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The Case for an International Hard Law on Corporate Killing

Abstract

Marc Rhys Johnson*

On 4 December 2006, during discussions on the Corporate Manslaughter and Corporate Homicide Bill, Andrew Dismore, Member of Parliament and then Chair of the Joint Committee on Human Rights, said, 'Organisations can kill people … but it is the actions and omissions of people in organisations that cumulatively cause death'. However, the corporate entity is a vehicle for the communal actions of those who guide the business activities. Attempting to seek out persons or people that are solely responsible for deaths and violations of human rights caused by companies is fruitless. The entity is a vehicle for those actions, it possesses its own, often deep, pockets of finance and resources, and it has a public image. It is more useful to punish the corporate entity, in instances where the corporate behaviour has led to death and human rights abuses, as it is in seeking out individual defendants. Soft law options have not brought about a sufficient reduction in instances of deaths caused by corporate behaviour across jurisdictional borders. This article will argue that the time has now come to establish an international hard law on corporate killing, and for states to ensure that there is a viable path towards a redress for victims and their families along with adopting a duty to assist the victim or their family to pursue redress to ensure a fair balance of power against transnational companies.

I. Introduction

In 2004, Wangari Maathai was awarded the Nobel Peace Prize for her contribution to sustainable development, democracy, and peace. In her Nobel Lecture, Maathai said '[i]n the course of human history, there comes a time when humanity is called upon to shift to a new level of consciousness, to reach a higher moral ground'.[1] Here, Maathai talks about a state of desperation in her lecture, which drives the need for a complete change of approach to democracy, human rights, and environmental conservation. In this article, I propose that we have now reached a precipice facing a state of desperation with regard to corporate killing, and the status quo is no longer a viable option to regulate the international influence and behaviour of companies.

Corporations are now vast and complex international entities that they can operate in an omnipresent way. A company can, at the same time, have supply chains in several different countries and retail outlets. Furthermore, large companies have an internet presence that can be accessed more widely. 'Corporate killing' is a general term that I

* Senior Lecturer, Cardiff Metropolitan University.
[1] Wangarĩ Maathai, 'Nobel Lecture' (Nobel Lecture, Oslo, December 10, 2004) <https://www.nobelprize.org/prizes/peace/2004/maathai/lecture/> accessed 08 May 2023.

have adopted in this article to avoid confusion with municipal law within states on the same subject matter. As a working definition for this paper, corporate killing is the description for incidents where corporate behaviour or commercial enterprise cause a situation where employees, contractors, workers in a supply chain, or members of the wider public are killed. This is a far broader definition that one might find in some municipal law; however, it is necessary to extend the definition to include those working in supply chains and beyond the scope of retail companies or those that commission work for.

Throughout this paper, I have referred to soft and hard law and it is pertinent to define these terms at the outset to avoid confusion. 'Soft law' is an international instrument or agreement that does not have the force of law – that is, it cannot be enforced in the same way that we would enforce laws through courts and so on – but it has the effect of stating a set of principles that the parties' agreement aims to adhere to.[2] It is true that some soft law can come with ramifications for non-compliance, but these are not the same as the punishments that we would associate with law, generally.[3] There is often debate and discontent with referring to these instruments as law,[4] as they do not conform to the definitions of law severally discussed by notable theorists such as Dworkin,[5] Hart,[6] Kelsen,[7] and Raz,[8] (to name a few). However, the use of the term is common and will suffice for delineating the boundaries between voluntary instruments, which aim to set aspirational statements and coerce compliance, and law with the force and enforcement characteristics that we have come to recognise, for which, the term 'hard law' will be used. Hard law, therefore, is law that is binding in character and is far more familiar in many respects.[9] In summary, Henriksen describes the difference between hard law and soft law as the difference in 'normative character … and not to the precision of the norm'.[10]

There have been attempts to coerce desirable corporate behaviour; for example, the respect for human rights in business behaviour, by the United Nations (UN) Global Compact – a voluntary register of organisations who make a commitment to 'align strategies and operations with universal principles on human rights, labour, environment and anti-corruption, and take actions that advance societal goals'.[11] Principle 1 of the UN Global Compact states that '[b]usinesses should support and respect the protection of internationally proclaimed human rights'. In addition to this, Principle 2 of the UN Global Compact states that businesses should 'make sure that

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[2] Alan Boyle, 'Soft Law in International Law-Making' in Malcolm Evans (ed), *International Law* (5th edn, Oxford University Press 2018).
[3] Bryan H. Druzin, 'Why does Soft Law have any Power anyway?' (2016) 7 Asian Journal of International Law 361.
[4] Prosper Weil, 'Towards Relative Normativity in International Law' (1983) 77(3) American Journal of International Law 413; Jan Klabbers, 'The Redundancy of Soft Law' (1996) 65 Nordic Journal of International Law 167.
[5] Ronald Dworkin, *Taking Rights Seriously* (Duckworth 1977); Ronald Dworkin, *Law's Empire* (Harvard University Press 1986).
[6] HLA Hart, *The Concept of Law* (2nd edn with postscript by J Raz and P Bulloch (eds), Clarendon Press 1994).
[7] Hanz Kelsen, *General Theory of Law* (Anders Wedberg tr, Russell and Russell 1945).
[8] Joseph Raz, 'Can there be a Theory of Law' in Golding and Edmundson (eds), *The Blackwell Guide to the Philosophy of Law and Legal Theory* (Blackwell Publishing 2004).
[9] Boyle (n 2).
[10] Anders Henriksen, *International Law* (3rd edn, Oxford University Press 2021) 35.
[11] Taken from the United Nations Global Compact website < https://www.unglobalcompact.org/what-is-gc > accessed on the 08 May 2023.

they are not complicit in human rights abuses'.[12] A further notable example of soft law that already exists in this area is the United Nations (UN) Guiding Principles on Business and Human Rights.[13] These principles contain three key elements: the state possessing a duty to protect human rights; a corporation's responsibility to respect human rights; and the need for access to a remedy where these rights have not been respected. We will come to see that these principles, well founded and intentioned, have not stopped instances of corporate behaviour arising that is an affront to human rights. This article aims to show that, notwithstanding instruments such as the UN Global Compact, there are still incidents that arise transnationally that bring into question compliance with the spirit of the Compact as well as its stated aims. It will go on to argue that individual states that offer a pathway to claim redress following these incidents often lead to issues in conflict of laws along with irregular and inconsistent outcomes for the victims and their families. Therefore, I suggest that the alternative position that should be considered is an international hard law. This would remove the municipal inconsistencies and, given that the UN Guiding Principles already state that the state has a duty to protect human rights, should be accompanied with an indemnity by the victim's state. This indemnity would involve the state supporting the victim or their families to seek redress, ensuring that victims and their families do not suffer negatively from an imbalance in power, money, and resources that transnational companies have access to, especially given that some are, on occasion, as large as a state.

To do this, the article will analyse four incidents that have occurred recently: the Karachi and Lahore fires; the Rana Plaza disaster; the Tianjin explosion; and a Colombian human rights issue. There is a limitation here to be acknowledged *viz*. the incidents generally occur in countries in the developing world and, as such, there are questions over press reporting integrity, the availability of facts, and the publication of legal proceedings in the public interest.[14] It is also important to acknowledge that the incidents that are presented in this article have occurred in countries that generally score highly on the global Corruption Perception Index.[15] Bangladesh, for example, was ranked 149 out of the 180 countries assessed, according to Transparency International.[16] Bangladesh is not the only area to suffer these problems; another incident that this article will consider occurred in China, which has one of the world's worst records for press freedom and scores poorly on corruption markers too.[17] These factors prohibit the author from conveying facts with full confidence; despite this, it is a worthwhile venture to discuss the shortcomings of the current international arrangements. Furthermore, it will draw parallels with human rights issues to demonstrate that there is a more lenient approach taken when private law is used to regulate the actions of companies despite companies, in some instances, having larger capital flow and a larger number of employees than many smaller states. The use of

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[12] The principles of the United Nations Global Compact can be accessed here: <https://unglobalcompact.org/what-is-gc/mission/principles> accessed 08 May 2023.

[13] Office of the High Commissioner for Human Rights, 'Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework' (2011) <http://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf> accessed 08 May 2023.

[14] See, Reporters Sans Frontieres, '2023 World Press Freedom Index' (2023) <https://rsf.org/en/ranking> accessed 08 May 2023.

[15] Transparency International, 'Corruption Perceptions Index 2021' (2021) <https://www.transparency.org/en/cpi/2021/index/bgd> accessed 03 February 2024.

[16] ibid.

[17] ibid.

human rights is an intentional juxtaposition within this article to frame the discussion of hard law on an international scale. Although specifics of disasters will be discussed below, this is not to attempt to levy blame against any party involved; rather, it is an attempt to discuss the nature of responsibility and contributory pressures placed on companies through supply chains. This article will also consider some academic opinion on the subject matter and whether there is scope to develop the existing arguments already laid down. At this stage there is another factor to note, *viz.* this, as an area of study, is particularly under-researched and, as such, it must be acknowledged that there is limited academic opinion to contrast.

Finally, this article will conclude by restating that a precipice such as that described above by Maathai has been reached regarding corporate killing,[18] and that the way forward should lie in an international hard law.

II. Why are we now at a precipice?

The most recent developments related to corporate killing, on an international platform, come in the form of guidance from the United Nations, which, it could be argued, is an attempt to 'softly'[19] coerce businesses to respect human rights.[20] Following the atrocities of World War Two, the Universal Declaration of Human Rights (UDHR) was drafted to create a common standard of human rights across the world.[21] As the atrocities of World War Two became apparent following its denouement, the global community acknowledged that a turning point had been reached. By collective agreement, the world had reached a higher moral ground by choosing not to allow the derogation of rights that are so fundamental to the continuation of civilised society that they ought not to be interfered with. To establish a new list of fundamental rights that accorded with the global community's values generally, a peripherally connected and earlier set of rights (known as the Four Freedoms,[22] championed by President Franklin D. Roosevelt in 1941 as freedoms that should be enjoyed universally) was developed into the framework for the UDHR that we see today. 48 countries out of the 58 member states of the United Nations in 1948 voted in favour of the proposed UDHR at the General Assembly.[23] Through collective agreement of the majority, the global community set a new standard for basic rights that all people should enjoy irrespective of their country of origin. The UDHR began its life as a set of moral obligations and later came to have some legal effect;[24] the result of this is a phased integration of human rights carrying some form of legal effect across the global community.[25] The turning point, or precipice, at this period was the

[18] Maathai (n 1).
[19] Relates to the idea of soft law, a non-binding form of international instrument that attempts to encourage a certain behaviour without punishing non-compliance.
[20] Office of the High Commissioner for Human Rights (n 13).
[21] Ruti Teitel, 'Human Rights Genealogy' (1997) 66 Fordham Law Review 301; see also Philip Alston and Ryan Goodman, *International Human Rights* (Oxford University Press 2013) 140-145.
[22] The Four Freedoms were: Freedom of speech, Freedom of worship, Freedom from want, Freedom from fear. See Dan Plesch, *Human Rights After Hitler: The Lost History of Prosecuting Axis War Crimes* (Georgetown, University Press 2017).
[23] Gordon Brown (ed), *The Universal Declaration of Human Rights in the 21st Century: A Living Document in a Changing World* (Open Book Publishers 2016).
[24] ibid.
[25] The actual legal effect of human rights law is complicated as most states have assimilated human rights into their own municipal law. For some discussion on the legal status of the UDHR, see Kate

collective abhorrence of the actions of some states and non-state actors during the war years, though those actions were already contrary to accepted norms across the world. The end of the war and the discovery of such atrocities brought about the turning point that led to a new moral high ground in the form of codified fundamental rights. This is an example of a precipice from the relatively recent past,[26] and I propose that the following matters constitute a modern precipice of sorts and, as such, warrant a change in moral and social order similar to that seen above.

Today, the world is fundamentally different from the post–war world that existed in 1948; technology is exponentially more advanced and ubiquitous, and trade and commerce are not only conducted very differently today by the standards of 1948, but the commodities traded are also substantially different. Furthermore, the global population of companies exist in a complex and multi-layered corporate global society that is not confined to any single jurisdiction.[27] Research conducted by the Organisation for Economic Co-operation and Development indicated that globalisation of companies across the world is not a simple or single factor. Economic integration of foreign companies is continually evolving.[28] Companies are now deeply rooted in interstate and international relations and, as such, some companies now have revenues far higher than many smaller states.[29] In the United Kingdom (UK), companies are encouraged to look past their own municipal boundaries to become part of the global trading society.[30] Given the volume of influence that companies can assert over individuals, Professor John Ruggie has suggested that companies should be subject to, and that individuals should benefit from, three pillars concerning human rights in business. His three pillars are: that states should protects citizens against human rights abuses; that companies should respect the human rights of their employees, customers, and the public; and that there should be an adequate remedy where these first two pillars are not satisfied.[31] It should be noted here that this accords exactly with the UN Guiding Principles on Business and Human Rights abovementioned. While I find it difficult to logically argue against this, one criticism is that this has no foundation in enforceable law and, although I agree with Ruggie's assertion, this article will now go on to demonstrate why human rights in business, specifically relating to corporate killing, cannot be left to soft, coercive measures but should be enshrined in an enforceable international hard law.

Cook, 'Solidarity as a basis for human rights: Part One: Legal Principle or Mere Aspiration?' (2012) 5 European Human Rights Journal 504.

[26] In terms of legal history, 1948 is relatively recent as the United Kingdom has statute law in force from as early as 1297.

[27] Andrew Clapham, *Human Rights Obligations of Non-State Actors* (Oxford University Press 2013) 8.

[28] OECD, *Measuring Globalisation: OECD Economic Globalisation Indicators* (OECD 2010).

[29] The magnitude of some companies is difficult to comprehend in isolation; Walmart's revenue for 2023 stood at $611.3 billion and it employs approximately 2.1 million people worldwide. See 'Walmart' (21 February 2023) <https://s201.q4cdn.com/262069030/files/doc_financials/2023/q4/Earnings-Release-(FY23-Q4)-(final).pdf> accessed 8 May 2023.

[30] See UK Government, 'Made in the UK, Sold to the World: New strategy to boost exports to £1 trillion' (Press Release, 16 November 2021) <https://www.gov.uk/government/news/made-in-the-uk-sold-to-the-world-new-strategy-to-boost-exports-to-1-trillion> accessed 8 May 2023.

[31] John Ruggie, 'Promotion and Protection of all Human Rights, Civil, Political, Economic, Social and Cultural Rights, Including the Right to Development' (Protect, Respect and Remedy: A Framework for Business and Human Rights, Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, Human Rights Council, United Nations, 7 April 2008).

1. Karachi and Lahore Fires

The first incident that will be considered is colloquially known as the Karachi and Lahore fires, which took place in September 2012.[32] The fires are often referred to jointly as one incident though they are two separate incidents that took place nearly 750 miles apart. The Karachi fire occurred in a garment factory and killed a total of 289 workers and the Lahore fire occurred in an illegal shoe factory,[33] killing 25 people.[34] The Karachi incident is of particular interest for the purposes of this article, given some comments that have been reported in the media that will be considered below. The cause of the fire in the Karachi factory has been disputed; however, it is reported by a number of news agencies that chemicals present in inappropriate storage may have made the fire more toxic or volatile and so exacerbated what would have already been an industrial emergency.[35] The reports state that workers were encouraged to protect the garments rather than evacuate the building, that the fire exits were blocked or purposely locked,[36] and that there were metal bars across windows and that this, in practical terms, created an environment that could not be escaped from in an emergency.[37] It is reported by some agencies that there were upwards of 500 people in the factory at the time of the event and the insinuation is that this number was excessive and that the building was not fit to hold such a vast number.[38]

A month prior to the fire breaking out in the factory in Karachi, it was awarded a Social Accountability 8000 certificate by Social Accountability International,[39] a non-governmental organisation that was subcontracting the certification process to two separate firms.[40] This is a particularly poignant matter, given that health and safety is one of the nine topics that are assessed in order for an organisation to be awarded the

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[32] Jon Boone, 'Safety flaws blamed as Pakistan factory fires kill more than 300' *The Guardian* (London, 12 September 2012) <https://www.theguardian.com/world/2012/sep/12/pakistan-factory-fires-karachi-lahore> accessed 8 May 2023.

[33] Samira Shackle, 'Karachi's factory fire exposes Pakistan's lax health and safety regime' *The Guardian* (London, 14 September 2012) <https://www.theguardian.com/commentisfree/2012/sep/14/karachi-factory-fire-pakistan-health-safety> accessed 8 May 2023.

[34] Imtiaz Shah, 'Fires engulf Pakistan factories killing 314 workers' *Reuters* (London, 12 September 2012) <http://www.reuters.com/article/us-pakistan-fire-idUSBRE88B04Y20120912> accessed 8 May 2023.

[35] Shackle (n 33); BBC News, 'Karachi fire: Factory owners granted bail' *BBC News* (London, 14 September 2012) <http://www.bbc.co.uk/news/world-asia-19598571> accessed 8 May 2023.

[36] Shackle (n 33); BBC News, 'Death toll from Karachi factory fire soars' *BBC News* (London, 12 September 2012) <http://www.bbc.co.uk/news/world-asia-19566851> accessed 8 May 2023; Rob Crilly, 'More than 300 killed as fire engulfs factory in Karachi' *The Telegraph* (London, 12 September 2012) <http://www.telegraph.co.uk/news/worldnews/asia/pakistan/9537388/More-than-300-killed-as-fire-engulfs-factory-in-Karachi.html> accessed 8 May 2023.

[37] Zia ur-Rehman, Declan Walsh and Salman Masood, 'More than 300 Killed in Pakistani Factory Fires' *The New York Times* (New York, 12 September 2012) <https://www.nytimes.com/2012/09/13/world/asia/hundreds-die-in-factory-fires-in-pakistan.html> accessed 8 May 2023.

[38] Crilly (n 36).

[39] This is a certificate that aims to ensure the highest quality of social compliance in their supply chains, and it also aims to reflect labour provisions contained within international conventions, according to Social Accountability International, 'SA8000 Standard' <https://sa-intl.org/resources/sa8000-standard/> accessed 8 May 2023.

[40] Michael A. Helfand (ed), *Negotiating State and Non-State Law: The Challenge of Global and Local Pluralism* (Cambridge University Press 2015) 168.

Social Accountability 8000 certificate.[41] This raises questions over whether the factory was operating to achieve the certification and then changed its operational practices, or whether the subcontractors were adequately assessing the criteria in accordance with their mandate by Social Accountability International. In either situation, it can be argued that the certification process had been misused. It is proposed that it is difficult to argue, even without reference made to specific national or international norms or regulations, that the systematic blocking and locking of emergency exits is an acceptable business practice that is compliant with the notion of respect for the dignity and autonomy of a person, such as that encouraged by the Preamble and Article 1 of the UDHR.

Following the fire, the police began a criminal investigation into the matter and, on 13th September 2012, a murder charge was registered against the owners of the factory and a company operating within it known as Ali Enterprises.[42] Owing to the limitations caused by international companies contracting and subcontracting work across jurisdictional borders, the victims of the fire issued proceedings in Germany attempting to sue the German retailer KiK for its involvements in the supply chain and, in 2014, the European Centre for Constitutional and Human Rights (ECCHR) issued an *Amicus Curie* brief to the High Court in Pakistan asking the court to consider whether any responsibility for the disaster lay with the factory's largest customer, KiK.[43] It is important to note that at this stage, the criminal proceedings were continuing against the owners of Ali Enterprises and so the ECCHR was effectively asking the High Court of Sindh in Karachi, Pakistan to consider its brief *curia adversari vult*. The submission made by the ECCHR asked a poignant question: should responsibility transcend the supply chain and rest with those commissioning work? The international approach taken by the ECCHR is of particular interest; the ECCHR issued a brief against a German company (KiK) in Pakistan's High Court, using terminology that would not be alien to a lawyer in the UK *viz.* duty of care and negligence.[44] To have any possibility of success, the ECCHR brief needed to use whatever legal mechanism they could to establish a duty of care on the part of those commissioning work through an international supply chain. Unfortunately, the civil case in Germany was later dismissed in 2019 after it exceeded the statutory time limits. This leaves questions over civil liability across international supply chains, and the applicability of fatal accidents legislation, such as the Fatal Accidents Act, 1855 (Pakistan),[45] in such cross-jurisdictional business ventures. If a legal connection had been found to exist between the German retailer and the factory workers, then there may have been additional liability for payments to be made to the family of the victims under the Fatal Accidents Act, 1855 mentioned above. Furthermore, the effects of

[41] Social Accountability International (n 39).
[42] Declan Walsh and Steven Greenhouse, 'Inspectors Certified Pakistani Factory as Safe Before Disaster' *The New York Times* (New York, 19 September 2012) <http://www.nytimes.com/2012/09/20/world/asia/pakistan-factory-passed-inspection-before-fire.html> accessed 8 May 2023.
[43] Business and Human Rights Resource Centre, ' KiK Lawsuit (Re Pakistan)' (15 March 2015) <https://www.ecchr.eu/en/business-and-human-rights/working-conditions-in-south-asia/pakistan-kik/proceedings-in-pakistan.html> accessed 8 May 2023.
[44] European Centre for Constitutional and Human Rights, 'Legal Opinion on English Common Law Principles on Tort: Jabir And Others v Textilien Und Non-Food Gmbh' (ECCHR, 2015) <https://www.ecchr.eu/fileadmin/Juristische_Dokumente/Legal_Opion_Essex_Jabir_et_al_v_KiK_2015.pdf> accessed 8 May 2023.
[45] Thomas Thiede and Andrew J. Bell, 'Picking the piper, the payment, and tune - the liability of European textile retailers for the torts of suppliers abroad' (2017) 33(1) Professional Negligence 25.

creating a legal link between companies across the supply chain may be wider, given that they could have amounted to sufficient cause to bring an additional claim under the German tort law found in s.823 of the Civil Code (Germany). It is important to note that these propositions are hypothetical since the case was dismissed for exceeding time limits. However, these caveats are provided to demonstrate that using a civil claim to sue a company further along the supply chain could lead to a flood of claims under different laws. The creation of a legal link by a piecemeal approach through judicial precedent is an uncertain path to tread; it places a burden on the parties to the matter, and the judges hearing the case, to consider the effects of the litigation on international law and potentially set a precedent that changes the way that companies view liability through their supply chain. This is arguably too great a task for one case. It is proposed that looking at a codified law in international law is a far more sustainable and controlled approach to establishing any form of liability that operates through the supply chain.

2. Relevance of Location

The issue above raises questions in private international law, which concerns the relationships that arise across jurisdictional boundaries.[46] For example, in the case of *Maharanee Seethadevi Gaekwar of Baroda v Wildenstein,*[47] the claimant was a French citizen who wished to bring a claim in the English courts against a French-domiciled international art dealer whilst he was briefly visiting England. In this situation, the mere trivial link with the jurisdiction of England and Wales was sufficient to create a legal connection for the courts to assume jurisdiction over the matter. Additionally, Lord Denning MR stated in *Wildenstein* that the matter was international in its character; the citizens involved were *de facto* 'citizens of the world' and were, therefore, entitled to bring the claim anywhere in the world.[48] This reference to cosmopolitanism is particularly interesting here, given that Lord Denning appeared willing to give greater weight to the notion of a single community of humans and that there are occasions where national boundaries must give way to this notion of the single community in pursuance of the good administration of justice.[49] At a glance, the matter mentioned above is very different from the fire that broke out at Ali Enterprises' factory in Karachi; however, there is a common denominator, that is, the attempts to use one jurisdiction's municipal law to address an issue arising, at least in part, in another jurisdiction.[50] The fact that there is an attempt to use conflict of laws in relation to the Karachi fire to claim some form of financial recompense is indicative of the lack of international instruments.

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[46] Jonathan Hill and Maire Shuilleabain, *Clarkson and Hill: Conflict of Laws* (5th edn, Oxford University Press 2016).
[47] *Maharanee Seethadevi Gaekwar of Baroda v Wildenstein* [1972] 2 QB 283.
[48] ibid 288.
[49] For more on cosmopolitanism, law, and access to justice, see Sharon Anderson-Gold, 'Cosmopolitan Justice' in Deen K. Chatterjee, *Encyclopedia of Global Justice* (Springer 2011); Kok-Chor Tan, 'The need for cosmopolitan justice' in Kok-Chor Tan, *Justice without Borders: Cosmopolitanism, Nationalism, and Patriotism* (Cambridge University Press 2004); Charles R. Beitz, 'Cosmopolitanism and Global Justice' (2005) 9(1/2) The Journal of Ethics 11; Eirik Bjorge, 'Legal cosmopolitanism in international law' (2020) 9(3) Global Constitutionalism 552.
[50] It is noted here that Conflict of Laws in the law of England and Wales is not domestic in nature; it is instead a venue through which matters that are international or supra-national in nature can be heard if the courts in England and Wales accept jurisdiction.

Another aspect of particular note at this stage, and possibly of relevance to the ECCHR's decision to issue an *Amicus Curie* brief in the High Court in Pakistan, is Article 5.3 of the Brussels 1 Regulation,[51] which stipulates that, in relation to tortious matters, the relevant jurisdiction within which to issue proceedings is 'where the harmful event occurred'.[52] Although Pakistan is not a member of the European Union, had the ECCHR issued proceedings in Germany under the law of tort,[53] the Regulation may have provided some arguments against the ECCHR's suggestion that there should be a remedy in tort and, as such, damages paid. The ECCHR would have been issuing a brief in Germany, against a German company, and so the Brussels 1 Regulation would have applied. As the harm took place in Pakistan, it would then have been incumbent upon the judiciary in Germany to question whether they had jurisdiction to hear the case as the harm was caused elsewhere. It is possible that an argument may have been advanced regarding legal causation; namely that Kik may have been, in part, responsible for the behaviour of its contractors as the contractors were operating under Kik's instructions. This is a theoretical argument; it has no precedent to fall on *per se*. However, it does follow the well-established lines of vicarious liability,[54] from the UK and elsewhere in the world.[55] As vicarious liability comes from the original notion that the master is required to answer for the servant's behaviour if an issue arises in the normal course of the servant's engagement, it is possible to logically extrapolate this same principle to contracting and subcontracting companies also. It is well established in the UK, and in many countries globally, that companies have a distinct legal personality that exists separately from those who own and run the company.[56] It may be argued that, by having a distinct legal personality of its own, when the company contracts or subcontracts work out, the company is *de facto* acting in a manner that is consistent with the master-servant relationship that gave rise to the principles of vicarious liability. It is therefore asserted that, in logic at least, a company benefitting from a discrete legal personality and commissioning work is acting akin to a master-servant relationship and, therefore, is not a far cry from the structures and familiarity of vicarious liability.

A topical case that goes some way to exploring the point above is *AMT Futures Ltd v MMGR*,[57] which is a cross-jurisdictional tort case. It can be seen in the *AMT Futures* case (and in earlier case law)[58] that the jurisdiction for any litigation in matters of tortious liability should generally fall to the jurisdiction that the defendant is domiciled in, and though there are special exceptions, these exceptions are generally used sparingly and interpreted restrictively.[59] Therefore, there is some discrepancy between Article 5(3) of the Brussels 1 Regulations and the European and British jurisprudence relating to the jurisdiction in which a claim for tortious liability should be brought. This further adds weight to the need for a clear and stable international instrument to

[51] Council Regulation (EC) No 44/2001 of 22 December 2000 jurisdiction and the recognition and enforcement of judgments in civil and commercial matters [2001] OJ L12/1.
[52] ibid Article 5.3.
[53] Known as the law of delict in Germany.
[54] Often originally referred to by its Latin principle, *Respondeat Superior*.
[55] Christian Witting, *Street on Torts* (16th edn, Oxford University Press 2021) ch 24.
[56] *Aron Salomon (Pauper) v A. Salomon and Company* [1897] A.C. 22; this case is often reported *as Salomon v Salomon & Co Ltd*; *Salomon & Co Ltd v Salomon*; or *Broderip v Salomon*, though the law report reference remains the same. For familiarity, I will use *Salomon v Salomon* throughout.
[57] *AMT Futures Limited v MMGR* [2017] UKSC 13.
[58] *Melzer v MF Global UK Ltd* [2013] Q.B. 1112; *Coty Germany GmbH v First Note Perfumes NV* [2014] Bus. L.R. 1294; *Kolassa v Barclays Bank* Plc [2016] 1 All E.R. (Comm) 733.
[59] *AMT Futures Limited* (n 57).

offer clarity and certainty of rights and responsibilities to both individuals and companies.

A further related matter that can be considered at this stage is the arguments that were put forward in the KiK litigation, which revolve around three headings: negligence, duty of care, and vicarious liability.[60] There is clearly much discussion to be had around the matter of proximity and the chain of causation in relation to companies that operate through an international supply chain. It could be argued that each company is in fact its own distinct entity and, therefore, it is inappropriate to attempt to lay liability on companies for the transgressions of its subcontractors further along the supply chain. However, this argument does not take account of the complex interdependencies that exist between companies involved in a contracting relationship.[61] There are also questions over the balance of power that exists between the two companies;[62] the company placing an order through its contractors and subcontractors has the buyer's power and so the influence it is able to exert on its supply chain is notable.[63] It is this influence that I will turn to next.

3. Influence

A company that is seeking to outsource work to a subcontractor may be able to influence the subcontractor to the point where it is right to question whether the outsourcing company has any duty to answer for the failures of its subcontractor. Furthermore, the fact that many of these subcontracted companies are situated in developing countries ought not to be glossed over. Factories in developing areas, such as the one in Karachi, are sources of cheap labour,[64] and this can attract western companies as a means of maintaining profitability whilst driving down retail prices.[65] An example of the effect that companies can have across supply chains can be seen in the military intervention in the Nike shoe factory supply chain in Indonesia. It is reported by several sources that Nike or one of its contractors had paid the Indonesian military to intimidate workers into accepting salaries less than the legal minimum wage.[66] Furthermore, it is reported that one factory (in Kota Serang, Indonesia) did

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[60] Business and Human Rights Resource Centre (n 43).
[61] For a topical insight into the matter of interdependent organisations, see Rexford Draman, *The Interdependent Organization: The Path to a More Sustainable Enterprise* (Greenleaf Publishing 2016).
[62] John Fernie, 'Quick Response in Retail Distribution: An International Perspective' in Eleni Hadjiconstantinou (ed), *Quick Response in the Supply Chain* (Springer 1999) 182.
[63] Andrew Cox and others, *Supply Chains, Markets and Power* (Routledge 2002).
[64] Paul K. C. Shum and others, 'Globalization and the Role of Multinational Corporations' in Tony Fu-Lai Yu, Yuen Wai-Kee and Diana Kwan (eds), *International Economic Development: Leading Issues and Challenges* (Routledge 2014).
[65] Lloyd Klein and Steve Lang, 'Truth, Justice and the Walmart Way: Consequences of a retailing behemoth' in Gregg Barak (ed), *The Routledge International Handbook of the Crimes of the Powerful* (Routledge 2015).
[66] Shum and others (n 64); Kathy Marks, 'Nike Supplier "Resisting Pay Rises" in Indonesia' *The Independent* (London, 15 January 2013) <http://www.independent.co.uk/news/world/asia/nike-supplier-resisting-pay-rises-in-indonesia-8452946.html> accessed 8 May 2023; David M. Boje, 'Change Solutions to the Norms and Standards Overwhelming Organizations: An Introduction to "Fractal" Wings of "Tetranormalizing"' in David M. Boje (ed), *Organizational Change and Global Standardization: Solutions to Standards and Norms Overwhelming Organizations* (Routledge 2015) 25.

not pay for a total of 600,000 hours of overtime worked despite workers agreeing, under duress, to less than the national legal minimum wage.[67]

Here, the level of influence that can be exerted through the supply chain is sufficient to cause municipal laws to be broken and human rights principles to be ignored. It is this fundamental nexus of conflicting factors that contribute to the argument for an international law requiring non-state actors, in all their forms, to adhere to those principles first set out in the UDHR and give effect to Ruggie's three pillars abovementioned. In this example, Nike (as the originator of the supply chain) promoted itself as a transparent and accountable business at the same time as these incidents were taking place in its supply chain.[68] It is noted here that Nike is a signatory to the UN Global Compact. It is acknowledged that there are no reports at this stage of any deaths that can be attributed wholly or in part to corporate behaviour in the Nike shoe factory example. Instead, this example is only offered to demonstrate the pressure that a company can place through its supply chain and the influence that extends beyond company and jurisdictional borders. It also demonstrates that, whilst proclaiming to be transparent and accountable, and signing up to the UN Global Compact, it is still possible for a company to assert a negative influence through its supply chain. It is appropriate to question whether ethical business statements and membership of a voluntary register is sufficiently effective to combat abuses in the supply chain. The lack of formal redress available to those whose human rights may have been infringed in Indonesia, Pakistan, or anywhere else in the world, is concerning. The reliance on victims and their families to litigate against companies is a short-sighted view; it may not offer an effective remedy, given that there will be obvious financial constraints that face victims and their families that will not face companies or transnational organisations. If the move to consider some form of hard law is to be pursued further, these are some of the salient facts that should feed into what the law requires companies to do and how the individual can redress a breach.

4. Rana Plaza and Redressing Corporate Manslaughter with Municipal Law

Here, I will set out the deficiencies of relying on domestic criminal prosecutions to rectify systemic corporate malpractices that are international in nature. The collapse of the Rana Plaza building in Bangladesh killed 1,129 people and injured a further 2,515 people.[69] The original factory building consisted of four floors and was completed in 2007 without formal building permission. By 2012, a further four floors had been built and a ninth floor was under construction at the time of the collapse.[70] It is reported by one author that fundamental due diligence practices by authorities and corporations were not undertaken with reference to Rana Plaza.[71] The result of

[67] Boje (n 66).
[68] Nike Incorporated, 'FY16/17 Sustainable Business Report' (2018) <https://about.nike.com/en/newsroom/resources/reports> accessed 8 May 2023.
[69] Keith Read, 'Many parties, many risks: Part 1: Who are your third parties?' (2015) 4(4) Compliance & Risk 6.
[70] ibid.
[71] ibid 6-8.

these systematic failures and breaches of the building regulations was seen on 24 April 2013 when the building collapsed.[72]

At the time of writing, there have been a total of 42 people charged with offences ranging from murder to corruption offences.[73] Even though the collapse of the Rana Plaza building occurred in April 2013, in many instances, legal proceedings against many of those connected with the building's collapse had only started to work through the domestic legal system by the middle of 2017. It would be difficult to argue that this is an acceptable delay in criminal proceedings; there are several reasons for the delays, though this does not justify victims of the disaster and their families having to wait a substantial length of time to have their cases heard. Within the charges were eighteen charges for corruption offences brought by the Anti-Corruption Commission in Bangladesh. These second strand of charges give an indication of the nature of corruption in business ventures in Bangladesh and may go some way to explaining the delay that has been encountered. Even in developed jurisdictions, corruption matters are notoriously lengthy and difficult to investigate.[74] Notwithstanding this, it is problematic and somewhat self-limiting to require individual jurisdictions to deal with corporate killings that have truly international dimensions. There is also a question to be asked over the access to justice in developing jurisdictions, when a domestic criminal trial is dealing with claims pertaining to the death and injury of 3,644 people. Some authors have also argued that these delays have impacted negatively on victims' mental health and wellbeing.[75] The fires in Karachi and Lahore and the collapse of Rana Plaza are two examples that demonstrate that municipal courts often face administrative or other challenges in bringing matters to trial. It could be argued that both jurisdictions highlighted above are developing nations and, so, it is inevitable that trials may take longer. Although this is a valid argument, it does not excuse the relative injustice of waiting for so long for a matter to be brought to trial and so it is proposed that the *status quo* leads to injustice through lengthy legal processes, the impact this has on the victims, and the uncertainty that this state of limbo brings.

In addition to the argument above, these delays are not solely confined to developing jurisdictions. In the UK, there have been some notable corporate manslaughter prosecutions that have taken considerable time to bring to trial even where there was absence of international aspects to the case. For example, the trial of *R v Cotswold Geotechnical Holdings Limited* took place in 2011 and the victim, who was killed by a hole that collapsed in on him as he inspected the earth, died in 2008.[76] In addition to this, a similar delay was seen in the case of *R v Sterecycle*,[77] where the injury leading to death occurred in 2011 and the matter did not come to trial until late 2014. Both cases are purely domestic in nature and do not have the added complexity that international corporate operations bring. They occurred in a developed state with a

[72] Rina Chandran, 'Three years after Rana Plaza disaster, has anything changed?' *Reuters* (London, 22 April 2016) <http://www.reuters.com/article/us-bangladesh-garments-lessons-analysis-idUSKCN0XJ02G> accessed 8 May 2023.
[73] Md Sanaul Islam Tipu, 'Depositions for Rana Plaza cases yet to begin' *Dhaka Tribune* (Dhaka, 24 April 2017) <http://www.dhakatribune.com/bangladesh/2017/04/24/depositions-rana-plaza-cases-yet-begin/> accessed 8 May 2023.
[74] Richard Parlour, 'Bribery and corruption - an international update' (2013) 34(7) Company Lawyer 218.
[75] Jim Parsons and Tiffany Bergin, 'The impact of criminal justice involvement on victims' mental health' (2010) 23(2) Journal of Traumatic Stress 182.
[76] *R v Cotswold Geotechnical Holdings Ltd* Official Transcript [2011] EWCA Crim 1337
[77] *R v Sterecycle (Rotherham) Ltd* (Crown Ct (Sheffield), 7 November 2014).

well-established legal system and yet, in both cases highlighted above, the matters took three years to come to trial. Domestic approaches to incidents, such as those discussed above, appear to be inefficient and leave victims and their families waiting several years for a trial. This brings a degree of perspective to the matters that have been considered in Bangladesh and Pakistan and may lead the reader to question what other options can be established. It is proposed that one option is to look at a global mechanism in international law.

In addition to the time delays that have plagued the Rana Plaza disaster, the punishments that are available in domestic courts is another factor to consider when looking at international corporate killing. It is possible for the Pakistani court to sentence those convicted of murder to the death penalty.[78] This potential outcome demonstrates the difficulty that some jurisdictions face with blurring the lines between the corporate entity doing wrong, and the individuals in positions of authority within those entities doing wrong. If the chief executive or managing director of a company is personally pursued for the failings of a company that lead to the deaths of workers or the general public, it is questioned whether a charge of murder and the possibility of the defendant being sentenced to death is truly remedying a wrong done by the corporate entity, or whether it is a means of appeasing the masses. There are also questions to be asked over the use, of the death penalty as it is not in keeping with the current trajectory of international law.[79] There have been several legal instruments attempting to coerce states to move away from the death penalty; however, the effectiveness of these instruments is questionable.[80] The use of the death penalty to remedy a corporate wrong, even a corporate wrong that injured and killed 3,644 people is, arguably, counterproductive, as it punishes the individual within the company and not the company itself. If a senior manager in any of these disasters mentioned above was convicted of murder, and sentenced to death, it may provide several news headlines, but what great benefit does it bring to the families of those who have been affected? It does not provide them with compensation in order that they may afford treatment, care, and support, and neither does it effectively punish the corporate entity, which, as we have seen, is separate from those senior managers who work for it. It may offer some degree of public vindication; however, it is a doubtful argument that the law exists solely to publicly vindicate the victims. The punishment seems to offer to 'pierce the corporate veil',[81] at the expense of providing

[78] Bangladesh Penal Code, 1860, s 302; BBC News, 'Bangladesh murder trial over Rana Plaza factory collapse' *BBC News* (London, 1 June 2015) <http://www.bbc.co.uk/news/world-asia-32956705> accessed 8 May 2023.

[79] United Nations General Assembly Resolution 67/176 on a Moratorium on the Use of the Death Penalty 2012; Second Optional Protocol to the International Covenant on Civil and Political Rights, aiming at the abolition of the death penalty 1989; Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment 1984; International Covenant on Civil and Political Rights 1966; Universal Declaration of Human Rights 1948. Additionally, there are federalist laws such as Protocol No. 6 to the European Convention on Human Rights Concerning the Abolition of the Death Penalty 1983 and Protocol No. 13 to the European Convention on Human Rights Concerning the Abolition of the Death Penalty in All Circumstances 2002.

[80] Patrick Dumberry, 'Incoherent and ineffective: the concept of persistent objector revisited' (2010) 59(3) International & Comparative Law Quarterly 779; Gernot Biehler, 'International law and legal procedures before the International Court of Justice in arbitration and diplomatic methods: an analysis of the limits of international law' (2007) 29 Dublin University Law Journal 209.

[81] This term has become ubiquitous in corporate criminal law and regulatory law generally to denote the action of looking past the artificial legal personality of the company and seeking to attribute blame to specific individuals. It has been written about at length; for a modern review, see Rian Matthews,

an effective remedy for the victims and punishment of the offending corporate entities involved. This argument is not to say that there should be no punishment of the individuals at senior management levels that have fostered the environment that caused the death and injury of those thousands of people; however, it is appropriate to question whether the personal punishment of senior management and the limited or no punishment of the company only really achieves half of the goal that the law could offer. If the reported facts are correct,[82] then the companies based at the Rana Plaza building were profiting from breaking planning laws and treating workers poorly. There is a moral and legal question that arises from this legal matter; should the victims and their families be compensated for the indiscretions and unlawful behaviours of the employer? In Bangladesh, there is disparity between what is legally required to happen and what transpires to happen. In both Pakistan and Bangladesh, the predominant religion is Islam, and under Islamic law, there is a means for payment of compensation to the victims of murder, which is known as Diya or blood money.[83] In the Karachi incident in Pakistan, victims were paid Diya in instalments prior to the formal commencement of the trial.[84] Whereas, it has not been reported that the victims in the Rana Plaza incident in Bangladesh had received any blood money in compensation in the same way prior to trial. Instead, several petitions began gathering momentum in an attempt to coerce the large retailers that were involved in the supply chain for Rana Plaza to contribute towards a $30m disaster relief fund for the victims of the building collapse and their families.[85] These are very different approaches that have been taken and it must be questioned whether the continued disparate response to corporate malpractice is sustainable. If there is another Karachi-style fire or Rana Plaza-style building collapse, which path will it follow? Will the victims get compensation, or will it be left to the international community to attempt to place pressure on those companies operating in the respective supply chains to try and achieve some degree of recompense? The state-wide issues around access to justice,[86] corruption, and the freedom of the press makes this question particularly difficult to answer. It seems that, in both of these incidents, the law does not offer the certainty that the western world has become accustomed to. The lack of clarity and certainty may affect the deterrent objectives of the law; it has been argued that a defined and certain law and legal process is a relatively effective deterrent to criminal behaviour and, as such, the antithetical argument may also hold water.[87] In the absence of domestic certainty of process, sentencing, and redress for the victims, it may be argued that international law could operate in the void of certainty left by municipal law. As

'Clarification of the doctrine of piercing the corporate veil' (2013) 28(12) Journal of International Banking Law and Regulation 516.

[82] It is important here to recall the caveat given at the start of this article regarding the freedom of press in the countries that are discussed.

[83] Anver M. Emon, *Religious Pluralism and Islamic Law: Dhimmis and Others in the Empire of Law* (Oxford University Press 2012) 234-235.

[84] The Express Tribune, 'Baldia factory fire: Two of three Ali Enterprises owners sent to jail' *The Express Tribune* (Karachi, 7 October 2012) <https://tribune.com.pk/story/447996/baldia-factory-fire-two-of-three-ali-enterprises-owners-sent-to-jail/> accessed 8 May 2023.

[85] Such as the Avaaz petition against Benetton, which more than 1 million people signed at "Our Clothing Kills", found at <https://secure.avaaz.org/en/benetton_pay_up_loc/?bAnffcb&v=53493> accessed 8 May 2023.

[86] Osama Siddique, *Pakistan's Experience with Formal Law: An Alien Justice* (Cambridge University Press 2013) 241.

[87] Horst Entorf and Hannes Spengler, 'Crime, prosecutors, and the certainty of conviction' (2015) 39(1) European Journal of Law & Economics 167.

such, an international law in this field would possibly offer the certainty that municipal law cannot.

5. Tianjin Explosion

On 12 August 2015 in Tianjin, China, a storage factory chemical explosion left 173 people dead, more than 720 hospitalised,[88] caused approximately £790m of damage,[89] scorched 20,000m^2 of land,[90] and left an eighty-five-meter-wide crater in the ground.[91] China has one of the world's worst reputations for freedom of press and reporting and, as such, information around the Tianjin explosion is sometimes difficult to come by.[92] In addition to this, much of the information is sanitised or approved for release by state agencies and, therefore, it does make providing a critical review of the incident difficult as some information may be biased.[93] To do this, some assumptions must first be identified and discussed. The factory based at Tianjin was a storage facility for the Port of Tianjin, which has shipping links across the world.[94] Little is known about the customers or the producers of the chemicals that were stored in the factory; however, the chemicals must have arrived at the port from another place. What cannot be ascertained is whether the chemicals were travelling to or from China. Given that they were in transit, it would be reasonable to assume that these chemicals were part of a supply and demand arrangement and that, given that they were stored at the port-side, these were part of a supply chain. One report states that a total of 700 tons of cyanide was stored at the explosion site and that this is 70 times the legal limit.[95] There are also reports that the chairman of the company that operated the storage facility has been fined the equivalent of approximately £100,000 for bribery and corruption leading to his company's non-compliance with safety regulations.[96] Furthermore, a report by the Chinese authorities had, at one point, identified a total of 123 people who were of interest to criminal investigations, and

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[88] BBC News, 'China explosions: What we know about what happened in Tianjin' *BBC News* (London, 17 August 2015) <http://www.bbc.co.uk/news/world-asia-china-33844084> accessed 8 May 2023.
[89] Caroline Mortimer, 'Tianjin explosion: Gigantic crater left by Chinese factory accident revealed' *The Independent* (London, 19 August 2016) <http://www.independent.co.uk/news/world/asia/tianjin-explosion-photos-china-chemical-factory-accident-crater-revealed-a7199591.html> accessed 8 May 2023.
[90] This statement should be treated with a degree of caution, given the sources that the information was obtained from. Zheping Huang, 'Pick your poison: The firm behind huge explosions in Tianjin handles all manner of hazardous chemicals' *Quartz* (New York, 13 August 2015) <https://qz.com/478605/pick-your-poison-the-firm-behind-huge-explosions-in-tianjin-handles-all-manner-of-hazardous-chemicals/> accessed 8 May 2023.
[91] Munitions Safety Information Analysis Center, 'Accident Reporting Overview 2015' (August 12, 2015, Tianjin (China), 2015) <https://www.msiac.nato.int/news/accident-reporting-overview-2015> accessed 8 May 2023.
[92] Reporters Sans Frontieres (n 14).
[93] Qiuqing Tai, 'China's Media Censorship: A Dynamic and Diversified Regime' (2015) 14(2) Journal of East Asian Studies 185.
[94] Yang Ziman and Zhang Min, 'Tianjin Port Links Sea and Rail Routes' *China Daily* (Beijing, 30 August 2016) <https://www.chinadaily.com.cn/business/2016-08/30/content_26639372.htm> accessed 8 May 2023.
[95] Charlotte Niemiec, 'Nationwide inspections in China follow Tianjin explosion: Supply chain disruption is likely, (*Chemical Watch*, 18 August 2015) <https://chemicalwatch.com/36730/nationwide-inspections-in-china-follow-tianjin-explosion> accessed 8 May 2023.
[96] BBC News, 'Tianjin chemical blast: China jails 49 for disaster' *BBC News* (London, 9 November 2016) <http://www.bbc.co.uk/news/world-asia-china-37927158> accessed 8 May 2023.

these included five at ministerial levels.[97] Following a criminal trial, 49 people were sentenced to varying prison terms, including the company chairman, who was handed a suspended death sentence.[98]

The explosion in Tianjin is in a very different industry to the incidents that have been explored earlier; however, there are similar thematic issues that arise. Namely, there is a demonstrable state of corruption,[99] and it is possible to ask questions over the influence that can be exerted through a supply chain and the demands that this places on governmental organisations to monitor such behaviour. It could also be said that the disparate approach to addressing the criminal behaviour of companies and those who occupy positions in senior management seems to leave victims in want of more than a simple punishment.[100] It seems that transparency has a cathartic effect to some extent and, given that these incidents have occurred in countries that have poor corruption and free press records,[101] the lack of transparent reporting and critical analysis takes away from the healing process that the victims and their families have to go through. If it is not feasible for individual jurisdictions to provide the victims of incidents, such as these, with a timely and just remedy along with transparent reporting and freely available information, and possibly an open public enquiry, is it possible that international law could fill the void that is being created by municipal law? What is more amenable to discussion in this article is the justification for such further investigations. Continuing the investigation into the salient point around these disasters, it has been suggested that the rapid expansion of economies had contributed to the Tianjin disaster;[102] it is postulated whether this logic could be applied to the incidents that have been considered in Pakistan and Bangladesh also. There is an important discussion in which to engage here; the developing countries and those with rapidly growing economies can attract work from across the globe by offering competitive labour and material prices. The result of this could be a drive to keep prices competitive in the industry, which has become reliant on outsourcing work. To keep costs low, this article has seen several instances where unlawful or immoral pressure has been applied through the supply chain, where a culture of corruption and bribery has prevailed, and where health and safety, regulatory requirements, and even human rights have been compromised in favour of market competitiveness and lower operating costs. It is this balance of obligations and competing priorities that seems to lead to the legal obligations being disregarded in favour of the commercial viability of the business. It is unlikely that a resolution to the *status quo* will come solely in the form of municipal legislation, as municipal legislation is already being overlooked in

[97] BBC News, 'China blasts: Tianjin report finds 123 people responsible' *BBC News* (London, 5 February 2016) <http://www.bbc.co.uk/news/world-asia-china-35506311> accessed 8 May 2023.
[98] Neil Connor, 'Chinese chemical factory boss given suspended death sentence, as 48 others are jailed over blasts that killed 165 in Tianjin' *The Telegraph* (London, 10 November 2016) <http://www.telegraph.co.uk/news/2016/11/10/chinese-chemical-factory-boss-handed-suspended-death-sentence-as/> accessed 8 May 2023.
[99] As can be seen from the criminal investigations and prosecutions mentioned above.
[100] For example, using the incident in Tianjin, one victim said that the silence on the part of state media since the conclusion of the formal investigations and criminal matters left him wanting the public to know more and to talk about the incident. BBC News, 'Tianjin chemical blast' (n 96).
[101] Reporters Sans Frontieres (n 14).
[102] John Woodside and others, 'Too fast, too soon: how China's growth led to the Tianjin disaster' *The Guardian* (London, 23 May 2017) <https://www.theguardian.com/cities/2017/may/23/city-exploded-china-growth-tianjin-disaster-inevitable> accessed 8 May 2023.

favour of continuing business relationships. Therefore, it is likely that the future may hold a hybrid of both hard and soft law options to address these ongoing issues.

6. Human Rights and Colombia

Given that human rights have been mentioned above, it is necessary at this stage to consider one final incident that will be used to illustrate the extent to which companies have previously engaged in human rights violations. In terms of human rights violations, a topical matter is the case brought against BP in the High Court of England and Wales for alleged human rights violations in Colombia, including BP's involvement in kidnap, torture, killing, and displacement of locals.[103] This case has an extensive history; however, there is a range of reporting on the matter and some conflicting data. It is alleged that BP paid a government tax for the army and police to protect a pipeline, and it is also alleged that this work was contracted out to a paramilitary organisation.[104] Individuals from paramilitary organisations have been convicted of kidnapping and torture and, during the trials, those members of the paramilitary organisations claimed that a company, *viz.* Ocensa,[105] paid for the murder of a trade union official. It is reported that Amnesty International had warned BP on several occasions about its involvement with the supply chain that it was partly responsible for creating and that it was paying to indirectly finance kidnapping, torture, and murder.[106] The lack of action on BP's part draws a question as to the responsibility that should lie with companies that can apply considerable influence throughout a supply chain and across the world. In 2022, BP reported an 'operating cash flow' of $40.9b,[107] which is higher than (although relatively comparable to) the nominal gross domestic product of Uganda or Bolivia.[108] The case brought against BP was heard in the High Court of England and Wales and was eventually dismissed due to several factors.[109] It is argued that BP's impact globally is more akin to that of a state and, where this is the case, it is questioned whether reliance on private legal remedies is sufficient to give effect to the third of Ruggie's pillars and to safeguard against breaches of human rights obligations. Companies are not generally required to adhere to human rights law as this type of law governs the relationship between the state, its uses of power, and the individual.[110] However, where a company is as large as a state and the impact it has on a person's life is as extensive as that which is exercised by a state, then it is logical to conclude that responsibility under human rights law for alleged violations of human rights must also accompany the ability to interfere with

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[103] Mary Carson and others, 'Colombian takes BP to court in UK over alleged complicity in kidnap and torture' *The Guardian* (London, 22 May 2015) <https://www.theguardian.com/environment/2015/may/22/colombian-takes-bp-to-court-in-uk-alleged-complicity-kidnap-and-torture> accessed 8 May 2023.

[104] ibid.

[105] Ocensa was partly set up by BP and Ecopetrol, which is owned by the government of Colombia.

[106] Carson and others (n 103); BNamericas, 'BP vows to fight lawsuit over Colombia kidnapping' (*BNamericas*, 22 May 2015) <https://www.bnamericas.com/en/news/oilandgas/bp-vows-to-fight-lawsuit-over-colombia-kidnapping/> accessed 8 May 2023.

[107] BP, 'Performing While Transforming: Annual Report and Form 20-F 2022' (2022) 21 <https://www.bp.com/content/dam/bp/business-sites/en/global/corporate/pdfs/investors/bp-annual-report-and-form-20f-2022.pdf> accessed 8 May 2023. BP states that its '[o]perating cash flow is net cash flow provided by operating activities".

[108] World Bank, 'GDP (current US$)' (World Bank Open Data, 8 May 2023) <http://data.worldbank.org/indicator/NY.GDP.MKTP.CD> accessed 8 May 2023.

[109] *Arroyo v Equion Energia Ltd (formerly BP Exploration Co (Colombia) Ltd)* [2016] EWHC 1699 (TCC).

[110] Clapham (n 27).

those rights. If a company can interfere with human rights and there is no cogent legal mechanism to claim redress, the outcome of this is a failure of Ruggie's pillars, the UN Guiding Principles on Business and Human Rights, and the principles of natural justice.[111]

The case against BP was dismissed as the claimant had, *inter alia,* failed to prove the case sufficiently against BP; however, it is also recalled that BP was admonished by Amnesty International.[112] Though there may not have been sufficient evidence against BP in the matter mentioned above, it is questioned whether the dispersal of responsibility along a supply chain has limited the redress that is available to victims by introducing jurisdictional limitations. To lay out the supply chain in this matter, BP and other transnational companies were shareholders in Ocensa.[113] Ocensa managed an oil pipeline, and it is alleged that it subcontracted the security work to a paramilitary organisation. Individuals from the paramilitary organisation were convicted of the kidnapping, torture, and killing of several trade union employees associated with the pipeline.[114] Given that there are several companies involved in the arrangement, including Ecopetrol, which is a company wholly owned by the Colombian government,[115] it is reasonable to question how the apportionment of blame should permeate the supply chain. There are specific questions that need to be addressed when considering tracing through the supply chain to attribute responsibility in part to all those who contribute to the violations; for example, the principle of *novus actus interveniens*. This principle works to extinguish a legal chain of causation, and exists in many areas of law including, most notably, criminal law and tort, though the doctrine of complicity in international law is closely linked.[116] If BP had no understanding of the actions of Ocensa, it may be possible to argue, at least to some degree, that any liability should be nominal, given that there was no knowledge of Ocensa's actions. However, as BP had been informed by Amnesty International, it is questioned whether the acquiescence of a company should amount to some form of culpability, even though it currently does not, as can be seen from the case of *Arroyo v Equion Energia Ltd*.[117]

Where liability for atrocious behaviour has been proven previously, municipal courts have often struggled with the notion of jurisdiction. This was the case in a lawsuit in the USA, *Doe v Unocal*;[118] the facts of the case bear striking resemblance to the BP allegations, though with some subtle differences. Unocal constructed the Yadana pipeline along with a Burmese company (Myanmar Oil and Gas Enterprise (MOGE)) and a division of the Burmese government.[119] Security for the pipeline was outsourced

[111] For an excellent summary of these two legal principles, see Mark Elliott and Robert Thomas, *Public Law* (4th edn, Oxford University Press 2020).
[112] Carson and others (n 103).
[113] BP, 'BP agrees to sell Colombian business to Ecopetrol and Talisman' (Press Release, 3 August 2010) <https://www.bp.com/en/global/corporate/news-and-insights/press-releases/bp-agrees-to-sell-colombian-business-to-ecopetrol-and-talisman.html > accessed 8 May 2023.
[114] Carson (n 103).
[115] BP (n 107 and 113).
[116] Miles Jackson, *Complicity in International Law* (Oxford University Press 2015) 43.
[117] *Arroyo v Equion Energia Ltd (formerly BP Exploration Co (Colombia) Ltd)* [2016] EWHC 1699 (TCC).
[118] *Doe v Unocal,* 395 F.3d 932 (9th Cir. 2002), and later *Doe v Unocal*, 403 F.3d 708 (9th Cir. 2005)
[119] Edwin C. Mujih, '"Co-deregulation" of multinational companies operating in developing countries: partnering against corporate social responsibility?' (2008) 16(2) African Journal of International and Comparative Law 249.

to soldiers,[120] who, in turn, committed a range of human rights violations including rape, torture, and murder.[121] At first instance, the matter was dismissed as the district court felt that the claimants had failed to demonstrate that Unocal was sufficiently connected to the human rights violations.[122] However, the United States Court of Appeals for the Ninth Circuit granted permission to appeal and eventually listed the matter for an *en banc* hearing before eleven judges, pending the decision in the case of *Sosa v Alvarez-Machain*.[123] The case of *Sosa v Alvarez-Machain* is important as the United States Supreme Court found that individuals were entitled to pursue claims in US courts against foreign citizens, including companies. Unfortunately, the matter never came to a full appeal hearing as there was a tentative out-of-court settlement made between the representatives of the victims and Unocal, and so there is no direct judgment to analyse. Here, the matter was listed for appeal, and, at the permission stage, three judges agreed that a full hearing on Unocal's liability for its complacency and inaction should take place. This decision was taken, in part, because of a need to test evidence of the human rights violations of the soldiers contracted to provide security to the gas pipeline. However, it would not be viable to require every person who wished to claim redress against a company for human rights abuses to file their claim in a US court; this could lead to the formation of a form of 'inherent jurisdiction' of the US courts by the piecemeal acceptance of jurisdiction beyond its constitutional authority.[124] A similar issue developed in the field of international criminal law; in 1993, Belgium enacted a law granting itself universal jurisdiction to prosecute war crimes (and later, other international crimes) on behalf of the accuser or accusing state, irrespective of where the crime occurred.[125] In this case, there was a substantial degree of political controversy over the Belgian claim to universal jurisdiction, leading to a court case against Belgium for acting unlawfully.[126] Although it can be argued that the Belgian law and claim to universal jurisdiction is no longer truly universal, it does retain a strong degree of extraterritoriality, and this is still a sensitive political issue.[127] Given the difficulty that Belgium has experienced in attempting to offer a seat for claimants in international criminal law, it is logical to conclude that any attempt to claim inherent or universal jurisdiction by the US courts over human rights violations by corporations would attract the same degree of challenges or political unease. Therefore, the disparity between the UK and US approaches in the BP and Unocal matters offers little assistance with attempting to resolve issues that arise under the current national and international structures.

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[120] It is not known at this stage whether these soldiers were paramilitary or armed forces personnel.
[121] Olivier Salas-Fouksmann, 'Corporate liability of energy/natural resources companies at national law for breach of international human rights norms' (2013) 2(1) UCL Journal of Law and Jurisprudence 201.
[122] Eileen Rice, 'Doe v Unocal Corporation: Corporate Liability for International Human Rights Violations' (1998) 33 University of San Francisco Law Review 153.
[123] *Sosa v Alvarez-Machain*, 542 U.S. 692 (2004).
[124] Grigoriĭ Ivanovich Tunkin, *Theory of International Law* (William E. Butler tr, Harvard University Press 1974) 327-330; Luiz Eduardo Salles, 'Jurisdiction' in William A. Schabas and Shannonbrooke Murphy (eds), *Research Handbook on International Courts and Tribunals* (Edward Elgar 2017) 254; Isabelle Van Damme, 'Jurisdiction, Applicable Law, and Interpretation' in Daniel Bethlehem and others (eds), *The Oxford Handbook of International Trade Law* (Oxford University Press 2009) 305.
[125] Robert Cryer, Darryl Robinson and Sergey Vasiliev, *An Introduction to International Criminal Law and Procedure* (3rd edn, Cambridge University Press 2019) ch 3.
[126] Neil Boister, 'The ICJ in the Belgian Arrest Warrant Case: Arresting the Development of International Criminal Law' (2002) 7 Journal of Conflict and Security Law 293.
[127] Cryer, Robinson and Vasiliev (n 125).

III. Opinion

There is not a vast field of literature to review, and the subject matter is sensitive given that it discusses the introduction of international laws, which are often subject to persistent objections by some states.[128] Notwithstanding this, it is relevant to review the authors' thoughts and consider their opinions. Yiannaros and Nyombi (henceforth Yiannaros) have argued that both municipal law and current international law are not sufficiently evolved to deal with the concept of transnational corporations.[129] As shown from the international incidents mentioned above, there is a continuing disparity between the legal framework governing the behaviour of large transnational companies within jurisdictions,[130] and the legal and regulatory framework across jurisdictions. Yiannaros concludes that there is a 'vacuum' that exists between the law and the corporate entity itself.[131] This is an interesting proposal; however, it is possible that the word 'vacuum' misleads the reader into thinking that there is an absolute void of regulatory provision. Rather, it is more accurate to state that there is limited legal interference with the corporate structure and international commercial behaviour, given that many of the provisions enacted are soft law in the sense that they attempt to coerce companies to adhere to certain standards. The fact that these measures are not regulatory (they do not contain some form of tangible punishments for companies that breach the statements and objectives), gives weight to the argument that there is a vacuum; however, the existence of soft law measures such as the UN Global Compact and the UN Guiding Principles on Business and Human Rights acts to counter the argument. Yiannaros argues that transnational companies have come into being in more recent times and both international and municipal law has far older roots, and this has caused a disconnect. Considering this argument further, it may be possible to understand why the situation is as it currently stands. Although the origin of international law is difficult to briefly state,[132] it is true to say that international law has gathered formality and popularity in the post-World War Two era;[133] notwithstanding this, its origins in one shape or form can be traced back many millennia.[134] The corporation as a distinct legal personality is colloquially traced back to the case of *Salomon v Salomon*,[135] which is the formalisation of the principle that companies possess distinct legal personalities from the natural legal personalities of those who own and operate the company. More recently, the emergence of globalisation and global trade sees companies operating not through a single distinct and artificial legal personality, but through several legal personalities and often through a supply chain. The supply chains themselves consist of several distinct legal personalities operating on a supply and demand basis. Yiannaros' conclusion that a

[128] The term persistent objector refers to an action in the creation of international law where a state objects to a treaty or *jus cogens* from the law's inception and, as such, is not bound to comply with it. For further information, see Malcolm N. Shaw, *International Law* (7th edn, Cambridge University Press 2015) 64.

[129] Chrispas Nyombi and Andreas Yiannaros, 'Corporate personality, human rights, and multinational corporations' (2016) 27(7) International Company and Commercial Law Review 234.

[130] The terms 'transnational company' and 'multinational company' are not interchangeable. 'Multinational' tends to refer to several or many countries or nationalities, whereas 'transnational' refers to interests that extend beyond national boundaries.

[131] Nyombi and Yiannaros (n 129) 251.

[132] It is recalled that there are distinct areas of international law referred to as 'private international law' and 'public international law' and these have distinct origins.

[133] As such, this is often referred to as 'new' or 'modern international law'.

[134] David J. Bederman, *International Law in Antiquity* (Cambridge University Press 2001).

[135] *Salomon* (n 56).

vacuum exists is not entirely disengaged from my proposition: ancient principles that exist in some areas of international law are not an appropriate means to regulate artificial legal personalities since the time of *Salomon v Salomon*.[136] It is, in part, because of this disconnect between laws created to govern people and the development of distinct artificial legal personalities that we see a relative stagnancy in this area in international law.

Turning to the content of law, rather than its form and reach, I have discussed above the question of human rights obligations of non-state actors. It is argued here that commercial actions of artificial legal personalities can, *prima facie,* contravene human rights obligations. This argument is difficult to summarise as it is a wide collection of interwoven arguments that, on the one hand involve the public law of human rights, and on the other the private law of commercial enterprise. However, this matter was discussed in brief above, and Yiannaros offers several arguments on this topic, one of which concerns the individual as a subordinate of the state. This point is interesting as it is formulated of Emer de Vattel's proposition that:

> Whoever uses a citizen ill, indirectly offends the state, which is bound to protect this citizen; and the sovereign of the latter should avenge his wrongs, punish the aggressor, and, if possible, oblige him to make full reparation; since otherwise the citizen would not obtain the great end of the civil association, which is, safety.[137]

Vattel made this argument in 1758, long before the modern notion of human rights had developed. However, Vattel's proposition demonstrates that nearly two centuries prior to the adoption of the UDHR, there was still a general understanding that the state had a duty to seek remedies or redress for its citizens who had been wronged by another. If this logic is extrapolated to the current topic, it could still be applied and the result of the application of Vattel's proposition is this: where an individual is harmed by an act or omission of an artificial legal personality, the state should seek reparation for the victim. One complexity arises when the artificial legal personality is seated in another state;[138] cross-jurisdictional issues, such as those seen in the examples above, draw in other matters that make pursuing the aggressor (to use Vattel's terminology) more difficult. States have differing views on the incorporating of companies, limiting of liability, and the prosecution of the corporate entity, as opposed to solely seeking redress against the company's office holders. In addition to this, the modern transnational organisation is a vast array of different legal personalities and, as has been shown in the BP incident above, the financial power of a company could outweigh that of a state. Where an artificial legal personality has committed human rights violations, the victim will invariably be a citizen of a state and the aggressor will also have a seat in a state, though this may not be the same state as the victim. Subsequently, if this argument is developed further towards human rights law, it could be argued that Vattel would insist that the state is responsible for seeking redress against a legal personality that has committed human rights violations, as a human rights violation, by its very nature, is an abuse of power used against a person.

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[136] *Salomon* (n 56).
[137] Emer de Vattel, *The Law of Nations, Or, Principles of the Law of Nature, Applied to the Conduct and Affairs of Nations and Sovereigns with Three Early Essays on the Origin and Nature of Natural Law and on Luxury* originally published 1758, Joseph Chitty tr, Cambridge University Press 1834) 298.
[138] The seat of a corporate entity is the jurisdiction in which the organisation is largely located or incorporated.

In essence, Vattel appears to be suggesting that the onus lay on the state to pursue abuses of their citizens by others. There are two salient points here: first, this matter is consistent with the theoretical notion of the social contract; and second, this duty would necessarily have a correlative indemnity.

Regarding the first point above, Thomas Hobbes suggested that the relationship between the individual and the state was in pursuance of 'the end of the institution of sovereignty, namely, the peace of the subjects within themselves, and their defence against a common enemy'.[139] Here, Hobbes suggests that the purpose of the relationship between the individual and the state is a reciprocal relationship pursuing the mutually beneficial objective of defence against aggressors. The individual offers their servitude to the state in return for forming part of a collective of individuals seeking to do the same and thus, a body of defenders is formed, organised, and administered by the state. John Locke expanded further on this point, albeit by disagreeing with Hobbes on some elements. Locke states that the purpose of the social contract is offering away a proportion of an individual's absolute freedom in exchange for safety and security and protection of rights and entitlements.[140] If the purpose of the social contract is the reciprocal arrangement whereby an absolutely free individual offers some freedom away – in the form of civil obedience – in exchange for protection and the realisation of right or entitlement, then the social contract is supportive of the position adopted by Vattel, namely, that the state is bound to protect its citizen and to seek redress when this has not happened. This is also concurrent with the argument that I advance, namely, that a state should be responsible for seeking redress on behalf of a victim or the victim's family where that individual has been harmed by a transnational corporation based beyond the borders of the state. There needs to be a legal framework for this to occur, and I content that the framework should be an international hard law, such as a treaty. The duty to protect an individual and to seek redress on their behalf when injured by an extraterritorial legal entity is the duty which arises as a result of the bargain made between the individual and the state in the social contract described above.

Hobbes's conceptualisation of the state as a mechanism for ensuring internal peace and security, alongside Locke's emphasis on the reciprocal exchange inherent in the social contract, where liberties are willingly traded for protection, highlight the fundamental duty of the state to safeguard the rights and welfare of its citizens against all forms of aggression, including those that originate from beyond its own borders. The traditional notions of sovereignty, characterised by territorial integrity and the principle of non-interference, are increasingly being challenged by the realities of globalization, wherein actions by entities in one region can significantly affect individuals in another. This interconnectedness of the global landscape necessitates a revision of the social contract to extend the state's protective obligations to harms inflicted by extraterritorial entities, such as transnational corporations. I propose that the establishment of an international hard law, akin to a treaty, serves as an effective mechanism to uphold these duties, aligning with international law principles and acknowledging the pressing need for a governance framework capable of addressing transnational issues. The state's duty to protect its citizens and to seek redress on their

[139] Thomas Hobbes, *Leviathan* (originally published 1651, Wordsworth Editions Limited 2014) 168.
[140] John Locke, *Two Treatises*, *Two Treatises of Government* (Originally published 1689, Peter Laslett (ed), Cambridge University Press 1988). This is a summary from several places in the book. For more, see: 1.92, 2.88, 2.95, 2.131, 2.147.

behalf, as derived from the social contract, is not merely a continuation of historical philosophical doctrines but a critical requirement in a world where the operations of transnational corporations can result in significant human rights impacts. This first point seeks not only to broaden the protective mantle of the state but also to reinforce the core principles of the social contract in a contemporary, globally interconnected context. In advocating for the establishment of an international hard law, it is imperative to underscore the necessity for such a framework to explicitly encompass provisions for redressing human rights violations perpetrated by companies. Given that certain corporations wield power and influence on par with, if not exceeding, that of states, their capacity to impact human rights is profound. The objective of human rights (that is, to protect the autonomy and dignity of the individual from interference by entities with state-like power) demands that our legal frameworks evolve to address the realities of a globalized world where corporate actions often transcend national boundaries and jurisdictions. This necessitates a legal mechanism that not only holds states accountable for protecting their citizens from domestic threats but also empowers them to act against extraterritorial entities whose operations infringe upon individual rights. Therefore, any international treaty or legal instrument developed should be designed with the capability to impose accountability on corporations for human rights abuses, providing clear avenues for victims to seek redress. Such provisions should not only aim at compensation but also ensure that corporations implement preventive measures against future violations. This approach acknowledges the shift in the global power dynamics, where non-state actors possess the capability to significantly influence the human rights landscape. By embedding these principles within an international hard law, the international community can make significant strides towards creating a more equitable and just global order, where the dignity and rights of individuals are protected, irrespective of the source of infringement, be it state or corporate entities. This aligns with the broader aims of international human rights law, reinforcing the notion that the protection of individual rights and dignity must adapt to the complexities of the modern world.

This leads on to the second salient point mentioned above, that a duty would have a correlative indemnity. I have said above that there is a duty on the state to protect the individual and their rights as an element of the social contract. This is a Hohfeldian correlative: where a right exists, there is a commensurate and correlative duty.[141] Furthermore, Samuel von Pufendorf said that perfect duties, those are duties that grant us a remedy when not performed, are the correlative of that which is owed to us.[142] Both Pablo Gilbert and John Tasioulas, in summarising the work of Immanuel Kant, state that the perfect duty or obligation is one that corresponds to a right of another.[143] The existence of a right presupposes that a duty arises in relation to another. That duty is, in part, a duty that correlates with the right, though there is some debate about the extent to which rights and duties may not be wholly aligned.[144] Notwithstanding this debate, the existence of a right and a corresponding duty is

[141] Wesley N. Hohfeld, 'Fundamental Legal Conceptions as Applied in Judicial Reasoning' (1917) 26(8) Yale Law Journal 710; Wesley N. Hohfeld, 'Some Fundamental Legal Conceptions as Applied in Judicial Reasoning' (1913) 23(1) Yale Law Review 16.
[142] Samuel von Pufenorf, *Elements of Universal Jurisprudence* (originally published 1661) in Craig Carr (ed), *The Political Writings of Samuel Pufendorf* (Oxford University Press 1994).
[143] Pablo Gilbert, 'Kant and the Claims of the Poor' (2010) 81(2) Philosophy and Phenomenological Research 382; John Tasioulas, 'Taking Rights out of Human Rights' (2010) 120(4) Ethics 647.
[144] Simon Hope, 'Perfect and Imperfect Duty: Unpacking Kant's Complex Distinction' (2022) 28(1) Kantian Review 63.

consistence with the reciprocal (if not equal or equitable) relationship that is outlined by social contract theory. It should be noted here that this definition and description of the relationship between right and duty is not one solely adopted by theorists. The Supreme Court of India has previously stated that 'in a strict sense, legal rights are correlative of legal duties and are defined as interests which the law protects by imposing corresponding duties on others'.[145] Therefore, if, as I have set out above, the social contract and position by Vattel supports the creation of a duty in an international hard law to protect or pursue a remedy for injury or death suffered by a victim, none-compliance with that duty should raise the possibility of remedy against the state reneging on their responsibility under the duty. This gives rise to a form of indemnity, where the state is bound to pursue the defendant company for the harm caused to one of its citizens, or to pay a fine to the victim or their family for defaulting on their duty.

This conceptualisation of indemnity within the context of international law and the social contract requires a more nuanced understanding of state accountability, particularly in the era of globalisation, where the actions of transnational corporations can transcend national boundaries. The establishment of a clear legal framework that requires that states enforce remedies against corporations or, alternatively, provide compensation directly, represents a significant evolution in the application of social contract principles to contemporary international relations. Such an approach not only reinforces the state's role as the protector of individual rights but also acknowledges the complexity of enforcing rights in a globalised world where corporate entities often operate with the same level of influence and autonomy as states themselves. By extending the duty of protection and the right to a remedy to include harms caused by transnational corporations, this framework effectively bridges the gap between traditional state-centric notions of sovereignty[146] and the realities of a global economy. It underscores the necessity for international law to adapt, ensuring that the principles of the social contract remain relevant and enforceable in a world where the distinction between the actions of states and those of corporations is increasingly blurred. This position appears to bolster the protection of individual rights but also introduces a paradigm where states and corporations are co-accountable to the principles of human dignity and justice, as envisioned by the foundational theorists of the social contract.

Further to this point above, Hassan and others have also commented on the move towards acknowledging the state's responsibility for 'abuses committed in the private sphere'.[147] In their work, Hassan and others cite the European Court of Human Rights (ECtHR) case of *X v Netherlands*.[148] Briefly, the case concerned a young female with mental health problems who was sexually abused by a relative of the director of a privately-run home for children with mental health conditions. There was a void in Dutch criminal law that meant that no person or institution could be prosecuted for the crime. Hassan and others summarise the conclusion of the judgement by saying that the state is responsible for 'ensuring that laws are adequate' to punish individuals that violate human rights obligations that apply generally to states and public

[145] *State Of Rajasthan & Ors. vs Union of India* 1977 AIR 1361, 1978 SCR (1) 1
[146] For a philosophical review of legal sovereignty, see Marc Johnson, 'Legislative sovereignty: moving from jurisprudence towards metaphysics' (2020) 11(3) Jurisprudence 360.
[147] Jahid Hassan and others, 'International Business and Human Rights: Time for Hard Law' (2016) 27(10) International Company and Commercial Law Review 343, 348.
[148] *X v Netherlands* (A/91) (1986) 8 EHRR 235.

bodies.[149] Although the points made by both Hassan and others and the court in *X v Netherlands* are aligned, my argument is that the state should do more than offer a legal framework through which a victim can claim redress. I suggest that a more just framework would see the state indemnify the victim and possess a duty to pursue redress on behalf of the victim. There is a considerable imbalance in power and resources when an individual, or class of individuals, is seeking to redress a harm caused by a state-sized company operating across jurisdictional borders. There is a disparity between the position of the ECtHR and the proposition I advanced above made by Vattel; the ECtHR's perspective according to the judgement in *X v Netherlands* is that the state is a facilitator of redress while Vattel's perspective is that the state is an advocate for the victim in pursuance of justice on the victim's behalf. However, the two functions can coexist where there is an effective separation of powers between a state's executive and judicial functions and I assert that the two should exist in order to ensure not only that there is an adequate means to obtain a remedy, but also that victims of harm do not suffer unjustly due to the imbalance in power and resources between the two parties.[150] Therefore, it can be argued that the state is required to keep laws that offer some form of redress to the victims of human rights abuses by private entities, and this could include legal personalities. Within the UK, for example, section 6 of the Human Rights Act 1998 sets out that the UK's court system is a public body and, as such, in hearing cases brought before it, the courts must act compatibly with Convention rights.[151] It is recalled above that the UK courts do not believe that section 6 of the Human Rights Act 1998 creates any form of new cause of action; however, the court will apply the Convention rights under a claim when using an existing cause. There is a degree of discrepancy arising here as the UK courts do not believe that a new cause of action is created by section 6, and yet the earlier case of *X v Netherlands* seems to indicate that where a cause of action does not exist, in respect of an action that is also a human rights violation, the state is liable to compensate the victim in the absence of legal redress. This marginally different reasoning leads to very different outcomes.

The next point that will be discussed is one that concerns the reasoning provided by Hassan and others for not needing hard law to compel businesses to respect human rights obligations. Hassan and others rely on a quote from the infamous *IG Farben* judgement,[152] where the court stated that '[c]rimes against international law are committed by men, not by abstract entities…' and goes on to state that where a company acts in an aggressive manner there is provision in international criminal law to punish the individuals responsible.[153] This premise is often known as the 'Legacy of the Nuremburg Trials'.[154] However, there may be a number of challenges to this argument, of which, I will advance four. The first is that the reality of the actions following the convictions at the *IG Farben* trial was that both individuals and the company (IG Farben) were punished, although the company's punishment was in a

[149] Hassan and others (n 145) 348.
[150] Andrew Le Sueur, Maurice Sunkin and Jo Eric Khushal Murkens, *Public Law: Text, Cases and Materials* (4th edn, Oxford University Press 2019) 125-160.
[151] Human Rights Act 1998, s 6(3)(a).
[152] *United States of America v Carl Krauch et al. (IG Farben)* (1948) 8 TWC 1169.
[153] Hassan and others (n 145) 348.
[154] Philippe Kirsch, 'Applying the Principles of Nuremberg in the ICC' (Keynote address at Judgment at Nuremberg conference, Missouri, 30 September 2006) <https://www.icc-cpi.int/sites/default/files/NR/rdonlyres/ED2F5177-9F9B-4D66-9386-5C5BF45D052C/146323/PK_20060930_English.pdf> accessed 8 May 2023.

less direct manner. For example, those company officials found guilty during the trial were sentenced to periods in custody ranging from one and a half to eight years, and so this sentence does follow with the logic of the Legacy of the Nuremburg Trials.[155] However, following the end of World War Two, control of IG Farben was passed to the Allied Authority, who, along with the West German authorities, agreed to break up the operational components of IG Farben and leave IG Farben as a shell company against which claims could be brought by former victims of forced and slave labour.[156] Therefore, both the organisation and the individuals who were personally culpable were punished for their respective involvements in war crimes and, although these punishments were meted out by different authorities, it must be recalled that in 1949, modern international criminal law was in its infancy. This is contrary to the argument advanced by Hassan and others. The punishment for the corporate entity that was IG Farben was left to the Allied Authority and West German Authority to dismantle. Arguably, this could be the predecessor for corporate criminal sanctions by cooperating jurisdictions and states.

The second point is linked to the first, above; punishment of the individual and the company need not be mutually exclusive. It is advanced by Hassan and others and by the Legacy of the Nuremberg Trials that punishment of the individual is preferable where there is clear culpability. However, if there is clear culpability of an office holder, or as in the case of *IG Farben*, a number of office holders, then there is no reason why punishment cannot be exercised against both the artificial legal personality and any culpable natural legal persons. This is an approach seen commonly in the UK, such as in the case of *Attorney General's Reference (No.9 of 2015)*,[157] where the culpability of an individual and a company were found not to be mutually exclusive but concurrent. As such, it was acceptable to fine a company and to imprison a person of high culpability in a gross negligent manslaughter matter. This, in itself, does not amount to double jeopardy,[158] as, legally, the two entities are different, and so there is no reason why two separate entities could not be punished according to their liability in criminal law.[159]

The third point to make is that the Nuremburg trials took place before the UDHR was adopted, and more than half a century before the movement to promote human rights in business gathered momentum following the UN Global Compact. It is difficult in the modern climate to see how companies from the 1940s and 2023 can be compared; the commercialisation of many aspects of the general population's day-to-day life and the globalisation of trade has created a global population of companies that have

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[155] United Nations War Crimes Commission, *Law Reports of Trials of War Criminals: Selected and Prepared by the United Nations War Crimes Commission* (Vol 10, HM Stationery Office 1949) 63.
[156] The Editors, 'Encyclopædia Britannica' (IG Farben: German Cartel, 27 April 2017); Raymond G. Stokes, *Opting for Oil: The Political Economy of Technological Change in the West German Chemical Industry 1945-1961* (Cambridge University Press 1994) 70; BBC News, 'IG Farben to be dissolved' *BBC News* (London, 17 September 2001) <http://news.bbc.co.uk/1/hi/business/1549092.stm> accessed 8 May 2023.
[157] Attorney General's Reference (No.9 of 2015) [2015] EWCA Crim 2152.
[158] Which does not exist at common law in England and Wales due to the principles of *autrefois acquit* and *autrefois convict*, save for specific circumstances under Part 10 of Criminal Justice Act 2003. However, it does in other jurisdictions.
[159] Unknown, 'New Zealand: double jeopardy - prosecution of company and principal director/shareholder is permissible' (2001) 3(2) Commonwealth Human Rights Law Digest 186; *Spencer v Wellington* [2001] 3 L.R.C. 34 (HC (NZ)); Corporate Manslaughter and Corporate Homicide Act 2007, s 19(2).

complex networks and, often, interconnected relationships. In the *IG Farben* case, the company was charged with using Reich slave labour and forced labour.[160] The modern company may not be using slave labour or forcing prisoners to work for them in the same way; however, it is appropriate to question the influence and material impact of a transnational company when it is able to exert such influence on an individual. There is a contrary argument: that companies should be allowed to pursue and engage in profit making and 'free competition without deception or fraud'.[161] This premise was first advanced by Milton Friedman in 1962 and, though this is reiterating a criticism used earlier, there is a substantial shift in corporate practices that has taken place since that time and I am not convinced that this proposition alone is sufficient to defend companies against human rights obligations.

The final point to raise leads on from the second and third; that company structures that are seen in modern transnational companies make it difficult to isolate individuals who are culpable in one way or another for the actions of a corporation. In a purely domestic company with no subsidiaries and confined operations, it may be possible to identify an individual who has caused an unlawful action in the company's name, such as in the case of *IG Farben*. However, it is not always possible to do this when considering companies that have vast subsidiary structures and supply or transactional chains attached to them.[162] It could be argued that there is a degree of anonymity that is gained from being part of a vast management structure and so there are safeguards that are created to the identification of a group of individuals who bear responsibility for criminal failures of a company. Notwithstanding this, it is also important to note that the remit of international criminal law and of the International Criminal Court (ICC) is defined in the Statute of Rome, which originally confined the ICC's subject matter jurisdiction to matters of genocide, war crimes, crimes against humanity, and the crime of aggression.[163] However, since 2016, the jurisdiction has been extended to encompass serious environmental crimes also,[164] and this does raise several possible avenues for further research on the jurisdiction and enforcement of any such hard law on corporate killing.

IV. Conclusion

This article has shown that there have been several incidents that have occurred since the adoption of the UN Guiding Principles on Business and Human Rights in 2011. It has also been shown that, as a result of which, many people have died. There have been discussions over the involvement in, and questions raised over the degree of responsibility that could arise through, supply chains in these incidents, along with the effect and impact that large transnational organisations can have through such supply chains. It is the culmination of all of these factors that have been discussed that leads me to conclude that the matter of corporate killing and the responsibility of

[160] United Nations War Crimes Commission (n 154).
[161] Milton Friedman, *Capitalism and Freedom* (University of Chicago Press 1962); some further discussion on this topic is available in Joseph Heath, *Morality, Freedom and the Firm: The Market Approach to Business Ethics* (Oxford University Press 2014) 31-36.
[162] Richard Schaffer, Filiberto Agusti, and Lucien J. Dhooge, *International Business Law and Its Environment* (9th edn, Cengage Learning 2015) 393.
[163] Rome Statute of the International Criminal Court 2010.
[164] ibid art 93(10); see also Office of the Prosecutor, 'Policy Paper on Case Selection and Prioritisation' (International Criminal Court, 2016) <https://www.icc-cpi.int/itemsDocuments/20160915_OTP-Policy_Case-Selection_Eng.pdf> accessed 8 May 2023.

transnational companies is not settled and requires review. The effectiveness of soft law approaches is questionable given that there have been continued disasters involving international supply chains and transnational companies that have led to the loss of life. It is also concluded that the lack of transparency and readily available information is a barrier to justice and critical review of those organisations involved. One such important discussion that should take place is whether the increased participation in soft law would bring about a reduction in international corporate killing or whether there is evidence to demonstrate the contrary is true. It is proposed, at this stage, that the *status quo* is not a viable option as acquiescence towards the level of impact that has been seen earlier in this article could lead to 'more of the same'.

The soft law instruments that I referred to in the introduction clearly have human rights at the core of their endeavours, but the lack of clear and specific enforcement of these objectives has led to an environment where disastrous incidents, such as those outlined above, can continue to arise. It is on this basis that I argue that the time has come, and the precipice therefore reached, necessitating a hard law on international corporate killing which protects the individuals' human rights from interference by international and transnational corporate entities. I propose that such a hard law should respect the dignity and autonomy of the individual by reference to internationally recognised standards found in human rights law, and that the state should be subject to an indemnity to prevent an imbalance in power from impacting negatively on victims' access to justice. The alternative is merely to continue to acquiesce to the poor treatment of people in international and transnational corporate spheres of influence.