

THE Ogoni Case Revisited: Should Corporations, Like States, Bear Obligations to Respect & Protect Human Rights?

O Caso Ogoni Revisitado: Devem Corporações, Como Estados, Deter Obrigações de Proteger e Respeitar Os Direitos Humanos?

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Abstract: It is a common understanding that human rights must be protected by States. Despite such fact, it is necessary to consider that the veil shielding private actors from the obligation to secure human rights no longer is sustainable in today's globalized world. In this article, through the adoption of the deductive method and through a bibliographical and documental research, an analyses of the Ogoni Case, a case appreciated by the African Commission on Human Rights and Peoples Rights, is made, as a way to understand why multinational corporations (MNCs), should be jointly and severally liable with States in the case of violations to basic rights, as a way to secure human rights of the individuals and people of Africa.

Keywords: Ogoni Case; Human Rights; Multinational Corporations.

Resumo: É entendimento comum que os direitos humanos devem ser protegidos pelos Estados. Apesar disso, é necessário considerar que o véu que protege os atores privados da obrigação de garantir os direitos humanos não mais é sustentável no mundo globalizado de hoje. Neste artigo, por meio da adoção do método dedutivo e da realização de uma pesquisa bibliográfica e documental, é feita uma análise do Caso Ogoni, um caso apreciado pela Comissão Africana dos Direitos Humanos e dos Direitos dos Povos, como forma de entender por que as corporações multinacionais devem ser solidariamente responsáveis perante os Estados em caso de violação dos direitos básicos dos homens, como forma de garantir os direitos humanos dos indivíduos e das pessoas da África.

Palavras-chave: Caso Ogoni; Direitos Humanos; Corporações multinacionais.

SUMMARY: 1. Introduction. 2. Tradition versus modernity. 3 The Ogoni Case, the African Charter and MNCs liability. Conclusion. References.

1 INTRODUCTION

As a general proposition, Human Rights obligations, be they from statute, international treaty or convention, are owed by the State. While it is true that since World War 2 a number of new subjects of international law have emerged including international organizations, national liberation movements and individuals, states are the 'primary' or 'traditional' subjects of international law (CASSESE, 1986), and it might be fair to say that States are reluctant to share that space with non-state entities.¹ It is therefore States, which must secure citizens' human rights and, where this does not happen in the domestic space, face censure from local courts.

An infraction against international human rights treaty obligations is dealt with by the relevant international treaty enforcement procedures such as international tribunals, treaty bodies, United Nations organs, and regional enforcement mechanisms. Individuals have over the years gained rights of recourse through these enforcement mechanisms² and can largely petition for redress.

This process, however, is not always easy, nor does it always bring results, as States that do not respect human rights are typically not likely to be ones that create easy pathways for their citizens to seek redress.

2 TRADITION VERSUS MODERNITY

Traditionally, it has always been the case that Human Rights obligations are not owed by multinational corporations (MNCs). While people have human rights, the obligation to respect and protect them lies with their respective States.³ That is because MNCs have not been seen as, and are not accepted as, being subject to international law. And, as human rights discourse has developed,

¹ It is usually non-state actors - especially corporations - who are the ones who primarily resist having direct human rights obligations under international law. The same is true of IFIs like the World Bank and the IMF. See WILLS, J. "The World Turned Upside Down? Neo-Liberalism, Socioeconomic Rights, and Hegemony," *Leiden Journal of International Law*, 27(1): 11, 2014

² As well as becoming subject to the jurisdiction of international criminal law

³ According to an early formulation, it was stated that 'a tacit assumption underlying much discussion of Human Rights seems to be that, although all persons have these rights, the obligation corresponding to a persons' rights lies only on his or her own government". NELSON, W.N. Human Rights and Human Obligations. In: PEACOCK, J.R; CHAPMAN, J.W. (eds). *Human Rights*. New York: New York University Press, 1981, p. 281.

this has been identified and sometimes accepted without much criticism, but as indicative of a failure of international law to find ways to bring in MNCs into the fold as obligated to uphold human rights at the pain of sanction. Writing in 2001, the Harvard Law Review stated that:

Though corporations are capable of interfering with the enjoyment of a broad range of human rights, international law has failed both to articulate the human rights obligations of corporations and to provide mechanisms for regulating corporate conduct in the field of human rights. Since the nineteenth century, international law has addressed almost exclusively the conduct of states. Traditionally, states were viewed as the only “subjects” of international law, the only entities capable of bearing legal rights and duties.⁴

There is evidence that international human rights discourse is moving away from this view. The Human Rights Council has begun discussions on a binding instrument that covers MNCs and businesses in general (HUMANS RIGHTS COUNCIL, 2014; RATNER, 2001; SANTORO, 2010). It has been argued that a binding treaty would be the best way to cover the *lacuna* created by the current position where ‘*in cases where the state cannot be shown to be culpable or complicit in the harm caused, there will be no-one who will be legally responsible despite the fact that a violation of rights has occurred*’ (BILCHITZ, 2010). It is submitted that in some cases however, emphasis placed on this *lacuna* blinds the focus on existing mechanisms and innovative ways of interpreting these to find that in fact, corporations can and should be found to already have obligations under international human rights law. In my view, some existing treaties such as the African Charter on Human and Peoples’ Rights (the African Charter) are capable of being interpreted to allow for the inference that there are legally binding and enforceable obligations on MNCs to respect, protect and fulfil human rights.

Given that in today’s globalised world, many MNCs⁵ control budgets that are bigger than entire national budgets of most (if not all) third world countries, this is an important issue. At the turn of the millennium, right when the Harvard Law Review was making the observation above, the evidence showed that MNCs already controlled some 20-30% and 70% of world output and trade respectively

⁴ ‘Developments in the Law-Corporate Liability for Violations of International Human Rights Law,’ 114. *HARV. L. REV.* 2025, 2030-31 (2001) p.225

⁵ The reference to MNCs in this article does not include the many NGOs and other purely philanthropic organizations, which though run by business people, are purely philanthropic, but rather those entities that are strictly for profit, (such as, in the *Ogoni case, infra*, Shell) whether or not they have a philanthropic arm. The key distinction is that MNCs referred to in this article are for profit enterprises.

(HELD *et al*, 1999).⁶ Kinley and Tadaki have argued that these corporations ‘*are the driving agents of the global economy, exercising dominant control over global trade, investment, and technology transfers. Flowing directly from such positions of economic influence, [they] also manage to exercise considerable political leverage in both domestic and international spheres*’ (KINLEY; TADAKI, 2004).⁷ In many respects, many MNCs have as much, if not more, power than most states. It has further been said that the business that these MNCs control spans the entire world “*linking the fortunes of disparate communities and nations in complex webs of interconnectedness*” (HELD *et al*, 1999). The power that comes with this much influence rivals and in some cases surpasses that which some Third World States can muster.

Because of this power, it is inevitable that MNCs leave footprints in the civil, political, economic, social and cultural spheres of many people’s lives.⁸ With reference to the complaint in the African Commission on Human and Peoples’ Rights (the Commission) in the *Ogoni Case* (ACHPR, 2001)⁹ where a large part relates to actions of a multinational oil company, I posit that the case for making MNCs jointly and severally liable with States as obligation bearers under the African Charter would better secure the human rights of the individuals and peoples of Africa. I argue further that the language of the African Charter does not preclude such an interpretation.

The reason for this view is that not only do corporations have the political power and influence to affect people’s human rights, but that they have in some cases an incentive to do so: profit (HELD *et al*, 1999). For this reason, it is necessary to consider whether the veil shielding private actors from the obligation to secure human rights is necessary. In order to curb corporate greed, and avoid situations where corporations instrumentalise political proxies within the polities where they operate to induce or even create conditions that lead to human rights violations, that shield should no longer be regarded as sustainable.

⁶ Some ten years later, as of 2010, this situation had not changed. See: BUCKINX, Barbara C.J. Reducing Domination in Global Politics. Princeton University PhD Dissertation, June 2010. At: <<https://search.proquest.com/openview/1867fd227108b0ca7edf04216733a6b4/1?pq-origsite=gscholar&cbl=18750&diss=y>>. Accessed on 08 September 2017; and EZEUDU, Martin-Joe. (2011), *infra*. who refers to MNCs as ‘modern leviathans’.

⁷ The article comprehensively addresses the evolution of MNCs’ position *vis-a-vis* international human rights law as well as the arguments against extending direct human rights liabilities to them.

⁸ Duruigbo, *infra*, at p.239, citing David Adedayo Ijalaye, ‘The extension of corporate personality in international law’ 221- 23 (1978) argues that ‘MNCs can now be regarded as selective subjects of international contract law for contracts entered into with states.’

⁹ David Bilchitz (2010) also makes reference to this case as indicative of why the current regime is inadequate.

The reason why this would be a good development is the practical benefits to individuals and their countries in the developing world. Corporations doing business in poor countries would no longer be able to hide behind the protection of regimes whose survival depends on repressing their citizens while at the same time financially propped up by the backhanded deals that are endemic in the transactional relationships between MNCs and Thirds World countries.¹⁰ Propping up undemocratic regimes for the purposes of extracting wealth on the cheap will no longer be as attractive if individuals can go against the MNCs directly, including in the MNCs' home countries, for violations of human rights.¹¹ Instead, MNCs would be encouraged to act in ways that are consistent with international human rights law, knowing that there is no buffer between them and direct liability.¹²

If respect for human rights is a societal good, and protection thereof a positive societal goal, then it should not matter whether that protection is from violations by the state or non-state actors (BILCHITZ, 2010). The protection of individuals' human rights must ensue only from a violation of said rights and not be dependent on the nature of the persona causing the violation. This leads to a more universal (in the sense of coverage) protection of human rights, and also introduces into the human rights field players with the financial means to not only influence states to better protect human rights, but to compensate victims. Corporations being obligated to protect and respect human rights would also help operationalize the UN Guiding Principles on Business and Human Rights (the Guiding Principles) (OCHCHR, 2012).¹³

¹⁰ See for example the Al Yamamah arms deal, summarised in Tim Jarrett and Claire Taylor: Bribery allegations and BAE UK House of Commons Standard Note SN/BT/5367: researchbriefings.files.parliament.uk/documents/SN05367/SN05367.pdf. Accessed on 08 September 2017. Although this did not involve a MNC, it is perhaps evidence of how secretive and potentially lucrative (for Third World politicians) it is to do business with powerful corporations from the West.

¹¹ See a discussion on suing in the MNCs' home country or other foreign jurisdiction in Fellmeth, Aaron Xavier (2002) "Wiwa v. Royal Dutch Petroleum Co.: A New Standard for the Enforcement of International Law in U.S. Courts?," *Yale Human Rights and Development Journal*: Vol. 5: Iss. 1, Article 7. Available at: <http://digitalcommons.law.yale.edu/yhrdlj/vol5/iss1/7> (accessed 08 September 2017).

¹² After Shell initially arguing *forum non conveniens*, and succeeding in a lower court, the U.S. Court of Appeals for the Second Circuit reversed the lower court and indicated a willingness to entertain claims against human rights violations abroad. It was reported in 2009 that the case was eventually settled out of Court for \$15.5million <http://ccrjustice.org/newsroom/press-releases/settlement-reached-human-rights-cases-against-royal-dutch/shell> (accessed 08 September 2017)

¹³ For a critique of why the Guiding Principles are an inadequate substitute for a treaty and debates around the SRSG Report, see David Bilchitz (2010). See also D. Bilchitz 'A chasm between 'is' and 'ought'? A critique of the normative foundations of the SRSG's Framework and the Guiding Principles' in S.Deva and D. Bilchitz (eds.), *Human rights obligations of business: Beyond the corporate responsibility to respect?* (Cambridge: Cambridge University Press 2013) 111-114, as

This is not a novel approach, but part of a growing line of thinking in international human rights jurisprudence. In 2013, David Bilchitz (2013) argued that in fact, corporations do have actionable obligations to respect human rights at international law. Earlier, when commenting on the question of corporate accountability and liability under international human rights law, Emeka Duruigbo (2008) had identified evidence of a shift towards integrating corporations as bearers of obligations. Duruigbo cited the UN Special Representative of the Secretary General's (SRSG) report of February 2007 as indicating that

[...] in the course of the past few decades, the legal status of corporations in international law has shifted to some extent from the classical position, with corporations now considered bearers of duties under international criminal law. The SRSG believes that while this shift is emerging in the international criminal context, it has not yet extended to other aspects of human rights law. [The] report notes, however, that significant changes are occurring in the domestic and international planes that suggest that a more far-reaching shift, that would more fully integrate private business enterprises into the international legal system, will occur some time in the near future (DURUIGBO, 2008, p. 224).

That SRSG Report was part of a process that included the work of the UN Sub-Commission on the Promotion and Protection of Human Rights, which in August 2003 had produced a report¹⁴ viewed as part of a pioneering soft law codification of practice (WEISSBRODT; KRUGER, 2003), albeit one that was not fully acknowledged by the SRSG (BILCHITZ, 2010). Instead, the SRSG argued that international law at best imposes on indirect obligations on corporations, and not direct obligations (HUMAN RIGHTS COUNCIL, 2007), but that this position was largely because states had in fact not placed such obligations on corporations:

Long-standing doctrinal arguments over whether corporations could be "subjects" of international law, which impeded conceptual thinking about and the attribution of direct responsibility to corporations, are yielding to new realities. Corporations increasingly are recognized as "participants" at the international level, with the capacity to bear some rights and duties under international law. . . . [T]hey have certain rights under bilateral investment treaties; they are also subject to duties under several civil liability conventions dealing with environmental pollution. Although this

well as J Nolan, 'The Corporate Responsibility to Respect Rights: Soft Law or Not Law?' in S. Deva and D. Bilchitz (eds.), *Human rights obligations of business: Beyond the corporate responsibility to respect?* (Cambridge: Cambridge University Press 2013), 138.

¹⁴ Titled 'Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights' UN Sub-Commission on the Promotion and Protection of Human Rights Resolution 2003/16, 13 August 2003.

has no direct bearing on corporate responsibility for international crimes, it makes it more difficult to maintain that corporations should be entirely exempt from responsibility in other areas of international law ((HUMAN RIGHTS COUNCIL, 2007, paragraph 35).

Violations of human rights by MNCs can be addressed by empowering countries to use both local legislation and international recognition of their right to do so within international human rights law to put in place a preventative regime. That MNCs are players on the international plane but are not completely subject to the laws and rules governing that space creates a problem that operates in their favor. The very dearth of references to the MNC involved in the Ogoni case, despite the fact that it was the primary beneficiary of the abuses committed, shows how lopsided and unsatisfactory the current position is in practice. That correct position would be to create legal obligations, recognized under international human rights law, mandating that corporations, just like states, have an obligation to respect and, where they are in business and in relation to their employees, to protect human rights.

Clearly, the obligation to protect would need to be qualified, so that it does not entail asking MNCs to effectively be at par with the State in its obligations as regards to its citizens. A sensible qualification would be to limit the duty to those areas where the company's business and policies directly and indirectly impact its employees and those that are impacted by its business. The question of who is impacted by a particular MNC's business would be an objectively verifiable fact: for example, a corporation involved in diamond mining operations that result in the State moving people from their homes to make way for mining operations clearly impacts on those people. Such people ought to be able to look to both the state and the company to ensure that in the process of being moved, their fundamental rights such as the right to property, fair and adequate compensation, equal protection of the law, prior consultation and right to petition through an impartial judicial process are respected.

The important point to note is not that such obligations will need to be carefully balanced. Rather, the fact that the debate is still on whether or not such legal obligations exist in the first place is unacceptable given the influence that MNCs wield. And, as Kinley and Tadaki have argued, MNCs *"have the ability significantly to affect the nature, form and extent of social relations. By virtue, specifically, of their economic and political muscle, [MNCs] are uniquely positioned to affect, positively and negatively, the levels of enjoyment of human rights."*(KINLEY; TADAKI, 2004).

3 THE Ogoni CASE, THE AFRICAN CHARTER AND MNCS LIABILITY

In this communication (the language used by the Commission for a case) the factual background and the arguments indicated that the government of Nigeria, through the State oil company, the Nigerian National Petroleum Company (NNPC), was working with a MNC, Shell Petroleum Development Corporation (Shell), in oil extraction operations *“and that these operations have caused environmental degradation and health problems resulting from the contamination of the environment among the Ogoni People”*(paragraph 1). It was further alleged, *inter alia*, that the government had aided and abetted these activities by refusing to allow independent scientific and environmental studies on the health impact of the oil operations (paragraph 5) and by *“placing the legal and military powers of the state at the disposal of the oil companies”* (paragraph 3), and *“neither monitored operations of the oil companies nor required safety measures that are standard procedure within the industry”* (paragraph 4).

The Commission noted an international consensus to the effect that *“all rights, both civil and political rights and social and economic, generate at least four levels of duties for a State that undertakes to adhere to a rights regime, namely the duty to respect, protect, promote and fulfil these rights”* (paragraph 44) The Commission buttressed its reasoning with reference to Article 2(1) of the International Covenant on Economic, Social and Cultural Rights (ICESCR), which obligates States to take steps *“...by all appropriate means, including particularly the adoption of legislative measures”* and found that the state has a duty to make *“concerted action”* (paragraph 48) to ensure enjoyment of the human rights. Following an examination of the claimed violations and in the absence of any contest from the government around the facts (paragraph 49), the Commission made a finding that the State had violated the African Charter (paragraph 58) because

[...] in the present case, despite its obligation to protect persons against interferences in the enjoyment of their rights, the Government of Nigeria facilitated the destruction of Ogoniland. Contrary to its Charter obligations and despite such internationally established principles, the Nigerian Government has given the green light to private actors, and the oil companies in particular, to devastatingly affect the well-being of the Ogonis. By any measure of standards, its practice falls short of the minimum conduct expected of States.

There was no finding of liability against the state oil company or the MNC. David Bilchitz (2010) has remarked at the absurdity of this finding, stating that *“the fact that the Commission focused its attention only on the actions and obligations of the government is puzzling: the oil companies could arguably have been said to have primary responsibility for the harms caused yet the Commission never addresses*

their responsibilities directly." It is inconceivable that the Nigerian government's liability extended beyond aiding and abetting the destructive operations of the oil companies, and more likely that the positive actions of both Shell and NNPC caused all the damage. Yet all legal liability accrued to the State. The Commission therefore took the view that there is nothing in place both in the Charter or Nigerian law that could have created legally binding human rights obligations against Shell.

Yet, Article 1 of the African Charter specifically enjoins member states to "undertake to *adopt legislative or other measures to give effect*" to the rights in the Charter. Article 16(2) of the African Charter explicitly enjoins states to "*take all necessary measures to protect*". This is a similar obligation to that under Article 2(1) of the ICESCR, which places an obligation on states to use legislation to protect to human rights. In the Ogoni case, the Commission proceeds from the viewpoint that this is limited to placing an obligation on the state *alone* to protect human rights.

The question whether the state should, in the process of adopting 'legislative or other measures to give effect' or taking 'all necessary measures to protect', also pass an equal duty to secure human rights on another entity (in this case both the local and foreign oil companies) is never canvassed. It must be recalled that there is no reason why international human rights law would forbid a state imposing direct human rights obligations on non-state actors. And there is precedence on the regional level, South Africa has done so through 8(2) of the Constitution.¹⁵

Instead, the Commission focused on the State's duty to protect citizens from "*damaging acts that may be perpetrated by private parties*", and relied on jurisprudence from the Inter-American Court of Human Rights¹⁶ and the European Court of Human Rights¹⁷ for support of the proposition that there is such a duty. The failure to take note of a relevant regional example is symptomatic of a consistent weakness in the Commission's decisions and might speak to issues of the quality of argument when cases are brought to it,¹⁸ but it still does represent a missed opportunity.

¹⁵ Which provides that 'A provision of the Bill of Rights binds a natural or a juristic person if, and to the extent that, it is applicable, taking into account the nature of the right and the nature of any duty imposed by the right.'

¹⁶ *Velásquez Rodríguez v. Honduras* judgment of July 19 1988, Series C, No. 4.

¹⁷ *X and Y v. Netherlands* 91 ECHR (1985) (Ser. A) at 32.

¹⁸ In an unpublished work: Tinomudaishe Chinyoka, *Neither African nor Necessary: the Problematic Reasoning of the African Commission on Human and Peoples' Rights Regarding 'Indigeneity' in the Endorois case*, Dissertation Submitted for the Master of Studies Degree in International Human Rights Law University of Oxford 2016, I make the argument that decisions of the African Commission are affected by poor argument and that this explains some glaring inconsistencies. For example, Communication 276/03 *Centre for Minority Rights Development (Kenya) and Minority Rights Group (on behalf of Endorois Welfare Council) v. Kenya* (2009) AHRLR 75 (ACHPR 2009) (27th Activity Report), dealing with the question of the meaning of 'peoples', makes no reference whatsoever to the African Commission's own earlier decision in Communication 266/03, *Gunme and others v Cameroon*

There is nothing in the language of the Charter that supports this limitation. There is nothing that stops the State from using legislation to place obligations on other entities to respect and protect human rights.¹⁹ While it is arguable that at face value this might be tantamount to advocating for the state parties to the Charter to pass on their obligations to another party, this is in fact not the case. First, the language of the Charter makes clear that the State has a primary obligation to respect, protect, promote and fulfil the obligations of the Charter. Passing that duty over in a way that would then absolve the state of its duty is not a possible interpretation of the language of the Charter. The example of section 8(2) of the South African Constitution shows that this is not a very difficult legislative feat.

Secondly, and perhaps more importantly, the seemingly wide discretion²⁰ given in the words “*shall take the necessary steps*”²¹ appears to be one that offers a wide range of possibilities to the States. It suggests that there is a wide discretion as to what can be done under to give effect to the Charter. And, as long as a measure will result in the protection of rights then it is necessary (or “needful,” “requisite,” “essential,” “conducive to,”) and therefore needed to be done, thus permissible under the Charter definition. Clearly, any measure that results in additional protection over and above what is available from the State can only be regarded as necessary or essential for the purposes of fulfilling the requirements of the Charter. In *Avocats sans Frontieres (on behalf of Gaetan Bwampamye) v. Burundi* (ACHPR, 2000)²² the African Commission observed as against Burundi that contrary to Article 1 the African Charter, the country had not only failed to recognise the fundamental “rights, obligations and freedoms proclaimed in the Charter, [but also to] take measures to give effect to them” (ACHPR, 2000).

(2009) AHRLR 9 (ACHPR 2009) (26th Activity Report)

¹⁹ Joe J. Wills, who reviewed an early draft of this article, made this comment on this point: “This is clearly correct. But it is also true to say that there is nothing that requires them to do so as well.”

²⁰ It could also be argued that the words are in fact peremptory, as evidenced by the use of ‘shall’, placing an obligation on the State to use any and all conceivable (as opposed to preferred) means to protect human rights.

²¹ On the import of the word ‘necessary’, see the discussion by Chief Justice Marshall in *McCulloch v. Maryland*, 17 U.S. 4 Wheat. 316 316 (1819). at page 17 U.S. 418: ‘Does [the word “necessary”] always import an absolute physical necessity so strong that one thing to which another may be termed necessary cannot exist without that other? We think it does not. If reference be had to its use in the common affairs of the world or in approved authors, we find that it frequently imports no more than that one thing is convenient, or useful, or essential to another. To employ the means necessary to an end is generally understood as employing any means calculated to produce the end, and not as being confined to those single means without which the end would be entirely unattainable..... [T] he word “necessary” means “needful,” “requisite,” “essential,” “conducive to,”. At: <<https://supreme.justia.com/cases/federal/us/17/316/case.html>> Accessed on 08 September 2017.

²² The same observation was also made against Zambia in *Communication 211/98, Legal Resources Foundation v. Zambia*, Fourteenth Activity Report 2000-2001, Annex V.

In line with its tradition of always looking for an expansive interpretation of the Charter,²³ the Commission found (in the *Ogoni case*) that ‘there is no right in the African Charter that cannot be made effective’ (paragraph 69) but then limited itself by finding that part of that process should not

[...] fault States that are labouring under difficult circumstances to improve the lives of their people...[and that the] intervention of multinational corporations may be a potentially positive force for development if the State and the people concerned are ever mindful of the common good and the sacred rights of individuals and communities.

Being liable for the protection of human rights on the one hand and being a positive force for development need not be mutually exclusive.

It is true that there are a number of alternatives to ensuring that corporations act in a way that respects the law, such as effectively regulating corporate conduct, prosecuting corporate criminality, providing compensation for victims of corporate abuse²⁴ and adherence to democratic principles and the rule of law. However, because of the dynamics inherent in the uneven relationship between MNCs and Third World states, many of these measures presuppose the existence of both the will and the ability on the part of the State, where in fact there might be none. Given the size and power that some MNCs have, it is inconceivable that some developing states would have the power to effectively regulate or prosecute them (EZEUDU, 2011),²⁵ even if there was a will to take such steps.²⁶

In this regard, I would suggest that the focus on promoting corporate social responsibility is somewhat misguided, and that the best guarantee for what this focus seeks to achieve would be to place an obligation to protect human rights. The former is voluntary and self-defined, much like asking a patient to decide which

²³ But see however the debate in Malcolm Evans, Rachel Murray (eds): *The African Charter on Human and Peoples' Rights: The System in Practice 1986–2006* (Cambridge, Cambridge University Press, 2008) at p.174, where the ‘expansive interpretation’ seems to be something of a case by case phenomenon.

²⁴ I am indebted to Joe J. Wills for helping me develop this point.

²⁵ Martin-Joe Ezeudu (2011), also commenting on the activities of Shell in the Niger delta and the facts surrounding the Ogoni case, argues for an expansion of the International Criminal Court’s jurisdiction to include the power to prosecute MNCs.

²⁶ And, given the decision of the African Commission in Communication 245/2002, *Zimbabwe Human Rights NGO Forum v. Zimbabwe*, Twenty-first Activity Report 2007, Annex III, which adopted the jurisprudence of the Inter-American Court in *Velasquez Rodriguez v. Honduras*, Series C, No.4, Human Rights Law Journal 9 (1988) 212, it is the State that bears the obligation to prevent, to investigate and to punish the actions of non-state actors when they affect human rights. Given that in that case the evidence showed a direct link between the Zimbabwe Liberation War Veterans Association as an arm of the ruling party, the fact that the African Commission still found that they were a non-state actor goes to show the hurdle that litigants have when going against powerful opponents.

disease they want to decide that they have and then treat it, rather than having an independent diagnosis and a tried and tested formula for addressing it. It has not been shown that companies' commitment to corporate social responsibility, like corporate codes of conduct, can ever be "*more than public relations exercises - fig leaves for exploitation- the latest in a long title of efforts by firms to escape responsibility for the production conditions from which they profit...*"(KEARNEY, 2000, p. 1359).

According to Steiner and Alston, at the very least, "*the human rights obligations assumed by each government require it (or should require it) to use all appropriate means to ensure that actors operating within its territory subject to its jurisdiction comply with national legislation designed to give effect to human rights*"(STEINER; ALSTON, p. 1349). Clearly, given that one basic reason for having a human rights protection mechanism is that in instances where this is likely to become an issue is that some states do not respect this duty, it is incumbent upon States to use the language of human rights instruments to widen the net for to cover all possible holders of the duty to respect and uphold.

This is especially so when, such as in the *Ogoni case*, it is clear that the reason why the violations occurred, and in deed were aided and abetted by the state, was for the benefit of private companies. The influence that MNCs have over States, especially in Africa, cannot be underestimated. States are discouraged from close regulatory oversight by the economic benefits that come from creating an enabling environment. Indeed, Steiner and Alston concede that states are often powerless to resist MNCs. This is because of the economic need for investment and the need to reduce operating costs, because "*in the context of increasing global mobility of capital, competition among potential host countries discourages initiatives that may opus up labour costs and make one country less attractive than others with lower regulatory standards - the so-called race to the bottom*" (STEINER; ALSTON, p. 1349). This is further complicated by the fact that in these poor countries, even those MNCs that are committing human rights violations sometimes still pay better than the alternative.²⁷

It is time that the orthodox (CHOW, 1988) understanding of human rights as applicable only to states (CLAPHAM, 1993) must give way to a reality that looks at the modern world for what it is: a hybrid of actors and actions that blur the divide between state and private enterprise. To continue to argue that MNCs only

²⁷ A Human Rights Watch report from August 1996 examined the systematic discrimination against women at the expert processing factories (Maquiladoras) on the US-Mexico border and found that despite these violations, these companies offered better pay to the local population than the alternatives, forcing the locals to put up with the human rights violations. <https://www.hrw.org/legacy/reports/1996/Mexi0896.htm> (accessed 17/07/17)

interact with international law through their States (CHOW, 1988) is to avoid reality. In other words, I submit that rather than have an argument whether that corporations should bear human rights obligations under domestic law through specific legislation passed to that effect, the debate should really be on whether similar obligations should also ensue from international human rights law.²⁸ According to Duruigbo (2008, p. 228), “*international law cannot continue to play the ostrich and pretend that these corporations can be under the effective control of national laws and institutions only.*” Privatisation in many European countries means that purely state functions are now carried out by private, usually MNCs, on behalf of the state. In the United Kingdom, private companies run prisons,²⁹ carried out some police functions,³⁰ and are involved in immigration enforcement.³¹ To suggest that once so contracted out, these activities are outside the oversight of human rights treaties would be absurd.³² Instead, and to adapt the words of Cane in relation to administrative law into the human rights context:

[...] what matters for questions for questions of legal liability is the nature of the activity, not the identity of the person or body conducting; and since activities are not by their nature either public or private, the distinction is irrelevant to the regulation and control of human activity (CANE, 1987)

Reading existing human rights treaties as already empowering states to share their obligations with MNCs is arguably better than trying to create new instruments specifically directed at companies. To begin with, because International Treaties require voluntary signup, it is unlikely that many MNCs would sign up to any robust process that affected their bottom-line. Secondly, when these instruments have been attempted³³ that have been largely aspirational,

²⁸ If it is possible to make individuals liable for criminal wrongdoing under international law, it seems odd that corporations, which rely on their distinctive legal persona to effectively stand separate from their shareholders, cannot be equally liable. See also Peter Muchlinski, ‘Limited Liability and Multinational Enterprises: A Case for Reform?’ (2010) 34 *Cambridge Journal of Economics* 915

²⁹ See HM Prison Service <https://www.justice.gov.uk/about/hmps/contracted-out> (accessed 01 September 2017)

³⁰ See The Guardian: Private security firm G4S to run Lincolnshire police station, 22 February 2012 <https://www.theguardian.com/uk/2012/feb/22/g4s-run-police-station-lincolnshire> (accessed 08 September 2017)

³¹ See The Telegraph: ‘G4S staff suspended after claims of abuse on detainees at immigration removal centre’ 1 September 2017 <http://www.telegraph.co.uk/news/2017/09/01/g4s-staff-suspended-claims-abuse-detainees-immigration-removal/> (accessed 08 September 2017)

³² Indeed, the practice in the UK from the news reports are that these companies are then held to the same standards as would the state if it was carrying out these functions. The fact that it is possible to hold corporations to those standards should mean that placing direct legal obligations on them to respect human rights is not impossible.

³³ See for example Amnesty International’s ‘Human Rights Principles for Companies’, January

relying on MNCs' supposed concerns about protecting reputational damage and avoiding the creation of unstable operating environments. Unfortunately, these aspirations, though noble, do not address the practicalities of doing business in the environments where this is ever an issue: sometimes these companies profit from instability. What if it is cheaper to pay bribes to some regional warlord than taxes to a national entity? Isn't it in fact the case that MNCs move from the west to poorer countries because of the low operating costs, which in turn are a result of "*weak labour laws and enforcement, and restrictions on trade union activity, [conditions which in turn lead] to violations of internationally recognised rights*"(STEINER; ALSTON, p. 1354) and enforcement mechanisms?

CONCLUSION

In the field of human rights, it should matter who has committed the human rights violation, be they a private entity or a state body. Either should carry the obligation to uphold international and national human rights law. Since it matters not to the nature of the harm suffered by the holder of the right whether the violator was a state or someone doing it for profit, maintaining the distinction is an anachronism which protects private business for no justifiable reason. In the Ogoni case, the Commission passed up on an opportunity to find that one of the 'necessary steps' that the Nigerian government ought to have taken in protecting the rights of the Ogoni people was to place an obligation on the two oil companies to uphold the rights in the Charter in their operations in Ogoniland.³⁴

So, rather than finding that the Nigerian government was liable as it did, in my view the Commission ought to have made a specific finding that the Nigerian government had not done everything necessary by failing to enact legislation making corporations like Shell directly liable for human rights violations. At first glance this might appear like a contradiction in that it seems to presuppose a power that most Third World States will quite simply not have against giant MNCs. However, if international human rights law recognized such an obligation, and placed on corporations a legally enforceable duty to respect human rights as subjects of international law, this would take the pressure away from the States in the developing world, who would simply be implementing an international law obligation.

1998, AI Index: ACT 70/01/98 <https://www.amnesty.org/download/Documents/148000/act700011998en.pdf> (accessed 17/07/17)

³⁴This failure on the part of the state did not absolve the state of its own obligations to protect, but MNCs will invariably have deeper pockets to make restitution and, perhaps more importantly, a reason to avoid incurring the liability in the first place: profit.

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