

# Accountability and Corporate Human Rights Violations in Tort and International Law



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By

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**Cambridge  
Scholars  
Publishing**



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This book first published 2021

Cambridge Scholars Publishing

Lady Stephenson Library, Newcastle upon Tyne, NE6 2PA, UK

British Library Cataloguing in Publication Data

A catalogue record for this book is available from the British Library

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ISBN (10): 1-5275-7505-5

ISBN (13): 978-1-5275-7505-9

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## ACKNOWLEDGEMENTS

I would like to extend thanks to the many people in Ghana and Abidjan, the Ghanaian and Ivorian Judo Federation, who so generously contributed to the work presented in this book. Special mention goes to my enthusiastic supervisor, Dr. Costantino Grasso and Prof. Kofi Kufuor. My PhD has been an amazing experience and I thank Juergen Klinger, Lt. Col. Campey, Mallika Singhal, Morgan Moone, The British Army, The Royal Tank Regiment and Team University of East London wholeheartedly, not only for their tremendous support but also for giving me so many wonderful opportunities. Similar, profound gratitude goes to Prof. Jeremie Gilbert, who has been a truly dedicated mentor. I am also hugely appreciative of Mr. Emmanuel Tetteh, especially for sharing his expertise so willingly, and for being so dedicated to his role as President of the Ghana Judo Federation.

Special mention goes to my Family, Fanni Simon, Urszula Piątek, Ekaterina Petrova, Matthew Tansley, Prisca Awiti-Alcaraz, Iveta Mogyorodiova, and TeamBath, The International Judo Federation and the African Judo Union. Finally, but by no means least, thanks go to mum, Enoyoma Nartey, late dad, Richard Kwame Nartey, and Séverine Nebie for almost unbelievable support. They are the most important people in my world, and I dedicate this book to them.

## PREFACE

For over 60 years, issues around globalisation and multinational corporations (MNCs) have been at the fore of the most intense debates in international economics, international law, and international politics. Indisputably, they are the main catchphrases in terms of economics, environmental protection, and human rights law. The concept of globalisation has promoted an economic liberalisation that brought to light Adam Smith's theory of 'the invisible hand', which perceives that the market economy should regulate itself. Undoubtedly, this ideological concept has promoted economic development, trade liberalisation and the transfer of technology, knowledge, and finance across the globe.

However, it has also been observed that globalisation has brought economic inequality, social injustice, environmental damage, destruction of ecosystems and indigenous people's livelihoods, corruption, bad governance in developing countries, a lack of appropriate mechanisms to govern the global economy, and an imbalance of economic power between developed and developing countries. In the context of the international legal system and legal scholars' views, the self-regulatory perception of globalisation has led to violations of international law and human rights law by MNCs, either directly or indirectly, through their subsidiaries or host state governments. This concern indicates a need to develop an appropriate mechanism to regulate the conduct of MNCs at the international level. It should be noted that the idea of imposing private rights and duties under national and international law through collective jurisdiction and multinational trading systems, at both global and regional levels, signals the end of the Westphalian State System.

The primary aim of this book is to identify a coherent legal principle to establish a novel duty of care for corporate human rights violations and environmental damages. This book examines whether tort and civil law offer better accountability and remedy for victims of corporate human rights abuses. Over the course of the research, this book has attempted to carry out an in-depth and critical analysis of the concept of corporate accountability. Moreover, a fundamental part of this book is devoted to examining the extent to which international criminal law influences international human rights law in its use of tort law and civil law remedies. Finally, it attempts to set out a theoretical mechanism for duty of

care as well as a proposal for the establishment of a Hybrid International Transnational Corporation Court that would have the potential to effectively interpret the concept of the corporate duty of care under tort law.

The central objective of the book is to strengthen the argument on MNC accountability and remedy, as well as to develop and present a new practical paradigm for international legal actions against human rights violations by MNCs in host or home states, in the context of the tort of negligence (the neighbourhood principles of duty of care). This book rests on the assumption that a corporation under a duty of care or its equivalent has the ability to control the business activities directly causing the harm. The ability to control, and not actual control, should be a good enough basis for legal liability. The control should be defined broadly to cover not only majority shareholding, but other situations that give entities either legal or factual control. In certain cases, including but not limited to when there is a majority ownership (over 50%), the ability to control should be assumed and the claimant should not have to prove it. Creating and structuring a relationship with a subsidiary, for example, through holding corporations or share companies so that there is no apparent control over its activities, should not be a defence. Suggestions in this book can also operate alongside direct regulatory actions by the state, and would help reinforce compliance. Lastly, the recommendation concerning applicable law is relevant and should be implemented in relation to all cases dealing with private claims under tort/non-contractual liability law.

Grateful acknowledgement is here made to those who helped this research and this book. This work would not have reached its present form without their invaluable help, especially to the Global Legal Review Editorial Team.

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30 October 2019

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## LIST OF ABBREVIATIONS

ATCA – Alien Tort Claims Act  
ATS – Alien Tort Statute  
CCL – Control Council Law  
ECHR – European Convention on Human Rights  
FDI – Foreign Direct Investment  
HITNCCC – Hybrid International Transnational Corporation Claim Court  
ICC – International Criminal Court  
ICESCR – International Covenant on Economic, Social and Cultural Rights  
ICJ – International Court of Justice  
ICT – International Criminal Tribunal  
ICTR – International Criminal Tribunal for Rwanda  
ICTY – International Criminal Tribunal for the former Yugoslavia  
IFOR – Implementation Force  
ILC – International Law Commission  
ILO – International Labour Organisation  
IMT – International Military Tribunal  
JCE – Joint Criminal Enterprise  
MNCs – Multi-National Corporations  
NATO – North Atlantic Treaty Organisation  
NGO – Non-Governmental Organisation  
OECD – Organisation for Economic Co-operation and Development  
PICC – Permanent International Criminal Court  
RCO – Responsible Corporate Officer  
RICO – Racketeer Influenced and Corrupt Organisations Act  
SA – Standard on Auditing  
SFOR – Stabilisation Force  
TVPA – Torture Victims Prevention Act  
UJ – Universal Jurisdiction  
UK – United Kingdom  
UN – United Nations  
UNDHR 1948 – Universal Declaration of Human Rights  
UNGA – UN General Assembly  
UNGPs – United Nations Guiding Principles  
UNSC – UN Security Council  
UNSG – Secretary-General of the United Nations

US – United States

WCHR – World Court of Human Rights

WWII – World War II



# INTRODUCTION

Remedies for human rights violations on matters such as the right to life, workers' rights, the right to food and shelter, the right to own property, the right to health and clean air, freedom from oppression, and freedom of expression,<sup>1</sup> together with freedom from environmental damages, are governed by international voluntary mechanisms under the auspices of a number of United Nations initiatives.<sup>2</sup> 'Human rights are the basic rights and freedoms that belong to every person in the world, from birth until death.'<sup>3</sup> They apply regardless of where you are from, what you believe or how you choose to live your life. They can never be taken away, although they can sometimes be restricted, such as when a person breaks the law or in the interests of national security. These basic rights are based on shared values like dignity, fairness, equality, respect and independence. These values are defined and protected by law. However, from the research carried out in this study, it appears that reparations<sup>4</sup> for victims who have suffered human rights abuses are ineffective and remedies are mostly unenforceable.<sup>5</sup> So far, states have been reluctant to offer an effective remedy, explicitly and in general, for victims of human rights violations and environmental damages. But, what is important to note is that the drafters

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<sup>1</sup>UN General Assembly, *Universal Declaration of Human Rights*, 10 December 1948, 217 A (III), <<http://www.refworld.org/docid/3ae6b3712c.html>> Accessed 24 May 2018.

<sup>2</sup>Robert C Blitt, 'Beyond Ruggie's Guiding Principles on Business and Human Rights: Charting an Embrasive Approach to Corporate Human Rights Compliance' (2012) 48 (1) *Texas International Law Journal* 33.

<sup>3</sup>The Equality and Human Rights Commission, 'What are human rights?' (2019). <<https://www.equalityhumanrights.com/en/human-rights/what-are-human-rights#:~:text=Human%20rights%20are%20the%20basic,choose%20to%20live%20your%20life.&text=These%20basic%20rights%20are%20based,%2C%20equality%2C%20respect%20and%20independence>> Accessed 19 April 2019.

<sup>4</sup>Mijke De Waardt and Sanne Weber, 'Beyond Victims' Mere Presence: An Empirical Analysis of Victim Participation in Transitional Justice in Colombia' (2019) 11 (1) *Journal of Human Rights Practice* 209, 228.

<sup>5</sup>Liesbeth Zegveld, 'Remedies for Victims of Violations of International Humanitarian Law' (2003) 85 (851) *Revue Internationale de la Croix-Rouge/International Review of The Red Cross* 497, 527.

of the nineteenth-century human rights convention<sup>6</sup> already believed that humanity had inviolable rights that were protected under any jurisdiction.<sup>7</sup> However, human rights treaties do not expressly envisage causes of action for victims of human rights abuses under international or national law, and victims are hardly able to invoke their rights.

Critical observation of the development of human rights ‘accountability can be noted at the conclusion of’<sup>8</sup> World War II, which created a crucial principle in the human rights accountability movement. ‘The Nuremberg and Tokyo Tribunals tried military, civilian government and industrialist’<sup>9</sup> ‘(corporate) officials and found those in each category liable for their actions’<sup>10</sup> and inactions.<sup>11</sup> ‘The inclusion of military, state and private officials in the trials held in the occupied zones continued into the 1950s, although Cold War politics led to the dismissal of charges against’<sup>12</sup> corporate officials in the early 1950s.<sup>13</sup> Other developments towards ‘human rights accountability included the US Civil Rights Movement and increasing activism around human rights issues, including the formation of organisations such as Amnesty International in 1961, which saw the push for liability for human rights abuses.’<sup>14</sup> Human rights were also increasingly codified with the emergence of a growing number of human rights treaties in 1966<sup>15</sup> and the protocols on humanitarian law in

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<sup>6</sup>AW Brian Simpson, *Human Rights and the End of Empire: Britain and the Genesis of the European Convention* (Oxford University Press on Demand 2004).

<sup>7</sup>Janet Holl Madigan, *Being Human, Being Good: The Source and Summit of Universal Human Rights* (Theses and Dissertations UMD 2004).

<sup>8</sup>Jennifer M Green, ‘Corporate Torts: International Human Rights and Superior Officers’ (2016) 17 *Chicago Journal of International Law* 447.

<sup>9</sup>*Ibid.*

<sup>10</sup>Jennifer M Green, ‘Corporate Torts: International Human Rights and Superior Officers’ (2016) 17 *Chicago Journal of International Law* 447.

<sup>11</sup>Michael R Marrus, *The Nuremberg War Crimes Trial, 1945-46: A Documentary History* (Macmillan 1997)

<sup>12</sup>Jennifer M Green, ‘Corporate Torts: International Human Rights and Superior Officers’ (2016) 17 *Chicago Journal of International Law* 447.

<sup>13</sup>Michael Bazylar and Jennifer Green, ‘Nuremberg-Era Jurisprudence Redux: The Supreme Court in *Kiobel v. Royal Dutch Petroleum Co.* and The Legal Legacy of Nuremberg’ (2012) 7 *Charleston Law Review* 23 and Jennifer M Green, ‘Corporate Torts: International Human Rights and Superior Officers’ (2016) 17 *Chicago Journal of International Law* 447.

<sup>14</sup>*Ibid.*

<sup>15</sup>Oona A Hathaway, ‘Do Human Rights Treaties Make a Difference?’ (2002) 111 *Yale Law Journal* 1935, and Beth Simmons, ‘Treaty Compliance and Violation’ (2010) 13 *Annual Review of Political Science* 273.

1977.<sup>16</sup> A complementary development was the increasing examination of the overlapping responsibilities for human rights violations of state and non-state actors, prominently in the context of gender rights, which examined and developed standards for due diligence in cases of domestic violence over the years.<sup>17</sup>

It is through the ‘development of human rights law that the role of transnational corporations began to receive additional international attention. In 1972’<sup>18</sup>, the United Nations ‘Economic and Social Council ordered a study of the impact of transnational corporations on the development process and international relations.’<sup>19</sup> ‘In 1979, the UN created an advisory body, the Commission on Transnational Corporations (UNCTC).’<sup>20</sup> ‘From 1977 to 1990, the UNCTC developed a code of conduct for multinational corporations, but the final draft prepared in 1990 was never adopted.’<sup>21</sup> ‘Country-specific standards included the 1977 Sullivan Principles to

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<sup>16</sup>Protocol Additional to the Geneva Conventions of 12 August 1949 and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), opened for signature June 8, 1977, 1125 UNT.S. 3 (entered into force Dec. 7, 1978) [hereinafter Protocol I]; Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), opened for signature June 8, 1977, 1125 UNT.S. 609 (entered into force Dec. 7, 1978).

<sup>17</sup>Catherine Phuong, ‘Hilary Charlesworth and Christine Chinkin, The Boundaries of International Law: a Feminist Analysis’ (2002) 10 (2) Feminist Legal Studies 203.

<sup>18</sup>Jennifer M Green, ‘Corporate Torts: International Human Rights and Superior Officers’ (2016) 17 Chicago Journal of International Law 447.

<sup>19</sup>Jennifer M Green, ‘Corporate Torts: International Human Rights and Superior Officers’ (2016) 17 Chicago Journal of International Law 447. Also see: United Nation Economic and Social Council Res. 1721 (LIII) (July 28, 1972).

<sup>20</sup>*Ibid.* Also see: Karl P Sauvant, ‘The Negotiations of The United Nations Code of Conduct on Transnational Corporations: Experience and Lessons Learned’ (2015) 16 (1) Journal of World Investment & Trade 11, 87.

<sup>21</sup>Jennifer M Green, ‘Corporate Torts: International Human Rights and Superior Officers’ (2016) 17 Chicago Journal of International Law 447 and De La Vega Connie, Amol Mehra & Alexandra Wong, Holding Businesses Accountable for Human Rights Violations: Recent Developments and Next Steps (2011).

<[perma.cc/8WAA-SGCC](http://perma.cc/8WAA-SGCC)> Accessed 13 June 2016.

address apartheid in South Africa<sup>22</sup> and ‘the 1984 MacBride Principles, the code of conduct for US companies doing business in Northern Ireland.’<sup>23</sup>

Furthermore, what has become clear in the past decades is that there is a substantial focus on actors with the highest levels of responsibility for human rights violations, which has translated into an important development for demanding greater accountability for human rights violations.<sup>24</sup> Together, these dynamics added to the momentum for a universal system of accountability for non-state actors,<sup>25</sup> a point which shall be argued throughout this book. This development was observed in the 1990s, when there was an increased focus on the rights of human rights victims to remedies for the violations perpetrated against them. Special international tribunals were created to address mass atrocities in the former Yugoslavia and in Rwanda,<sup>26</sup> followed by the 1998 establishment of the International Criminal Court (ICC).<sup>27</sup> The ICC statute, often referred to as the Rome Statute,<sup>28</sup> required the establishment of a trust fund so that victims of those convicted of human rights violations would benefit from the ‘principles relating to reparations to, or in respect of, victims, including restitution, compensation and rehabilitation.’<sup>29</sup> Furthermore, in 2003 the ICC Prosecutor stated that these violations could include corporate

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<sup>22</sup>Jennifer M Green, ‘Corporate Torts: International Human Rights and Superior Officers’ (2016) 17 *Chicago Journal of International Law* 447 and *The Global Sullivan Principles*, The University of Minnesota Human Rights Library (2016). <<https://perma.cc/JU6X-WGCT>> Accessed 24 May 2016.

<sup>23</sup>Father Sean McManus, ‘The MacBride Principles, The University of Minnesota Human Rights Library’ (2016). <<https://perma.cc/JA8X-5HCM>> Accessed 8 January 2016.

<sup>24</sup>Michael Bazylar and Jennifer Green (n 136).

<sup>25</sup>*Ibid.*

<sup>26</sup>John RWD Jones, *The Practice of The International Criminal Tribunals for The former Yugoslavia and Rwanda* (Transnational Pub Incorporated 2000).

<sup>27</sup>Cesare PR Romano, André Nollkaemper and Jann K Kleffner, eds. *Internationalized Criminal Courts and Tribunals: Sierra Leone, East Timor, Kosovo, and Cambodia* (Oxford University Press 2004).

<sup>28</sup>Mahnoush H Arsanjani, ‘The Rome Statute of The International Criminal Court’ (1999) 93 (1) *American Journal of International Law* 22, 43.

<sup>29</sup>Rome Statute of the International Criminal Court, art. 75, opened for signature July 17, 1998, 2187 UNT.S. 90 (entered into force July 1, 2002).

<<https://perma.cc/Z3ML-Q9FR>> Accessed 7 March 2016.

officers,<sup>30</sup> and in September 2016, the ICC issued a policy paper discussing the liability of corporate officials for environmental crimes.<sup>31</sup>

In 1989, the UN Sub-Commission on the Prevention of Discrimination and Protection of Minorities began to research the right to restitution, compensation, and rehabilitation for victims of gross violations of human rights and fundamental freedoms.<sup>32</sup> The research by the Sub-Commission examined violations by those who were considered to have ‘indirect’ responsibility, or who might have violated rights by omission rather than by commission.<sup>33</sup> This ultimately led to a Resolution by the UN General Assembly which summarised the important steps towards an international system to advance the right of victims to remedies, including compensation and restitution.<sup>34</sup> The movement to impose transnational norms on corporations also intensified throughout this period. To date, several studies investigating corporate human rights violations illustrate that cases in the United States, Australia, England, and France against multinational corporations and corporate officers corroborate the push for corporate human rights accountability at the international level.<sup>35</sup> The UN continued to develop standards for businesses and their officers. In 2002, the UN Commission on Human Rights (Sub-Commission) drafted a set of principles that directly bound businesses and endorsed corporate officer responsibility.<sup>36</sup> The preamble reaffirmed that transnational corporations and other business enterprises, their officers including managers, members of corporate boards or directors and other executives, and persons working

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<sup>30</sup>International Criminal Court, Policy Paper on Case Selection and Prioritisation (2003). <<https://perma.cc/SDL9-A7B2>> Accessed 8 March 2017.

<sup>31</sup>International Criminal Court, Policy Paper on Case Selection and Prioritisation (2016). <<https://perma.cc/SDL9-A7B2>> Accessed 16 May 2017.

<sup>32</sup>Theo Van Boven, ‘The United Nations Basic Principles and Guidelines on The Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law’ (2010) United Nations Audiovisual Library of International Law. New York, United Nations. <<https://perma.cc/7U38-HQ8F>> Accessed 2 September 2017.

<sup>33</sup> *Ibid.*

<sup>34</sup>G.A. Res. 60/147, Basic Principles and Guidelines on The Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law (Dec. 16, 2005). <<https://perma.cc/C49S-5MA3>> Accessed 8 September 2017.

<sup>35</sup>Sarah Joseph, *Corporations and Transnational Human Rights Litigation* (Vol. 4. Hart Publishing 2004).

<sup>36</sup>Economic and Social Council, Commission on Human Rights, Sub-Commission on the Promotion and Protection of Human Rights, 55th Sess., UN Doc. E/CN.4/Sub.2/2003/12/Rev.2 (Aug. 26, 2003).

for them, have, inter alia, human rights obligations and responsibilities.<sup>37</sup> However, these standards were met with strong opposition and were obstructed at the UN Commission.<sup>38</sup>

Additionally, voluntary mechanisms such as the Guiding Principles (GPs),<sup>39</sup> the OECD Guidelines,<sup>40</sup> the ILO Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy,<sup>41</sup> and the SA800 Standards<sup>42</sup> arguably have not helped victims gain access to justice and effective remedy. In fact, these initiatives have contributed to ongoing human rights violations in the international arena by allowing corporations to choose the methods and processes with which they respect human rights and the environment.<sup>43</sup> Some research has found that, while voluntary regulation has resulted in some substantive improvements in corporate behaviour, it cannot be regarded as a substitute for the more effective exercise of state authority at both national and international levels. The relevance of rights under international law and human rights law is questionable if victims have no legal capacity to enforce their rights before either a national or international court once they claim to have become a victim of human rights abuses.

International law has historically been between states, which are treated as subjects with legal personalities, allowing them to draft and consent to international agreements that regulate their affairs and relationships with each other. This relationship contrasts with domestic law, as international law goes beyond the internal affairs of a state to impinge

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<sup>37</sup> David Weissbrodt and Muria Kruger, 'Norms on the Responsibilities of Transnational Corporations and other Business Enterprises with Regard to Human Rights' (2003) 97 (4) *American Journal of International Law* 901, 922.

<sup>38</sup> *Ibid.*

<sup>39</sup> United Nations, *Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework* (UN Press 2011).

<sup>40</sup> Kathryn Gordon, 'The OECD Guidelines and Other Corporate Responsibility Instruments: A Comparison' (OECD Working Papers on International Investment 2001).

<sup>41</sup> Jernej Letnar Cernic, 'Corporate Responsibility for Human Rights: Analyzing The ILO Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy' (2009) 6 (1) *Miskolc Journal of International Law* 24.

<sup>42</sup> Grigoris Giannarakis, Nikolaos Litinas and Nikolaos Sariannidis, 'Evaluation of Corporate Social Responsibility Performance Standards' (2011) 5 (17) *African Journal of Business Management* 7367.

<sup>43</sup> David Vogel, 'The Private Regulation of Global Corporate Conduct: Achievements and Limitations' (2010) 49 (1) *Business & Society* 68, 87, also see: Steven R Ratner, 'Corporations and Human Rights: a Theory of Legal responsibility' (2001) 111 (3) *Yale Law Journal* 443.

upon the interests of other states and the international community as a whole. The right to a remedy and/or reparation is imperative for victims involved in human rights abuses, but the theory of international law and the exercise of state jurisdiction in domestic affairs has created a legal and jurisdictional impediment for victims' access to a remedy. The parameter of international law and state jurisdiction has contributed to the lack of effective remedies at both the national and international level. Also, voluntary regulation does not provide an effective remedy for state misconduct. As put by Lord Denning, a member of the British House of Lords, 'a right without a remedy is no right at all'.<sup>44</sup> Lord Denning's view stresses the importance of human rights and access to a remedy. Rights must be accompanied by a remedy.

Human rights abuses resulting from human activities, such as the disposal of toxic chemicals, the generation of power, and the exploitation of oil naturally produce violations without a remedy. Mismanagement of natural resources causes severe watershed erosion, desertification, and atmospheric pollution which severely impair human life.<sup>45</sup> Although human suffering associated with environmental destruction is growing,<sup>46</sup> international and regional human rights institutions have yet to clarify the obligations of governments to protect and provide remedies for the victims involved. A primary concern of this can be seen in the article 'ICC Widens Remit to Include Environmental Destruction Cases'.<sup>47</sup> The Hague International Criminal Court cited that it would prosecute governments and individuals for environmental crimes, including land grabs.<sup>48</sup> As put forward by Gallmetzer,<sup>49</sup> the ICC would establish jurisdiction based on the situations that produced human rights violations as opposed to whether or not the state that allowed the violation had agreed to ICC jurisdiction.

Recent evidence suggests that the ICC is extending its focus on corporate accountability to include Rome Statute crimes already in their

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<sup>44</sup>*Gouriet v Union of Post Office Workers* [1978] AC 435, p. 435.

<sup>45</sup>Michelle Leighton Schwartz, 'International Legal Protection for Victims of Environmental Abuse' (1993) 18 *Yale Journal of International Law* 355.

<sup>46</sup>Michelle Leighton Schwartz, 'International Legal Protection for Victims of Environmental Abuse' (1993) 18 *Yale Journal International Law* 355.

<sup>47</sup>John Vidal and Owen Bowcott, *ICC Widens Remit to Include Environmental Destruction Cases* (2016) *The Guardian*.

<<https://www.theguardian.com/global/2016/sep/15/hague-court-widens-remit-to-include-environmental-destruction-cases>> Accessed 15 June 2017.

<sup>48</sup>*Ibid.*

<sup>49</sup>Reinhold Gallmetzer, 'Prosecuting Persons Doing Business with Armed Groups in Conflict Areas: the Strategy of the Office of the Prosecutor of the International Criminal Court' (2010) 8 (3) *Journal of International Criminal Justice* 947, 956.

jurisdiction. The ICC, however, does not fully explain what it means by stating that the ‘Office will also seek to cooperate and provide assistance to states, upon request’,<sup>50</sup> with respect to conduct which constitutes a serious crime under national law, such as the illegal exploitation of natural resources, arms trafficking, human trafficking, terrorism, financial crimes, land grabbing or the destruction of the environment.<sup>51</sup> Thus, what does the ICC mean by ‘assisting national governments’<sup>52</sup> in a form of legal prosecution or investigation? Nonetheless, the existence of false justice and equality before the law, in addition to the lack of cooperation by world powers and a lack of transparency in judicial systems, means enforcing this policy will be difficult.<sup>53</sup> Also, with the misrepresentation of the rule of law<sup>54</sup> that exists in developing country<sup>55</sup> judicial systems and the unwillingness of countries to cooperate with the ICC, it is hard to see how this policy will be effective in practice. Not to mention the various difficulties of holding corporations accountable for their misconduct under international criminal law.<sup>56</sup> Furthermore, without states and international institutions working together, it will be difficult for the ICC to promote direct interaction with victims, including coordinating preliminary examinations, investigations, pre-trials, trial and reparation arrangements.

The relationships between victims and the corporation, its subsidiaries and the environment require a renewed examination of the proper balance between corporate misconduct and solutions for victims.<sup>57</sup> It

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<sup>50</sup>*Ibid.*

<sup>51</sup> ayal Patel, ‘Expanding Past Genocide, Crimes Against Humanity, and War Crimes: Can an ICC Policy Paper Expand the Court’s Mandate to Prosecuting Environmental Crimes?’ (2016) 14 Loyola University Chicago International Law Review 175.

<sup>52</sup> Anna Stenning and Samantha Walton, *Introduction* (2017) iii-x.  
<<http://www.tandfonline.com/doi/full/10.1080/14688417.2017.1310440>>  
Accessed 15 June 2017.

<sup>53</sup> Tim Allen, *Trial Justice: The International Criminal Court and the Lord’s Resistance Army* (Zed Books Ltd 2013).

<sup>54</sup> Antonin Scalia, ‘The Rule of Law as A Law of Rules’ (1989): 56 (4) University of Chicago Law Review 1175, 1188.

<sup>55</sup> United Nations, ‘Economic Analysis & Policy Division’ (2018) <<https://www.un.org/development/desa/dpad/least-developed-country-category.html>> accessed 4 July 2016.

<sup>56</sup> Jonathan A Bush, ‘The Prehistory of Corporations and Conspiracy in International Criminal Law: What Nuremberg Really Said’ (2009) 109 Columbia Law Review 1094.

<sup>57</sup> Lucinda A Low, Sarah R. Lamoree and John London, ‘The Demand Side of Transnational Bribery and Corruption: Why Levelling the Playing Field on the

is therefore likely that the connection between international criminal law and environmental crimes will not yield effective accountability for corporate human rights violations and environmental damages, but may provide some grounds for enforcing human rights obligations in the international community. Hence, it could be hypothesised that what is conceived as a violation or breach of a duty of care under civil and tort law will most likely not be conceived of as a violation of domestic criminal law, international criminal law, or criminal obligations under international law. Therefore, the need to create a legal principle for corporate accountability arises in the existing civil and tort law framework, which will give expression to new human rights treaties and existing obligations under the Universal Declaration of Human Rights.<sup>58</sup>

Nonetheless, the development of environmental crime has led many authors in the last two decades to see environmental law as the new legal framework for corporate human rights accountability and for the violations of human rights with respect to environmental law.<sup>59</sup> International environmental crime and environmental law have been identified as international mechanisms able to regulate corporate misconduct,<sup>60</sup> the protection of human rights, and the environment.<sup>61</sup> Commenters have

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Supply Side Isn't Enough' (2015) 84 Fordham Law Review 563, DEP'T OF JUSTICE, CRIM. DIV., & SEC. ENF'T DIV., A RESOURCE GUIDE TO THE US FOREIGN CORRUPT PRACTICES ACT, at 71 (2012) [hereinafter DOJ & SEC RESOURCE GUIDE]. <<https://www.sec.gov/litigation.shtml>> Accessed 14 July 2017 and Joseph F Warin, Michael S Diamant, and Veronica Root, 'Somebody's Watching Me: FCPA Monitorships and How They Can Work Better' (2011).

<sup>58</sup>UN General Assembly, *Universal Declaration of Human Rights*, 10 December 1948, 217 A (III). <<http://www.refworld.org/docid/3ae6b3712c.html>> Accessed 15 June 2017.

<sup>59</sup>Alone Boyle, 'Human Rights and the Environment: Where Next?' (2012) 23 (3) European Journal of International Law 613; Lorand Bartels, 'Human Rights and Sustainable Development Obligations in EU Free Trade Agreements' (2013) 40 Legal Issues of Economics Integration 297 and Daniel Augenstein, 'Study of The Legal Framework on Human Rights and the Environmental Applicable to European Enterprise Operating Outside the European Union' (2014).

<[http://en.frankbold.org/sites/default/files/tema/101025\\_ec\\_study\\_final\\_report\\_en\\_0.pdf](http://en.frankbold.org/sites/default/files/tema/101025_ec_study_final_report_en_0.pdf)> Accessed on 28 May 2017.

<sup>60</sup>Joshua P Eaton, 'The Nigerian Tragedy, Environmental Regulation of Transnational Corporations, and The Human Right to a Healthy Environment' (1997) 15 Business and International Law Journal 261.

<sup>61</sup>Antonio Cardesa-Salzmann, 'Constitutionalising Secondary Rules in Global Environmental Regimes: Non-compliance Procedures and the Enforcement of Multilateral Environmental Agreements' (2011).

argued that the evolution of this field of international legal order, from substantive and institutional and legal procedural perspectives,<sup>62</sup> will provide victims of corporate human rights abuses with legal redress.<sup>63</sup> The recognition of corporate environmental abuses impacting human rights has led to the development of the principle of inter- and intra-generational equity. Inter- and intra-generational equity posits that previous generations have an obligation to maintain the earth in a reasonable condition for future generations, who inherit the earth from the preceding generation.<sup>64</sup> This has ultimately changed the traditional role of the state with its mutual relationship, towards a more practical role.

Inter- and intra-generational equity suggests that states should act in the interest of individuals and groups in society and in the common interest of humanity. Failure to meet this obligation may constitute a violation of the state's responsibility to protect its citizens under international law and human rights law.<sup>65</sup> With regards to cases for an enforceable international mechanism,<sup>66</sup> the studies of the accountability of transnational corporations in the developing world conducted so far have highlighted a potential inconsistency with this argument of corporate accountability because international environmental law cannot be used as a mechanism for corporate human rights obligations. A possible reason for this states that a country is limited in terms of solutions for corporate misconduct and criminal liability. Also, as will be explained, states have failed to establish effective mechanisms for regulating corporate misconduct linked to environmental crime. Typical examples include the Niger Delta,<sup>67</sup> the

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<[https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2790886](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2790886)> Accessed 20 April 2017.

<sup>62</sup>*Ibid.*

<sup>63</sup>Beth Stephens, *The Amorality of Profit: Transnational Corporations and Human Rights; Human rights and Corporations* (Routledge 2017).

<sup>64</sup>Edith Brown Weiss, *Intergenerational Equity: a Legal Framework for Global Environmental Change* (United Nations University 1992).

<sup>65</sup>Ian Brownlie and Kathleen Baker, *Principles of Public International Law* (Vol. 1. Oxford Clarendon Press 1973).

<sup>66</sup>Kamil Omoteso and Hakeem Yusuf, 'Accountability of Transnational Corporations in the Developing World: The Case for an Enforceable International Mechanism' (2017) 13 (1) *Critical Perspectives on International Business* 54.

<sup>67</sup>Okechukwu Ibeanu, 'Oiling the Friction: Environmental Conflict Management in the Niger Delta, Nigeria' (2000) 6 *Environmental Change and Security Project Report* 19.

Bhopal disaster,<sup>68</sup> the Gulf Oil spill,<sup>69</sup> Lago Agrio,<sup>70</sup> Ok Tedi,<sup>71</sup> and the Sandoz spill.<sup>72</sup> Debates regarding environmental crimes argue that the application of human rights to international environmental law requires the creation of judicial balancing since environmental laws do not provide criminal standards themselves. Violations, therefore, become subject to judicial discretions which are difficult to implement in practice.

Taking the above into consideration, this book seeks to answer the following: what legal solutions should the national and international systems implement in order to remedy victims of corporate human rights abuses and environmental damage? Although voluntary mechanisms such as the Guiding Principles (GPs), the OECD Guidelines, the ILO Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy, and the SA800 Standards have occasionally raised awareness of human rights violations and environmental damages, little has been done to prevent ongoing human rights abuses. Equally, it is only occasionally that a tort law such as The Alien Tort Statute (28 USC. § 1350) (ATS) provides an avenue for a tort claimant to obtain monetary compensation.<sup>73</sup> The fact remains that victims of human rights violations are often left without any remedy, specifically those victims located in developing countries that want to attract multinational corporations but lack the legal and judicial system necessary for regulating corporate business practices effectively.<sup>74</sup> Victims of corporate abuse face serious obstacles to obtaining legal remedy both in the jurisdiction where the harm occurred ('host state') as well as where multinational companies are headquartered ('home state'). When multinational companies commit human right abuses in host countries, host courts often remain the preferred forum for pursuing legal redress. However, for various reasons which include a lack of due process, political interference, mistrust

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<sup>68</sup>Lee Wilkins, *Shared Vulnerability: The Media and American Perceptions of The Bhopal Disaster* (Vol. 8. Greenwood Press 1987).

<sup>69</sup>Bernard D Goldstein, Howard J Osofsky and Maureen Y Lichtveld, 'The Gulf Oil Spill' (2011) 364 (14) *New England Journal of Medicine* 1334.

<sup>70</sup>Cortelyou Kenney, 'Disaster in the Amazon: Dodging "Boomerang Suits" in Transnational Human Rights Litigation' (2009) 97 (3) *California Law Review* 857.

<sup>71</sup>Stuart Kirsch, 'Indigenous Movements and the Risks of Counter Globalization: Tracking the Campaign Against Papua New Guinea's Ok Tedi Mine' (2007) 34 (2) *American Ethnologist* 303.

<sup>72</sup>Aaron Schwabach, 'The Sandoz Spill: The Failure of International Law to Protect the Rhine from Pollution' (1989) 16 *Ecology Law Quarterly* 443.

<sup>73</sup>The Alien Tort Statute (28 USC. § 1350; ATS) 'The Alien Tort Statute (ATS; also known as the Alien Tort Claims Act) refers to 28 USC. § 1350.

<sup>74</sup>John Madeley, *Big Business, Poor Peoples: The Impact of Transnational Corporations on the World's Poor* (Palgrave Macmillan 1999).

of the courts or lack of affordable legal assistance, a claim in the host state may not be a viable option.<sup>75</sup> In these instances, legal options in the home state also need to be leveraged to ensure justice.

Victims of corporate human rights abuses and environmental damages come from a variety of backgrounds and experiences. These relationships may partly be explained by victims' perceptions of effective remedy and the process of remedy which may be varied and multidimensional in developing countries. Perhaps, cultural differences may also impact perceptions of remedies for victims of human rights abuses. In some cultures, active participation in criminal proceedings may be essential whereas, in others, the admission of guilt by the wrongdoer is most important. It can, therefore, be assumed that the fact that one can never undo what has been done or provide adequate remedies may mitigate against reparations, whereas in others, the symbolic effect is seen as extremely beneficial.<sup>76</sup> The context of the violation should give rise to specific perceptions of what kinds of remedies should be awarded. For example, a situation of massive population displacement and ethnic cleansing will necessitate a remedy for the return of people from the community and displaced persons, and/or provide alternative solutions for these victims. Many times, however, these remedies are not enacted. Great scrutiny and transparency is required in judicial procedures in order for effective remedies to be put in place for victims.

Another obstacle in seeking solutions with respect to corporate accountability includes the legal challenges victims of corporate misconducts face by both the host and home state jurisdiction in obtaining solutions from a company subsidiary. The 'corporate veil' or 'separate legal personality' doctrine is a major barrier to holding parent companies legally accountable for abuses committed by their subsidiaries. According to the corporate veil doctrine, each separately incorporated member of a corporate group is considered to be a distinct legal entity that holds and manages its own separate liabilities. This doctrine implies that the liabilities of one member of a corporate group will not automatically be imputed to another merely because one holds shares in the other, even if it holds the majority or all of those shares.<sup>77</sup>

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<sup>75</sup>Amnesty International, 'Creating a Paradigm Shift: Legal Solutions to Improve Access to Remedy for Corporate Human Rights Abuse' (2017).

<sup>76</sup>Max F Perutz, *Redress: Torture Survivors Perceptions of Reparation: A Preliminary Survey* (2001)

<<http://www.redress.org/downloads/publications/TSPR.pdf>> Accessed 4 July 2017.

<sup>77</sup>Henry W Ballantine, 'Separate Entity of Parent and Subsidiary Corporations' (1925) California Law Review 12.

International and national legal systems have failed to address the concept of parent corporations and subsidiary relations. Often, ‘there will be cases in which a claim against a parent company may be the only way of securing an effective remedy for the human rights impacts of a subsidiary’s activities.’<sup>78</sup> Conversely, whenever victims try to sue parent companies, parent companies invariably rely, amongst others, on two principles of corporate law: ‘separate corporate personality’<sup>79</sup> and ‘limited liability’. One of the consequences of the legal separation is that a company is generally not liable legally for the conduct (both acts and omissions) of its subsidiaries. On the other hand, the principle of limited liability limits the liability of a parent company for the wrongful conduct of its subsidiary company to the extent of its investment in the subsidiary.<sup>80</sup> It may be the case that victims who have suffered from corporate human rights abuses through corporate subsidiaries in developing countries,<sup>81</sup> which include environmental violations that have taken place in high-risk host states, may be denied access to remedies against the subsidiary in the host state.<sup>82</sup> This may be the case for varying reasons, which include: insufficient precautionary measures, lack of human rights regulatory mechanisms at the national level, judicial redress at the national level, lack of funds, underfunding, bankruptcy, or lack of enforcement.<sup>83</sup>

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<sup>78</sup>Human Rights Council, ‘Improving Accountability and Access to Remedy for Victims of Business-Related Human Rights Abuse: Report of The United Nations High Commissioner for Human Rights’, A/HRC/32/19 (10 May 2016), para 22 (‘OHCHR Guidance’).

<sup>79</sup>David Millon, ‘Theories of the Corporation’ (1990) *Duke Law Journal* 201.

<sup>80</sup>Surya Deva, *Fictitious Separation, Real Injustice: Why and How to Tame the Twin Principles of Corporate Law?* (2017) and Amnesty International, ‘Creating a Paradigm Shift: Legal Solutions to Improve Access to Remedy for Corporate Human Rights Abuse’ (2017).

<<https://www.amnesty.org/download/Documents/POL3070372017ENGLISH.PDF>>  
Accessed 09 March 2018.

<sup>81</sup>Michael Diamond, *Corporation 905* (3rd edn, Carolina Academic Press 2012); Special Representative on Business and Human Rights, United Nations Guiding Principles on Business and Human Rights: Implementing the United Nations ‘Protect, Respects, and Remedy’ Framework, adopted by the Human Rights Council, 17<sup>th</sup> Sess., Mar. 21. 2011, U. N. Doc. A/HRC/17/. L.17/31 (2011).

<sup>82</sup>*Burnham v Superior Ct.*, 495 US 604, 628 (1990); *Kulko v Superior Ct.*, 436 U.S. 84, 101 (1978). See also, *Daimler AG v Bauman*, 134 S. Ct., 746 (2014).

<sup>83</sup>Manby Bronwen, *The Price of Oil: Corporate Responsibility and Human Rights Violations in Nigeria's Oil Producing Communities* (Vol. 2156 Human Rights Watch 1999).

Further analysis demonstrates that multinational companies are normally structured in parent-subsidiary relationships for a variety of managerial, regulatory, and tax-related reasons,<sup>84</sup> which make it very difficult to hold them liable for business misconduct. Parent-subsidiary relationships have created a legal deficit that has contributed to a lack of solutions at the national level. This legal deficit remains within the sphere of a subsidiary not subject to the jurisdiction where the parent company is domiciled. The lack of effective remedy from the subsidiary could be due to the lack of identity of the parent corporation that is regulated by corporate law.<sup>85</sup> Further, human rights contained in multilateral agreements cannot be invoked by individuals against private companies because human rights can only be enforced against the state. Interestingly, the correlation between this legal theory of human rights law, international law and corporate law treats subsidiaries as separate from the parent corporation.<sup>86</sup> This distinct legal concept of corporate law treats business entities separately for the purposes of taxation, regulation, and liability. In other words, a subsidiary can sue and be sued separately from its parent, and its obligations will not normally be the obligations of its parent.<sup>87</sup>

Furthermore, complex corporate structures used to organise business subsidiaries within the transnational context often make access to justice for victims exceptionally difficult and even the establishment of a link between the violation and parent corporation very challenging.<sup>88</sup> One problem, and perhaps the key problem, is that no record of the violation is kept, and in most cases victims may not have the knowledge or legal expertise to examine complex legal issues, such as ones related to human rights violations and environmental damages.<sup>89</sup> It could also be that there is

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<sup>84</sup>Alan O Sykes, 'Corporate Liability for Extraterritorial Torts under the Alien Tort Statute and Beyond: An Economic Analysis' (2011) 100 *Georgetown Law Journal* 2161.

<sup>85</sup>Murray A Pickering, 'The Company as a Separate Legal Entity' (1968) 31 (5) *Modern Law Review* 481.

<sup>86</sup>Henry W Ballantine, 'Separate Entity of Parent and Subsidiary Corporations' (1925) *California Law Review* 12.

<sup>87</sup>Jay Lawrence Westbrook, 'Theories of Parent Company Liability and The Prospects for an International Settlement' (1985) 20 *University of Texas School of Law* 321.

<sup>88</sup>Rolf H Weber and Rainer Baisch, 'Liability of Parent Companies for Human Rights Violations of Subsidiaries' (2015) <<https://ssrn.com/abstract=2625536> or <http://dx.doi.org/10.2139/ssrn.2625536>> Accessed 25 September 2017.

<sup>89</sup>For more information see Chapter VI and VII of the book.

a lack of proximity to the victims and the corporation's business activities.<sup>90</sup> Difficulties arise when attempting to establish legal proximity<sup>91</sup> between the parent corporation and the subsidiary in order to bring a claim against the parent corporation. Moreover, the subsidiary may be underfunded or there may not be legal redress facilities in the host state legal system. Lastly, the presence of corruption and the ineffectiveness of domestic legal systems might represent another insurmountable obstacle for victims of corporate abuses.<sup>92</sup> This observation supports the hypothesis that, in considering legal options to establish the liability of a parent company, legislators and advocates must assess the following factors: 'duty of care'; the extent to which control or lack thereof was a proximate cause to the damage; how to establish liability and control; and whether damage must be proven or can be assumed in court.

The reasons acknowledged above indicate some of the main impediments for providing victims of corporate human rights abuses and environmental damages with effective remedies.<sup>93</sup> As has been mentioned in the above paragraph, in the parent corporation legal doctrine<sup>94</sup> and the organisational structure of corporate enterprises, both parties financially benefit from the subsidiary's business activities.<sup>95</sup> Therefore, it is legally and financially difficult for victims to gain access to an effective remedy against the parent corporation because of a deeply ingrained orthodox legal doctrine of corporate law<sup>96</sup> (i.e. parent corporation doctrine and the doctrine

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<sup>90</sup>Ronen Shamir, 'Between Self-Regulation and The Alien Tort Claims Act: On the Contested Concept of Corporate Social Responsibility' (2004) 38 (4) Law & Society Review 635.

<sup>91</sup>Adrian Chan, *Who then—in Law—is my Neighbour? Lord Atkin's 'Neighbour Principle' as an Aid for the Principled Delineation of the Boundaries of Negligent Liability* (Diss 2011).

<sup>92</sup>Sarah Knuckey and Eleanor Jenkin, 'Company-Created Remedy Mechanisms for Serious Human Rights Abuses: A Promising New Frontier for the Right to Remedy?' (2015) 19 (6) International Journal of Human Rights 801.

<sup>93</sup>Joshua P Eaton, 'The Nigerian Tragedy, Environmental Regulation of Transnational Corporations, and The Human Right to a Healthy Environment' (1997) 15 Boston University International Law Journal 261.

<sup>94</sup>Christopher R Knight, 'International Human Rights Litigation after Bauman: The Viability of Veil Piercing to Hale Foreign Parent Corporations into US Courts' (2016) 41 University of Dayton Law Review 213.

<sup>95</sup>Julian Birkinshaw, Neil Hood and Stefan Jonsson, 'Building Firm-Specific Advantages in Multinational Corporations: The Role of Subsidiary Initiative' (1998) Strategic Management Journal 221.

<sup>96</sup>David. Millon, 'Theories of The Corporation' (1990) 2 Duke Law Journal 201.

of limited liability of shareholders),<sup>97</sup> which also applies to corporate shareholders.<sup>98</sup> Victims can only convince their home state court to pierce the corporate veil if the parent corporation is directly engaged in the abuse or if the subsidiary was acting as the parent's alter ego.<sup>99</sup> Without this, the parent corporation cannot be held liable or be required to provide a remedy to a victim of the subsidiary's action. Given these difficulties, the question that needs to be asked is, what is the legal principle for establishing the proximity between victims, parent corporations, and the subsidiary's misconduct?

It is difficult to explain how to address the issue of corporate law in this book, though it might be related to the idea of 'corporation as fiction' as seen in the *Case of Suttons*.<sup>100</sup> This theory arose by necessity from the idea that law regulates human beings and corporations do not constitute human beings. The representation of certain organisations as corporations, however, is justified by accepting that courts can treat them as living individuals. Consequentially, there is no limit to the jurisdiction of legal personality of courts and Parliament over laws as to what corporations are involved in.<sup>101</sup> Furthermore, the 'bracket theory' was taken to be an alternative vision, although it is not essentially so. It envisions 'corporation' as a shorthand for a whole set of rules with respect to its relationship to human beings. For instance, limited liability becomes a way of expressing an extraordinarily complicated set of terms in contracts.<sup>102</sup> Another source of uncertainty is the 'concession' theory,<sup>103</sup> which focuses on substance rather than form by acknowledging that corporations contain advantages,

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<sup>97</sup>Bryan A Garner, *Black's Law Dictionary 1054* (10<sup>th</sup> ed. 2014), also see Robert B Thompson, 'Piercing The Corporate Veil: an Empirical Study' (1990) 76 Cornell Law Review 1036 and William O Douglas and Carrol M Shanks, 'Insulation from Liability Through Subsidiary Corporations' (1929) 39 Yale Law Journal 193.

<sup>98</sup>*United State v Bestfoods*, 524 US, 61-64 (1998). Also see; Phillip I Blumberg, 'Limited Liability and Corporate Groups' (1985) 11 Journal Corporation Law 573.

<sup>99</sup>*Bestfoods*, 524 US at 62. < <https://caselaw.findlaw.com/us-2nd-circuit/1538603.html>> Accessed 23 July 2016.

<sup>100</sup>*Case of Sutton's Hospital* (1612) 77 Eng Rep 960 and Grietje Baars, *Law (yers) Congealing Capitalism: On the (im) Possibility of Restraining Business in Conflict through International Criminal Law*. Diss. UCL (University College London 2012).

<sup>101</sup>*Ibid.*

<sup>102</sup>Petri Mäntysaari, 'Theories of Corporate Law and Corporations: Past Approaches' (Springer Berlin Heidelberg 2012).

<sup>103</sup>John Dewey, 'The Historic Background of Corporate Legal Personality' (1926) 35 (6) Yale Law Journal 655; see also: Stefan J Padfield, 'Corporate Social Responsibility & Concession Theory' (2015) 6 William & Mary Business Law Review 1.