Arnold Allan Lazarus, "Multinational Corporations" in Neil Smelser & Paul Baltes, eds, *International Encyclopedia of the Social & Behavioural Sciences* (Pergamon: Oxford University Press, 2001) 10197 at 10197. John Ruggie also defines MNCs as "companies that conduct business in more than one country, whether as vertically integrated firms, joint ventures, corporate groups, cross-border production networks, alliances, trading companies, or through ongoing contractual relationships with off-shore suppliers of goods and services; and whether publicly listed, privately held, or state owned." See John Ruggie, *Just Business: Multinational Corporations and Human Rights* (New York: WW Norton, 2013) at XXXI. Since there is no legally acceptable definition of multinational corporations, this thesis used the term descriptively. See Peter Muchlinski, *Multinational Enterprises and the Law* (Oxford, UK: Oxford University press, 2007) at 12–15. For ease of reference, this thesis uses the term multinational corporations (MNC), transnational corporations (TNC), corporations, and enterprises interchangeably. This is similar to Baleva's approach. See Mary Baleva, *Regaining Paradise Lost: Indigenous Land Rights and Tourism: Using the UNGPs on Business and Human Rights in Mainstreaming Indigenous Land Rights in the Tourism Industry* (Leiden: Brill Nijhoff, 2013) at 60.

[3] See generally, Abhash Kumar, "Role of Multinational Companies in Developing Markets: A Special Reference to India" (2015) 1:4 International Journal of Applied Research 154. See also Ntina Tzouvala, *Capitalism as Civilization: A History of International Law* (Cambridge, UK: Cambridge University Press, 2020).

some cases, they are more powerful than states.[4] MNCs' operations across borders have increased their tendency to commit human rights abuses that harm individuals, the environment, and the planet in diverse ways.[5] They can also be complicit with state governments in perpetuating human rights abuses and environmental damage.[6]

However, states are the primary duty-bearers under international law.[7] Traditionally, corporations are not recognized as duty-bearers under international law.[8] This is because corporations are artificial entities created by or under the law of a state. In other words, the juridical status of a corporation is dependent on the state of their incorporation.[9] This dependent status makes MNCs objects and not subjects of international law; they have only a derivative legal personality.[10] Conversely, the nature of MNCs and their operations make it difficult for some states with weak governments or

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[4] See Joseph Stiglitz, "Regulating Multinational Corporations: Towards Principles of Cross-Border Legal Frameworks in a Globalized World Balancing Rights with Responsibilities" (2007) 23:3 American University of International Law Review 451 at 476.

[5] John Ruggie, *supra* note 2 at 1-15.

[6] See generally Florian Wettstein, "The Duty to Protect: Corporate Complicity, Political Responsibility, and Human Rights Advocacy" (2010) 96 Journal of Business Ethics 33; Caroline Kaeb, "Emerging Issues of Human Rights Responsibility in the Extractive and Manufacturing Industries: Patterns and Liability Risks" (2008) 6:2 Northwestern Journal of International Human Rights 327.

[7] See generally José Alvarez, "Are Corporations 'Subjects' of International Law?" (2011) 9 Santa Clara Journal of International Law 1; Sukanya Pillay, "And Justice for All? Globalization, Multinational Corporations, and the Need for Legally Enforceable Human Rights Protections" (2004) 81 University of Detroit Mercy Law Review 489 at 502.

[8] See generally Adefolake Adeyeye, "Corporate Responsibility in International Law: Which way to Go? (2007) 11 Singapore Yearbook of International Law 141.

[9] See *Barcelona Traction (Belgium v Spain)* [1970] ICJ 3.

[10] Bin Chen, "Introduction to Subjects of International Law" in Mohammed Bedjaoui, ed, *International Law: Achievements and Prospects* (London, UK: Martinus Nijhoff, 1991) 23. However, the status of MNCs is an evolving one in international law. See Math Noortmann, August Reinisch & Cedric Ryngaert, eds, *Non-State Actors in International Law* (Oxford-Portland: Hart Publishing, 2015); Davor Muhvić, "Legal Personality as a Theoretical Approach to Non-State Entities in International Law: The Example of Transnational Corporations" (2017) 1 Pécs Journal of International and European Law 1. Andrew Clapham argues that that MNCs can be potentially liable under criminal law by virtue of the fact that individuals who direct corporate affairs are amenable to the jurisdiction of the International Criminal Court. Therefore, criminal liability may be extended to MNCs in this regard. See generally Andrew Clapham, "State Responsibility, Corporate Responsibility and Complicity in Human Rights Violations" in Lene Bomann-Larsen & Oddyny Wiggen eds, *Responsibility in World Business: Managing Harmful Side-Effects of Corporate Activity* (New York: United Nations University Press, 2004).

legislation to hold them accountable.[11] Even if states could, they may, for different reasons, be unwilling to hold MNCs accountable for human rights abuses committed abroad.[12] Fleur Johns describes MNCs as "invisible" because they do not have a "concrete presence" under international law.[13] Indeed, under this legal regime, they are elusive.[14] MNCs definitely enjoy the rights conferred on them by legal doctrines, such as corporate legal personality. However, they often avoid national and international legal responsibilities that come with this recognition. It has been noted that "[t]he ability of multinationals to move capital between different countries, to create flexible international structures, and exploit the legal fiction that subsidiaries are independent from their parents, makes it difficult for any single state to regulate their activities."[15] Therefore, the challenge for states, non-governmental organizations, and scholars is how to regulate them transnationally to ensure that they are accountable for their actions and inactions under national and international law. Some examples of MNC's human rights and environmental abuses will illustrate this point in the next sub-section.

1.1. Corporations Operating in Governance Gaps

The cases illustrated in this section are drawn from two African countries—Nigeria and the Democratic Republic of Congo (DRC). They are chosen to demonstrate the abundance of

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[11] See Lewis Solomon, "Multinational Corporations and the Emerging World Order" (1976) 8:2 Case Western Reserve Journal of International Law 329. Sometimes, states may even be complicit in the human rights abuse. Therefore, there is no impetus to hold corporations accountable. See generally, Viljam Engström, *Who Is Responsible for Corporate Human Rights Violations?* (LLM Thesis: Åbo Akademi University Institute for Human Rights, 2002).

[12] See Phillip Blumberg, "Accountability of Multinational Corporations: The Barriers Presented by Concepts of the Corporate Juridical Entity" (2001) 24 Hastings International and Comparative Law Review 297.

[13] Fleur Johns, "The Invisibility of the Transnational Corporation: An Analysis of International Law and Legal Theory" (1994) 19 Melbourne University Law Review 893 at 893.

[14] Sarah Joseph, "Taming the Leviathans: Multinational Enterprises and Human Rights" (1999) 46:2 Netherlands International Law Review 171 at 172.

[15] The International Council on Human Rights, "Beyond Voluntarism: Human Rights and the Developing International Legal Obligations of Companies" (2002) The International Council on Human Rights Policy 1 at 12.

natural resources in Africa that have encouraged massive human rights and environmental abuses in host communities. They paint the picture of MNCs' exploitation, driven by greed, which has had negative effects on the environment, human dignity, and health of the host communities in which they operate. The cases show that from the oil-rich country (Nigeria) to the civil war raged country (DRC), the stories are broadly similar.

1.1.1 Oil Curse: The Niger Delta Region of Nigeria and Shell.

Shell Petroleum Development Company of Nigeria (Shell), a subsidiary of an MNC, Royal Dutch Shell Plc, is one of the major oil exploration, development, and production companies in the Niger Delta region of Nigeria. The Niger Delta, though richly blessed with crude oil, continues to suffer environmental and human rights abuse from the activities of Shell.[16] The environmental effect of gas flaring and crude oil spillage from pipelines continue to have ravaging effects on the lives of the Niger Delta people.[17] For example, in a 1992 scientific study of the environmental impact of oil operations in the Niger Delta region, it was discovered that incessant oil spills resulted in enormous pollution of water bodies and the degradation of agricultural land.[18] Furthermore, the oil spillages have negatively affected the availability and productivity of farmland, as well as the quality of water for agricultural and consumption purposes. Since the basic means of livelihood of the Niger Delta people is farming and fishing, oil spillage has negatively affected the

[16] Daniel Bertram, "Transnational Experts Wanted: Nigerian Oil Spills before the Dutch Courts" (2021) 33 Journal of Environmental Law 423 at 425.

[17] See Joint written statement submitted by the Europe-Third World Centre (CETIM), a non-governmental organization in General consultative status, Environmental Rights Action/Friends of the Earth Nigeria (ERA/FoEN) to the Human Rights Council (6 June 2014) A/HRC/26/NGO/100, online: CETIM<www.cetim.ch/wp-content/uploads/G1404473.pdf>.

[18] Oladele Osibanjo, "Industrial Pollution Management in Nigeria" in EOA Aina & NO Adedipe, eds, *Environmental consciousness for Nigerian national development* (Lagos: The Federal Environment Protection Agency, 1992).

economic lives of this community.[19] Water pollution has also had a devastating effect on marine life, especially fish, and the health of inhabitants of the Niger Delta. The perpetual impoverishment and deteriorating health of the Niger Delta people are mainly attributed to Shell's disregard for the lives of those living in its host communities, notwithstanding the huge profit it makes yearly from oil exploration in the region.[20]

Similarly, Shell's incessant gas flaring activities are a major cause of environmental concern in the region.[21] For example, the continuous gas flaring has substantially contributed to the release of greenhouse gases (GHG) into the atmosphere and reportedly caused acid rain.[22] The Niger Delta people also claim that gas flaring has destroyed their plants and wildlife. Shell's gas flaring activities in Nigeria has contributed to the countries' reputation as a major producer of GHG affecting global warming in the world today.[23] Concomitantly, gas flaring has been identified as a major cause of health problems in the Niger Delta, including asthma, bronchitis, cancer, blood disorders, and skin diseases.[24] These diseases have considerably reduced the numbers of life expectancy of the Niger delta people.[25] An Ogoni song aptly puts the devastating effect of Shell's activities as follows:

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[19] Kaniye SA Ebeku "The Right to a Satisfactory Environment and the African Commission" (2003) 3 African Human Rights Law Journal 149.
[20] Amnesty International, *Nigeria: Petroleum, Pollution and Poverty in the Niger Delta* (London, UK: Amnesty International, 2009), online: Amnesty Interntaional<www.amnestyusa.org/wp-content/uploads/2017/04/afr440172009en.pdf>.
[21] Cyril Nwankwo & Difference Ogagarue, "Effects of Gas Flaring on Surface and Ground Waters in Delta State Nigeria" (2011) 3:5 Journal of Geology and Mining Research 131.
[22] See generally Inumidun Fagorite, Feyisayo Anifowose, & Victor Chiokwe, "Air Pollution; Causes, Effects and Remediation in Nigeria" (2021) 7:1 International Journal of Advanced Academic Research 13.
[23] Eferiekose Ukala, "Gas Flaring in Nigeria 's Niger Delta: Failed Promises and Reviving Community Voices" (2011) 2 Washington & Lee Journal of Energy, Climate and Environment 97 at 102-103.
[24] See Nnimmo Bassey, "Gas Flaring: Assaulting Communities, Jeopardizing the World" (paper delivered at the National Environmental Consultation hosted by the Environmental Rights Action in conjunction with the Federal Ministry of Environment at Reiz Hotel, Abuja, 10-11 December 2008) [unpublished].
[25] *Ibid*.

"[t]he flames of Shell are flames of hell, we bask below their light, nought for us to serve the blight, of cursed neglect and cursed Shell."[26]

Despite the enactment of a Nigerian law in 1979 that bans gas flaring[27] and claims against Shell in Nigerian Courts, Shell remains largely uncountable for its activities in the Niger Delta.[28] Shell's non-accountability can be attributed to many factors, including the weak judicial and governance systems in Nigeria, the complicity of the Nigerian government in the human rights and environmental abuses, corruption, and the connivance of the political class with Shell to maximize wealth at the expense of the local communities.

To demand and enforce Shell's responsibility to respect human rights, some activists under the aegis of Movement for the Survival of the Ogoni People (MOSOP), led by author and activist, Ken Saro-Wiwa, confronted the Nigerian government and Shell.[29] The activists led protests to prevent Shell from continuing oil exploration but they were repressed through the Nigerian military might.[30] In 1995, matters came to its head when nine MOSOP members, including Ken Saro Wiwa, were brutalized, tortured, summarily tried for their campaigns against Shell activities, and executed by the Nigerian

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[26] Reproduced in Augustine Ikein, *The Impact of Oil on a Developing Country: The Case of Nigeria* (New York, Prager Publishers, 1990) at 262.

[27] *Associated Gas Reinjection Regulation Act,* Laws of the Federal Republic of Nigeria 2004, online:<http://extwprlegs1.fao.org/docs/pdf/nig150976.pdf>.

[28] There have been few instances where the court declared that Shell's activities constitute a human rights and environmental abuse in the Niger Delta. See e.g., *Jonah Gbemre v Shell Development Company Nigeria Ltd & ors* (Suit no FHC/B/CS//53/05). Notwithstanding this "victory," the Nigerian government has been criticized for failure to enforce the judgment. See generally Bukola Faturoti, Godswill Agbaitoro & Obinna Onya, "Environmental Protection in the Nigerian Oil and Gas Industry and *Jonah Gbemre* v. *Shell PDC Nigeria Limited*: Let the Plunder Continue?" (2019) 27:2 African Journal of International and Comparative Law 225.

[29] See generally Amnesty International, *A Criminal Enterprise? Shell's Involvement in Human Rights Violations in Nigeria in the 1990s* (London, UK: Amnesty International, 2017), online: Amnesty International<www.amnesty.org/en/wp-content/uploads/2021/05/AFR4473932017ENGLISH.pdf>.

[30] Human Rights Watch, Nigeria: A Case Study of Military Repression in Southeastern Nigeria" (1995) 7:5 Human Rights Watch 1, online: Human Rights Watch<www.hrw.org/legacy/reports/1995/Nigeria.htm>.

government.[31] Although Shell was fingered in the role it played in the executions, the company denies any involvement to this day.[32] Due to the problems of access to Justice in Nigeria highlighted above, the Niger Delta people, including the wives of the activists executed, resorted to transnational litigation by suing Shell's parent companies in the United States and the Netherlands in 2002 and 2017 respectively.[33] Although these cases are discussed in chapter 5 of the thesis, it suffices to point out at this juncture that Shell's inability to respect human rights has sown the seeds of underdevelopment, health crisis, and environmental pollution in the Niger Delta region.[34] In 2017, the United Nations reported that it will take at least 25-30 years to fully clean up the contaminated water and land in the Ogoni area.[35]

1.1.2. Mining—Child Labour and Human Rights abuse in the Democratic Republic of Congo

The Democratic Republic of Congo (DRC) is one of the poorest countries in the world and has suffered from decades of war and poor governance.[36] However, the country is widely known for its mineral resources, including tin, copper, tungsten, gold, and tantalum.[37] For example, Cobalt has been mined since 1924 in the DRC.[38] Approximately two-thirds of the

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[31] Amnesty International, *In the Dock: Shell's Complicity in the Arbitrary Execution of the Ogoni Nine* (London, UK: Amnesty International, 2017).
[32] *Ibid*.
[33] Amnesty International, "Nigeria: Shell Complicit in the Arbitrary Executions of Ogoni Nine as Writ Served in Dutch Court" (29 June 2017) Press Release, online: Amnesty International<www.amnesty.org/en/latest/press-release/2017/06/shell-complicit-arbitrary-executions-ogoni-nine-writ-dutch-court/>.
[34] Amnesty International, *supra* note 20.
[35] United Nations Environment Program (UNEP), *Environmental Assessment of Ogoni Land: Executive Summary* (UNEP Report, 2017), online: UNEP<https://postconflict.unep.ch/publications/OEA/UNEP_OEA_ES.pdf>.
[36] DRC Congo: Cursed by its Natural Wealth", BBC News (9 October 2013), online: BBC<www.bbc.com/news/magazine-24396390>.
[37] *Ibid*.
[38] *Institute for Geosciences and Natural Resources, Mapping of the Artisanal Copper-Cobalt Mining Sector in the Provinces of Haut-Katanga and Lualaba in the Democratic Republic of Congo* (German Institute for Geosciences and Natural Resources Report, 2019), online: German Institute for Geosciences and Natural Resources<

global supply of cobalt is mined in the "copper belt" region of Haut-Katanga and Lualaba provinces in the DRC.[39] Cobalt is a key component of every rechargeable lithium-ion battery in all technology and automobile products.[40] Therefore, companies like Apple, Google, Tesla, Alphabet, Microsoft, and Dell highly seek cobalt for their products.[41]

However, the rush for Cobalt has brought about cruel exploitation fueled by greed, corruption, and indifference to a population of powerless, starving Congolese people.[42] Cobalt is produced by traders who forcefully conscript children and women into mines to work under deplorable conditions and without safety equipment.[43] In 2014, approximately 40,000 boys and girls worked in all the mines across southern DRC, many of them involved in cobalt mining.[44] The children worked for up to 12 hours a day in the mines, carrying heavy loads, to earn between one and two dollars a day.[45] They were beaten and exploited by security operatives whenever they trespassed on mining companies' land concessions.[46]

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www.bgr.bund.de/EN/Themen/Min_rohstoffe/Downloads/studie_BGR_kupfer_kobalt_kongo_2019_en.pdf?__blob=publicationFile&v=3>.

[39] *Ibid*.

[40] Jasper Jolly, "Cutting Battery Industry's Reliance on Cobalt will be an Uphill Task" (5 January 2020), online: The Guardian Newspaper<www.theguardian.com/environment/2020/jan/05/cutting-cobalt-challenge-battery-industry-electric-cars-congo>.

[41] Ewelina Ochab, "Are the Tech Companies Complicit in Human Rights Abuse of Child Cobalt Miners in Congo?" (13 January 2020), online: Forbes News, online:<www.forbes.com/sites/ewelinaochab/2020/01/13/are-these-tech-companies-complicit-in-human-rights-abuses-of-child-cobalt-miners-in-congo/?sh=299f6fac3b17>.

[42] See Isabel Padalecki, "Cobalt, Computation, and the Congo: Making Corporations Pay for Their Transnational Terror" (2020) 12:9 Inquiries Journal 1.

[43] Padalecki, *ibid*. See also Amnesty International, "Is my Phone Powered by Child Labour?" (6 June 2016), online (blog): Amnesty International <www.amnesty.org/en/latest/campaigns/2016/06/drc-cobalt-child-labour/>.

[44] World Economic Forum, *Making Mining Safe and Fair: Artisanal cobalt extraction in the Democratic Republic of the Congo* (World Economic Forum White Paper, September 2020), online: World Economic Forum < www3.weforum.org/docs/WEF_Making_Mining_Safe_2020.pdf>.

[45] Amnesty International, *This is what we Die for: Human Rights Abuses in the Democratic Republic of the Congo Power the Global Trade in Cobalt* (Amnesty International Report, 2016) at 5, online: Amnesty International <www.amnesty.org/en/wp-content/uploads/2021/05/AFR6231832016ENGLISH.pdf>.

[46] Hermann Boko, "DR Congo: Video of Miners Beaten for Trespassing Shows Stranglehold of Foreign Mining Interests" (30 July 2021), online: The Observers News<https://observers.france24.com/en/africa/20210802-dr-congo-video-artisanal-miners-beaten-for-trespassing>.

The children were also left to suffer the effects of a mine collapse that had maimed and killed some of them. These accidents, which occurred because of the companies' dangerous mining practices and recklessness have endangered the lives of many children and adults.[47] Beyond the immediate hazardous conditions under which the miners worked, they face potential long-term health conditions because exposure to dust containing cobalt can cause lung disease, called hard metal lung disease.[48] Also, inhaling cobalt particles can cause birth defects, respiratory sensitization, asthma, shortness of breath, decreased pulmonary function and sustained skin contact with cobalt can lead to dermatitis.[49] There is already a manifestation of the symptoms of these diseases, including difficulty in breathing and body pain, among mine workers.[50]

Congo Dongfang Mining International (CDM), a 100% owned subsidiary of China-based Company Ltd (Huayou Cobalt), buys cobalt from traders, who buy directly from the miners.[51] CDM smelts the ore at its plant in the DRC before exporting it to China from where it is shipped to technology companies in different parts of the world, including China, Germany, Japan, South Korea, Taiwan, the UK, and the USA.[52] The relationship between the Chinese company and its buyers in different parts of the world reflects a supply chain relationship that encourages the use of child labour to generate wealth for companies in developed countries. Tech companies that benefit from these arrangements intentionally look away from the source of the cobalt because of the profit that the business venture

[47] Amnesty International, *supra* note 43 at 24.
[48] *Ibid*.
[49] *Ibid*. See also Daan Van Brusselen et al, "Metal Mining and Birth Defects: A Case-control Study in Lubumbashi, Democratic Republic of the Congo" (2020) 4 The Lancelet Planetary Health 158.
[50]Amnesty International, *supra* note 43 at 24.
[51] David Akana, "Another Troubling Report of Cobalt Mining in DRC" (2016), online: *InfoCongo News* <https://infocongo.org/en/another-troubling-report-of-cobalt-mining-in-drc/>.
[52] *Ibid*.

creates. While the MNCs and developed countries profit from this supply-chain arrangement, it comes at a great cost to the human dignity and health of children, women, and other workers in the DRC mines.

MNCs may argue that they are not directly involved in human rights abuse in the DRC. Hence, they are absolved from any wrongdoing. However, as this thesis demonstrates, the corporate responsibility to respect human rights goes beyond the direct relationship between those that are harmed and the company. It also covers supply chain relations where there is no direct contact with those harmed. This responsibility can be discharged through a supply chain due diligence that investigates, identifies, mitigates, and remedies human rights abuse risks that arise from business relationships. Therefore, although the MNCs have not directly caused the human rights abuse, they contributed to it through their failure to conduct human rights due diligence. The MNCs' attitude of "don't ask, don't tell" demonstrates corporate irresponsibility that negatively affects the human dignity of Africans and one which perpetually enslaves poor local communities in Africa for the benefit of MNCs and the developed countries.

Although there are cases of human rights abuse in other African countries,[53] the two cases from Nigeria and the DRC Congo show a discernable pattern of thriving human rights and environmental abuse amidst weak governance systems in Africa that is driven by resource exploitation and greed.[54] They also show that MNCs manipulate this

[53] See e.g., Amnesty International, *Our Lives Means Nothing: The Human Cost of Chinese Mining in Nagonha, Mozambique* (Amnesty International Report, 2018), online: Amnesty International<www.amnesty.org/en/wp content/uploads/2021/05/AFR4178512018ENGLISH.pdf>; Amnesty International, "South Africa: Mining Gathering Must Confront Human Rights Violations" (3 February 2020), online (blog) Amnesty International <www.amnesty.org/en/latest/news/2020/02/south-africa-mining-gathering-must-confront-human-rights-violations/>.

[54] Subhan Ullah et al, "Multinational Corporations and Human Rights Violations in Emerging Economies: Does Commitment to Social and Environmental Responsibility Matter?" (2021) 280 Journal of Environmental Management 1 at 5.

governance gap to maximize profit, for example, by outsourcing their due diligence responsibilities.[55] In effect, because African states fail in their duty to protect citizens from harmful conduct by non-state actors as stipulated in international human rights instruments, MNCs are not held accountable for their failure to respect human rights in these countries. Therefore, the question of corporate accountability continues to be a major problem for states, host communities, NGOs, academics, international organizations, and lawyers. These actors agree that there is a need to induce and sustain a corporate responsibility behaviour that is independent of states' obligation to protect human rights. However, the challenge of regulating MNCs is not a light one. This is because of the enormous economic power that MNCs wield in the present global power dynamics.

1.2. Towards Closing the Governance Gaps

The gaps existing in public and private international law, along with the inability or unwillingness of states to regulate and control MNC activities have led to the evolving development of a global governance framework on this subject.[56] The framework allows a form of communication between private and public actors in a way that suggests "a system of coordinated meta-governance."[57] Although decisions reached through the framework

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[55] Filipe Calvão, Catherine Erica Alexina Mcdonald, & Mathieu Bolay, "Cobalt Mining and the Corporate Outsourcing of Responsibility in the Democratic Republic of Congo" (2021), online: The Extractives Industry <https://reader.elsevier.com/reader/sd/pii/S2214790X21000290?token=E69C6502CF19BFB1B29D4B15F38C8C4169C202EE92F8CEB00E387645A15091FA6CCFBBB02A4322C75D668E47DC2DF229&originRegion=us-east-1&originCreation=20211010222251>.

[56] See generally Larry Catá Backer, "Multinational Corporations as Objects and Sources of Transnational Regulation" (2008) 14:2 ILSA Journal of International & Comparative Law 500. Global governance is defined as the "sum of laws, norms, policies, and institutions that define, constitute, and mediate trans-border relations between states, cultures, citizens, intergovernmental and nongovernmental organizations, and the market." See Thomas Weiss, "The UN's Role in Global Governance" (August 2009) UN Intellectual History Project: Briefing Note No 15, online: United Nations <www.unhistory.org/briefing/15GlobalGov.pdf>.

[57] Larry Catá Backer, "Private Actors and Public Governance Beyond the State: The Multinational Corporation, the Financial Stability Board, and the Global Governance Order" (2011) 18:2 Indiana Journal of Legal Studies 751 at 752.

lack the positivist nature of domestic and international law, they rely on the power of the consensus of all actors to hold corporations accountable.[58] It is noteworthy that because of their economic power, autonomy, and authority, MNCs are now considered as actors within this emerging global governance structure.[59]

As an international organization, the United Nations (UN), plays a role in the development of this global governance framework.[60] Thomas Weis and Ramesh Thakur have identified five major gaps in the construction of global governance—they are institutional gaps, normative gaps, knowledge gaps, compliance gaps, and policy gaps.[61] This thesis focuses on one of the efforts of the UN to close the normative gaps in the business and human rights field. In particular, this research focuses on the UN Human Rights Council's endorsement of the *United Nations Guiding Principles on Business and Human Rights* (UNGPs).[62] The UNGPs are important because their endorsement signaled the first time that the UN adopted a set of standards on the subject of business and human rights.[63] It is also the first time that the Council has "endorsed a normative text on any subject that governments did not negotiate themselves."[64] Its further scrutiny is necessary

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[58] Larry Catá Backer, "Governance Polycentrism—Hierarchy and Order Without Government in Business and Human Rights Regulation" (2014) Coalition for Peace and Ethics Working Paper 1.
[59] See John Ruggie, "Multinational as Global Institution: Power, Authority, and Relative Autonomy" (2018) 12 Regulation and Governance 317.
[60] See generally Thomas Weiss, Ramesh Thakur, *Global Governance and the UN: An Unfinished Journey* (Indiana: Indiana University Press, 2010).
[61] *Ibid* at 2-5.
[62] Jong Ruggie, *supra* note 2 at 81. See also the United Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework 2011, online: OHCHR<www.ohchr.org/sites/default/files/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf> [UNGPs]; Resolution 17/4 of the UN Human Rights Council, A/HRC/RES/17/4 (6 July 2011), online: UN< https://documents-dds-ny.un.org/doc/RESOLUTION/GEN/G11/144/71/PDF/G1114471.pdf?OpenElement>.
[63] John Ruggie, "Global Governance and 'New Governance Theory': Lessons from Business and Human Rights" (2014) 20 Global Governance 5 at 5.
[64] *Ibid*.

to show how a norm of corporate responsibility to respect human rights (CR2R) can develop in a globalized world.[65]

2.0. Background to the United Nations Guiding Principles on Business and Human Rights

The *UNGPs* are a product of the United Nations High Commissioner's mandate to the Special Representative of the Secretary-General (SRSG) on the issue of Human rights, Transnational Corporations, and other Business Enterprise.[66] In 2005, the United Nations Commission on Human Rights adopted a resolution that mandated the Secretary-General to appoint a Special Representative whose mandate was to

> (a) identify and clarify standards of corporate responsibility and accountability for transnational corporations and other business enterprises with regard to human rights;
>
> (b) elaborate on the role of States in effectively regulating and adjudicating the role of transnational corporations and other business enterprises with regard to human rights, including through international cooperation;
>
> (c) research and clarify the implications for transnational corporations and other business enterprises of concepts such as 'complicity' and 'sphere of influence;
>
> (d) develop materials and methodologies for undertaking human rights impact assessments of the activities of transnational corporations and other business enterprises;

[65] Polycentricism is defined as a regulatory system that consists of "a collective of partially overlapping and nonhierarchical regimes." See Kal Raustiala & David Victor, "The Regime Complex for Plant Genetic Resources" (2004) 58 International Organizations 277 at 277. In polycentric governance, states play little or no role in the rule-making process. Rather, it "comprises of a complex array of interdependent entities or decision-making centers, both state and nonstate, which may be formally independent of one another, form networks and interact among themselves." These entities act to add value to each other and to complement each other's limitations and weaknesses. See Jamie Prenkert & Scott Shackelford, "Business, Human Rights, and the Promise of Polycentricity" (2014) 47 Vanderbilt Journal of Transnational Law 451 at 460.

[66] See generally Jena Martin & Karen Bravo, *The Business and Human Rights Landscape: Moving Forward, Looking Back* (Cambridge, UK: Cambridge University Press, 2015).

(e) compile a compendium of best practices of States and transnational corporations and other business enterprises.[67]

The former UN Secretary-General, Kofi Annan, appointed John Ruggie, a political scientist, as his Special Representative. Ruggie's appointment was significant because he had made intellectual contributions to the study of international relations, focusing on the impact of globalization on global rulemaking.[68] However, before Ruggie's appointment and the advent of the UNGPs, other soft law initiatives sought to regulate corporate behavior.[69] They were motivated by concerns about the impact of corporations' powerful economic interest on the socio-economic and political lives of individuals and states.[70] For example, the Draft United Nations Code of Conduct on Transnational Corporations was the first attempt to provide guidance for MNCs.[71] The negotiation ended in 1992 amidst stiff opposition from governments in the Global North who sought to protect their economic interests in the Global South.[72] The quest for corporate accountability was also

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[67] United Nations Commission on Human Rights, Human Rights and Transnational Corporations and other Business Enterprise, Resolution UN Doc 2005/69 (20 April 2005), online: United Nations<www.refworld.org/docid/45377c80c.html>.

[68] See e.g., John Ruggie, "Reconstituting the Global Public Domain: Issues, Actors and Practices" (2004) 10:4 European Journal of International Relations 499.

[69] There is no universally accepted definition of "soft law," However, in this thesis, the term refers to "rules (prescribing conduct or otherwise establishing standards) that are in the process of becoming, though may not ultimately become, binding rules of international law in the form of any of the established sources of international law—customary law, general principles of law, or as an authentic (binding) interpretation of a rule of treaty law." See Stéphanie Lagoutte, Thomas Gammeltoft-Hansen & John Cerone, eds, *Tracing the Roles of Soft Law in Human Rights* (Oxford: Oxford University Press, 2016) at 5. Generally, Brunnée and Toope argue that the distinction between hard and soft law is irrelevant because the process of creating both documents determine their normative force. See Jutta Brunnée & Stephen Toope, *Legitimacy and Legality in International Law: An International Account* (Cambridge: Cambridge University Press, 2010) at 48.

[70] Patricia Feeney, "Business and Human Rights: The Struggle for Accountability in the UN and the Future Direction of the Advocacy Agenda" (2009) 6:11 Sur-International Journal on Human Rights 161 at 162.

[71] See Karl Sauvant, "The Negotiations of the United Nations Code of Conduct on Transnational Corporations: Experience and Lessons Learned" (2015) 16 Journal of World Investment and Trade 11.

[72] Feeney, *supra* note 70 at 162. This thesis uses the term Global North (developed countries) and Global South (developing countries) the same way Lemuel Odeh defines it. He notes that "[w]hile Global North countries are wealthy, technologically advanced, politically stable and aging as their societies tend towards zero population growth the opposite is the case with Global South countries. While Global South countries are agrarian based, dependent economically and politically on the Global North, the Global North has continued to dominate and direct the global south in international trade and politics." See Lemuel Odeh, "A

championed by the Organization for Economic Cooperation and Development (OECD) which introduced the OECD Guidelines for Multinational Enterprises in 1976.[73] However, although the 1976 version of the OECD Guidelines made provisions for labour rights, they did not incorporate human rights provisions.[74]

In 1977, the International Labour Organization (ILO), a specialized agency of the United Nations, also adopted the Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy.[75] The Declaration is another soft law that "offer[s] guidelines to multinational enterprises, governments, and employers' and workers' organizations in such areas as employment, training, conditions of work and life, and industrial relations."[76] In 2000, the United Nations birthed yet another initiative—the Global Compact, which is a network-based program that involves public-private collaboration among UN agencies, Non-governmental organizations (NGOs), and corporations.[77] The Global Compact, as soft law, contains ten Principles. Corporations voluntarily agree to annually report their compliance with these Principles by submitting a Communication on Progress (COP) Report.[78] The Principles cover issues relating to human

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Comparative Analysis of Global North and Global South Economies" (2010) 12:3 Journal of Sustainable Development in Africa 338 at 338. More clarification is provided in the definition section of this thesis.

[73] See James Salzman, "Decentralized Administrative Law in the Organization for Economic Cooperation and Development" (2005) Duke Law School Legal Studies Research Paper Series No 77.

[74] The OECD Guideline has been amended in 1982, 1984, 1991, 2000, and 2011. The 2011 version of the Guidelines incorporates human rights provisions in its Chapter IV. OECD, *Guidelines for Multinational Enterprises*, 2011 Ed (Paris: OECD Publishing, 2011), online: OECD<www.oecd.org/corporate/mne/48004323.pdf>.

[75] This declaration has been amended in 2000, 2006, and 2017. See Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy, online: ILO<www.ilo.org/wcmsp5/groups/public/---ed_emp/---emp_ent/---multi/documents/publication/wcms_094386.pdf>.

[76] *Ibid*.

[77] See Katarina Weilert, "Taming the Untamable? Transnational Corporations in United Nations Law and Practice" in Armin Von Bogdandy & Rudiger Wolfrum, eds, *Max Planck Yearbook of United Nations Law,* Vol 14 (Netherlands: Koninklijke Brill N V, 2010) 445 at 468.

[78] UN Global Compact Reporting, online: UNGC<www.unglobalcompact.org/participation/report>.

rights, labour and environmental standards, and commitment against corruption.[79] Although they are non-binding, companies that do not comply are displayed on the Global Compact website as "non-communicating participants."[80] Since there are no real sanctions for non-compliance with the Global Compact, Katarina Weilert questions its value and effect on MNC conduct.[81] However, John Ruggie, Dirk Ulrich Gilbert, and Michael Behnam argue the Global Compact's value as a learning network which was the rationale for setting it up, rather than as a tool for corporate accountability.[82]

In 2003, for the first time, the UN Sub-Commission on Human rights attempted to subject corporations to international human rights law through the Draft Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises (Draft Norms).[83] The Sub-Commission was an advisory expert body to the UN Commission on Human Rights (now known as the Human Rights Council). The Draft Norms are couched in the form of obligations that bind both states and corporations to adhere to the internationally recognized instruments on human rights through a framework of shared responsibility. It is based on the notion that although states are primary duty holders, corporations also have obligations under international human rights law. Article 1 of the Draft Norms states that "[w]ithin their respective spheres of activity and influence,

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[79] The Ten Principles of the UN Global Compact, online:<www.unglobalcompact.org/what-is-gc/mission/principles>.
[80] UN Global Compact Reporting, *supra* note 78.
[81] Weilert, *supra* note 77 at 468.
[82] See John Ruggie, "Global_governance.net: The Global Compact as Learning Network" (2001) 7:4 Global Governance 371; Dirk Ulrich Gilbert & Michael Behnam, "Trust and the United Nations Global Compact: A Network Theory Perspective" (2012) 52:1 Business & Society 135.
[83] Sub-Commission on the Promotion and Protection of Human Rights, Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights, UN ESCOR, 55th sess, 22nd mtg, Agenda Item 4, UN Doc E/CN 4/Sub 2/2003/12/Rev 2 (13 August 2003). See also Pini Pavel Miretski & Sascha-Dominik Bachmann, "The UN Norms on the Responsibility of Transnational Corporations and Other Business Enterprises with Regard to Human Rights': A Requiem" (2012) 17:1 Deakin Law Review 5.

transnational corporations and other business enterprises have the obligation to promote, secure the fulfillment of, respect, ensure respect of and protect human rights recognized in international as well as national law."[84] This means that, contrary to the recognized status of corporations under international law, the Draft Norm seek to make corporations subjects of international law, just like individuals and states.[85]

Although the Draft Norms were not a binding instrument, proponents of the Norms, which include academics like David Weissbrodt and Muria Kruger, and some NGOs hoped that the Norms' implementation would either facilitate the development of an international human rights treaty or provide a legal statement around which international human rights interpretation and corporate practice might coalesce.[86] Indeed, Amnesty International characterized the Draft Norms, in comparison to the OECD Guidelines, the ILO Tripartite Declaration, and the Global Compact, as "the most comprehensive statement of standards and rules relevant to companies in relation to human rights."[87]

However, the international business community objected to the Draft Norms—they argued that it is the responsibility of states, and not corporations, to enforce compliance with human rights.[88] For example, the International Chamber of Commerce and the

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[84] Sub-Commission's Report, *ibid*.
[85] See Miretski & Bachmann, *supra* note 83 at 10.
[86] David Weissbrodt & Muria Kruger, "Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights" (2003) 97 The American Journal of International Law 901 at 915. See also International Network for Economic, Social & Cultural Rights, UN Human Rights Norms for Business: Briefing Kit (January 2005), online: IESCR<https://docs.escr-net.org/usr_doc/Briefing_Kit.pdf>.
[87] Submission by Amnesty International under Decision 2004/116 on the "Responsibilities of Transnational corporations and related business enterprises with regard to Human Rights" AI Ref: UN 411/2004 (29 September 2004), online: Amnesty International<www.amnesty.org/download/Documents/100000/pol340062004en.pdf>.
[88] Juli Campagna, "United Nations Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights: The International Community Asserts Binding Law on the Global Rule Makers" (2004) 37 Journal of Marshall Law Review 1205 at 1212.

International Organization of Employers issued a joint statement saying that the Draft Norms evince a "legalistic" approach to tackling the concern.[89] They argued that "[i]f put into effect, it [the Draft Norms] will undermine human rights, the business sector of society, and the right to development."[90] Some states also criticized the Draft Norms as vague and arbitrary—the Draft Norms do not distinguish between human rights obligations of states and the responsibility of corporations.[91] Overall, the Draft Norms were rejected because (1) they were drafted by a group of legal experts without consultation with business communities and states (2) they seek to extend states' obligations to corporations (3) they included vague and overly inclusive human rights provisions without properly demarcating those that apply to states and corporations (4) they recommend impractical implementation options, and (5) they have a questionable basis for proposed human rights obligations.[92] In 2003, the UN Commission on Human Rights declared that the Draft Norms have no legal standing because they were not requested by the Commission.[93] It directed the UN Sub-commission to cease any implementation of the Draft Norms, thereby confining the Draft Norms to the archives.

2.1. The Mandate of the Special Representative of the Secretary-General on Human Rights

[89] Joint Views of the IOE and ICC on the Draft Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights, U N ESCOR, 55th Sess, UN Doc E/CN 4/Sub 2/2003/NGO/44.
[90] Joint Views of the IOE and ICC, *ibid*.
[91] For example, Canada opposed the Draft Norms on the ground that they seek to extend existing international human rights and other obligations of states to multinational corporations. See Submission of Canada to the High Commissioner for Human Rights on the Responsibilities of Business Enterprises with Regard to Human Rights. Fuller arguments against the Draft Norms can be accessed in the Report of the United Nations High Commissioner on Human Rights on the Responsibilities of Transnational Corporations and Related Business Enterprises with Regard to Human Rights UN DOC E/CN.4/2005/91 (15 February 2005), online: United Nations<https://documents-dds-ny.un.org/doc/UNDOC/GEN/G05/110/27/PDF/G0511027.pdf?OpenElement>.
[92] See generally Justin Nolan, "With Power Comes Responsibility: Human Rights and Corporate Accountability" (2005) 28:3 University of New South Wales Journal 581.
[93] See UNHCR, Responsibilities of Transnational Corporations and Related Business Enterprises with Regard to Human Rights (20 April 2004) UN Doc Res 2004/116.

John Ruggie started his mandate as the SRSG in 2005.[94] He had the option to either continue with the work of the Sub-Commission on the UN Draft Norms or to build on other soft law initiatives, which include the OECD Guidelines, ILO Declaration, and the Global Compact. Ruggie unequivocally rejected the work of the UN Sub-Commission in its entirety, labeling it as a "distraction" and that no part of it can be salvaged.[95] According to him, "the Norms exercise became engulfed by its own doctrinal excesses."[96] He questioned the Draft Norms' notion of shared responsibility under international human rights law because it has a "little authoritative basis in international law."[97] Corporations, he asserts, are specialized organs of society that cannot be imbued with the same human rights obligations as states. Therefore, the "Norms end up imposing higher obligations on corporations than on States by including as standards binding on corporations, instruments that not all States have ratified or have ratified conditionally…."[98] Ruggie concludes that "the divisive debate over the Norms obscures rather than illuminates promising areas of consensus and cooperation among business, civil society, governments and international institutions with respect to human rights."[99] In sum, the SRSG committed what he termed "Normicide."[100]

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[94] His mandate ended in 2011 and he sadly passed away in his sleep on 16 September 2021. See "Memory of Professor John G. Ruggie: Tribute by the UN Working Group on Business and Human Rights", online: United Nations<www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=27507&LangID=E>.
[95] Interim Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and other Business Enterprises, UN DOC E/CN.4/2006/97 (22 February 2006), online: United Nations<https://documents-dds-ny.un.org/doc/UNDOC/GEN/G06/110/27/PDF/G0611027.pdf?OpenElement>.
[96] *Ibid* at para 59.
[97] *Ibid*.
[98] *Ibid* at para 66.
[99] *Ibid* at para 69.
[100] Ruggie, *supra* note 2 at 158.

Ruggie decided to use a "principled form of pragmatism" to move his mandate forward.[101] He describes a principled form of pragmatism as "an unflinching commitment to the principle of strengthening the promotion and protection of human rights as it relates to business, coupled with a pragmatic attachment to what works best in creating change where it matters most – in the daily lives of people."[102] Contextually, Ruggie sought to generate a "thick consensus" on a soft law rather than a "thin consent" on an international binding instrument which may not be ratified or enforced by states.[103] He adopted this approach as a persuasive tool to move his mandate forward. His approach may have been, partly, influenced by his training as an international relations scholar and a social constructivist. Ruggie's background and ideology are further explained in chapter 3 of this thesis.

Unlike the process of drafting the Draft Norms, which was criticized for lack of consultation, the SRSG commenced a wide stakeholder consultation with states, corporations, and civil society organizations. He submitted a report to the UN Human Rights Council in 2007, a "mapping exercise" that illustrated international standards, practices, gaps, and trends regarding business and human rights.[104] The SRSG recognized

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[101] Interim Report, *supra* note 95 at para 70-81. It should be noted that some NGOs objected to the SRSG's wholesale rejection of the UN Draft Norms. For example, the International Network for Economic, Social, and Cultural Rights (ESCR-NET) in its response to the SRSG's Report notes that the SRSG could have drawn on the elements of the existing UN initiatives. It, therefore, cautioned the SRSG to avoid the pitfall of reaching agreements that merely reflect the 'lowest common denominator." See the International Network for Economic, Social, and Cultural Rights (ESCR-NET), Joint NGO Letter in response to the interim report of the UN Special Representative on Human Rights and Business, (18 May 2006), online: ESCR<https://docs.escr-net.org/usr_doc/NGO_Endorsements_-_NGO_Joint_NGO_Response.pdf>.
Another scholar notes that "[t]he report's key pitfall, one could say, was that it seemed to be more concerned with "human rights challenges" facing business rather than the human rights abuses faced by victims." See Feeney, *supra* note 70 at 167.

[102] Interim Report, *supra* note 95 para 81.

[103] See Ruggie, *supra* note 2 at Xlii-Xliii.

[104] John Ruggie, Report of the Special Representative of the Secretary-General on the issue of Human Rights and Transnational Corporations and other Business Enterprises: Business and Human Rights: Mapping International Standards of Responsibility and Accountability for Corporate Acts, UN Doc A/HRC/4/35 (19

that there was an expanding market that has not been matched with expansive protection of individuals that suffer from corporate human rights abuse, and which has created a governance gap in curbing the adverse effects of globalization.[105] He noted the reluctance or inability of states to regulate and redress corporate human rights abuse and reviewed some soft laws, including the ILO Declaration and OECD Guidelines, noting that their "normative role remains essential to elaborating and further developing standards of corporate responsibility."[106] Ruggie concluded that corporate accountability must evolve from state practice and self-regulatory measures observed by all relevant actors because "no single silver bullet can resolve the business and human rights challenge."[107]

In his 2008 Report, the SRSG presented to the UN Human Rights Council a conceptual and policy framework titled "Protect, Respect and Remedy: A Framework for Business and Human Rights," which is designed to help to anchor the business and human rights debate and guide relevant actors.[108] The framework outlined three core principles: (1) states have the duty to protect human rights abuse by third parties, including corporations (2) corporations have a responsibility to respect human rights (3) victims of business and human rights abuse require greater access to remedy, including non-state grievance mechanisms.[109] These principles are complementary and are intended to help all social actors—governments, corporations, and civil societies—to reduce the adversities of

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February 2007), online: <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G07/108/85/PDF/G0710885.pdf?OpenElement>.

[105] *Ibid* at para 3.

[106] *Ibid* at para 49.

[107] *Ibid* at para 88.

[108] John Ruggie, Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, UN Doc A/HRC/8/5 (7 April 2008), online: United Nations <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G08/128/61/PDF/G0812861.pdf?OpenElement>.

[109] *Ibid*.

corporate human rights abuse and, consequently, to reduce the governance gap created by the interaction of market forces.

He explains that the state duty to protect human rights is based on the traditional role of states in international human rights law, which includes prevention, investigation, and provision of access to remedy in cases of abuse.[110] The second principle—corporate responsibility to respect human rights—is based on the notion that corporations are expected to obey the laws (recognized human rights instruments or national laws), even if they are not enforced, or where there is no sanction for non-compliance.[111] In effect, corporations should ensure that they do not infringe on the rights of others—that is, to do no harm.[112] He argued that through a corporate due diligence exercise, corporations can avoid the risk of human rights abuse, as well as comply with national laws.[113] The third principle—access to remedy—states that where individual human rights are violated, victims should have access to effective remedy, and both states and corporations have a role to play in enabling this to occur.[114] The SRSG aptly summarized the framework of the three overlapping principles as follows: "…the State duty to protect ... lies at the very core of the international human rights regime; the corporate responsibility to respect ... is the basic expectation society has of business; and access to remedy because even the most concerted efforts cannot prevent all abuse."[115] Ruggie requested the UN Human Rights Council's support to elaborate on the framework, which would make an intellectual contribution to closing the governance gaps he identified in his previous reports.[116]

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[110] Ruggie Report, *supra* note 108 at para 18.
[111] *Ibid*.
[112] *Ibid* at para 24.
[113] *Ibid* at para 25.
[114] *Ibid* at para 26.
[115] *Ibid* at para 9.
[116] *Ibid* at para 107.

2.2. The United Nations Guiding Principles on Business and Human Rights—A Smart Mix of Regulations

In June 2008, the Human Rights Council extended the SRSG's mandate for another three years and asked him to "operationalize" the framework by providing concrete guidance to state and corporations, as well as promote the framework by coordinating with regional and international organizations and other stakeholders.[117] After submitting successive reports to the Council in 2009 and 2010,[118] the SRSG completed his work in March 2011 and submitted the UNGPs, a set of 31 recommendations containing foundation and operational principles.[119] While the "protect, respect and remedy framework" addresses what should be done regarding business and human rights, the UNGPs prescribe how to do it.[120] The UN Human Rights Council welcomed the SRSG's work and unanimously endorsed the UNGPs, which implemented the United Nations Protect, Respect, and Remedy framework.[121]

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[117] Mandate of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and other Business Enterprises, Resolution 8/7 adopted without a vote at the 28th Meeting on (18 June 2008), online: United Nations<https://ap.ohchr.org/documents/E/HRC/resolutions/A_HRC_RES_8_7.pdf>. Specifically, the Council requests to the SRSG include "(a) provide views and concrete and practical recommendations on ways to strengthen the fulfilment of the duty of the State to protect all human rights from abuses by or involving transnational corporations and other business enterprises, including through international cooperation; (b) elaborate further on the scope and content of the corporate responsibility to respect all human rights and to provide concrete guidance to business and other stakeholders; (c) explore options and make recommendations, at the national, regional and international level, for enhancing access to effective remedies available to those whose human rights are impacted by corporate activities."

[118] See Business and human Rights: Towards Operationalizing the "Protect, Respect and Remedy Framework: Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and other Business Enterprises, UN DOC A/HRC/11/13 (22 April 2009), online: United Nations<www2.ohchr.org/english/bodies/hrcouncil/docs/11session/A.HRC.11.13.pdf>; Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and other Business Enterprises, John Ruggie, Business and human rights: Further Steps Toward the Operationalization of the "Protect, Respect and Remedy" framework, UN Doc A/HRC/14/27 (9 April 2010), online: United Nations<www2.ohchr.org/english/issues/trans_corporations/docs/a-hrc-14-27.pdf>.

[119] Human Rights Council, Human Rights and Transnational Corporations and other Business Enterprises, UN Doc A/HRC/71/L17/Rev 1 (2011).

[120] Ruggie, *supra* note 2 at 81.

[121] *Ibid*.

The UNGPs contain three pillars: state duty to protect human rights, corporate responsibility to respect human rights, and access to remedy for victims in case of harm. The first pillar—the state duty protect provides that states must protect their citizens against human rights abuse within their territories by third parties, including businesses.[122] This pillar is a restatement or elaboration of states' responsibility under international human rights. Pillar I does not create any new obligation other than the ones already contained in human rights instruments. This pillar gives states an oversight role as they have the responsibility to ensure that businesses within their territory respect human rights throughout their operations.[123] When states are part of a business enterprise or network, Pillar I provides that states must use their status to promote respect for human rights within the business enterprise.[124] However, regardless of whether they are part of the business enterprise or not, states should ensure that in cases where human rights abuse arise from business operations, those persons harmed have access to effective remedy (including legislative, administrative, and judicial mechanisms).[125]

Pillar II, which is the focus of this thesis, specifically provides that "[b]usiness enterprises should respect human rights. This means that they should avoid infringing on the human rights of others and should address adverse human rights impacts with which they are involved."[126] The UNGPs sets the standard against which corporate respect should be measured when it states that

> [t]he responsibility of business enterprises to respect human rights refers to internationally recognized human rights – understood, at a minimum, as those expressed in the International Bill of Human

[122] UNGPs, *supra* note 62.
[123] *Ibid* at 7 (Principle 5).
[124] *Ibid* at 8 (Principle 6).
[125] *Ibid* at 27 (Principle 25).
[126] *Ibid* at 14 (Principle 11).

> Rights and the principles concerning fundamental rights set out in the International Labour Organization's Declaration on Fundamental Principles and Rights at Work.[127]

It explicates further that

> [a]n authoritative list of the core internationally recognized human rights is contained in the International Bill of Human Rights (consisting of the Universal Declaration of Human Rights and the main instruments through which it has been codified: the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights), coupled with the principles concerning fundamental rights in the eight ILO core conventions as set out in the Declaration on Fundamental Principles and Rights at Work. These are the benchmarks against which other social actors assess the human rights impacts of business enterprises.[128]

Pillar II lists requirements to respect human rights in Principles 13 through 23. Principle 13 provides that the responsibility to respect human rights requires that MNCs should avoid causing or contributing to human rights abuse through their own activities but in case human rights abuse occurs, they should address it. Also, the Principle states that MNCs should prevent or mitigate human rights abuses that are directly linked to their products, services, or business relationships, notwithstanding that they did not contribute to the abuse.

Principle 15 provides MNCs need to know and show that they respect human rights. To do this, they should have policies that expressly show their respect for human rights. Also, they should put in place a human rights due diligence (HRDD) process to identify, prevent, and mitigate human rights abuses. Similarly, MNCs should create processes that enable the remediation of any human rights abuse they cause or to which they contribute. The requirements for policy commitment, HRDD, and remediation of harm are further

[127] UNGPs, *supra* note 62 at 14 (Principle 12).
[128] *Ibid* (commentary to Principle 12).

elaborated in Principles 16 through 22. For example, Principle 17 defines the essential parameters of the HRDD to include considerations about the size of the company and the duration of the HRDD exercise. Principles 18 through 21 disclose the essential components of HRDD, which include MNCs' responsibility to identify actual or potential impacts of human rights abuse and to prevent and mitigate the abuse identified.[129] Also, MNCs should effectively integrate the results of the HRDD exercise across the whole of the business and the response of the exercise should be tracked and communicated to affected stakeholders. Principle 22 provides that in a case where MNCs identify that they have caused or contributed to adverse impacts, they should provide for or cooperate with other actors in the remediation through legitimate processes.

Principle 14 provides that the responsibility to respect human rights should be undertaken by all companies, "regardless of the size, sector, operational context, ownership, and structure."[130] Principle 23 states that in all contexts, MNCs should "comply with all applicable laws and respect internationally recognized human rights, seek ways to honour the principles of internationally recognized human rights when faced with conflicting requirements, and treat the risk of causing or contributing to gross human rights abuses as a legal compliance issue wherever they operate."[131] The UN Working Group on business and human rights clarified this to mean that a corporate responsibility to respect

[129] See generally John Ruggie & John Sherman III, "The Concept of 'Due Diligence' in the UN Guiding Principles on Business and Human Rights: A Reply to Jonathan Bonnitcha and Robert McCorquodale" (2017) 28:3 The European Journal of International Law 921.
[130] UNGPs, *supra* note 62 at 15. However, the Principle admits that "…the scale and complexity of the means through which enterprises meet that responsibility may vary according to these factors and with the severity of the enterprise's adverse human rights impacts."
[131] *Ibid* at 25.

human rights exist even when the state in question is unable or unwilling to fulfil their human rights obligations.[132]

A few take-aways from Pillar II are important here. Unlike Pillar I which restates states' obligations in international law, Pillar II does not create legal liability for MNCs because issues of legal liability remain defined by national law and international law.[133] Pillar II only subjects corporations to the court of public opinion.[134] In other words, corporations have the responsibility to respect human rights, not because of any binding international obligation, but because this is what society expects from them.[135] If this expectation is met, MNCs are rewarded with a social licence from society.[136] In sum, Pillar II is based on the prevailing social norm,[137] which proposes that corporations should avoid infringing on human rights ("do no harm") in their activities.[138] However, this does not stop them from voluntarily undertaking any other activities that promote human rights.[139]

Although Pillar II is an independent pillar, it is expected to complement other pillars. For example, when reading the UNGPs as a whole, Pillars I and II contain normative elements that reflect provisions on corporate responsibility to respect human rights (CR2R).[140] Principle 3 of the UNGPs provides that states should provide guidance on how businesses can respect human rights and ensure that their law does not constrain

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[132] UN Working Group, "Leading by Example: The State, State-Owned Enterprises and Human Rights" (Report of the Working Group on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises) (2016) A/HRC/ 32 / 45 at 9.
[133] Surya Deva, *Regulating Corporate Human Rights Violations: Humanizing Business* (Oxford: Routledge Press, 2012) at 111.
[134] Ruggie Report, *supra* note 108 at par 54.
[135] Human Rights Council Report, *supra* note 119 at par 46-49.
[136] *Ibid*.
[137] *Ibid*.
[138] Ruggie Report, *supra* note 108 at par 24.
[139] *Ibid*.
[140] See Karin Buhmann, "Neglecting the Proactive Aspect of Human Rights Due Diligence? A Critical Appraisal of the EU's Non-Financial Reporting Directive as a Pillar One Avenue for Promoting Pillar Two Action" (2018) 3:1 Business and Human Rights Journal 23.

businesses from operationalizing the CR2R. Principles 4, 5, and 6 also contain the CR2R prescription for states-owned enterprises (SOEs) when they enter into business relationships with MNCs. These principles provide that states should also conduct human rights due diligence which is one of the tools for discharging the CR2R obligations. Therefore, because the CR2R applies to all enterprises regardless of their "size, sector, operational context, ownership, and structure," the CR2R is a continuum that animates the operations under pillars I and II. Although discussions in this thesis touch on both pillars in chapters 4 and 5, their operational dimensions are not conflated because as Surya Deva cautions, "[a]lthough the UNGPs 'should be understood as a coherent whole' and there are important interlinkages between Pillars I and II, the two pillars should not end up becoming one."[141]

Pillar III provides that in cases where human rights abuses arise from business operations, victims of human rights abuse should have access to adequate remedy.[142] However, the provision of adequate remedy should not be limited to states. MNCs should also remediate harm whenever it occurs during their operations. Pillar III envisages a situation where states, MNCs, multi-stakeholder groups, or industry or association leaders can provide mechanisms to redress business-related human rights abuse.[143] Therefore, pillar III categorizes grievance mechanisms into state-based judicial mechanisms, state-based non-judicial grievance mechanisms, and non-state-based grievance mechanisms.[144] However, it sets out certain criteria against which the effectiveness of the grievance

[141] Surya Deva, "The UN Guiding Principles' Orbit and Other Regulatory Regimes in the Business and Human Rights Universe: Managing the Interface" (2021) 6 Business and Human Rights Journal 336 at 341.
[142] UNGPs, *supra* note 62 at 28.
[143] *Ibid*.
[144] *Ibid*.

mechanisms can be measured. To ensure effective remedy, the grievance mechanism must be legitimate, accessible, equitable, transparent, and have predictable rules and procedures.[145]

Pillars I, II, and III weave three governance systems into one framework—the traditional system of public law governance as evidenced in international law and domestic law, civil governance system that centers on stakeholders concerned with adverse business conduct, and corporate governance that focuses on management conduct.[146] These governance systems are expected to play mutually reinforcing roles to influence cumulative change in business conduct. The UNGPs are a normative framework that states, companies, and civil society organizations can utilize to close the governance gap created by the effect of globalization.[147] They are a "smart mix" of regulatory and voluntary approaches, "which do not by themselves create new legally binding obligations but derive normative force through their endorsement by states and support from other key stakeholders, including business itself."[148]

The UNGPs aim to be a blueprint for action because they define parameters within which states and corporations can develop to promote and protect human rights policies, practices, and rules, depending on their peculiar roles and circumstances.[149] By providing such a blueprint, the UNGPs hope to "create a common platform for action and

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[145] UNGPs, *supra* note 62 at 33 (Principle 31).
[146] John Ruggie, "The Social Construction of the UN Guiding Principles on Business and Human Rights" (2017) Cambridge, MA: John F Kennedy School of Government, Harvard University Working Paper No 67 at 12.
[147] Office of the United Nations High Commissioner for Human Rights, *Introduction to the Guiding Principles on Business and Human Rights* (December 2013), online: United Nations<www.ohchr.org/Documents/Issues/Business/IntroductionsGuidingPrinciples_en.pdf>.
[148] Ruggie, *supra* note 146 at 2.
[149] Office of the United Nations High Commissioner for Human Rights, *Frequently Asked Questions about the Guiding Principles on Business and Human Rights* (Geneva: United Nations, 2014), online: United Nations<www.ohchr.org/Documents/Publications/FAQ_PrinciplesBussinessHR.pdf>.

accountability against which the conduct of both states and companies can be assessed."[150] Ruggie notes that the UNGPs "marks the end of the beginning, by establishing a common global platform for action, on which cumulative progress can be built, step-by-step, without foreclosing any other promising longer-term developments."[151] In effect, the UNPGs are not an end in themselves; they are only policy statements that seek to influence the global public debate on corporate accountability.

As soft law, the UNGPs influence practice in states, corporations, and international organizations.[152] Some states have created National Action Plans and due diligence legislation that implement the UNGPs' framework. Also, in 2015, the South African Appellate Court cited the UNGPs when it held that a garnishment law was unconstitutional because it does not adequately protect human rights, which states should protect under Pillar I of the UNGPs.[153] The Court noted that "while reports of the UN General Assembly and Human Rights Council are not binding, they are highly persuasive and generally express the current consensus among States."[154] As well, corporations have created internal policy procedures and grievance mechanisms that mirror the UNGPs' corporate responsibility to respect human rights under pillar II. The OECD also incorporated the

[150] Office of the United Nations High Commissioner for Human Rights, *ibid* at 8.
[151] Presentation of Report to United Nations Human Rights Council, Professor John Ruggie, Special Representative of the Secretary-General for Business and Human Rights, Geneva (30 May 2011), online: United Nations<www.business-humanrights.org/sites/default/files/media/documents/ruggie-statement-to-un-human-rights-council-30-may-2011.pdf>.
[152] See John Ruggie, Caroline Rees, & Rachel Davis "Ten Years After: From UN Guiding Principles to Multi-fiduciary Obligations" (2021) 0:0 Business and Human Rights Journal 1; Debevoise & Plimpton, "UN Guiding Principles on Business and Human Rights at 10: The Impact of the UNGPs on Courts and Judicial Mechanisms" (2021) at 203. See also Special Representative of the United Nations Secretary-General for Business & Human Rights, *Applications of the UN "Protect, Respect and Remedy" Framework* (30 June 2011), online: United Nations<www.business-humanrights.org/sites/default/files/media/documents/applications-of-framework-jun-2011.pdf>.
[153] *University of Stellenbosch Legal Aid Clinic and Ors v Minister of Justice and Correctional Services and Ors* [2015] ZAWCHC 99.
[154] *Ibid* at para 73.

UNGPs' framework into its 2011 update of the OECD Guidelines for Multinational Enterprises.[155] Indeed, Ruggie notes that the UNGPs have influenced major developments in states, international organizations, and corporate decisions since the endorsement of the UNGPs by the UN Human Rights Council in 2011.[156]

3.0. Criticism/Contestation Amidst the UNGPs' Endorsement

Despite the endorsement by the UN Human Rights Council, the UNGPs were received with mixed reactions by NGOs and scholars. Civil society organizations critique the UNGPs on the ground that: (1) they do not guide how states can regulate companies both at home and abroad (2) they set a lower bar than international human rights standards, especially as it relates to corporate accountability and access to remedies (3) they do not provide robust guidance for the protection of rights of women, children, Indigenous Peoples, and human rights defenders (4) they do not take a comprehensive approach to provide remedy through a legally binding treaty and (5) they do not provide guidance for states to assist individuals and communities to overcome barriers to justice, which include power imbalance and information asymmetry between local communities and corporations.[157] In sum, civil society organizations argue that the endorsement of the UNGPs is a regressive step in the regulation of corporate human rights abuse.

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[155] OECD, *Guidelines for Multinational Enterprises*, 2011 Ed (Paris: OECD Publishing, 2011) Ch IV.

[156] Ruggie, Rees, & Davis, *supra* note 152 at 203; John Ruggie, "Progress in Corporate Accountability" (Commentary, 04 February 2013), online: Institute for Human Rights and Business<www.ihrb.org/focus-areas/benchmarking/commentary-progress-corporate-accountability>.

[157] Joint Civil Society Statement on the Draft Guiding Principles on Business and Human Rights (January 2011), online: FIDH <www.fidh.org/IMG/pdf/Joint_CSO_Statement_on_GPs.pdf>. See also Business and Human Rights: CRIN Response to Adoption of the Guiding Principles, CRIN (21 June 2011), online: CRIN<www.crin.org/resources/infodetail.asp?id=25245>; International Federation for Human Rights, "UN Human Rights Council adopts Guiding Principles on Business Conduct, Yet Victims still Waiting for Effective Remedies" (Press Release) Business and Human Rights, online: FIDH<www.fidh.org/en/issues/globalisation-human-rights/business-and-human-rights/UN-Human-Rights-Council-adopts>. See also Daniel Augenstein & David Kinley, "When Human Rights 'Responsibilities become 'Duties': The Extra-territorial Obligations of States that Bind Corporations" in Surya Deva & David

Amnesty International argued that although the UNGPs' policy approach is a step in the right direction for corporate accountability, a regulatory legal framework in the form of a treaty is needed to ensure corporate responsibility because "[l]aw and policy are often two sides of the same coin…, [w]hen it comes to corporate abuses, we need more of both."[158] Therefore, the UNGPs present a "woefully inadequate approach" to corporate accountability because they lack mechanisms to ensure compliance or to measure implementation from corporations, a state of affairs that may perpetuate human rights abuse.[159] In effect, the UN Human Rights Council's endorsement is approval of "the status quo: a world where companies are encouraged, but not obliged, to respect human rights."[160] Other critics argue that the UNGPs are very state-oriented and they do not bring any groundbreaking new ideas to corporate accountability.[161] Ruggie admits this as much when he notes that the normative contribution of the UNGPs "lies not in the creation of new international law obligations but in elaborating the implications of existing standards and practices for States and businesses, integrating them within a single, logically coherent and comprehensive template."[162]

Bilchitz, *Human Rights Obligations of Business: Beyond the Corporate Responsibility to Respect?* (Cambridge: Cambridge University Press, 2013) at 11.

[158] Peter Frankental, "Letter to Professor Ruggie" (4 February 2011), online: Amnesty International <www.business-humanrights.org/sites/default/files/media/documents/ruggie/amnesty-uk-ltr-to-ruggie-4-feb-2011.pdf>. See also Stéphane Brabant, "Commentary Regarding Joint Civil Society Statement on Draft Guiding Principles on Business & Human Rights" (25 January 2011) Amnesty International 1.

[159] Chris Albin-Lackey, "Without Rules: A Failed Approach to Corporate Accountability" (2013), online: Human Rights Watch World Report <www.hrw.org/sites/default/files/related_material/business.pdf>.

[160] Human Rights Watch, "UN Human Rights Council: Weak Stance on Business Standards: Global Rules Needed, Not Just Guidance" (16 June 2011), online (blog) Human Rights Watch Blog<www.hrw.org/news/2011/06/16/un-human-rights-council-weak-stance-business-standards>.

[161] Nils Rosemann, "Zweiter Bericht von John Ruggie bleibt hinter den Erwartungen zurück" (14 July 2009), online: Informationsplattform humanrights.ch <hwww.humanrights.ch/home/de/Themendossiers/TNC/Nachrich-ten/idart_5154-content.html?zur=404> cited in Weilert, *supra* note 77 at 503.

[162] Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and other Business Enterprises, John Ruggie (A/HRC/17/31) (21 March 2011), online: OHCHR<www.ohchr.org/documents/issues/business/a.hrc.17.31.pdf>.

Some scholars and civil society organizations also criticized the drafting process of the UNGPs, especially as it relates to voices incorporated into the "protect, respect, and remedy" framework.[163] Surya Deva argues that the drafting group did not include leading human rights or corporate social responsibility scholars as well as representatives of NGOs such as Greenpeace, Amnesty International, Human Rights Watch, Earthrights International, Centre for Constitutional Rights, and Corporate Watch.[164] Birgit Spiesshofer also critiqued the representation on the SRSG's team.[165] Spiesshofer argues that though the UNGPs were politically sponsored by five states –Argentina, India, Nigeria, Norway, and Russia— the composition of his team does not reflect inclusivity. This is because "[Ruggie's] team was exclusively made up of individuals from the United States and (a few) western Europeans."[166]

Even when consulted, NGOs argue that the SRSG gave great importance to the concerns of corporations and neglected the views and submissions of civil society

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[163] See generally Surya Deva, "Treating Human Rights Lightly: A Critique of the Consensus Rhetoric and the Language Employed by the Guiding Principles" in Surya Deva & David Bilchitz, eds, *Human Rights Obligations of Business: Beyond the Corporate Responsibility to Respect* (Cambridge: Cambridge University Press, 2013) 78. See also Robert Blitt, "Beyond Ruggie's Guiding Principles on Business and Human Rights: Charting an Embracive Approach to Corporate Human Rights Compliance" (2012) 48:1 Texas International Law Journal 33 at 52-56; Surya Deva, "Protect, Respect, and Remedy: A Critique of the SRSG's Framework for Business and Human Rights" in Karin Buhmann, Lynn Roseberry, & Mette Morsing, eds, *Corporate Social and Human Rights Responsibilities: Global Legal and Management Perspectives* (UK: Palgrave Macmillan, 2011) 108 at 118 (he argues that the UNGPs contain flawed institutional and conceptual premises This is because they do not acknowledge the importance of the role of institutional bodies like the World Trade Organization, World Bank, and International Momentary Fund in ensuring that corporations comply with their human rights responsibilities. Also, Ruggie incorrectly premised the reason for proposing his framework on a 'governance gap.' This is because governance deficit cannot be the root cause of corporate human rights abuse— 'the governance gap thesis is too general to be the root cause of the specific issues that have been and are central to the business and human rights project").

[164] Surya Deva, "Protect, Respect, and Remedy: A Critique of the SRSG's Framework for Business and Human Rights" in Karin Buhmann, Lynn Roseberry, & Mette Morsing, eds, *Corporate Social and Human Rights Responsibilities: Global Legal and Management Perspectives* (UK: Palgrave Macmillan, 2011) 108 at 116.

[165] Birgit Spiesshofer, *Responsible Conduct: The Emergence of a Global Economic Order* (CH Beck, Hart & Nomos, 2018) at 99.

[166] *Ibid*.

organizations on issues of rights to remedy.[167] Human Rights Watch particularly argued that the United Nations Human Rights Council ignored recommendations from civil society organizations, thereby squandering the opportunity to take stronger action against corporate human rights abuse.[168] In sum, critics argue that there is a bias in favour of powerful stakeholders, like corporations and states in the Global North, who can influence the acceptance or rejection of the SRSG's work.

Ruggie's reason for excluding civil stakeholder voices from the final report may have been his strong belief in the nature of his approach to developing international human rights standards.[169] The SRSG maintained that his mandate was focused on reducing human rights abuse by prescribing policies and practices for states and businesses alike, rather than create a binding regulatory framework that is "abstract" and presently "elusive."[170] The SRSG's response reflects a desire for a polycentric governance framework that could finally culminate in a corporate accountability norm, instead of the uncertain future of a treaty. Denise Wallace describes Ruggie's response to Amnesty International and other

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[167] See e.g., International Network for Economic, Social & Cultural Rights, "Rethinking the UN Guiding Principles and Company Grievance Mechanisms" (9 April 2015), online: Press Release <www.escr-net.org/news/2015/rethinking-un-guiding-principles-and-company-grievance-mechanisms>.

[168] *Ibid*.

[169] He argues that "[s]o let AI and HRW hold out the promise to victims that something good may come their way in another generation. My aim, as I have stated explicitly from the beginning, is to reduce corporate-related human rights harm to the maximum extent possible in the shortest possible period of time. And I am doing so primarily by recommending significant changes in policies and practices, on the part of governments and businesses alike." See John Ruggie, Response Letter to Arvind Ganesan of Human Rights Watch (28 January 2011), online: Business and Human Rights Org<www.business-humanrights.org/sites/default/files/media/documents/ruggie/ruggie-response-to-letter-by-arvind-ganesan-28-jan-2011.pdf>.

[170] John Ruggie, Letter in Response to the Joint Civil Society Statement of January 2011 (17 January 2011), online: Financial Times <www.business-humanrights.org/sites/default/files/media/documents/ruggie/ruggie-response-to-financial-times-article-17-jan-2011.pdf>.

civil society organizations as "a self-serving edict that resonated with the childless taunt, 'it's my way or the highway."[171]

Beyond the drafting process, Deva contends that the stakeholder consultation process was also narrow.[172] Although the SRSG consulted in different regions of the world, his consultation mainly or largely focused on three groups—businesses, states, and civil society organizations.[173] This obscured the voices of victims in local communities that are affected by corporate human rights abuses. Of importance in this regard is the SRSG's regional consultation in South Africa held on 27-28 March 2006.[174] The participants underscored the importance of replicating the consultation with local communities that are directly affected by corporate human rights abuses.[175] Although Ruggie visited South Africa again on 21 October 2008 for another consultation, he only consulted with "experts from states, corporations, and civil society as well as academics and legal practitioners."[176] Ruggie's excuse for this deliberate omission was that "…a mandate aimed at producing

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[171] Denise Wallace, *Human Rights and Business: A Policy-oriented Perspective* (Leiden: The Netherlands, Brill Nijhofff) at 255.

[172] Surya Deva, Treating Human Rights Lightly, *supra* note 163 at 84.

[173] See e.g., Consultation with Business Stakeholders On The Implementation Of the UN "Protect, Respect And Remedy" Framework Summary Note (Paris, France, 5 October 2010) Hosted By Mouvement Des Entreprises De France, online: Business and Human Rights<www.business-humanrights.org/sites/default/files/media/documents/report-from-ruggie-business-consultation-paris-5-oct-2010.pdf>; Consultation with Member States on The Implementation of the UN "Protect, Respect And Remedy" Framework Summary Note (Palais Des Nations, Geneva, Switzerland, 6 October 2010), online: Business and Human Rights<www.business-humanrights.org/sites/default/files/media/documents/report-from-ruggie-govts-consultation-geneva-6-oct-2010.pdf>; Consultation with Civil Society Stakeholders on the Implementation of the UN "Protect, Respect And Remedy" Framework summary Note (Palais Des Nations, Geneva, Switzerland, 11--12 October 2010).

[174] Regional consultation convened by the Special Representative of the Secretary-General on Human Rights and Transnational Corporations and Other Business Enterprises Johannesburg (South Africa, 27-28 March 2006), online: Business and Human Rights<www.business-humanrights.org/sites/default/files/reports-and-materials/Ruggie-consultation-Johannesburg-27-28-Mar-2006.pdf>.

[175] *Ibid* at 2. This advice is understandable because sometimes, civil society organizations lose touch with the communities and issues that gave birth to their activism. See Gaby Aguilar, "The Local Relevance of Human Rights: A Methodological Approach" in Koen De Feyter, Stephan Parmentier, & Christiane Timmerman, eds, *The Local Relevance of Human Rights* (Cambridge University Press, 2011) 109 at 116.

[176] Stabilization Clauses and Human Rights: Consultation Summary (Johannesburg, South Africa, 21 October 2008) at 7, online: Business and Human Rights<www.business-humanrights.org/sites/default/files/reports-and-materials/Ruggie-consultation-stabilization-clauses-21-Oct-2008.pdf>.

general principles and guidance for states and business would not mix well with jumping into the middle of specific disputes, which in any case are extremely difficult to resolve from thousands of miles removed…"[177] He claims to have heard the voices of the victims and that they animate the UNGPs' framework.[178] However, Deva argues that the lack of direct (adequate) consultation with victims in local communities still opens the UNGPs framework to a legitimacy attack.[179]

Notwithstanding the criticisms, the UNGPs continue to be influential in the corporate accountability context.[180] Therefore, it is important to engage with the SRSG's framing of the UNGPs. If the SRSG claims that the overlapping mutual effort of actors will culminate in a global corporate accountability norm, it is only reasonable to examine how actors in Africa can contribute to the development of the norm. The inquiry in this regard relates to the theoretical underpinnings of the UNGPs that (can) enable them to drive a corporate responsibility norm in the absence of an international treaty or an obligatory legal framework for corporations. This exercise is important because of the claim that the existing regulatory initiatives to make MNCs accountable for human rights abuse are "seriously inadequate."[181]

4.0. Thesis Focus & Original Contribution to Literature

This thesis fills a gap in the literature on Africa's contribution to the interpretation and application of the UNGPs. Particularly, an African perspective on what corporate

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[177] John Ruggie, "Opening Remarks at Mandate Consultation with Civil Society" (11-12 October 2010, Geneva), online: Business and Human Rights<www.business-humanrights.org/sites/default/files/reports-and-materials/Ruggie-remarks-consultation-civil-society-11-Oct-2010.pdf>.
[178] *Ibid*.
[179] See Deva, *supra* note 163 at 110.
[180] See Debevoise & Plimpton, *supra* note 152 at 203.
[181] Surya Deva, *Regulating Corporate Human Rights Violations: Humanizing Business* (London, UK: Routledge, 2012) at 12. Chapter 2 examines whether a BHR treaty is enough to fill the global governance gap. This thesis negatively answers this question.

responsibility to respect human rights (pillar II) means and entails is lacking, despite the continent being at the receiving end of many human rights atrocities attributed to corporations. The long conversations about corporate responsibility predominantly take place in forums and conferences in the Global North. Yet, the majority of the human rights abuses and their impacts are felt by peasants, farmers, children, and women in local communities in the Global South who do not have a voice in the institutionalized governance systems that animate global affairs. This thesis is an effort to generate some conversation about the potential role that norms and human rights institutions in Africa can play in the development of the corporate responsibility to respect (CR2R) norm. In effect, this thesis puts Africans at the center of the CR2R norm development discussion in terms of the inclusion of their views to affect the prescriptive and policy implications of emergent human rights norms and principles.

Specifically, this thesis answers the question of how norms and human rights institutions in Africa can influence the CR2R norm as embedded in pillar II. Through the theory of social constructivism,[182] this thesis examines how the CR2R norm is changing the dominant narrative that MNCs do not have human rights responsibilities in international law. In light of the CR2R norm's status as a social and (growing) legal norm, this thesis asks how norms and institutions in Africa can contribute to the interpretation and application of the UNGPs.[183] First, this thesis argues that to contribute to global

[182] Like many legal terms, there is no consensus on the definition of a norm. See Marcel Kahan, "The Limited Significance of Norms for Corporate Governance" (2001) 149 University of Pennsylvania Law Review 1869 at 1870-71. However, this thesis adopts Posner's definition of norms "as rules that distinguish 'desirable and undesirable behavior' and give a third party the authority to punish a person who engages in the undesirable behavior." See Eric Posner, "Law, Economics, and Inefficient Norms" (1996) 144 University of Pennsylvania Law Review 1697 at 1699. Chapter 3 of this thesis discusses norms in detail.

[183] On the question whether the UNGPs are soft law or not, see Justin Nolan, "The Corporate Responsibility to Respect Human Rights: Soft Law or Not?" in Surya Deva & David Bilchitz, eds, *Human Rights*

behavourial change, the CR2R norm must be contextually interpreted to reflect the socio-cultural realities of different regions. This is because "…without a deep engagement in diversity, without robust interaction, law cannot be created in international society."[184] Therefore, this thesis proposes localization of the CR2R norm through the African norm (Ubuntu). Second, this thesis argues that the CR2R, as a social and growing legal norm, can be supported by African human rights institutions to further influence corporate responsibility culture in Africa. In sum, this thesis contends that Africa's normative and human rights institutions' contributions to the CR2R norm diffusion may potentially increase the norm's application, legitimacy, and legality in Africa.[185] These two main contributions of this thesis are further broken down below.

4.1 **Localizing CR2R through an Ubuntu Lens—An Ethical and Moral Perspective**

From an African perspective, this thesis examines how Ubuntu, as a social norm, can contribute to the legitimacy and development of the CR2R norm.[186] By way of interpretation, it examines what a CR2R norm could look like if unpacked through Ubuntu's moral and ethical lens.[187] Ubuntu is a pan-African philosophy that emphasizes being human through other people—relationality.[188] It is aptly reflected in the phrase "I am because of who we all are," or "I am human because I belong, I participate, I share"[189]—a

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Obligations of Business: Beyond the Corporate Responsibility to Respect (Cambridge: Cambridge University Press, 2013) 138.

[184] Brunnée & Toope, *supra* note 69 at 80-89.

[185] See Jutta Brunnée & Stephen Toope, "Interactional International Law: An Introduction" (2011) 3:2 International Theory 307 at 308. This will be discussed in detail in chapter 2 of this thesis.

[186] Ubuntu can be applied as a norm, philosophy, and ethics. This thesis uses these perspectives interchangeably. See Vincent Mabvirira, "Hunhu/Ubuntu Philosophy as a Guide for Ethical Decision Making in Social Work" (2020) 10:1 African Journal of Social Work 73.

[187] The term "philosophy" as used in this thesis refers to an activity of criticism and clarification. See Nelson Udoka Ukwamedua, "Philosophy and African Philosophy: A Conceptual Analysis" (2017) 17:3 Unizik Journal of Arts and Humanities 87 at 91.

[188] Maree Lovemore & Jenny Mbigi, *Ubuntu: The Spirit of African Transformation Management* (California: Knowledge Resources, 1995) at 2.

[189] *Ibid*.

popular Zulu saying "Umuntu ngumuntu ngabantu."[190] This thesis identifies the importance of reframing the CR2R norm through Ubuntu. First, Ubuntu framing increases the CR2R norm's intelligibility in Africa because it clarifies and contextualizes the meaning of the term "respect" as used in the UNGPs. Second, Ubuntu infuses an ethical perspective into the interpretation, application, or implementation of the CR2R norm. Third, an Ubuntu-inspired interpretation insulates the CR2R norm from some scholars' critique that the scope of the norm is narrow because it only encourages MNCs to avoid infringing on the human rights of others without prescribing positive obligations.

Ubuntu is an African social norm that has been applied in various fields, including theology, institutional management, computer science, politics, social work, business ethics, public governance, and journalism.[191] It has not been interpreted in the context of the UNGPs, especially as they relate to the CR2R norm. Although Ubuntu's existence is not controversial, its application and scope as a social and legal norm for guiding social conduct is controversial.[192] For example, as a social norm, Eusebius McKaiser argues that Ubuntu is vague and incapable of providing a publicly justifiable rationale for decisions.[193]

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[190] See Jacob Mugumbate & Andrew Nyanguru, "Exploring African Philosophy: The Value of Ubuntu in Social Work" (2013) 3:1 African Journal of Social Work 82 at 84. This concept has phonological variants in different African languages like Kenya, Democratic Republic of Congo, Angola. See Alexis Kagame*, La philosophie bantu comparee* (Paris: Presence Africaine, 1976).

[191] Mugumbate & Nyanguru, *ibid*; Esinath Ndiweni, "Towards a Theoretical Framework of Corporate Governance: Perspectives from Southern Africa" in Mathew Tsamenyi & Shahzad Uddin, *Corporate Governance in Less Developed and Emerging Economies* (UK: JAI Press, 2008) 335; Simphiwe Sesanti, "The Concept of 'respect' in African Culture in the Context of Journalism Practice: An Afrocentric Intervention" (2010) 36:3 South African Journal for Communication and Theory Research 343; Desmond Tutu, *No future without forgiveness: A Personal Overview of South Africa's Truth and Reconciliation Commission* (London: Ebury Publishing 2012); Maree Lovemore & Jenny Mbigi, *Ubuntu: The Spirit of African Transformation Management* (South Africa: Knowledge Resources, 1995); Richard Kayuni, "Can African Feet Divorce Western Shoes? The Case of 'Ubuntu' and Democratic Good Governance in Malawi" (2005) 14:2 Nordic Journal of African Studies 147.

[192] See e.g., Penny Enslin & Kai Horsthemke, "Can Ubuntu Provide a Model for Citizenship Education in African Democracies" (2004) 40:4 Comparative Education 545 (they argue that Ubuntu is not unique in its application and that most of its values are universally applied).

[193] Eusebius McKaiser, "Public Morality: Is there Sense in Looking for a Unique Definition of Ubuntu?" (2 November 2009) Business Day Newspaper 1.

This is because what Ubuntu means in a legal context "depends on what a judge had for breakfast… [Ubuntu] is a terribly opaque notion not fit as a normative moral principle that can guide our actions, let alone be a transparent and substantive basis for legal adjudication."[194] Ima Kroeze also argues that Ubuntu originated from a traditional small-scale culture that bears no or little resemblance to contemporary African society.[195] Kroeze suggests that the influence of Ubuntu is waning in the 21st century because it does not influence conduct as it did in the pre-colonial African societies.[196] Also, Ethna Swartz and Rae Davies criticize Ubuntu for its collectivist orientation because it fails to acknowledge the value of individual freedom; it requires individuals to make sacrifices and deny themselves for the benefit of society.[197] In the same vein, Molly Manyonganise argues that Ubuntu does not promote contemporary human rights, such as gender equality.[198] She argues that "Ubuntu needs to be seen as a creation of men who were determined to regard women as restricted, dominated, and marginalized."[199]

This last critique, which castigates patriarchy, may be an isolated position. This is because other scholars argue that Ubuntu supports gender diversity and social empowerment. From an African feminist epistemological standpoint, Faith Wambura Ngunjiiri argues that Ubuntu enables women, as agents of change, to exemplify spiritual

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[194] McKaiser, *ibid.*
[195] Ima Kroeze, "Doing Things with Values II: The Case of Ubuntu" (2002) 13:2 Stellenbosch Law Review 252.
[196] Anthony Oyowe, "Strange Bedfellows: Rethinking Ubuntu and Human Rights in South Africa" (2013) 13 African Human Rights Law Journal 103 at 124.
[197] See Ethna Swartz & Rae Davies, "Ubuntu- The Spirit of African Transformation Management-A Review" (1997) 18:6 Leadership & Organization Development Journal 290 at 293 (they refer to the sacrifice of individual self for the collective will as the shadow or negative side of Ubuntu).
[198] Molly Manyonganise, "Oppressive and Liberative: A Zimbabwean Woman's Reflections on Ubuntu" (2015) 36:2 Verbum et Ecclesia 1.
[199] *Ibid* at 3.

leadership, courage, and a spirit of collectivism to stand against social injustice.[200] Angelo Nicolaides also argues that the marginalization of women is contrary to the spirit of Ubuntu.[201] She notes that though "…the issue of gender disparity exists in virtually all parts of the world, from Asia to Africa, from Europe to the Americas,"[202] Ubuntu is an ethical tool for gender transformation in Africa. In support of these efforts, Drucilla Cornell, in 2003, convened an Ubuntu feminism project that examined controversies in western feminism to show how feminism, influenced by Ubuntu, can respond to some of the criticisms.[203]

At first blush, criticisms of Ubuntu may make readers think that Ubuntu is an anachronistic norm that cannot be used to interpret the CR2R norm. This is because of the question whether Ubuntu is a progressive African concept, or it has outlived its relevance.[204] The argument is that vices like corruption and other economic fraud do not show that Ubuntu exists in Africa. It is in this sense that Ubuntu is considered irrelevant in modern times. It could, therefore, be said to be counter-intuitive to attempt an interpretation of the CR2R norm through Ubuntu. In other words, "…culture is a double-edged sword that can be used as a weapon to strike a blow for empowerment or to threaten those who would assert their own self-expression of identity."[205] However, these arguments do not

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[200] See e.g., Faith Wambura Ngunjiri, "I Am Because We Are': Exploring Women's Leadership Under Ubuntu Worldview" (2016) 18:2 Advances in Developing Human Resources 223.
[201] Angelo Nicolaides, "Gender Equity, Ethics and Feminism: Assumptions of an African Ubuntu Oriented Society" (2015) 42:3 Journal of Social Science 191.
[202] *Ibid* at 205.
[203] See Drucilla Cornell & Karin van Marle, "Ubuntu Feminism: Tentative Reflections" (2015) 36:2 Verbum et Ecclesia 1.
[204] See Jonathan Chimakonam, "The End of Ubuntu or its Beginning in Matolino-Kwindingwi-Metz Debate: An Exercise in Conversational Philosophy" (2016) 35:2 South African Journal of Philosophy 224; Thaddeus Metz, "Just the Beginning for Ubuntu: Reply to Matolino and Kwindingwi" (2014) 33:1 South African Journal of Philosophy 65. See also Mojalefa Koenane & Cyril-Mary Pius Olatunji, "Is it the End or Just the Beginning of Ubuntu? Response to Matolino and Kwindingwi in view of Metz's rebuttal" (2017) 36:2 South African Journal of Philosophy 263.
[205] Wangari Maathai, *The Challenge for Africa* (London; UK: Arrow Books, 2010) at 164.

recognize Ubuntu's potential contribution to the ethical grounding of the CR2R norm.[206] It is almost impossible for any culture, religion, or norm to be uncontested. Confucianism, Christianity, Islam, and western philosophies of autonomy, self, and liberalism are often criticized. Even the utility of the UNGPs as a tool for social business construct remains contested on many, including gender-related terms.[207] In effect, it is premature to discard Ubuntu's potential contribution to localizing the CR2R norm.[208] Indeed, Mogobe Ramose concludes that "[f]ar from being nostalgic for an obsolete tradition, the invocation of the Ubuntu human rights philosophy is a credible challenge to the deadly logic of the pursuit of profit at the expense of preserving human life…[it] is an alternative worldview that people "should opt for."[209]

In sum, Ubuntu interpretations used in this thesis are largely normative. Notwithstanding that the normative influence of Ubuntu on corporate governance in Africa is debated,[210] this thesis argues that it would be wrong to simply deny Ubuntu's potential

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[206] See generally Thaddeus Metz, "Ubuntu as a Moral Theory and Human Rights in Africa" (2011) 11 African Human Rights Law Journal 532. He constructs an Ubuntu moral theory that is grounded on the notion of human dignity which is expressed in human beings' capacity to act communally ("while the Kantian theory is the view that persons have a superlative worth because they have the capacity for autonomy, the present, Ubuntu-inspired account is that they do because they have the capacity to relate to others in a communal way").

[207] See Bonita Meyersfeld, "Business, Human Rights and Gender: A Legal Approach to External and Internal Considerations" in Surya Deva & David Bilchitz, eds, *Human Rights Obligations of Business: Beyond the Corporate Responsibility to Respect* (Cambridge: Cambridge University Press, 2013) 193; Penelope Simons & Melisa Handl "Relations of Ruling: A Feminist Critique of the United Nations Guiding Principles on Business and Human Rights and Violence against Women in the Context of Resource Extraction" (2019) 31:1 Canadian Journal of Women and the Law 113.

[208] See Christelle Terreblanche, "Ubuntu and the Struggle for An African Eco-Socialist Alternative Chapter" in Vishwas Satgar, ed, *The Climate Crisis: South African and Global Democratic Eco-Socialist Alternatives* (Wits University Press, 2018) at 169. (She notes that Ubuntu "is thriving—as practice and philosophy—from rural commonages to urban townships").

[209] Mogobe Ramose, "Globalization and Ubuntu" in P H Coetzee & A PJ Roux, eds, *The African philosophy reader* 2nd ed (New York: Routledge, 2004) 626 at 644. See also Temitope Fagunwa, "Ubuntu: Revisiting an Endangered African Philosophy in Quest of a Pan-Africanist Revolutionary Ideology" (2019) 3:3 Genealogy 45.

[210] See e.g., Vishnu Padayachee, "Corporate Governance in South Africa: From 'Old Boys Club' to 'Ubuntu?" (2013) 81:82 Transformation 260 at 286 (he argues that "…any claims that the country's corporate governance approach is more stakeholder-oriented, more transparent and democratic, more caring, more harmonious, more Ubuntu-oriented and more connected to society, would appear somewhat exaggerated).

to contribute to the interpretation of the CR2R norm in Africa. It is not denied that there is corruption and poverty in Africa. Even so, this thesis focuses on normative insights into the nature of the human community from an African perspective. To acknowledge and consider the insights that Ubuntu brings to interpreting the CR2R norm is to accept that "…in the long- run the special contribution to the world by Africa will be in this field of human relationship. The powers of the world may have done wonders in giving the world an industrial and military look, but the great gift still has to come from Africa – giving the world a more human face."[211]

4.2 The Role of African Human Rights Institutions in Promoting the CR2R Norm—An Opportunity for Norm Entrepreneurship

The CR2R norm is presently being recognized by national and regional courts, and arbitration tribunals.[212] The phrase "CR2R norm recognition" as used in this thesis refers to court decisions that directly reference the CR2R norm or indirectly incorporate it through various means, including counsel or third-party submissions. This thesis examines how court decisions are developing the CR2R norm into a legal norm, and how African human rights institutions can contribute to its legalization. Specifically, it examines court decisions from different countries, including Nigeria, South Africa, Kenya, Canada, the United Kingdom, the Netherlands, and the United States, to demonstrate that the CR2R norm has begun to directly or indirectly influence court decisions in transnational human rights abuse cases involving MNCs.

However, Andreasson argues that the emerging South African model of corporate governance is a "genuine hybrid" of Anglo-American shareholder model and Africa's stakeholder model which is founded on African values like Ubuntu. See Stefan Andreasson, "Understanding Corporate Governance Reform in South Africa: Anglo-American Divergence, the King Reports, and Hybridization" (2011) 50:11 Business & Society 647 at 660-661.

[211] Steve Biko, *I Write What I Like*, ed. Aelred A Stubbs (London: The Bowerdean Press, 1978) at 46.

[212] See generally Debevoise & Plimpton, *supra* note 152.

Having emerged over time, the cases show how courts have grappled with the CR2R norm. Beyond national courts, this thesis also focuses on how human rights institutions in Africa can become "norm entrepreneurs" in the diffusion of the CR2R norm. It uses the Community Court of Justice of the Economic Community of West African States (ECCJ) as an example of an institution that has the potential to promote the CR2R norm. The choice of the ECCJ is based on the court's history, its strikingly capacious jurisdiction, and access to justice rules. There is no other African sub-regional court that has a similar expansive jurisdiction and authority.[213] Given this, the ECCJ's decisions can, potentially, set a CR2R norm tone in the West African sub-region that can influence courts in other sub-regions. This is more so because ECOWAS members, including Nigeria, Sierra Leone, and Guinea-Bissau are countries where environmental and human rights abuse arise from oil exploration and mining activities.[214]

Overall, this thesis examines Africa's interaction with the CR2R norm through normative and legal perspectives. These perspectives are combined in keeping with Jutta Brunnée and Stephen Toope's admonition (which is examined in detail in chapter 2) that legal norms (or law) can only be created in the context of social norms, which are based on shared understanding.[215] A normative interpretation from an African point of view would promote a shared understanding of the CR2R norm, more so when the continent's sub-

[213] Karen Alter, Laurence Helfer & Jacqueline McAllister, "A New International Human Rights Court for West Africa: The ECOWAS Community Court of Justice" (2013) 107 The American Journal of International Law 737 at 378.
[214] See e.g., Human Rights Watch, "The Regional Crisis and Human Rights Abuses in West Africa: A Briefing Paper to the UN Security Council" (20 June 2003), online (blog): Human Rights Watch <www.hrw.org/news/2003/06/20/regional-crisis-and-human-rights-abuses-west-africa>; Human Rights Watch, "What do we Get out of it": The Human Rights Impact of Bauxite Mining in Guinea" (4 October 2018) online (blog): Human Rights Watch <www.hrw.org/report/2018/10/04/what-do-we-get-out-it/human-rights-impact-bauxite-mining-guinea>.
[215] Brunnée & Toope, *supra* note 69 at 15.

regional human rights court systems contribute to the interpretation effort and application of the CR2R norm. Doing this would, in regard to ensuring the protection of human rights, facilitate proffering African solutions to African problems.[216] The overarching theme that this thesis pursues can now be framed into one research question, as follows.

5.0. Research Question

> Can and if so how, may African social norms and human rights institutions interact with the CR2R norm to influence the corporate responsibility to respect human rights in Africa?

6.0. Theoretical Framework

To answer this question, this thesis engages with the international relations theory of social constructivism in the works of Martha Finnemore and Kathryn Sikkink.[217] Finnemore and Sikkink developed a norm cycle theory. Defining a norm as a "standard of appropriate behavior for actors with a given identity,"[218] Finnemore and Sikkink propose that norms exist in a patterned "life cycle" consisting of three stages: norm emergence, norm cascade, norm internalization.[219] Adopting this analytical framework, this thesis examines how norms develop in society, and how a group of people accepts a norm as binding without an external enforcing mechanism. In effect, the norm cycle theory helps to understand how norms develop in international relations. The thesis then uses Pillar II of the UNGPs as an example of a norm that promotes corporate responsibility to respect human rights. The CR2R norm is subjected to the Finnemore—Sikkink norm cycle theory

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[216] This is because "Africa's achievements and genius lie in social and spiritual spheres, and hence imitations do not give them competitive advantage." See Lothar Auchter, "An African and Asian View on Global Business Ethics" (2017) 3:1 Global Journal of Contemporary Research in Accounting, Auditing and Business Ethics (GJCRA) 505 at 506.
[217] Martha Finnemore & Kathryn Sikkink, "International Norm Dynamics and Political Change" (1988) 52:4 International Organization 887.
[218] *Ibid* at 891.
[219] *Ibid* at 888.

test to determine the cycle stage of the CR2R norm. The examination shows that the CR2R norm is approaching the third stage of the norm cycle—norm internalization.

Though Finnemore and Sikkink's norm cycle theory helps to understand norm development, it does not explain factors that contribute to the reception or rejection of a norm in political and international relations. Scholars, especially political scientists, sociologists, and international relations experts, identify and fill this gap with the study of causal mechanisms and processes through which norms and ideas spread.[220] They engage with the theory of norm diffusion. Generally, diffusion is the "transfer or transmission of objects, processes, ideas, and information from one population or region to another."[221] Using the norm diffusion theory as explained by Amitav Acharya, this thesis examines requirements to be fulfilled before a global norm diffuses from one country to another.[222] One of the requirements is that prior local norms must find interpretations/expressions in the global norm for local actors to accept it. This is what Acharya calls norm localization.[223] This theory will be examined in detail in chapter 3.

Going by Acharya's theory of norm diffusion, the CR2R norm is a global norm that can diffuse through its localization. This thesis undertakes a localization exercise of the CR2R norm in Africa. It explores how local norms in Africa are congruent with the CR2R norm. It uses Ubuntu as an example of a prior local norm through which the CR2R norm

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[220] Mona Lena Krook & Jacqui True, "Rethinking the Life Cycles of International Norms: The United Nations and the Global Promotion of Gender Equality" (2010) 18:1 International Journal of International Relations 103. See also David Strang & Sarah Soule, "Diffusion in Organizations and Social Movements: From Hybrid Corn to Poison Pills" (1998) 24 Annual Review of Sociology 265 at 266.

[221] Jeffrey Checkel, "Norms, Institutions, and National Identity in Contemporary Europe" (1999) 43:1 International Studies Quarterly 83 at 85. Diffusion theories have been used in various disciplines including Anthropology, History, Archeology, Sociology, and International Relations. See Peter Hugill & Bruce Dickson, *The Transfer and Transformation of Ideas and Material Culture* (Texas: A & M University Press, 1988) at 263-264.

[222] Amitav Acharya, "How Ideas Spread: Whose Norms Matter? Norm Localization and Institutional Change in Asian Regionalism" (2004) 58:2 International Organization 239

[223] *Ibid*.

may be interpreted to aid its diffusion in Africa. Ubuntu is congruent with the CR2R norm because it clarifies corporations' responsibility to respect human rights. In effect, this thesis takes an analytical approach to understand whether and if so, how the CR2R norm and Ubuntu as social norms interact in an overlapping and reinforcing fashion with the potential to contribute to a shared understanding of the concept of corporate responsibility to respect human rights.

The importance of creating a shared understanding of ideas and norms among global and local actors is illuminated by Brunnée and Toope's interactional approach to international law-making.[224] Brunnée and Toope argue that the process of making a law determines its legal force, and not the form of enforcement mechanisms put in place.[225] If international law actors, including states and non-states, participate in law-making by sharing normative understanding about a particular subject, Brunnée and Toope argue that the law will be more likely obeyed notwithstanding that there is no enforcement mechanism. This approach is fully discussed in chapter 2. This thesis chooses an interactional approach to law-making for two reasons. First, an interactional framework is not contingent on states' political commitment, but on the interaction of international actors who share a common understanding about an acceptable behaviour. Second, an interactional framework embraces norm diversity and application that aligns with the theme of this thesis.[226] Understanding the influence of normative shared understanding in

[224] Brunnée & Toope, *supra* note 69 at 7. They draw on Lon Fuller's morality of law theory. See Lon Fuller, *The Morality of the Law,* rev ed (New Haven: Yale University Press, 1969).
[225] Brunnée & Toope, *ibid* at 7.
[226] *Ibid* at 21 ("[a]nalysing law [through an interactional account] cuts to the heart of the greatest challenge facing international law: to construct normative institutions while admitting and upholding the diversity of peoples in international society").

international law-making helps to appreciate the need to localize norms to increase the intelligibility of global norms in local settings.

The application of a norm cycle theory and interactional approach to international law-making in this thesis goes beyond the debate between proponents of 'hard' and 'soft' law approaches to corporate accountability.[227] Some scholars believe that signing a treaty is the only option to create a norm and ensure its acceptance in international law.[228] To them, the UNGPs "underestimates (whether intentionally or not) what is required to push corporate responsibility for human rights beyond due diligence processes and the redress of individual grievances."[229] Other scholars argue that the argument of "pro-treaty" scholars is a non-starter because hardening the UNGPs not only poses problems in terms of the transposition of primary obligations to MNCs in international law, but it may also erode the very foundations of international law.[230] This thesis moves beyond the hard/soft

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[227] See Sara McBrearty, "The Proposed Business and Human Rights Treaty: Four Challenges and an Opportunity" (2016) 57 Harvard International Law Journal 11; John Ruggie, The Past as Prologue? A Moment of Truth for UN Business and Human Rights Treaty (July 8, 2014), online: <www.hks.harvard.edu/m-rcbg/CSRI/Treaty_Final.pdf>; Surya Deva & David Bilchitz, eds, *Building a Treaty on Business and Human Rights: Context and Contours* (Cambridge University Press, 2017); David Bilchitz, "The Necessity for a Business and Human Rights Treaty" (2016) 1:2 Business and Human Rights Journal 203; Douglass Cassel & Anita Ramasastry, "White Paper: Options for a Treaty on Business and Human Rights" (2016) 6:1 Notre Dame Journal of International and Comparative Law 1.

[228] David Bilchitz, "Putting the Flesh on the Bone: What Should a Business and Human Rights Treaty Look Like" in Surya Deva & David Bilchitz, eds, *Building a Treaty on Business and Human Rights: Context and Contours* (Cambridge University Press, 2017) 1 at 8.

[229] Christine Parker & John Howe, "Ruggie's Diplomatic Project and its Missing Regulatory Infrastructure" in Radu Mares, ed, *The UN Guiding Principles on Business and Human Rights: Foundations and Implementation* (The Hague: Brill, 2012) at 274; Stefanie Khoury & David Whyte, *Corporate Human Rights Violations: Global Prospects for Legal Action* (New York: Routledge, 2017); David Bilchitz, "The Ruggie Framework: An Adequate Rubric for Corporate Human Rights Obligations? (2010) 7:12 International Journal on Human Rights 198; Christopher Albin-Lackey, Human Rights Watch, "Without Rules: A Failed Approach to Corporate Accountability" in Human Rights Watch: 2013 World Report(2013) (characterizing UNGPs as "woefully inadequate" by "setting a lower bar than international human rights standards"); Tara Melish, "Putting 'Human Rights" Back into the UN Guiding Principles on Business and Human Rights: Shifting Frames and Embedding Participation Rights in C Rodriguez-Garavito eds, *Business and Human Rights: Beyond the End of the Beginning* (Cambridge: Cambridge University Press, 2017).

[230] Parker & Howe, *ibid*. It should be noted that some scholars do not advocate for the hard law/soft law divide, because "the choice between hard law and soft law is not a binary one." See, e.g, Gregory Schaffer & Mark Pollack, "Hard vs. Soft Law: Alternatives, Complements and Antagonists in International Governance" (2010) 94 Minnesota Law Review 706.

law dichotomy to examine how norms are generated and how a shared understanding of the CR2R norm can generate compliance among global actors.[231]

7.0. Literature Review and Contribution to Original Research

Scholars have written on the growing influence of soft law in international law, especially as it relates to global governance.[232] For example, Dinah Shelton and other scholars examine factors that ensure compliance with hard and soft laws, especially in areas of law like human rights, the environment, and trade.[233] They note that a norm generates compliance when: (1) different regions contribute to its development, (2) the norm is specific, and (3) it is supported by strong institutions.[234] However, few scholars have examined how local norms and legal structures can interact with the CR2R norm to influence corporate responsibility in Africa. Birgit Spiesshofer argues that the UNGPs can be localized but does not demonstrate how it can be done.[235] She questions western-centric norms in the corporate accountability discourse and argues that "a historically and culturally sensitive approach [to norm-making] should be promoted."[236] Particularly, in

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[231] This is in light of Dinah Shelton's comment that "[t]he considerable recourse to and compliance with non-binding norms appears to represent a maturing of the international system. The on-going relationships among states and other actors, deepening and changing with globalization, create a climate that may require that fewer expectations of behaviour be set forth in formal legal obligations." Dinah Shelton, "The Role of Non-binding Norms in the International Legal System" in Dinah Shelton, ed, *Commitment and Compliance: The Role of Non-Binding Norms in the International Legal System* (Oxford: Oxford University Press, 2000) 554 at 556.

[232] Miroslava Filipovic & Sonja Buncic, "Global Economic Governance: A New Regime through Soft Law?" (2015) 11:44 Uluslararası İlişkiler 101; Kevin Jackson, "Global Corporate Governance: Soft Law and Reputational Accountability" (2010) 35:1 Brooklyn Journal of International Law 43; Christoph Knill & Dirk Lehmkuhl, "Private Actors and the State: Internationalization and Changing Patterns of Governance" (2002) 15 Governance 41; James Rosenau, "Governance in the Twenty-first Century" (1995) 1:1 Global Governance 13.

[233] Dinah Shelton, ed, *Commitment and Compliance: The Role of Non-binding Norms in the International Legal System* (Oxford: Oxford University Press, 2003). See also Andrew Guzman & Timothy Meyer, "International Soft Law" (2010) 2:1 Journal of Legal Analysis 171; Lazlo Blutman, "In the Trap of a Legal Metaphor: International Soft Law" (2010) 59:3 International & Comparative Law Quarterly 605.

[234] Dinah Shelton, *ibid*.

[235] Spiesshofer, *supra* note 165 at 436.

[236] *Ibid*.

relation to the Global South, she notes that "the uncritical transfer of western standards, developed through a long political-economic process, can lead to problematic consequences in an environment that is on a different level of development..."[237] She concludes that the UNGPs should be interpreted to reflect the importance of national and regional particularities and the different historical, cultural, and religious backgrounds, especially the top priorities of fighting poverty and the right to life.[238] This is the task that my thesis seeks to undertake.

The thesis recognizes the importance of African norms, particularly because of their ethical contributions to the understanding of the CR2R norm in Africa. This perspective is important not only because of the insights it brings to understanding the CR2R norm contextually, but also because of its potential to drive acceptance and legitimacy of the CR2R norm in Africa. Beyond the norms, the potential contributions of African human rights institutions play a complementary role in the judicial recognition of the CR2R norm. In sum, understanding Africa's contribution to the internalization of the CR2R norm places Africans at the center of matters that concern them.

Florian Wettstein argues that ethical perspectives are conspicuously missing in the UNGPs.[239] This critique is similar to Cragg's claim that the CR2R norm has a "serious weakness" because it is not rooted in ethical foundations and principles.[240] Cragg argues that the failure to ground the CR2R framework on explicitly moral foundations makes it

[237] Spiesshofer, *supra* note 165 at 436.
[238] *Ibid* at 456.
[239] Florian Wettstein, "Normativity, Ethics and the UN Guiding Principles on Business and Human Rights: A Critical Assessment" (2015) 14:2 Journal of Human Rights 162.
[240] Wesley Cragg, "Ethics, Enlightened Self-Interest, and the Corporate Responsibility to Respect Human Rights: A Critical Look at the Justificatory Foundations of the UN Framework" (2012) 22:1 Business Ethics Quarterly 9.

"intellectually unpersuasive."[241] He acknowledges that although the UNGPs' CR2R is important to improve standards of corporate conduct, the standards against which progress will be evaluated should be ethical.[242] This is because corporations have been or are subject to public scrutiny and their actions are justified by reference to the intrinsic moral significance of human rights.[243] According to Wettstein, the CR2R norm ought to be built on legal and ethical (moral) obligations.[244] This is the task that my thesis embarks upon—to localize the CR2R norm through an ethical and legal perspective to increase the intelligibility and legitimacy of the CR2R norm in Africa.

7.1 TWAIL Literature

Third World Approach to International Law (TWAIL) literature on the UNGPs is concerned about the fairness of norms, processes, institutions, and practices regarding the people in Third World states.[245] TWAIL scholarship "exists in opposition to, and as a limit on, the triumphal universalism of the liberal/conservative consensus in international law."[246] TWAIL-ers strongly oppose and reject the universalization of specific cultures under the guise of promoting global order, peace, and security in international law.[247] This is because the universalization agenda of international law, especially in human rights, does

[241] Cragg, *ibid* at 10.
[242] *Ibid* at 11.
[243] *Ibid* at 25.
[244] *Ibid* at 27.
[245] See James Thuo Gathi "Fairness as Fidelity to Making the WTO Fully Responsive to All Its Members" (2003) 96 American Society of International Law 157; Usha Natarajan & K. Khoday, *Fairness and International Environmental Law from Below: Social Movements and Legal Transformations in India* (2012) 25 Leiden Journal of International Law 415. See also Makau Mutua, "What Is TWAIL?" (2000) 94 Proceedings of the ASIL Annual Meeting 31.
[246] James Thuo Gathii, "Rejoinder: Twailing International Law" (2000) 98 Michigan Law Review 2066 at 2067.
[247] Mutua, *supra* note 245 at 36; Mohsen Al Attar, "Reframing the 'Universality' of International Law in a Globalising World" (2013) 59 McGill Law Journal 95.

not reflect the richness of a diverse world.[248] Although some TWAIL-ers acknowledge that universality is inevitable, and even desirable, they oppose attempts to universalize norms and practices that are rooted only in western origins, thought and experience.[249]

Some scholars draw on TWAIL to critique the UNGPs. For example, Sara Seck examines the possibility of home state regulation in host states.[250] Although the UNGPs (and international human rights law) do not create binding obligations for transnational home state regulation, she argues that home states should be obligated to protect human rights in host states due to their role in creating and influencing structural orders that support MNCs.[251] She notes that while a TWAIL outlook to home state regulation is fraught with problems of consultation, imperialism, and domination, Third World local communities must be given a voice in their affairs to surmount these challenges—a voice to subaltern resistance.[252]

Also, Sara Andersen, using TWAIL, examines the efficacy of the UNGPs to provide transnational justice.[253] Through a comparative approach, and using case studies

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[248] Mutua, *ibid*. Sundhya Pahuja, *Decolonising International law: Development, Economic Growth and the Politics of Universality* (Cambridge: Cambridge University Press, 2011); Luis Eslava & Sundhya Pahuja, "Between Resistance and Reform: TWAIL and the Universality of International Law (2011) 3 Trade, Law & Development 103.

[249]James Gathii, "The Promise of International Law: A Third World View" (2021) 36:3 American University International Law Review 378. See also Balakrishnan Rajagopal, "Locating the Third World in Cultural Geography" (1999)15:2 Third World Legal Studies 1.

[250] Sara Seck, "Transnational Business and Environmental Harm: A TWAIL Analysis of Home State Obligations" (2011) 3:1 Trade, Law and Development 164 at 167. See also Sara Seck, "Collective Responsibility and Transn ational Corporate Conduct" in Tracy Isaacs & Richard Vernon, eds, *Accountability for Collective Wrongdoing* (New York: Cambridge University Press, 2011) 140; Sara Seck, *Home State Obligations for the prevention and Remediation of Transnational Harm: Canada, Global Mining and Local Communities* (PHD Thesis: Osgoode Hall Law School, York University Toronto, Ontario, 2007) at 416.

[251] Sara Seck, "Conceptualizing the Home State Duty to Protect Human Rights" in Karin Buhmann, Lynn Roseberry, & Mette Morsing, eds, *Corporate Social and Human Rights Responsibilities: Global Legal and Management Perspectives* (UK: Palgrave Macmillan, 2011) 25 at 26.

[252] Seck, Transnational Business and Environmental Harm, *supra* note 250 at 172, 200.

[253] Sara Helene Andersen, *Business and Human Rights: A Comparative Study of the United States, England and Denmark Using the Third World Approaches to International Law* (PHD Thesis: European University Institute, 2018) [unpublished].

in the United States, Denmark, and the United Kingdom, she argues that current business and human rights frameworks do not sufficiently address the reality of "certain developing states' need to attract foreign direct investment by keeping their regulatory systems powerless."[254] Andersen, therefore, proposes a UN business and human rights multilateral treaty that is influenced by a TWAIL perspective to solve corporate accountability problems in the Global North and Global South respectively.[255]

Penelope Simons also argues that Ruggie's approach to addressing corporate human rights impunity is misconceived.[256] Using a TWAIL methodology, she notes that although the SRSG identified a governance gap in the business and human rights context, closing the governance gap is not the solution to securing corporate accountability.[257] This is because the SRSG did not deal with the root cause of corporate human rights impunity, which is deeply embedded in the international legal system.[258] Drawing inspiration from the TWAIL approach and feminist critiques of international law, she contends "that powerful states have used international law and international institutions to create a globalized legal environment which protects and facilitates corporate activity and, although the SRSG identified symptoms of this reality during his tenure, he did not examine the deep structural aspects of this problem."[259] Like Andersen, she argues for a business and human rights treaty to cushion the inequality created by the Global North and South divide. She believes that a treaty will ultimately improve corporate accountability.

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[254] Andersen, *ibid*.
[255] *Ibid*.
[256] Penelope Simons, "International Law's Invisible Hand and the Future of Corporate Accountability for Violations of Human Rights" (2012) 3:1 Journal of Human Rights and the Environment 5 at 11.
[257] *Ibid*.
[258] *Ibid*.
[259] *Ibid* at 5-6.

Samentha Goethals also uses TWAIL as an analytical tool in her critique of the UNGPs.[260] She views the UNGPs from a historical materialist and southern counter-perspective. She argues that the process leading to the UNGPs and the text of the UNGPs "neither reflect the expectations and needs of the violated for binding corporate accountability, nor address institutional and North/South agency asymmetries underlying the governance gaps, but only provide weak and under-conclusive guidance potentially undermining critical developments in international human rights law."[261] Like Penelope Simons, Goethals also notes that the underlying international human rights legal institutions and structures that legitimize inequalities are not challenged despite their analysis in the 2008 UNGPs' framework.[262] She concludes that the UNGPs do not challenge the power inequalities and hierarchical structures that TWAIL-ers identify in international human rights law.

This thesis acknowledges the TWAIL critiques and adopts them in developing its theme. However, as shown in chapter 2, the thesis does not approach the CR2R norm through a critical deconstructive lens that is associated with some TWAIL literature.[263]

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[260] Samentha Goethals, *Embedding Business in Human Rights or Human Rights in Business?* (Masters Thesis: Oxford Brooks University, 2011) [unpublished].

[261] *Ibid* at V.

[262] *Ibid* at 24 ("[t]he Framework does emphasize the significance of institutional imbalances and the difficulty for developing countries to balance economic development and foreign investment needs and human rights particularly as they may lack institutional capacities to enforce national laws and regulation on foreign corporations…but the GPs take a more general outlook and do not mention developing countries. This sidelining of the South in the GPs is potentially a reflection of the second politically motivated fallacy of globalization highlighted by Sousa Santos; despite the integration of the world into an interdependent global economy, the inequalities between North and South which have dramatically increased over the past three decades do not support the discursive disappearance or sidelining of the South. This, in fact, may be no more than a trivialising strategy of the negative exclusionary consequences of neoliberal globalization").

[263] See generally James Gathii, "International Law and Eurocentricty" (1998) 9 European Journal of International Law 184; James Gathii, "TWAIL: A Brief History of Its Origins, Its Decentralized Network, and a Tentative Bibliography" (2011) 3 Trade Law and Development 26 at 41; David Fidler, "Revolt Against or From Within the West?: TWAIL, the Developing World, and the Future Direction of International Law" (2003) Chinese Journal of International Law 29. See also Makau Mutua, "Africa and the Rule of Law" (2016) 13:23 SUR International Journal on Human Rights 159 (Mutua argues that "The rule of law – understood as adherence to good laws – is not enough of a panacea for Africa's complex problems") Mutua rejects a rule

Rather, it adopts a constructivist approach to construct channels through which Africa can influence the diffusion of the CR2R norm. In effect, this thesis uses TWAIL as a method to examine how Africa can participate in the norm cycle process.[264] It adopts James Gathii's view that "…[TWAIL] can also focus on ordinary people and social movements not only in resisting rules made from above but in forging new ones that reflect their concerns."[265] In sum, this thesis uses a constructive TWAIL method to tease out the role of Africa in international norm-making. This methodology is considered in detail in the next Part and chapter 2.

8.0. Research Methodology

Legal methodology is described as a field that deals with questions concerning methods, while a legal method is understood to be an orderly and systematic manner to do research.[266] This thesis is desk research that relies on legal methods to develop its analysis and ground its theme. Apart from the theories (interactional theory of law and norm cycle theory) described above, this thesis adopts a theoretical approach (TWAIL constructivism) that underpin its methodological presentation. Other methods used in this thesis include the comparative and the doctrinal. These main analytical methods help to systematically present Africa's possible interactions with the CR2R norm.

8.1 Theory as Method

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of law definition that uses law to protect ill-gotten wealth and an unjust economic order. He, instead, pushes for a rule of law that advances social and substantive justice. In other words, he rejects a western-framed meaning of rule of law as assimilating Africans into modernization.

[264] On how TWAIL can be used as a method, see Obiora Okafor, "Critical Third World Approaches to International Law (TWAIL): Theory, Methodology or Both?" (2008) 10 International Community Law Review 371 at 373, 376 (he argues that TWAIL is both a theory and a method because TWAIL is a "predictive, logical, and testable set of systematic and formalized expressions").

[265] Gathii, *supra* note 249 at 413.

[266] Husa Jaakko, "Methodology of Comparative Law Today: From Paradoxes to Flexibility?" (2006) 58:4 Revue Internationale de droit comparé 1095 at 1096.

Soft law has normative force when states and international actors recognize the social expectations that it proposes.[267] My thesis seeks to theoretically understand the UNGPs' normative force, especially when interpreted through local perspectives. The social constructivism theory, although arising from the field of international relations, can help to understand the social process of norm development.[268] Social constructivism is a theoretically informed approach to the study of international relations.[269] It is a social theory that makes claims about the nature of social life and social change.[270] Social constructivism is concerned about how social practices among a group of individuals crystalize to become norms through a process of intersubjective learning.[271] Social constructivists believe that it is important to understand social relationships because this is a way to explain how norms are generated and observed among a group of people. Generally, social constructivists focus on how factors, including culture, ideas, institutions, and social norms influence the behaviour of individuals.[272] As discussed in chapter 3, the SRSG presented the CR2R as a social norm and relied on institutions to promote the norm. Although this thesis explores how an institution in Africa can promote the norm, it goes further to examine how ideas and culture rooted in African philosophy can contribute to the CR2R norm promotion. It examines and develops the theme of social norms in chapters

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[267] See Ann Florini, "The Evolution of International Norms" (1996) 40:3 International Studies Quarterly 363 at 364.
[268] See John Ruggie, "What Makes the World Hang Together? Neo-Utilitarianism and the Social Constructivist Challenge" (1998) 52:4 International Organization 855.
[269] *Ibid* at 880.
[270] Martha Finnemore & Kathryn Sikkink, "Taking Stock: The Constructivist Research Program in International Relations and Comparative Politics" (2001) 4 Annual Review of Political Science 391 at 393.
[271] Rogoff refers to intersubjectivity as a "shared understanding among individuals whose interaction is based on Common interests and assumptions that form the ground for their communication." Thus, intersubjectivity is based on communication and interaction among actors. see Barbara Rogoff, *Apprenticeship in Thinking: Cognitive Development in Social Context* (New York: Oxford University Press, 1990).
[272] Jutta Brunnée & Stephen Toope, "Constructivist Approaches to International Law" in Jeffrey Dunoff & Mark Pollack, eds, *Interdisciplinary Perspectives on International Law and International Relations: The State of the Art* (Cambridge: Cambridge University Press, 2012) at 4.

2 and 3, and other influencing factors (culture, ideas, and institutions) in chapters 4 and 5. Therefore, it suffices to say that constructivism's contribution to international law is important because of the insight it offers into the social process that drives the creation and operation of international law.[273]

This thesis uses social constructivism the way Ibironke Odumosu-Ayanu, Olabisi Akinkugbe, and Obiora Okafor have used it. Odumosu-Ayanu examines the contribution of Third World Peoples to the development of the international investment dispute settlement system and argues that there is a mutually reinforcing interaction between Third World Peoples, investment law and activities, and the International Centre for Settlement of Investment Disputes (ICSID) tribunals.[274] Odumosu-Ayanu concludes that the Third World Peoples' resistance to the processes of the ICSID tribunal has the potential to account for the reconstruction of the investment dispute settlement system. In sum, Odumosu's research examines the normative contributions of Third World Peoples in international law.

This thesis benefits from the insights in what Odumosu-Ayanu's terms "TWAIL constructivism theory."[275] TWAIL constructivism involves the combination of insights from social constructivism and TWAIL. Traditionally, international relations theories ignore or do not analyze the impact of colonialism, and various post-colonial responses to colonialism and its legacies in their account of relationship building and norm creation.[276] Therefore, it is difficult to imagine or even construct international relations theories using

[273] Brunnée & Toope, *ibid* at 26.
[274] Ibironke Odumosu, ICSID, *Third World Peoples and the re-construction of the Investment Dispute Settlement System* (PHD Thesis: University of British Columbia, 2010) [unpublished].
[275] *Ibid* at 38.
[276] See Naeem Inayatullah & David L. *Blaney, International Relations and the Problem of Difference* (New York: Routledge, 2004) at 2.

contributions of Third World Peoples' experience that is shaped by colonialism and neocolonialism. For example, although social constructivism offers insights on how law is socially constructed, it is difficult to imagine the application of such law without considering the sociological backgrounds of the people to whom law is meant to apply. Therefore, a TWAIL constructivism analysis fills a gap in international relations by rendering the accounts of the Third World Peoples in the construction of social norms. According to Odumosu-Ayanu, TWAIL constructivism is an interactional theory of law that examines how actors from Third World states directly or indirectly interact within the global normative framework. The actors are primarily Third World Peoples, as opposed to formal structures of states and other institutions that represent Third World Peoples in international law.

Applying this theory to this thesis, TWAIL Constructivism helps to tease out how local actors and norms in Africa can interact with the CR2R norm. Indeed, insights from TWAIL-constructivism are beginning to emerge from scholars like Acharya. Acharya used TWAIL constructivism as a method to examine the role of norms in Third World states in international politics.[277] Acharya examines how Third World states and regions engage in rule-making and normative actions to regulate relationships among themselves and with other regions of the world. Using the relations between Third World and western states after the second world war, Acharya demonstrated how leaders in the Third World, including Jawaharlal Nehru of India at the Bandung Asia-Africa Conference in 1955 reformulated the norm of military non-intervention to prevent western domination after the

[277] Amitav Acharya, "Norm Subsidiarity and Regional Orders: Sovereignty, Regionalism, and Rule Making in the Third World" (2011) 55 International Organizations 95.

second world war.[278] Acharya argues that the process where local actors develop norms, develop new rules, offer new understandings of global rules, or reaffirm global rules in the regional context accounts for their role in norm creation in international relations. Although Acharya did not term his research as TWAIL constructivism, he principally adopted a TWAIL constructivism method as coined by Odumosu-Ayanu.

Akinkugbe's research examines the normative importance and contribution of the Economic Community of West African States (ECOWAS) in a socio-political context.[279] Contrary to criticisms that ECOWAS is a failure, Akikugbe uses a socio-legal approach to illuminate the major contributions of ECOWAS as a sub-regional organization and its importance to the global normative order. To the extent that Akinkugbe uses a socio-legal analysis and a normative framework, this thesis uses insights from his social constructivism architectural design. In effect, this thesis uses social constructivism to examine a bottom-up framework where the local norms and actors support the interpretation and application of CR2R as a global norm.

Similarly, Obiora Okafor's constructivism theory helps to understand the potential role of the ECCJ in the promotion of the CR2R norm in the business and human rights context. Okafor used a constructivist method to examine how international human rights institutions contribute meaningfully to local struggles.[280] Specifically, Okafor examined how local actors interact with human rights institutions, including *the African Commission on Human and Peoples Rights (ACHPR),* to influence domestic practices in states. This

[278] Acharya, *ibid* at 112.
[279] Olabisi Delebayo Akinkugbe, *Revisiting the Economic Community of West-African States: A Socio-Legal Analysis* (PHD Thesis: University of Ottawa, 2017) [unpublished].
[280] Obiora Okafor, "The African system on Human and Peoples' Rights, Quasi-constructivism, and the Possibility of Peacebuilding within African states" (2004) 8:4 The International Journal of Human Rights 413.

thesis uses a similar constructivist approach by examining how local actors can engage with the CR2R norm before the ECCJ. Decisions of the ECCJ will not only aid the cause of local popular forces; it will also help to diffuse the CR2R norm beyond the West African sub-region.[281]

The thesis' choice of a norm dynamics theory is influenced by a social constructivist approach. This is because the SRSG, John Ruggie, identifies himself as a social constructivist.[282] His scholarship as a social constructivist influenced the construction of the UNGPs within a "public domain." He describes the public domain as

> ...an institutionalized arena of discourse, contestation, and action organized around the production of global public goods. It is constituted by interactions among non-state actors as well as states... It 'exists' in transnational non-territorial spatial formations, and is anchored in norms and expectations as well as institutional networks and circuits within, across, and beyond states ...[283]

In the business and human rights context, the public domain consists of three main institutional actors—states, multinational corporations, and non-governmental organizations—who try to influence one another.[284] It is important to critically engage with Ruggie's theoretical premise to tease out ways to demonstrate potential African contributions to the internalization of the CR2R norm. It is when Ruggie's model of social constructivism is understood on its terms that scholars can engage with the architectural

[281] Obiora Okafor and Okechukwu Effoduh conducted similar research on the role of local agents to serve as Poor Activist Forces. See Obiora Okafor & Okechukwu Effoduh, "The ECOWAS Court as a (Promising) Resource for Pro-Poor Activist Forces: Sovereign Hurdles, Briany Relays, and 'Flipped Strategic Social Constructivism" in James Gathii ed, *The Performance of Africa's International Courts* (Oxford, UK: Oxford University Press, 2020) 106.
[282] Ruggie, *supra* note 68 at 856, 862. See also Glen Whelan, Jeremy Moon & Marc Orlitzky, "Human Rights, Transnational Corporations and Embedded Liberalism: What Chance Consensus?" (2009) 87:2 Journal of Business Ethics 367 at 372.
[283] Ruggie, *supra* note 68 at 519.
[284] Whelan, Moon & Orlitzky, *supra* note 282 at 373.

and normative design of the UNGPs to improve on it. In sum, it is important to adopt African-focused social constructivism to analyze the CR2R norm.

8.2 Doctrinal Method

Adopting a doctrinal method involves an in-depth analysis of legal doctrines with their development process and legal reasoning. The word doctrine is derived from the Latin word "doctrina" which means "a synthesis of rules, principles, norms, interpretive guidelines and values [that] explains, makes coherent or justifies a segment of the law as part of a larger system of law."[285] A doctrinal method, therefore, involves "analysis of case law, arranging, ordering and systematizing legal propositions and study of legal institutions through legal reasoning or rational deduction."[286] This thesis analyzes case law on the CR2R norm in different jurisdictions to demonstrate how the norm is being recognized by courts at different levels. The aim is to show how courts as local actors in Africa can play a complementary role to court decisions from other jurisdictions, including the United States, the United Kingdom, Canada, and the Netherlands. At first blush, drawing examples from domestic courts to ground analysis in a regional court may be tantamount to comparing apples and oranges. However, considering that the ECCJ can exercise jurisdiction in the same areas of competence as national courts, normative lessons from national courts can serve as a compass for the ECCJ in its effort to assert its role as a CR2R norm promoter in Africa. This doctrinal analysis helps to contribute to the socio-legal theme of this thesis.

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[285] Trischa Mann, ed, *Australian Law Dictionary* (Oxford University Press, 2010) at 197, quoted in Terry Hutchinson & Nigel Duncan, Defining and Describing What We Do: Doctrinal Legal Research" (2012) 17:1 Deakin Law Review 84 at 84.

[286] S.N.Jain, "Doctrinal and Non-Doctrinal Legal Research" in S K Verma & M Afzal Wani, eds, *Legal Research and Methodology* (India: Indian Law Institute, 2006) at 68.

Doctrinal analysis in this thesis is both textual and contextual. Textually, it interprets black letter laws which include statutes and case law. It is contextual because it situates the interpretation of these documents within a larger context of sociology and international relations. This is what Richard Schwartz classifies as "internal" and "external" methods in the study of law.[287] An internal method reflects the viewpoint of a participant in the legal system through a traditional doctrinal study, while an external method uses knowledge in other fields to interpret a document, an exercise that results in a broader interpretation from the original text.[288] This thesis engages in an external study because "…discarding an external outlook in a doctoral thesis would be perceived as fairly short-sighted and would deprive the work of a more ambitious relevance."[289] This thesis uses insights from international relations (constructivism) to understand the nature and implication of judicial and legislative developments in the development of the CR2R norm.

Specifically, the discussion on the sources of law in international law in chapter 2 of this thesis combines internal and external doctrinal methods. First, it adopts an internal doctrinal method to examine the traditional sources of law in international law as stated in *Article 38 of the Statute of the International Court of Justice*.[290] These traditional sources are classified as hard and soft laws, depending on the nature of the obligation that they impose on actors. This thesis, then, adopts an external doctrinal method to propose an

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[287] Richard L Schwartz, "Internal and External Method in the Study of Law" (1992) 11:3 Law and Philosophy 179 at 180.
[288] *Ibid*.
[289] Marie-Luce Paris, "The Comparative Method in Legal Research: The Art of Justifying Choices" in Laura Cahillane & Jennifer Schweppe, eds, *Legal Research Methods: Principles and Practicalities* (Dublin: Clarus Press 2016) at 2.
[290] Article 38 states that: "The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply: (a) International conventions, whether general or particular, establishing rules recognized by the contesting States; (b) International custom, as evidence of a general practice accepted as law; (c) The general principles of law recognized by civilized nations; (d) Subject to the provisions of article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of the rule of law."

interactional approach to international law-making that considers factors that command compliance from actors, notwithstanding the choice of the global governance instrument (hard or soft law). Similarly, chapter 5 of this thesis adopts an internal doctrinal method to examine case law and mandatory human rights due diligence legislation that signify the diffusion of the CR2R norm in different countries. It, then, adopts an external doctrinal method to tease out the broader implication of these developments for local actors in Africa.

8.3 Comparative Method

The comparative method involves the application of the comparative technique to the field of law.[291] Mark Van Hoecke notes that all scholarly research implies comparisons.[292] A comparative method is often used as: (1) instrument of learning and knowledge on the law elsewhere and a better understanding thereof (2) instrument of evolutionary and taxonomic science, (3) contribution to one's own legal system to understand it better (4) harmonization of law.[293] Through a comparative method, this thesis analyzes the present recognition of the CR2R norm by courts. This comparative analysis does not aim to show that a state or regional approach is better than another. Rather, it demonstrates how the CR2R norm is being recognized by courts along the Global North-South divide.[294] The comparative analysis shows how interpretations by national courts in the UK, the Netherlands, Canada, and the United States, as well as the Inter-American Court of Human Rights (IACHR) formally or indirectly promote the CR2 norm. It then

[291] Marie-Luce Paris, *supra* note 289 at 6.
[292] Mark Van Hoecke, "Methodology of Comparative Legal Research" (2015) Law and Method 1 at 3.
[293] Patrick Glenn, "Aims of Comparative Law" in Jan Smits, eds, *Elgar Encyclopedia of Comparative Law* (UK: Edward Elgar Publishing, 2006) at 57-64.
[294] Some of the countries examined include the United Kingdom, United States, Nigeria, and Netherlands. This choice is motivated by court decisions and the prevalence of transnational litigation cases in these jurisdictions.

examines how an African international human rights institution (the ECCJ) can play a complementary role to the efforts of its counterparts in other jurisdictions.

8.4 Interdisciplinary Method

This thesis is a work in socio-legal research because it combines legal and non-legal approaches.[295] Akinkugbe notes that "[a]s a multidisciplinary method, socio-legal approaches focus on the mutually constitutive interaction between law and society."[296] A constitutive interaction occurs when social norms influence the development of law and vice versa. The CR2R is a social norm whose effect is now transcending into law through various approaches, including human rights due diligence policies of corporations, mandatory due diligence legislation, and court decisions. This development shows a constitutive interaction between law and society. Since this thesis examines the continuum between social norms and law, it thematically adopts a socio-legal approach method to ground its analysis.

Similarly, adopting the theoretical approaches (norm dynamics, and localization theory) discussed above necessitates borrowing insights from disciplines such as international relations, law, politics, culture, and sociology.[297] To this end, this thesis draws on interdisciplinary scholarship because "[l]aw, by its very nature, must be interdisciplinary."[298] However, to the extent that my thesis draws from business ethics, law,

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[295] Indeed, it has been noted that "[h]uman rights is a multidisciplinary field in which political science, law, anthropology, sociology and other disciplines intersect to convey and enhance the field's meaning and global understanding." See Aguilar, *supra* note 175 at 127.
[296] Olabisi Akinkugbe, "Reflections on the Value of Socio-Legal Approaches to International Economic Law in Africa" (2021) 22:1 Chicago Journal of International Law 24 at 28.
[297] This thesis explores how these fields of study contribute to how a shared normative understanding can increase the prospect of corporate accountability. See Brunnée & Toope, *supra* note 69.
[298] Alan Dershowitz, "The Interdisciplinary Study of Law: A Dedicatory Note on the Founding of the NILR" (2008) 1 North Western Interdisciplinary Law Review 3 at 3.

and sociology to ground its analysis, it is not oblivious of what Roux calls the danger of incorporation.[299] Roux notes that

> researchers who engage in the typical kind of interdisciplinary research in which legal academics are engaged – socio-legal research – are pulled in two seemingly incompatible directions. On the one hand, they need to satisfy the standards of the legal tradition in which they are working – to be faithful enough to conventionally accepted methods of legal reasoning that their doctrinal arguments carry sufficient weight to be accepted. On the other hand, they need to satisfy the standards of the scholarly literature to which they are contributing, a literature whose standards are in the nature of things policed by scholars from other disciplines. Straddling this divide is very difficult, if not impossible…[300]

This thesis avoids the danger of incorporation because it does not extrapolate or incorporate insights from sociology and ethics fields into doctrinal scholarship. Rather, it borrows insights from these fields to ground another worldview of the CR2R norm—an ethical perspective that is conspicuously lacking since its endorsement by the UNHRC. While the doctrinal scholarship in this thesis focuses on decisions of courts at different levels, insights from sociology help to understand the social purpose and relevance of the CR2R norm. In sum, the theme of this thesis reinforces the notion that "successful interdisciplinarity is not about ignoring or transgressing disciplinary boundaries, but about researching across two or more disciplines while remaining true to their methods and purposes."[301]

9.0 Thesis Limitation/Definition of Terms

It is important to clarify the analytical scope of this thesis. This thesis acknowledges that it is ambitious to talk of a universal African culture. However, it has been noted that

[299] Theunis Robert Roux, "The Incorporation Problem in Interdisciplinary Legal Research: Some Conceptual Issues and a Practical Illustration" (2015) 2 *Erasmus Law Review* 39.
[300] *Ibid* at 60.
[301] *Ibid* at 61.

"[a]lthough African cultures display awesome diversity, they also show remarkable similarities. Community is the cornerstone in African thought and life."[302] In effect, although debates pervade much of the existing literature on Ubuntu and business ethics, this thesis does not engage in the debate. Rather it focuses on the simplistic meaning and virtues of Ubuntu commonly shared in Africa—communalism and respect for human dignity.

Also, the term "local community" or "host community" as used in this thesis generally refers to a group of people who constitute a community at local levels or grass-root levels of government, especially in developing countries.[303] The term is also used interchangeably with host communities. This thesis adopts Aguilar's definition of local communities "as groups or organizations, inclusive and plural, which are based at the level of geographic community and are unified by common needs and interests as articulated in human rights terms."[304] In effect, the term is used to depict the group of people in global governance who are far removed from the global hierarchies of power and decision-making. This thesis does not refer to, or engage in, the complexities of representation within local communities. Rather, it adopts Oche Onazi's simplistic mode of direct participation of all community members in matters that directly affect them.[305] In Onazi's view, individuals, particularly, the poor and vulnerable, must be able to organize

[302] David Lutz, "African Ubuntu Philosophy and Philosophy of Global Management" (2009) 84 Journal of Business Ethics 313 at 313.
[303] See David Szablowski, *Transnational Law and Local Struggles: Mining, Communities and the World Bank (Oregon: Hart Publishing, 2017).*
[304] See Aguilar, *supra* note 175 at 114.
[305] See generally Oche Onazi, *Reframing Public Goods: Human Rights, Community and Governance in The Third World* (PHD Thesis: University of Edinburgh, 2010) [unpublished].

themselves democratically to claim ownership of the processes that determine their human rights.[306]

Similarly, although there are debates about the term "Third World Peoples,"[307] This thesis uses the term in the same way Muni uses it to include nearly all African and Latin American states.[308] However, emerging economies in Latin America, like Brazil, and in Asia, like China, may be excluded from the list because of their economic growth over the years but this does not mean that human rights abuse does not occur in emerging economies. Muller calls countries that do not fall between the categories of Global North and Third World Countries "Global East."[309] Some scholars have even couched a new terminology, "fourth world," used to describe marginalized groups, especially Indigenous Peoples.[310] The Fourth World scholars criticize Third World approaches to international law for their inability to accommodate the interests of Indigenous Peoples. Indigenous Peoples hold spiritual relationships with land, the awareness of ecological disaster, and the social commodities of land, water, and air.[311] However, notwithstanding the differences, a common theme with both Fourth and Third World theories is their representation of

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[306] Onazi, *ibid* at 5.

[307] Some scholars even contest the existence of a "Third World" arguing that it is no longer relevant. See e.g., Mark Berger, "After the Third World?: History, Destiny and the Fate of Third Worldism" (2004) 25 Third World Quarterly 9 at 31.

[308] See Sukh Deo Muni, "The Third World: Concept and Controversy" (1979) 1:3 Third World Quarterly 119.

[309] See generally Martin Muller, "In Search of the Global East: Thinking Between North and South" (2020) 25:3 Geopolitics 734 ("So, the East is inferior, but not inferior enough. It is kind of subaltern, but not really. It is not rich, but neither is it poor. It has some elements of European modernity but lacks others: too different to be included in the North, too European to be included in the South."). See also Jerry Harris, "Emerging Third World Powers: China, India, and Brazil" (2005) 46:3 Race and Class 7.

[310] See Hiroshi Fukurai, "Fourth World Approaches to International Struggles and Quests for Recognition under International Law" (2018) 5:1 Asian Journal of Law and Society 221.

[311] See Amar Bhatia, "The South of the North: Building on Critical Approaches to International Law with Lessons from the Fourth World" (2012) 14 Oregon Review of International Law 131. See also George Manuel & Michael Posluns, *The Fourth World: An Indian Reality* (Minnesota: University of Minnesota Press, 1974) at 11-12.

marginalized peoples in matters that concern them in international law. This is the premise from which this thesis makes its analysis.

10.0 Chapter Summary

The next chapter, chapter 2, examines the literature on the debate whether soft or hard laws are the appropriate instrument of global regulation. It focuses on the manifestation of this debate in the business and human rights context, which is whether the UNGPs (soft law) or the zero-draft treaty (hard law) is the appropriate instrument for ensuring corporate accountability. However, the chapter moves away from the debate and argues that it is important to think about what makes law generate commitment among international law actors rather than focus on the instruments of regulation. In effect, it looks beyond the form of global governance instruments and focuses on the characteristics of international law-making that ensure commitment from actors. Using Brunnée and Toope's interactional account of international law, this chapter proposes a global governance approach that considers the interaction between legal and social norms. The UNGPs adopts an interactional approach because it relies on social and legal norms as standard-setting tools.

To understand the application of norms, chapter 3 examines social constructivism's theory of norms. First, it examines the cycle of norms as postulated by Finnemore and Sikkink. This theory explains how a norm develops and crystalizes to be an internalized or universal norm. However, Finnemore and Sikkink do not explain the factors that cause norms to move from one cycle to another. Riise and Sikkink attempt to fill this gap because they explain how transnational networks contribute to the development of norms in their spiral model theory. They argue that transnational social agents like international organizations and international NGOs (INGOs) contribute to norm adoption from the international to the domestic level. However, they still overlook domestic (local) factors

that influence the adoption or internationalization of norms. Through the works of Amitav Acharya, this chapter explores how conditions in local contexts influence norm diffusion and adoption. Specifically, this thesis examines how the congruence theory as explained by Acharya helps to understand how different domestic (local) actions shape and modify international norms. Drawing from these theories, this thesis examines how the CR2R norm is developing and the potential of local actors/ norms, especially in Africa, to resist or support the CR2R norm through pre-existing local norms.

Chapter 4 presents an alternative epistemic worldview of the CR2R norm. This chapter takes a methodological shift away from UNGPs' discussions on formal governance and institutionalized structures to engage with literature on business ethics, sociology, and grassroots socio-cultural movements. In normative terms, this chapter examines how an Afrocentric (Ubuntu-influenced) interpretation of the CR2R norm can support the CR2R norm in Africa. The choice of an Afrocentric approach is influenced by the argument that transplantation of the narrow formulation of western liberalism cannot adequately respond to the historical reality, political, and socio-economic needs of Africa. The aim is to show how a subsidiary norm (Ubuntu) can support and influence MNCs' engagement with local communities in Africa (African relations) to move from conceptions of "do no harm" to "do good." An Ubuntu analysis further clarifies societal expectations in Africa as prescribed in the CR2R norm. Although this chapter identifies the potential of Ubuntu to support MNCs' positive obligations in the fulfilment of the CR2R norm, it does not provide an exact quantification of those obligations. This question will be the subject of future research. Also, this chapter does not construct a consultative framework for local

community engagement with MNCs as this is already rehearsed in literature.[312] In sum, chapter 4 only localizes the CR2R norm from an African perspective to interpret the CR2R norm in light of Africans' societal expectations from MNCs as exemplified in Ubuntu.

Chapter 5 examines a human rights institution in Africa that can potentially promote the diffusion or internalization of the CR2R norm. Specifically, it examines a sub-regional human rights court in Africa— the Community Court of Justice of the Economic Community of West African States (ECCJ)— and its unique position as a norm entrepreneur to support the diffusion and internalization of the CR2R norm. It proposes that through a purposeful interpretation of international guidance instruments, the ECCJ can influence corporate responsibility in international law. In effect, this chapter proposes a path to localize the judicial interpretation of the CR2R norm in Africa.

Altogether, this thesis fills a gap in the African literature on the CR2R norm. It accentuates the combination and social and legal approaches influenced, and driven, by African perspectives to promote a corporate human rights culture that reflects Africa's socio-cultural and economic realities.

[312] See e.g., Irit Tamir and Diana Kearney, Community Voice in Human Rights Impact Assessment (Washington, Oxfam America, 2015), online: OXFAM<https://s3.amazonaws.com/oxfam-us/www/static/media/files/COHBRA_formatted_07-15_Final.pdf>.

Chapter 2: An Interactional Approach to Law-making for Corporate Responsibility

2.0 Global Governance

The preceding chapter highlighted business and human rights (BHR) global governance issues relating to transnational corporate accountability. John Ruggie aptly summarizes the statement of the problem in the BHR context as "a microcosm of a larger crisis in contemporary governance where there are widening gaps between the scope and impact of economic forces and actors, and the capacity of societies to manage their adverse consequences."[1] Global governance is a phrase that is used to describe attempts to regulate the international system; it has become a prominent concept in the contemporary study and practice of international relations.[2] The phrase itself is easier described than defined because of the ambiguity in the two words—"global" and "governance."[3]

Lawrence Finkelstein notes that global governance "appears virtually to be anything."[4] In an attempt to describe it, he says "[g]lobal governance is doing internationally what governments do at home."[5] This definition is state-centric—it describes global governance in terms of what states do. There is an increasing emergence of other international actors, including non-governmental organizations and multinational

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[1] John Ruggie, *Just Business: Multinational Corporations and Human Rights* (New York: WW Norton, 2013) at XV.

[2] John Clarke & Geoffrey Edwards, "Introduction" in John Clarke & Geoffrey Edwards, eds, *Global Governance in the Twenty-first Century*; Global Issues Series (London, UK: Palgrave Macmillan, 2004) 1 at 2.

[3] The term "global" can may be used for different concepts including international, inter-state, intergovernmental, or transnational. See Klaus Dingwerth & Philip Pattberg, "Global Governance as a Perspective on World Politics" (2006) 12:2 Global Governance 185 at 188. The term "governance" has also been used in a variety of contexts but a common theme that runs within these contexts is that "it denotes a form of social steering that does not necessarily rely on hierarchy and command, as the concept of government implies, but also on processes of self-organisation and horizontal negotiation." See Mathias Koenig-Archibugi, "Global governance" in Jonathan Michie, ed, *The Handbook of Globalisation* (London, UK: Edward Elgar Publishing, 2011) 393 at 394.

[4] Lawrence Finkelstein, "What Is Global Governance?" (1995) 1:3 Global Governance 367 at 368.

[5] *Ibid* at 369.

corporations (MNCs) that, sometimes, are more powerful than states.[6] This thesis adopts Ruggie's definition of global governance as "the systems of authoritative norms, rules, institutions, and practices by means of which any collectivity, from the local to the global, manages its common affairs. [It] is generally defined as an instance of governance in the absence of government."[7] Global governance used in this sense is a verb that indicates a systematic regulation of international relations. International law, through its conventional sources of law—treaties, international customs, general principles of laws, judicial decisions, and the teachings of the most highly qualified publicists of the various nations—is a tool of global governance.[8]

This chapter focuses on how some scholars approach global governance models in the BHR context. It classifies the scholars' models of governance under two rubrics: (1) the international treaty stream, representing traditional international law; and (ii) the soft law stream, representing contemporary emerging practice. Scholars, like David Bilchitz, Daniel Blackburn, and Giorgia Papalia that fall under the treaty rubric, argue that to regulate state and non-state actors in the BHR context, there is need for an international treaty that sets out the obligations of each international actor, particularly MNCs. Scholars,

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[6] See Karsten Nowrot, "Global Governance and International Law" (Paper presented at the 7th International Human Rights Conference, "An Asia-Europe Dialogue on Human Rights and International Law – The International Criminal Court: A New Era for Justice?" organized by the Friedrich-Ebert-Foundation, Manila/Philippines, 11-12 October 2004) [unpublished]. ("The global level, governance has been viewed primarily as intergovernmental relationships, but it must now be understood as also involving non-governmental organizations (NGOs), citizens' movements, multinational corporations and the global capital market."

[7] John Ruggie, "Global Governance and 'New Governance Theory': Lessons from Business and Human Rights" (2014) 20 Global Governance 5 at 5.

[8] See *Statute of the International Court of Justice*, 24 October 1945, 993 UNTS 33, Art *38* (1). See also generally Walter Baber & Robert Bartlett, "The Role of International Law in Global governance" in John Dryzek, Richard Norgaard, & David Schlosberg, eds, *The Oxford Handbook of Climate Change and Society* (New York: Oxford University Press, 2011) 653; Charlotte Ku, *Global Governance and the Changing Face of International Law* (New Haven: The Academic Council on the United Nations System, 2001) at 8 ("[i]n its most basic form, international law is recognized as a body of rules and practices that regulates state behavior in the conduct of international relations").

like John Ruggie, Tori Kirkebo, and Pierre Thielbörger that fall under the soft law rubric, argue that in view of the history of states' non-implementation of international human rights treaties and the political nuances that engulf the negotiation, signing, ratification, and implementation of treaties, a soft law that sets international standards for international actors is the appropriate global governance instrument.

However, this chapter argues that there are inherent weaknesses in an exclusive soft or hard law approach. This is because, as John Ruggie rightly noted, there is no silver bullet solution to corporate accountability problems. This chapter invites us to look at what makes law generate commitment among international law actors, rather than on the instruments of regulation. In other words, it invites us to look beyond the form of global governance instruments and focus on the process of international law-making that elicits compliance from actors. It argues that an inclusive process of international law-making that promotes an exchange of norms and ideas among state and non-state actors is likely to elicit compliance from actors regardless of the form of the instrument.

The pursuit of this theme is divided into three parts as follows: Part I examines the use of hard law—treaties and customary international law—as some of the traditional sources of international law and how the term "soft law"—rules, standards, codes—emerged because of the structural inadequacies of international law to respond to the increasing complexity of state relations after the second world war. It examines the strength and weaknesses of treaty as hard and soft law. It notes that notwithstanding the increasing adoption of soft laws in international law, some scholars still oppose its use, labeling it as normatively confusing and functionally redundant. Part II contextualizes the debate between the use of hard and soft law in the BHR context. The debate focuses on the relative strength and weaknesses of the business and human rights treaty proposal (zero draft) and

the UNGPs. Scholars are divided on whether the zero draft (a proposal for hard law) or UNGPs (soft law) can hold MNCs accountable and give justice to victims of corporate human rights abuse.[9] Although these arguments arose during the mandate of the SRSG as discussed in chapter 1, Ecuador's sponsorship of a zero Draft Treaty, which is being revised by an intergovernmental working group (IGWG) at the time of writing this thesis, keeps the debate alive.[10] After examining the strength and weaknesses of both sides of the debate, Part 2 concludes that a global governance regime that takes an exclusive hard or soft law approach will be deficient. Contrary to the existing soft and hard law dichotomy, Part 3 explores an interactional approach that considers the normative underpinning of hard and soft laws. It argues that since social and legal norms are foundations of hard and soft laws, an understanding of the interactions of these norms is necessary to move beyond the soft and hard law dichotomy and to focus on the requirements of international law-making that may generate compliance from actors. Part 3 concludes that it is important to examine an interactional approach through a Third World Approach to International Law (TWAIL) lens because this thesis is concerned about the participation of Third World Peoples in matters that directly affect them in international law. In effect, an interactional approach informed by a TWAIL perspective is useful to examine whether it is possible for norms and institutions in Africa to interact with the UNGPs' norm of corporate responsibility to respect human rights (CR2R norm).

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[9] See Zero Draft Bill, "Legally Binding Instrument to Regulate, in International Human Rights Law, The Activities of Transnational Corporations and other Business Enterprises" (16th July 2018), online: OHCHR<www.ohchr.org/Documents/HRBodies/HRCouncil/WGTransCorp/Session3/DraftLBI.pdf>.

[10] See the OHCHR website, online:<www.ohchr.org/en/hrbodies/hrc/wgtranscorp/pages/igwgontnc.aspx>; OEIGWG Chairmanship Second Revised Draft, Legally Binding Instrument to Regulate, in International Human Rights Law, The Activities of Transnational Corporations and other Business Enterprises (6th August 2020), online: <www.ohchr.org/Documents/HRBodies/HRCouncil/WGTransCorp/Session6/OEIGWG_Chair-Rapporteur_second_revised_draft_LBI_on_TNCs_and_OBEs_with_respect_to_Human_Rights.pdf>.

Part I

2.1 Hard Law

Hard law is a traditional instrument adopted by states in a form that suggests the existence of legal obligation.[11] Hard law, often in the form of treaties in international law, is negotiated by states. This is followed by individual ratification and implementation of the treaty by each state that becomes a party when the treaty enters into force. Treaties are recognized by Article 38 of the *Statute of the International Court of Justice* as one of the sources of international law.[12] Abbott and Snidal define hard laws as "legally binding obligations that are precise (or can be made precise through adjudication or the issuance of detailed regulations) and that delegate authority for interpreting and implementing the law."[13] In effect, hard law exhibits characteristics of binding obligations, precision, and implementation/interpretation by independent bodies, including international courts and tribunals. Abbott and Snidal argue that hard laws are desirable for ordering international relations because they reduce transactional costs, strengthen the commitments of international actors, expand available political strategies for actors, and ensure that all gaps in the field are covered (complete contracting).[14] They see international hard law in the form of covenants and contracts that set out the duties and obligations of each state signatory. Notwithstanding its advantages, they note that it is difficult to negotiate and

[11] See Arnold Pronto, "Understanding the Hard/Soft Law Distinction in International Law" (2015) 48:4 Vanderbilt Journal of International Law 941.
[12] Article 38 of the ICJ statute states that: "[t]he Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply: (a) international conventions, whether general or particular, establishing rules recognized by the contesting States; (b) international custom, as evidence of a general practice accepted as law; (c) The general principles of law recognized by civilized nations; (d) Subject to the provisions of article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of the rule of law."
[13] Kenneth Abbott & Duncan Snidal, "Hard and Soft Law in International Governance" (2000) 45:3 International Organization 421 at 421.
[14] *Ibid* at 422.

implement a treaty because of the political and economic interests that inform and influence treaty-making.[15] States also find it difficult to reach consensus on treaty texts because of power differentials among major actors, inability to craft treaty provisions to cover uncontemplated future circumstances, sovereignty costs inherent in some state concessions, differences in time horizons, and divergence among national preferences.[16] Indeed, it has been argued that hard law is unsuitable for dynamic and fast-changing areas of law, such as international economic issues, because treaties are slow to conclude, slow to come into force, and bind only parties to them.[17] However, it should be noted that in some cases, treaties may create binding or non-binding commitments. For example, the Paris Agreement in the international climate regime, although adopted as a treaty, contains both binding and non-binding provisions.

Treaties are not the only form of hard law. Customary international law (CIL), described as the "oldest and original source of law,"[18] has also been identified as a form of hard law.[19] CIL is regarded as "a form of tacit agreement, by which States, in behaving in certain ways towards each other, agree to guide their future conduct by it and be legally bound by it."[20] CIL has two constitutive elements— consistent state practice and *opinio*

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[15] Abbott & Snidal, *ibid* at 436. For example, the definition of the word "gender" was fiercely contested during the negotiation of the Rome Statute of the International Criminal Court. See Valerie Oosterveld, "The Definition of 'Gender' in the Rome Statute of the International Criminal Court: A Step Forward or Back for International Criminal Justice?" (2005) 18 Harvard Human Rights Journal 55; Valerie Oosterveld, "Constructive Ambiguity and the Meaning of "Gender" for the International Criminal Court" (2014) 16:4 International Feminist Journal of Politics 563.

[16] Abbott & Snidal, *supra* note 13.

[17] Gunther Handl et al, "A Hard Look at Soft Law" (1988) 82 Proceedings of the Annual Meeting (American Society of International Law, April 20-23) 371 at 389.

[18] Philip Alston & Ryan Goodman, *International Human Rights, 2nd ed* (Oxford: Oxford University Press, 2013) at 72.

[19] Laurence Helfer & Ingrid Wuerth, "Customary International Law: An Instrument Choice Perspective" (2016) 37:4 Michigan Journal of International Law 563 at 564.

[20] André da Rocha Ferreira et al, "Formation and Evidence of Customary International Law" (2013) 1 UFRGS Model United Nations Journal 182 at 186.

juris (a psychological feeling among states that a consistent practice is legally binding).[21] The status of a custom in international law is decided by these constitutive elements. However, CIL is often overlooked as hard law because treaties have codified many legal rules that were previously classified as customary rules.[22] For example, it has been noted that customary rules on torture, slavery, and genocide are essential components of treaties regulating these issues.[23] Similarly, customs are discarded as irrelevant because their application is plagued by doctrinal confusion, and because they lack the precision of statutory text.[24]

Three characteristics distinguish CIL from treaties and soft law. First, CIL is universal in its application. Article 38 of the ICJ statute describes it as "general practice accepted as law."[25] Unlike treaties and soft law, the formation of which states may choose to participate or refrain from participating in, in principle, a custom is formed by the participation of all states, even if stronger states have more influence in its formation than weaker ones.[26] As well, though the application of treaties is measured by the number of state ratifications, and the widespread influence of soft law is measured by the adoption of agreements and codes among state and non-state actors, the status of CIL is not measured

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[21] See Roozbeh (Rudy) Baker, "Customary International Law in the 21st Century: Old Challenges and New Debates" (2010) 2:1 The European Journal of International Law 173.
[22] See Joel Trachtman, The Growing Obsolescence of Customary International Law" in Curtis Bradley, ed, *Custom's Future: International Law in a Changing World* (Cambridge, UK: Cambridge University Press, 2016) at 172.
[23] *Convention on the Prevention and Punishment of the Crime of Genocide*, 9 December 1948, 78 UNTS 277 (entered into force 12 January 1951), Art 9-14 (entered into force 23 March 1976) [ICCPR]; *United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, 9 December 1975, 1465, UNTS 85 (entered into force 26 June 1987).
[24] See Helfer & Wuerth, *supra* note 19 at 564; Timothy Meyer, "Codifying Custom" (2012) 160:4 University Pennsylvania Law Review 995 at 1000.
[25] Article 38 of the ICJ, *supra* note 12. See also the Report of the International Law Commission's Study of Customary International Law, Sixty-fifth session of the UN General Assembly (6 May–7 June and 8 July–9 August 2013).
[26] See generally Mark Villiger, *Customary International Law and Treaties: A Manual on the Theory and Practice of the Interrelation of Sources*, 2nd ed (Leiden: Martinus Nijhoff Publishers, 1997).

by the active participation of actors because it is presumed that states have actively acquiesced in its formation.[27] The universalist nature of CIL was enunciated in *Nevsun Resources Ltd v Araya* where the Supreme Court of Canada held that absent conflicting legislation, CIL, which is referred to as the common law of the international legal system, automatically forms part of Canadian law.[28] Consequently, a civil action seeking to hold Canadian companies liable for violations of customary international law committed outside of Canada is a justiceable cause.

Second, a striking characteristic of CIL that distinguishes it from treaties and soft law is that custom is unwritten.[29] Treaties and soft law satisfy the requirement of codification as proof of their existence. Often, the texts of treaties and soft law are part of the evidence of state practice or *opinio juris* which then becomes an expression of custom.[30] This is because a customary rule is not sourced from a single piece of an authoritative document; it is inferred through a combination of different national and international sources including, treaties, soft law, official publications, historical records, and newspaper articles.[31] In effect, unlike treaties and soft law, CIL is not a procedure for creating norms, but an expression of a pre-existing legal rule.[32] For example, Article 5 of the Universal Declaration of Human Rights 1948 states that "[n]o one shall be subjected to torture or to

[27] Helfer & Wuerth *supra* note 19 at 570.
[28] *Nevsun Resources Ltd v Araya* [2020] SCC 5 at para 74.
[29] Roy Mersky & Jonathan Pratter, "A Comment on the Ways and Means of Re-searching Customary International Law: A Half-Century After the International Law Commission's Work" (1996) 24 International Journal of Legal Information 302 at 303.
[30] Helfer & Wuerth *supra* note 19 at 574.
[31] *Ibid*. See also Malcolm Shaw, *International Law*, 5th ed (Cambridge, UK: Cambridge University Press, 2003) at 78.
[32] Ferreira et al, *supra* note 20 at 186.

cruel, inhuman or degrading treatment or punishment." This Article is widely regarded as expressing customary international law.[33]

Third, CIL is not negotiated in the manner that treaties and soft law are negotiated.[34] In other words, customs are not preceded by formal discussion or exchange of views to reach an agreement.[35] They are formulated through an unstructured, undefined, and slow process of state practice and acquiescence (*opinio juris*). This is why some scholars refer to CIL law-making as "informal, haphazard, not deliberate, even partly unintentional and fortuitous".[36] Due to its non-negotiated nature, CIL is usually framed at a high level of generality, unlike treaties and soft law principles whose content are fleshed out through carefully delineated contours and exceptions during formal negotiations and meetings.[37]

In sum, the distinguishing features of CIL help us to understand that CIL does not arise from conscious efforts at rulemaking, unlike treaties and soft law (which are discussed together next). Customary rules are binding, expressed through constant *state practice and opinio juris,* and are evidenced by written treaty instruments, soft law, and judicial decisions, like the *Nevsum* case referenced above. It is important to note that whenever CIL is identified and applied, it usually imposes legal obligations on either state or non-state actors.[38]

2.2 Soft Law

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[33] *Torture in International Law, A Guide to Jurisprudence* (Note Jointly published by the Association for the Prevention of Torture (APT) and the Center for Justice and International Law (CEJIL) Geneva, 2008) at 6.
[34] Helfer & Wuerth *supra* note 19 at 575.
[35] Curtis Bradley & Mitu Gulati, "Withdrawing from International Custom" (2010) 120 Yale Law Journal 202 at 204 ("[u]nlike treaties, the rules of CIL do not arise from express negotiation, and they do not require any domestic act of ratification to become binding").
[36] Louis Henkin, *How Nations Behave: Law and Foreign Policy*, 2nd ed (New York: Columbia University Press, 1979) at 34.
[37] Helfer & Wuerth *supra* note 19 at 576.
[38] See Agata Klechzkowska, "Armed Non-state Actors and Customary International Law" in James Summers & Alex Gough, eds, *Non-state Actors and International Obligations: Creation, Evolution and Enforcement* (Netherlands: Nijhoff Brill, 2018) 1.

Soft law is not easy to define for reason of disagreements over its legal character and effects.[39] However, it has been described as consisting of non-binding norms that govern international relations, and are codified in instruments like codes, declarations, agreements, rules, and principles.[40] Specifically, soft law refers to "rules (prescribing conduct or otherwise establishing standards) that are in the process of becoming, though may not ultimately become, binding rules of international law, in the form of any of the established sources of international law—customary law, general principles of law, or as an authentic (binding) interpretation of a rule of treaty law."[41] Pierre-Marie Dupuy notes that soft law is a "troublemaker because it is either not yet or not only law."[42] Jan Klabbers also notes that the term "soft law" is used to denote everything that falls short of being hard law.[43] However, Christine Chinkin adopts a content-oriented definition because she distinguishes hard law from soft law based on the obligatory implications of their provisions—while the provisions of hard law are enforceable, soft law provisions are not

[39] See Malgosia Fitzmaurice, "International Protection of the Environment" (2001) vol 293 Recuel des Cours 100 ("soft law is one of these phenomena of international law which puzzle international lawyers and leave disagreement as to their legal character and their legal effects"). John Cerone, "A Taxonomy of Soft Law" in Stéphanie Lagoutte, Thomas Gammeltoft-Hansen & John Cerone, eds, *Tracing the Roles of Soft Law in Human Rights* (Oxford: Oxford University Press, 2016) at 15 ([e]xisting definitions of the term soft law are varied, inconsistent, and at times incoherent from the perspective of international law").

[40] See Dinah Shelton, "Introduction" in Dinah Shelton, ed, *Commitment and Compliance: The Role of Non-binding Norms in the International Legal System* (Oxford: Oxford University Press, 2000) at 10. See also Henry Gabriel, "The Advantages of Soft Law in International Commercial Law: The Role of UNIDROIT, UNCITRAL, and the Hague Conference" (2009) 34:3 Brooklyn Journal of International Law 655 at 658-659.

[41] Thomas Gammeltoft-Hansen, Stéphanie Lagoutte, & John Cerone, "Introduction" in Stéphanie Lagoutte,Thomas Gammeltoft-Hansen, & John Cerone, eds, *Tracing the Roles of Soft Law in Human Rights* (Oxford: Oxford University Press, 2016) 1 at 5.

[42] Pierre-Marie Dupuy, "Soft Law and the International Law of the Environment" (1990) 12:2 Michigan Journal of International Law 420 at 420. See also Tadeusz Gruchalla-Wesierski, "A Framework for Understanding "Soft Law" (1985) 30 McGill Law Journal 37 (he describes soft laws as "vague unenforceable legal norms that create expectations in international law behaviour").

[43] Jan Klabbers, "The Redundancy of Soft Laws" (1996) 65:2 Nordic Journal of International Law 167 at 168.

enforceable.[44] In effect, she argues that the decisive factor that distinguishes hard from soft law is the nature and precision of the behaviour requested or expected by a norm—if it is non-binding, the norm is soft law.[45] This thesis agrees with Chinkin's definition because it recognizes that the hardness or softness of a rule of law or principle of law depends on the obligatory implications of the conduct expected from state and non-state actors to whom it is directed.

The concept of soft law arose from the structural inadequacies of international law by way of responses to the increasing complexity of state relations after the 2nd world war.[46] This became inevitable because of the emergence of non-state actors (NGOs and MNCs), international organizations, including the United Nations, and the increasing scope of global issues that need international cooperation to deal with.[47] Essentially, soft law is a product of the descriptive normative activities being carried out outside of the regulatory ambit of the traditional sources of international law as set out in Article 38 of the *Statute of the International Court of Justice*.[48] Fabián Castañeda notes that soft laws are "…the result of reality modelling international law, of international practice modelling the

[44] Christine Mary Chinkin, "The Challenge of Soft Law: Development and Change in International Law" (1989) 38:4 The International and Comparative Law Quarterly 850 at 851 (she defines soft laws as [i]nstruments ranging from treaties, but which include only soft obligations (legal soft law), to non —binding or voluntary resolutions and codes of conduct formulated and accepted by international and regional organizations (non-legal soft law), to statements prepared by individuals in a non— governmental capacity, but which purport to lay dawn international principles"). For example, Pillar 1 of the UNGPs that restates states' obligations to protect human rights, which is already contained in international law treaties, is a hard law, although embedded in a soft law instrument.

[45] *Ibid*.

[46] Ilhami Alkan Olsson, "Four Competing Approaches to International Soft Law" (2015) Scandinavian Studies in Law 178 at 179.

[47] *Ibid*; Chinkin, *supra* note 44 at 866.

[48] However, this does not make them illegitimate or less than a source of law in contemporary times. See Patricia Birnie & Alan Boyle, *International Law and the environment*, 2nd ed (Oxford, Oxford University Press, 2002) at 25 ("these instruments are clearly not law in the sense used by that article but nonetheless they do not lack all authority").

sources!"[49] This modelling, as Chinkin argues, causes "normative confusion" and uncertainty,[50] though she accepts that the emergence of soft law is an "inevitable consequence of unresolved pressure for change in international law."[51]

Soft law is increasingly attractive to international actors, scholars, and activists for different reasons.[52] For example, they reduce the transactional and political costs associated with treaty negotiation, as well as provide a framework within which international actors can adopt flexible arrangements as circumstances change over time.[53] Hartmut Hillgenberg notes that states adopt soft laws because of the need for mutual consensus building among international actors; the need to stimulate development which is still in progress; the need to coordinate national legislation; and the concern that a hard law may fail in a specific issue area, resulting in straining or overburdening already fragile international relations.[54] Other reasons include the need for simpler procedures compared to treaty conferences associated with hard laws, the ability to include parties (NGOs, MNCs) that are not recognized to vote on treaties in international law, and avoidance of cumbersome processes in cases of treaty amendments or subsequent national legislation.[55]

In the context of international human rights law (IHRL), Stéphanie Lagoutte et al., argue that the introduction of soft law has helped to develop international law and filled

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[49] Fabián Augusto Cárdenas Castañeda, "A Call for Rethinking the Sources of International Law: Soft Law and the Other Side of the Coin" (2013) 8 Mexicano de Derecho Internacional 355 at 369.
[50] Chinkin, *supra* note 44 at 866.
[51] *Ibid*.
[52] See Alan Boyle, "Soft Law in International Law- Making" in Malcolm Evans, ed, *International Law*, 5th ed, (Oxford: Oxford University Press, 2018) at 119. See also Daniel Thürer, "Soft Law" (2009), online: Max Planck Foundation for International Peace and the Rule of Law<http://docenti.unimc.it/paolo.palchetti/teaching/2017/17311/files/soft-law-1>.
[53] See Charles Lipson, "Why Are Some International Agreements Informal?" (1991) 45 International Organization 495.
[54] Hartmut Hillgenberg, "A Fresh Look at Soft Law" (1999) 10:3 EJIL 499; Shelton, *supra* note 40 at 10.
[55] Hillgenberg, *ibid*.

the vacuum where there are decreasing hard laws to regulate emerging issues.[56] Soft law performs two functions in IHRL: it is norm-filling and norm-creating.[57] Soft laws are norm filling when they serve as interpretative tools for existing hard laws because they create a common understanding of the existing rules.[58] Second, soft laws are norm-creating in cases where there are no existing hard laws or binding international standards. In this sense, soft laws pave the way for the creation of hard law or even coalesce into binding standards through a process called norm cascade.[59]

As shown in chapter 1, the history of the UNGPs demonstrates how human rights standards can play a pivotal role in forging consensus when it is difficult for states and non-state actors to agree on the content of hard law. The role of soft law in consensus building is particularly important because of the emerging global non-state actors in international human rights law, including NGOs, human rights activists, business associations, and MNCs. Therefore, soft law is important to galvanize the views of those whose voices would otherwise be hidden in the formation of hard law. In effect, soft law enhances the potential to democratize international human rights law. This thesis uses the UNGPs as an example of soft law that has the potential to generate policy convergence to align states and non-states actors' divergent interests.

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[56] See generally Stéphanie Lagoutte, Thomas Gammeltoft-Hansen & John Cerone, eds, *Tracing the Roles of Soft Law in Human Rights* (Oxford: Oxford University Press, 2016).
[57] *Ibid* at 6.
[58] *Ibid* at 6-7. This is one of objectives that the SRSG sought to achieve with the UNGPs framework. See John Ruggie, "Business and Human Rights: The Evolving Agenda" (2007) 101:4 The American Journal of International Law 819 at 838.
[59] Lagoutte, Gammeltoft-Hansen & Cerone, *supra* note 56 at 7.

Soft law, especially in relation to human rights, can also serve as a decolonizing tool for Third World Peoples.[60] This is because it is usually framed in generic and vague terms. Although this is a criticism of soft law,[61] it also has its advantage. Soft law's vagueness leaves room for its adaptability for future developments and contextual interpretation.[62] Its vague and open-ended contents present an opportunity for scholars, states, and NGOs to re-interpret it in a way to address the present and future normative events. This feature could lend support for the re-interpretation of international law for the benefit of Third World Peoples. Although the goal of re-interpreting international law for some Third World scholars is examined in more detail later in this chapter, it suffices to point out here that soft law lends itself to such re-interpretation.

However, not all scholars believe in the necessity and utility of soft law in global governance. Chris Ingelse argues that soft laws weaken the global governance system because of their unclear borderline with hard laws.[63] He concludes that soft law is not international law because the characteristics of soft laws can be included or excluded from international law.[64] Others argue that soft laws are unsuitable for some specific areas of international law. For example, Alberto Székely argues that instruments, especially ones relating to environmental law, that contains "supposedly agreed 'rules' of so-called 'soft law,' which are so deprived of any mandatory or imperative language, and of any reciprocal

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[60] Tatiana Cardoso Squeff, "Overcoming the "Coloniality of Doing" in International Law: Soft Law as a Decolonial Tool" (2021) 17:2 Revista Direito GV 1 at 17-23; Hikmat Salem Nasser, *Sources and Norms of International law: a Study on Soft Law*, 2nd ed (São Paulo, Atlas, 2006).

[61] See Opeoluwa Adetoro Badaru, "Examining the Utility of Third World Approaches to International Law for International Human Rights Law" (2008) 10 International Community Law Review 379 at 384; Makau Mutua, *Human Rights Standards: Hegemony, Law, and Politics* (New York: State University of New York Press, 2016) at 124, 126.

[62] See Squeff, *supra* note 60 at 17.

[63] See Chris Ingelse, "Soft law?" (1993) 20 Polish Yearbook of International Law 75.

[64] *Ibid* at 79 ("[t]here should either be law or non-law; law is not soft. It would be a contradiction *in terminis*"). See also Lazlo Blutman, "In the Trap of a Legal Metaphor: International Soft Law" (2010) 59:3 The International and Comparative Law Quarterly 605.

rights and obligations… could hardly be recognized as rules of international law at all."[65] Székely is concerned that the growing influence of soft laws in global governance is reversing the long-tradition of the use of hard laws.[66] Specifically, Székely advances the following arguments against the adoption of soft laws: (1) soft laws lack the requisite characteristics of international normativity, (2) usually the softness of soft law instruments corresponds with the softness of its contents, (3) it results in creating a grey area between law and non-binding agreements, (4) it is expressed in vague, imprecise, and uncompelling language which blurs the distinction between legal and non-legal norms; (5) although it allows international actors to adopt a provision unanimously, they are usually not interpreted unanimously, and they weaken the willingness of states to pursue hard law or to observe it.[67]

In terms of compliance with soft laws, it is argued that the risk of reputational damage to non-adherent international actors impels them to comply with soft laws—this is characteristically described as "naming" and "shaming."[68] However, Anthony D'Amato argues that soft law non-adherents sometimes deem non-compliance to be cost-effective, as the benefits accruing from non-compliance may well overweigh the reputational

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[65] Alberto Székely, "Non-binding Commitments: A Commentary on the Softening of International Law Evidenced in the Environmental Field" in International Law Commission, ed, *International Law on the Eve of the 21st Century — Views from the International Law Commission* (New York: United Nations, 1997) 173 at 176. See also Marianna Naicker, *The Use of Soft Law in the International Legal System in the Context of Global Governance* (LLM Thesis, University of Pretoria, 2013) [unpublished] at 37. (She argues that soft laws may be more disruptive than helpful where public interests are affected).

[66] Székely *ibid* at 194.

[67] *Ibid* at 193-194. Székely concludes that "soft law, in its current international version, is not at all equivalent to a proposition de lege ferenda, simply because its objective is not to indicate what the law should be but, rather, to prevent the law from taking shape altogether." See also Prosper Weil, "Toward Relative Normativity in International Law? (1983) 77:3 The American Journal of International Law 413. But see Richard Reeve Baxter, "International Law in 'Her Infinite Variety" (1980) 29:4 The International and Comparative Law Quarterly 549 (he argues that soft law is one of the varieties of international law).

[68] See generally Behnam Taebi & Azar Safari, "On Effectiveness and Legitimacy of 'Shaming' as a Strategy for Combatting Climate Change" (2017) 23:5 Science and Engineering Ethics 1289.

damage.[69] Jean d'Aspremont also argues that soft law protagonists are "opportunists" pushing non-treaty options in international law to carve a career for themselves at the risk of destroying the structures of international law.[70] Similarly, feminist scholars criticize the use of soft law in global governance because soft law has the potential to marginalize the interests of women in cases where states are unwilling to commit to obligations that promote those interests.[71] Indeed, it has been noted that soft law is a double-edged sword that powerful states use to avoid obligations perceived as detrimental to their global economic interests, and to strengthen their positions by undermining the strategy of weaker states for strict commitments.[72] Summarizing some of the arguments against the adoption of soft law, Jan Klabbers concludes that

> [t]he soft law thesis rests on shaky presumptions and finds but meagre support in both state practice and judicial practice. The soft law thesis encounters problems in cases of collision. Its most sophisticated theoretical justification falters on several counts. And it is not even necessary to resort to the soft law thesis to do justice to political considerations. Isn't it about time to discard the thesis altogether and proclaim the redundancy of soft law?[73]

Notwithstanding the arguments against the adoption of soft laws in global governance, this thesis argues that soft law, especially in international human rights law, can play a complementary role to hard law. Therefore, both hard and soft laws contain normative elements that shape the behaviour of actors towards specific conduct, which

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[69] Anthony D'Amato, "Softness in International Law: A Self-Serving Quest for New Legal Materials: A Reply to Jean d'Aspremont" (2009) 20:3 The European Journal of International Law 897 at 902.
[70] See generally Jean d'Aspremont, "Softness in International Law: A Self-Serving Quest for New Legal Materials" (2008) 19:5 The European Journal of International Law 1075. See also D'Amato, *ibid* at 910.
[71] See Hilary Charlesworth & Christine Chinkin, *The Boundaries of International Law: A Feminist Analysis* (Manchester: Manchester University Press, 2000) at 66 ("…[m]any of the issues that concern women thus suffer a double marginalisation in terms of traditional international law making: they are seen as the 'soft issues of human rights and are developed through 'soft' modalities of law-making that allows states to appear to accept such principles while minimising their legal commitments").
[72] Ilhami Alkan Olsson, *supra* note 46 at 194.
[73] Klabbers, *supra* note 43 at 182.

means that hard and soft laws can be used as alternatives, complements, and antagonists.[74] This thesis does not advocate for the hard law and soft law divide, because "the choice between hard law and soft law is not a binary one."[75] The strength and weaknesses of both sides make it difficult to choose one side over the other. However, it is possible to use both soft and hard law as part of a continuum in a global governance framework. Since hard and soft laws contain normative elements,[76] it is safe to conclude that soft laws, although still viewed with skepticism in some quarters, are now part of a continuum in a global governance structure.[77]

The next part contextualizes the hard and soft law divide by examining the debate on the appropriate global governance instrument in the BHR context. Although the discussion in the next section is similar to the traditional debate on hard and soft law, arguments in the BHR context are slightly different because of the nuances of IHRL, including (1) the longstanding (debatable) position that MNCs are not subjects of

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[74] Gregory Schaffer & Mark Pollack, "Hard vs Soft Law: Alternatives, Complements and Antagonists in International Governance" (2010) 94 Minnesota Law Review 706 ("the choice between hard law and soft law is not a binary one"). See also Patrick Low, *Hard Law and 'Soft Law: Options for Fostering International Cooperation* (Geneva: International Centre for Trade and Sustainable Development (ICTSD) and World Economic Forum 2015), online:<https://e15initiative.org/publications/hard-law-and-soft-law-options-for-fostering-international-cooperation/>. Abbott and Snidal conclude that "[s]oft law is valuable on its own, not just as a stepping-stone to hard law. Soft law provides a basis for efficient international 'contracts,' and it helps create normative 'covenants' and discourses that can reshape international politics." See Abbott & Snidal, *supra* note 13 at 456.

[75] See Schaffer & Pollack, *ibid* at 706.

[76] Indeed, Prosper Weil argues that international relations constitute an aggregate of prescriptive, prohibitive, and permissive norms that creates a normative order within which international actors act. He concludes that whether a rule is 'hard' or 'soft' does not affect its normative character. See Weil, *supra* note 67 at 414.

[77] Hema Nadarajah, *Soft Law and International Relations: The Arctic, Outer Space, And Climate Change* (PHD Thesis, University of British Columbia, 2020) [unpublished] at iv. She argues that soft law continue to be relevant in the 21st century because of its relative importance which are: "(1) shifting global politics arising from an increasing diversity and influence of states and non-state actors; (2) coordination despite mutual suspicion; (3) the desire for states to paper over differences; (4) a desire to avoid constitutional constraints domestically; (5) the promotion of epistemic communities; (6) a desire to be seen as doing something; and (7) the gradual crystallization of harder law."

international law;[78] and (2) the existence of a policy guidance document (UNGPs) that combines established state treaty-obligations with voluntary standards on corporate conduct meant to complement traditional states' obligation to protect human rights.[79] The question, then, is whether the UNGPs, especially Pillar II on corporate responsibility, which is couched as soft law, should be the subject of treaty negotiation to secure commitment from states and non-state actors.[80] The next part examines how scholars are tackling this question amidst ongoing treaty negotiation for a business and human rights treaty.

Part II

2.3 Soft versus Hard Law? — Contextualizing the Business and Human Rights Debate

In 2014, the UN Human Rights Council adopted a resolution sponsored by Ecuador, South Africa, Bolivia, Cuba, and Venezuela to draft a business and human rights treaty.[81] The Council established an open-ended intergovernmental working group (IGWG), chaired by Ecuador, with the mandate to elaborate an international legally binding instrument on transnational corporations and other business enterprises with respect to

[78] See Emeka Duruigbo, "Corporate Accountability and Liability for International Human Rights Abuses: Recent Changes and Recurring Challenges" (2008) 6:2 Northwestern Journal of International Human Rights 222.

[79] See Stéphanie Lagoutte, "The UN Guiding Principles on Business and Human Rights: A Confusing 'Smart Mix' of Soft and Hard International Law" in Stéphanie Lagoutte,Thomas Gammeltoft-Hansen, & John Cerone, eds, *Tracing the Roles of Soft Law in Human Rights* (Oxford: Oxford University Press, 2016).

[80] It is possible that the corporate responsibility to respect human rights norm could grow overtime into customary international law developed by state and corporate practices and *opinio juris*. See Kristen Stefanik, "Rise of the Corporation and Corporate Social Responsibility: The Case for Corporate Customary International Law" (2016) 54 The Canadian Yearbook of International Law 276 (She argues that corporate social responsibility can develop as customary international law, just like how state practice and *opinio juris* influence the development of customary international law).

[81] United Nations Human Rights Council, Elaboration of an international legally binding instrument on transnational corporations and other business enterprises with respect to human rights, Resolution UN Doc A/HRC/26/L.22/Rev 1 (25 June 2014), online: United Nations<https://documents-dds-ny.un.org/doc/UNDOC/LTD/G14/064/48/PDF/G1406448.pdf?OpenElement>.

human rights. In July 2018, the IGWG presented the zero draft treaty and invited stakeholders to make comments and provide input.[82] The zero draft treaty has been revised thrice; the latest draft was published in August 2021.[83] Article 8(3) of the draft proposal stands out because it addresses the legal accountability of MNCs and the duties of states. It provides that

> [s]tate Parties shall adopt legal and other measures necessary to ensure that their domestic jurisdiction provides for effective, proportionate, and dissuasive criminal, civil and/or administrative sanctions where legal or natural persons conducting business activities have caused or contributed to human rights abuses.[84]

The content of the zero draft treaty has attracted some arguments, as well as the preliminary question whether a treaty is the most appropriate regulatory instrument for BHR issues in the first place.[85] The debate whether the zero draft treaty is necessary is an offshoot of the pre-2011 mandate of Ruggie.[86]

This thesis focuses on the form of the zero draft as it relates to the debate between hard and soft law approaches to corporate accountability, an issue that continues to animate

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[82] See Zero Draft Bill, "Legally Binding Instrument to Regulate, in International Human Rights Law, The Activities of Transnational Corporations and other Business Enterprises" (16th July 2018), online: OHCHR <www.ohchr.org/Documents/HRBodies/HRCouncil/WGTransCorp/Session3/DraftLBI.pdf>.

[83] See OEIGWG Chairmanship Third Revised Draft, Legally Binding Instrument to Regulate, in International Human Rights Law, The Activities of Transnational Corporations and other Business Enterprises" (17th August 2021), online: OHCHR<www.ohchr.org/Documents/HRBodies/HRCouncil/WGTransCorp/Session6/LBI3rdDRAFT.pdf>

[84] *Ibid*.

[85] See generally Jernej Letnar Černič & Nicolás Carrillo-Santarelli, eds, *The Future of Business and Human Rights: Theoretical and Practical Considerations for a UN Treaty* (Cambridge, UK: Intersentia, 2018). See also Shane Darcy, "Key Issues in The Debate on A Binding Business and Human Rights Instrument" (13 April 2015), online: (blog): Business and Human Rights in Ireland<https://businesshumanrightsireland.wordpress.com/2015/04/13/key-issues-in-the-debate-on-a-binding-business-and-human-rights-instrument/>; Antoni Pigrau Sole Daniel Iglesias Marquez, "The Revised Draft of the UN Treaty on Business and Human Rights: Towards the Next Round of Negotiations" (19 October 2019) ICIP Policy Paper 1.

[86] See Jolyon Ford, *Business and Human Rights: Emerging Challenges to Consensus and Coherence* (Chatham House: The Royal Institute of International Affairs, February 2015) at 4.

the UNGPs since its adoption by the UN Human Rights Council in 2011.[87] Some scholars, like David Bilchitz, Daniel Blackburn, and Giorgia Papalia, believe that a treaty is the only means by which to create norm cascade under international law to ensure that MNCs are held accountable for their human rights abuses.[88] To Christine Parker and John Howe, the UNGPs "underestimates (whether intentionally or not) what is required to push corporate responsibility for human rights beyond due diligence processes and the redress of individual grievances."[89] In contrast, scholars like John Ruggie, Tori Kirkebo, and Pierre Thielbörger argue that the view of "pro-treaty" scholars is a non-starter because hardening the UNGPs not only poses problems in terms of the transposition of primary obligations to MNCs in international law, but this may also erode the very foundations of international law because it places direct obligations on MNCs.[90] Classifying these scholars as positivists

[87] See Sara McBrearty, "The Proposed Business and Human Rights Treaty: Four Challenges and an Opportunity" (2016) 57 Harvard International Law Journal 11; John Ruggie, The Past as Prologue? A Moment of Truth for UN Business and Human Rights Treaty (July 8, 2014), online: Harvard Kennedy School<www.hks.harvard.edu/m-rcbg/CSRI/Treaty_Final.pdf>; Surya Deva & David Bilchitz, eds, *Building A Treaty on Business and Human Rights: Context and Contours* (Cambridge, UK: Cambridge University Press, 2017); Douglass Cassel & Anita Ramasastry, "White Paper: Options for a Treaty on Business and Human Rights" (2016) 6:1 Notre Dame Journal of International and Comparative Law 1.

[88] David Bilchitz, "Putting the Flesh on the Bone: What Should a Business and Human Rights Treaty Look Like" in Surya Deva & David Bilchitz, eds, *Building a Treaty on Business and Human Rights: Context and Contours* (Cambridge, UK: Cambridge University Press, 2017) 1 at 8. See also Nadia Bernaz, "Conceptualizing Corporate Accountability in International Law: Models for a Business and Human Rights Treaty" (2020) Human Rights Review 1.

[89] Christine Parker & John Howe, "Ruggie's Diplomatic Project and its Missing Regulatory Infrastructure" in Radu Mares, ed, *The UN Guiding Principles on Business and Human Rights: Foundations and Implementation* (The Hague: Brill Publishing, 2012) 272 at 274. See also Stefanie Khoury & David Whyte, *Corporate Human Rights Violations: Global Prospects for Legal Action* (New York: Routledge Press, 2017); David Bilchitz, "The Ruggie Framework: An Adequate Rubric for Corporate Human Rights Obligations? (2010) 7:12 International Journal on Human Rights 198; Christopher Albin-Lackey, "Without Rules: A Failed Approach to Corporate Accountability" (2013), online: (blog) Human Rights Watch Report, <www.hrw.org/sites/default/files/related_material/business.pdf> (labelling the UNGPs as "woefully inadequate" for "setting a lower bar than international human rights standards"); Tara Melish, "Putting 'Human Rights' Back into the UN Guiding Principles on Business and Human Rights: Shifting Frames and Embedding Participation Rights" in C Rodriguez-Garavito ed, *Business and Human Rights: Beyond the End of the Beginning* (Cambridge: Cambridge University Press, 2017) 62.

[90] See e.g., Parker & Howe, *ibid*.

and pragmatists respectively, this section maps out below the literature on the debate.[91] This classification is for easy framing only. It does not suggest the usual contexts in which these words are used. As stated earlier, the term "positivists" refers to protagonists of the zero draft treaty because they rely on a traditional source of international law—treaty—for global governance. Pragmatists, on the other hand, recognize that the contemporary global governance regime necessitates a pragmatic and flexible instrument in their choice of a non-traditional source of international law—soft law. These views are set out below.

2.3.1 Positivists

David Bilchitz argues that considering the ambiguity in the scope of MNCs' obligations in Pillar II of the UNGPs and international law, a treaty is required to clarify the state of the law and to create mechanisms that can influence human rights norms at the national and international levels.[92] He argues that a treaty will create mechanisms—tribunals or international courts—that will balance commercial interests with human rights obligations.[93] Particularly, there are trade and investment treaties that specify states' and MNCs' interests which may conflict with human rights obligations that are not delineated in a treaty.[94] Therefore, the zero draft treaty will ensure that trade and commercial interests do not trump human rights obligations by providing mechanisms for interpretation and enforcement, like tribunals, as it is under most treaty-created regimes.

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[91] This thesis acknowledges that it is impossible to review all the arguments on both sides. However, this thesis samples some of the prominent and common arguments in the debate.
[92] David Bilchitz, "The Moral and Legal Necessity for a Business and Human Rights Treaty" (2016) 1:2 Business and Human Rights Journal 203 at 210.
[93] *Ibid* at 212. See also Surya Deva, *Regulating Corporate Human Rights Violations: Humanizing Business* (London, UK: Routledge Publishing, 2012) at 215-216 (arguing that once "corporate human rights responsibilities are agreed upon at [an] international level, they would have to be given a more precise meaning at [a] national level").
[94] Bilchitz, *supra* note 92.

Bilchitz further argues that a BHR treaty will ensure access to justice for victims of human rights abuses because it will obligate states to enact laws to investigate and prosecute MNCs transnationally.[95] Even if a national grievance mechanism is not established, he argues that the zero draft treaty could create an international court or tribunal before which claimants can file both civil and criminal claims against MNCs.[96] This will obviate the need to solely rely on weak and inefficient national judicial systems.[97]

Daniel Blackburn contends that the zero draft treaty could be used to ensure a radical transformation of international and domestic laws, including rules on criminal and civil corporate liabilities on human rights violations.[98] First, he says that a treaty will reduce the jurisdictional battles that prevent victims of human rights abuse from accessing justice. This is because a treaty will clarify the choice of law issues, evidentiary procedures, and jurisdictional rules that most domestic courts presently grapple with.[99] Second, a treaty will improve corporate legal accountability by placing a broad duty of care on both parent companies and their subsidiaries. As well, it will create a mechanism for making a parent company directly liable for its subsidiaries' conduct.[100] Third, a treaty will give legal force

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[95] Bilchitz, *ibid*. See also Olivier De Schutter "Towards a New Treaty on Business and Human Rights" (2015) 1:1 Business and Human Rights Journal 41 at 54-55.

[96] Bilchitz, *supra* note 92 at 212. See also Maysa Zorob, "New Business and Human Rights Take Shape" (11 Dec 2018), online: Business & Human Rights Resource Centre<www.openglobalrights.org/new-business-and-human-rights-treaty-takes-shape/> ("[t]he Zero Draft offers a critical opportunity to move beyond a voluntary framework and establish an international framework for legal liability for companies who fail to live up to their human rights responsibilities").

[97] David Bilchitz, "Germany's Moral Responsibility to Support a Treaty on Business and Human Rights" (18 July 2018), online (blog): Fachinformationsdienst für internationale und interdisziplinäre Rechtsforschung,< https://intr2dok.vifa-recht.de/content/index.xml;jsessionid=13669EC51E93E67E8D31F634CE4C5F92>.

[98] See generally Daniel Blackburn, *Removing Barriers to Access to Justice: How a Treaty on Business and Human Rights could Improve Access to Remedy for Victims* (Amsterdam: Stichting Onderzoek Multinationale Ondernemingen, 2017).

[99] *Ibid* at 11. See also Philippa Osim, *Corporate Accountability for Human Rights Violations: Road to a Binding Instrument on Business and Human Rights* (PHD Thesis, Lancaster University, 2019) at 211.

[100] Blackburn, *ibid*. See also Connie De La Vega, "International Standards on Business and Human Rights: Is Drafting a New Treaty Worth It?" (2017) 51:3 University Of San Francisco Law Review 431 at 468.

to the current UNGPs' due diligence framework. Although some developed countries, including the United Kingdom, Australia, France, and the Netherlands, are already integrating this framework into their domestic legislation, he argues that a treaty can build on the progress already made to promote a broad direct duty of care for parent companies over their subsidiaries.[101] Fourth, the treaty could be used to extend the scope of the UNGPs to protect human rights defenders, whose rights are increasingly violated in the course of their duties.[102] Fifth, the zero draft treaty could create an international agreement on judicial cooperation, mutual recognition, and enforcement of judicial decisions. This affirms the obligation and role of domestic agencies to hear criminal and administrative transnational cases and implement effective sanctions transnationally.[103]

Giorgia Papalia also argues for a treaty regulation because of the inadequacies of the provisions of the UNGPs and its lack of enforceability as soft law.[104] Considering lack of states' commitment and uptake of the UNGPs, Papalia argues that soft law is inadequate to drive a legal accountability norm transnationally.[105] According to her, the UNGPs' reliance on state and MNCs' goodwill creates a lopsided BHR compliance regime because some states and MNCs may not adopt its provisions, giving them an "advantageous position" over those that are guided by soft law. The zero draft treaty will create a "level-playing field" among states and MNCs, thereby ensuring that states and MNCs that are

[101] Blackburn, *ibid*. See also Larry Catá Backer, "Moving Forward the UN Guiding Principles for Business and Human Rights: Between Enterprise Social Norm, State Domestic Legal Orders, and the Treaty Law that Might Bind Them All" (2015) 38:2 Fordham International Law Journal at 457 at 542.
[102] Blackburn, *ibid* at 11.
[103] *Ibid*.
[104] Giorgia Papalia, "Doing Business Right: The Case for a Business and Human Rights Treaty" (2018) 3 Perth International Law Journal 96.
[105] *Ibid* at 99.

complying with human rights standards are not disadvantaged by doing so.[106] In effect, she argues that the fundamental nature of human rights standards requires that they be contained in a binding instrument.[107]

Papalia argues also that the UNGPs "suffer from ambiguities and legal lacunae that prevent corporate human rights abuse victims from seeking protection or redress."[108] According to her, the UNGPs' approach lacks practical utility because it does not provide concrete guidance to companies, states, and regulatory bodies on when there is a breach of the UNGPs' provisions.[109] Also, the UNGPs are ambiguous in areas that touch on the home states' extraterritorial control of MNCs.[110] In effect, the interpretation gaps and ambiguities on issues of corporate accountability and monitoring controls in the UNGPs make the case for the treaty framework inevitable.[111] She concludes that a BHR treaty will improve upon the developments in international law that increasingly recognize MNC's civil and criminal liability.

Dalia Palombo's views do not differ from the foregoing. She also argues that a treaty will be a tool to hold home states accountable for human rights abuses committed transnationally by subsidiaries of parent companies.[112] So also Graham Markiewicz, who

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[106] Papalia, *ibid*. See also Chip Pitts, "The World needs a Treaty on Business and Human Rights (26 May 2014), online (blog) Open Democracy<www.opendemocracy.net/en/openglobalrights-openpage-blog/world-needs-treaty-on-business-and-human-rights/>. This thesis believes that Papalia's argument could be flipped in that the same problem arises when states unevenly sign the Zero draft treaty. Even if states evenly sign the treaty, its implementation may be uneven, thereby, creating a lopsided treaty compliance. This argument if further explored below.

[107] Papalia, *ibid*.

[108] *Ibid* at 100. See also Arvind Ganesan, "Dispatches: A Treaty to End Corporate Abuses?" (1 July 2014), online (blog) Human Rights Watch<www.hrw.org/news/2014/07/01/dispatches-treaty-end-corporate-abuses>.

[109] Papalia, *supra* note 104 at 100.

[110] *Ibid* at 101.

[111] *Ibid*. See also Olivier De Schutter, "Towards a New Treaty on Business and Human Rights" (2015) 1:1 Business and Human Rights Journal 41 at 46.

[112] Dalia Palombo, *Business and Human Rights: The Obligations of the European Home States* (Oxford, UK: Hart Publishing, 2019) at 223-234.

argues that the zero draft treaty could be a way to strengthen host states' positions against the economic and political powers of homes states and MNCs and to ultimately gain a political advantage in international law.[113] Palombo and Markiewicz's arguments point to the potential of the zero draft treaty to disrupt the global governance power dynamics that have previously favoured developed countries. Therefore, the move from voluntariness to binding obligations could be viewed as an economic/political struggle between developed and developing states for global regulation control.[114]

In sum, the positivists' arguments tackle the inadequacy of the UNGPs' form and content to hold MNCs accountable in international law and to provide transnational access to justice for victims of corporate human rights abuses. It appears that the positivists' approach to the zero draft treaty proposal presumes that states will sign, ratify, and implement the treaty (depending on states' political and legal structures) without considering the political nuances, long-established doctrinal considerations (doctrines of legal personality and piercing the veil), and developed states' entrenched interests in BHR treaty law-making. It must not be belittled that because of their entrenched interests, developed states may be slow to sign, or ratify the treaty. For example, in dualist states, the treaty must first be signed, ratified by the executive, and then domesticated by the legislature, a process that maintains tight scrutiny to ensure that the entrenched interests of developed dualist jurisdictions are protected and maintained. In developed countries with

[113] See Graham Markiewicz, "The Logical Next Step: Motivations on the Formations of a Business and Human Rights Treaty" (2017) 26:1 Minnesota Journal of International Law 63 at 70-71.
[114] See Larry Catá Backer, "Considering a Treaty on Corporations and Human Rights: Mostly Failures But with a Glimmer of Success" (Remarks delivered at the Workshop on a Treaty on Business and Human Rights, Universidad Autonoma de Madrid, 26 June 2015) [unpublished] at 4 ("[t]he treaty process is crucial to ensure that small and developing states are not swallowed up by powerful enterprises, developed states and even the largest NGOs, all of which dwarf many of the smaller and less developed states in power and influence in the public sector and within the halls of international organizations").

monist structures, the lack of the legislative oversight may even prevent treaty implementation because there is no check on the powers of the executive. Indeed, Austria, the Czech Republic, Estonia, France, Germany, Ireland, Italy, Japan, Montenegro, South Korea, Romania, Macedonia, the United Kingdom, and the US opposed the adoption of the zero draft treaty by the Human Right Council.[115] This list includes major countries (UK, US, Germany, and France) that are homes to MNCs. It reinforces the argument that assuming they ratify in the first place, implementation of the treaty may face opposition in terms of its domestication in these jurisdictions. Although it is arguable that some developing states also have a dualist model, their motivation to sign and implement the zero draft treaty will be higher because of the need to ensure corporate accountability in these regions. Also, the argument that the zero draft treaty will support a direct liability of parent companies over their subsidiaries' tortious and civil liabilities may not align with the domestic application of the doctrines of separate legal personality and piercing the corporate veil that seek to protect the business interests and support for MNCs' economic and capital growth.[116]

The zero draft treaty also expands the jurisdiction of domestic courts on issues of domicile and nationality—a proposal that is likely to be politically contested by states whose participation is essential for the success of the treaty.[117] For example, article 9 (1) (d) of the draft treaty provides that courts should exercise jurisdiction based on claimants'

[115] Overall, there are 20 votes in favor, 14 votes against, and 13 abstentions. For full details, see "26/9 Elaboration of an international legally binding instrument on transnational corporations and other business enterprises with respect to human rights," Human Rights Council Twenty-sixth session, UN Doc A/HRC/RES/26/9 (14 July 2014).
[116] See generally Phillip Lipton, "The Mythology of Salomon's Case and the Law Dealing with the Tort Liabilities of Corporate Groups: An Historical Perspective" (2014) 40:2 Monash University Law Review 452.
[117] Ben Grama, et al, "Third Revised Draft Treaty on Business and Human Rights: Comments and Recommendations" (October 2021) Asser Institute Policy Brief 2021-01 1 at 4.

nationality or domicile. However, in private international law, courts' exercise of jurisdiction based on the nationality of the claimant is considered exorbitant because it has the potential to make forum courts adjudicate on issues or claims that are unconnected with the forum.[118] Also, this rule encourages forum shopping because nationals of any country can approach the court, regardless of whether the cause of action is connected to the forum or not. Although French courts (rarely) apply the nationality rule, courts in the United States and Europe do not apply it.[119] The inclusion of this provision in the draft treaty means that the United States and countries in Europe will be reluctant to accede to this provision because it has private international law and foreign policy implications for them.

Positivists also downplay the history of a similar instrument in the BHR context examined in chapter 1 of this thesis—the *Draft Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises (Draft Norms)*. This document was abandoned due to, among other things, its political and economic implications for developed countries.[120] Similarly, the arguments do not consider how difficult it was for John Ruggie to get developed states and MNCs to support the adoption of the UNGPs by the UN Human Rights Council, given the divergent interests and dissenting voices by these "spoilers," as he calls them.[121] He had to manage dissenting voices and politically persuade states to get a unanimous endorsement from the Human

[118] See generally Kevin Clermont & John Palmer, "Exorbitant Jurisdiction" (2006) 58 Maine Law Review 473.
[119] Ben Grama et al, *supra* note 117 at 4. See also the Permanent Bureau Hague Conference on Private International Law's Comparative Table on States' ground of jurisdiction 2015, online: HCCH< https://assets.hcch.net/docs/03c39e9f-878b-400d-a359-e70b7937edde.pdf>.
[120] See generally Pini Pavel Miretski & Sascha Dominik Bachmann, "The UN 'Norms on the Responsibility of Transnational Corporations and other Business Enterprises with Regard to Human Rights: A Requiem" (2012) 17:1 Deakin Law Review 5.
[121] Ruggie, *Just Business*, *supra* note 1 at 133. See also generally Ruggie, *supra* note 7.

Rights Council. This was the first time that the Council endorsed a normative text on a subject that governments did not negotiate themselves.[122]

The political bickering during the adoption of the UNGPs shows the sharpness of interest divergence that trails negotiations or discussion on BHR global governance.[123] It is thus obvious, given this precedent from the adoption of the UNGPs that an agreement on the text of a hard law that touches on the economic and political interests of developed states will be more difficult, if not impossible. The developed countries are unlikely to support proposals that put any extra burden of regulation on them. They will also not relinquish the economic benefits accruing from MNCs that successfully operate in developing countries for reason of the weak national human rights legislation under which they operate in these countries. Thus, it was not surprising that most developed states, including the United States, the European Union, and the business community, opposed the proposal for the zero draft treaty.[124] It is also not surprising that only developing countries initially supported, and are championing the draft treaty.[125] In sum, the positivist arguments can be likened to visions of light at the end of the tunnel without discerning the darkness and uncertainties in the tunnel that may well prevent the traveller from getting to

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[122] Ruggie, *Just Business*, *supra* note 1 at 159.
[123] *Ibid* at ix.
[124] See generally Dana Johnston, "Human Rights Incorporated, Not Everyone Agrees" (2019) 13:1 The Journal of Business, Entrepreneurship & the Law 97. See also *Business response to the Zero Draft Legally Binding Instrument to Regulate, in International Human Rights Law, the Activities of Transnational Corporations and Other Business Enterprises ('Zero Draft Treaty') and the Draft Optional Protocol to the Legally Binding Instrument* (Draft Optional Protocol) Annex, UN Treaty Process on Business and Human Rights (Oct.2018), online: Business and Human Rights Resource Center <https://iccwbo.org/content/uploads/sites/3/2018/10/icc-joint-business-response-zero-draft-2018.pdf>.
[125] For example, after initially being reluctant, the EU is now involved in the negotiations of the zero draft treaty but insists that the future treaty's scope should include all businesses, not only transnational ones. See Ionel Zamfir, "Towards a Binding International Treaty on Business and Human Rights (November 2018) EU Parliament Briefing, online: European Parliament <www.europarl.europa.eu/RegData/etudes/BRIE/2018/630266/EPRS_BRI(2018)630266_EN.pdf>.

the end of the tunnel. These arguments, and more, animate the pragmatists' counter views examined next.

2.3.2 Pragmatists—A Defence of Soft Law

John Ruggie argues that an encompassing human rights treaty, like that sought by the positivists, is "not only a bad idea; it is a profound deception."[126] Marcia Narine also claims that the zero draft treaty proposal "is unlikely to pass."[127] Pragmatists hail the UNGPs as a soft law that bridges the acute governance gaps created by doctrines of sovereignty, separate legal personality, and the reality of weak governance without upsetting the international law balance.[128] Particularly, Ruggie argues that the broad scope of human rights involved in the BHR context requires a soft law approach.[129] This is because it "includes complex clusters of different bodies of national and international law—for starters, human rights law, labor law, anti-discrimination law, humanitarian law, investment law, trade law, consumer protection law, as well as corporate law and securities regulation."[130] Similarly, he notes that the BHR field is embroiled with problems of diversity, institutional variation, and conflicting interests across and within states.[131] Therefore, he argues that even if states sign the zero draft treaty, it will operate at such a

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[126] John Ruggie, International Legalization in Business and Human Rights" (11 June 2014), online: Harvard Kennedy School Brief Note at 6, <https://media.business-humanrights.org/media/documents/files/media/documents/ruggie_-_wfls.pdf>.
[127] Marcia Narine, "Disclosing Disclosure Defects: Addressing Corporate Irresponsibility for Human Rights Impact" (2015) 47:1 Columbia Human Rights Law Review 84 at 89. She argues that "[t]he fate of the proposed treaty is uncertain, but many do not hold much hope for its passage."
[128] See e.g., John Ruggie, "A UN Business and Human Rights Treaty" (28 January 2014) An Issue Brief Statement at 5, online: Harvard Kennedy School<https://media.business-humanrights.org/media/documents/files/media/documents/ruggie-on-un-business-human-rights-treaty-jan-2014.pdf>.
[129] John Ruggie, "Quo Vadis? Unsolicited Advice to Business and Human Rights Treaty Sponsors" (9 September 2014), online: Institute for Human Rights and Business<www.ihrb.org/other/treaty-on-business-human-rights/quo-vadis-unsolicited-advice-to-business-and-human-rights-treaty-sponsors>.
[130] Ruggie, *supra* note 128 at 64.
[131] Ruggie, Quo Vadis, *supra* note 129 at 2.

"high level of abstraction that it would be largely devoid of substance, of little practical use to real people in real places, and with high potential for generating a serious backlash against any form of further international legalization in this domain."[132] Also, because of the negotiations involved in treaty law-making, he argues that if states agree on a treaty, it will contain provisions short of the current highest voluntary human rights standards because this is an easy way to get buy-in from powerful developed countries.[133] To Ruggie, such inferior human rights standards contained in a treaty, which are difficult to amend, enable MNCs to operate with minimum accountability.[134]

Furthermore, Ruggie argues that the treaty proposal will be embroiled in the same political skirmishes that bedeviled its predecessors—the Draft United Nations Code of Conduct on Transnational Corporations (Code) and the Draft Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises (Draft Norms)—discussed in chapter 1. He notes that the Code was abandoned after 22 years of negotiation without a consensus.[135] Ruggie draws insights from the history of climate change treaties and their inability to command states' commitment.[136] Other scholars also point to the history of the *International Convention for the Protection of the Rights of All Migrant Workers and Their Families*, which has not been ratified by any of the largest migrant worker receiving countries, as a lesson for what may happen to the zero draft treaty

[132] Ruggie, *ibid* at 3.
[133] John Ruggie, *supra* note 128 at 4.
[134] *Ibid*.
[135] Ruggie, *supra* note 129.
[136] *Ibid* at 5. For details on why and how the climate change treaty failed to secure states' commitment, see Amanda Rosen, "The Wrong Solution at the Right Time: The Failure of the Kyoto Protocol on Climate Change" (2015) 43:1 Politics and Policy 30. But see Radoslav Dimitrov, "The Paris Agreement on Climate Change: Behind Closed Doors" (2016) 16:3 Global Environmental Politics 1.

proposal.[137] They argue that it is unlikely that developed states that are not signatories to ILO human rights instruments will support or implement the zero draft treaty. They also argue that major home states of MNCs will be reluctant to commit to a transnational regulation of their corporations abroad.[138] This is because there is currently no international instrument that prescribes this regulation.[139] Even if the treaty comes to fruition, they argue that the road leading to states' consensus on human rights texts is often long and arduous. Ruggie particularly believes that it is reasonable to build a consensus through a soft law instrument pending the time a (un) likely BHR treaty emerges.[140] Although he does not entirely dismiss the possibility of a future treaty, he believes that the UNGPs, as soft law, can serve as a precursor for the treaty.[141]

Tori Kirkebo and Malcolm Langford reaffirm that a treaty proposal should be viewed with circumspection because of the history of the enforcement, observance, and

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[137] See Connie De La Vega, "International Standards on Business and Human Rights: Is Drafting a New Treaty Worth It?" (2017) 51:3 University of San Francisco Law Review 431 at 434.

[138] Ruggie, *supra* note 128 at 4. See also Chris Esdaile, "Does the World Need a Treaty on Business and Human Rights?" (Paper delivered at the University of Notre Dame Law School and Business & Human Rights Resource Centre first annual London human rights speaker series event, 10 May 2014) [unpublished], online: Business & Human Rights Resource Centre <https://media.businesshumanrights.org/media/documents/files/media/documents/chris_esdaile_ndu_talk_may2014_full_text.pdf> (he concludes that "a treaty negotiation process would face the very real possibility of ending up with a watered-down set of rules, a treaty with few ratifications, and in the process create much hostility to the prospect of binding rules on business and human rights. In short, such a negotiation process may leave us in no better position than we are now").

[139] See Philippa Osim, *Corporate Accountability for Human Rights Violations: Road to a Binding Instrument on Business and Human Rights* (PHD Thesis Lancaster University, 2019) [unpublished] at 238.

[140] John Ruggie, "Hierarchy or Ecosystem? Regulating Human Rights Risks of Multinational Enterprises" in C Rodriguez-Garavito ed, *Business and Human Rights: Beyond the End of the Beginning* (Cambridge: Cambridge University Press, 2017) 46 at 60 ("…the issue for me has never been about international legalization as such; it is about carefully weighing what forms of international legalization are necessary, achievable, and capable of yielding practical results, all the while building on the GPs' foundation"). See also Johnston, *supra* note 124 at 122 (She argues that "[p]rior to creating binding regulation, it is in the UN's best interest to let the effects of the UNGP play out to see what regulations work in certain States and what regulations do not").

[141] See e.g., John Ruggie, "Embedding Global Markets: Lessons from Business & Human Rights" (Paper presented at the CEL Annual Lecture Centre for Ethics and Law University College London, 25 February 2015) [unpublished].

compliance with hard laws in international human rights protection.[142] They argue that IHRL treaties are easily forgotten because of lack of commitment from states either at the ratification or implementation stage,[143] more so when "there is little evidence that human rights treaties, on the whole, have improved the well-being of people, or even resulted in respect for the rights in those treaties."[144] Therefore, the zero draft treaty may fail too because it requires commitment and accountability from developed home states that presently benefit from the accountability gap.[145] Altogether, states may not support the zero draft treaty because it imposes a higher political, economic, and legal cost than the slow cumulative progress that may or may not coalesce over time via the UNGPs.[146]

In any event, Pierre Thielbörger and Tobias Ackermann are not hopeful that the zero draft treaty will close the governance gap. Rather, the treaty runs the danger of failure in the face of unrealistic expectations.[147] Just like Ruggie, they argue that the BHR treaty is premature because there is no existing consensus on the liability of state and non-state actors in this regard.[148] According to them, treaty discussions will jeopardize, rather than promote the trust-building process among states, international organizations, and civil

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[142] Tori Loven Kirkebo & Malcolm Langford, "Ground-Breaking? An Empirical Assessment of The Draft Business and Human Rights Treaty" (2020) 114 American Journal of International law 179.
[143] *Ibid* at 185. See also Oona Hathaway, "Do Human Rights Treaties Make a Difference?" (2002) 111:8 Yale Law Journal 1935.
[144] Eric Posner, *The Twilight of Human Rights Law* (Oxford, UK: Oxford University Press, 2014) at 7.
[145] See Markiewicz, *supra* note 113 at 72. See also John Ruggie, "Get Real or We'll Get Nothing: Reflections on the First Session of the Intergovernmental Working Group on A Business and Human Rights Treaty" (22 July 2015), online (blog): Business and Human Rights Resource Centre <www.business-humanrights.org/en/blog/get-real-or-well-get-nothing-reflections-on-the-first-session-of-the-intergovernmental-working-group-on-a-business-and-human-rights-treaty/>.
[146] Kirkebo & Langford, *supra* note 142 at 180 ("…states are rational actors, concerned with the cost of compliance and spill-over effects in future regulation….it is sensible for states to resist soft and hard instruments because of their perception that these instruments impose costs. Thus, states will seek to maximize the benefits (reputational or material) of joining a global standard while minimizing the costs of commitment for themselves and corporations (e.g., the strength and scope of a standard"). See also Markiewicz, *supra* note 113 at 72.
[147] Pierre Thielbörger & Tobias Ackermann, "A Treaty on Enforcing Human Rights Against Business: Closing the Loophole or Getting Stuck in a Loop?" (2017) 24:1 Indiana Journal of Global Legal Studies 43.
[148] *Ibid* at 76.

society groups that the UNGPs started.[149] Thielbörger and Ackermann prefer cumulative progress because it is important to "take the issue one step at a time instead of taking too many steps at once, stumbling, and potentially tearing the whole process down."[150] They believe that a treaty proposal is necessary only when the corporate responsibility norm is globally internalized, which means that state and non-state actors must see corporate accountability beyond voluntary self-regulation and as a normative expectation.[151] Although Thielbörger and Ackermann acknowledge that internalizing corporate responsibility norms will take a while, they argue so also will treaty law-making. In sum, they advocate for a bottom-up approach where state and non-state practices, influenced by the UNGPs, can create a corporate accountability norm, instead of a top-bottom approach where a treaty imposes obligations on state and non-state actors.[152]

It is worth highlighting that though the pragmatists believe that a treaty is presently unwarranted, what they do not address, however, are some of the key positivist arguments relating to the potential efficacy of the UNGPs. For example, the positivists are sure that the UNGPs inhere in ambiguity, interpretation gaps, and inadequacy of their provisions on issues of corporate accountability and monitoring controls. Generally, ambiguity and imprecision characterize the text of soft laws, including the UNGPs. Since there is no provision for interpretative mechanisms in the form of courts and tribunals, state and non-state actors may pick and choose those UNGPs' provisions that suit their convenience to observe.[153] If soft law is needed to build consensus among international actors before a

[149] Thielbörger & Ackermann, *ibid* at 77. See also Esdaile, *supra* note 138 at 2.
[150] Thielbörger & Ackermann, ibid.
[151] *Ibid* at 78.
[152] *Ibid* at 79.
[153] It could be argued that the OECD National Contact Points that interpret the embedding of pillar 2 in the revised OECD MNE Guidelines, 2011 can serve as an interpretative tool. However, NCP decisions are often

possible treaty can be agreed upon in the future, the question is what the fate of victims of human rights abuses would be under the present soft law regime.[154] Would they have to wait for justice under a treaty that may or may not ever be concluded?

Between both sides of the debate regarding the UNGPs and the zero draft treaty is a discernable pattern. The positivists focus on the benefits of treaty law without considering the process leading to the result, while the pragmatists are taken up with the processes and procedures of reaching a consensus that would lead to concluding an effective treaty. Yet, they too fail to fully consider the implications of the absence of a justice mechanism for those who seek justice in the short term. Also, it is arguable that the need for ensuring corporate accountability and access to remedy for rights abuse victims features on both sides of the debate, which is about the more efficacious means by which to achieve a common goal of corporate accountability. A third discernable feature is the inherent weaknesses of the views on both sides.[155] John Ruggie captured this eloquently in his report to the Human Rights Council. He asserts that "no single silver bullet can resolve the business and human rights challenge."[156] This is why he proposed "a smart mix of reinforcing policy measures that are capable over time of generating cumulative change

region-based and non-binding. These characteristics detract from the utility of NCPs as transnational interpretive tools.

[154] See generally Bonita Meyersfeld, "Committing the Crime of Poverty: The Next Phase of the Business and Human Rights Debate" in Cesar Rodriguez-Garavito, ed, *Business and Human Rights: Beyond the End of the Beginning* (Cambridge, UK: Cambridge University Press, 2017) at 173.

[155] For example, the arguments and counterarguments on both sides are well rehashed in the literature. See Barnali Choudhury, "Spinning Straw into Gold: Incorporating the Business and Human Rights Agenda into International Investment Agreements" (2017) 38:2 University of Pennsylvania Journal of International Law 425 at 443-453; Jens Martens & Karolin Seitz, *The Struggle for a UN Treaty: Towards Global Regulation on Human Rights and Business* (New York: Global Policy Forum, 2016) at 45-48.

[156] *John Ruggie*, Report of the Special Representative of the Secretary-General on the issue of Human Rights and Transnational Corporations and other Business Enterprises: Business and Human Rights: Mapping International Standards of Responsibility and Accountability for Corporate Acts, UN Doc A/HRC/4/35 (19 February 2007) at par 88, online: United Nations <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G07/108/85/PDF/G0710885.pdf?OpenElement>.

and achieving large-scale success—including in the law."[157] In other words, Ruggie proposes a normative framework where legal and social norms guide businesses and states' conduct transnationally.[158]

Taking Ruggie's proposal at face value, it requires examining the relationship between social and legal norms in the BHR global governance context. As stated earlier in this chapter, both hard and soft law contain normative elements.[159] Understanding the normative underpinnings of a regulatory mechanism helps to improve compliance with law among international actors. This is also important because historically, norms that originate from different cultural ideologies have influenced the development and compliance with transnational human rights regulations.[160] Indeed, it has been noted that "the business and human rights discourse contains a galaxy of norms."[161] However, for actors to comply with norms, the process of norm-making must include essential elements. This point is further examined in the next section.

2.4 An Interactional Account of Social and Legal Norms

Clearly, this thesis must move beyond the debate about whether a soft or hard law is a better form of global governance regulation. It must answer the question of how to construct a regulatory framework that generates compliance from actors, regardless of the form of the regulatory instrument. This thesis adopts Brunnée and Toope's interactional

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[157] Ruggie, *supra* note 1 at xiv.
[158] Ruggie, "Business and Human Rights: The Evolving International Agenda" (2007) 101:4 American Journal of International Law 819 at 839 ("…many elements of an overall [governance] strategy lie beyond the legal sphere altogether. Consequently, the interplay between systems of legal compliance and the broader social dynamics that can contribute to positive changes needs to be carefully calibrated").
[159] Weil, *supra* note 67 at 414.
[160] See generally Sonia Cardenas, "Norm Collision: Explaining the Effects of International Human Rights Pressure on State Behavior" (2004) 6:2 International Studies Review 213; Linda Carter, "The Global Impact and Implementation of Human Right Norms: Introduction" (2012) 25 Global Business & Development Law Journal 5.
[161] Elise Groulx Diggs, Mitt Regan, & Beatrice Parance, "Business and Human Rights as a Galaxy of Norms" (2019) 50:2 Georgetown Journal of International Law 309.

approach to international law-making to substantiate its claims. Brunnée and Toope argue that what makes hard or soft law is their ability to generate compliance, not through raw power, political or economic muscling, or central authority, but by the moral force of shared normative understandings that appeal to and inform the rational autonomous choices that actors would make.[162] This thesis chooses an interactional approach for two reasons. First, an interactional framework is not contingent on states' political commitment, but on the internal and autonomous choices of international actors that are based on shared understandings. Second, an interactional framework embraces norm diversity and application, and this aligns with the theme of this thesis.[163]

It is noteworthy that Brunnée and Toope's theory is based on Lon Fuller's theory of morality of law.[164] They extend Fuller's theory (which is state-centric) to international law. Fuller argues that what distinguishes law from other types of social ordering is not the form of the legal instrument but adherence to a criterion of legality: the law must be promulgated, non-retroactive, clear, non-contradictory, not asking the impossible, consistently applicable to various situations, and maintain congruence between the rule as announced and their actual administration. Fuller argues that norms that satisfy the requirements of legality stand a higher chance of being obeyed. When norms meet the criteria of legality and are applied by actors, Fuller says there is "a practice of legality."[165] Fuller argues that the practice of legality (adherence to the requirements of legality),

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[162] Jutta Brunnée & Stephen Toope, *Legitimacy and Legality in International Law* (Cambridge, UK: Cambridge University Press, 2010).
[163] *Ibid* at 21 ("[a]nalysing law [through an interactional account] cuts to the heart of the greatest challenge facing international law: to construct normative institutions while admitting and upholding the diversity of peoples in international society").
[164] Lon Fuller, *The Morality of the Law,* (New Haven: Yale University Press, 1969).
[165] Fuller, *ibid*. See also Jutta Brunnée & Stephen Toope, "Interactional International Law: An Introduction" (2011) 3:2 International Theory 307 at 308.

generates compliance among actors to whom the law is addressed.[166] He was more concerned with the procedural requirements to satisfy the inner morality of law. According to him, an inner morality of law is not concerned with the substantive aims of legal rules (which is enforcement), but with how a system of rules which govern human conduct is constructed and administered.[167]

Fuller justified his theory on the basis that a practice of legality creates an interaction between the state and citizens. He argues that compliance with the law is borne out of the interaction within the legal system. This is because the state fulfils citizens' expectations of making a law under the criteria of legality stated above.[168] Conversely, the state expects that citizens will comply with the law, not necessarily because of any compulsion, but because the law satisfies the criteria of legality. In my view, compliance with the law, as Fuller described it, is based on shared expectations, a relationship that Fuller described as horizontal reciprocity between lawgivers and citizens.

Brunnée and Toope's extend Fuller's theory to international law. Their theory is based on the premise that "the distinctiveness of law lies not in form or enforcement but the creation and effects of legal obligation."[169] This resonates with Lon Fuller's inner morality of law that is concerned with the process of law-making. They note that in international law, norms are not dictated by the sovereign, central authority or lawgivers. Norms arise as a matter of reciprocity between international actors.[170] They define reciprocity to arise in situations where international actors (notwithstanding their diverse

[166] Fuller, *supra* note 164 at 43.
[167] *Ibid* at 97.
[168] *Ibid* at 219.
[169] Brunnée & Toope *Toope, supra* note 162 at 7.
[170] *Ibid* at 6.

interests) socially interact and collaborate to exchange ideas, opinions, and practices, such that the interactions generate a new understanding of previous concepts or norms. They argue that the interactions produce "shared understandings" about concepts, norms, practices, and values. In effect, the central theme of their argument is that legal norms (or law) should be a product of social norms that are intersubjectively constructed and held among actors.[171] In sum, international law should be a product of social interactions among state and non-state actors.

Like Fuller, Brunnée and Toope also discuss the reasons for compliance with international law.[172] They argue that international actors comply with laws because such laws resonate with the prior normative values that they hold. Therefore, an international law-making enterprise requires an exchange of ideas and norms, such that international actors feel a sense of commitment to the law when it is adopted. In effect, in an interactional account, participation from international actors is a crucial element in securing compliance with the law. Brunnée and Toope give an example of the World Trade Organization (WTO) disputes regime.[173] They argue that the resistance of most developing nations to the trade regime negotiated under the WTO can be explained by the absence of shared norms between developing and developed states. They note that less influential states believe that they are not true participants in the WTO negotiations, but rather are bystanders in disputes between them and more influential nations, which are usually to the benefit of developed states.[174] In sum, the inclusion of international actors in law-making efforts determines whether they see the law as legitimate or not.

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[171] Brunnée & Toope *Toope, supra* note 162 at 15.
[172] *Ibid* at 55.
[173] *Ibid* at 74.
[174] *Ibid* at 74.

Where norms are not socially constructed and intersubjectively held, the result is illegitimate law—situations where a treaty, though concluded as formally binding obligation on parties, fails to generate the necessary sense of obligation or commitment from the parties to elicit their compliance.[175] As evident in the argument of the pragmatists reviewed in the previous section, the inability of international human rights treaties to command commitment from states and non-state actors is a common occurrence in the human rights field. An interactional approach would enable us to understand the strategies by which to ensure effective law-making in the future. This thesis argues that a BHR global governance framework needs "…a distinctive form of legitimacy [that] is internal to international law; [and] not an external measure of political value or preference."[176]

Brunnée and Toope also answer the question as to when social norms become law, or when soft law hardens. In their view, social norms become legal obligations when they meet the requirements of legality as set out by Fuller.[177] As well, law is authoritative only when it is mutually constructed among actors who constantly communicate through a specific process.[178] In effect, a social norm hardens when actors continuously observe it because they share the underlying values of the norm, rather than an externally imposed duty that is matched by a sanction of non-compliance.[179]For example, Makau Mutua criticizes how international law developed human rights norms after the second world war in a way that exhibits normative gaps and cultural biases against Africans.[180] He notes that the exclusion of Africans from the norm-making process in international law undercuts the

[175] Brunnée & Toope *Toope, supra* note 162 at 8.
[176] *Ibid* at 28.
[177] *Ibid* at 16.
[178] *Ibid* at 24.
[179] Brunnée & Toope, *supra* note 165 at 308.
[180] See generally Makau Mutua, *Human Rights Standards: Hegemony, Law, Politics* (New York: State University of New York Press, 2016).

legitimacy of international human rights norms as presently constituted. Given Mutua's critique of contemporary human rights norms, it is important to examine whether TWAIL scholars will embrace the interactional approach that Brunnée and Toope propose in the development of a corporate responsibility to respect human rights norm. Their proposal raises many questions, one of which is whether the present international law structure makes any form of interaction possible. In effect, is the promise of interaction among diverse views, not a façade for maintaining international law or western nations' dominance perpetuated by the thoughts of universalism? The next sub-section describes how TWAIL scholars would view an interactional approach. It describes two generations of TWAIL scholarship to situate this thesis within one of the generations of TWAIL that accommodates Brunnée and Toope's interactional account.

2.4.1 An Interactional Account—A TWAIL Perspective

As stated in chapter 1, transnationally, TWAIL scholars (TWAILER-ers) are concerned about the fairness of norms, processes, institutions, and practices to Third World Peoples.[181] They advocate for voices that are not institutionalized, especially poor women, farmers, and traders—subordinated groups—who do not have voices in the international global order.[182] They also oppose the complicity of Third World states with global powers to silence the voice of Third World Peoples.[183] In effect, TWAIL scholarship advocates for the democratization of international law so that all voices can be heard and considered in

[181] See James Thuo Gathi, "Fairness as Fidelity to Making the WTO Fully Responsive to All Its Members" (2003) 96 American Society of International Law and Procedure 157; Usha Natarajan & K. Khoday, *Fairness and International Environmental Law from Below: Social Movements and Legal Transformations in India* (2012) 25 Leiden Journal of International Law 415.
[182] Upendra Baxi, "Voices of Suffering, Fragmented Universality and the Future of Human Rights" in Burns Weston & Stephen Marks, eds, *The Future of International Human Rights: Commemorating the 50th Anniversary of the Universal Declaration of Human Rights* (Iowa: University of Iowa, 1999).
[183] Makau Mutua, "What Is TWAIL?" (2000) 94 Proceedings of the ASIL Annual Meeting 31 at 37.

the reconstituted world order.[184] To reconstitute the global legal order, TWAIL-ers focus on the hierarchical systems that entrench economic and political disparity between the Global North and the Third World Peoples.[185]

TWAIL is both a political and intellectual movement because it focuses on the relationship between law and politics on the one hand, and law and economics on the other hand.[186] Since its first conference in 1997,[187] TWAIL-ers have written on diverse areas, which include contemporary empire,[188] origins of international law,[189] international environmental justice,[190] culture and gender,[191] human rights,[192] interpretation,[193] Third

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[184] See Alam, Shawkat; Al Faruque, Abdullah, "From Sovereignty to Self-Determination: Emergence of Collective Rights of Indigenous Peoples in Natural Resources Management" (2019) 32 Georgetown Environmental Law Review 59.

[185] James Gathii, "The Agenda of Third World Approaches to International Law (TWAIL)" in Jeffrey Dunoff & Mark Pollack, eds, *International Legal Theory: Foundations and Frontiers* (Cambridge University Press, 2019) 1 at 21.

[186] See generally John Haskell, "TRAIL-ing TWAIL: Arguments and Blind Spots in Third World Approaches to International Law" (2014) 27: 2 Canadian Journal of Law and Jurisprudence 383.

[187] For the origin and themes that underpins TWAIL, see James Gathii, "TWAIL: A Brief History of Its Origins, Its Decentralized Network, and a Tentative Bibliography" (2011) 3 Trade L & Dev 26.

[188] Bhupinder Chimni, *International Law and World Order: A Critique of Contemporary Approaches* 2nd ed (Cambridge: Cambridge University Press, 2017); Bhupinder Chimni, "Third World Approaches to International Law: A Manifesto" (2006) 8 International Community Law Review 3; Bhupinder Chimni & Antony Anghie, "Francisco De Vitoria and the Colonial Origins of International Law" (1996) 5 Social and Legal Studies 321; Antony Anghie, *Imperialism, Sovereignty and the Making of International Law* (Cambridge: Cambridge University Press, 2004).

[189] Anthony Anghie, "The Evolution of International Law: Colonial and Post Colonial Realities" (2007) 27:5 Journal of Third World Quarterly 739; Antony Anghie, *ibid*.

[190] Sara Seck, "Transnational Business and Environmental Harm: A TWAIL Analysis of Home State Obligations" (2011) 3:1 Trade, Law and Development 164; Karin Mickelson, "South, North, International Environmental Law, and International Environmental Lawyers" (2000) 11 Yearbook of International Environmental Law 52; Karin Mickelson, "Critical Approaches" in Daniel Bodansky, Jutta Brunnee & Helen Hey, eds, *The Oxford Handbook of International Environmental Law* (New York: Oxford University Press, 2007) 262.

[191] Celestine Nyamu, "How Should Human Rights and Development Respond to Cultural Legitimization of Gender Hierarchy in Developing Countries?" (2000) 41:2 Harvard International Law Journal 11; Mosope Fagbongbe, "The Future of Women's Right from a TWAIL Perspective" (2008) 10:4 International Community Law Review 401.

[192] Larissa Ramin, "TWAIL – 'Third World Approaches to International Law' and Human rights: Some Considerations" (2018) 5:1 Journal of Constitutional Research 261; Makau Mutua, "Savages, Victims, and Saviors: The Metaphor of Human Rights" (2001) 42:1 Harvard International Law Journal 202; Upendra Baxi, *The Future of Human Rights* (Delhi: Oxford University Press, 2006).

[193] Usha Natarajan et al, "Introduction: TWAIL - on Praxis and the Intellectual" (2016) 37:11 Third World Quarterly 194.

World resistance,[194] and bio-piracy.[195] This literature uses methodological tools that include historical and doctrinal analysis. The historical method emphasizes the effect of colonialism in Third World countries, while the doctrinal method exposes doctrines and practices that have profound implications for the distribution of power between the North and South divide.[196] These sets of scholarship are broadly classified into two strands: TWAIL I, which is produced by first generational post-colonial lawyers, and TWAIL II, which broadly follows and elaborates on TWAIL I.[197]

TWAIL I projects are characterized by their reluctance to repudiate international law and their commitment to helping in producing a "universal" international law.[198] Scholars in this strand argue that Third World countries are not strangers to processes of international law and that pre-colonial societies have well-structured legal systems that could be used for the benefit of the international community.[199] Notwithstanding the exclusion of Third World Peoples, scholars in this strand argue that, through institutions like the United Nations, the content of international law could still be transformed for the benefit of Third World people.[200] Furthermore, TWAIL-ers in this group argue for the

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[194] Balakrishnan, Rajagopal, *International Law from Below: Development, Social Movements and Third World Resistance* (Cambridge: Cambridge University Press, 2003).
[195] Ikechi Mgbeoji, *Global Biopiracy*, *Patents Plants, and Indigenous Knowledge* (Vancouver: UBC Press, 2006).
[196] See e.g., Ntina Tzouvala, "TWAIL and the 'Unwilling or Unable' Doctrine, Continues, and Ruptures" (2016) 109 AJIL Unbound 267; James Gathii, "Imperialism, Colonialism, and International Law" (2007) 54 Buffalo Law Review 1013.
[197] Antony Anghie & Bhupinder Chimni, "Third World Approaches to International Law and Individual Responsibility in Internal Conflicts" (2003) 2:1 Chinese Journal of International Law 77 at 78.
[198] Bhupinder Chimni, "The Past, Present and Future of International Law: A Critical Third World Approach the Past, Present and Future of International Law" (2007) 9 Melbourne Journal of International Law 1 at 3.
[199] See e g, Charles Henry Alexandrowicz, *An Introduction to the History of the Law of Nations in the East Indies: (16th, 17th and 18th Centuries)* (Oxford: Clarendon Press, 1967); Teslim Olawale Elias, *Africa And the Development of International Law* (Leiden: Martinus Nijhoff, 1972); U Umozurike, *International Law and Colonialism in Africa* (Enugu, Nigeria: Nwamife Publishers, 1979); Prakash Sinha, "Human Rights: A Non-Western Viewpoint" (1981) 67:1 Archives for Philosophy of Law and Social Philosophy 76.
[200] See e.g., Prakash Sinha, *New Nations and the Law of Nations* (Leiden: Martinus Nijhoff, 1967); Teslim Olawale Elias, *New Horizons in International Law* (New York: Springer, 1980).

entrenchment of sovereign equality of states and non-interventionism in newly independent states.[201] They note that political independence is not enough in the absence of economic independence from colonial structures. In sum, scholars in this group seek to contribute to the universalization of international law without questioning its foundation.[202]

TWAIL II scholarship reformulates the analytical tools of TWAIL I in a dynamic and reactive international law setting. Scholars in strand II critique the processes and language of international law.[203] They particularly consider the interests of marginalized groups within Third World states, including women, peasants, workers, minorities, and how they had been generally excluded and marginalized by international law.[204] Scholars in this strand also consider how Third World countries embrace international law to their disadvantage because they contend that colonialism is central to the formulation of international law.[205] In their view, legal doctrines contribute to the entrenchment of international law, which is a product of colonial history and domination. TWAIL-ers in this group particularly oppose international law's "gospel" of universalism that seeks to assimilate non-Europeans into a universalist system founded on doctrines like sovereignty and rule of law.[206]

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[201] See Ram Prakash Anand, *New States and International Law* (India: Hope India, 1972).

[202] These scholarships pre-date the 1997 Conference at Harvard University. One of the goals of the 1997 Conference is to [h]onour[e] an already well-established lineage of international lawyers, political actors, and intellectuals from the South who had long grappled with the vicissitudes and complexities of the international legal order." See Luis Eslava, "TWAIL Coordinates" (2 April 2019), online: Critical Legal Thinking (blog)< https://criticallegalthinking.com/2019/04/02/twail-coordinates/>.

[203] See e.g., James Gathii, "International Law and Eurocentricty" (1998) 9 European Journal of International Law 184. Some scholars also consider the marginalization of Indigenous Peoples within settlor-colonial states like Canada. See Sujith Xavier et al, "Placing TWAIL Scholarship and Praxis" (2017) 33:3 Windsor Yearbook of Access of Justice V.

[204] See James Gathii, "TWAIL: A Brief History of its Origins, Its Decentralized Network, and a Tentative Bibliography" (2011) 3 Trade L & Dev 26 at 41.

[205] David Fidler, "Revolt Against or From Within the West?: TWAIL, the Developing World, and the Future Direction of International Law" (2003) Chinese Journal of International Law 29.

[206] See Gathii, *supra* note 204. See also Makau Mutua, "Africa and the Rule of Law" (2016) 13:23 SUR International Journal on Human Rights 159 (Mutua argues that "The rule of law – understood as adherence

They also turn their attention to how the knowledge about international law is processed and produced.[207] They recognize that this is another method of domination from the Global North because western scholars control, manipulate, or spin the knowledge that is produced to promote western dominance.[208] They argue that it is only when knowledge about the lived experiences of Third World Peoples are discussed that western domination can be obliterated in international law.[209] Therefore, to reconstruct international law that is based on different experiences and background, TWAIL-ers in this group attempt to first decolonize and deconstruct the narratives of Third World Peoples as backward and barbaric people who need to be incorporated and integrated into the civilized world.[210] Thereafter, they seek to reconstitute the Third World narratives not as a pupil of Europe or North America but as a people of power, knowledge, and influence who can influence global affairs, and particularly international law.[211] In sum, TWAIL II scholarship constructs methodological and normative alternatives that transcend international law's colonial inequalities structures.[212]

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to good laws – is not enough of a panacea for Africa's complex problems") Mutua rejects a rule of law definition that uses law to protect ill-gotten wealth and an unjust economic order. He, instead, pushes for a rule of law that advances social and substantive justice. In other words, he rejects a western-framed meaning of rule of law as assimilating Africans into modernization.

[207] See generally Pooja Parmar, "TWAIL: An Epistemological Inquiry" (2008) 10 International Community Law Review 363.

[208] James Thuo Gathii, "Introduction" in James Thuo Gathii ed, *The Performance of Africa's International Courts: Using International Litigation for Political, Legal, And Social Change* (Oxford: Oxford University Press, 2020).

[209] See e.g., Obiora Okafor, "Newness, Imperialism, and International Legal Reform in our Time: A TWAIL Perspective" (2005) 43:2 Osgoode Hall Law Journal 171; Walter Mignolo, "Coloniality: The Darker side of Modernity" (2007) 21:2 Cultural Studies 155.

[210] See Makau Mutua, "Change in the Human Rights Universe" (2007) 20 Harvard Human Rights Journal 3 at 4. See generally Marta Iniguez de Heredia & Zubairu Wai, eds, Recente*ring Africa in International Relations: Beyond Lack, Peripherality, and Failure* (Gewerbestrasse: Palmgrave Macmillan, 2018).

[211] See Sebelo J Ndlovu-Gatsheni, "Against Bringing Africa 'Back in" in Marta Iniguez de Heredia & Zubairu Wai, eds, Recente*ring Africa in International Relations: Beyond Lack, Peripherality, and Failure* (Gewerbestrasse: Palmgrave Macmillan, 2018) 283 at 302. James Sakej Youngblood Henderson, "*Postcolonial Indigenous Legal Consciousness*" (2002) 1 Indigenous Law Journal 21.

[212] James Gathii, "The Promise of International Law: A Third World View" (2021) 36:3 American University International Law Review 378 at 410.

This thesis belongs to the TWAIL II scholarship because it is concerned about creating normative alternatives to the dominant understanding of the CR2R norm. It seeks to construct normative alternatives to interpret the UNGPs in a way that incorporates views of the Third World Peoples. From the debate on the process leading to the development of the UNGPs in chapter 1, it can be gleaned that the critics of the UNGPs are concerned that the standard seeks to maintain the imbalance and status quo between the Global North and Global South divide and favour the liberal market agenda and global policies to the detriment of Third World Peoples.[213] These reflect some of the central themes in TWAIL. TWAIL II scholars are also likely to resist claims that the UNGPs are a "global authoritative standard" [214] because this claim seeks to perpetuate universalism of international law.

Like TWAIL-ers, this thesis also resists international law's quest to assimilate other non-western cultures by universal standards. This is because human rights standards cannot be neutrally interpreted; they are interpreted through prisms of colonialism, power, politics, and history in different regions. However, international law's universal narrative is important to shape the contours of a regional or context-specific approach to problems of international law.[215] Universalism, however, should not necessarily mean assimilation.

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[213] Baxi defines a liberal market agenda as a trade-related, market friendly human rights paradigm that promotes and protects the collective human rights of various formations of global capital mostly at the direct expense of human beings and communities. See Uprenda Baxi, *The Future of Human Rights* (Delhi: Oxford University Press,2002) at 131-166; Uprenda Baxi, "Market Fundamentalisms: Business Ethics at the Altar of Human Rights" (2005) 5 Human Rights Law Review 1. See also Daniel Augenstein, "The Crisis of International Human Rights Law in the Global Market Economy" (2014) 118 Robert Schuman Centre for Advanced Studies Global Governance Programme Working Paper-144.

[214] See John Ruggie, "The Social Construction of the UN Guiding Principles on Business and Human Rights" (2017) Cambridge, MA: John F Kennedy School of Government, Harvard University Working Paper No 67 at 1.

[215] This is similar to Cultural relativists' arguments. See e.g., Bonny Ibhawoh, "Cultural Relativism and Human Rights: Reconsidering the Africanist Discourse" (2001) 19:1 Netherlands Quarterly of Human Rights 43.

Therefore, each region must fashion out the policy implications of universal standards to their socio-economic and political progress.[216]

This approach has some benefits in the international human rights context. First, it considers the history of colonialism in Africa to develop solutions and remedies to human rights abuses in Africa. Second, it accommodates both local and universal insights in assessing the causes of human rights abuse. This enables scholars to proffer a balanced view of the problem and maximizes the chance of success of a rights-based framework that addresses the concerns of rights bearers and rights holders. Third, it is an inclusive governance system that encourages the collective responsibility of all stakeholders in international law without discriminating between strong and weak actors because each stakeholder is valued for its unique contribution. Fourth, it inspires legitimacy because it is premised upon inclusivity, fairness, openness, and dialogue. However, the actualization of the benefits of a contextualized approach is hinged on the dislocation of power imbalance in international human rights law. One way of doing this is to provide alternatives based on the lived realities of those who would be affected by the application of international law.[217] The nature and characteristics of the UNGPs as soft law offer an opportunity to provide these alternatives.

As stated earlier, soft law can serve as a decolonization tool because its contents are usually vague, giving room for contextualization and adaptation. The UNGPs lends

[216] See generally Ulf Johansson Dahre "Searching for a Middle Ground: Anthropologists and the Debate on the Universalism and the Cultural Relativism of Human Rights" (2017) 21:5 The International Journal of Human Rights 611.

[217] See Nqosa Maho, "Can African Judicial Principles Redeem and legitimize Contemporary Human Rights Jurisprudence?" (2016) 49 Comparative and International Law Journal of Southern Africa 455 at 456 ("…the values underpinning the dominant rights paradigm are, by and large, removed from notions of justice as understood and lived by the vast majority of people previously colonised in places such as Africa. Thus, mainstreaming indigenous juridical principles in the legal system holds the promise of going some distance towards legitimising the system. Inherently, however, this entails an epistemological shift in world outlook").

itself to such contextual interpretations because of its vague terminology. The SRSG's most controversial proposal—corporate responsibility to respect human rights in Pillar II—was worded in abstract and neutral terms. For example, the SRSG framed corporate obligations using words like "societal expectation," "social licence," "social norm," "courts of public opinion," "specialized economic organs," and "responsibility to respect human rights."[218]As noted in chapter 1, although the SRSG is criticized for using these words to avoid fall-out from business organizations and western states, as well as manage objections from dissenting voices and objections from NGOs and Third World countries,[219] there is still an opportunity to re-interpret or contextualize its meaning through a constructivist method. This thesis embarks on a constructive exercise in chapter 4 to show how Third World Peoples' conception of respect for human rights can shape a soft law that has an impact on them.

Essentially, this thesis shares TWAIL II Scholarship's goal of reconstructing international law. As noted in chapter 1, a TWAIL constructivist methodology puts Third World Peoples at the center of international law to discover their contributions to global governance, which ultimately frees them from the dominance of international law. Lessons from Brunnée and Toope's interactional account demonstrate the need for interaction between international law and Third World Peoples to facilitate the exchange of ideas. The

[218] Also, he used access to remedy instead of right to remedy. In an interview with the International Bar Association, he admitted that the word "access to remedy" was used to avoid arguments whether the victims have a right to remedy or not. See Film: A Conversation with John Ruggie, online: International Bar Association<www.ibanet.org/Conferences/JohnRuggie2013.aspx>.

[219] See e.g., Carlos Lopez, 'The Ruggie Process': From Legal Obligations to Corporate Social Responsibility' in David Bilchitz & Surya Deva, *Human Rights Obligations of Business: Beyond the Corporate Responsibility to Respect?* (Cambridge, Cambridge University Press, 2013) 59; Weil, Gotshal, & Manges LLP, Corporate Social Responsibility for Human Rights: Comments on the UN Special Representative's Report Entitled 'Protect, Respect and Remedy: A Framework for Business and Human Rights': Memorandum (22 May 2008).

reciprocity and cross-fertilization of norms between the Third World Peoples and products of international law like the UNGPs are possible because, apart from its soft law status, the UNGPs are designed to be a focal point upon which other ideas and actions can converge.[220] In sum, universal human rights standards should only serve as a template and not a finished product. Ruggie admitted this when he noted that the endorsement of the UNGPs by the Human Rights Council will mark the end of the beginning of corporate responsibility discourse.[221]

To increase the acceptance or legitimacy of the UNGPs in the Third World, this thesis examines opportunities for norm reciprocity between different levels of governance (the global and local) in the BHR context. Subsequent chapters of this thesis show how the implementation of the UNGPs can benefit from an intercultural exchange and communication that may generate compliance, especially from the Third World Peoples' perspective.

Generally, the UNGPs are discussed among big law firms, the elites, state representatives, and business communities.[222] Even the consultative process of the UNGPs has been described as "too international, elitist and too far away from the actual corporate-community constellations that it was set out to govern."[223] These criticisms prevent

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[220] See John Ruggie, "The UN 'Protect, Respect, and Remedy' Framework for Business and Human Rights" (September 2010), Business and Human Rights Resource Centre online:<https://media.business-humanrights.org/media/documents/files/reports-and-materials/Ruggie-protect-respect-remedy-framework.pdf>.

[221] Presentation of Report to United Nations Human Rights Council, Professor John Ruggie, Special Representative of the Secretary-General for Business and Human Rights, Geneva (30 May 2011), online: Business and Human Rights Resource Centre<www.business-humanrights.org/sites/default/files/media/documents/ruggie-statement-to-un-human-rights-council-30-may-2011.pdf>.

[222] See Meyersfeld, *supra* note 154 at 175.

[223] Laura Dominique Knöpfel, "Contesting the UN Guiding Principles on Business and Human Rights from Below: NGOs, Extractive Industries and the Case of Colombia" (Swisspeace Working Paper No 4/2017) at 29, online:

discussion on what corporate responsibility and access to remedy would look like from local communities' standpoints. In effect, confining interaction on this to elite global actors hides the potential that local communities' norms or understanding hold to contribute to a "practice of legality" regarding corporate responsibility for their human rights violations.[224] In chapter 4, this thesis examines this often-neglected issue by examining the Afrocentric norm, Ubuntu, that has the potential of normatively shaping corporate responsibility in Africa and internationally. Chapter 4 advances a normative reconstruct of the UNGPs along cross-cultural and diversified lines. This is because norm-sharing must not only occur at the horizontal level among states, MNCs, INGOs, transnational social networks, and human rights defenders; it must also occur at a vertical level between local norms and global norms. This thesis argues that a vertical—horizontal shared understanding increases the potential for internalizing the corporate responsibility norm that the UNGPs advocates. To make this claim, this thesis tackles the themes of exclusion, diversity, western neo-liberalism, neo-colonialism, and relativism as these relate to the adoption and implementation of Pillar II of the UNGPs. To increase the level of commitment of local and global actors to the norms provided in the UNGPs, there must be increased interaction among diverse norms, thoughts, understandings, and knowledge.

2.5 Conclusion

This chapter has examined the debate on the use of hard and soft laws in global governance. It noted that through treaties, known as hard law, constitute one of the traditional sources of international law, there is increasing use of a non-traditional source

Swisspeace<www.swisspeace.ch/fileadmin/user_upload/Media/Publications/Working_Paper/SP_Working-Paper_1704-web.pdf>.

[224] They note that "[l]imited shared understandings do not mean no law, but they limit the possibilities of law making." See Brunnée & Toope, *supra* note 162 at 56.

in form of codes, standards, and agreements which are generically referred to as soft law. Soft law emerged after the Second World War because of the structural inadequacies of international law that disabled its response to the increasing complexity of post-war state relations. This chapter examined the strengths and weaknesses of both hard and soft laws in global governance. It was noted that notwithstanding the increasing adoption of soft laws in international law, some scholars oppose its use, labeling it as normatively confusing and functionally redundant. However, despite its criticisms, this thesis does not believe that soft law is redundant. Rather, it points out that depending on the context in which it is used, soft law could be a potent tool for a reconstructive exercise like the one undertaken in this thesis.

Turning to the debate within the BHR context, this chapter examined arguments on the relative strengths and weaknesses of the zero draft treaty that aims to provide a treaty framework in place of the existing UNGPs' soft law approach to demanding and regulating corporate accountability. It was argued that a global governance regime that takes an exclusive hard or soft law approach would be fundamentally flawed. It argued for the adoption of an interactional approach that considers the normative underpinning of law, whether hard or soft. Its focus is that social and legal norms must constitute the normative foundations of hard and soft laws, and that an understanding of the interactions of these norms is necessary to move beyond the soft and hard law debate. This is the way to create international law that generates commitments from actors. Brunnée and Toope's interactional theory facilitates understanding how shared views of norms ensure such commitments from international actors with diverse interests. The chapter concluded that international law-making must not only occur at the horizontal level among states, MNCs, INGOs, transnational social networks, and human rights defenders; it must also occur at a

vertical level between local norms and global norms. It proposes that such a relationship can be facilitated through TWAIL constructivism.

The next chapter advances this discussion on norms. It takes an international relations' constructivism approach to examine how social norms develop and spread through a mutually constructed framework to regulate state and non-state actor conduct. It examines the conditions for the creation and spread of social norms into internalized standards of conduct in international relations. It points out that the spread of norms across jurisdictions—norm diffusion—can be achieved via two approaches: norm cosmopolitanism and norm congruence. It analyzes the UNGPs through norm diffusion thinking and argues that the SRSG adopted a cosmopolitan approach that encouraged norm diffusion along horizontal lines between elite international networks, not a congruence approach that dovetails local and global frameworks to encourage norm diffusion between global and local norms. The latter would have facilitated shared understandings among the diversified groups affected by the subject-matter of the UNGPs.

The next chapter concludes that the UNGPs' cosmopolitan approach denies the potential of local norms to contribute normatively to shaping corporate accountability. This is why it is difficult to argue that the UNGPs are legitimate in the eyes of those whose norms are marginalized in its construction—Third World Peoples.

Chapter 3: The C2R2 Norm—An Analysis through Norm Cycle and Norm Diffusion Theories

3.0 The Theory of Norm Dynamics

This chapter engages with the international relations theory of norm dynamics through the works of Martha Finnemore, Kathryn Sikkink, and Amitav Acharya. As already said, a norm is a "standard of appropriate behavior for actors with a given identity."[1] Chiekel defines norms as "shared expectations about appropriate behavior held by a collectivity of actors."[2] These definitions reflect that a norm is held within a reference or identified group.[3] The discussion in the previous chapter showed that for a norm to be social, it must be shared by other people and partly sustained by their approval.[4] This chapter further examines the importance of social norms in international law-making.

Social norms perform various functions. For example, they are used to "make demands, rally support, justify action, ascribe responsibility, and assess the praiseworthy or blameworthy character of an action."[5] In international law, social norms provide solutions to coordination problems, reduce transaction costs, and provide a language and grammar of international politics.[6] Social norms are, however, different from rules, legal

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[1] Martha Finnemore and Kathryn Sikkink, "International Norm Dynamics and Political Change" (1988) 52:4 International Organization 887 at 891. An identity is the character or attributes assigned to person/state by reason of an intersubjectively held belief by other actors.

[2] Jeffrey Checkel, "Norms, Institutions, and National Identity in Contemporary Europe" (1999) 43:1 International Studies Quarterly 83 at 83.

[3] See Gerry Mackie et al, *What are Social Norms? How are they Measured?* (UNICEF / University of California, San Diego, Center on Global Justice, 27 July 2015) ("Social norm is held in place by the reciprocal expectations of the people within a reference group").

[4] Jon Elster, "Social Norms and Economic Theory" (1989) 3:4 The Journal of Economic Perspectives 99 at 99-100.

[5] Friedrich Kratochwil, "The Force of Prescriptions" (1984) 38:4 International Organization 685 at 686.

[6] Andrew Cortell & James Davis Jr, "Understanding the Domestic Impact of International Norms: A Research Agenda" (2000) 2:1 International Studies Review 65 at 65-66.

norms, or maxims.[7] James Fearon explains that while rules take the form ‘‘do X to get Y,’’[8] social norms take a different form: ‘‘Good people do X.’’[9] In effect, while compliance with rules and maxims are motived by outcomes, social norm observance is usually influenced by emotion.[10]

Social norms have constitutive and constraining aspects. They are constitutive when they create a class of actors or actions and determine actors' identities and interests.[11] Social norms create meaning through the construction of intersubjective (collectively held) understanding of who and what things are.[12] Their meanings are value-laden, such that actions of identified actors are judged against the values that are intersubjectively held. This is because social facts are classified with the values (created by a constitutive norm) in order that they can be judged as good or bad.[13] In sum, constitutive norms "define an identity by specifying the actions that will cause others to recognize that identity and respond to it appropriately."[14] For example, traditionally, if someone raises their arm during an auction, such conduct is recognized by others as bidding.[15] The norm creating

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[7] See Jon Elster, "Norms of Revenge" (1990) 100:4 Ethics 862 at 864-866.

[8] For example, Posner's definition characterizes norms in terms of rules that are obeyed for fear of punishment. He defines norms "as rules that distinguish 'desirable and undesirable behavior' and give a third party the authority to punish a person who engages in the undesirable behavior." See Eric Posner, "Law, Economics, and Inefficient Norms" (1996) 144:5 University of Pennsylvania Law Review 1697 at 1699.

[9] James Fearon, "*What is Identity (as we now use the word)*?" (1999) [unpublished, archived at Department of Political Science, Stanford University, 1999] 1 at 27, online: Stanford University<https://web.stanford.edu/group/fearon-research/cgi-bin/wordpress/wp-content/uploads/2013/10/What-is-Identity-as-we-now-use-the-word-.pdf>.

[10] Elster, *supra* note 4 at 100.

[11] Carla Winston, "Norm Structure, Diffusion, and Evolution: A Conceptual Approach" (2018) 24:3 European Journal of International Relations 638 at 640.

[12] Ronald Jepperson, Alexander Wendt & Peter Katzenstein, "Norms, Identity, and Culture in National Security" in Peter Katzenstein, ed, *The Culture of National Security*: *Norms and Identities in World Politics* (New York, Columbia University Press, 1996) 54.

[13] Alexander Wendt, *Social Theory of International Politics* (Cambridge, UK: Cambridge University Press,1999).

[14] Ted Hopf, "The Promise of Constructivism in International Relations Theory" (1998) 23:1 International Security 171 at 173.

[15] See Natalia Criado et al, "Reasoning about Constitutive Norms in BDI Agents" (2014) 22:1 Logic Journal of the IGPL 1 at 2.

auctioneering sets a particular conduct that is recognized by others and responded to appropriately.

Conversely, social norms are restraining when they define "acceptable" justifications for certain behavior.[16] A society may constrain a certain behaviour to address a defined problem. However, the acceptance of a constraining norm is dependent on how the public accepts it, and this speaks to its legitimacy.[17] Riise notes that actions are justified by reference to widely held values.[18] This is because it is impossible to justify one's behaviour on self-interested grounds.[19] A constitutive norm that prescribes justification for acceptable conduct may also be constraining. For example, cut-throat competitiveness in the market may be constrained by strict adherence to norms of honesty.[20] Therefore, a constraining norm, sometimes, relies on the value created by a constitutive norm to limit behaviour or guide response to a problem.[21] The synergistic relationship between constitutive and constraining functions of norms is referred to as norm-building. Norm-building is "the process of constructing a bridge between the constitutive and the constraint functions of norms such that a combined statement is reached: 'Given this problem, my values dictate this behavior."[22]

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[16] Winston, *supra* note 11 at 640.
[17] Elster, *supra* note 4 at 99-100. ("[f]or norms to be social, they must be shared by other people and partly sustained by their approval and disapproval").
[18] Thomas Risse, "Let's Argue!': Communicative Action in World Politics" (2000) 54:1 International Organization 1 at 17.
[19] *Ibid*.
[20] Elster, *supra* note 4 at 102.
[21] Andrew Hurrell & Terry Macdonald, "Norms and Ethics in International Relations" in Beth Simmons, Walter Carlsnaes, & Thomas Risse, eds, *Handbook of International Relations* (London, UK: Sage Publications, 2012) 57 at 61.
[22] Winston, *supra* note 11 at 640. He explains further that there is a tripartite framework in the construction of norms: "First, a norm presupposes a *problem*, which is the issue to be addressed. Second, the norm includes a *value*. It is the enjoyment or attainment of something "good" or the avoidance of something "bad" and, as such, gives moral weight to the problem. Third, a norm enjoins a particular *behavior*: the action to be taken to address the given problem that allows the actor to better express or practice the value. In short, a problem inhibits the full enjoyment of a value and necessitates a corrective behavior."

This chapter refers to norms as values that govern human behaviour—social norms.[23] The study of social norms has been a major devotion of social constructivists in international relations.[24] They understand that state conduct is usually influenced by the soft powers of ideas, values and norms, and not necessarily by the distribution of political power.[25] They consider norms to be important because they influence and motivate actors toward guided behaviour.[26] For example, Vaughan Shannon notes that the norm of military non-intervention has been an important influence on most developed states' conduct when there is a crisis in another state.[27] As well, the norm is a justification for international organizations (for example, the United Nations) to rebuke states for non-compliance. Not only are social constructivists interested in the influence of norms, but they are also interested in their origin and development. Indeed, it has been noted that "[t]o state that norms matter is no longer controversial; scholars are now concerned more with how, when and why norms emanate and evolve."[28] In sum, the social constructivism approach to international relations contributes to new theoretical insights regarding the emergence and influence of norms.

This chapter's examination of social constructivism's theory of norms begins with the concept of the cycle of norms as postulated by Finnemore and Sikkink. This theory

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[23] This is different from legal norms that are standards of behaviour defined in terms of rights and obligations. See Stephen Krasner, "Structural Causes and Regime Consequences: Regimes as Intervening Variables" (1982) 36:2 International Organization 185 at 186; Posner, *supra* note 8.

[24] The term "social constructivism" was first used by international relations scholar, Nicholas Onuf. See Nicholas Onuf, *The World of Our Making* (Columbia: University of South Carolina Press, 1989). Alexander Wendt is also a leading proponent of social constructivism. See Alexander Wendt, *Social Theory of International Politics* (Cambridge, UK, Cambridge University Press, 1999).

[25] See generally Annika Björkdahl "Norms in International Relations: Some Conceptual and Methodological Reflections" (2002) 15:1 Cambridge Review of International Affairs 9.

[26] *Ibid*.

[27] Vaughan Shannon, "Norms are What States Make of Them: The Political Psychology of Norm Violation" (2000) International Studies Quarterly 293 at 307.

[28] Björkdahl, supra note 25.

explains how a norm develops and crystalizes to be an internalized or universal norm. However, Finnemore and Sikkink do not explain the factors that cause norms to move from one cycle to another. Riise and Sikkink attempt to fill this gap by explaining how transnational networks contribute to the development of norms in their spiral model theory.[29] They argue that transnational social agents, like international organizations and international NGOs (INGOs), contribute to norm adoption from the international to the domestic level.[30] However, they still overlook domestic (local) factors that influence the adoption or internalization of norms. The chapter also draws on Acharya's work to explore how conditions in local contexts influence norm diffusion and adoption. Specifically, this chapter examines how the congruence theory as explained by Acharya, enables us to understand how different domestic (local) actions shape and modify international norms. Drawing from these theories, this chapter examines how the UNGPs' concept of corporate responsibility to respect (CR2R) is developing, and the potential of local actors and norms, especially in Africa, to resist or support the CR2R norm to the extent of its resemblance/assimilation to local pre-existing norms and structures.

The chapter is divided into three broad parts. Part I discusses Finnemore and Sikkink's norm cycle. It specifically examines the characteristics of each stage of the cycle and the condition precedent for a norm to proceed from one stage to another. However, since Finnemore and Sikkink do not explain why and how norms diffuse, Part II engages

[29] See generally Thomas Risse & Kathryn Sikkink, "The Socialization of International Human Rights Norms into Domestic Practices: Introduction" in Thomas Risse, Stephen Ropp, & Kathryn Sikkink, eds, *The Power of Human Rights International Norms and Domestic Change* (Cambridge, UK: Cambridge University Press, 1999) 1.

[30] Margret Keck & Kathryn Sikkink, *Activists Beyond Borders: Advocacy Networks in International Politics* (Ithaca, NY: Cornell University Press, 1998) at 3 ("[n]etwork actors bring new ideas, norms and discourses into policy debates…They also promote norm implementation by pressuring target actors to adopt new policies, and by monitoring compliance with international standards").

with the theory of norm diffusion, identifies and distinguishes between two theories of norm diffusion—the cosmopolitan and congruence theories. The former emphasizes transnational networks, while the latter focuses on local actors and norms' influence on the international normative order. Part II also explains variants of the congruence theory—localization and subsidiarity—as explained by Amitav Acharya. The variants explain the role of local actors in the contestation or support for international norms. Part I and Part II of this chapter are, therefore, descriptive, and explanatory as they lay the background for Part III and subsequent chapters in this thesis. Part III explains the development of the UNGPs' norm of corporate responsibility to respect (CR2R) in light of Finnemore, Sikkink, and Acharya's theories of norm cycle and congruence. It particularly examines the role of the (former) SRSG, John Ruggie and his team, as norm entrepreneurs in the universalization of the CR2R norm. Part III identifies that the UNGPs are at the cascading stage in the norm cycle theory. It also classifies the SRSG's norm diffusion strategy as a cosmopolitan rather than a congruence approach. It concludes with a note that the UNGPs, when understood or implemented through a congruence approach, show local actors and norms to be either potential "disruptors" or "supporters" of CR2R internalization and the implementation of the SRSG's agenda and vision.

Part I—Norm Cycle

3.1.1 Stage 1—Norm Emergence

Martha Finnemore and Kathryn Sikkink explain that norms exist in a patterned "life cycle" consisting of three stages: norm emergence, norm cascade (norm acceptance), and norm internalization.[31] The first stage—norm emergence—occurs when a group of actors, called

[31] Sikkink & Finnemore, *supra* note 1 at 888.

"norm entrepreneurs," convinces a group of states and non-state actors (norm leaders) to embrace new norms.[32] This stage is characterized by persuasion and conviction borne out of norm entrepreneurs' strong feelings or position about acceptable behaviour in their community.[33] Norm entrepreneurs can take many forms: they may be non-governmental organizations (NGOs), grassroots organizations, international organizations, legal experts, UN representatives, and academics.[34] Norm entrepreneurs are important for norm emergence because they call attention to issues or even create issues by using names and languages that (re)interpret and (re)name them—this is called framing.[35] However, framing is not accepted without contestation within a larger framework of existing norms.[36] This is because norms "emerge in a highly contested normative space where they must compete with other norms and perceptions of interest."[37] Therefore, norm entrepreneurs promote norms within the context of the "appropriate standard" of conduct defined by prior norms.[38]

At the stage of norm emergence, norm entrepreneurs are motivated by several factors, which include empathy, altruism, ideology, and ideational commitment.[39] In other words, norm entrepreneurs promote new norms, usually not because of their gain or benefit but because of their strong desire to see others do well, even if the well-being of others is

[32] Sikkink & Finnemore, *supra* note 1 at 896.
[33] *Ibid*.
[34] Giovanni Mantilla, "Emerging International Human Rights Norms for Transnational Corporations" (2009) 15:2 Global Governance 279 at 281.
[35] David Snow et al, "Frame Alignment Processes, Micromobilization, and Movement Participation" (1986) 51:4 American Sociological Review 464 at 464.
[36]Wiener defines contestation as a "social practice [that] entails objection to specific issues that matter to people; in international relations, contestation . . . involves the range of social practices which discursively express disapproval of norms." See Antje Wiener, *A Theory of Contestation* (Heidelberg, Germany: Springer, 2014) at 3. See also Lucrecia GarcÍa Iommi, "Norm Internalisation Revisited: Norm Contestation and the Life of Norms at the Extreme of the Norm Cascade" (2020) 9:1 Global Constitutionalism 76.
[37] Sikkink & Finnemore, *supra* note 1 at 897.
[38] *Ibid*.
[39] *Ibid* at 898.

detrimental to the interest of the norm entrepreneur.[40] However, it is difficult to determine the underlying reasons to promote a norm beyond empathy, altruism, and ideational commitment. Some norm entrepreneurs may promote a norm to create a mark or score some academic achievement. Whatever the reason for norm emergence, norm entrepreneurs aim to create an acceptable standard of behaviour that distinguishes between "good" and 'bad" outcomes.

At the international level, norm entrepreneurs use international organizational platforms to promote new norms because these organizations may be major influences in the emergence of a new norm.[41] Standing international organizations like the UN and World Bank are platforms that norm entrepreneurs use for various reasons, like good organizational structure, leverage with member states, and expertise/information in specific areas that can convince actors.[42] International organizations also provide norm entrepreneurs with tools to secure the support of states through persuasion or, sometimes, coercion in the case of weak states.

For a norm to reach the second stage (norm cascade), it must be institutionalized in specific set rules of international organizations.[43] An institutionalized norm contributes to the possibility of norm cascade because it clarifies what the norm is and what constitutes a violation. It also sets out the procedures by which norm leaders coordinate disapproval and sanctions for norm-breaking.[44] Norm leaders' persuasion of other actors to adopt a new

[40] See Kristen Monroe, *The Heat of Altruism: Perceptions of a Common Humanity* (Princeton, New Jersey: Princeton University Press, 1996) at 206.
[41] Finnemore & Sikkink, *supra* note 1 at 899. See also Daisuke Madokoro, "International Commissions as Norm Entrepreneurs: Creating the Normative Idea of the Responsibility to Protect" (2019) 45: 1 Review of International Studies 100.
[42] Finnemore & Sikkink, *ibid*.
[43] *Ibid* at 900.
[44] *Ibid*.

norm at this stage leads to a "tipping point."[45] A norm cycle reaches a tipping point when a critical mass of states adopts a norm.[46] Although the number that qualifies to be a critical mass is debatable, Finnemore and Sikkink suggest that if 1/3 member states of an organization adopt a norm, they can be called a critical mass.[47] Also, the relative strength of states may contribute to determining whether there is enough support for a norm to reach the tipping point.[48] Finnemore and Sikkink define "critical states" as "those without which the achievement of the substantive norm goal is compromised."[49]

3.1.2. Stage 2—Norm Cascade

A norm cascade occurs after the tipping point. Norm cascade is characterized by imitation, which occurs when norm leaders attempt to socialize other states (or actors) to adopt a norm—that is, to become norm followers.[50] This often results in cascading or trickling of norms throughout the rest of an identified population. Socialization involves the "induction of new members…into the ways of behavior that are preferred in a society."[51] Thomas Risse and Sikkink explain that the goal of socialization is to internalize a norm so that external pressure is no longer needed to ensure compliance.[52] Since the international community comprises a group of states and non-state actors, the socialization process is a way to understand socio-political interaction among them. In effect, further to

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[45] Finnemore & Sikkink, *supra* note 1 at 900.
[46] *Ibid*.
[47] *Ibid* at 901.
[48] The consideration given to the relative strengths of states is debatable because, sometimes the strength of states may be irrelevant where weak states unanimously support a trend or where they are major contributors to the operationalization of a norm. See generally Olabisi Akinkugbe, "Reverse Contributors? African State Parties, ICSID, and the Development of International Investment Law" (2019) 34:2 ICSID Review—Foreign Investment Law Journal 434.
[49] Finnemore & Sikkink, *supra* note 1 at 901.
[50] *Ibid* at 902.
[51] James Barnes, Marshall Carter & Max Skidmore, *The world of politics* (New York: St Martin's Press, 1980) at 35.
[52] Risse & Sikkink, *supra* note 29 at 11.

the works of norm entrepreneurs, a critical mass of states and non-state actors who believe in a norm socialize others into adopting the norm.

States adopt norms at this stage for different reasons, such as legitimization, conformity, and esteem.[53] These factors are products of what Francisco Ramirez calls peer pressure among states.[54] Legitimization occurs when states feel the need to adopt a norm to obtain the approval of other states or to become members of a community. For example, in cases of human rights, some scholars classify some western states as a community of "democratic liberal states" who are seen as the epitome of freedom, democracy, and the rule of law.[55] States not belonging to this category are classified as non-liberal states.[56] Therefore, a state seeking international legitimation and domestic acceptance may be socialized into adopting norms promoted by liberal states.[57] This is because adopting such norms may help to define its identity as a liberal state.[58]

Conformity and esteem focus on how states see themselves. States may adopt a norm because of the need to fulfill the psychological need of a sense of belonging.[59] In other words, the desire to gain or defend one's pride and reputation can explain norm

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[53] Finnemore & Sikkink, *supra* note 1 at 903. This is based on a theoretical premise rather than empirical evidence.
[54] Francisco Ramirez, Yasemin Soysal & Suzanne Shanahan, "The Changing Logic of Political Citizenship: Cross-National Acquisition of Women's Suffrage Rights, 1890 to 1990" (1997) 62:5 American Sociological Review 735 at 740.
[55] See e.g., Anne-Marie Slaughter, "International Law in a World of Liberal States" (1995) 6:3 European Journal of International Law 503.
[56] Risse & Sikkink, *supra* note 29 at 9.
[57] *Ibid* at 8.
[58] *Ibid*.
[59] Axelord refers to this as "social proof." See Robert Axelrod, "An Evolutionary Approach to Norms" (1986) 80:4 The American Political Science Review 1095 at 1105. Reference to states having psychological needs alludes to the collective responsibility/actions of state representatives and not individual members' actions. See Hans Kelsen, "Collective and Individual Responsibility in International Law with Particular Regard to the Punishment of War Criminals" (1943) 31:5 California Law Review 530 at 551; Richard Vernon, "Punishing Collectives: States or Nations?" in Tracy Isaacs & Richard Vernon, eds, *Accountability for Wrongdoing* (Cambridge, UK: Cambridge University Press, 2012) 287.

following.[60] Therefore, these factors are linked to how states' representatives feel about themselves and how they want other states to perceive them.[61] Finnemore & Sikkink give an example of an instance where states care about norms associated with liberalism because being a "liberal state" is part of their identity and it is something they take pride in, or an identity from which they gain their self esteem.[62] Indeed, it has been noted that social norms are sustained, in part, by "feelings of embarrassment, anxiety, guilt, and shame that a person suffers at the prospect of violating them."[63] Norm leaders adopt tools that include naming and shaming to inspire a sense of pride or self-esteem on the one hand, and guilt and shame on the other hand to achieve norm cascade.[64]

3.1.3. Stage 3—Internalization

The third stage occurs when norms acquire a taken-for-granted quality and are no longer a matter of broad public debate—that is, a norm crystalizes as a generally accepted standard of conduct within an identified population.[65] Rommetveit describes internalization as "the subtle change occurring when an enduring social pressure exerted by a norm-sender gradually is felt or experienced by the norm-receiver as an obligation toward himself."[66] At this stage, conformity to a norm is not questioned or debated because it is deemed a near-universal norm. For example, many western norms about market

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[60] Finnemore & Sikkink, *supra* note 1 at 903.
[61] Fearon, *supra* note 9 at 27.
[62] Finnemore & Sikkink, *supra* note 1 at 904.
[63] Fearon, *supra* note 9 at 23.
[64] Risse & Sikkink, *supra* note 29 at 11.
[65] David Lake, "Laws and Norms in the Making of International Hierarchies" in Ayse Zarakol, *Hierarchies in World Politics* (Cambridge, UK: Cambridge University Press) 17 at 17; Finnemore & Sikkink, *supra* note 1 at 904. Campbell describes internalization as "a commitment to a norm or standard, such that the actor would be expected to commit energy to its defense and maintenance even when external supports or pressures are not available." Ernest Campbell, "The Internalization of Moral Norms" (1964) 27:4 Sociometry 391 at 396.
[66] Ragnar Rommetveit, *Social Norms and Roles: Explorations in the Psychology of Enduring Social Pressures* (Minneapolis: University of Minnesota Press, 1954) at 56-57.

exchange, individualism, sovereignty, and the rule of law have gained prominence in the international community to the extent that states' conformity with these norms is deemed to be normal behaviour.[67] After the internalization stage, norms may be supplemented or replaced by domestic law.[68] Indeed, it has been noted that "norms often precede laws but are then supported, maintained, and extended by laws."[69] However, this does not mean that all norms must be supported or supplemented by law.

Part II

3.2. Theory of Norm Diffusion

Although Finnemore and Sikkink's norm cycle theory helps to understand the development or origin of norms, they do not explain the factors that contribute to the reception or rejection of a norm within the dynamics of political and international relations. Scholars, especially political scientists, sociologists, and international relations experts, identify and fill this gap with the study of causal mechanisms and processes through which norms and ideas spread.[70] Their work engages with the theory of norm diffusion. The word "diffusion" is used synonymously with words like "spread," "trickling down," and

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[67] Kingsley Davis, *Human Society* (New York: Macmillan Press, 1949) at 55 ("[a] norm is said to be internalized when it is a part of the person, not regarded objectively or understood or felt as a rule, but simply as a part of himself, automatically expressed in behavior"). See also Simon Chesterman, "An International Rule of Law?" (2008) 56:2 The American Journal of Comparative Law 331; William Aceves, "Relative Normativity: Challenging the Sovereignty Norm through Human Rights Litigation" (2002) 25:3 Hastings International and Comparative Law Review 261 (he describes sovereignty as a grund norm of international law).

[68] It is not compulsory for laws to supplement norms. A norm can still maintain its value and persuasiveness notwithstanding that it is not supported by positive law.

[69] Axelord, *supra* note 59 at 1106.

[70] Mona Lena Krook & Jacqui True, "Rethinking the Life Cycles of International Norms: The United Nations and the Global Promotion of Gender Equality" (2010) 18:1 International Journal of International Relations 103. See also David Strang & Sarah Soule, "Diffusion in Organizations and Social Movements: From Hybrid Corn to Poison Pills" (1998) 24 Annual Review of Sociology 265 at 266.

"translation."[71] Generally, diffusion is the "transfer or transmission of objects, processes, ideas, and information from one population or region to another."[72] Concerning international relations and policy choices, Simmons explains that "[i]nternational policy diffusion occurs when government policy decisions in a given country are systematically conditioned by prior policy choices made in other countries."[73] This definition emphasizes the interdependence of states in the process of making policy choices. States make "uncoordinated, but interdependent" choices through causal mechanisms that include coercion, competition, learning, and emulation.[74]

There are two approaches to studying norm diffusion— moral cosmopolitanism and norm congruence.[75] Moral cosmopolitanism is the propagation and promotion of "universal" moral norms by transnational actors either through agencies like states or transnational networks like NGOs and international organizations.[76] Moral cosmopolitanism has three main features. First, it is promoted as a universal or

[71] Rogers defines diffusion as "the process by which an innovation is communicated through certain channels over time among the members of a social system." See Everett Rogers, *Diffusion of Innovations*, 3rd ed (New York: The Free Press, 1983) at 6.
[72] Checkel, *supra* note 2 at 85. Diffusion theories have been used in various disciplines, including Anthropology, History, Archeology, Sociology, and International Relations. See Peter Hugill & Bruce Dickson, *The Transfer and Transformation of Ideas and Material Culture* (Texas: A & M University Press, 1988) at 263-264.
[73] Beth Simmons, Frank Dobbin & Geoffrey Garrett, "Introduction: The International Diffusion of Liberalism" (2006) 60:4 International Organizations 781 at 787. See also Winston, *supra* note 11 at 645 ("[n]orm diffusion implies that norms travel: they are taken out of their original (highly specific) context and applied to a new (highly specific) context").
[74] Zachary Elkins & Beth Simmons, "On Waves, Clusters, and Diffusion: A Conceptual Framework" (2005) 598:1 Annals of the American Academy of Political and Social Sciences 33 at 35. Diffusion mechanisms "are systematic sets of statements that provide a plausible account of how policy choices in one country are systematically conditioned by prior policy choices made in other countries." See Dietmar Braun & Gilardi Fabrizio, "Taking 'Galton's Problem' Seriously: Towards a Theory of Policy Diffusion" (2006) 18:3 Journal of Theoretical Politics 298 at 299; Gilardi Fabrizio, "Transnational Diffusion: Norms, Ideas, and Policies" in Walter Carlsnaes, Thomas Risse & Beth Simmons, eds, *Handbook of International Relations* (Thousand Oaks: SAGE Publications, 2012) 453 at 489.
[75] Amitav Acharya, "How Ideas Spread: Whose Norms Matter? Norm Localization and Institutional Change in Asian Regionalism" (2004) 58:2 International Organization 239 at 243.
[76] *Ibid*.

cosmopolitan idea. Examples are the campaign against land mines, intervention against genocide, struggle against racism, ban against chemical weapons, and promotion of human rights.[77] Second, a cosmopolitan norm is promoted by transnational agents—individual "moral entrepreneurs" or social movements–with little emphasis on the reaction of domestic actors.[78] Third, the literature on moral cosmopolitanism relies on moral proselytism to convert norm followers, and any resistance to the moral persuasion or conversion to adopt a norm is labeled immoral or illegitimate.[79]

Moral cosmopolitanism is criticized for giving causal primacy to "international prescriptions" while ignoring the expansive appeal of "norms that are deeply rooted in other types of social entities—regional, national, and subnational groups."[80] Acharya argues that the distinction between norms that originate internationally and those originating from local contexts sets up a dichotomy between "good" global norms and "bad" regional or local norms.[81] For example, Ellen Moyer, in a research project funded by the European Commission, argued that it is presumed that "African gender norms and sexual practices are static, conservative, and 'backward."[82] She notes that this stereotype hides the fact that there is also unsolved gender inequality in developed states. She contends

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[77] Acharya, *ibid*.
[78] *Ibid*. For the purpose of this thesis, social movements are defined as "a particular mode of coordination of collective action, based on sustained networks of coordination between independent, autonomous organizations and groups. At the same time, their components are linked by specific intense solidarities which go beyond the boundaries of specific organizations." See Mario Diani, "Struggling Movements in Dubious Opportunities – An Afterword to 'Surviving Neoliberalism: The Persistence of Australian Social Movements" (2010) 9:2 Social Movement Studies 229 at 230.
[79] See Ethan Nadelmann, "Global Prohibition Regimes: The Evolution of Norms in International Society" (1990) 44:4 International Organization 479 at 481.
[80] Jeffrey Legro, "Which Norms Matter? Revisiting the 'Failure' of Internationalism" (1997) 51:3 International Organization 31– 32.
[81] Acharya, *supra* note 75 at 242. See also Jeffrey Checkel, "Norms, Institutions and National Identity in Contemporary Europe" (1998) (Advanced Research on the Europeanization of the Nation-State, University of Oslo, Copenhagen, Denmark, ARENA Working Paper, 98/16).
[82] Ellen Moyer et al, *Becoming Men: Performing Responsible Masculinities in Contemporary Urban Africa* (European Research Council Project, 2021).

that without understanding the cultural contexts of local norms, it is inaccurate to label them as bad or backward. Similarly, cosmopolitanism is criticized for elevating the role of transnational actors over local actors.[83] Critics conclude that, by emphasizing the importance of international agencies, norm cosmopolitanism limits the potential of norm dynamics to be shaped by different conditions and processes.[84]

Conversely, congruence theory examines norm diffusion "beyond international prescriptions and stresses the role of domestic political, organizational, and cultural variables in conditioning the reception of new global norms."[85] This theory focuses on the domestic reception of global norms—that is, the cultural fit (or congruence) between existing local cultural norms with an internationally developed norm.[86] This is similar to Susanne Zwingel's concept of translation where norms are influenced by different cultural and socio-economic contexts.[87]

Acharya introduces concepts like framing, grafting, and localization in the process of norm congruence.[88] Framing and grafting are principles of re-interpreting or re-representing a norm in a local context by norm advocates who may not necessarily be local agents.[89] Framing is the process where norm advocates "highlight and create issues by

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[83] Acharya, *supra* note 75 at 243.
[84] *Ibid*.
[85] *Ibid*. See also Thomas Risse-Kappen, "Ideas do not Float Freely: Transnational Coalitions, Domestic Structures, and the End of the Cold War" (1994) 48:2 International Organization 185.
[86] Checkel, *supra* note 81 at 87 ("diffusion is more rapid when a cultural match exists between a systemic norm and a target country, in other words, where it resonates with historically constructed domestic norms"). See also Paul Dimaggio & Walter Powell, eds, *The New Institutionalism in Organizational Analysis* (Chicago: University of Chicago Press, 1991) at 199-201.
[87] See Susanne Zwingel, "How Do Norms Travel? Theorizing International Women's Rights in Transnational Perspective" (2012) 56:1 International Studies Quarterly 115 at 126.
[88] Amitav Acharya, *Rethinking Power, Institutions and Ideas in World Politics: Whose IR?* (New York: Routledge, 2014) at 186.
[89] *Ibid*. See also Erik Bleich, "Integrating ideas into policy-making analysis: Frames and race policies in Britain and France" (2002) 35:9 Comparative Political Studies 1054 at 1064. He defines "frames" as "multidimensional ideas relevant to a particular policy sphere that serve to organize information, empower certain actors, define goals, and constrain actions").

using languages that names, interprets, and dramatizes them."[90] Framing is important because "the linkages between existing norms and emergent norms are not often obvious and must be actively constructed by proponents of new norms."[91] Therefore, framing, through its re-interpretative tool, has the potential to create similarities between global and local norms. Grafting, on the other hand, is used by norm advocates to "institutionalize a new norm by associating it with a pre-existing norm in the same issue area, which makes a similar prohibition or injunction."[92] This is different from radical transplantation or norm displacement because grafting only encourages incremental norm transplantation in an issue area.[93]

Localization goes further than framing and grafting. Acharya defines localization as "the active construction (through discourse, framing, grafting, and cultural selection) of foreign ideas by local actors, which results in the former developing significant congruence with local beliefs and practices."[94] It resonates with the notion that norms have to be remade in the vernacular to have any meaning.[95] For example, a global norm on patentability is contained in *The Agreement on Trade Related Aspects of International Trade* (TRIPS).[96]

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[90] Acharya, supra not 88 at 186.
[91] Martha Finnemore & Kathryn Sikkink "International Norm Dynamics and Political Change" in Peter Katzenstein, Robert Keohane & Stephen Krasner, eds, *Exploration and Contestation in the Study of World Politics* (Cambridge, Mass: MIT Press, 1999) 247 at 268.
[92] Acharya, *supra* note 88 at 186. See also Richard Price, "Reversing the Gun Sights: Transnational Civil Society Targets Land Mines" (1998) 52:3 International Organization 613 at 617. Price refers to grafting as a technique that uses "the combination of active, manipulative persuasion and the contingency of genealogical heritage in norm germination."
[93] Acharya, *supra* note 88 at 186. Keck and Sikkink explain that norm displacement occurs when a foreign norm replaces a local norm whose moral claim or functional competence has already been challenged from within. See Keck & Sikkink, *supra* note 30 at 62.
[94] Acharya, *supra* note 88 at 187.
[95] Sally Engle Merry, *Human Rights & Gender Violence: Translating International Law into Local Justice* (Chicago: University of Chicago Press, 2006) at 1.
[96] Agreement on Trade-Related Aspects of Intellectual Property Rights, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, 1869 U.N.T.S. 299, 33 I.L.M. 1197 (1994) [TRIPS Agreement].

Article 27 (1) of the Agreement provides that "patents shall be granted in all fields of technology, provided that they are new, involve an inventive step and are capable of industrial application." This provision commodifies the patent system. It promotes a free market economy in favour of multinational pharmaceutical companies who may claim monopoly of an invention notwithstanding that the source is from traditional knowledge or local pharmaceutical industries. However, local actors in Brazil contested and reframed Article 27. Through a process of localization, they infused nationalistic requirements that protect the interest of local pharmaceutical companies into the norm.[97] This resulted in a legislation that, although retained some portions of the original norm, safeguarded the interest of local pharmaceutical companies in Brazil.[98] The actions of local actors created a congruence between local interests with a global norm.

Traditionally, constructivist scholarship on norm diffusion privileges the study of the activities of "transnational moral entrepreneurs" over "insider proponents."[99] Transnational moral entrepreneurs have been described as those with the ability to "mobilize popular opinion and political support both within their host country and abroad," "stimulate and assist in the creation of like-minded organizations in other countries," and "play a significant role in elevating their objectives beyond its identification with the national interests of their government."[100] However, the localization approach is a shift in the understanding of norm entrepreneurship from "outsider proponents" committed to understanding and promoting universal or transnational moral agenda to "insider

[97] See generally Thomas R. Eimer, Susanne Lütz & Verena Schüren, "Varieties of Localization: International Norms and the Commodification of Knowledge in India and Brazil" (2016) 23:3 Review of International Political Economy 450.
[98] *Ibid* at 468.
[99] Merry, *supra* note 95 at 1.
[100] Nadelmann, *supra* note 79 at 482.

proponents" committed to congruence between universal and prior and pre-existing cultural norms.[101] Localization actors include individuals, NGOs, social groups, and local communities.

Localization is a systematic and dynamic process where existential compatibility between local norms and foreign norms are prioritized for norm adaptability.[102] The prior existence of a local norm in a similar issue area as that of a foreign norm makes it easier for local actors to subject the foreign norm to some pruning, adjustments, framing, and grafting to fit into a specific cultural and socio-economic context.[103] In other words, without losing its attributes, the foreign norm is adapted into a cultural, local, and specific context, without the local community losing its identity as well.[104] Bosch describes the outcome of localization as a situation in which "the foreign culture gradually blend[s] with the ancient native one so as to form a novel, harmonious entity, giving birth eventually to a higher type of civilization than that of the native community in its original state."[105] Acharya approaches measuring outcomes from a different angle when he says "[l]ocalization is indicated when an extant institution responds to a foreign idea by functional or membership expansion and creates new policy instruments to pursue its new tasks or goals without supplanting its original goals and institutional arrangement."[106]

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[101] Acharya, *supra* note 75 at 249.
[102] *Ibid* at 252 ("Localization is progressive, not regressive or static. It reshapes both existing beliefs and practices and foreign ideas in their local contexts. Localization is an evolutionary or 'everyday' form of progressive norm diffusion").
[103] Kai Michael Kenkel & Felippe De Rosa, "Localization and Subsidiarity in Brazil's Engagement with the Responsibility to Protect" (2015) 7:3-4 Global Responsibility to Protect 325 at 328.
[104] Indeed, some scholars describe the process of localization as "adaptation." See e g, Alastair Johnston, "Learning Versus Adaptation: Explaining Change in Chinese Arms Control Policy in the 1980s and 1990s" (1996) 35 China Journal 27. However, Wolters distinguishes adaptation from localization. See Oliver Wolters, *History, Culture and Region in Southeast Asian Perspectives* (Ithaca: Cornell University Southeast Asian Studies Program, Singapore: Institute of Southeast Asian Studies, 1999) at 56.
[105] Frederik David Kan Bosch, *Selected Studies in Indonesian Archaeology* (The Hague, Netherlands: Martinus Nijhoff, 1961) at 3.
[106] Acharya, *supra* note 75 at 253.

Zimmermann takes a middle course between total loss of identity and total rejection of a norm through her embedding approach. According to her, "[e]mbedding describes a localization type where the adopted [norm] and its implementation is mostly in line with international standards but where the dominant frames and practices differ from an interpretation in the transnational community."[107] Acharya concedes that localization may be the first step in a norm displacement process, which means that local norms may be displaced by a foreign norm that has been fitted into local contexts and adopted by elitists.[108]

Localization progresses in four stages. The first stage (pre-localization) occurs when local actors resist new external norms because of doubts about their application and utility, and the fear that the norm may undermine existing local identity, beliefs, and practices; the second stage (entrepreneurship and framing) occurs where local actors re-interpret a foreign external norm in a manner that brings out its value to the local audience; the third stage (grafting and pruning) occurs when both norms (local and foreign) are adjusted and reconstructed to accommodate each other, such that they synergistically operate on a common ground for the benefit of the local audience; the last stage (amplification and "universalization") occurs when new instruments and practices are established from the synergistic and mutual normative framework between local and foreign norms in which local influence remains dominant and visible.[109] Zimmermann concludes that "…localization is at least recognized as having the potential to produce

[107] Lisbeth Zimmermann, "Same Same or Different? Norm Diffusion Between Resistance, Compliance, and Localization in Post-conflict States" (2016) 17 International Studies Perspectives 98 at 107.
[108] *Ibid* ("localization provides an initial response to new norms pending norm displacement, which may or may not occur. But at least localization gives such change a decent chance").
[109] *Ibid* at 251.

outcomes of a more legitimate, more stable, and locally more appropriate kind."[110] An example is Brazil's localization of the TRIPS norm described above. The resistance by local actors because of the effect of the foreign norm on local pharmaceutical companies started the localization process. The second stage was the reframing of Article 27 to reflect the socio-economic realities in Brazil. The third stage was the grafting of both global and local norms. For instance, although a patent could still be granted to MNCs in Brazil, the patent can only be granted if the technology will be applied within Brazil. This prevents indigenous ideas from being exported to foreign countries and ensures that Brazilian enjoys the benefit of indigenous knowledge transformed into patents. This is an incentive for economic growth of local pharmaceutical companies because they can partner with MNCs without the fear of MNCs obtaining exclusive patents, exporting the patents, and then reselling them to local pharmaceutical companies at exorbitant costs. Admittedly, the localized norm has not reached the fourth stage of influencing global norms.

Akin to the localization theory is the subsidiarity theory espoused by Acharya.[111] Acharya developed the subsidiarity theory in response to the lack of literature on how norms diffuse from a Third World perspective.[112] Subsidiarity theory enables international relations scholars and social constructivists to view norm making and diffusion as a bottom-up process "in which weak local actors can challenge and influence global

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[110] Zimmermann, *supra* note 107 at 105. She distinguishes "embeddedness" from "reshaping" as outcomes of localization. Reshaping is the active modification of foreign norm during translation into local norms.
[111] Amitav Acharya, "Norm Subsidiarity and Regional Orders: Sovereignty, Regionalism, and Rule Making in the Third World" (2011) 55:1 International Organizations 95.
[112] *Ibid* at 96. Subsidiarity originates from scholarships in Europe as an argument for power distribution among various units of governments. However, it has been extended to various areas relating to global governance. Jachtenfuchs and Krisch note that subsidiarity "holds significant promise as normative and legal guidance for institutional design and for the exercise of authority in the global realm." Markus Jachtenfuchs & Nico Krisch "Subsidiarity in Global Governance" (2016) 79:1 Law and Contemporary Problems 1 at 29. See also George Bermann, "Taking Subsidiarity Seriously: Federalism in the European Community and the United States Community and the United States" (1994) 94 Colum L Rev 331.

normative processes, rather than a largely top-down one."[113] Theresa Reinold describes subsidiary scholarship as "a default preference for locating governance at the lowest possible level –that is, the level which is closest to the individuals affected by the decisions of the governing body."[114] To compensate for the legitimacy deficit of global governance institutions, subsidiary norms make individuals the primary unit of normative concern.[115] Therefore, subsidiarity theory is a challenge to the western framing of norm dynamics and diffusion as an institutionalized process. For example, one of the subsidiary norms from Latin America is the doctrine of uti possidetis juris.[116] This doctrine recognized the rights of colonies to retain their boundaries after independence. Upon independence, the colonies have the right to maintain their existing boundaries. This norm, with its origin in Latin America, later influenced and supported a global norm on territorial sovereignty which is mostly adopted in other regions, including Africa and Asia.[117]

Acharya defines subsidiarity as a "process whereby local actors create rules with a view to preserve their autonomy from dominance, neglect, violation, or abuse by a more powerful central actor."[118] This principle in international relations is inspired by Anne-Marie Slaughter. She defines subsidiarity as "a principle of locating governance at the lowest possible level—that [is] closest to the individuals and groups affected by the rules

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[113] Acharya, *supra* note 111 at 96.
[114] Theresa Reinold, "The Promises and Perils of Subsidiarity in Global Governance: Evidence from Africa" (2019) 40:11 Third World Quarterly 2092 at 2094.
[115] *Ibid* at 2100. See generally Paolo Carozza, "Subsidiarity as a Structural Principle of International Human Rights Law" (2003) 97 American Journal of International Law 38. Subsidiarity is also a principle of international sustainable development law. For example, the Supreme Court of Canada in *114957 Canada Ltée (Spraytech, Société d'arrosage) v. Hudson (Town)* [2001] 2 SCR 241 cited this principle in support of municipal action and idea that all levels of government have different roles to play in environmental governance.
[116] Acharya, supra note 111 at 113.
[117] *Ibid*. see also Enver Hasani, "Uti Possidetis Juris: From Rome to Kosovo" (2003) 27:2 The Fletcher Forum of World Affairs 85.
[118] Acharya, *ibid* at 97.

and decisions adopted and enforced."[119] In international relations, the subsidiarity principle featured in the universalism and regionalism debate at the time of the drafting of the United Nations Charter in 1945.[120] In sum, subsidiarity stresses the importance of local autonomy in Third World countries' decisions on how and when to adopt a foreign norm.[121]

Third World countries develop subsidiary norms for two reasons. First, they develop subsidiary norms to challenge their exclusion and marginalization from global norm-making processes.[122] Indeed, global institutions dominated by strong global actors do not always reflect the ideas, interests, or views of weaker states.[123] Subsidiary norms are used as a response to multilateral organizations' dominance in the distribution of power in global governance, a situation that may be classified as tyrannous.[124] For example, Latin American states developed the Drago doctrine to challenge the US and Europe's position that they have a right to intervene to force states in Latin America to honour their sovereign debts.[125] Named after Argentine Foreign Minister, Luis Drago, the norm resists the intervention of superpowers in contractual matters between a debtor and creditor. Second, developing countries develop subsidiary norms in response to "great power hypocrisy."[126] This arises when these countries "see the violation of their cherished global norms by

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[119] Anne-Marie Slaughter, *A New World Order* (Princeton, New Jersey: Princeton University Press, 2004) at 30.
[120] See Norman Padelford, "Regional Organization and the United Nations" (1954) 8:2 International Organization 203.
[121] As stated in previous chapters, this thesis uses the term "Third World Peoples," the same way Muni uses it as including nearly all countries of Africa and Latin America. See S D Muni, "The Third World: Concept and Controversy" (1979) 1:3 Third World Quarterly 119.
[122] Acharya, *supra* note 111 at 100.
[123] *Ibid*. This, again, is reflected in the drafting of the Universal Declaration of Human Rights in 1945 and the cultural relativism critique that ensued therefrom. See Jack Donnelly, "Cultural Relativism and Universal Human Rights (1984) 6:4 Human Rights Quarterly 400. Of course, the exclusion and/or marginalization of Third World Peoples inform their understanding of the content of a norm and its legitimacy.
[124] Acharya, *supra* note 111 at 100.
[125] *Ibid* at 113.
[126] *Ibid*.

powerful actors and when higher-level institutions tasked with their defense seem unwilling or incapable of preventing their violation."[127] For example, the Calvo doctrine was developed in South America in response to foreign intervention and exploitation via the rules of international investment law.[128] The Calvo doctrine developed into a foreign policy doctrine that ensured that jurisdiction in international investment disputes lies with the country in which the investment is located.[129] In effect, subsidiary norms may arise from the need to limit the scope and application of global norms that are selectively applied and implemented by stronger western states against weaker states.[130] Ibironke Odumosu-Ayanu depicts such bottom-up constructivism when she explored how Third World Peoples' interaction with the investment system contributes to the re-construction of the investment dispute settlement system.[131] The interaction of Third World Peoples with the investment law system is a manifestation of subsidiarity because they seek to reconstruct the system to consider their unrepresented interests in international investment law.

Norm subsidiarity is different from norm localization in terms of its contribution to the global normative order. Although localization serves as a reference point for identifying and distinguishing the essential aspect of norm subsidiarity, the motives driving both concepts are different.[132] First, localization is "inward-looking" because it involves making foreign ideas consistent with prior local norms while subsidiarity is "outward-looking"

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[127] Acharya, *supra* note 111 at 113.
[128] See Andrew Newcombe & Llus Paradell, *Law and Practice of Investment Treaties* (Netherlands: Kluwer Law International, 2009) at 13.
[129] Muthucumaraswamy Sornarajah, "Toward Normlessness: The Ravage and Retreat of Neo-liberalism in International Investment Law" in Karl Sauvant, ed, *Yearbook on International Investment Law & Policy 2009-2010* (Oxford, UK: Oxford University Press, 2010) 595 at 597.
[130] In this case, the interpretation of strong Western powers counts in the application and implementation of global norms.
[131] Ibironke Odumosu, *ICSID, Third World Peoples and the re-construction of the Investment Dispute Settlement System* (PHD Thesis: University of British Columbia, 2010) [unpublished].
[132] Kenkel & De Rosa, *supra* note 103 at 329; Acharya, *supra* note 111 at 97.

because it focuses on the relations between local actors and external powers in terms of the local actors' fear of dominance by external powers.[133] Second, in localization, local actors are norm-takers while in subsidiarity, local actors can be norm-makers or norm rejecters.[134] Third, in localization, foreign norms are imported for local usage only, while in subsidiarity, local actors may "export" or "universalize" locally constructed norms; the local norm may support or amplify an existing global norm against the parochial ideas of powerful actors.[135] Fourth, in localization, local agents redefine foreign norms, which they take as "good" and "desirable" but not consistent with prior local norms, while in subsidiarity local agents reject foreign ideas (of powerful central actors), which they consider not worthy of adoption, emulation, or borrowing in any form.[136] Fifth, norm localization applies to all actors regardless of size or economic power, while norm subsidiarity is specific to the "periphery" of smaller, weaker actors whose definition is often challenged.[137] However, notwithstanding their differences, subsidiarity and localization are complementary concepts and, indeed, countries apply them simultaneously.[138]

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[133] Acharya, *ibid* at 98.
[134] *Ibid*.
[135] *Ibid*. The word "foreign" as used here is not synonymous with the one used in Comparative law or Conflict of Laws as a body of law external to the state. Rather, it means international law in its function of promoting global norms through international institutions, for example, the United Nations.
[136] *Ibid* at 98.
[137] *Ibid* at 99. It should, however, be noted that the subsidiary terminology used to distinguish between weaker states as lower levels of governance and stronger states/global institutions as higher levels of governance is done with caution in this thesis. I prefer an ontology-sensitive approach to subsidiarity that uses the term "primary levels of governance" to represent local levels of governance and "subsidiary units" to represent higher levels of governance. See generally Maria Cahill, "Theorizing Subsidiarity: Towards an ontology-Sensitive Approach" (2017) 15:1 International Journal of Constitutional Law 201. In reference to this thesis, economically weaker states, mostly in the Third World, constitute the primary levels of governance, while economic stronger states in the Global North exhibit characteristics of subsidiary units.
[138] Kenkel & De Rosa, *supra* note 103 at 330.

Subsidiary norms have two effects on the international norm-making process. First, they may have a "challenging/resisting effect."[139] Local actors may develop a norm to resist norms promoted by great powers and institutions which seek to displace existing cultural practices and ideas.[140] Local actors, in this case, claim the right to deal with their issues without external intervention or influence.[141] The Drago doctrine described above in Latin America is an example of a norm that resists the dominance of superpowers. Second, subsidiary norms may have a "supportive/strengthening effect."[142] If an existing global norm is deemed legitimate via consensus and participation throughout all levels of authority, from the international to the community,[143] local actors may support such norms. For example, the humanitarian intervention norm is supported by the African Union's norm on peace and security which allows a state, through the use of military force, to protect the human rights of the population in another state in cases where the violating state refuses to comply with human rights standards.[144] In sum, a subsidiary norm can show resistance to the global normative order, or it may support it.

Acharya explains that combining "localization" and "subsidiarity" culminates in norm circulation,[145] a two-way norm diffusion process where local norm agents influence the global normative order and vice versa. Here, the norm is first contested, reframed, grafted, and reconstituted to fit prior cognitive identities (localization) and then processed

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[139] Acharya, *supra* note 111 at 101.
[140] See generally Antje Weiner, "Theory of Contestation – A Concise Summary of its Arguments and Concepts" (2017) 49:1 Polity 109.
[141] See e.g., Hussein Solomon, "African Solutions to Africa's Problems? Africa's Approaches to Peace, Security, and Stability" (2015) 43:1 Scientia Militaria, South African Journal of Military Studies 45 at 46.
[142] Acharya, *supra* note 111 at 101-102.
[143] By legitimacy, I mean norms developed with the participation and recognition of local actors and issues (Acharya describes it as norms consistent with "rules of all by all for all"). Acharya, *ibid*.
[144] See Linda Darkwa, "Humanitarian Intervention' in Katharina Coleman & Thomas Tieku, eds, *African Actors in International Security: Shaping Contemporary Norms* (Colorado: Lynne Rienner Publishers. 2018).
[145] Amitav Acharya, "The R2P and Norm Diffusion: Towards A Framework of Norm Circulation" (2013) 5:4 Global Responsibility to Protect 466 at 469.

through a feedback channel to the global normative system (subsidiarity).[146] He explains it as follows

> …the initial norm goes through a period of contestation, leading to its localization or translation. This might create a feedback/repatriation effect which might travel back to the point of origin of the norm in the transnational space and lead to its modification or qualification. At the same time, locally-constructed norms in similar issue areas (including those in the West or non-West) might be exported to the transnational space and acquire a global resonance, thereby modifying the definition or promotion of the more globally prominent norm/s in similar issue areas.[147]

Norm circulation is usually inevitable in the norm cycle process because norms are seldom likely to be adopted wholesale. Therefore, the norm circulation process involves broad participation of normative agencies and actors for its actualization and smooth running. Norm actors may be Western, non-Western, global, local, states, non-states, and social movements.[148] Acharya illustrates this point by referencing the development of the *United Nations' Principles of Responsibility to Protect* (R2P) norm. He identified the African origin of some of the ideas informing the R2P norm and argued that this influenced the normative scope of the R2P to the extent that the norm was "qualitatively different in origin and inspiration" from the older 1990s era of humanitarian intervention norm.[149] The modified scope and implementation of the R2P norm show a norm circulation between Western and non-Western normative channels. The interaction between the domestic and the global system for norm circulation may be understood through a relational theory of

[146] *Ibid*. See also Jochen Prantl & Ryoko Nakano, "Global Norm Diffusion in East Asia: How China and Japan Implement the Responsibility to Protect" (2011) 25:2 International Relations 204. They describe a feedback loop as a way of influencing the global normative system.
[147] Acharya, *supra* note 145 at 471.
[148] *Ibid* at 470.
[149] *Ibid* at 469-478.

the transnational legal process.[150] A relational theory in international relations posits that the identities and roles of social actors are shaped by relations.[151] It sees the world as "composed not of self-subsistent and pre-constituted actors, but of interwoven and dynamic relations."[152] Sara Seck, drawing an analogy from the relationship between human beings and the ecosystem, argues that states must not be seen as autonomous bounded entities, but as relational beings that are interconnected and interdependent with a responsibility and duty to maintain international cooperation.[153] If states share a common purpose, as Seck argues, norm circulation among states will be without transnational boundaries until they are universalized. In a relational approach to understanding norm circulation, state and non-state actors may be resistant or receptive to a norm-based on their relationships with one other. As Qui Yaqing noted, "[i]n an interrelated world, the totality of relations is very much like an intangible hand that orients an actor toward a certain action."[154]

Yaqing explains that interaction among global actors can be a system of "relational governance."[155] He defines relational governance as "a process of negotiating sociopolitical arrangements that manage complex relationships in a community to produce order so that members behave in a reciprocal and cooperative manner with mutual trust

[150] Koh describes transnational processes as the "theory and practice of how public and private actors—nation states, international organizations, and private individuals—interact in a variety of public and private, domestic and international forum to make, interpret, enforce, and ultimately, internalize rules of transnational law." See Harold Koh, "Transnational Legal Processes" (1996) 75 Nebraska Law Review 181 at 183.
[151] Yaqing Qin, "A Relational Theory of World Politics" (2016) 18 International Studies Review 33 at 36.
[152] *Ibid* at 41.
[153] See Sara Seck, "Moving beyond the E-word in the Anthropocene" in Daniel Margolies et al, eds, *The Extraterritoriality of Law: History, Theory, Politics* (Abingdon, UK: Routledge, 2019) at 49. See also Sara Seck, "Relational Law and the Reimagining of Tools for Environmental and Climate Justice" (2019) 31:1 Canadian Journal of Women and the Law 151 at 170.
[154] Qin, *supra* note 151 at 38.
[155] *Ibid* at 37.

evolved over a shared understanding of social norms and human morality."[156] The definition distinguishes between government (rule-based governance) characterized by most international relations theory, and governance inspired by a Confucian theory of relationality and supported by social theory.[157] It reflects a process of negotiation among actors, which is inspired by the concept of shared responsibility instead of handed-down rules that characterize a traditional view of government.[158] Also, it reflects a dynamic and evolving process of making arrangements among actors, instead of a static nature of rules.[159] It should, however, be noted that trust is an essential ingredient for a working relational structure.[160]

"Process" is another key concept in a relational theory of norm circulation.[161] This is because the process of making a norm is essential to determining its resistance and, ultimately, its circulation.[162] Acharya notes that "[n]orm circulation occurs when the less powerful actors feel marginalized in the norm creation process or feel betrayed by the abuse

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[156] Qin Yaqing, "Rule, Rules, and Relations: Towards a Synthetic Approach to Governance" (2011) 4 The Chinese Journal 117 at 133. This theory is influenced by the Chinese Confucian theory of morality, relationality, and trust.

[157] *Ibid*. "Governance" is described as "sets of implicit or explicit principles, norms, rules, and decision-making procedures around which actors' expectations converge." See Stephen Krasner, ed, *International Regimes* (Ithaca, NY: Cornell University Press, 1983) at 2.

[158] Yaqing, *supra* note 156 at 133.

[159] This is the difference between relational governance and polycentrism. While Polycentrism is a collection of decision makers acting independently but under a common system of rules and norms, relational governance does not envisage the collection of decision-makers under rules. See Vlad Tarko, *Polycentric Governance: A Theoretical and Empirical Exploration* (PHD Thesis: George Mason University, Fairfax, Virginia, 2013) [unpublished] at 21.

[160] Yaqing, *supra* 156 at 133. The same is true for polycentric governance. See Marcel Dorsch & Christian Flachsland, "A Polycentric Approach to Global Climate Governance" (2017)17:2 Global Environmental Politics 45 at 57.

[161] Alison Brysk, "Expanding Human Rights" in Alison Bryk & Michael Stohl, eds, *Expanding Human Rights: 21st Century Norms and Governance* (Cheltenham, UK: Edward Elgar, 2017) 1 at 9. See also Qin, *supra* note 151 at 37. See also Mustafa Emirbayer, "Manifesto for a Relational Sociology" (1997) 103:2 American Journal of Sociology 281 at 289.

[162] In their exposition on "interactional theory" which is similar to the "relational governance" discussed in this chapter, Jutta Brunnée and Stephen Toope argue that "[l]egal norms are particularly persuasive when they are created through processes of mutual construction by a wide variety of participants in a legal system." See Jutta Brunnée & Stephen Toope, "International Law and Constructivism: Elements of an Interactional Theory of International Law" (2000) 39:1 Columbia Journal of Transnational Law 19 at 74.

of the norm by the more powerful actors in the implementation stage."[163] In effect, participation in the process of making norms is not enough for developing countries because, sometimes, norms are partially implemented in favour of powerful countries.[164] The marginalization of less powerful states and impartial norm implementation goes to the root of the "trust factor" in relational governance. For example, Mutua argues that notwithstanding African participation in the making of some of the founding documents on human rights, including the Universal Declaration of Human Rights, the documents do not include the historical, ideological, and cultural narratives in Africa.[165] This causes distrust of the human rights movement, which consequently (partly) generated scholarship on cultural relativism. The distrust of a norm-making process plays a significant role in norm resistance and, ultimately, motivates less powerful states to find ways to influence the global normative order.[166] The point here is that the legitimacy and acceptance of the norm-making processes is a critical determinant in the life cycle of a norm and the level of local resistance.[167]

In effect, local actors' acceptance of the norm process has an important influence on its effectiveness at the internalization stage.[168] If the process is fair, transparent, and participatory, it potentially increases the chance for actors, especially local actors, to

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[163] Acharya, *supra* note 145 at 469.
[164] Acharya terms this "great power hypocrisy." See Acharya, *supra* note 111 at 97, 101.
[165] Makau Mutua, "The Limited Promise of Liberalism" (2008) 51:1 African Studies Review 17.
[166] This is what Sara Seck refers to as "a customary international law process that includes subaltern voices." See Sara Seck, "Unilateral Home State Regulation: Imperialism or Tool for Subaltern Resistance?" (2008) 46:3 Osgoode Hall Law Journal 565 at 602.
[167] Stephen Toope, "Emerging Patterns of Governance and International Law" in Michael Byers, ed, *The Role of Law in International Politics: Essays in International Relations and International Law* (Oxford, UK: Oxford University Press, 2000) 91 at 98.
[168] Indeed, social norms sometimes develop to be law. See generally Paul Hayden, "Cultural Norms as Law: Tort Law's 'Reasonable Person' Standard of Care" (1992) 15:1 Journal of American Culture 45; Mark Geistfeld, "Compensation as a Torn Norm" in John Oberdiek, ed, *Philosophical Foundations of the Law of Torts* (Oxford, UK: Oxford University Press, 2014).

(rightly) claim ownership of the norm and, ultimately, reduce the potential for contesting and resisting the norm's emergence and establishment.[169] For example, the R2P is hailed by some African scholars as bearing an African mark.[170] Indeed, it has been noted that "the responsibility to protect is in many ways an African contribution to human rights."[171] This approbation is associated, among others, for the central role of African countries in the International Commission on Intervention and State Sovereignty (ICISS) roundtable consultations held, especially in Maputo, Mozambique in 2001. It also reflects the key roles that Africans including Francis Deng, Mohamed Sahnoun, Boutros Boutros-Ghali and Kofi Annan played in conceptualizing the norm.[172] The perception of African inclusion in the R2P norm-making process reduces the contestation and resistance to the norm in Africa.

In sum, in contrast to the cosmopolitan theory, the congruence theory explains that local (domestic) factors influence contestation or support for norm internalization. Localized and subsidiary norms play mutual and overlapping and reinforcing roles to modify, graft, reframe, or reject foreign norms. It is, therefore, important to examine the prospect of norm internalization beyond the efforts of transnational networks. It is imperative to see it as a function of relations between the local and global levels of governance.[173]

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[169] See generally Karin Buhmann, *Power, Procedure, Participation and Legitimacy in Global Sustainability Norms: A Theory of Collaborative Regulation* (London, UK: Routledge, 2017).

[170] The Principle states that it is the responsibility of every state and the international community to protect people from genocide, war crimes, ethnic cleansing and crimes against humanity. See John Siebert, "Africa and the Roots of Responsibility to Protect" (2009) 30:4 The Ploughshare Monitor 1.

[171] Mohamed Sahnoun, "Africa: Uphold Continent's Contribution to Human Rights, Urges Top Diplomat (21 July 2009), online (blog): AllAfrica.com <https://allafrica.com/stories/200907210549.html?viewall;1>.

[172] See generally Yolanda Spies & Patrick Dzimiri "A Conceptual Safari *Africa and R2P"* (2011) 1:1 Regions and Cohesion 32. See also Gareth Evans, "The Responsibility to Protect in Africa" (Address to mark Africa Day 2019, Australian National University, Canberra, 24 May 2019) [unpublished], online: Gareth Evans<www.gevans.org/speeches/Speech695.html>.

[173] This is similar to a glocalization model. Ritzer defines glocalization as "the integration of the global and the local resulting in unique outcomes in different geographic areas." George Ritzer, *The Globalization of Nothing* (London, UK: Sage Publication, 2004) at 73.

The next part discusses the UNGPs in this light. It provides a concrete example of Finnemore and Sikkink's norm cycle theory by examining how the UNGPs' CR2R norm is developing as a business and human rights norm capable of eliciting measurable compliance.

Part III

3.3 The Corporate Responsibility to Respect Human Rights as a Norm

The UNGPs embody the corporate responsibility norm in Pillar II. As stated in chapter 1, this norm provides that corporations should respect human rights not because of any legal obligation, but because it is a social norm.[174] Pillar II lists requirements to comply with the norm in Principles 13 through 23. Principle 13 provides that the responsibility to respect human rights requires that MNCs should avoid causing or contributing to human rights abuse through their own activities but in case human rights abuse occurs, they should redress it. Also, the Principle states that MNCs should prevent or mitigate human rights abuses that are directly linked to their products, services, or business relationships, notwithstanding that they did not contribute to the abuse.

Principle 15 provides that to comply with the norm, MNCs need to know and show that they respect human rights. To do this, they should have policies that expressly show their commitment to the CR2R norm. Also, they should put in place a human rights due

[174] This is different from pillar I that maps existing states' obligation under international human rights law. See Paul Redmomd, "International Corporate Responsibility" in Thomas Clarke & Douglas Branson, eds, *The Sage Handbook of Corporate Governance* (London, UK: Sage Publications, 2012) 585 at 602 ("[i]n contrast to the state's duty to protect, the corporate responsibility to respect human rights does not derive directly from international law, whether in its customary form or from the terms of the treaties"). However, in cases of egregious/gross human rights abuse, corporate responsibility to respect human rights may arise from international human rights instruments and domestic laws. See John Ruggie, "Closing Plenary Remarks, 3rd UN Forum on Business and Human Rights" (Paper delivered at the UN Forum on Business and Human Rights, Geneva, Switzerland, 3 December 2014) [unpublished] at 7. See also Jennifer Zerk, *Corporate Liability for Gross Human Rights Abuses: Towards a Fairer and more Effective System of Domestic Law Remedies* (Report prepared for the Office of the UN High Commissioner for Human Rights, 2014) [unpublished].

diligence (HRDD) process to identify, prevent, and mitigate human rights abuses. Similarly, MNCs should create processes that enable the remediation of any human rights abuse they cause or to which they contribute. The requirements for policy commitment, HRDD, and remediation of harm are further elaborated in Principles 16 through 22. For example, Principle 17 defines the essential parameters of the HRDD to include considerations about the size of the company and the duration of the HRDD exercise. Principles 18 through 21 discloses the essential components of HRDD, which include MNCs' responsibility to identify actual or potential impacts of human rights abuse and to prevent and mitigate the abuse identified.[175] Also, MNCs should effectively integrate the results of the HRDD exercise across the whole of the business and the response should be tracked and communicated to affected stakeholders. Principle 22 provides that in a case where MNCs identify that they have caused or contributed to human rights abuse, they should "provide for or cooperate [with other actors] in the remediation through legitimate processes."

Principle 14 provides that the norm applies to all companies, regardless of the "size, sector, operational context, ownership, and structure."[176] Principle 23 states that in all contexts, MNCs should "comply with all applicable laws and respect internationally recognized human rights, seek ways to honour the principles of internationally recognized human rights when faced with conflicting requirements, and treat the risk of causing or contributing to gross human rights abuses as a legal compliance issue wherever they

[175] See generally John Ruggie & John Sherman III, "The Concept of 'Due Diligence' in the UN Guiding Principles on Business and Human Rights: A Reply to Jonathan Bonnitcha and Robert McCorquodale" (2017) 28:3 The European Journal of International Law 921.

[176] However, the Principle admits that "…the scale and complexity of the means through which enterprises meet that responsibility may vary according to these factors and with the severity of the enterprise's adverse human rights impacts."

operate." The UN Working Group on business and human rights clarified this to mean that a corporate responsibility to respect human rights exists even when the state in question is unable or unwilling to fulfil its own human rights obligations.[177]

The normative influence of the UNGPs promoted by Ruggie, a social constructivist, contributed to the evolution of the corporate responsibility to respect human rights as a social norm.[178] Although this normative project was initiated by an African, the then UN Secretary-General, Kofi Annan,[179] it was executed by Ruggie. As part of the normative enterprise, Kofi Annan's philosophical views could have influenced the choice of Ruggie for the business and human rights project. Annan is described as a global leader, diplomat, and "a great son of Africa."[180] His address at Davos reflected his philosophical principle regarding globalization when he proposed collaboration between the UN and the CEOs of Corporations to give a human face to the global market. It has been argued that Annan, in his Davos speech, planted the seeds for the modern corporate sustainability movement.[181] Indeed, Ruggie describes Annan as his mentor and "favourite boss." Ruggie also describes the field of business and human rights as Annan's legacy.[182] Annan, unlike Ruggie, is an economist, having obtained degrees in Economics from the Graduate Institute in Geneva

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[177] UN Working Group, "Leading by Example: The State, State-Owned Enterprises and Human Rights" (Report of the Working Group on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises) (2016) A/HRC/ 32 / 45 at 9.

[178] John Ruggie, "The Paradox of Corporate Globalization: Disembedding and Reembedding Governing Norms" (2020) (M-RCBG Faculty Working Paper Series No 01) at 4.

[179] For example, Kofi Annan, in a speech addressed to business leaders at the World Economic Forum in Davos, asked business leaders to join him in initiating "a global compact of shared values and principles." See Kofi Annan, "Kofi Annan's address to the World Economic Forum in Davos" (01 February 1999), online: United Nations Secretary General <www.un.org/sg/en/content/sg/speeches/1999-02-01/kofi-annans-address-world-economic-forum-davos>.

[180] See John Ruggie, "Celebrating Kofi Annan's Contributions to Business and Human Rights" (2018), online: Business and Human Rights Resource Center <www.business-humanrights.org/en/celebrating-kofi-annan%E2%80%99s-contributions-to-business-and-human-rights>.

[181] *Ibid*.

[182] *Ibid*.

and MIT's Sloan School of Business. Notwithstanding his background, Annan considers human dignity as an integral part of business strategies and practices. He is a strong supporter of poverty eradication and human rights promotion.[183]

As the driving force behind the UNGPs, Ruggie's goal is to provide a framework that sets out criteria upon which economic actors (corporations) can be embedded in transnational social norms and institutional practices that promote corporate responsibility.[184] This is based on the belief that normatively, corporations must reorient from a focus on capitalist and private property accumulation to become socially constructed entities legitimized by societal licence from the community that they operate in.[185] Ruggie may be classified as an entrepreneur of the CR2R norm because his efforts in finalizing the Global Compact and the UNGPs are significant in its emergence.[186] Although Ruggie's motive is unclear, it is arguable that it may have been an ideational commitment. Finnemore and Sikkink note that an ideational commitment is one of the motivations of norm entrepreneurs, and it occurs when they "promote norms or ideas because they believe

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[183] *See The Interview of Kofi Annan and John Ruggie* at the annual conference of the International Bar Association held on 6 October 2018, online: Kofi Annan Foundation <www.kofiannanfoundation.org/videos/business-and-human-rights/>. Also, see generally George Kell, "In Memory of Kofi Annan: Father of the Modern Corporate Sustainability Movement" (19 August 2018), online Forbes Magazine<www.forbes.com/sites/georgkell/2018/08/19/in-memory-of-kofi-annan-father-of-the-modern-corporate-sustainability-movement/#697cf7f354b1>.See also James Traub, *The Best Intention: Kofi Annan and the UN in the Era of American World Power,* 1st ed (New York: Macmillan, 2007).

[184] Ruggie, *supra* note 174.

[185] *Ibid* at 4. See also Kate Macdonald, "The Socially Embedded Corporation" in John Mikler, ed, *The Handbook of Global Companies* (Chichester, UK: Wiley Blackwell, 2013) 371.

[186] See John Ruggie, "Business and Human Rights: The Evolving International Agenda" (2007) 101:4 American Journal of International Law 819. The UNGPs and UNGC are two of many parallel initiatives that develop similar but distinct models on corporate accountability. See the OHCHR, "The UN Guiding Principles on Business and Human Rights: Relationship to UN Global Commitments" (June 2014), online: OHCHR<https://d306pr3pise04h.cloudfront.net/docs/issues_doc%2Fhuman_rights%2FResources%2FGPs_GC+note.pdf>. However, on issues of competing interpretation on the scope of social responsibility between the UNGPs and similar initiatives, for example, ISO 26000, see Stepan Wood, "The Case for Leverage-Based Corporate Human Rights Responsibility" (2012) 22:1 Business Ethics Quarterly 63.

in the ideals and values embodied in the norms, even though the pursuit of the norms may have no effect on their well-being."[187]

To be clear, the SRSG never acted alone during the period of his mandate. Apart from expert consultations and workshops that featured experts from fields including corporate law, human rights, climate, and the environment,[188] the SRSG also acknowledged the contributions of particular individuals, including Christine Bader, Rachel Davis, Gerald Pachoud, Caroline Rees, Andrea Shemberg, John Sherman, Lene Wendland, Vanessa Zimmerman, Amy Lehr, Michael Wright, David Vermijs, Jonathan Kaufman, Larry Catá Backer, Andrew Clapham, and Mark Taylor.[189] The coalition of individuals and corporate bodies (including law firms, corporations, and intergovernmental organizations) that collaborated to draft of the UNGPs could technically be described as a social movement in which the SRSG, acting under the mandate of the UN Human Rights Council (UNHRC) and enjoying the support of his boss, Kofi Annan, acted as a focal point to navigate and negotiate the endorsement of the UNGPs by the UNHRC. In effect, though the SRSG is referred to as a norm entrepreneur in this thesis, the story of the UNGPs' norm entrepreneurship is incomplete without acknowledging the contribution of those without whom the SRSG would not have carried out his mandate.

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[187] Finnemore and Sikkink, *supra* note 1 at 898. Notwithstanding the difficulties and inconvenience that the SRSG encountered during his mandate, John Ruggie managed to get an overwhelming consensus from states, as well as the United Nations Council's endorsement. For a detailed account of his activities, see generally John Ruggie, *Just Business: Multinational Corporations and Human Rights* (New York: WW Norton, 2013). However, some scholars contend that securing consensus for the endorsement of the UNGPs is not a yardstick for success. See e.g., Surya Deva, "Treating Human Rights Lightly: A Critique of the Consensus Rhetoric and the Language Employed by the Guiding Principles" in Surya Deva & David Bilchitz, eds, *Human Rights Obligations of Business: Beyond the Corporate Responsibility to Respect* (Cambridge, UK: Cambridge University Press, 2013) 78.

[188] See Legal Workshop Consultations, Meetings and Workshops, online: Business & Human Rights Resource Center, <www.business-humanrights.org/en/special-representative/un-secretary-generals-special-representative-on-business-human-rights/consultations-meetings-workshops/legal-workshops>.

[189] See Ruggie, Just Business, *supra* note 187 at ii.

Employing the norm cycle theory in relation to the UNGPs, one could say its introduction enables the emergence of the CR2R norm in the business and human rights context.[190] This view fits with Winston's characterization of a norm. Winston explains that

> [f]irst, a norm presupposes a *problem*, which is the issue to be addressed. Second, the norm includes a *value*. It is the enjoyment or attainment of something "good" or the avoidance of something "bad" and, as such, gives moral weight to the problem. Third, a norm enjoins a particular *behavior*: the action to be taken to address the given problem that allows the actor to better express or practice the value. In short, a problem inhibits the full enjoyment of a value and necessitates a corrective behavior.[191]

The SRSG describes the problem in the business and human rights context as an economic crisis that is characterized by "the widening gaps between the scope and impact of economic forces and actors, and the [in]capacity of societies to manage their adverse consequences."[192] The SRSG identified the embeddedness of businesses in transnational social norms and institutional practices that promote corporate responsibility as the value derived for solving the problem.[193] Business embeddedness in a corporate responsibility culture is meant to reduce the risk of MNCs contributing to human rights abuses in the process of wealth maximization—this is both a moral and social value. The third characteristic of a norm, therefore, enjoins corporations to respect human rights through

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[190] It should, however, be noted that that the UNGPs emerged out of many other initiatives that paved the way – not only the UNGC, but the UN Norms, and other CSR initiatives. These prior initiatives laid the foundations and kick-started the conversation on business responsibility. Indeed, the first mandate of the SRSG was to identify and clarify existing international standards on corporate responsibility.

[191] Winston, *supra* note 11.

[192] Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and other Business Enterprises, John Ruggie, Business and human rights: Further Steps Toward the Operationalization of the "Protect, Respect and Remedy" framework, UN Doc A/HRC/14/27 (9 April 2010) at 3, online: OHCHR <www2.ohchr.org/english/issues/trans_corporations/docs/a-hrc-14-27.pdf>.

[193] See Business and Human Rights: Towards Operationalizing the "Protect, Respect and Remedy" Framework: Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and other Business Enterprises, UN DOC A/HRC/11/13 (22 April 2009) at 5, online: OHCHR<www2.ohchr.org/english/bodies/hrcouncil/docs/11session/A.HRC.11.13.pdf>.

the exercise of HRDD.[194] HRDD enables corporations to identify risks and to prevent or remedy those arising from their business or related activities.[195] In effect, the UNGPs prescribe HRDD practice as one of the ways to close the governance gaps (problem) in order to reduce incidents of business and human rights abuses (enjoyment of value).

At the norm emergence stage, Ruggie characteristically used the tool that most norm entrepreneurs employ—framing.[196] He calls it a "multi-perspective framing" that uses three pillars of the UNGPs to draw on different but mutually reinforcing governance structures.[197] According to his 2008 Report, the first pillar—states' responsibility to protect human rights—draws on the system of public governance and law at international and domestic levels to reiterate the states' obligations under international human rights law.[198] The second pillar, through a system of civil governance, involves persons adversely affected by business enterprises and those acting on their behalf. Those harmed by the activities of business enterprises employ various social compliance mechanisms, such as campaigns, lawsuits, and engagement with firms.[199] The third pillar, corporate governance, unevenly draws on the first two pillars because it frames the corporate responsibility to

[194] He defines HRDD as "a process whereby companies not only ensure compliance with national laws but also manage the risk of human rights harm with a view to avoiding it." See *Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, John Ruggie* UN Doc A/HRC/8/5 (7 April 2008) at par 25, online: OHCHR <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G08/128/61/PDF/G0812861.pdf?OpenElement>. See also UNGPs, Principle 17.
[195] Radu Mares, "Business and Human Rights After Ruggie: Foundations, the Art of Simplification and the Imperative of Cumulative Progress" in Radu Mares, ed, *The UN Guiding Principles on Business and Human Rights: Foundations and Implementation* (Leiden: Martinus Nijhoff) 1 at 27.
[196] Ruggie, *supra* note 174 at 22.
[197] *Ibid*.
[198] Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, *John Ruggie* UN Doc A/HRC/8/5 (7 April 2008), online: OHCHR <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G08/128/61/PDF/G0812861.pdf?OpenElement>.
[199] *Ibid*.

respect human rights in terms of societal expectation and social compliance.[200] In effect, the UNGPs' normative framework draws on systems of public governance, civil governance, and corporate governance to frame the role of states, NGOs, and businesses in human rights protection.[201]

This framing is significant because the three systems of governance are expected to play mutually reinforcing roles to cause a cumulative change in the existing neo-liberal market system that focuses on profit maximization. Also, the framing is significant because it avoids the contestation and long-standing debate on whether corporations can be duty-bearers under international human rights law.[202] As stated in chapter 1, Ruggie did not follow Draft Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises[203] which imposed obligations on MNCs under international because he believed that corporations are not subjects under international law. Rather, Ruggie framed his project as a norm that is based on recognized international human rights instruments through which state and non-state actors could imbibe a corporate responsibility culture. In sum, the framing of three mutually interconnected governance systems enabled the SRSG to propose a normative change in the role of corporations in society.

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[200] *Ibid*.
[201] See Mares, *supra* note 195 at 1.
[202] See Jose Alvarez, "Are Corporations 'Subjects' of International Law?" (2011) 9:1 Santa Clara Journal of International Law 1 at 32.
[203] Sub-Commission on the Promotion and Protection of Human Rights, Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights, UN ESCOR, 55th sess, 22nd mtg, Agenda Item 4, UN Doc E/CN 4/Sub 2/2003/12/Rev 2 (13 August 2003). See also Pini Pavel Miretski & Sascha-Dominik Bachmann, "The UN Norms on the Responsibility of Transnational Corporations and Other Business Enterprises with Regard to Human Rights': A Requiem" (2012) 17:1 Deakin Law Review 5.

As discussed in Part I, Finnemore and Sikkink explain that for a norm to reach the second stage (norm cascade), it must be institutionalized in specific rules of an international organization.[204] The SRSG ensured that beyond his clarification of existing human rights standards and instruments, which were his original mandate from the UN, he developed "Guiding Principles" to guide business and state conduct. Upon his request, and backed by states, the Human Rights Council extended the SRSG's mandate to "operationalize" the recommendations made in his final report during his first mandate period from 2005-2008.[205] The SRSG's strategy to codify the Principles with commentaries is significant in the norm cycle because it sets out the scope and limits of the CR2R norm.

The codification of the UNGPs is instrumental to reaching its tipping point and for its progress to the next stage of the norm cycle—norm cascading. According to the SRSG, he influenced and collaborated with standard-setting bodies beyond the UN machinery, like the OECD, International Finance Corporation (IFC), International Standard Organization (ISO), UNCITRAL (investor-state arbitration rules), and the European Union. As well, professional organizations, such as the International Bar Association, incorporated UNGPs provisions into a Practical Guide for business lawyers.[206] All these

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[204] Finnemore & Sikkink, *supra* note 1 at 900.

[205] Mandate of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and other Business Enterprises, Resolution 8/7 adopted without a vote at the 28th Meeting on (18 June 2008), online: OHCHR <https://ap.ohchr.org/documents/E/HRC/resolutions/A_HRC_RES_8_7.pdf>. Specifically, the Council requests the SRSG to "(a) provide views and concrete and practical recommendations on ways to strengthen the fulfilment of the duty of the State to protect all human rights from abuses by or involving transnational corporations and other business enterprises, including through international cooperation; (b) elaborate further on the scope and content of the corporate responsibility to respect all human rights and to provide concrete guidance to business and other stakeholders; (c) explore options and make recommendations, at the national, regional and international level, for enhancing access to effective remedies available to those whose human rights are impacted by corporate activities."

[206] Ruggie, *supra* note 174 at 25. See *IBA Practical Guide on Business and Human Rights for Business Lawyers* (Adopted by a resolution of the IBA Council 28 May 2016), online: IBA<www.business-humanrights.org/sites/default/files/documents/IBA_Practical_Guide.pdf>; *The Hague Rules on Business and Human Rights Arbitration* (December 2019), online: CILC <www.cilc.nl/cms/wp-

are an indication of the UNGPs' norm cascading effects. The OECD incorporated CR2R into its 2011 revised Guidelines for Multinational Enterprises (OECD MNE). It is noteworthy that before 2011, the OECD MNE lacked a human rights chapter.[207] Also, the International Standard Organization aligned the human rights chapter of its social responsibility standard (ISO 2006) with the UNGPs.[208] Indeed, the UNGPs has influenced human rights developments in different fields, including transnational human rights litigation,[209] international investment law,[210] trade,[211] and labour law.[212]

Karin Buhmann notes that the key to the institutionalization (norm cascade) of the UNGPs' norm is the legitimacy of the process through which it was developed.[213] She

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content/uploads/2019/12/The-Hague-Rules-on-Business-and-Human-Rights-Arbitration_CILC-digital-version.pdf>; Andrea Shemberg & John Ruggie, "Stabilization Clauses and Human Rights" (A research project conducted for IFC and the United Nations Special Representative to the Secretary General on Business and Human Rights, 27 May 2009) [unpublished].

[207] See Joshua Yanga, Patricia McDaniel, & Ruth Malone, "A Question of Balance': Addressing the Public Health Impacts of Multinational Enterprises in the OECD Guidelines for Multinational Enterprises" (2012) 7:10 Global Public Health 1045 at 1053. The OECD also published several human rights due diligence guides for different business sectors and operational contexts. For example, *OECD Due Diligence Guidance for Responsible Business Conduct*, 2018, online: OECD <http://mneguidelines.oecd.org/OECD-Due-Diligence-Guidance-for-Responsible-Business-Conduct.pdf>; *OECD, Due Diligence Guidance for Responsible supply Chains of Minerals from Conflict-Affected and High-Risk Areas*, 3rd ed (Paris: OECD Publishing, 2016); OECD, *Due Diligence Guidance for Meaningful Stakeholder Engagement in the Extractive Sector* (Paris: OECD Publishing, 2017).

[208] See *ISO Guidance on Social Responsibility* (2014), online: ISO <https://asq.org/quality-resources/iso-26000>. However, see Wood *supra* note 174 on the contested scope of corporations' social responsibility. He notes that before the introduction of the UNGPs, previous initiatives, including the UN Global Compact and UN Draft Norms adopted a sphere of influence, but the SRSG rejected this approach and, instead, suggested an impact assessment approach. Wood labelled the SRSG's approach as narrow.

[209] See e.g., Astrid Sanders, "The Impact of the 'Ruggie Framework' and the United Nations Guiding Principles on Business and Human Rights on Transnational Human Rights Litigation" in Jena Martin & Karen Bravo, eds, *The Business and Human Rights Landscape: Moving Forward, Looking Back* (Cambridge, UK, Cambridge University Press, 2015) 288.

[210] See e.g., John Gerard Ruggie & Emily Middleton "Money, Millennials and Human Rights: Sustaining 'Sustainable Investing" (2019) 10:1 Global Policy 144.

[211] Simon Walker, "HRIA in the Context of Trade Agreements" in Nora Gotzmann, ed, *Handbook on Human Rights Impact Assessment* (Cheltenham, UK: Edward Elger Publishing, 2019).

[212] Magda Donia et al, "The Theorized Relationship between Organizational (Non) Compliance with the United Nations Guiding Principles on Human Rights and Desired Employee Workplace Outcomes" (2020) 12:5 Sustainability 1.

[213] Karin Buhmann, "Business and Human Rights: Analysing Discursive Articulation of Stakeholder Interests to Explain the Consensus-based Construction of the 'Protect, Respect, Remedy UN Framework" (2012) 1:1 International Law Research 88. See also Karin Buhmann, "The Development of the 'UN Framework': A Pragmatic Process Towards a Pragmatic Output" in Radu Mares, ed, *The UN Guiding Principles on Business*

argues that the SRSG used a reflexive process to promote the UNGPs. Reflexivity, according to her, is "a process oriented legal theory and regulatory strategy which counts on multi-stakeholder development of norms through exchanges that allow stakeholders to learn about the needs or expectations of other social groups or stakeholders."[214] Karin Buhmann's characterization of the exchange between stakeholders (businesses, civil societies, and governments) reflects the interactional theory discussed in Part II above.[215] The UNGPs relied on a relational process that allowed stakeholders to exchange information and influence one another in the process of building shared expectations about the appropriate behavior of states and corporations in business and human rights context.[216]

The architectural design of the UNGPs is also influential for its cascading effect. As stated in chapter 1, the SRSG designed the UNGPs to be a smart mix of regulation, oscillating between public law (international law for states) and private law (domestic law for MNCs).[217] This framework, which Buhmann characterized as "Transnational Business Governance Interactions," recognizes the relationship between states and organizations created by states—non-state actors.[218] However, the UNGPs' approach goes beyond the stakeholders' relations because it constructs a polycentric governance system that guides

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and Human Rights (Leiden: Martinus Nijhoff) 85. This chapter has earlier noted that process is key to the development of a norm.

[214] Karin, Business and Human Rights. *ibid* at 93.

[215] Ruggie notes that "[d]eveloping the Guiding Principles involved participants from each of these governance systems; it was an instance of polycentric governance." John Ruggie, "Incorporating Human Rights: Lessons Learned, and Next Steps" in Dorothee Baumann-Pauly & Justine Nolan, eds, *Business and Human Rights: From Principles to Practice* (London, UK: Routledge, 2016) 64 at 66.

[216] Karin Buhman, *supra* note 213 at 93. This is particularly true because of the SRSG's discursive approach that relies on MNCs' discursive powers to promote human rights norms within the business circle through persuasion instead of coercion. See John Ruggie, "Multinationals as Global Institution(s?): Power, Authority and Relative Autonomy" (2018) 12:3 Regulation & Governance 317 at 325.

[217] Karin Buhmann, "Business and Human Rights: Understanding the UN Guiding Principles from the Perspective of Transnational Business Governance Interactions" (2014) 10:6 Osgoode Legal Studies Research Paper No 52.

[218] *Ibid* at 9. See also Stepan Wood et al, ed, *Transnational Business Governance Interactions: Advancing Marginalized Actors and Enhancing Regulatory Quality* (Cheltenham: Edward Elgar Publishing, 2019).

the relations between two systems of governance—private and public—which has previously been kept in water-tight compartments in international law.[219] Unlike the UN Sub- Committee's *Norms on the Responsibilities of Transnational Corporations and other Business Enterprises with regards to Human Rights*,[220] the SRSG, with the help of his team, was able to promote the UNGPs beyond the norm emergence stage by creating shared-values among stakeholders in business and human rights context. He also created a flexible regulatory process that transcends traditional systems of governance. Indeed, it has been noted that

> [t]he UN Framework was accepted [by the UN Council] partly due to the innovative and inclusive multi-stakeholder process, partly because the insistence by the SRSG to refer to it as a 'policy framework' although in effect much of its contents has a soft law character. The novel transnational business governance framework offered by this approach allowed for agreement [by states] across past antagonism and across the intellectual and political boundaries of state-centrist international law.[221]

It is important to distinguish between two non-state actors—NGOs and Business Associations—that the SRSG employed. Traditionally, an NGO is a not-for-profit social organization that is independent of the state where it is created.[222] NGOs differ in political goals and strategies. They can either work in the interest of close-group members, grassroot

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[219] See generally John Ruggie, "Global Governance and 'New Governance Theory': Lessons from Business and Human Rights" (2014) 20 Global Governance 5. See also Christine Parker & John Howe, "Ruggie's Diplomatic Project and its Missing Regulatory Infrastructure" in Radu Mares, ed, *The UN Guiding Principles on Business and Human Rights: Foundations and Implementation* (Leiden: Martinus Nijhoff) 273 at 278. However, some scholars note the contested nature of the divide between public and private functions, as there are no bright lines between both governance structures. See, e.g., Sara Seck, "Relational Law and the Reimagining of Tools for Environmental and Climate Justice" (2019) 31:1 Canadian Journal of Women and the Law 151 at 173.

[220] *Sub-Commission on the Promotion and Protection of Human Rights, Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights*, UN ESCOR, 55th sess, 22nd mtg, Agenda Item 4, UN Doc E/CN 4/Sub 2/2003/12/Rev 2 (13 August 2003).

[221] Karin Buhmann, *supra* note 213 at 14.

[222] See generally Eric Werker & Faisal Ahmed, "What Do Non-Governmental Organizations Do?" (2008) 22:2 Journal of Economic Perspectives 73.

movements, or general advocacy groups focusing on issues like the environment, human rights, and climate.[223] Industry Associations, on the other hand, are also not-for-profit organizations but they act as service providers and political voices for their for-profit members.[224] Their structures differ from NGOs because unlike NGOs that rely on donations and grants, business associations are clubs with access restricted to corporate members paying fees and expecting services in return.[225] Due to their close ties with an industry, business associations can mediate between two companies, act as a voice for companies in an industry, and be a lobby group for its members in the international arena.[226]

The major differences between business associations and NGOs relate to their size, and scope of interest. While the membership of an NGO is not limited by artistic or business affiliation, membership of business associations is restricted to companies in a shared industry.[227] Also, while NGOs represent a range of interests, and may sometimes serve as political or social groups business associations are often restricted to the concerns of their members, without necessarily representing any general political or social interest.

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[223] Examples include Amnesty International, online: <www.amnesty.org/en/>; Human Rights Watch, online: <www.hrw.org/>; World Vision, online:<www.worldvision.org/>; Feed the Children, online:<www.feedthechildren.org>; Food for the Poor, online:<www.foodforthepoor.org/>; Catholic Relief, online:<www.crs.org/>; and World Wildlife Fund, online:<www.worldwildlife.org/>.

[224] Jens Steffek & Viviane Romeiro, "Private Actors in Transnational Energy Governance" in Michele Hdnot, Nadine Piefer & Franzisha Muler, eds, *Challenges of European External Energy Governance with Emerging Powers* (London: Ashgate Publishing, 2015) 251.

[225] *Ibid*. It should be noted that the nature of charitable NGOs, at least in Canada and the UK law, there is a strict list of features that must be met for an NGO to acquire charitable status, which then allows the NGO to offer tax deduction receipts to donors (signaling a curious relationship with the state and the concept of public good). However, not all NGOs have charitable status, and the extent to which those with charitable status can engage in 'political' activities is defined carefully and is contested. For example, see the 2021 Report of the Public Inquiry into Anti-Alberta Energy Campaigns, online: Alberta<https://open.alberta.ca/dataset/3176fd2d-670b-4c4a-b8a7-07383ae43743/resource/a814cae3-8dd2-4c9c-baf1-cf9cd364d2cb/download/energy-report-public-inquiry-anti-alberta-energy-campaigns-2021.pdf>.

[226] *Ibid*.

[227] See Debora Spar & Lane La Mure, "The Power of Activism: Assessing the Impact of NGOs on Global Business" (2003) 45:3 California Management Review 78 at 79.

However, NGOs and business associations are subject to the same concerns, which include management transparency, legitimacy, internal competition, and public organizations and institutions.[228]

However, large western-based NGOs that Mutua calls International Non-governmental Organizations (INGOs) share striking similarities with business associations because of their influence in policy debates, [229] and their potential to further the interests of their members or the states in which they are registered or incorporated—this speaks to absence of their neutrality. Specifically, in their relationship with (western) states, INGOs, like business associations or large businesses, may play an active or passive role in support of a western state's ideology. For example, Amnesty International has been criticized for its refusal to condemn South Africa's Apartheid because "the biggest economic and political supporter of the criminal apartheid regime in South Africa was the British government, followed by the United States government."[230] In effect, both businesses and INGOs may show bias for an ideology or political agenda that may be state-driven.[231] Therefore, it may be difficult to draw a bright line between transnational networks—

[228] CYM, "Answer to the Question: What is the Difference between an NGO and an Association?" online: CYM <https://en.changeyourmind-cym.org/faqs/what-is-the-difference-between-an-ngo-and-an-association>.
[229] See Susan Sell, "Using Ideas Strategically: "The Contest Between Business and NGO Networks in Intellectual Property Rights" (2004) 48:1 International Studies Quarterly 143; Makau Mutua, "Human Rights International NGOs: A Critical Evaluation" in Claude Welch, ed, *NGOs and Human Rights: Promise and Performance* (Philadelphia: University of Pennsylvania Press, 2001) 151.
[230] Editor's note, "Is Amnesty International Biased" (13 June 2002), online: Global Policy Forum <www.globalpolicy.org/component/content/article/176/31407.html>.
[231] Mutua drives this point forcefully when he argues that "[i]n reality, INGOs have been highly partial: their work has historically concentrated on these countries that have not attained the stable and functioning democracies of the West, the standard of liberal democracy." Makau Mutua, *Human Rights: A Political and Cultural Critique* (Pennsylvania: University of Pennsylvania Press, 2008) at 53.

business associations and INGOs—and states because, sometimes, they may share the same economic or political agenda or ideology.[232]

The UNGPs is presently diffusing among several states, corporations, inter-governmental and standard-setting organizations.[233] For example, some countries have published National Action Plans (NAPs) to implement the provisions of the UNGPs.[234] The United Kingdom and the Netherlands are the first two countries to develop NAPs in 2013, two years after the UN endorsement of the UNGPs.[235] This is significant at the norm cascading stage because both countries are homes to MNCs that have been accused of human rights violations in developing countries, including Nigeria.[236] In quick succession, Denmark, Finland, Lithuania, Sweden, Norway, Colombia, and Switzerland published their NAPs in 2014, 2015, and 2016.[237] Other countries that have done so include Italy, the USA, Germany, France, Poland, Spain, Belgium, Chile, the Czech Republic, Ireland,

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[232] Bonny Ibhawoh, "Human Rights INGOs and the North-South Gap: The Challenge of Normative and Empirical Learning" in Daniel Bell & Jean-Marc Coicaud, *Ethics in Action: The Ethical Challenges of International Human Rights Non-Governmental Organizations* (Cambridge: Cambridge University Press, 2006) 79.

[233] See generally John Ruggie, Caroline Rees, & Rachel Davis, *"*Ten Years After: From UN Guiding Principles to Multi-fiduciary Obligations" (2021) 0:0 Business and Human Rights Journal 1. Indeed, Ruggie notes that "[c]ompared with normative and policy developments in other highly complex and contested domains, like climate change, uptake of key elements of the Guiding Principles has been relatively swift: by other international standard-setting bodies, states, businesses, civil society and workers' organizations and bar associations." See John Ruggie, "Incorporating Human Rights: Lessons Learned, and Next Steps" in Dorothee Baumann-Pauly & Justine Nolan, eds, *Business and Human Rights: From Principles to Practice* (London, UK: Routledge, 2016) 64 at 64.

[234] It is important to note that the NAPs are critiqued by some scholars as lacking innovation and progress. See, e.g., Humberto Cantu Rivera, "National Action Plans on Business and Human Rights: Progress or Mirage?" (2019) 4:2 Business and Human Rights Journal 213. However, Oyeniyi Abe suggests practical ways to implement the UNGPs in Africa. See Oyeniyi Abe, *Implementing Business and Human Rights Norms in Africa: Law and Policy Interventions* (New York: Routledge, 2022).

[235] State National Plans on Business and Human Rights, online: OHCHR <www.ohchr.org/EN/Issues/Business/Pages/NationalActionPlans.aspx>.

[236] See e g, Amnesty International, *On Trial: Shell in Nigeria: Legal Actions Against the Oil Multinational* (UK: Amnesty International, 2020), online: Amnesty International <amnestyfr.cdn.prismic.io/amnestyfr/5bbbd2af-a536-4faa-b1c5-51664517b5c9_Shell_on_trial_online.pdf>.

[237] Amnesty International, *ibid*.

Luxemburg, Republic of Slovenia, Kenya, and Thailand.[238] The number of countries that have implemented the UNGPs represents a "critical mass of states," as Finnemore and Sikkink put it.[239] It is also important to note that most of the states in this group are from Europe.

Furthermore, several states have enacted legislation that draw on the UNGPs' due diligence provisions. For example, the United Kingdom enacted its Modern Slavery Act in 2015,[240] France enacted its Due Diligence Law in 2017,[241] Australia enacted the Modern Slavery Act in 2018,[242] and the Netherlands enacted its Dutch Child Labour Due Diligence Law in 2019.[243] The ILO had a Declaration containing provisions on human rights before the mandate of the SRSG was issued to him[244]. If anything at all, the SRSG borrowed from some of the ILO initiatives. He also used the *ILO Declaration on Fundamental Principles and Rights at Work* as one of the benchmarks against which compliance with human rights must be measured.[245]

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[238] *Ibid*. Other countries currently developing NAPs include Argentina, Australia, Azerbaijan, Guatemala, Greece, India, Indonesia, Japan, Jordan, Latvia, Malaysia, Mauritius, Mexico, Mongolia, Morocco, Mozambique, Pakistan, Peru, Portugal, Uganda, Ukraine, Zambia, Ghana, Nigeria, and South Africa. See OHCHR, State National Action Plans on Business and Human Rights, online: OHCHR< www.ohchr.org/EN/Issues/Business/Pages/NationalActionPlans.aspx>. On what a good NAP should look like, see Guidance on National Action Plans on Business and Human Rights (December 2014) UN Working Group on Business and Human Rights, online: OHCHR<www.ohchr.org/Documents/Issues/Business/UNWG_%20NAPGuidance.pdf>. For more critiques of the NAPs, see Damiano De Felice & Andreas Graf, "The Potential of National Action Plans to Implement Human Rights Norms: An Early Assessment with Respect to the UN Guiding Principles on Business and Human Rights" (2015) 7:1 Journal of Human Rights Practice 40 at 64-65.

[239] Finnemore & Sikkink, *supra* note 1 at 901.

[240] *United Kingdom Modern Slavery Act*, 2015 *C. 30 (2015*) <www.legislation.gov.uk/ukpga/2015/30/contents/enacted>.

[241] *French Corporate Duty of Vigilance for Parent and Instructing Companies* (Law No 2017-399 of 27 March 2017).

[242] *Australia Modern Slavery Act*, 2018 (No 153), online: <www.legislation.gov.au/Details/C2018A00153>.

[243] *Dutch Child Labour Due Diligence Law* (14 May 2019), online: <www.eerstekamer.nl/verslagdeel/20190514/wet_zorgplicht_kinderarbeid>.

[244] See ILO Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy, online: ILO<www.ilo.org/wcmsp5/groups/public/---ed_emp/---emp_ent/---multi/documents/publication/wcms_094386.pdf>.

[245] *ILO Declaration on Fundamental Principles and Rights at Work* and its Follow-up (adopted by the International Labour Conference at its Eighty-sixth Session, Geneva, 18 June 1998 (Annexed revised version

Beyond legislation, states and organizations have issued guidance to their corporations at home and abroad. For example, a Chinese mining association affiliated with the Ministry of Commerce advised the overseas operations of its members to "ensure that all operations shall be in line with the UN Guiding Principles on Business and Human Rights during the entire life-cycle of the mining project".[246] In 2016, the International Bar Association also issued guidance on what the UNGPs mean for business lawyers.[247] The UNGPs has also influenced developments in the sports industry,[248] and private dispute resolution processes in the form of business and human rights arbitration.[249]

Beyond state legislation and organizational guidelines, some corporations have also begun to align their practices with the UNGPs' recommendations.[250] Although it is difficult to monitor its implementation in the corporate sector, there are discernable patterns of UNGPs influence on corporations' attitudes toward respect for human rights. For example, in 2016, Nestle published its UN Guiding Principles' Reporting Framework Index of

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15 June 2010). See also Remarks by SRSG John Ruggie "The 'Protect, Respect and Remedy Framework: Implications for the ILO" (delivered at the International Labour Conference Geneva, Switzerland, 3 June 2010). See also John Ruggie Letter to ILO Directorate General, Guy Ryder (30 May 2016), online: Shift <https://shiftproject.org/john-ruggie-letter-to-ilo-director-general-guy-ryder/>.

[246] China Chamber of Commerce of Metals Minerals & Chemicals Importers & Exporters, Guidelines for Social Responsibility in Outbound Mining Investments, online: EMM <www.emm-network.org/wp-content/uploads/2015/03/CSR-Guidelines-2nd-revision.pdf>.

[247] See Anna Triponel, "Respecting Business and Human Rights: IBA's Guidance on Applying the UN Guiding Principles" (11 July 2015), online (blog) Thomson Reuters Practical Law <https://uk.practicallaw.thomsonreuters.com/2-630 5490?transitionType=Default&contextData=(sc.Default)&firstPage=true&bhcp=1>.

[248] See "Report by Harvard Expert Professor Ruggie to Support Development of FIFA's Human Rights Policies" (14 April 2016), online (blog): FIFA.com<www.fifa.com/who-we-are/news/report-by-harvard-expert-professor-ruggie-to-support-development-of-fi-2781111>; Third Report by the FIFA Human Rights Advisory Board (May 2019), online (blog): FIFA.com <https://resources.fifa.com/image/upload/third-report-by-the-fifa-human-rights-advisory-board.pdf?cloudid=sxdtbmx6wczrmwlk9rcr>.

[249] See the *Hague Rules on Business and Human Rights Arbitration*, *supra* note 206.

[250] John Ruggie & John Sherman, III, "Adding Human Rights Punch to the New Lex Mercatoria: The Impact of the UN Guiding Principles on Business and Human Rights on Commercial Legal Practice" (2015) 6:3 Journal of International Dispute Settlement 455 at 457. ("The GPs are increasingly reflected in law and regulation, in public policy, in global, industry-specific or issue-specific standards, in the practice of companies and in the advocacy of civil society").

Answers.[251] The answers reflect the company's approach to respect for human rights, especially as it relates to child labour, workers' safety and health, environment, land acquisition, and access to grievance mechanisms.[252] Unilever, in its 2015 Report, states that the company is applying the UNGPs to underpin its standard of corporate behaviour.[253] Also, Coca-Cola' Policy Statement says: "[w]e strive to respect and promote human rights in accordance with the UN Guiding Principles on Business and Human Rights in our relationships with our employees, suppliers and independent bottlers."[254] These examples show the diffusion of the UNGPs beyond UN membership, the institutional sphere of origin of the UNGPs. The examples signify the cascading effect that the UNGPs is having in private and public circles. It has been noted that "…if ever we have witnessed a norm cascade, to quote the constructivists, the last decade surely represents one in the BHR space."[255]

Worthy of note are the activities of Shift, a not-for-profit organization headquartered in New York, and which comprises experts who promote the provisions of the UNGPs among corporations so they may build a culture of business practice where human dignity is respected.[256] Ruggie was the Chairman of the Board of Trustees of this

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[251] See UN Guiding Principles Reporting Framework Index of Answers, 2016, online: Nestle <www.nestle.com/sites/default/files/asset-library/documents/library/documents/corporate_social_responsibility/ungprf-index-of-answers-2016.pdf>. It should be noted that Shift, an NGO, contributed to the development of this Framework. See Shift Index of Answers, online: Shift <www.ungpreporting.org/resources/index-of-answers/>.

[252] *Ibid*.

[253] Unilever, Enhancing Livelihoods, Advancing Human Rights: Human Rights Report 2015, online: Unilever <www.unilever.com/Images/unilever-human-rights-report-2015_tcm244-437226_en.pdf>.

[254] The Coca-Cola Company Human Rights Policy, online: Cocacola<www.coca-colacompany.com/content/dam/journey/us/en/policies/pdf/human-workplace-rights/human-rights-principles/human-rights-policy-pdf-english.pdf>. For a report of the corporate uptake of the UNGPs, see Shift Reporting Framework, online: Shift <www.ungpreporting.org/database-analysis/explore-disclosures/companies-page/>.

[255] Steven R Ratner, "Introduction to the Symposium on Soft and Hard Law on Business and Human Rights" (2020) 114 American Journal of International Law Unbound 163 at 164.

[256] See Shift, online:<https://shiftproject.org/who-we-are/>.

NGO. Members and co-founders of the Organization, including Rachel Davis, John F Sherman, and Caroline Rees, were active participants in the drafting of the UNGPs.[257] Shift works closely with MNCs, governments, trade unions, and intergovernmental organizations to develop a reporting framework and to translate the UNGPs into reality-changing practices. In effect, they are a part of institutions that promote the work of the SRSG after the completion of his six-year mandate.

Educational institutions are also playing a strategic role in norm diffusion. For example, Harvard Business School contributes to the promotion of the UNGPs. Apart from engaging with the debates during the drafting of the UNGPs, through its Business and Human Rights Clinics, the school embarks on projects and research to bridge the business and human rights gap.[258] In fact, the Harvard Kennedy School of Government received grants to facilitate research during the mandate of the SRSG.[259] Also, a Teaching and Business and Forum was established by Adjuncts at Columbia University which now includes members from institutions around the world.[260] The educational activities that these institutions undertake promote continuous learning, which is an important component of norm diffusion.

The SRSG attributes the diffusion of the CR2R norm to the distributed network strategy that he employed.[261] The transnational network includes mainly constituted international agencies beyond the UN, like the OECD, ISO, IFC, the European

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[257] *Ibid*.
[258] See Tyler Giannini, Human Rights at Harvard Law, online: <https://hrp.law.harvard.edu/areas-of-focus/business-human-rights/>.
[259] Ruggie, Just Business, *supra* note 187 at 31.
[260] See Teaching Business and Human Rights Forum, online: <https://teachbhr.org/about/>.
[261] See John Ruggie, "The Social Construction of the UN Guiding Principles on Business and Human Rights (August 2017) Harvard Kennedy School Faculty Research Working Series No RWP17-030 1 at 21.

Commission, and FIFA, who served as norm agents.[262] Ruggie argues that the advantage of using these agents is that they spread norms faster and more widely than they would ordinarily spread.[263] This strategy validates Acharya's identification of the moral cosmopolitan aspect of the theory of norm diffusion.

As noted in Part II, the moral cosmopolitanism theory of norm diffusion, as opposed to the congruence theory, focuses on the propagation and promotion of "universal" moral norms by transnational actors either through agencies like states or transnational networks like NGOs.[264] The SRSG's cosmopolitan approach to the cascading of the UNGPs may be limited if a congruence approach that emphasizes the role of local actors and prior local norms in the same process is not properly acknowledged and accommodated. Acharya's congruence theory tells us that to gain legitimacy among local actors and weak African states, the UNGPs must fit into pre-existing local norms and culture. In other words, a congruence approach to the CR2R norm is important if the UNGPs is to reach the last stage of the norm cycle—internalization. The reframing of the CR2R as a localized or subsidiary norm is important because of the shortcomings of the process of its formulation and its scope as a norm. As discussed in Chapter 1, these weaknesses are highlighted by scholars, local communities, and NGOs. They are further elaborated in the next chapter.

3.4. Conclusion

This chapter's focus on Finnemore and Sikkink's theory of the norm cycle, specifically the characteristics of each stage of the cycle—norm emergence, norm cascade, norm internalization, and the conditions that cause a norm to proceed from one stage to

[262] *Ibid*.
[263] *Ibid*.
[264] Acharya, *supra* note 75 at 243.

another—points out also that these theorists fail to explain why and how norms diffuse. As discussed, this gap is filled in by resort to the theory of norm diffusion. The theory highlights that norm diffusion is both cosmopolitan and one of congruence. The former emphasizes transnational networks, and the latter focuses on the influence of local actors and local norms on norm diffusion. The discussion highlights that congruence is expressed in localization and subsidiarity and emphasizes that these are significant regarding local/domestic contestation and/or support for assuring the legitimacy of international norms or rejecting them as such.[265] The application of these ideas to the development of the UNGPs' norm of corporate responsibility to respect (CR2R) allowed me to establish that the efforts of the SRSG, Ruggie with his team as norm entrepreneurs, advanced the universalization of the CR2R norm, which is presently cascading. This chapter also classified the SRSG's norm diffusion strategy as cosmopolitan, not one of congruence, and noted that a congruence approach would better enhance the legitimacy of the CR2R norm and tip it more quickly towards norm internalization. This implies that the congruence approach has greater potential to minimize the impact of local actors/norms as "disruptors" and enhance their roles as "supporters" of the CR2R norm.

The next chapter draws on insights from the congruence approach to interpret the CR2R norm. It emphasizes the significance of a bottom-up approach to its diffusion and shows that failure to do so may well have been the missing link in its internalization after a decade of its endorsement by the United Nations Human Rights Council. Chapter 4 focuses on how the prior local African norm of Ubuntu can aid the interpretation of the

[265] Indeed, it has been noted that "Ruggie's work has been and will continue to be contested." See Giovanni Mantilla, "Emerging International Human Rights Norms for Transnational Corporations" (2009) 15:2 Global Governance 279 at 292.

CR2R norm and localize it to drive a shared understanding between local farmers in the Global South and Executive Directors in the Global North.

Chapter 4: Localizing the UNGPs—An Afrocentric Approach to Interpreting the CR2R Norm

Part I

4.0. Afrocentrism

This chapter presents an alternative epistemic analysis of the corporate responsibility to respect human rights (CR2R) norm. It applies the norm diffusion theory discussed in chapter 3. Methodologically, it shifts away from discussing the UNGPs via formal governance and institutionalized structures, to engage with literature on business ethics, sociology, and grassroots socio-cultural movements in order to present a constructive perspective to the UNGPs. The constructivist approach enables a reconstruction of the UNGPs as a set of "pluriversal" normative principles that are nourished from diverse perspectives via intercultural exchanges.[1] This imperative is what Jutta Brunnée & Stephen Toope capture in their observation that "…without a deep engagement in diversity, without robust interaction, law cannot be created in international society."[2]

The chapter is inspired by the views of social constructivists who believe that grassroot norms can transform, influence, and change the global Eurocentric narrative regarding norm diffusion, namely, a handing down from the top (Global North) to Third

[1] Grosfoguel defines pluriversal norms as "norms that construct common global projects across diverse worldviews while respecting 'the multiples of local particularities' by enabling a world in which many worlds are possible." Ramon Grosfoguel, "A Decolonial Approach to Political-economy: Transmodernity, Border Thinking and Global Coloniality" (2009) 6 Kult (Special Issue) 10 at 33.
[2] Jutta Brunnée & Stephen Toope, *Legitimacy and Legality in International Law: An International Account* (Cambridge, UK: Cambridge University Press, 2010) at 80-89.

World Peoples. These scholars, including Acharya,[3] Dunford,[4] Bettiza and Dionigi,[5] Merry,[6] and Levitt and Merry,[7] argue that the process of norm diffusion must be decolonized and democratized to include the voices of local communities in the shaping of a norm.[8] They reject a norm diffusion theory carried by the wisdom of a white-male saviour, thus challenging the West-centric story in which Western values are the "normative referent in world politics."[9]

Throughout this chapter, this thesis focus on Pillar II of the UNGPs because it embodies the CR2R norm. This thesis offers a plausible reinterpretation of the CR2R norm through Acharya's localization technique discussed in chapter 3. Reframing the CR2R norm is important because it helps the norm to: (1) gain local legitimacy among Third World Peoples, especially in local communities in Africa; (2) re-order the economic imbalance that a dominant interpretation of the C2R2 norm perpetuates in Third World countries; and (3) re-write the story of international human rights norm-making which sees non-western traditions and philosophies as non-existent or non-influential to support

[3] Amitav Acharya, "How Ideas Spread: Whose Norms Matter? Norm Localization and Institutional Change in Asian Regionalism" (2004) 58:2 International Organization 239; Amitav Acharya, "Norm Subsidiarity and Regional Orders: Sovereignty, Regionalism, and Rule Making in the Third World" (2011) 55 International Organizations 95.
[4] Robin Dunford, "Peasant activism and the rise of food sovereignty: Decolonising and democratising norm diffusion?" (2017) 23:1 European Journal of International Relations 145.
[5] Gregorio Bettiza & Filippo Dionigi, "How do Religious Norms Diffuse? Institutional Translation and International Change in a Post-secular World Society" (2015) 21:3 European Journal of International Relations 621.
[6] Merry Sally Engle, *Human Rights and Gender Violence: Translating International Law into Local Justice* (Chicago: Chicago University Press, 2006).
[7] Peggy Levitt & Merry Sally Engle, "Vernacularization on the Ground: Local uses of Global Women's Rights in Peru, India, China and the United States" (2009) 9:4 Global Networks 441.
[8] The term "local community" as used in this thesis generally refers to a group of people who constitute a community at local levels or grass-root levels of government, especially in Africa. See David Szablowski, *Transnational Law and Local Struggles: Mining, Communities and the World Bank* (Oregon: Hart Publishing, 2017) at 138-139.
[9] John Hobson, *The Eurocentric Conception of World Politics: Western International Theory,1760–2010* (New York: Cambridge University Press, 2010) at 1.

human rights norms. In sum, this chapter constructs an alternative normative version of the CR2R norm that the UNGPs promote, albeit through an Afrocentric lens.

In normative terms, this chapter examines how an Afrocentric interpretation of the CR2R norm can contribute to a relational system where corporations participate in host communities in Africa. It argues that an Afrocentric approach adequately responds to the historical reality, and the political and socio-economic needs of Africa. In effect, this chapter proffers African solutions to African socio-economic and human rights issues.[10] But to be clear, this thesis does not discard other (for example, western or Asian) views. Rather, it reflects on them through Africa's socio-cultural lens to construct its pluriversal worldview. The aim is to show how a local norm (Ubuntu) can support and influence the interpretation of the CR2R norm to move from conceptions of "do no harm" to "do good." The use of the localization technique enables me to argue that an analysis of the African philosophy of Ubuntu (dignity of persons) further clarifies MNCs' responsibility to respect human rights under the UNGPs.[11] This perspective is important because to gain local legitimacy, which enhances the prospects of promotion and enforcement by state and non-state actors, the CR2R norm must be intelligible in a local idiom.[12] It is only when a version of the CR2R norm is supported by local norms that the CR2R norm can be internalized.

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[10] This is because "Africa's achievements and genius lie in social and spiritual spheres, and hence imitations do not give them competitive advantage." See Lothar Auchter, "An African and Asian View on Global Business Ethics" (2017) 3:1 Global Journal of Contemporary Research in Accounting, Auditing and Business Ethics 505 at 506.

[11] See generally Bonny Ibhawoh, "Cultural Relativism and Human Rights: Reconsidering the Africanist Discourse" (2001) 19:1 Netherlands Quarterly of Human Rights 43.

[12] Bonny Ibhawoh, "From Ubuntu to Grootboom: Vernacularising Human Rights Through Restorative and Distributive Justice in Post-Apartheid South Africa" in Thembela Keep, Melissa Levin & Bettina Von Lieres, *Domains of Freedom: Justice, Citizenship and Social Change in South Africa* (Cape Town: University of Cape Town Press, 2015) 239 at 240.

It is also important to clarify the analytical scope of Afrocentrism and Ubuntu as used in this chapter. This thesis does not argue that MNCs should not make a profit as is often the case.[13] Rather it argues that making a profit should not be the only goal of MNCs, especially in situations where members of the community in which they operate wallow in poverty and environmental degradation. In effect, profit maximation should not be at the expense of host communities. The current interpretation of the CR2R norm seems to suggest that MNCs can make a profit so far as they do not infringe on the rights of community members. Meyersfeld argues that "the current international law regime identifies certain socio-economic rights as human rights; however, an accumulation of the violation of the rights to water, to health, to housing or justice, - we call this 'poverty.' Yet poverty is not considered a human rights violation or a breach of international law."[14] Ubuntu recognizes how poverty can reduce human dignity. Therefore, this thesis examines how an Ubuntu interpretation of "respect for human rights" as conceived by the UNGPs, will not only prevent human rights breaches, but also promote human rights.

Ubuntu can both be a constitutive and restraining norm. It is constitutive when it prescribes an Ubuntu-like behavior. In this sense, the actions of actors are judged against Ubuntu values that are intersubjectively held among Africans. For example, a behavior may be judged as Ubuntu-like if it promotes human flourishing. Thus, the constitutive contents of Ubuntu prescribe the character traits that a person should exhibit to be adjudged

[13] For example, this does not mean that foreign investors should not be involved in resource extraction in Africa because, inevitably, their aim is to profit and send returns to their home countries, which often is in the West. Indeed, foreign investment has the potential to increase a state's economic growth. See generally Xiaoying Li & Xiaming Liu, "Foreign Direct Investment and Economic Growth: An Increasingly Endogenous Relationship" (2005) 33:3 World Development 393.

[14] Bonita Meyersfeld, "Committing the Crime of Poverty: The Next Phase of the Business and Human Rights Debate" in Cesar Rodriguez-Garavito, ed, *Business and Human Rights: Beyond the End of the Beginning* (Cambridge: Cambridge University Press, 2017) 173 at 180.

as an Ubuntu person.[15] Ubuntu as a constraining norm prevents actors from exhibiting behaviours that may jeopardize Ubuntu values. For example, Ubuntu prescribes a relational framework where everyone looks out for the other. Therefore, Ubuntu values, if complied with, constrains behaviours based on self-interest because actions that exhibit greed are abandoned for those that promote the interest of others.

This thesis adopts both the constitutive and constraining aspects of Ubuntu. Ubuntu does not only prescribe that a company should do no harm (a constraining norm). It also prescribes that a company should do good (a constitutive norm). The thesis uses these approaches to determine whether the CR2R norm contains these two interpretations. If the answer to this query is positive, it means that the CR2R norm is congruent with a social norm in Africa. Since this thesis argues that the CR2R norm does not go far enough as would Ubuntu, it argues that the CR2R is partly congruent with Ubuntu. Therefore, this chapter attempts to reframe the CR2R norm in Ubuntu terms.

The pursuit of this theme is divided into five parts in this chapter. Part 2 generally examines the term Afrocentrism and its relevance to discussing matters related to Africans. It explores the characteristics of Afrocentrism and its importance for constructing an alternative worldview, notwithstanding the dominant (global) narrative. Part 3 examines the Afrocentric philosophy of Ubuntu, its meaning and relevance in Africa. It identifies Ubuntu as a social norm that applies in different sectors of activity, including management, education governance, and law. It also discusses other characteristics of Ubuntu which show that individuals (and, indeed, corporations) are relational beings who should promote human dignity. Part 4 explains why the CR2R norm should be localized in Africa through

[15] Douglas Taylor, "Defining Ubuntu for Business Ethics– A Deontological Approach" (2014) 33:3 South African Journal of Philosophy 331 at 331.

Ubuntu. It argues that Ubuntu is an example of a local norm through which corporations can fulfil their commitments to the CR2R norm. Part 5 examines how to use existing channels—human rights initiatives and structures, legislation, and company policy statements—to interpret the CR2R norm through Ubuntu. It also demonstrates how Ubuntu could be used to interpret the CR2R norm, using a case study. To conclude, the chapter emphasizes that a local norm like Ubuntu has the potential to support the CR2R norm. Therefore, scholars must continue to devise creative ways to rewrite and re-interpret the global narrative of the CR2R norm. Proceeding on the footing that the norm, as presently constituted, must not be taken as an end in itself, this thesis is conceived as a modest beginning to an unfolding journey onto a fresh normative landscape regarding the regulation of corporate conduct by all actors.

Part II

4.1. Afrocentrism—Nature and Characteristics

Afrocentrism refers to a mode of analysis where Africans seek to assert subject place within the context of African history and culture.[16] It is a paradigm dedicated to "validating, regenerating, creating, and perpetuating African life and living, informed by an African perspective or world outlook."[17] Afrocentrism seeks to free African studies from Eurocentric hegemony on scholarship, and thus present an alternative worldview through

[16] Molefi Asante, *An Afrocentric Manifesto* (Cambridge, UK: Polity Press, 2007) at 17. See also Keto Tsehloane, *The Africa-centered Perspective of History: An Introduction* (Delhi: K A publishers, 1991). Culture in this thesis is defined "as a set of shared values, assumptions and beliefs that are learnt through membership in a group, and that influence the attitudes and behaviors of group members." See Pankaj Ghemawat & Sebastian Reiche, "National Cultural Differences and Multinational Business" (2010), online: Globalization Note Series <www.aacsb.edu/-/media/aacsb/publications/cds%20and%20dvds/globe/readings/national-cultural-differences-and-multinational-business.ashx?la=en&hash=1EE3B87623B9793351312DDB644853309EF01AAF>.

[17] Ayele Bekerie, "The Four Corners of a Circle: Afrocentricity as a Model of Synthesis" (1994) 25:2 Journal of Black Studies 131.

which Africa can be studied.[18] Afrocentrism is not a universal perspective because it recognizes the validity of other non-hegemonic perspectives—Asia-centered, America-centered, and even Europe-centered in its non-dominant form.[19] In sum, Afrocentrism offers the opportunity to look at the world from a non-dominant perspective in order to better understand our diversified and multicultural universe.[20]

The word "Afrocentric" was first coined by Du Bois in the early 1960s to describe the subject matter of his project, *Encyclopedia Africana*.[21] However, Afrocentrism's contemporary meaning comes from Molefi Kete Asante[22] who sees it as a "mode of thought and action…placing African people in the center… [and] enshrining the idea that blackness itself is a trope of ethics."[23] Asante argues that human beings cannot divest themselves of culture; they are either participating in their historical culture or that of some other group. The Afrocentric school of thought, rather than embrace Eurocentric dominance, promotes an African viewpoint in the rendering of historical and cultural world events. In effect, Afrocentrism is an intellectual exercise aimed at breaking global narratives by putting African people at the center of the narrative.[24]

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[18] Bayo Obeyade, "African Studies and the Afrocentric Paradigm: A Critique" (1990) 21:2 Journal of Black Studies 233 at 234.
[19] *Ibid.* To be clear, Afrocentrism also acknowledges views from marginalized, groups, including women and indigenous peoples within these continents.
[20] Elias Konyana, "Hunhu/Ubuntu Philosophy Incompatible with Business Ethics? Reflections on Business Viability in Rural Shona Communities in Zimbabwe" (2013) 10:2 IOSR Journal of Humanities and Social Science 67 at 67.
[21] Mia Bay "The Historical Origins of Afrocentrism" (2000) 45:4 American Studies 501 at 503.
[22] Molefi Kete Asante, *Afrocentricity: The Theory of Social Change* (Trenton, NJ: Africa World Press, 1988).
[23] *Ibid* at 2. See also Molefi Kete Asante, *Kemet, Afrocentricity and Knowledge* (Trenton, New Jersey: Africa World Press, 1990).
[24] Molefi Kete Asante, "The Afrocentric Idea in Education" (1991) 60:2 The Journal of Negro Education 170 at 172 (he describes Afrocentrism as "a frame of reference wherein phenomena are viewed from the perspective of the African person.... It centers on placing people of African origin in control of their lives and attitudes about the world. This means that we examine every aspect of the dislocation of African people; culture, economics, psychology, health and religion...As an intellectual theory, Afrocentricity is the study of the ideas and events from the standpoint of Africans as the key players rather than victims. This theory becomes, by virtue of an authentic relationship to the centrality of our own reality, a fundamentally empirical

Afrocentrism shares similar ideologies with other African movements like Pan-Africanism, because it promotes a philosophical understanding of African culture, history, and politics in the liberation of Africans from colonial and neo-colonial ideologies.[25] Although Afrocentrism is criticized for trying to replace Eurocentricity in its hegemonic form,[26] Afrocentrists deny this charge. In their view, Afrocentrism only pushes for the interpretation of matters concerning Africans through an African socio-cultural and historical lens.[27] In effect, Afrocentrism dethrones Eurocentric philosophical interpretations in matters relating to Africans.[28] It embraces a multi-cultural approach rather than a universal or hegemonic interpretation of the history and culture of non-Africans.[29] This thesis adopts Afrocentrism's multicultural approach to norm creation.[30] It is from this viewpoint that Part II, next, examines the Afrocentric philosophy of Ubuntu. In so doing, it situates Africans at the center of the CR2R norm-building discourse to examine what a CR2R norm might mean to them in Ubuntu terms.

Part III
4.2. The African Philosophy of Ubuntu

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project ... it is Africa asserting itself intellectually and psychologically, breaking the bonds of Western domination in the mind as an analogue for breaking those bonds in every other field").

[25] Sidney Lemelle, "The Politics of Cultural Existence: Pan-Africanism, Historical Materialism and Afrocentricity" (1993) 35:1 Race and Class 93 at 95. See also Kurt Young, "Towards a Holistic Review of Pan-Africanism: Linking the Idea and the Movement" (2010) 16:2 Nationalism and Ethnic Politics 141.

[26] See Christopher Brown II, "Critiques of Afrocentricity, Comments on Multiculturalism" (2001) 94 Counterpoints 539.

[27] Ama Mazama, "The Afrocentric Paradigm: Contours and Definitions" (2001) 31: 4 Journal of Black Studies 387 at 388 ("[t]he Afrocentric idea rests on the assertion of the primacy of the African experience for African people. Its aim is to give us our African, victorious consciousness back. In the process, it also means viewing the European voice as just one among many and not necessarily the wisest one").

[28] See Molefi Kete Asante, *supra* note26. See also Molefi Kete Asante, *African Pyramids of Knowledge: Kemet, Afrocentricity and Africology* (Brooklyn, New York: Universal Write Publications, 2015).

[29] Molefi Kete Asante, "The Afrocentric Idea in Education," *supra* note 24.

[30] It is important to note that some Afrocentrism ideas are also present in literature on Indigenous Peoples, especially as it relates to the individual's spiritual attachment to land and environment. See e.g., Sara Seck, "Relational Law and the Reimagining of Tools for Environmental and Climate Justice" (2019) 31:1 Canadian Journal of Women and the Law 151. However, due to limited space, this thesis will not compare the indigenous and Afrocentric perspectives; it only approaches Ubuntu from an Afrocentric perspective with limited discussion on individuals' spiritual attachment to land and environment.

Ubuntu is a pan-African philosophy that emphasizes being human through other people—relationality .[31] It is aptly reflected in the phrase, "I am because of who we all are," or "I am human because I belong, I participate, I share."[32] These translate into a popular Zulu saying "Umuntu ngumuntu ngabantu."[33] Ubuntu rests on such core values as humanness, caring for human beings, sharing, respect for human beings, respect for human dignity and human life, compassion, hospitality, interdependence, interconnectivity, and communalism.[34] These values reflect themes that include respect for persons, community, personhood, and morality.[35] Regardless of social status, gender, or race, persons are recognized, valued, and accepted for their own sake.[36] This is because a person is the cornerstone of a community.[37] Therefore, anything that undermines, hurts, threatens, and destroys human beings is not accommodated in the Ubuntu worldview because community and personhood are intricately intertwined. If one person maltreats or disrespects another, other members of society can intervene or remind the perpetrator of the victim's dignity and the necessity to uphold the value of a human being in society.[38]

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[31] Maree Lovemore & Jenny Mbigi, *Ubuntu: The Spirit of African Transformation Management* (California: Knowledge Resources, 1995) at 2.
[32] *Ibid*.
[33] See Jacob Mugumbate & Andrew Nyanguru, "Exploring African Philosophy: The Value of Ubuntu in Social Work" (2013) 3:1 African Journal of Social Work 82 at 84. This concept has phonological variants in different African languages such as Kenya, Democratic Republic of Congo, and Angola. See Alexis Kagame, *La philosophie bantu comparee* (Paris: Presence Africaine, 1976).
[34] Nkonko Kamwangamalu, "Ubuntu in South Africa: A Sociolinguistic Perspective to a Pan-African Concept" (1999) 13:2 Critical Arts 24 at 26.
[35] Mluleki Mnyaka & Mokgethi Motlhabi, "The African Concept of Ubuntu/Botho and its Socio-Moral Significance" (2005) 3:2 Black Theology 215 at 219.
[36] *Ibid*.
[37] Steve Biko, *I Write What I Like* (London: The Bowerdean Press, 1978) at 46.
[38] Mnyaka & Motlhabi, *supra* note 35 at 219.

The foregoing reflects the centrality of communalism, interdependence, solidarity, and dignity in the construction of Ubuntu.[39] Nkodo notes that "Ubuntu advocates...express commitment to the good of the community in which their identities were formed, and a need to experience their lives as bound up in that of their community."[40] A successful person (whether natural or artificial) must recognize that their success is from the community and must seek to live harmoniously and share with others.[41] Therefore, society is inbalanced where individuals profit at the expense of others, or do not share their success to help others within the community.[42] In sum, Ubuntu frowns on "exporting" wealth from one community to another because each community is a source of wealth that must be distributed to benefit all its members—distributive justice.[43] It is arguable that those who take the risk to make wealth should enjoy the proceeds of their risk. However, Ubuntu prescribes that it is in the sharing that joy and happiness is derived because Ubuntu preaches that no one should lack.[44]

Ubuntu is expressed differently in different African languages because its etymological root is found in African proverbs.[45] Nkonko Kamwangamalu, using a

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[39] Clever Mapaure, "Reinvigorating African values for SADC: The Relevance of Traditional African Philosophy of Law in a Globalising World of Competing Perspectives" (2011) 1 SADC Law Journal 149 at 160.

[40] Gessler Muxe Nkondo, "Ubuntu as a Public Policy in South Africa: A Conceptual Framework" (2007) 2:1 International Journal of African Renaissance Studies 88 at 91. See also Michael Onyebuchi Eze, *Intellectual History in Contemporary South Africa* (New York: Palgrave MacMillan, 2010) at 190-191.

[41] Thaddeus Metz, "An Ubuntu-based Evaluation of the South African State's Responses to Marikana: Where is the Reconciliation?" (2017) 44:2 Polikton South African Journal of Political Studies 287 at 290.

[42] Desmond Tutu, *No future without forgiveness: A Personal Overview of South Africa's Truth and Reconciliation Commission* (London, UK: Ebury Publishing 2012) at 35.

[43] See Edwin Etieyebo, "Ubuntu, Cosmopolitanism, and Distribution of Natural Resources" (2017) 46:1 Philosophical Thesis 139. See also Moeketsi Letseka, "Ubuntu and Justice as Fairness" (2014) 5:9 Mediterranean Journal of Social Sciences 543 at 547-549.

[44] See John Eliastam, "Exploring Ubuntu Discourse in South Africa: Loss, liminality and hope" (2015) 36:2 Verbum et Ecclesia 1 at 4.

[45] See Kamwangamalu, *supra* note 34. See also generally Chielozona Eze, *Justice and Human Rights in the African Imagination: We, too, are Humans* (New York: Routledge, 2021). Indeed, Chinua Achebe notes that "proverbs are the palm oil with which words are eaten. See Chinua Achebe, *Things Fall Apart* (London, UK: William Heinemann, 1958) at 6.

sociolinguistic approach, found that Ubuntu is expressed in different countries including Gimuntu (giKwese, Angola), Bomoto (iBobangi, Congo), Umundu (Kikuya, Kenya), Vumuntu (ShiTsonga, Mozambique), and Bunmuntu (kiSukuma, Tanzania).[46] Other similar concepts include Ubunwe (Kinyarwanda, Rwanda), Hunwe (Shona, Zimbabwe), umoja (Swahili, Kenya, Tanzania, and Zanzibar), ubawananyina (Bemba, Zambia), pamodzi (Malawai), al takafol al egtma' ey (Arabic, Egypt, Libya, Morocco, Tunisia, Sudan, Algeria), Ku tchew (Cameroon),[47] igwebuike (Igbo, Nigeria), Agbajowo la fin soya (Yoruba, Nigeria).[48] These examples show that Ubuntu finds expression in almost all languages in Africa. The expansive literary interpretations demonstrate that the application of Ubuntu is not limited to Southern Africa.

Ubuntu has social and economic influence in Africa because it seeks to prevent economic relations that produce harmful poverty by depriving others of the essential means of survival.[49] It regards the essential means of survival, such as land and labour, as universal communal resources that must be accessible to all members of the community.[50] Vilikazi refers to Ubuntuism as the foremost priority in all conduct.[51] According to him,

> the value, dignity, safety, welfare, health, beauty, love, and development of the human being and respect for the human being are to come first, and should be promoted to the first rank before all

[46] Kamwangamalu, *supra* note 34 at 25.
[47] See Benviolent Chigara, "The Humwe Principle: A Social Ordering Grundnorm for Zimbabwe and Africa?" in R Home, ed, *Essays in African Land Law*, vol 1 (Pretoria: Pretoria University Law Press, 2011) 113.
[48] Princess Omovrigho Idialu, "The Eradication of Toxic Wastes and Pollutants in Ogoni Land: An Igwebuike Approach" (2020) 19:1 Journal of Applied Philosophy 43.
[48] Kamwangamalu, *supra* note 34.
[49] Peter Nwipikeni, "Ubuntu and the Modern Society" (2018) 37:3 South African Journal of Philosophy 322 at 327.
[50] Thaddeus Metz, "Towards an African Moral Theory" (2007) 15: 3 Journal of Political Philosophy 321.
[51] Herbert Vilikazi, "The Roots of Ubuntu/Botho (paper delivered at the Secretariat for Multilateral Cooperation in Southern Africa (SECOSAF) Seminar, Johannesburg, South Africa,1991) [unpublished].

> other considerations, particularly, in our time, before economic, financial, and political factors are taken into consideration.[52]

Therefore, an individual is both the subject and object of duties and obligations because of the interconnectivity between personhood and society.[53] In sum, Ubuntu philosophy, although expressed differently in different African languages, emphasizes the importance of persons in community. It seeks the good of all members of a community and requires group solidarity to work toward achieving this common goal. The requirement is that each member of the group must align their self-interest with the ultimate realization of the community's needs, seeing that it is only in the realization of community goals that their personal goals are fulfilled.[54] In effect, Ubuntu espouses ideas of communalism with an emphasis on social responsibility.[55]

Ubuntu's values of communalism, solidarity, and interrelatedness may also find expression in western ideologies,[56] such as in Rousseau's postulation that individual interests must be in submission to the general will;[57] Hegel's view that the same must be in unqualified submission to state institutions;[58] Karl Marx's view that communism and socialism together are an alternative to capitalism.[59] A feminist relational theory is also similar to Ubuntu because they share similar values on the interdependence of human

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[52] Vilikazi, *ibid* at 70.
[53] Etieyebo, *supra* note 43 at 140.
[54] Indeed, Martin Luther King, Jr noted that "[a]n individual has not started living until he (or she) can rise above the narrow confines of his individual concerns to the broader concerns of all humanity." See Sharon Griffin, *Ubuntu: The Virtue of Being Fully Human* (Durban: Institute of Current World Affairs Letters, 1995) at 3.
[55] *Ibid* at 1.
[56] A Shutte, "The Ubuntu Project" (Paper presented at the 22nd Congress of Philosophical Society of Southern Africa, Durban, University Natal, July 1994) [unpublished].
[57] See generally Patrick Riley, "A Possible Explanation of Rousseau's General Will" (1970) 64:1 The American Political Science Review 86.
[58] Jeffrey Church, *Infinite Autonomy: The Divided Individual in the Political Thought of GWH Hegel and Friedrich Nietzche* (Pennsylvania: Pennsylvania State University Press, 2012) at 57.
[59] Karl Marx & Frederick Engels, *Manifesto of the Communist Party* (Chicago: Kerr & Co, 1848).

beings and connection to the environment.[60] Thus, "[i]t would be ethnocentric and silly to suggest that the Ubuntu ethic of caring and sharing is uniquely African. After all, the values which Ubuntu seeks to promote can also be traced in various Eurasian philosophies."[61] However, Ubuntu and western philosophies have different origins. Communism, socialism, fascism, and social democracy have been characterized as "western humanism"— a sense of humanity or self-worth that is developed by the intellect, science, and technology.[62] Ubuntu, on the other hand, is an African form of humanism that has a religious connotation and origin.[63]

Similarly, Ubuntu's notion of the dignity of persons has limited expression in the corpus of human rights. The preamble to the *Universal Declaration of Human Rights* (*UDHR*) speaks of the inherent dignity, equality, and inalienable rights of all members of the human family.[64] Human dignity may be the basis for upholding human rights. Beyond

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[60] For a feminist analysis of relational autonomy which discusses the interdependence of human beings like Ubuntu, see Jessica Eisen, Roxanne Mykitiuk & Dayna Nadine Scott, "Constituting Bodies into the Future: Toward a Relational Theory of Intergenerational Justice" (2018) 51:1 UBC Law Review 1. See also Sara Seck, *supra* note 30.

[61] Dirk Louw, "Ubuntu: An African Assessment of the Religious Other" (Paper presented at the Twentieth World Congress of Philosophy, Boston, Massachusetts, August 10-15, 1998) [unpublished]. See also Johann Broodryk "Is Ubuntuism unique?" in J Malherbe, ed, *Decolonizing the mind: Proceedings of the 2nd Colloquium on African Philosophy* (Pretoria: UNISA Research Unit for African Philosophy,1996) at 31.

[62] Reuel Khoza, "Ubuntu as African Humanism" (Paper read at Ekhaya Promotions: Diepklo of Extension, South Africa, 1994) [unpublished]; Edward Prinsloo, "The African View of Participatory Business Management" (2000) 25:4 Journal of Business Ethics 275 at 280. Louw, aptly puts it as follows: "[w]hile Western Humanism tends to underestimate or even deny the importance of religious beliefs, Ubuntu or African Humanism is resiliently religious. For the Westerner, the maxim "A person is a person through other persons" has no obvious religious connotations. He/she will probably interpret it as nothing but a general appeal to treat others with respect and decency. However, in African tradition this maxim has a deeply religious meaning." Louw, *supra* note 61 at 2. See also Dirk Louw, "Ubuntu and the Challenges of Multiculturalism in Post-Apartheid South Africa" (2001) 15:2 Quest 15 at 17. Areli Valencia, *Human Rights Trade-Offs in Times of Economic Growth: The Long-Term Capability Impacts of Extractive-Led Development* (New York: Palgrave MacMillan, 2016); Marilyn Friedman, Autonomy, Gender, Politics (New York: Oxford University Press, 2003).

[63] See generally Maake Masango, "African Spirituality that Shapes the Concept of Ubuntu" (2006) 27:3 Verbum et Ecclesia 930; Maake Masango, "Towards an African Theology of Life and Human Dignity" in James Amanze et al, eds, *Religion and Development in Southern and Central Africa,* Vol II (Luwinga: Mzuni Press, 2019) at 287.

[64] United Nations General Assembly, *United Nations Universal Declaration of Human Rights* 217 (III) A (Paris, United Nations 1948).

this, however, Ubuntu protects the intrinsic value of being human.[65] And to the extent that dignity of persons means autonomy, self-fulfillment, and individualism outside the community, Ubuntu deviates from the corpus of human rights thought. This is because, in the Ubuntu conception of dignity, human beings emanate from the network of relationships in a community.[66]

So then, though Ubuntu's ideals may be expressed in other western traditions and philosophies that preach compassion, warmth, kindness, understanding, humanness, and sharing,[67] its interdependence (communalism) values have a distinct and unique cultural and religious meaning to Africans, which can be described as a social norm.[68] This thesis describes Ubuntu as a norm because though there are cases of violence, corruption, and intolerance in Africa,[69] Ubuntu represents a cultural ideal that most Africans strive to achieve.[70] In other words, "Ubuntu is both a given and a task or desideratum in African

[65] See Tibi, "The European Conception of Human Rights and the Culture of Islam" in Abdullahi An-Na'im & Francis Deng, eds, *Human Rights in Africa: Cross-cultural Perspectives* (Washington DC: The Brookings Institution, 1990) 104.
[66] Russel Botman, "The Oikos in a Global Economic Era: A South African Comment" in James Cochrane & Bastienne Klein, eds, *Sameness and Difference: Problems and Potentials in South African Civil Society South African Philosophical Studies*, vol I (Washington: The Council for Research in Values and Philosophy, 2000) 269 at 271.
[67] T I Nzimakwe "Practising Ubuntu and Leadership for Good Governance; The South African and Continental Dialogue" (2014) 7:4 African Journal of Public Affairs 30 at 39.
[68] Kamwangamalu, *supra* note 34 at 35. Indeed, Cornell and Muvangua argue that it is a "profound misunderstanding of Ubuntu to confuse it with simple-minded communitarianism." See Drucilla Cornell & Nyoko Muvangua, eds, *Ubuntu and the Law: African Ideas and Post Apartheid Jurisprudence* (Fordham: Fordham University Press, 2012) 1 at 3.
[69] See Ryland Fisher, "Ubuntu? No, SA [South Africa] has a Penchant for Intolerance" (6 April 2019), online: IOL news<www.iol.co.za/news/opinion/Ubuntu-no-sa-has-a-penchant-for-intolerance-20693068>.
[70] Indeed, Kingsley Okoro and Lilian Nkama argue that "[i]t is in the practice of Ubuntu that African nations will find their relevance in the global village." See Kingsley Okoro & Lilian Nkama, "Ubuntu Ideality: The Solution to Xenophobic Practice in South African" (2018) 6:3 World Journal of Research and Review 115 at 115.

societies."[71] This is why Renee Caprari sees the recent xenophobia in South Africa as "un-African and a violation of the spirit of Ubuntu."[72]

Ubuntu is not only a social norm, but it also contains normative values that influence constitutional and human rights interpretations in some countries.[73] For example, the landmark case of *S v Makwanyane* in South Africa reinforces it as such.[74] The South African Constitutional Court declared capital punishment unconstitutional, among other grounds, because of its lack of compassion, and respect for dignity and solidarity. The Court noted that South African society must reflect Ubuntu values and since capital punishment does not reflect them, it ought to be abolished.[75] Also, in *Barkhuizen v Napier,* the same court, per Ngcobo J, held that South African public policy is influenced by Ubuntu.[76] The Constitutional Court further recognizes Ubuntu as a standard to uphold in dealing with foreigners.[77] South African Courts have also linked Ubuntu to restorative

[71] Louw, *supra* note 61 at 5.
[72] See Renee Caprari, "Xenophobia is un-African and a Violation of the Spirit of Ubuntu" (26 September 2019), online (blog): Daily Maverick <www.dailymaverick.co.za/opinionista/2019-09-26-xenophobia-is-un-african-and-a-violation-of-the-spirit-of-Ubuntu/>.
[73] See generally Drucilla Cornell, Roger Berkowitz & Kenneth Michael Panfilio, eds, *Ubuntu and the Law: African Ideals and Post Apartheid Jurisprudence* (New York: Fordham University Press, 2012); Serges Djoyou Kamga, "Cultural values as a source of law: Emerging Trends of Ubuntu Jurisprudence in South Africa" (2018) 8 African Human Rights Law Journal 625 at 646. See also Cornell & Muvangua, *supra* note 69.
[74] (1995) 3 SA 391 (CC), online:<www.saflii.org/za/cases/ZACC/1995/3.pdf>. See also *MEC for Education: Kwazulu-Natal v Pillay* (2008) 1 SA 474 (CC); *Joseph v City of Johannesburg* (2010) 4 SA 55 (CC); *Koyabe v Minister for Home Affair*s *(Lawyers for Human Rights as Amicus Curiae)* (2014) SA 327 (CC). See also Mvuselelo Ngcoya, *Ubuntu: Globalization, Accommodation and Contestation in South Africa* (PhD Dissertation, American University, Washington DC, 2009) [unpublished].
[75] *S v Makwanyane*, *ibid*, para 131.
[76] *Barkhuizen v Napier* (2007) ZACC 5, para 51.
[77] *Port Elizabeth Municipality v Various Occupiers* (2005) 1 SA 217 (CC), par 37.

justice and Truth and Reconciliation practices.[78] In a restorative justice context, Ubuntu emphasizes virtues that include forgiveness, reconciliation, and truthfulness.[79]

Beyond the judicial landscape in South Africa, Ubuntu has been judicially recognized and asserted in other African jurisdictions.[80] For example, the Uganda High Court in *Solvatori Abuki v Attorney General* confirmed the application of Ubuntu to communities in Uganda.[81] The court rejected the argument that Ubuntu is confined to South Africa or any other group because Ugandan communities recognize Ubuntu. Also, the Lesotho High Court in *Mokoena v Mokoena* [82] referred to Ubuntu in a case where the applicants sought to dispossess the widow of their deceased brother of the land he left behind under Lesotho's customary law of succession. In a way that shows the importance of Ubuntu in fostering solidarity and respect for human dignity, the court held that

> [t]he widow has a customary law right to expect her late husband's relatives to protect her and the property that her husband left her with…It is contrary to Basotho culture, good conscience and a sense of what is right in the African sense -that applicant should be attempting to deprive the widow of her house and arable lands (masimo). It is not botho or Ubuntu to dispossess a widow.[83]

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[78]Chuma Himonga, Max Taylor & Anne Pope, "Reflections on Judicial Views of Ubuntu" (2013) 16:5 Potchefstoom Electronic Law Journal 372 at 377. See also Adeoye Akinola & Ufo Uzodike, "Ubuntu and the Quest for Conflict Resolution in Africa" (2018) 49:2 Journal of Black Studies 91.

[79] Mofihli Teleki & Serges Djoyou Kamga, "Recognizing the Value of the African Indigenous Knowledge System: The Case of Ubuntu and Restorative Justice" in Samuel Ojo Oloruntoba, Adeshina Afolayan, & Olajumoke Yacob-Haliso, eds, *Indigenous Knowledge Systems and Development in Africa* (Cham: Palgrave Macmillan, 2020). See also Jacob Meiring, "Ubuntu and the Body: A Perspective from Theological Anthropology as Embodied Sensing" (2015) 36:2 Verbum et Ecclesia 1 at 2.

[80] Indeed, some scholars describe Ubuntu as a meta norm similar to the English notion of equity which gives voice to something distinctively African, especially on issues of social justice See generally TW Bennett, "Ubuntu: An African Equity" (2011) 14:4 Potchefstroom Electronic Law Journal 30 at 41.

[81] *Solvatori Abuki v Attorney General* [1997] UGCC 5. In this case, the court held that Uganda's Witchcraft Act is unconstitutional because its application produces inhumane and degrading results.

[82] *Mokoena v Mokoena* [2007] LSHC 14 (CIV/APN/216/2005).

[83] *Ibid*.

As a contribution to human rights and constitutional law scholarship, Ubuntu has also been used to justify a constitutional interpretation of human rights to water in Namibia.[84] Ndjodi Ndeunyema argues that to solve the problems of water scarcity in Namibia, courts must purposively interpret the Namibian constitution. He argues that although everyone should have a right to safe and clean water in Namibia, the right to water is not included in the Namibian constitution. Using Ubuntu, he contends that the right to water could be implied from the interpretation of the right to life as stated in Article 6 of the Namibian constitution.[85] Ndeunvana justifies this argument on the basis that African normative values animate the foundational principles of the Namibian constitution. Therefore, a purposive interpretation of the constitution will include considerations of Ubuntu which imposes a duty on the state to provide water in the fulfilment of its socio-economic obligations to its citizens.[86] In effect, Ndeunvana claims that the right to water can be implied as a socio-economic dimension of the right to life through Ubuntu. It is important to note that Ndeunvana suggests that Ubuntu is part of African customary law,[87] a claim that points to its normative influence as a source of interpreting human rights and constitutional rights outside South Africa.

Therefore, Ubuntu is Africa's worldview of social relations—a social and humanistic ethic.[88] It is an "…African ethical concept, a way of life, an authentic mode of being African, an individual ideal, the appropriate public spirit, a definition of life itself,

[84] See generally Ndjodi Ndeunyema, *Re-invigorating Ubuntu Through Water: A Human Right to Water under the Namibian Constitution* (Pretoria: Pretoria University Press, 2021).
[85] Namibian Constitution (GG2) (As amended by the Namibian Constitution Third Amendment Act 8 of 2014), online: <www.lac.org.na/laws/annoSTAT/Namibian%20Constitution.pdf>
[86] Ndeunyema, *supra* note 84 at 62.
[87] *Ibid* at 67.
[88] Mugumbate & Nyanguru, *supra* note 33 at 84.

and the preferred manner of conducting public and private business."[89] Ubuntu is important in Africa because it is "the foundation and the edifice of African philosophy,"[90] the foundation of "African communal cultural life,"[91] and a "unifying factor, bringing people together regardless of their background or access to wealth."[92] As a social norm, Ubuntu does not only apply to individuals. It also applies to institutions (MNCs) that have formal decision-making structures.[93] The composition or corporate structure of a company (as state-owned enterprises or Africans in management positions in foreign-owned companies) is irrelevant to determining whether a company should speak Ubuntu. To give credence to the structure or nomenclature of a company in determining who should be Ubuntu-compliant is akin to arguing that only particular individuals, for example, based on their gender, should be the only ones to inculcate Ubuntu values. In effect, local, foreign-owned, and state-owned enterprises are all subject to Ubuntu values.[94]

Bearing in mind the meaning and normative relevance of Ubuntu in Africa, Part IV, next, examines the importance of reframing the CR2R norm through an Ubuntu lens. It identifies the reasons for this reframing: (1) to increase the norm's intelligibility in Africa by clarifying and contextualizing the meaning of the term "respect" as used in Pillar II; (2)

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[89] Bernard Matolino & Wenceslaus Kwindingwi, "The End of Ubuntu" (2013) 32:2 South African Journal of Philosophy 197 at 197.
[90] Mogobe Ramose, *African Philosophy through Ubuntu* (Harare: Mond Books, 1999) at 49.
[91] Richard Tambulasi & Happy Kayuni, "Can African Feet Divorce Western Shoes? The Case of 'Ubuntu' and Democratic Good Governance in Malawi" (2005) 14:2 Nordic Journal of African Studies 147 at 147.
[92] Jabulani Sithole, "Africa Can Only Use Own Culture to Influence Globalization" (15 May 2001), online: Afrol News <www.afrol.com/html/News2001/afr020_culture_econ.htm>.
[93] See Peter French, "The Corporation as a Moral Person" (1979)16 American Philosophical Quarterly 207. See also Metz, *supra* note 41 at 291.
[94] This is similar to the scope of the *UNGPs* which provides in Article 14 that "the responsibility of business enterprises to respect human rights applies to all enterprises regardless of their size, sector, operational context, ownership and structure." Indeed, one of the reasons the Zero Draft Treaty, discussed in chapter 2, was initially critiqued is because of its limited application to only foreign companies. See Marco Fasciglione, "Another Step on the Road? Remarks on the Zero Draft Treaty on Business and Human Rights" (2018) 12:3 Diritti Umani E Diritto Internazionale 629 at 637.

to fill the ethical gap in its interpretation; (3) by its Ubuntu-inspired interpretation, to insulate CR2R from the critique that the norm's scope is narrow because it only encourages MNCs to avoid infringing human rights without prescribing positive obligations. The overall argument advanced is that reframing the CR2R norm in Ubuntu terminology may be a modest way to influence corporate conduct in Africa, and beyond.

Part IV

4.3. Localizing the CR2R Norm Through Ubuntu

The interpretation of the UNGPs, especially pillar II, is a subjective exercise.[95] Therefore, by way of a localization theory, it is possible to contextually interpret the CR2R norm. In a view similar to Acharya's congruence theory, Gaby Aguilar notes that localization is a "strategic framework for prompting the normative development of human rights from the bottom up."[96] It is a process where research recognizes the local need for human rights to inspire the re-interpretation or elaboration of human rights. Koen De Feyter also notes that localization "implies taking human rights needs as formulated by local people (in response to the impact of economic globalization in their lives) as the starting point for both the further interpretation and elaboration of human rights norms and the development of human rights action, at all levels, ranging from domestic to global."[97]

Pillar II refers to MNCs' responsibility to respect human rights norms as contained in international legal instruments, including the Universal Declaration of Human Rights,

[95] See Tadeusz Gruchalla-Wesierski, "A Framework for Understanding 'Soft Law" (1984) 30 McGill Law Journal 37 at 47 ("[i]t is true that soft law rules admit of subjective interpretation…").
[96] Gaby Aguilar, "The Local Relevance of Human Rights: A Methodological Approach" in Koen De Feyter, Stephan Parmentier, & Christiane Timmerman, eds, *The Local Relevance of Human Rights* (Cambridge, UK: Cambridge University Press, 2011) 109 at 111.
[97] Koen De Feyter, "Localizing Human Rights" in Wolfgang Benedek, Koen De Feyter, & Fabrizio Marrella, eds, *Economic Globalization and Human Rights* (Cambridge, UK: Cambridge University Press, 2007) 67 at 68.

the *International Covenant on Civil and Political Rights* (ICCPR), *the International Covenant on Economic, Social and Cultural Rights* (ICESCR), and eight ILO core conventions as set out in the Declaration on Fundamental Principles and Rights at Work.[98] From the list of the instruments, it could be gleaned that the benchmark for measuring compliance with the CR2R norm is contemporary human rights norms, including those on civil, political, labour, social, cultural, and economic rights.

These human instruments are broadly classified as those containing positive and negative rights.[99] For example, the ICCPR contains negative rights—that is, rights that require others to abstain from actions that interfere with individual liberties and political freedoms.[100] Similarly, the IECSR contains positive rights—that is, rights that require others to actively contribute to the realization of human rights by providing basic necessities of life, including access to housing, food, and education.[101] However, there is a debate about whether civil and political rights should have priority over economic and social rights.[102] The debate may be unnecessary because both positive and negative rights

[98] The United Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework 2011, online: OHCHR<www.ohchr.org/sites/default/files/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf> [UNGPs] Principle 12.

[99] See generally Sandra Fredman, *Human Rights Transformed: Positive and Negative Rights* (Oxford: Oxford University Press, 2008). However, some scholars contend that there is no bright line between positive and negative rights because the fulfilment of a positive right can involve the realization of a negative right. For example, Henry Shue prefers to classify the rights into basic and non-basic rights. See Henry Shue, *Basic Rights: Subsistence, Affluence, and US Foreign Policy*, 2nd ed (Princeton, New Jersey: Princeton University Press, 1996).

[100] *Ibid* at 18.

[101] See Laurens Lavrysen, "Positive Obligations in the Jurisprudence of the Inter-American Court of Human Rights" (2014) 1 Intersentia 94 at 110; Hugh Breakey, "Positive Duties and Human Rights: Challenges, Opportunities and Conceptual Necessities" (2015) 63 Political Studies 1198.

[102] See Rhoda Howard, "The Full-Belly Thesis: Should Economics Rights Take Priority Over Civil and Political Rights? Evidence from Sub-Saharan Africa" (1983) 5:4 Human Rights Quarterly 467; David Harris "Regional Protection of Human Rights: The Inter-American Achievement, in David Harris & Stephen Livingstone, eds, *The Inter-American System m of Human Rights* (Oxford: Oxford University Press, 1998) 1 at 9.

can complement each other.[103] This is because human rights are interrelated, interdependent, and indivisible.[104]

Pillar II's framing of the CR2R norm mirrors a language that denotes negative rights because it states that MNCs have a responsibility to prevent human rights abuse through their actions or relationships with third parties. However, scholars have criticized this framing. Some scholars like Daniel Aguirre and Olivier De Schutter, explore the possibility of using human rights norms contained in instruments like the IECSR to extend the scope of the CR2R norm.[105] The underlying argument is that human rights cannot be enjoyed in the absence of basic necessities of life which include rights to education, housing, food, clothing, health, and freedom from hunger.[106] Therefore, MNCs have a duty to promote the realization of basic rights. The enjoyment of these rights, especially in Africa, is considered paramount in living a dignified life.[107] For example, Danwood Chirwa and Nojeem Amodu point to the need to extend the scope of the CR2R norm using the ISECR.[108] They argue that MNCs have a responsibility to promote human rights when the CR2R norm is read together with the IECSR.

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[103] See generally Stephen Marks, "The Past and Future of the Separation of Human Rights into Categories" (2009) 24 Maryland Journal of International Law 209. See also Nojeem Amodu, "Business and Human Rights versus Corporate Social Responsibility: Integration for Victim Remedies" (2021) 21 African Human Rights Law Journal 853.

[104] Vienna Declaration and Programme of Action, adopted by the World Conference on Human Rights in Vienna on 25 June 1993, para 5, online: OHCHR<www.ohchr.org/en/instruments-mechanisms/instruments/vienna-declaration-and-programme-action>.

[105] See e.g., Daniel Aguirre, "Multinational Corporations and the Realisation of Economic, Social and Cultural Rights" (2004) 35:1 California Western International Law Journal 53; Olivier De Schutter, "Corporations and Economic, Social and Cultural Rights" in Eibe Riedel, ed, *Economic, Social and Cultural Rights in International Law: Contemporary Issues and Challenges* (Oxford: Oxford University Press, 2013) 193.

[106] Charles Jones, "Human Rights to Subsistence" (2013) 30:1 Journal of Applied Philosophy 57.

[107] A Byaruhanga Rukooko, Poverty and Human Rights in Africa: Historical Dynamics and the Case for Economic Social and Cultural Rights" (2010) 14:1 The International Journal of Human Rights 13.

[108] Danwood Chirwa & Nojeem Amodu, "Economic, Social and Cultural Rights, Sustainable Development Goals, and Duties of Corporations: Rejecting the False Dichotomies" (2021) 6:1 Business and Human Rights Journal 21.

Similarly, David Bilchitz argues that the CR2R norm should not only mean a negative duty to avoid infringing on human rights; it should also include a positive obligation to fulfill human rights—that is, to contribute to the realization of fundamental human rights.[109] He argues that the failure of the SRSG to express the CR2R norm in positive terms makes the UNGPs' framework "fundamentally incomplete."[110]

Chirwa, Amodu, and Bilchitz are not alone in their proposal and critique of the CR2R norm. Scholars like Florian Wettstein,[111] Denis Arnold,[112] and Wesley Cragg,[113] maintain the same position. Wettstein argues that the interpretation of the CR2R norm should not mean that MNCs only have a "minimalist" obligation not to infringe human rights; it should also be interpreted to mean that MNCs have obligations to take proactive and positive steps towards the protection and realization of human rights.[114] Arnold, like Chirwa and Amodu, refers to the obligations of MNCs to provide basic rights under IESCR and argues that the content of the CR2R norm is vague because it does not fully set out the responsibilities of MNCs in cases where state laws do not protect human rights.[115] He argues that MNCs should have the obligation to promote basic human rights.[116] Therefore,

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[109] David Bilchitz, "The Ruggie Framework: An Adequate Rubric for Corporate Human Rights Obligations?" (2010) 7:12 International Journal on Human Rights 198 at 200.
[110] *Ibid* at 211. But see Nien-hê Hsieh, "Should Business Have Human Rights Obligations?" (2015) 14 Journal of Human Rights 218. (He argues that MNCs do not have a moral obligation to promote human rights). See also John Bishop "The Limits of Corporate Human Rights Obligations and the Rights of For-Profit Corporations" (2012) 22:1 Business Ethics Quarterly 119 ("Corporations have no obligation to ensure a society in which human rights are fulfilled").
[111] Florian Wettstein, "CSR and the Debate on Business and Human Rights: Bridging the Great Divide" (2012) 22:4 Business Ethics Quarterly 739.
[112] Denis Arnold, "Transnational Corporations and the Duty to Respect Basic Human Rights" (2010) 20:3 Business Ethics Quarterly 371.
[113] Wesley Cragg, "Ethics, Enlightened Self-Interest, and the Corporate Responsibility to Respect Human Rights: A Critical Look at the Justificatory Foundations of the UN Framework" (2012) 22:1 Business Ethics Quarterly 9 at 9.
[114] Wettstein, *supra* note 111 at 740.
[115] Arnold, *supra* note 112 at 384-386. Arnold's account is similar to Henry Shue's moral theory of basic subsistence. See Shue, *supra* note 99.
[116] *Ibid*.

he proposes that the tripartite pillars of the UNGPs should be modified to include MNCs' obligation to promote basic rights, without which human beings cannot enjoy human rights.[117] Cragg also argues that the foundation of the CR2R norm is "intellectually unpersuasive."[118] This is because the CR2R norm is based on an appeal to the self-interest of MNCs and not on any moral or ethical foundation. According to him, MNCs should fulfil human rights not because of their self-interest, but because of the intrinsic moral and ethical value of doing so.

While Chirwa, Amodu, and Arnold critique the CR2R norm from the prism of IESCR and basic rights, Bilchitz, Wettstein, and Cragg critique the norm from the prism of morality and ethics: that the CR2R norm lacks an ethical and moral foundation by which to persuade MNCs to prevent human rights abuse and promote human rights. The latter argument raises the following questions on morality and ethics: how do we define morality, by what standards should morality be judged, and how do we apply morality in different geographical contexts? These questions are important because the proposal that MNCs should undertake positive obligations is not rooted in any social norm that justifies or spell out the contours of MNCs' moral duty. The questions can be answered by interpreting the CR2R through an Ubuntu lens to justify MNCs' positive obligations in Africa. An Ubuntu-inspired interpretation of the norm is important because, as Surya Deva points out, MNCs "ought to comply with basic moral and legal norms of society in which they operate, for not doing so will lead to chaos and instability."[119]

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[117] Arnold, *supra* note 112 at 384-386.
[118] Cragg, *supra* note 113 at 10.
[119] Surya Deva, *Regulating Corporate Human Rights Violations Humanizing Business*, 1st ed (London, UK: Routledge 2012) at 146.

This thesis contends that using an Ubuntu lens to interpret the CR2R norm supports the claim that MNCs should discharge both negative and positive obligations. As stated in chapter 2, one of the advantages of using soft law that contains vague terms as a tool for global governance is that it leaves room for reconstruction.[120] Therefore, the UNGPs' wording of the CR2R norm in general terms leaves room to re-interpret the norm through a localization technique.[121] Since social expectation (which differs from one region to the other) is the basis of the CR2R norm,[122] and this thesis has pointed out that Ubuntu is a social norm, it is safe to conclude that Ubuntu is a tool to reframe and broaden the normative scope of the CR2R norm in Africa.

First, it is conceded that it is almost impossible to find an exact vocabulary for Ubuntu in the CR2R norm.[123] Admittedly, the CR2R norm was not subjected to this contextual scrutiny.[124] However, when understood that both the CR2R norm and Ubuntu seek to influence social conduct, it is important to contextually define the social conduct that would meet the social licence requirement of the CR2R norm in Africa.[125] Interpreting the CR2R norm through Ubuntu also helps to clarify the meaning of "respect" as used in

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[120] See generally Tatiana Cardoso Squeff, "Overcoming the "Coloniality of Doing" in International Law: Soft Law as a Decolonial Tool" (2021) 17:2 Revista Direito GV 1.
[121] Carlos Lopez, "The Ruggie Process': From Legal Obligations to Corporate Social Responsibility" in David Bilchitz & Surya Deva, *Human Rights Obligations of Business: Beyond the Corporate Responsibility to Respect?* (Cambridge, Cambridge University Press, 2013) 59 at 64 ("[b]ecause the Framework' s formulation of the 'corporate responsibility to respect' was worded in general terms, it left significant room for interpretation and possible developments").
[122] *Ibid* at 67.
[123] Yvonne Mokgoro, "Ubuntu and the Law in South Africa" (1998) 1:1 Potchefstoom Electronic Law Journal 1 at 2-3.
[124] UNGPs supra note 98 at 32.
[125] This argument assumes that those who mostly benefit from the governance gap that Ruggie identifies are MNCs in the Global North. See Florian Wettstein, "Normativity, Ethics and the UN Guiding Principles on Business and Human Rights: A Critical Assessment" (2015) 14:2 Journal of Human Rights 162 at 151. It is important to acknowledge that even in the Global North, there are dissenting voices of the Indigenous Peoples against imperial dominance and exclusion.

the UNGPs, more so because the "respect" terminology is labeled as "confusing" and "deeply flawed."[126]

Altogether, the CR2R norm has been criticized for not fully clarifying the exact contours of MNCs' human rights responsibilities,[127] Ubuntu's virtues help to contextualize the interpretation of the CR2R norm by defining UNGPs' "respect" terminology relationally.[128] As argued below, it is when the CR2R norm is defined relationally that MNCs' commitment to meeting social expectations and obtaining a social licence may be meaningful in Africa. This is because respect for "human rights mean very little within a context of mass poverty, unemployment, illiteracy, hunger, marginalization, and the general lack of basic human needs."[129]

Since human rights are rooted in morality,[130] reframing the CR2R norm in Ubuntu terminology provides a moral justification for MNCs' positive duties. Considering Acharya's norm localization and grafting techniques discussed in chapter 3, it is possible to reframe the meaning of the CR2R norm for the benefit of the Third World Peoples in Africa. One way to do this is to reframe the terminology of "respect" as used in the CR2R

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[126] Surya Deva, "Protect, Respect, and Remedy: A Critique of the SRSG's Framework for Business and Human Rights" in Karin Buhmann, Lynn Roseberry, & Mette Morsing, eds, *Corporate Social and Human Rights Responsibilities: Global Legal and Management Perspectives* (UK: Palgrave Macmillan, 2011) 108 at 121. See further Surya's critique, "Treating Human Rights Lightly: A Critique of the Consensus Rhetoric and the Language Employed by the Guiding Principles" in Surya Deva & David Bilchitz, eds, *Human Rights Obligations of Business: Beyond the Corporate Responsibility to Respect* (Cambridge: Cambridge University Press, 2013) 78 at 91-95. Carlos Lopez makes a similar argument. He argues that Pillar II has no normative or theoretical appeal. See Lopez, *supra* note 121 at 66.

[127] Deva, *ibid* at 88.

[128] Indeed, it has been noted that "In order to promote and preserve human rights in societies with various social and political backgrounds, a contextual interpretation is required." See Julia Swanson, "The Emergence of New Rights in the African Charter" (1991) 12:1 NYLS Journal of International and Comparative Law 307 at 322.

[129] Julius Ihonvbere, "Underdevelopment and Human Rights Violations in Africa" in Shepherd & Anikpo, eds, *Emerging Human Rights: The African Political Economy Context* (New York: Greenwood Press, 1990) at 64.

[130] John Tasioulas, "The Moral Reality of Human Rights" In Thomas Pogge ed, *Freedom from poverty as a human Right* (New York: Oxford University Press, 2007) 75.

norm. When the terminology of respect for human rights is interpreted in Ubuntu terms, it carries a broader human rights obligation beyond a negative responsibility to "do no harm." Johann Broodryk gives an insight on the respect terminology in Ubuntu terms.[131] He explains that respect is associated with words like commitment, dignity, and care.[132] According to him, respect is the most central theme in the Ubuntu worldview that governs relationships at different levels of society. This is because human existence is dependent on goodwill and acceptance from one another.[133] Although Broodryk explains the respect terminology relationally, he does not fully explore the human rights angle. However, his definition is enough to show that respect in Ubuntu terms carries an obligation and commitment to care for others' quality of life.

Thaddeuz Metz explores Ubuntu's relational framework by conceptualizing the meaning of respect for human dignity.[134] He argues that dignity, which is the foundation of most human rights claims, is an inherent value in all human beings that commands respect from others. However, the definition of dignity in Ubuntu is different from the Kantian philosophy's meaning of dignity that treats human beings as autonomous.[135] Rather, the basis of human dignity in Ubuntu is communality—that is, human beings' capacity to form communal relationships.[136] Metz explains that a person respects the dignity of others by identifying with them and exhibiting acts of solidarity towards them—

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[131] Johann Broodryk, *Ubuntu: Life Lessons from Africa* (Indiana: Ubuntu School of Philosophy, 2002) at 32.
[132] *Ibid*.
[133] *Ibid*.
[134] See generally Thaddeus Metz, "African Values and Human Rights as Two Sides of the Same Coin: A Reply to Oyowe" (2014) 14:2 African Human Rights Law Journal 306 ["African Values and Human Rights"] Thaddeus Metz, "Dignity in the Ubuntu Tradition" in Marcus Duwell et al, *The Cambridge Handbook of Human Dignity: Interdisciplinary Perspectives* (Cambridge, London: Cambridge Press, 2015) 310.
[135] *Ibid* at 312 ["Dignity in Ubuntu Tradition"].
[136] *Ibid* at 315-316.

actions that are borne out of care and concern for the quality of life of others.[137] These actions create and nurture the capacity of human beings to create friendly and loving relationships.[138] In sum, Metz says a person is "friendly" when they can share an identity with others and stand in solidarity with them.[139]

Metz further explains that in Ubuntu terms, respect for human dignity means that a person has a duty not to impair other people's capacity to form communal relationships (negative duty) and also to take steps to act in a friendly way towards others (positive duty).[140] For example, human rights abuses, including slavery and forced labour make persons who are capable of being friendly become unfriendly. People are unfriendly when they treat others as a means to an end to accumulate power or wealth for themselves. Those subjected to inhumane treatments feel less than human beings, which makes them evince feelings of animosity and ill-will that destroy the capacity for communal relationships.[141]

Besides acts of omission, Metz points out that respect for human dignity is also demonstrated by deliberate actions that nurture communal relationships (positive duty).[142] This entails empowering other people to encourage them to actualize their capacity to create and sustain relationships. The provision of food, education, housing, and health care are some of the examples that Metz cites as forms of empowerment.[143] These examples show that the definition of respect entails the promotion of human flourishing that

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[137] *Ibid* ["Dignity in Ubuntu Tradition"].
[138] *Ibid*.
[139] Metz, *supra* note 134 at 310 ["African Values and Human Rights"] ([t]o be friendly is not much other than to share a way of life with others and to care for their quality of life and for their sake. And, so, an initial way to understand African ethics from a theoretical perspective is to suggest that morally wrong actions are to be identified as those that are, roughly, unfriendly").
[140] *Ibid* at 312.
[141] *Ibid*.
[142] *Ibid* at 313.
[143] *Ibid*.

contributes to the socio-economic development in society. Metz classifies these actions as those that fulfil positive rights because they require aiding deprived persons to fulfil pillars of Ubuntu, which include communality and solidarity.[144]

So, when re-interpreted in the business and human rights context, the Ubuntu-inspired CR2R norm stipulates that community members should help and defend one another in cases where anyone's capacity to form a communal relationship is threatened or abused.[145] For example, under the notion of respect for human rights, MNCs will be required to avoid business practices that promote slavery (as it prevents people from forming communal relationships) and to promote socio-economic conditions that protect peoples' vulnerability to slavery (an action that encourages others to be friendly). The terminology carries both negative and positive obligations and prescribes commitment, and not mere responsibility,[146] to protect and promote relationships in African societies. This could be a catalyst for development in an African society because it ensures that everyone has access to basic human necessities.[147] It also has the potential to curb the exploitation of African markets by MNCs and to make them assume active roles in ensuring individual welfare as part of society's welfare.[148]

Furthermore, since Ubuntu's definition of "respect" connotes commitment and duty, an Ubuntu-inspired CR2R norm does not make human rights promotion voluntary

[144] Metz, *supra* note 134 at 312, 309. He notes that solidarity means "roughly enjoying a sense of togetherness and engaging in cooperative projects."
[145] Mnyaka & Motlhabi, *supra* note 35 at 219, 227, 228.
[146] This is contrary to the CR2R norm. Lopez notes that the term "responsibility" as used in pillar II is does not denote commitment. See Lopez *supra* note 109 at 68 ("…the 'term' responsibility' is clearly different from 'commitment' or similar words which require a voluntary act").
[147] Rita Kiki Edozie, *Pan Africa Rising: The Cultural Political Economy of Nigeria's Afri-Capitalism and South Africa's Business* (London, UK: Palgrave Macmillan, 2017) at 79-80.
[148] *Ibid* at 81

because its conception of respect for human rights has obligatory implications.[149] A one-sided duty to prevent human rights abuse without a corresponding obligation to effectuate social capacity does not conform with Ubuntu's values of solidarity. Therefore, Pillar II's provision that MNCs "may undertake other commitments or activities to support and promote human rights…"[150] is incongruent with the expectations under Ubuntu.

As pointed out above, the CR2R norm is criticized for being vague.[151] Leaving the norm as vague as it is may be detrimental to the interest of the Third World Peoples. Clearly, capital flight from the Global South to the Global North is arguably a contributor to underdevelopment in Africa.[152] The UNGPs may have unwittingly legitimized capital flight because the CR2R norm may be interpreted as only a "baseline expectation" that asks MNCs not to abuse human rights while transferring wealth to home countries. The transfer of wealth to MNCs' home states to the detriment of African host communities means that African countries may continue to be at the mercy of home countries who benefit from the profit of MNCs.

However, if the CR2R is defined relationally in Ubuntu terms, it will encourage MNCs to take active roles in the community to promote human rights because Ubuntu recognizes wealth-sharing among individuals in a community. This is always found in expressions like: "if you want to see Ubuntu, you will find it in socialism, it is when we

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[149] See Kéba M'baye & Bacre Ndiaye, "The Organisation of African Unity" in Karel Vasak, ed., *The International Dimensions of Human Rights*, vol. 2 (Westport, Conn.: Greenwood Press, 1982) 583 at 588-589. ("... [i]n traditional Africa, rights are inseparable from the idea of duty. They take the form of a rite which must be obeyed because it commands like a "categorical imperative." In this, they tie in, through their spiritualism, with the philosophy of Kant."

[150] UNGPs, *supra* note 98 at 14.

[151] Deva, *supra* note 126 at 88.

[152] Léonce Ndikumana, "Capital Flight from Africa and Development Inequality: Domestic and Global Dimensions" (paper presented at the 2015 Conference of The Institute for New Economic Thinking (INET), Paris, 10 April 2015) [unpublished].

are sharing,"[153] and "where I live I slaughtered a cow; then all of my neighbours come with dishes to get meat. It is not their cow, but the meat is for all of us because no one should be hungry. So, each person will take what they need and we share the meat."[154] Therefore, MNCs' relationship with host communities should mean that they contribute positively to the sustenance of the community that they operate in.[155] Obviously, the CR2R norm's baseline expectation of "do no harm" does not address the systemic root causes of human rights abuses in Africa.[156]

Arguably, it may be unfair to subject MNCs who are not based in Africa or whose headquarters are outside Africa to an Ubuntu interpretation. It raises the question of whether MNCs' compliance with Ubuntu values should be by assimilation or imposition. This thesis does not support either of these methods because they are similar to the reasons why TWAIL scholars criticize international law. Adopting these methods would mean that Afrocentrism is assuming universalism. Rather, this thesis proposes that compliance should be based on Metz's concept of shared identification discussed above.[157] This stipulates that MNCs should see themselves as part of the social group in Africa because it is the source of their operation. Community in this sense means a society formed by relationship and affinity, and not necessarily by descent.[158] So, if MNCS identity with the problems of poverty, illiteracy, and lack of basic amenities, they would have the (moral) impetus to

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[153] John Eliastam, "Exploring Ubuntu Discourse in South Africa: Loss, Liminality and Hope" (2015) 36:2 Verbum et Ecclesia 1 at 4.
[154] *Ibid*.
[155] Fainos Mangena, "Towards a Hunhu/Ubuntu Dialogical Moral Theory" (2012) 13:2 Phronimon 1 at 10-11.
[156] On the critique of the *UNGPs* along this line, see Peter Osimiri, "An Ethical Critique of Neoliberal Development in Africa" (2013) 1:1 Covenant Journal of Politics and International Affairs 62. See also Penelope Simons, "International Law's Invisible Hand and the Future of Corporate Accountability for Violations of Human Rights" (2012) 3:1 Journal of Human Rights and the Environment 5 at 26.
[157] Metz, *supra* note 134 at 310 ["African Values and Human Rights"].
[158] See James Ogude, "Introduction" in James Ogude, ed, Ubuntu and the Reconstitution of Community (Indiana, Indiana University Press, 2019) 1 at 3.

stand in solidarity with host communities to eradicate or reduce the economic impoverishment in society.[159]

Justifying compliance with Ubuntu based on shared identification is synonymous with the SRSG's embedded liberal philosophy that seeks to embed economic actions into social norms.[160] The SRSG's proposal for synergetic interaction between states, non-state actors, and MNCs to contain market forces can be locally interpreted through what Ntibagirirwa calls an Ubuntu economy. An Ubuntu economy is a framework where everyone, MNCs, states, or individuals synergize efforts to contribute to economic growth and development. According to Ntibagirirwa, "what one can learn from African values centered on the community is that what would work to achieve economic development is not exclusion but the inclusion of all the actors. Accordingly…. in the African context, what could achieve economic growth and development is the synergy of the state, the market, and the people. I called this the Ubuntu economy."[161]

The relationship in an Ubuntu economy is characterized by collectivism—the community provides both human and natural resources, while MNCs use social capital to generate wealth for themselves and other members of the community.[162] Each actor relies on its unique qualities to advance socio-economic development in the community. Indeed,

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[159] By "solidarity" Metz refers to "caring and supporting relationships', ones in which people help one another, are affectionate towards one another and empathetic" Metz, *supra* note 134 at 335-336.

[160] See generally John Ruggie, "International Regimes, Transactions, and Change: Embedded Liberalism in the Postwar Economic Order" (1982) 36 International Organization 379. He describes embedded liberalism as a new kind of liberal multilateralism that is compatible with "domestic interventionism" which supports domestic social security and economic stability within industrialized states. Embedded liberalism seeks to embed market practices in the values and principles of national societies and, most broadly, in global civil society, which he called a global public domain.

[161] Symphorien Ntibagirirwa, "Cultural Values, Economic Growth and Development" (2009) 84:3 Journal of Business Ethics, Global and Contextual Values for Business in a Changing World 297 at 307-308.

[162] Lin defines social capital as the resources embedded in a network (community) that can be accessed by the members of the network (community) to gain a benefit. See Nan Lin, "Inequality in Social Capital" (2000) 29:6 Contemporary Sociology 785 at 786.

Africans "do not see [MNCs'] as legal artefacts but focus on human beings who preside over organizational activities and should exude Ubuntu."[163] Therefore, the bounded relationship between states and non-state actors to contain global market forces, as the SRSG describes it, occurs in an Ubuntu economy.

Interpreting the CR2R norm through Ubuntu is more compelling because of Africa's weak state mechanisms compared to developed states.[164] MNCs can provide capacity for local communities to hold governments accountable through Ubuntu's communitarian values of solidarity.[165] This way, MNCs would indirectly help to create formidable social pressure for and against states to promote human rights and deliver on their promise of good governance. When MNCs help with basic amenities like water, education, and access to good roads, it indirectly empowers individuals to hold their states accountable for their human rights and socio-economic development obligations.[166]The CR2R norm's positive obligations can also be framed under a stakeholder theory influenced by Ubuntu.[167] A communitarian stakeholder theory states that MNCs should promote the interest of all actors who are part of the production process.[168] Therefore, MNCs are answerable to different actors in society under a tripartite framework of

[163] See Esinath Ndiweni, 'Towards a Theoretical Framework of Corporate Governance: Perspectives from Southern Africa' in Mathew Tsamenyi & Shahzad Uddin, *Corporate Governance in Less Developed and Emerging Economies* (UK: JAI Press, 2008) 335 at 349.
[164] See generally Larry Catá Backer, "Corporate Social Responsibility in Weak Governance Zones" (2016) 14 Santa Clara Journal of International Law 297.
[165] Although Communalism denotes the importance of community values in Ubuntu, it is a wider concept than Ubuntu. Therefore, this thesis limits communalism to the community values that Ubuntu reflects.
[166] See generally Stepan Wood, "The Case for Leverage-Based Corporate Human Rights Responsibility" (2012) 22:1 Business Ethics Quarterly 63 (he suggests that MNCs can indirectly influence state conduct and promote human rights by discharging their "positive leverage-based corporate human rights responsibility[ies]").
[167] James Khomba, *Redesigning the Balanced Scorecard Model: An African Perspective* (PHD Thesis: University of Pretoria, 2011) [unpublished] at 234.
[168] See Etzioni Amitai, "A Communitarian Note on Stakeholder Theory" (1998) 8:4 Business Ethics Quarterly 679.

shareholders, host communities, and employees.[169] This theory recognizes the interconnectedness between corporate activities and host communities.[170] It focuses on MNCs' potential to serve the interest of shareholders and non-shareholders alike.[171] Indeed, John Ruggie, Caroline Rees, and Rachel Davis accept that the UNGPs' corporate governance framework veers toward a stakeholder-oriented approach—one under which MNCs have a multi-fiduciary obligation toward the individual and their community.[172]

The influence of Ubuntu on a stakeholder model in Africa is described, for example, by Khomba and Vermaak as having direct impact on business ethics, corporate governance approaches, and corporate performance of organizations that operate in Africa.[173] They note that corporate systems in the world are influenced by different socio-cultural frameworks which ultimately underpin their approaches to corporate governance.[174] For example, North America's corporate governance structure is influenced by an exclusive model of shareholder theory, which primarily protects the interests of shareholders.[175] Conversely, the African model is influenced by the inclusive stakeholder theory which aims to satisfy a variety of stakeholder concerns and interests.[176] Africa's stakeholder

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[169] Freeman and Reed defines stakeholders as those groups without whose support the corporation would cease. See Edward Freeman & David Reed, "Stockholders and Stakeholders: A New Perspective on Corporate Governance" (1983) 25:3 California Management Review 88 at 91.
[170] Ndiweni, *supra* note 163 at 352.
[171] James Khomba, Rhoda Bakuwa & Ella Cindy Kangaude-Ulaya, "Shaping Business Ethics and Corporate Governance: An Inclusive African Ubuntu Philosophy" (2013) 13:5 Global Journal of Management and Business Research Administration and Management 31 at 33.
[172] See generally John Ruggie, Caroline Rees, & Rachel Davis, "Ten Years After: From UN Guiding Principles to Multi-fiduciary Obligations" (2021) 0:0 Business and Human Rights Journal 1.
[173] James Khomba & Frans Vermaak, "Business Ethics and Corporate Governance: An African Socio-cultural Framework" (2012) 6:9 African Journal of Business Management 3510.
[174] *Ibid* at 3512-3513.
[175] Gedeon Joshua Rossouw, "The Ethics of Corporate Governance: Global Convergence or Divergence" (2009) 51:1 International Journal of Law and Management 43 at 44. But see Lynn Stout, *The Shareholder Value Myth: How Putting Shareholders First Harms Investors, Corporations, and the Public*, 1st ed (California, USA: Berrett-Koehler Publishers, 2012). See also Carol Liao, "A Canadian Model of Corporate Governance" (2014) 37:2 Dalhousie Law Journal 559 (she distinguishes Canadian law from the United States' shareholder primacy model).
[176] Rossouw, *ibid*.

model is influenced by African values, including Ubuntu.[177] James Khomba, Rhoda Bakuwa, and Ella Kangaude-Ulaya agree that under Africa's socio-cultural framework, business ethics approaches to corporate governance, and the performance of Africa-hosted corporations cannot retain their western orientations in these matters.[178] This re-orientation is what an Ubuntu-stakeholder approach to the interpretation of the CR2R norm will secure—an emphasis and practical observance of a corporate culture that upholds African social values.[179]

The next part, first, using the case study from the Democratic of Congo (DRC) described in Chapter 1, demonstrates how the CR2R norm is insufficient on its own to promote corporate responsibility, especially as it relates to their due diligence responsibility. This shows a need to reframe the CR2R norm through an Ubuntu lens. It then examines how the interpretation of human rights and corporate governance initiatives, regional instruments, and the UNGPs, can promote an Ubuntu-influenced CR2R norm.

Part V

4.4. "Ubuntulizing" the CR2R Norm—A Reframing Exercise

[177] Rossouw, *ibid* at 45. See also James Khomba & Frans Vermaak, *supra* note 172 at 3510. Other factors like strong support for development activities in Africa and the presence of state-owned enterprises have been attributed to the influence of Africa's stakeholder model.

[178] James Khomba, Rhoda Bakuwa & Ella Kangaude-Ulaya, "Shaping Business Ethics and Corporate Governance: An Inclusive African Ubuntu Philosophy" (2013) 13:5 Global Journal of Management and Business Research Administration and Management 31 at 33.

[179]James Khomba & Ella Cindy Kangaude-Ulaya, "Indigenisation of Corporate Strategies in Africa: Lessons from the African Ubuntu Philosophy" (2013) 12:7 China-USA Business Review 672 at 687 ("to be successful, Africa-based organisations must be founded on this Ubuntu philosophy. Indeed, all we need is Ubuntu"). See also Khali Mofuoa, "Applying Ubuntu-Botho African Ethics to stakeholder Corporate Social Responsibility" (2014) 12:3 Management Research 222; Omphemetse Sibanda Snr, "Trade, Human Rights and Environmental Sustainability in Africa with Special Reference to the Extractive Sector" in Michael Addaney & Ademola Jegede, eds, *Human Rights and the Environment under African Union Law* (London, UK: Palgrave Macmillan, Cham, 2020) 441 at 456.

The events that unfolded in the DRC show how a supply chain relationship harmed children working in the "copper belt" mines. Giant technology companies, including Apple, Google, Tesla, Alphabet, Microsoft, and Dell profited from cobalt that is tainted with human rights abuse of children.[180] The parents of these children filed a class action against the companies in the United States for aiding and abetting forced labour in the mines.[181] The claimants sought relief based on common law claims of unjust enrichment, negligent supervision, and intentional infliction of emotional distress on children.

The claimants allege that the defendants breached provisions of the *Trafficking Victims Protection Reauthorization Act* (TVPRA) in the United States.[182] This statute provides that any company in the United States that knowingly profits from a "business venture" involved in child labour or recklessly disregards the use of child labour in its business venture is liable to a fine or 20 years imprisonment, or both.[183] However, the defendants argue that the arrangement under the supply chain contracts cannot qualify as a "business venture" to trigger the provisions of the TVPRA. To the defendants, an entire global supply chain is not a business venture. However, this argument is unsupported by the defendants' later argument that they mandate suppliers to commit to a due diligence framework modeled along with the OECD Guidelines before doing "business" with

[180] Ewelina Ochab, "Are the Tech Companies Complicit in Human Rights Abuse of Child Cobalt Miners in Congo?" (13 January 2020), online: Forbes News <www.forbes.com/sites/ewelinaochab/2020/01/13/are-these-tech-companies-complicit-in-human-rights-abuses-of-child-cobalt-miners-in-congo/?sh=299f6fac3b17>.
[181] *Jane Doe 1 & ors v. Apple Inc. & ors.,* Case No. 1:19-cv-03737, the U.S. District Court for the District of Columbia.
[182] *Trafficking Victims Protection Reauthorization Act* 2008*,* s1589, <www.govinfo.gov/content/pkg/BILLS-110hr7311enr/pdf/BILLS-110hr7311enr.pdf>.
[183] *Ibid*.

them.[184] It is difficult to rationalize the use of HRDD in supply chain contracts when the defendants argue that there is no "business venture."

On the other hand, the claimant sought relief based on the doctrine of unjust enrichment. This relief merits attention because the rationale of the doctrine is similar to Ubuntu—they both abhor profiting at the expense of others. Under the doctrine, the plaintiff must prove that: (1) the defendant was enriched; (2) the plaintiff suffered a corresponding deprivation; and (3) there is an absence of a juristic reason for the enrichment.[185] Similarly, in Ubuntu terms, the MNCs' will be rebuked for unjustly enriching themselves at the expense of the children in the mines. However, the defendants denied having a "requisite" knowledge of the specific human rights abuse in the mines which would have made them liable for unjust enrichment. This defence is surprising because the defendants admitted that they knew that forced labour existed in the mining industry. This thesis will demonstrate how this defence is insufficient in Ubuntu terms below.

The District Judge dismissed the claimants' class action on 3rd November 2021.[186] It held that the human rights abuse is too remote to ground the defendants' liability because the harm is untraceable to the defendants. In dismissing the claim, the court noted that the

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[184] See *OECD, Due Diligence Guidance for Responsible Supply Chains of Minerals from Conflict-Affected and High-Risk Areas*, 3rd ed (Paris: OECD Publishing, 2016), online: OECD <www.oecd.org/daf/inv/mne/OECD-Due-Diligence-Guidance-Minerals-Edition3.pdf>. The UNGPs HRDD requirements is similar to the OECD Guidelines' HRDD requirement because it was modeled along the UNGPs' provisions. See John Ruggie & Tamaryn Nelson, "Human Rights and the OECD Guidelines for Multinational Enterprises: Normative Innovations and Implementation Challenges." (2015) Corporate Social Responsibility Initiative Working Paper No. 66. Cambridge, MA: John F. Kennedy School of Government, Harvard University.

[185] See *Rathwell v Rathwell* [1978] 2 SCR 436.

[186] As at the time of writing this thesis, this case is unreported. But see Danielle Toth, "Judge Dismisses Child Labor Class Action Against Apple, Google Alphabet, Microsoft, Dell, and Tesla" (3 November 2021), online: (blog) Top Class Action<https://topclassactions.com/lawsuit-settlements/employment-labor/1036859-judge-dismisses-child-labor-class-action-against-apple-google-alphabet-microsoft-dell-and-tesla/>.

claimants did not show a causal connection between the injuries in the DRC and the defendants in the United States. The legal analysis of the court's decision is beyond the scope of this chapter. Rather, this thesis is concerned about whether the defendants' action conforms with the CR2R as a social norm. At first blush, it is arguable that since the defendants performed HRDD, they complied with the CR2R norm's baseline expectation of "do no harm."

It is important to ask why issues of forced labour arose from the supply chain relationship despite the defendants' claim that they performed HRDD. This thesis contends that this is because of the moral and ethical bankruptcy of the CR2R norm. The norm does not prescribe any moral or ethical obligation in the performance of the HRDD. An Ubuntu-influenced CR2R norm described above would have filled this ethical gap because it would require MNCs to be committed to the HRDD process. The MNCs' argument that they do not have the requisite knowledge of the specific situation in the mines shows they are not committed to upholding human dignity in the mines. This makes their actions fall short of Ubuntu's definition of respect for human rights, which includes identifying with the host communities and standing in solidarity with them.[187] Their admission that incidents of child labour are not uncommon in the mining industry points to their responsibility to investigate, identify, and mitigate specific risks associated with their supply chain in the DRC. They adopted a "don't look, don't ask" approach in an industry that is prone to human rights abuse. This approach throws humanism away in the face of huge profits generated from the business relationship.

[187] See Posi Olatubosun & Sethi Nyazenga, "The Value of Ubuntu-Moral and Governance Case for Ethical and Responsible Financing and Investment Practices in South Africa" in Kemi Ogunyemi, *African Virtue Ethics Traditions for Business and Management* (Cheltenham, UK: Edward Elgar Publishing, 2020) 137.

The human rights abuse in the DRC shows how a due diligence exercise could be reduced to a mere tick-box exercise if it is not rooted in social norms that are based on relationality. Ubuntu compels members of society to look out for one another. If one person maltreats or disrespects another, other members of society can intervene or remind the perpetrator of the victim's dignity and the necessity to uphold the value of a human being in society. Interpreting HRDD in this light means that the MNCs, although not directly involved in human rights abuse, still have the responsibility to ask questions about the source of the cobalt, investigate the human rights risk before doing business with Congo Dongfang Mining International (CDM), a 100% owned subsidiary of China-based Company Ltd (Huayou Cobalt).

The MNCs argue that they should not be burdened with the obligation to inquire about the source of the cobalt because this would mean that every user of cobalt will also have the same obligation. However, they downplay the economic resources at their disposal which put them in a better position to identify and mitigate the risk of doing business in the mines. They also downplay the leverage they have on suppliers to prevent human rights abuse. Ubuntu's relational framework allows MNCs to leverage their relationship to demand accountability from them.

The MNCs can, in Ubuntu terms, relationally fulfil their CR2R responsibilities on two levels. First, they can use their leverage in supply chain contracts to prevent human rights abuses. For example, in 2017, human rights groups, including Amnesty International, reported the human rights abuses in the DRC mines but the MNCs did not demand accountability from their suppliers.[188] It was not until 2020 that Huayou Cobalt

[188] Amnesty International, Industry Giants Fail to Tackle Child Labour Allegations in Cobalt Battery Supply Chains" (15 November 2017), online (blog): Amnesty International<

announced that it has temporarily stopped sourcing cobalt from two mines in DRC until it is sure that they are free from human rights abuse.[189] Huayou's decision shows the type of leverage that MNCs have on suppliers to demand accountability. It also shows that MNCs' resolve to demand accountability from suppliers is not impossible; it only depends on the companies' ethical values

Second, MNCs can promote the right to subsistence in the DRC. The children in the mines are weak persons who cannot provide for themselves. For example, a policy report identified poverty, illiteracy, and hunger as causal factors that made children vulnerable to forced labour in the DRC mines.[190] Many of the children who worked at the mines do so to pay their school fees.[191] Others worked at the mines to feed their parents who are displaced by the miners.[192] This situation made children and women vulnerable to local miners who exploited them. So, what does Ubuntu say about this? Ubuntu requires MNCs to build social capacity, which includes providing basic amenities like education, clean water, and small-scale businesses for members of the host communities. By doing this, they indirectly displace the economic hold that local miners have on children and women. In effect, MNCs can "do good" if they acknowledge poverty as a factor that makes people vulnerable to human rights abuses. For example, Huayou Cobalt, as part of its responsible supply chain obligations, admitted that poverty is one of the reasons for the human rights abuse in the DRC mines and expressed commitment to support free education

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www.amnesty.org/en/latest/news/2017/11/industry-giants-fail-to-tackle-child-labour-allegations-in-cobalt-battery-supply-chains/>.

[189] Reuters, "Huayou Temporarily Suspends Purchases of Cobalt from Two Congo Mines" (12 August 2020), online (blog): Reuters <www.reuters.com/article/congo-mining-huayou-cobalt-idUSL8N2FE5MZ>.

[190] See generally Benjamin Faber, Benjamin Krause, & Raúl Sánchez De La Sierra, Artisanal Mining, *Livelihoods, and Child Labor in the Cobalt Supply Chain of the Democratic Republic of Congo* (Center for Effective Global Action Policy Report, 2017).

[191] *Ibid.*

[192] *Ibid.*

and offer small loans to small-scale businesses.[193] This statement shows that in the face of poverty and illiteracy, a baseline responsibility for MNCs not to infringe human rights would not be enough.

The DRC Congo case study shows that the CR2R norm is not sufficient to persuade MNCs to be responsible in Africa (partly) because it is not hinged on any moral normative framework. It also shows that, sometimes, MNCs' discharge of the baseline responsibility to do no harm may not be sufficient to receive a social licence from the community where they operate. Therefore, Ubuntu provides an ethical lens through which the CR2R norm could be interpreted to command both positive and negative responsibilities from MNCs. The norm on its own cannot initiate or sustain virtues in people; it must also be initiated in interpersonal relationships outside the reach of laws. An Ubuntu interpretation of the CR2R norm is hinged on the moral and ethical integrity of individuals behind the corporate veil, which can support the CR2R norm by emphasizing the embedded relationship between MNCs and host communities.

4.5. Reframing the CR2R

To implement the CR2R norm through Ubuntu, MNCs must understand principles of relational ethics in Africa as described in this thesis.[194] Without understanding the socio-cultural context in which MNCs operate, it will be difficult to operationalize the CR2R norm through Ubuntu.[195] For a perceived socio-cultural gap will not only adversely affect

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[193] See Huayou, "Responsible Supply Chain", online: Huayou<http://en.huayou.com/social111.html?introId=64>.

[194] See Thomas Donaldson, "Values in Tension: Ethics Away from Home" (1996) 74:5 Harvard Business Review 48.

[195] See Geert Hofstede, "The Business of International Business is Culture" (1994) 3:1 International Business Review 1; Ghemawat & Reiche, note 16 at 1 (cultural differences, while difficult to observe and measure, are obviously very important. Failure to appreciate and account for them can lead to embarrassing blunders, strain relationships, and drag down business performance). Unfortunately, corporations most often than not fail to recognise the need to balance the cultural complexity between home and host states. This results in

corporations' ability to obtain a social license to operate;[196] it also means that there is continued underdevelopment and social conflict in Africa. In effect, there should be a balance between profit maximization and socio-economic development as understood in an Ubuntu economy.[197]

MNCs can function as members of society—the visible economic faces of a social system.[198] *Stavridou and Vangchuay agree that "*[i]f there is a social contract regulating the relationship between individuals, society, and government, a corporation as a natural person and member of society should be part of that relationship."[199] Therefore, to function in an Ubuntu economy, MNCs should be part of an embedded relationship in society.[200] In this view, they contribute to social capital and development in host communities.[201] This resonates with the Ubuntu-influenced stakeholder theory proposed in this thesis. A fluid interpretation of the UNGPs may enable MNCs to adopt an Ubuntu-influenced interpretation of the CR2R norm.

Principle 16 of the UNGPs, which relates to the operational activities of MNCs, provides that MNCs should express their commitment to respect human rights through a

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tagging host state's culture or morality as inferior to home states. See Christopher Michaelson, "Revisiting the Global Business Ethics Question" (2010) 20:2 Business Ethics Quarterly 237 at 247.

[196] Lisa Calvano, "Multinational Corporations and Local Communities: A Critical Analysis of Conflict" (2008) 82 Journal of Business Ethics 793 at 799-800.

[197] See generally Steve Ouma Akoth, "Africa and the Corporate Citizenship Agenda (Discussion Paper presented at the Kenya Committee on ISO 2006, Kenya, 1 May 2006) [unpublished]

[198] See generally George Steiner, *Business and Society* (New York: Random House, 1971).

[199] Marianthe Stavridou & Sumon Vangchuay, "Beyond Corporate Social Responsibility–A Human-Centred Approach to Business Ethics in the 21st Century" (2017) 9:1 African Technology Development Forum Journal 70 at 75.

[200] Jose Ventura & Kety Jauregui, "Business-Community Relationships for Extractive Industries: A Case Study in Peru" (2017) 14:2 Brazilian Administration Review 1 at 6. The nomenclature of the company, either as state-owned enterprise or investor-owned, is irrelevant when considering how corporations should engage with local communities. The obligation to consider the stake of local communities is even more acute in state-owned enterprises because the government holds shares in trust of its constituents, including local communities.

[201] See David Ahlstrom, "Innovation and Growth: How Business Contributes to Society" (2010) 24:3 Academy of Management Perspectives 11.

policy statement. This provision allows MNCs to include context-specific human rights commitments that address host communities' concerns. Given this, Principle 16 offers an avenue by which to express MNCs' commitment to Ubuntu values in various operational activities affecting human rights, environment, climate change, finance, management, conciliation, and sustainability.[202] In effect, an organizational strategy via which MNCs may embed Ubuntu in policy statements may potentially set them on the path to obtaining a social licence from host communities in Africa. Their implementation of such Ubuntu-influenced policy statements would reflect MNCs' stance on participatory culture, strategic planning, management strategy, treatment of their workforce, supply chain contracts, and interaction with host communities. In sum, MNCs' policy statements on Ubuntu may demonstrate their resolve to coexist and consult with host communities as part of their economic activities in these communities.[203]

To achieve the foregoing, it must be pointed out that a commitment to HRDD cannot be over-emphasized in an Ubuntu-influenced interpretation of the CR2R norm. This stance would ensure that MNCs operating in Africa can make objective assessments, and adopt unbiased attitudes regarding people's rights, values, beliefs, and property.[204] This commitment would ensure that they identify potential problems of socio-cultural clashes in their relations with their host communities. Traditionally, MNCs use due diligence in

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[202] Jacqueline Church, "Sustainable Development and the Culture of Ubuntu" (2012) De Jure 511; Aïda Terblanché-Greeff, "Ubuntu and Environmental Ethics: The West Can Learn from Africa When Faced with Climate Change" in Matthew Chemhuru, ed, *African Environmental Ethics* (Geneva: Springer 2019) 93.

[203] See Gedeon Joshua Rossouw, "Business Ethics and Corporate Governance in Africa" (2005) 44:1 Business & Society 94 at 98.

[204] Poovan Negendhri, *The Impact of the Social Values of Ubuntu on Team Effectiveness* (MA Thesis, University of Stellenbosch, 2005) [unpublished] at 26 ([r]espect is one of the foundations on which the African culture is built and therefore it determines the life of an African). See also Nien-hê Hsieh, "Corporate Moral Agency, Positive Duties, and Purpose" in Eric Orts & Craig Smith, eds, *The Moral Responsibility of Firms* (Oxford, UK: Oxford University Press, 2017).

business transactions involving mergers and acquisitions (M&A).[205] This is because merging two companies with different organizational cultures can generate internal rancour within the new company—a "we" versus "they" relationship.[206] The notion and process of merging two companies can be extrapolated to the relationship between host communities and MNCs. It stands to reason, therefore, that MNCs must consider how best to integrate into host communities to prevent living in a relationship of ostracism with them.[207] Adopting ethical values embedded in Ubuntu to interpret their obligations under the CR2R norm will foster harmonious co-existence between MNCs and host communities in Africa. The HRDD exercise proposed in Pillar II of the UNGPs is one way to create harmony between rights holders and rights bearers.[208] For a stakeholder engagement to acquire a social licence in Africa, and indeed globally, it should be transparent, fair, and show genuine concern for the protection and fulfilment of human rights.[209] These values are core tenets of Ubuntu.

Indeed, some scholars, including Oyeniyi Abe, propose that increasing local community participation is key to the business and human rights agenda.[210] Similarly, the

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[205] See generally Daniel Denison & Ia Ko, "Cultural Due Diligence in Mergers and Acquisitions" (2016) 15 Advances in Mergers and Acquisitions 53.

[206] Mario Pezzillo Iacono "Cultural Due Diligence as A Proactive Strategy of Organisational Change: An Empirical Analysis" (2011) Piazza Bovio Working Series No 12 at 13.

[207] Indeed, Scherer, Palazzo, and Matten note that "TNCs operate in a complex environment with heterogeneous, often contradictory legal and social demands. By itself, this statement implies that whatever the TNCs home country (the United States or China, for example), there will be cultural adaptation challenges to doing business wherever the host country may be (China or the United States, for example)" See Andreas Georg Scherer, Guido Palazzo, & Dirk Matten, "Introduction to the Special Issue: Globalization as a Challenge for Business Responsibilities" (2009) 19:3 Business Ethics Quarterly 327 at 328.

[208] See generally John Ruggie, Caroline Rees, & Rachel Davis, *supra* note 172.

[209] For an example of what transparency and genuine concern entails in community engagement, see generally Rajiv Maher, "Squeezing Psychological Freedom in Corporate–Community Engagement" (2019) 160 Journal of Business Ethics 1047.

[210] Oyeniyi Abe, "Untying the Gordian Knot: Re-Assessing the Impact of Business and Human Rights Principles on Extractive Resource Governance in Sub -Saharan Africa" (2016) 32:4 American University International Law Review 895 at 929. See also Oyeniyi Abe, "The Feasibility of Implementing the United Nations Guiding Principles on Business and Human Rights in the Extractive Industry in Nigeria" (2016) 7:1 Journal of Sustainable Development and Law 137.

African Commission on Human and People's Rights in its Report on how MNCs in the extractive industry impact the realization of human rights cited lack of genuine consultation as one of the major causes of human rights abuses in the extractive sector.[211] The Commission proposed genuine consultation as a means toreduce human rights abuses in Africa. These proposals point to the need to view and construct meaningful consultations through Ubuntu's ethical lens of a shared identity as discussed above. In sum, the interpretation of the CR2R norm should not only be a legal exercise; it should also be interpreted through non-legal (social) values.[212] Ubuntu is an example of a social value the adoption of which would enrich the normative content and leverage of the CR2R norm as an operational obligatory standard of conduct on the part of MNCs.

Regarding their supply chain relationships, through HRDD, MNCs may use their leverage with supply chain contractors to influence a human rights culture inspired by Ubuntu.[213] Ubuntu supports an operational risk management system that promotes human dignity within a network of relationships.[214] The SRSG and his team acknowledge that HRDD goes beyond issues of corporate law to a greater concern about relationships among corporate actors.[215] Therefore, MNCs can use their leverage in supply chain relationships to inspire an Ubuntu-based interpretation of the CR2R norm through their policy

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[211] African Commission on Human and People's Rights, "Background Study on the Operations of the Extractive Industries Sector in Africa and its Impacts on the Realisation of Human and Peoples' Rights under the African Charter on Human and Peoples' Rights" (23 November 2021) 69th Ordinary Session of the African Commission on Human and Peoples' Rights.
[212] Cragg, *supra* note 113 at 13.
[213] See generally Wood, *supra* note 166. Wood classifies MNCs' leverage as: "impact-based negative responsibility;" "leverage-based negative responsibility;" "impact-based positive responsibility;" "leverage-based positive responsibility."
[214] Mnyaka & Motlhabi, note 35 at 219.
[215] John Gerard Ruggie & John Sherman, III, "The Concept of 'Due Diligence' in the UN Guiding Principles on Business and Human Rights: A Reply to Jonathan Bonnitcha and Robert McCorquodale" (2017) 28:3 The European Journal of International Law 921. However, there is still debate on the scope and meaning of a sphere of influence of MNCs as a condition for triggering corporate responsibility. See Wood *supra*, note 165.

statements, the impact of which may transcend national boundaries into those jurisdictions from which the major MNCs operating in Africa originate. Indeed, jurisdictions like the United Kingdom, Netherlands, France, and Australia have enacted HRDD legislation that mandates companies to prevent, mitigate, and remedy human rights abuses in their supply chain relationships.[216] Ubuntu interpretations with regard to supply chain relationships would complement these normative efforts and lay the foundation of domestic HRDD legislation in Africa.

As earlier discussed, Ubuntu is a source of law with established and developing jurisprudence in African jurisdictions. Thus, if MNCs disregard its ethical values, this may be a cause of action in the courts in some jurisdictions.[217] Ruggie agrees that non-compliance with the CR2R norm can make MNCs subject to public opinion, or in some cases, subject to suit before courts of law.[218] Apart from securing MNCs' compliance to the CR2R norm through non-legal means, strategic litigation inspired by Ubuntu values can establish an Ubuntu jurisprudence that may inspire Africa courts to rely on local norms to protect human rights in Africa.[219] This proposal creates challenges of its own in view of corporate legal personality and other corporate law doctrines. Lawyers must rise above these challenges to forge an Ubuntu human rights jurisprudence to localize a corpus of human rights jurisprudence that promotes the upholding and respect for the socio-economic

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[216] For discussions on the development of mandatory HRDD, see Ruggie, Rees, & Davis, *supra* note 172 at 11-18.
[217] Kamga, *supra* note 73 at 627.
[218] Report of the Special Representative of the Secretary-General on the issue of Human Rights and Transnational Corporations and other Business Enterprises, John Ruggie, (7 April 2008) UN Doc A/HRC/8/5 at par 54, online: United Nations <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G08/128/61/PDF/G0812861.pdf?OpenElement>.
[219] See generally Rosaline English, "Ubuntu: The Quest for an African Jurisprudence" (1996) 12:4 South African Journal on Human Rights 641. See also Mirna Adjami, "African Courts, International Law, and Comparative Case Law: Chimera or Emerging Human Rights Jurisprudence?" (2002) 24:1 Michigan Journal of International Law 103.

rights of individuals and communities across Africa.[220] It is noteworthy that conversations about company law reform that promote rather than inhibit human rights protection as part of business operations are taking place in Europe.[221] Unless scholars and human rights advocates from Africa also pursue corporate law reforms that suit Africa's socio-economic context, African states would continue to be norm-takers rather than norm-givers in the business and human rights discourse.

Glimpses of hope are emerging, however. As discussed above, scholars like Ndeunyema are beginning to ground human rights claims on Ubuntu.[222] Also, the normative influence of Ubuntu as a source of law and its promotion via strategic litigation is seen in a decision of the ECOWAS Community Court of Justice (ECCJ), *Linda Gomez v The Federal Republic of Gambia*.[223] The issue was whether Gambia's legislation on death penalty constitutes an arbitrary deprivation of life. Though the ECCJ held that the death penalty is inconsistent with the right to life and is an inhuman punishment, the Amicus Brief submitted by Amnesty International is instructive.[224] Amnesty International framed the issue for determination on whether "under evolving legal and judicial norms of right to life and freedom from inhumane treatment, the imposition of the death penalty may constitute arbitrary deprivation of life."[225] Amnesty International then referenced Ubuntu

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[220] See e.g., Radley Henrico, "Educating South African Legal Practitioners: Combining Transformative Legal Education with Ubuntu" (2016) 13 US-China Law Review 817; Christopher Thomas, "Ubuntu. The Missing Link in the Rights Discourse in Post-Apartheid Transformation in South Africa" (2008) 3:2 International Journal of African Renaissance Studies 39.

[221] See e.g., Beate Sjåfjel, "How Company Law has Failed Human Rights–and What to Do About It" (2020) 5 Business and Human Rights Journal 179; Beate Sjåfjel, "Sustainable Value Creation Within Planetary Boundaries—Reforming Corporate Purpose and Duties of the Corporate Board" (2020) 12 Sustainability 6245.

[222] Ndeunyema, *supra* note 84.

[223] *Linda Gomez v The Federal Republic of Gambia* [unreported] Suit No: ECW/CCJ/APP/18/1.

[224] See Amnesty International Amicus Brief, *Linda Gomez & 5 ors v The Federal Republic of Gambia*, Suit No: ECW/CCJ/APP/18/1, online: Amnesty International <www.amnesty.org/download/Documents/8000/afr270082013en.pdf>.

[225] *Linda Gomez & 5 ors v The Federal Republic of Gambia, ibid*.

and its judicialization in South Africa to support its arguments that the abolition of the death penalty is a growing norm.[226] Although the EECJ did not refer to Amnesty International's argument on Ubuntu in its judgment, the Amicus Brief's reference to Ubuntu to support a human rights to life norm means that Ubuntu also has the potential to support the CR2R norm.

African regional efforts can also play an important role in interpreting the CR2R norm through an Ubuntu lens.[227] In particular, the proposed African Union Policy on Business and Human Rights, which aims to make businesses more responsive to human rights,[228] is an important contribution to the African business and human rights discourse. This policy document, which will be an African Union soft law, offers an opportunity to push forward the need to internalize the CR2R norm as this thesis argues for. First, the AU policy provides an opportunity to consult with local communities in Africa on how to fashion socio-economic relationships with MNCs operating in Africa for mutual benefit. The policy document would serve as a Handbook or a road map by which MNCs may navigate their operations in Africa. The document would likely define what human rights means to host African communities and how MNCs can respect and meet societal expectations.[229]

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[226] *Ibid* at para 36.

[227] See Nora Götzmann & Claire Methven O´Brien, *Business and Human Rights: A Guidebook for National Human Rights Institutions Regional Supplement 1: African Regional Frameworks and Standards on Business and Human Rights* (International Coordinating Committee of National Human Rights Institutions (ICC) and Danish Institute for Human Rights (DIHR), November 2013).

[228] Ololade Bamidele, "AU Set on Making African Businesses More Responsive to Human Rights" (24 March 2017), online: Premium Times<www.premiumtimesng.com/business/business-news/227098-au-set-making-african-businesses-responsive-human-rights.html>.

[229] Indeed, the European Networks of Indigenous Peoples produced a report similar to the AU policy document. Therefore, the AU will not be revolutionizing the business and human rights space if it creates a similar framework. See Johannes Rohr & José Aylwin, *Business and Human Rights: Interpreting the UN Guiding Principles for Indigenous Peoples (*European Networks of Indigenous Peoples, 2014). To be clear, the process for the AU Policy document is still ongoing. It is not clear whether local communities will be

Second, the AU policy has the potential to interpret the CR2R norm to include Ubuntu-informed positive obligations. It could move the CR2R norm from "do no harm" to "do good" in Africa. This is not the first time that a policy document from the AU will make such a recommendation. Article 24 of the *Draft Pan-African Investment Code* already provides that investors must comply with human rights and business ethics principles by supporting and taking steps to protect internationally recognized human rights and ensuring equitable sharing of wealth derived from their investments.[230] If corporations observe this mandate of the *Code*, they will be implementing Ubuntu values of positive obligations.

Again, the CR2R norm may be implemented through the *African Charter on Human and Peoples' Rights* (The African Charter).[231] The African Charter has been described as "… a synthesis of universal and African elements" that balances between African traditional principles and modern principles of international law. [232] The Charter is distinct because it supports African norms that reflect the African rich tradition of communalism.[233] Although the Charter does not outrightly reject universal human rights norms, it contextualizes them to suit the circumstances and sensibilities of Africans.[234] The Charter has a wide scope because it applies to both states and individuals in Africa.[235] It

involved in the drafting stage. At its Working Committee meeting in 2017, there were 50 participants comprising of representatives of the African Union (AU) member states, Regional Economic Commissions (RECs), National human Rights Commissions, Businesses, the media and civil society. See Bamidele, *ibid*.

[230] *Draft Pan-African Investment Code*, (2016) online: African Union<https://au.int/sites/default/files/documents/32844-doc-draft_pan-african_investment_code_december_2016_en.pdf>.

[231] *African (Banjul) Charter on Human and Peoples' Rights,* 27 June 1981, OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (entered into force 21 October 1986).

[232] Nsongurua Udombana, "Between Promise and Performance: Revisiting States' Obligations under the African Human Rights Charter" (2004) 40:1 Stanford Journal of International Law 105 at 110.

[233] Thaddeus Metz. "African Values, Human Rights and Group Rights: A Philosophical Foundation for the Banjul Charter" in Oche Onazi, *African Legal Theory and Contemporary Problems: Critical Essays* (London, UK: Springer, 2014) 131.

[234] Eva Brems, *Universality and Diversity* (The Hague: Martinus Nijhoff, 2001) at 93-94.

[235] *Ibid*.

contains correlative rights and duties on social, economic, and cultural rights for both states and individuals (including corporations).[236] In effect, the Charter reinforces the proposals of scholars like Chirwa and Amodu that MNCs should have a positive obligations to promote socio-economic rights under the IESCR.

The Charter provides a unique opportunity to interpret an Ubuntu-influenced CR2R norm because the instrument obligates individuals to promote the communal relationship in African societies.[237] The duty of individuals in relation to other members of the community is contained in Chapter II of the Charter. Articles 27-29 highlight the individual's duty to place his physical and intellectual abilities at the service of society.[238] They also refer to an individual's duty to preserve and strengthen positive African values in his relations with other members of society and to promote the moral well-being of the society.[239] Drawing from these provisions, the Charter implicitly refers to an Ubuntu economy where all members, including corporations, can meaningfully participate in a relational system. They also implicitly refer to corporations' duty to strengthen the positive African values that Ubuntu represent. In sum, an Ubuntu-inspired CR2R norm can be moored in an African regional instrument like the Charter that promotes African values.

Another policy document from Africa that recognizes and explicitly builds on an Ubuntu economy, is South Africa's King Reports on South Africa's corporate

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[236] See Olufemi Amao, "The African Regional Human Rights System and Multinational Corporations: Strengthening Host State Responsibility for the Control of Multinational Corporations" (2008) 12:5 The International Journal of Human Rights 761 at 765.
[237] The Preamble to the Charter provides that "[i]t is henceforth essential to pay particular attention to the right to development and that civil and political rights cannot be dissociated from economic, social and cultural rights in their conception as well as universality and that the satisfaction of economic, social and cultural rights is a guarantee for the enjoyment of civil and political rights."
[238] *African* Charter, *supra* note 231 at 9.
[239] *Ibid*.

governance.[240] The *King IV Code*, the latest version published in 2016, expressly states that:

> [t]his idea of interdependency between organisations and society is supported by the African concept of Ubuntu or Botho…Ubuntu and Botho imply that there should be a common purpose to all human endeavours (including corporate endeavours) which is based on service to humanity. As a logical consequence of this interdependency, one person benefits by serving another. This is also true for a juristic person, which benefits itself by serving its own society of internal and external stakeholders, as well as the broader society.[241]

The *King IV Code* is not restricted to listed companies. It also applies to unlisted entities and family, state/foreign-owned companies whose shares are not traded widely. The Code is described as "a homegrown solution by Africans for Africans" and Ubuntu is described as the "philosophical golden thread that binds the content of the Code."[242] The SRSG and his team received a report on corporate law in South Africa as part of a multi-stakeholder consultation it held in Toronto in support of the "corporate law tools project."[243] This report considers how corporate law in South Africa enhances the prospect of corporations to respect human rights. The *King IV Code* was one of the documents considered in the report.[244] It is plausible to assume that this code, and consequently

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[240] Andrew West, "The Ethics of Corporate governance: A (South) African Perspective" (2009) 51:1 International Journal of Law and Management 10 at 12.

[241] *King IV Report on Corporate Governance for South Africa* 2016 (Institute of Directors of Southern Africa, 2016) at 24, online: AdamsAfrica <www.adams.africa/wp-content/uploads/2016/11/King-IV-Report.pdf>.

[242] See International Finance Corporation, "What We Learned about Corporate Governance and Code Development in Sub-Saharan Africa" (International Finance Corporation Report, 2018) at 1, 10, online: IFC <www.ifc.org/wps/wcm/connect/0284a64d-8879-4f09-933c4d200e41c123/What_We_Learned_about_CG_and_Code_Development_in_SSA.pdf?MOD=AJPERES&CVID=mkr5hSj>.

[243] Report of Edward Nathan Sonnenbergs (ENS) on Corporate Law in South Africa Submitted to the Special Representative of the Secretary--General (SRSG) on the Issue of Human Rights and Transnational Corporations and other Business Enterprises (May 2010), online: United Nations <https://media.business-humanrights.org/media/documents/7ff0cb347a1ebe4a1491de3ec89e1856f531b691.pdf>.

[244] *Ibid* at para 11.

Ubuntu, may have influenced Ruggie's decision adoption of the stakeholder approach, instead of a shareholder primacy approach to the construction of the CR2R norm.[245]

In sum, Ubuntu holds the potential of an efficacious tool for socio-economic transformation that MNCs, local communities, and African regional bodies can collaboratively explore in order to improve the normative scope and obligatory imprimatur of the CR2R norm. The ultimate framework must remain focused on strong business ethics to minimize the negative impacts of business practices, enhance MNCs' potential to live by human rights standards, promote social justice, and share with the local community as co-habitants of mother earth. De Schutter rightly notes that the UNGPs has set in motion an unfolding process.[246] To enhance its prospect of gaining legitimacy and influence over corporate conduct in Africa, the CR2R norm must be localized and moored to the socio-cultural languages of the people.

4.6. Conclusion

This chapter demonstrated that prior local norms in Africa can localize and support the CR2R norm. It established that a local reframing of the CR2R must be viewed through an Afrocentric lens to validate its own jurisprudential claims in a world of competing perspectives through a pair of Afrocentric goggles.[247] The reinterpretation of the CR2R norm through those goggles and, highlighting its content virtues of humanness, sharing, respect for human dignity, interdependence, interconnectivity, and communalism, the analysis argued that Ubuntu and the C2R2 norm are similar on two levels. First, they both prescribe normative conduct for corporate behaviour. Second, they also recognize the

[245] See the discussion on the stakeholder model above.
[246] De Schutter, "Beyond the Guiding Principles" in David Bilchitz & Surya Deva, eds, *Human Rights Obligations of Business: Beyond the Corporate Responsibility to Respect* (Cambridge, UK: Cambridge University Press, 2013) xviii.
[247] Mapaure, note 39 at 159.

interconnectivity between corporations and the society in which they operate. However, Ubuntu goes beyond the CR2R norm's baseline expectation to "do no harm" to demand a committed devotion to "do good." Thus, it was argued that an Ubuntu-influenced interpretation of the CR2R norm would help to fill the positive obligation vacuum that the CR2R norm presently has. Also, it argued that re-interpreting the CR2R norm through an Ubuntu lens helps to provide a legitimate normative platform to implement the CR2R norm in Africa. In other words, localizing the CR2R norm via Ubuntu provides an opportunity to develop practical normative tools by which MNCs, as relational beings, can act to foster socio-economic development in Africa.

The next chapter moves beyond a normative analysis. It adopts a doctrinal method to examine how sub-regional human rights institutions in Africa, as local actors, can support the CR2R norm. It uses the ECCJ as an example of a local actor, and argues that through purposeful interpretation, ECCJ decisions can support the CR2R norm. Combining the analyses in this chapter and the next, this thesis demonstrates how African prior local norms and local actors can support and promote the CR2R norm.

Chapter 5: The Role of Human Rights Institutions in Promoting the CR2R Norm—The ECOWAS Court of Justice

5.0. Setting the Stage

This Chapter examines sub-regional human rights institutions in Africa that can potentially support the diffusion of the corporate responsibility to respect human rights (CR2R) norm. Specifically, it examines the Community Court of Justice of the Economic Community of West African States (ECCJ) in terms of its unique position as a norm entrepreneur to support the diffusion of the CR2R norm. It proposes that through creative and purposeful interpretation of international guidance instruments, the ECCJ can influence the obligatory implications of corporate responsibility in international law. This thesis proposes that by doing so, the ECCJ would chart a path to localize the CR2R norm in Africa.

The pursuit of the ECCJ's CR2R norm promotion theme in the rest of this chapter proceeds as follows: Part 2, situates this chapter within existing literature. It maps out the analytical scope of this chapter by providing a conceptual definition of state-owned enterprises (SOEs). Part 3 examines ECCJ's special design features and normative structures. It identifies the ECCJ's characteristics, including its accessibility to private individuals, and its expansive human rights mandate that distinguishes it from other sub-regional courts in Africa. Part 4 describes the case of *SERAP v Nigeria & Ors* as a tale of a missed opportunity for the ECCJ in 2010 to promote the obligatory implications of corporate accountability in Africa.[1] It argues that the ECCJ's reluctance to hold SOEs responsible as a matter of international law, despite arguments before it, underutilizes its

[1] *SERAP v Nigeria*, Ruling, Suit No: ECW/CCJ/APP/08/09 and RUL. No: ECW/CCJ/APP/07/10 (ECOWAS, Dec. 10, 2010), online: World Court<www.worldcourts.com/ecowasccj/eng/decisions/2010.12.10_SERAP_v_Nigeria.htm>.

normative influence as a court. Part 5 argues that considering the growing recognition of the CR2R norm in other parts of the world, the ECCJ must revisit its stance on corporate responsibility of SOEs in international law. Part 6 explores how the ECCJ can actively contribute to the promotion of the CR2R norm—through holding SOEs responsible for human rights abuses, and for this to serve as a catalyst for MNCs to be held accountable in their home states for such misconduct, an outcome that may be founded on mandatory human rights due diligence legislation, the doctrine of negligence, or international human rights principles. The ECCJ's willingness to take this initiative would be a green light for litigants, human rights advocates, NGOs, and litigators, to harness its potential to pursue cases through which CR2R can be internalized in West Africa (and beyond).

5.0.1. Research Scope and Conceptual Clarification

Scholars have examined the capacity of African human rights systems to influence corporate accountability in Africa. For example, Joe Oloka-Onyango and Olufemi Amao argue that the African Commission on Human Rights could pronounce on the responsibility of MNCs in international law.[2] It is noteworthy that the African Commission is not a court; it is a body established to receive complaints from individuals and states on issues, including human rights abuses.[3] Oloka-Onyango and Amao contend that the Commission could have exercised its power to pronounce on MNCs' liability in *Social and Economic*

[2] Joe Oloka-Onyango, "Reinforcing Marginalized Rights in an Age of Globalization: International Mechanisms, Non-State Actors, and the Struggle for People's Rights in Africa" (2003) 18:4 American University International Law Review 851; Olufemi Amao, "The African Regional Human Rights System and Multinational Corporations: Strengthening Host State Responsibility for the Control of Multinational Corporations" (2008) 12:5 The International Journal of Human Rights 761.

[3] *African (Banjul) Charter on Human and Peoples' Rights,* 27 June 1981, OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (entered into force 21 October 1986). Article 30 of the Charter establishes the African Commission on Human and Peoples' Rights. Article 45 of the Charter states the Commission's functions, and they include the promotion of human rights, the protection of human rights under the African Charter, the interpretation of the African Charter, and any other functions assigned to the Commission by the Assembly of Heads of State. The Commission also has the task of preparing cases for submission to the African Court on Human and Peoples' Rights.

Rights Action Centre (SERAC) & Another v Nigeria, a similar case to the ECCJ's decision that will be the focus of this chapter.[4] Like Oloka-Onyango and Amao, this chapter examines the status of non-state actors in international law. First, it admits that it may be difficult to hold MNCs liable under international law because, as stated in chapter 1, MNCs do not have a concrete presence under international law.[5] It then examines whether non-state actors like State-owned enterprises (SOEs) should have the same status as MNCs. This chapter points out that SOEs are entities that have obligations to protect human rights in international law. Therefore, they should be amenable to international law's jurisdiction. This argument is examined in detail in part 6 below.

In a collection of essays edited by James Thou Gathii, some African scholars, including Karen Alter, Laurence Helfer, Solomon Eboborah, Obiora Okafor, and Olabisi Akinkugbe examine how human rights claimants, activists, lawyers, and civil societies harness the normative powers of African regional courts in advancing causes relating to human rights, the environment, rule of law, and opposition to authoritarian governments.[6] They argue that these courts are advantageous to litigants because they give credibility to their causes and help them to communicate and advance their agenda of social, political,

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[4] *The Social and Economic Rights Action Centre and the Centre for Economic and Social Rights v. Nigeria* (Communication 155/96) African Commission on Human and Peoples Rights, 27 October 2001, online: ACHPR <www.achpr.org/communication/decisions/155.96/> [SERAC].

[5] It is important to acknowledge that there is a debate on whether MNCs are subject to international human rights law. See generally Oliver De Schutter, ed, *Transnational Corporations and Human Rights* (London: Harts Publishing, 2006); Gwynne Skinner, ed, *Transnational Corporations and Human Rights: Overcoming Barriers to Judicial Remedy* (Cambridge: Cambridge University Press, 2020); Jordan Paust, "The Reality of Private Rights, Duties, and Participation in the International Legal Process" (2004) 25 Michigan Journal of International Law 1229; Emeka Duruigbo "Corporate Accountability and Liability for International Human Rights Abuses: Recent Changes and Recurring Challenges" (2008) 6:2 Northwestern Journal of International Law 222. However, as stated in chapter 1, the introduction of the UNGPs is based partly because of the governance gaps created by MNCs' elusiveness under international. This chapter proceeds from chapter 1's problem statement without engaging in the debate whether MNCs are traditionally subject to international law or not.

[6] See generally James Gathii, ed, *The Performance of Africa's International Courts* (Oxford, UK: Oxford University Press, 2020).

or legal change by engaging governments in a forum that they do not control.[7] The social relevance of these courts to promote norms, especially the ECCJ, is the anchor upon which the analysis in this chapter hinges.

Obiora Okafor, using a constructivist theory, examines the influence of international human rights institutions on peacebuilding in Africa states.[8] He identified how human rights NGOs, which he described as an example of a local popular force, can harness the normative influence of international human rights institutions like the African System on Human and People's Rights. He argues that the importance of human rights institutions should not be based on how their decisions are complied with—a compliance-focused and positivistic approach.[9] Rather, they should be assessed based on their influence to contribute to the domestic social justice struggles that rage within states. Although Okafor focuses on the work of local popular forces within states, this chapter looks beyond states to focus on regional human rights institutions. Like Okafor, this thesis does not use a positivistic lens to examine the possible contributions of the ECCJ to the diffusion of the CR2R norm in Africa.

Okechukuwu Effoduh also interprets decisions of the ECCJ through a constructivist lens.[10] He examines the normative role of the ECCJ in advancing the justiciability of environmental and socio-economic rights in Africa. In doing so, he chose three landmark

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[7] See e.g., Obiora Okafor & Okechukwu Effoduh, "Sovereign Hurdles, Brainy Relays, and 'Flipped Strategic Social Constructivism" in James Gathii, ed, *The Performance of Africa's International Courts* (Oxford, UK: Oxford University Press, 2020) 106.

[8] Obiora Okafor, "The African System on Human and Peoples' Rights, Quasi-Constructivism, and the Possibility of Peacebuilding within African States" (2004) 8:4 International Journal of Human Rights 1.

[9] For an analysis of the compliance problems associated with enforcing ECCJ's judgment, see Eghosa Ekhator, "International Environmental Governance: A Case for Sub-regional Judiciaries in Africa" in Michael Addaney & Ademola Jegede, eds, *Human Rights and the Environment under African Union Law* (Palgrave Macmillan 2020) 209 at 220-223.

[10] Okechukwu Effudoh, *The Ecowas Court, Activist Forces, and The Pursuit of Environmental and Socioeconomic Justice in Nigeria* (LLM Thesis: York University, 2017) [unpublished].

cases of the ECCJ—*SERAP v. Nigeria& Anor (2010); SERAP v. Nigeria & 8 Ors (2012); and SERAP & 10 Ors v. Nigeria & 4 Ors (2014)*—to tease out the normative influence of the court. Effoduh's (constructive) methodology is similar to how this chapter examines ECCJ decisions. However, this thesis is different in that it focuses on the UNGPs to demonstrate the court's potential to diffuse the CR2R norm in Africa. It uses one of the ECCJ decisions to show how the court could have exercised its normative influence. In other words, while Effoduh focuses on the normative contributions of the ECCJ, this thesis looks at the potential normative contribution of the court in future cases.

Essentially, this chapter contributes to the literature on the role of African sub-regional courts, albeit in the business and human rights (BHR) context. Drawing from Ayodeji Perrin's conclusion that African regional courts have the potential to "dispense distinctly African Jurisprudence over African claims,"[11] this thesis examines the current role of the ECCJ in the development of the CR2R norm. It classifies the court's role as conservative because of its reluctance to affirm corporate responsibility in international law when it had the chance to do so in 2010. However, considering the normative history of the court, it argues that the ECCJ is not fulfilling its potential to promote the CR2R norm. Consequently, this chapter examines how the court could contribute to this effort through interpretational approaches to the application of the CR2R norm in disputes.

The ECCJ is chosen for this examination due to its strikingly capacious jurisdiction and access to justice rules. There is no other African sub-regional court that has a similar

[11] Ayodeji Perrin, "African Jurisprudence for Africa's Problems: Human Rights Norm Diffusion and Norm Generation Through Africa's Regional International Courts" (2015) 109 ASIL Proceedings 32.

expansive jurisdiction and authority as the EECJ.[12] Except for the East African Court of Justice,[13] African sub-regional courts only allow state-state claims.[14] Even if individuals are allowed to file claims, their access is restricted. For example, Article 5 of the *Protocol Establishing an African Court on Human and Peoples' Rights* limits parties who can file a claim before the court to the African Commission, state parties, and African intergovernmental organizations.[15] Individuals and relevant NGOs with observer status with the Commission can only be given access if the state concerned makes a declaration accepting the competence of the court to receive such cases. Similarly, Articles 33 and 49 of the *Protocol Establishing the Southern African Development Community Tribunal* (SADC) limits access to states.[16] Non-state actors' lack of access limits the potential of these courts to contribute to the jurisprudence in business and human rights claims. As argued below, states may not be willing to file human rights claims on behalf of their citizens, a situation that prevents the courts from entertaining business and human rights claims. The ECCJ could advance CR2R jurisprudence because individuals and NGOs from ECOWAS member states like Nigeria, Sierra Leone, and Guinea-Bissau can access the

[12] Karen Alter, Laurence Helfer & Jacqueline McAllister, "A New International Human Rights Court for West Africa: The ECOWAS Community Court of Justice" (2013) 107 American Journal of International Law 737 at 378.
[13] *Treaty for the Establishment of the East African Community*, 30 November 1999, 2144, UNTS 255 (entered into force 7 July 2000), art 30. The analysis of the jurisdiction of this court is outside the scope of this thesis. However, James Gathii notes that the court's human rights jurisdiction is growing. See James Guo Gathii, "Variation in the Use of Sub-regional Integration Courts Between Business and Human Rights Actors: The Case of East African Court of Justice" (2016) 79 Law and Contemporary Problem 37. To my knowledge, there has not been any business and human rights claim before this court.
[14] See Rahina Zarma, *Regional Economic Community Courts and the Advancement of Environmental Protection and Socio-economic Justice in Africa: Three Case Studies* (Ph.D. Dissertation, Osgoode Hall Law School, 2021) [unpublished] at 188.
[15] *Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights*, Art 3 (10 June 1998), OAU Doc OAU/LEG/EXP/AFCHPR/PROT (III) (entered into force 25 January 2004), online: ACHPR<www.achpr.org/legalinstruments/detail?id=45>.
[16] Protocol on the Tribunal in the Southern African Development Community, 18 August 2014, online: IJR Centre< https://ijrcenter.org/wp-content/uploads/2016/11/New-SADC-Tribunal-Protocol-Signed.pdf>.

court to claim damages from environmental and human rights abuses in the West African sub-region.[17]

A caveat must be entered at this juncture. This chapter cites examples of the recognition of the CR2R norm at different levels of courts (national and regional) to demonstrate the ECCJ's potential contribution to the norm's diffusion. These cases are examined at a superficial level because of the need to tease out important points that advance the general theme in this chapter. At first blush, drawing examples from domestic courts to ground analysis in a regional court may be tantamount to comparing apples and oranges. However, considering that the ECCJ can exercise jurisdiction in the same areas of competence as some national courts, normative lessons from national courts can serve as a compass for the ECCJ in its effort to assert its role as a norm promoter of the CR2R norm in Africa.

Similarly, it is important to define SOEs because this is the context in which the analysis in Part 6 proceeds. It is difficult to define SOEs because there is no universally accepted definition for these entities. However, within the business and human rights context, this chapter, consistent with the UNGPs Working Group,[18] adopts a working definition of SOEs developed by the Organization for Economic Co-operation and Development (OECD) to mean:

[17] See e.g., Human Rights Watch, "The Regional Crisis and Human Rights Abuses in West Africa: A Briefing Paper to the UN Security Council" (20 June 2003), online (blog): Human Rights Watch:<www.hrw.org/news/2003/06/20/regional-crisis-and-human-rights-abuses-west-africa>; Human Rights Watch, "What do we Get out of it": The Human Rights Impact of Bauxite Mining in Guinea" (4 October 2018), online (blog): Human Rights Watch: <www.hrw.org/report/2018/10/04/what-do-we-get-out-it/human-rights-impact-bauxite-mining-guinea>.

[18] See the UNGPs Working Group Report, online: United Nations<www.ohchr.org/EN/HRBodies/HRC/RegularSessions/Session32/Documents/ExSummary-WGBHR-SOE_report-HRC32.pdf>.

> [a]ny corporate entity recognized by national law as an enterprise, and in which the State exercises ownership, should be considered as a state-owned enterprise. This includes joint stock companies, limited liability companies and partnerships limited by shares. Moreover, statutory corporations, with their legal personality established through specific legislation, should be considered as state-owned enterprises if their purpose and activities, or parts of their activities, are of a largely economic nature.[19]

The OECD working definition shows that factors like ownership, control, and purpose of the company matter in identifying an SOE. These factors will be examined in detail in Part 6 to examine whether SOEs have legal status in international law, and hence, amenable to the ECCJ jurisdiction.

5.1. Background and Jurisdictional Scope of the ECCJ

The Economic Community of West African States (ECOWAS) is a sub-regional community of 15 states.[20] ECOWAS was founded by West African states in 1975 under the ECOWAS Treaty signed in Abuja, Nigeria.[21] The treaty aims to secure the economic interest and integration of member states.[22] Articles 11 and 56 of the treaty create a tribunal to ensure the observance of law and justice in the interpretation of its provisions and to settle disputes that may be referred to it by member states.[23] At that time, the court was not physically constituted. As well, it was given jurisdiction over only economic and regional integration issues.[24] In 1993, ECOWAS member states signed a new treaty to replace the

[19] OECD, *Guidelines on Corporate Governance of State-Owned Enterprises* (Paris: OECD, 2015) at 14.
[20] ECOWAS, online: <www.ecowas.int/about-ecowas/basic-information/>.
[21] *Treaty of the Economic Community of West African States*, May 28, 1975, 1010 UNTS 17, 14 ILM 1200.
[22] See Kofi Oteng Kufuor, *The Institutional Transformation of the Economic Community of West African States* (Abington, United Kingdom: Routledge Press, 2006) at 1.
[23] *Treaty of the Economic Community of West African States*, *supra* note 20 Arts. 11 & 56.
[24] Okafor & Effoduh, *supra* note 7 at 112.

1975 Charter.[25] The 1993 revised treaty addresses issues relating to security, good governance, and human rights.[26] Article 15(4) of the revised treaty created an ECOWAS Court whose decisions are binding on all member states, ECOWAS institutions, individuals, and corporate bodies.[27] Despite this reform, ECOWAS still did not have an existing court.

In 1991, ECOWAS member states adopted a Community Protocol which did not enter into force until November 1996.[28] The Protocol created a permanent and physical ECOWAS Court (the ECCJ) that maintains jurisdiction over cases relating to the interpretation and application of ECOWAS legal instruments.[29] The ECCJ entertains disputes between member states *inter se* or one or more member states and ECOWAS' institutions.[30] It also hears cases instituted by a member state on behalf of its nationals against another member state or an ECOWAS institution.[31] Although the court has a permanent status, member states did not grant access to private individuals to present claims before it, despite repeated proposals from interest and civil society groups.[32] Therefore, between 1991 and 2002, the ECCJ was established to resolve only economic disputes among member states.[33]

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[25] Revised Treaty of the Economic Community of West African States, July 24, 1993, 35 ILM 660 [1993 Treaty].
[26] Alter, Helfer & McAllister, *supra* note 12 at 744-745.
[27] Although non-state actors can sue states and ECOWAS institutions, the ECCJ has held that non-states actors cannot be sued in the court. Cases establishing this stance are discussed below. ECOWAS institutions are the Commission, the Community Parliament, the Community Court of Justice, and the ECOWAS Bank for Investment and Development (EBID).
[28] *Protocol A/P1/7/91 on the Community Court of Justice*, Arts. 3(1), 4(1), (6 July 1991) provided for a court comprising seven independent judges, each of whom serves for a five-year term that is renewable once. The judges are appointed "by the Authority and selected from a list of persons nominated by Member States." They must have qualifications similar to those associated with other international courts and tribunals.
[29] *Protocol A/P1/7/91, ibid*.
[30] *Ibid*, Art. 9(2), (3).
[31] *Protocol A/P1/7/91, ibid*.
[32] Alter, Helfer & McAllister, *supra* note 12 at 747.
[33] *Ibid* at 748.

A culmination of events, starting from 2004, led to private individuals' access to the ECCJ and the expansion of the court's jurisdiction to human rights issues. The first of such events is the case of *Afolabi v Nigeria* where the ECCJ declined to entertain a private individual's request to present a claim arising from Nigeria's non-compliance with ECOWAS free movement rules.[34] Afolabi, a Nigerian trader, had entered a contract to purchase goods in Benin. Afolabi could not complete the transaction because Nigeria unilaterally closed the border between the two countries. He filed a suit with the ECOWAS Court, claiming that the border closure violated the right to free movement of persons and goods. Nigeria challenged the jurisdiction of the court and Afolabi's standing because, according to Article 9(3) of the 1991 Protocol, only states could present claims on behalf of their citizens. The court upheld Nigeria's preliminary objection.

The dismissal of Afolabi's case disclosed a flaw regarding the implementation of the ECOWAS economic agenda. It became apparent that "governments had little incentive to challenge barriers to regional integration, and private traders had no judicial mechanism for doing so."[35] To bridge this gap, judges of the ECOWAS court, together with NGOs, West African Bar Associations, human rights groups, and ECOWAS secretariat officials formed a lobby group and campaigned for the inclusion of private individuals in the list of those with standing before the court.[36] They also advocated for an expansive human rights jurisdiction for the court to deal with human rights issues arising from disputes connected to economic and trade relations. These groups met with ECOWAS member states, engaged

[34] *Afolabi v Nigeria*, Case No. ECW/CCJ/APP/01/03, Judgment (Apr 27, 2004), reprinted in 2004–2009 Community Court of Justice, ECOWAS Law Report1 (2011).
[35] Alter, Helfer & McAllister, *supra* note 12 at 750.
[36] *Ibid*. Academics also joined in critiquing the position in *Afolabi. See* Adewale Banjo, "The ECOWAS Court and the Politics of Access to Justice in West Africa" (2007) 32:1 Africa Development 69.

with the media, and made policy arguments for the overhaul of the 1991 Protocol which, according to them, was restrictive.[37]

On 19 January 2005, barely nine months after the dismissal of Afolabi's case, ECOWAS member states adopted a Supplementary Protocol that amended the 1991 Protocol—*Supplementary Protocol A/SP1/01/05 Amending the Preamble and Articles 1, 2, 9, and 30 of Protocol(A/P.1/7/91)*.[38] The Supplementary Protocol gave distinctive and broad authority to the ECCJ, a feature that most sub-regional courts in Africa lack.[39] Article 9 (4) of the Supplementary Protocol extends the jurisdiction of the ECCJ to human rights cases. It provides that "[t]he Court has jurisdiction to determine case[s] of violation of human rights that occur in any Member State."[40] Also, Article 10 (d) of the Supplementary Protocol grants standing to individuals and corporate bodies to seek relief for violations of their human rights before the ECCJ. These two provisions (Articles 9(4) and 10 (d)) are examined in detail below for strategically positioning the ECCJ as a norm entrepreneur in the BHR context.

5.1.1 Article 9(4)—An Indeterminate Human Rights Jurisdiction

Article 9(4) of the Supplementary Protocol is significant because it grants the ECCJ jurisdiction to adjudicate human rights issues. Importantly, there is no ECOWAS Protocol or treaty that delimits the scope of human rights instruments that the ECCJ Judges can

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[37] Alter, Helfer & McAllister, *supra* note 12 at 751.

[38] *Supplementary Protocol A/SP1/01/05 Amending the Preamble and Articles 1, 2, 9 and 30 of Protocol*(A/P.1/7/91) Relating to the Community Court of Justice and Article 4 Paragraph 1 of the English Version of the Said Protocol, (19 January 2005) [2005 Supplementary Protocol], online: <http://prod.courtecowas.org/wp-content/uploads/2018/11/Supplementary_Protocol_ASP.10105_ENG.pdf>.

[39] These features are in respect of its human rights mandate. See Lucyline Nkatha Murungi & Jacqui Gallinetti, "The Role of Sub-Regional Courts in the African Human Rights System" (2010) 7:13 Sur Journal of International Law 119 at 132.

[40] *2005 Supplementary Protocol*, *supra* note 38 at art. 9(4).

apply.[41] Usually, as regards the European Union, the Americas, and other African courts, regional courts interpret only their respective regional human rights charters and international instruments ratified by member states.[42] For example, the Inter-American Court of Human Rights only applies the *American Convention on Human Rights*, treaties ratified by the Organization of American States members, and other regional treaties.[43] Similarly, the African Court on Human and Peoples' Rights (AfCHPR) applies the African Charter and "other relevant Human Rights instrument[s] ratified by the States concerned."[44] In contrast, the ECCJ is not restricted to apply or interpret instruments signed or adopted only by ECOWAS member states. The ECCJ can apply both hard and soft law, including the UNGPs. As Ebobrah notes, "[f]rom the viewpoint of a human rights lawyer, the human rights jurisdiction of the ECCJ should be cause for celebration, especially as most domestic courts have not lived up to the high expectations of human rights lawyers and activists alike."[45]

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[41] Alter, Helfer & McAllister, *supra* note 12 at 754.
[42] *Ibid*.
[43] Gerald Neuman, "Import, Export, and Regional Consent in the Inter-American Court of Human Rights" (2008) 19:1 European Journal of International Law 101 at 102. See also Ximena Soley & Silvia Steininger "Parting ways or lashing back? Withdrawals, backlash and the Inter-American Court of Human Rights" (2018) 14 International Journal of Law in Context 237 at 238.
[44] *Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights*, (10 June 1998), OAU Doc OAU/LEG/EXP/AFCHPR/PROT (III) (entered into force 25 January 2004), Art 3, online: ACHPR<www.achpr.org/legalinstruments/detail?id=45>. In the case of AfCHPR, the rationale for limiting the regional court's jurisdiction is to avoid jurisprudential chaos that will undermine the formation of the African *corpus juris.* See Adamantia Rachovista, "On 'new Judicial Animals': The Curious Case of an African Court with Material Jurisdiction of Global Scope" (2019) 19:2 Human Rights Law Review 255 at 255. However, soft laws or instruments that are not ratified by states can still serve as an interpretative guide for the AfCHPR, if the human rights norms sought to be interpreted find expression in instruments ratified by a state. This is what Waschefort refers to as incorporation by reference. See Gus Waschefort "The Subject-matter Jurisdiction and Interpretive Competence of the African Court on Human and Peoples' Rights in Relation to International Humanitarian Law" (2020) 20 African Human Rights Law Journal 41.
[45] Solomon Ebobrah, "Critical Issues in the Human Rights Mandate of the ECOWAS Court of Justice" (2010) 54:1 Journal of African Law 1 at 13.

On the application of norms and rules of international customary law, the ECCJ in *Ugokwe v Nigeria* held that under Article 19 (1) of the 1991 Protocol and Article 38(1) (c) (d) of the Statute of the International Court of Justice, the ECCJ can apply general principles of law recognized in "civilized nations" and customary international law.[46] In effect, customary international law can ground a cause of action in the ECCJ as it did in the Supreme Court of Canada in *Nevsun v Araya*.[47] The implications of the Nevsun case for the ECCJ are examined in Part 6.

5.1.2. Article 10(d)—Private Litigants' Access to the ECCJ

Article 10 (d) of the Supplementary Protocol grants private litigants, civil societies, NGOs, and corporate bodies access to the ECCJ.[48] For example, in 2020, seven NGOs, including Amnesty International, filed a suit against the Republic of Togo, claiming that the Togolese government's shut down of the internet during an anti-government protest in

[46] *Jerry Ugokwe v Nigeria*, Suit No ECW/CCJ/JUD/03/05, online: <https://ihrda.uwazi.io/api/files/1524732618117yx2hxr8wt41n3lv30widx6r.pdf>. See also Hon. *Sule Audu & Amp; Ors v The Federal Republic of Nigeria* (ECW/CCJ/APP/02/16) [1970] ECOWASCJ 8. Customary international law was explained in chapter 2 of this thesis. The general principles of law recognized in civilized nations are derived from national legal systems but redefined within the international legal system. See the International Law Commission Report to the UN General Assembly at its Seventy-first Session Geneva, (29 April–7 June and 8 July–9 August 2019), online:<https://legal.un.org/ilc/reports/2019/english/chp9.pdf>. However, some TWAIL scholars criticize the characterizing of countries as "civilized" or "uncivilized" nations because this dichotomy raises the question of how to recognize a civilized nation, and by which standard should a nation be categorized as civilized. See Antony Anghie, *Imperialism, Sovereignty and the Making of International Law* (Cambridge: Cambridge University Press, 2005); González Hauck, Sué: "All Nations must be Considered to be Civilized': General Principles of Law between Cosmetic Adjustments and Decolonization" (*7/21/2020)* online (blog) VerfBlog<https://verfassungsblog.de/all-nations-must-be-considered-to-be-civilized/>.

[47] *Nevsun v Araya* [2020] 5 SCC, online: <www.canlii.org/en/ca/scc/doc/2020/2020scc5/2020scc5.html>.

[48] See generally Matthew Happold & Relja Radović, "The ECOWAS Court of Justice as an Investment Tribunal" (2018) 19:1 The Journal of World Investment & Trade 95; Matthew Happold, "Investor-state Dispute Settlement using the ECOWAS Court of Justice: An analysis and Some Proposals" (2019) 34:2 ICSID Review-Foreign Investment Law Journal 496. Examples of cases where corporations have filed cases before the ECCJ include *Ocean King Nigeria Ltd. v Senegal* (2011) Suit No ECW/CCJ/APP/05/08, *Dexter Oil v Liberia* (2019) Suit No ECW/CCJ/APP/24/17.

2017 violates Togolese peoples' right to freedom of information.[49] The plaintiffs argued that the Togolese people have the right to seek and receive information, and to disseminate opinions under Article 9 (1) and (2) of the ACHPR, the right to freedom of expression under Article 19(2) of the ICCPR, and access to information under Article 66(2) of the Revised ECOWAS Treaty.[50] The ECCJ upheld the arguments of the NGOs and ordered the Togolese government to enact legislation to protect freedom of information in the future.

Another striking feature of Article 10 (d) is that it does not require litigants to exhaust local domestic remedies before applying to the ECCJ.[51] In effect, the ECCJ is a court of first instance, just like national courts.[52] The status of the ECCJ as a court of first instance removes the political protection that most states rely on to object to the jurisdiction of sub-regional courts.[53] For example, in *Collectif Des Anciens Travailleurs Du Laboratoire Als v Republic of Mali*, the plaintiffs approached the AfCHPR, claiming that the defendant violated their rights to health under Articles 16 and 24 of the *African Charter on Human and People's Rights*.[54] The plaintiffs had initiated a claim in Mali but abandoned it because it was unduly prolonged. The AfCHPR held that the plaintiffs had not exhausted domestic remedies because there were other mechanisms in Mali which they could have used before initiating the claim. Therefore, the court declined jurisdiction.

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[49] *Amnesty International Togo & ors v The Togolese Republic*, Case No ECW/CCJ/JUD/09/20, online: <https://globalfreedomofexpression.columbia.edu/cases/amnesty-international-togo-and-ors-v-the-togolese-republic/>.
[50] *Ibid*.
[51] *Tidjani v Nigeria*, unreported case No ECW/CCJ/APP/01/06, Judgment, para 22 (28 July 2007).
[52] See Edefe Ojomo, "Competing Competences in Adjudication: Reviewing the Relationship between the ECOWAS Court and National Courts" (2014) 7:1 African Journal of Legal Studies 84 at 110.
[53] See Kangnikoé Bado, "Good Governance as a Precondition for Subsidiarity: Human Rights Litigation in Nigeria and ECOWAS" (2019) 57:2 Commonwealth & Comparative Politics 242 at 250.
[54] *Collectif Des Anciens Travailleurs Du Laboratoire Als v Republic of Mali*, Application No. 042/2016 (28 March 2019), online:<http://kenyalaw.org/kenyalawblog/inadmissibility-of-applications-before-the-african-court/>.

Ibibia Worika and Uzuazo Etemire argue that an exhaustion of the domestic remedy clause is necessary to regulate the ECCJ's workload.[55] They suggest that in cases where domestic local remedies are available, the ECCJ should not be the court of first instance.[56] In their opinion, limiting the court's jurisdiction aligns with prevailing customary international law and treaty trends on exhaustion of domestic remedies.[57] Also, the exhaustion of local remedies clause reduces the risk of conflicting judgments arising between the ECCJ and national courts.[58] Muhammed Ladan concludes that the ECCJ's mandate as a court of first instance is a "design flaw" that needs to be remedied.[59]

In response, the ECCJ judges argue that there is no design flaw in the mandate of the court and even if this were true, only member states' express amendment of the 2005 Supplementary Protocol would take away private litigants' direct access to the ECCJ.[60] The ECCJ judges' argument is sound. First, insisting that litigants should exhaust local remedies in member states may take the court back to the *Afolabi* era where litigants are denied access to the court, notwithstanding the merit of a case. In effect, human rights victims will be left at the mercy of states that may be complicit in their abuses. Second, it will reduce the normative legitimacy and influence of the ECOWAS Commission and

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[55] See Ibibia Worika & Uzuazo Etemire, "ECOWAS Community Court of Justice: Recent Trends and Future Directions" in Sylvester Popnen et al, *The Challenge of Justice: Contemporary Legal Essays in Honour of B M Wifa, SAN, DSSRS, KJW* (Lagos: Princeton & Associates, 2017) 1.

[56] *Ibid*. See also Nsongurna Udombana, "So Far, So Fair: The Local Remedies Rule in the Jurisprudence of the African Commission on Human and Peoples' Rights" (2003) 97 African Journal of International Law 1 at 9.

[57] Worika & Etemire, *supra* note 55 at 10. See also Amos Enabulele, "Sailing Against the Tide: Exhaustion of Domestic Remedies and the ECOWAS Community Court of Justice" (2012) 56:2 Journal of African Law 268.

[58] Worika & Etemire, *supra* note 55.

[59] Muhammed Tawfiq Ladan, "Access to Justice as a Human Right under the ECOWAS Community Law" (Paper delivered at the Commonwealth Regional Conference on 8–11 April 2008, Lagos, Nigeria) [unpublished] at 17.

[60] *Hadijatou Mani Kouraou v The Republic of Niger*, Case No ECW/CCJ/JUD/06/08 (27 October 2008) para 45, online: <www.globalhealthrights.org/wp-content/uploads/2013/10/Koraou-Niger-2008-Eng.pdf>. See also Worika & Etemire, *supra* note 55 at 10; Alter, Helfer & McAllister, *supra* note 12 at 756.

consequently diminish the ECCJ's growing jurisprudence on human rights. This is because if private litigants do not have access to court, there will be limited opportunities for the court to make some pronouncements. For example, *Hadijatou Mani Kouraou v The Republic of Niger*,[61] a case discussed below because of its significance in promoting anti-slavery nom in Africa, was filed because the plaintiff, an individual, had access to the court. In cases where individuals do not have access to ECCJ, the court may lose an opportunity to pronounce on the norm. This is more so because states may be reluctant to file such cases because they may be complicit in the human rights abuse.

Notwithstanding its critics, the ECCJ's expansive mandate on human rights and individuals' access to the court potentially set it up to shape the normative potential of the CR2R norm. The ECCJ has delivered judgements on different human rights issues, including slavery, wrongful imprisonment, and torture.[62] It has also offered remedies, including declarations, damages, and injunctions.[63] The next section examines the ECCJ's position in a BHR claim in 2010. As earlier noted, it argues that the Court missed an opportunity to adopt a creative approach to the CR2R norm, and that, hopefully, it may fare better at the next chance.

5.2. The ECCJ—A Missed Opportunity

In 2010, the ECCJ had the opportunity to consider arguments on the "Protect, Respect and Remedy" framework[64] in the case of *The Registered Trustees of the Socio-*

[61] *Hadijatou Mani Kouraou v The Republic of Niger*, ibid.
[62] See ECCJ's Judgments, online:<http://prod.courtecowas.org/decisions-3/>.
[63] *Ibid*.
[64] For reference to the framework, see Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and other Business Enterprises, John Ruggie UN Doc A/HRC/8/5 (7 April 2008), online: <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G08/128/61/PDF/G0812861.pdf?OpenElement>. For the relationship between the framework and the UNGPs, see chapter 1.

Economic Rights and Accountability Project (SERAP) v President of the Federal Republic of Nigeria and others.[65] The defendants, alongside Nigeria, are a Nigerian SOE, the Nigerian National Petroleum Corporation (NNPC), and six subsidiaries of MNCs—Shell Petroleum Development Company (SPDC), Elf Petroleum Nigeria Ltd, Agip Nigeria Plc, Chevron Oil Nigeria Plc, Total Nigeria Plc, and ExxonMobil Corporation.[66] The plaintiffs claimed damages arising from abuse of their rights and for adverse social and environmental impacts of the operations of the MNCs. They alleged that the defendants individually and/or jointly violated international law and, therefore, sought an order compelling them to pay damages to the victims.[67]

The third defendant, SPDC, filed a preliminary objection challenging the ECCJ's jurisdiction to entertain issues relating to the responsibility and liability of corporations in international law. In response, the plaintiffs, finding support in the UN "Protect, Respect and Remedy" framework, argued that the defendant corporations failed to conduct due diligence, which also means they failed to apply the minimum requirement of the CR2R norm.[68] The plaintiff argued that if the MNCs carried out due diligence as required under pillar II of the "Protect, Respect and Remedy" framework, they would have discharged their responsibility to respect human rights.

The ECCJ ruled that corporate accountability has an unsettled status in international law, notwithstanding initiatives in that legal realm to promote corporate accountability.

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[65] *SERAP v Nigeria*, *supra* note 1.
[66] *Ibid*.
[67] *Ibid*. A striking feature of the plaintiffs' claim is their petition for joint allocation of responsibility among the defendants.
[68] Plaintif's Brief of Argument, *ibid*. They argue that "[m]ultinational corporations like the third defendant have obligations under international law not to be complicit in human rights violations. Multinational corporations must not perform any wrongful act that would cause human rights harms; must be aware of their role not to provide assistance or any support that would contribute to human rights violations; and must not knowingly and substantially assist in the violation of human rights."

Particularly, the ECCJ referred to the nomination of the SRSG, John Ruggie, and the "Protect, Respect and Remedy" framework as "one of the greatest reference[s] on the accountability of multinationals for human rights violation in the world."[69] However, the court held that it lacked jurisdiction to declare the liability and responsibility of the corporate defendants. It reasoned that "the process of codification of international law has not yet arrived at a point that allows the claim against corporations to be brought before international courts."[70] The court held that, in any event, only member states can be sued for their alleged violation of human rights.[71] In sum, though the ECCJ recognized that the CR2R norm is going through a "norm cycle," it concluded that it had in 2010, not yet reached an internalized stage.

The ECCJ's decision is quintessentially traditional regarding corporate accountability in international law.[72] It held that the Nigerian government is responsible for failure to regulate oil companies whose oil extraction activities polluted Niger Delta's clean water and environment. It, therefore, ordered the government to "(1) [t]ake all effective measures, within the shortest possible time, to ensure restoration of the environment of the Niger Delta; (2) [t]ake all measures that are necessary to prevent the occurrence of damage to the environment; and (3) take all measures to hold the perpetrators of the environmental damage accountable."[73] These declarations are restatements of

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[69] *SERAP v Nigeria*, *supra* note 1 at para 68.
[70] *SERAP v Nigeria*, *supra* note 1 at para 69. It is not clear which "process of codification" the ECCJ referred to. The court may have taken this position from one of the SRSG's report to the UN Human Rights Council. See United Nations General Assembly. *Report of the Special Representative of the Secretary-General (SRSG) on the issue of human rights and transnational corporations and other business enterprises*, U.N. Doc. A/HRC/4/035, (February 9, 2007), online: business and Human Rights Resource Centre <https://media.business-humanrights.org/media/documents/files/media/bhr/files/SRSG-report-Human-Rights-Council-19-Feb-2007.pdf>.
[71] *SERAP v Nigeria*, *supra* note 1 at para 71.
[72] *Ibid*.
[73] *Ibid* para 121.

Nigeria's obligations under international human rights treaties to protect human rights. In sum, the ECCJ re-iterated that states are the duty bearers and enforcers of human rights obligations. This holding did not expand the frontiers of the CR2R norm.

It is pertinent to ask whether if presented with the same facts in 2021 as in *SERAP*, the ECCJ would come to a different conclusion regarding corporate accountability in international law. Simultaneously, it is important to ask whether the ECCJ should assume jurisdiction over corporations owned and controlled by states—SOEs. In the section that follows, it is argued that considering the evolving normativity of the CR2R norm and the normative history of the ECCJ, the ECCJ's response may be different. Proceeding from this premise, in Part 6, It is argued that the court should take a different approach from its previous decision by considering the liability of SOEs in international law—if the ECCJ finds SOEs liable, it may indirectly establish the liability of other corporations with whom SOEs have relationships through supply chain contracts (SPCs), joint venture agreements (JVAs), Investment Agreements (IAs), and Production Sharing Contracts (PSCs). The argument in part 6 is based, in part, on the guidance instrument on the attribution of SOEs' conduct to states in international law— the *Draft Articles on Responsibility of States for Internationally Wrongful Acts* (ARSIWA)—and the UNGPs.[74]

5.3. Courts' Recognition of the CR2R Norm—Some Examples

There is transnational judicial recognition of the CR2R norm. Although it may be anecdotal to claim that there is a universal consensus among national courts, there is support for the claim that judicial decisions are contributing to the development of the CR2R norm. It has

[74] UN International Law Commission, *Draft Articles on Responsibility of States for Internationally Wrongful Acts, with commentaries*, Report of the International Law Commission at the fifty third Session A/56/10 2001 (23 April-June and 2 July-10 August 2001), online: United Nations<https://legal.un.org/ilc/texts/instruments/english/commentaries/9_6_2001.pdf> [ARSIWA].

been noted that "[t]he UNGPs as a whole have been referenced in numerous legal cases against companies, not as a cause of action themselves but to illustrate overall shifts in the international normative landscape."[75] Courts, mostly in developed states, recognize corporations' responsibility to respect human rights, either because of their direct involvement in human rights abuses, or indirectly through relationships with subsidiaries and contractors in a developing state. Some of these cases—from Canada, the United Kingdom, the United States, and the Netherlands—are examined below to demonstrate approaches by national courts that, arguably, tend to the recognition of the CR2R norm. These decisions are significant because they represent the evolving state of things in Europe and North America from where some MNCs operating in Africa originate. The cases are only selected to illustrate the evolving normativity of the CR2R norm in different countries.

5.3.1 Canada

The first case arises from the 2020 Supreme Court of Canada's (SCC) decision in *Nevsun v Canada*.[76] This case involves three Eritrean workers who are refugees in Canada as plaintiffs and a Canadian company—Nevsun Resources Ltd—as defendant. The Eritrean workers claimed that they were conscripted into Eritrea's military service where they were placed under indefinite forced labour and subjected to violent, cruel, inhuman, and degrading treatment. The plaintiffs sought damages for breaches of customary

[75] John Ruggie, Caroline Rees, & Rachel Davis "Ten Years After: From UN Guiding Principles to Multi-fiduciary Obligations" (2021) 0:0 Business and Human Rights Journal 1 at 19.
[76] *Nevsun v Araya, supra* note 47. It should be noted that before this decision, there were other court decisions in Canada that did not consider arguments on customary international law. For example, in *Das v George Weston Limited*, 2018 ONCA 1053, the Ontario Court of Appeal dismissed the appellants' claim because it was statute-barred under the Bangladeshi law, which the court adjudged to be the applicable law in this case. This case was decided mainly on private international rules.

international law which prohibits forced labour, slavery, cruel, inhuman, or degrading treatment, and crimes against humanity.[77] As a preliminary point, the company argued that the claims should be struck out because customary international law cannot give rise to a cause of action in Canada, and that in any case, corporations are not subject to international law.[78] Consequently, the plaintiff's arguments have no reasonable prospect of success. The Chambers Judge and Court of Appeal dismissed the defendant's preliminary objection. The company then appealed to the SCC.

On the application of customary international law to corporations, the SCC noted that international law has long since evolved from a state-centric position. It concluded that the current state of the law is that corporations do not "enjoy a blanket exclusion under customary international law from direct liability for violations of 'obligatory, definable, and universal norms of international law."[79] In effect, the SCC, citing international human rights instruments and principles, recognized that corporations are subject to rules of customary international law.[80] The case was remitted to the British Columbia Supreme Court for trial but parties settled out of court.[81] In sum, Canadian courts expressly recognize that the days when corporations were untouchable under international law are long gone.

5.3.2. The United Kingdom

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[77] *Nevsun v Araya, ibid*.
[78] *Ibid*.
[79] *Nevsun v Araya, supra* note 47 at para 113.
[80] It should, however, be noted that the dissenting Justices, relying partly on a 2007 SRSG report to the United Nations Human Rights Council concluded that "[t]]he authorities thus favour the proposition that corporate liability for human rights violations has *not* been recognized under customary international law; the most that one could credibly say is that the proposition that such liability has been recognized is equivocal. *Nevsun v Araya*, *ibid* at par 191. See United Nations General Assembly, *Report of the Special Representative of the Secretary-General (SRSG) on the issue of human rights and transnational corporations and other business enterprises*, U.N. Doc. A/HRC/4/035, (February 9, 2007). This thesis assumes that majority of the justices must have had an opportunity to read the dissenting opinion before its delivery in open court. Even so, in 2020, the majority were not swayed by the SRSG's position in 2007.
[81] Bernise Carolino, "Nevsun Settles with Eritrean Plaintiffs in Relation to Landmark Supreme Court of Canada" (5 November 2020) blog, online:<www.canadianlawyermag.com/practice-areas/litigation/nevsun-settles-with-eritrean-plaintiffs-in-relation-to-landmark-supreme-court-of-canada-case/334916>.

Regarding corporate responsibility, the UK courts take a unique traditional common law tort approach rooted in negligence. The UK Supreme Court has held that MNCs can be held responsible for human rights abuses that occurred abroad for failure to discharge their duty of care to victims of human rights abuse. In a line of cases, including *Vedanta Resources Plc (Vedanta) v Lungowe*,[82] *Okpabi & Ors v Royal Dutch Shell Plc*,[83] and *Begum v Maran (UK) Ltd*,[84] claims against parent companies in the UK were declared to have a prospect of success because parent companies know or ought to know that human rights abuse could arise from their relationships with subsidiaries and contractors. For example, in Vedanta, residents of the Zambian city of Chingola brought proceedings in the English courts against Vedanta, a UK incorporated parent company, and Konkola Copper Mines Plc (KCM), its Zambian subsidiary, claiming that waste discharged from the Nchanga copper mine—owned and operated by KCM—had polluted the local waterways, causing personal injury to the local residents, as well as damage to property and loss of income. The claims are founded in negligence, although the allegations also relate to breaches of applicable Zambian environmental laws.

Vedanta challenged the jurisdiction of English courts to hear the suit because the parent company is merely an indirect owner of KCM, and no more than that. The company argued that the plaintiffs are only using a claim against Vedanta PLC in England purely as a vehicle for attracting English jurisdiction against their real target defendant, KCM, by

[82] *Vedanta v Lungowe* [2019] UKSC 20. For an analysis of the UK decision, see Rachael Chambers, "Parent Company Direct Liability for Overseas Human Rights Violations: Lessons from the U.K. Supreme Court" (2021) 42:3 University of Pennsylvania Journal of International Law 519.
[83] *Okpabi & Ors v Royal Dutch Shell Plc* [2021] UKSC 3. For an analysis of this decision, Lucas Roorda & Daniel Leader, "Okpabi v Shell and Four Nigerian Farmers v Shell: Parent Company Liability Back in Court" (2021) 6 Business and Human Rights 368.
[84] *Begum v Maran (UK) Ltd* [2021] WLUK 162.

means of the necessary or proper party gateway. In other words, there is no real issue to be tried against Vedanta PLC before the English courts. The UK Supreme Court rejected this argument. It affirmed the reasoning of the lower courts that there is a real issue to be tried because the parent company exercised a sufficiently high level of supervision and control of the activities at the Zambian mine to incur a duty of care towards third parties, including farmers, living in the vicinities of the mine.[85]

Similarly, in *Begum v Maran,* the UK Court of Appeal extended the MNC's duty of care from that rooted in a contractual relationship to the "unusual case" involving third parties' intervention causing harm.[86] In this case, the UK Court of Appeal imputed constructive knowledge to a UK shipbroker, Maran (UK) Ltd, who sold a ship to be ultimately demolished through a third party, Hsejar Maritime Inc. The third-party company chose to demolish the vessel in Bangladesh, a place where there are lower health and safety standards. In effect, the third party did not follow health and safety standards in demolishing the ship, causing the death of a Bangladeshi shipbreaker. The UK company (Maran) raised the defence that the death of the shipbreaker was too remote from itself, since it had sold the ship before its demolition.

[85] Vedanta, *supra* note 82 at par 55. The following are some of the actions that contributed to the parent's company duty of care: (1) publication of a sustainability report which emphasized how the Board of the parent company had oversight over its subsidiaries, (2) entering into a management and shareholders agreement under which the parent company was obligated to provide various services to KCM, including employee training, (3) provided health, safety and environmental training across its group companies, (4) provided financial support to KCM, (5) released various public statements emphasizing its commitment to address environmental risks and technical shortcomings in KCM's mining infrastructure, (6) exercised control over KCM, as evidenced by a former employee. However, Vedanta settled this case with the local community and farmers in 2021. See Helen Reid, "Vedanta Resources Settles Zambia Copper Mine Pollution Claim" (19 January 2021), online: Reuters<www.reuters.com/article/us-zambia-mining-vedanta-idUSKBN29O1EL>.

[86] The general rule is that the law does not impose liability on a person for the interventions of a third party which cause harm to another. See *Smith v Littlewoods Organisation Ltd* [1987] AC 241 at 27.

However, the UK Court of Appeal imputed constructive knowledge to Maran because it knew the vessel would be dismantled in Bangladesh, rather than in one of the shipyards in China or Turkey where health and safety standards are higher. As such, the court held that Maran owes a duty of care to the plaintiff (the wife of the deceased) and may be liable for its failure to exercise a duty of care in the sale and demolition of the ship. Although this case focused on jurisdiction and choice of law issues, it demonstrates how far a court in the UK is willing to go to hold MNCs responsible for the consequence in their remote dealings with contractors, and in supply chain relationships where they have oversight control or supervision.

5.2.3. The Netherlands

In January 2021, the Dutch Court of Appeal assumed jurisdiction over an oil spill case from Nigeria involving some Nigerians from the Niger Delta as plaintiffs, against Royal Dutch Shell (RDS), an MNC domiciled in the Netherlands and a parent company of Shell Petroleum Development Company of Nigeria (SPDC).[87] The Plaintiffs claimed damage resulted from an oil spill in 2005 from a pipeline near the village of Oruma in Nigeria. The Plaintiffs contended that oil supply in the leaking pipeline could have been shut down sooner if Shell had provided a Leak Detection System (LDS). For its failure to provide the LDS system, the plaintiffs claimed jointly and severally against the SPDC and its parent company (RDS).

The Court of Appeal held RDS responsible for failure to discharge its duty of care owed to the plaintiffs. This duty arises from RDS' policy statements on environmental and

[87] *Fidelis Ayoro Oguru v Shell Petroleum NV* (2021) ECLI:NL: GHDHA: 2021:132, online:<https://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:GHDHA:2021:132>. For an analysis of this decision and its sister cases, see Daniel Bertram, "Transnational Experts Wanted: Nigerian Oil Spills before the Dutch Courts" (2021) 33 Journal of Environmental Law 423.

health standards for Shell's corporate group. Consequently, the court held SPDC liable for the 2005 oil spill due its failure in its oversight management functions. The court also ordered both RDS and SPDC to equip and maintain the pipelines in the Oruma village with an LDS. The court found that the Nigerian law on negligence, which is the applicable law in this case, is similar to the one laid down in the *Vedanta decision.* Therefore, it adopted the duty of care analysis in *Vedanta* to reach its decision. This case is significant because it shows that courts (at least, those in Europe) are increasingly permeating territorial barriers to hold MNCs accountable. For example, in 2015, SPDC objected to the jurisdiction of the court, arguing that the Hague is not the proper forum because both the parent and subsidiary company cannot be sued in the Netherlands.[88] The court rejected this argument based on the combined provisions of the *Brussels I Regulation* (applicable in the European Union)[89] and the *Dutch Code of Civil Procedure*.[90] Article 2 of the *Brussels I Regulation* states that persons domiciled in a Member State shall be sued in the court of that Member State. Article 60 states that a company is domiciled at the place where it has its statutory seat. Since RDS' seat is in The Hague, it falls under the scope of the Regulation. Also, article 7(1) *Dutch Code of Civil Procedure* allows a court to hear a case against a defendant that is not within its jurisdiction, provided the claim is in such a way related to the claim of the defendant over which the court does have jurisdiction (in this instance, the claim against RDS). Therefore, the court held that it is efficient to assume jurisdiction over both companies. This shows that court rules in some jurisdictions are

[88] See Court of Appeal The Hague 17 December 2015, ECLI:NL:GHDHA:2015:3586 (Dooh/Shell); Court of Appeal The Hague 17 December 2015, ECLI:NL:GHDHA:2015:3587 (Shell/Akpan); Court of Appeal The Hague 17 December 2015, ECLI:NL:GHDHA:2015:3588 (Oguru-Efanga/Shell).

[89] *Regulation (Eu) No 1215/2012 of The European Parliament and of the Council* of 12 December 2012, online:<https://eurlex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2012:351:0001:0032:en:PDF>.

[90] *The Dutch Code of Civil Procedure*, 2019, online:<www.dutchcivillaw.com/civilprocedureleg.htm>.

evolving to create a conducive procedural environment in which the CR2R norm can thrive.

Similarly, in *Vereniging Milieudefensie v Royal Dutch Shell PLC(RDS)*,[91] the Dutch High Court, in May 2021, expressly adopted and followed the UNGPs to hold RDS responsible for its contribution to harmful greenhouse gas and their global impacts. The court declared the UNGPs as a "suitable guideline in the interpretation of the unwritten standard of care."[92] It noted that MNCs do not need to expressly adopt the UNGPs before they are bound by them because the content of the UNGPs is universally endorsed.[93] The court held that corporations are responsible for actions taken (or not taken) in their value chain relationships where they maintain control, leverage, or supervision. The court found that the defendant has control over the Shell corporate group and suppliers. Therefore, it held that RDS is responsible for the harmful CO2 emissions that arose from its value chain relationship.[94] This judgement is significant. It is the first time that a court expressly adopted and applied the CR2R norm as prescribed in the UNGPs. Second, it is the first time that a court has held an MNC responsible for harmful emissions causing climate change. The court ordered RDS to reduce the C02 emissions of the Shell corporate group by a net 45% by 2030. Third, the court interpreted the meaning of MNCs' "activities" as stated in UNGPs to include emissions. This way, it extended the scope of MNC's business responsibility as set out in the UNGPs to international climate responsibility.

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[91] *Vereniging Milieudefensie v Royal Dutch Shell PLC(RDS)*Case No: ECLI:NL: RBDHA:2021:5339, online:<https://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:RBDHA:2021:5339&showbutton=true&keyword=shell>.
[92] *Ibid* at para 4.4.11.
[93] *Vereniging Milieudefensie v Royal Dutch Shell PLC, supra* note 91.
[94] In apportioning responsibility, the court distinguished the level of responsibility for scope 1 and 2 emissions from scope 3. The court order means that Shell must cut emissions created by its customers (Scope 3) and suppliers, a move likely to impact the kinds of products it sells.

5.2.4. The United States

Apart from Canadian, UK, and Netherlands cases, there are developments in the United States that suggest that the US courts recognize corporate liability under international law. In 2013, the US Supreme Court in *Kiobel v Royal Dutch Petroleum Co* held that the plaintiffs who are outside the US cannot rely on the Alien Tort Statue [ATS] to sue parent companies in US courts.[95] Although ATS gives federal courts jurisdiction to hear lawsuits filed by non-U.S. citizens for torts committed in violation of international law, the court held that there is a presumption that the ATS cannot be applied extraterritorially due to the US foreign policy of non-interference in other states. However, the court noted that the presumption against extraterritoriality can be displaced when claims "touch and concern the territory of the United States... with sufficient force." This decision was followed in *Daimler AG v Bauman*,[96] and *Jesner v Arab Bank*.[97] However, the recent Supreme Court decision in *Nestle US Inc. v Doe* has clarified the decision in *Kiobel* and the status of MNCs in international law. In *Nestle*, the issue was whether a claim against Nestle on aiding and abetting slavery and inhumane practices in Ivory Coast can overcome the extraterritoriality bar earlier set in *Kiobel* and *Jesner*. Another question was whether the Court has the power under the ATS to impose liability on domestic corporations like Nestle.

The plaintiffs, in this case, are formerly enslaved children who were kidnapped and forced to work on cocoa farms in the Ivory Coast for up to fourteen hours without pay.

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[95] *Kiobel v Royal Dutch Petroleum Co,* 569 *U.S.* 108 (2013). See also see Rachael Chambers & Gerlinde Berger-Walliser, "The Future of International Corporate Human Rights Litigation: A Transatlantic Comparison" (2021) 58:3 American Business Law Journal 579.
[96] *Daimler AG v Bauman,* 571 *U.S.* 117 (2014).
[97] *Jesner v Arab Bank,* 138 S. Ct. 1386 (2018).

They alleged that Nestle was complicit in the human rights abuse they suffered because it was aware or ought to be aware that child slave labor is a problem in the Ivory Coast. Yet, Nestle continued to provide financial support and technical farming aid to farmers who use forced child labor. In effect, the case was about Nestle's aiding of farmers in their cocoa production, though there is no value chain relationship between them and the farmers. The District Court did not agree with the plaintiffs' claim, but the Court of Appeal for the Ninth Circuit allowed it, holding that corporations are triable under the ATS for human rights abuses committed abroad. Nestle appealed to the US Supreme Court.[98] At the Supreme Court, arguments similar to those put before the Supreme Court of Canada in *Nevsun*, were advanced by the defendants. They argued that corporations are not triable under customary international law. Specifically, the court was asked to determine whether there is a universal and obligatory international law norm of corporate liability that fully applies to US domestic corporations.

The Supreme Court delivered its Judgment in June 2021.[99] On the question whether corporations are amenable to the jurisdiction of ATS and international law's obligatory norms, the court held that a corporate status does not justify immunity. Therefore, it is irrelevant whether the defendant in the ATS suit is a corporation or not.[100] On the second question whether Nestle triggered the ATS, the court answered the question in the negative.

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[98] *Nestle Inc US v John Doe*, et al,S.Ct 593 (2021) online:<https://ballotpedia.org/Nestl%C3%A9_USA_v._Doe_I#>. For an analysis of the decision, see Desiree LeClercq, "Nestle United States, Inc. v. Doe. 141 S. Ct. 1931" (2021) 115:4 American Journal of International Law 694.

[99] *Nestle Inc US v John Doe*, *ibid*.

[100] *Ibid*. Justice Gorsuch noted that "[n]othing in the ATS supplies corporations with special protections against suit. The statute specifies which plaintiffs may sue ("alien[s]"). It speaks of the sort of claims those plaintiffs can bring ("tort[s]" in "violation of the law of nations or a treaty of the United States"). But nowhere does it suggest that anything depends on whether the defendant happens to be a person or a corporation."

Following its decision in *Sosa* v *Alvarez-Machain*,[101] the court held that courts cannot create a cause of action outside those laid down by specific statutes in the United States. Since there is no specific statute that creates a cause of action for aiding and abetting transnational human rights abuses, judges cannot create or sustain this cause of action under the ATS. This is because a cause of action created by judges has foreign policy implications under the ATS.[102] For example, in the present case, Thomas J, writing for the majority, noted that the relationship between Nestle and farmers in Ivory Coast is that of a partnership where Nestle provides technical aid to the farmers. Therefore, holding Nestle liable for such activities means that corporations may be reluctant to perform intergovernmental activities for fear that those activities may subject them to private suits. In effect, the Supreme Court held that Nestle did not trigger any tort action recognized under ATS, and judges cannot create a new cause of action to cover this gap.

The decision of the Supreme Court is significant on two levels. First, it sets the threshold for plaintiffs to meet when suing corporations under the ATS jurisdiction. Second, like previous Supreme Court cases, it delimits the causes of action under the ATS to actions contrary to international law norms that are specific, universal, and obligatory. The decision also delimits actions that qualify under the ATS. The court held that pleading general corporate activity or presence in a foreign jurisdiction without pleading domestic corporate conduct in the United States is not enough to sustain an action under the ATS. Though the Supreme Court dismissed the case, its recognition of corporate liability in international law indirectly promotes the CR2 norm. Notwithstanding the US court's restrictive foreign policy approach, it is a matter of time before a plaintiff meets the

[101] *Sosa* v *Alvarez-Machain* 542 U. S. 692, 732 (2004).
[102] *Nestle Inc US v John Doe*, *supra* note 98.

requirements of ATS. This is because there are precedents that set the threshold to trigger the ATS jurisdiction.

Apart from the Supreme Court cases, other courts have mentioned or referred to the UNGPs. For example. the U.S. District Court for the District of Delaware (in the Third Circuit) mentioned the UNGPs in its Memorandum Opinion in *Acuna-Atalaya v. Newmont Mining Corp.*[103] Although the court did not rely on the CR2R norm, it acknowledged the UNGPs' overarching theme of corporate reform. The First Circuit court made a similar reference in *Tomasella v. Nestlé USA, Inc. et al*.[104] The plaintiff alleged that the defendant's supply chain activities offended established and internationally recognized public policies (including the United Nations' 1948 Universal Declaration on Human Rights). Although the court did not rely on the UNGPs or any soft law, in a footnote, the court restated the UNGPs' human rights due diligence requirements, which is one of the ways companies adopt the CR2R norm. Similarly, parties have cited the UNGPs in submissions before courts. For example, parties' submissions referenced the UNGPs in *Wirth v Mars, Inc.,*[105] *Hodsdon v Mars, Inc.,* and *Calhoun v Google.*[106] Although courts have not adopted or commented on these submissions, their increasing references to the UNGPs indirectly point to the uptake of the CR2R norm by litigating parties in the United States.[107]

5.2.5. Courts in Africa

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[103] *Acuna-Atalaya v. Newmont Mining Corp*, No. 20-1765, 2020 WL 7311315 (3d Cir. Dec. 11, 2020).
[104] *Tomasella v. Nestlé USA, Inc.*, 962 F.3d 60, 67 (1st Cir. 2020).
[105] *Wirth v Mars, Inc* (2015) WL 6087455, at 6. This case was cited in Debevoise & Plimpton, UN Guiding Principles on Business and Human Rights at 10: The Impact of the UNGPs on Courts and Judicial Mechanisms (2021) at 203.
[106] *Calhoun v. Google LLC*, (2020) WL 4368895 (N.D. Cal.) (No. 5:20-CV-05146).
[107] Briefs filed by persons who are not parties to the suit, for example, *Amicus Curiae* have also referenced the UNGPs. See, e.g., the *Amicus Curiae* Brief filed before the Supreme Court in *Nestle v Doe*, *supra* note 86, online:<www.supremecourt.gov/DocketPDF/19/19-416/158368/20201021124552826_Nestle%20Amicus%20Brief.Final.October.20.2020.pdf>.

African courts have made limited references to the UNGPs or the CR2R norm. However, there are still instances where corporations have been held accountable for their contribution to human rights abuses and environmental degradation. For example, in 2021, the Nigerian High court, Federal Capital Territory Division, found the 2nd defendant liable in tort in *Obong Effiong Archiang & Ors v Nigerian National Petroleum Corporation, Mobil Producing Nigeria Unlimited, & Exxon Mobil Corporation (5959) Las Conilas Boulevard Irving Texas, United States of America (USA).*[108] The first defendant is a Nigerian State-owned enterprise, the second defendant is a subsidiary of the 3rd defendant operating under a joint agreement with the NNPC. The plaintiffs claimed against the defendants for their negligence in oil spillage from a pipeline causing environmental harm in the Niger Delta Region of Nigeria. The court found in favour of the plaintiffs, and the case is significant because it analyzed parent-subsidiary relationships.

The court was influenced by the UK Supreme Court decision in *Vedanta* because there was no Nigerian precedent that touches directly on how to establish liability arising from a parent-subsidiary company relationship.[109] Since the CR2R norm may have indirectly influenced the decision in *Vedanta*, the norm may have also indirectly influenced the Nigerian court decision. Like in *Vedanta,* the court held that a parent company domiciled outside Nigeria may be subject to the jurisdiction of Nigerian courts if the plaintiffs adequately plead facts showing that the parent company exercises control and supervision over the subsidiary company in Nigeria. However, the necessary facts were not pleaded in this case to show that the US parent company exercises such control and

[108] *Obong Effiong Archiang & Ors v Nigerian National Petroleum Corporation, Mobil Producing Nigeria Unlimited, & Exxon Mobil Corporation (5959) Las Conilas Boulevard Irving Texas, United States of America (USA) Unreported Suit No FHC/ABJ/CS/54/12. (*A copy of the judgment is on file with the author).
[109] *Ibid* at 119. The court also referenced *Oguru v Shell, supra* note 87.

supervision over the Nigerian subsidiary company. As the court rightly noted, holding a parent company liable in Nigeria may help the plaintiffs to enforce the judgement against parent companies who are often financially capable of satisfying the judgment sum. In effect, Nigerian courts may be treading the same paths as their counterparts in the UK and the Netherlands.

There is also a limited reference to the CR2R norm in South Africa. In 2015, the South African Appellate Court, in *University of Stellenbosch Legal Aid Clinic and Ors v Minister of Justice and Correctional Services and Ors,* cited the UNGPs when it held that a garnishment law was unconstitutional because it does not adequately protect human rights, which states should protect under pillar I of the UNGPs.[110] The Court noted that "while reports of the UN General Assembly and Human Rights Council are not binding, they are highly persuasive and generally express the current consensus among States."[111] However, there are no reported authorities on the application of the CR2R norm to ground the civil liability of MNCs in South Africa.[112] Similarly, the UNGPs have only been mentioned once by the Kenyan courts in the case of *Kenneth Gona Karisa v. Top Steel Kenya Limited*.[113] The Kenyan constitutional court referred to the UNGPs while summarizing the petitioner's arguments. However, the court did not rely on the UNGPs in its reasoning. In sum, compared to counterparts in Europe and North America, there has been less reported cases in Africa that reference the CR2R norm.[114]

5.2.6. Regional Courts

[110] *University of Stellenbosch Legal Aid Clinic and Ors v Minister of Justice and Correctional Services and Ors* [2015] ZAWCHC 99.
[111] *Ibid* at para 73.
[112] See Debevoise & Plimpton, *supra* note 105 at 47.
[113] *Kenneth Gona Karisa v. Top Steel Kenya Limited* [2020] eKLR 1.
[114] See Debevoise & Plimpton, *supra* note 105.

Regional courts, especially in the Americas, have made references and applied the UNGPs. These decisions hold states liable for failure to protect human rights. For example, in 2020, the Inter-American Court of Human Rights (IACHR) referenced the UNGPs in *The Kaliña and Lokono People v. Suriname.*[115] The IACHR, relying on pillar I of the UNGPs, held that Suriname's mining concession to a mining company, Suralco, without prior supervision of, and an independent social and environmental impact assessment violates the state's responsibility to protect human rights. Similarly, the court referenced the CR2R norm in its statement on the role of corporations to prevent human rights abuse. The court noted that "businesses must respect the human rights of members of specific groups or populations, including indigenous and tribal peoples, and pay special attention when such rights are violated."[116] Although the court did not hold the company accountable, this pronouncement on the CR2R norm supports the argument in this thesis that there is continued recognition of the norm.

Similarly, in *Spoltore v. Argentina*, the IACHR in 2020 held that the plaintiff has a right to fair and satisfactory working conditions.[117] In its concurring judgment, the court clarified the status of the UNGPs in the IACHR's legal framework by noting that "[t]his Court has incorporated into its juridical reflections the 'Guiding Principles on Business and Human Rights."[118] Like in *The Kaliña and Lokono People v. Suriname,* the court also referred to the state duty to protect human rights and the corporate responsibility to respect

[115] *The Kaliña and Lokono People v Suriname*, IACtHR Series C No. 309, Judgment on Merits, Reparations and Costs, 25, November 2015, online:<www.lexology.com/library/detail.aspx?g=7ec1f0fb-405e-4e1d-b7c9-94add086884a>.
[116] *Ibid* at 226.
[117] *Spoltore v Argentina*. Preliminary Objections, Merits, Reparations and Costs. Inter-Am. Ct. H.R. (ser. C) No. 404 (June 9, 2020), online:<www.corteidh.or.cr/docs/casos/articulos/seriec_404_ing.pdf>.
[118] *Ibid* at 3.

human rights. These two cases have a normative significance. First, they represent the few cases where the UNGPs has been recognized and cited with judicial approval in a regional court. Second, they provide a precedent for future cases brought before the IACHR and may be a catalyst for other domestic courts in the region and beyond to consider the normative value of the UNGPs.

Overall, the cases examined in this section show that there are growing domestic and regional procedural rules, analysis, doctrinal interpretations that are breaking territorial barriers, and corporate law doctrines (corporate separability) that MNCs often rely on to evade accountability. Also, the examples above show that some courts are beginning to understand the foundational values and spirit behind the UNGPs, especially the CR2R norm—while some courts directly reference it in their decisions, others do so indirectly. It is, therefore, safe to say that the norms of the UNGPs are diffusing through the courts in different jurisdictions slowly but steadily.

5.3. Normativizing CR2R: The Prospect of ECCJ's Contribution

A question that follows from the growing recognition of the CR2R norm is whether, if the ECCJ is presented with another opportunity like *SERAP*, it would still conclude that as a matter of international law, CR2R has not reached a stage for its recognition as a rule of that legal regime. From the growing normativity of the CR2R norm, it will not be difficult for the ECCJ to make a pronouncement on the CR2R norm, even if it is just a reference to the role of MNCs as the Inter-American Court did. However, the court would still have to determine whether it has jurisdiction over MNCs and SOEs to make such pronouncements. This thesis contends that although the court may decline jurisdiction over

MNCs, it should not do so for SOEs. The ECCJ should revisit its position on the jurisdiction of non-state actors, especially SOEs in the business and human rights context.

The position of the court has been that only member states who are signatories to the ECOWAS treaty can be sued before the court. For example, in *Nancy Bohn-Doe v Liberia*, the plaintiff sued Liberia together with the Central Bank and Attorney General of Liberia.[119] The court struck out the latter two defendants because they are not "principal subjects of international law."[120] The court noted that since the Central Bank and Attorney General are not signatories to the African Charter on Human and Peoples' Rights nor the Universal Declaration of Human Rights, they cannot be defendants in the ECCJ, not even as a nominal party. This decision flows from the Court's holdings in a line of cases, including, *Peter David v Ambassador Ralph Uwechue*[121] and *Tandja v Djibo and another*,[122] that only states can be sued for alleged human rights violations.[123]

The ECCJ's blanket prohibition of non-state actors because they are not "principal subjects" of international law narrows the mandate and normative influence of the court. Over the years, the court has maintained a reputation as a human rights promoter by delivering landmark judgments that shape the human rights jurisprudence in West Africa and beyond.[124] The case of *Hadijatou Mani Koroua v Niger* is an example of a situation where the court engaged its human rights jurisdiction.[125] The court held that the state of

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[119] *Nancy Bohn-Doe v Liberia* (judgment No. ECW/CCJ/JUD/12/19).
[120] *Ibid*.
[121] *Peter David v Ambassador Ralph Uwechue* (ECw/CCJ/RUL/03/10).
[122] *Tandja v Djibo & Anor*, Unreported Suit no ECW/CCJ/05/10.
[123] This position has been critiqued as one that narrows the ECCJ's economic and human rights mandate. See generally Enyinna Nwauche, "The ECOWAS Community Court of Justice and the Horizontal Application of Human Rights" (2013) 13African Human Rights Law Journal 30.
[124] See Segnonna Adjolohoun, "The Ecowas Court as a Human Rights Promoter? Assessing Five Years' Impact of the Koraou Slavery Judgment" (2013) 31:3 Netherlands Quarterly of Human Rights 342.
[125] *Hadijatou Mani Kouraou v The Republic of Niger*, *supra* note 60 at para 45, This case was followed by the recent ECCJ decision in *Fodi Mohammed v Niger*, suit no *ECW/CCJ/APP/27/19, online:< https://ihrda.uwazi.io/en/entity/pcaiwdusd5?page=5>*.

Niger violated its international obligations to protect *Hadijatou Mani* from slavery. The case is significant on three levels. It was the first time that a case on slavery was brought and won at the international level.[126] Second, it was the first case to expose and condemn the practice of slavery in Niger, which is widespread and yet unacknowledged.[127] Third, the court reached this decision by relying on international law principles and applying decisions from other courts, including the European Court of Human Rights (ECtHR). The decision of the court was historic[128] and it shows that the ECCJ is not shy to exercise its human rights mandate. Beyond *Hadijatou*'s case, the ECCJ became a promoter of an anti-slavery norm. The decision influenced legislation, domestic court decisions, and government policies in African counties, including Niger, Mali, and Mauritania.[129] This shows the normative character and strength of ECCJ decisions.

The reputation of the ECCJ necessitates examining whether the court should revisit its position on non-state actors in the BHR context. The next section examines how SOEs may be classified to determine their responsibility before sub-regional courts like the ECCJ. First, it examines the International Law Commission's work in the *Draft Articles on Responsibility of States for Internationally Wrongful Acts* (ARSIWA) to draw practical guidance from the requirements for attributing the actions of SOEs to states. Second, it examines the growing literature on how SOEs are classified under the UNGPs. It then draws larger conclusions based on the analysis from ARSIWA and UNGPs for possible guidance on future cases like *SERAP* before the ECCJ or any regional court in Africa.

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[126] Helen Duffy, "Human Rights Cases in Sub-regional African Courts: Towards Justice for Victims or Just More Fragmentation?" in Van den Herik and Stahn, eds, *The Diversification and Fragmentation of International Criminal Law* (Netherlands, Brill Publishing, 2012) 163.
[127] *Ibid.*
[128] Helen Duffy, "Hadijatou Mani Koroua v Niger: Slavery Unveiled by the ECOWAS Court" (200) 9:1 Human Rights Review 151.
[129] *Ibid* at 364-367.

5.4. Attributing Human Rights Abuse Responsibility: International Law Guidance & UNGPs Perspectives

In international law, the attribution of human rights responsibility to SOEs is usually not clear-cut. This is because the establishment of SOEs, usually by legislation, does not automatically generate state responsibility.[130] In some human rights cases, it is not always clear whether to determine that the conduct of SOEs can be attributed directly to states. To resolve this dilemma demands identifying the criteria by which to determine the extent of SOEs' liability. Doing so would ensure that decisions on SOE liability are not capricious or arbitrary but are paired to applicable legal factors. This thesis classifies the tools by which courts may be guided in this attribution exercise into two—an international instrument, the *Draft Articles on Responsibility of States for Internationally Wrongful Acts* (ARSIWA) and the UNGPs—a soft law. To be clear, this section answers the question of whether a non-state actor's (SOEs) conduct can be attributed to the state as an agent that receives instructions or is controlled by the state. If the question is answered positively, then, it is argued that SOEs have obligations in international law, which should make them amenable to the ECCJ jurisdiction.

5.4.1. Draft Articles on Responsibility of States for Internationally Wrongful Acts (ARSIWA)

The International Law Commission adopted ARSIWA at its fifty-third session in 2001.[131] The purpose of the Draft Articles is to provide guidance regarding the responsibility of states in international law. At its 85th Plenary meeting in 2001, the United Nations took note of the Draft Articles and commended the International Law

[130] Judith Schönsteiner, "Attribution of State Responsibility for Actions or Omissions of State-owned Enterprises in Human Rights Matters" (2019) 40:4 University of Pennsylvania Journal of International Law 895 at 903.
[131] ARSIWA, *supra* note 74.

Commission's efforts.[132] Although ARSIWA has not been adopted to the status of Convention, it is nevertheless considered to represent an accurate codification of the customary international law on state responsibility.[133]Therefore, notwithstanding some debates on the status of ARSIWA,[134] its non-elevation to the status of a Covenant does not detract from its influence in international law.[135]

Article 1 of ARSIWA states that "every international wrongful act entails the international responsibility of that State." This provision is broad because it means that state responsibility could arise for any acts or omissions that may be contrary to their obligations under international law, including human rights violations. However, the attribition of the conduct of individuals and corporations to the state, giving rise to state responsibility is the focus of this thesis. Since ARSIWA contains a "logic similar to that of vicarious liability in domestic law,"[136] it is important to examine the logic behind states' liability through the actions or omissions of SOEs.

Article 4 of ARSIWA generally attributes the conduct of a state organ to a state under international law.[137] Conducts of state organs—executive, legislature, and

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[132] United Nations, Resolution adopted by the General Assembly on the Report of the Sixth Committee (A/56/589 and Corr.1), A/RES/56/83 (28 January 2002), online: <www.refworld.org/pdfid/3da44ad10.pdf>.
[133] Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro) (International Court of Justice, Judgment, ICJ Reports 2007) at 168, online:<www.icj-cij.org/public/files/case-related/91/091-20070226-JUD-01-00-EN.pdf>.
[134] See Sara L Seck, "Conceptualizing the Home State Duty to Protect Human Rights" in Karin Buhman, Mette Morsing, & Lynn Roseberry, eds, *Corporate Social and Human Rights Responsibilities: Global Legal and Management Perspectives* (Palgrave Macmillan, 2011) 25.
[135] Indeed, Caron argues that ARSIWA could be more influential as an ILC text than a multilateral treaty. See David D Caron, "The ILC Articles on State Responsibility: The Paradoxical Relationship between Form and Authority" (2002) 96 American Journal of International Law 857 at 857.
[136] Eric Posner and Alan Sykes, "An Economic Analysis of State and Individual Responsibility under International Law" (2007) 9 American Law & Economics Review 72 at 72.
[137] ARSIWA, *supra* note 74. It states that "[t]he conduct of any State organ shall be considered an act of that State under international law, whether the organ exercises legislative, executive, judicial or any other functions, whatever position it holds in the organization of the State, and whatever its character as an organ of the central Government or of a territorial unit of the State."

judiciary—are automatically considered as state actions because these are channels through which states carry out their constitutional duties. The state organs do not perform commercial activities as their principal aim is to discharge constitutional responsibilities. Article 4 aligns with the principle that the acts or omissions of all state organs should be regarded as acts or omissions of the State for the purposes of international responsibility.[138] Therefore, it is not difficult to attribute their actions to states because they have a joint constitutional mandate. However, article 4 does not cover actions of non-state actors owned and controlled by the state in furtherance of its public functions.

Articles 5 and 8 of ARSIWA provide some of the criteria to be met in order to attribute non-state actors' conduct to states.[139] Article 5 provides that the conduct of any person or entity that does not qualify as a state organ (under Article 4) can be attributed to a state if the entity or person is empowered by the laws of the state to exercise elements of governmental authority. However, for this Article to be triggered, the entity or person must be acting in a governmental capacity.[140] The commentary to Article 5 clarifies that "parastatal entities" that exercise elements of governmental authority will qualify as an SOE, as well as former state corporations that have been privatized but retain certain public or regulatory functions.[141] In effect, Article 5 is not based on the status of the government agency but the exercise of a government authority.[142] The commentary also defines the

[138] ARSIWA, *supra* note 74 at 40.
[139] *Ibid*.
[140] *Ibid*. It states that "[t]he conduct of a person or entity which is not an organ of the State under article 4 but which is empowered by the law of that State to exercise elements of the governmental authority shall be considered an act of the State under international law, provided the person or entity is acting in that capacity in the particular instance."
[141] *Ibid* at 43.
[142] See Robert McCorquodale & Penelope Simons, "Responsibility Beyond Borders: State Responsibility for Extraterritorial Violations by Corporations of International Human Rights Law" (2007) 70:4 The Modern Law Review 598 at 607.

term "entity" to include public corporations, semi-public entities, public agencies of various kinds, and private companies, provided the private company is empowered by the law of the state to exercise functions of a public character normally exercised by state organs.[143] The condition that private companies should exercise public functions similar to a state organ is unclear because Article 5 does not define the scope of the government authority required for the attribution of an SOE conduct to the state. However, the commentary clarifies that matters that could be considered to determine the scope include: (1) the way powers are conferred on an entity; (2) the purposes for which the powers are to be exercised; and (3) the extent to which the entity is accountable to the government for their exercise.[144]

Article 8 offers a more remote attribution of private actors conduct to the state. It provides that an individual's actions may still be attributed to the state where the person, though not formally employed by the state, is acting for, or under the instruction of the state.[145] The most important test for analysis under Article 8 is whether the government has an "effective control" over SOEs.[146] Therefore, Article 8 is triggered where there is a form of state control, notwithstanding that the person or group of persons that are acting was not commissioned for state purposes.[147] An example is where states' instructions to paramilitary groups or supernumerary police result in human rights abuse.[148] Such conduct

[143] ARSIWA, *supra* note 74 at 43.
[144] *Ibid*.
[145] *Ibid* at 47.
[146] This is commonly referred to as the Nicaragua test of effective control. See Military and Paramilitary Activities (Nicar. v. U.S.), Merits, 1986 I. Court of Justice 14 at 115, cited with approval in Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosn. & Herz. v. Serb. & Mont.) 2006 International Court of Justice 91 at 399.
[147] See Seck, *supra* note 134 at 44.
[148] See Caroline Kaeb, "Emerging Issues of Human Rights Responsibility in the Extractive and Manufacturing Industries: Patterns and Liability Risks" (2008) 6:2 Northwestern Journal of International Human Rights 327. See also Amnesty International, *A Criminal Enterprise? Shell's Involvement in Human*

may be attributed to the state under Article 8. It is not clear whether corporations can fall under Article 8 since it only refers to "persons." However, it is arguable that the definition of "persons" in international law may include corporations who enjoy legal personality.[149] Indeed, the African Human Rights Commission defines the category of persons included in ARSIWA to mean

> individuals, organisations, institutions and other bodies acting outside the State and its organs. They are not limited to individuals since some perpetrators of human rights abuses are organisations, corporations or other structures of business and finance, as the research on the human rights impacts of oil production or the development of power facilities demonstrates.[150]

A combined interpretation of Articles 5 and 8 shows that for states to be responsible for an SOE's conduct, the plaintiff must show that the state has exercised authority or showed effective structural control over the SOE.[151] Elements of structural control are non-exhaustive. They include factors such as states' voting rights in the SOE, the right to nominate or withdraw leading executives, and reporting and accountability obligations of state officials.[152] As Schönsteiner argues, it is also important to consider whether the SOE is carrying out states' obligation to fulfil human rights. [153] For example, SOEs' provision of clean water, health, and environmental protection are indicators of government control.

Rights Violations in Nigeria in the 1990s (Amnesty International Brief, 2017), online: Amnesty International<www.amnesty.org/download/Documents/AFR4473932017ENGLISH.PDF>.

[149] See generally Roland Portmann, *Legal Personality in International Law* (Cambridge, UK: Cambridge University Press, 2010).

[150] See Zimbabwe Human Rights NGO Forum v Zimbabwe, Communication 245/02, Annexure 3 to the African
Commission on Human and Peoples' Rights, 21st Activity Report (July– December 2006) at Par 136, online: ACHPR<www.achpr.org/public/Document/file/English/achpr39_245_02_eng.pdf>.

[151] See Schönsteiner, *supra* note 130 at 910; Jonas Dereje, *Staatsnahe Unternehmen. Die Zurechnungsproblematik im Internationalen Investitionsrecht und weiterenBereichen des Völkerrechts* (Baden-Baden: Nomos, 2015) at 405.

[152] Dereje, *ibid* at 410-412.

[153] Schönsteiner, *supra* note 130 at 936.

This argument may be extended to say that SOEs that perform human rights risk management oversight functions in an industry whose activities can harm the public may be an SOE because they fulfil the state's obligation to protect human rights.[154] In sum, state control of the SOEs is the most important factor by which to determine whether an SOE's conduct is attributable to the state.

5.4.2. The Status of SOEs—ARSIWA and The UNGPs

Principle 14 of the UNGPs provides that the CR2R norm applies to all enterprises regardless of their size, sector, operational context, ownership, and structure. However, the UNGPs does not mention SOEs in pillar II that embodies the CR2R norm. Rather, it refers to SOEs in pillar I which relates to states' duty to protect human rights. As stated in chapter 1, pillar I—the state duty to protect human rights—is a restatement of states' obligations under international law. This thesis examines two Principles (4 and 5), which pillar I used in conceptualizing the "state-business nexus." The purpose is to show that Pillar I mirrors the provisions of ARSIWA. Therefore, the UNGPs is also a useful guidance tool to interpret SOEs' responsibilities in the business and human rights context.

Under the "state-business nexus," Principle 4 provides that states should take additional steps to protect against human rights abuses by businesses that are owned or controlled by the state by requiring them to undertake human rights diligence. The condition to trigger state protection is that the company must be controlled or owned by the state. The commentary to Principle 4 explains that "[w]here a business enterprise is controlled by the State or where its acts can be attributed otherwise to the State, an abuse

[154] See generally Mikko Rajavuori "How Should States Own? Heinisch v. Germany and the Emergence of Human Rights-Sensitive State Ownership Function" (2015) 26:3 The European Journal of International Law 727.

of human rights by the business enterprise may entail a violation of the State's own international law obligations."[155] This is because states must exercise oversight and regulatory functions over the activities of SOEs to ensure that they undertake human rights due diligence.

Principle 4 and its commentary mirrors Articles 5 and 8 of ARSIWA because it identifies the test for attributing SOEs' actions to states—state ownership and control. States must take additional steps to protect human rights whenever SOEs engage in a business relationship, even if the state is merely a shareholder with no actual control of the business.[156] This is because the principle applies in either direct or indirect state ownership. An example of indirect ownership could occur where the state is a minority shareholder of a company, or, in extreme cases, where completely independent businesses receive support and services from an SOE.[157]

Principle 5 of the UNGPs also provides that "[s]tates should exercise adequate oversight to meet their international human rights obligations when they contract with, or legislate for, business enterprises to provide services that may impact upon the enjoyment of human rights."[158] The commentary to this principle explains that states have human rights obligations even when SOEs are privatized.[159] This principle implies that the "private" status of the SOEs is immaterial in attributing SOE's action to states. It mirrors Article 5 of ARSIWA which provides that the state's exercise of an oversight function is a

[155] United Nations Guiding Principles on Business and Human Rights [UNGPs] at 7.
[156] Mihaela Barnes, "The United Nations Guiding Principles on Business and Human Rights, the State Duty to Protect Human Rights and State-Business Nexus" (2018) 15:2 Brazilian Journal of International Law 42 at 49.
[157] *Ibid* at 49.
[158] UNGPs, *supra* note 155 at 9.
[159] Barnes, *supra* note 156 at 50.

key factor in the attribution process.[160] For example, a privatized national oil company or military will fall under this category.[161] In sum, if companies provide a public good or have the capacity to contribute to human rights abuse, their actions could be attributed to states.

International human rights jurisprudence arising from the European Court of Human Rights (ECtHR) further clarifies the provisions of the UNGPS and ARSIWA. For example, in the *Islamic Republic of Iran Shipping vs Turkey*, the court considered the meaning of "non-governmental organization" as stated in Article 34 of the *European Convention on Human Rights*.[162] It held that when considering whether an SOE's conduct can be attributed to a state, the court will assess: (1) SOE's legal status and the rights that the status gives to the SOEs; (2) nature of the SOE's activity and the context in which it is carried out; and (3) degree of the SOE's independence from political authorities.[163] The court also stated that SOEs carrying out commercial activities and who are subjected to the ordinary laws of the state will not meet the requirement of state attribution. Similarly, SOEs that do not exercise government powers do not meet the requirements of state attribution.[164] Also, a corporation that does not enjoy a monopoly in the production of public services will not meet the requirement of state attribution.[165] In another decision, the ECtHR held that the non-applicability of insolvency laws to SOEs suggests attribution of state

[160] Barnes, *supra* note 156 at 50.
[161] *Ibid* at 46.
[162] Article 34 provides that "[t]he 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…"
[163] *Islamic Republic of Iran Shipping vs Turkey* [2008] ECtHR Application no 40998/98, at para 79, online:<https://cdn.istanbul.edu.tr/FileHandler2.ashx?f=case-of-islamic-republic-of-iran-shipping-lines-v.-turkey.pdf>.
[164] *Ibid* at para 80. See also *Österreichischer Rundfunk v Austria* [2006] Application no 35841/02, online:< https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:62006CJ0195&from=en>.
[165] *Ibid*.

responsibility.[166] Also, the court noted in *Mykhaylenky v Ukraine* that where the SOE operates in a strictly regulated sector, such as nuclear energy, the ECtHR may attribute the SOE's actions to the state.[167] These cases show that the purpose of a company together with its relationship with the state plays an important role in the State-SOE attribution process.

However, it is important to examine whether SOEs only have a "responsibility" to respect human rights as in pillar II or an elevated "duty" to respect human rights as in pillar I. This issue arises partly because notwithstanding that the UNGPs refers to SOEs' responsibility in pillar I, it also subjects them to the CR2R norm under pillar II. Larry Backer suggests that Principle 4 could mean that SOEs have a dual role under the UNGPs—a duty to protect (pillar I) and a responsibility to respect human rights (pillar II).[168] This is because although SOEs carry out commercial activities, their management and control rest with states who are charged with the responsibility of protecting human rights. This interpretation may raise some complexities. For example, it will be difficult to know when a responsibility or duty arises. Arguably, a duty to protect is triggered when SOEs are performing a public function. However, the definition of a public function is problematic. In my view, the responsibility to respect could be merged into the duty to respect because the performance of a duty to respect would necessarily have obligatory implications, which comes with commitment. Indeed, Sara Seck agrees that

[166] *Luganskvugillya v Ukraine* [2009] Appl no 23938/05.
[167] *Mykhaylenky v Ukraine* [2004] Appl. Nos 35091/02, 35196/02, 35201/02, 35204/02, 35945/02, 35949/02, 35953/02, 36800/02, 38296/02, and 42814/02.
[168] Larry Catá Backer, "The Human Rights Obligations of State-Owned Enterprises (SOEs): Emerging Conceptual Structures and Principles in National and International Law and Policy" (2017) 50:4 Vanderbilt Journal of Transnational law 827 at 844-845. (SOEs occupy a dual place within the UNGP. They are to some extant an instrumentality of the state and thus potentially subject to the state duty to protect. At the same time they function as commercial ventures and are thus subject to the less legalized provisions of the corporate responsibility to respect").

"...international law imposes on SOEs an enhanced, rather than diminished, responsibility to respect human rights."[169]

Another approach to interpreting the UNGPs is to focus on the status of SOEs in international law—a purpose-centric approach.[170] Mihaela Barnes argues that SOEs are "sui generis" participants in international law because states confer this status on them, which makes them "limited" subjects of international law.[171] Barnes asserts that although SOE's have a corporate status, they are owned and controlled by the states. First, she acknowledges that SOEs operate both in the public and private domains.[172] However, although SOEs are created by domestic law and carry out commercial activities, they belong to the public domain because they are purposed to fulfil public interest. Also, she argues that usually, the purpose of an SOE is to keep the proprietary interest in the company with the public or regulate an industry by creating a monopoly with the SOE—elements that point to the public purpose of the company.[173] In effect, Barnes suggests that there is a false dichotomy between a public and private function of an SOE. Therefore, when SOEs are seen in the light of their public function, "the corporate 'responsibility' to respect human rights may be elevated to the level of a 'duty' in the case of SOEs."[174]

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[169] Sara Seck, "Revisiting Transnational Corporations and Extractive Industries: Climate Justice, Feminism, and State Sovereignty" (2017) 26:2 Transnational & Contemporary Problems 383 at 404. See also Schönsteiner, *supra* note 1308 at 895.
[170] Mihaela Barnes, *State-owned Entities and Human Rights: The Role of International Law* (Cambridge, UK: Cambridge University Press, 2021).
[171] *Ibid* at 54.
[172] *Ibid* at 69. Bilchitz describes the public and private domains as follows: "[a SOE is] an entity created through law with the goal of achieving social benefits (its "public dimension"); yet the entity itself is successful only insofar as it retains an ability to express individual self-interest and autonomy in conducting business in the best way possible to ensure satisfactory profits (its "private dimension")." See David Bilchitz, "Corporations and the Limits of State-Based Models for Protecting Fundamental Rights in International Law (2016) 23:1 Indiana Journal of Global Legal Studies 143 at 166.
[173] Barnes, *supra* note 170 at 88.
[174] *Ibid* at 50.

If SOEs have a duty to protect human rights as sui generis participants in international law, why should they not be amenable to the ECCJ jurisdiction, even as a nominal party? The argument is that due to the relationship between states and SOEs, SOEs are duty bearers in international law, a status that should make them subject to international law, and consequently, the ECCJ jurisdiction. Recognizing the relationship between SOEs and states, the United Nations Global Compact warns that "State-owned enterprises should be aware that because they are part of the State, they may have direct responsibilities under international human rights law."[175] Therefore, before concluding that SOEs do not have status in international law, it is only prudent to examine each SOE on a case-by-case basis with the guidance of ARISWA and the UNGPs in the business and human rights context.

Events that unfolded after *Afolabi*'s case show that the court is responsive to the need to promote human rights in Africa. Arguments made before the ECCJ in *Afolabi* are similar to the one made in this thesis for SOEs because they both invite the court to reconsider the role of traditional non-state actors before the court. Therefore, an invitation to reconsider its stance on SOEs to promote human rights in Africa aligns with the jurisdictional history of the court. This examination could be a step to promote the CR2R norm. Indeed, Xili Ma notes that focusing on the SOE-state attribution could be a "golden opportunity" to renew the opportunity to rethink corporate accountability in international law.[176] Although Ma cautions that the application of ARSIWA may sometimes be a difficult task, this thesis believes it is not an impossible one. The next sub-section examines what it would look like if the ECCJ conducts an ARSIWA analysis before concluding that

[175] UN Global Compact, *Principle Two: Human Rights*, online:<www.unglobalcompact.org/what-is-gc/mission/principles/principle-2>.
[176] *Xili* Ma, "Advancing Direct Corporate Accountability in International Human Rights Law: The Role of State-Owned Enterprises" (2019) 14:2 Frontiers of Law in China 233.

it does not have jurisdiction over non-state actors, like the NNPC.[177] The court did not make this analysis in *SERAP* before declining jurisdiction over NNPC. Therefore, this thesis asks the question whether the court can find NNPC's conduct attributable to Nigeria in the *SERAP's* case. To this end, the characteristics of NNPC are examined against the criteria set out in ARSIWA and the UNGPs and it is argued that Nigeria has effective control of the NNPC.

5.5. NNPC—Nigerian State-owned Enterprise

As at the time ECCJ decided the *SERAP* case, NNPC was established by an Act of the National Assembly—*Nigerian National Petroleum Corporation Act* (NNPC Act).[178] The Corporation has the attributes of a company, which include the power to own moveable and immovable properties, the ability to enter contracts or partnerships with any company, firm, or person, and to purchase and acquire property.[179] The NNPC is headed by a Board of Directors which consists of a Chairman and other appointed members. The Chairman is a Minister in the Nigerian government, known as Minister of Petroleum Resources.[180] Similarly, the director of the Corporation is appointed by the Nigerian Council of Ministers.[181] NNPC's establishment through an Act of the National Assembly means that the mode of appointment of the leading executives could not be changed without a resolution passed by the National Assembly and assented to by the President of Nigeria. Also, the Nigerian government controlled the budget and finances of the NNPC.[182] In

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[177] Ma, *ibid* at 258.
[178] *Nigerian National Petroleum Corporation Act,* Chapter 320, Laws of the Federal Republic of Nigeria1999 [NNPC Act].
[179]*Ibid, s 6(1) (c)*
[180] *Ibid*, s 1(3).
[181] *Ibid*, s 3(1). The Nigerian Council of Minister comprises of the President together with his Cabinet members.
[182] *NNPC Act*, s 7(5) ("The Corporation shall submit to the National Council of Ministers not later than three months before the end of each financial year estimates of its expenditure and income relating to the

effect, NNPC does not have operational and financial autonomy as its budgets, loans, and expenditures must be approved by the government.[183]

The Long Title of the NNPC Act also indicates its special status and the government's control over it. The Long Title states that the "...Corporation [is] empowered to engage in all commercial activities relating to the petroleum industry and to enforce all regulatory measures relating to the general control of the petroleum sector through its petroleum inspectorate department."[184] Section 5 of the Act enumerates the Corporation's duties to include: "(1) exploring and prospecting for, working, winning or otherwise acquiring, possessing and disposing of petroleum; and (2) doing anything required for giving effect to agreements entered into by the Federal Government [of Nigeria] to secure participation by the Government or the Corporation in activities connected with petroleum."[185] Section 5(i) of the Act gives NNPC the omnibus power to perform any activity that is necessary or expedient to give full effect to the provisions of the Act. These characteristics demonstrate Nigeria's ownership and control of the NNPC. Therefore, it is not difficult to conclude that NNPC was an SOE in 2010 when the ECCJ decided SERAP.

However, in September 2021, the *NNPC Act* was repealed by the *Petroleum Industry Act* (PIA).[186] Part V of the legislation privatized the NNPC by converting the Corporation to a limited liability company. Section 53 (1) of the PIA provides that within 6 months of the Act coming into force, NNPC is to be commercialized and registered as

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next/following financial year"). Section 19 also provides that "he Corporation shall prepare and submit to the National Council of Ministers, through the Minister not later than 30th June in each financial year, a report on the activities of the Corporation during the immediately preceding financial year, and shall include in such report a copy of the audited accounts of the Corporation for that year and the auditors' report thereon."

[183] *Ibid*, s 8.

[184] *Ibid*, Long Title.

[185] *Ibid*, s 5.

[186] *Petroleum Industry Act*, 2021 [PIA Act], online:<www.petroleumindustrybill.com/wp-content/uploads/2021/09/Official-Gazette-of-the-Petroleum-Industry-Act-2021.pdf>.

Nigerian National Petroleum Company Limited (NNPC Limited)—a limited liability company under the *Company and Allied Matters Act*, 2020.[187] However, the government will still maintain shares in the company, which will be held in trust by the ministries of finance and petroleum on behalf of the government.[188] Also, the government will continue to control the appointment of key members of the board of directors. Members of the Board, including the Chairman, Chief Financial Officer, Chief Executive Officer, are appointed and removed by the president of Nigeria.[189] Some of the objectives of the company include acting as a national oil company and managing the production sharing contracts in the petroleum industry.[190] Going by the new legislation, the *PIA Act* shows that NNPC Limited is an SOE in charge of the government's policies regarding the production, marketing, and distribution of petroleum products. Therefore, NNPC Limited's functions will still meet the requirements under Articles 5 and 8 of ARSIWA and Principles 4 and 5 the UNGPs, as the company's purposes are in furtherance of the state's objectives and policies in the petroleum industry. Also, the *PIA Act* shows that the federal government of Nigeria effectively controls the appointment and withdrawal of the company's leading executives. As Article 5 of ARSIWA and UNGPs point out, the privatization of NNPC does not detract from its SOE status.

Altogether, the characteristics of the NNPC Limited justify attributing its conduct to Nigeria. These features can be summarized as follows: (1) state control of the company through its Board of Directors appointed by the president; (2) Nigeria nominates and (can)

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[187] *Company and Allied Matters Act*, 2020, online:<https://r6a8n4n6.stackpathcdn.com/wp-content/uploads/2020/08/Companies-and-Allied-Matters-Act-2020-1-1.pdf>. As at the time of writing this thesis, the company is yet to be incorporated.
[188] *PIA Act*, *supra* note 184 at s 53. At the time of writing this thesis, the number of shares that Nigeria will take up in the company is unknown, because (to the author's knowledge) the company is yet to incorporated.
[189] *Ibid*, s 59.
[190] *Ibid,* s 64.

withdraw leading executives of the company; (3) the company is established by a statute, and (4) the company is saddled with the responsibility to maintain regulatory standards in the petroleum industry. The characteristics of NNPC and the (prospective) NNPC limited show that Nigeria still maintains ownership and exercises a degree of control in both entities. Notwithstanding the privatization of NNPC, the control and management of the new company largely remain the same under the *NNPC Act*. The point is that viewed from the previous legislation or the new one, companies like the NNPC who perform public functions, whether they are privatized or not, can attain the status of an SOE. However, for the remainder of this chapter, this thesis will proceed under the assumption that NNPC still has its current structure because the 6 months period for incorporating NNPC limited has not lapsed as at the time of writing this thesis.

Viewed then, in light of the *SERAP* case, it is safe to conclude that NNPC is an SOE whose actions or involvement in Niger Delta's oil pollution should be attributed to Nigeria. The oil pollution incident may be linked to NNPC's failure to maintain regulatory standards in the production and distribution of petroleum products. The ECCJ held Nigeria accountable for its failure to regulate oil companies whose oil extraction activities have degraded the Niger Delta. It ordered the government to "[t]ake all measures that are necessary to prevent the occurrence of damage to the environment…"[191] The regulatory functions that the ECCJ alludes to are performed by the NNPC who is already before it. It is only reasonable that when SOEs whose actions are being impugned are before the court, the court should have the power to make specific declarations regarding their responsibility and liability. Had the ECCJ assumed jurisdiction to determine that it was liable, this finding

[191] *SERAP v Nigeria*, *supra* note 1 at para 121.

would indirectly hold Nigeria responsible for the failure to protect the human rights violated. The point is that "[w]here a business enterprise is controlled by the state, an abuse of human rights by the business enterprise may entail a violation of the state's own international law obligations."[192] As well, declaring NNPC liable for environmental and human rights abuses may have direct and indirect implications for the home state liability of other corporations with which NNPC maintains business relationships through Supply chain Contracts (SPCs), Joint Venture Agreements (JVAs), and Production Sharing Contracts (PSCs).

The next sub-section examines the legal implication of holding SOEs accountable in the ECCJ for purposes of fostering the internalization of the CR2R norm. It argues that when SOE's liability is established before the ECCJ, this may be a catalyst for holding MNCs liable in their home states.

5.6. Legal Implications of the ECCJ's Jurisdiction over SOEs

To operate in a foreign jurisdiction, MNCs usually maintain relationships with SOEs through SPCs, JVAs, IAs, and PSCs. For example, in Nigeria, Shell Nigeria operates mainly through the Shell Petroleum Development Company (SPDC), the largest oil-producing venture in Nigeria. SPDC is 100% Shell-owned, but operates a joint venture consisting of the Nigerian National Petroleum Corporation (55%), Shell (30%), Elf (10%), and Agip (5%).[193]Also, Shell Nigeria Exploration and Production Company (SNEPCo) operates in deep-water acreage off-shore and in frontier areas onshore under production-

[192] Ramute Remezaite "The Application of The UN 'Protect, Respect and Remedy' Framework to State-Owned Enterprises : The Case of the State Oil Company SOCAR in Azerbaijan" in Bard Andreasen & Vo Khanh Vinh, eds, *Duties Across Borders: Advancing Human Rights in Transnational Business* (Cambridge, UK: Cambridge Press, 2016) 302 at 316.

[193] NNPC, Joint Operating Agreement, online: NNPC<www.nnpcgroup.com/NNPC-Business/Upstream-Ventures/Pages/Joint-Operating-Agreement.aspx>.

sharing contracts agreed with the Nigerian Government.[194] Similarly, the Nigeria Liquefied Natural Gas (NLNG) project operates as another joint venture, consisting of NNPC (49%), Shell (25.6%), Elf (15%), and Eni (10.4%).[195]

Therefore, if the ECCJ holds NNPC liable together with Nigeria for failure to perform regulatory functions in its relationship with MNCs, it indirectly indicts MNCs involved in its oil exploration activities.[196] For example, Amnesty International in its 2013 Report, accused Shell of not operating according to international standards in the Ogoni region of Nigeria.[197] Indeed, the plaintiffs in *SERAP* claimed jointly and severally against Nigeria and MNCs, because Shell and other corporate defendants aided and abetted the environmental pollution in the Niger Delta of Nigeria. Given this, the EECJ's declaration of NNPC's liability may indict the other corporate defendants involved in the joint venture relationship with NNPC. This indictment may necessitate the home countries of the MNCs to look into the involvement of those companies in the alleged human and environmental abuse in the host states.[198] The decision of the Nigerian High Court in *Obong Effiong Archiang & Ors* cited above, alludes to the relationship between NNPC and MNCs. The trial judge concluded that

> It is a fundamental right of all persons and communities to clean and healthy environment. Legislations and agencies out in place to address issues of environmental degradation, including the 1st

[194] National Petroleum Investment Management Services, Production Sharing Contractors, online: NNPC<https://napims.nnpcgroup.com/our-services/Pages/Production-Sharing-Contractors.aspx>.
[195] NNPC, LNG Investment Management Services (LMIS), online: NNPC<https://nnpcgroup.com/GasAndPower/Pages/LIMS.aspx>.
[196] See Julia Ruth-Maria Wetzel, *Human Rights in Transnational Business: Translating Human Rights Obligations into Compliance Processes* (Luzern, Switzerland: Springer, 2015) at 15-16. See also Eghosa Ekhator, "Multinational Corporations, Accountability and Environmental Justice: The Move Towards Subregional Litigation in Africa" (2022) ZVglRWiss 121(forthcoming).
[197] See Amnesty International, *Bad Information: Oil Spill Investigations in the Niger Delta* (London, UK: Amnesty International Publications) at 44-45.
[198] See Markos Karavias, "Shared Responsibility and Multinational Enterprises" (2015) 62 Netherlands International Law Review 91 at 103.

> Defendant [NNPC] must be seen to make sure that the legislations are complied with by oil companies. [NNPC] should not only be interested in the profit it shares with the 2nd Defendant [Mobil].[199]

MNCs may raise the defence of the "act of State" doctrine in their home countries, as did the defendants in *Nevsun* before Canada's Supreme Court.[200] The doctrine, when invoked, is to the effect that courts cannot examine the actions of a foreign sovereign.[201] My response to this defence is two-fold. First, as the *Nevsun* case shows, the "act of state" defence is limited to common law countries that have adopted this doctrine.[202] Second, even for countries that have adopted the doctrine, it may not apply in every situation involving a foreign sovereign. This is because, as the Supreme Court of Canada did in *Nevsun*, courts can bifurcate the act of state from other issues by examining the cause of the harm. Therefore, courts are only interested in the causal factors that contribute to the human rights harm either through the parent-subsidiary relationship, or business partnership with contractors. This involves analyzing the evidence of MNCs' leverage or control within a corporate group and in relationships with SOEs.[203] The ECCJ's decision on the SOE's liability only apportions SOEs' liabilities in a chain of commercial relationships.[204] In effect, the ECCJ decision will be the first step in a liability attribution process for corporations involved in human rights and environmental abuse.

In terms of legislation, the ECCJ's decision may have legal implications for some states' human rights due diligence laws. This is because some mandatory human rights due

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[199] *Obong Effiong Archiang & Ors, supra* note 108 at 147.
[200] *Nevsun v Araya, supra* note 47.
[201] See Matthew Alderton, "The Act of State Doctrine: Questions of Validity and Abstention from Underhill to Habib" (2011) 12 Melbourne Journal of International Law 1 at 3.
[202] *Nevsun v Araya, supra* note 47. See also Fritz Mann, *Foreign Affairs in English Courts* (Oxford, UK: Clarendon Press, 1986) at 164.
[203] This was what the Dutch High Court did in *Vereniging Milieudefensie v Royal Dutch Shell PLC, supra* note 89.
[204] See *W.S. Kirkpatrick & Co., Inc. v. Environmental Tectonics Corp., International*, 493 U.S. 400 (1990).

diligence legislation prescribe MNCs' responsibility to respect human rights in their dealings abroad through SPCs, JVAs, and PSC.[205] For example, the French *"Duty of Vigilance" Law* enacted by the French National Assembly on 27 March 2017 provides that corporations domiciled or doing business in France should perform due diligence functions to identify, mitigate, and remediate human rights, health, safety, and environmental risks arising from their operations or in their relationship with other companies.[206] The corporate relationships exist in the forms of parent-company relationships, supply-value chain contracts, or permanent business relationships between a company domiciled in France and another company outside of France. Therefore, the duty to conduct human rights due diligence can arise from a relationship where a company has leverage over another company, or where it maintains business relationships with other entities for the long term.[207] Failure to perform human rights due diligence in such relationships may establish a corporation's liability in civil cases before French courts.[208]

In February 2022, the European Commission adopted a proposal that will mandate companies to conduct environmental and human rights due diligence within their value

[205] See Ruggie, Rees, & Davis, *supra* note 75 at 11-17.
[206] See Art. L. 225-102-4.-I. Although with some nuances, similar provisions exist in other human rights due diligence legislation, including the *Australian Modern Slavery Act* 2018, online: <www.legislation.gov.au/Details/C2018A00153>; the United Kingdom *Modern Slavery Act* 2015, online:<www.legislation.gov.uk/ukpga/2015/30/contents/enacted>. See also OECD. Due Diligence Guidance for Responsible Supply Chains in the Garment and Footwear Sector (Paris: OECD Publishing 2018); OECD, *Due Diligence Guidance for Responsible Supply Chains of Minerals from Conflict-Affected and High-Risk Areas, 3rd ed* (Paris: OECD Publishing, 2016), and ILO-IOE International Child Labour Guidance for Business (2015).
[207] See Olivier De Schutter, "Towards a Mandatory Due Diligence in Global Supply Chains" (June 2020) International Trade Union Confederation 1 at 27, online:<www.ituc-csi.org/IMG/pdf/de_schutte_mandatory_due_diligence.pdf>.
[208] See Elsa Savourey & Stéphane Brabant, "The French Law on the Duty of Vigilance: Theoretical and Practical Challenges Since its Adoption" (2021) 6:1 Business and Human Rights Journal 141 at 150. See also Almut Schilling-Vacaflor, "Putting the French Duty of Vigilance Law in Context: Towards Corporate Accountability for Human Rights Violations in the Global South?" (2021) 22 Human Rights Review 109.

chains.[209] The proposal will be submitted to EU Parliament and the European Council for approval. Once approved, each EU Member State would have two years to adopt a national law incorporating the Directive.

Article 2(8) of the proposed EU Directive states that "[u]ndertakings shall carry out value chain due diligence, which is proportionate and commensurate to their specific circumstances, particularly their sector of activity, the size and length of their supply chain, the size of the undertaking, its capacity, resources and leverage."[210] Also, the proposed EU Directive instructs member states to enact legislation that requires corporations to "identify, assess, prevent, cease, mitigate, monitor, report, address and remedy potential and/or actual adverse impacts on human rights, the environment and good governance in their value chain."[211] Although the scope of each member states' legislation is unknown at the time of writing this thesis, the member states' legislation may ground the civil liability of parent companies in relationships with subsidiaries and in value chain relationships with business partners.

Some scholars, including Carolijn Terwindt, Nicolas Bueno, and Claire Bright, argue that considering the tort doctrine of negligence and recent cases in the EU,[212] MNCs can be held liable for failure to exercise a duty of care in supply chain relationships.[213] Specifically, Douglas Cassel argues for the judicial recognition of a common law duty of

[209] See European Parliament Procedure, online: <https://oeil.secure.europarl.europa.eu/oeil/popups/printficheglobal.pdf?id=716220&l=en>.
[210] *Ibid*.
[211] European Parliament Procedure*, supra* note 209, art 1(1).
[212] See e.g., *Jabir anors v KiK'* (2016) 16 HRLR 373.
[213] Carolijn Terwindt et al, "Supply chain liability: pushing the boundaries of the common law?" (2017) 8:3 Journal of European Tort Law 261; Nicolas Bueno & Claire Bright "Implementing Human Rights Due Diligence Through Corporate Civil Liability" (2020) 69 International and Comparative Law Quarterly 789.

care in relationships where companies have effective control or leverage.[214] The EU Directive may adopt these arguments because its scope has been interpreted to cover human rights harms that occur outside the EU.[215] If anything at all, the case of *Begum v Maran*[216] discussed earlier, suggests that UK courts are willing to extend the scope of MNCs' duty of care to third parties over which a company has leverage or control. It remains to be seen whether EU courts will follow this path. In sum, the judicial recognition of the CR2R norm discussed earlier means that some home state courts may be open to strategic initiatives anchored on the relationship between SOE and MNCs.

If the liability of MNCs is extended to business relationships as suggested in legislation and scholarly literature, it will not be difficult for the ECCJ's decisions to influence corporate liability in home countries. For example, if the ECCJ in *SERAP* finds NNPC liable, the judgement will indirectly touch on the liability of MNCs with which NNPC has business relationships through BITs, JVAs, or PSCs. It will also touch on the role of MNCs as shareholders in some NNPC production arrangements. The indictment could raise issues of collusion, aiding or abetting human rights or environmental abuse.[217] Therefore, the ECCJ's declaration of an SOE's liability could contribute to the pursuit of a cause of action regarding which plaintiffs can approach MNCs' home countries to demand accountability for the part that the MNCs played in the business relationship with SOEs.[218]

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[214] Douglass Cassel, "Outlining the Case for a Common Law Duty of Care of Business to Exercise Human Rights Due Diligence" (2016) 1 Business and Human Rights Journal 179.
[215] Thalia Kruger, "European Parliament Resolution on Corporate Due Diligence and Corporate Accountability" (14 April 2021) Conflict of Laws.net, online:<https://conflictoflaws.net/2021/european-parliament-resolution-on-corporate-due-diligence-and-corporate-accountability/?print=pdf>.
[216] *Begum v Maran, supra* note 84.
[217] See Markos Karavias, "Shared Responsibility and Multinational Enterprises" (2015) 62 Netherlands International Law Review 91 at 102.
[218] As well, it can serve as a cause of action in host states. See Richard Frimpong Oppong, "The Higher Court of Ghana Declines to Enforce an ECOWAS Court Judgment" (2017) 25:1 African Journal of International & Comparative Law 127.

Indeed, it has been noted that "…in cases of harmful outcomes resulting from the actions of multiple wrongdoers, one should look beyond the jurisdictional limitations to possible interactions between international and national dispute settlement bodies called upon to adjudicate 'shared responsibility' cases arising from the same factual patterns."[219]

In sum, the ECCJ's jurisdiction over SOEs and its recognition of the CR2R norm will position the court as a norm entrepreneur helping the CR2R to develop normative relevance. It has been noted that "…a European human rights due diligence instrument cannot replace effective protection of human rights by the countries of the Global South themselves. All efforts to impose human rights due diligence obligations on companies must therefore be complemented by measures that bring these countries on board."[220] ECCJ's judicial creativity via purposeful interpretation of ARSIWA and learning from practices from other regional courts on state attribution will greatly promote the CR2R norm and aid legislative developments in African and other countries to consolidate the norm's internalization process.

5.7. Conclusion

This chapter examined the possible normative influence of the ECCJ in the business and human rights context. Its concern was to ask how the ECCJ can contribute to diffusing the CR2R norm alongside growing national legislation and case law that recognize corporate accountability. It was argued that considering the expansive jurisdiction of the ECCJ on human rights, the court has the potential to be a norm entrepreneur for this cause. The ECCJ had held in 2010 that it does not have jurisdiction over corporations, or the

[219] Karavias, *supra* note 217 at 107.
[220] Giesela Ruhl, "Towards a German Supply Chain Act? Comments from a Choice of Law and a Comparative Perspective" (2021) European Yearbook of International Economic Law 1 at 18.

power to declare corporate responsibility to respect human rights in international law. This thesis has argued that should a similar case come before the ECCJ in 2021, its decision should be different. This argument is anchored on two pivotal points. First, there is a growing number of decisions from national courts that declare corporate accountability in international law. Second, though the ECCJ declined jurisdiction over NNPC, an SOE, ARSIWA, and jurisprudence from the ECtHR and IACHR show that courts cannot turn a blind eye to the relationship between states and SOEs. Therefore, if the ECCJ conducts a control analysis of the relationship between states and SOEs, it would have reason to assume jurisdiction over NNPC in a case like *SERAP*. Holding SOEs accountable for human rights and environmental abuse may have legal implications for corporations with which the SOEs maintain business relationships. The growing mandatory HRDD legislation in the EU suggests that a cause of action could arise from MNCs' relationships with corporations abroad. Therefore, MNCs' relationship with SOEs in Africa could cause MNCs' conduct to be questioned in their home states.

This chapter concluded that the ECCJ could play a pivotal normative role in affirming accountability of corporations by acknowledging and declaring their liability of SOEs as arising from their business relations or supply chain arrangements. African courts cannot continue to rely on developed states to hold corporations responsible for human rights abuses that take place within their jurisdictions. Sub-regional courts, like the ECCJ, must play their part when called upon to do so, to hold these entities accountable for their violations of human rights rules and principles of acceptable conduct in their business undertakings. Undoubtedly, these rules and principles are, quite clearly, established international and transnational law, including the evolving CR2R norm.

Chapter 6: Conclusion—Social Constructivism and the CR2R Norm

This thesis adopted a social constructivism theory influenced by a Third World Approach to International Law (TWAIL) in the business and human rights context. It examined the unique perspectives that a TWAIL constructivist approach brings to the interpretation of the United Nations Guiding Principles (UNGPs). This thesis focused on pillar II of the UNGPs which prescribes that MNCs should respect human rights wherever they operate, not because of any binding obligation, but because of existing social norms.[1] This thesis characterized the Special Representative of the Secretary General's (SRSG) proposal of pillar II to the UN Human Rights Council and its endorsement by the Council as a norm-building exercise aimed to promote responsible corporate conduct globally. Since pillar II relies on social norms to drive compliance among MNCs, this thesis characterized it as corporate responsibility to respect human rights (CR2R) norm. However, it recognized that social norms are dynamic and different from one society to another. Therefore, its focus was on how social norms and actors in Africa can support the CR2R norm. To this end, this thesis examined how existing African prior local norms and actors can influence corporate accountability in Africa. In sum, it answered the question of how African local norms and actors can accentuate and tilt the CR2R into becoming a global standard of acceptable conduct.

6.1 CR2R Norm-An Afrocentric Constructive Exercise

[1] See generally John Ruggie, "The Social Construction of the UN Guiding Principles on Business and Human Rights" (2017) Cambridge, MA: John F Kennedy School of Government, Harvard University Working Paper No 67.

This thesis argued that the CR2R norm has the potential to gain legitimacy in the Third World through a social constructivism theory. To do this, this thesis focused on the relationship between actors in international law. First, this thesis examined approaches to global governance in the BHR field. This thesis classified scholars' models of governance under two rubrics: (1) the international treaty stream, representing traditional international law; and (ii) the soft law stream, representing contemporary emerging practice. Scholars that fall under the treaty rubric argue that to regulate state and non-state actors in the BHR context needs an international treaty that sets out the obligations of each international actor, particularly MNCs. On the other hand, scholars that fall under the soft law rubric, argue that considering the history of states' non-implementation of international human rights treaties and the political nuances that engulf the negotiation, signing, ratification, and implementation of treaties, a soft law that sets international standards for international actors is the appropriate global governance instrument.

This thesis argued that there are inherent weaknesses in an exclusive soft or hard law approach. This is because, as John Ruggie rightly noted, there is no silver bullet solution to corporate accountability problems. This thesis invited us to look at what makes law generate commitment among international law actors, rather than focusing on the instruments of regulation. In other words, it invited us to look beyond the form of global governance instruments and focus on the characteristics of international law-making that ensure commitment from actors. Using Brunnée and Toope's interactional account of international law, this thesis proposed a global governance approach that considers the interaction between legal and social norms. Arguably, the UNGPs adopts an interactional approach because it relies on social and legal norms as standard-setting tools. However, this thesis argued that the UNGPs ultimately fail Brunnée and Toopes' legitimacy test

because it does not consider Third World Peoples' voices—and by extension, social norms—that are marginalized in the construction of the CR2R norm. In effect, this thesis argued that international law-making must not only occur at the horizontal level among states, MNCs, INGOs, transnational social networks, and human rights defenders; it must also occur at a vertical level between local norms and global norms.

To anchor and substantiate its proposal for relationships between norms and actors in different levels of governance, this thesis adopted insights from social constructivists on the creation and diffusion of norms in international relations. Its focus on Finnemore and Sikkink's theory of the norm cycle, specifically the characteristics of each stage of the cycle—norm emergence, norm cascade, norm internalization, and the conditions that cause a norm to proceed from one stage to another—points out that these theorists fail to explain why and how norms diffuse. This gap is filled in by resort to Acharya's theory of norm diffusion. The theory highlights that norm diffusion is both cosmopolitan and one of congruence. The former emphasizes the role of transnational networks, and the latter focuses on the influence of local actors and norms on norm diffusion. The discussion highlights that congruence is expressed in localization and subsidiarity and emphasizes that these are significant regarding local and domestic contestation or support for assuring the legitimacy of international norms or rejecting them as such. The application of these ideas to the development of the UNGPs' norm of the CR2R allowed me to establish that the efforts of the SRSG with his team, as norm entrepreneurs, advanced the diffusion of the CR2R norm, which is presently cascading. This thesis also classified the SRSG's norm diffusion strategy as cosmopolitan, not one of congruence, and noted that a congruence approach would better enhance the legitimacy of the CR2R norm and tip it more quickly towards norm internalization. This implies that the congruence approach has greater

potential to minimize the impact of local actors and norms as "disruptors" and enhance their roles as "supporters" of the CR2R norm.

To demonstrate the application of the congruence approach to the UNGPs, this thesis examined how local norms and actors can support the CR2R norm to promote corporate accountability in Africa. It argued that prior local norms in Africa can localize and support the CR2R norm. To do this, it proposed a local reframing of the CR2R that is viewed through an Afrocentric lens to validate Africa's jurisprudential claims in a world of competing perspectives through a pair of Afrocentric goggles. This thesis used an African norm—Ubuntu—as an example of how a local norm can influence the interpretation of the CR2R norm in Africa. Using an African goggle, it highlights Ubuntu's content virtues and values of humanness, sharing, respect for human dignity, interdependence, interconnectivity, and communalism. The analysis argued that Ubuntu and the C2R2 norm are similar on two levels. First, they both prescribe normative conduct for corporate behavior. Second, they also recognize the interconnectivity between MNCs and the society in which they operate. However, Ubuntu goes beyond the CR2R norm's baseline expectation to "do no harm" to demand a committed devotion to "do good." Using a case study from the Democratic Republic of Congo, this thesis noted that the CR2R norm is not sufficient to persuade corporations to be responsible in Africa (partly) because it is not hinged on any moral normative framework. It also showed that, sometimes, MNCs' discharge of the baseline responsibility to do no harm may not be sufficient to receive a social licence from the community where they operate. Thus, it was argued that an Ubuntu-influenced interpretation of the CR2R norm would help to fill the positive obligation vacuum that the CR2R norm presently has. Similarly, an Ubuntu-influenced interpretation will increase the intelligibility of the CR2R norm among local communities. Re-

interpreting the CR2R norm through an Ubuntu lens helps to provide a legitimate normative platform to implement the CR2R norm in Africa. In other words, localizing the CR2R norm via Ubuntu provides an opportunity to develop practical normative tools by which MNCs, as relational beings, can act to foster socio-economic development in Africa.

In effect, since the intended purpose of the UNGPs is to command compliance through appeal to social norms, this thesis argued that Ubuntu can serve as a springboard by which the CR2R norm is interpreted in Africa. Also, because the CR2R norm is rooted in the conception of societal expectations that is different from one society to another, Ubuntu serves to shape MNCs' understanding of the societal expectation in Africa. Therefore, constructing a social norm in Africa through congruence between CR2R and Ubuntu increases the potential of the UNGPs' legitimacy and minimizes social conflicts that arise from divergent expectations from local communities and MNCs operating in Africa. In sum, this thesis demonstrated how social norms can interact at a global and local level to influence responsible business conduct in Africa.

However, norms do not by themselves crystalize into law or influence conduct; they are driven by local actors or institutions. This thesis also examined how local actors in Africa can support the CR2R norm. It examined the possible normative influence of the Community Court of Justice of the Economic Community of West African States (ECCJ) in the business and human rights discourse. Its concern was to ask how the ECCJ can contribute to diffusing the CR2R norm alongside growing national legislation and case law that recognize corporate accountability. It was argued that considering the expansive jurisdiction of the ECCJ on human rights, the court has the potential to be a norm entrepreneur for this cause. The ECCJ had held in 2010 that it does not have jurisdiction

over MNCs, or the power to declare corporate responsibility to respect human rights in international law. This thesis argued that should a similar case come before the ECCJ in 2021, its decision should be different.

This argument is anchored on two pivotal points. First, there is a growing number of decisions from national courts that declare corporate accountability in international law. Second, though the ECCJ declined jurisdiction over Nigerian National Petroleum Corporation, a state-owned enterprise (SOE), the *Draft Articles on Responsibility of States for Internationally Wrongful Acts*, Pillar I of the UNGPs, and jurisprudence from the European Court of Human show that courts cannot turn a blind eye to the relationship between states and SOEs. Therefore, if the ECCJ conducts a control analysis of the relationship between states and SOEs, it would have reason to assume jurisdiction over NNPC in a case like *SERAP*. Holding SOEs accountable for human rights and environmental abuse may have legal implications for MNCs with which the SOEs maintain business relationships. The growing mandatory HRDD legislation in the EU suggests that a cause of action could arise from MNCs' relationships with MNCs abroad. Therefore, MNCs' relationship with SOEs in Africa could cause MNCs' conduct to be questioned in their home states.

This thesis argued that the ECCJ could play a pivotal normative role in affirming the accountability of MNCs by acknowledging and declaring their liability of SOEs as arising from their business relations or supply chain arrangements. African courts cannot continue to rely on developed states to hold MNCs responsible for human rights abuses that take place within their jurisdictions. Sub-regional courts, like the ECCJ, must play their part when called upon to do so, to hold these entities accountable for their violations of human rights rules and principles of acceptable conduct in their business undertakings.

Undoubtedly, these rules and principles are, quite clearly, established international and transnational law, including the evolving CR2R norm.

Overall, social constructivism informed by a Third World perspective shows that actors in the Third World are normative agents that may increase the support for a global norm based on the norm's congruence or incompatibility with prior existing norms in their societies. Also, the constructivist TWAIL view of the CR2R norm demonstrates that responsible corporate conduct cannot be viewed through a universal standard formulated by international global actors, but the norm must be a dynamic and evolving one whose content and scope can be modified by other norms. Also, this thesis affirms the SRSG's statements that there is no silver bullet to solving the problem of corporate accountability and that there is a need for a smart mix of measures to regulate corporate conduct.

6.1. Opportunities for Further Research

Future research can build on this project through various research methods, including empirical research. For example, empirical research may identify companies that imbibe Ubuntu in their dealings with local communities. This project would help to assess Ubuntu's normative relevance to companies operating in Africa. Also, it may be rewarding to examine how Ubuntu supports human rights norms in supply chain relationships beyond Africa. For example, future research may examine whether Ubuntu supports provisions in supply chain legislation and contracts. Although this thesis focused on pillar II of the UNGPs, future research may also examine the congruence between Ubuntu and pillar I which relates to states' obligation to protect human rights. Possible questions include: does Ubuntu support state obligations to protect human rights, what will a state duty to protect human rights influenced by Ubuntu look like, does Ubuntu support accountability of state officials and institutions in their constitutional and statutory roles, does Ubuntu apply to

SOEs? In effect, it is important to examine whether Ubuntu applies to states in the discharge of their human rights obligations.

It is also important to examine the sphere of relationship in Ubuntu terms and Principle 13 of the UNGPs. For example, is Ubuntu's relational approach congruent with Principle 13 which limits the scope of responsibility of MNCs to instances where they cause or contribute harm? Also, is Ubuntu congruent with principle 13's prescription that MNCs should provide prevent, mitigate, and remedy only in cases where they are directly linked to business relationships? Would Ubuntu also consider MNC's sphere of influence beyond direct causal links? These are some of the questions that may arise from research that examines the sphere of relationship in Ubuntu terms and the UNGPs.

Similarly, there are multiple layers in the UNGPs' prescription with HRDD, especially in relation to preventing harm and providing an effective remedy. Although this thesis describes what an Ubuntu-influenced CR2R norm would look like, it does not examine the procedural rights associated with HRDD and mechanisms for grievance redress. Empirical research can go further to sample some MNCs' HRDD policies and procedures. This project would aim to determine Ubuntu's influence on policies and procedures.

Similarly, future research may explore how local norms support pillar III of the UNGPs which relates to providing effective remedies to victims of human rights abuse. This research could focus on non-state or company-led grievance mechanism procedures. For example, future research may focus on the role of local norms in creating grievance procedures and determining appropriate remedies for victims of human rights abuse. It will also be important to examine how local norms can enhance the potential of grievance

mechanisms to satisfy the criteria stated in Pillar III, which include legitimacy, accessibility, predictability, equitability, rights compatibility, and transparency.

Furthermore, it is important to assess whether these criteria reflect an Ubuntu approach. Future research may examine how local norms may enable MNCs to assess the effectiveness of the remedial outcomes from the grievance mechanisms. This includes assessment as to whether there was genuine consultation with affected stakeholders or groups, or whether the remedies reflect the expectations of the victims.[2]

Beyond the normative sphere, future research may also focus on the recognition of the CR2R norm in Africa. This thesis used the ECCJ as an example of an institution that can support the CR2R norm. However, other sub-regional human rights institutions may lend themselves to this sort of analysis. They include the African Court on Human and Peoples and the East African Court of Justice. It is important to examine the jurisdictional scope of these institutions to determine whether they possess commonalities with the ECCJ. Also, future research may examine how local popular forces, including civil societies, non-governmental organizations, and members of the local community, have harnessed the institutions' jurisdiction over business and human rights abuse. This inquiry would consequently speak to the institutions' capacity to further push the CR2R norm in Africa and support the UNGPs' vision of corporate responsibility.

In sum, this thesis is a beginning of an unending journey to examine the contributions of African norms and actors in the growing international effort to hold MNCs accountable for their actions/inactions that cause or contribute to human rights abuse.

[2] See generally Sara L Seck & Akinwumi Ogunranti, "Accountability – Legal Risk, Remedies and Damages" in Rae Lindsay & Roger Martella, eds, *Corporate Social Responsibility – The Corporate Governance of the 21st Century* (Kluwer Law International, 2020).

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