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Access to remedies in the field of business and human rights: A critique of the *status quo* and a way forward for victims

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"Is this not the fast that I have chosen: To loose the bonds of wickedness, to undo the heavy burdens, to let the oppressed go free, and that you break every yoke? Is it not to share your bread with the hungry, and that you bring to your house the poor who are cast out; when you see the naked, that you cover him, and not hide yourself from your own flesh?"

Isaiah 58 verses 6 and 7
the Holy Bible
(New King James Version)

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Introduction

International human rights law has come a considerably long way since it became globally relevant after the end of World War II and the advent of the 1948 United Nations (UN) Universal Declaration of Human Rights.[1] Globally uniform minimum standards on how states should treat people within their territory have become well entrenched in international law through human rights instruments such as the International Covenant on Economic, Social and Cultural Rights (ICESCR)[2] and the International Covenant on Civil and Political Right (ICCPR).[3] Such instruments, as well as various other international efforts such as the establishment of global and regional overseeing bodies, have played an integral role in scrutinising and calling to order the way that states wield the immense power that they have over their subjects in relation to human rights.[4]

However, with the increase in globalisation and international commercial activity over the past several decades, a new challenge for has emerged for the protection of human rights, namely the adverse consequences of global business activity on human rights. As such, business and human rights has been a globally recognised issue for many years.[5] Nonetheless, it cannot yet be said that many of the pressing issues relating to business and human rights are anywhere near being solved.[6]

It is no secret that today some of the most powerful actors on the world stage are no longer governments but businesses.[7] This is problematic for human rights because as businesses advance economically and globally, they increasingly have a vast influence on human rights, which many times reaches far beyond that of states.

With such influence, businesses have the power to significantly affect the human rights of the people in the areas in which they operate, both positively and negatively. As such

[1]UN General Assembly, *Universal Declaration of Human Rights,* 10 December 1948, 217 A (III).
[2]UN General Assembly, International Covenant on Economic, Social and Cultural Rights, 16 December 1966, United Nations, Treaty Series, vol. 993, p. 3.
[3]UN General Assembly, International Covenant on Civil and Political Rights, 16 December 1966, United Nations, Treaty Series, vol. 999, p. 171.
[4]Falk Human *Rights Horizons : The Pursuit of Justice in a Globalizing World* (2002) page 1-2.
[5]Ruggie "The Construction of the UN 'protect, respect and remedy" framework for business and human rights: the true confessions of a principled pragmatist" 2011 *European Human Right Law Review* 2 127, page 1.
[6]Lopez "The Ruggie Process: A move towards CSR?" in in Deva and Bilchitz *Human Rights Obligations of Business* (2013) 77.
[7]In 2011 alone, oil and gas behemoth ExxonMobil generated revenues of USD 467 billion- the size of Norway's entire economy- see Albin-Lackey "Without Rules: A Failed Approach to Corporate Accountability" 2014 *Human Rights Watch*, page 1.

finding a way to regulate the manner in which businesses affect human rights is an important challenge for the international community to address.[8]

Among the hurdles that some in the international community encounter in the face of this challenge, is the mission of trying to move global policy away from the rhetoric of businesses dealing with human rights on the basis of corporate social responsibility (CSR), which is largely based on voluntary initiatives.[9] One of the main points of criticism to the voluntary approach to the relationship between businesses and human rights is its non-binding character.[10] There is good reason to be found behind this criticism, for example, when people experience gross violations of their fundamental rights at the hands of powerful economic actors such as businesses, voluntarism is almost always an ineffective option to securing effective reparation for the victims.

As such, access to remedies in the face of gross violations of human rights involving or at the hands of businesses has been one of the key concerns in the field of business and human rights.[11] Despite this, however, victims of gross human rights abuses involving businesses continue to find themselves without real access to remedies and often stuck between two powerful actors who refuse to be held accountable by many means.

In light of this, this paper will focus on access to remedies, in particular effective access to judicial remedies, as an important feature in any jurisdiction to strengthen the accountability of businesses, in particular, for gross human rights violations. To achieve this, this paper will explore the question of whether effective access to remedies for victims of gross human rights violations can be secured in the field of business and human rights.

This will be done by first analysing what is currently one of the most prevalent documents in the field, the United Nations Guiding Principles on Business and Human Rights (the Guiding Principles),[12] and investigating what they say about access to remedies. This paper

[8]Falk (n 4), page 52; see also Alston *Non-State Actors and Human Rights* (2005); UN Sub-Commission on the Promotion and Protection of Human Rights, Economic, Social and Cultural Rights: Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights, 26 August 2003, E/CN.4/Sub.2/2003/12/Rev.2, available at: http://www.refworld.org/docid/403f46ec4.html (11-10-015).
[9]In 1992, the UN endorsed the use of voluntary initiatives through agenda 21, UN Conference on Environment and Development, *Agenda 21, Program of Action for Sustainable Development,* UN Doc. A/Conf. 151/14 (1992).
[10]See Kerr, Janda and Pitts *Corporate Social Responsibility: A legal Analysis* (2009) page 97.
[11]See Bilchitz D "The Moral and Legal Necessity for a Business and Human Rights Treaty" (10 February 2015), 5 the Argument from Access to Remedy.
[12]Human Rights Council, 'Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework', A/HRC/17/31 (21 March 2011) ('Guiding Principles").

will then briefly argue how and why the Guiding Principles fall short of having the impact required to sufficiently deal with the issue of effective access to remedies in this field.

This paper will thereafter explore whether effective access to remedies can generally be found in domestic courts by victims of business related human rights violations and investigate whether domestic courts are currently a viable option to be used, going forward, for victims seeking redress for business related gross human rights abuses. This will be achieved by analysing and drawing an understanding from the general outcomes achieved in some of the big cases relating to gross human rights violations involving businesses.

Duly taking into account the current efforts being made by the international community to elaborate on a binding treaty on the human rights obligations of businesses, this paper favours the adopting of a multi-pronged approach to address the issue of effective access to remedies in the business and human rights field. As such, all of the above will be done with a view of, while critiquing the current state of affairs, advocating for other additional angles to be taken to address the issues of effective access to remedies in this field.

To conclude this paper will briefly propose creative efforts that can be taken by states at a regional and sub-regional level as well as through regional bodies, such as the African Union (AU) and the Southern African Development Community (SADC) to deal with the remedial gaps that currently exist in the business and human rights field.

1. Setting the Stage

"[R]ecognition of the inherent dignity and of the equal and unalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world…"

Universal Declaration of Human Rights, 1948

1.1. Towards the Guiding Principles on Business and Human Rights

Regulating the relationship between businesses and human rights has been a part of the global policy agenda since the 1990's.[13] The past two decades have seen the debate on the human rights obligations of business gain some traction, with the Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights (Draft Norms)[14] beginning some of the most contentious debates in the international arena.[15]

In August 2003, the UN Sub-commission for the Promotion and Protection of Human Rights approved the Draft Norms, which were intended to advance to become a confirmation of the human rights obligations imposed on businesses under international law. However, these Draft Norms were received as deeply controversial[16] and were eventually abandoned by the UN Commission on Human Rights (now the Human Rights Council). Following this, in 2005 the UN Commission on Human Rights adopted a resolution for the UN Secretary-General to appoint a Special Representative of the Secretary-General on the issue of Human Rights and Transnational Corporations and other Business Enterprises (SRSG) to investigate and report on the issue further.[17] By 2008 the SRSG presented the 'Protect, Respect and Remedy Framework' (the Framework)[18] to the

[13]Ruggie "The construction of the UN 'protect, respect and remedy" framework for business and human rights: the true confessions of a principled pragmatist" 2011 *European Human Right Law Review* 2 127.
[14]UN Sub-Commission on the Promotion and Protection of Human Rights, Economic, Social and Cultural Rights: Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights, 26 August 2003, E/CN.4/Sub.2/2003/12/Rev.2.
[15]See Kinley, Nolan and Zerial, "The Norms are Dead! Long Live the Norms! The Politics behind the UN Human Rights Norms for Corporations" in McBarnet *et al The New Corporate Accountability: Corporate Social Responsibility and the Law* 2007, page 467.
[16]UN Commission on Human Rights, 'Report o the United Nations High Commissioner on Human Rights on the Responsibilities of Transnational Corporations and Related Business Enterprises with Regard to Human Rights' UN doc. E/CN.4/2005/91 (15 February 2005).
[17]UN Commission on Human Rights, Human Rights Resolution 2005/69: Human Rights and Transnational Corporations and Other Business Enterprises, 20 April 2005, E/CN.4/RES/2005/69.
[18]UN Human Rights Council, 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, John Ruggie, 7 April 2008, A/HRC/8/5.

Human Rights Council and in 2011 presented the Guiding Principles, a vehicle intended to assist stakeholders understand and implement the Framework.

Following this, on 25 June 2011 the Guiding Principles were unanimously endorsed by the UN Human Rights Council and lauded, by many in the international community, as a progressive step toward framing the human rights obligations of businesses at an international level. The Guiding Principles were also said to represent an international consensus on the principles applicable to business and human rights.[19]

The Framework and the Guiding Principles establish a structure comprising of three pillars, namely:

(i) The State's responsibility to protect, which emphasises that the primary responsibility to protect human rights lies with the state;

(ii) Business's responsibility to respect, which emphasises that businesses have a responsibility to respect human rights (the SRSG has subsequently strongly clarified that this responsibility does not stem from any legally binding obligation for businesses under international law but rather a "social expectation")[20], and

(iii) Access to remedy, which emphasises that as part of their duty to protect against human rights abuse at the hands of business, States need to take appropriate steps to ensure, through judicial, administrative, legislative or other appropriate means, that when such abuses occur within their jurisdiction those affected have access to effective remedies. [21]

Although the Framework and the Guiding Principles emphasise that victims of human rights violations at the hands of business need to be afforded access to effective remedies, and restate that states have a duty to ensure this, they give little focus to how the states can achieve this. They also give no specific attention to gross human rights abuses. Instead, the Guiding Principles focus in how businesses can give effect to the right to access to remedies through mostly non-judicial mechanisms.

[19]See Deva "Treating Human Rights Lightly: a critique of the consensus rhetoric and the language employed by the Guiding Principles" in Deva and Bilchitz *Human Rights Obligations of Business* (2013) 78.
[20]See Bilchitz "Critiquing the Normative Foundations of the GPs" in Deva and Bilchitz *Human Rights Obligations of Business* (2013) 118.
[21]Guiding Principles (n 12), General Principles.

This becomes confusing when coupled with the fact that the principles fail to elaborate on any legally binding obligation on businesses to respect human rights.[22] The Guiding Principles furthermore give very little attention and focus to access to judicial remedies in the commentary relating to access to remedies. This effectively leaves victims with very few new viable avenues to real and effective access to remedies. As such, it has to be concluded that the Guiding Principles do very little to change the status quo in respect of one of the main issues that has led to the debate around business and human rights in the first place, effective access to remedies.

For this and other reasons, and despite their best intentions and the much lauding which they received after their endorsement, the implementation of the Guiding Principles has ben very slow, by both states and businesses, and the principles themselves have remained, to many, insufficient to deal with the many issues relating to the adverse impact of business on human rights.[23] In light of this, even four years after their endorsement, many scholars, activists and other members of the international community[24] maintain their deep dissatisfaction with the Guiding Principles, and continue the call for an alternative, more binding, route to be established to deal with the human rights obligations of business.

[22]See Nolan "The corporate responsibility to respect human rights: soft law or not law?" in Deva and Bilchitz *Human Rights Obligations of Business* (2013) 138.

[23]Treaty Alliance "Resolution on binding business and human rights treaty passes in Human Rights Council" 2014 *Global Policy Forum* https://www.globalpolicy.org/global-taxes/52651-treaty-alliance-press-release-on-resolution-on-binding-human-rights-standards.html (01-10-2015).

[24]See Bilchitz "The Necessity for a Business and Human Rights Treaty" (November 30, 2014). Available at http://dx.doi.org/10.2139/ssrn.2562760 (10-10-2015); Ganesan "Proper powers needed to uphold human rights" *Financial Times* (20 Jan 2011); "Joint Civil Society Statement on the Draft Guiding Principles on Business and Human Rights" January 2011, available at https://www.fidh.org/IMG/pdf/Joint_CSO_Statement_on_GPs.pdf; Blitt "Beyond Ruggie's Guiding Principles on Business and Human Rights: Charting an Embracive Approach to Corporate Human Rights Compliance" 2012 *Texas International Law Journal* Volume 48; Williamson "Rights groups slam UN plan for multinationals" *Financial Times* (17 Jan 2011); Deva and Bilchitz *Human Rights Obligations of Business* (2013); Human Rights Council 'Elaboration of an International Binding Instrument on Transnational Corporations and Other Business Enterprises with respect to Human Rights', A/HRC/26/9 (25 June 2014); Albin-Lackey (n 7) page 2-4.

1.2. Beyond the Guiding Principles

In a bid to move beyond the Guiding Principles on Business and Human Rights, in June 2014 the international community reacted to the insufficiency of the Guiding Principles by passing a resolution at the UN Human Rights Council, which began the process of elaborating on an international legally binding instrument in relation to business and human rights.[25]

This resolution established the open-ended intergovernmental working group on a legally binding instrument on transnational corporations and other business enterprises with respect to human rights. The working group's mandate is to elaborate on an international legally binding instrument to regulate, in international human rights law, the activities of transnational corporations and other business enterprises and their impact on human rights.[26]

One has to agree that the elaboration of a legally binding instrument is an important step towards dealing with the many issues that remain unaddressed and unresolved by the Guiding Principles in relation to business and human rights. However, while supporting this step, specifically in relation to effective access to remedies for victims of gross human rights violations by businesses, other steps should be taken to address the issue and a multi-pronged approach should be followed to hold businesses accountable to victims for gross human rights violations. In particular, such an approach would help to better address the need for victims to have access to remedies from businesses that grossly violate of human rights (such as compensation).

[25]Human Rights Council 'Elaboration of an International Binding Instrument on Transnational Corporations and Other Business Enterprises with respect to Human Rights', A/HRC/26/9 (25 June 2014) and Human Rights Council 'Elaboration of an International Binding Instrument on Transnational Corporations and Other Business Enterprises with respect to Human Rights', A/HRC/26/22/Rev.1 (26 June 2014).
[26]See point 1 of HRC Resolution 26/9 (n 25).

2. Effective Access to Remedies

2.1. Where do victims stand?

As already stated above affording victims of human rights abuses, especially gross human rights abuses, effective access to remedies is one of the key issues in the business and human rights field. Businesses often operate in more than one country, including poor or post conflict countries. One of the main challenges for victims of human rights abuses involving businesses within poor and post conflict countries is that their governments are often either unable or unwilling to enforce laws protecting human rights. This potentially leaves such victims in a worse position in pursuing remedies for violations of their rights than that of their counterparts living in states with better or more independent courts and judicial systems. This is true even if the laws required to protect the human rights of people within such countries are present. A government's unwillingness or inability to enforce their human rights laws on businesses that operate within their territory (host state) is an important consideration to take into account when addressing the question of effective access to remedies.

In such a set up, victims often find themselves trapped between two actors who have no interest in protecting their human rights, and where violations have been committed, remedying those violations.[27] For example, in Eritrea the government has been known to often mobilize and exploit forced labour, at times even assigning its conscripts to work for state-affiliated companies. An important question that follows is what happens when a business is also implicated in the use of this forced labour with the corrupt government, as is the case with Canadian mining firm Nevsun Resources?[28] Or for instance, in Papua New Guinea for a long time various human rights abuses, such as assault and gang rape, were being carried out by the security guards of one of the world's largest gold producers, multi-national company Barrick Gold.[29] The question that arises here is what can the victims do when the Papua New Guinea police refuse to investigate these crimes while the far removed international company refuses to even acknowledge that they are taking place?

[27]See cases relating to the Shell an Ogoniland Debacle *infra*; and Swart "The Khulumani Litigation: Complementing the work of the South African Truth and Reconciliation Commission" 2011 *Tilburg Law Review 16* 30.
[28]See Albin-Lackey "Hear No Evil: Forced Labour and Corporate Responsibility in Eritrea's Mining Sector" January 2013 *Human Rights Watch*.
[29]See Albin-Lackey "Gold's Costly Divide: Human Rights Impacts of Papua New Guinea's Porgera Gold Mine" February 20122 *Human Rights Watch.*

While the Guiding Principles rightly point out that states have the primary duty to protect human rights,[30] when dealing with corrupt or governments that simply have a very low or no capacity to deal with human rights abuses, including even gross human rights abuses, involving economically powerful businesses, the ability of victims to effectively access remedies is illusive. Therefore, it is imperative that we consider new ways that businesses can be held accountable for violations of human rights. It is also imperative that these ways go beyond the usual rhetoric of the host state being responsible to enforce these rights, if we are to practically deal with the remedial gap that undeniably exists in the business and human rights field.

2.2. Access to remedies and the Guiding Principles

As already touched on above, the Guiding Principles apparently attempt to address the issue of effective access to remedies in their elaboration of the final pillar of the Framework 'Access to Remedy'.[31] In terms of the principles, both the state and businesses are required to provide effective access to remedies for victims by way of either judicial and or non-judicial mechanisms, however, it is only the state that has a legal duty to do so.[32] The SRSG thus interprets this pillar as flowing from both the states duty to protect as well as businesses responsibility to respect (which is bases on social expectation). In line with this interpretation, the Guiding Principles list various judicial and non-judicial mechanisms that can be used to provide access to remedies.

In respect of the states duty to protect, the Guiding Principles hold that unless the state takes appropriate steps to investigate, punish and redress business related human rights abuses when they occur; the state duty to protect is rendered weak or meaningless.[33] Therefore, the Guiding Principles recommend that states take appropriate steps to ensure the effectiveness of domestic judicial mechanisms when addressing human rights abuses at the hands of businesses.

According to the Guiding Principles, this includes considering ways to reduce legal, practical and other relevant barriers that could lead to a denial of access to remedies.[34] Some of the legal and practical barriers include the costs of bringing a claim against

[30]Guiding Principles (n 12), Foundational Principles, page 3-4.
[31]Guiding Principles (n 12), page 27-35.
[32]Guiding Principles (n 12), Operational Principles, page 28- 29.
[33]Guiding Principles (n 12), Foundational Principles, page 27.
[34]Guiding Principles (n 12), Principle 26, page .28.

businesses being too high or a difference in the way that legal responsibility is attributed to businesses under different domestic laws. However, the lack of any suggestions relating to how states can address these barriers does very little for the help the state on the issue of effective access to judicial remedies. In addition, the omission of addressing factors that cause the accountability gap makes this principle and its recommendations less helpful to the debate regarding remedies and business related human rights abuses.

In respect of the corporate responsibility to respect, the SRSG gives a number of non-judicial remedies and effectiveness criteria to aid businesses give effect to the pillar of access to remedy.[35] Some of the effectiveness criterion includes legitimacy, accessibility, transparency and the predictability of the non-judicial mechanisms.[36] While these are helpful guidelines for businesses to use in providing for effective access to non-judicial remedies, absent of any binding obligation to respect human rights other than those that arise from social expectation, the use of these and other criterion remains solely in the discretion of the business. As such, it is hard to understand how the SRSG's approach will help provide effective access to any remedies for victims of gross human rights abuses at the hands of businesses.

It must also be noted that despite the non-binding position taken by the Guiding Principles in relation to businesses' human rights obligations, the SRSG gives special focus to non-judicial remedies in the principles.[37] This is indicative of SRSG's preference of the pursuit of non-judicial remedies instead of judicial remedies in the field of business and human rights. This is evident, as authors Deva and Bilchitz observe, from the way that the principles not only suggest various non-judicial remedial actions which businesses can take to provide access to remedies, but also the way in which they devote weighty attention to outlining the 'effectiveness criteria' for non-judicial grievance mechanisms. It has been further observed that the same weight and attention is not given to judicial mechanisms to reduce well-known barriers to judicial remedies.[38]

By giving this preference to non-judicial remedies, the principles perpetuate the problematic set-up that continues to plague the current issues around accountability of

[35]Guiding Principles (n 12), page 30-35.
[36]Guiding Principles (n 12), page 33.
[37]Guiding Principles (n 12), Operational Principles, page 29-35.
[38]Deva and Bilchitz *Human Rights Obligations of Business* (2013) 16.

businesses for human rights abuses, which is continued minimal or weak government action and an unwarranted deference to the prerogatives of businesses. [39]

It is therefore argued that the Guiding Principles' approach to access remedies does not help move the debate any further in the right direction. In particular, the deference to businesses' prerogatives and non-judicial remedies will not aid the creation of a culture of transparent accountability and the provision of precedents and examples when providing remedies for victims of gross corporate human rights abuses. Without transparency and precedents, each business and human rights complaint or action will be starting from nowhere each time they attempt to access remedies.

Further, the Guiding Principles (and the SRSG's) flawed non-recognition of any legal obligations on businesses in relation human rights further aggravates the situation, as there is no obligation for companies to apply a uniform approach (or any approach) to cases of gross human rights abuses in which they are involved. This inherently has the potential to lead to unequal treatment of victims in respect of the remedies they can seek or receive. Further still, there would be no reason for businesses to begin to disclose the intricacies of their non-judicial approaches to remedying gross violations of human rights (which effectively leaves the criterion of transparency in the realm of voluntarism, once again).

[39] Albin-Lackey (n 7) page 3.

2.3. Access to remedies and international human rights law

Article 8 of the Universal Declaration on Human Rights provides that everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted to them by the constitution or law.[40] This right is also confirmed in many binding international human rights instruments,[41] which provide for the right to a remedy for victims of human rights violations. For example, article 2 of the ICCPR provides that each state party undertakes:

> *a) To ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity;*
>
> *b) To ensure that any person claiming such a remedy shall have his right thereto determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the State, and to develop the possibilities of judicial remedy;*
>
> *c) To ensure that the competent authorities shall enforce such remedies when granted.*[42]

In addition, many regional conventions[43] protecting human rights also provide for the right to a remedy for victims of violations of human rights. For example, article 7 (a) of the African Charter provides that everyone has the right to an appeal to competent national

[40](n 1), Article 8.
[41]In particular see: Article 8 of the Universal Declaration of Human Rights (n 1); Article 2 of the ICCPR (n 2); article 6 of the UN General Assembly, International Convention on the Elimination of All Forms of Racial Discrimination, 21 December 1965, United Nations, Treaty Series, vol. 660, p. 195, available at: http://www.refworld.org/docid/3ae6b3940.html (14-10-2015), article 14 of the UN General Assembly, Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 10 December 1984, United Nations, Treaty Series, vol. 1465, p. 85, available at: http://www.refworld.org/docid/3ae6b3a94.html (14-10-2015), and article 39 of the UN General Assembly, Convention on the Rights of the Child, 20 November 1989, United Nations, Treaty Series, vol. 1577, p. 3, available at: http://www.refworld.org/docid/3ae6b38f0.html (14-10-2015).
[42]ICCPR (n 3), article 2.
[43]In particular see: Article 25 of the Organization of American States (OAS), American Convention on Human Rights, "Pact of San Jose", Costa Rica, 22 November 1969, available at: http://www.refworld.org/docid/3ae6b36510.html (14-10-2015) and article 13 of the Council of Europe, European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14, 4 November 1950, ETS 5, available at: http://www.refworld.org/docid/3ae6b3b04.html (14-10-2015).

organs against acts violating his fundamental rights as recognised and guaranteed by conventions, law, regulation[s] and customs in force.[44]

Furthermore, the UN Basic Principles and Guidelines on the Right to a Remedy and Reparation[45] elaborate that:

> *Remedies for gross violations of international human rights law and serious violations of international humanitarian law include the victim's right to the following as provided for under international law:*
>
> *(a) Equal and effective access to justice;*
>
> *(b) Adequate, effective and prompt reparation for harm suffered;*
>
> *(c) Access to relevant information concerning violations and reparation mechanisms*

What is clear from the above is that subjects of human rights not only have the right to have these rights protected and promoted, but to also, when violations of these rights occur, be afforded access to remedies. Many of the instruments further more envision, specifically, effective access to judicial remedies by competent courts or tribunals. What is clear from the above is that the right to remedies arises by virtue of the right attached to the subject of that right and is not dependant on who or what the violator is. The remedies themselves can be a different range of things such as apologies, restitution, rehabilitation, financial or non-financial compensation and punitive sanctions (whether criminal or administrative, such as fines), as well as the prevention of harm through, for example, injunctions or guarantees of non-repetition.[46]

The SRSG has rightly acknowledged in the past that many human rights are internationally agreed upon and attach to all human beings by virtue of the fact that they are human.[47] As

[44] Article 7 (a) of the Organization of African Unity (OAU), African Charter on Human and Peoples' Rights ("Banjul Charter"), 27 June 1981, CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982), available at: http://www.refworld.org/docid/3ae6b3630.html (14-10-2015).

[45] UN General Assembly, Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law : resolution / adopted by the General Assembly, 21 March 2006, A/RES/60/147, available at: http://www.refworld.org/docid/4721cb942.html (14-10-2015).

[46] Guiding Principles (n 12), page 27.

[47] Commission on Human Rights, "Interim Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises" E/CN.4?2006/97 (22 February 2006, para 19.

such, it must be concluded that every human being on earth is the subject of human rights if such rights attach to them by virtue of the fact that they are human beings. It has been argued therefore, that if this is the normative basis of human rights, everybody on earth has a legal obligation to respect these human rights.[48] In light of this, it should then follow that the right to remedies is enforceable against anyone who violates human rights.

Therefore, in addition to ensuring that remedial mechanisms are available and working, states should also ensure that this right to remedies and to access thereof should be enforceable against all who violate human rights. This is where the issue becomes problematic in the business and human rights field because businesses, for many reasons are able to circumvent the right of victims to access to remedies.

One such reason is that while, in terms of the Guiding Principles, the SRSG rightly points out that victims should have access to effective remedies, he neglects to elaborate exactly what gives rise to the need for access to these remedies (i.e. the violation of these rights by anyone). Due to the omission of elaborating on the nature of these rights in the Guiding Principles and who such rights are legally enforceable against, as well as the negating of any legal obligations on business in respect of human rights, the Guiding Principles fail to assist making accessing remedies any easier for victims of business related human rights abuses.

Another reason why it is not always easy to enforce these rights against businesses is what Bilchitz calls "the accountability gap".[49] The accountability gap is caused by many factors. Some of the main factors include corporate structures that cut across multiple jurisdictions, weak governance zones in countries where laws are not properly enforced or where courts lack independence, and the corporate structure itself, which can be a convoluted collection of companies and subsidiary companies with limited liability and each with its own, avowed, separate legal personality.[50]

These and other factors pose a significant challenge to victims for accessing remedies against businesses that violate, even grossly, human rights. Furthermore, the contrariness

[48]Bilchitz "A chasm between 'is' and 'ought'? A critique of the normative foundations of the SRSG's Framework and the Guiding Principles" in Deva and Bilchitz *Human Rights Obligations of Business* (2013) 113.
[49]See Bilchitz D "The Necessity for a Business and Human Rights Treaty" (14 November 2014). Available at http://dx.doi.org/10.2139/ssrn.2562760 (10-05-2015).
[50]Bilchitz D "The Moral and Legal Necessity for a Business and Human Rights Treaty" (10 February 2015) available at http://business-humanrights.org/sites/default/files/documents/The%20Moral%20and%20Legal%20Necessity%20for%20a%20Business%20and%20Human%20Rights%20Treaty%20February%202015%20FINAL%20FINAL.pdf (03-05-2015).

of the Guiding Principles on the issues further muddy the already murky waters. However, the attainment of effective access to remedies should not be so contentious if one has regard to the fact that where there is a right, there is a remedy and as stated above, the right to a remedy should be enforceable against anyone who violates human rights (regardless of who and what they are). This paper will now turn to the question of whether access to remedies can be satisfactorily attained in other ways, particularly through domestic courts and litigation against businesses

3. Access to remedies for gross human rights violations by businesses in domestic courts

3.1. Case Study the Ogoniland debacle

In the 1990's Dutch and Nigerian oil exploration companies began exploiting oil resources in the Ogoni Niger Delta area. During this time, the Nigerian Government brutally crushed peaceful resistance to the oil development in the area by the indigenous Ogoni people leading to a wide range of gross human rights violations including mass murder, displacement and torture. In many attempts by the victims to seek effective access to remedies for the injustices suffered by them during this time, members of the Ogoni people sought remedies in various forums against the Nigerian Government and the businesses involved in the violations. For the purpose of this paper, focus will only be given to the attempts to hold the businesses accountable for their role in the various violations of the Ogoni people's human rights

As a point of departure it is, however, worth mentioning that in the case *Social and Economic Rights Action Centre (SERAC) and another v Nigeria*[51] the African Commission on Human and Peoples Rights found that the actions taken by the government violated a number of human rights which are guaranteed by the African Charter on Human and Peoples Rights. Many of these human rights are also guaranteed in other international human rights instruments. At the African Commission, throughout the case, very little attention was given to the actions of the companies involved in the oil exploration and in this regard the Nigerian government alone was ordered to pay compensation to the Ogoni people along with a number of other directives aimed at remedying the violations that occurred.

It is not clear whether the government ever compensated any of the victims, although the late President Umar Musa eventually rescinded Shell's oil exploration licence over Ogoniland in 2008. Instead, the government seemed to influence the courts into prosecuting and killing many activists and leaders of the Ogoni people including Ken Saro-

[51] *Social and Economic Rights Action Centre (SERAC) and Another v Nigeria* AHRLR 60 (ACHPR 2001).

Wiwa who was one of the Ogoni nine hung by the Nigerian Government for a peaceful protest against Shell's pollution.[52]

These and other issues clearly made access to justice in the Nigerian domestic courts ineffective and illusive. What then followed was a string of attempts by various members of the Ogoni people at seeking effective access to judicial remedies in the domestic courts of other jurisdictions, such as the United States of America (USA), the United Kingdom (UK) and the Netherlands.

Litigation in the UK

The court case, which were filed in the UK against Royal Dutch Shell and Shell Petroleum Development Company Nigeria on behalf of Nigerian farmers, for two oil leaks that occurred in the Bodo region between 2008 and 2009, very quickly reached an out of court settlement. What is interesting is that the result of the settlement talks was that Royal Dutch Shell (the parent company) was left out of settlement and Shell Petroleum Development Company (the Nigerian subsidiary) would enter talks for compensation with the affected communities.[53]

This is interesting because all parties who ended up settling were Nigerian, however in order for the community to be taken seriously its apparent that they had to take the case all the way to courts in the UK. This speaks even greater volumes to how unequal the treatment is of victims in different jurisdictions and court. When faced with the task of seeking remedies against Shell in Nigeria, victims received little effective access to justice, whereas the result was significantly different in the UK's jurisdiction.

Litigation in the Netherlands

In 2009, in the Netherlands, three torts (delict) cases were brought against the Shell Petroleum Development Company and its parent company Royal Dutch Shell.[54] Under Dutch law, it is possible for a holding company to be held liable for the acts and omissions

[52]Chinwo "Nigeria: Clear Ken Saro-Wiwa, Others of Murder, MOSOP Urges Govt" *This Day* (November 11, 2014) http://allafrica.com/stories/201411111319.html.
[53] Vidal "Shell Accepts Liability for Two Oil Spills in Nigeria" *The Guardian* (03 August 2011) http://www.theguardian.com/environment/2011/aug/03/shell-liability-oil-spills-nigeria.
[54]*Dooh et al. v Royal Dutch Shell and Shell Petroleum Development Company* (2013) District Court of The Hague; *Akpanand Milieudefensie v Shell* (2013) District Court of The Hague and *Oguru et al. v Shell* (2013) District Court of The Hague.

of one or more of its group companies.[55] However, these cases were unsuccessful as the courts reasoned that the proximity between the parent companies and the human rights violations suffered by the plaintiffs was insufficient, and as such, the claims were rejected. One of the cases has since been appealed.[56]

The position of the court taken in this instance is problematic for the victims of the Shell Nigeria debacle and their right to access to judicial remedies. While it is noted that in law, Shell Nigeria and Royal Dutch Shell are seen as two separate legal entities, the argument that there is an insufficient link between the two companies militates against access to effective judicial remedies where the victims have tried and cannot seek redress in Nigerian courts. It is also superficial to say that there is no sufficient link because there undoubtedly is no end to the benefit derived by a parent company from the activities of its subsidiaries. Furthermore, depending on the shareholding, the parent company does have effective control over its subsidiary company. As such, even if there was no sufficient link between the victims and Royal Dutch Shell, the control could be possibly used to establish a link.

Litigation in the United States of America

Two cases stand out in the Shell Nigeria debacle the US courts. The first is the *Wiwa v Shell*[57] case that was first filed in 1996. The lawsuit was brought against the Royal Dutch Petroleum Company and Shell Transport and Trading Company; the head of its Nigerian operation, Brian Anderson; and the Nigerian subsidiary itself, Shell Petroleum Development Company. In the papers, the victims sought redress from the defendants accusing them of complicity in human rights abuses against the Ogoni people in Nigeria, including summary execution, crimes against humanity, torture, inhumane treatment, arbitrary arrest, wrongful death, assault and battery, and infliction of emotional distress. The cases were brought under the Alien Tort Claims Act (ATCA).[58] This case was litigated for almost 13 years before it finally ended in an out of court settlement, members of the

[55]See Lambooy T, Argryou A and Varner M "An Analysis and Practical Application of the GP's" in Deva and Bilchitz *Human Rights Obligations of Business* (2013) 346.
[56]See https://milieudefensie.nl/english/shell/courtcase
[57]*Wiwa v. Royal Dutch Petroleum Company*, No. 96 Civ. 8386 (KMW)(HBP), 1998 U.S. Dist. LEXIS 23064 (S.D.N.Y. Sept. 25, 1998).
[58]See Centre for Constitutional Rights "Wiwa et al v. Royal Dutch Petroleum et al" https://ccrjustice.org/home/what-we-do/our-cases/wiwa-et-al-v-royal-dutch-petroleum-et-al (16-10-2015).

Wiwa family were given USD 15.5.million without an apology or any admission of guilt from Shell itself.[59]

The second important case is the *Kiobel v Royal Dutch Petroleum* case.[60] This case also revolved around the complicity of the Royal Dutch Petroleum Company in the gross violations of human rights which took place in Nigeria against the Ogoni People. This case was also brought under ATCA but unlike in *Wiwa v Shell* the case did not settle out of court. Rather, the case went all the way to the US Supreme Court on the question of whether corporations can be held accountable for human rights abuses and whether USA federal courts can hear claims arising from human rights violations committed abroad under ATCA.[61]

On 17 April 2013, after almost 17 years of litigation, the Supreme Court issued its decision ruling that ATCA could not be applied to Shell's actions in Nigeria. The reasoning of the court was not only a fatal blow to the *Kiobel* case but also significantly affects all victims and cases that have sough remedies in US courts under ATCA. The Supreme Court held in this case that the application of ATCA is limited to only those cases that "touch and concern" the U.S. with "sufficient force".

The ruling in Kiobel has been cited as a severe set back for human rights.[62] The limiting of the application of ATCA negatively affects many other cases that are or would have been brought before the US courts to seek effective access to judicial remedies and corporate accountability for human rights violations at the hands of business that took place in a foreign state. For instance, cases such as the *Khulumani* case now have a difficult and onerous case to prove in the US courts in trying to access remedies against businesses that are alleged to have been complicit in human rights violations that occurred during apartheid.[63]

Before the *Kiobel* ruling, ATCA was seen as a significant mechanism for increasing corporate accountability, especially in relation to human rights violations committed in

[59] Pilkington "Shell pays out $15.5m over Saro-Wiwa killing" *The Guardian* (09 June 2009) http://www.theguardian.com/world/2009/jun/08/nigeria-usa (16-10-2015).
[60] *Kiobel v Royal Dutch Petroleum Co.*, 113 S. Ct. 1659 (No. 10-1491) (2013).
[61] Centre for Constitutional Rights "Kiobel v. Royal Dutch Petroleum Co. (Amicus)" https://ccrjustice.org/home/what-we-do/our-cases/kiobel-v-royal-dutch-petroleum-co-amicus (16-10-2015).
[62] Jogerson "Set-Back for Corporate accountability on Human Rights: Why the US Supreme Court Ruling to Limit the Alien Tort Statute Was Bad News Waiting to Happen" *Danish Institute for Human Rights*, 23 April 2013.
[63] See Swart M "Requiem for a Dream? The Impact of Kiobel on Apartheid Reparations in South Africa" 2015 *Journal of International Criminal Justice* 13, pages 353-371.

foreign states by businesses.[64] This was viewed as one of the most viable vehicles available for foreign victims of gross human rights violations by businesses operating abroad but which still had a foot print in a the United States. It was also ideal because it gave victims access to better and more sophisticated or independent domestic courts and legal dispensations, and therefore better access to judicial remedies than that which they would have been afforded in their own country. Although some remain hopeful, that this is not the end of ATCA and for securing access to justice and remedies for foreign victims of business related human rights violations,[65] as it currently stands, the ruling has dealt a fatal blow to the prospects of domestic courts in the USA being a viable option for foreign victims seeking effective access to judicial remedies.

The ruling is even more undesirable because ATCA had the potential to be used as a legislative model for other counties and jurisdictions in order to close the accountability gap, which affects effective access to judicial remedies in the business and human rights field. The ruling is unfortunate, however it only applies to victims attempting to seek remedies in the domestic courts of the USA where there is not a sufficient link between the forum and the violation of human rights in foreign countries by the actor or business in question. As such, one would think that with an effective domestic court system, such as that found in the United States, access to judicial remedies should be easier to secure for non-foreign claimants. However, this too has its challenges.

3.2. Other challenges for pursuing human rights cases against businesses in domestic courts

Securing access to effective remedies can also be a challenge in the developed world with sophisticated and fair legal systems and domestic courts.[66] One such challenge for access to justice and remedies in domestic courts is that in many cases where the victims have a legitimate claim against a business that could lead to just and effective remedies being sought and obtained before a court of law, the businesses usually opt for an out of court settlement. This is a problem because it goes on to further work against the progression of access to effective judicial remedies.

[64] See Kerr (n 10) page 476.
[65] See closing remarks by Centre for Constitutional Rights in respect of "Kiobel v. Royal Dutch Petroleum Co. (Amicus)" https://ccrjustice.org/home/what-we-do/our-cases/kiobel-v-royal-dutch-petroleum-co-amicus (16-10-2015).
[66] Wilde Ramsing, Sandjojo, Genovese, Daniel "Remedy Remains Rare" 2015 OECD Watch available at http://oecdwatch.org/publications-en/Publication_4201 (18-08-2015).

For instance, the amounts settles for in out of court settlements between companies and victims of human rights abuses involving such companies are usually much lower than that which the victims deserved or could have received should they have continued on to successfully litigate their cases. In such instances, instead of risking the reputational and economic damage[67] that comes with losing a mass action case for violations of human rights, businesses usually throw money at the case until it disappears.

One such example is the Vioxx debacle. In 2001, United States cardiologist Dr Eric Topol published a paper warning about the risks of the drug Vioxx (a pain killer), which was manufactured by a drug company called Merck. In 2004 a clinical trial showed that the drug raises the risk of heart attacks, which led to Merck abandoning manufacturing of the drug. However internal company documents later revealed that Merck's scientists were aware and concerned about the risks of the drug many years before but had not acted on or disclosed the risks.[68]

By the time the drug was taken off the market, it was estimated that over 20 million Americans had received Vioxx. In the wake of the findings 26,000 cases were filed against the company in United States courts. The liability for the company was estimated at USD 25 billion however the company managed to make out of court settlements with many of the claimants, which the overall figure was capped at USD 4.85 billion.[69] This figure is only 19.4% of what the company was essentially liable for due to their actions. Merck is now currently worth a market cap of USD 164 billion. In the face of the facts of this one example alone, the countless lives which were lost by heart attacks due to the actions of one company and its violation of the right to health (and one can even argue, the right to life), these facts are undeniably unfair. However, there are many cases just like this.

The Blackwater/Iraq debacle is another example of the injustices that can arise from of out of court settlements. Blackwater, a privately owned security firm, was sued in 2007 in USA courts along with its parent company Prince Group LLC and its owner Eric Prince, alleging direct liability for extra-judicial killings and war crimes following the actions of Blackwater employees in Iraq. Four employees of the defendant fired into a crowd of unarmed civilians in Nisour Square during the Iraqi war using machine guns and grenade

[67] In the 1990's United States company Dow Corning into bankruptcy protection as a result of losing the a mass torts (delictual) case. See In re Dow Corning Corp., No. 95-20512 (Bankr. E.D. Mich. filed May 15, 1995).
[68] Berenson "Merck Agrees to settle Vioxx Suits for 4.85 billion" *the New York Times* (9 November 2007) http://www.nytimes.com/2007/11/09/business/09merck.html?_r=0 (accesses 16-10-2015).
[69] Berenson "Merck Agrees to settle Vioxx Suits for 4.85 billion" *the New York Times* (9 November 2007) available at http://www.nytimes.com/2007/11/09/business/09merck.html?_r=0 (18-10-2015).

launchers. Although the employees were eventually found guilty of murder, manslaughter and weapons charges in 2014,[70] the cases brought by the families for compensation for the negligence of the company that led to the death of their loved ones were settled out of court.[71] Once again, we see that there is a missed opportunity for finding good and binding precedent on such an important and contemporary issues such as the human rights liabilities of private security companies in times of war.

One cannot argue against the approach of out of court settlements from a business perspective because certainly makes business sense. Businesses are not compelled to continue in endless litigation for the sake of precedent or to uphold human rights. In addition, businesses have to take their shareholders interests into account and ensure that those to whom they owe a fiduciary duty have their monetary interests protected. It is all about the money or the "bottom lime".

However in this evolving world, when it comes to human rights, businesses cannot only be held to the standard of "the bottom line". Out of court settlements are problematic for the question of effective access to judicial remedies in business and human rights. This is true because no other actors or violators of human rights, especially on such a large scale, can avoid being held accountable by simply throwing money at a problem. States and individuals alike are held to account for their actions when they lead to violations of human rights. In such cases, there becomes entrenched a culture of accountability and the creation of precedent for the benefit of future victims of gross human rights abuses against such actors. However it is not so in the business realm and this further feeds the remedial problems and the accountability gap existent in the business and human rights field.

Further still the fact that in the Vioxx cases example, the claims were only litigated in the United States, is another compelling reason to tackle the issue of business and human rights in terms of access to judicial remedies at an international or at the very least a regional level. This is because Vioxx was not only used in the United States but was distributed an promoted globally by Merck.[72] So another important consideration is how victims of the drug in other countries, where the main company is not registered and where

[70]The editorial board "A Verdict on Blackwater" 2014 *New York Times* http://www.nytimes.com/2014/10/23/opinion/a-verdict-on-blackwater.html?_r=0 (12-10-2015).
[71]Zerk J "Corporate Liability for gross human rights abuses: Towards a fairer and more effective system of domestic law remedies" A report prepared for the Office of the UN High Commissioner for Human Rights, report commissioned in May 2013, page 17.
[72] Shnier "Merck publishes fake journal to promote Vioxx and Fosamax" *The Politics of Prescribing* http://adrienneshnier.com/1/post/2013/05/merck-publishes-fake-journal-to-promote-vioxx-and-fosamax.html.

victims are faced with the challenges of a less sophisticated legal system and courts, are meant to have effective access to judicial remedies. These and other considerations mentioned above are among some of the compelling reasons why a new approach needs to be adopted in holding businesses accountable for gross human rights violations and in affording victims of human rights abuses involving businesses access to judicial remedies.

3.3. Is litigation in domestic courts a viable option for access to remedies?

From the above cases study on the Ogoni people and their quest for access to remedies in various forums and jurisdictions, it seems clear that seeking effective access to judicial remedies in foreign and local domestic courts is not always a viable options. This case study is by no means a representation of the outcomes of all cases relating to business and human rights, however, it does serve to highlight many of the problems that victims have or will encounter when seeking remedies for gross violations of human rights by businesses in domestic courts.

Further, more the challenges discussed above in relation to out of court settlements even in jurisdictions with somewhat effective and independent domestic courts serves to further highlight the challenges that currently face victims when seeking access to remedies for gross human rights violations. As stated above, problems such as, the lack of transparency, acknowledgement of wrongdoing and the undercutting of the compensation that victims truly deserve for the violation of human rights by businesses all serve to make access to effective remedies in business and human rights, even in domestic courts, deeply problematic.

Having consideration to all the issues and prospects stated above that relate to access to remedies for victims of human rights abuses, this paper will now explore some of the ways in which the international community can respond to challenges, beyond the elaboration of a binding treaty.

4. A way forward to addressing the remedial challenges for victims in the business and human rights field

"Dream no small dreams for they have no power to move the hearts of men."

Johann Wolfgang von Goethe,
(1749-1832)

4.1. Towards regional efforts

It must be stated from the onset that, in relation to the proposals which will be stated below, a regional approach to agreeing and forging a way forward to combat business and human rights issues relating to access to remedies is more desirable than attempting to attain international consensus. As such, this paper will specifically focus on the African region and its sub-regions. This regional approach to addressing the issues is favoured, in this paper, over an international one for two reasons: (i) reaching international consensus has been one of the biggest challenges in the field of business and human rights for a very long time, one of the reasons for this is the vastly differing interests that inform the North/South divide; and (ii) it is believed that solving the issue of access to effective judicial remedies is more pressing in developing nations than in developed nations, for reasons that will be further elaborated below.

A massive question that would be on anyone's lips right now is why the poorer regions would be interested in enforcing human rights standards and obligations on businesses. One of the reasons for this question may be the fact that states, especially the poorer states, are or should be weary to take too strong a stance against businesses on human rights issues for fear of losing business' interests and investment in their country. Another reason why this question seems valid more so when considering the fact that poorer states themselves do not have the greatest track records themselves in relation to human rights promotion and protection.

However, there are various answers to this question that will not be dealt with in detail here, but to give a few:

(i) For one, it seems that developing states are usually on the receiving end of some of the worst human rights violations involving businesses.[73] As such, it would be in the interest of the citizens of developing states to have better effective access to remedies against businesses for the gross human rights violations in which they are implicated.

Any human rights activist would believe this to be enough of a reason for government, especially developing governments to act to regulate the impact of business activities on human rights. However, it is undeniable that many of these governments are also about the "bottom line" and as such one would think that the protection of their citizens from human rights abuses, even gross human rights violations, is not very high up on their lists.

(ii) However, another reason can be found for states in poorer, developing regions to be at the forefront of enforcing human rights obligations on business and this time- its about to the "bottom line".

In 2010, a groundbreaking study by Global Financial Integrity[74] made the following conclusions in relation to illicit financial flows from Africa:

- *Total illicit financial outflows from Africa, conservatively estimated, were approximately $854 billion during the period 1970 to 2008;*
- *Total illicit outflows from Africa may be as high as $1.8 trillion;*
- *Sub-Saharan African countries experienced the bulk of illicit financial outflows with the West and Central African regions posting the largest outflow numbers;*
- *Illicit financial outflows from Africa grew at an average rate of 11.9 percent per year.*[75]

According to the UN Economic Commission for Africa, illicit financial flows out of Africa have become a matter of major concern because of the scale and negative impact of such flows on Africa's development and governance agenda. The estimated illicit financial

[73] See for instance the Danzer Group case on human rights violations in the Democratic Republic of Congo; the Total case from Myanmar; the Kiobel case; Rio Tinto case relating to complicity in Human Rights abuses in Bougainville; Talisman Energy case from South Sudan; the Anvil Mining case relating to human rights abuses in the Democratic Republic of Congo; the Unocal case from Myanmar; and the Khulumani Lawsuits from South Africa, to name a few.

[74] Kar and Cartwright-Smith "Illicit Financial Flows from Africa: Hidden Resource for Development" Global Financial Integrity report, March 26, 2010 available at http://www.gfintegrity.org/storage/gfip/documents/reports/gfi_africareport_web.pdf (18-10-2015).

[75] Thabo Mbeki Foundation "Tackling Illicit Capital Flows for Economic Transformation" available at http://www.thabombekifoundation.org.za/Pages/Tackling-Illicit-Capital-Flows-for-Economic-Transformation.aspx 16-10-2015).

flows out of Africa is at least double the official development assistance that Africa receives and, indeed, the estimate may well be short of reality as accurate data does not exist for all transactions and for all African countries.[76]

Thinking in line with the use of the words illicit cash flows one would imagine that drug cartels and other sinister actors are at the forefront of these illicit cash flows out of Africa. However according to Thabo Mbeki (who chairs the High Level Panel on Illicit Financial Flows from Africa of the UN Economic Commission for Africa), *et al,* multi-national corporations are at the forefront of the culprits of the illicit cash flows out of Africa. Through tax evasion and even fraud, businesses manage to escape with at least USD 50 billion in money that could be used to develop Africa, annually.[77]

This has been recently brought to the attention of African leaders when Mbeki directly addressed the Pan African Parliament on this very issue. So as far as avoiding enforcing human rights on businesses for fear of losing their investment, it seems Africa is already losing more than it previously knew, as such there is good reason for African leaders to abandon this line of thinking.

(iv) In addition to all of the above, the most compelling reason for states to act and find new ways to enforce human rights standards on businesses can be found in the preamble of many international human rights instruments. Namely that "recognition of the inherent dignity and of the equal and unalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world".[78] There can be no true development in developing countries absent of human development and the championing of human rights. Once African leaders truly recognise this, they will take the forefront in advocating for stronger human rights enforcement, especially in relation to business and human rights, rather than continuously waiting for other nations and regions to dictate the standards and norms for them.

[76] See UN Economic Commission for Africa "IFF Background" http://www.uneca.org/pages/iff-background (16-10-2015).
[77] See Mbeki *et al* "Illicit Financial Flows Report of the High Level Panel on Illicit Financial Flows from Africa" 2015 report commissioned by the AU and the ECA Conference of Ministers of Finance, Planning and Economic Development; City Press "Private companies getting away with tax evasion – Thabo Mbeki" *News 24* 02 February 2015 (18-10-2015); Whittles "Mbeki: Illegal Financial Flows Crippling Africa" 21 May 2015, *Eye Witness News* http://ewn.co.za/2015/05/21/Mbeki-Illegal-financial-flows-cripple-Africa (18-10-2015); Agutamba "Africa loses $50 billion to multinational firms annually" *the New Times* http://www.newtimes.co.rw/section/article/2015-05-21/189005/ (18-10-2015).
[78] *Universal Declaration of Human Rights* (n 1) first recital of the preamble.

In light of the above there is very good reason for African states to pursue new ways to hold businesses accountable for human rights violations, and advance the need for access to effective remedies at a regional and sub-regional level. In this respect, it is worth mentioning that developing nations are already in some ways at the forefront of pushing for binding obligations on business with regards to human rights. For instance, the UN Human Rights Council resolution 26/9[79] was sponsored by South Africa and Ecuador. Furthermore, if one looks at the voting figures of the same resolution, all but one country that voted in favour of the resolution was a developing country, namely Russia. In addition, out of the 20 developing nations that voted to pass the resolution 10 were African nations, including South Africa, Namibia and Kenya.[80]

4.2. Improving upon what is already there: The human rights due diligence and regional enforcement

Despite their many shortfalls, the Guiding Principles do offer some sound options that if adapted correctly can be used to secure accountability for companies and effective access remedies for victims. One such option is the human rights due diligence concept proposed by the Guiding Principles.

Principle 17 establishes the concept of the human rights due diligence and provides that businesses should carry this out to: (i) assess their actual human rights impact; (ii) act upon the findings; (iii) track responses; and (iv) communicate how impacts are to be addressed.[81] Although this concept is nothing more than a suggestion for businesses to consider in carrying out their duty to respect human rights, which is based on social expectation according to the SRSG, the concept could be helpful if given some legal obligatory backing by states.

In this regard, we can consider the model of the environmental impact assessment, which is a form of due diligence that companies whose activities have the potential to cause environmental damage should conduct. Environmental impact assessments can be defined as procedures that ensure that the environmental implications of decisions are taken into account before those decisions are made.[82]

[79]UN (n 25).
[80]See voting results on "Resolution on binding human rights standards passes in Human Rights Council" (n 23).
[81]Guiding Principles (n 12), Operational Principles, page 13.
[82]See European Commission website- Environment http://ec.europa.eu/environment/eia/home.htm (19-10-2015).

The requirement to conduct environmental impact assessments is often found in domestic legislation and in commercial contracts between parties who wish to engage in a transaction that could have an impact on the environment. Those decisions can pertain to prospective projects or the funding thereof.

Under South African Law, activities for which an environmental impact assessment is required in terms of section 24(2)(a) and (d) of the National Environmental Management Act[83] are listed and published in government gazettes from time to time. In terms of South African Law an environmental impact assessment is a regulatory requirement needed by businesses that wish to conduct any activities or engage in any projects that are listed in the aforementioned list. In order to carry out the activity or project, the company in question is required to not only carry out the environmental impact assessment, but also apply for a permit, with the results of that assessment, with the relevant government authority. Due to these strict requirements, the need for an environmental impact assessment usually finds its way into many commercial contracts, for example banks require it before funding a big project that could possibly have an environmental impact.

However, the environmental impact assessment model is not without its faults.[84] For one, in many instances such assessments have become nothing more that a mere formality for businesses wanting to engage in potentially environmentally harmful activities. Once the reports are filed and the relevant permits are obtained businesses still circumvent certain standards of actions in relation to what is contained in their environmental impact assessment or policy. Governments have also not established many effective monitoring mechanisms to ensure that all decisions being made by businesses are in line with their respective environmental impact assessments. Furthermore, it has been seen time and time again, that businesses knowingly make decisions that are in contravention of responsible environmental considerations, with many businesses even budgeting for the fines which will be imposed for their irresponsible actions should they be found out. These are valid pitfalls to keep in mind when considering in the environmental impact assessment model. However the model still provides some assistance for future thinking in relation to the use and regulation of human rights due diligences.

[83]National Environmental Management Act 107 of 1998.
[84]See Murombo T "Beyond Piblic Participation: The Disjuncture between South Africa's Environmental Impacy Assesment (EIA) Law and Sustainable Development" *Potchefstroom Electronic Law Journal* 2008, Vol 11 and Sowman, Fuggle and Preston "A Review of the Evolution of Environmental Evaluation Procedures in South Africa" *Environmental policy making* volume 15.

From this model, we see that due diligences can be regulated and enforced through legislation and practice. If governments at a national or even regional level could begin requiring human rights due diligences to be conducted by any business wishing to do business in their territory and requiring such assessments to be a regulatory prerequisite to that business operating in the country, carrying out human rights due diligences can be enforced on businesses.

While the regulatory framework and the involvement of government and the possible fines and other sanctions that could arise therefrom would be good for calling businesses into order, enforcing the carrying out of human rights due diligences would particularly be helpful for victims should the businesses thereafter engage in human rights violations. This is because, if the business in question is aware of its actual and potential human rights impacts but fails to act to prevent or avoid it, the victims will have a greater leg to stand on when seeking remedies against the business, and will find themselves with a better case to prove against it.

Furthermore, if human rights due diligences were regulated in such a way that they are required to be acknowledged by the directors of the company as well as their holding companies and even any banks funding the project or business activity, the knowledge chain could be used to seek accountability for gross human rights violations not only from the company but from the directors and well as the holding company. This chain could even lead victims to being able to seek redress from the banks, should the banks have continued to fund the activity even after the violations occurred or were likely to occur.

The enforcement of the requirement of businesses conduction human rights due diligences can also be a regionally enforce effort. For instance the way in which SADC countries have achieved this with regards to ensuring that environmental impact assessments are formalised into law in all 14 countries, could also be used as a model to entrench human rights due diligences as a regional norm.[85]

4.3. Business meeting Human Rights: Using the language of business to secure effective access to remedies

One of the biggest problems with the business and human rights debate is how far apart business is, or is perceived to be, from human rights. Business is all about commerce,

[85]See Walmsley B and Patel S *SADC Environmental Legislation Handbook* (2012), page 6.

international trade and contracts, whereas human rights are all about obligations of the state, legal norms and universally agreed standards. In the mind of many, the two worlds are just too far apart. However due to the various examples that can be found of how businesses have affected human rights in some very significant and negative ways, it is clear that the two world's cannot truly be that far apart. The challenge is how to regulate how they interact when the two adhere to very different rules?

This is where using the language of businesses may help, namely through contracts. While the world debates whether businesses have human rights obligations under international law, regional bodies have the power to impose various obligations on business through contractual norms and standards. Indeed the sanctity of contract is one of the main sources of rights and obligations in the world of business. So the question is how can human rights and the effective access to remedies be brought into the contractual world of businesses?

Standard Contractual Terms

One of the ways in which access to remedies for victims of human rights abuses can be achieved is through including regionally recognised standard contractual terms in certain contracts or from certain companies (i.e. based on net asset value; human rights track record etc.). Various criteria and directives can be developed, at a regional level, to ensure that certain contracts pertaining to certain business activities include specific contractual terms.

Regional bodies such as SADC, the Economic Community of West African States (ECOWAS) and the East African Community (EAC), for example, can start requiring certain stipulations to be present in different contracts relating to human rights and in particular, in relation to effective access to remedies.

For example, jurisdiction and governing law clauses in contracts can be used to submit entire multi-national corporations (the parent company and all it's related group companies) to a specific or more than one jurisdiction. Such clauses could be used to allow litigants to pursue access to justice in a company's home country and the like. Furthermore, clauses such as the standard *non stipulation alteri* (which often limits the application of a contract to the contracting parties only and not for the benefit of any third parties) can be altered to include third parties in instances where gross human rights violations occur.

Contractual terms can also be used to join a company and a government as jointly and or severally liable for any damages caused by gross human rights violations, by the actions or the omissions of both parties. Such stipulations could even help countries improve their own human rights track record as companies would not want to take the risk of investing in and being jointly liable with a country with a questionable human rights track record.

The development of standard contractual terms, through practice or through their imposition by different bodies, already occurs in various areas of law. For example, as has been already touched on above, the requirement of environmental impact assessments has seen clauses relating to the environment being built into various contracts in relation to certain businesses activities. Another example can be found in the banking and finance field, where bodies such as the loan markets association (LMA), provide standard documents, guidelines and contractual terms to be used by those practising in the syndicated loan market in Europe, the Middle East and Africa.[86] It is important to note however, that the LMA is established by private actors for the benefit of private actors. The LMA influences laws and policy through lobbying or being active in the policy making space in various ways for the interests of its members.

An example of how such a body could be used to advance human rights is the LMA's position on sanctions. Any banking and finance documents, which include cross boarder financing have to include a contractual term relating to sanctions. Although this is not a legal obligation, one will hardly find a cross boarder finance document relating to any of these three regions without a sanctions clause. If regional bodies could begin to perform the same or a similar function in standardising certain contractual terms or encouraging states to enact laws and regulations that support those contractual terms, we could see entire regions begin the practice of holding businesses to human rights standards through contractual terms.

[86]Loan Markets Association: About us, http://www.lma.eu.com/landing_aboutus.aspx (10-10-2015).

Conclusion

Businesses have interacted and affected human rights in a way that has gone unchecked and unbalanced for too long. In the last few years the entrance of the relationship between business and human rights into the global policy agenda has seen the debate around the human rights obligations of businesses encounter various attempts at solving some of the many issues. The Guiding principles are one such attempt.

Although these principles have left too many issues unresolved, as the SRSG has admitted on occasion, the Guiding Principles cannot in and of themselves bring business and human rights challenges to an end. The SRSG has also gone on to say that that they are intended, rather, to bring an end to the beginning and to provide an global normative platform and policy guidance for all stakeholder groups to build on.[87] This statement is truest in relation to the Guiding Principles' impact on the various problems relating to business and human rights, especially with regard to their impact on the right to access to remedies.

This paper aimed to explore the question of whether access to remedies for gross human rights violations can be secured in the business and human rights field. It explored and found wanting the provisions of the Framework and the Guiding Principles in relation to their ability to assist victims of gross human rights abuses find access to remedies, and in particular judicial remedies, against businesses involved in the wrongdoings.

This paper then explored the question of whether litigation in various domestic courts is a viable alternative option for victims of gross human rights abuses at the hands of business. This paper analysed some of the cases that arose from one situation, the Shell and Ogoniland debacle. Through this it was further found that victims of gross human rights violations, in particular victims from less developed countries, seldom found access to remedies in domestic courts. It was further found that in instances even where victims litigate in their own local sophisticated courts, businesses still find a way to circumvent being held accountable, often using out of court settlements to dispose of problematic cases. It was found that this practice militates against victims having real access to remedies in many ways. As such, it has been concluded that access to remedies for gross human rights violations, and in particular access to effective remedies, remains illusive for victims in the field of business and human rights.

[87]Ruggie J- Response to "*Human Rights Obligations of Business: Beyond the Corporate Responsibility to Respect"* 17 December 2013.

This paper then turned to the question of what efforts can be taken by the international community to creatively secure access to remedies other than the efforts already being taken to try and reach international consensus on an international binding treaty on the human rights obligations of businesses.

The focus of these suggestions was on regional efforts as opposed to international efforts. In this regard, the regions and sub-regions closest to home were focussed on. The first suggestion was for states to find ways to make certain features of the Guiding Principles binding upon businesses wanting to operate in the region, in particular the human rights due diligence. This was done with a view of proposing ways in which a binding obligation to conduct human rights due diligences can be used to secure access to remedies for victims of human rights violations, or at least make the road thereto a lot easier to travel. The second suggestion was the proposal of the use of regional norms and standards in relation to certain stipulations in contracts being used to bind businesses to certain human rights obligations.

The main result of this paper was showing the huge remedial gap that exists in the business and human rights field. From this result it is clear that the international community will eventually have to deal with this remedial gap decisively as the number of victims of gross human rights violations involving businesses who are without remedies continues to increase despite the global spotlight in the issue. In order for the international community to deal with this remedial gap truly and decisively new, more creative and robust approaches will need to be used in the future.

At present this seems like an impossible task considering the contention that surrounds the issues relating to business and human rights, however as the saying goes- nothing changes if nothing changes.

While the world has not reached a perfect utopia in relation to the promotion and protection of human rights by states, we have come a significantly long way from the horrors of World War II. The progress of this journey can be attributed to the decisive and daring actions taken by those who had the power to take those actions in the world of the 1940's. If we are to see the journey of holding economically powerful and influential businesses accountable for their negative human rights impacts finally head off in the right direction the same level of decisive and daring action needs to be taken by the leaders of today while they still have the power to do so. It is imperative that our leaders finally do

this, not only for the sake of the many victims of today who are without remedies, but for the sake of the countless victims that the future may hold if things do not change.

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