Violations of Human Rights by Transnational Corporations: Issue of Responsibility under International Law

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ABSTRACT

In the past century, Transnational Corporations (TNCs) emerged as powerful economic entities in the international society. The recent emerging entities expanded their power and influence through cross-border operations. Despite the positive effects of such operations, TNCs' cross border operations may infringe human and labor rights, harm the environment, and massively exploit natural recourses especially in developing countries. However, states and especially developing state are unwilling or incapable of regulating TNCs' operations and attributing responsibility on TNCs for such infringements. In addition, the international law lacks a concrete legal framework to regulate the cross border operations of TNCs. Nevertheless, international, regional and domestic instruments were adopted to regulate TNCs' operations, such as the Global Compact, the UN Framework of Protect, Respect and Remedy, and the Alien Tort Claim Act.

This thesis examines the issue of attributing responsibility on TNCs for human rights violations during their operations from a legal perspective. The thesis starts with examining the international legal personality of TNCs as actors in the international society to provide a concrete understanding of TNCs' participation in international law and international society. Moreover, this study investigates the mechanisms and instruments adopted on the international and domestic level to provide a concrete assessment of the effectiveness of such instruments. The thesis concludes that the current position of TNCs as actors in international law and international society illustrate a gap between the disciplines of international law and international relations due to inability of international law to incorporate TNCs in

the process of international law and to reflect the interactions between members of the international society. Thus, the study calls for a codification of the concept of international legal personality in order to incorporate TNCs in the discipline of international law. As for the proposed instruments, this study considers these instruments as reflection of the international attention on the issue of human rights violations by TNCs; however the failure of such instruments to legally attribute responsibility on TNCs is deeply affected by the lack of clear legal personality of TNCs. Thus improving such instrument should be in the light of developing a concrete standard for the concept of international legal personality.

Keywords: Transnational Corporations, international law, international legal personality, human rights.

ÖZ

Geçen yüzyılda , Uluslar Aşırı Şirketler (ulusötesi şirketler) uluslararası toplumda güçlü ekonomik kuruluşlar olarak ortaya çıkmıştır. Son yeni çıkanları sınır ötesi operasyonlar yoluyla güç ve etki genişletti. Bu operasyonların olumlu etkilerine rağmen , ulusötesi şirketlerin ' sınır ötesi operasyon , insan ve işçi hakları ihlalçevreye zarar ve kitlesel özellikle gelişmekte olan ülkelerde doğal kaynakların istismar olabilir . Ancak, devletler ve özellikle devlet gelişmekte isteksiz ya da ulusötesi şirketler ' operasyonları düzenleyen ve bu ihlaller için ulusötesi şirketlerin sorumluluk atfederek aciz. Buna ek olarak, uluslararası hukuk ulusötesi şirketlerinsınır ötesi operasyon düzenleyen somut bir yasal çerçeve yoktur . Bununla birlikte , uluslararası, bölgesel ve yerel aletleri gibi Küresel İlkeler Sözleşmesi , Koruma , BM Çerçeve , Saygı ve Çözüm ve Alien Tort Talep Yasası olarak TNC ' işlemleri , düzenleme kabul edildi . Bu tez bir yasal açıdan kendi operasyonları sırasında insan hakları ihlalleri için ulusötesi şirketlerin sorumluluk atfederek konusunu inceler . Tez uluslararası hukuk ve uluslararası topluma ulusötesi şirketlerin katılımı somut bir anlayış sağlamak için uluslararası toplumda aktörler olarak ulusötesi şirketlerin uluslararası tüzel kişiliği incelenmesi ile başlar . Ayrıca bu çalışma, araçların etkinliğinin somut bir değerlendirme sağlamak içinuluslararası ve ulusal düzeyde tarihinde kabulmekanizmaları ve araçları inceler . Tez uluslararası hukuk ve uluslararası toplumda aktörler olarak ulusötesi şirketlerin geçerli konumunu uluslararası hukuk sürecinde ulusötesi şirketler dahil ve arasındaki etkileşimi yansıtacak şekilde uluslararası hukukun yetersizliği nedeniyleuluslararası hukuk disiplinleri ve uluslararası ilişkiler arasında bir boşluk göstermektedir sonucuna varmıştır uluslararası toplumun üyeleri . Böylece, çalışma uluslararası

hukukdisiplini içinde ulusötesi şirketler dahil etmek amacıyla uluslararası hukuki kişilik kavramı bir kodlama gerektirir. Önerilen araçlar gelince , bu çalışmada çokuluslu büyük şirketlerin insan hakları ihlalleri konusunda uluslararası ilgi yansıması olarak bu araçların gördüğü , ancak yasal olarak ulusötesi şirketlerin sorumluluk atfetmek bu araçların arıza derin açık tüzel kişilik eksikliği etkilenir ulusötesi şirketler . Böylece türev finansal araçların geliştirilmesi uluslararası hukuki kişilik kavramı için somut bir standart geliştirme ışığında olmalıdır .

Anahtar Kelimeler: Uluslar Aşırı Şirketler, uluslararası hukuk, uluslararası tüzel kişiliği, insan hakları.

To Khawla and Judeh

TABLE OF CONTENTS

LIST OF ABBREVIATIONS

ATCA	Alien Tort Claim Act
CLDS	Cuban Liberty and Democratic Solidarity Act
CRS	Corporate Social Responsibility
ICC	International Criminal Court
ICJ	International Court of Justice
ICL	International Criminal Law
ICTFY	International Criminal Tribunal for the Former Yugoslavia
ICTR	International Criminal Tribunal for Rwanda
IGOs	Intergovernmental Organizations
ILO	International Labor Organization
ILSA	Iran-Libya Sanctions Act
NGOs	Non-Governmental Organizations
OCED	Organization for Economic Co-operation and Development
PCIJ	Permanent Court of International Justice
TNCs	Transnational Corporations
TVPA	Torture Victim Protection Act
UDHR	Universal Declaration of Human Rights
UNSC	United Nations Security Council
WTO	World Trade Organization

Chapter 1

INTRODUCTION

The international arena witnessed various developments in the past century. One of these developments is the emergence of transnational corporations[1]in the international society.[2] The recently emerging economic entities are a result of several factors, such as the evolution of communication means and fast transportation which accelerated the spread of TNCs' activities and operations globally. Nowadays, from an economic perspective, TNCs are considered as powerful actors. For instance, in the last year, 40 out of 100 of the largest economic entities worldwide are TNCs.[3] Moreover, these 40 TNCs created nearly 13 million job opportunities and achieved approximately 8 trillion USD as revenues which consist 11% of the global GDP.[4]

The evolution of the TNCs in the international level should be understood in accordance with their role within the state level. At first, TNCs started by controlling and dominating various operations and aspects of the state's duties and functions due to the domestic privatization of the authority and governance, and the

[1] Also Known as Multinational Corporation or Transnational/Multinational Enterprise, however in this thesis will use Transnational Corporations (TNCs) to describe these economic entities.
[2] The term of international society or community is used mainly in the disciplines of international relations and politics to describe the association of actors in the international level whether states, IGOs or NGOs. Based on that, in this thesis we will use the terms of international arena or sphere to describe the level or the medium where the international interactions between this community members occur. For more information on the terms, See Conway W. Henderson, *Understanding international law*, (Wiley-Blackwell, 2009), 9.
[3]Tracey S. Keys, Thomas W. Malnight and Christel K. Stoklund,"Corporate Clout 2013: Time for responsible capitalism," Strategy Dynamics Global SA, (2013), 2.
[4] Ibid., 5

globalization of public tasks.[5] With time, influence of the TNCs or corporations enhanced on the internal affairs of the state and TNCs played a significant role in the state's economic process and policies. After this triumph, TNCs established cross-border operations and activities to increase their profit and extend their influence on the international level. However, TNCs enhanced their relations with states and used the state medium to achieve this end.[6] For instance, TNCs intervened in the foreign policies of the developed states to ensure the adoption of liberal policies on the international level and via bilateral treaties with other states to ensure a more fixable expansion of TNCs' operations and activities. Moreover, TNCs took advantage of the corrupted developing countries and governments to exploit their natural resources and the cheap labor to achieve more profit. Finally, TNCs established international and national lobbies to explicitly affect the political negotiation of international trade treaties between states. Therefore, in the last fifty years, TNCs implicitly evolved into critical and effective actors in the international society.

As a form of foreign direct investment, TNCs' cross border operations can lead to various social and economical advantages and disadvantages for states. Transfer of technologies, creating jobs, reducing the poverty levels and boosting the state economy are samples of the positive effects of TNCs' operation in developing states. On the other hand, during their operations especially in developing states, TNCs' activities may harm the environment, infringe human and labor rights and exploit natural resources. Although negative effects can be handled according to domestic

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[5]Math Noortmann, and Cedric Ryngaert. *Non-state Actor Dynamics in International Law: From Law-takers to Law-makers*, (Lund Humphries Publishers, 2013), 95.

[6] Jed Greer and Kavaljit Singh, "Brief History of Transnational Corporations," Global Policy Forum, available at http://www.globalpolicy.org/component/content/article/221-transnational-corporations/47068.html (accessed on 1/ 07/2013).

regulation for TNCs, many developing states lack a concrete and clear legal framework to deter and punish TNCs for such violations.

The unwillingness and the incapability of some states to regulate TNCs' unlawful acts motivate us to consider international law as a legal mean to fill this gap and to attribute direct international responsibility to TNCs for such violations. The international law, as a law itself, regulates the various interactions and relations between the actors or members of the international society through obligatory international norms and rules. However, despite the influence of TNCs on the international society and their cross border operations under the scope of the contemporary international law, no explicit norms regulate TNCs' infringements.[7]

Despite the absence of international legal framework to regulate TNCs' operations, specific precedents in international law and some domestic legal frameworks rebut this assumption and attribute responsibility on TNCs for unlawful acts and infringements. For instance, the Nuremberg Military Tribunals heard cases related to war crimes committed by TNCs during the Second World War. In addition, according to the Bilateral Investment Treaties, TNCs have the right to sue states and to be sued by states under the scope of these agreements according to specific arbitration procedures. As for domestic legal framework, the Alien Tort Claim Act is provoked before the US federal courts by victims against TNCs for human rights violations. Moreover, the Act Concerning the Punishment of Grave Breaches of International Humanitarian Law (1999) in Belgium allowed domestic courts to hear

[7]Conway W. Henderson, *Understanding international law*, (Wiley-Blackwell, 2009), 40.

claims against TNCs for violations of international law during their operations.[8] Therefore, various attempts are made either domestically or internationally to regulate and incorporate TNCs' operations under the scope of international law.

TNCs' responsibility can be based on violations of various aspects such as the environmental aspect, the human rights aspect; the labor aspect and the economical aspect. However, this thesis will focus on the human rights violations committed directly or indirectly by TNC's during their cross border operations and the legal mechanisms of attributing international responsibility on TNCs for such infringements. In this thesis, we will investigate international human rights norms and mechanisms regulating TNCs' cross border operations proposed by international bodies and agencies such OCED, ILO, and the Human Rights Council. Moreover, we will examine the extraterritorial jurisdiction of national courts through domestic statutes or acts to attribute responsibility on TNCs for human rights violations. However, we will limit our scope of investigation to the Alien Tort Claim Act (ATCA) in the light of the American legal order as a domestic legal framework. Considering the ATCA in this study was based on its features that allow non-US citizens to bring civil claims before federal court against any entity –individual or TNC- for violating international law and specific human rights norms. Therefore, examining the ATCA shall provide a clear understanding on the effectiveness of similar domestic legal frameworks attributing responsibilities on TNCs for human rights violations. Finally, this thesis will provide case studies to assess the

[8] *Act Concerning the Punishment of Grave Breaches of International Humanitarian Law*, 10 February 1999, available at: http://www.refworld.org/docid/3ae6b5934.html (accessed 7/09/2013). However, due to an amendment in 2003, the scope of the act was limited to include only nationals or citizens of Belgium as defendants, See Stefan Sims and Kim Van der Borght, "Belgian Law concerning The Punishment of Grave Breaches of International Humanitarian Law: A Contested Law with Uncontested Objectives," *American Society of International Law Insight*, July 2003 Available at http://www.asil.org/insigh112.cfm (accessed 31/08/2013)

applications, the strengths and weaknesses of the current initiatives and frameworks –whether domestic or international initiatives.

To clarify the scope of our study, we will consider a specific definition of TNCs as economic entities. Although several definitions are available to describe the term, the most comprehensive definition is the one adopted by the Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights.[9] In which TNCs were defined as "an economic entity operating in more than one country or a cluster of economic entities operating in two or more countries - whatever their legal form, whether in their home country or country of activity, and whether taken individually or collectively". Therefore, TNCs can be considered as entities that are based and established within the domain of the domestic legal system of a state. However, their operations and activities are taking places in several countries and their main goal is to increase its profit through these cross border operations. Moreover, this definition includes all the forms or shapes of these private entities that are related to international trade, imports and exports, and finally subsidiaries or local corporations owned or related to TNCs.

The aim of this study is to achieve the following: a general understanding of the international law, clarifying TNCs' position in the light of the discipline of international law and the doctrine of human rights, examining the role of the TNCs in the international society and their relations and interactions with other actors, investigating the relationship between the contemporary international legal order and

[9]"Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Right," UN Economic and Social Council, Document number E/CN.4/Sub.2/2003/12/Rev.2, (August 2003, 7).

TNCs especially in the light of attributing responsibility on TNCs for human rights violations, assessing the current international mechanisms and initiatives to handle the issue of TNCs' responsibility for human rights infringements, and analyzing the Alien Tort Claim Act as a domestic legal framework to regulate TNCs' responsibility for human rights violations.

The main research questions in this thesis are: As members or actors of the international society, is there any attribution of responsibility for human rights violations on TNCs during their cross border operations under the contemporary international law discipline and the doctrine of human rights? How are the current legal frameworks, proposed and adopted internationally, regionally and domestically, handle the infringements of human rights by TNCs?

In addition, the main questions are followed by secondary questions: Why should be TNCs considered as actors in the international society? How do TNCs fit within the criteria of international legal personality? How do TNCs participate in the evolution process of the discipline of international law? How do the current international law discipline and the human rights doctrine handle and regulate TNCs' operations and activities? What are the factors that affect the international and domestic legal frameworks and mechanisms of attributing responsibility on TNCs for human rights violations?

1.1 Methodology

In order to answer the research questions proposed above, this study will mainly depend on textual analysis as methodology. Several sources will be examined in this study such as primary resources i.e. multilateral treaties and international

agreements including the Charter of United Nations, the Rome Statue of the International Criminal Court, human rights treaties, and proposals and drafts related to the topic. The aim of examining the primary recourses is to clarify and provide a comprehensive understanding of the human rights doctrine and the contemporary international law norms related to the issue of TNCs' responsibility of human rights violations.

Moreover, decisions and advisory opinions by international, regional and domestic judicial bodies such as the International Court of Justice and the American federal courts will be examined in order to assess the TNCs' position within the scope of international and domestic legal frameworks. In addition, we will take into consideration various scholars' contributions of articles from journals, books, reports and presentations related to the issue of TNCs' responsibility of human rights infringements in order to enhance our understanding and assessment of the topic.

The significance of this study can be summarized in two points. First, despite the considerable number of scholars' contributions on the relationship between TNCs and the human rights doctrine, we will attempt to provide a concrete assessment of the current legal order, instruments and mechanisms regulating TNCs' violations of human rights during their cross border operations by focusing on the weakness and strength points of the contemporary mechanisms and instruments. Hence, this study provides the gist of the current international legal practice related to the issue of human rights infringements by TNCs as actors in the international society, which is essential for any future legal solution or proposal to prevail over the issue of human rights violations by TNCs.

Secondly, this study examines a topic that reflects an overlapping between international relations and international law as disciplines. In general, international law is considered as a regulation framework for interactions and relations of the international society. As for international relations, it provides a theoretical clarification of the interactions and relations between the members of the international society. However, TNCs as economic actors with influence and power on international society are excluded from the scope of international law. Therefore, this study will examine this relationship between both disciplines and attempt to clarify the overlapping between international law and international relations on the issue of TNCs' international responsibility of human rights violations.

1.2 Structure

To achieve its aims, the arguments of this thesis will be divided as the following: the next chapter will focus on the concept of international legal personality of TNCs within the international society. The first section of the chapter will investigate the standards and the various theoretical approaches to the concept of international legal personality. In addition, the international judicial bodies' judgments and advisory opinions will be briefly examined in the light of implementing the concept of international legal personality.

The next section will consider TNCs as actors of the international society according to the concept of legal personality. The first part of the section will investigate the emergence of TNCs in the international society as effective actors. In the second part, the TNCs legal personality will be examined in the light of each standard of the international legal personality concept mentioned in the first section.

The third chapter will focus on the issue of attributing legal responsibility on TNCs for human rights violations. The first section will investigate the evolution process of the current international human rights doctrine, specifically according to the international bodies and agencies i.e. the United Nations. The second section will consider TNCs in the light of the international human rights frameworks focusing on international precedents and international treaties that attribute responsibility on TNCs. The third section will briefly argue the contemporary initiatives and instruments developed by international or regional institutions to regulate TNCs' operations and interactions with human rights discipline. The last section will provide a case study on one of the contemporary international legal mechanism for attributing responsibility on TNCs in order to examine its application, effectiveness and drawbacks.

The fourth chapter will investigate the ATCA as a domestic legal framework for attributing legal responsibility on TNCs for human rights infringements. Firstly, a brief introduction to the US legal order will be provided, followed by an examination on TNCs' responsibility for cross border operations under the American federal legal order. Then, the chapter will focus on ATCA according to its history, requirements and purpose. The next section will investigate the case law and the interpretations of the ATCA by the US federal court. Finally, a case study will be provided based on a lawsuit against TNC for human rights violation in order to clarify the application of the ATCA and its effectiveness as a domestic legal instrument.

The conclusion chapter will indicate our main findings on the issue of attributing responsibility on TNCs for human rights violations according to the relationship

between international law and international relations as disciplines and the contemporary international practice on the matter. Moreover, an assessment will be provided on the current international and domestic mechanisms and instruments according to their effectiveness, strengths and weaknesses. In the end our recommendations will be suggested on the topic.

1.3 Literature Review

As mentioned earlier, reviewing contributions of scholars is essential to support the main arguments of this thesis. Various scholars examined the issue of attributing human rights responsibilities on TNCs from several angles. However this section will be limited to investigate specific literature that are related to the concepts of international legal personality; approaches to international law and the human rights doctrine; the evolution of TNCs in the international society; international instruments and practice for attributing legal responsibility on TNCs; and perspectives on the ATCA as domestic legal framework for attributing responsibilities on TNCs for human rights violations. Therefore, this section will focus on articles and books by Claire Cutler; De Brabandere; Jonathan Charney; Andrew Clapham; Rosaline Higgins; Oliver De Schutter; Harold Koh; and Julian Ku. This section will provide a brief review on the concepts mentioned above in the lights of the scholars' contributions.

Based on examining the role of TNCs in the international society according to theoretical analysis, Claire Cutler concluding that a legitimacy crisis is facing the discipline of international law due to the inconsistency between the theory and

practice of international law.[10] Firstly, Cutler argued that the current international law is based on the positivist law theory as a result of the Westphalian concepts which grant a supreme position for states as the main and only subjects of international law. Under this approach, the state's will and practice are considered as the sole sources of international law. To protect the supremacy of states, Cutler noted that states are promoting the notion of international legal personality, or the 'subject-object' doctrine, to distinguish between states and other entities and exclude or limit the latter from participating in the various aspects of international law. Cutler referred to this exclusion as the 'problem of the objects' in which non state actors are regarded according to the contemporary international law as objects, meanwhile, and in fact, they are operating as subjects due to their power and influence in the international society.

Secondly, Cutler noted the effects of the liberal theory on the practice of international society through the separation between public and private spheres. In which the former is associated with states or governments only and the latter is associated with individuals, markets and TNCs. Cutler emphasized that this separation is reflected in the discipline of international law through the concept of international legal personality. However, he identified an overlapping between these spheres in the practice of the international society in which states are playing critical role in markets and TNCs are interfering implicitly in the international public or political arena. He supported his arguments by providing several examples on

[10]Claire Cutler, "Critical reflections on the Westphalian assumptions of international law and organization: a crisis of legitimacy," *Review of International Studies* 27, no. 02 (2001): 133-150.

TNCs' participation in the creation and implementation of the international law such as TNCs' participation directly and indirectly in international treaties negotiations process and their legal standing before various dispute settlement mechanisms.

Cutler acknowledged that a 'legitimacy crisis' occur when a situation of inconsistency occur between the norm or the theory and its application or practice. Therefore, due to the increase of TNCs' influence and the inability of the international law to adapt with developments of the international society, international law is facing a legitimacy crisis.

In our perspective, Cutler provides a critical explanation to understand the overlapping between international law and international relations in the context of TNCs' participation in the international society. Moreover, we should clarify that although the legitimacy crisis is occurring in the light of the international actors aspect, its effects may result in a sever dilemma for the international law as a discipline if these actors are not incorporated as international legal actors in the future. Although, Cutler acknowledged the roots of this crisis, he did not clarify a solution to overcome this crisis whether through direct or indirect incorporation of TNCs in the international law discipline.

In his chapter Eric De Brabandere clarified several reactions of international law and the human rights doctrine to the issue of human rights violations by TNCs.[11] Firstly,

[11] Eric De Brabandere, "Non-state actors and human rights: corporate responsibility and the attempts to formalize the role of corporations as participants in the international legal system." In *Participants in the International Legal System. Multiple Perspectives on Non-State Actors in International Law,* edited by Jean d'Aspremont, 268-283. (Abingdon: Routledge, 2011).

he emphasized that the current human rights doctrine is imposing dual obligations on states only, in which the state must respect the human rights of individuals and ensure that entities under its jurisdiction also respect human rights -i.e. individuals; TNCs; and NGOs. Therefore, the human rights doctrine is not imposing direct international human rights obligations on TNCs. However, he added that TNCs are attributed obligations related to human rights under the scope of the municipal legal frameworks only. De Brabandere noted that extending the scope of human rights responsibility to include TNCs is not a practical solution due to the domination of the traditional approach and the positivist law theory on the discipline of international law.

De Brabandere then investigated and criticized soft-law initiatives; domestic legal mechanisms; and extending the international criminal responsibility of TNCs to attribute human rights on TNCs. De Brabandere considered that due to the lack of legally binding provisions, soft law instruments only provide 'moral' and 'commercial' effects and thus cannot evolve into international customary law in the future. As for domestic legal mechanisms, De Brabandere regarded that these instruments do not attribute direct international human rights obligations on TNCs; instead they are much related to the application of extraterritorial jurisdiction of national courts over TNCs' violations of human rights. Moreover, he noted that extending the criminal responsibility of TNCs will not be effective due the lack of international legal personality of TNCs according to the contemporary discipline of international law. Therefore, De Brabandere concluded that instead of creating legally binding frameworks, these instruments reflect the absence of an international normative dimension on TNCs' legal personality.

In our opinion, De Brabandere based his approach findings on the topic according to the traditional theory of international law, therefore his conclusions and findings can be criticized from several angles. For instance, he did not take into account that the human rights doctrine and international law are constantly developing in order to reflect and regulate the actors' relations on the international level. Several examples can be provided to support this argument such as the adoption of the Geneva Conventions and the Rome Statute of the ICC that attribute human rights responsibility on individuals. However, De Brabandere's notes on the contemporary initiatives are essential to understand the drawbacks of these initiatives which are mainly caused by the lack of international legal personality of TNCs. Thus, it can be concluded from his arguments that the concept of international legal personality is essential to understand the current problem of these initiatives and to propose a solution for the absence of 'hard-law' initiatives to attribute responsibility on TNCs.

Jonathan Charney focused on the influence, activities and participation of TNCs in the international society.[12] Charney noted that despite the increase of TNCs' influence, the international law is still incapable of mirroring TNCs presence in the international society and more precisely to incorporate TNCs in the law-making process of international norms and mechanisms of regulating TNCs' cross border operations such as codes of conducts and soft-law initiatives. He noted that precluding TNCs from participating in the adoptions of such norms will have several consequences such as: losing the ability of international law as a discipline to represent or reflect major developments in the international society; leading to an explicit conflict between states, as the main actors in the international society, and

[12] Jonathan I. Charney, "Transnational corporations and developing public international law," *Duke Law Journal* (1983): 748-788.

the recently emerged economic entities; and finally soft law initiatives will not be effectively implemented by TNCs.

In his perspective, to overcome the state-TNC conflict, Charney promoted a legal 'hybrid system' in which TNCs are granted the right to participate in the law making process of these norms, meanwhile, states maintain their role as law enforcer of the norms. According to Charney, this legal framework will achieve two main positive ends: first, the states' position as main actors in the international society will be protected; and secondly the international law will incorporate TNCs in law creating mechanism, thus achieving 'just' representation of member of the international society especially for non state actors. After examining various forms of participations by TNCs, Charney concluded that an indirect participation mechanism through 'expert group' which consists of TNCs and other actors such as NGOs and labor unions to participate in norms negotiation and making process will effectively present the real needs and demands of the excluded non state actors.

In sum, Charney correctly considered that the lack of TNC's participation in creating the norms applied on them is the main weakness of these initiatives. However, in our standpoint, his proposed hybrid system implicitly grant 'limited' international legal personality, in which TNCs will participate on law creating process of these norms or rules only. Moreover, the proposed system by Charney did not cover other critical and vital aspects of the issue such the enforcement mechanisms on TNCs.

In his book 'Human Rights Obligations on Non State Actors', Andrew Clapham investigated approaches to international human rights obligations for TNCs as non

state actors.[13] According to Clapham, the approaches on this issue is directly affected by our understanding of international law as a discipline, thus he categorized three main approaches to human rights doctrine and non state actors obligations. The first approach is based on the traditional theory of international law in which states are considered as the main actors in the international society, thus human rights responsibility is attributed to states only even if human rights were violated by TNCs or any other non state actor. Based on this approach, attributing responsibility on TNCs would enhance the legitimacy of these entities on the international society while negatively affecting the supreme position of states and the stability of the contemporary human rights doctrine.

Unlike the first approach, the second approach undermines the role of states as the sole obligations holder in favor to the recently emerged economic entities such as TNCs and the International Monetary Fund. This approach consider that due to globalization, these economic entities became the main actors in the international society and thus attributing direct human rights obligations on these entities should be implemented to insure the protection of individuals human rights. Moreover, similar to the natural law theory, this approach is based on considering that the norms and rules of human rights should be based according to normative and moral foundation.

Clapham suggested a third approach which can be considered as a *via media* or middle road approach of the previous approaches. Clapham argued for an approach based on the main concepts of the international law especially concepts related to

[13] Andrew Clapham, *Human rights obligations of non-state actors*, (Oxford University Press: New York, 2006).

states' role in the law-making process, meanwhile, expanding the scope of human rights obligations to include the newly emerged entities due to their influence and power on the international society. In other words, TNCs and non state actors should be considered as subjects of international law but 'without any legitimizing effects'. Moreover, this approach rebuts two assumptions in the current human rights doctrine and the discipline of international law which are: (i) international human rights obligations are attributed to states only; (ii) that international law is considered ineffective in the absence of enforcement mechanism. To support his arguments, Clapham provided several examples on attributed human rights obligations over non state actors such as individuals; IGOs; TNCs; and NGOs. While arguing on TNCs, Clapham noted that the absence of international jurisdiction over TNCs should not be considered as a ground for excluding TNCs from holding international obligations and assuming that TNCs are incapable of violating human rights during their operations and activities.

Clapham went further and examined the counter arguments that his approach may face and rebutted them. He acknowledged five counter arguments[14] that are based on various arguments but united on considering the following notions as their starting points: (i) that attributing international obligations on TNCs will modify the form and the stability of the contemporary human rights doctrine; (ii) that more power and legitimacy will be conferred to TNCs if international obligations are attributed on TNCs. Clapham emphasized that his approach should not be considered as a contradictory to the previous approaches, instead the differences between the three

[14] The Five counter arguments are: the trivialization argument; the legal impossibility argument; the policy tactical argument; the legitimization of violence argument; the rights as barriers to social justice arguments.

approaches should be examined based on the concept of 'complementarily' which will ensure the ability of the human rights doctrine to adapt to the needs and demands of the current international society by considering the role of the newly emerged entities.

In sum, similar to Charney's system, Clapham's approach to the international law focused on overcoming the exclusion of TNCs from the international law discipline through granting limited legal personality to TNCs. However Clapham regarded that TNCs should only be attributed international obligations without acquiring international rights. Therefore, in our viewpoint, his approach will face harsh opposition by TNCs and will enhance the exclusion of TNCs from international law due to the limited incorporation of TNCs as international actors of the international society.

Higgins refused the assumption that international law is defined as a set of rules; rather, she regarded international law a process of decision making.[15] She rejected the attempts to contrast law with power, in which law, according to Higgins, is only concerned with authority alone – authority in the sense of binding decisions and jurisdictional competence. Higgins argued that the authority which characterizes law exists where it intersects with power and not in a vacuum, thus, law is considered as the interlocking of authority with power. Therefore, according to Higgins, there are situations in which power overcomes the authority of law and in these situations

[15] Rosalyn Higgins, *Problems and process: international law and how we use it*, (Oxford University Press, 1995).

power should not be regarded as a threat to the law, instead power should be considered as an integral element of it.

Higgins elaborated that international law is a decision making process by authorized decision-makers, when authority and power coincide. Thus, Higgins criticized the contemporary categorization of the subject object doctrine for actors of international law. Higgins adopted the methodology of 'participant' to illustrate legal entities, in which entities with influence on the international society are actors in the light of international law.

Higgins categorized the sources of obligation in international law according to several schools of international law: firstly, the natural law school which was affected by religious obligations sources and justice in general. Secondly the traditional school that is based on the concept of the states' consent related to the notion of sovereignty; however it lacks justification for the customary law obligations.

In our perspective, Higgins's contribution illustrates an alternative approach to international law in general. In the light of this approach, various developments in the international society can be incorporated in international law. Thus, this approach prevails over the solidity and the failure of the mainstream approaches to international law to incorporate the newly emerged entities of the international society.

Oliver De Schutter in his introductory chapter investigated the role of the UN as an international body and the aspect of TNCs violations of human rights according to

the soft law instruments and initiatives such as the Global Compact and the Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights which were considered by De Schutter as developments for attributing responsibility on TNCs for human rights violations.[16] De Schutter noted that the inclusion of this issue in UN agenda occurred through the emergence of the New International Economic Order and the notion of Corporate Social Responsibility, which aimed to achieve the same end; however, the means of implantation varied.

In his argument, De Schutter noted that criminal complicity concept is used by international or domestic law to legally attribute responsibility on TNCs for human rights violations committed by the TNCs' subsidiaries or by state. De Schutter suggested that TNC's complicities can take three forms: (i) direct complicity where the TNC provide aid or abet to third party to facilitate the violations of human rights; (ii) indirect complicity when the TNC is aware that the state should violate human rights in order to meet its commitment in a joint venture; (iii) silent complicity in which TNC continues its operations while acknowledging that the host state is violating human rights. However De Schuttler emphasized that the application of the complicity concept to attribute TNCs' responsibility is not unified due to the variety of standards adopted by several judicial bodies while applying this concept.[17]

[16] Olivier De Schutter, ed. *Transnational corporations and human rights*, (Oxford: Hart Pub Limited, 2006).

[17] For instance, the ICTFY, the ICC and the Global Compact based the issue of examining complicity in human right violations on different standards.

To summarize, the argument of De Schutter mirror the evolution of TNC's responsibility under the UN institutions and bodies. Clearly some of these initiatives faced direct opposition by states for their 'negative' effects over the international market and the position of states in the international society. In addition, his argument clarified that under the UN efforts, various point are not gaining consensus, due the diversity of legal practice internationally and domestically, such as the implementation of the complicity concept.

The following part focuses on the ATCA as a domestic legal framework by investigating opponents and the defender of TNCs' responsibility under the ATCA. Therefore, we will examine articles by Harold Koh who defend TNCs responsibility under the ATCA and Julian Ku who oppose this notion. However, Koh and Ku were chosen for this part due to their previous enrolment in governmental positions related to the field of human rights, and due to their academic experience as professors of international law.

In his article Koh attempted to provide counter arguments against four claims or 'myths' adopted by the opponents of TNC's human rights responsibility under the ATCA.[18] Starting with the first claim which stated that the US courts are incapable of attributing civil responsibilities on TNCs due to the absence of international practice, Koh briefly examined various international treaties and incidents in which TNCs are conferred international obligations especially in the light of TNCs' complicity in *jus cogens* norms violations and 'transnational offenses' such as

[18] Harold Koh, "Separating Myth from Reality About Corporate Responsibility Litigation," *Journal of International Economic Law* 7, no. 2 (2004): 263-274

slavery and piracy. In addition he mentioned that domestically, the US congress recently enacted the Torture Victim Protection Act as a legal mean to bring civil claims against judicial persons – i.e. TNCs- for human rights violations which can be considered as indication of the US Congress intention to face human rights violations under the scope of the domestic American legal system.

The second myth is assuming that US courts will face a huge number of litigations provoking the scope of the ATCA based on an empirical study done by Hufbauer and Mitrokostas. Koh rebutted this claim by emphasizing that since 1789 –when the ATCA was enacted- around three lawsuits only survived the stage of summary judgment. Moreover he added that the US legal is based on various legal barriers facing the plaintiffs before invoking the ATCA such as personal jurisdiction and the statute of limitation.

The third myth is claiming that to overcome the side effects of the act, the US legal order should amend the act or repeal it. After examining the current practice of the US federal courts and the case law of the ATCA, Koh concluded that the act itself is not facing any hurdles. In addition, Kuh criticized the negative role of the Bush Administration which called the US federal courts against the expansion of ATCA's scope.

Finally, the fourth myth is based on considering that domestic mechanisms are inappropriate to attribute human rights responsibilities on TNCs. Koh agreed in part with this claim by regarding that the domestic legal framework should not be the main and only legal mean or instrument to face TNCs' human rights violations. Instead, based on the transnational legal process approach, Koh called for a treaty

solution based on public-private consensus and understanding of the issue of human rights obligations on TNCs.

On the other hand, Julian Ku challenged the current ATCA's application by the US federal courts based on several levels.[19] Ku started by claiming that the contemporary international law is strictly state-centric and thus obligations are attributed and rights are acquired by states only and not private actors. Although Ku noted that after the Second World War individuals were granted direct international rights and international obligations under the human rights law and the international criminal law, he regarded that these international obligations are imposed through the state medium and thus did not contradict with the traditional approach to international law. However, Ku acknowledged that according to the customary international law and jus cogens specific crimes, such as war crimes, are extended to apply against natural persons only i.e. individuals.

Next, based on several examinations on the role and jurisdiction of the Nuremberg Tribunal after the Second World War, Ku claimed that although TNC's activities were investigated and challenged before the court, the Nuremburg Tribunal convicted only TNCs' owners and officials for committing human rights violations during the war. Thus Ku concluded that international practice did not attribute international obligations on judicial persons. In addition, Ku argued that the

[19] Julian Ku, "The Curious Case of Corporate Liability Under the Alien Tort Statute: A Flawed System of Judicial Lawmaking." (2010), Paper presented in the American Society of International Law's workshop on the topic of International Law in Domestic Court Interest Group, 2010. Available at http://works.bepress.com/julian_ku/1 (accessed 08/08/2013).

contemporary international tribunals and the ICC lack jurisdiction over judicial persons and TNCs which is, according to him, another indication that reflects the contemporary norms and practices of the international law and human rights.

Moreover, Ku examined the case law of ATCA by the US federal and noted that imposing international responsibilities on TNCs before the US courts is caused by the reference of federal courts to the American practice and precedents only and ignoring the international practice, while examining cases related to TNCs responsibility for human rights violations. Ku argued that US courts are pushed to refer to US case law only due to structural reasons of the American judicial system; to avoid any conflict with other courts judgment on the same issue; and due to the lack of international law experience by the US judges. Thus Ku concluded that the legal loophole of domestic law and international law to attribute responsibilities on TNCs for human rights violations is faced with the American law instead of applying international law and practice.

In our standpoint, although the ATCA is jurisdictional in nature, both arguments relayed their justification according to mainstream approaches to international law, which can reflect that the current international legal framework is not unified in the aspect of attributing responsibility on TNCs. However, this can justify the dependence of US courts on national precedents instead of analyzing the related international norms; therefore a concrete interpretation of these norms is not provided under the ATCA precedents.

Despite the contribution of the scholars mentioned above, in this thesis we will elaborate on the issue of human rights violations by TNCs based on a wider scope of

analysis. We will focus on the concept of international legal personality as a theoretical base to examine the participation of TNCs as members of the international society in the aspects of international law. Moreover, we will attempt to provide a concrete assessment of the contemporary international and domestic mechanisms and instruments adopted to handle human rights violations by TNCs by focusing on the effectiveness of these instruments. We will investigate case law and precedents of international and domestic practice to clarify the strength and weakness aspects of such instruments.

Chapter 2

INTERNATIONAL LEGAL PERSOANLITY OF TRANSNATIONAL CORPORATION

International law as a discipline can be defined as the body of norms and rules that actors within the international system are obliged to obey in their mutual relations and interactions.[20] As a discipline, the international law is directly affected by the developments which occur in the international arena. One of these recent developments is the emergence of several entities in the international society such as inter-governmental organizations (IGOs); non-governmental organizations (NGOs); transnational corporations (TNCs); individuals; and national liberation movements.

Last century a global revolution occurred in the sector of transportation and communication that lead to an increase in the investment and the economic activities of the private corporations and firms. This form of foreign direct investment was partly based on the role played by TNCs for spreading their production operations and investing in all over the world. Moreover, the TNCs emerged in the international society as a powerful actor with influence that can affect other actors either negatively or positively. However, the emergence of these entities created a severe dilemma within the discipline of international law, especially whether these entities posses international legal personality or not. Therefore it is essential to understand

[20] Henderson, *Understanding international law*, 5.

the concept of legal personality according to the discipline of international law in order to understand how international entities interact in the international society.

This chapter will be divided into two sections; the first section will focus on the concept of international legal personality. First, several definitions of the concept adopted by scholars will be examined, and then we will elaborate on its relation with legal personality according to domestic legal order. Then, it will argue about the criteria or standards of the international legal personality. Secondly, we will investigate approaches to the concept of international legal personality adopted in the international law literature by taking into consideration the developments within the international legal order. Finally, the last part of this section will consider the practice of the international judicial bodies through judgments and advisory opinions related to the concept of international legal personality.

The second section will mainly focus on TNCs as entities emerged in international society with significant influence and power affecting the legal order. Therefore, the first part of the section will examine the process of its emergence on the international level; in addition it will take into consideration the relationship between states and TNCs and the level of their interactions in the international society. The second part will discuss the international legal personality of TNCs based on our findings in the previous section. The third part will examine the TNCs interactions within the international legal order according to the criteria of the international legal personality by taking into consideration the imposition of international obligations; duties conferred to TNCs; the participation of TNCs before international judicial bodies and dispute settlement frameworks; and finally the participation of TNCs in the process of law making.

2.1 The Concept of International Legal Personality

At first, the Peace of Westphalia[21] should be examined as a historical event that shaped the contemporary discipline of international law. The importance of the Peace of Westphalia is reflected through three consequences or effects on the modern international legal order:[22] (1) the equality of states on the international level as members of the international community despite the power, size and population of each state; (2) the recognition of state sovereignty, which means that the state, represented by its government, is regarded as the supreme power or authority within its domestic sphere; (3) the emergence of the non-intervention concept in another state's domestic affairs.

Moreover, these consequences resulted in an international 'state-system' community which needs the international law to regulate mutual relations and interactions between the community members.[23] Finally, this international arena is regulated by the concept of legal personality to examine the ability of entities to interact on this arena.

2.1.1 The Scope of the International Legal Personality as a Concept

The legal personality in general is derived from the domestic legal framework, in which according to the philosophy of law, was created in order to grant an entity certain rights and to attribute responsibilities or liabilities under domestic law to regulate the various activities of these entities in a similar manner to natural person

[21] The Peace of Westphalia (1648) in the international law literature refers to the several treaties between several parties: the Swedish Empire; the Holy Roman Empire; the French Kingdom; the Kingdom of Spain and the Dutch Republic who agreed to overcome the Thirty Years War through the treaties of the Peace of Westphalia.
[22] Leo Gross, "The peace of Westphalia, 1648-1948," *The American Journal of International Law* vol. 42, no. 1, (1948): 28-31.
[23] Claire Cutler, "Critical reflections on the Westphalian assumptions of international law and organization: a crisis of legitimacy," *Review of International Studies* vol. 27, no. 02 (2001):137.

and to handle its legal interactions with other community members. A good example of these entities are the corporations; work unions; and NGOs. Hence, domestic legal orders regulate all the aspects related to legal personality to ensure the implementation of the rule of law and stability of the legal relations between community members.

According to the literature of international law, several definitions were suggested to clarify the concept of the international legal personality; firstly, it can be regarded as permission or tool for an entity to be part of the international legal order and to interact with other entities within the international community.[24] Moreover, it was defined as the concept used to determine whether an entity is considered related to international legal order or it is excluded from.[25] Finally, international legal personality can be considered as a mean that defines the scope or the boundaries of the international legal order, thus it is the tool that transforms entities from the 'sphere of international relations into the sphere of international law'.[26]

The issue of international legal personality is not codified by any international treaty to clarify its requirement and its consequences. Although it was proposed to the International Law Commission in 1949 to codify and regulate the issue of the international legal personality but these attempts failed.[27] Thus, unlike the domestic legal order, the international legal system lacks a binding regulatory framework directly related to this matter.

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[24] Cedric Ryngaert, "Imposing International Duties on Non State Actors and the Legitimacy of International Law," In *Non-state Actor Dynamics in International Law: From Law-takers to Law-makers*, ed. Math Noortmann and Cedric Ryngaert (Ashgate Publishing, Ltd., 2010), 93.
[25]Roland Portmann, *Legal personality in international law* (Cambridge University Press, 2010), 1.
[26] Fergus Green, "Fragmentation in Two Dimensions: The ICJ's Flawed Approach to Non-State Actors and International Legal Personality." *Melb. J. Int'l L* vol. 9, (2008): 4.
[27]Portmann, *Legal personality in international law*, 9.

However, scholars proposed several standards or criteria to determine whether an entity possess an international legal personality or not. For instance H. Lauterpacht considered that an international legal personality is achieved by an entity –mainly states, according to him- due to fact of acquiring international rights and holding international obligations.[28] Moreover Cutler suggested that an international legal person must bear international obligations and acquire international rights that are enforceable before the international judicial mechanism or bodies.[29] Finally, Higgins argued that international legal personality as a concept is based on several general criteria such as the ability to contract; the ability to own a property; the ability to sue and be sued; and the ability to be legally bound by its decision.[30] In sum, the international legal personality allows an entity to bear international rights and possess obligations; to bring claims before international judicial institution; and to legally interact with other entities on the international level.

2.1.2 Approaches to Concept of International Legal Personality

The lack of international framework and instruments to regulate the issue of international legal personality resulted in ambiguity about the exact criteria and the scope of the concept. However, the concept of international legal personality is related and affected by the general developments of the international society; thus taking into consideration this relation will improve our understanding of the legal personality concept.

Despite the ambiguity of the concept of international legal personality, scholars have been adopting several approaches or conceptions to understand the issue of

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[28] Lauterpacht Hersch, "The Subjects of International Law," In *Non-State Actors and International Law*, ed. Andrea Bianchi (Ashgate Pub Limited, 2009), 3.
[29] Cutler, "Critical reflections on the Westphalian," 135.
[30] Higgin, *Problems and process: international law and how we use it*, 46.

international legal personality and to examine its relation with the developments on the international level. Therefore, we will discuss some of these attributions by scholars to enrich our understanding of the concept.

For instance Ronald Portman clarified that five approaches were made to understand the concept of international legal personality according to the international legal order, which are:[31]

A. 'The state-only conception' or the 'state centric approach': according to this approach states are considered as the main and only actor within the international community, therefore states are regarded as superior entities.[32] This approach is based on the positivist approach to the discipline of international law, in which other entities are excluded from the sphere of international law such as individuals and IGOs. Moreover, the will of the states is regarded as the main source of the international law, which can be expressed in two ways: explicitly, by treaties between states; implicitly, by the common practice of states on specific matter or the customary international law.[33] Thus, this conception can be regarded as an obvious reflection of the Peace of Westphalia; in which states have a supreme position in the international society.
B. 'The recognition conception': this approach is mainly based on the state-only conception but with several amendments. States are still the main actor within the international legal system, but states have the capability to recognize new

[31] Portmann, *Legal personality in international law*, 13-18.
[32] Ibid., 42
[33] Ibid., 43

international actors within the system.[34] Moreover, the legal personality can be granted to states or non-state entities such as IGOs or individuals or minority groups. Therefore, this approach admitted the ability of non-state entities to be actors or part of the international system, but this legal personality –conferred by states- can be limited through the will of the states.[35]

C. 'The individualistic conception': this approach is fully based on the natural law theory to international law, in which individuals are international persons excited before or *'priori'* of the states.[36] Thus, this conception contradicts with and rebuts the only-state and the recognition conceptions justifications. States are considered, according to this approach, as collective entities consisting of individuals to eliminate the differences between state's interests and individual's interests. Moreover, the will of states is not considered as a source of the international law, rather, general principles of international law is based on the natural law, therefore individuals are regarded as the supreme actors within the international legal system.[37]

D. 'The formal conception': this conception basically considers that the international legal personality can be achievable by any entity within the international system; in which an entity being addressed by an international norm is considered as an international person.[38] Thus, international legal personality is a '*posteriori'* concept.[39] On the other hand, according to this conception, the legal personality does not confer the person the authority of creating the international law or international duties and rights.

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[34] Ibid. 80-81
[35] Ibid., 82-83
[36] Ibid., 126-127
[37] Ibid., 128-130
[38] Ibid., 174
[39] Ibid., 177

E. ‘The actor conception’: in this approach the international legal system is not considered as a set of rules, but rather as an authoritative decision making process which take place on several levels.[40] Thus, actors are not defined according to a specific rule or norm, but instead according to their ‘effective power’ to participate in this process. Moreover, in order to identify an international actor, an observer must examine the international level and the participants in the decision making process.[41] In sum, this conception can be regarded as a flexible concept to examine and determine the legal personality.

Another categorization was adopted by F. Green based on relating these conceptions to the evolutions or developments within the international law as a discipline in general and theories of international relations.[42] Firstly, the state-only and the recognition conceptions are mainly a reflection of the positivist theory to international law, in addition to the realist theory of international relations.[43] It is clear that the state -according to both theories- is the corner stone within the international order. Therefore, according to Green the most common terms used to describe international legal personality is the ‘subject’ for states and ‘objects’ for any entity other than states. However, those approaches were criticized for the inability to handle new ‘subjects’ or actors of international law such as IGOs and individuals, in which the recently emerged actors were regarded as subjects of international law with ‘limited’ legal personality especially in the latter approach.[44]

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[40] Ibid., 209-210
[41] Ibid., 213
[42] Green, "Fragmentation in Two Dimensions,” 4-6.
[43] Ibid., 4
[44] Ibid., 5

Secondly, the individualistic approach which some scholars relate it to the natural law and anthropocentric theories. This approach is based on the post-modernism approach to international relations and international law through 'reconstruction the individual subject as the empowered global citizen'.[45] Moreover, according to this approach, a shift in the doctrine of positivist international law to adopt some concepts of natural law occurred in the last century after the First and the Second World War by the adoption of the UN Charter and the UDHR, in which individuals were conferred direct international rights.[46] However, some scholars consider the individualistic conception of international legal personality as an unrealistic reflection of the current international legal system and in being 'over-idealistic'.[47]

Thirdly, the policy-oriented conception is based on criticizing the classification methodology adopted by other conceptions to international legal personality.[48] For instance, Alston regarded that using the 'non-state actor' as a term is related to the narrow interpretation of international law by the 'mainstream' or traditional approaches to the discipline of international law, moreover, the term of 'non-state actor' negatively affect the understanding of international personality in which it is considered as consisting of 'states' and the 'rest'.[49] In addition, Higgins considers that the 'subject – object' classification lacks 'credible reality' and 'functional purpose' to examine the legal personality. Moreover, she considers that international law 'should not be understood as a set of rules or norms', rather, international law

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[45] Ibid., 6
[46] Bartram Brown, "The Protection of Human Rights in Disintegrating States: A New Challenge," *Chicago-Kent Law Review* vol. 68 (1992): 206.
[47] Green, "Fragmentation in Two Dimensions," 6.
[48] Ibid., 5
[49] Philip Alston, ed. *Non-state actors and human rights*, (Oxford, New York: Oxford University Press, 2005), 3.

should be regarded as a dynamic decision-making process.[50] Therefore, the policy oriented approach uses the term 'participants' to describe actors of the legal order. Thus, states; individuals; NGO's; IGO's; and TNCs are participants, in addition to any actor or entity has the capabilities to influence or be part of the decision making.[51]

Based on the above, it is clear that due to the lack of codification on this issue, within the discipline of international law several terms are used to characterize or describe the concept international legal personality; such as: actors and non-actors of international law; subjects and objects of international law; and participants of international law. The usage of various terms to describe the international legal personality reflects the wide range of approaches or conceptions to this topic.

Finally, J. Hickey developed a threefold categorization of international legal personality.[52] Firstly, the 'Legal Traditional Approach', in which states have a supreme position in the international arena. Moreover, the will of the states is considered as main source of international law whether through multilateral treaties or states practice.[53] Therefore, any new entities must obtain the states consent in order to achieve in international legal personality.

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[50] Higgins, *Problems and process*, 49-50.
[51] Math Noortmann, "Understanding Non-State Entities in the Contemporary World Order," (Paper presented at the Non-State Actor Research Seminar, Leuven, Belgium, 26-28 March 2009. Available on https://ghum.kuleuven.be/ggs/projects/non_state_actors/publications/noortmann.pdf (Accessed on 22/08/2013)): 12.
[52] James Hickey, "The Source of International Legal Personality in the 21st Century," In *Hofstra L. & Pol'y Symp.*, vol. 2. (1997): 4.

[53] Ibid.

Secondly, 'the Factual Realist Approach' which regard that the power and influence of state are declining on the international arena; meanwhile, other entities are emerging on the international arena due to their increasing power.[54] Therefore, the international order will be modified, due to the influence of the recently emerged entities especially on the law making process, despite the consent of states.

Thirdly, 'the Dynamic State Approach' which claim that a status of overlapping is occurring between internal and international law; and states and other entities on the issue of international legal personality.[55] The overlapping situations are caused by the change from the 'absolute sovereignty' to 'popular sovereignty' by states, in addition to the permission of states for IGOs and regional organizations to handle global issues.

2.1.3 ICJ Practice on the Concept of International Legal Personality

Although, the international legal order lacks a legal framework to regulate the concept of international legal personality, this did not preclude claims to be brought before international judicial bodies related directly or indirectly to the concept of international legal personality. For instance, states may bring a claim before the ICJ to represent their nationals' –whether individuals or TNCs- for violations of international rights and disputes. In addition, the UN organs may submit a request for advisory opinion relating to non-state actors.[56] Therefore, this section will examine briefly specific judgments and advisory opinions to clarify the evolution of international legal personality concept before the international judicial bodies.

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[54] Ibid., 5.
[55] Ibid.,6.
[56] An example on a case before the ICJ will be provided later on.

2.1.3.1 The PCIJ Advisory Opinion on the Jurisdiction of the Courts of Danzig[57]

The case is related to the unique situation of Danzig city.[58] According to the Convention of Paris after the First World War, the city of Danzig and Poland signed a bilateral treaty to regulate employment matters of the Dazing Railway System which was transferred to the Polish Administration.[59] However, based on the treaty, employees sued Polish authorities before Danzig's courts to obtain compensations and unpaid salaries. The Polish authorities and the League's High Commissioner for Danzig refused jurisdiction of Danzig courts over the Polish authorities and claimed that employees had no legal standing to sue in Danzig courts.

Thus, the League of Nations Council resorted to the PCIJ for advisory opinion on the matter. In 1928 the PCIJ issued its advisory opinion and argued that individuals cannot acquire international rights or bear international duties according to an international treaty, which was regarded as an exclusive aspect for states only.[60]

However, although in this case the PCIJ clearly declared that direct obligations and rights cannot be conferred to private actor due to the lack of international legal personality, it argued that the intention of the parties should be taken into account on

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[57] Jurisdiction of the Courts of Danzig, Advisory Opinion, 1928 PCIJ. (ser. B) No. 15 (Mar. 3).

[58] As an outcome of the First World War, the Free City of Danzig was established under the Treaty of Versailles (1919) as an independent entity from Poland and Germany and under the administration of the League of Nations High Commissioner for Dazing. However, nowadays the Danzig city is city of Gdansk in Poland.

[59] The "Definitive Agreement in regard to officials" (in German langue: endgültiges Beamtenabkommen) was signed on the 22nd of October 1921 to handle this matter.

[60] Ibid., para. 37 (The PCIJ stated that "according to a well established *principle of international law*, the Beamtenabkommen, being an international agreement, *cannot*, as such, *create direct rights and obligations for private individuals*").

this matter and thus opened the door to grant individuals international rights through international treaty but according to specific requirements and standards.[61]

2.1.3.2 ICJ Advisory Opinion on the Reparation for Injuries[62]

The dispute of this case is based on the assassination of the UN Secretary-General envoy Count Bernadotte to Palestine in the late 1940's of the previous century. This incident raised the issue of whether the UN as non state actor is capable of obtaining reparation through direct international claim against the state of Israel.

The advisory opinion of the ICJ clearly acknowledged the direct relation between the developments of the international level and the main concepts of the discipline of international law such as the international legal personality.[63] As for the legal personality of the UN, the ICJ concluded that the UN obtained an international legal personality, however this legal personality should be distinguished from the personality of states.[64]

Therefore, this advisory opinion reflects the evolution and development of the international law as a discipline according to the understanding of the international

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[61] Ibid., para. 37 (The PCIJ mentioned that "But it cannot be disputed that the very object of an international agreement, according to the intention of the contracting Parties, may be the adoption by the Parties of some definite rules creating individual rights and obligations and enforceable by the national courts").

[62] Reparation for Injuries Suffered in the Service of the United Nations, Advisory Opinion, 1949 ICJ (11 April).

[63] Ibid., 8 (The ICJ claimed that "throughout its history, the development of international law has been influenced by the requirements of international life, and the progressive increase in the collective activities of States has already given rise to instances of action upon the international plane by certain entities which are not States. This development culminated in the establishment in June 1945 of an international organization whose purposes and principles are specified in the Charter of the UN").

[64] Ibid., 9 (The ICJ argued that "the Court has come to the conclusion that *the Organization is an international person.* That is not the same thing as saying that it is a State, which it is certainly not, or that its legal personality and rights and duties are the same as those of a State ... It does not even imply that all its rights and duties must be upon the international plane, any more than all the rights and duties of a State must be upon that plane. What it does mean is that it is a subject of international law and *capable of possessing international rights and duties, and that it has capacity to maintain its rights by bringing international claims*").

judicial bodies. Unlike the advisory opinion of the PCIJ, the ICJ clearly stated the possibility of conferring international legal personality for entities other than state which means acquiring international rights; holding international obligations and the capability to bring claims before international judicial bodies.

2.1.3.3 ICJ Judgment on LaGrand (2001)[65]

This case is related to accusation of two Germans for bribery and murder before the domestic federal courts of the United States who were sentenced to death. However, during the investigations and tribunal procedures, the US failed to inform the defendants of the consular assistance option according to the Vienna Convention on Consular Relations (VCCR) Article (36) (1) (b). This incident was regarded by the German authorities as a violation of international rights of the defendants; however this claim was rejected by the US authorities. Therefore the German authorities brought a claim against the US before the ICJ for violating the rights of the Germans defendants.

After examining the VCCR, the ICJ ruled in favor of the German claims, and therefore, the judgment stated that entities other that state –in this case individual- can be conferred international rights through international treaty. [66] Therefore, this decision contradicts with the PCIJ decision by clearly stating that individuals can be holder of international rights according to treaties between states**.**

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[65] LaGrand (Federal Republic of Germany v. United States of America), Judgment, 2001, ICJ, 466, (June 27).

[66] Ibid., 32 (the ICJ stated that: "Based on the text of these provisions, the Court concludes that Article 36, paragraph 1, *creates individual rights*, which, by virtue of Article 1 of the Optional Protocol, may be invoked in this Court by the national State of the detained person. These rights were violated in the present case").

The previous cases indicate that the ICJ has been facing several dilemmas while dealing with claims related to international legal personalities, this is mainly due to the absence of clear and obvious norm or framework to regulate this issue. Moreover, the court has failed in the previous opinions and decisions to develop a clear and coherent framework for non-state actors which led to the statue of fragmentation facing claims before the ICJ.[67]

This fragmentation took two forms, firstly, the substantively form in which the ICJ applied different legal doctrines to different entities or non-state actors without developing a coherent legal framework.[68] For instance, the international legal personality of the IGOs –i.e. the UN- was determined through the possession of certain characteristic and international rights. Individuals were considered subject to different legal doctrine related to self-determination, by granting people critical sovereign rights over territory but meanwhile not possessing international obligations. Terrorists, on the other hand, were not considered as subject to any international legal regime or doctrine. Therefore, when several entities collide in a legal dispute before ICJ, different legal regimes are applied by the ICJ and thus vertical fragmentation occurs.[69]

Secondly, fragmentation are taking place in the procedural law of the ICJ, in which only states and bodies of the United Nations can bring a claims before the ICJ in

[67] Green, "Fragmentation in Two Dimensions," 24-26.
[68] Ibid., 24
[69] Ibid., 25

order to obtain a judgment or an advisory opinion.[70] Thus, other international actors are not conferred the right to submit claims before the ICJ.

2.2 The Issue of Transnational Corporations

It is essential to clarify that the past century had witnessed several developments that affected the international law as a discipline. During that period and especially after the Second World War, several entities emerged on the international arena such as individual; IGOs; NOGs and national liberation movements. The emergence of these entities can be explained in the light of the reduction of state's power and influence on the international level due to three factors: [71] (1) the revolution in global communication; (2) regulatory competition among states especially in the economic dynamic; (3) the diminish of the priority of territorial factor on the international level.

2.2.1 TNCs as Actors of the International Society

Various other entities also emerged in the international society, but the most important and related to our paper is the TNCs. As mentioned earlier, we defined TNCs as "an economic entity operating in more than one country or a cluster of economic entities operating in two or more countries - whatever their legal form, whether in their home country or country of activity, and whether taken individually or collectively".

TNCs starting point can be tracked to the colonial era in which trade was a critical cornerstone for ancient empires.[72] The English East India Company and the Dutch

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[70] http://www.icj-cij.org/information/index.php?p1=7&p2=2 , (accessed on 17th of May, 2013)
[71] Peter J. Spiro, "New Players on the International Stage," In *Hofstra L. & Pol'y Symp.*, vol. 2. (1997): 20.
[72] "The East India Company: The company that ruled the waves" *The Economist*, December 2011, Available at http://www.economist.com/node/21541753 (Accessed on 1/07/2013).

United East India Company were the first TNCs established 400 years ago.[73] These two TNCs were used as a mean to achieve greater aims for the empire of Holland and Great Britain.[74] Nowadays, however, no doubt that the TNCs are fully independent from their governments or any political activity in which their aim is gain profit.[75]

TNCs' leverage nowadays can be related to three critical factors: [76] the nature of its economic activities which takes place in more than one state; the ability to benefit from geographic differences between states in factors of endowments; and finally the geographical flexibility in which TNCs can depend on several resources and markets to operate and achieve their aims. Based on these factors, TNCs have high capabilities and can affect the international society and other international actors, especially in the aspect of economy and trade. Due to this position, TNCs activities may have direct effects –either positive or negative effects- on the global public goods or the community interests[77] which include several aspects such as protection of human rights, environment, and enforcement of core labor and social standards.

Although, TNCs have several positive effects -as form a foreign direct investment- on the domestic level such as enhancing job opportunities; facilitating the transfer of technology between states; and improving the state's economy, on the other hand,

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[73] Ibid.
[74] Stefan Kirchner, "The Subjects of Public International Law in a Globalized World," *Baltic Journal of Law & Politics* vol. 2, no. 1 (2009): 93.
[75] In our perspective, this does not rebut the assumption that TNCs and states are related indirectly and affected by each others' interest, especially in the case of the home states of the TNCs.
[76] Daniel Thürer, *The Emergence of Non-governmental Organizations and Transnational Enterprises in International Law and the Changing Role of State*,(Duncker & Humblot, 1999), 46-47.
[77] Karsten Nowrot, "New Approaches to the International Legal Personality of Multinational Corporations Towards a Rebuttable Presumption of Normative Responsibilities," *Journal of Global Legal Studies,* (1993): 2.

TNCs may have various side-effects especially in the cases of the activities of TNCs within the 'third world' countries or the developing states. The negative effects by the TNCs cannot be countered by the developing states for two main reasons: firstly, the developing states may be *unwilling* to face the side-effects due to the corruption of government officials; secondly, states may be *powerless* or *incapable* to limit these effects due to globalization and the competition between states to attract foreign direct investments. [78] Hence, it is essential to regulate the activities of the TNCs on international level rather than the domestic level to overcome this hurdle.

2.2.2 International Legal Personality of the TNCs

No doubt that the current international legal order is based on the traditional approach, mainly due to the states' supreme position and their role on the international law-making process either through multilateral treaties or state practice. However, scholars claimed that, according to the contemporary approach, TNCs have no legal personality due to three reasons.[79] Firstly, the current structure of the international legal system is based on a state-centric concept, in which TNCs do not fit according to it. Secondly, according to ideological argument based on the notion of reducing TNCs influence in the international society by limiting or even precluding the international legality of TNCs. Finally, based on the facts that TNCs cannot be part in the process of law creation -either through treaties or international customary law- which require states actions and activities only. However,

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[78] Menno T. Kamminga, "Corporate Obligations under International Law," (Paper presented at the 71st Conference of the International Law Association, plenary session on Corporate Social Responsibility and International Law, Berlin, 17 August 2004. Available on http://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&ved=0CCsQFjAA&url=http%3A%2F%2Fwww2.ohchr.org%2Fenglish%2Fissues%2Fglobalization%2Fbusiness%2Fdocs%2Fkamminga.doc&ei=X4xEUpaRB8XTtAb3nIG4AQ&usg=AFQjCNGI00GYtkmNmI7DVUcFb7hcOe0dig&sig2=FLrD_7HjBT1whvDigm0koQ&bvm=bv.53217764,d.Yms (Accessed on 20/08/2013)): 3.

[79] Patrick Dumberry, and Erik Labelle-Eastaugh. "Non-State Actors in International Investment Law: The Legal Personality of Corporations and NGOs in the Context of Investor-State Arbitration," In *Participants in the international legal system: multiple perspective on non-state actors in international law*, ed. Jean D'Aspremont, (Routledge: 2011), 362.

precedents on the international level, relating to TNCs, can rebut the arguments above, thus the next sections will elaborate on TNCs participation on various levels in the international arena.

2.2.2.1 Law Making Process and TNCs

TNCs interact in various ways on the international level. One of these aspects is the international investment law, in which TNCs obtain a vivid and obvious position. For instance, within the structure of the International Labor Organization (ILO), the TNCs play a critical role on the process of international negotiation; by acquiring the right to be represented and to vote independently than states.[80] Moreover, other UN bodies permitted the participation of TNCs as observers and advisors through committees to facilitate the process of international negotiation of the Law of the Sea Treaty, the General Agreement on Tariffs and Trade (GATT) and the Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPS). [81] [82] Hence, the TNCs role in these limited circumstances reflects the possibility to incorporate TNCs in the law making process.

2.2.2.2 Law Enforcement and TNCs

TNCs are not conferred the right to bring claim before international judicial bodies. According to the Article 96 of the UN Charter and the Statute of the ICJ, the ICJ hear legal disputes that are submitted by states only and can issue advisory opinion based on a request by any organ of the UN. Although the TNCs cannot submit actions before the ICJ, the ICJ heard and ruled over disputes directly related to

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[80] For more information see ILO Constitution Article 3 arguing about membership of employers and workers representatives; Article 4 granting the voting rights to employers; and Article 7 clarifying the composition of the governing body between governments, employers and workers.

[81] Fleur E. Johns, "The Invisibility of the Transnational Corporation: An Analysis of International Law and Legal Theory," *Melbourne University Law Review* vol. 19 (1994):902.

[82] Nowrot, "New Approaches to the International Legal Personality," 1.

TNCs issues, in which these claims were brought by states such as the 'Barcelona Traction' case.[83]

The Barcelona Traction, Light and Power Company Ltd., registered in Canada in 1911 with a majority of Belgium nationals as shareholders, was the main power supplier in Catalonia Province of Spain. After the 1930's civil war in Spain, the TNC's bonds were negatively affected by the authority control over the currency exchange system in Spain and the refusal to transfer the foreign currency needed for supplying Barcelona Traction's operations. Thus, Barcelona Traction was declared bankrupt by the Spanish courts. At first, Canada attempted to overcome this problem via the Spanish judicial system, but in 1955 the Canadian government regressed from the legal procedures. Therefore the Belgium government interfered by submitting claims against Spain before the ICJ for reparation of damages for its national citizens -the shareholders of Barcelona Traction.

The ICJ rejected the Belgium claims and argued that TNCs nationality is determined according to the state of registration and not the nationality of the shareholder. Thus rejecting Belgium's right to espouse for Barcelona Traction. However, despite the fact that this case was brought by stats, it proved that the ICJ can handle cases and issues related to TNCs such as the nationality of TNCs.

Unlike the ICJ, the European Court of Human Rights accepts to hear claims submitted by TNCs against member states of the European Convention on Human

[83] Barcelona Traction, Light, and Power Company Ltd. (Belgium v. Spain),Judgment, 1970, ICJ.

Rights for violating the human rights of the TNCs.[84] For instance, in *Pressos Compania Naviera sa v. Belgium*[85] the plaintiffs – shipping TNC and insurance association- claimed that Belgium's recent Act of 1988 violate their rights of fair trial and the right of property. Moreover, in *Autronic A.G. v. Switzerland*[86] the plaintiff –an electronic equipment seller and dealer specialized in TV antenna- brought claims against the Switzerland for precluding the plaintiffs from prod casting a Soviet TV show and thus violating the freedom of expression.

Moreover, TNCs' interaction exceeded more in the field of international economic and investment fields. Due to the nature of the cross border operations of the TNCs and to protect the TNCs -which were regarded as investors in the state- states established the Bilateral Investment Treaty or the Multilateral Investment Treaty. These treaties are considered as a legal framework to regulate the relationship between states and TNCs, to protect the foreign investors, and to establish frameworks for dispute settlement through arbitration procedures.[87] Thus, TNCs were granted the right to bring claims against states directly. For instance, the International Center for the Settlement of Investment Disputes (ICSID), established by the Washington Convention of 1966 between several members of the World Bank, conferred this right to TNCs. [88] In addition to the ICSID, several international arbitration institutions and multilateral treaties started to confer the TNCs the right to bring claims against states and conferring TNCs a legal standing such as The

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[84] Philip Leach, *Taking a case to the European Court of Human Rights*, (Oxford University Press, 2011), 115-116.
[85] *Pressos Compania Naviera sa v. Belgium*, No. 17849/91, Series A332, (1995).
[86] *Autronic A.G. v. Switzerland*, No. 12726/87, Series A178, (1990).
[87] Julian Ku, "The Limits of Corporate Rights under International Law," *Chi. J. Int'l L*. 12 (2011): 742.
[88] Patrick Dumberry, and Labelle-Eastaugh Erik, "Non-State Actors in International Investment Law," 361.

Hague Permanent Court of Arbitration, The Canada-U.S. Free Trade Agreement, The North America Free Trade Agreement and finally the World Trade Organization.[89] [90]

2.2.2.3 International Obligations on TNCs

TNCs in a limited number of cases and in specific fields - the international environment law and the international investment law- acquired limited international legal personality and thus holding international obligations or granted rights. For instance, Article (137) (1) of the UN Convention on the Law of the Sea (1982) indicated that 'judicial persons', such as TNCs, are obliged to respect the international water.[91]Moreover, the Convention on Civil Liability for Oil Pollution Damage (1969) attributes direct responsibility on TNCs, as owners of ships, for environmental pollution by oil leaking in the international water.[92] To ensure the implementation of the UN Convention on the Law of the Sea, the International Tribunal for the Law of the Sea (ITLS) was established to examine disputes related to international water. The ITLS examined several cases and disputes related to privet entities such as TNCs.[93]

Another aspect of TNCs presence on the international arena is the field of International Human Rights Law. According to the type of operations the TNCs run,

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[89] Cutler, "Critical reflections on the Westphalian," 143-144.
[90] Kirchner, "The Subjects of Public International Law," 82.
[91] Article (137) (1) of the UN Convention on the Law of the Sea (1982) stated that "no state shall claim or exercise sovereignty or sovereign rights over any part of the area or its resources, nor shall any state or natural or *juridical person* appropriate any part thereof. No such claim or exercise of sovereignty or sovereign rights nor such appropriation shall be recognized".
[92] Convention on Civil Liability for Oil Pollution Damage (1969), Article (3) states that: "the *owner of a ship* at the time of an incident, or where the incident consists of a series of occurrences at the time of the first such occurrence, *shall be liable* for any pollution damage caused by oil which has escaped or been discharged from the ship as a result of the incident".
[93] More information and cases related to TNCs' disputes before the ITLS are available at http://www.itlos.org/index.php?id=35&L=0 (accessed on 30/08/2013).

it is possible that these operations or activities infringe the human rights especially in the case of lack of domestic regulation on this issue due to the incapability or unwillingness of the states as mentioned earlier. Thus, this aspect should be based on the obligations on TNCs according international law in general and specifically according to the international human rights law. However, neither international law nor human rights law imposes international obligations on TNCs to respect human rights. Moreover, this is mainly due to the dependent over the traditional approaches by both disciplines, in which states are the only entities holding international obligations, although on the other hand, some scholars of international law claimed that human rights treaties can be interpreted for creating international obligations on TNCs.[94]

However, international attention increased on the issue of TNCs and human right through several bodies of the United Nations. For instance, the UN Economic and Social Council (ECOSOC) established in 1974 the Commission on TNCs in order to produce recommendations in the form of codes of conduct to be adopted separately by states and TNCs. Moreover, The Organization for Economic Co-operation and Development adopted the Guidelines for Multinational Enterprises (1976) to be taken into consideration by TNCs while operating globally. The Global Compact is another initiative based on principles related to regulate TNCs behavior. These initiatives have two common features: They do not regulate human rights aspect alone; rather they include several aspects related to the operations of TNCs such as environmental; labor; and employment issues. Secondly, the initiatives do not impose direct or indirect obligations on the TNCs or even states; therefore, they are

[94]Nowrot, "New Approaches to the International Legal Personality," 5.

regarded as ‘soft law’ means or mechanisms based on voluntary acceptance of the provisions, thus, not as source for international obligations on TNCs.[95]

2.2.2.4 International Rights and TNCs

Obligations under international human rights law on TNCs is one side of the equation, some scholars such as Julia Ku argued that TNCs must also acquire international rights based on human rights treaties as a result of the international legal personality.[96] Ku admitted that there is no clear text to create such international rights for TNCs; however an interpretation of the terms used by human rights treaties can lead to this result. According to Ku, ECHR is the only treaty that has a direct textual base for granting international rights for TNCs. As for the other treaties, the International Convention on Civil and Political Rights is clearly directed to human beings only. Meanwhile, the American Convention on Human Rights admitted some legal standing for judicial persons in order to represent individuals only, however, this mandate was intentionally conferred for NGOs. However, we should mention that conferring international human rights is based on the interpretation of these treaties, thus, these treaties do not confer international rights directly.

In the end, it is clear that TNCs in international law are being regulated in two main sub-branches of international law: international investment law and international human rights law, mainly due to the type of operations and activities that TNCs run in the international levels. However, nowadays TNCs are still not directly regulated through those fields of international law; instead indirect regulations are used to

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[95] Math Noortmann, and Cedric Ryngaert. *Non-state Actor Dynamics in International Law: From Law-takers to Law-makers*. (Lund Humphries Publishers, 2013), 28.
[96] Ku, "Limits of Corporate Rights under International Law," 746-749.

handle the issue of TNCs activities to avoid the hurdles of legal personality of TNCs.

To summarize this chapter, the notion of international legal personality is a developing concept within the discipline of international law. In which it can be considered as relative concept with no coherent legal base or framework to regulate it. The present legal order consists of wide range of new ‘non-state actors’ emerged in the last century, in which no general consensus in the literature over their position within the international legal order. This ambiguity is related to the critical consequences it can have on international law, especially to the supreme position of states. In addition the international legal order lacks a codification that set the criteria or the requirements to be considered as an actor of international law.

TNCs as non-state actors, TNCs have some international rights and international obligation, especially in specific circumstances and situations related to international investment law and international human rights. Therefore, it can be argued that TNCs have obtained a limited legal personality. Moreover, the international rights of TNCs are mainly based on the consensus of states through international treaties. As for the international obligation of human rights on TNCs, it is clear and obvious that these obligations are not based on ‘hard law’ source but rather on ‘soft law’ initiatives.

Based on the previous incidents, it can be concluded that TNCs have the capability to participate in the process of international law. This participation can be in the law-making process, holding international obligations, acquiring international rights and the ability to resort to international judicial bodies. However, the inability of the

contemporary traditional approach to international law to adapt itself is the main hurdle to include TNCs in these aspects of international law.

Finally, according to traditional international law theory, TNCs are excluded from the subject categories of international law. However, no doubt the role and the influence of TNCs on the international arena are critical. Although attempts were made in order to handle the issue of TNCs through 'indirect' international rights and obligations, a growing gap still exists between the practice and the theory of international law. In addition, despite the other conceptions or approaches to international legal personality to provide alternative methods to understand the legal personality of other actors than states, these conceptions are not reflected directly on the application of international law. Hence, the ICJ, for instance, is not considering TNCs or individuals as subjects of international law. Therefore, international law as a discipline must be 'updated' to overcome the gap of theory and practice due to the increase number of 'non-state' actors and their influence over the international arena, thus, international law need to include these newly emerged actors through direct international rights and obligations and involvement in the process of law making and law enforcing.

Chapter 3

INTERNATIONAL HUMAN RIGHTS ORDER AND INTERNATIONAL OBLIGATIONS ON TNCs

In the previous chapter we examined the concept of international legal personality and concluded that it is a relative concept. First, it is not codified by any treaty; secondly, scholars developed various approaches to understand this concept based on different grounds; and finally various criteria are essential to indicate the international legal personality such as assuming international obligations, enjoying international rights, the ability to resort to international juridical bodies, and finally to legally interact with other actors. Then we elaborated on TNCs as newly emerged entities in the international sphere according to the criteria of international legal personality, in which we concluded that TNCs obtain a 'limited' legal personality basically due to their ability in special situation to achieve specific criterion.

In this chapter, the field of international human rights law will be examined through the historical events that led to the current structure and norms of the human rights legal framework in order to understand how the concept of responsibility evolved for human rights violations. However, in this chapter will focus on the modern human rights order and briefly mention the early evolution of the human rights order in the light of international bodies due to the limitation of this chapter. Moreover, the international human rights framework will be analyzed according to the position

of states and TNCs which emerged as non-state actor that are capable of affecting individual's human rights.

Then, the next section will clarify responsibility attribution to TNCs in the light of the international human rights framework and specifically through the international criminal law. In the third section, we will analyze initiatives or 'soft-law' instruments to regulate TNC's behavior and activities, whether proposed by international organizations or individually adopted by TNCs themselves.

Finally, we will proved a case study to investigate attributing responsibility on TNCs via the UN Security Council as an international body to clarify the drawbacks of the current international legal order in the light of TNCs international responsibility.

3.1 The Evolution of the International Human Rights Legal Order

The emergence of human rights can be tracked to the year of 1780 B.C. when the King Hammurabi issued the Code of Hammurabi, since then, several documents such as the Charter of Cyrus (539 BC); the Charter of Liberties (1100) and the Provisions of Westminster (1259) emerged and reflected the evolution and the development of the human rights discipline.[97]The 'modern' human rights system was evolved in the early of the past century; in which the Peace of Westphalia's main concepts -state sovereignty; the non-intervention in the domestic affairs of the states and the equality between states- resulted at first in considering the human rights as an internal affair of each state or government, thus each state adopted its own framework to protect human rights.

[97] The historical basic for HR pp. 37-38

Due to the First and the Second World Wars, the Nazi regime in Germany, and the mass number of casualties, it became clear that although states and governments are regarded as the main protectors of human rights, still states and governments can negatively use its power and leverage to commit human rights violations against its own people. Thus the state should not be regarded as the sole protector of human rights violations, in which an international legal framework needed to regulate and monitor the role of states regarding human rights.[98]

Hence, the modern international human rights legal order can be traced to the establishment of the League of Nations as an aftermath of the First World War,[99] in which one of its main functions was to protect and ensure the implementation of the treaties between the Allied and Associated Powers with the Central Powers that were signed to protect minorities in states through institutional mechanisms such as the Committees of Three and the Mandates Commission.[100]

However, after the Second World War it became more critical for the international community that establishing a more concrete and wider human rights legal framework is a requirement in order to extend the protection to include individuals rather than minorities only. This demand was supported by the relatively weak and the developing states during the San Francisco Conference; however, on the other

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[98] Implementation at National level pp 84

[99] Thomas Buergenthal, "The Evolving International Human Rights System," *Am. J. Int'l L.* 100 (2006): 784-785.

[100] Article 22 of the League of Nations Covenant stated that: 'the Mandatory must be responsible for the administration of the territory under conditions which *will guarantee freedom of conscience and religion*, subject only to the maintenance of public order and morals, the prohibition of abuses such as the slave trade, the arms traffic and the liquor traffic, and the prevention of the establishment of fortifications or military and naval bases and of military training of the natives for other than police purposes and the defense of territory, and will also secure equal opportunities for the trade and commerce of other Members of the League'.

hand the powerful states refused the attempts to impose direct international obligations on UN member states on this aspect.

As a result, the UN Charter contained three articles related to human rights which can be described as 'vague' or broad principles.[101] For instance Article (1) states that one of the UN purposes is to ensure and promote the 'respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion'. In addition, Article (55) argues that in order to achieve equal rights and self-determination of people, the UN shall promote universal respect for fundamental freedoms and human rights without discrimination.[102] Finally, Article (56) emphasis that all members are obliged to act separately or collectively – in accordance with the UN- to ensure the achievement of the purpose of the previous articles.[103]

However, the evolution of human rights within the UN order is not limited to articles of the UN Charter, rather the international human rights system was enhanced through the adoption of the Universal Declaration of Human Rights (UDHR) by the General Assembly; the International Covenant on Civil and

[101] Ibid., 786
[102] Article (55) states that "With a view to the creation of conditions of stability and well-being which are necessary for peaceful and friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, the United Nations shall promote: …. (c) Universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion".
[103] Article (56) states that "All Members pledge themselves to take joint and separate action in co-operation with the Organization for the achievement of the purposes set forth in Article 55".

Political; and the International Covenant on Economic, Social and Culture Rights in which consist all together the International Bill of Human Rights.[104]

Moreover, the UN human rights framework is based on two main monitoring procedures:[105] the Charter-based bodies such the Human Rights Council; and the Treaty-based bodies that are established due to a universal treaty between state that regulate specific field related to the discipline of human rights. For instance, the Subcommittee on Prevention of Torture is created in the light of the Optional Protocol to the Convention against Torture.

Recently, the human rights system was enhanced through the creation of regional human rights doctrines that are based on stronger enforcement and protection mechanisms such the adoption of the ECHR in the European Union; and the American Convention on Human Rights and the American Declaration of the Rights and Duties of Man within the Organization of the American States.

In the end, the current international human rights legal order is clearly based on imposing international obligations on states to protect, promote and respect human rights,[106] these international obligations have their roots in the international treaties of human rights and the customary international law.[107] Therefore, the international human rights order seems to bear international obligations on states only to limit its

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[104]" The Foundation of International Human Rights Law," Available on http://www.un.org/en/documents/udhr/hr_law.shtml (Accessed on 06/07/13)
[105] More information about the classification of the monitoring bodies in the UN human framework is available on http://www.ohchr.org/en/hrbodies/Pages/HumanRightsBodies.aspx (accessed on 20/08/2013)
[106] Surya Deva, "Human rights violations by multinational corporations and international law: where from here," *Conn. J. Int'l L.* 19 (2003): 1.
[107] Andrea Bianchi, "Globalization of Human Rights: The Role of Non State Actors," In *Global Law Without A State. (Aldershot: Dartmouth Gower* (1997): 181.

power that can be used to violate human rights of its individuals -who are holders of international rights and are considered weak in comparison to states. Hence, based on the above, the international human rights legal order is applied vertically, not horizontally.[108] No doubt that this situation is affected by the traditional approach to international law in general, in which states are regarded as the main and only actors within the international arena which can bear international obligations or duties.

3.2 TNCs and the International Human Rights Law

In the previous chapter we examined the emergence of non-state actors on the international level. The emergence process of TNCs as recent entities affected the human rights legal framework directly due to four factors or phenomena:[109] (1) The globalization of the international economy in which the obstacles that were used to limit and negatively affect the activities of TNCs are removed, and nowadays TNCs are able to run operations in foreign states much easier than before, therefore the role of the state is limited nowadays in controlling and regulating TNCs behavior. (2) The privatization of public sector, in which TNCs took over activities or functions that were originally operated by the states –such as health, security services and transportation – and thus resulted in a situation of overlapping between the 'public' and the 'private' spheres. (3) The fragmentation of states by affecting the implementation of human rights norms in case of the failed states which cannot maintain its public activities. (4) The feminization of international human rights law, in which several factors such as abusing the women in homes and the economic and

[108] John Knox, "Horizontal human rights law," *The American Journal of International Law* 102, no. 1 (2007): 1-2.
[109] Andrew Clapham, *Human Rights Obligations of Non-state Actors*, (Oxford: Oxford University Press, 2006), 3-4.

social discrimination enhanced the efforts to protect human rights within the private sphere.

Hence, according to the international human rights system states are not regarded as the sole entities that are capable of violating and, on the other hand, protecting human rights anymore.[110] The recently emerged entities or non-state actors can have direct effects on the international human right legal order and are capable of violating human rights.

Over the last century, an increased influence of TNCs on the international arena can be witnessed due to their cross border operations and activities. TNCs are capable of infringing various human rights such as the right to life; freedom from slave labor; freedom to enjoy property; right to enjoy healthy and clean environment; and freedom from discrimination.[111] Several examples can prove the human rights violations by TNCs during their operations and activities, for instance the recent murder incidents by the Black Water security firm against the Iraqi civilians in Bagdad during the American invasion of Iraq;[112] Unocal supported the military troops in Burma to abuse human rights of the population while constructing and its pipeline project;[113] and Nike's child labor abuse and poor working conditions during

[110]Deva, "Human rights violations by multinational corporations and international law," 2.
[111] Jordan Paust, "Human rights responsibilities of private corporations," *Vand. J. Transnat'l L.* 35, (2002): 818-817.
[112]"Iraq Black Water Incident," available on http://www.business-humanrights.org/Documents/IraqBlackwater16Sep2007 (accessed on 15/07/13).
[113] "UNOCAL in Burma," available on http://www.scu.edu/ethics/practicing/focusareas/business/Unocal-in-Burma.html (accessed on 08/07/13).

its operations in Asia.[114] Moreover, from a legal perspective and according to characteristic or features of the human rights norms, the human rights of individuals can be violated by TNCs' cross border operations directly and indirectly. In which the human rights are attributed to each individual according to the current human rights treaties. Therefore, it is clear that TNCs' activities and behavior should be regulated within the international human rights order to handle their power and influence on the human rights aspect.

3.2.1 Direct International Obligations on TNCs

After examining the relationship between TNCs and the international human rights order by proving that TNCs are capable of directly violating human rights, this section will examine TNCs in the light of current international legal order by focusing on imposing direct obligations on TNCs. As mentioned earlier, several entities emerged in the international level challenging the traditional or the state-centric approach to international law in general, such as IGOs and their international legal personality, in addition to individuals as holders of international rights and international obligations or duties.

Under the discipline of international law, the issue of international responsibility was examined since 1955 by the International Law Commission.[115] The International Law Commission codified the issue of states' responsibility through a draft proposed on 2001.[116] This draft focused on states responsibility only without

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[114] "Nike Labor Abuse" available on http://www.business humanrights.org/Categories/Lawlawsuits/Lawsuitsregulatoryaction/LawsuitsSelectedcases/NikelawsuitKaskyvNikeredenialoflabourabuses (accessed on 10/07/13).

[115] "Summary of the ILC activities," available at: http://legal.un.org/ilc/summaries/9_6.htm (accessed on 04/08/2013).

[116] International Law Commission, 2001, "Responsibility for States for International Wrongful Acts," available at: http://legal.un.org/ilc/texts/instruments/english/draft%20articles/9_6_2001.pdf (accessed on 11/08/2013).

examining other entities of international society. According to the draft, states are held responsible for unlawful acts that are attributed to the state –according to international law- and considered a violation or a breach of international obligations on states.[117] Moreover, Article 12 defined that a breach of international obligations occurs when 'an act of state is not in conformity with what is required of it by that obligation, regardless of its origin or character'. In addition, the draft regarded that international responsibility may be owed to a specific state, to several states or to the international community.

Despite the fact that the international law practice lacks a general framework for non-state actors and TNCs, the draft can be considered as an essential document to the issue of attributing international responsibility on TNCs for international unlawful acts during their cross border operations. In which the draft illustrate how international responsibility is triggered in accordance to obligations of the international community.

Recently the international legal order started to impose direct international human rights obligations on non-state actors. A clear indication can be tracked in the discipline of international criminal law in which three precedents reflects bearing international obligations on non-state actors:[118] (1) The precluding of slave trade; piracy; war crimes; torture; and genocide through bearing individuals direct obligation on these issues.[119] (2) According to the international juridical order and

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[117] Ibid., Article 2

[118] Andrew J. Wilson, "Beyond Unocal: Conceptual Problems in Using International Norms to Hold Transnational Corporations Liable under the Alien Tort Claims Act," in *Transnational Corporations and Human Rights*, ed. Olivier De Schutter (Oxford: Hart Pub Limited, 2006), 48-49.

[119] For instance the International Convention on the Prevention and Punishment of the Crime of Genocide in Article (4) states that '*Persons* committing genocide or any of the other acts enumerated

specifically the Nuremberg International Tribunal; the International Criminal Tribunal for Rwanda (ICTR)[120]; and International Criminal Tribunal for the Former Yugoslavia (ICTFY)[121] in which individuals were accused and found guilty on war crimes. (3)The Rome Statute of the ICC, in which Article (25) states that individuals or natural persons fall within the jurisdiction of ICC.[122] In sum, international law is clear about imposing several international obligations on individuals in the sphere of international human rights law and criminal law precisely, which refute the assumption that international obligations are imposed on states only.

As for TNCs, due to the complex relationship between the TNCs, the home state and the host state, and their cross-border operations on the international level, it is essential to adopt a regulatory framework based on the international law as a ground to regulate this type of overlapping and complexity relations. Based on the previous chapter and from a theoretical perspective, the TNCs do not acquire full international legal personality, which mean that TNCs do not bear international obligations; enjoy no international rights; and cannot resort to international courts or tribunals. However, although the human rights legal framework lacks direct obligations on TNCs, the international law in other aspects and in specific circumstances imposed TNCs international obligation. Thus, based on international precedents, TNCs are capable of holding international human rights obligations.

3.2.2 Attempts to Incorporate TNCs under International Criminal Law

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in Article 3 shall be punished, *whether they are constitutionally responsible rulers, public officials or private individuals*'.

[120] For example *The Prosecutor v. Paul Bisengimana*, ICTR, Case No. 00-06-T (April, 2006) the defendant was accused of crimes against humanity.

[121] *Prosecutor v. Z. Tolimir*, ICTY, Case No. IT-05-88/2-T (December 2012).

[122] Rome Statute, Article (25) (1): 'The Court shall have jurisdiction *over natural persons* pursuant to this Statute' Thus the ICC has jurisdiction over states and individuals'.

The issue of extending the jurisdiction of the international tribunal bodies – by allowing international tribunals to hear claims brought by TNCs and against TNCs- is an indirect indication to bear international obligations on TNCs. The matter of granting TNCs international obligations was discussed in several occasions and international panels.[123] First, the Report of the Preparatory Committee on the Establishment of an International Criminal Court of 1996 included a proposal on the issue of individual criminal responsibility in which the Court has the jurisdiction to regard criminal acts on behalf of a 'juridical person' other than states. However, the scope or meaning of the 'juridical person' as a term was neither clarified nor accepted by all parties,[124] in which some regarded that it should include entities lacking of legal status; on the other hand, some considered that it should be attributed to criminal entities; and other expressed their doubts about including this issue on the agenda.

Secondly, the draft Statute by the Preparatory Committee to the UN Diplomatic Conference on the Establishment of an International Criminal Court in Rome 1998 stated that to the Court jurisdiction over natural persons should be extended to include jurisdiction over criminal act committed by judicial persons. However, delegations did not achieve consent over this proposal.[125]

Finally, in Rome Conference, the issue of criminal responsibility was discussed by several delegations through submitting papers and proposals on the issue. For

[123] Cristina Chiomenti, "Corporations and the International Criminal Court," in *Transnational Corporations and Human Rights*, ed. Olivier De Schutter, (Oxford: Hart Pub Limited, 2006), 288-291.
[124] Ibid., 289
[125] Ibid., 290 (The draft statute stated that "the court shall also have jurisdiction over juridical persons with the exception of states, when the crimes committed were committed on behalf of such juridical persons or by their agencies or representatives").

instance, the French delegation clearly supported the idea of juridical criminal responsibility and included a definition of the 'juridical person' in the light of TNCs activities.[126] However, the disagreement of the delegations over procedural issues - such as the scope of TNCs liability and sorts of evidence that can be use before the court- and the time limitation of the negotiation process prevented to included TNCs responsibility under the Statute of the ICC.[127]

Although the international legal order does not impose international obligations on TNCs, the Nuremberg Military Tribunal after the Second World War as a precedent rebuts this assumption.[128] The Military Tribunal did not investigate individual activities only, rather it included the activities of organizations and corporations such as the Krupp Corporation; the Gestapo and the Farben in which it was proved that these corporations violated labor rights and indirectly committing war crims during the war and thus responsibility was attributed to officials and owners of these firms instead of the TNCs themselves due to procedurals constrains.[129] Hence, the Nuremberg Military Tribunal can be considered as a precedent in which other non-state actor beside individuals can be held indirect responsible before the international tribunals.

3.2.3 UNSC Sanctions on TNCs

[126] Ibid., 291 (The French proposal defined the judicial person as a 'corporation whose concrete, real, or dominant objective is seeking private profit or benefit, and not a State or other public body in the exercise of State authority, a public international body or an organization registered and acting under the national law of a State as a non-profit organization'),
[127] Julian Ku, "The Curious Case of Corporate Liability Under the Alien Tort Statute: A Flawed System of Judicial Lawmaking," (Paper presented in the American Society of International Law's workshop on the topic of International Law in Domestic Court Interest Group, 2010. Available at http://works.bepress.com/julian_ku/1 (accessed 08/08/2013)): 27-28.
[128] Inés Tófalo, "Overt and Hidden Accomplices. Transnational Corporations' Range of Complicity for Human Rights Violations," in *Transnational Corporations and Human Rights*, ed. Olivier De Schutter, (Oxford: Hart Pub Limited, 2006), 335.
[129] Laura A. Dickinson, "Accountability of Private Security Contractors under International and Domestic Law," In *The American Society of International Law*, vol. 11, no. 31, (2007), http://www.asil.org/insights071226.cfm (accessed on 1/07/2013).

Generally, the UN Security Council (UNSC), as an international body, is responsible to maintain global peace and security. Various means can be used by the UNSC in order to achieve its aim such as financial sanctions over states and entities. Recently the UNSC adopted new mechanisms of sanctions known as the 'smart sanctions system' to face the harsh criticism for the negative effects of the sanctions over the population and the economy of developing states.[130] The smart sanctions through freezing of assets and blocking financial transactions can be directed to individuals and economic entities selected by special sanctions committees.[131]

According to the UN Charter, the UNSC sanctions are obligatory; however sanctions over non-state actors – such as TNCs- should be implemented through the state sphere which has the primary responsibility for implementing UNSC resolutions. For instance the Security Council Committee concerning Al-Qaida regards that all States are obliged to 'freeze the assets of, prevent the entry into or transit through their territories by, and prevent the direct or indirect supply, sale and transfer of arms and military equipment to any individual or entity associated with Al-Qaida as designated by the Committee. The *primary responsibility* for the implementation of the sanctions measures *rests with Member States* and effective implementation is mandatory'.[132]

Thus, although the UNSC admitted the influence of non-state actors especially TNCs in threatening the international peace and security, the implementations of

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[130] UN Sanctions Secretariat, "The Experience of the UN in Administrating Arms Embargos and Travel Sanctions," (Paper submitted to the First Expert Seminar, Bonn, 21-23 November 1999), 3.
[131] "Security Council Sanctions Committees: An Overview," available on http://www.un.org/sc/committees/index.shtml (accessed on 11/07/13).
[132] "General Information on Al-Qaida Sanctions Committee," available on http://www.un.org/sc/committees/1267/information.shtml (accessed on 12-07-13).

sanctions against TNCs, according to the UNSC, should be through the state sphere and therefore it is considered as states' responsibility to implement the sanctions not the TNCs. This issue will be examined in more details in the case study in the last section.

3.3 Soft-Law Initiatives for TNCs

The previous section clarified that despite the limited precedents and circumstances in which TNCs were attributed responsibility for human rights violations, the current international legal order and the international human right law lack a sufficient legal framework of obligations on TNCs. This situation resulted in a legal gap of enforcement and regulatory norms on TNCs' activities and operations, in which TNCs are benefiting from this gap.[133]

However, due to the increase of human rights violations by TNCs on the international arena, several initiatives on various levels were established, yet these initiatives can be regarded as 'soft-law' instruments. These soft-law instruments are based on non-binding and voluntary norms. Moreover, the initiatives may be proposed by an international body or organization for TNCs or may be adopted voluntary by the TNC. Finally, the soft-law initiatives may regulate various aspects other than human rights such as labor rights; environmental matters; internal accountability; and corruption.

[133] Eric De Brabandere, "Non-state actors and human rights: corporate responsibility and the attempts to formalize the role of corporations as participants in the international legal system," in *Participants in the International Legal System. Multiple Perspectives on Non-State Actors in International Law*, ed. Jean d'Aspremont, *(*Abingdon: Routledge, 2011.), 270-71.

In order to understand the diversity of subjects in soft-law initiatives we must examine the Corporate Social Responsibility (CSR) concept. Two approaches were suggested to define the CSR concept:[134] the first approach was promoted by A. Berle assuming that TNCs, as private entities, have the obligation or responsibility toward the shareholder to maximize the corporation's profit and shareholder wealth only.[135] Secondly, E.M. Dodd assumed that TNCs as economic entities shall not limit their responsibility to material profit and wealth; rather TNCs responsibility shall include achieving public goods and social aspects toward stakeholder and not just shareholders.[136]

The later approach can be related to the 'good governance concept' which was promoted by the International Monetary Fund (IMF) in the 1980's as a condition for borrowing loans by states.[137]According to the good governance concept states must enhance and promote administrative accountability; transparency of the government; and the rule of the law within the state.[138] Moreover, the concept was used and developed by regional and the UN organizations to evaluate state's practices and behavior.[139] Thus, the diversity of subject regulated under the scope of soft-law initiatives can be related to the relationship between soft-law initiatives – as reflection of CSR- and the broad of good governance concept which is based on the variety of issues.

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[134] Larry Catá Backer, "Multinational Corporations, Transnational Law: The United Nations' Norms on the Responsibilities of Transnational Corporations as a Harbinger of Corporate Social Responsility in International Law," *Colum. Hum. Rts. L. Rev.* Vol. 37, (2005): 298.
[135] Ibid.
[136] Ibid.
[137] August Reinisch, "The Changing International Legal Framework for Dealing with Non-State Actors," in *Non-State Actors and Human Rights,* ed. Philip Alston. (New York: Oxford University Press, 2005), 49.
[138] Ibid.
[139] Ibid., 51

The emergence of the initiatives was considered by scholars as privatization of states' responsibility for human rights violations. [140] In which the responsibility of violating human rights will be attributed to private entities, such as the TNCs, through implementation and the enforcement means or mechanisms that incorporate non-state actors. The privatization of human rights responsibilities is regarded as a shift from the current state-centric human rights legal order by directly conferring much more influence and power to non-state actor while negatively affecting – reducing- the state position in the international society.[141]

In sum, the soft-law initiatives can be considered as means and mechanisms to overcome the legal gap in the contemporary international legal order and human rights framework through voluntary and non-binding norms that cover various issues beside human rights. The next section will briefly examine the main soft-law initiatives related to TNCs' activities by focusing on the main features and drawbacks of these initiatives.

3.3.1 International Soft-Law Initiatives

Before examining the soft-law initiatives, we should mention that there are two international precedents enhanced the international community to opt these initiatives:[142] the New International Economic Order Resolution adopted by the General Assembly in the 1974 which lead to various initiatives on the international arena such as the Guidelines for MNCs by the OECD and ILO Declaration.[143] In addition, the UN established the Commission on TNCs to prepare a draft Code of

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[140] Ibid., 75
[141] Andrew Clapham, *Human Rights Obligations of Non-state Actors*. (Oxford: Oxford University Press, 2006): 58.
[142] Olivier De Schutter, ed. *Transnational corporations and human rights*. (Oxford: Hart Pub Limited, 2006), 2-9.
[143] Ibid., 4

Conduct for TNCs in the 1990's which did not obtained enough consensus especially due to the harsh challenge by the developed states and thus the Commission was transformed into the Commission on the International Investment and TNCs. [144] Therefore, during this era, the UN efforts failed to create a commonly accepted code of conduct for TNCs.[145]

Secondly, the1990's witnessed demands for CRS in the domestic and international level.[146] For instance, in the domestic arena several law-cases were brought directly against TNCs for abusing human rights especially in the US and the European states.[147] The UN Global Compact principles and the UN Norms in the 2000's are the main initiatives in the international arena.[148]

A. The Guidelines for Multinational Corporations by the OECD[149]

The Guidelines was adopted in 1976 and revised in 2000 and 2011.[150] The Guidelines are adopted by more than 40 states; even non-state members of the OECD. The Guidelines represents various recommendations adopted by states to TNCs registered or operating in the OCED states.[151] Moreover, the Guidelines regulated several aspects beside human rights such as environmental issues; combating bribery; taxation; and competition.[152] As for human rights, the revision of 2011 adopted the UN framework of 'Protect, Respect and Remedy' which clarified that it is the state primary role and responsibility to protect human rights, however,

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[144] Reinisch, "The Changing International Legal Framework," 43-44.
[145] Ibid., 44
[146] De Schutter, *Transnational corporations and human rights*, 7-8.
[147] The US domestic framework and the TNCs responsibility will be examined in the following chapter.
[148] De Schutter, *Transnational corporations and human rights*, 9.
[149] OECD (2011), OECD Guidelines for Multinational Enterprises, OECD Publishing, available on http://www.oecd.org/daf/inv/mne/ (accessed on 11/07/13) (hereinafter the Guidelines).
[150] Ibid., 3-4
[151] Ibid., 13
[152] Ibid., 14

TNCs should respect human rights by avoiding the abuse of the human rights of others, or contributing to the violations.[153]

The implementation and enforcement of the Guidelines is ensured via the establishment of National Contact Points (NCP) and the Committee of International Investments (CII) by each state to monitor the application of the Guidelines.[154] Although the Guidelines explicitly refer to implementation procedures, it limits these procedures and attributes no legal consequences on TNCs for violating the Guidelines norms.[155]

B. Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy by the ILO[156]

The Declaration was adopted in 1977 through the ILO Governing Body as a guidelines for TNCs as employers; states; and labors unions with regard to issues such as industrial relations; employments; conditions of work and life; and human rights.[157] The Declaration indicated the role of the TNCs in the modern economic process and their influence over labor rights and human rights in general; moreover the Declaration argues that all parties shall respect the UDHR and the ILO Constitution.[158] The Declaration claimed that TNCs shall take into account the ILO main agreement as guidelines while implementing their social policy. Nevertheless,

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[153] Ibid., 31, para. 36
[154] Ibid., 71
[155] Ibid., 17 (The Guidelines noted that the "observance of the Guidelines by enterprises is *voluntary and not legally enforceable*").
[156] ILO (2006),"Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy," 4th Edition, available on http://www.ilo.org/empent/Publications/WCMS_094386/lang--en/index.htm (accessed on 12/07/13) (hereinafter the Declaration).
[157] Ibid., 2
[158] Ibid., 1

the Declaration is clear that is not based on legal obligation, rather it is a voluntary and non-binding norms.[159]

C. The UN Global Compact (2000)[160]

The Global Compact was proposed during the World Economic Forum in Davos by the UN Secretary General Kofi Annan in 1990, this initiative is directed to TNCs to influence their strategies and operations by voluntary taking into consideration the ten principles of the Global Compact. The Global Compact's principles are related to human rights; environmental; anti-corruption; and labor issues.[161]

Moreover, the Compact is based on a procedural framework of submitting annual reports by TNCs to ensure the implementation of principles. However the Compact, like the ILO Declaration and the OECD Guidelines, is a voluntary initiative in which if a TNC does not submit its report, this will affect its status and may result in its eviction out of the Global Compact membership only, without any other legal measures.[162]

The ten principles are influenced by, and based on, concepts of several international treaties such as the UDHR; ILO's on Fundamental Principles and Rights at Work; Rio Declaration on Environment and Development; and The UN Convention Against Corruption. According to the first and the second principles, the

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[159]Ibid., 2 (The Declaration stated that "This Declaration sets out principles in the fields of employment, training, conditions of work and life and industrial relations which governments, employers' and workers' organizations and multinational enterprises are recommended to observe on a voluntary basis; its provisions shall not limit or otherwise affect obligations arising out of ratification of any ILO Convention").

[160] "Overview of the UN Global Compact," available on http://www.unglobalcompact.org/AboutTheGC/index.html (accessed on 15/07/13).

[161] "UN Global Compact Brochure," page 4, available on http://www.unglobalcompact.org/docs/news_events/8.1/GC_brochure_FINAL.pdf , (accessed on 16/08/13).

[162] Ibid., 3

international human rights should be respected and supported by TNCs, and TNCs shall avoid any type of compliance in human rights abuse by third parties related to their activities and operations.[163]

D. UN Norms on the Responsibility of TNCs and other Business Enterprises with Regard to Human Rights,[164] by the UN Sub-Commission on the Promotion and the Protection of Human Rights[165]

The UN Norms regulated several issues beside environmental and labor issues such as consumer protection, non-discrimination rights and equality treatment, and security rights. The preamble made a clear reference to the International Bill of Human Rights and various multilateral treaties related to human rights issues, such as the Convention on the Prevention and Punishment of the Crime of Genocide and the International Convention on the Elimination of All Forms of Racial Discrimination. Finally, the draft indicated the importance of human rights instruments and mechanisms adopted by regional doctrine, such as the African Charter on Human and Peoples' Rights; the American Convention on Human Rights; and the European Convention for the Protection of Human Rights and Fundamental Freedoms.

The UN Norms adopted implementation mechanisms based on three levels:[166] (1) the TNCs level, by adopting internal codes of conducts and taking into account the UN Norms while dealing or establishing relations with subsidiaries and other business partners. (2) The UN level, by establishing a periodic mentoring mechanism to ensure the implementation of the UN Norms by TNCs. (3) the state

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[163] Ibid., 6 (Principle 1 states that "Businesses should support and respect the protection of internationally proclaimed human rights. As for Principle 2 it argues that [TNCs] make sure that they are not complicit in human rights abuses").
[164] Hereinafter will be referred as the 'UN Norms'.
[165] "UN Norms," available at http://www1.umn.edu/humanrts/links/norms-Aug2003.html#approval (accessed on 14/07/13).
[166] Ibid., para. 15-20

level, through developing administrative and judicial frameworks to ensure the incorporation of UN Norms. However, in case of failure to comply with the provisions, the UN Norms suggest reparation, compensation, restitution, and rehabilitation for the victims of the TNCs' unlawful activities.[167]

However, the reactions on the UN Norms varied;[168] the supporters regarded the UN Norms as a positive contribution because, unlike the previous initiatives, it is not based on a voluntary notion to regulate TNC's activities; secondly, the UN Norms are considered as a dual based initiative in which obligations are imposed over TNCs and states; and finally because the UN Norms provides a strong base for evaluating TNCs' behavior and the implementing mechanism.[169] On the other hand, opponents of the UN Norms –mainly TNCs and the developed states- regarded the UN Norms as a challenge to the current and traditional approach to international law in general and especially the notion of state responsibility of human rights. [170] In addition, they criticized the inaccuracy and vagueness of the terms and concepts used by the UN Norms.

The UN Norms imposed explicit obligations on the TNCs especially within the 'sphere of influence' of their activities and operations in which TNCs "have the obligation to promote, secure the fulfillment of, respect, ensure respect of and protect human rights recognized in international as well as national law, including the rights and interests of indigenous peoples and other vulnerable groups".

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[167] Ibid., para. 18 (para. 18 mention that "Transnational corporations and other business enterprises shall provide prompt, effective and adequate reparation to those persons, entities and communities that have been adversely affected by failures to comply with these Norms through, inter alia, reparations, restitution, compensation and rehabilitation for any damage done or property taken").
[168] Backer, "Multinational Corporations, Transnational Law," 350-52.
[169] Ibid., 351
[170] Ibid., 351-352

In the end, the UN Norms were not adopted by the Commission on Human Right and thus it is considered as a draft with no legal effects over states or TNCs.[171] However, if the Commission on Human Rights adopted the UN Norms, it would have promoted the UN Norms to the level of customary international law in which it will be a legally binding document for states and TNCs.[172]

E. The 'Protect, Respect and Remedy' Framework[173]

This initiative is indirectly related to the failure of the Commission on Human Rights to adopt and promote the UN Norms. The UN Secretary-General Kofi Annan, based on request from the Commission, [174] named John Ruggie as the Special Representative of the Secretary-General (SRSG) on the issue of human rights and TNCs and other business enterprises with a mandate to clarify the standards of TNCs' responsibility to human rights; to examine the role of states in the field of TNC's violations and the means to develop its internal framework related to TNCs' responsibility; to rectify and elaborate on broad and vague notions in the previous UN initiatives such as the 'sphere of influence' and the notion of complicity; and finally to establish methodologies to undertake human rights impact assessments of TNCs' behavior.[175]

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[171] In recommendation (2004/116) to the Economic and Social Council the Commission on Human stated that it "affirm that document E/CN.4/Sub.2/2003/12/Rev.2 [UN Norms] has not been requested by the Commission and, as a draft proposal, has no legal standing, and that the Sub-Commission should not perform any monitoring function in this regard".

[172] Jacob Gelfand, "The Lack of Enforcement in the United Nations Draft Norms: Benefit or Disadvantage?," in *Transnational Corporations and Human Rights*, ed. Olivier De Schutter. (Oxford: Hart Pub Limited, 2006.), 315.

[173] "SRSG on HR and TNCs," available on http://www.ohchr.org/EN/Issues/Business/Pages/SRSGTransCorpIndex.aspx (accessed on 17/7/13).

[174] Office of the High Commissioner of the Human Rights, Human Rights Resolution No. 2005/96, (20, April 2005).

[175] Secretary-General Department of Public Information, "Secartary General appoints John Ruggie United States Special Representative on Issue of Human Rights, Transnational Corporation, Other Business Enterprises" No. SG/A/934.

On 2008 the SRGS submitted the 'Protect, Respect and Remedy' Framework report which is based on three fundamental principles of responsibility that vary but meanwhile complement each other:[176] (1) the states have the main duty to protect human rights through various mechanism, policies and regulations and to prevent unlawful acts by third-parties especially TNCs. (2) the TNCs have the duty to respect human rights by acting with due diligence to avoid abusing human rights of others during their operations and activities. (3) Enhancing and developing remedy mechanisms –whether judicially or non-judicially- for the victims of human rights violations by TNCs.

In addition to the framework, the SRGS's report argues that this initiative should be regarded as an 'authoritative focal point' to start on a common ground in the future by initiatives related to TNCs and human rights.[177] Moreover, to strengthen the Framework and improve its implementation, the report suggests recommendations for various international bodies and institutions such as the OCED; several international treaty bodies; and the High Commissioner of the Human Rights Office.[178]

In sum, this initiative was developed by Ruggie as 'road-map' to clarify the relationship between TNCs and the international human rights order through taking

[176] "The UN "Protect, Respect and Remedy" Framework For Business and Human Rights," (Sept. 2010), 2, Available on http://www.reports-and-materials.org/Ruggie-protect-respect-remedy-framework.pdf (accessed on 1/08/13).
[177] Ibid., 1
[178] Ibid.

into consideration the previous initiatives and the points of interactions and conflicts between TNCs and the human rights order.[179]

3.3.2 Self-Regulating Initiatives

Another type of initiative emerged in the late 1990's which focus on establishing a self-regulating framework for TNC's behavior based on voluntary and non-legally binding codes of conducts adopted by the TNC itself.[180] The self-regulating initiatives focused on various issues that are related to TNCs' behavior and activities such as corruption; social development; labor; and freedom from discrimination.[181]

The roots of the self-regulating mechanism can be tracked to the mid 1970's in which special codes of conducts were adopted by TNCs –on a voluntary base- while running their operations and activities in a specific states or circumstances. For instance, the Sullivan Principles (1977) offered framework for the TNCs operating in South Africa during the apartheid regime; the MacBride Principles of 1984 to TNCs operating in Northern Ireland to eliminate discrimination; and the Miller Principles by TNCs operating in the People's Republic of China and Tibet to promote political freedom.[182]

3.3.3 Effectiveness of the Soft-Law Initiatives

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[179] Christiana Ochoa, "The 2008 Ruggie Report: A Framework for Business and Human Rights," In *The American Society of International Law Insight*, vol. 12, no. 12. (2008), http://www.asil.org/insights080618.cfm (accessed on 20/08/2013).

[180] Fiona McLeay, "Corporate Codes of Conduct and the Human Rights Accountability of Transnational Corporations: A Small Piece of a Larger Puzzle," in *Transnational Corporations and Human Rights*, ed. Olivier De Schutter. (Oxford: Hart Pub Limited, 2006), 22. Moreover, these initiatives were defined by the OCED as "commitments voluntarily made by companies, associations or other entities, which put forth standards and principles for the conduct of business activities in the marketplace". In addition, the ILO defined it as "written policy, or statement of principles, intended to serve as the basis for a commitment to particular enterprise conduct".

[181] Willem van Genugten, "The Status of Transnational Corporations in International Public Law," In *Human Rights and the Oil Industry*, ed. Asbjorn Eide, Helge Ole Bergesen and Pia Rudolfson Goyer, (Oxford: Intersentia, 2000), 71.

[182] McLeay, "Corporate Codes of Conduct and the Human Rights," 220.

In this section, judging the effectiveness of soft-law initiatives will be according to two aspects: attributing responsibility directly to TNCs for human rights violations and the ability to impose punishment over TNCs if found guilty. Although some of the initiatives established procedural mechanism of implementation, it is clear that the all the pervious initiatives have a common weakness which is the lack of legally binding obligations and implementation mechanisms whether for states or TNCs. However, due to the limitation of thesis we will focus on precedents in the light of the OCED Guideline and the ILO Declaration only.

First, under the OCED Guidelines, the British National Contact Point (NCP) received a complaint by Global Witness – British NGO- against the British TNC, Afrimex Ltd., for violating the OCED Guidelines in the Democratic Republic Congo for paying bribes and supporting child labor according to a UN report.[183]After examining evidences, the NCP concluded that the TNC violated directly the provisions of the OCED Guidelines. However the NCP introduced recommendations only -without imposing sanctions- to the TNC for taking into consideration several mechanisms or frameworks while adopting their future policies, such as the UN Framework; and OECD Risk Awareness Tool for Multinational Enterprises in Weak Governance Zones.[184]

Secondly, the Declaration of the ILO states clearly that the procedures for hearing disputes related to the application of the Declaration should be limited within the scope of interpretation the provisions of the Declaration only. Moreover it also states

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[183] Jernej Letnar Cernic, *"Global Witness v. Afrimex Ltd.*: Decision Applying OECD Guidelines on Corporate Responsibility for Human Rights," *In the American Society of International Law Insight*, vol. 13, no. 1. (2009), **http://www.asil.org/insights090123.cfm** (accessed on 21/08/2013).
[184] Ibid.

explicitly that the procedure should not contradict with national or other ILO procedures.[185] Thus, the Declaration cannot be invoked to attribute responsibility on TNCs before the ILO judicial bodies.

As for the domestic level, these initiatives also have no effect and cannot be invoked to impose obligations on TNCs before domestic courts. However, in the 1970's the British American Tobacco Co. declared that it will close its factory in Amsterdam without consulting worker unions, thus infringing its commitment toward the OCED Guidelines which was adopted in their internal policies. Therefore, the worker unions brought a case against the TNC to prevent the factory from closing based on the OCED Guidelines that requires consulting worker unions before taking such action. The court ruled in favor of the worker unions arguing that adopting OCED Guideline into the TNC's internal policies was 'of considerable importance'.[186] However, this does not mean that the Court based its judgment and finding on the OCED Guidelines alone but rather several other legal documents and incidents beside the Guidelines were used to reach the decision. [187]

3.4 Case Study: Al-Kadi and Al-Barakaat International Fund

Although, the international legal order lacks a framework to regulated TNCs activities and operations, in specific occasions or specific fields of international law, TNCs were held responsibility for violating international law or human rights. This

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[185] ILO (2006),"Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy,"17 (The Declaration argued that 'The purpose of the procedure is to interpret the provisions of the Declaration when needed to resolve a disagreement on their meaning, arising from an actual situation, between parties to whom the Declaration is commended. 2. The procedure should in no way duplicate or conflict with existing national or ILO procedures. Thus, it cannot be invoked: (a) in respect of national law and practice; (b) in respect of international labor Conventions and Recommendations').

[186] Genugten, "The Status of Transnational Corporations in International Public Law," 72.

[187] Ibid.

case-study will examine attributing responsibility on TNCs in the international level by focusing on the UNSC economic sanctions against judicial entities, i.e. TNCs.

Various TNCs were considered as threat to global peace and security and thus were designated for the UNSC's economic sanctions and assets freezing, for instance the Consolidated List of Entities and Individuals related to the nuclear and weapons issues of the Democratic People's Republic of Korea included about twenty TNCs facing direct economic sanctions of assets freezing such as Hong Kong Electronics and Korea Mining Development Trading Corp.[188]

By analyzing the case of Al Kadi and Al Barakaat International Fund[189] in the light of the UNSC and the European Court of Justice (ECJ), we will clarify the complexity of attributing international responsibility to TNCs in the international level. Although, neither Al Kadi, nor Al Barakaat are TNCs, the rules and circumstances applied over these parties can be applicable on TNCs, because basically according to the UNSC the term 'entities' refers to TNCs; individuals; and organizations.

Firstly, we will briefly discus the UNSC sanctions mechanisms. Then, a background on the Al Kadi case will be provided based on ECJ ruling. Next, we will analyze the aftermath of this case on the issue of attributing TNCs responsibilities on the international level.

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[188] Consolidated List of Entities and Individuals, Available at: http://www.un.org/sc/committees/1718/pdf/List_Entities_and_Individuals.pdf (Accessed on 31/07/13). For more information see the UNSC Committee established pursuant to Resolution 1718/2006.

[189] (Hereinafter Al Kadi)

According to the UN Charter, the UNSC is responsible for ensuring the global peace and security, and thus the UNSC was conferred with several authorities to achieve this aim.[190] Mandatory Sanctions, according to Article 41 of the UN Charter, can be used by the UNSC to force a state to comply with its Resolutions; moreover, other UN members should ensure and act according to the mandatory sanctions.

The UNSC recently improved its sanctions framework by adopting the 'smart sanctions' or 'targeted sanctions' system which aims to reduce the side-effects of the UNSC sanctions' over the states' economy and population, which was the scenario in Iraq in the 1990's.[191] Thus, the smart sanctions framework is based on specifically targeting individuals and entities through personal sanctions instead of collective sanctions. [192] The smart sanctions take the form of assets freezing; travel ban; and financial restriction.[193] Moreover, based on Article (29) of the UN Charter, the UNSC has the mandate to establish several 'sanctions committees' in order to ensure the implementation of the UNSC sanction resolutions by member states.[194]

In October 1999 the UNSC issued resolution 1267 condemning Al Qaida existence in Afghanistan for shelter and practice and the assistance provided by Taliban to Osama Ben Laden to enhance their terrorist activities.[195] The resolution imposed financial sanctions over Taliban; requested member states to freeze any funds or

[190] For more information, See Chapter VII of the UN Charter.
[191] Sarah Léonard, and Christian Kaunert. "'Between a rock and a hard place?': The European Union's financial sanctions against suspected terrorists, multilateralism and human rights." *Cooperation and Conflict* 47, no. 4 (2012), 476.
[192] 'Security Council Sanctions Committees: An Overview' Available on: http://www.un.org/sc/committees/index.shtml (Accessed on 15/07/2013)
[193] Ibid.
[194] The list of Sanction Committees created by UNSC is available at: http://www.un.org/en/sc/subsidiary/ (Accessed on 15/08/2013)
[195] UN Security Council Resolution 1267, UN Document S/RES/1267 (October, 1999), available at http://www.un.org/en/ga/search/view_doc.asp?symbol=S/RES/1267%281999%29 (accessed on 21/07/2013).

material resources related to Taliban; to impose travel ban over individuals; and an arms embargo by precluding any sort of weapon transfer to Taliban. Moreover, the UNSC established sanction committee to ensure the implementation of the Resolution.

The UNSC continued to issue resolutions related to Taliban, Al Qaida and Osama Ben Laden and asked the sanction committee to produce a list of the individuals and entities related to Al Qaida and Taliban for applying asset freezing.[196] In 2001 the sanction committee issued the consolidate list of individuals and entities related to Al Qaida, the list included Yassin Al Kadi a Saudi citizen and Al Barakaat International Fund as an organization registered in Sweden.[197]

In order to comply with UNSC resolutions related to Al Qaida and to implement the sanctions, the Council of the European Union issued Regulation 881affariming on the UNSC sanctions and adopting the list prepared by the sanction committee.[198] Thus the assets of Al Kadi and Al Barakaat were frozen in the EU financial institutions.

In 2001, Al Kadi brought a claim before the Court of First Instance against the Council of the European Union and the Commission of the European Communities, demanding the annulment of Regulation 881 for violating his right to be heard; his right to property and his right to effective judicial review. However, in 2005 the

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[196] The related Resolutions are: UNSC Resolutions 1333/2000; 1390/2002; 1455/2003; 1526/2004; 1617/2005; 1735/2006; 1822/2008; 1904/2009; 1989/2011 and 2083/2012

[197] More information about the list adopted by the sanctions committee available on http://www.un.org/sc/committees/1267/aq_sanctions_list.shtml (Accessed on 20/08/2013)

[198] Council of the European Union, Regulation No. 881/2002 (27 May 2002), available at http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2002:139:0009:0022:EN:PDF (accessed on 21/08/2013).

court rejected the plaintiffs claims on the grounds that the court's jurisdiction is limited and do not include reviewing Regulation of the Council of the EU that incorporate UNSC, due to the supremacy of the international law –UNSC resolutions- over EU law.[199] In addition, the court considered that it can examine indirectly the UNSC resolution –through examining Regulations of the EU- only in the case of alleged violations of *jus cogens*.[200]

The plaintiffs appealed before the European Court of Justice (ECJ) to reverse the decision of the first instance and to annulment the Regulation 881by claiming that the Council should respect and promote human rights -and especially the rights of property and the right of effective judicial review- while adopting its regulations that have direct effects on individuals. The ECJ ruled in favor of the plaintiffs by annulling Regulation 881.[201] The ECJ emphasized that it has no jurisdiction to examine the lawfulness of the UNSC resolutions in any circumstances, even in the case of *jus cogens*.[202] However, the ECJ affirmed that the court have the jurisdiction to examine the EU regulations in the light of the fundamental rights granted by EU Treaties even if these regulations were issued to incorporate UNSC resolutions.[203]

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[199] *Kadi & Al Barakaat Intl Fund. v. Council of the E.U. & Comm'n of the E.C*., The Court of First Instance, II-3649, (2005) para. 216-225.
[200] Ibid., para. 239-243
[201] *Kadi & Al Barakaat Intl Fund. v. Council of the E.U. & Comm'n of the E.C*., European Court of Justice, I-6351, (3/09/2008), para. 2
[202] Ibid., 287 (The Court stated that "With more particular regard to a Community act which, like the contested regulation, is intended to give effect to a resolution adopted by the Security Council under Chapter VII of the Charter of the United Nations, it is not, therefore, for the Community judicature, under the exclusive jurisdiction provided for by Article 220 EC, to review the lawfulness of such a resolution adopted by an international body, even if that review were to be limited to examination of the compatibility of that resolution with jus cogens."
[203] Ibid., 326 (The ECJ argued that "It follows from the foregoing that the Community judicature must, in accordance with the powers conferred on it by the EC Treaty, ensure the review, in principle the full review, of the lawfulness of all Community acts in the light of the fundamental rights forming an integral part of the general principles of Community law, including review of Community measures which, like the contested regulation, are designed to give effect to the resolutions adopted by the Security Council under Chapter VII of the Charter of the United Nations").

Based on these grounds the ECJ concluded that Regulation 881violated Al Kadi's right of defense;[204] the right to an effective judicial review;[205] the right of an effective legal remedy;[206] the right of property.[207]

The Kadi case suggests critical questions for examining the issue of attributing responsibility to TNCs for violations of international law under the UNSC. The first questions is related to the relation between international law and domestic law –in this case EU law, for instance in Kadi the ECJ adopted a dualist approach in which it confirmed the separation between EU community law and international law by granting the supremacy of the EU law in specific aspects such as human rights.[208]

The second question focus on the role of UNSC to enforce and ensure the global peace and security through direct enforcing mechanism over states; however in the case of smart sanctions –especially in the case of Resolution 1267- the UNSC was granted more authorities by targeting individuals and entities directly through binding sanctions.[209]

Therefore, the Kadi case indicates sever legal loophole in the UNSC smart sanctions system and an oblivious violation of human rights. In which although the UNSC adopted mechanism of attributing responsibilities and imposing sanctions over individuals and entities, it lacks respecting the due process -such as effective judicial

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[204] Ibid., 348
[205] Ibid., 349
[206] Ibid., 353
[207] Ibid., 371
[208] Grainne De Burca, "The European Court of Justice and the International Legal Order after Kadi," *Harv. Int'l LJ* 51 (2010): 2-3.
[209] Vanessa Arslanian, "Great Accountability Should Accompany Great Power: The ECJ and the UN Security Council in Kadi I & II," *Boston College International and Comparative Law Review* 35, no. 3 (2013): 7.

review, information or evidence are provided to defendants - and provides no independent judicial body to implement the sanctions.[210]

Hence, attributing responsibility on TNCs – or non-state actors- should be based on a concrete and wide legal framework by including various legal aspects and rights. However, the Kadi case indicated that the current international legal order is insufficient to handle the issue TNCs' responsibility. Therefore, TNCs responsibility should not be considered as the sole solution for human rights violations by TNCs, instead the current legal order should adapt itself to ensure international rights to TNCs and to adopt an independent international body and regulation to handle this dilemma.

In this chapter, we argued that although the human rights discipline has its roots to thousands of years. As for the modern human rights legal order, it evolved after the First and Second World War. The modern human rights doctrine rebuts the practice of considering human rights as an internal affair of the states and assuming that it should be based on international framework to ensure that states respect human rights. Therefore, the contemporary international human rights legal order imposes international obligations on states and grants individuals international rights.

In the last century TNCs emerged in the international arena with influence and power that can be used to abuse human rights. However, due to the impact of the

[210] Peter Fromuth,"The European Court of Justice Kadi Decision and the Future of UN Counterterrorism Sanctions,"In the *American Society of International Law Insight*, vol. 13, no. 10. (2009), Available at http://www.asil.org/insights091030.cfm (Accessed on 12/08/2013)

traditional approach, the international human rights legal order failed to regulate the TNCs' activities and behavior. Despite this assumption, the international criminal law witnessed several attempts to incorporate TNCs under its jurisdiction.

Moreover, several initiatives were established on the international and the TNCs' level to regulate TNCs' acts. However these initiatives are based on voluntary and non-legally binding norms. Thus these soft-law instruments failed to achieve its aims. Nevertheless, from a philosophical perspective judging these instruments should not be based on short-term vision, rather the long-term or the future achievements should be considered also. These initiatives are the first step to solve the dilemma of TNCs and human rights by examining the reactions of various actors on the international arena such as states; IGOs; NGOs; and TNCs in order to set a common ground or solution for this matter.

Chapter 4

DOMESTIC LEGAL FRAMEWORK FOR TNCs: ALIEN TORT CLAIM ACT

The previous chapters examined the attempts to attribute responsibility on TNCs for human rights violations according to the international legal order; obviously the international level lacks a judicial body for TNCs to enforce the international human rights norms. However, in some limited aspects of international law and in some specific incidents, TNCs are attributed responsibility i.e. international investment law and the international environmental law.

This chapter will examine attributing responsibility on TNCs for human rights violations in the domestic legal order and specifically according to the American legal order. Several laws or acts in the American legal order attribute responsibility on TNCs for their violation of international law and norms during their cross border operations and activities, this chapter will focus on the Alien Tort Claim Act (ATCA). Since the mid 1990's lawsuits invoking ATCA were brought against TNCs such as Coca-Cola; Yahoo!; Exxon Mobil; Shell Petroleum; Pfizer; and Chevron.[211] The litigations were based on various human rights violations such as freedom of speech; torture; people displacement; environmental damage; genocide; and war crimes.

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[211] *Sinaltrainal v. Coca-Cola Company*, 578 F.3d 1252 (11th Cir. 2009); *Barnes v. Yahoo!, Inc.*, 570 F.3d 1096 (9th Cir. 2009); *Doe v. Exxon Mobil Corp.*, 393 F. Supp. 2d 20 (D.C. 2005); *Kiobel v. Royal Dutch Petroleum Co.*, 456 F. Supp. 2d 457 (S.D.N.Y. 2006); *Abdullahi v. Pfizer, Inc.*, 562 F.3d 163 (2d Cir. 2009); and *Bowoto v. CHEVTON CORP.*, 557 F. Supp. 2d 1080 (N.D. Cal. 2008).

The chapter will investigate the ATCA as a domestic framework of attributing responsibility on TNCs and its effectiveness. Firstly, the chapter will briefly provide an introduction to the US legal order by focusing on the structure of the federal judicial body and by clarifying the main legal principles such as power separation and precedents.

Then, the next section will focus on US acts or statutes similar to ATCA that attribute responsibility to TNCs such as the Torture Victims Protection Act (TVPA); the Iran Sanctions Act; and the Cuban Liberty and Democratic Solidarity Act.

The third chapter will examine the ATCA from two angles: (i) from a descriptive point of view by focusing on the historical aspect; its purposes and aims; and a brief analytical analysis of the ATCA's text. (ii) According to the case law of the federal legal order, precedents and courts interpretation of the ATCA. The final section will provide a case study of litigation against TNC based on ATCA to clarify the application of the ATCA by federal courts.

4.1 Introduction to the US Legal Order

The US is based on the concept of 'federal system' which consists of the federal government that is central; and several states. The relationship between the federal government and the states is regulated via the constitution by focusing on the concepts of power and authority. The constitution grant specific power and authority to the federal government and the residual power and authority are left for each state to be regulated through their own constitutions, legal orders, governmental structure and judicial framework. Thus, the constitution plays a vital role especially in the

aspect of power and authority distribution between federal government and the states.

The concept of 'power separation' is adopted by the constitution in which the federal power and authority are distributed between the legislative; executive; and judicial branches of the federal government. Thus a system of checks and balances is created mainly to prevent the hegemony of one branch over the others.

The American legal order is also affected by the federal system. Federal law is attached to the purpose and aim of the federal government. Therefore the constitution ensures the supremacy of the federal law over states' regulations and laws through the concept of 'supremacy clause' in all the legal aspects.[212] Moreover, the judicial branch has federal jurisdiction over specific subject matters according to Article III section 2 of the US constitution such as disputes related to questioning federal law; cases involving other sovereign states; diversity cases -which consist of disputes between two US citizens from different states; and finally the mandate to interpret provisions of the constitution.

Related to the judicial branch of the federal system is the structure of federal courts that hear disputes and enforce the federal law according to three levels of courts.[213] Based on the mandate conferred by the constitution, the Congress established the US

[212] Article VI of the Constitution argued that: "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding".

[213] The Supreme Court of the US was established according to Article III Section 1 of the US Constitution, which also grants the Congress the mandate to establish the lower levels of federal courts: the US District Courts and the US Circuit Courts of Appeals.

District Courts as the first instance courts of the federal judicial system, each court consist of an individual judge to hear the case. The US Circuit Courts of Appeals are consisted of panel of three judges to hear cases appealed from the District Courts and considered as the second level of federal judicial system. According to the US constitution, the Supreme Court is considered the higher level of the federal judicial structure which hears appeals related to the Constitution or the federal law from cases of the Circuits Courts of Appeals. In additions, nine judges form the panel of the Supreme Court which is located in Washington D.C.

According to the Federal Judicial Center more than 90 District Courts are available throughout the US; in which minimum one district court exist in each state. Moreover, twelve Circuits Courts of Appeals spread across the US, in which each Circuit Court serves several states according to the geographic location.[214]

The federal judicial system is based on the notion of 'judicial precedent' or the '*stare decisis*'. Federal courts are obliged to interpret federal law or the Constitution in case of ambiguity, however courts within the same level may interpret the same law in different manner than other courts did before. Thus this will create a state of inconsistency due to the different application and interpretation of the law. Therefore, the judicial precedent overcomes this hurdle by ensuring that a decision of a higher degree court on the same issue will be respected and applied in the same manner by the lower courts. Hence, if Circuit Courts interpreted the law differently, a decision or an interpretation by the Supreme Court on the same matter must be

[214] For instance the 9th Circuit Court serves the states of Washington; Nevada; California; Montana; Idaho; Organ; and Arizona. The 11th Circuit Court serves Georgia; Alabama; and Florida.

respected and applied in the future by any Circuit Courts. Therefore, judicial precedent provides consistency and predictability of the federal judicial system.

Before moving to the next section, distinguish must be made between civil and criminal lawsuit as types of lawsuit that could be brought before federal courts.[215] Firstly, the parties of the civil cases are always individuals (whether natural or judicial persons) who resort for the federal courts for various cause of actions such as the violation of acts or common law; breach of contract; or tort. As for criminal cases, cases can be brought before the federal courts only by the federal prosecutor, a public body or agency, who is an essential party –always the plaintiffs- of the case who represent the people and the state. Secondly, procedures of both cases differ according to the federal legal order, such as standards of proof and potential penalties. Thirdly, the aim of the civil lawsuit is to redress the misconduct through material means, such as compensation, to remedy the situation or to restore the previous situation if possible, meanwhile criminal lawsuit aims to deter through punitive means such as punishments and the blame and shame. [216]

4.2 Attributing Responsibility on TNCs in the US Legal Order

Jurisdiction reflects the ability of a state to practice its authority or power lawfully within its borders and over its people. Moreover, courts jurisdiction is related to the ability of the court to hear cases according to personal and subject matter-standards. Recently, the traditional concept of jurisdiction, within the territory and over the citizen of the state, has expanded to include other sovereign territories or persons.

[215] "Outline of the US Legal System" Bureau of International Information Programs, US Department of State (2004): 14-15.
[216] Chiomenti, "Corporations and the International Criminal Court," 293.

This evolution is known as the concept of extraterritorial jurisdiction.[217] However, extraterritoriality requires legal justification in order to be considered lawful according to the international legal system.[218] Thus, in the contemporary international legal order several approaches are adopted to justify the extension of the state's jurisdiction such as: the personality principle which can take two forms: (i) the active personality principle when a state legislates a law to regulate its citizen activities in other sovereign states; (ii) the passive personality principle in which the state consider extraterritorial laws or statutes to protect its citizen abroad.[219] In addition, the universality principle grants jurisdiction for massive violation or infringement of international law and human rights –i.e. torture, genocide, and slavery- mainly through domestic criminal law.[220] Hence, it is based on the nature or characteristic of the violation without attention to the location of the conduct or the nationality of the offender.

Based on the universal jurisdiction, several statutes are enacted within the American legal order to regulate corporations in general, whether national or foreign TNCs. As mentioned earlier, this thesis is interested in examining acts that are related to TNCs and their cross border operations, and will specifically focus on the Alien Tort Claim Act (ATCA). However, it is essential to examine other acts that regulate the

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[217] Malcolm N. Shaw," *International Law, 6th edition, (Cambridge,* 2008), 688-689.
[218] Reinisch, "The Changing International Legal Framework for Dealing with Non-State Actors," 430.
[219] Olivier De Schutter, "Extraterritorial Jurisdiction as a tool for improving the Human Rights Accountability of Transnational Corporations." (Paper submitted to seminar organized in collaboration with the Office of the UN High Commissioner for Human Rights in Brussels, 3-4 November 2006. Available on http://cridho.uclouvain.be/documents/Working.Papers/ExtraterrRep22.12.06.pdf (Accessed on 11/07/2013)): 23.
[220] Eric A Engle, "Extraterritorial Corporate Criminal Liability: A Remedy for Human Rights Violations?," *St. John's Journal of Legal Commentary, Vol. 20,* (2006): 313.

international operations and activities of TNCs and attribute responsibility for human rights and international law violations on TNCs.

Firstly, the Cuban Liberty and Democratic Solidarity Act (CLDS)[221] was adopted by the Congress in 1996 to attribute direct responsibility to TNCs operating in Cuba under special requirement. An understanding of the Act must be according to the following incidents: (i) the American foreign policy towards Cuba due to the historical Cuban-American crisis in the early 1960's of the past century, when Fidel Castro came to power and established an alliance with the USSR with oil-sugar exchange program. The US excluded Cuba from the sugar quota as a reaction. The crisis reached its peak when Cuba nationalized the American properties in Cuba without offering compensations to the American owners. After the end of the Cold War, Cuba was facing a severe economic crisis which resulted in the adoption of liberal strategies to attract foreign direct investment through TNCs investments in the US properties in Cuba. (ii) In February 1996 Cuban forces shot down an American jet which killed four American passengers and was regarded as a threat to the US interest and security.

Title III of the CLDS grants federal courts jurisdiction to hear lawsuits by Americans citizens against natural or judicial persons – such as TNC- who are 'trafficking' these properties to obtain material remedy or recovery for their properties which were confiscated by Cuba. In addition, Title IV confers the US Administration the authority to preclude the entrance of any 'trafficker' to the US territories. Several TNCs were affected by the CLDS by prohibiting executive

[221] Also called the Helms-Burton Act, named after the Representative Dan Burton who suggested the act to House of Representative and by Senator Jess Helms to the Senate.

board-member from entering US.[222] For instance, Sherritt International was a part of joint venture with the regime to mine natural materials from a property owned by an American firm; and Grupo Domus for joint venture with the Cuban government.

Secondly, the Iran-Libya Sanctions Act (ILSA)[223] of 1996 was adopted by the Congress to achieve two goals: (i) to prevent Iran from obtaining nuclear weapons and to stop supporting terrorist organization; (ii) to enforce Libya to comply with the resolutions of the UNSC on Pan Am 103.[224] In order to achieve its aim, the Act authorize the President to impose sanctions over TNCs that invest over 20 million USD within one year in the oil and natural gas sector of Iran and any TNC invest more than 40 million USD in the oil sector of Libya. [225] In 1998 Total S.A.; Gazprom; and Petronas were threatened by the ILSA due to a contract of 2 billion USD value with Iran.[226]

However, both Acts failed to achieve their aims and to impose responsibility on TNCs due to the harsh criticism of other states who considered that:[227] (i) both acts are based on unlawful extraterritoriality; (ii) both depending on boycott as a method to achieve its ends; (iii) both directly violate the principles of non-intervention in internal affairs and the sovereignty of other states. These states threatened the US to

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[222] Jeffrey Dunning, "The Helms-Burton Act: A Step in the Wrong Direction for United States Policy toward Cuba, " *Wash. UJ Urb. & Contemp. L.* 54 (1998): 229-230.
[223] Also known as the D'Amato Act as reference to Senator Alfonso D'Amato who submitted the act before the Senate. However, it should be noticed that the Congress in 2006 modified the Act by excluding Libya due to its compliance and therefore changed the name of the Act to Iran Sanctions Act (ISA).
[224] Stefaan Smis and Kim Van der Borght, "The EU-US Compromise on the Helms-Burton and D'Amato Acts," *The American Journal of International Law* 93, no. 1 (1999): 230.
[225] Kenneth Katzman, "The Iran Sanctions Act (ISA)," Report submitted as CRS Report to the US Congress, October 2007, Available on http://www.fas.org/sgp/crs/row/RS20871.pdf (Accessed on 07/08/2013), 3.
[226] Ibid., 2
[227] Smis Kim and Van der Borght, "The EU-US Compromise," 227.

resort to international or regional organizations to complain against both acts. For instance EU threatened to submit a complain to WTO based on the obstacles both Acts caused for TNCs. In addition, Canada and Mexico referred to North American Free Trade Agreement (NAFTA) to counter both acts.

However, the US and EU reached an agreement on 1997 to overcome the dispute of the CLDS and ISA or ILSA.[228] According to the agreement, the EU stopped the procedures of the complain before the WTO, meanwhile the US suspended the implications of Title III of the CLDS and the ISA sanction's on TNCs.[229] Thus, it can be concluded that both Acts failed to attribute responsibility due to the political pressure of other states on the one hand, and the legal obstacles according to general principles of international law and the principles of jurisdiction over foreigners.

Thirdly, the Torture Victim Protection Act (1992) that creates a substantive civil cause of action for victims of torture and extra-judicial killing –whether US citizens or aliens- against judicial or natural persons acting under the color of other foreign states.[230] The Congress enacted the TVPA in order to:[231] (i) ensure the concept of power separation in the federal legal system by conferring a private cause of action for torture, especially after the ambiguity emerged after the implication of the ATCA by the federal courts; (ii) extend the civil cause of action in case of torture to include nationals of the US rather than excluding them –unlike the ATCA; (iii) incorporate

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[228] Ibid., 229-228

[229] According to section (9) (C) of the ISA, the President has the authority to waive the sanctions if that would achieve the US national interest; As for CLDS, Sec. 306 (B) the President is allowed to suspended the effective date of the Act only to achieve an American national interest or to enhance democracy in Cuba.

[230] Ekaterina Apostolova, "The Relationship between the Alien Tort Statute and the Torture Victim Protection Act," *Berkeley J. Int'l L.* 28 (2010): 641.

[231] Ibid., 642.

the Convention against Torture and other Cruel, Inhuman or Degrading Treatment into the American legal order after the ratification in 1990 by the US.

The TVPA was provoked several times to attribute responsibility to TNCs before the US federal court. However, due to the feature of the TVPA, a state action or complicity with state are required to accept the hearing of the claims which the plaintiffs should prove.[232] Thus, the TVPA cases face procedural hurdles to be implemented by federal courts, especially in lawsuits against TNCs.

4.3 The Alien Tort Claim Act

This section will examine the ATCA from two angles. Firstly, from a descriptive point of view by focusing on the historical aspect; its purposes and aims; and a brief analytical analysis of the ATCA's text. Secondly, according to the case law of the federal legal order, precedents and courts interpretation of the ATCA.

4.3.1 Text, History, and the Purpose of the ATCA

224 years ago the US adopted the Alien Tort Claim Act (ATCA) as part of the Judicial Act. The ATCA states simply that: "District courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States". Thus, according to the text, the ATCA grants the federal court the jurisdiction to hear civil litigations of tort, submitted by non-Americans only against US nationals or foreigners for a violation of international law – which was referred to as the law of the nations- or treaty of the US.

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[232]Barnali Choudhury, "Beyond the Alien Tort Claims Act: Alternative approaches to attributing liability to corporations for extraterritorial abuses," *Northwestern Journal of International Law & Business* 26, no. 43 (2005): 50. (Examples on cases based on TVPA against TNCs: Beanal v. Freeport-McMoran before Eastern District Court of Louisiana 1997; Estate of Rodriguez v. Drummond before Northern District Court of Alabama 2003; and Sinaltrainal v. Coca-Cola before Southern District Court of Florida 2003).

Although there is a lack of historical information or data to examine the purpose behind adopting the ATCA by the US Congress, some explanations or approaches were proposed by scholars.[233] The first approach is based on two historical incidents occurred in the US:[234] (i) in 1784 the French Consul F.Marbios was attacked in Philadelphia. This assault was regarded as violation of the diplomatic protection ensured by the international law. (ii) In 1787, the immunity of a Dutch minister was violated when police forces broke in the minister's residence to arrest an American national working there. However, during that period, the federal law lacked a regulatory framework for such incidents or crimes. Therefore both cases were handled according to the states' law and pressure was made to incorporate the issue under the scope of the federal law. Moreover, the approach emphasize that in the 18th century an assault over a citizen or diplomatic officer of a foreign state followed by a denial of justice for such crimes was considered as one of the main war justification between states or nations. Thus, the US adopted the ATCA to insure its neutrality before the power of the European empires.[235]

Secondly, an approach claimed that the ATCA was adopted to incorporate the international law within the domestic legal order to overcome legal clash between international law, federal law and states' law and to ensure legal consistency between international law and municipal law.[236] Finally, an approach was proposed

[233] Anthony D'amato, "The Alien Tort Statute and the Founding of the Constitution," *The American Journal of International Law* 82, no. 1 (1988): 62.
[234] Theresa Adamski, " The Alien Tort Claims Act and Corporate Liability: A Threat to the United States' International Relations, " *Fordham Int'l LJ* 34, (2010): 1508.
[235]D'amato, "The Alien Tort Statute and the Founding of the Constitution," 64.
[236] Jordan Paust, "The History, Nature, and Reach of the Alien Tort Claims Act," *Florida Journal of International Law* 16 no. 2, (2004):249.

based on the assumption that ATCA was enacted to prevent pirates from using the US territories as safe haven.[237]

Approximately twenty cases invoked the ATCA before federal courts till 1980,[238] in which only two cases the courts upheld jurisdiction:[239] (i) *Bolchos v Darrel*[240] that was related to slavery ownership dispute after wars, in which the defendant conduct was found violating the US-French Amity treaty; (ii) *Adra v.Clift.*[241] in which the defendant violated the international law by manipulating passport data to ensure a child custody.

After the 1980's, due to new interpretation of the ATCA by the federal courts in Filartiga v. Pena-Irala,[242] the ATCA evolved as one of the main acts invoked before the federal courts. Nowadays, according to the case law or precedents of ATCA, the form or sort of defendant vary in which defendant may be individual, a group of people, private entity such as TNCs or public persons as former state officials.[243] Thus, the ATCA is used against a wide range of entities due to the expansion of the ATCA scope by the federal courts.

In addition to the legal framework by the ATCA, several features in the federal judicial order attract human rights victims to resort to ATCA as a legal framework

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[237] Choudhury, "Beyond the Alien Tort Claims Act," 46.
[238] Adamski, " The Alien Tort Claims Act and Corporate Liability," 1512
[239] Claudia T. Salazar, "Applying International Human Rights Norms in the United States: Holding Multinational Corporations Accountable in the United States for International Human Rights Violations under the Alien Tort Claims Act," *John's J. Legal Comment.* 19, (2004): 120.
[240] *Bolchos v. Darrel*, 3 F. Cas. 810 (1795).
[241] *Abdul-Rahman Omar Adra v. Clift*, 195 F. Supp. 857 (D. Md. 1961).
[242] *Filartiga v. Pena-Irala*, 630 F.2d 876 (2d Cir. 1980). Will be examined in more detail in the next section.
[243] Adamski, " The Alien Tort Claims Act and Corporate Liability," 1510.

against TNCs:[244] (i) the relatively low cost of lawsuit procedures comparing to other domestic legal order; (ii) several legal centers and lawyer are available in the US to provide support and legal assistance for human rights victims voluntarily or for nominal amount of money; (iii) the US federal legal order provides access to documents and data easier than other domestic legal order; (iv) high amount of compensation are provided if the court ruled in favor of the plaintiff. These factors played a major role in increasing ATCA cases before federal courts and thus revived the ATCA after its rare usage.

On the other hand, plaintiffs may face procedures and legal hurdles before federal courts under the ATCA.[245] Firstly, personal jurisdiction is considered an essential requirement to hear the case, in which the court must have a sufficient connection with the defendant. Secondly, the ATCA application is limited to specific sort of violations against international law or treaty of the US. Thirdly, federal courts, based on various legal doctrines, can dismiss cases such as *forum non conveniens*[246] and international comity[247].

Reactions to ATCA cases can be categorized into supporters and opponents of TNCs responsibility under the ATCA. The supporters for TNCs accountability justify their

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[244] Ibid., 1520.
[245] Joel Slawotsky, "Corporate liability for violating international law under The Alien Tort Statute: The corporation through the lens of globalization and privatization," *International Review of Law* 6, (2013): 9-10. Available on http://dx.doi.org/10.5339/irl.2013.6 (Accessed on 07/07/2013).
[246] *Forum non conveniens*: a legal doctrine that allow courts to dismiss case if another domestic legal forum is more legally convenient to hear the dispute. Several standards affect the court decision such as the access to evidence and the cost of obtaining witness.
[247] International comity: refer to the international codes of conducts between states on the international level that is not legally binding but are implemented as a reflection of mutual respect between state thus it enhances the international relations.

claims on two bases.[248] Firstly, according to the social aspect, by focusing on the impact and influence of TNCs in the international society and the absence of an effective international legal framework to regulate TNCs' operations and activities. Thus, the ATCA was regarded as legal mean to fill the gap. Secondly, based on the legal aspect of ATCA, in which the ATCA is not considered violating the US jurisdiction due to the requirement of the personal jurisdiction by the federal courts. In addition, the limitation of alleged violations or cause of actions that can be heard before federal courts reflects the accordance of the federal legal order with the international legal order. Finally, they supported their argument by referring to the Nuremberg Tribunal which was considered as a precedent in the international law to attribute responsibility on TNCs.

On the other hand, the opponents of TNCs responsibility under ATCA criticized the application of the ATCA by the federal courts from political perspective. [249] They considered that the application of the ATCA is affecting other sovereign states and the non-intervention and the sovereignty of states principles through the 'judicial imperialism' of the US courts over other states. Therefore, the contemporary application of ACTA contradicts with the original purpose that pushed the Congress to enact the ATCA in 1789. In addition, they based their criticism on the power separation principle within the federal legal order. In which the federal courts jurisdiction over international law is considered as matter related to the executive

[248] Salazar, "Applying International Human Rights Norms in the United States," 145-146.
[249] Adamski, " The Alien Tort Claims Act and Corporate Liability," 1538-1539.

branch of the government not the federal court which may negatively affect the foreign policy of the US.[250]

As mentioned earlier, TNCs support the efforts to eliminate any legal attempt to regulate their cross border operations and meanwhile support non-legally binding instruments in this aspect.[251] Thus, TNCs are supporting the opponents of ATCA through the establishment of collations and campaigns against TNCs accountability such as the "USA Engage".[252] In addition TNCs depend on scholars and trade associations to support their claims.[253] For instance, the International Chamber of Commerce, through an official statement, urged the US administration to take legal measures to limit TNCs application over TNC.

4.3.2 The Case-Law of the ATCA

As mentioned earlier, the US domestic legal order is based on the common law system, in which the courts play major role in shaping the application and the interpretation of the acts and laws according to the precedent concept. However, due to the limitation of this study, we will focus and examine four cases that are critical to understand the evolution of the ATCA as a legal mean to attribute responsibility of TNCs human rights violations nowadays.

4.3.2.1 Filartiga v. Pena-Irala[254]

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[250] Julian Ku, "The Curious Case of Corporate Liability Under the Alien Tort Statute: A Flawed System of Judicial Lawmaking," (Paper presented in the American Society of International Law's workshop on the topic of International Law in Domestic Court Interest Group, 2010): 7-8. Available at http://works.bepress.com/julian_ku/1 (accessed 08/08/2013). (Although according to A. D'Amato, this point can be justified on the base of the Congress intention in 1789 to ensure the neutrality of the US by handling matter related to foreigners claims against the US to impartial branch of the federal courts legal order, in the ATCA and the founding constitution p 66-67

[251] Ronen Shamir, "Between Self-Regulation and the Alien Tort Claims Act: On the Contested Concept of Corporate Social Responsibility," *Law & Society Review* 38, no. 4, (2004): 650.

[252] Ibid., 651

[253] Ibidi, 651-652

[254] *Filartiga v. Pena-Irala*, 630 F.2d 876 (2d Cir. 1980). (hereinafter Filartiga)

This case was brought by D. Filartiga against Americo Pena-Irala for kidnapping and torturing to death Jeolito Filartiga. The incident took place in Paraguay in March 1976 when the defendant, who was an officer in the police forces of Paraguay, tortured J. Filartiga to death because – as claimed- of his father's political opinion and opposition to the regime. At first, the family of Filartiga brought a case against the police officer and the police department before Paraguayan courts which dismissed the case.

In 1978 D. Filartiga witnessed Pena-Irala in New York and decided to bring a civil litigation against him based on the ATCA for torturing her brother to death before the District Court of Eastern District of New York. However the claim was dismissed by the District Court because it did not consider that state's treatments of its nationals as a violation of international law.[255] The plaintiffs appealed before the Second Circuit Court which found that the former official, Pena-Irala, liable for torture and murder of J. Falartiga as a form of human rights violations.[256]

The Falartiga case is considered the most critical precedent of the ATCA before the federal judicial order for its interpretation of ATCA.[257] Firstly, it ended about 200 years of ineffective use of ATCA before the federal court by allowing lawsuits provoking the ATCA for tort claims to be heard by federal courts. This was described as the "awakening the ATCA from its 200-years slumber".[258] Secondly,

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[255] Ibid., 880 (In which the court found itself obliged "to construe narrowly "the law of nations," as employed in § 1350, as excluding that law which governs a state's treatment of its own citizens").
[256] Ibid., (The Court found that "An act of torture committed by a state official against one held in detention violates established norms of the international law of human rights, and hence the law of nations").
[257] Hugh King, "Corporate Accountability under the Alien Tort Claims Act," *Melb. J. Int'l L.* 9, (2008): 473.
[258] Adamski, "The Alien Tort Claims Act and Corporate Liability," 1512.

The court considered that the 'law of nations' must be interpreted by federal courts according to the current international law and not as it was in the eighteenth century when ATCA was enacted.[259] Moreover, the court argued that interpreting international law should be in the light of various precedents, works of jurists and professors of public law and customs to examine whether a specific act is a violation of international law.[260] Thirdly, the court adopted a test or criteria to examine whether an act is considered a violation of international law or not by focusing on the consensus of all international community members.[261] Thus the alleged act should violate a universally recognized and well-established norm of the current international legal order to be considered as a violation of international law by the federal courts.

In sum, the rule of the court of Appeal resulted in opining the door for tort claims before federal courts for international law and human rights violations. Despite the positive effects of this decision, several issues were still ambiguous and unclear such as the responsibility scope of ATCA and the sort of cause of actions that can be invoked under the ATCA.

4.3.2.2 Kadic v. Karadzic[262]

This case was brought in 1994 by citizens of the Bosnia Herzegovina against Radovan Karadzic, the commander of the military forces and the president of

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[259] *Filartiga v. Pena-Irala*, 881 (The Court stated that "… it is clear that courts must interpret international law not as it was in 1789, but as it has evolved and exists among the nations of the world today").

[260] Ibid.,880 (The court claimed that "The law of nations "may be ascertained by consulting the works of jurists, writing professedly on public law; or by the general usage and practice of nations; or by judicial decisions recognizing and enforcing that law").

[261] Ibid., 888 (The court argued that "It is only where the nations of the world have demonstrated that the wrong is *of mutual*, and not merely several, concern, by means of express international accords, that a *wrong generally recognized* becomes an international law violation within the meaning of the statute").

[262] *Kadic v. Karadzic*, 70 F.3d 232 (2d Cir. 1995). (hereinafter Kadic)

Srpska, a self-declared and unrecognized republic. The plaintiffs claimed that genocide; torture; rape and murder were committed by the Serbians forces under the command of the Karadzic. The claims were submitted before Southern District of New York which dismissed the lawsuit based on its finding that private actors cannot be considered as violator of international law.[263]

The plaintiffs appealed before the Second District Court which reversed the previous decision and concluded that non state actors can be considered as violators of international law specifically in the case of genocide and war crimes.[264] The court justified its findings according to various international treaties such as the Convention on the Prevention and Punishment of the Crime of Genocide and Geneva Conventions.

The court decision can be considered as a justification to attribute direct responsibility on private actors without the state action requirement in the cases of *jus cogens*[265] violation i.e. genocide and war crime in this case.[266] However, the court did not abandon the state action requirement for all cause of actions; instead it remains an essential requirement for courts to hear the claims except for the *jus cogens* norms.

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[263] Ibid., 237. (The court mentioned that "acts committed by non-state actors do not violate the law of nations").
[264] Ibid., 241-244
[265] According to Article (53) of the Convention on Treaties Law, Jus Cogens are defined as "a norm accepted and recognized by the international community of states as a whole from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character". Moreover, Jus Cogens may be violated by state and non-state actors. Examples on Jus Cogens are the prohibition of piracy; slave trade and genocide.
[266] Salazar, "Applying International Human Rights Norms in the United States,"134.

In addition, according to the precedent principle of the federal legal order, Kadic decision eliminated the clash between decisions of the lower level courts on private actor responsibility under ATCA. Hence lower federal courts are obliged to hear claims for human rights violations committed by private actors under ATCA. However, the scope of the 'private actors' term was not clarified by the court, whether it includes natural persons or judicial persons, i.e. TNCs.

4.3.3.3 Sosa v. Alvarez-Machain[267]

The facts of the case started in mid 1980's when an agent of the American Drug Enforcement Administration (DEA) was tortured and killed. The DEA suspected Dr. Alvarez-Machain, a Mexican citizen, and did not succeed in securing his extradition from Mexico. In 1990, the DEA hired a group of Mexicans – including Sosa- who abducted Dr. Alvarez and transferred him to the US territories. However, Dr. Alvarez was not convicted. Then, in 1993 Dr. Alvarez brought civil claim against Sosa before the federal courts for violating international law through unlawful arbitrary arrest and detention under the ATCA.

This case was the first case invoking ATCA that reached the Supreme Court. Therefore, the interpretation of the Supreme Court was critical for the future application and interpretation of the ATCA by federal courts. Before Sosa, ATCA faced several legal clashes due the various interpretations by US District Courts and the Circuit Courts of Appeals. The following points illustrate these clashes between the interpretations related to TNCs responsibility under ATCA:[268] (i) the scope of ATCA applications over private actors, whether it includes TNCs or just include natural persons; (ii) the sort of cause of actions under the ATCA, whether it is only

[267] *Sosa v. Alvarez-Machain*, 542 U.S. 692, 124 S. Ct. 2739, 159 L. Ed. 2d 718 (2004).
[268] King, "Corporate Accountability under the Alien Tort Claims Act,"477-478.

based on ‘core’ violations of human rights and international law such as genocide and crimes against humanity or it also includes also civil, political and social human rights such as freedom of speech or assembly; (iii) the criteria to examine which violations of human rights are actionable according to the ATCA in which several tests were adopted by several courts. (iv) ‘Third party liability’ of TNCs under ATCA and the standard adopted to examine it, whether according to international criminal law or according to federal law.

In June 2004 the Supreme Court issued its decision which included critical interpretation of the ATCA. Firstly, the court emphasized that although the ATCA is jurisdictional in nature, it do not preclude provoking the ATCA by federal courts for limited sorts of cause of actions.[269] Moreover, the court adopted a restrictive criteria or test to examine whether alleged human rights violations fall under the scope of ATCA by recognizing only causes of actions that are obligatory; universally accepted; and specific.[270] In addition to the general test, the court supported its findings by claiming that the Congress indented to include only limited violations under the ATCA which are offenses against ambassadors; piracy; and violations of safe conduct.[271]

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[269] *Sosa v. Alvarez-Machain*, 712 (The court stated that "…Although we agree the statute is in terms only *jurisdictional*, we think that at the time of enactment the jurisdiction *enabled federal courts* to hear claims in a *very limited* category defined by the law of nations and recognized at common law").
[270] Ibid., 732 (The court mentioned that "…federal courts should not recognize private claims under federal common law for violations of any international law norm with less *definite* content and *acceptance* among civilized nations than *the historical paradigms* familiar when § 1350 [ATCA] was enacted").
[271] Ibid., 720 (The court stated that "The second inference to be drawn from the history is that *Congress intended* the ATS to furnish jurisdiction for a relatively modest set of actions alleging violations of the law of nations. Uppermost in the legislative mind appears to have been *offenses against ambassadors*…; *violations of safe conduct* were probably understood to be actionable, ... and individual actions arising out of prize captures and piracy may well have also been contemplated").

Secondly, the court admitted implicitly that the application of ATCA before federal courts can have effects over the foreign policy of the US -which is related to the executive branch not the judicial branch. [272] Therefore the federal courts should not grant new causes of actions that are related to the US international relations and foreign policy.

Finally, although the court decision lacked any legal analysis on the issue of the TNCs, the court mentioned the issue in the footnotes and admitted the existence of clash between lower courts decisions on this issue.[273] However, this footnote was used by both TNCs responsibility opponents and defenders to strengthen their arguments and points of view.[274] In addition, the court did not argue about third party liability of TNCs under ATCA and did not provide any guideline to examine this issue.[275]

Hence, based on the mentioned above, the Supreme Court decision was criticized for its 'opacity' and lack of guidelines for clear interpretation of the ATCA.[276] This carful approach by the Supreme Court can be explained, in our perspective, due to its intention to focus on general issues of ATCA application by federal court and due to the irrelevance of the case topic and parties to the issue of TNCs.

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[272] Ibid., 727 (The Court mentioned that "the subject of those collateral consequences …for the potential *implications for the foreign relations* of the United States of recognizing such causes should make courts particularly wary of impinging on the discretion of the *Legislative and Executive Branches* in managing foreign affairs").
[273] Ibid., (Footnote 20 stated that: "A related consideration is whether international law extends the scope of liability for a violation of a given norm to the perpetrator being sued, if the defendant is a private actor such as a corporation or individual. Compare *Tel-Oren* v. *Libyan Arab Republic*, 726 F. 2d 774, 791-795 (CADC 1984) (Edwards, J., concurring) (insufficient consensus in 1984 that torture by private actors violates international law), with *Kadic* v. *Karadzć,* 70 F. 3d 232, 239-241 (CA2 1995) (sufficient consensus in 1995 that genocide by private actors violates international law)").
[274] Adamski, "The Alien Tort Claims Act and Corporate Liability," 1516.
[275] King, "Corporate Accountability under the Alien Tort Claims Act,"480-481.
[276] Ibid., 482

4.3.3.4 Kiobel v. Royal Dutch Petroleum[277]

In 2002, twelve Nigerian brought a civil litigation under the ATCA against Royal Dutch Petroleum; Shell Transport and Trading Co.; and the Nigerian subsidiary the Shell Transport Petroleum Development Company. The defendants were engaged in several oil exploration projects in Ogoni region in the Niger Delta. The projects were opposed by the locals due to their environmental harms. The local opposition started huge demonstrations in 1993 which were faced by the Nigerian army forces with massive use of force. According to the lawsuit, the plaintiffs claimed that the defendant aided and abetted the Nigerian forces by providing transpirations; providing instant assistance for soldiers such as food and shelter; and finally through direct financial assistance and compensations for the injured soldiers.

The US District Court of the Southern District of New York granted motions to dismiss and certified its entire order to interlocutory appeal.[278] Then the Second Circuit of Appeal endorsed the finding of the District Court based on lack of subject matter jurisdiction by claiming that TNCs cannot be held responsible under the ATCA due to the lack of international obligations on TNCs.[279] Although the three Justices agreed on the dismissal as judgment, they disagreed on the issue of TNCs responsibility under the ATCA. The majority based their finding on the standard adopted in Sosa case, in which the Supreme Court stated explicitly that federal

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[277] *Kiobel v. Royal Dutch Petroleum Co.*, 456 F. Supp. 2d 457 (S.D.N.Y. 2006) (hereinafter Kiobel).
[278] *Ibid.*, 468 (The Court concluded that "… Defendants' Second Motion to Dismiss is granted as to Count I (extrajudicial killings), Count V (rights to life, liberty, security and association), Count VI (forced exile), and Count VII (property destruction), and is denied as to Count II (crimes against humanity), Count III (torture), and Count IV (arbitrary arrest and detention). The Court hereby certifies this order for interlocutory appeal to the Second Circuit pursuant to 28 U.S.C. § 1292(b)").
[279] *Kiobel v. Royal Dutch Petroleum Co.*, 621 F.3d 111 (2d Cir. 2010). 120 (The court argued that "We must conclude, therefore, that insofar as plaintiffs bring claims under the ATCA against corporations, plaintiffs fail to allege violations of the law of nations, and plaintiffs' claims fall outside the limited jurisdiction provided by the ATCA").

courts are obliged to examine international law, not the domestic law, to determine whether TNCs fall under the scope of ATCA of attributing responsibility. Thus, based on the international criminal tribunal and treaties the court majority concluded that international norms are used to regulate states' relations or the relationships between states and individuals only with the exclusion of TNCs.[280] Finally, the majority regarded that the Congress should interfere in order to expand the scope of ATCA to include TNCs responsibility based on the power separation concept.[281]

The ruling of the Second Circuit Court in Kiobel changed the interpretation of ATCA within the Second Circuit;[282] and secondly was challenged by other Circuits' interpretations of the ATCA and TNCs responsibility.[283]

Firstly, the Second Circuit Court in Kiobel adopted a new a path of ATCA interpretation that contradicts with previous judgments. For instance, in Khulumani v. Baraclay Nat. Bank Ltd.,[284] South Africans brought civil claims before the federal court of Southern District Court of New York against several TNCs that conducted operations during the rule of the apartheid regime in South Africa. According to the plaintiffs, the defendants were accused of aiding and abating the regime through

[280] Ibid., 118 (The court stated that "customary international law includes only those standards, rules or customs (a) affecting the relationship between states or between an individual and a foreign state, and (b) used by those states for their common good and/or in dealings inter se").
[281] Ibid., 149 (The court mentioned that "We do not know whether the concept of *corporate* liability will "gradually ripen into a rule of international law... It (the Congress) can do so, ... For now, and for the foreseeable future, the ATCA does not provide subject matter jurisdiction over claims against corporations").
[282] Slawotsky, "Corporate liability for violating international law under The Alien Tort Statute," 15.
[283] Curtis A. Bradley, "Supreme Court Holds That Alien Tort Statute Does Not Apply to Conduct in Foreign Countries," In *The American Society of International Law Insight*, vol. 17, no. 12, (2013): 2. Available on http://www.asil.org/pdfs/insights/insight130418.pdf (Accessed on 1/08/2013).
[284] *In re South African Apartheid Litigation*, 346 F. Supp. 2d 538 (S.D.N.Y. 2004).

their operations and activates in South Africa. The District Court granted the defendants motion to dismiss the claims in 2004.[285]

However the plaintiffs appealed before the Second Circuit Court. In 2007 the court of appeals confirmed the district court dismissal of the TVPA claims and vacated the dismissal of ATCA claims.[286] As for the issue of TNCs responsibility, the court implicitly affirmed it, in which the court declared that third party liability – or aiding and abating- are acceptable as claims under the ATCA against TNCs.[287] Nevertheless; the Justices disagreed on the standards of third part liability whether according to federal law or international criminal law.[288]

The Presbyterian Church of Sudan v. Talisman Energy also illustrates the clash of interpretation within the Second Circuit Court of Appeals. The plaintiffs brought a lawsuit before the Southern District of New York claiming that the Talisman provided assistance for the Sudanese forces while committing violation of the locals' human rights through ethnic cleaning and displacement of the people, therefore, aiding and abating the regime in these violations under the ATCA.[289] Talisman won the summary judgment argument and the Court dismissed the case.[290]

The Second Circuit Court of Appeal ruled in favor of the defendant and affirmed the lower court decision. The Circuit Court stated that the plaintiffs could not prove the

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[285] Ibid., 554
[286] *Khulumani v. Barclay Nat. Bank Ltd.*, 504 F.3d 254 (2d Cir. 2007) 264, VI.
[287] Ibid., 260 and Adamski, "The Alien Tort Claims Act and Corporate Liability," 1524.
[288] Ibid.
[289] *Presbyterian Church of Sudan v. Talisman Energy, Inc.*, 244 F. Supp. 2d 289 (S.D.N.Y. 2003).
[290] *Ibid., 254*

responsibility of Talisman according to the third party standards.[291] Thus, the Court decision can be considered as an indirect acceptance of TNCs' responsibility through acknowledging the possibility of aiding and abating by TNCs for alleged violations under the ATCA.

Thus, it is clear from both precedents, that although the Second Circuit Court of Appeals ruled in favor of the defendants –which were TNCs; it admitted implicitly that TNCs can be held responsibility under the ATCA in the case of third party liability. However, Kiobel precluded invoking TNCs responsibility under ATCA based on legal personality justifications. Thus, a new precedent was set which modified the interpretation of ATCA within the Second Circuit Court of Appeals.

Secondly, Kiobel's ruling by the Second Circuit Court was challenged other Circuit Courts judgments on the issue of TNCs responsibility according to ATCA. For instance, in Flomo v. Firestone, the citizens of Liberia brought a lawsuit before US District Court of California under the ATCA against Firestone, a TNC profiting from producing rubber, for violating international law through forced labor and child labor in their factories in Liberia. In 2010, the District Court dismissed the case based on the Kiobel by arguing that TNCs have no responsibility under the ATCA.[292] Thus, the plaintiffs appealed before the Seventh Circuit Court which affirmed the dismissal of the District Court but meanwhile refused the Koibel

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[291] *Presbyterian Church of Sudan v. Talisman Energy*, 582 F.3d 244 (2d Cir. 2009). 256; 263 (The Court argued that "plaintiffs have provided evidence that the Government violated customary international law; but they provide no evidence that Talisman acted with the purpose to support the Government's offenses").

[292] *Flomo v. Firestone Natural Rubber Co.*, 744 F. Supp. 2d 810 (S.D. Ind. 2010), 818. (The Court found that "Plaintiffs have sued a corporation under the ATCA for an alleged violation of international law. The Court has jurisdiction to hear Plaintiffs' claim and concludes that Plaintiffs have failed to establish a legally cognizable claim because no corporate liability exists under the ATCA").

argument.[293] The court clearly considered that the Kiobel ruling is wrong and based this claim on the precedents of international criminal courts which affirm TNC's responsibility for human rights violations.[294]

The Eleventh Circuit Court also regarded that TNCs are responsible under the ATCA, supporting the Seventh Circuit Court decision. In Romero v. Drummond Co., the plaintiffs who are relatives of former labor union leaders brought civil lawsuit against the subsidiary of Drummond – TNC profiting from coal mining- for aiding and abating in torturing and killing the workers union leaders. Although several claims were brought based on several Acts – such as the TVPA- only the claim that was based on ATCA preceded to trial before the jury.[295] However the jury ruled in favor of the defendant, thus the plaintiffs appealed but the Eleventh Circuit Court confirmed the District Court decision.[296] Despite the affirmation by the court of appeals, TNCs responsibility was confirmed and justified under the ATCA as a subject matter according to the language of the ATCA which did not limit the scope of responsibility and also due to the precedents and case law.[297]

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[293] *Flomo v. Firestone Nat. Rubber Co., LLC*, 643 F.3d 1013 (7th Cir. 2011), 1025. (The Court argued that "although we disagree with the district court's ruling that corporations cannot be held liable for violating the ATCA and we reject many of the defendant's arguments, we agree with the judgment").

[294]Ibid., 1017 (The Court stated that "All but one of the cases at our level hold or assume (mainly the latter) that corporations can be liable. … The outlier is the split decision in Kiobel… The factual premise of the majority opinion in the Kiobel case is incorrect. At the end of the Second World War the allied powers dissolved German corporations that had assisted the Nazi war effort, along with Nazi government and party organizations—and did so on the authority of customary international law.").

[295] *Romero v. Drummond Co., Inc.*, 552 F.3d 1303 (11th Cir. 2008), 1313.

[296] Ibid., 1324

[297] Ibid., 1315 (The Court stated that "Because the Alien Tort Statute is jurisdictional, we must address the argument of Drummond about corporate liability under that statute. The text of the ATCA provides no express exception for corporations, ... , and the law of this Circuit is that this statute grants jurisdiction from complaints of torture against corporate defendants. … . Again, we are bound by that precedent").

According to the previous examples of case law, obviously a split or clash between Circuits Courts was occurring in the federal judicial order over the issue of TNC's responsibility under the ATCA. In which the Second Circuit did not extend the scope of ATCA to include TNCs meanwhile other Circuits such as the Eleventh and the Seventh attributed responsibility to TNCs under the ATCA. Thus, in our perspective, this can be considered as justification for the Supreme Court's acceptance to granted certiorari in 2011 for Kiobel.[298]

At first, the oral argument before the Supreme Court focused on the examining whether the responsibility of TNCs under the ATCA is a subject matter jurisdiction or merits question, and secondly whether TNCs should be treated in a similar manner as other private actors under the ATCA. Later on, the Supreme Court added another question to examine if the ATCA allows federal courts to determine violations in other territories or sovereign states, and if so, under what requirements.[299]

In April 2013, the Supreme Court issued its decision and affirmed the Second Circuit Court decision –the exclusion of TNCs responsibility under ATCA.[300] Although the nine Justices agreed on the outcome, they disagreed on the justification of the decision. The majority of five Justices based their opinion according to the

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[298] Bradley, "Supreme Court Holds That Alien Tort Statute Does Not Apply to Conduct in Foreign Countries," 2.

[299] Chimène I. Keitner, "The Reargument Order in *Kiobel v. Royal Dutch Petroleum* and Its Potential Implications for Transnational Human Rights Cases," In *The American Society of International Law Insight*, vol. 16, no. 10, (2012): 1, Available on http://www.asil.org/insights120321.cfm (Accessed on 03/08/2013).

[300] *Kiobel v. Royal Dutch Petroleum Co.*, 133 S. Ct. 1659, 569 U.S., 185 L. Ed. 2d 671 (2013), 1669.

presumption against extraterritoriality which ensure that the national acts do not apply over conducts in foreign sovereign states unless the act states explicitly so.[301]

The majority reasoned their finding based on three grounds: (i) Despite the text of the ATCA that grant cause of actions for tort by alien for violation of international law or treaty of the US, the text was not regarded by the majority as granting extraterritorial jurisdiction for the ATCA since torts may occur in the US or in other sovereign. [302] In addition the text used in the ATCA was not considered as sufficient evidence to rebut this presumption; (ii) the court regarded that the historical background do not proved sufficient evidence to rebut the presumption against extraterritoriality. Moreover, the court justified that the offences adopted by Sosa to determine the purpose of ATCA either have no extraterritorial application – for the violation of safe conducts and the infringement of the rights of ambassadors- or occurring in the high seas and not in a other sovereign territory – referring to piracy;[303] (iii) the court regarded that the main purpose of ATCA was to ensure and protect the foreign relations of the US - especially in the cases of diplomatic offenses; thus constraining the application of ATCA by the federal would achieve

[301] Ibid., 1669 (The court concluded that " … all the relevant conduct took place outside the United States. And even where the claims touch and concern the territory of the United States, they must do so with sufficient force to displace the presumption against extraterritorial application").
[302] Ibid., 1665 (The Court stated that "To begin, nothing in the text of the statute suggests that Congress intended causes of action recognized under it to have extraterritorial reach. The ATS covers actions by aliens for violations of the law of nations, but that does not imply extraterritorial reach — such violations affecting aliens can occur either within or outside the United States. Nor does the fact that the text reaches "*any* civil action" suggest application to torts committed abroad; it is well established that generic terms like "any" or "every" do not rebut the presumption against extraterritoriality").
[303] Ibid., 1666 (The Court declared that "Nor does the historical background against which the ATS was enacted overcome the presumption against application to conduct in the territory of another sovereign. … The first two offenses have no necessary extraterritorial application. … Piracy typically occurs on the high seas, beyond the territorial jurisdiction of the United States or any other country").

that purpose.[304] Moreover, the court considered that mere present of TNCs in the US does not rebut the presumption against extraterritorial application.[305]

The decision also included four concurring opinions by Justices, the first was submitted by Justice A. Kennedy who joined the majority opinion arguing that several questions related to the reach and application of ATCA were not considered by the Supreme Court decision and were left for future interpretations by federal states.[306] Thus, the decision did not clarify the standards to rebut the presumption under the ATCA. Justices S. Alito and C. Thomas joined the majority and argued that previously the ATCA was properly applied only in the case of domestic conduct violating international norm according to Sosa standards.[307]

The final concurring opinion was submitted by Justice S. Breyer on behalf of the rest of Justices. Although the minority affirmed the dismissal of the case, they refused the justification of the majority. The minority refused to exclude the extraterritorial conducts from the scope of ATCA and called for a less restrictive approach that is

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[304] Ibid., 1669 (the Court mentioned that "The presumption against extraterritoriality guards against our courts triggering such serious foreign policy consequences, and instead defers such decisions, quite appropriately, to the political branches").

[305] Ibid., (the Court declared that " … And even where the claims touch and concern the territory of the United States, they must do so with sufficient force to displace the presumption against extraterritorial application. … Corporations are often present in many countries, and it would reach too far to say that mere corporate presence suffices. If Congress were to determine otherwise, a statute more specific than the ATS would be required").

[306] Ibid., 1669 (Justice A. Kennedy argued that: "The opinion for the Court is careful to leave open a number of significant questions regarding the reach and interpretation of the ATCA … Other cases may arise with allegations of serious violations of international law principles protecting persons, cases covered neither by the TVPA nor by the reasoning and holding of today's case; and in those disputes the proper implementation of the presumption against extraterritorial application may require some further elaboration and explanation").

[307] Ibid., 1670 (Justice S. Alito stated that "as a result, a putative ATS cause of action will fall within the scope of the presumption against extraterritoriality — and will therefore be barred — unless the domestic conduct is sufficient to violate an international law norm that satisfies *Sosa*'s requirements of definiteness and acceptance among civilized nations").

based on the Restatement of Foreign Relation Law.[308] In which the ATCA scope would include conduct that occurred on the US territories; or committed by an American citizen –as a defendant; or when the US national interest is affected adversely by the alleged conduct.[309]

In our standpoint, the restrictive approach by the Supreme Court in Kiobel will reduce the scope of TNCs responsibility under the ATCA by excluding cases provoking ATCA for conducts occurred outside the US territories by TNCs. Moreover, the limitation of ATCA application against TNCs in Kiobel can be considered as victory to the opponents of TNCs' responsibility.

The effects of Kiobel on the federal judicial order and precedents can be examined through Rio Tinto v. Sarei. The case was submitted in 2000 by citizens of Papua New Guinea against Rio Tinto Corp. for aiding and abating the regime forces in committing war crimes and crimes against humanity in the island of Bougainville where Rio Tinto operates. The District Court dismissed the claims and later the Ninth Circuit Court of Appeals reversed the lower court dismissal and considered that crimes against humanity are viable under the ATCA.[310] Based on Kiobel, the Supreme Court vacated the decision of the Ninth Circuit Court and ordered the Circuit Court to examine the case agian according to Kiobel. In the end, the Circuit

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[308] Ibid., 1673 (The opinion claimed that "The Restatement (Third) of Foreign Relations Law is helpful … In addition, § 404 of the Restatement explains that a "state has jurisdiction to define and prescribe punishment for certain offenses recognized by the community of nations as of universal concern, such as piracy, slave trade," and analogous behavior").

[309] Ibid., 1671 (The opinion stated that "would find jurisdiction under this statute where (1) the alleged tort occurs on American soil, (2) the defendant is an American national, or (3) the defendant's conduct substantially and adversely affects an important American national interest, and that includes a distinct interest in preventing the United States from becoming a safe harbor (free of civil as well as criminal liability) for a torturer or other common enemy of mankind").

[310] *Sarei v. Rio Tinto, PLC*, 671 F.3d 736 (9th Cir. 2011). 770.

Court dismissed the case and the claims due to the presumption against extraterritoriality.[311]

Based on our investigation of the US case law, we should mention that since the revival of the ATCA by Falartigia in late of the previous century, approximately 150 litigations have been brought before the federal courts provoking ATCA to remedy human rights violations by TNCs.[312] Although some cases proceeded to trial and other settled outside the court through private agreements between the plaintiffs and defendants – the TNCs,[313] there is no federal court decision ruled against TNCs for human rights violation.

The lack of judgment against TNCs can be due the procedural hurdles the plaintiffs face according to the ATCA such as personal jurisdiction; the limited cause of actions; and *forum non conveniens* and international comity.[314]The internal political pressure also played a major role in achieving this end. This internal pressure took the form of submitting *amicus curiae*[315] by the American Administration to the federal courts in cases related to TNCs. For instance, in Sosa the US Administration

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[311]*RIO TINTO PLC v. Sarei*, No. 11-649 (U.S. Apr. 22, 2013). (The Supreme Court stated that "On petition for writ of certiorari to the United States Court of Appeals for the Ninth Circuit. Petition for writ of certiorari granted. Judgment vacated, and case remanded to the United States Court of Appeals for the Ninth Circuit for further consideration in light of Kiobel")

[312] "The Shell game ends," *The Economist*, 20/04/2013
Available at http://www.economist.com/news/united-states/21576393-some-good-news-multinationals-shell-game-ends (Accessed 20/05/2013).

[313] Slawotsky, "Corporate liability for violating international law under The Alien Tort Statute," 14. (Examples on litigations settled out the court: (i) Abtan v. Blackwater: the TNC paid nearly 7.5 million USD for family victims or injured from the shooting by Blackwaters security guards in Bagdad in 2004; (ii) Wiwa v. Shell, during the 1990's Shell operated oil extraction projects in Ogoni, Nigeria which resulted in national demonstration which faced massive force and murder by the Nigerian military, therefore, a lawsuit was brought against Shell for third party liability. However Shell settled the litigation out the court by paying 15$ million as compensation).

[314] Mentioned earlier in this chapter page

[315] *amicus curiae* refer to brief submitted to the court by someone who is not part of the case based on legal arguments or valuable information and aim to clarify the effects of this case.

claimed through *amicus curiae* that casus of actions cannot be brought for international law violations under the ATCA due to its jurisdictional feature.[316]

In the mid 1990's the US Administration was facing four options to handle the TNCs responsibility under the ATCA:[317]Firstly, it could have maintained its previous position by supporting claims under ATCA for alleged human rights violations before federal courts; secondly, it could have adopted an approach based on analyzing each case and the specific ground of each case; thirdly, adopting a neutral position; and finally, rejecting any sort of TNCs responsibility under the ATCA – which was adopted by the US Administration to handle TNCs cases.

4.4 Case Study: Doe v. Unocal Cor. [318]

Unocal represents a significant case study for examining ATCA for several reasons. Firstly, it is the first litigation provoking ATCA and accepted by the court for hearing claims against TNC. Moreover, it can be considered as direct interpretation of Kadic case which admitted that private actors can be held responsibility for violating international law and human rights without specifying whether TNCs are included or not. Thirdly, the litigation is based on alleged 'core' human rights violations such as genocide; torture; murder and rape. Thus the court ruling would clarify the criteria to attribute responsibility on TNCs for such violations. Fourthly, Unocal is related to the third party responsibility and the state action requirement for the alleged violations of human rights under the ATCA by TNCs. Hence, for these reasons we found that examining Unocal as a brief case-study would clarify more detailed aspects of the ATCA.

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[316] Hugh King, "Corporate Accountability under the Alien Tort Claims Act," 479.
[317] Harold Koh, "Separating Myth from Reality About Corporate Responsibility Litigation," *Journal of International Economic Law* 7, no. 2, (2004): 263-274.
[318] (Hereinafter Unocal); *Doe v. Unocal Corp.*, 395 F.3d 978 (Court of Appeals 2003).

Unocal is an American TNC founded in the 1890's, its main operation is in the energy sector by producing fuel from natural resources.[319] In early 1990, Unocal became a member of a joint venture with the French TNC Total S.A. and the Burmese government. The project aimed to establish an extraction plant in the 'Yadana' field located in the Andaman Sea within the Exclusive Economic Zone of Burma -estimated to produce five trillion cubic feet of natural gas- and to construct a pipeline for transferring the produced gas.[320] According to the agreement, Total S.A. was responsible for extracting the natural gas from the field; Unocal was responsible for constructing a 260 mile pipeline to transfer the produced gas north to Thailand; and the Burmese government was responsible for securing the project and the pipeline which mostly located under the seawater and in the region of 'Tenasserim' in Burma.[321]

In 1996, Burmese villagers brought a lawsuit before the federal District Court of California against Unocal and their subsidiaries for complicity with the Burmese military forces in alleged human rights violations of forced displacement of the people; torture; rape; forced labor; and murder. Although the court accepted to hear the case and regarded that TNCs can be held responsibility for human rights violations under the ATCA based on Kadic precedent,[322] it granted Unocal a summary judgment.[323] The court reasoned its findings by claiming that despite the existence of evidences proving the military unlawful conducts against the villagers

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[319] "NNDB: Unocal," available on http://www.nndb.com/company/263/000058089/ (accessed on 04/07/2013).
[320] Manuel Velasquez, "Unocal in Burma" http://www.scu.edu/ethics/practicing/focusareas/business/Unocal-in-Burma.html (Accessed on 30/07/13).
[321] Ibid.
[322] *Doe v. Unocal Corp.*, 110 F. Supp. 2d 1294 (C.D. Cal. 2000), 1305. (The court found that Kadic approved the liability of private person under the ATCA which includes TNCs also).
[323] Ibid., 1312

such as forced labor; murder; rape; and torture and the knowledge of Unocal of the violations committed by the military forces, the court claimed that the plaintiffs did not prove that the defendant was controlling the military forces or conspiring with the authorities to commit these violations.[324]

The plaintiffs appealed before the Ninth Circuit Court of Appeals. In 2002, the Circuit Court reversed the lower court summary judgment and regarded that the Unocal can be held responsibility under the ATCA through third party responsibility – under the aiding and abating concept.[325]

The court started by analyzing the forced labor as alleged violations of human rights. According to the court, forced labor was characterized as modern slavery which does not require acting under the color of the state –the state action requirement- to attribute personal responsibility to individuals directly.[326] As for the rape; murder; and torture, the court considered that because these violations were committed in accordance with -or in the light of – the forced labor, the state action requirement also do not apply on these conducts.[327] However, the court considered that the

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[324] Ibid., 1307 (The court stated that "Here, Plaintiffs present evidence demonstrating that before joining the Project, Unocal knew that the military had a record of committing human rights abuses; that the Project hired the military to provide security for the Project, a military that forced villagers to work and entire villages to relocate for the benefit of the Project; that the military, while forcing villagers to work and relocate, committed numerous acts of violence; and that Unocal knew or should have known that the military did commit, was committing, and would continue to commit these tortious acts. ... *Plaintiffs present no evidence that Unocal "participated in or influenced" the military's unlawful conduct; nor do Plaintiffs present evidence that Unocal "conspired" with the military to commit the challenged* conduct").

[325] *Doe I v. Unocal Corp.*, 395 F.3d 932 (9th Cir. 2002), 963.

[326] Ibid., 947 (The court stated that "In light of these authorities, we conclude that forced labor is a modern variant of slavery that, like traditional variants of slave trading, does not require state action to give rise to liability under the ATCA").

[327] Ibid., 954 (The court consider that ". According to Plaintiffs' deposition testimony, all of the acts of murder, rape, and torture alleged by Plaintiffs occurred in furtherance of the forced labor program. As discussed above in section II.A.2.a, forced labor is a modern variant of slavery and does therefore never require state action to give rise to liability under the ATCA. Thus, under *Kadic*, state action is

plaintiffs failed to provide sufficient evidence to support their claims for torture, thus Unocal was not liable for this conduct.[328]

Although the court agreed on third party responsibility as legal justification to attribute responsibility to Unocal, the Justices disagreed on the standards that should be adopted. Two Justices regarded that the standard should be according to the international criminal law and the ad hoc ICTR and ICTFY.[329] Therefore, the responsibility should be attributed when the third party is aiding and abating with knowledge that the practical assistance or encouragement will directly affect the conduct of the crime. On the other hand, Justice Reinhardt regarded that third party responsibility standards should be according to the standards of the American federal law.[330]

Despite the acceptance of the Ninth Circuit Court of Appeals to rehear the case *en banc* in 2003,[331] the parties reached a settlement outside the court two years later. According to the settlement agreement, Unocal had to compensate the 14 survived

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also not required for the acts of murder, rape, and torture which allegedly occurred in furtherance of the forced labor program").

[328] Ibid., 956 (The court stated that "By contrast, the record does not contain sufficient evidence to support Plaintiffs' claims of torture. We therefore affirm the District Court's grant of Unocal's motion for summary judgment on Plaintiffs' torture claims").

[329] Ibid., 950 (The Court based its findings by examining the *Prosecutor v. Furundzija* before ICTY, and *Prosecutor v. Musema* before the ICTR).

[330] Ibid., 963 (Justice Reinhardt claimed that "In fact, I do not agree that the question of Unocal's tort liability should be decided by applying any international law test at all. Rather, in my view, the ancillary legal question of Unocal's third-party tort liability should be resolved by applying general federal common law tort principles, such as agency, joint venture, or reckless disregard").

[331] *Doe v. Unocal Corp.*, 395 F.3d 978 (Court of Appeals 2003). (*En banc* means that the case will be heard by the full court panel, composed of 11 justices, unlike the normal appeal which are heard by three-justices panel. Moreover, en banc hearing can be requested by the litigators or by the court itself when a significant issue at stake.)

plaintiffs and support community programs for improving life conditions and health care in the Tenasserim region.[332]

Finally, in Unocal the US Administration submitted an *amicus curiae* claiming that TNCs responsibility should not be extended under the ATCA due its direct negative consequences on the foreign relations of the US.[333]Moreover, the US Administration emphasized that Congress only has the mandate to extend the scope of ATCA responsibility and not the federal courts itself.[334] In addition, the US Administration argued that imposing responsibility on TNCs under ATCA will negatively affect the trade, investment and the competitiveness of the American TNCs on the international level.[335] In our standpoint, these arguments were mainly focusing on the overlapping between law and politics especially in the light of the US foreign policy.

After examining this case study, we found that Unocal can be considered as positive development in the ATCA case law. Unocal was the first case against TNC under the ATCA, thus it opened the door for litigations against TNCs. Moreover, Unocal can be considered as clear application of Kadic which extended litigations against private actors without specifying whether TNCs are included or not. Thus Unocal ended this argument by proving that TNCs can be held responsible for human rights violations. In addition, Unocal went further by adopting the international criminal law standards of third party responsibility based on knowledge and encouragement.

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[332] "John Doe v. Unocal corp.," International Network for Economic, Social and Cultural Rights, Available at http://www.escr-net.org/docs/i/1054008 (Accessed on 05/07/2013).
[333] Adamski, "The Alien Tort Claims Act and Corporate Liability," 1519.
[334] Ibid.
[335] Ibid.

Also, Unocal clarified the issue of state action requirement for TNCs under ATCA in which in claimed that specific violations can be attributed directly to TNCs i.e. forced labor. Moreover if any other violations were conducted in the light of forced labor, no state action requirement is needed. Finally, the settlement agreement was understood by the opponents and the supporters of TNCs responsibility under the ATCA as an indication of the effectiveness of ATCA as a mean to handle human rights violations by TNCs.[336]

In this chapter we examined the ATCA as legal framework to attribute responsibility on TNCs for human rights violations and concluded that it is based on the concept of extraterritorial jurisdiction of the American courts on TNCs' conducts overseas. Moreover, the ATCA is based on incorporating international norms and human rights on disputes before the American federal courts. Unlike the international legal framework, the ATCA provides more comprehensive legal framework supported with enforcement mechanism on TNCs as international actor. Despite the fact that the ATCA is based on civil case, no doubt that it succeeded in imposing legal pressure over TNCs and their cross border operations and activities especially in developing countries.

On the other hand, the ambiguity of the ACTA's text and the various interpretations of the federal courts are the main drawbacks of this legal mechanism. In addition, the application of the ACTA was limited recently by the US Supreme Court especially in litigations against TNCs. Thus, the usage of the ACTA is no longer an effective option to attribute responsibility on TNCs for human rights violations.

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[336] Adamski, "The Alien Tort Claims Act and Corporate Liability," 1518-1519.

In addition, the ATCA application against TNCs illustrates the struggle between the unwillingness of states and TNCs to attribute responsibility on TNCs for their cross border operation on the one hand, and the need of an effective legal framework to fill this gap on the other hand. In our perspective, the ATCA failure can be attributed to several factors. Firstly, the purpose of the ATCA was not intended to fill this gap. In which the interpretation of ATCA by the federal courts resulted in using temporary the ATCA as legal framework to fill the gap. Secondly, the application of the ATCA indicated the lack of experience by the domestic judges on issues related international norms. Thirdly, the application of the ATCA reflects the overlapping between politics and law on the issue of attributing responsibility on TNCs. In which judges were anxious about attributing responsibility on TNCs especially according to their mandate as judicial body and the influence of their judgments on the US foreign policy.

Hence, the application of the ATCA illustrate that domestic legal framework may not be the only perfect legal solution to overcome the issue of TNCs' violations of human rights in specific states that are unwilling or incapable to regulate this aspect. In which a comprehensive international legal framework with a concrete normative and enforcement mechanisms is needed to complement the domestic legal frameworks. Moreover, domestic frameworks are essential in order to support the international mechanism, especially in the enforcement aspect. Thus, the relation between the domestic and the international legal frameworks should be a complementary relation.

Chapter 5

CONCLUSION

The arguments in this study clarify the failure of the contemporary international law and the doctrine of human rights to attribute international responsibility on TNCs for human rights violations during their cross border operations. However, the failure of attributing international responsibility on TNCs for human rights violations illustrate the gap between the discipline of international law and the international society in the light of international legal personality. Thus, based on this gap, the critical question is: comparing to the incorporation of other non state actors in international law i.e. individuals or IGOs, why are not TNCs incorporated in international law yet, despite their influence and economical power as actors in the international society?

The answer of this question may be based on various justifications. Firstly, based on power analysis of the international society, states may be anxious about granting international legal personality for TNCs due to its negative effects on the hegemonic position of states in international law and international society, and its enhancement of TNCs' legitimacy and participation in the international public sphere. Secondly, based on the interest of developed states and TNCs, limited legal personality will ensure more flexible or liberal sphere for TNCs to expand their cross border operations and thus increase TNCs profit and raise taxes revenues for developed states. Thirdly, based on the interest of TNCs, the contemporary position of TNCs in international society, as powerful economic entities, and international law, as entities

with only international rights without holding any international obligation, is the most adequate sphere for TNCs to practice its cross-border operations. Finally, from a legal perspective, the absence of concrete legal framework for the concept of international legal personality resulted in excluding TNCs as participant and actors in international law.

In this thesis we elaborated on the issue according to legal analysis based on the concept of international legal personality. We argued about the concept of international legal personality by examining the approaches to this concept and the criteria to acquire the legal personality. Moreover, we noted that examining the legal personality is affected by our understanding of international law as a discipline. Therefore if we adopt the traditional approach to international law, we will consider only the states as actors in the international society which acquire international rights, hold international obligations towards other members of international community and individuals, capable of resorting to international judicial bodies, and interact legally with other states. However, if we adopt alternative approaches, which focus on normative concepts of international law, we will rebut the assumption of the traditional approach by undermining the role of state in international law and call for a more flexible framework to regulate the international legal personality.

In the last century, no doubt that the international law adopted the evolution of newly emerged entities through *via media* or 'middle road' approaches that are based on the foundation of the traditional approach and the acceptance of limited legal personality for these entities. Under these approaches the states maintained their supreme position meanwhile the new entities acquired specific international

rights or obligations. Several examples can be provided such as the UN which achieved international legal personality in the light of states' consensus to promote and achieve its aims and goals. In addition, individuals acquired international rights through the evolution of the human rights doctrine and hold direct international obligations under the international criminal law.

The previous examples indicate the ability of the international law to incorporate non state actor of the international society, however other non state actors proved that the current approaches still lack a concrete and practical solutions. For instance the Palestinian Liberation Organization (PLO) as a national liberation movement was granted representation rights before international institutions i.e. the UN, meanwhile the legal personality was considered controversial according to some scholars, who considered that its international legal personality was based on bilateral agreement with Israel and not according to its features as a national liberation movement. Hence, approaches failed to incorporate specific non state actors in the international arena due to the absence of obvious criteria to the concept of international legal personality. Therefore, based on both categorizes of examples, we conclude that the contemporary concept of international legal personality can be used in a normative manner to incorporate or to exclude non state actors in the international arena. Moreover, in our standpoint, we consider that the international practice on the issue of legal personality illustrates the deviation of the international law in its process of evolution in the light of reflecting the interactions and relations of the actors of international society.

TNCs as non state actor with power and influence in the international society enjoy a limited international legal personality. For instance, TNCs are represented directly

or indirectly in various international institutions and agencies such as the ILO where TNCs acquire full voting right and representation, and in other UN bodies TNCs participate as observers and advisors. Participating in international arbitration mechanism is another aspect in which TNCs achieve a legal standing before dispute settlement bodies under the scope of Bilateral Investment Treaties. Moreover, the legal standing of TNCs was extended under the ECHR to include TNCs as plaintiffs against member states for human rights violations. Finally, under specific international treaties TNCs are attributed direct responsibility for oil pollution in international water. The previous incidents clarify that TNCs are capable of obtaining the main legal personality standards.

On another aspect and despite the previous indications on TNCs' participation in international law, no sufficient international mechanism exists to handle the issue of human rights violations by TNCs. Violating human rights by TNCs especially in developing countries is resulted due to the corruption of government or the lack of effective domestic legal mechanism in these countries to regulate TNCs operations and activities. From a theoretical point of view, the absence of a legal framework to regulate the human rights violations of TNCs should be understood according to two points. First, the limitation of TNCs' legal personality, in which TNCs are only incorporated by the international law in the specific aspects mentioned above. Second, the limited legal foundation of the contemporary international human rights doctrine, which operates vertically by imposing international obligations on states only.

Obviously the second point is deeply affected by the inadequate concept of international legal personality –the first point- especially in the case of imposing

international obligations on TNCs for human rights violations. Generally, the international practice illustrates that alternative methods can be adopted to overcome the lack of international human rights obligations on non state actors. For instance after the First and the Second World War, individuals were attributed direct human rights violations according to the international criminal law. The alternative methods implicitly recognize the international legal personality of the non state actors -i.e. individuals in this case- without developing a clear legal framework for the concept of international legal personality.

Since the 1970's international attention and demand were raised to regulate human rights obligations of TNCs. The pressure resulted in the adoption of various international and domestic mechanisms and instruments. The first attempt was through proposing soft law initiatives or codes of conducts by international and regional institutions for TNCs to implement during their cross border operations. TNCs supported these initiatives through participating in the creation and the adoption of these instruments, which included under its scope various aspects such as human rights, environment, labor rights and anti-corruption protection mechanisms. Although these instruments are supported with enforcement bodies and mechanisms, the effectiveness of the soft law instruments are not guaranteed due to their focus on voluntary implementation and non-legally binding norms. Thus, human rights victims of TNCs' operations cannot achieve 'justice' or attribute responsibility to TNCs for their violations of human rights.

In our perspective, despite the explicit failure of these instruments to attribute responsibility to TNCs for human rights violations, the soft law instruments illustrate that the international society is gradually developing an international

frameworks for TNC's activates and operations. Moreover, the incorporation of TNCs in creation of such frameworks is essential to produce an effective mechanism that covers all the aspect of TNC's activities. Thus, in the future, cooperation between states, TNCs and international institutions should be enhanced in order to achieve a comprehensive framework or mechanism to handle TNCs' human rights violations.

Another attempt was suggested in late 1990's at the negotiations of the Rome Statute based on extending the scope of the ICC's jurisdiction to include TNCs. The proposal was faced with massive objection by member states due to the limitation of time to discuss the subject and the intricacy of the matter. In our standpoint, the failure of this attempt lies in considering the issue of attributing human rights responsibility on TNCS as a secondary or periphery issue despite its complexities and details which may consist of the legal personality of TNCs; forms of violations, state action requirement, criminal complicity and third party liability. Moreover, we consider that states feared that including TNCs in the Rome Statute would enhance TNCs' position on the international level as international actors while weakening the states' position as the main actors.

Moreover, another failure lies in the methodology of proposing this attempt, therefore, this attempt should be suggested and discussed through more comprehensive proposal during a special international summit or conference that focus mainly on the issue of TNCs' criminal responsibility for human rights violations to cover the complexity of the matter. In addition, TNCs should be incorporated directly or indirectly in the discussion and negotiation in order to ensure the implementation of these norms.

The third attempt proposed attributing human rights responsibility on TNCs via domestic legal mechanism. This mechanism is based on the concept of extraterrestrial jurisdiction, in which the national courts hear litigation against TNCs for human rights violations during their cross border operations. In our perspective, the effectiveness and the adequacy of this mechanism is doubted for several factors. First, national judges may lack experience to examine disputes related to international human rights law and international law. Second, as mentioned in this thesis, developing states may be unwilling or incapable of adopting such mechanism and to intervene in the private sector and market due to the financial benefits they gain from TNCs investments. Third, the implication of such mechanisms lacks international cooperation and thus judgments may vary according to each state. Finally, this mechanism may be considered as form of interfering in other sovereign states and thus producing political tension, which was the case of the CLDS and ILSA in the US.

As for the ATCA as an example on this sort of mechanism and despite the fact that the US Supreme Court recently ruled to constrain the application of this act, it faced various hurdles during its application by the federal court in cases related to TNCs' operations. Firstly, the lack of specificity of its text resulted in conflicting interpretations by courts. Secondly, the political pressure of the American Administration, based on legal concepts such as the separation of power under the US Constitution, was vivid to limit the ability of federal courts to grant and admit new causes of action. Thirdly, related to the previous point, the ATCA lacks a clear legal framework for types of human rights violations and standard for attributing responsibility on TNCs especially in the case of third party liability.

In our point of view, despite the fact that the ATCA legally threatened the TNCs, the ATCA should not be regarded as a successful mean to attribute responsibility on TNCs for human rights violations. The case law proves that no single judgment accused TNCs for human rights violations. Moreover, the ATCA is based on civil law litigation not criminal litigation which is based on boarder scope and more deter sanctions or penalties. On other aspects, the ATCA illustrates 'non legal' threats on TNCs through enhancing public awareness on the issue through the media which may produce pressure in the future on governments and states to handle this issue more effectively. In addition, the failure of the ATCA reflects the need to international legal framework focusing on the role of TNCs and its relation to the aspect of human rights.

Despite the failure of the ATCA, domestic legal frameworks remain essential to incorporate of international norms and rules and thus these legal frameworks should be supported by an international legal framework. Therefore, the international legal framework must legally oblige the unwilling and incapable states to handle TNCs violations of human rights. In which these states cannot ignore the human rights violations by TNCs

In sum, although these three attempts indicate the failure to attribute human rights responsibility on TNCs, these attempts should be regarded as primary steps towards a comprehensive international legal framework. However, this end cannot be achieved except in the light of codifying the concept of international legal personality. In our standpoint, the concept of international legal personality is the broader framework and the key to attribute international responsibility to TNCs for human rights violations. Thus, ignoring the concept of international legal personality

of TNCs by the previous attempts resulted in the failure of attributing responsibility on TNCs. Meanwhile, the legal personality of TNCs should not be similar to the legal personality of states, but rather it may take the form of 'less' limited legal personality than the one the TNCs acquire nowadays by acquiring more rights and imposing obligations on TNCs especially in the human rights aspect.

After achieving this personality, the international society –states, IGOs, NGOs, TNCs- should focus on establishing a comprehensive international framework and mechanism to incorporate TNCs in the field of international human rights law. This framework should include the participation of TNCs in the law making process, and to establish an independent international judicial body to hear disputes and lawsuits related to human rights violations by TNCs and an enforcement mechanism in domestic legal system.

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