THE RESPONSIBILITY OF HOME STATES FOR VIOLATIONS OF INTERNATIONAL OBLIGATIONS BY THEIR CORPORATE CITIZENS IN FRAGILE STATES

by

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ABSTRACT

The number of multinational corporations (MNC) operating across the globe and their size have grown markedly since the 1990s. Mainly based in Global North countries, MNCs are created under the laws of their home states, from which they are separated by a corporate veil. Although home states benefit from the operations of their MNCs in other countries, they cannot be held accountable for the out-of-country actions of their corporate citizens unless, as the home state, they exercise a significant degree of control over the corporation. Meanwhile, the existence of fragile states persists. Such states frequently cannot regulate foreign companies on their soil, which often operate to lower standards abroad than in their home country. The result is that MNCs regularly violate international obligations in fragile states with impunity.

In responding to this inequity, this dissertation uses Third World Approaches to International Law (TWAIL) to address the question of how international law has contributed to MNCs operating with impunity in fragile states. The dissertation attributes the persistence of an exaggerated corporate veil to the narrow application of the doctrine of state responsibility. The dissertation maintains this is manifested in the International Law Commission’s 2001 Draft Articles on Responsibility of States for Internationally Wrongful Acts (draft articles), which functions, to the benefit of the Global North, as a hindrance to the true development of the international customary law of state responsibility.

As a solution, the dissertation argues in favor of increased investigation into the current state of customary law outside of the draft articles. It also proposes an application of state responsibility that holds states responsible for the acts of their corporate citizens in fragile states when states have
aided or assisted a company without performing the requisite due diligence to ensure the corporation’s compliance with international law.

Finally, in addition to a theoretical discussion, the dissertation addresses the above through a case study involving the violation of an arms embargo by a private military and security company in Somalia.
LAY SUMMARY

Multinational corporations (MNC) are established under their home state’s domestic laws and operate in at least one other country. They are frequently incorporated in wealthy states, where they often benefit from different forms of assistance from their home government and are subject to the state’s human rights, environmental, and labour laws. Yet they may also operate abroad in areas absent of law, referred to in this dissertation as fragile states. When in these areas, they are often not subject to regulation and may violate international obligations without punishment. This dissertation argues that when homes states aid their MNCs, they should be held liable the acts of those companies in fragile states. The dissertation makes its case by using the Third World Approaches to International Law approach, applying it to the customary international law of state responsibility.
PREFACE

This dissertation is an original intellectual product of the author, B. Naef. The interviews reported in Chapter 7 were covered by UBC Ethics Certificate number H13-01242.
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<td>American Convention on Human Rights</td>
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<td>AMISOM</td>
<td>African Union Mission in Somalia</td>
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<td>ANC</td>
<td>African National Congress</td>
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<td>ARS</td>
<td>Alliance for the Re-Liberation of Somalia</td>
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<td>ASR</td>
<td>2001 Draft articles on Responsibility of States for Internationally Wrongful Acts</td>
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<td>ATS</td>
<td>Alien Tort Statute or Alien Tort Claims Act</td>
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<td>ATT</td>
<td>UN Arms Trade Treaty</td>
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<tr>
<td>AU</td>
<td>African Union</td>
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<tr>
<td>CATSCA</td>
<td>California Transparency in Supply Chains Act</td>
</tr>
<tr>
<td>CDI</td>
<td>Commission du droit international (French for ILC)</td>
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<tr>
<td>CELAC</td>
<td>Latin American and Caribbean states</td>
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<tr>
<td>CESCR</td>
<td>UN Committee on Economic, Social and Cultural Rights</td>
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<tr>
<td>CFPOA</td>
<td>Corruption of Foreign Public Officials Act</td>
</tr>
<tr>
<td>CIA</td>
<td>Central Intelligence Agency (US)</td>
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<td>CID</td>
<td>Criminal Investigation Division</td>
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<td>CIDA</td>
<td>Canadian International Development Agency</td>
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<td>CIL</td>
<td>Customary International Law</td>
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<td>CSR</td>
<td>Corporate Social Responsibility</td>
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<td>CTCS</td>
<td>Canadian Trade Commissioner Service</td>
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<td>DRC</td>
<td>Democratic Republic of Congo</td>
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<td>DSOA</td>
<td>Dubai Silicon Oasis Authority</td>
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<td>ECA</td>
<td>Export Credit Agency</td>
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<td>ECHR</td>
<td>European Convention on Human Rights</td>
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<td>ECtHR</td>
<td>European Court of Human Rights</td>
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<td>EO</td>
<td>Executive Outcome</td>
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<td>ESTMA</td>
<td>Extractive Sector Transparency Measures Act</td>
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<td>EU</td>
<td>European Union</td>
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<td>FCPA</td>
<td>Foreign Corrupt Practices Act</td>
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<td>G20</td>
<td>Group of 20</td>
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<tr>
<td>GDP</td>
<td>Gross Domestic Product</td>
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<td>HDI</td>
<td>Human Development Index</td>
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<tr>
<td>ICCPR</td>
<td>International Covenant on Civil and Political Rights</td>
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<tr>
<td>ICESCR</td>
<td>International Covenant on Economic, Social and Cultural Rights</td>
</tr>
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<td>ICISS</td>
<td>International Commission on Intervention and State Sovereignty</td>
</tr>
<tr>
<td>ICJ</td>
<td>International Court of Justice</td>
</tr>
<tr>
<td>Acronym</td>
<td>Full Name</td>
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<tr>
<td>ICoC</td>
<td>International Code of Conduct for Private Security Service Providers</td>
</tr>
<tr>
<td>ICoCA</td>
<td>International Code of Conduct Association</td>
</tr>
<tr>
<td>ICRC</td>
<td>International Committee of the Red Cross</td>
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<td>ICSID</td>
<td>International Centre for Settlement of Investment Disputes</td>
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<td>ICTY</td>
<td>International Criminal Tribunal for the former Yugoslavia</td>
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<td>ICU</td>
<td>Islamic Courts Union</td>
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<td>IHL</td>
<td>International Humanitarian Law</td>
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<td>IHRL</td>
<td>International Human Rights Law</td>
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<tr>
<td>ILC</td>
<td>International Law Commission</td>
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<tr>
<td>IWA</td>
<td>Internationally Wrongful Act</td>
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<td>JCAP</td>
<td>Justice and Corporate Accountability Project</td>
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<tr>
<td>MD</td>
<td>Montreux Document on pertinent international legal obligations and good practices for States related to operations of private military and security companies during armed conflict</td>
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<tr>
<td>MNC</td>
<td>Multinational Corporation</td>
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<tr>
<td>MSA</td>
<td>UK Modern Slavery Act</td>
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<tr>
<td>NCP</td>
<td>National Contact Point</td>
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<tr>
<td>NGO</td>
<td>Non-Governmental Organization</td>
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<td>NSA</td>
<td>Non-State Actor</td>
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<tr>
<td>OAU</td>
<td>Organization of African Unity</td>
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<tr>
<td>OECD</td>
<td>Organization for Economic Co-operation and Development</td>
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<tr>
<td>OHCHR</td>
<td>United Nations Human Rights Committee</td>
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<tr>
<td>OSCE</td>
<td>Organization for Security and Co-operation in Europe</td>
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<tr>
<td>PCIJ</td>
<td>Permanent Court of International Justice</td>
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<tr>
<td>PLO</td>
<td>Palestine Liberation Organization</td>
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<tr>
<td>PMPF</td>
<td>Puntland Maritime Police Force</td>
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<tr>
<td>PMSC</td>
<td>Private Military and Security Company</td>
</tr>
<tr>
<td>PSC</td>
<td>Private Security Company</td>
</tr>
<tr>
<td>PSPC</td>
<td>Public Services and Procurement Canada</td>
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<tr>
<td>PSSA</td>
<td>Federal Act on Private Security Services Provided Abroad (Switzerland)</td>
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<tr>
<td>RCMP</td>
<td>Royal Canadian Mounted Police</td>
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<tr>
<td>SC</td>
<td>Security Council (UN)</td>
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<tr>
<td>SCR</td>
<td>Security Council Resolution</td>
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<tr>
<td>SEMG</td>
<td>Somalia and Eritrea Monitoring Group</td>
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<tr>
<td>SWAPO</td>
<td>South West Africa People’s Organization</td>
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<tr>
<td>TFG</td>
<td>Transitional Federal Government of the Republic of Somalia</td>
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<tr>
<td>Abbreviation</td>
<td>Full Form</td>
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<tr>
<td>TNC</td>
<td>Trans-National Corporation</td>
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<tr>
<td>TWAIL</td>
<td>Third World Approaches to International Law</td>
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<tr>
<td>UN</td>
<td>United Nations</td>
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<tr>
<td>UNC</td>
<td>United Nations Charter</td>
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<tr>
<td>UNCITRAL</td>
<td>United Nations Commission on International Trade Law</td>
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<tr>
<td>UNGA</td>
<td>United Nations General Assembly</td>
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<tr>
<td>UNGP</td>
<td>United Nations Guiding Principles on Business and Human Rights</td>
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<tr>
<td>UNITAF</td>
<td>Unified Task Force</td>
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<tr>
<td>UNOSOM</td>
<td>United Nations Operation in Somalia</td>
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<tr>
<td>UNSC</td>
<td>United Nations Security Council</td>
</tr>
<tr>
<td>USC</td>
<td>United Somali Congress</td>
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<tr>
<td>USSR</td>
<td>United Soviet Socialist Republic</td>
</tr>
<tr>
<td>VCLT</td>
<td>Vienna Convention on the Law of Treaties</td>
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</table>
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DEDICATION

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CHAPTER 1 – INTRODUCTION

1. The Concern

On August 13, 2015, the United Nations Human Rights Committee (OHCHR) released a report on Canada’s compliance with the *International Covenant on Civil and Political Rights* (ICCPR).\(^1\) Among the Committee’s concerns were human rights abuses by Canadian companies operating abroad and the absence of remedies for their victims.\(^2\) The Committee cited the lack of Canada’s oversight of Canadian firms as a violation of the convention and recommended that Canada enhance the effectiveness of its mechanisms designed to ensure that all Canadian corporations respect human rights when operating abroad.\(^3\) Less than a year later, more than 180 Latin American nongovernmental organizations (NGO) wrote Canadian Prime Minister Justin Trudeau requesting that the operations of Canadian mining companies abroad be better regulated by Canada.\(^4\) More recently, a December 2017 report by the Justice and Corporate Accountability Project (JCAP) revealed details behind the reasons for the Latin American NGOs’ concerns. The report listed 30 targeted deaths and 709 cases of criminalization related to operations of 28 Canadian mining companies in Latin America between 2000 to 2015.\(^5\) Given that Latin America accounts for only

\(^{1}\) *Concluding observations on the sixth periodic report of Canada*, UN HRC, 114\(^{th}\) Sess., 2015, UN Doc. CCPR/C/CAN/CO/6.


\(^{3}\) *Ibid.*


30% of Canadian mining abroad, these numbers raise considerable concern about the scope of this problem.⁶ Questionable corporate behaviour abroad is not only a Canadian problem and is not limited to the extraction industry.⁷ In his book on multinational corporations (MNC)⁸ and international human rights law (IHRL), Professor John Ruggie presents a troubling view of the behaviour of MNCs across many countries’ industries as a result of corporate globalization beginning in the 1990s:

Evidence mounted of sweatshop conditions and even bonded labour in factories supplying prestigious global brands; indigenous peoples’ communities displaced without adequate consultation or compensation to make way for oil and gas company installations; food and beverages firms found with seven-year-old children toiling on their plantations; security forces guarding mining-company operations accused of shooting and sometimes raping or killing trespassers and demonstrators; and Internet service providers as well as information technology companies turning over user information to government agencies tracking political dissidents in order to imprison them, and otherwise helping those governments to practice censorship.⁹

As the former UN Secretary General's Special Representative for Business and Human Rights, Ruggie’s expertise in the area is extensive and his work regarding how IHRL can protect vulnerable

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⁷ Two notorious examples are the Blackwater private military and security company (PMSC) Nisour Square shooting in Iraq (2007) and the Rana Plaza garment production building collapse in Bangladesh (2013).

⁸ As the name suggests, multinational corporations (MNCs) consist of businesses, regardless of size, incorporated or registered under the laws of a state who operate in more than one country. While an ownership claim or effective control by a company in one state over the operations of firms abroad helps to identify a supply chain, the degree of autonomy within the corporation can vary widely from one MNC to the other. Ownership scenarios also range from fully private to parapublic organizations. A more precise definition of MNCs, while an instructive exercise, is not required for the purposes of this dissertation. For a discussion about the definition, see *OECD Guidelines for Multinational Enterprises*, (OECD Publishing, 2011) online http://dx.doi.org/10.1787/9789264115415-en [Accessed 25 November 2017]. See also Bruce Kogut, “Multinational Corporations” in Neil Smelser and Paul Baltes eds., *International Encyclopedia of the Social and Behavioral Sciences*, (Oxford: Pergamon, 2001) 10197.

populations is insightful. However, while advocating for more rigorous application of human rights law is important, constraints on its application have limited its ability to solve the problems described above.

MNCs often operate in states unable to provide domestic legal protection and the extent to which IHRL can fill the void by applying across territorial borders is limited. This means that a subsidiary of a Canadian company operating in a state experiencing civil unrest, for example, may face no enforceable human rights obligations. The state within which the company is operating (the host state) may simply not have the means to regulate MNCs on its territory. At the same time, save exceptions, the jurisdictional limits of Canada’s international human rights obligations (the home state of the company) are drawn at the border and do not apply to a subsidiary abroad.10 Despite a growing number of corporations in countries around the globe,11 the United States (US), the United Kingdom (UK), France, Germany and Japan remain home to the majority of large multinationals.12 Domestic laws in these countries are well developed, providing corporate regulation intended to protect citizens and residents. While MNCs based in Global North countries often benefit from economic stability, favourable taxation and regulatory environments, and a variety of export credit

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11 Ruggie, “Just Business”, supra note 9. With respect to their increase since the 1990s, Ruggie states that “Multinational firms emerged robustly, in larger numbers and greater scale than ever before.”; For details and reasoning behind the growth, see the introduction to Paz Estrella Tolentino, Multinational Corporations: Emergence and Evolution (London: Routledge, 2001) at 3 - 5.

programs available in their home countries, they operate worldwide – often in areas without the constraints on behaviour imposed in their home state.\textsuperscript{13}

The growth in size and reach of MNCs, as well as their overall numbers adds impetus to their scrutiny. At the turn of the century, the sales of the top five corporations worldwide were each greater than the Gross Domestic Product (GDP) of 182 countries.\textsuperscript{14} The combined sales of the top 200 corporations were larger than the combined economies of all countries save for the biggest 10 and the top 25 MNCs in the world were richer than approximately 170 nations.\textsuperscript{15} Furthermore, according to the United Nations Conference on Trade and Development, there were more than 60,000 MNCs by the year 2000 (up from 37,000 in 1990) with approximately 800,000 foreign affiliates.\textsuperscript{16} Finally, in 2010, 57 corporations figured in the 100 largest economies in the world.\textsuperscript{17} Accordingly, regulation of such influential – and so many - players is no small task. For states

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\textsuperscript{13} Corporations possess legal personalities under the domestic law of the states in which they are incorporated or registered. Therefore, under international law, corporations hold a nationality. There is no single test to determine corporate citizenship. While the state of incorporation is the primary determinant, nationality is also a factor of a company’s \textit{siege social} or location of administration. Other tests consider nationality of managers and shareholders or simply the state in which the majority of business is performed.

\textsuperscript{14} “General Motors is now bigger than Denmark, DaimlerChrysler is bigger than Poland, Royal Dutch/Shell if bigger than Venezuela, IBM is bigger than Singapore, and Sony is bigger than Pakistan.” Sarah Anderson and John Cavanagh, \textit{The Top 200; The Rise of Corporate Global Power}, (Washington D.C.: Institute for Policy Studies at “Key Findings”), online http://www.ips-dc.org/top_200_the_rise_of_corporate_global_power/ [Accessed November 16, 2017].


preoccupied with drought, famine, armed conflict, or poverty, the exercise of authority over these entities is a formidable challenge.\(^{18}\)

States, individually and collectively, have responded in different degrees and in different ways to the growing influence of MNCs. Some countries have tacitly welcomed investment by companies while remaining unable to respond to violations of their domestic law. Others have enacted and enforced legislation imposing obligations on corporations.\(^{19}\) Beyond domestic legislation, international guidelines and industry-written Corporate Social Responsibility (CSR) codes have attempted to influence corporate behaviour but remain non-binding and can be toothless when needed most.\(^{20}\) The *UN Guiding Principles on Business and Human Rights* (UNGP), endorsed by the OHCHR in June 2011, were an attempt by the organization to provide a global standard for addressing the risk of adverse impacts on human rights linked to business activity. Yet despite recent attempts by some states to regulate MNCs, the comments of the OHCHR above continue to ring true: clear remedies for victims of violations of international obligations by MNCs, as well as

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\(^{19}\) Alice de Jonge, "Transnational corporations and international law: bringing TNCs out of the accountability vacuum" (2005) 7:1 Critical Perspectives on International Business 66 at 67. De Jonge explains that Western countries have enacted legislation “which, implicitly or explicitly, protect human rights standards, and include laws covering conditions and safety at work, environmental protection, non-discrimination, and rights of free speech and assembly.”

\(^{20}\) An example of the confusion created by the plurilegal setting is illustrated by Lee James McConnell in his article on liability of multinational corporations: “[…] complex challenges concerning selection of an appropriate forum, the allocation of jurisdictional competence, and the application of a particular state’s domestic law frequently arise. The situation is further exacerbated by the variety of tangentially relevant laws, including human rights, tort, employment, and company law.” Lee James McConnell "Establishing liability for multinational corporations: lessons from Akpan" (2014) 56:2 International Journal of Law and Management 88 at 88.
effective oversight and regulation are often absent from law.\textsuperscript{21} Simply stated, corporations with imposing power, primarily based in developed states, operate to lower standards with impunity in other states.

Finally, the problem is not limited to violations of human rights law. Cases abound of corporate violations of environmental law, bilateral investment treaties, International Humanitarian Law (IHL), and even United Nations (UN) Security Council Resolutions (SCR). Private military and security companies (PMSC), for example, risk violating IHL in addition to human rights law and, as the case study for this dissertation shows, companies have violated arms embargos implemented by the UN Security Council (UNSC). In summary, the scene set in this introduction is one of an imbalance. Global North countries benefit from goods and services of MNCs, from employment for their citizens and from taxation income. The citizens of these countries are protected by established laws, including labour legislation, human rights, and consumer protection laws, allowing them to benefit from the existence of the companies while remaining protected from exploitation. Meanwhile, a significant number of MNCs based in the Global North have subsidiaries in states with weak legal protection due to a variety of factors including, protracted armed conflict, civil unrest, corruption, and/or severe economic disparities. While some of these countries exercise their sovereign right to allow MNCs to operate with lower standards on their territory, for others, it is not a question of choice.

\textsuperscript{21} Continuing with the example of Canada, Peña states that out of more than 100 countries hosting Canadian mining companies, most lack the legal remedies required to protect affected communities. Peña highlights that while there are no provisions in international law that negate home state jurisdiction, Canadian courts have refused to hear human rights cases on the grounds of \textit{forum non conveniens}. Susana C. Mijares Peña, “Human Rights Violations by Canadian Companies Abroad: \textit{Choc v Hudbay Minerals Inc}” (2014) 5:1 Western Journal of Legal Studies 1 at 1.
2. **Introduction to the theoretical approach**

The purpose of this dissertation is to identify factors that contribute to the persistence of the scenario described above and to propose steps towards eliminating the imbalance. The dissertation is particularly concerned with hidden contributing factors that are part of the international legal system and that have thus far escaped academic legal scrutiny. To help frame the topic and to provide a methodological approach, the dissertation is guided by the Third World Approaches to International Law (TWAIL) method. Fully described in chapter two, TWAIL is a scholarly agenda that evolved under concern for the Global South. It identifies and critiques colonial legacies in international law, providing an alternative approach to understanding how international law operates. Rather than consider international law to be comprised of objective principles and rules emanating from the will of states, TWAIL operates under an assumption that international law consists of principles and rules that emanate from the will of certain states. TWAIL does not necessarily critique how the mechanisms of international law work, but rather how they are appropriated by certain powers to further their ends. The method seeks out subjugated voices in international law and illustrates how the international legal system perpetuates inequalities. Proposing solutions is equally important under the TWAIL approach, namely ones that promote balance and justice within the international system rather than relying on concepts of international law entrenched during the colonial period.

In choosing my supporting legal theory, I was mindful that adopting a traditional approach risked limiting the possible solutions. This concern stemmed from a suspicion that the absence of an effective mechanism for the regulation of MNCs operating outside their home state was not simply the result of a “blind spot” of international law but rooted in something systemic. My previous
studies in International Public Law focused on employing the authoritative sources listed in the Statute of the International Court of Justice (ICJ), but rarely included questioning the workings of the international legal system from a higher level. As such, the answers to these questions were only found by applying applicable treaties, customary law, and general principles of law rather than by reflecting upon how rules were formed or how they might be manipulated in favour of powerful states. The investigation of a potentially systemic problem required an approach that fundamentally questioned the international legal system rather than simply applying international law from within. While I chose my topic and applicable legal theory before Andrea Bianchi’s 2016 book *International Law Theories*, his statement about the importance of non-traditional legal theories resonated with my thoughts at the time of conception of my dissertation. Bianchi writes that his book is an “attempt to get an increasing number of scholars, researchers, and students to realize that there are different ways in which one can think about international law.”22 He advocates in favour of increased attention towards alternative approaches and highlights the need to “stir up ‘the water’ that we, as international lawyers swim in.”23 In this same spirit, and with the goal of uncovering lesser known systemic issues in international law, the chosen method for this dissertation was selected as a step away from traditional approaches.

The circumstances outlined in this introduction appear compatible with TWAIL at first blush. The scenario of powerful corporations based in the Global North and operating to lower standards in fragile states represents a symptom that should reflexively raise suspicion among TWAIL scholars.

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Indeed, this situation inspired my initial interest in the topic and led me to introductory readings on Corporate Social Responsibility (CSR), the so-called universality of IHRL, colonialism, and on the proliferation of MNCs worldwide. While identifying why the imbalance exists is a legitimate pursuit, more profound thought considers whether aspects of international law not only allow for the imbalance but entrench or encourage it. This second layer of TWAIL-inspired thought emerged when I considered the impunity of MNCs in fragile states in relation to celebrated developments in international law, namely, the proliferation of multilateral human rights conventions and institutions since 1945. Critical views of how states easily dismiss their international human rights obligations\(^2\) provided me with an indication that the international system may not function in the way it appeared on the surface. Although instruments such as the UNGP and domestic legislation with respect to MNCs point towards an emerging trend of states acknowledging more responsibility vis-à-vis corporations within their jurisdiction, there appeared a need to determine whether hidden aspects of international law played a role in keeping some of the most vulnerable areas of the world free of controls on MNCs. That is, the persistence of a legal void despite advances made to control MNCs encouraged me to determine whether an aspect of international law was actively countering these progressive developments.

Finally, having studied law and having worked as a lawyer in Global North, TWAIL provided a counterbalance to my subject positioning. As noted above, when addressing topics of international law, my instinct has traditionally been to apply the tools I learned in Western legal studies rather than reflecting critically on the tools themselves. TWAIL removed my focus from this bubble and

allowed me to question the validity of a fundamental component of modern international law. Given that TWAIL inspired my focus on fragile states and that many such states are in the Global South,\textsuperscript{25} the approach safeguarded against tendencies to return to solutions limited by Global North approaches.

3. Introduction to the evaluative and normative frameworks

In searching for possible factors contributing to the scenario described above, I became curious as to how corporate veils operate in international law. My initial interest was primarily with respect to the extent to which states that are home to large MNCs might profit from the separation between state and corporation. Given the benefits MNCs bring to their home states and that they are artificial entities constituted under the laws of those states, I pondered the fairness of companies violating laws outside of their home states with impunity when the same acts, if performed by a state, would trigger a form of recourse under international law. This led me to consider whether there is always a clear separation between the state and a corporate citizen or whether, in certain circumstances, home states could be held responsible for transgressions committed by their corporate citizens. The legal doctrine that came to mind when considering linking the acts of an entity to a state was that of the international customary law (ICL) of state responsibility. The doctrine of state responsibility contains mechanisms that can attribute the behaviour of entities or individuals abroad to a home state, triggering the home state’s responsibility and initiating forms of recourse. As explained below, focusing on how the doctrine of state responsibility functions and how it is being

\textsuperscript{25}Fragile States Index, Measuring Fragility; Fragility in the Word 2019, online https://public.tableau.com/views/fsi-2018-world-heatmap/DashboardWorldMap820?:embed=y&:embed_code_version=3&:loadOrderID=0&:display_count=yes&publish=yes&origin=viz_share_link [Accessed 27 May 2019]
manipulated not only identifies one of the contributing factors to the impunity of MNCs, but also provides a path to a solution to the problem.

Once again, in its concern for the Third World and systemic biases in international law, TWAIL influences where a researcher looks for a problem and sets parameters for how a problem is solved. Therefore, as the theoretical framework for this dissertation, TWAIL involves both evaluative and prescriptive aspects. The evaluative (or descriptive) aspect in this dissertation lays out the failure of international law to provide a legal framework to ensure fair practices by MNCs, thus protecting the public. It demonstrates this by revealing a bias in the formation of CIL, by revealing how the customary law of state responsibility is currently being applied through a narrow codification document, and by drawing attention to the limits of IHRL. The prescriptive aspect of the dissertation, that is, how the bias could and should be fixed, is provided by focusing on a normative solution in the form of a proposed application of state responsibility. This, it will be argued, can be done by encouraging the eschewal of the narrow draft codification of the rules of state responsibility introduced by the International Law Commission (ILC) and by considering modern and postmodern applications of CIL. The proposed solution diminishes the strength of the corporate veil in international law, specifically with respect to the doctrine of state responsibility, and introduces the possibility of increasing the involvement of home states in the regulation of the behaviour of their corporate citizens abroad. The dissertation argues that when states can be (even partly) associated to the acts of MNCs incorporated on their territory, aspects such as domestic legislation calling for transparency of operations, improved domestic due diligence, and legislation with extraterritorial effects become options for controlling corporate behaviour abroad.
Before addressing the sources and structure of the dissertation, a short introduction to the normative framework being employed is provided below. Through the doctrine of state responsibility, international law provides a system in which states can be held responsible by their peers for breaches of their international obligations. State responsibility rules are founded in CIL, though they are often referred to in the form of their draft codification under the ILC’s 2001 *Draft Articles on Responsibility of States for Internationally Wrongful Acts* (hereinafter referred to as the ASR of the draft articles).26 The obligations subject to the doctrine consist of everything from centuries-old principles to the latest treaties. They contain “all the possibilities” of primary obligations of states under international law27 including, *inter alia*, bilateral and multilateral treaty obligations, CIL, and obligations under general principles of law.28 State responsibility manages what occurs between states when these primary obligations are violated. That is, the doctrine provides the rules to be followed, often referred to as secondary obligations, when states believe that primary obligations have been violated. In its attempt to codify these secondary obligations under the draft articles, the ILC claims to have taken into account long established principles of international law.29

26 International Law Commission, “Draft articles on Responsibility of States for Internationally Wrongful Acts, with commentaries 2001” (2001) 2:2 Yearbook of the International Law Commission para. 1, [ASR and Commentary] online http://legal.un.org/ilc/texts/instruments/english/commentaries/9_6_2001.pdf [Accessed 29 November 2018]; The primary goal for codification, be it at the domestic or international level, is to make law more predictable and facilitate its application. Domestically, codifications replace existing rules with new versions that immediately hold authority. Within common law, the purpose is essentially to transform a rule of law from its unwritten form to one within legislation. Within civil law, codes have been established with the specific intent of establishing common rules within a defined jurisdiction. Civil codes go further than simply reformulating laws – they attempt to collect all the rules on given topics from all sources. See Pierre-André Côté and Stéphane Beaulac, *Interprétations des lois*, 4th ed, (Montreal: Themis, 2009) at 60, para. 180.


28 See Chapter 7 for a discussion on Security Council Resolutions (SCR) as primary obligations.

interpretations from international case law, and evidence of state practice.\textsuperscript{30} Indeed, the articles are meant to be a manifestation of a doctrine that has evolved over hundreds of years, culminating in rules that assign responsibility along with reparations.\textsuperscript{31} As per the ILC Commentaries on the ASR, the codification sets out the “basic rules of international law concerning the responsibility of states for their internationally wrongful acts.”\textsuperscript{32}

After slow and divisive development of a draft codification under the ILC, progress towards a final document intensified as of 1992.\textsuperscript{33} Forty years of deliberations, drafts, and reports of Special Rapporteurs culminated in the finalizing of the ASR on August 9, 2001. At this point, the ILC was faced with differing opinions from states on how to review and consider the project. The majority favoured initiating the steps leading to the formation of a convention, which typically include a preparatory commission and diplomatic conference.\textsuperscript{34} Preparatory commissions are time-consuming but provide all states involved with a measure of input into a draft text and ensure that all participants can voice concerns. Yet rather than push to have the document signed by states as

\textsuperscript{30} Danwood Mzikenge Chirwa, “The Doctrine of state Responsibility as a Potential Means of Holding Private Actors Accountable for Human Rights” (2004) 5 MJIL 1 at 2, see also \textit{Noble Ventures, Inc. v Romania}, Award, ICSID Case No. ARB/01/11, IIC 179 para 69 (2005) “While those Draft Articles are not binding, they are widely regarded as a codification of customary international law.”


\textsuperscript{32} ASR and Commentary, \textit{supra} note 26 at 48 (para. 1).

\textsuperscript{33} \textit{Supra} note 27 at 60.

\textsuperscript{34} \textit{Ibid.}
a convention, the ILC chose the quicker option of having the articles recommended by the UN General Assembly (UNGA). The commission proposed that further consideration of the articles and possible adoption of a convention occur after a period of reflection. Almost two decades later, the period of reflection is ongoing with no preparatory commission or conferences in sight. This is a key observation for this dissertation as it underlines important TWAIL elements that are repeated in the chapters ahead. The ASR was written by jurists, not by official representatives of states. The rules included within the draft articles were extrapolated from primary obligations of international law and were intended to be further considered in later sessions of the UNGA. States have not had the opportunity to provide the type of input and to negotiate the elements of the ASR as they would in a preparatory session. Yet the ASR, which contain elements that clearly favour Global North states, are applied in a manner similar to a convention and are cited as the authority on the matter of state responsibility. Thus, the formation of the ASR was detrimental to weaker states, as has been its ongoing implementation.

Once again, the ASR do not hold the weight of a convention. Yet they are cited by the ICJ, as well as specialized arbitration tribunals and dispute settlement processes such as trade and investment law tribunals and the Dispute Settlement Understanding of World Trade Organization respectively. Courts and tribunals perform some general interpretation of the rules of state responsibility as reflected in the ASR, but their main focus is on the use of the rules to complete the application of

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36 Supra note 27 at 59.
their specific areas of law. Even though much attention is paid to how deciding bodies have interpreted state responsibility, this overlooks the fact that no courts or central institutions are needed for application of the rules. The rules can be invoked through declarations of injured states, controlled countermeasures can be taken at an injured state’s will, and reparations are performed by offending states to stop or avoid countermeasures.

Although a cursory reading of the ASR suggests that there are several options for tying the actions of MNCs abroad to their home states, chapter four demonstrates that the imputation mechanism is prohibitively difficult to trigger under the narrow interpretations included in the draft codification. As demonstrated in chapter four, the criteria for attribution require either a significant amount of integration into the state structure (formal or not) by the company or a high degree of control over a company’s actions. Of the scholarly works that discuss the responsibility of states for the acts of their corporate citizens overseas, those that have applied the ASR have mostly stopped at literal readings of the draft articles. 37 This dissertation picks up where others have left off by investigating attribution for acts of third-parties in ways not addressed in the ASR. Specifically, the dissertation focuses on acts of MNCs in fragile states. For example, most conclusions in this regard have been consistent with the ASR and its Commentaries: a corporate veil separates MNCs from their home states and without effective control over the company, attribution cannot occur. 38 While other


38 See ASR and Commentary, supra note 26 at 48, Commentary to Article 8 paragraph 6: “[…] it is necessary to recall that international law acknowledges the general separateness of corporate entities at the national level […] The fact that a state initially establishes a corporate entity, whether by special law or
commentators have provided insight into how the ASR are generally to be applied, few have ventured outside the common interpretations of the draft codification, as this dissertation does in chapter six. I contest the extent to which the draft codification represents actual CIL throughout this dissertation. TWAIL therefore shapes this dissertation by helping to recognize the problem (impunity of MNCs in fragile states), by identifying an aspect of how international law perpetuates the imbalance (the role played by the draft articles), and by influencing the proposed solution (refocusing on fair customary law and an emerging application of state responsibility).

In summary, this dissertation addresses an aspect of international law that contributes to the continued existence of the regulatory gap described above and argues that emerging interpretations of international law can provide a solution. Its specific normative focus is narrowed to the doctrine of CIL of state responsibility. Admittedly, state responsibility is likely only one aspect in a web of contributing negative factors. However, the fact that it is both part of the problem and a possible solution make it particularly relevant to study. Framed as research questions, the dissertation addresses the following:

a) How has international law contributed to MNCs operating with impunity in fragile states?

b) How effectively can the application of an equitable doctrine of state responsibility contribute to more comprehensive regulations of MNC’s in fragile states?

4. Structure of the dissertation

The dissertation is divided into three parts. Part A introduces the legal theory supporting the research and provides a short history of state responsibility, Part B addresses the applicable
international law and the normative solution, and Part C provides a case study that tests the efficacy of the proposed solution through a comparison to the existing state of affairs.

**4.1 Part A**

Part A focuses on the method that inspired the study and provides a brief historical review of state responsibility. Chapter two describes the TWAIL approach and outlines the role it plays in this dissertation. As noted above, in selecting a theoretical approach for the dissertation, preference was given to one that avoided assuming the legitimacy of international law. Chapter two therefore elaborates upon how TWAIL operates under the assumption that international law is not neutral and not impartially administered. The chapter shows that the TWAIL approach makes no apologies for being partisan. Its agenda to denounce inequalities in international law might subvert positivist views of neutrality and objectivity of law, but it does not discount using international law in a fair manner to address social, economic, and political injustice. The chapter further explains that while TWAIL scholars contest the partiality of international law, they generally do not bring into question the ability of international law to create and sustain legal norms. That is, for many TWAIL scholars the answer to inequality and injustice can be found within the legal system. Indeed, the same strength of international law that contributes to the institutionalization of inequalities can be used, once exposed, to overcome them.

The chapter traces the method’s history and outlines the contributions of distinguished scholars. The review includes a discussion of early Third World approaches, the emergence of TWAIL, and the method’s concerns with the current international legal system. The survey of the method culminates in the identification of three primary aspects of the approach that ultimately contribute to the framework of the dissertation: 1) identifying subjugated voices in international law, 2) determining how international law perpetuates this subjugation, and 3) offering a solution that
injects equality into the international system. The identified subjugated voice of fragile states is then defined before outlining how TWAIL applies to the rest of the dissertation. Naturally, the sources for chapter two are the writings of TWAIL scholars, as well as the works of Third World commentators that predate TWAIL. The early TWAIL views of Antony Anghie, Bhupinder Chimni, James Gathii, and Makau Mutua are considered, among others, along with the newer approaches of Pooja Parmar and Karin Mickelson. The literature review, as much as possible, included works of authors from different regions.

With the underlying thread of the dissertation identified, Chapter three provides background for the discussion of state responsibility by showing how the doctrine has evolved alongside other principles of international law. The chapter provides a history of the roots and development of state responsibility, as well as an explanation of the elements related to its application. Literature is primarily used to support the historical review of state responsibility. The primary source works of Hugo Grotius, August Heffter, and Dionisio Anzilotti, among others, are cited where possible, with secondary sources of scholarly writings used to complete the section. Once the pairing of state responsibility and concepts such as sovereignty are addressed, arguments pertaining to where CIL is heading become easier to grasp. Thus, I use chapters two and three to make readers familiar with concepts that surface throughout the dissertation and to set the dissertation’s direction.

### 4.2 Part B

Part B discusses three scenarios related to how and to what extent MNCs might be subject to regulation by their home state: 1) under the ASR, 2) under IHRL, and 3) under emerging CIL of state responsibility. Together, the three chapters demonstrate how and why the regulatory gap for MNCs in fragile states exists, how international law contributes to its persistence, and the
possibility of addressing the issue by rethinking state responsibility. Chapters four and five provide
the evaluative aspect of the dissertation. This is a necessary component of the dissertation as it
demonstrates how international law both creates and fails to resolve lawless jurisdictions in fragile
states, as well as sets up the solution proposed in chapter six. Although the early chapters show that
the ASR and the rights-based solutions can bind home states for acts of their corporate citizens
abroad, reviewing these methods is primarily done to demonstrate their limits.

Chapter four first delivers an overview of the few ways in which home states can currently be held
responsible for acts of entities such as MNCs abroad under the ASR and outlines the high threshold
of control needed to impute such acts to home states. The different possibilities of attribution are
examined in turn, from state organs and those empowered to represent the state through domestic
legislation to entities under the express direction and control of the state. The second part of the
chapter includes a discussion of TWAIL, demonstrating how Global North states benefit from the
high threshold and how international law consolidates theirs gains. In this part, I address the
perpetuation of inequalities among states by discussing how narrow interpretations of the ASR
restrict the development of the CIL of state responsibility. For sources, the first part of chapter four
employs mainly the draft articles themselves, their accompanying Commentaries from the ILC,
and international tribunal decisions interpreting the ASR. The partiality of the ILC Commentaries,
however, are noted. While they are a useful aid for interpreting the ASR, they were written by the
same commission that proposed the project and contribute to a narrow interpretation of the
document. The second part of the chapter uses recent reports from the Sixth Committee of the
UNGA (Legal), case law, and scholarly commentary to reveal the views of states with respect to
the ASR and indicate how the use of the draft articles stunts the development of CIL. The chapter
therefore relies heavily on primary source materials, resorting to academic commentary mainly to aid with the interpretation of case law.

Chapter five then examines how IHRL fills part of the legal gap created by strict interpretations of the ASR. The chapter begins by explaining how a state’s positive human rights obligations ensure the protection of those in its territory from third parties. It then goes on to detail the limited instances in which the extraterritorial application of IHRL obligations can be relevant for cases of MNCs operating abroad. The chapter concludes by suggesting that the extraterritorial application of human rights law may be expanding but that it ultimately does not solve the problem of impunity of MNCs in fragile states. The chapter draws on a variety of sources including texts of international human rights instruments (e.g. UN and regional human rights conventions), decisions of regional treaty bodies such as the European Court of Human Rights (ECtHR), communications of the ICCPR’s Human Rights Committee (HRC), and domestic legislation and court decisions. Analysis from leading scholars helps to establish the foundation of the arguments related to extraterritorial jurisdiction and to identify key case law on the topic.

Chapter six returns to TWAIL and state responsibility to argue that CIL of state responsibility has evolved beyond the ASR. The chapter then proposes a reconsidered, and fairer, attribution criteria that would be consistent with emerging CIL. Indicators of emerging CIL are therefore necessarily addressed first. These include declarations by states about the ASR and other official pronouncements, increasing use of extraterritorial legislation by states to regulate MNCs, and an evolution in the concept of state sovereignty. The chapter then argues that, with these developments, comes a necessary re-evaluation of the way attribution of responsibility is perceived in cases of MNCs in fragile states, contributing to diminishing the element of required control by
the state. The proposed reconsidered attribution criteria include consideration of the fragility of the host state, the amount of support provided to the MNC from the home state, and the existence or absence of due diligence by the home state. Sources for chapter six comprise of academic commentaries, international conventions, GA Sixth Committee meeting reports, and domestic law of various states. International and regional cases and comments reveal assumptions by deciding bodies surrounding the ASR and errors of interpretation. They also provide evidence of the true flexibility of the attribution criteria. International initiatives and domestic legislation for selected states are presented as evidence of a growing willingness of states to commit to regulating actions of MNCs abroad.  

4.3 Part C

Chapter seven applies the substantive concepts of Part B to a case study. It considers state responsibility within the scenario of the violation of an international obligation by a MNC in Somalia. Specifically, the chapter analyses the case of a PMSC, Saracen International (Saracen), that allegedly violated several UNSC Resolutions (SCR), including a long-standing arms embargo. The value of choosing Somalia and Saracen is explained in section two of chapter seven. Briefly, Somalia provides a clear example of a fragile state with little to no control over much of its territory during the time of the case study. Saracen, as the second largest military force in the country at the

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39 The selection criteria are listed in section 2.5 of chapter six.
time, was incorporated outside of the country and operated with impunity within Somalia, even after violating a UN arms embargo. Although the case study has certain confounding characteristics (ambiguous home state involvement with the company and funding from a third state), one can generally extrapolate lessons on MNCs as a whole. Indeed, all case studies will have intricacies and the Saracen case is no different. The chapter subsequently performs a TWAIL analysis of PMSCs before confirming the fragility of the state as one of the elements to be satisfied for the application of the emerging attribution criteria. The chapter then provides a comparative understanding of the legal concepts discussed in Part B by assessing the same fact pattern under the narrow application of the ASR, under IHRL, and under the proposed emerging approach. Moreover, it tests the feasibility of the emerging approach, helping to identify any problems with its application. The chapter relies on customary law, treaty texts, and several SCRs to establish the violation of international obligations by the PMSC in question. A significant portion draws on views of courts, tribunals, and committee reports. Interviews were sought with individuals familiar with the PMSC industry in Somalia, including representatives of NGOs working in the country, PMSC employees, academics, and journalists. The interviews were used to verify and elaborate upon preliminary information gathered from literature and to establish a more detailed picture of Somalia during the period of the case study. The questionnaire employed was designed to provide consistency among participants and to protect against the interviewer guiding the result. It was, however, also flexible enough to adapt the interview to issues uncovered during further research or brought up during other interviews. The complete methodology of the interviews is outlined in section four of chapter seven. The questionnaire has been included in the Annex in Part D.
5. Conclusion

The goal of this dissertation is to contribute, through a legal framework, to an increase in accountability of MNCs in fragile states. I chose the solution proposed in this dissertation for both concrete and abstract reasons. The more tangible reasons include the relative strength of home states in enforcing law. That is, saying nothing of obligations to do so, Global North states that are home to the majority and the largest of MNCs have the greatest capacity to regulate corporate acts at home and abroad. State responsibility applies to all violations of international obligations. Thus, state responsibility’s breadth reaches farther than, for example, IHRL. Finally, the framework of state responsibility already exists. In this respect, state responsibility already has a functioning set of norms and what is needed for it to contribute to corporate accountability is relatively small compared to what is required under other initiatives. The abstract reasons are founded in the shared responsibilities of the international community and in having developed states assume responsibility for the political, social, and economic systems they adopt. Indeed, it is curious that international law favours principles obliging states to use their property so as not to injure others, yet MNCs can establish themselves under the laws of one state and operate elsewhere to lower standards. The following chapters outline aspects of international law that hold state responsibility back from playing a role in regulating MNCs, as well as the potential the doctrine has should the inhibiting factors be removed. Of course, the proposal herein is not the only way of contributing to increased corporate accountability. Other approaches could include supporting the implementation of CSR guidelines promoted by international institutions, targeting executives through ICL, or encouraging industry led initiatives to name only a few. Efforts towards full corporate accountability can be exercised on several fronts and can complement one another; the support of
state responsibility as a tool to diminish corporate violations of international law should not be seen as a rebuke of other initiatives.
PART A – THEORETICAL UNDERPINNING

CHAPTER 2 - THIRD WORLD APPROACHES TO INTERNATIONAL LAW

1. Introduction

This chapter elaborates upon the theoretical approach briefly introduced in the first chapter. In its explanation of how TWAIL scholarship emerged, the chapter provides both an account of the source of TWAIL’s distrust of the international system and an understanding of how the theory can be applied. The chapter shows that TWAIL’s suspicion of the international legal system is less a presumption of fault or corruption than a method of prioritizing the consideration of the realities of how power operates between states. An important component of this is that the aspect of consolidation of power can operate behind the scenes of international law in a systemic manner. As such, TWAIL matches its concern of subjugated populations with an analysis of international law that is free from assumptions of equality within the international system. The description of TWAIL below confirms the theory’s status as an outside approach and makes it clear that it falls under Bianchi’s category of an alternative way of thinking about international law as noted in the introduction. TWAIL is reflected in this dissertation by the topic’s concern for fragile states, by the focus on how international law contributes to their fragility through the draft articles of state responsibility, and by the promotion of emerging customary law as a potential, if imperfect, solution. TWAIL, among other things, shapes how this dissertation considers the concepts of fragile states, state responsibility, sovereign equality of states, and CIL. Each of these aspects are addressed in light of TWAIL throughout the chapters ahead. Since it would be premature to discuss the issues before TWAIL is understood, this chapter outlines the concept of the approach. Finally,
given that they are the subjugated population of concern in this dissertation, the chapter addresses the challenges of fragile states and how these states should be considered under TWAIL.

2. Explanation of the TWAIL method

2.1 Early Third World views and the lead up to TWAIL

Emerging during the second period of decolonization, academic interest in international law and the Third World remains relatively new. The various approaches to Third World scholarship share the goal of improving the condition of Third World populations and of subjugated groups. The differences between the main approaches, however, reflect the hopes of achieving equality through inclusion within the international system versus an understanding that the system itself reinforces inequalities. The first wave of commentaries concerning the struggles of subjugated populations and international law emerged during decolonization and continued through the Cold War. The focus at the time was centred on the incorporation of new states into the existing international system, along with it the right to self-determination and full national independence, as well as integration into the international economy. Early Third World scholars insisted on the promotion of development for the proper functioning of the principle of sovereign equality of states and they believed that international law could be changed from within. These scholars also contested the

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40 Defined as the period of post WWII up to 2000, the era began in 1945 with 50 nations signing the Charter of the United Nations, 26 June 1945, Can. T.S. 1945 No. 7 [UN Charter] with Article 1(2) indicating that among the purposes of the organization is the development of “friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, and to take other appropriate measures to strengthen universal peace”.

41 Martin Gallié, “Les théories tiers-mondistes du droit international (TWAIL) Un renouvellement ?” (2008) XXXIX:1 Revue Études internationales at 19. Gallié explains that before decolonization Third World populations were subject to the national law of their parent states and their cases were rarely addressed by international institutions.

42 Ibid.
over-reliance on chronological aspects of international law. That is, they challenged the view that historical international norms were entrenched to the extent commonly believed and could not be changed. Therefore, not only did early Third World scholars believe that incorporation of subjugated groups into the international system would increase their welfare, they believed that, as new participants, these groups would change international law in a positive manner and break the system’s entrenched traditions. It appears that for some, incorporation into the system was less about improving international law and more about finding a means of empowerment to fight for sovereignty. By embracing the international system as established by Western states and by using doctrines based on recognized humanitarian values, Third World countries could make use of the tools created by the major powers against the latter.43 Thus, where TWAIL advocates suggest that the current international system systemically holds Third World states back, early Third World scholars saw benefits of incorporation into the institutions of their subjugators.

Building on momentum created by the Badung (Indonesia) Conference in 1955,44 the 1960s saw an emancipation of Third World nations that resulted in an important period of decolonization. Third World states used their increased numbers in the UNGA to pass important declarations, many of which affirmed the will of those states in political and economic matters.45 The flurry of activity

43 This is an interpretation of Gallié’s statement “Ainsi, avec la décolonisation, les droits humain et l’ensemble des valeurs humanitaires du droit international se retournent contre leurs promoteurs au nom du droit des peuples à disposer d’eux-mêmes.”

44 The Badung Conference (1955), often referred to in discussions of resistance to colonialism, consisted of a meeting of 29 countries, many newly independent. The agenda covered cold war tensions and condemned colonialism in all its forms. It is commonly referred to as the precursor to the formation of the Non-Aligned movement.

45 Concerning declarations of independence of states under colonial tutelage: Declaration on the Granting of Independence to Colonial Countries and Peoples, GA Res. 1514 (XV), UN GAOR, 15th Sess., Supp. No. 16, UN Doc A/RES/1514(XV), (1960), 66; the Declaration on Principles of International Law Concerning Friendly Relations and Cooperation among states in Accordance with the Charter of the
from the newly formed states at the UN through GA resolutions, through declarations, through their own diplomatic meetings, and the fact that they represented more than fifty percent of the world’s population gave a perception of agency and optimism. Karin Mickelson describes the period as “the heyday of optimism regarding the possibilities of Third World solidarity to transform international society.” This optimism did not last. As Third World countries continued to struggle, the early theories evolved into the more critical TWAIL approach.

Whereas early Third World scholarship began with a struggle by subjugated nations for recognition, TWAIL emerged after the wave of national independence. Its advent can be understood in part as a response to globalization, the end of the Cold War, and the growing strength of international law. During the post-Cold War period, many countries experienced true independence for the first time, allowing market economies and liberal democracies to spread across the globe. This contributed to the disappearance of homogeneous political blocs and highlighted the differences between countries normally considered together under the Third World banner. Fewer similarities existed between countries as some remained underdeveloped, others

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47 The 1997 TWAIL Vision statement (included above) clearly shows disappointment with international law and legal scholarship: “We understand the historical scope and agenda of the dominant voice of international law scholarship as having participated in, and legitimated global processes of marginalization and domination that impact on the lives and struggles of third world peoples.”

48 Gallié, *supra* note 41 at 22.

49 *Ibid* at 19.
adopted different political systems, and still others began to see significant economic improvement.⁵⁰ Increased recognition of these differences, the disappearance of Cold War alliances, and a step back from focusing on former colonial relationships also meant that more attention was paid to specific responsibilities of individual states. Consequently, TWAIL emerged in a setting where Third World states held less collective strength and were becoming more concerned with individual challenges.⁵¹ As it became clear that the status of “member state” under the international system changed little with respect to the welfare of traditionally subjugated populations, suspicion arose that the system of international public law might be the source of, or at least a main contributor to, the inequalities.

2.2 The TWAIL method

TWAIL scholars are concerned with imbalances in international law and hold that structural factors promoting inequalities between developed countries and emerging states remain embedded within the international system.⁵² The approach attributes these factors to the assertion that international law developed alongside colonialism and posits that “colonialism is central to the

⁵¹ See for example Philippe Berbard & Christophe Jakubyszyn, “À Dakar, Nicolas Sarkozy appelle l’Afrique à renaître et à s’élancer vers l’avenir ”, Le Monde, July 27 juillet 2007. Gallié states that during this period lingering colonial issues were outweighed by home grown concerns and solutions, specific to each state, see Gallié, supra note 41 at 21. Pooja Parmar’s interpretation of TWAIL appears to shape itself around this context, stressing the importance of considering specific state problems first and foremost while not providing an “uncritical privilege”, see Pooja Parmar, “TWAIL: An Epistemological Inquiry” International Community Law Review, vol. 10, 2008, at 365.

formation of international law.”\textsuperscript{53} Specifically, it sees the creation of international law in part as answering a need to account for the colonial relations existing between European and non-Europeans.\textsuperscript{54} The TWAIL approach by no means signifies that the analysis of a given situation is “limited and partial as opposed to other [more so-called universalist] methods”.\textsuperscript{55} Rather, in its consideration of disadvantaged or underrepresented regions, TWAIL assures that the plight of the most vulnerable is considered – a necessary component if the end goal is one of true universal protection under international law.\textsuperscript{56} Best described as an applied method rather than a theory, TWAIL is useful as both a foundation for research and for practical application of findings. The approach is less concerned with determining “what the law is” than understanding “the formulation of a particular set of concerns and the analytic tools with which to explore them.”\textsuperscript{57} The TWAIL method was chosen for this dissertation to both identify the problem and to construct a proposed solution.

\textsuperscript{53} Ibid.; Antony Anghie, \textit{Imperialism, sovereignty, and the making of international law} (Cambridge: Cambridge University Press, 2005) at 3 (see also, in general, the introductory chapter, pages 1 – 12).

\textsuperscript{54} Ibid. at 3.

\textsuperscript{55} Anghie & Chimni, \textit{supra} note 52 at 210.


\textsuperscript{57} Anghie & Chimni, \textit{supra} note 52 at 185; This view is consistent with Parmar’s premise that questions related to ‘how’ theories are constructed are a fundamental part of TWAIL and provide more insight than ‘what is’ questions: Parmar, \textit{supra} note 51 at 363.
In its simplest form, TWAIL’s purpose is to uncover how international law subjugates the Third World to the West. While there are no mandated steps for a TWAIL “approach”, openness to diversity, concern for the populations of the Third World, and a willingness to question the current system of public international law are common characteristics of TWAIL studies. Although the context of TWAIL’s emergence can be considered a major influence on TWAIL’s workings, the method continues to draw inspiration from a variety of sources in its contemporary application. James Gathii, one of TWAIL’s founders, explains the role of diversity in his description of the history of the approach:

[…] just like there is no single modernity, there is no single TWAIL. As has been discussed, a central project of TWAIL is to challenge the hegemony of the dominant narratives of international law, in large part by teasing out encounters of difference along many axes – race, class, gender, sex, ethnicity, economics, trade, etc – and in inter-disciplinary ways – social, theoretical, epistemological, ontological and so on. The approaches within TWAIL include critical, feminist, post-modern, Lat-Crit Theory (Latina and Latina Critical Theory Inc.), postcolonial theory, literary theory, modernist, Marxist, critical race theory and so on.

While this suggests that the approach accepts, and even encourages, varied methodological paths to understanding international law, its proponents adhere to a number of founding constructs.


59 According to Sara Seck, while TWAIL is referred to as a theory or methodology, it is best considered “a broad approach”. Sara Seck “Home state Regulation of Environmental Human Rights Harms as Transnational Private Regulatory Governance”, (2012) 13 German Law Journal 1363.


61 See *ibid.* at 27 where Gathii states that “TWAIL, however, has not sought to produce a single authoritative voice or text. Instead, it has generated a vibrant ongoing debate around questions of colonial history, power, identity and difference, and what these mean for international law”. This is consistent with TWAIL’s inclusion of, and arguably its foundation upon, post-colonialism, critical race theory and law and development studies.
These concepts are clearly stated in a vision statement discussed at a founding meeting in 1997 at Harvard University:

We are a network of scholars engaged in international legal studies, and particularly interested in the challenges and opportunities facing 'third world' peoples in the new world order. We understand the historical scope and agenda of the dominant voice of international law scholarship as having participated in, and legitimated global processes of marginalization and domination that impact on the lives and struggles of third world peoples.

Members of this network may not agree on the content, direction and strategies of third world approaches to international law. Our network, however, is grounded in the united recognition that we need democratization of international legal scholarship in at least two senses: (i) first, we need to contest international law's privileging of European and North American voices by providing institutional and imaginative opportunities for participation from the third world; and (ii) second, we need to formulate a substantive critique of the politics and scholarship of mainstream international law to the extent that it has helped reproduce structures that marginalize and dominate third world peoples.

Thus we are crucially interested in formulating and disseminating critical approaches to the relationships of power that constitute, and are constituted by, the current world order. In addition, we appreciate the need to understand and engage previous and prevailing trends in third world scholarship in international law.  

The participants aimed to regroup researchers with interests in the challenges faced by the Third World, and, more substantively, to question the dominant doctrine of international law with the view that it supports and legitimizes a system that marginalizes Third World populations. Two influential TWAIL advocates, Makau Mutua and Antony Anghie have offered their additions to

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62 For insight into the original TWAIL conference *New Approaches to Third World Legal Studies* at Harvard University in March 1997, see generally Mickelson, *supra* note 46.

63 This objective of the approach continued to be promoted by James Gathii more than a decade later as is evident in his description of TWAIL as “a decentralized network of academics who share common commitments in their concern about the third world.” Gathii, *supra* note 60 at 27.

64 The TWAIL vision statement was written by professors Bhupinder Chimni, James Gathii, Celestine Nyamu, Vasuki Nesiah, Elchee Noworjee, and Hani Sayed. The specific text can be found in James Thuo Gathii “Alternative and Critical. The Contribution of Research and Scholarship on Developing Countries to International Legal Theory” (2000) 41 International Law Journal 263.
Mutua considers the three objectives driving TWAIL scholarship to be 1) a search for understanding of how international law perpetuates norms that subordinate the Third World to the West, 2) the proposition of alternatives to the current system, and 3) ending the underdevelopment of the Third World. Anghie adds that “[…] TWAIL does no more than to make real the promise of international law to transform itself into a system based, not on power, but justice.” Hence, TWAIL is more than an expression of a concern for the challenges of Third World countries. Its fundamental drive must be understood as containing both this concern and a determination to discover aspects of international law that are not only responsible for past struggles but that continue to enforce a discriminatory system. Judging from the various statements above, the democratization of international law and a concern to improve the conditions of the Third World seem both interdependent and independent for TWAIL scholars.

In sum, TWAIL evolved to deal with more varied scenarios than early Third World commentary. It therefore follows that TWAIL is equipped to respond to an increasingly complicated political environment. Whereas original Third World commentators where able to invoke a larger common issue to advocate for their concerns (i.e. emancipation and decolonization) and a simpler solution (national and economic sovereignty), TWAIL represents varied suppressed populations that do not all identify with the same cause. Moreover, solutions for scenarios under TWAIL are not always clear. By seeking out marginalization more generally, the TWAIL approach shows its ability to treat various issues touching upon a variety of groups. The path between early Third Word

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65 Mutua & Anghie, supra note 58 at 31.
66 Ibid.
67 Ibid. at 40.
approaches and TWAIL demonstrates that the former was fundamental to the birth of the latter. The first wave of scholars recognized an imbalance between populations that benefited from the international system in contrast to those that were kept outside. The legitimacy of TWAIL today exists because of the attempts made by early Third World commentators. It was the first wave’s attempt at using the international system as it was that confirms TWAIL’s suspicion of persisting bias.

3. TWAIL and the concept of fragile states

With the theory explained, a discussion of the term “fragile state” provides initial consideration of the object of concern of this dissertation. While the term has historically been reserved for state rankings and conflict-affected states, it is now being applied more judiciously and to a wider variety of situations. The first part of this section therefore briefly overviews how the term has been applied in literature and by international organizations before outlining a definition for this dissertation. As a preliminary comment, this dissertation avoids using the term “failed state” when referring to areas absent of legal protection. Since September 11, 2001 the term failed state has increasingly been associated with countries involved in armed conflict or states suspected of involvement with terrorist groups. Consider, for example, the former director of Harvard Kennedy School Program on Intrastate Conflict, Robert Rothberg’s description of failed states as deeply conflicted and dangerous areas contested by warring factions. Failed state appears to be


69 As opposed to being used in factual or more objective manners and often in relation to humanitarian needs. See Charles T. Call, “The Fallacy of the ‘Failed state’” (2008) 29 Third World Quarterly 1491 at 1493.

increasingly related to outward repercussions or security issues that might emanate from a state rather than the well-being of the state and of the people in it. The detriment of using the term rests in diminishing concern from the international community towards the domestic challenges of the state.

Although Charles Call recognizes some positive aspects from using the term,\textsuperscript{71} he explains that the expression “contains culturally specific assumptions about what a ‘successful’ state should look like” and lumps states with diverse challenges into the same category.\textsuperscript{72} In addition, Call underlines that it colours foreign policy towards the state in question while silencing more useful remedies.\textsuperscript{73} In what Call labels ‘cookie-cutter prescriptions’, he details the problem with categorizing and designating a state as ‘failed’:

Just as the 'failed state' concept cobbles together diverse states, it tends to lead to a single prescription for diverse maladies: more order. Although those who advance the failed state concept prescribe diverse and tailored solutions to the problems of failing and failed states, they privilege policies that will reinforce order and stability, even when the prevailing order is unjust. This emphasis on order and stability clearly serves the interests of Western powers concerned about international insecurities stemming from drug trafficking, terrorism, or internal armed conflicts abroad.\textsuperscript{74}

\begin{itemize}
  \item \textsuperscript{71} Call, supra note 69 at 1494: 
    \begin{enumerate}
      \item the directing of resources and attention to states that have let down their populations;
      \item highlighting the link between international security and internal state stability;
      \item highlighting the link between the existence of “basic freedoms and service delivery within small, powerless societies and the interests of Western powers […]”;
      \item increasing awareness among humanitarian actors of the disadvantages of furnishing aid directly to populations without helping to build national institutions;
      \item additional attention to the role of institutions in development efforts.
    \end{enumerate}
  \item \textsuperscript{72} Ibid.
  \item \textsuperscript{73} Ibid.
  \item \textsuperscript{74} Ibid.
\end{itemize}
Similarly, although Donald Potter employs the term failed state in his work, he provides a nuanced definition and focuses on the different degrees of state incapacity. As he writes, “state failure need not be reserved for cases of complete state collapse, either into civil war or anarchy”. Rather, for Potter the expression is better understood in terms of a spectrum or a degree of a state’s capacity to meet its responsibilities. This approach reflects Call’s condemnation of the grouping of states into one category and allows for more tailored responses of support. Potter explains that the degree of integrity of the state can be measured through governance, corruption, economic, and social wellbeing models. Nevertheless, in view of Call’s concerns and mindful of TWAIL principles, this paper forgoes the use of the term failed state.

A recent attempt at improving how fragile state are identified is found in the Organisation for Economic Co-operation and Development’s (OECD) 2015 report on States of Fragility and its subsequent yearly reports. The 2015 study reassessed how fragility should be viewed, highlighting the need to look beyond the common practice of limiting consideration to economic indicators and stereotypes related to conflicts. Since 2015, the OECD has considered five “clusters” of fragility indicators: 1) level of violence; 2) access to justice; 3) effective, accountable and inclusive institutions; 4) economic inclusion and stability; and 5) capacities to prevent and adapt to

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76 Ibid at 5.

social, economic and environmental shocks and disasters. The organization considers these five vulnerabilities both separately and as a whole, with countries identified in several clusters likely being listed on the organization’s classification of fragile states. The approach is an expanded version of Potter’s view of degrees of incapacity discussed above. Just as Potter noted that there can be a spectrum of a state’s capacity to meet its responsibilities, the OECD approach underlines different state vulnerabilities to different degrees. According to the OECD, the intersection of these vulnerabilities provides a better indicator of fragility. The organization explains its approach as follows:

Fragility is widely recognised as a multi-dimensional challenge. Rigorous approaches to analysing fragility allow for its dimensions to be separately monitored. Considering several dimensions of fragility separately differs from the traditional approach to tracking fragility (used, for instance, in previous OECD Fragile States reports) in several important respects. Rather than highlighting a single set of particularly vulnerable countries, it groups together those contexts that face quite distinct risks and development challenges. These include endemic violence, economic instability and weak institutions. Identifying subsets of countries facing specific forms of fragility and vulnerability will allow for a more focused prioritisation of development assistance.

The OECD method shows greater deference for Third World challenges by not indiscriminately placing states in the same broad category and by encouraging tailored responses to their vulnerabilities. While all the clusters identified could apply indirectly to different scenarios in this dissertation, they key ones to consider are access to justice, as well as effective, accountable and inclusive institutions. That is, the main considerations for fragility in this dissertation should be directly related to whether a state can control MNCs on its territory through legislation and institutions and whether it can provide access to justice for its citizens. The following paragraphs

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78 Ibid., at p. 19.

79 Ibid., at p. 43.
discuss some of the more hidden aspects affecting state ability to regulate MNCs before returning to the definition for this dissertation.

While certain external factors contributing to the undermining of governance are easy to understand (e.g. protracted armed conflict, extensive corruption), others, such as marked economic dependence, are more complex. Dependence on foreign investment can place countries in the position of creating a legal environment with few constraints on the operations of foreign corporations. The resource extraction industry provides an example. David Szablowski explains that mineral rich countries have been strained by economic crises and neoliberal fiscal policies that have increased “the importance placed upon transnational mining investment in relation to other sectors of the economy.”

Mining is an important source of taxation and foreign exchange revenue and such revenue is badly needed by states in the Global South. He further states that:

Some 34 countries worldwide (mainly in the Global South) rely on the mining sector for at least 25 per cent of their total merchandise exports. In Peru, mining accounts for roughly 45 per cent of the country’s exports, and over 7 per cent of its tax revenue. Particularly when a state is in the grip of a macroeconomic straitjacket and is struggling to pay its foreign debt, the access to foreign exchange provided by the mining sector is vital.

In some cases, even if states wished to regulate MNCs on their territory, approaches to investment in the Global South discourage them from doing so. Be it stabilization clauses in contracts with corporations guaranteeing minimal regulations, bilateral investment treaties, or the threat of

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81 *Ibid.* at 43.

losing a reputation as an investor friendly environment, debt-heavy and cash poor states have little ability to advocate for MNCs to absorb a part of the social costs of their actions. Danwood Mzikenge Chirwa explains how depleted funds can cripple a host state’s ability to have any command over corporations on its territory:

Regulation requires financial and human resources. For under-resourced or developing states, resource constraints present another difficulty for regulating and controlling private actors. It has been argued that the resources needed to ensure compliance by MNCs with labour rights far outweigh the resource capabilities of developing countries.83

Thus, while lack of resources in developing countries affects ability to regulate, severe economic pressures linked to competition for foreign investment may compromise the will of some jurisdictions to restrict corporate behaviour.84 Alice De Jong explains that “poorer, less developed nations are often so captive to the need for foreign investment funds that their ability to impose or enforce employment, environmental, social and other standards on MNCs within their borders is severely compromised.”85 Although host state collaboration with MNCs can be manifest, more subtle versions of compromise exist, including the delegation of select aspects of state authority to MNCs.86 Consider the Peruvian interaction with foreign mining companies during the 1990s where

83 Chirwa, supra note 30 provides insight into the issue with reference to human rights and labour rights.

84 Diane F. Orentlicher & Timothy A. Gelatt, PublicLaw, “Private Actors: The Impact of Human Rights on Business Investors in China” (1993) 14 J. Int’L L. Bus. 66; Lena Ayoub explains that the competition existing between developing countries for foreign investment combined with MNCs goals of decreasing costs diminishes motivation of host countries to impose effective labour rights protection and environmental standards: “Many developing countries will even condone MNCs’ labor rights violations by turning a blind eye to employee abuse or by purposefully omitting domestic labor laws, as applicable to visiting MNCs, from their legislation.” Lena Ayoub, “Nike Just Does It—And Why the United States Shouldn’t: The United States’ International Obligation to Hold MNCs Accountable for Their Labor Rights Violations Abroad” (1999) 11 DePaul Business Law Journal 422; on the topic of limitations of the host state approaches and their need for sound legal systems see Chirwa, supra note 30 at 25.

85 de Jonge, supra note 19 at 70.

86 Szablowski, supra note 80 at 58.
the Fujimori’s government quietly removed itself from aspects of regulation while delegating other aspects to the industry. During a crisis of hyperinflation, public debt, and civil war, Peru liberalized its mining laws, turning the sector to large-scale private foreign investment while relegating state involvement to that of a regulator of “narrowly defined technical issues.” Perú’s amended legislation removed agency from both the state and community actors and provided “mining enterprises with formal mechanisms to assist them in establishing relatively swift, secure and inexpensive control over the entitlements necessary for project development.” Szabowski explains that in addition to regulatory frameworks favourable to the mining sector, companies also benefited from the responsibility of social mediation for industry development:

> It is the mining enterprise that is left to negotiate contracts of sale with community actors and to determine the local commitments that will be assumed in its environmental impact statement. Meanwhile, the state appears removed from these processes, seeking both to preserve its image as a sovereign neutral arbiter of the public interest and to avoid the responsibility and expense involved in direct mediation of the local costs of mine development.

This passage shows that judging the fragility of a state can be a complicated exercise. This is especially true when governments cede certain powers to corporate interests due to economic

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87 President from 1990 to 2000, Fujimori’s regime was characterized by human rights abuses and systematic corruption. Fujimori fled into exile during his presidency in 2000, *ibid.* at 40.


89 *Ibid.* at 36. In addition to other regulatory changes, the government reduced the influence of unions through new labour legislation, enacted changes to indigenous land tenure, and generally decreased its formal state responsibilities with respect to the mining sector.


pressure as it may be difficult to determine where effective government regulation ends and corporate measures begin.

The definition of fragile state for this dissertation favours models that are inward looking and that consider ability to govern and enforce the rule of law as key indicators. In elaboration to the above, consideration should therefore be given to the promotion of the rule of law within the state, including access to justice. The existence of effective institutions capable of implementing policies and regulations with respect to corporate actors should also be considered. Thus, fragility is related to the absence of the capacity to regulate the behaviour of a MNC on its territory, as well as the inability provide remedy to citizens victim of human rights violations by the company. While reference to fragile states is made more casually in the following two chapters, the dissertation adopts a more technical definition in its chapter six discussion. The refined definition of chapter six is intended to be precise enough to provide consistent determination of such states for the purpose of the application of state responsibility.

4. Conclusion

The goal of this chapter was to provide background into TWAIL to clarify its application to the dissertation. The chapter also introduced the concept of state fragility as it is to be understood

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within the following chapters. It began by explaining that TWAIL’s purpose is to uncover the ways in which international law has not only subjugated the Third World to the West, but how it perpetuates the subjugation. This dissertation’s concern with how wealthy states benefit from corporate citizens that exploit fragile jurisdictions provides a clear example of inequities in international law that lead to such subjugation. The chapter demonstrated, too, how and why TWAIL cautions that the power exercised by the West can operate behind the scenes of international law and in a systemic manner. This is shown in the chapters ahead by the ways international law reinforces the corporate veil that primarily protects Global North states.

Through TWAIL, chapter four exposes how international law perpetuates the identified inequity by over-valuing the authority of the draft codification of state responsibility. The chapter first explains how the narrow application of the attribution criteria within the ASR protect home states from being held responsible for corporations they support and benefit from. TWAIL reveals that this mainly benefits Global North countries at the expense of fragile states. The chapter argues that deciding bodies and commentators mistakenly treat the ASR, a draft codification last modified in 2001, as a treaty text, and warns that doing so effectively extinguishes curiosity as to whether the customary rules of state responsibility have evolved. It further holds that the crystalizing characteristics of the draft codification hinder the customary law of state responsibility from adapting to the influx of MNCs. The chapter shows that a majority of states, including almost all Latin American and African states, have requested that negotiations regarding the draft articles be reopened and debated to adapt them into an acceptable form and sign them as a treaty. Countries such as Canada, the UK, the US, and Australia have resisted any such negotiations, preferring to apply the ASR as drafted. Thus, chapter four not only reveals an aspect of international law that contributes to the normative gap in fragile states, it exposes how international law perpetuates the
gap though systemic processes. Chapter five continues the discussion of the normative gap by showing that IHRL, while being touted as universal, suffers from lack of enforcement in fragile states and only obliges home states to provide extraterritorial protection in limited scenarios.

The description of TWAIL above also explained that among the objectives that drive the method is the proposition of alternatives to the current system. Chapter six is therefore devoted to recommending a fair solution through TWAIL considerations. To neutralize the bias of the ASR, the chapter proposes considering the law of state responsibility outside of what is represented in the draft articles. It argues in favour of returning to the practice of considering the components of customary law, *opinio juris* (a state considering itself bound by a rule) and state practice, when applying the rules of state responsibility. It further argues that once focus is removed from the ASR, a more progressive trend within CIL of state responsibility becomes visible. However, along with the proposition of returning to customary law outside of the draft articles comes a warning: CIL may indeed prove to be more equitable than what is reflected in the ASR, but it is not immune to the systemic biases of international law noted above. As such, when considering the benefits of CIL, attention must focus on whether current CIL is equitable to the Global South. The chapter puts forward a fairer application of the mechanism of attribution within state responsibility, requiring a lower threshold to link violations of international obligations by MNCs to their home states. The TWAIL inspired solution takes into account the fragility of the host state, any support offered to the MNC in question by the home state, as well as any precautionary steps the home state may have taken to ensure that its corporate citizens respect international obligations. The purpose of the proposed criteria is to inject equality into the international system by engaging home states to better regulate their MNCs, thereby reducing the normative gap described above.
Section three above discussed the challenges fragile states face with respect to MNCS and provided an understanding of what a fragile state is for the purposes of this dissertation. The section highlighted the many potential causes of fragility and warned against definitions purely relating to stereotypes of conflict. Given that fragility is used in this dissertation to describe areas absent of regulation in which MNCs may operate, the definition is limited to the inability of states to control MNCs on their territory and to provide remedy to their citizens in the event of violations by MNCs. Linking the definition to the ability of the state to perform these tasks means that the TWAIL solution is not applicable to states that are unwilling to perform them. This aspect is discussed in chapter 6 and in the conclusion of the dissertation.

Finally, there is no doubt that a TWAIL inspired approach advocating permission for stronger states to dictate how companies should behave in weaker states may seem peculiar. That is, some may argue that it is a host state’s sovereign right to lower labour standards, for example, to attract foreign investment and that a home state's intervention would be a violation of the international law doctrine of non-intervention into the domestic affairs of others. Arguments may further suggest that encouraging powerful states to enact legislation with extraterritorial effects risks initiating colonial-like control, precisely what the Third World fought against for so long. Yet it is difficult to conceive of how ensuring regulation exists where the host state lacks the capacity to enforce any violates the fragile state’s sovereignty. Indeed, the presence of a MNC operating to lower standards in a state that cannot control the company’s entry or operations is in itself a violation of that state’s sovereignty that ought to be addressed. Furthermore, and with reference to the immediate paragraph above, the proposed solution of this dissertation only applies to situations where states are unable to regulate companies on their territory. The dissertation does not argue in favour of home state control when the host state has the means but not the will.
The first step to seeing how the TWAIL approach may contribute to decreasing the normative gap in fragile states is understanding how state responsibility is linked to fundamental principles of international law as well as how the doctrine evolved. This is therefore addressed in the following chapter.
CHAPTER 3 – THE EVOLUTION OF STATE RESPONSIBILITY

1. Introduction

TWAIL scholars understand that the marginalization of the Third World has occurred through a process of entrenchment of Western approaches. Its search for understanding how current international law perpetuates subjugation requires understanding past struggles that have been incorporated into a discriminatory system. Thus, TWAIL’s suggestion that history is essential for us to unveil untold truths of international law inspires the historical review provided in this chapter. The chapter maps out the early influences on, and evolution of, state responsibility. Although much has been written about modern state responsibility and the draft codification, relatively few commentators have addressed the historical development of the norms. The following therefore provides a short survey of the major influences on the topic and outlines the lead up to the ASR.

The individuals and events below are discussed due to either their stature and lasting impact on international law (Grotius), the pertinence of considering their view for reasons based in TWAIL (Anzilotti), or for their direct role in shaping the draft codification (the ILC).

State responsibility is the result of a fusion of legal concepts and the culmination of hundreds of years of customary law development. Its rules can be traced back to the Roman law of delict, canon law, theological doctrines, natural law, and the form these laws took in the chapters of extra-contractual liability in European civil codes. Yet, regardless of its extended history, the topic was long overlooked by legal scholars in favour of more substantive rules. For much of their existence, the rules were merely considered by-products of other early international law doctrines including
diplomatic protection, treatment of foreigners, law of the sea, or the laws of war.\textsuperscript{93} State responsibility only emerged as its own subject during the late nineteenth century, not surprisingly during a time when states came to monopolize the role of international actors.\textsuperscript{94} Considering the short period between its emergence as a stand-alone topic and today, state responsibility has evolved rapidly. This chapter discusses the early influences on what would become state responsibility, starting with the work of Hugo Grotius. It also looks at the emergence of the first forms of modern state responsibility. The section concludes with a review of the ILC’s efforts to codify the customary law. Considered within the greater view of the dissertation, the chapter provides more than a simple historical background. It shows how state responsibility has developed and adapted over time only to be captured at a specific moment by the framers of the ASR. In other terms, the draft codification provides a snapshot of state responsibility and freezes, or “crystalizes” a narrow view of the doctrine at a time where the utmost deference was provided to the concept of state sovereignty. The subsequent chapters explain how this favours Global North states by stunting the grown of a doctrine that previously showed flexibility.

2. **Influence of Grotius (1583 – 1645)**

Grotius is often credited as the founder of international law.\textsuperscript{95} His development of a doctrine of liability based on fault and his interpretation of Roman law, canon law, theology and general


\textsuperscript{94} Ibid.

\textsuperscript{95} “Leading Figures in International Law: Hugo Grotius” (2007) 2:3 International Judicial Monitor, American Society of International Law and the International Judicial Academy, online http://www.judicialmonitor.org/archive_1007/leadingfigures.html [Accessed 18 November 2017]; Grotius’ works *Mare Liberum* (The Freedom of the Seas) and *De Jure Belli ac Pacis* (On the Laws of War and Peace) are two important examples of his contribution to international law. The common use of the
principles of liability were early contributions to the topic. Additionally, his domestic law efforts could be considered a catalyst for the formation of state responsibility. Grotius’ principles of liability are absent from his well-known texts on the law of nations, which never specifically identify a separate responsibility of states. This is unsurprising as the principles stemmed from his work on civil law and during Grotius’ time there were no distinctions between civil law and the law of nations on these matters. Simply, no institutions or procedures existed at the international level that would allow for differences to be drawn between states and citizens. Nevertheless, it must be understood that his civil liability writings indeed influenced interactions between nations.

Two works on delictual liability that contributed to the formation of state responsibility are *Inleiding tot de Hollandsche Rechtsgeleerdheid* (Introduction to the Laws of Holland) and *De Jure Belli ac Pacis* (On the Laws of War and Peace). In Book 2, Chapter 17 of On the Laws of War and Peace (entitled *Damage Caused Injury and Obligations Arising Therefrom Through*) Grotius explains that legal actions may arise from “pact, wrong, and statute” and details diverse wrongs and their relationships with fault and damage. His description of the process of violation of obligations, damage, and retribution shows similarities to the modern interpretations of state responsibility. Grotius posited that fault could result from commission or omission of acts “in phrase “Grotian Moment”, which represents a significant development where new rules of customary international law emerge rapidly, is yet another indication of Grotius’ lasting influence.

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96 Crawford “The General Part”, *supra* note 93 at 8.


conflict with what men ought to do” and that if damage ensued, it should be “made good.”\textsuperscript{99} Damage, per Grotius, was defined as having occurred “when anyone has less than belonged to him.”\textsuperscript{100} As part of the concept of damage, loss of property included the loss of products belonging to the property “whether they have been gathered or not”. With respect to reparation, Grotius wrote that some damages “may be made good with money, if the injured party so desire”.\textsuperscript{101} Grotius widened the focus from purely that of the injurer’s actions to one that included the need for compensation of the victim. Furthermore, his interpretation of compensation marked a shift from the traditional Roman law approach to one where compensation is disassociated from the degree of fault and associated to the nature of damage.\textsuperscript{102} That shift understood, however, Borzu Sabahi explains that it is not so much Grotius’ widened focus on fault as his creation of the foundations of a general theory of liability that could be considered his significant contribution.\textsuperscript{103} Regardless, Konrad Zweigert and Hein Kötz encapsulate the overall importance of Grotius’ contribution to civil law and eventually the European civil codes, writing:

Roman Lawyers […] never arrived at the general principle that everyone is responsible for the harm he or she is to blame for causing. This principle had to wait until the seventeenth and eighteenth centuries for its promulgation by the great natural lawyers, especial Grotius and Domat. Thereafter it made its way into many of the codes of Europe.\textsuperscript{104}

\textsuperscript{99} Ibid.
\textsuperscript{100} Ibid. at II.
\textsuperscript{101} Ibid. at XXII.
\textsuperscript{102} Supra note 31 at 29.
\textsuperscript{103} Ibid. at 27.
\textsuperscript{104} Konrad Zweigert & Hein Kötz, \textit{An Introduction to Comparative Law} (Oxford: Oxford University Press, 1998) 597.
It is a testament to the quality and originality of Grotius’ overall work that his doctrine of civil liability would have a sustaining impact at the international level. Concepts elucidated by Grotius linking the breach of obligations with reparation, restitution and compensation are the pillars of the customary law of state responsibility.

3. Codifications in Europe

Civil law codifications in Europe during the 19\textsuperscript{th} century provided the next major influence on the development of state responsibility. Swiss, German, French, and Scandinavian civil codes adopted the principles of full compensation (compensate to the extent of loss) and restitution (restoring the state of affairs) as consequences for extra-contractual liability.\textsuperscript{105} Although most legal systems focused their remedies on compensation, some codes offered it only as an alternative to restitution in certain cases – allowing the harmed party to make a special request for a monetary amount instead of restoration.\textsuperscript{106} The private law influence from these codifications is most evident in one of the earlier attempts at an international system of responsibility between states. August Wilhelm Heffter’s 1844 treatise on international law manifestly copies the European civil code chapters on extra-contractual responsibility and applies them to violations of international law.\textsuperscript{107} Sabahi notes the extent to which Heffter modelled his system on domestic law:

Chapter 3 of his treatise is called obligations; and, predictably, he divides his chapter into two sections: (1) public treaties; and (2) obligations that do not arise from conventions. This division mirrors the general division of the law of obligations in some civil law jurisdictions to obligations arising from contracts, and obligations arising extra-contractually.\textsuperscript{108}

\textsuperscript{105} Supra note 31 at 31.

\textsuperscript{106} Ibid. at 12.

\textsuperscript{107} August Wilhelm Heffter, \textit{Le Droit International de l’Europe} (Muller, 1883).

\textsuperscript{108} Supra note 31 at 41.
Although the extent to which Heffter’s scholarship may have influenced the more recent deliberations of the ILC is questionable, his work is the first clear attempt at state responsibility.\textsuperscript{109}

Given its translation into French in 1883, the least that can be said is that it reinforced the early influence of civil domestic law on the doctrine of state responsibility.\textsuperscript{110}

Heffter’s model of liability based on fault would be replaced by another theory of state responsibility posited by Dionisio Anzilotti. Anzilotti’s theory focuses on harm rather than fault of the committing agent.\textsuperscript{111}

4. Anzilotti’s influence: the removal of fault

Dionisio Anzilotti, President of the Permanent International Court of Justice and a professor of law, wrote two important manuscripts\textsuperscript{112} that included deliberations on state responsibility.

\textsuperscript{109} Although it does not mean his work did not influence the evolution of state responsibility, a search of the deliberations of the ILC unveiled no specific mention of Heffter’s model.

\textsuperscript{110} The civil liability influence on state responsibility is especially important when considering current and proposed interpretations of how third-party actions are imputed to a home state. Civil liability, as shown in modern European Civil Codes and in the Quebec Civil Code, contains different levels of liability for injury to others for the acts or faults of another. Parental authority, persons entrusted with custody of a child or thing, and owners of animals are all subject to presumptions of liability for the acts of another. Of course, the levels of liability vary. Parents, for example, can overcome a presumption of liability (attribution) by proving they did not commit fault with respect to custody, supervision, or education while animal owners are subject to strict liability. Given this influence, it is interesting to note where the ILC decided to draw the line with respect to presumptions of liability in the ASR. As is shown in the discussion of the ASR articles in the following chapter, presumptions of liability only exist for state organs, actors representing the state, or actors under a high degree of control by the state.


\textsuperscript{112} Teoria generale della responsabilita dello Stato nel diritto internazionale (1902) and La responsabilité internationale des Etats (1906).
Concerned that domestic law principles should not be applied between legal subjects endowed with equal sovereignty under international law, Anzilotti was preoccupied with separating the domestic and international legal orders. At the turn of the century, fault continued to form an important basis of liability in Roman law\textsuperscript{113} and Anzilotti differentiated its application in state responsibility:

'Malice and fault', in the proper senses of the words, express human will as a psychological fact, and one cannot therefore speak of them except in relation to the individual. The point is, subsequently, whether an action contrary to international law, in order to be imputable to the State, has to be caused by malice or of fault by individual agents; in other words, whether the latter's malice or fault is a condition laid down by the law in order for particular acts to lead to particular consequences for the State.\textsuperscript{114}

Anzilotti believed that fault should not matter in state responsibility as ‘malice and fault’ are characteristics that could only be linked to an individual. He believed that malice or fault should only be considered on an international level if they were elements of a violation of an international obligation. What mattered for Anzilotti was the confirmation that the act breached an international obligation and was attributable to the state. He replaced the use of fault under Grotius and within early civil law cases with a focus on confirming that the act was indeed that of a state organ. This shift of focus is reflected within the draft articles of state responsibility, where an ‘internationally wrongful act’ (and not fault) incurs responsibility. Anzilotti further explains that, under state responsibility, a violation of an international obligation is considered to occur only if it is performed by an organ of the state:

In reality, the doctrine may simply be understood to apply to scenarios in which international responsibility is not due to an act of an individual but rather one by the state. More accurately, the illicit act under international law does not exist for the simple fact that

\textsuperscript{113} Supra at note 112.

a wrongful act offered. It occurs because state organs behaved, in this respect, in a certain manner.\textsuperscript{115}

As the following chapters show, the ASR mirror the concepts put forth by Anzilotti, making his influence on the formation of the draft code clear. While the above citation does not deny that attribution of private acts to states can occur, the tone of Anzilotti’s conceptual framework plainly advocates strict removal of the individual.\textsuperscript{116} In doing so, his opinions appear to have galvanized a turn away from the more universalistic positions of state responsibility, such as Herffter’s above. To understand the shift, consideration of Anzilotti’s opinions should take into account the foundation of international law at the time. In his article comparing Anzilotti’s views to those of other scholars, and in discussion of the rejection of universalism at the turn of the century, Nolte explains:

Given the general political situation at the end of the nineteenth century – a group of European powers in a race for colonies and dominance – such a statement was not unreasonable. It should not be forgotten that, in this situation, the theory was gaining ground according to which the sovereignty of states took precedence over international law and that this sovereignty would exclude any form of legal responsibility against the will of the state.\textsuperscript{117}

The acceptance of the above model of sovereign rights of the state is consistent with (and determinative of) a narrow reading of state responsibility. That is, views supporting the unchecked

\textsuperscript{115} Ibid. (Author’s translation) Gidel’s translation reads: “En réalité, cette doctrine peut également s'entendre simplement en ce sens que la responsabilité internationale ne naît pas d'un fait de l'individu mais d'un fait de l'Etat; pour mieux dire, que le fait illicite au regard du droit international, n'existe pas pour la simple raison qu'un délit a été commis, mais pour la raison que les organes ont tenu, a tel égard, une certaine conduite.”

\textsuperscript{116} Dionisio Anzilotti, “La responsabilité internationale des États à raison des dommages soufferts par des étrangers” (1906) 13 RGDIP at 6. The page can be viewed online at http://gallica.bnf.fr/ark:/12148/bpt6k734812/f9.image.r=revue%20g%20c3%A9%20c3%A9ral%20droit%20international%20public.langFR, [Accessed 18 November 2017].

power of sovereign states, as were popular at the turn of the century, naturally favour limiting the possibilities of imputation of acts of third parties to states.\textsuperscript{118} Nation states were consolidated as the only clear actors in international law and violations of international obligations “did not exist”\textsuperscript{119} if they were committed by private entities. This is important to the dissertation as chapter six argues that the evolution of sovereignty no longer supports the narrow representation of attribution in the draft articles. Viewed through the TWAIL lens, this means that a major influence on the draft codification emerged during a period of international law that eschewed positive obligations between states, focusing mainly on non-intervention. Thus, any consideration for weak states during the period came in the form of how dominant states could control them rather than support. Yet, since Anzilotti formed his theory of state responsibility, the concept of sovereignty has begun to shift away from absolute watertight compartments and there has been a marked rise of non-state actors (NSA) in the form of MNCs with GDPs that surpass that of many states. Chapter four demonstrates how the ASR fails to take these changes into account and how it captures a version of state responsibility mostly consistent with Anzilotti’s approach favouring powerful states. Chapter six, in turn, identifies these issues as ones that should affect how state responsibility is considered today.

\textsuperscript{118} For example, the views would resist any suggestions that the acts of MNCs could be imputed to the state as this paper argues in chapter six.

\textsuperscript{119} See Anzilotti quote earlier in this section: “…the illicit act under international law does not exist for the simple fact that a wrongful act offered. It occurs because state organs behaved, in this respect, in a certain manner”. 

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5. The lead up to the work of the International Law Commission

As the balance of power between nation-states unfolded in the 1800s, general rules emerged setting an international standard of justice, i.e. a minimum standard of international protection for individuals. The standard was both vague and low, as well as arbitrarily applied. Indeed, the ways in which these rules, precursors to state responsibility, were applied provides an example of how early versions of the doctrine favoured powerful states. The standard was meant to apply to various fields of state conduct including protection of foreigners, operation of tribunals, and acts of armed forces. Western European countries and the US advocated for the application of the standard, while Eastern European, Asian, and Latin American countries argued in favour of simply applying equal protection to nationals and foreign-nationals irrespective of their country of citizenship. Western Europe and the US provided rights equivalent to those afforded their own citizens amongst each other, yet applied the minimum standard to citizens of countries excluded from the select number of states parties privy to this mutual understanding.

Given the unpredictability of the standard’s application, disputes concerning state responsibility where often solved through arbitration. Diplomacy was favoured to settle the disputes and even played an important role for cases reaching arbitration. Naturally, such situations were

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121 Ibid.

122 Ibid. at 7.

123 Ibid. at 8.

124 Ibid.
favourable for developed states as they tended to hold predominant weight during negotiations.\textsuperscript{125} According to Myres McDougal et al., “the decision makers of powerful industrialized states [were] in a position to exert disproportionate influence upon the outcome of controversies.”\textsuperscript{126} Nevertheless, the international standard of justice remained the closest representation of state responsibility and continued to develop under customary law through failed attempts at codification under the League of Nations. The next attempt at codification would begin after the shock of the Second World War, with the encouragement of the United Nations, and as a project of a commission (ILC) with a mandate to promote the growth of international law.

6. Work of the International Law Commission

The ILC’s draft codification was the result of nearly forty years of work. Earmarked for codification under the League of Nations, the process for the formation of the ASR was initiated by the ILC in 1956.\textsuperscript{127} Six reports submitted between 1956 and 1961 evoked little interest and resulted in a lack of consensus on how to proceed.\textsuperscript{128} In 1963, under the direction of Roberto Ago as Special Rapporteur, the ILC approved a wider focus on the “general” rules of international responsibility over a previous narrow focus on rules of diplomatic protection. That same year, Ago proposed to a sub-committee of the ILC that codification work should avoid mixing the “genres” of primary and secondary rules of international law and focus purely on the secondary rules. Today,

\textsuperscript{125} Myres S. McDougal, Harold D. Lasswell, & James C. Miller, \textit{The Interpretation of Agreements and World Public Order: Principles of Content and Procedure} (New Haven: Yale University Press, 1967) at 42.

\textsuperscript{126} Ibid.

\textsuperscript{127} Supra note 27 at 1.

\textsuperscript{128} Ibid.
the primary rules are not addressed by the codification\textsuperscript{129} simply because, during the examination of Ago’s first report in 1969, almost all the speakers accepted the idea of limiting the Commission’s work to the secondary rules. Nevertheless, Eric David highlights that the positions taken by various delegates at the ILC at that time demonstrate that “sufficiently clear principles as to how the responsibility of the state could be engaged on account of the violation of other rules of international law did not yet exist.”\textsuperscript{130} This absence of clear demarcation between the primary rules and the principles of engaging the responsibility of states is especially relevant to this dissertation, as discussed below, as it suggests that the secondary rules may be somewhat arbitrary.

Due to Ago’s accepted proposal, the draft articles therefore attempt to codify the application of the secondary rules only. Accordingly, the ASR are what enable states that have been wronged to assert breaches and claim compensation – they contain no catalogue of specific wrongful behaviour. The ASR instead “outsource” this function under the definition of Internationally Wrongful Acts (IWA). Under state responsibility, IWAs exist when a breach of an \textit{international obligation} of the state occurs and when that breach is attributable to the state under international law.\textsuperscript{131} As noted above, an IWA can result from a violation of a wide variety of norms, including CIL, treaties, or general principles of international law. Given the primary/secondary distinction, there is minimal discussion below on the proscription of specific acts.

\textsuperscript{129} Once again, primary obligations are wide ranging and encompasses any “breach of an international obligation”. This includes, but is not limited to, bilateral and multilateral treaty obligations, international customary law, and obligations under general principles of law. The primary obligations for the case study in chapter seven, for example, are Security Council Resolutions (SCR).


\textsuperscript{131} ASR and Commentary, supra note 26 at 34 (article 2).
In its 1980 Report, the ILC stated the following to clarify that the scope of the draft articles encompassed no more than an attempt to codify the secondary rules of international law:

[…] the purpose of the present draft articles is not to define the rules imposing on states, in one sector or another of inter-state relations, obligations whose breach can be a source of responsibility and which, in a certain sense, may be described as ‘primary’. In preparing the present draft the Commission is undertaking solely to define those rules which, in contradistinction to the primary rules, may be described as ‘secondary’, inasmuch as they are aimed at determining the legal consequences of failure to fulfil obligations established by the ‘primary’ rules. Only these ‘secondary’ rules fall within the actual sphere of responsibility for internationally wrongful acts.132

Malcom Evans explains this aspect of state responsibility more succinctly:

The concepts which are bundled up into the rubric of state responsibility in international law are said to be a means to an end, that end being the establishment of responsibility at the international level for international wrongs. State responsibility is not concerned with defining what comprise international wrongs that are capable of being addressed at the international level.133

It is important to keep in mind, however, that the distinction between primary and secondary rules was, at its heart, little more than a way of framing, or adding focus to, the codification exercise. Careful reading of the articles reveals that classification of the rules into two separate categories is not always possible. Being aware of this helps to remove some of the connotations associated with draft ‘codes’ while considering the ASR, i.e. that they represent significantly entrenched law and are difficult to change. While it would be wrong to say that excluding the primary rules from the codification framework simplified what remained a Herculean task, it did seem to move the project

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into high gear. Between 1969 and 1980, the ILC would be particularly productive, producing eight reports and completing proposed articles for a draft of Part One. The ILC continued to develop the articles with the next major step being the publication of the 1996 version of the draft articles. By this time, the draft articles were being cited by courts and provoking reflection in academic literature.  

This dissertation focuses primarily on the composition of IWAs and on the articles related to the attribution of acts of third parties to states. These important concepts make up Part One of the draft articles along with sections outlining different modes of shared responsibility, as well as a list of circumstances that may preclude the responsibility of state (for example, self-defence, force majeur, and necessity). Yet it is worth noting that the final 2001 version of the ASR also include three other main sections. Part Two addresses the legal consequences of an IWA, including obligations of cessation of behavior, reparation for injury, and compensation. Part Three addresses the methods of invocation of the responsibility by injured states, along with rules to be followed when implementing countermeasures. Part Four contains general provisions dealing with, among others, how the ASR interact with special rules of international law and asserting they operate without prejudice to the UN Charter.

Chapter six, section two, discusses the unconventional way the 2001 version (the latest version) of the draft articles were introduced. After years of deliberation, the ILC chose to promote the draft codification through a UNGA resolution rather than the longer process of convening states to work towards a convention. As explained below, doing so ensured quicker implementation of the ILC’s

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134 Supra note 27 at 11.
version of state responsibility, but it was to the detriment of a more representative and democratic process favoured by developing states.

The history of the efforts of the ILC may seem less significant than the developments in the previous sections, but it is important to acknowledge that the doctrine of state responsibility appeared to have been prone to growth. When considering the time it took for the ASR to come to fruition, the partially arbitrary classification of primary and secondary rules for the purpose of advancing the project, original interpretations of attribution when courts thoroughly consider CIL,\textsuperscript{135} and the fact that the articles have never been agreed to as a convention, alternative interpretations of the ASR become plausible.

7. Conclusion

The purpose of the short history was to provide an understanding of the significant European influence on the development of state responsibility, culminating in a doctrine that poorly accounts for NSAs. The intention was also to show that, up until 2001 and the introduction of the ASR, the history of state responsibility was one of evolution. CIL of state responsibility both formed and transformed as actors within the international community emerged and interacted. The chapter began by using Grotius’ work to show the origins of linking breaches of obligations with reparation, restitution and compensation and to highlight that these remain fundamental principles of state responsibility. European civil law codifications from the 19th century were noted as another important influence on the development of the doctrine. Heffter’s 1844 treatise on international law, which reflected European civil code chapters on extra-contractual responsibility, was

\textsuperscript{135} See the discussion of the Tadić case in chapters four and six.
highlighted as an example of how the principles of the codifications were incorporated into international law. Anzilotti’s contribution, in turn, was noted as removing fault from state responsibility and confirming its state-centric status. A violation of an international obligation, for Anzilotti, would occur only if it was performed by an organ of the state. The chapter explained that this reflected a period where sovereignty of states became dominant and where such sovereignty would exclude any form of legal responsibility against the will of the state.

It should now be clear that state responsibility developed over time only to be seized at a specific moment by the framers of the ASR. Whether the narrow view of the doctrine, as represented in the ASR, was appropriate during its period of negotiations (1956 – 2001) has now become less relevant than the fact that the draft articles have manage to inhibit further development of the doctrine. Otherwise stated, the European influenced evolution of state responsibility may indeed have contributed to a doctrine that favours the Global North. But more imperative, today, is the fact that the Global North was able to pause the doctrine’s evolution at a time when developing states were becoming increasingly emancipated and beginning to contribute to the formation of customary law.

The subsequent chapters explain how the ASR operate to favour Global North states by reinforcing a strong corporate veil in international law and by stunting the grown of a doctrine that previously showed flexibility. Once again, this contributes to the normative gap describe in chapter one by absolving home states of any responsibility for the overseas actions of their corporate citizens.

At this point, the dissertation moves from the theoretical section into three chapters of substantive law discussion. Given that the original content of this dissertation lies in its arguments pertaining to the second founding condition of the IWA – attributing breaches of law to the state - the next chapter is dedicated to understanding the limits of attribution under the ASR. It further addresses
how the draft articles fail to represent the views of a majority of states and how they prohibit the evolution of CIL of state responsibility.
PART B – SUBSTANTIVE LAW

CHAPTER 4 - ATTRIBUTION UNDER THE DRAFT ARTICLES ON RESPONSIBILITY OF STATES FOR INTERNATIONALLY WRONGFUL ACTS

1. Introduction

In the introductory chapter, I noted that my methodological approach foresaw a descriptive component of the state of the law before applying a normative tool to propose a solution to the problem of weak control of MNCs in fragile states. This chapter’s discussion of the draft articles and the following chapter on IHRL contribute to the descriptive element. Although the ILC’s draft codification might provide an impression of being the authority on state responsibility, the document, once again, does not represent a treaty agreed to by states. Indeed, having never reached convention status, the common and casual reference to the draft by both scholars and courts as a “codification” is manifestly wrong. The ASR represent the culmination of research and opinions of jurists on the rules of customary law at the time.\(^{136}\) Yet even when the UNGA recommended the draft articles in 2001, the codification was not a comprehensive reflection of the corresponding customary law. The significant number of customary rules could not be simply replicated in the document and not all the articles included could be considered to accurately mirror their customary counterparts.\(^{137}\) While the codification of CIL may, in general, contribute to practicality and to the reduction of doubt in the application of law,\(^{138}\) the 59 Articles of the ASR were already a step behind upon their adoption.

\(^{136}\) See chapter three, section 6, Work of the International Law Commission.

\(^{137}\) For an indication of the variety of state views with respect to the comprehensiveness of the draft codification, see their statements from the General Assembly Sixth Committee (Legal): UN GA (6\(^{th}\) Committee), 71\(^{st}\) Sess. 9th Mtg., UN Doc. A/C.6/71/SR.9 (2016) page 5, para. 27 and following.

The respective characteristics of codes and of customary law compounds the schism between what is represented in the draft articles and actual customary law of state responsibility. Draft codified rules are essentially attempts to restate customary law in an organized or condensed form and can often resemble treaties. As such, codified rules that have not been subsequently entrenched by a convention (such as the ASR) should only hold the same legal weight as customary law where they are confirmed to match their corresponding customary rules. For this reason, draft codified rules must continuously be reviewed for conformity with customary law. Customary rules, by their nature, evolve over time (this dissertation argues below that this process does not happen enough).

The contention that the ASR represent an accurate reflection of current customary law becomes increasingly difficult to defend as time passes, especially considering geopolitical changes. Addressing the draft codification from a TWAIL perspective reveals why the inconsistency between the draft codification and customary law is important. Global North states have benefited from the narrow interpretation of state responsibility reflected in the ASR as detailed in section two below. The explanation of attribution below demonstrates the high threshold of control over a MNC needed for its acts to be considered attributable to its home state. Recall that chapter one highlighted the predominance of MNCs based in Global North countries. Maintaining the interpretation of

attribution provided by the ASR therefore protects these states from incurring international responsibility for violations of international obligations.

Since I argue that the threshold for the imputation of acts of third parties to a state in the ASR is exceedingly high, the goal of this chapter is, first and foremost, to reveal the threshold and then to show, through a TWAIL inspired analysis, how it benefits powerful states. This chapter begins by explaining why it is difficult to link the behaviour of MNCs to their home states. The second part of the chapter shows how components of international law reinforce the restrictive reading of the ASR, consolidate the advantages afforded to the Global North, and encourage the crystallization of rules of state responsibility as reflected in the draft articles. This second section also shows how less powerful states are advocating in favour of reopening negotiations with respect to the draft articles with the purpose of having their concerns properly represented in any future codification efforts.

2. Relevant draft articles

Since states must carry out their actions through organs or individuals, rules concerning attribution of conduct play a fundamental role in the system of international responsibility. Attribution is the process developed under customary law that determines whether an individual or group’s conduct (in the form of an act or omission) can be characterized as an act of a state.\textsuperscript{139} The rules are found in Part I of the ASR and reflect various possibilities for linking conduct to states. For example,

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while state organs bind the state without controversy, the conduct of one state’s organ may, under certain circumstances, become attributable to a different state. Conduct that is *prima facie* private may become attributable to a state where the individual or entity acts on the instructions of, or under the direction or control of a state. There also exist possibilities of states acknowledging and adopting relevant conduct as their own. The articles pertaining to attribution within the ASR are reviewed below in the order in which they are presented in the draft codification.

The draft codification contains four articles defining methods of attribution that are relevant to MNCs. Article 4 denotes attribution for conduct of state organs. Article 5 applies to conduct of persons or entities exercising elements of governmental authority. Article 8 highlights conduct directed or controlled by a state and Article 16 pertains to attribution through complicity. While Article 4 is based on a structural assessment of attribution (when an entity holds a position within the organization of the state), Article 5 is functional (when an entity exercises governmental authority). Article 8 is based on aspects of control (when an entity acts on the instructions of or is under the direction or control of a state) and Article 16 attribution is founded on complicity in the form of knowledge and assistance. Articles 4, 5, and 16 will be addressed in a briefer manner than Article 8 as attribution through instruction, direction or control is most relevant to this dissertation.

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2.1 Article 4 – State organ

Article 4

Conduct of organs of a State

1. The conduct of any state organ shall be considered an act of that state under international law, whether the organ exercises legislative, executive, judicial or any other functions, whatever position it holds in the organization of the state, and whatever its character as an organ of the central Government or of a territorial unit of the state.

2. An organ includes any person or entity which has that status in accordance with the internal law of the state.

Article 4 addresses the responsibility of states for the acts or omissions of entities determined to be de jure state organs. Considered the “starting point” of attribution, acts of state organs are deemed to be acts of the state and the components of these organs are characterized, minus exceptions, by a state’s domestic law.\textsuperscript{141} This was confirmed before the ILC codification by the ICJ in the Military and Paramilitary Activities in and against Nicaragua case (Nicaragua v. United States of America) through its statement that states are free to formulate their own “political, economic, social and cultural system[s]” with respect to foreign policy.\textsuperscript{142} State organs come in all shapes and sizes and are composed of individuals or collective entities that either constitute part of the state organization or act on its behalf.\textsuperscript{143} Distinctions between state organs that can commit IWAs and ones that cannot are not made under the ASR – an approach in keeping with the principle of unity of states and of

\textsuperscript{141} ASR and Commentary, supra note 26 at 40. Article 4 specifically lists legislative, executive, and judicial organs, and outlines that an organ “includes any person or entity which has that status in accordance with the internal law of the State.”; Hannah Tonkin, State Control Over Private Military and Security Companies in Armed Conflict (Cambridge: Cambridge University Press, 2011) 57.

\textsuperscript{142} Case Concerning Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v. United States of America), Merits, International Court of Justice, 27 June [1986] ICJ Rep p. 14m at 108, para 205. [Nicaragua v. United States of America (Merits)]

\textsuperscript{143} Supra note 27 at 94.
diversity of international obligations. Similar to the discussion of primary obligations above, state responsibility confirms its flexibility through its application to the various numbers and forms of state organs from, for example, police to immigration officials.

For a MNC to be considered under Article 4, its status as a *de jure* organ would need to be established through domestic law. One possibility is that of a company established separately from the state that is subsequently formally incorporated into the state apparatus through domestic law. Such situations require incorporation beyond everyday contact between a state and its contractors. PMSCs established as state organs through domestic legislation are a recent example of this phenomenon. These include a contract for ‘special constables’ between the PMSC Sandline International and Papua New Guinea, the work of Executive Outcomes (EO) in Sierra Leon and Angola, and a recent security force established in the United Arab Emirates (UAE) trained by a PMSC but placed under the command of the UAE. Despite these examples, however, such cases remain rare.

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144 ASR and Commentary, *supra* note 26 at 40 (article 4, para 5).


146 Cameron & Chetail, *supra* note 37 at 138 discuss this as possible “in theory” for a PMSC.


149 Before the start of its civil war in 1995, Sierra Leone incorporated EO personnel into its armed forces. Tonkin, *supra* at note 141 at 85.

150 Cameron & Chetail, *supra* note 37 at 141.
Given domestic law plays the determinative role in establishing what is to be considered a state organ, it is beyond the scope of this study to discuss the many possibilities of integration of corporate entities into state organs aside from what has been mentioned above. It suffices to highlight certain points from the ILC Commentaries to Article 4. Reference to state organs is meant to be made “in the most general sense” and extend to “organs of government of whatever kind of classification, exercising whatever functions, and at whatever level of the hierarchy[.]”\textsuperscript{151} For the purpose of this dissertation, companies incorporated within the state to the extent considered under Article 4 should pose little problem in terms of attribution. Their attachment to the state in such cases is manifest and explicit and states will likely take appropriate action to control their behaviour abroad. Furthermore, in cases of violations of international obligations, there is little a state can do to distance itself from the MNC. Of greater interest are cases that go beyond the starting point of Article 4, that is, entities for which international law is used to determine whether there is a connection to the state. The first of these is expressed in Article 5 of the ASR.

\section*{2.2 Article 5 – Exercising elements of government authority}

\textit{Article 5}

\textit{Conduct of persons or entities exercising elements of governmental authority}

The conduct of a person or entity which is not an organ of the state under Article 4 but which is empowered by the law of that state to exercise elements of governmental authority shall be considered an act of the state under international law, provided the person or entity is acting in that capacity in the particular instance.\textsuperscript{152}

\textsuperscript{151} ASR and Commentary, supra note 26 at 40 (article 4, para. 5).

\textsuperscript{152} Ibid. at 42 (article 5).
Article 5 covers conduct of entities other than state organs that are nevertheless empowered by domestic law to exercise governmental authority. The article provides the mechanism to trigger attribution for the first degree of removal of an entity from the state. While a greater burden of proof is imposed on a state invoking Article 5 as opposed to Article 4, the gap between the two is much smaller than between Articles 5 and 8. This is partly because articles 4 and 5 both belong to a category referred to by Crawford as the “hard core” of attribution, dealing specifically with “organs and agencies of state exercising sovereign authority.”\textsuperscript{153} The obvious common component for attribution tests within this category is the focus on domestic legal features of the state under discussion.\textsuperscript{154} By contrast, as will be shown, the amount of control exercised by the state is what preoccupies scenarios under Article 8. The elements between Articles 4 and 5 are close enough that Article 5 has frequently been referred to in combination with Article 4.\textsuperscript{155} Simply put, if a person or entity is not found to constitute an organ under Article 4 but exercises “elements of governmental authority,” the attribution test is rolled over to Article 5.\textsuperscript{156} See, for example, the tribunal’s reasoning in \textit{Eureko BV v Republic of Poland}:

\begin{quote}
[t]he principles of attribution are cumulative so as to embrace not only the conduct of any state organ (Article 4) but the conduct of a person or entity which is not an organ of the state but which is empowered by the law of that state to exercise elements of governmental authority (Article 5). It embraces as well the conduct of a person or group of persons if he
\end{quote}

\textsuperscript{153} Crawford “The General Part”, supra note 93 at 115.

\textsuperscript{154} Ibid.


\textsuperscript{156} Ibid.
or it is in fact acting on the instructions of, or under the direction or control of, that state (Article 8).  

When applying Article 5, claimant states need to identify the conduct of the entity, its empowerment under domestic law, and that the person/entity acted in its governmental capacity (even if beyond its power or instructions). Included within the term “entities” are public and semi-public corporations, public agencies, and private companies. Article 5 does not define “government authority,” however, leaving its application uncertain. While roles related to public order and security spur little controversy as to their governmental character, other roles may be more related to the culture, customs, and traditions of the country in question. Using the example of corporations (as entities), Brigitte Stern distinguishes between actions that are \textit{jure imperii} (companies exercising the public acts of the state where the corporate veil doesn’t apply) and those considered \textit{jure gestionis} actions (representing the private, commercial acts of the state). This approach highlights the difference between a state contracting out services and a corporation acting as a representative of the state. The Commentaries to the ASR attempt to provide guidance by identifying four aspects to consider when evaluating whether an entity is acting within its government authority. They include contemplation of the content of the powers, the way they are conferred, the purpose for which they are exercised, and the extent to which the entity is responsible

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\begin{itemize}
\item[157] \textit{Eureko BV v Republic of Poland} (Netherlands-Poland BIT \textit{Ad Hoc} Award, 23 November 2006) para. 129. (parentheses added)
\item[158] \textit{ASR and Commentary, supra} note 26 at 43 (article 5, para 2).
\item[159] See \textit{Ibid.} at 43 (article 5 para 6).
\end{itemize}
to government. Unfortunately, while this approach may be a step towards defining the term, it does little to facilitate its application.

### 2.3 Article 8 – Conduct directed or controlled by a state

**Article 8**

*Conduct directed or controlled by a State*

The conduct of a person or group of persons shall be considered an act of a state under international law if the person or group of persons is in fact acting on the instructions of, or under the direction or control of, that state in carrying out the conduct.

The draft codification foresees limited situations in which the behaviour of private entities not officially delegated state power can be assimilated to a state. If the conditions of Article 5 are not satisfied, attribution may still occur if the requisite instruction, direction or control by the state is present, creating *de facto* agents of the state. The tests for “acting on the instructions,” “under the direction” or “control of” a state are disjunctive. As such, any of the three tests can individually trigger responsibility. However, while the draft codification may appear to provide greater certainty for the amount of involvement required for state responsibility to arise under the three scenarios, attempts to interpret Article 8 show that the issue is far from settled. The current debate revolves mainly around the final “control” criterion and the amount of control needed by a state over a private entity in order to trigger responsibility. Before discussing the specific amount of state

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161 ASR and Commentary, *supra* note 26 at 43 (article 5, para. 6).

162 Such is the view stated in *Tulip Real Estate and Development Netherlands B.V. v. Republic of Turkey*, ICSID, Case No. ARB/11/28, Award, 10 March 2014, para. 281; See also Antonio Cassese, “The Nicaragua and Tadić Tests Revisited in Light of the ICJ Judgment on Genocide in Bosnia” (2007) 18:4 EJIL at 650; ASR and Commentary, *supra* note 26 at 48 (article 8, para. 7).
instruction, direction, or control required for Article 8 to apply, more general aspects of this type of attribution to MNCs are summarily addressed.

The ILC Commentaries to Article 8 opens by noting that “in theory” the conduct of all human beings, including corporations, can be attributed to the state “whether or not they have any connection to the government.”\(^\text{163}\) This point, while simple, is important because it confirms that attribution begins with the possibility that MNCs can indeed be linked to states. This, as shown below, isolates the discussion to the details of imputation rather than the legitimacy of the process.

The Commentaries’ qualification of the above statement is found in its subsequent limits to linking private acts to states:

In international law, [strict imputation is] avoided, both with a view to limiting responsibility to conduct which engages the state as an organization, and also so as to recognize the autonomy of persons acting on their own account and not at the instigation of a public authority. Thus the general rule is that the only conduct attributed to the state at the international level is that of its organs of government, or of others who have acted under the direction, instigation or control of those organs, i.e. as agents of the state.\(^\text{164}\)

The Commentaries caution that “[b]earing in mind the important role played by the principle of effectiveness in international law, it is necessary to take into account […] the existence of a real link between the person or group performing the act and the state machinery.”\(^\text{165}\) They further support this by explaining that “the fact that a state initially establishes a corporate entity […] is not a sufficient basis for the attribution to the state of the subsequent conduct of that entity.”\(^\text{166}\)

\(^{163}\) ASR and Commentary, supra note 26 at 38.

\(^{164}\) Ibid.

\(^{165}\) Ibid. at 47 (article 8, para. 1).

\(^{166}\) Ibid. at 48 (article 8, para. 6).
Considering this, the invoking of the principle of effectiveness\footnote{The principle of effectiveness provides that statutory interpretation in international law should lie primarily with the treaty text representing the original agreement of the parties.} and the need for a “real link,” the Commentaries frame the use of Article 8 restrictively, rendering circumspect its applicability to the acts of third parties.

While the logic of limiting the responsibility of the state to acts that are substantially tied to it is clear, the bar for the consideration of state participation is set too high. This dissertation does not posit that the simple establishment of a corporate entity under national law forms the necessary link for state responsibility. However, a test that lies between strict responsibility and the current interpretation of the ILC would, it is argued below, better reflect CIL. The “real link” referred to by the Commentaries currently has no definition in international law and the various interpretations of the tests of control discussed below reflect this. Moreover, the fact that “persons acting on their own account” but who still have substantial support from their home state can often act with impunity in fragile states compounds the problem, resulting in an important gap in the coverage of international law. To examine this gap more closely, the high threshold for imputation (through instructions, direction or control) set by the ASR are discussed in more detail below. Following this discussion, a subsequent section will address how this high threshold favours Global North states and how international law contributes to sustaining the criteria.
i) Instructions and Directions

The Commentaries to Article 8 and some commentators specify that imputation only occurs under instructions when a state provides instructions pertaining to a specific illegal act.\footnote{168} The ICJ echoed this view in 2007 in the Genocide Convention case:

\begin{quote}
It must however be shown that [...] the state’s instructions were given, in respect of each operation in which the alleged violations occurred, not generally in respect of the overall actions taken by the persons or groups of persons having committed the violations.\footnote{169}
\end{quote}

This interpretation significantly limits what may be considered “instruction” under Article 8. Given that it is rare to find evidence of instructions by a state ordering an unlawful act, this first test under Article 8 has not received the same attention as the control criteria. When proof of instruction is absent, recourse is made to the more abstract processes of determining direction or control. Although instructions and direction are often referred to together,\footnote{170} direction as a reason for attribution stands on its own.\footnote{171} Colloquially a synonym for instructions, direction differs under the draft codification through the requirement that the state lead in the commission of the unlawful

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\begin{itemize}
\item \footnote{168} Cameron & Chetail, supra note 37 at 205; ASR and Commentary, supra note 26 at 47 (para. 1).
\item \footnote{170} The ICJ in Nicaragua v. United States of America (Merits) seems to conflate the terms at 64, para 115, supra note 142.
\item \footnote{171} The title of Article 8 (Conduct directed or controlled by a State) likely contributes to the lumping together of the tests in Article 8. Nevertheless, when referring to Article 8 in the Commentary, the ILC writes “Article 8 deals with conduct carried out on the instructions of a State organ or under its direction or control.” ASR and Commentary, supra note 26 at 39 (para. 8).
\end{itemize}
In this respect, under directions, a state “must show how the operation is to be conducted”\(^\text{172}\) whereas for instructions the state must simply provide orders. Determining a more precise meaning of direction remains challenging as the criterion has received less treatment by courts and scholars than the other elements. Moreover, the ILC’s attempt at clarification of the term has not been entirely successful. To begin with, the ILC employs the term “instigation” instead of direction in its introduction to attribution in the Commentaries.\(^\text{174}\) Given that the terms “instigation” and “direction” are far from synonyms in international law, the ILC’s use of the former is confusing. Indeed, the burden for proving instigation would be lower than direction. Consider the following definition, albeit borrowed from international criminal law, which appears in the *International Law Reports*:

> Instigating entails “prompting another to commit an offence”. The wording is sufficiently broad to allow for the inference that both acts and omissions may constitute instigating and that this notion covers both express and implied conduct. The ordinary meaning of instigating, namely, “bring about” the commission of an act by someone, corroborates the opinion that a causal relationship between the instigation and the physical perpetration of the crime is an element requiring proof.\(^\text{175}\)

Given this definition, the replacement of direction with instigation should be considered an anomaly and should not be interpreted to have an impact on the definition of direction proposed by

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\(^{\text{172}}\) Cameron and Chetail explain that for “direction” to be considered, the State must “show how the operation is to be conducted.” Cameron & Chetail, *supra* note 37 at 209.


\(^{\text{174}}\) ASR and Commentary, *supra* note 26 at 38 (para. 2) “the general rule is that the only conduct attributed to the State at the international level is that of its organs of government, or of others who have acted under the direction, instigation or control of those organs, i.e. as agents of the State.” (emphasis added)

the ASR. It does, however, point out a lack of consistency within the draft codification. Curiously, at a later point in the Commentaries the ILC specifically indicates that direction should not be considered “incitement” (a relative of instigation). In a footnote related to the definitions of direction and control within the Commentaries to Article 8, the ILC refers to this paragraph, which describes the direction and control exercised over the commission of an IWA by another state:

In the formulation of article 17, the term “controls” refers to cases of domination over the commission of wrongful conduct and not simply the exercise of oversight, still less mere influence or concern. Similarly, the word “directs” does not encompass mere incitement or suggestion but rather connotes actual direction of an operative kind.

Although Article 17 applies direction and control adjunctively to the situation of states directing and controlling another, the reference included by the ILC indicates that this definition also applies to Article 8.

It is appropriate to attempt to define “direction” by incorporating the definition provided by the ILC above. According to the ILC, direction should encompass aspects of an “operative kind” and should relate to the specific operation at issue with the conduct in question being an “integral part of [the] operation.” As a final note on the term, instruction, direction, and control can be understood as nuances, moving from the specific to the more general. In such a view, the specificity of instructions would require less evidence of authority over the third party and control would require evidence of authority but not specific instructions.

176 ASR and Commentary, supra note 26 at 47 (article 8, para. 3) and 69 (article 17, para. 7).
177 The ILC refers to direction and control as ‘more general’ situations. Ibid. at 47, article 8 para. 1.
ii) Control

As is the case for direction, for conduct to be attributable to a state under the control criterion of the ASR (according to the ILC) the state must have controlled the specific operation and the act must have been integral to the event. According to the ILC, attribution cannot be considered if the conduct at issue was only “incidentally or peripherally associated with an operation.” In specifying the amount of control needed to impute the acts of a third party to a state, the Commentaries refer to the control criteria discussed in cases before international courts, ultimately favouring the most restrictive interpretation. Two seminal cases are addressed within the text of the Commentaries, one emanating from the ICJ and the other from the International Criminal Tribunal for the former Yugoslavia (ICTY).

The ILC clearly indicates it favours the ICJ’s more stringent test from the aforementioned Nicaragua v. United States of America. The ICJ’s test sets a benchmark of “effective control” over a third party by a state in order for responsibility to be imputed. The case involved violations of IHL by pro-US contra rebels during the Nicaraguan civil war. The ICJ categorized three types of groups under varying degrees of US control in the affair: CIA operatives and US Forces, Latin American operatives, and the contras rebels. Per the Court, there was no doubt concerning US responsibility for actions of its own forces and for the Latin American operatives who operated

\[178\] Ibid. at 47, article 8 para. 3.

\[179\] Ibid.

under instructions of US agents.\textsuperscript{181} However, Nicaragua’s argument that the \textit{contra} rebels’ actions were attributable to the US was rejected. The following much cited paragraph demonstrates that, according to the ICJ, in the absence of a satisfactory level of “direction” or “enforcement,” even “preponderant” or “decisive” support from a state may be deemed insufficient for attribution to exist:

That United States participation, even if preponderant or decisive, in the financing, organizing, training, supplying and equipping of the contras, the selection of its military or paramilitary targets, and the planning of the whole of its operation, is still insufficient in itself, on the basis of the evidence in the possession of the Court, for the purpose of attributing to the United States the acts committed by the contras in the course of their military or paramilitary operations in Nicaragua. All the forms of United States participation mentioned above, and even the general control by the respondent state over a force with a high degree of dependency on it, would not in themselves mean, without further evidence, that the United States \textbf{directed or enforced} the perpetration of the acts contrary to human rights and humanitarian law alleged by the applicant state.\textsuperscript{182}

The Court opined that effective control of the specific operations over the course of which the violations occurred was needed:

Such acts could well be committed by members of the \textit{contras} without the control of the United States. For this conduct to give rise to the legal responsibility of the United States, it would in principle have to be proved that that state had effective control of the military or paramilitary operations in the course of which the alleged violations were committed.\textsuperscript{183}

The paragraph above marks the extent to which the court described effective control. Thus, in order to know what effective control consists of, one needs to take note of what the Court suggested was missing, namely the US directing or enforcing the perpetration of the acts. In assessing the Court’s opinion on effective control, eminent jurist Antonio Cassese states that:

It seems clear from these words that by ‘effective control’ the Court intended either (1) the issuance of directions to the \textit{contras} by the US concerning specific operations

\begin{itemize}
\item \textsuperscript{181} \textit{Nicaragua v. United States of America} (Merits), \textit{supra} note 142 paras. 75-80.
\item \textsuperscript{182} \textit{Ibid.} para. 115. (emphasis added)
\item \textsuperscript{183} \textit{Ibid.} para. 115.
\end{itemize}
There is little risk in stating that, under the view expressed in *Nicaragua*, attributing the conduct of a private party to a state under the doctrine of state responsibility entails satisfying a high threshold. The fact that preponderant or decisive involvement by a state remained insufficient to trigger responsibility in *Nicaragua* and that the ILC adopted the reasoning of the decision should raise concern. Returning to the concepts discussed previously under TWAIL, it is this particular threshold that protects Global North states from attribution for their involvement in other countries. With specific respect to MNCs, the threshold upholds the strong corporate veil of international law, protecting states for any responsibility for the acts of their corporate citizens abroad. This veil persists despite significant potential support given to companies by state (discussed in chapter six, section four) and despite benefits for home states from the operations of such actors.

Although state responsibility falls within the purview of international public law, the interpretation of the concept of attribution is not limited to a particular court. While bodies that decide matters of state responsibility may be the venue in which attribution plays “the greatest practical importance,” its application has extended to other topics where legal repercussions exist due to linking an individual to a state. For this reason, the contribution made by ICL in *Prosecutor v.*

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184 Cassese, “The *Nicaragua* and *Tadić* Tests Revisited”, *supra* at note 162 at 653.


186 *Supra* note 139 at 222.
in 1999 should not be understated. Attribution was discussed in this case by the ICTY with the purpose of determining the classification of the armed conflict within which the supposed acts of the accused occurred. Although the court found that the conflict was of international character prior to May 19, 1992, it used attribution criteria from case law and Article 8 of the ASR to determine whether the conflict maintained that character once the Federal Republic of Yugoslavia removed itself from the fighting.

Of particular importance are the Appeals Chamber’s comments that attribution can be satisfied without fulfilling the high degree of effective control outlined by the ICJ in the Nicaragua case and the possibility of the degree of control varying case by case:

The requirement of international law for the attribution to states of acts performed by private individuals is that the state exercises control over the individuals. The degree of control may, however, vary according to the factual circumstances of each case. The Appeals Chamber fails to see why in each and every circumstance international law should require a high threshold for the test of control.

Tadić shows that Courts may be open to considering individual circumstances and adapted cases of control. The insistence of the Appeals Chamber on providing consideration of the “factual circumstances of each case” suggests that current restrictive views of attribution may not be set in stone. Moreover, questioning the definition from Nicaragua and opening attribution to a wider application provides fodder for the approaches discussed in chapter six. Tadić will be revisited in

\[187\] Supra at note 180.

\[188\] Ibid. at para. 117.
section 2.3 of chapter six, where I argue that more a thorough consideration of CIL lead the ICTY to propose the lower threshold of “overall control.”

Still, as noted above, the ILC favoured the stricter standard of control espoused by the ICJ. After discussing both judgements, the Commentaries spell out the ILC’s conclusion that:

[…] where persons or groups have committed acts under the effective control of a State, the condition for attribution will still be met even if particular instructions may have been ignored. The conduct will have been committed under the control of the State and it will be attributable to the State in accordance with Article 8.189

The extent to which effective control is described in both the Nicaragua decision and within the Commentaries is surprisingly short. Indeed, the ILC does not outline its reasons for adopting the criteria, suggesting implicitly that the authority of the ICJ is the reason for the adoption of effective control. More worrisome is the fact that the ICJ’s investigation into CIL relating to attribution is cursory as well. The result is an overly strict standard for imputing responsibility of third actors to states within the draft codification that appears not to have any basis in actual CIL. This, of course, is problematic for a document that purports to represent existing CIL and holds significant weight in international forums. Section three, below, addresses how international law upholds the high threshold and the effects this has on fragile states. Before this, Articles related to more particular aspects of attribution are briefly addressed.

189 Supra note 27 at 113.
Articles 4, 5, and 8 represent the most discussed methods of attribution under the ASR, with the high threshold of Article 8 identified as a contributor to the impunity of MNCs. Other rules related to precise scenarios fill out the rest of the articles related to attribution in the ASR. For example, attribution can be triggered when actors violate an international obligation while assuming government authority in the absence of the state.\footnote{190} Also, the conduct of an organ of a state that has been put at the disposal of another state can be attributed to the state exercising temporary authority over the entity.\footnote{191} Behavior that is not normally attributable to a state can be considered an act of the state if a government acknowledges and adopts the conduct in question.\footnote{192} Conduct occurring during insurrectional movements is not imputable to a state unless the movement successfully forms a government or succeeds in establishing a new state.\footnote{193} Finally, acts of official organs or entities in excess of authority are nevertheless attributable to the state.\footnote{194}

2.4 Article 16 and state complicity

In addition to identifying the components of an IWA and the various methods of attribution, Part One of the ASR addresses modes of participation in an act and circumstances that may preclude the responsibility of a state. Article 16 provides for attribution through connection of a state with the act of another. The relationship between a home state and a MNC could render the home state

\footnote{190} Article 9; Such cases involve persons taking up governmental functions on their own initiative when the state has lost control of part of its territory. See Robert Kolb, The International Law of State Responsibility; An Introduction, Northampton: Elgar (2018) at 83.

\footnote{191} Article 6.

\footnote{192} Article 11.

\footnote{193} Article 10.

\footnote{194} Article 7.
responsible for an IWA of another state in cases where the support provided amounts to collaboration. Article 16 of the ASR holds a state responsible for an IWA when it “aids or assists another state in the commission of an [IWA]”:

Article 16

_Aid or assistance in the commission of an internationally wrongful act_

A state which aids or assists another state in the commission of an internationally wrongful act by the latter is internationally responsible for doing so if:

(a) that state does so with knowledge of the circumstances of the internationally wrongful act; and

(b) the act would be internationally wrongful if committed by that state.

While the host state remains simply the victim of the in the cases above, under Article 16 the host state is part of the violation. To consider invoking Article 16 for acts of MNCs abroad, the roles of three actors must be considered: the corporation that undertakes the triggering act; the host state that has either participated in the act or acquiesced to it; and the home state that has contributed to it. Rather than focusing on home state control, Article 16 considers the home state’s knowledge of the circumstances of the act and any assistance furnished. For the first part of this analysis, consider situations involving states alone. The material act under Article 16 is committed by the _assisted_ state. The _assisting_ state is “responsible for its own act in deliberately assisting another state to breach an international obligation”\(^1\) and not for the primary act of the assisted state. However, the facts of the individual case will determine whether there is truly a distinction between the acts. Where assistance is significant and determinative of the act occurring, both states could be attributed the same amount of injury caused. Where there is less contribution, the assisting state

\(^{195}\) ASR and Commentary, _supra_ note 26 at 67 (article 16, para. 10).
would only be responsible for consequences linked to its involvement. The following examples of aid or assistance in the commission of an IWA are listed by the ILC: “providing financing for an activity that violates an international obligation.” “providing means for the closing of an international waterway,” “facilitating the abduction of persons on foreign soil,” and “assisting in the destruction of property belonging to nationals of a third country.” An often-cited accusation of complicity under state responsibility was made by Iran about UK assistance to Iraq in 1984. Iran claimed that the UK had supplied financial and military aid to Iraq that included chemical weapons and facilitated the act of aggression by Iraq.

The involvement of a MNC in a violation of an international obligation complicates the application of complicity. Four conditions would need to be satisfied for a home state to incur responsibility under Article 16: the host state must allow the MNC to operate on its territory; the aid or assistance by the home state must contribute to a breach of an international obligation that would be internationally wrongful if committed by both the host and assisting states; the assisting state must have knowledge of the circumstances leading to the act in question; and the assistance must be given with the purpose of facilitating commission of the act. The first two conditions are essentially related; it is difficult to imagine the existence of a mutual violation between the two states involved if the host state does not accept the presence of the MNC within its jurisdiction.

196 Ibid. at 66 (Article 16, para. 1).


198 The conditions are extrapolated from the elements of Article 16 and the fact scenario that would need to exist for Article 16 to apply.
Robert McCorquodale and Penelope Simons use support provided by home state export credit agencies (ECA) to offending companies to demonstrate what the link between a MNC and home state could consist of.

[...] ECAs routinely provide a full range of services to their corporate nationals to develop the latter’s competitiveness in global markets. These services range from the provision of export credits and risk insurance to developing essential contacts in other states and participating in government trade missions abroad [...] The direct link between the provision of such services to assist the foreign direct investment of a state’s corporate nationals, could be seen as a state aiding and assisting internationally wrongful acts.199

Although the potential in Article 16 to bind MNCs and home states is of interest and study, further review falls outside of the scope of the dissertation. Chapter six nevertheless explores the implications of ECA support to MNCs when discussing its emerging attribution proposal.

3. Issues with the draft codification of customary law

The next sections show how international law helps Global North countries consolidate their benefits under the ASR and how the draft articles are systemically applied to the disadvantage of weaker states. The sections demonstrate that, despite being promoted by the UN, the practise of codification is harmful to the fair development of CIL of state responsibility and that it perpetuates inequalities between states. This is shown below in three ways: 1) through the existence of a draft code that does not adequately represent the views of all states; 2) through the stunting of the development of fair customary law; and 3) through strict readings of the codified text by commentators and deciding bodies.

3.1 A draft code inconsistent with the views of most states

Recent views expressed by states about the adoption of a convention on state responsibility provide an indication of how they view the draft codification. That is, the pattern of states wishing to negotiate a treaty on state responsibility versus those advocating to maintain the current draft codification reveals which states feel adequately served by the ASR and which consider themselves disadvantaged by them. A 2016 report from the Sixth Committee of the UNGA (Legal) listed the concerns and opinions of member states and regional group representatives with respect to moving toward a true codification of the rules of state responsibility. Of the states included in the report, those in favour of negotiating a convention were the Dominican Republic on behalf of Latin American and Caribbean states (CELAC), South Africa on behalf of the African Group, Cuba, El Salvador, Russia, Venezuela, Algeria, Iran, Mexico, and China. Against (in favour of maintaining the current state) were the US, Canada, the United Kingdom, Israel, Finland, Denmark, Iceland, Norway, Sweden, New Zealand, and Australia. While there are countries of varying Human Development Indexes (HDI) and GDPs on both sides of the argument, those in favour of keeping the ASR in their current form are all developed states. Most developing states (along with a majority of all states) advocate for initiating treaty negotiations. In other words, not only have

200 Supra at note 137 at 5.
201 Antigua and Barbuda, Argentina, The Bahamas, Barbados, Belize, Bolivia, Brazil, Chile, Colombia, Costa Rica, Cuba, Dominica, Dominican Republic, Ecuador, El Salvador, Grenada, Guatemala, Guyana, Haiti, Honduras, Jamaica, Mexico, Nicaragua, Panama, Paraguay, Peru, Saint Kitts and Nevis, Saint Lucia, Saint Vincent and the Grenadines, Suriname, Trinidad and Tobago, Uruguay, and Venezuela.
most states expressed a desire to move beyond the current version of the ASR, support is also
drawn along geo-political and economic index lines.

The occurrence of the differing views renders it difficult to argue that the ASR currently reflect
CIL. This chapter repeatedly argues this point and a TWAIL analysis provides clues as to why the
schism exists. In deference to the ILC, I do not argue that there was an intentional bias in favour
of Global North states among the drafters of the ASR. The membership composition of the ILC
from 1956 to 2001 provides no outright indication of undue representation from one set of
countries. Member states submit the names of candidates who are subsequently voted upon by the
UNGA. The members do not represent their countries of citizenship and the nationalities of
members appear varied and generally representative of all regions. No two members of the ILC
may be nationals of the same state and eligibility for election is not restricted to nationals of
member states of the UN (however, no national of any non-member state has ever been elected).
As such, the process of member selection, on the surface, appears fair. However, when addressing
systemic bias, diverse national representation does not necessarily equate to impartiality. The ILC’s
founding statute provides insight into other aspects that deserve consideration when attempting to
verify its impartiality. Section 15 of the Statute of the ILC describes the codification of international
law as the “systematization of rules of international law in fields where there already has been
extensive State practice, precedent and doctrine.” TWAIL scholars have noted that state practice,

203 A list of all 228 members from 1949 to present can be consulted on the International Law
August 08, 2018].

204 Statute of the International Law Commission, GA Resolution 174 (II), November 21, 1947, article 2(2).

205 Ibid at 15.
precedent and scholarly writings in international law, however, have historically been Western-based. The lack of availability of state practice of Third World nations has been highlighted by Chimni as contributing to Western-influenced customary law through “the identification of rules of CIL primarily on the basis of state practice of advanced capitalist nations and the opinions of their scholars.”²⁰⁶ Although Chimni notes that customary law is becoming increasingly representative of all states, his observation is directly applicable to the formation of draft customary law codes under earlier CIL practice.²⁰⁷ Codification during the period of the lead up to the draft articles contributed to a systemic bias in international law by further legitimizing customary law that evolved from Western state practice. Compounding this, the statutes of the ILC highlight the importance of considering what is essentially Western state practice in the formation of draft codifications. In addition, although the ILC’s 34 members are described in the statute as “persons of recognized competence in international law,”²⁰⁸ during the period in which the ASR was developed this recognized competence could well have meant members with competence in European or Global North concepts of international law, regardless of the country of nationality.²⁰⁹ Thus, while there may not be intentional bias among members, an inquiry into where members were trained in law or into their professions could provide insight into Western influence within


²⁰⁷ Concern surrounding the bias of CIL, whether or not it persists, and the proposition that increased attention be paid to CIL outside of the draft articles is raised in chapter seven.

²⁰⁸ Supra at note 204, article 2(1).

²⁰⁹ ILC members are often referred to as imminent scholars and consist of lawyers, professors, and judges. Some, nevertheless, have noted the importance of not over-evaluating the ILC. See Marko Milanovic who writes “The ILC’s work is certainly not gospel and its authority, as well as that of the ICJ for that matter, does not place it or the ICJ beyond criticism” Marko Milanovic, “State Responsibility for Genocide” (2006) 17 (3) European Journal of International Law, at 561.
the ILC. Despite TWAIL encouraging analysis beyond the surface to identify systemic biases, the goal of this section is less to reveal bias at the ILC upon formation of the draft codification than to demonstrate a current eschew of the draft articles by states outside of the Global North. In other words, the need to confirm historical bias, although of academic interest, is not as important as recent declarations by states showing disagreement with respect to the codification.

In addition to the problem that the ASR represent an artificially high threshold, they are increasingly (and wrongly) being referred to as a veritable codification. Courts applying the ASR without investigating their customary status means that the longer the ASR do not proceed to negotiations to be formalized as a convention, the more chance they will crystalize into accepted rules to the benefit of states such as Canada, the US, and the UK. The arguments voiced by these states in support of leaving the ASR untouched include that initiating negotiations would “dilute or undermine” the influence of the articles,\(^{210}\) that “a convention based on the articles would not bring additional authority or clarity,”\(^{211}\) and that discussions could “unravel the fragile balance struck in the wording of the articles.”\(^{212}\) Curiously, these statements do not reflect the existence of a stable set of rules or an existing *opinio juris*. If the draft codification truly mirrored customary law to the extent pronounced by the courts in the sections below, states would have little issue initiating negotiations for codification as the articles would not risk significant change. Another argument, this one concerning the evolution of customary law, advanced by the US and the United Kingdom seems inconsistent with the current reality. The representative of the UK stated that:

\(^{210}\) New Zealand, *supra* at note 137 para. 37.

\(^{211}\) United States of America, *ibid.* para. 70.

\(^{212}\) Israel, *ibid.* para. 54.
It would be dangerous to press ahead with a convention during the process of natural development of customary international law. The very premise upon which the codification was founded, namely that customary law was settled, would be absent. The process of elaborating a convention would highlight and exacerbate the differences of approach, thereby threatening the very coherence that the articles sought to and did indeed instil.\textsuperscript{213}

The US, for its part, noted:

\begin{quote}
Although the Secretary General’s report (A/71/80) demonstrated that the articles had already become a helpful guide for international courts and tribunals, states and legal experts on both the state of the law and how it might be progressively developed, the negotiation of a convention risked undermining the very important work undertaken by the International Law Commission in crafting the articles. Particularly worrisome was the prospect that such an instrument might deviate from important existing rules or ultimately not enjoy widespread acceptance by states.\textsuperscript{214}
\end{quote}

Essentially, the two paragraphs above argue that the ASR came to fruition at a moment when customary law on state responsibility was settled (or settling) and that any negotiations by states would disrupt a delicate balance and throw customary law into chaos. However, the American argument overestimates support for the ASR (which is far from widespread, as shown below) and uses presumptive reasoning to state that countries wishing to negotiate a treaty would push for provisions that do not coincide with customary law rules. Moreover, it is ironic that the quotes above refer to the development of customary law when the ASR are currently doing the opposite. Statements from deciding bodies mistakenly referring to the ASR as an authoritative reflection of CIL and treating the ASR as a treaty text can hardly be said to contribute to the progression of customary law; they are, rather, stunting it. Indeed, the negotiations feared by the US, Canada, and the UK would likely be more representative than deliberations at the ILC and would include all interested parties on equal footing. Consider the messages from states supporting the negotiation

\textsuperscript{213} United Kingdom, \textit{ibid.} para. 52.

\textsuperscript{214} United States of America, \textit{ibid.} para. 70.
of a treaty, the common thread being that they seek their opportunity to be part of negotiations and want rules to be based on a conference with full participation of states:

Dominican Republic on behalf of the 33 CELAC stated:

Despite persisting differences of opinion, CELAC was convinced that a consensus agreement could be reached at a diplomatic conference and that the interests of the international community would prevail over the interests of individual states.\(^{215}\)

South Africa on behalf of the 54 African Group stated:

A diplomatic conference to negotiate a treaty would allow for the participation of all states, further enhancing the political acceptance of the rules reflected in the articles, and provide a forum for reaching a consensus.\(^{216}\)

Cuba was forthright in its criticism of states not wanting to proceed to a convention:

The reports of the Secretary General (A/71/79 and A/71/80) and information and observations received from Member states showed that a number of states were reluctant to move ahead with codification of those norms, arguing that opening up the text to negotiation might jeopardize the current consensus on the binding nature and acceptance of the articles, and upset the delicate balance in the text. There was also a risk that some states would not ratify or see any benefit in adopting such a convention. However, certain states were delaying the adoption of a convention simply as a way of continuing to evade their responsibility and to act with impunity, owing to the absence of clear international obligations on the topic. Court rulings in those same states were often ambiguous and contradictory, because decisions on such a crucial issue were left in the hands of judges who were free to interpret the articles as they chose.\(^{217}\)

In addition to hidden biases, TWAIL focuses attention on how powerful states consolidate the advantages afforded to them under international law. While the quotes above show that most states seek dialogue on state responsibility, the priority of a smaller number is to crystalize the restrictive

\(^{215}\) Dominican Republic on behalf of CELAC, *ibid.* para. 29.

\(^{216}\) South Africa on behalf of the African Group, *ibid.* para. 31.

\(^{217}\) Cuba, *ibid.* para. 40.
application encapsulated in the ASR. This approach is described by Timothy Meyer, who notes that countries advocating centralization and clarification of customary law through codification may intend to capture its development at an opportune moment.\textsuperscript{218} As chapter four demonstrated, the ASR significantly limit the application of attribution, protecting Global North countries (home of the largest and most powerful MNCs)\textsuperscript{219} from responsibility for the actions of their corporate citizens. The high level of control required under interpretations of the draft articles for a state to be held responsible for the acts of their MNCs do nothing to encourage home states to legislate in favour of due diligence or transparency. In fact, it was shown that this high threshold allows powerful states to benefit from MNCs incorporated on their territory while these same companies can operate with impunity to lower standards in fragile states. Yet the paragraphs above show that not all countries are comfortable with this approach, recognizing that the draft articles permit certain states to evade responsibility. Considering the advantages afforded to powerful states and the suspicion voiced by certain cohorts, it is indeed an opportune moment, as Meyer states, for certain states to capture the development of state responsibility.

In conclusion to the subsection, the snapshot of a Western-influenced and aging view of CIL created by the ASR is not supported by a majority of states. Current views express disagreement between states over the progress of state responsibility and demonstrate a desire to capture the rules in the ASR versus one to renegotiate them. The following section will show the role the draft

\textsuperscript{218} Timothy Meyer, “Codifying Custom”, \textit{supra} at note 138 at 995.

articles play in inhibiting state responsibility from evolving to consider changes in components of international law. The subsequent section demonstrates how the overreliance on the draft codification by courts and scholars compounds this. All this leads to the understanding that emerging views are now pitted against increasingly indiscriminate mention of the ASR as representing customary law by tribunals. The UNGA advocated for the ASR to be considered a comprehensive representation of customary law by referring to them as part of the “codification and progressive development of international law.”

Given the dissatisfaction of many states with the draft codification, and given the wide acceptance of the ASR by deciding bodies in spite of this, it is difficult to argue that the UNGA’s vision of a comprehensive, definitive representation of CIL has been achieved.

3.2 Inhibiting the development of customary law

The second reason codification is detrimental to weaker states evolves from the first. A common practice of commentators, and indeed judges, with respect to draft codifications of international law is to refer to both the codification and the customary law it is meant to reflect. An example of this is the Vienna Convention on the Law of Treaties (1969) (VCLT), an instrument that was the result of another ILC project. Entered into force in 1980 with 108 state parties, the convention is referred to as a codification of the customary law of treaty interpretation despite not being a pure replication of such.

Nevertheless, the similarities between customary law and the VCLT are

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221 As per Malcolm Shaw, only certain provisions of the convention may be truly regarded as reflective of customary international law (the rules on interpretation, material breaches, and fundamental changes of
assumed by the ICJ to be close enough to refer to the convention without even determining whether litigants were in fact parties to it.\footnote{Karl Zemanek, “Vienna Convention on the Law of Treaties”, Audiovisual Library of International Law (United Nations, 2017) online http://legal.un.org/avl/ha/vclt/vclt.html [Accessed 23 November 2017].} The \textit{Max Planck Encyclopedia of Public International Law} states the following with respect to the issue:

When questions of treaty law arise during negotiations or litigation, whether concerning a new treaty or one concluded before the entry into force of the VCLT, the rules set forth in the VCLT are invariably relied upon by the states concerned, or the international or national court or tribunal, even when the states concerned are not parties to the VCLT. In treaty negotiations non-parties will refer to specific articles of the VCLT. The justification for invoking the VCLT is rarely made clear, though the unspoken assumption is that the VCLT represents customary international law. Whether a particular convention rule represents customary international law is likely to be an issue only if the matter is litigated, and even then the court or tribunal will take the VCLT as its starting—and probable finishing—point.\footnote{Aust,”Vienna Convention on the Law of Treaties”, \textit{supra} at note 138 at para 14.}

A similar practice has developed for the ASR even though, unlike the VCLT, the draft codification has not reached treaty status. By inferring authority from a draft codification, courts place the opinions of the 34 members of the ILC above CIL. While it is true that the UN GA recommended the use of the ASR in 2001, its statement does not give courts leave to place the value of the ASR above a fundamental source of international law. Keeping TWAIL related concerns in mind, courts’ assumptions of validity of the draft articles result in less investigation into current CIL and tilt their reasoning to favour powerful states. Moreover, excessive dependence and trust in the ASR by courts risks prematurely entrenching the draft articles along with an interpretation of state responsibility that best serves Global North states. Alain Pellet expresses concern with respect to

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an absence of thorough investigation into the components of attribution and reveals the following as a result of his review of investment tribunal decisions:

Still in the field of state responsibility, one would expect frequent references to the Court’s case law with regard to attribution issues, for which, as some tribunals noted, neither the Washington Convention nor generally BITs are of any help. This is only partially—or indirectly—true: on these particular issues, ICSID tribunals use much more readily and systematically the 2001 ILC Articles than the jurisprudence of the Court. The 2001 ILC Articles, together with their commentaries, often constitute sufficient evidence of the applicable law on that matter, the case law (including but not exclusively) of the ICJ appearing only as a secondary argument to support the reasoning. Here, it is not polite indifference but rather ‘eclipsed jurisprudence’—eclipsed by a soft law instrument considered to be law.  

An example of Pellet’s point is Conoco Phillips Petrozuata B.V. and others v. Bolivarian Republic of Venezuela where the International Centre for Settlement of Investment Disputes (ICSID) stated that the ASR “have been regularly referred to […] as codifying or declaring customary international law.”

Reference to the ASR in this manner is not reserved to the ICSID. In Samsonov v. Russia, the ECtHR noted simply that the ASR “codified the principles provided by modern international law regarding state responsibility.” In another recent ECtHR case, Liseytseva and Maslov v. Russia, the court supports its reasoning by casually noting that the draft articles and Commentaries are recognized as “codified principles developed in modern international law in respect of the


226 Samsonov v. Russia, No. 2880, [2014] First Section, 10, Decision, para 45. Author’s translation. Original French text reads: “ont codifié les principes dégagés par le droit international modern concernant la responsabilité de l’État…”. 
state’s responsibility for internationally wrongful acts.”227 Yet another tribunal, the Permanent Court of Arbitration under the United Nations Commission on International Trade Law (UNCITRAL), stated in Hulley Enterprises Limited (Cyprus) v. The Russian Federation that the substantive rules applied by the tribunal include those “authoritatively set out in the Articles on Responsibility of States for Internationally Wrongful Acts of the International Law Commission.”228 Sweeping comments that the articles have codified state responsibility are not accurate. Indeed, they squarely contradict the views of the states quoted above.

Perhaps the most striking example, though, is found in the ICJ’s Genocide Convention case.229 In this case, the Court uses its previous reasoning in Nicaragua to affirm that it is “settled jurisprudence” that Article 8 reflects customary law:

398. On this subject the applicable rule, which is one of customary law of international responsibility, is laid down in Article 8 of the ILC.

[...]

399. This provision must be understood in the light of the Court’s jurisprudence on the subject, particularly that of the 1986 Judgment in the case concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United states of America) referred to above (paragraph 391). In that Judgment the Court, as noted above, after having rejected the argument that the contras were to be equated with organs of the United states because they were “completely dependent” on it, added that the responsibility of the Respondent could still arise if it were proved that it had itself “directed or enforced the perpetration of the acts contrary to human rights and humanitarian law alleged by the applicant state” (I.C.J. Reports 1986, p. 64, para. 115); this led to the following significant conclusion: “For this conduct to give rise to legal responsibility of the United states, it would in principle have to be proved that that state had effective control of the military or

227 Liseytseva and Maslov v. Russia, Nos. 39483/05 and 40527/10, [2014] First Section, Judgment, para 128.


229 Genocide Convention case, supra at note 169.
paramilitary operations in the course of which the alleged violations were committed.” (Ibid., p. 65.)

[...]

406. It must next be noted that the “overall control” test has the major drawback of broadening the scope of state responsibility well beyond the fundamental principle governing the law of international responsibility: a state is responsible only for its own conduct, that is to say the conduct of persons acting, on whatever basis, on its behalf. That is true of acts carried out by its official organs, and also by persons or entities which are not formally recognized as official organs under internal law but which must nevertheless be equated with state organs because they are in a relationship of complete dependence on the state. Apart from these cases, a state’s responsibility can be incurred for acts committed by persons or groups of persons — neither state organs nor to be equated with such organs — only if, assuming those acts to be internationally wrongful, they are attributable to it under the rule of customary international law reflected in Article 8 cited above (paragraph 398). This is so where an organ of the state gave the instructions or provided the direction pursuant to which the perpetrators of the wrongful act acted or where it exercised effective control over the action during which the wrong was committed. In this regard the “overall control” test is unsuitable, for it stretches too far, almost to breaking point, the connection which must exist between the conduct of a state’s organs and its international responsibility.

407. Thus it is on the basis of its settled jurisprudence that the Court will determine whether the Respondent has incurred responsibility under the rule of customary international law set out in Article 8 of the ILC Articles on state Responsibility.230

The court makes no mention of state practice or opinio juris, the two traditional components of customary law. Instead, to confirm that Article 8 represents customary law, it refers to a previous decision from more than 20 years prior. Even if the court felt that the Nicaragua decision laid out customary law at the time, a complete decision would include a discussion of whether customary law had evolved since Nicaragua. The decision lacks any indication that such a scenario was considered. In responding to the court’s reasoning in his writings about revisiting the Nicaragua and Tadić decisions, Antonio Cassese states:

The Court’s basic assumption, that Article 8 of the ILC Articles reflects customary law, is undemonstrated, being simply predicated on the authority of the Court itself (the Nicaragua precedent), as well as the authority of the ILC. The logical sequences of propositions in

230 Ibid.
which the Court’s holding is grounded could perhaps be set out as follows: (1) The Court in *Nicaragua* enunciated the test [as an apodictic truth in the Kantian sense, namely as enouncing an absolute and necessary truth] (2) the ILC upheld the same test (based only on *Nicaragua*); (3) hence the test is valid and reflects customary international law.

[...]

Thus, the Court’s assertion that the ‘overall control’ test has ‘the major drawback’ of excessively broadening state responsibility by going beyond the three ILC standards, simply begs the question: as I have just pointed out, the Court should have proved that, if applied to state responsibility, ‘overall control’ was unsupported by state practice and *opinio juris*.

It follows that the reader expecting a closely-argued decision will be left instead with the impression that the Court’s holdings have a tinge of oracularity (oracles indeed are not required to give reasons).\(^\text{231}\)

Failing to refer to customary law contributes to its disappearance. It is true that court decisions do not officially form customary law. Nevertheless, their contribution to its evolution should not be underestimated. Decisions solve contentious matters between states in the manner in which they interpret the law and contribute to states’ understanding of and belief in CIL. This, in turn, influences state practice and *opinio juris*. States that benefit from the ASR will naturally disseminate the views of courts that repeatedly refer to the ASR as representative of customary law. In this respect, rather than improving the application of international law as codifications are meant to do, the ASR risk enforcing disparities between states – effectively confirming and entrenching the biases of international law in favour of powerful states.

### 3.3 How courts interpret draft codifications

The third issue with respect to the draft codification is again related to how courts use the document. However, the concern in this case extends beyond over-referencing the ASR and focuses on *how*

\(^{231}\) Cassese, “The *Nicaragua* and *Tadić* Tests Revisited”, *supra* at note 162 at 651.
the articles are referred to. It has been established above that the draft codification does not equate to a treaty, but by setting aside discussions of customary law in their decisions, deciding bodies effectively refer to the draft as if it were a treaty text. In doing so, courts are not applying treaty interpretation techniques. Instead, interpretations of the ASR are being made mainly through “ordinary meaning” readings of the codification and the accompanying ILC Commentaries. An example of recourse to the ILC Commentaries as an authority on state responsibility is found in a recent decision of the ECtHR. In assessing whether the conduct of a company could be attributed to a state in *Samsonov v. Russia* in 2014, the court addressed the effective control test and stated “this approach is consistent with previous cases […] as well as the ILC’s interpretation of article 8 of the articles of state responsibility.”232 Thus, the court looked no further than its previous non-binding cases and the Commentaries as authorities to apply the effective control test. In other examples, the Commentaries are the only other source of law referred to. Consider Giorgio Gaja’s conclusion after reviewing ICJ cases to determine how various instances dealt with the ASR:

[…] no methodology has yet been developed with regard to the interpretation of the ILC articles. In most cases, the ILC texts have been viewed as self-explanatory. The Court has not addressed questions of interpretation of ILC articles. In particular, the Court has not dwelt on the question of the respective weight of the articles and their commentaries. While the reference to the commentaries has been significant in certain cases, the Court has not hinted at the possible discrepancy between an article and its commentary and at the resulting problem of interpretation.233

Of course, it is understandable that courts shy away from traditional interpretation techniques as, once again, the draft codification is not a convention. However, it leaves courts in a peculiar

232 Supra at note 226 at para. 73. Author’s translation. Original French text reads: “cette approche est conforme tant à sa jurisprudence antérieur […] qu’à l’interprétation donnée par la CDI à l’article 8 des articles sur la responsabilité de l’État”.

position with respect to the legal weight of the instrument, to judicial reasoning, and to the consideration of customary norms. Indeed, their preoccupation with the text of the ASR could have the odd outcome of stifling the evolution of customary law more than if the rules were based in a treaty. Upon interpretation of an actual treaty, courts are guided by the interpretation articles of the VCLT (Articles 31 to 33). This permits judges to take into account such aspects as the context, object and purpose of the convention. Articles are often interpreted in a broader manner than originally deliberated at the birth of the respective treaties (as discussed below, this has been the trend with human rights treaties). Yet given that the ASR do not benefit from the interpretation rules of the VCLT, courts have limited their interpretations to strict readings and textual arguments. To be clear, this dissertation does not argue that the draft codification should be considered a treaty and treated as such. As discussed above, the proper solution would be for courts to delve deeper into whether the codified articles accurately reflect customary law. However, if deciding bodies choose to continue to only turn to the ASR and accompanying Commentaries to understand state responsibility, consistency suggests that they should consider interpretation tools being used in international law. This section therefore builds upon the TWAIL based reasoning from the previous two sections to demonstrate how misguided legislative interpretation can further entrench a bias in favour of Global North states within the draft articles. Specifically, restrictive readings of the text of the draft articles by courts ensure that the high threshold for attribution of acts of MNCs to home states outlined above is maintained at its most limiting level. This means that restrictive readings are not only unfavourable to weaker states in individual court decisions, but that they also risk contributing to the crystallization of rules of state responsibility that are unrepresentative of actual CIL. It is important to note that the decisions of international deciding bodies, be they from the ICJ, the ECtHR, or the various tribunals, are not bound by stare decisis. Yet while they do not
create law directly, their decisions influence the formation of customary law and are used to inform further decisions.

Inspired by TWAIL, I argue that judges ought to, at a minimum, apply interpretation techniques that avoid restrictive readings, take present day conditions into account, and provide an effective application of state responsibility. Moreover, progressive interpretations should consider the issue of fragile states and increasingly universal aspects of international law. The first point is simple: International law does not foresee restrictive interpretations of treaties.234 A passage from the ECtHR in Wemhoff explains that judges must “seek the interpretation that is most appropriate in order to realize the aim and achieve the object of the treaty, not that which would restrict to the greatest possible degree the obligations undertaken by the Parties.”235 With this in mind, recourse to the Commentaries by deciding bodies is consistent with an ordinary (or textual) reading of a treaty and an overreliance on the treaty text. The Commentaries may give the impression of informing a court of the aim of the ASR, but the reality is that in consulting the Commentaries, the court never ventures outside the ILC’s writings. Once again, the Commentaries do not represent the will of states and their purpose is to reinforce or justify the ASR rather than provide an interpretation tool. As such, they are better understood as an extension of the draft articles rather than an annotation or commentary by jurists. Even reference to scholarly writings could at least be considered independent from the draft articles. In other words, it seems inappropriate to use the Commentaries as the only interpretation tool when they were created to support the ASR.


The second point addresses interpretations that consider present day conditions and an effective interpretation of state responsibility. The evolutive principle of interpretation has been applied to readings of human rights treaties in international law. In *Loizidou v. Turkey*, for example, the ECtHR describes the ECHR as “a living instrument which must be interpreted in the light of present day conditions is firmly rooted in the Court’s case-law” and that “[i]t follows that these provisions cannot be interpreted solely in accordance with the intentions of their authors as expressed more than forty years ago.”

The Inter-American Court considered the same principle in an advisory opinion on the interpretation of the *American Declaration of the Rights and Duties of Man*:

> It is appropriate to look to the Inter-American system of today in the light of the evolution it has undergone since the adoption of the Declaration, rather than to examine the normative value and significance which that instrument was believed to have had in 1948.

Finally, the same court referred to the ECtHR’s evolutive approach while indicating that “human rights treaties are living instruments, the interpretation of which must evolve over time in view of existing circumstances.” Of course, the sources of obligations under human rights treaties differ from those under state responsibility: as discussed above, human rights treaties protect individuals from state power whereas state responsibility evolved to manage matters between states. It is understandable that wider treaty interpretations are easier to accept when considering the disparity of power between an individual and a state. Nevertheless, in cases where courts have chosen to

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236 *Case of Loizidou v. Turkey (Preliminary Objections)* (ECtHR) Series A No 310 at para. 71.


analyze the ASR as they would a treaty text, inequalities between states should be considered and interpretations adjusted in a similar manner as the examples above. The underlying justification for this is the declining concept of strict sovereign equality and increasing universality of international law discussed in chapter six. This is the evolutive aspect that courts can consider upon interpretation. This would, for example, permit a more flexible interpretation of the definition of “control” in attribution, that is, one that sets the bar lower for linking acts of MNCs to home states. Finally, the effectiveness rule overlaps with the argument above and encourages the deciding body to interpret provisions using a method that gives full meaning to a convention. The introduction to this dissertation highlighted the strength of MNCs, their predominant establishment in powerful states, and the fact that they often have subsidiaries operating in fragile states. Excluding any possibility of linking acts of MNCs to home states (under strict readings of attribution), even in cases of significant state involvement, creates a blind spot in the law of state responsibility and renders parts of it ineffective. Once again, a broader interpretation of attribution could solve this problem. In conclusion to this subsection, it is important to again stress that the preferred solution is for deciding bodies to refrain from treating the ASR as a treaty text. Rather, courts should be using the draft codification merely to guide their inquiries of the current state of customary law. However, when courts wrongly apply the ASR as a treaty, they should at the very least consider a wider interpretation than that offered by the treaty text and the accompanying Commentaries.

4. Conclusion

The goal of the chapter was to demonstrate the high threshold set by the ASR to attribute conduct of a MNC to its home state and to show, through TWAIL, how Global North states benefit from the high threshold and how international law protects these benefits. The different possibilities of attribution under the ASR were examined in turn, from state organs and those empowered to
represent the state through domestic legislation to entities under the express direction and control of the state. This part of the chapter was mainly descriptive and focused particular attention on the attribution criteria of article 8 of the ASR. The chapter discussed reasoning for the *Nicaragua and Tadić* decisions noting the role of *Tadić* in slightly lowering the threshold of attribution. Once the chapter identified how the draft articles contribute to the normative gap introduced in chapter one, it addressed how they are systemically applied to the disadvantage of weaker states. The chapter highlighted that, despite being promoted by the UN, the ASR do not adequately represent the views of all states, they inhibit the development of fair customary law, and are being applied by courts through strict readings of the codified text.

The following chapter addresses the manner in which another regime (IHRL) partly makes up for the current shortcomings of state responsibility.
CHAPTER 5 – THE LIMITATIONS OF RIGHTS BASED SOLUTIONS

1. Introduction

This chapter provides the second part of the descriptive component of the dissertation. In a similar vein to chapter four, the following shows where limits of regulation and protection are drawn in international law and how this contributes to the persistence of a normative gap.

IHRL foresees human rights obligations for home states with respect to its MNCs operating abroad in certain situations. However, territorial limitations on the application of IHRL remain strong and, by definition, IHRL only covers a subset of international obligations. In other words, while IHRL may apply to some cases not covered by attribution under the draft articles (as described in the previous chapter), it does so in few scenarios and only for violations of international obligations related to human rights treaties. Addressing the limits of IHRL within a dissertation primarily concerned with state responsibility may, at first, seem arbitrary. The importance of this short chapter within the greater view of the dissertation is to highlight the difference between actual application of IHRL and its associated rhetoric. Significant attention paid to human rights issues across academic fields, the proliferation of human rights conventions and institutions since 1945, and increasing mention of these instruments by courts contribute to an assumption of universality of human rights for those in the West. One need only consult the introductory chapter of this dissertation, however, to understand that universality of human rights remains a goal rather than a reality. Yet in and of itself the belief of the existence of universal human rights should be understood as a concern. Otherwise stated, blind assumptions, especially by the West, that universal coverage exists perpetuates legal voids such as the one identified in this dissertation.
Two characteristics of rights based solutions can be identified as pillars of their application to home states for acts of MNCs. The first is the existence of positive obligations of states under human rights law. This chapter shows that states are responsible under human rights law not only to refrain from violating the rights of individuals, but also to fulfil those rights in a proactive manner by undertaking due diligence to keep private parties from violating rights. The second pillar is the potential, albeit limited, for extraterritorial application of human rights law. While not a frequent occurrence, a state’s jurisdiction can extend beyond its borders when the state has a requisite amount of control over areas or individuals outside of its territory. This means that, when the necessary conditions are met and jurisdiction is extended outside a state’s territory, the violation of human rights by a MNC can amount to a violation of the state’s obligation to protect human rights. For such cases, the nationality of the MNC and its link to the state are of less importance given the state’s general positive obligation to protect flowing from its control of the area.

Considering the two driving arguments combined, states have extraterritorial rights obligations, and could be held responsible for rights violations by a MNC outside their territory, if they exercise control over the territory in which an act occurred (or control over the individual harmed) and if they did not take adequate measures to prevent the violation (due diligence).

The chapter first demonstrates the limits of IHRL with respect to the regulation of MNCs operating outside of their home states. It explains the method by which human rights law imposes obligations on states to ensure they undertake the necessary due diligence to keep corporations from violating human rights within their ‘jurisdiction’. The chapter subsequently differentiates a state’s territory from its jurisdiction, outlining cases in which a state can be held responsible for rights abuses that occur outside of its territory, yet within its jurisdiction. The section concludes by reviewing cases from international deciding bodies to demonstrate that extraterritorial jurisdiction can be applied
to acts of MNCs and not merely to acts of states. The chapter then addresses whether concepts of extraterritorial application might reach beyond traditional definitions of state jurisdiction under international human rights law. Before beginning the analysis of how human rights law can indirectly bind companies, the chapter briefly addresses the compatibility of human rights law and state responsibility.

2. The compatibility of state responsibility and international human rights law

State responsibility and IHRL and are founded in different systems of international obligations: state responsibility focuses on the relationship between states; human rights law is founded in the protection of the individual from the state. For the most part, this chapter looks at human rights separately from state responsibility. This should not suggest, however, that both cannot apply simultaneously and influence the regulation of MNCs in a belt and suspenders fashion. This dissertation submits that this is so despite the ILC’s initial reticence toward examining how human rights law could be incorporated into state responsibility\textsuperscript{240} and despite certain detractors towards a concurrent application of the regimes\textsuperscript{241} From the IHRL point of view, the principles of state


\textsuperscript{241} Andrew Clapham, a supporter of direct application of human rights to third parties, claims that the rules of state responsibility are not appropriate for human rights violations under the ECHR as the convention “…does not primarily operate at the inter-State level, as it grants remedies to individuals; effective protection demands that the Convention control private actors; the Convention takes effect in the national order of the Contracting Parties…”: Andrew Clapham, “The ‘Drittwirkung’ of the Convention”, in Franz Matscher, R St John Macdonald & Herbert Petzold eds., \textit{The European System for the Protection of Human Rights} (Boston: Nijhoff, 1993) 170; Malcolm Evans, for his part, states that the European Convention’s “character as a human rights treaty […] makes the international principles of state
responsibility have been overlooked by human rights actors to the extent of Theodor Meron declaring state responsibility a *terra incognita* for human rights lawyers.\(^{242}\) Nevertheless, in my view, as well as that of recent commentators,\(^{243}\) compatibility clearly flows from the manner in which state responsibility takes into account all international obligations of states. Human rights law forms part of the corpus of international obligations identified as primary rules; these rules are established separately from state responsibility, are applied to the doctrine without discrimination, and include obligations owed to states, individuals, or the international community as a whole.\(^{244}\) The ILC itself confirmed this in remarks concerning the structure of the proposed ASR in its *Yearbook of the International Law Commission* in 1973. The organization declared that the articles covered the responsibility of states “not only in regard to certain particular sectors” and that “the responsibility of the state is a situation which results not just from the breach of certain specific

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\(^{244}\) See *Rainbow Warrior (New Zealand v France)*, France-New Zealand Arbitration Tribunal (1990) 20 RIAA 217 at 251 where the Court held that “any violation by a State of any obligation, of whatever origin, gives rise to State responsibility and consequently, to the duty of reparation”; Also see *Case concerning the Gabčíkovo-Nagymaros Project (Hungary v. Slovakia)*, Judgment, 25 September 1997, ICJ Reports 1997, 39 at para. 38 where the ICJ held that when a state commits an IWA, “its international responsibility is likely to be involved whatever the nature of the obligation it has failed to respect’ at 38.
international obligations, but from the breach of any international obligation.” Although confusion may stem from state obligations towards protection of individuals under human rights law, breaches of these obligations are indeed violations of international treaties and, consequently, also violations of international obligations. Finally, if doubt persists concerning their compatibility, one may consider that the ILC refers to human rights conventions as examples for the application of the draft ASR in their publications246 with the Commentaries to the ASR containing references to human rights law and to the ICCPR specifically.247

3. Direct and indirect horizontal human rights obligations

To better understand the reasoning of the rights based approach, it is important to appreciate the relationship of rights and obligations between states, individuals, and corporations. Initially, human rights law, as represented by the French Declaration of the Rights of Man and of the Citizen and the American Bill of Rights, introduced vertical rights protection; human rights norms existed to defend individuals from repressive or irresponsible actions of the state.248 Under vertical rights, individuals suffering harm from a state would be victims of a rights violation, while equivalent


247 McGoldrick, supra at note 240 at 162.

harm caused by NSAs would fall outside of rights protection. More recent accounts of human rights acknowledge a horizontal application of the rules. In such cases, rights and obligations between persons (legal or natural) exist in addition to those apropos the state. While the identification of the rights at play remain the purview of the state, the procedure of enforcement depends on whether there exists direct rights protection between individuals or whether the rights are defended in an indirect manner (through the state). For example, the Bill of Rights incorporated into the South African Constitution enables provisions to be applied in both vertical and horizontal manners to the extent that the rights and associated obligations can affect natural and/or legal persons. The Constitution lays out the rights to be protected and courts decide whether they are applicable to given situations between citizens. If the right is applicable, the link between the right holder and the obligation holder, both NSAs, is direct. Constitutional jurisprudence from Germany and Ireland confirm this type of application of rights in their respective countries.

While I acknowledge the argument that human rights law may apply directly between private actors in some situations, exploring the mechanisms of direct application between private parties is

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249 The latter may nevertheless be a crime in of itself, depending on domestic law.

250 Černič, supra at note 17 at 49.

251 Ibid. at 51.

252 Ibid.; David Jason Karp, Responsibility for Human Rights: Transnational Corporations in Imperfect States (Cambridge: Cambridge University Press, 2014) at 27. Karp explains that in Ireland, the direct horizontal effect means that rights means that “if it can be established that freedom from discrimination on the basis of religion or sexual orientation is a human right, then any State or non-State actor can be taken to an Irish court for this kind of discrimination.” By comparison, in Germany human rights principles can be used by judges when deciding cases other than specific human rights law cases (ex contract law or criminal law), thus directly horizontal, but remains indirectly horizontal for human rights cases.
outside of its scope. Rather, the work focuses on indirect, yet still horizontal, applications of international human rights law. Under this approach, private parties (including corporations) have human rights obligations towards one another, however these obligations exist through the responsibility of the state within its jurisdiction. Specifically, the positive obligations of states ‘to protect’ individuals and to allow them to fully actualize their rights provides the source of the obligation. State obligations to respect human rights, to take action to prevent their violation, to fulfil rights, and to punish rights violations on their territory are found in numerous conventions, from fundamental documents of human rights law to labour law. This method of actualizing rights has been confirmed in prominent cases across treaty bodies. In A. v. United Kingdom, a case where the applicant (a young boy) was abused by his stepfather, the ECtHR ruled that the failure of UK domestic law to provide adequate protection for the applicant constituted a breach of Article 3 (inhuman or degrading punishment) of the European Convention on Human Rights. In the Velasquez Rodriguez Case, the Inter-American Court considered that, although the rights of

253 Typically, a state’s obligations related to a right include respecting the right (not violating the right), protecting the right (taking positive measures to ensure the existence of the right), and fulfilling the right (providing recourse in cases of violation of the right). See Benedetto Conforti, “Exploring the Strasbourg Case-Law: Reflections on State Responsibility for Breach of Positive Obligations” in Malgosia Fitzmaurice & Dan Sarooshi eds., Issues of State Responsibility before International Judicial Institutions; The Clifford Chance Lectures, Volume 7 (Oxford: Hart Publishing, 2004) 129, while the ECtHR uses the term obligation to protect, the ILC prefers obligation to prevent; both conveying a need for action from the State.

254 Ibid.

255 Conventions identified as “fundamental” by the International Labour Organization (ILO) identify the obligations of member states to take measures on their own territories to promote various labour associated rights. For example, “to pursue a national policy designed to ensure the effective abolition of child labour” (art. 1 Convention concerning Minimum Age for Admission to Employment Minimum Age, 1973 (No. 138) (Entry into force: 19 Jun 1976) and that “Each Member shall […] ensure the application to all workers of the principle of equal remuneration for men and women workers for work of equal value […] by means of - a) national laws or regulations” (arts.1, 2 Equal Remuneration Convention, 1951 (No. 100) (Entry into force: 23 May 1953).

Rodriguez (a victim of forced disappearance) had been violated by private actors, the state was responsible for failing to take steps to prevent, investigate, and punish the violation. The HRC highlights the importance of positive obligations under the ICCPR in its General Comment Number 6 in 1982. With respect to the right to life, the committee states that:

“…the right to life has been too often narrowly interpreted. The expression “inherent right to life” cannot properly be understood in a restrictive manner, and the protection of this right requires that states adopt positive measures.”

As shown in A. v. United Kingdom, a state’s obligation to protect extends to more than the right to life. It also applies to all private actors, including corporations. According to the HRC, states must provide a legislative framework prohibiting acts amounting to unlawful interference with “privacy, family, home or correspondence” by both “natural and legal persons”. In Franz Nahlik v. Austria the HRC confirmed that state parties are under an obligation to ensure that individuals within their territory or jurisdiction are free from discrimination whether it occurs “within the public sphere or among private parties in the quasi-public sector of, for example, employment.” Thus, the burden on states to establish effective restraints on activities of corporations to protect


258 Human Rights Committee, General Comment 6, Article 6 (Sixteenth session, 1982), U.N. Doc. HRI/GEN/1/Rev.1 at 6 (1994) para 5.

259 UN Human Rights Committee, General Comment No. 16, Article 17 (Right to Privacy), The Right to Respect of Privacy, Family, Home and Correspondence, and Protection of Honour and Reputation, (8 April 1988), HRI/GEN/1/Rev.9 (Vol. I.) para 9.


261 Ibid. at 8.2.
human rights on their territories has become clear. In 2009, the UN Secretary General’s Special Representative for Business and Human Rights highlighted the state duty to protect as a fundamental principle in the framework for addressing MNC regulation. Indeed, the UNGP place the obligation of states to protect against human rights abuses within their own jurisdiction as the first “foundational principle” of the document:

A) 1. States must protect against human rights abuse within their territory and/or jurisdiction by third parties, including business enterprises. This requires taking appropriate steps to prevent, investigate, punish and redress such abuse through effective policies, legislation, regulations and adjudication.

The phrase “appropriate steps to prevent” is an indicator of the presence of due diligence and applies in a similar manner in the human rights cases above. Positive human rights obligations are generally not obligations of result. This means that states must take reasonable measures to ensure the fulfilment of rights (not just their respect or protection) but are not bound to ensure their existence under every possible scenario. Under IHRL, states are given a large margin of appreciation as to how they will satisfy their positive obligations and, should their efforts be considered sufficient by a deciding body, they will have fulfilled their due diligence. As a preliminary conclusion, the existence of positive obligations appears undisputed under human rights law. Their applicability to the acts of corporations, not just individuals, has also been demonstrated. The next step is therefore to discuss the possibility of extraterritorial jurisdiction of


human rights law and whether states have the same positive obligation to protect against actions of a company beyond its borders.

4. Extraterritorial jurisdiction in international human rights law

Although the wording of certain international treaties suggests an existence of globally accepted human rights, human rights obligations of states are often considered delimited by national borders. Commentators and both regional and international treaty bodies have hinted at a more expansive vision. The conventional interpretation of international human rights jurisdiction limits state obligations to respecting, protecting, and fulfilling rights within their respective territories, only stretching beyond borders in exceptional circumstances and when the state exercises the requisite control over territory or over an individual. This view continues to be promulgated by certain states even though the jurisdictional clauses of contemporary international human rights instruments clearly indicate that state obligations are not exclusively defined by


265 Supporters of the expansive view include Robert McCorquodale and Penelope Simons (see McCorquodale & Simons, “Responsibility Beyond Borders”, supra note 197) and Muthucumaraswamy Sornarajah, “Linking State Responsibility for Certain Harms Caused by Corporate Nationals Abroad to Civil Recourse in the Legal Systems of Home States” in Scott & Craig, Torture as Tort: Comparative Perspectives on the Development of Transnational Human Rights Litigation (Oxford: Hart Publishing, 2001). Of all the works read, Olivier De Schutter’s is the most extensive, arguing for an application of human rights law beyond the classic application of extraterritorial jurisdiction. Olivier De Schutter, “Extraterritorial Jurisdiction as a tool for improving the Human Rights Accountability of Transnational Corporations”, background paper to the seminar organized in collaboration with the Office of the UN High Commissioner for Human Rights (Brussels, 3-4 November 2006) online https://business-humanrights.org/sites/default/files/reports-and-materials/Olivier-de-Schutter-report-for-SRSG-re-extraterritorial-jurisdiction-Dec-2006.pdf [Accessed 15 February 2017]; CF See Tonkin, supra at note 141 at 256 who states “Whatever the merits of these arguments, they do not represent the current State of the law.”
territory. Article 1 of both the *European Convention on Human Rights* (ECHR)\(^{266}\) and the *American Convention on Human Rights* (ACHR)\(^{267}\) refer to jurisdiction rather than territory whereas the ICCPR at Article 2 refers to both territory and jurisdiction.\(^{268}\)

While narrow readings of the articles suggest that conventions are not constrained by territory, opinions from the ECtHR and communications from the Human Rights Committee (HRC) have limited the breadth of the term jurisdiction, rendering its definition unpredictable.\(^{269}\) Accordingly, Malcolm Langford et al. explain that “obligations that extend beyond [the] domestic sphere have been largely understood or interpreted in residual, minimalistic or moral terms, if at all.”\(^{270}\) Nevertheless, the authors also state that the territorial framing of rights is a model “under strain”\(^{271}\). Both Nicola Jägers and Viljam Engström claim that there is a movement away from the presumption that a state’s obligations are limited to its territory.\(^{272}\) Jägers states that “in general a state is not under an obligation to control the activities of private individuals (being its nationals)

\(^{266}\) *European Convention for the Protection of Human Rights and Fundamental Freedoms*, 4 November 1950, 213 U.N.T.S. 221 at 223 [*ECHR*], art. 1: “secure to everyone within their Jurisdiction”.


\(^{268}\) ICCPR, *supra* at note 262 at art.2: “ensure to all individuals within its territory and subject to its jurisdiction”.


\(^{270}\) Langford et al., *supra* note 264 at 3.

\(^{271}\) *Ibid.*

\(^{272}\) Jägers, *supra* at note 243 at 166-7; Engström, *supra* at note 243 at 18.
beyond the bounds of state territory however the territorial principle […] has been modified.”

She adds that while territoriality is currently the rule, there are circumstances in which “the principle should be moderated.” Ian Brownlie, for his part, adds that territorial views are “open to serious question and can operate, if at all, only as a weak presumption.” Finally Olivier de Shutter notes that in international law “a clear obligation for states to control private actors […] operating outside their national territory, to ensure that these actors will not violate the human rights of others, has not crystallized yet” but adds that the “classical view might be changing.” The perspectives noted above combined with the open wording of the conventions suggest that restrictive readings of jurisdiction clauses may not be everlasting and that pressure is mounting for an extended role of international human rights law. The latter part of this chapter submits that this is especially so for cases involving MNCs.

Although specific criteria can vary per convention, generally, for a state’s human rights obligations to apply outside of its territory, it must either have control over an individual whose rights are violated (e.g., arrest by state agents on another state’s territory) or have effective control over territory (e.g., certain occupation scenarios). The HRC has confirmed the application of the

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273 Jägers, ibid.

274 Ibid.


276 De Schutter, “Extraterritorial Jurisdiction as a tool”, supra at note 265 at 19.

ICCPR for extraterritorial violations on several occasions. In *Lopez Burgos v Uruguay*, for example, the Committee states that violations perpetrated by a state’s agents outside its territory (in this case the arrest, detention, and mistreatment of Lopez Burgos in Argentina) does not bar the Committee from hearing the case brought against Uruguay. The HRC claims that “it would be unconscionable to so interpret the responsibility under Article 2 of the Covenant as to permit a state party to perpetrate violations of the Covenant on the territory of another state, which violations it could not perpetrate on its own territory.” Jurisdiction was confirmed in this case as state agents had control over the individual whose rights were in question. The often-cited example of *Loizidou v. Turkey* at the ECtHR, a case concerning a Greek Cypriot prevented from returning to her property in Turkish-held northern Cyprus, provides an example of jurisdiction through control of territory. The Court affirmed that “the responsibility of a Contracting Party could also arise when, as a consequence of a military action, it exercises effective control over an area outside of its national territory.” The Court further established that control of the area could be deemed to exist simply due to the substantial presence of Turkish troops and that the applicant therefore fell under Turkish ‘jurisdiction’ within the meaning of Article 1 of the Convention.

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279 Para 12.3; The HRC repeated this reasoning in *Lilian Celiberti de Casariego v Uruguay, Human Rights Committee*, Communication No 56/1979, UN Doc CCPRJC/13/D/56/1979. In a case concerning the abduction of the plaintiff from Brazilian territory and held in detention in Uruguay, the HRC rejected the purely territorial reading, stating “Article 2(1) […] does not imply that the State party concerned cannot be held accountable for violations of rights under the Covenant which its agents commit upon the territory of another State […] it would be unconscionable to so interpret the responsibility under article 2 of the Covenant as to permit a State party to perpetrate violations of the Covenant on the territory of another State, which violations it could not perpetrate on its own territory.”

280 *Case of Loizidou v. Turkey (Preliminary Objections)* (ECtHR) Series A No 310, para. 61, confirmed at the merits stage, *Case of Loizidou v Turkey (Judgment of 18 December 1996) (Merits)* (ECtHR) Reports 1996-VI 2216., para. 52.
These cases confirm that jurisdiction extends beyond territory in cases of control over an individual or territory. The question of whether positive rights exist alongside negative rights in such cases is therefore fundamental for the discussion of acts of MNCs abroad. In *Cyprus v. Turkey*, the ECtHR held that Turkey’s obligations as an occupying power in Cyprus extended to acts of private parties violating the rights of both Greek and Turkish Cypriots:

> [...] the acquiescence or connivance of the authorities of a Contracting State in the acts of private individuals which violate the Convention rights of other individuals within its jurisdiction may engage that State’s responsibility under the Convention. Any different conclusion would be at variance with the obligation contained in Article 1 of the Convention.\(^{281}\)

While the HRC and ECtHR have confirmed through decisions that this is so, and consequently that acts of MNCs in such cases would bind the state in control of the area, the UN Committee on Economic, Social and Cultural Rights (the CESCR) has gone further by specifically referring to third parties in its General Comments. In General Comment 14 with respect to Art. 12 ICESCR (right to mental and physical health), the Committee declares that states must take steps to ensure ‘third parties’ respect human rights outside of the home state’s territory:

> To comply with their international obligations in relation to article 12, states parties have to respect the enjoyment of the right to health in other countries, and to prevent third parties from violating the right in other countries, if they are able to influence these third parties by way of legal or political means, in accordance with the Charter of the United Nations and applicable international law.\(^{282}\)

The Committee set the same tone in its General Comment 15 with respect to the right to water:

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\(^{281}\) *Cyprus v Turkey (Merits)* ECHR 2001-IV, IHRL 3076 (ECHR 2001) para. 81.

Steps should be taken by states parties to prevent their own citizens and companies from violating the right to water of individuals and communities in other countries. Where states parties can take steps to influence other third parties to respect the right, through legal or political means, such steps should be taken in accordance with the Charter of the United Nations and applicable international law.\(^{283}\)

Thus, positive rights obligations can, in some cases, extend beyond borders. The extraterritorial aspect of the CESCR comments have added significance in that they do not call for any type of control of foreign territory in order to be enacted. Indeed, the ‘control’ referred to is linked to the ability to perform due diligence with respect to companies ("parties can take steps to influence other third parties"). This reflects a bourgeoning principle in international law that values responsibility based on ability to influence rather than the simple criteria of whether an entity falls within a state’s territorial jurisdiction. This view appears increasingly plausible when combined with recent signs that the requirement of effective control under human rights law is not as prominent as many perceive. In *Isaak v. Turkey*, the ECtHR held Turkey responsible for rights violations that occurred in a neutral UN buffer zone between Turkish and Greek Cyprus.\(^{284}\) The case involved an individual beaten to death by a Turkish gang, in which Turkey, while occupying the area, was not deemed to have held effective control of the territory. The Court reiterated its reasoning from *Cyprus v. Turkey*, that the acquiescence of authorities in the acts of private individuals may engage the state’s responsibility. Thus, the possibility exists for a state to violate the European Convention through a failure to act, even in the absence of effective control of an

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\(^{284}\) *Isaak and Others v. Turkey case*, (Application no. 44587/98), Chamber, (Admissibility Decision) 28 September 2006, ECtHR; confirmed at the merits stage, *Isaak v. Turkey case*, (Application no. 44587/98), Chamber (Merits and Just Satisfaction), 24 June 2008, ECtHR.
area. While the acts in this case were committed by individuals, the reasoning is transferable to acts of corporations. And although the definition of acquiescence arguably includes aspects of approval, the failure to perform positive obligations to protect from violations is not far removed.

Violation of Convention rights within a host state can also be linked to the failure of a home state to control private actors on its territory. In Kovačič and Others v. Slovenia, the ECtHR examined whether domestic legislation regulating a company could ultimately violate rights outside of the country. The applicants, of Croatian origin, complained that they had been kept from withdrawing funds from the branch of a Slovenian bank in Croatia due to a Slovenian law, therefore incurring a violation of their property rights. No effective control over the territory by Slovenia existed and, in Slovenia’s view, any obligation to ensure rights under the ECHR was limited to its territory. The ECtHR concluded that the acts of Slovenian authorities had produced effects outside of the country, rendering Slovenia responsible under the convention. Thus, it appears possible that the true test of control is linked to the potential of the home state to have played a role in inhibiting the rights violation from occurring. This view of power over the rights holder is especially relevant for cases of fragile states, a particular interest of this dissertation.

5. Conclusion

The chapter began by setting out the purpose for studying the extraterritorial application of human rights law and by explaining its role under the analogy of belt and suspenders. IHRL partially picks up where restrictive readings of attribution under the draft articles leave off. That is, in cases where

285 Kovačič and Others v. Slovenia, (Application no. 44574/98) Chamber (Admissibility Decision), 1 April 2004, ECtHR.
a MNC’s acts abroad are not attributable to its home state under state responsibility, a select number of scenarios could nevertheless trigger the home state’s responsibility under human rights law. Thus, the chapter first sets out to confirm that states indeed have positive obligations to ensure that MNCs refrain from violating human rights within the state’s jurisdiction. Despite the existence of these obligations, the few scenarios in which a state’s jurisdiction is currently considered to extend past its territorial boundaries is noted as limiting the utility of the regime (jurisdiction being linked to control exercised by a state over a foreign area or individual). Thus, IHRL remains an incomplete solution to the issue of MNCs operating in fragile states. This conclusion is all the more valid when the limited breadth of rights is considered as opposed to the system of state responsibility that covers all primary international obligations.

There are, however, indications that the application of IHRL is evolving to incorporate more extraterritorial responsibilities by considering the home state’s ability to control an entity rather than actual control. As a final point, it is worth reiterating that the role of human rights law in the regulation of MNCs has clearly been significant on the territory where the state has the will and the means to enforce human rights. Positive human rights are entrenched in the workings of the system and rights abuses within home states for Global North countries are scarcely tolerated. In situations where human rights appear to be needed the most, however, they remain absent.
CHAPTER 6 – EMERGING APPROACHES

1. Introduction

The previous chapter demonstrated how IHRL, under limited circumstances, reduces the legal gap with respect to MNCs maintained by the draft codification. Inspired by TWAIL, this chapter argues that a more effective solution consists in adjusting the way acts of MNCs are considered imputable to their home states. The proposed adjustment targets the so-called secondary rules of international law, specifically, those establishing the criteria of control under attribution within state responsibility. It posits lowering the burden to link home states to corporate citizens violating international law when fragile host states are involved. The argument for more inclusive attribution criteria is based on indications that the customary law of state responsibility has evolved beyond what is reflected in the draft codification. This wider interpretation of attribution also has TWAIL related moral justifications. Recall that much of MNC intellectual and physical capital is often based in Global North states. These home states benefit from MNCs through tax revenue, employment of citizens, and general contribution to the domestic economy, among other advantages. Often, the same MNCs operate abroad to lower standards in areas of weak legal protection.

As impediments to the evolution of CIL were already described in chapter four, section two of this chapter turns to demonstrating how the customary rules of state responsibility have evolved beyond what is currently reflected in the ASR. In support of this argument, the section begins by listing indicators that suggest the draft codification is inconsistent with current customary law related to state responsibility. The section first addresses reasons to dismiss the strict interpretations of the ASR and later describes the direction in which state responsibility may be heading. Recent
initiatives at both the international and domestic levels are then discussed to demonstrate a shift in perception about home state obligations towards MNCs. Following this, section three links the concept of attribution under state responsibility to that of sovereignty and argues that as the latter changes, so must the former. Developments in international law are considered and the evolution of the definition of sovereignty is discussed. Within this discussion, it is shown that changes in the balance between international law principles of non-intervention and emerging obligations to protect vulnerable states allow for a corresponding modification of the attribution principle. Finally, section four posits what a reconsideration of attribution might look like. To provide an analogy to fragile states, existing laws that manage ambiguous jurisdictional areas (Law of the Sea and Space Law) are briefly discussed to demonstrate how they hold home states responsible for corporate acts in lawless areas. The points from previous sections are then pulled together to propose original attribution criteria specific to the scenario of MNCs operating in fragile states.

2. Diverging customary law

Judicial confidence in the authority of the ASR was discussed in chapter four. However, there are signs that state responsibility, at least as reflected in the ASR, is not as stable as some perceive. The awkward implementation of the ILC’s codification project, informed court decisions, and recent declarations from state representatives suggest that the ASR are outdated and hint toward a lower bar for imputing responsibility of third parties to states.

2.1 Lack of progress towards a convention

The inability of the international community to transform the draft articles into a convention manifests doubt as to the extent to which the ASR reflect current customary law. Firstly, it is telling
that the ILC chose the path of a GA resolution to promote the draft codification, rather than convening states to work towards a convention. After years of deliberation, it is understandable that the ILC preferred what would likely be the quickest method for the introduction of the draft codification. Indeed, the ILC’s work was already being mentioned by courts, which may have removed pressure to seek a convention at the time. However, it also suggests that the ILC was not confident in the possibility of concluding a convention on the issue.²⁸⁶ Moreover, since 2001, steps towards a convention have not passed beyond the stage of mentions of further investigation by the UNGA. In its original December 12, 2001, resolution encouraging the application of the ASR, the UNGA included a mention in the ILC recommendation that the UNGA “should consider at a later stage, in the light of the importance of the topic, the possibility of convening an international conference of plenipotentiaries to examine the draft articles with a view to concluding a convention on the topic.”²⁸⁷ Seventeen years later, states are no closer to convening an initial conference to discuss the possibility of doing so. In its latest statement on the issue on December 13, 2016, the UNGA noted in a resolution that it would, once again, place the question of a convention on responsibility of states for IWAs on the provisional agenda of its 74th session.²⁸⁸ The process of adjournment of the topic to the next session has become routine over the past decade. While it remains to be seen whether this routine will be broken, a review of recent state opinions suggests such an outcome is unlikely for the time being. A persistent lack of consensus related to the formation and future of the draft codification renders it difficult to argue that the ASR accurately

²⁸⁶ A GA statement promoting the use of the ASR is far from equivalent to concluding a convention on the basis of the codification. Despite possibly contributing to the eventual formation of CIL, GA statements are not considered a source of international law.

²⁸⁷ UNGA Res. 56/83 supra at note 220 at preamble.

²⁸⁸ UNGA Res. 71/133 supra at note 220 at para 8.
reflects CIL. Considering TWAIL and recalling state opinions outlined in section 3.1 of chapter four, the lack of progress towards the negotiation of a treaty is no coincidence. Rather, the active resistance of certain states in the face of calls by developing states to negotiate a representative treaty is an example of how the Global North manipulates the international system. By keeping a convention from being negotiated by all interested states and by promoting the ASR, the Global North essentially benefits from favourable rules with codification-like qualities. As such, not only do they avoid a convention that would be less favourable to them, they contribute to stalling the progressive development of customary law.

2.2 Declarations of states concerning the draft codification

Recent declarations from states demonstrate two important aspects with respect to state responsibility and, specifically, the acts of MNCs abroad. The first aspect is that, while not referring to specific articles, many states continue to publicly assert that the ASR do not fully capture the doctrine. The opinions expressed in the Summary record of the ninth meeting of the Sixth Committee of the UNGA held on October 7, 2016 provide an idea of the extent to which states feel bound (or not) by the draft articles. The Dominican Republic, on behalf of CELAC, noted that the articles had been referred to by courts and that “some of the articles had been regarded as reflecting customary international law.”289 Finland, a strong supporter of the ASR, stated on behalf of Denmark, Iceland, Norway and Sweden that the articles reflected a consensus about the international responsibility of states “even though there might be different views on specific details in that regard.”290 New Zealand, Australia, and Canada stated that courts have increasingly used

289 Supra at note 137 at para. 37.
290 Ibid. at para. 34.
the ASR as guidelines and that “many of the articles reflected international customary law.”\textsuperscript{291} El Salvador noted that the ASR reflected the customary nature “of a number of their provisions.”\textsuperscript{292} Peru, for its part, stated that “it could be said that some of the articles even reflected customary international law.”\textsuperscript{293} Finally, the statement of the United Kingdom is the most nuanced with respect to the customary character of the ASR:

51. Ms. Sornarajah (United Kingdom) said that the articles on state responsibility covered a range of sensitive and controversial topics and sought to reconcile the differing views of states. While some articles had codified existing customary international law, others represented progressive development. Courts and tribunals had chosen to draw on some of the articles to resolve issues arising in cases before them. It was not possible to identify the consensus view on certain key questions or to draw firm conclusions as to whether some aspects of the articles reflected customary international law — hardly surprising, given the breadth, complexity and controversy of many of the issues covered.

[...]

53. The articles could not be said to capture the state of customary international law in its entirety at the current stage.\textsuperscript{294}

Most of the declarations, while partially supportive of the draft articles, do not reinforce their legal heft. That is, statements claiming that “many” or “some” articles reflect customary law do not carry the same weight as court decisions that fully rely on the ASR, such as those mentioned above. Once again, given the importance of \textit{opinio juris} in the formation of customary law, the above quotes from states are a strong indication that the ASR do not reflect customary law. While the quotes call into question whether the ASR reflect customary law, the discussion below addresses future ways in which the customary law of state responsibility may evolve.

\textsuperscript{291} \textit{Ibid.} at para. 37.

\textsuperscript{292} \textit{Ibid.} at para. 43.

\textsuperscript{293} \textit{Ibid.} at para. 67.

\textsuperscript{294} \textit{Ibid.} at paras. 51 and 53.
2.3 Appropriate investigation by courts

Despite the strict readings of the ASR discussed above, interpretations of attribution have shown a measure of flexibility when Courts have delved into the founding elements of customary law.\footnote{Since the Tadić decision was released before the Commentaries to the ASR, it cannot be said that the court purposefully ignored them as a source of interpretation.}

As a preliminary remark, it is important to recall that the statements of international courts and tribunals, be they from the ICJ, the ECtHR, or the various tribunals, are not bound by \textit{stare decisis}. Their decisions may influence the formation of customary law and are used to inform further decisions, but they do not create law directly. This allows customary law related to state responsibility to evolve beyond early opinions from courts about its application. As such, cases such as \textit{Nicaragua}, while important considerations of law, should not be held to have locked in or crystalized legal norms or criteria of state responsibility.

A thorough consideration of state practice and \textit{opinio juris} in evaluating CIL notably occurred in the \textit{Tadić} decision, previously discussed in chapter four. Recall that \textit{Nicaragua} discussed the concept of attribution within state responsibility whereas \textit{Tadić} was applying international criminal law. Once again, in \textit{Nicaragua}, attribution was discussed to determine whether the acts of the contras could be linked to the US, while in \textit{Tadić} the test was used to determine whether and armed conflict was of international character in order to determine the applicable law. Although the \textit{Tadić} appeal decision is from 1999 (before the UNGA recommended the use of the ASR), the court nevertheless referred to an earlier version of the draft codification throughout its decision.\footnote{Report of the International Law Commission on the work of its Forty-Eighth Session (6 May-26 July 1996), U.N. Doc. A/51/10.}
Among other references to state practice, the ICTY appeals bench considered national liberation movements in its determination of the amount of control needed for imputation of acts of organized groups to states:

Judging from international case law and state practice, it would seem that for such control to come about, it is not sufficient for the group to be financially or even militarily assisted by a state. This proposition is confirmed by the international practice concerning national liberation movements. Although some states provided movements such as the PLO, SWAPO or the ANC with a territorial base or with economic and military assistance (short of sending their own troops to aid them), other states, including those against which these movements were fighting, did not attribute international responsibility for the acts of the movements to the assisting states.\(^{297}\)

In its footnote to the section above, the court listed the extensive number of SC debates and resolutions that informed their conclusion that states had not held counterparts to account in cases where territory and assistance were provided to liberation movements.\(^{298}\) In addition to its consultation of state practice, the following reasoning of the court showed independence from the draft articles and more respect for customary law than the decisions discussed in chapter four (namely, *Nicaragua*). The court began its discussion of Article 8 of the ASR by stating that “[a] first ground on which the *Nicaragua* test as such may be held to be unconvincing is based on the very logic of the entire system of international law on state responsibility.”\(^{299}\) The “logic” of the

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\(^{297}\) *Tadić*, *supra* at note 180 at 130.

\(^{298}\) *Ibid.* The Footnote reads as follows “See e.g., the debates in the U.N. Security Council in 1976, on the raids of South Africa into Zambia to destroy bases of the SWAPO (see in particular the statements of Zambia (SCOR, 1944th Meeting of 27 July 1976, paras. 10-45) and South Africa (ibid., paras. 47-69); see also SC resolution no. 393 (1976) of 30 July 1976)); see also the debates on the Israeli raids in Lebanon in June 1982 (in particular the statements of Ireland (SCOR, 2374th Meeting of 5 June 1982, paras. 35-36) and of Israel (ibid., paras. 74-78 and SCOR, 2375th Meeting of 6 June 1982, paras. 22-67) and in July-August 1982 (see the statement of Israel, SCOR, 2385th Meeting of 29 July 1982, paras. 144-169)); see also the debates on the South African raid in Lesotho in December 1982 (see in particular the statements of France (SCOR, 2407th Meeting of 15 December 1982, paras. 69-80), of Japan (ibid., paras. 98-107), of South Africa (SCOR, 2409th Meeting of 16 December 1982, paras. 126-160) and of Lesotho (ibid., paras. 219-227)).”

system, the court continues, is that the “principles of international law concerning the attribution to states of acts performed by private individuals are not based on rigid and uniform criteria.”

The court uses this as its foundation to argue that the less strict “overall control” test (in comparison to Nicaragua’s effective control test) needed to be satisfied for imputation of acts of members of an organized group to a state:

120. Plainly, an organised group differs from an individual in that the former normally has a structure, a chain of command and a set of rules as well as the outward symbols of authority. Normally a member of the group does not act on his own but conforms to the standards prevailing in the group and is subject to the authority of the head of the group. Consequently, for the attribution to a state of acts of these groups it is sufficient to require that the group as a whole be under the overall control of the state.

[…]

124. The “effective control” test propounded by the International Court of Justice as an exclusive and all-embracing test is at variance with international judicial and state practice: such practice has envisaged state responsibility in circumstances where a lower degree of control than that demanded by the Nicaragua test was exercised. In short, as shall be seen, this practice has upheld the Nicaragua test with regard to individuals or unorganised groups of individuals acting on behalf of states. By contrast, it has applied a different test with regard to military or paramilitary groups.

The Appeals Chamber’s reasoning is therefore at odds with the rigid representation of attribution within the ASR and accompanying Commentaries. Although the court still set a high threshold for imputation of responsibility, it confirmed that state responsibility can be triggered in circumstances with lower degrees of control. The court further submitted that the amount of control needed in order to link the acts of a third party to a state are affected by the circumstances of the situation. As an example, it noted that where a controlling state has territorial ambitions and is adjacent to where an act occurred, the threshold of control linking the state to the act may be lower.

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300 Ibid. at 117.
301 Ibid. at 120.
302 Ibid. at 138 – 140.
court also ruled that the amount of civil unrest within the territorial state when the acts occurred may alter the degree of control needed.

While recourse to only the ASR and its Commentaries have pushed the flexible threshold noted by the Appeals Chamber into a blind spot in international discourse, there remain signs that varying degrees of attribution criteria are still considered. For example, in *Bayindir Insaat Turizm Ticaret Ve Sanayi A.S. v. Islamic Republic of Pakistan* (2009), the ICSID stated that differences of legal realm can be taken into account when considering attribution:

> Finally, the Tribunal is aware that the levels of control required for a finding of attribution under Article 8 in other factual contexts, such as foreign armed intervention or international criminal responsibility, may be different. It believes, however, that the approach developed in such areas of international law is not always adapted to the realities of international economic law and that they should not prevent a finding of attribution if the specific facts of an investment dispute so warrant.\(^{303}\)

The above suggest that deciding bodies could be open to more inclusive attribution criteria and that the “extraordinarily high” threshold applied in *Nicaragua* and echoed in the Commentaries need not be the norm.\(^{304}\) The discussion in *Tadić* demonstrates that the amount of control may differ, but so too may the factors taken into consideration by deciding bodies. This is important for this dissertation, as I advocate below for several original factors to be considered in the determination of attribution for violations of international obligations by MNCs. In section four I propose an attribution test that takes into account the legal personality of the MNC, the fragility of the state where the violation occurred, the amount of assistance provided to the MNC from its home state, and whether or not the home state took preventative measures. Just as the court noted in *Tadić* that

\(^{303}\) *Bayindir Insaat Turizm Ticaret Ve Sanayi A.S. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/03/29, Award, 27 August 2009 at 130.

\(^{304}\) Gibney et al., *supra* at note 185 at 267.
circumstances affect the amount of control needed to link a third party’s act to a state, I argue that host state fragility and support provided by the home state decrease the amount of control needed to be shown to impute the acts of the MNC to the home state. This approach would contribute to closing the normative gap described in the introduction by encouraging states to adopt increased due diligence when providing support to corporate citizens operating in fragile states. The previous three sections demonstrated that there can be plenty of interpretation of state responsibility, and specifically the concept of attribution, beyond the ASR. The following two sections give an indication of the direction in which CIL is evolving with respect to MNCs, attribution, and state responsibility in order to better frame the proposed criteria.

2.4 Official pronouncements of states

States’ official statements are not without consequence in international law. Aside from political impact, they are recognized as contributing to state practice and the formation of customary law. For this reason, the G20 leaders’ declaration after their most recent meeting in Hamburg should not go unnoticed. The UNGPs do not create new international law obligations in of themselves. However, recent official pronouncements about the applicability of the UNGP provide an indication of where customary law may be headed. In its official post-meeting statement, the G20 stressed the importance of sustainable global supply chains for job creation, balanced sustainable growth, and “inclusive, fair and sustainable globalisation.” Moreover, the states specifically

305 Prosecutor v. Tadić, IT-94-AR72, Decision on the defence motion for interlocutory appeal on jurisdiction (2 October 1995) at para. 99 (International Criminal Tribunal for the Former Yugoslavia, Appeals Chamber).

noted their commitment to the UNGP. It is significant that the 20 most powerful countries announced their commitment to a document that not only highlights their responsibility towards the actions of companies outside their territory, but one that specifically accentuates the responsibility of states for conflict affected areas. With respect to corporate citizens operating abroad in general, the principles outline a state’s responsibility in consideration of state proximity to corporations:

4. states should take additional steps to protect against human rights abuses by business enterprises that are owned or controlled by the state, or that receive substantial support and services from state agencies such as export credit agencies and official investment insurance or guarantee agencies, including, where appropriate, by requiring human rights due diligence.\(^{307}\)

The principle dictates that states offering support to corporations should ensure the appropriate due diligence to protect against possible human rights abuses by the company. The Commentaries to the article add that “the closer a business enterprise is to the state, or the more it relies on statutory authority or taxpayer support, the stronger the state’s policy rationale becomes for ensuring that the enterprise respects human rights.”\(^{308}\) While this interpretation does not address the attribution test under state responsibility outright, it considers degrees of association, acknowledges that states can be linked to their corporate citizens in various ways and recognizes that states have corresponding obligations to influence a company’s behaviour abroad. Consider the manner in which the guiding principles warn that as the relationship between a company and the state becomes closer and as due diligence controls become fewer, the amount of risk assumed by the state grows:

A range of agencies linked formally or informally to the state may provide support and services to business activities. These include export credit agencies, official investment insurance or guarantee agencies, development agencies and development finance institutions. Where these agencies do not explicitly consider the actual and potential

\(^{307}\) UNGP, supra at note 263 at Guiding Principle 4.

\(^{308}\) Ibid.
adverse impacts on human rights of beneficiary enterprises, they put themselves at risk – in reputational, financial, political and potentially legal terms – for supporting any such harm, and they may add to the human rights challenges faced by the recipient state.

Given these risks, states should encourage and, where appropriate, require human rights due diligence by the agencies themselves and by those business enterprises or projects receiving their support. A requirement for human rights due diligence is most likely to be appropriate where the nature of business operations or operating contexts pose significant risk to human rights.\textsuperscript{309}

Questioning the authority of the ASR, as done above, allows for consideration of how the G20’s statement, and others like it, affect the evolution of customary law (or are the result of it). Once it is understood that the ASR do not fully represent customary law, increased attention is paid to statements and state practice previously ignored by courts. The fact that the UNGP link their due diligence obligation to the relationship between home states and companies widens the scenario from one based in IHRL to one that includes the realm of state responsibility. The ICSID has provided a reminder that “[a]ttribution has nothing to do with the standard of liability or responsibility” and that “[t]he question whether a state’s responsibility is ‘strict’ or is based on due diligence or on some other standard is a separate issue from the question of attribution.”\textsuperscript{310} This message lines up with the ILC’s warning in its Commentaries that “[a]s a normative operation, attribution must be clearly distinguished from the characterization of conduct as internationally wrongful.”\textsuperscript{311} In their effort to keep primary and secondary rules separate, the Commentaries stress that establishing attribution “says nothing, as such, about the legality or otherwise of that conduct,

\textsuperscript{309} Ibid.

\textsuperscript{310} Compañía de Aguas del Aconquija SA and Vivendi Universal v. Argentine Republic (ICSID Case No. ARB/97/3), Decision on Annulment of 3 July 2002 at 522.

\textsuperscript{311} ASR and Commentary, supra note 26 at 39 (para. 4).
and rules of attribution should not be formulated in terms which imply otherwise.”

With respect to this separation, the ILC nevertheless acknowledges that there is often a close link between the elements contributing to attribution and the primary rule said to have been breached. Nevertheless, and adding to the confusion, a concept such as due diligence can be present in both primary and secondary rules. It is true that the primary rule will determine the type of liability to apply to the internationally wrongful act. Should due diligence, for example, be required under certain aspects for violations of IHRL, a lack of due diligence by the state would be considered a violation of an international obligation. Attribution would be easy in such a case as the act, or lack thereof, is by nature done by the state and an IWA would be considered to have occurred. The doctrine of state responsibility provides for a limited number of defences, referred to in the ASR as circumstances precluding wrongfulness. These include: consent; self-defence; countermeasures in respect of an internationally wrongful act; force majeure; distress; necessity; and compliance with peremptory norms. However, the existence of these defences does not mean that the exercise of due diligence cannot be considered within the attribution test itself. In the final section of this chapter, appropriate due diligence is proposed as part of a reconsideration of the criteria forming attribution. In this way, it should not be seen as a circumstance precluding wrongfulness with

312 Ibid.

313 Ibid.

respect to the violation of a primary rule, but part of the consideration of the control or the involvement of the home state with its corporate citizen.

The second significant aspect of the UNGP is the mention of heightened responsibility in “conflict affected areas”:

6. Because the risk of gross human rights abuses is heightened in conflict affected areas, states should help ensure that business enterprises operating in those contexts are not involved with such abuses, including by:

(a) Engaging at the earliest stage possible with business enterprises to help them identify, prevent and mitigate the human rights-related risks of their activities and business relationships;

b) Providing adequate assistance to business enterprises to assess and address the heightened risks of abuses, paying special attention to both gender-based and sexual violence;

c) Denying access to public support and services for a business enterprise that is involved with gross human rights abuses and refuses to cooperate in addressing the situation;

d) Ensuring that their current policies, legislation, regulations and enforcement measures are effective in addressing the risk of business involvement in gross human rights abuses.

While Article 4 of the UNGP outlines due diligence obligations for states connected to a company in one manner or another, Article 7 foresees obligations of states for all companies that risk operating in areas affected by conflict. This runs parallel to (and indeed supports) this dissertation’s argument that the attribution threshold should be lower in situations where MNCs are operating in fragile states. The G20 declaration acknowledges that powerful states have an increased burden of responsibility towards “conflict affected areas.” While the statement shies away from mentioning fragile states specifically, it is a clear acknowledgement that, in order for states to universally benefit from the same rights or protection, law cannot be applied in the blanket manner conceived under strict sovereign equality.
2.5 Emerging responsibilities

In addition to declarations of states, emerging state behaviour reveals the direction in which CIL is evolving. That is, domestic legislative trends indicate both what states have the power to do and what they increasingly feel obliged to do with respect to MNCs. Examples of the increasing use of extraterritorial jurisdiction over MNCs are therefore described below. This trend, when considered alongside the official pronouncement above, suggests that states are becoming more inclined to use permissive extraterritorial jurisdiction and that this contributes to the formation of an obligation for states to take increased preventative measures vis-à-vis MNCs. In other words, recent domestic legislation is evidence of states’ increasing recognition of their responsibility for MNCs formed on their territory. This, in turn, has an impact on the discussion of attribution under state responsibility, as it suggests that the attribution threshold could be lower for cases of MNCs.

Home states have not traditionally been preoccupied with the overseas behaviour of their corporate citizens and this absence of concern has been legitimized by the territorial limitations modern international law places on states. As discussed above, a traditional perctet of international law has been that states exercise exclusive jurisdiction within the definite territory they occupy. The TWAIL focus of this dissertation, however, reveals that while this concept provides weaker states with protection from foreign interference, it also enables stronger states to limit potential extraterritorial responsibilities under the guise of respecting principles of state sovereignty and non-intervention. Thus, under traditional interpretations of the positivist view, home states are not responsible for the actions of their legal persons abroad and intervention by home states risks being considered an affront to host states’ sovereignty. For this reason, as will be explained below, any
exercise of legislation with extraterritorial repercussion becomes of interest, whether for the benefit of the home state or the host state.

States are free to legislate with extraterritorial intent on the condition that they do not surpass limits imposed by international law. The Permanent Court of International Justice (PCIJ) stated as such in the *Lotus Case* (1927):

> Far from laying down a general prohibition to the effect that states may not extend the application of their laws and the jurisdiction of their courts to persons, property and acts outside their territory, it leaves them in this respect a wide measure of discretion which is only limited in certain cases by prohibitive rules.\(^{315}\)

Legislation with extraterritorial effect is thus permitted within limits. The amount a state may be required to legislate in such a manner, however, is more controversial. Domestic measures with extraterritorial implications relating to legal persons are found in a wide range of legislation including, *inter alia*: acts promoting boycotts and other economic sanctions; controls placed upon exports; attempts to curb corruption; environmental protection; and criminal law.\(^{316}\) The examples below demonstrate this range by summarizing legislation that has, in one way or another, attempted to control the acts of MNCs beyond the home state’s borders. Legislation from the US, Canada, Italy, and France provide an idea of existing laws with both domestic and extraterritorial effects on actions of MNCs. These particular states were chosen on the basis of three criteria. Firstly, the section focuses on legislation with extraterritorial characteristics rather than purely domestic initiatives. Many countries have initiated action plans following the introduction of the UNGP, yet

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\(^{315}\) S.S. "*Lotus*" *Case (France v. Turkey)* (1927) P.C.I.J. (Ser. A) No. 10 at 19.

\(^{316}\) For an in-depth discussion of laws with extraterritorial reach see De Schutter, “Extraterritorial Jurisdiction as a tool”, *supra* at note 265.
fewer have included legislation with extraterritorial expression. Rather than include domestic reporting obligations or non-legally binding solutions proposed by states, the section narrows its examination to legislative tools with extraterritorial reach. Second, Global North countries were the focus of this section as they are the home countries for the large majority of MNCs and progressive home country legislation is identified as the preferred solution to MNCs operating in fragile states. Third, the four countries have introduced different types of legislation with extraterritorial effects, representing examples ranging from low degrees of extraterritoriality (US) to high degrees of extraterritorial reach (France). The inclusion of Italy and France also ensure that examples of what two countries are doing to implement the UNGP are included. Finally, Canada has been included as it provides an example of laws with topic-specific extraterritorial jurisdiction and because it is the home location of the dissertation.

Sporadic evidence of legislation regulating the behaviour of corporate citizens abroad from 1970 to 2010 is now being replaced with signs that states feel an increasing obligation to rein in actions of MNCs. Until recently, states have appeared slow to apply this practice to human rights law and MNCs globally, favouring instead the regulation of specific policy areas. Nevertheless, the more topic-specific extraterritorial legislation is introduced, the greater the chance that comprehensive human rights legislation applying to MNCs abroad will emerge. Indeed, the French initiative described below is likely the result of the increasing prevalence of extraterritorial legislation in general combined with the momentum of the UNGP. The following section therefore provides a short review of both the international initiatives that encourage extraterritorial jurisdiction and select domestic legislation.
The older domestic laws included below emerged as an answer to a notorious period of exploitation and MNC corruption in the 1970s.\textsuperscript{317} International efforts to regulate MNCs were also made at the UN during this period (see, for example, the \textit{International Code of Conduct of TNCs}), yet political interest dwindled in the 1980s and early 1990s during the Reagan, Thatcher, and Bush administrations and under various free-trade initiatives. The need for rights protection from MNCs resurfaced in a more consistent manner during the late 1990s, in part due to a rapid expansion of corporations.\textsuperscript{318} Heightened social awareness of MNC impact on human rights accompanied the growth and, once again, attracted the attention of individual states, as well as their collective under the UN. The international response to the resurgence of corporate scandals manifested itself in the UNGP project. Although the Compact’s Sustainable Development Goals\textsuperscript{319} were well received, the document contains no enforcement mechanism and no direct regulation. More recently (2011), the OHCHR endorsed the UNGP, implementing a global standard for both preventing and addressing risks linked to MNC activities. While far from perfect, the document appears to be holding new weight in the discussion of human rights and domestic regulation of MNCs.

\textsuperscript{317} The UN Intellectual History Project, \textit{The UN and Transnational Corporations}. Ralph Bunche Institute for International Studies, The CUNY Graduate Center, Briefing Note 17, July 2009, page 1, online at http://www.unhistory.org/briefing/17TNCs.pdf [Accessed 22 November 2017]. The briefing note highlights the increasing discontent of the UN towards MNCs during the late 1960s. The document notes that “…the 1970s were marked by discontent, disillusionment, and discord. Flashpoints and crises followed one another in rapid succession—the breakdown of the Bretton Woods system of fixed exchange rates in 1971, the OPEC oil-price hikes and ensuing energy crises, the Vietnam war, the Chilean episode, and corporate bribery scandals and indictments.”

\textsuperscript{318} John Ruggie, Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, UN HRC, 17\textsuperscript{th} Sess. UN Doc. A/HRC/17/31 (2011) at 3 para. 1.

\textsuperscript{319} The goals can be viewed on the United Nations Global Compact website at https://www.unglobalcompact.org/library [Accessed 22 November 2017].
i) International initiatives

As noted in the introduction, the UNGP were proposed by the UN Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, Professor John Ruggie. The principles recommend that states clearly set out the expectation that all businesses domiciled on their territory respect human rights, underline the importance of increased vigilance in areas of weak legal protection, and provide examples of legislation deemed lacking at the domestic level. While the UNGP are important and ubiquitously cited by states and corporate leaders, they are couched in permissive terms. That is, the UNGP outline what states should do rather than what they must do. The principles do not create new international law obligations in and of themselves, but rather attempt to define government and MNC pre-existing obligations to protect human rights and remedy violations of rights. The principles are described as follows by Professor Ruggie:

14. The Guiding Principles’ normative contribution lies not in the creation of new international law obligations but in elaborating the implications of existing standards and practices for states and businesses; integrating them within a single, logically coherent and comprehensive template; and identifying where the current regime falls short and how it should be improved. […]

15. At the same time, the Guiding Principles are not intended as a tool kit, simply to be taken off the shelf and plugged in. While the Principles themselves are universally applicable, the means by which they are realized will reflect the fact that we live in a world of 192 United Nations Member states, 80,000 transnational enterprises, 10 times as many subsidiaries and countless millions of national firms, most of which are small and medium sized enterprises. When it comes to means for implementation, therefore, one size does not fit all. 320

Much is written in this dissertation about the drawbacks of placing too much confidence in the accuracy of the supposed codifications of international law. Yet the general nature of the UNGP

320 Supra at note 318.
and the statement that they be implemented in manners that states see fit appear to provide significant flexibility. Thus, whereas the allegation by some that the UNGP marginalize the “prescriptive question” of the extraterritorial protection of human rights against corporate violations may hold weight, there is also evidence of states applying the principles as a guide and going beyond what they suggest. Otherwise said, although the UNGP could have been more prescriptive, it appears they have not held states back from legislating in an extraterritorial manner with respect to MNCs. The potential for the UNGP is wholly dependent on if and how states incorporate them into their domestic law.

The UNGP are often cited in tandem with the *OECD Guidelines on Multinational Enterprises* (OECD Guidelines).\(^{321}\) Originally adopted in 1976, the Guidelines have seen several revisions, most recently in May 2011. The latest update is especially relevant to this study as it introduces new human rights, due diligence, and supply chain responsibility provisions. The OECD Guidelines define standards for responsible corporate behaviour and contain suggested procedures for resolving disputes between corporations and individuals or communities negatively impacted by corporate activities. According to the Guidelines, the 44 adhering states should establish National Contact Points (NCPs) “whose main role is to further the effectiveness of the Guidelines by undertaking promotional activities, handling enquiries, and contributing to the resolution of issues that may arise from the alleged non-observance of the guidelines in specific instances.”\(^{322}\) The 2015 Annual Report, which covers activities undertaken to promote the implementation of the

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Guidelines from July 2014 to December 2015 includes, *inter alia*, a summary of legislative developments in support of the Guidelines. The summary lists legislation pertaining to supply chain responsibility and reporting requirements from France, Switzerland, the United Kingdom, and the European Union. Of note, neither the UNGP nor the OECD Guidelines restrict due diligence to the limits of the boundaries of the state. Still, the Guidelines are non-binding and do not supersede domestic legislation. Ultimately, both the UNGP and the OECD Guidelines are so-called soft law instruments and remain aspirational documents rather than binding rules. Nevertheless, they are not without merit as they influence domestic legislation and their implementation, or lack thereof, is an indicator of where CIL may be headed.

**ii) Domestic legislation**

**a) United States**

Among the most cited American examples of domestic legislation with extraterritorial reach is the *Alien Tort Statute* or *Alien Tort Claims Act* (ATS). Although future interpretation of the Act with respect to corporate actors is uncertain, it has been used to provide domestic civil remedies against NSAs that have violated international law. That is, it has allowed aliens to bring tort claims against MNCs in US district courts. The ATS was adopted in 1789 and, while it provided the basis of only two decisions between its adoption and 1980, it has been regularly used in litigation against natural

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324 U.S. Code, Title 28, Part IV, Chapter 85, *Alien Tort Statute*, § 1350, “The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States.”
and legal persons for human rights violations abroad over the past 25 years. The legislation’s extraterritorial reach was neither intended nor foreseen, but has developed exclusively through inventive application of the law by victims of rights abuses. Despite a recent US Supreme Court decision creating a strong presumption against the extraterritorial application of the ATS, there have been hints of continued willingness by US courts to accept ATS suits against MNCs.

Evidence of the extent to which US companies operating abroad are concerned with being subject to claims under ATS is difficult to determine. Although access to justice for individuals having suffered harm is clearly important and commentators highlight the benefits of focusing on tort law, recourse to justice is but one aspect of rights protection. In order to satisfy the requirements of the UNGP, for example, domestic legislation focusing on the prevention of harm would be needed.


326 On April 17, 2013, in a suit involving Shell in Nigeria, the Supreme Court of the United States ruled that ATS does not apply to acts outside of the United States, Kiobel v. Royal Dutch Petroleum 133 S.Ct. 1659 (2013).

327 Michael Congiu & Stefan Marculewicz, “Ninth Circuit Case Portends Implications for Alien Tort Claims Act Liability Throughout Corporate Supply Chains” (September 22, 2014) Litter (employment and labor law practice).

Another example of US legislation with extraterritorial repercussions is the *Foreign Corrupt Practices Act, 1977 (FCPA)*, a law prohibiting entities from making payments to foreign governments to obtain or retain business. The Act contains anti-bribery provisions that apply to all US natural and legal persons and residents, wherever they may be located. Following amendments in 1998, the Act also applies to “foreign firms and persons who cause, directly or through agents, an act in furtherance of such a corrupt payment to take place within the territory of the United States.” Non-US individuals transferring US dollars anywhere in the world that are cleared through US banks can also fall within the jurisdiction of the Act. US corporations organized under American federal or state law, companies having their principal place of business in the US, as well as US or foreign corporations that have classes of securities registered under the *Securities and Exchange Act of 1934* are all subject to the Act. Clearly the jurisdiction of the FCPA covers many actors, with some needing very little nexus to the US. Alongside the bribery provisions, the Act obliges companies listed in the US to meet certain accounting provisions, such as keeping records that accurately reflect the transactions of the corporation and maintaining adequate internal

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accounting controls. The Act was established following several prominent scandals in the 1970s and a US Securities and Exchange Commission investigation that saw over 400 American companies admit to making illegal payments to foreign government officials. The summary below provides a view of the motivation behind the Act:

Congress viewed passage of the FCPA as critical to stopping corporate bribery, which had tarnished the image of U.S. businesses, impaired public confidence in the financial integrity of U.S. companies, and hampered the efficient functioning of the markets. As Congress recognized when it passed the FCPA, corruption imposes enormous costs both at home and abroad, leading to market inefficiencies and instability, sub-standard products, and an unfair playing field for honest businesses. By enacting a strong foreign bribery statute, Congress sought to minimize these destructive effects and help companies resist corrupt demands, while addressing the destructive foreign policy ramifications of transnational bribery.

The payments in question ranged from outright bribery of officials to payments made to expedite clerical processes. The scandals reached the highest levels of governments including United Brands Company and the president of Honduras, as well as Lockheed Corporation and the Japanese prime minister. The broadness of applicability, both in scope of acts covered and individuals subject to the legislation are notable. Twenty-three enforcement actions of the law are detailed on the US Department of Justice website. For example, in December of 2016, a former Guinean minister of mines, Mahmoud Thiam, was charged with receiving and laundering $8.5 million in

334 See supra at note 329 at § 78m.
335 See supra at note 333 at 3.
336 Often referred to as the Bananagate scandal, after Honduras doubled taxes on banana exports to receive what it saw as fairer revenue on Honduran products, United Brands bribed the Honduran president $2.5 million to revoke the tax.
337 Lockheed Corporation was involved in several bribery scandals beginning in the 1950s. Among the most notorious were bribes paid to ANA Airlines and officials in Japan, including the Japanese prime minister; bribes to a Dutch prince in order to secure fighter plane contracts, and money paid to an arms dealer in order to secure contracts in Saudi Arabia.
bribes from Chinese companies (*United States v. Mahmoud Thiam*). The case involved two Chinese companies offering payment to Thiam to secure mining rights. While the case did not involve an American company, Thiam held US citizenship and laundered part of the funds through the US. A perusal of the 2016 cases shows a mix of US companies, foreign companies, individuals, and even a hedge fund as defendants. While the *FCPA* focuses on bribery and doesn’t target human rights specifically, it is a clear indication of the feasibility of legislation with extraterritorial reach when political will is present.

**Canada**

Canada has shown little interest in creating legislation to enable jurisdiction for Canadian courts to hear claims for violations of international law occurring outside of the country. There have, however, been several attempts at passing a private Members bill in Parliament on the matter. The latest, manifested in Bill C-331, *An Act to amend the Federal Courts Act (international promotion and protection of human rights)*, was specifically identified by the sponsoring Member as being inspired by the ATS. The bill proposes 17 grounds for actions that would provide the Federal Court with original jurisdiction, including systemic sexual violence, extrajudicial killings, torture, slavery and wanton environmental destruction. The most recent government response to the proposed legislation touted the new Canadian Ombudsperson for Responsible Enterprise as a more

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effective alternative. Introduced in 2015, C-331 has only just reached second reading in the House of Commons and will likely face termination with the dissolution of the current Parliament.

Canadian legislation affecting MNC actions abroad exists, even if only piecemeal. One example is the 1998 *Corruption of Foreign Public Officials Act* (CFPOA). The Act implements Canada’s obligations under the *UN Convention against Corruption* and brings Canadian legislation into compliance with the OECD *Convention on Combating Bribery of Foreign Public Officials in International Business Transactions*. The CFPOA applies to both individuals and companies and renders bribery of foreign public officials an indictable offence. Amendments were introduced to strengthen the Act in 2013, following recommendations from stakeholders and the OECD Working Group on Bribery. Among the amendments was the addition of nationality jurisdiction to that of territorial jurisdiction. For the territorial jurisdiction of the Act to be triggered, some aspect of the formulation, initiation or commission of an offence within the Act was required to take place within Canada. Considering the Act’s purpose of regulating transactions occurring abroad, territorial

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340 *Corruption of Foreign Public Officials Act* (S.C. 1998, c. 34); The Act is essentially the Canadian equivalent of the FCPA described above.


jurisdiction significantly limited its effectiveness. The inclusion of nationality rendered the CFPOA consistent with other global anti-corruption legislation, such as the previously discussed FCPA. Currently, the Act’s provisions apply to offences committed within Canada (in whole or in part) and offences committed outside the country by a Canadian citizen, permanent resident, or organization incorporated, formed, or otherwise organized in Canada. For the purposes of the CFPOA, the relevant provisions deem acts of the parties mentioned above having taken place abroad to be acts within Canada. This provision essentially subjects all Canadian citizens and companies to global regulation by Canadian authorities under the CFPOA.

Jurisprudence under the law is minimal but growing. A Canadian oil and gas exploration company, Niko Resources Ltd., pled guilty to providing a foreign public official in Bangladesh with improper benefits in violation of the Act in 2011. The company agreed to pay a $9.5 million fine, which was subsequently reduced in recognition of their cooperation in the investigation.\(^{344}\) In the 2013 case \(^{345}\) \textit{R. v. Griffiths Energy International}, Griffiths Energy plead guilty to the payment of a $2 million bribe to a corporate entity owned by the wife of the Chadian ambassador to Canada, under the guise of a consulting agreement. After discovering the bribe, the new management team self-reported the act and cooperated with authorities, agreeing to a penalty of $10.35 million, which was accepted by the court. The first case to proceed to trial under the law, \(^{346}\) \textit{R. v. Karigar} from the Ontario Superior Court of Justice in 2013, concerned an individual bribing Air India and an Indian cabinet minister on behalf of an Ottawa software company. Karigar was found guilty and sentenced to


\(^{346}\) \textit{R. v. Karigar}, 2013 ONSC 5199 (CanLII)
three years in prison. In its sentencing decision, the court noted the concerns of the OECD Working Group on Bribery (the monitoring body of the Convention) with what it viewed as Canada’s lenient enforcement efforts and negotiated pleas.\textsuperscript{347} Two other comments by the court indicated a willingness to apply the Act to its full extraterritorial potential. The court highlighted the opinion of government witnesses (Department of Global Affairs in this case) that “interest in the problem of bribery and corruption on the part of companies doing business in foreign countries [is] considerably enhanced when more significant penalties and prosecutions of individuals [are] identified as the likely outcome of future prosecutions.”\textsuperscript{348} The Court further noted the principle behind the law was that “bribery of foreign public officials should be subject to similar sanctions as would be applied to the bribery of Canadian public officials occurring in Canada.” \textsuperscript{349}

Once again, the CFPOA is the result of specific obligations to which Canada chose to adhere to at the international level.\textsuperscript{350} Although its breadth is limited, the Act provides an example of Canada’s increasing willingness to adopt legislation with extraterritorial effect and to apply consistent business standards, at home and abroad. Despite a slow start, the number of investigations and criminal proceedings under the CFPOA have increased over the past six years.\textsuperscript{351}

\textsuperscript{347} \textit{Ibid.}, at para 7.
\textsuperscript{348} \textit{Ibid.}
\textsuperscript{349} \textit{Ibid.}
\textsuperscript{350} The \textit{Convention on Combating Bribery of Foreign Public Officials in International Business Transactions} was signed by Canada on December 17, 1997. Canada ratified the Convention on December 17, 1998.
\textsuperscript{351} There were 35 investigations into offences under the \textit{CFPOA} under review by the RCMP in 2013, according to a brief by Guy Pinsonnault & Pierre-Christian Collins Hoffman, “Recent Trends and Developments under Canada’s Corruption of Foreign Public Officials Act” (2015) McMillan LLP, online
interest is the fact that a conviction or guilty plea under the Act renders a company ineligible to enter into a contract with Public Services and Procurement Canada (PSPC) for a period of 10 years.\footnote{See the \textit{Guide to the Ineligibility and Suspension Policy} on the Public Services and Procurement Canada (PSPC) website, online \url{http://www.tpsgc-pwgsc.gc.ca/ci-if/guide-eng.html#s8} [Accessed 23 November 2017].} Furthermore, Export and Development Canada (EDC) reserves the right to withdraw from a contract where they determine that corruption, as defined by the Act, is associated with a company.\footnote{Export Development Canada (EDC), \textit{What we Stand for}, (2017), online \url{http://www.edc.ca/EN/About-Us/Corporate-Social-Responsibility/Pages/business-ethics.aspx} [Accessed 23 November 2017] at 6.} Thus, it is apparent that there exists some due diligence steps taken across government agencies with the goal of diminishing corruption. Again, this aspect is further discussed in section four below where due diligence on behalf of the home state is included as part of the propose attribution criteria.

The \textit{Export and Import Permits Act}\footnote{Export and Import Permits Act (R.S.C., 1985, c. E-19).} is another example of Canadian legislation that affects MNC actions abroad, if only indirectly for the most part. Under the Act, exporters are subject to regulation concerning not only the types of goods exported, but also where the goods are sent.\footnote{Companies are required to apply to Global Affairs Canada for a permit to export goods to a controlled destination, to Canada’s embargoed or sanctioned countries, and for any goods that are listed on export control lists. Applications for export control documents are made electronically through Canada’s Export Controls On-Line (EXCOL) website.} The Global Affairs Canada website indicates that the motivation behind the controls is to ensure that exports of goods and technology are consistent with Canada’s foreign and defence policies and that exports:

- do not cause harm to Canada and its allies;

• do not undermine national or international security;
• do not contribute to national or regional conflicts or instability;
• do not contribute to the development of nuclear, biological or chemical weapons of mass destruction, or of their delivery systems;
• are not used to commit human rights violations; and
• are consistent with existing economic sanctions’ provisions.  

Section 13 of the Act outlines the prohibition:

No person shall export or transfer, or attempt to export or transfer, any goods or technology included in an Export Control List or any goods or technology to any country included in an Area Control List except under the authority of and in accordance with an export permit issued under this Act.

In assessing the issuance of an export permit (in addition to the considerations that must be made under the regulations made by the Governor in Council) a minister may take into account whether a permit risks being used for a purpose prejudicial to “peace, security or stability in any region of the world or within any country.” Exporters transferring goods without applying for a permit when one is required are subject to monetary penalties and/or imprisonment for its officers or directors. The Act foresees either a summary conviction with a fine of $25,000 and/or 12 months of imprisonment, or an indictable offence with a fine at the discretion of the court and/or a maximum 10 years of prison.


357 Supra at note 354, section 7(1.01).

358 Ibid., section 20.

359 Ibid., section 19.
Canada’s Export and Import Permits Act once again demonstrates a willingness to control the extraterritorial impact of acts of Canadian citizens. Of particular interest are the recent proposed amendments to the Act under Bill C-47, An Act to amend the Export and Import Permits Act and the Criminal Code.\(^{360}\) Following promises made during the 2015 Canadian election campaign, the current government announced in June 2016 that Canada would accede to the UN Arms Trade Treaty (ATT) and introduced Bill C-47 to implement changes to Canadian law in order to comply with the agreement.\(^{361}\) A close reading of the bill reveals that the proposed changes expand the extraterritorial aspects of the Export and Import Permits Act more than what is required under the ATT. The bill proposes to incorporate the act of brokering\(^{362}\) into the existing legislation and foresees the creation of a Brokering Control List (giving the Governor in Council the authority to establish the list) and the prohibition of transferring items on the list without acquiring a brokering permit from the minister. This is similar to the export/import process described above. Changes proposed by the bill that go beyond what is required under the ATT are clarifications of wording that ensure the legislation would be applicable to companies, a significant increase in the possible

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\(^{360}\) At the time of writing, the bill had passed through the House of Commons, as well as Second reading in the Senate and sent to the Standing Senate Committee on Foreign Affairs and International Trade, online at http://www.parl.ca/LegisInfo/BillDetails.aspx?Language=en&Mode=1&billId=8886296 [Accessed 30 November 2018].

\(^{361}\) Arms Trade Treaty, 3 June, 2013, UNTC (entered into force 24 December, 2014). [ATT] At the time of writing, the treaty had 92 states parties, 89 ratifications, and 130 Signatories.

\(^{362}\) The bill defines “broker” as “to arrange or negotiate a transaction that relates to the movement of goods or technology included in a Brokering Control List from a foreign country to another foreign country, including a transaction referred to in subsection (1.1),” and brokering as, “For the purpose of the definition ‘broker’, a transaction that relates to the movement of goods or technology includes a transaction that relates to its acquisition or disposition, and a transaction that relates to the movement of technology also includes a transaction that relates to the disclosure of its contents.”
fine for all violations under the Act, and the inclusion of extraterritorial personal jurisdiction for those who “broker or attempt to broker.”

C-47 would add “organization” to numerous sections of the *Export and Import Permits Act*, notably the Offence and Penalty section that currently only refers to “every person.”

Although this is a minor point, it reinforces the objective of holding not only individuals responsible, but corporations as well. Clause 16 of the bill raises the fine for summary convictions to $250,000. While debates on the bill did not shed light on this aspect, it is likely that the proposed amendment is meant to reflect that the Offence and Penalty section now applies to corporations.

Clause 13 of the bill proposes the complete control of Canadian individuals and corporations involved in brokering, even when such actions occur entirely outside of the country:

13 The Act is amended by adding the following after section 14.1:

Broker or attempt to broker

14.2 (1) No person or organization shall broker, or attempt to broker, except under the authority of and in accordance with a brokering permit issued under this Act.

Exception

For example, clause 16 of the bill, amending section 19 of the Act; The bill (at clause 2) refers to the *Criminal Code of Canada* for the definition of organization, which section 2 of the *Criminal Code* defines as:

“(a) a public body, body corporate, society, company, firm, partnership, trade union or municipality, or

(b) an association of persons that

(i) is created for a common purpose,

(ii) has an operational structure, and

(iii) holds itself out to the public as an association of persons; (organisation)”
(2) A person or organization does not contravene subsection (1) if, at the time of the alleged contravention, they would have brokered under the authority of and in accordance with a brokering permit issued under this Act had they applied for it, and if, after the alleged contravention, the permit is issued.

Act or omission outside Canada
(3) Every person or organization that commits an act or omission outside Canada that, if committed in Canada, would constitute a contravention of subsection (1) — or a conspiracy to commit, an attempt to commit, being an accessory after the fact in relation to, or any counselling in relation to, such a contravention — is deemed to have committed that act or omission in Canada if they are

(a) a Canadian citizen;
(b) a “permanent resident” as defined in subsection 2(1) of the Immigration and Refugee Protection Act who, after the commission of the act or omission, is present in Canada; or
(c) an organization that is incorporated, formed or otherwise organized under the laws of Canada or a province.

Jurisdiction
(4) If a person or organization is alleged to have committed an act or omission that is deemed to have been committed in Canada under subsection (3), proceedings for an offence in respect of that act or omission may, whether or not they are in Canada, be commenced in any territorial division in Canada. The person or organization may be tried and punished for that offence as if the offence had been committed in that territorial division.

Appearance at trial
(5) For greater certainty, the provisions of the Criminal Code relating to the requirements that a person or organization appear at and be present during proceedings and the exceptions to those requirements apply to proceedings commenced in any territorial division under subsection (4).

Thus, the Act foresees that organizations that broker or attempt to broker outside of Canada are deemed to have committed the act in Canada if the organization is incorporated under federal or provincial law. This clause is clearly significant as it regulates behaviour that occurs entirely outside of the country, as opposed to acts occurring in Canada with repercussions outside of the country. Furthermore, as mentioned above, the ATT does not require states parties to enact this type of jurisdiction. Article 10 of the treaty states the following about brokering:

Brokering

Each state Party shall take measures, pursuant to its national laws, to regulate brokering taking place under its jurisdiction for conventional arms covered under Article 2 (1). Such measures may include requiring brokers to register or obtain written authorization before engaging in brokering.
Canada voiced its opinion against such jurisdiction during treaty negotiations, to the point of threatening to use a reservation toward the clause.\textsuperscript{364} While the about-face can be attributed to a change in government, it is nevertheless an indicator of an increasing willingness among Western states to legislate in an extraterritorial manner with respect to MNCs. Finally, the topic of the treaty and its association to areas of compromised law should not go unnoticed. The primary concern of this dissertation is the responsibility of home states for violations occurring in fragile states. The extraterritorial jurisdiction in C-47 specifically targets an activity that is prone to occur, or involve actors in, states in conflict, which often constitute fragile states.

c) Italy

On December 1, 2016, Italy released its \textit{National Action Plan for 2016-2021 on Business and Human Rights}, a document outlining how the country intends to conform its domestic laws to the UNGP. Much of the plan resembles soft-law type commitments towards the promotion and facilitation of corporate responsibility. However, it also includes indications that Italy is prepared to further incorporate certain concrete aspects of the UNGP into domestic legislation. The most relevant propositions for this dissertation are included in a section on steps taken to satisfy the operational principles of the state duty to protect human rights, represented by Guiding Principle number 3. The principle foresees that states, in meeting their duty to protect, should:

a) Enforce laws that are aimed at, or have the effect of, requiring business enterprises to respect human rights, and periodically to assess the adequacy of such laws and address any gaps;

b) Ensure that other laws and policies governing the creation and ongoing operation of business enterprises, such as corporate law, do not constrain but enable business respect for human rights;

c) Provide effective guidance to business enterprises on how to respect human rights throughout their operations;

d) Encourage, and where appropriate require, business enterprises to communicate how they address their human rights impacts.  

The action plan outlines the state’s intention of incorporating the above obligations of due diligence for Italian corporations into Law (Decree) 231/2001. The law, however, already plays a role in regulating Italian companies at home and abroad.  

The Decree includes clauses on corporate criminal liability for crimes committed in the interest of the company, coupled with the defence of having adopted compliance programs for the preventing offences. The Decree is both preventive and punitive, and amendments since 2001 have extended its provisions to liability for human rights offenses committed by Italian MNCs abroad with special attention paid to cases where part of the violation occurs in Italy. While the proposed amendments will widen the set of human rights obligations of companies, the decree already lists specific human rights violations that would trigger corporate criminal liability under Article 24, including slavery; human trafficking; forced labour; juvenile prostitution and pornography; manslaughter or serious bodily harm committed with breach of laws governing the safeguarding of workplace health and safety; and environmental

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365 UNGP, supra at note 263, art. 3 at page 4.

366 Italian Legislative Decree No. 231, June 8, 2001 (Decree 231).
Provided that requirements set out in case law are met, parent companies could be held liable for acts of other legal persons under their control.

Importantly, defences are included in the proposed legislation in the form of implementation of programs to prevent offences from occurring. The Decree lays out criteria to be satisfied in order for due diligence to have been considered satisfactory. These criteria include: identifying business activities within which crimes might be committed; identifying effective procedures and financial resources suitable to prevent commission of the crimes; imposing an obligation on employees to inform the authority assigned to supervise operations; and introducing a suitable disciplinary system that sanctions failure to comply with the provisions established by the company. Should companies fail to take the necessary precautions, penalties could include fines, confiscation of crime profits, and interruption of business activity (Articles 9 and 10)\(^\text{368}\).

The Decree provides two instances in which corporate liability can be invoked: where part of the act occurred in Italy and where all elements of the act occurred abroad. For cases where the entirety of the act occurred abroad, the act would fall under Italian jurisdiction if the company had its headquarters in Italy and if the state where the offence occurred had not initiated prosecution. A company would only be held responsible in these latter cases, however, for the particularly serious acts falling within Articles 7 to 10 of the Italian Penal Code. Should the crime be the result of an

\(^{367}\) Maria Francesca Cuchiara & Giacomo Maria Cremonesi, “Italian Legislative Decree N. 231/2001, On Administrative Liability of Legal Persons and Business and Human Rights Violations: A Brief Overview” (2017) HRIC, online https://docs.wixstatic.com/ugd/6c779a_ae42b0a57aad4620ba65b9708836f3ef.pdf [Accessed 23 November 2017].

\(^{368}\) Ibid. at page 2.
act or decision taken in whole or in part by a parent company in Italy, the Italian Penal Code foresees the possibility that both the parent company and the subsidiary that committed the crime abroad would be subject to Italian jurisdiction.

The law provides an example of domestic legislation regulating the acts of corporate citizens in an extraterritorial manner with respect to human rights. The fact that decisions leading to repercussions abroad need to partly take place on Italian territory for the wider ambit of the law to apply limit the application of the Decree. Still, since 2001, Italy has had legislation controlling the acts of its MNCs on a variety of rights-related issues and not simply on aspects related to corruption.

d) France

The Loi relative au devoir de vigilance des sociétés mères et des entreprises donneuses d'ordre (Corporate Duty of Vigilance Law) was enacted on March 27, 2017, and was introduced in response to the Rana Plaza factory collapse. It establishes a duty of vigilance for French corporations towards the protection of human rights and the environment. The law targets French corporations that employ more than 5,000 people over a two-year period in France or 10,000 employees at any time worldwide (including subsidiaries). It applies both domestically and outside French territory.\(^{369}\) Companies subject to the legislation must perform a due diligence audit by monitoring and recording human rights violations, environmental law violations, and corruption related to the actions of the parent company or its subsidiaries. They must also publish the measures

they use to identify and prevent human rights abuses by their immediate employees, subsidiaries, and suppliers. The legislation also strengthens the role of courts by providing redress for victims of human right abuses, as well as fines of up to 10 million euros against guilty companies. Article 1 inserts the following into the French *Code de Commerce* concerning the obligation of publication of preventive measures to be taken by a company:


[...]

The proposal must include reasonable vigilance measures identifying risks and steps taken to prevent serious harm to human rights and fundamental liberties, as well as harm to the health and safety of individuals and of the environment resulting from activities of the company, from those of subsidiaries under its control, either directly or indirectly in keeping with Section II of article L. 233-16, and from contractors and suppliers commercially related to the company and involved in the actions in question.

The proposal must be developed by all company stakeholders, either at the territorial level or, when appropriate, within a framework of multi-party initiatives established with subsidiary branches of the company. It includes the following:

1° An analysis, ranking, and mapping of the risks of operations of the company and its affiliates;

2° Procedures for the regular evaluation of subsidiaries, contractors, and suppliers that hold a commercial relationship with the company and that might be involved with the determined risks;

3° Steps to be taken to diminish risks or to prevent serious injury;

4° A warning mechanism and recording procedure for instances related to the threat or the manifestation of risks, established in conjunction with organised labour (union) representatives within the company;

5° A procedure to keep track of the measures implemented and evaluation of their effectiveness.370

Although the legislation applies to a limited number of large companies, its corporate vigilance requirements extend to a much greater number of firms. Indeed, the law covers the activities of the primary corporation, its direct and indirect affiliates, as well as sub-contractors and suppliers with which it chooses to do business. Enlisting the largest of companies to ensure the compliance of their supply chains may be an effective solution for states struggling to create comprehensive and effective legislation. Of the examples of legislation to date, the French law provides the clearest intention of controlling the behaviour of corporate citizens acting on foreign soil. The breadth of subject matter covered by the law (human rights and environmental protection) is significantly wider than that provided in the legislation of other countries. The French law also goes beyond the mandated disclosure regimes established elsewhere by not only requiring reporting and transparency but by compelling vigilance plans to be carried out. Two types of penalties are provided by the law. In cases of violation of Article 225-102-4 included above, companies may be forced through civil claims to remedy any damage that the execution of the obligations could have prevented. The law also imposes penalty payments if companies do not fulfil their obligations to establish, publish and effectively implement a vigilance plan. A penalty payment can be sought by any party with standing (which could include victims and NGOs) and this procedure can be invoked irrespective of whether any actual damage has been sustained.


372 Ibid., at art. 225-102-5.
Initiatives underway in other European countries suggest the French legislation may be the forerunner rather than the exception. In May 2018, the Legal Affairs Committee of the Swiss National Council introduced a counter-proposal in response to the citizen-led Responsible Business Initiative referendum. The proposal would compel large Swiss companies and corporations in high-risk sectors to undertake human rights and environmental due diligence in their business activities abroad. Requirements would apply to Swiss companies that exceed two of the following criteria in two consecutive financial years: a balance sheet total of 40 million Swiss francs; sales of 80 million Swiss francs; or 500 full-time positions on an annual average.\footnote{Counter-proposal by the Swiss Parliament to the citizen initiative 'Responsible Business Initiative' (translation), Legal Affairs Committee of the National Council, May 4\textsuperscript{th}, 2018. Explanatory Report published by the Committee on May 18\textsuperscript{th} 2018. Bill adopted without changes by the National Council on June 14\textsuperscript{th}, 2018. Pending in the Council of States, online at http://www.bhrinlaw.org/180508-swiss-parliament-counter-proposal_unofficial_en-translation_updated.pdf [Accessed 30 July 2018]. Official French text available online at https://www.parlament.ch/centers/eparl/curia/2016/20160077/N11\%20F.pdf [Accessed 30 July 2018].}

The counter-proposal also applies to companies that have particularly high risks of violating provisions for the protection of human rights and the environment through their activities. Companies would be obliged to identify potential and actual impact of their business activities on human rights and the environment. They would be further required to mitigate risks, monitor the effectiveness of their adopted measures, and ensure effective remedy for violations. Companies would not be liable, however, in cases where they demonstrate they have undertaken satisfactory due diligence to comply with the law.\footnote{\textit{Ibid.}} The counter-proposal was approved by the Swiss National Council in June 2018 and is now being considered by the Council of States.
The legislation above represents a spectrum, from topic-specific extraterritorial legislation to laws that broadly encompass human rights. These examples are not meant to prove that extraterritorial control over MNCs has decidedly moved from permissive to obligatory. However, they do suggest an emerging trend of legislation that targets the behavior of corporate citizens abroad, bringing their activities within the control of their home states. The trend appears consistent with a well-established principle of international law outlined in 1949 by the ICJ in the Corfu Channel Case (UK v. Albania). In the case, the ICJ held Albania responsible for damages to British warships in the Corfu Strait with the underlying reasoning being that states should not allow their territory to be used contrary to the rights of other states. Indeed, the obligation is invoked to such an extent in international law that some commentators consider it a general principle applicable to all fields of international law. Thus, the emergence of similar rules incorporating the repercussion of the acts of a state’s corporate citizen abroad is not an exaggeration. In conclusion to this subsection, the legislation discussed above provide examples of state practice with respect to home states controlling the acts of corporate entities abroad. This emerging state behaviour is consistent with the declarations of states noted above acknowledging increasing home state responsibility towards acts of MNCs in other countries. Since one cannot discuss the control of behaviour outside of a state’s borders without addressing the international law principle of non-interference in the

375 See Corfu Channel Case (UK v. Albania), Merits, ICJ Reports 1949, at 22. The court determined that Albanian authorities were obliged to notify approaching British warships of a minefield in Albanian territorial waters and that “Such obligations are based […] on certain general and well-recognized principles, namely: elementary considerations of humanity, even more exacting in peace than in war; and every State’s obligation not to allow knowingly its territory to be used for acts contrary to the rights of other States.”

376 See the list provided by Vincent Chetail in “Chapter 5, The Legal Personality of Multinational Corporations, State Responsibility and Due Diligence: the way forward” in Denis Alland, Vincent Chetail, Olivier de Frouville & Jorge E. Viñuales, Unity and Diversity of International Law / Essays in Honour of Professor Pierre-Marie Dupuy (Brill: 2014) at 126.
domestic affairs of other states, a final aspect to consider before proposing original attribution criteria is the concept of state sovereignty.

3. The changing concept of sovereignty

The rules of state responsibility emerged to facilitate the coexistence of states and, as such, are prone to evolve along with changes in how states manage their obligations to one another. Otherwise stated, changes in what is prescribed by the conceptual boundaries of states will alter how the secondary rules of international law apply. The utility of examining the extent to which the related concepts of sovereignty, equality of states, and non-intervention have matured and the corresponding impact on the development of the customary law of state responsibility is therefore clear.

It is not suggested that such changes would alter all facets of the secondary rules of state responsibility. For example, the definition of an IWA or of enforcement mechanisms need not change along with transformations of sovereign equality. However, as explained below, aspects tied to non-intervention would have an impact on how the mechanism of attribution is applied. States no longer fit the analogy of water-tight compartments and increasingly have duties to the international community. This is so despite the concept that all states are meant to be considered equal and autonomous within their territory under international law. Indeed, among the principles underlying the negotiations of the draft treaty on MNCs spearheaded by the OHCHR are those of “sovereign equality and territorial integrity of States and non-intervention in the domestic affairs

377 It is important to highlight that primary rules of international law can and do change without changing the rules of state responsibility.
A way to reconcile the supposed universal responsibilities of states and the persistence of the concept of non-intervention is to consider whether the meaning of sovereignty and its related terms have evolved. The original principle recognizes that a sovereign state has full autonomy within its domestic territory. It follows that the concept contains an assumption that all states have the capacity to effectively manage their domestic affairs. The result of this presumption is that while the respect of sovereignty through non-intervention has protected weaker states from direct aggression by stronger states, it has also provided states with justification to keep from taking proactive measures to limit scenarios causing harm in fragile states. In considering this through a TWAIL lens, it becomes increasingly clear that the traditional concept of sovereignty systemically favours powerful states. In his critique of the globalizing aspects of international law in 2004, Chimni noted that the refusal to differentiate between states at different stages of development was one of the contributing factors to undermining the economic and political independence of the Third World. He further stated that:

There is no longer space for recognizing the concerns of States and peoples subjected to long colonial rule. Poor and rich states are to be treated alike in the new century and the principle of special and differential treatment is to be slowly but surely discarded. Equality rather than difference is the prescribed norm. The prescription of uniform global standards in areas like intellectual property rights has meant that the third world State has lost the authority to devise technology and health policies suited to its existential conditions. But since capital now resides everywhere, it abhors difference, and globalised international plays along.  

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Although Chimni is addressing disparities in development in the statement above, the same can be said for the blanket application of sovereignty across states. As is discussed below, employing a concept in equal measure to entities with different characteristics can have the opposite effect to equality. Assumptions that countries and corporations resist taking advantage of the contrast of wealth between states ignores explicit evidence that this occurs. Indeed, it is not farfetched to state that aspects of the international legal system perpetuate the dichotomy. While the concept of state sovereignty remains a founding principle of international law, it is becoming increasingly difficult to assert that all states are equal under the law. As Narula explains, the model of the accountability of states for ensuring the rights of individuals within their jurisdiction “is increasingly challenged by economic globalisation and the fragmentation of state sovereignty.”

Under the traditional understanding of sovereignty, states are assumed to have the capacity to represent and protect their citizens. While sovereignty and non-intervention forbid states from interfering with the internal affairs of other states, the traditional versions of the concepts do not envelop NSAs, such as MNCs. The result is that states are forbidden from interfering in the internal affairs of other states, yet MNCs incorporated in these same states can, for example, interfere in the internal affairs of fragile states with relative impunity. The high threshold of attribution under the ASR supports the corporate veil of international law, keeps MNCs from being assimilated to states, and maintains this impunity.

380 McCorquodale and Simons refer to the foreign office websites of the UK, Australia, the US, and Canada to show that “most of the governments of industrialised states explicitly or implicitly acknowledge that one of their key foreign relations priorities is to assist their own corporations to ‘win contracts in foreign markets and lobby against regulatory and political barriers’ in other states.”, McCorquodale & Simons, “Responsibility Beyond Borders”, supra note 197 at 598.

Chimni’s reasoning, however, is from 2006 and while it explains the absence of nuance of traditional sovereignty, I argue below that the concept has since evolved, or, at least, is on the cusp of doing so. This evolution would, in turn, permit customary law to evolve to lower the threshold of attribution under state responsibility. Finding the line between not applying sovereignty in a blanket manner and avoiding unlawful intervention by stronger states is among the primary challenges of this chapter on emerging approaches. Thus, while TWAIL shows how traditional views of sovereignty shelter Global North states from taking responsibility for their MNCs, it also warns against giving the Global North justification to intervene in the matters of weaker states.

The following sections explain how the shifting concept of sovereignty and non-intervention apply pressure to the stricter readings of attribution under state responsibility. It is argued that modern conceptions of sovereignty permit a reconsideration of the stark disassociation between states and MNCs as has existed in the past. The first part below sets out the origins of the concept of sovereign equality of states. Recent views concerning the development of sovereignty are then considered along with their contribution to an evolving application of state responsibility.

### 3.1 Early definition of sovereignty

A century before the first stand-alone references to state responsibility, Emerich de Vattel theorized about state sovereignty in a manner that implicitly incorporated the doctrine. Stépane Beaulac credits Vattel’s *Droit des Gens* (1758) with transposing the idea of the sovereign’s internal power to the international plane and to relationships between nations. He describes this as the “externalization” of state sovereignty and explains Vattel’s process as follows:
To a large extent, Vattel came up with his theory of government and his system of international law by transforming the reality that “sovereignty”, the word, represents through the cognitive process of the mind within the social consciousness of humanity […] Droit des Gens attempted the externalization of power, which was transposed from the internal plane to the international plane. Accordingly, his utilization of sovereignty creates a new reality, that of the exclusivity of authority without.\footnote{Stéphane Beaulac, The Power of Language in the Making of International Law, (Amsterdam: Matinus Nijhoff Publishers, 2004) at 133.}

Thus, per Vattel, the importance of the sovereign as the representative of the nation, or sole actor with the legitimacy to speak for a population, is clear. Vattel’s criteria for the existence of a sovereign state was simple and consisted of a population independent of foreign influence with the capacity of self-government. He elaborated as follows:

> Every nation that governs itself, under what form soever, without dependence on any foreign power, is a Sovereign state. Its rights are naturally the same as those of any other state. Such are the moral persons who live together in a natural society, subject to the law of nations. To give a nation a right to make an immediate figure in this grand society, it is sufficient that it be really sovereign and independent, that is, that it govern itself by its own authority and laws.\footnote{Emerich Vattel, The Law of Nations; or Principles of the Law and Nature Applied to the Conduct and Affairs of Nations and Sovereigns (1760) at BK I, Chapter I, para. 4.}

The assumption noted above, within the concept of sovereignty, of an independent state’s ability to manage its internal affairs, is therefore apparent. While explaining the general obligation of states to avoid injuring other states, Vattel describes the ultimate objective of self-reliance of states and a corresponding duty upon nations to not intervene with this goal:

> If every man is, by his very nature, obliged to assist in promoting the perfection of others, much more cogent are the reasons which forbid him to increase their imperfection and that of their condition. The same duties are incumbent on nations […] No nation ought therefore to commit any actions tending to impair the perfection of other nations, and that of their condition, or to impede their progress, - in other words, to injure them. And since the perfection of a nation consists in her aptitude to attain the end of civil society, - and the perfection of her condition, in not wanting any of the things necessary to that end […] – no one nation ought to hinder another from attaining it. This general principle forbids nations to practise any evil manoeuvres tending to create disturbance in another state, to foment
discord, to corrupt its citizens, to alienate its allies, to raise enemies against it, to tarnish its
glory, and to deprive it of its natural advantages.  

Vattel’s writings reflect what would become the standard view of the international system, focused
on the state’s capacity to provide for its own welfare, free from the interference of other states on
condition that it abstained from violating the rights of other states. They also highlight the
understanding that the sovereign (the state’s government) was the sole actor representing the state,
and therefore, the only entity capable of interfering with the internal affairs of other states. The
implied duty to avoid intervening in the internal affairs of other sovereign states was thus tied
exclusively to government actors. Under early interpretations of sovereignty, political or economic
dependence of a state upon another may have existed, but was inconsequential with respect to a
state’s classification as sovereign. That is, if the exercise of jurisdiction over its territory and
population remained de jure in the hands of the state, regardless of other influences, it was
considered independent.

This categorical approach to non-intervention persisted through the foundation of the UN and the
period of decolonization. The traditional definition of sovereign equality of states is present in the
UN Charter at Article 2.1 and non-intervention is represented by Article 2.7. Yet evidence of a
more nuanced view of non-intervention is present in the UNGA’s Declaration on Principles of
International Law Concerning Friendly Relations and Co-operation among States in accordance

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385 Supra at note 221 at 211.

386 Case of the Customs Régime Between Germany and Austria (1931), Advisory Opinion, P.C.I.J. (Ser. A/B), No. 41 at 77 (dissenting); See also the S.S. Wimbledon case, (France, Italy, Japan, United Kingdom v. Germany), P.C.I.J., Series A, No.1, 1923 at 25.
with the Charter of the United Nations from 1970 (Declaration on Friendly Relations). With respect to the “duty not to intervene in matters within the domestic jurisdiction of any state, in accordance with the Charter” the declaration states that:

[N)o state or group of states has the right to intervene, directly or indirectly, for any reason whatever, in the internal or external affairs of any other state. Consequently, armed intervention and all other forms of interference or attempted threats against the personality of the state or against its political, economic and cultural elements, are in violation of international law.

It also asserts that:

No state may use or encourage the use of economic political or any other type of measures to coerce another state in order to obtain from it the subordination of the exercise of its sovereign rights and to secure from it advantages of any kind.387

Including the terms “directly or indirectly” and “political, economic and cultural elements” acknowledges that intervention occurs through more than just the use of force and introduces a more inclusive and flexible definition than that proposed by Vattel.388 In conclusion to this subsection, it serves to warn that sovereignty is among the most written about topics of international law and that providing a full historical review naturally falls outside the scope of this paper. It suffices to note that early conceptions of sovereignty presumed states could fully control domestic issues (or were indifferent towards whether they could) – and that, indeed, the ability to do so was among the criteria for the formation of states. How this led to rules of state responsibility that

387 Declaration on Friendly Relations, supra note 45.

388 While the declaration highlights (under both its non-intervention and sovereign equality headings) that every state has an “inalienable right to choose its political, economic, social and cultural systems, without interference in any form by another state,” it does not address repercussions on third states due to a state’s own choice of systems. For example, a state promoting a free-market economy may encourage the establishment of MNCs on its territory with the risk that companies could violate international obligations in a fragile state that has not embraced a capitalist system or has been unable to build safeguards into its institutions.
overzealously disassociated states from their corporate citizens will be shown below. Before this, though, more recent considerations of sovereignty will be considered.

### 3.2 Changing definition of sovereignty

Momentum towards recognizing a responsibility of the international community for aspects previously considered the purview of domestic jurisdiction began to build at the end of the 21st century. In a discussion of what falls within a state’s internal affairs (and therefore protected from interference from another state), Shaw highlights the existence of “a constantly changing standard.”\(^{389}\) Among other matters, he notes that human rights and issues involving fundamental freedoms can no longer be considered the sole responsibility of the domestic jurisdiction. A report from the UN High-Level Panel on Threats, Challenges and Change in 2004 acknowledged the evolution of sovereignty in a similar manner. The report examined collective security measures other than the use of force under the UN Charter and outlined institutional weaknesses in response to threats other than armed conflict. The document’s introduction highlights the continuing importance of the nation-state in the functioning of international law but also hints at the importance of moving away from the isolated, more autonomous, view of state sovereignty.\(^{390}\) In a section advocating for more comprehensive collective security, the report notes the following about the privileges of sovereignty and associated responsibilities:

> Whatever perceptions may have prevailed when the Westphalian system first gave rise to the notion of state sovereignty, today it clearly carries with it the obligation of a state to protect the welfare of its own peoples and meet its obligations to the wider international community. But history teaches us all too clearly that it cannot be assumed that every state will always be able, or willing, to meet its responsibilities to protect its own people and

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\(^{389}\) *Supra* at note 221 at 212.

avoid harming its neighbours. And in those circumstances, the principles of collective security mean that some portion of those responsibilities should be taken up by the international community, acting in accordance with the Charter of the United Nations and the Universal Declaration of Human Rights, to help build the necessary capacity or supply the necessary protection, as the case may be.\textsuperscript{391}

Although the report’s focus is international security, its reasoning is related to the line of thought in this dissertation. The paragraph above notes the importance of identifying fragile legal jurisdictions and highlights the problem of building international law based on the assumed ability or will of states to live up to their domestic duties. In a section discussing the responsibility to protect countries with internal threats, the study notes that while Article 2.7 of the UNC prohibits intervention in matters that are essentially within the jurisdiction of the state, a recognition of a responsibility to protect is emerging:

There is a growing recognition that the issue is not the “right to intervene” of any state, but the “responsibility to protect” of every state when it comes to people suffering from avoidable catastrophe - mass murder and rape, ethnic cleansing by forcible expulsion and terror, and deliberate starvation and exposure to disease. And there is a growing acceptance (para 201) that while sovereign Governments have the primary responsibility to protect their own citizens from such catastrophes, when they are unable or unwilling to do so that responsibility should be taken up by the wider international community - with it spanning a continuum involving prevention, response to violence, if necessary, and rebuilding shattered societies.\textsuperscript{392}

While the instances noted in the quote are for cases of the most severe crimes, the reasoning nevertheless suggests increasing concern for how international law is applied across states and how to ensure that all benefit from protection. The UN High-Level Report is not the only document to address these issues. The International Commission on Intervention and State Sovereignty (ICISS),

\textsuperscript{391} Ibid. at 21, para. 29.

\textsuperscript{392} Ibid. at 56, para. 201.
established by the Canadian government in 2000 to study humanitarian intervention,\textsuperscript{393} attempted to establish criteria for states to follow when pondering coercive action against a state violating human rights. The document received mixed responses as humanitarian intervention outside of the UN raises, among other matters, issues of legality, risk of increased human rights rhetoric from powerful states, as well as misuse of precedent. The study nevertheless delved into the evolution of sovereignty and its findings on the matter are useful to this dissertation:

For all the reasons mentioned already, the conditions under which sovereignty is exercised – and intervention is practised – have changed dramatically since 1945. Many new states have emerged and are still in the process of consolidating their identity. Evolving international law has set many constraints on what states can do, and not only in the realm of human rights. The emerging concept of human security has created additional demands and expectations in relation to the way states treat their own people. And many new actors are playing international roles previously more or less the exclusive preserve of states. […]

It is acknowledged that sovereignty implies a dual responsibility: externally – to respect the sovereignty of other states, and internally, to respect the dignity and basic rights of all the people within the state. In international human rights covenants, in UN practice, and in state practice itself, sovereignty is now understood as embracing this dual responsibility. Sovereignty as responsibility has become the minimum content of good international citizenship.\textsuperscript{394}

The ICISS study provides another reminder that states hold responsibilities related to sovereignty both externally and internally. This document is relevant for the present case because it demonstrates that the presumption that all states can integrally protect their domestic realm is tenuous under the current conception of sovereignty. This present view increasingly allows for consideration of the plight of fragile states, which, in turn, influences how laws are interpreted and

\textsuperscript{393} The Commission was established in response to the question of if humanitarian intervention is an unacceptable violation of sovereignty, “how should we respond to a Rwanda, to a Srebrenica – to gross and systematic violations of human rights that affect every precept of our common humanity?” \textit{The Responsibility to Protect: Report of the International Commission on Intervention and State Sovereignty} (Ottawa: International Development Research Centre, 2001) at VII.

\textsuperscript{394} \textit{Ibid.} at 7.
how customary law evolves. If an argument indeed exists for humanitarian intervention when a state cannot protect its population, there should be a corresponding increase in duty of care among states to not violate the sovereignty of fragile states. In other words, states cannot argue in favour of humanitarian intervention while excusing themselves of other acts by raising the concept of non-intervention. The case of MNCs helps to illustrate this point. Recall from the conclusion of chapter two that an existing argument behind not legislating in an extraterritorial manner to regulate the behaviour of MNCs abroad is that doing so violates the principle of sovereign equality. Attempting to control how a company behaves in a third country, it is argued, amounts to intervening in that state’s domestic affairs. It is true that, in normal cases, states should be free to welcome MNCs on their territory and even compete for their presence by establishing competitive operating environments. The presumption that all states can regulate MNCs just as they benefit from them reduces the perceived risk of harm related to their operations abroad. This presumption has contributed to a steadfast acceptance of a corporate veil in international law. Yet the reality for fragile states is that there may be no choice regarding the presence of MNCs on their territory and the fragile state may be incapable of regulating the company’s behaviour. It follows that whereas extraterritorial regulation of companies might be viewed as a violation of sovereignty in cases of stable states, not regulating companies in fragile states should be considered intervention in domestic affairs. Otherwise stated, the concept of non-intervention is not the same for a state with a full capacity to protect itself as compared to one that is vulnerable. Indeed, it appears that states are beginning to recognize a responsibility to ensure that their corporate citizens refrain from violating international obligations in fragile states. The legislative trend discussed in the previous section, with states beginning to consider vulnerable jurisdictions, is consistent with the changing definition of sovereignty.
Although Canada has not yet implemented legislation similar to France and Italy, there have nevertheless been hints of a reconsideration of the country’s obligations toward fragile states. In 2004, the House of Commons Subcommittee on Human Rights and International Development of the Standing Committee on Foreign Affairs and International Trade submitted a report to Parliament on the topic of responsible conduct by Canadian companies.\footnote{House of Commons, Canada, Standing Committee on Foreign Affairs and International Trade, \textit{Fourteenth Report}, 38th Parliament, 1st Session, 2005, available online at http://www.ourcommons.ca/DocumentViewer/en/38-1/FAAE/report-14/ [Accessed 25 July 2018].} The report voiced concern that Canada did not have laws to ensure that the activities of Canadian mining companies in developing countries conform to human rights standards.\footnote{\textit{Ibid.}, at 2.} In a summary of its hearings, the committee noted the following with respect to areas with insufficient regulation:

> These hearings have underlined the fact that mining activities in some developing countries have had adverse effects on local communities, especially where regulations governing the mining sector and its impact on the economic and social wellbeing of employees and local residents, as well as on the environment, are weak or non-existent, or where they are not enforced.\footnote{\textit{Ibid.}, at 1.}

The subcommittee therefore called on the Government of Canada to, among other things, initiate stronger incentives to encourage Canadian companies to conduct their foreign activities in conformity with IHRL standards and to monitor the activities of Canadian mining companies in developing countries. The subcommittee’s preoccupation with Canada’s responsibility to vulnerable areas was therefore clear. From 2009 to 2010 private member’s bill C-300, on the topic of Canadian extractive sector companies operating in developing nations made its way to second
reading in Canada’s House of Commons. The bill called for the issuing of human rights guidelines for companies operating in developing states, for reporting and transparency measures for the same companies, as well as consequential amendments to the Export Development Act, Department of Foreign Affairs and International Trade Act, and the Canada Pension Plan Investment Board Act. Once again, the specific tailoring of the proposed legislation to developing states provides evidence of a perceived obligation to limit the negative impact of Canadian MNCs on vulnerable areas. As a non-government private member’s bill, its defeat was no surprise. The close final vote of 140-134, however, was notable and it is possible that C-300 provided momentum for the 2015 Extractive Sector Transparency Measures Act (ESTMA). The ESTMA is designed to address international corruption by enacting reporting obligations with respect to payments made to foreign, domestic, and aboriginal governments. It obliges mining companies over a specified size (defined in assets, revenue and employees) in Canada to disclose any payments to government officials over $100,000, including payments made by subsidiaries. The Act includes criminal penalties for non-compliance and applies to companies engaged in the development of oil, gas or minerals that are either listed on a Canadian stock exchange, have a place of business in Canada, do business in Canada or have assets in Canada, and that meet certain size thresholds. However, the Act only concerns disclosure of payments and omits the more progressive extraterritorial aspects of C-300. Also, unlike C-300, the Act makes no specific mention of developing states. In


399 Extractive Sector Transparency Measures Act (S.C., 2014, c. 39, s. 376).

400 Ibid., at section 24.
consolation, given the specific focus on the extractive sector and the high percentage of Canadian companies operating in fragile states, an argument that the act is implicitly concerned with the plight of fragile states could be made.

Up to this point, this dissertation has shown that attribution under the draft articles requires a significant amount of direction, instruction, or control on behalf of the home state. Although this keeps individuals not linked to a state apparatus from shifting responsibility to their national state by claiming they had acted on its behalf, it also absolves home states from any duty of care towards their MNCs operating abroad. I have also shown that the criteria for attribution established by the ILC is artificially high. In relation to this, I noted the disapproval of the majority of states with respect to the ASR and highlighted directions in which the customary law of state responsibility may be headed. Finally, the more nuanced interpretation of sovereignty outlined above provides additional justification for the reconsideration of how the regulation of MNCs could be considered under international law. The following therefore relies upon the points elaborated above to suggest a new attribution threshold that not only better protects fragile states, but that also satisfies the majority of states. The proposition outlines criteria that contribute to a lower threshold of attribution, thereby reducing the strength of international law’s corporate veil. It provides a mechanism that enforces home state obligations with regard to the behaviour of corporate citizens abroad while respecting the concept of sovereignty for all states - fragile or not.
4. Adjusted attribution criteria

4.1 Other vulnerable spaces

Given the concern of this dissertation with corporate behaviour in fragile states, an appropriate starting point for the proposition of an adjusted attribution test is to seek out and consider similar cases. Two examples are discussed below before a proposition for original criteria are offered. Although not CIL, conventions relating to space law and to the law of the sea are instructive in the ways they hold states responsible for the acts of their corporate citizens. That is, both instruments demonstrate types of duties of surveillance or of care to home states for their private actors. While it may seem obscure to compare fragile states to outer space and to the deepest parts of the sea, all share the challenge of addressing legal vacuums and potentially vulnerable spaces. An important difference, however, is that the areas addressed below are not subject to the principle of sovereignty while the latter remains a factor for fragile states. While fragile states may contain legal voids, sovereignty provides a state, even a fragile one, with deference to manage its internal affairs. An noted above, however, the deference contains limits.

The space race of the 1950s and 1960s between the US and United Soviet Socialist Republics (USSR) spurred those countries, and in turn the UN, to negotiate international agreements relating to areas previously unregulated. The first treaty to emerge was the 1967 *Convention on Principles Governing the Activities of States in the Exploration and Use of Outer Space, including the Moon*

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401 The legal void of space law and law of the seas stems from a geographical void, or empty space. That is, in the law of the sea, the legal void is due to the 17th century freedom-of-the-seas doctrine where, outside of a nation’s coastline, seas were proclaimed to be free to all and belonging to none. The void in space law naturally stems from areas that had previously been unreachable by humankind.
and other Celestial Bodies (Outer Space Treaty). The Outer Space Treaty entered into force with little delay after the drafting process, has been ratified by 105 states, and has been signed by another 25. Although its subject matter makes it a relatively unfamiliar treaty for international law practitioners, it is widely ratified and, importantly, is supported by states involved in space activities. Moreover, the treaty laid the foundation for future space activity agreements to follow, with its clauses copied by other treaties such as the Moon Agreement. The treaty foresaw the possibility that private companies would partake in space exploration and included liability of states for acts of their corporate citizens in Article VI:

States Parties to the Treaty shall bear international responsibility for national activities in outer space, including the Moon and other celestial bodies, whether such activities are carried on by governmental agencies or by non-governmental entities, and for assuring that national activities are carried out in conformity with the provisions set forth in the present Treaty.

Article VI therefore ensures that, regardless of who conducted space activity (government agency or private actors), a state would be held responsible for the entity’s compliance with space law. Indeed, upon formation of the convention, a specific concern of the USSR was that other nations

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404 Agreement Governing the Activities of states on the Moon and Other Celestial Bodies (Moon Agreement), New York, 18 December 1979, 1363 UNTS 3 (1979).

might circumvent the treaty by employing private enterprises.\textsuperscript{406} The treaty specifically foresees the presence of companies, establishes that states are held strictly responsible for their actions and does not provide states with a defence of having used due diligence to regulate a company’s behaviour. The article, however, limits its application to “national activities” with no further definition of the term in the treaty or elsewhere. The term suggests that the activities in question would need to be in accordance with the will of a state to fall under Article VI. This would therefore require showing some co-ordination between a state and a violating company.

Another example of how international law has dealt with corporations in jurisdictions where law is absent can be found in Article 139 (1) of the \textit{United Nations Convention on the Law of the Sea} (LOSC).\textsuperscript{407} The section sets out rules for how the exploration and use of resources on the ocean floor beyond the limits of national jurisdiction (known as “the Area”) should occur. Article 139 assigns to states a responsibility to ensure that acts of their organs or “natural or juridical persons that possess the nationality of states parties or are effectively controlled by them” should be carried out in conformity with the LOSC:

1. States parties shall have the responsibility to ensure that activities in the Area, whether carried out by states parties, or state enterprises or natural or juridical persons which possess the nationality of states parties or are effectively controlled by them or their nationals, shall be carried out in conformity with this Part. The same responsibility applies to international organizations for activities in the Area carried out by such organizations.

2. Without prejudice to the rules of international law and Annex III, article 22, damage caused by the failure of a state party or international organization to carry out its responsibilities under this Part shall entail liability; states parties or international organizations acting together shall bear joint and several liability. A state party shall not however be liable for damage caused by any failure to comply with this Part by a person whom it has sponsored under article 153, paragraph 2(b), if the state party has taken all necessary and appropriate measures to secure effective compliance under article 153, paragraph 4, and Annex III, article 4, paragraph 4.

\textsuperscript{406} \textit{Ibid.} at 4.

3. States parties that are members of international organizations shall take appropriate measures to ensure the implementation of this article with respect to such organizations.

The section establishes the responsibility of states to ensure that activities in the Area comply with the treaty regardless of whether they are carried out by the state itself, state enterprises, or private corporations (juridical persons) “that possess the nationality of states parties.” Under the treaty, contractors must apply for permission (or sponsorship) from their national state. States must also ensure that activities of parties that are “effectively controlled by them” abide by the treaty. This specification is relevant as it highlights a different attachment between states and entities for corporate citizens as compared to non-national juridical persons. Whereas the convention creates a direct link between national juridical persons and their home states, a high degree of control is needed to trigger responsibility for non-national corporate entities. The difference in the amount of control required is explained by the fact that the treaty deems states capable of controlling their corporate citizens. Sponsored companies have received a state’s approval to operate in the Area therefore it is highly likely that the company is operating in the state’s interest. The state will also be aware of the approved company’s operations. Because of this assumption, corporate citizens need not act under the instructions, directions, or control of the home state for that state to incur liability. The Seabed Disputes Chamber has explained that Article 139’s obligation to ensure compliance is one of due diligence, with a breach of the
obligation entailing liability.\textsuperscript{408} State parties can therefore prevent liability by ensuring that they have taken “all necessary and appropriate measures to secure effective compliance”.\textsuperscript{409}

The two treaties provide examples of different degrees of liability and different manners of triggering responsibility. They show that, for space and for the sea, states were uncomfortable leaving jurisdictions without any regulation covering private entities. However, neither treaty incorporates full strict liability of states for corporate citizens. The conventions confirm that the links or types of relationships between entities and states affect the strength of presumptions of responsibility. Where states sponsor juridical persons in LOSC, they are responsible for the acts of juridical persons unless they can show that sufficient due diligence has been taken. Where there is no link between a state and a company, the LOSC requires effective control to impute responsibility to a state. While space law appears to have a form of strict liability, a company must be operating within national activities for that particular state to incur responsibility. The type of control by the state required in such a scenario is uncertain. I argue that mere citizenship is not an appropriate threshold but also that effective control would be too high. Indeed, no actual control over a private entity may be needed for it to be considered to act within the national interest of a state. In such cases, mere co-ordination could suffice. Extrapolating from the above for the case of fragile states and MNCs, it becomes clear that the degree of involvement of states with private entities is important when determining what could lead the state to incur responsibility. Imputation of responsibility emerges along with incorporation due to sponsorship under the LOSC and


\textsuperscript{409} Supra at note 407, Article 139(2).
participating in national activities under the *Outer Space Treaty*. In the case of MNCs and fragile states, as discussed below, support provided to corporations by governments reinforces the link between state and company. In addition to this, the discussion below suggests that a due diligence defence, similar to that in LOSC, may also be present for states with respect to MNCs. The above therefore helps launch the discussion on adjusted attribution criteria by isolating aspects to be considered when determining where an emerging degree of attribution may lay for state responsibility. It also shows that when states are given the occasion to negotiate a treaty, context specific attribution criteria are included, and lower thresholds are considered.

4.2 Emerging attribution criteria

Viewing the draft articles of state responsibility through a TWAIL lens reveals that the high threshold of attribution maintains a corporate veil that shields Global North states from responsibility for the actions of their MNCs abroad. I have shown, however, that the attribution threshold can differ depending on the scenario. It follows that overreliance on decisions such as *Nicaragua* and on the ASR limit the consideration of relevant elements that could affect attribution. It also bears repeating that the threshold for attribution and the elements that affect it are free to evolve under CIL. Simply stated, attribution criteria can develop in different ways for varying scenarios involving different actors. Thus, this section provides an informed proposal for where the threshold of attribution could be drawn by CIL for the case of MNCs and fragile states, as well as the elements contributing to the threshold.

Aspects to be considered for emerging attribution criteria include: whether the offending entity is a legal person; determination of the home state; the fragility of the state where the violation of an
international obligation occurred; the link between the corporation in question and its home state; and actions the home state has taken to prevent the violation from occurring. All five features are related to the process of attribution. That is, while the fifth aspect (actions taken to prevent violations) can be mistaken for a defence similar to necessity or force majeure, this dissertation considers it integral to its attribution test. Once again, the following is not meant to be a definitive restatement of customary law but rather a representation of what TWAIL-inspired criteria would resemble while remaining within the confines of developing customary law. Considering the arguments above, the proposed criteria likely better reflect reality than the draft articles.

i) **Multinational legal person**

The first feature requires little elaboration. The proposed criteria are specific to the attribution of behaviour of MNCs to their home states and are not designed to apply to entities in a general manner.\(^{410}\) The test relies on the definition of MNCs noted in footnote 10, with the only conditions being the legal person’s locations of incorporation and of operation. Simply put, the company must be incorporated under the laws of a different state or run from a different state than the one in which it violated an international obligation. The proposed criteria therefore risk application to smaller companies that fall outside of the due diligence obligations of the French and Swiss initiatives discussed above, whose applications are limited to companies with high minimum numbers of employees.

ii) **Determination of home state**

To remain focused on the topic of attribution, the previous chapters identified home states under the simpler Anglo-American approach of the state of incorporation of the company. Given how

\(^{410}\) Although the consideration of fail states may apply to other scenarios, the elements and the defence below are tailored to MNCs.
companies are structured and how they take advantage of preferential jurisdictions, a more nuanced understanding of home state is applied for the adjusted attribution criteria. While more detailed criteria deserve further study, the determination of home state under the purposed emerging criteria also considers aspects of European or civil law approaches to corporate nationality. This means that consideration is not only given to where incorporation occurs but also to where a company’s center of management (sége social) exists. This approach keeps subsidiaries or shell companies from being used as an avenue to avoid the application of the model. Still, as will be shown in the next chapter’s case study, where a shell company exists in a country that contributes to the occurrence of the IWA, the country could be considered a home country for the purpose of the model.

iii) Fragility of the host state

Recent declarations by states in support of the UNGP and the evolution of the sovereign equality of states were noted as contributing factors for an emerging consideration of fragile states. Elements constituting a fragile state for this dissertation were also discussed in chapter two and included the ineffectiveness of state institutions, absence of law enforcement, and lack of remedies for victims. It serves, however, to further refine this definition given its role as an element in the proposed attribution criteria. Fundamental considerations to be made when determining whether a state is fragile for the application of adjusted attribution criteria include the ability of a state to refuse the presence of legal persons on its territory, its ability to regulate corporate operations, and the ability to provide recourse for victims of violations. These criteria overlap and are not intended to provide a hierarchy. They should all be considered.
Cases in which states are unable to control the entry of MNCs on their territory are likely the easiest to identify. The reasons for absence of control over territory can vary as can the length of time that control is lost. For example, in the year following Haiti’s January 2010 earthquake, PMSCs, engineering firms, and construction firms flooded the country under the pretext of providing humanitarian services.\(^{411}\) In March of 2010, while presenting the government’s recovery plan to the Senate, Haitian Prime Minister Jean-Max Bellerive stated, “I am optimistic that in 18 months, yes, we will be autonomous in our decisions. But right now I have to assume, as prime minister, that we are not.”\(^{412}\) The Haitian example also shows that the reasons contributing to the loss of control can be determinative of the type of foreign companies on the host state’s land. Manifest examples of fragility, such as countries recovering from severe natural disaster or involved in armed conflict, should provide little controversy for a deciding body making a determination of fragility.

The inability of a host state to regulate a corporation’s operations within its territory is the key determinant of fragility when assessing attribution criteria for imputing a MNC’s acts to its home state. States may have some control over whether a company can enter and operate in its territory but at the same time lack the means to properly regulate an industry or provide vigilance over corporate behaviour. Recall Chirwa’s remarks from chapter two in which he explained that regulation, especially in complicated industries such as mining, requires important financial and

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human resources. Chirwa further noted that the resources needed to ensure human rights compliance by MNCs far outweigh the resource capabilities of developing countries. A current example of this is the Democratic Republic of Congo (DRC). The DRC has a vast, sparsely populated territory with important natural resources and a government unable to exert authority in areas beyond the capital of Kinsasha.\(^{413}\) Armed conflict and lawlessness, however, have not stopped Canadian mining companies such as Ivanhoe Mines Ltd., Banro Corp. and Alphamin Resources Corp. from expanding their operations in the DRC and from operating in areas outside the reach of the capital.\(^{414}\) While the government has established a legal anti-corruption framework, its enforcement is weak to non-existent. Moreover, it is suspected that certain programs aimed at curbing corruption have primarily served as a measure of securing foreign development funding.\(^{415}\) Whether laws regulating industry exist and whether the host state is capable of enforcing such laws is therefore one of the determining factors of state fragility for the proposed criteria.

The availability of recourse for victims should be considered when determining state fragility. This aspect is closely related to the previous point. Indeed, it is difficult to imagine a state being able to effectively regulate an industry while being unable to provide remedies for its citizens. It is important to keep in mind, though, that the proposed mechanism for this dissertation, out of respect

\(^{413}\) Jeffrey Herbst, Greg Mills, “There is no Congo”, Foreign Policy, March 18, 2009, online at https://foreignpolicy.com/2009/03/18/there-is-no-congo/ [Accessed 26 July 2017].


for the sovereignty of states, is related to the ability of the host state to provide recourse. This means that a state that is able to regulate an industry or provide recourse to victims but that is unwilling to do so would not satisfy the criteria of fragile state. This is likely a disappointment for those seeking a more interventionist model. Potential criticism related to this point is further addressed in the conclusion of this dissertation, but the issue is raised here to avoid confusion between court decisions on appropriate forums to hear complaints and the determination of the fragility of a state. While corporate accountability cases such as Nevsun\textsuperscript{416} discuss whether or not a fair trial can occur in the host country and shed light on the country’s judicial system, they are not determinative of fragility for the purposes of state responsibility.

There are, however, aspects related to the admissibility of cases before the International Criminal Court (ICC) that inform the use of access to justice as part of the state fragility criteria. Specifically, the concept of complementarity, represented in Article 17 of the Rome Statute, supports the validity of including fragility in the adjusted attribution test, if only by containing a similar test of its own. Article 17 of the Rome Statute foresees jurisdiction for the ICC in cases where states are unable or unwilling to investigate or prosecute individuals in question.\textsuperscript{417} The article’s third paragraph stipulates that, in determining inability to prosecute, “the Court shall consider whether, due to a total or substantial collapse or unavailability of its national judicial system, the State is unable to

\textsuperscript{416}In November 2014, three Eritrean refugees to Canada filed a lawsuit against Nevsun Resources in Vancouver, British Columbia, Canada. They alleged the company used of forced labour by Nevsun’s sub-contractor at its mine in Bisha, Eritrea. In October 2016, the Supreme Court of British Colombia rejected Nevsun’s motion to dismiss the lawsuit and ruled that the case should proceed in British Colombia as there were doubts that the plaintiffs would get a fair trial in Eritrea. In November 2017, the British Columbia Court of Appeal rejected Nevsun’s appeal to dismiss the suit. On June 14, 2018, the Supreme Court allowed Nevsun to appeal the November 2017 decision.

obtain the accused or the necessary evidence and testimony or otherwise unable to carry out its proceedings. Thus, the Rome Statute’s use of inability to prosecute shows, by analogy, that using state fragility for the application of a legal mechanism would not be an exceptional method.

Case law from the ICC provides a sample of what may be considered when determining the effectiveness of a state’s judiciary. In *Prosecutor v. Saif Al-Islam Gaddafi and Abdullah Al-Senussi*, the Pre-Trial Chamber concluded that Libya was unable to prosecute the case against Al Gaddafi and affirmed the admissibility of the case before the ICC. The court opened its assessment of Libya’s national legal system by noting that despite efforts made to “improve security conditions, rebuild institutions and restore the rule of law” in the country,

> it is apparent from the submissions that multiple challenges remain and that Libya continues to face substantial difficulties in exercising its judicial powers fully across the entire territory. Due to these difficulties, which are further explained below, the Chamber is of the view that its national system cannot yet be applied in full in areas or aspects relevant to the case, being thus "unavailable" within the terms of article 17(3) of the Statute.

In supporting its statement, the court noted that Libya had not been able to secure the transfer of Gaddafi from his place of detention into state authority, that the state lacked capacity to obtain testimony due to the inability of judicial and governmental authorities, that adequate witness protection could not be provided, and that legal representation for Al Gaddafi was unavailable. The determination of “unavailability of a national judicial system” performed by the court is

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potentially more difficult than identifying cases of “total or substantial collapse”. That is, more ambiguous terms lead to more subjectivity in what the court uses in order to show an inability to prosecute. This speaks to the importance of having precise definitions that encourage accuracy and predictability within a legal context. Once again, given that state fragility forms an element in the proposed attribution criteria, this section attempts to narrow its definition from the one discussed in chapter two.

As a final note, the aforementioned Bill C-300 (An Act respecting Corporate Accountability for the Activities of Mining, Oil or Gas in Developing Countries) called for increased corporate vigilance in “developing countries” rather than fragile states. The bill defined developing countries as “territories named in the list of countries and territories eligible for Canadian development assistance established by the Minister of International Cooperation.”\textsuperscript{422} The bill contributes to the legitimacy of using an area of weak normative jurisdiction as part of the criteria in the lower proposed attribution threshold. By using developing countries, it encapsulates a larger number of states. The more specific definition proposed by this definition is due to its application within state responsibility. Using developing states in the proposed scenario would have risked applying an overly broad term.

\textit{iv) Link between the violating corporation and its home state}

I have already noted the ILC’s insistence in 2001 that the mere incorporation of a company under the laws of a home state does not render the state responsible for the corporation’s acts abroad. A counter-argument to the ILC’s rejection of strict liability would consider that MNCs are enabled

\textsuperscript{422} Supra note 398 at Clause 2.
by home state corporate governance legislation. In the same way that states can be held responsible for cross-border pollution or for allowing their territory to be used contrary to the rights of other states, incorporation should coincide with a responsibility to regulate behaviour abroad. Since it is doubtful, however, that CIL has developed to this extent, a more realistic proposal requires proof of some participation by the home state in the affairs of the offending corporation. It follows that the degree of the relationship to trigger responsibility needs to be addressed, as well as the behaviour that may contribute to the link. Whereas acts amounting to control established the attribution link in the scenarios above, more subtle acts can trigger responsibility under the proposed emerging threshold. Examples of such acts are outlined below, followed by a discussion on how the proposed threshold should be defined.

States provide support for their corporate citizens operating abroad in many ways. Involvement can take the form of any government initiative aimed at assisting the company or increasing its performance. Examples include funding (subsidies),\footnote{For example, see Philip Mattera & Kasia Tarczynska, *Uncle Sam’s Favorite Corporations Identifying the Large Companies that Dominate Federal Subsidies* (Washington D.C.: Good Jobs First) at 14 online http://www.goodjobsfirst.org/sites/default/files/docs/pdf/UncleSamsFavoriteCorporations.pdf [Accessed 25 November 2017].} finance initiatives (loans and guaranteeing loans), and grants and tax credits. Instances noted in the previous chapters include initiatives related to trade support and to financing assistance and credit insurance with respect to exports through ECAs. To use Canada as an example, the federal government operates extensive services to Canadian companies operating abroad through its Canadian Trade Commissioner Service (CTCS). According to the CTCS website, the service has 161 offices around the world with thousands of
officers working in Canadian embassies, high commissions, and consulates.\textsuperscript{424} The service assesses market potential and helps Canadian companies prepare to operate overseas, find qualified contacts, and problem-solve once abroad. According to the CTCS, helping to prepare for international markets includes, among other things, deciding on target markets, working on business strategies, searching for opportunities in the target markets, and explaining how the CTCS can help the company as it grows. Helping find qualified contacts comprises of benefiting from information related to “partnering, market entry, responding to unsolicited proposals or on how to approach an organization in a foreign market.”\textsuperscript{425} It also includes being introduced to potential buyers and partners, professionals in financial and legal institutions, technology sources, agents, manufacturer representatives, foreign regulatory authorities, and foreign investment promotion agencies. The services above are less than half of the services listed on the organization’s website. Thus, although the CTCS does not control companies, it clearly can be significantly involved in their operations. Finally, states’ current and sustained level of investment in establishing a worldwide network of trade commissioners is proof they are keenly aware of the benefit of helping their corporate citizens expand their operations abroad. The following paragraph from the CTCS website encouraging companies to use their services is a further indication of the beneficial link between corporate nationals and home states:

TCS services are offered free of charge to client companies and organizations.
If you are part of the Canadian business community, and contribute to Canada's economic growth, have a demonstrated capacity for internationalization and have good potential to add value to the Canadian economy, you can benefit from our services.


Meaningful economic ties include maintaining established offices, a subsidiary, a plant, a research and development establishment or a joint venture in Canada. A capacity for internationalization is reflected in having researched foreign markets, dedicated human and financial resources, and having a business plan. Increased economic activity benefitting Canada could be increased exports of Canadian-made products or services, technology transfer, new job creation, increased research and development activity or increased production in Canada.426

The services described above demonstrate the possibility of significant state involvement. Moreover, the CTCS website indicates that services exist for potentially fragile states even if there are no CTCS offices in those states. For example, the website provides contact information for services in Yemen, Somalia, and Syria.427 Finally, not only are there economic returns for a state to provide such services, they likely also allow states to unofficially guide corporate actors in state-approved directions.

Another example of how states provide support to corporate nationals is through ECAs. ECAs were mentioned in the section on complicity in chapter four and were noted in section 2.4 on state declarations above. ECAs are normally government agencies with a mandate to facilitate exports from the home state to other countries. Funded by the home state’s national treasury, they provide financing for companies and their foreign customers, as well as trade credit insurance to reduce the risk of exporting and investing in other countries. As a result, they encourage their corporate citizens to engage in export activities and international trade, with the end goal of contributing to


the home country’s economy and level of employment.\textsuperscript{428} The role they play in facilitating Third World debt for the benefit of sales and investment opportunities for Global North states also makes ECAs a natural focus for TWAIL. The list of 55 ECAs worldwide is dominated by Global North countries, with only four from Latin American countries and one from Africa.\textsuperscript{429} Canada, once again, provides an example of such an agency under its ECA, Export Development Canada (EDC). The following quote from Richard Poplak’s investigative article about EDC indicates just how significant a role such agencies can play and how important they are for their home economies:

\begin{quote}
For one thing, the agency is massive—its transactions in 2016 amounted to more than $100 -billion, almost twenty times as much as its American counterpart, the Export–Import Bank. Depending on the year, it ranks as the second or third largest such institution in the world, some distance behind China’s export credit agency but neck in neck with Japan’s. According to its own estimates, EDC—traditionally a major backer of the mining and oil-and-gas industries—helps generate about 5 percent of Canada’s gross domestic product, -making it a significant, if not an indispensable, player in the national economy.\textsuperscript{430}
\end{quote}

Out of all the countries of the world listed on the EDC webpage, only three are closed for EDC assistance: North Korea, Russia, and Syria.\textsuperscript{431}

The points discussed above, when considered together, suggest that very little host state involvement is needed to trigger attribution in cases of MNC violations in fragile states. Recall that the examples of domestic legislation with extraterritorial effect showed an increasing concern


\textsuperscript{429} Ibid., at 215.


among states for the behaviour of their corporate nationals abroad (with this concern not being contingent on the fragility of host states). Also, twenty of the most powerful countries announced their commitment to the UNGP, a document that highlights their responsibility toward the actions of companies abroad and that specifically emphasizes the responsibility of states for areas affected by conflict. When considering this alongside the definition of fragile state proposed above, mere assistance from a home state to a MNC should be all that is required to establish attribution. The trade commissioner and ECA examples above are easily assessed under this threshold. Both examples show substantial support from the home state to companies wishing to operate or export goods abroad. In addition to support, the agencies ensure, at least implicitly, that the type of operations involved are consistent with the will of the home state. Furthermore, as Poplak makes clear, a company’s success is ultimately beneficial to the home state. There is considerable state involvement in these examples and therefore little doubt of a sufficient link between the home state and its corporate national to trigger attribution in the case of a violation in fragile state. It is difficult to provide a list of acts that would be considered “assistance” for the purpose of the threshold. It suffices to use the term’s more general meaning, but to underline that the assistance should be related to, or have repercussions on, the MNCs operations in the fragile state.

v) Due diligence of the home state

Although the criteria above may appear overly constraining on home states, part of their burden can be alleviated by practicing sufficient due diligence. As noted earlier, the proposed reconsideration of attribution incorporates due diligence into the attribution criteria rather than
considering it a circumstance precluding wrongfulness. Although this may seem arbitrary at first blush, it is founded on the concept of control, a traditional element of attribution. While actual control does not occur unless there is substantial state involvement, assistance should also be thought of as a contributor to the link between company and state, simply to a different degree. The more assistance a state provides a MNC, the more it contributes to the company’s acts. The appropriate amount of due diligence by the home state, however, can negate a link between a state and a company. Thus, if a MNC receiving trade commissioner assistance for operations in a fragile state violated an international obligation in the state, attribution would occur unless the home state could demonstrate that sufficient means were taken for the violation not to occur. Due diligence, for its part, can be satisfied in a variety of ways. Licensing requirements, reporting requirements, and legislation controlling behaviour both at home and abroad are examples of possible due diligence controls. The regulatory power most home states is vast and can be exercised in a variety of ways. Two instruments provide examples of just how varied due diligence can be. In 2012, Olivier De Schutter et al. led a comprehensive study examining the different possibility of due diligence applications by home states and included legislation in the following areas:

- criminal liability for a company’s failure to act with due diligence
- civil liability for a company’s failure to act with due diligence
- administrative penalties for a company’s failure to act with due diligence
- due diligence as a basis for regulatory approval
  - due diligence and environmental impact assessments
  - due diligence and overseas infrastructure and development projects
- due diligence as a requirement for doing business with government

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432 The six circumstances precluding wrongfulness are consent (art. 20), self-defence (art. 21), countermeasures (art. 22), force majeure (art. 23), distress (art. 24) and necessity (art. 25).

433 Olivier De Schutter, Anita Ramasastry, Mark B. Taylor & Robert C. Thompson, Human Rights Due Diligence: The Role of States (Human Rights Due Diligence (HRDD): 2012) at page v (Contents).
Due diligence and procurement
- due diligence, labour rights and prevention of trafficking
- due diligence and ethical requirements for investment of state funds

- due diligence as a condition for trade and investment support
  - due diligence and export credit agencies
  - due diligence and trade preferences

- encouraging due diligence through consumer protection law
- reporting, transparency and disclosure requirements

In July 2018 the Zero Draft of the Legally Binding Instrument to Regulate the Activities of Transnational Corporations and Other Business Enterprises was released. It includes the following with respect to due diligence in article nine:434

2. Due diligence referred to above under Article 7.1 shall include, but shall not be necessarily limited to:

   a. Monitoring the human rights impact of its business activities including the activities of its subsidiaries and that of entities under its direct or indirect control or directly linked to its operations, products or services.

   b. Identify and assess any actual or potential human rights violations that may arise through their own activities including that of their subsidiaries and of entities under their direct or indirect control or directly linked to their operations, products or services.

   c. Prevent human rights violations within the context of its business activities, including the activities of its subsidiaries and that of entities under its direct or indirect control or directly linked to its operations, products or services, including through financial contribution where needed.

   d. Reporting publicly and periodically on non-financial matters, including at a minimum environmental and human rights matters, including policies, risks, outcomes and indicators. The requirement to disclose this information should be subject to an assessment of the severity of the potential impacts on the individuals and communities concerned, not to a consideration of their materiality to the financial interests of the business or its shareholders.

   e. Undertaking pre and post environmental and human rights impact assessments covering its activities and that of its subsidiaries and entities under its control, and integrating the findings across relevant internal functions and processes and taking appropriate action.

   f. Reflecting the requirements in paragraphs a. to e. above in all contractual relationships which involve business activities of transnational character.

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434 Zero Draft, supra at note 314, Article 9(2).
g. Carrying out meaningful consultations with groups whose human rights are potentially affected by the business activities and other relevant stakeholders, through appropriate procedures including through their representative institutions, while giving special attention to those facing heightened risks of violations of human rights within the context of business activities, such as women, children, persons with disabilities, indigenous peoples, migrants, refugees and internal displaced persons.

h. Due diligence may require establishing and maintaining financial security, such as insurance bonds or other financial guarantees to cover potential claims of compensation.

5. Conclusion

Chapter two explained that finding alternatives to the current system is among the objectives that drive TWAIL. For this reason, this chapter proposed attribution criteria that consider the fragility of the host state and the amount of support provided by the home state. The benefit of the proposed alternative for fragile states is that the lower attribution threshold would encourage home states to regulate the actions of their corporate citizens abroad and contribute to closing the normative gap described in the introduction. For the proposal to be legitimate, the chapter first needed to show that CIL of state responsibility is not accurately reflected by the ASR. Declarations of states concerning the ASR indicated that Global North states favour maintaining the state of affaires whereas most states prefer to renegotiate the draft articles. Considering the tenets of TWAIL, the support by wealthy states of a mechanism that reinforces a corporate veil was noted as evidence of stronger states manipulating international law to subjugate others. The chapter then used international case law to show that attribution criteria are more flexible than many perceive. The assertion was based on cases that encouraged a suppler standard that applies differently to varying scenarios.435 Exploring the direction customary law may be taking on the matter of attribution outside of the ASR was deemed fundamental to understanding where the limits of an emerging interpretation might be drawn. As such, the goal of the proposed alternative was to offer an

435 See Tadić, supra at note 180 at 116 and Bayindir Insaat Turizm Ticaret Ve Sanayi A.S. v. Islamic Republic of Pakistan, supra at note 303.
interpretation that is aspirational but that remains within the possible development of CIL. The chapter therefore surveyed domestic acts containing measures meant to influence the behaviour of MNCs abroad. The examples were noted as a sign of states’ perception of burgeoning extraterritorial responsibilities. Finally, an evolution in how sovereignty is perceived in international law was noted as an influence upon the current state of CIL. All of this led to the proposed alternative mentioned above, in which the provision of assistance by a home state to a company is all that would be needed to incur responsibility for a violation by a corporate national in a fragile state. It was further explained that due diligence could play a role within the attribution criteria by diminishing the possibility of attribution when the amount of prevention taken by a state is proportional to the assistance provided.

Strengths of the approach of this chapter include the wide variety of factors considered and the light they bring to contributors of customary law that may otherwise be ignored. The topics addressed come from all corners of international law. Yet, together they form a thread that legitimizes the suggestion of new attribution criteria, as well as what the criteria may consider. The chapter addresses the UNGA recommendation of the ASR, declarations of states on renegotiating the draft articles, court decisions applying attribution, international initiatives and domestic legislation meant to regulate MNCs, and a founding principle of international law in the sovereignty of states. The topics are therefore evidence of a wide consideration taken in order to reinforce the suggestion at the end of the chapter. Overreliance on the text of the ASR sees that contemplation of aspects such as those above are relegated; when TWAIL warns of subjugation in international law, ignoring the above developments is a way in which it occurs. Finally, although the chapter colours much of its discussions with the proposed alternative in mind, simply showing that customary law is developing beyond the ASR is an important point that bears recognition.
While the sections above showed that customary law is evolving, further studies would help to precisely determine the limits of the changes. Such studies would do well to keep in mind the difficulty developing states may have in contributing to state practice and put more emphasis on *opinio juris*. This aspect, and a TWAIL view of CIL, are further discussed in chapter eight, the conclusion of the dissertation. A more systematic and more profound investigation of domestic legislation would also be beneficial. The chapter focused on legislation with extraterritorial effects as this type of legislation was deemed most effective and more representative of sincere intention for change on behalf of states. There exist, however, other corporate accountability initiatives with less direct extraterritorial repercussion. For example, in 2010 California passed transparency legislation, requiring certain large companies to disclose what efforts, if any, they have made to end the use of child and forced labour in their supply chains. The Canadian ESTMA mentioned earlier also focuses on transparency by requiring companies to report payments made to foreign governments. These measures operate on the assumption that discerning consumers in local markets will shun companies that divulge questionable business practices. While the effectiveness of the measures can be called into question, they have the benefit of less interference in the internal matters of other states. With an increasing number of states legislating on corporate accountability with different approaches, a more thorough survey of current laws and an attempt at measuring their effectiveness would provide valuable insight.

The following chapter provides context to the concepts discussed above by applying them to a case study about the acts of a MNC in Somalia.
1. Introduction

To provide a more tangible application of the concepts above, as well as to test the proposed attribution criteria enumerated in the previous chapter, the final part of this dissertation takes a closer look at a case study focusing on the activities of Saracen, a South African registered PMSC, and its role in Somalia from 2010 to 2012. Headquartered in South Africa, Saracen was hired by a regional Somali government, funded by the UAE, and run by South African nationals. As shown below, numerous factors, including the number of states involved in the narrative, their different attachments to the MNC in question, and the types of violations they committed, result in a complex scenario. A close examination of the case helps show how the ASR impede the imputation of responsibility to home states and how new conceptions of attribution could consider the plight of fragile states.

The chapter briefly outlines the reasons for choosing Somalia for the case study before returning to a theoretical discussion of TWAIL – focusing primarily on the operation of PMSCs. It also addresses the use of interviews and the role they play in providing background for the case study before introducing the MNC in question. Finally, it applies the criteria discussed at the end of chapter six to the facts of the case. In so doing, it examines the events in question in the same TWAIL-inspired manner as in Part B of this dissertation. The high threshold-ASR version of attribution is applied to the scenario, followed by the rights-based approach. This first serves to

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436 The company had allegedly violated several Security Council Resolutions (SCR), including a long-standing arms embargo.
demonstrate the limits of traditional international law and contributes to lawlessness of MNCs in fragile states. The emerging scenario is then applied, compared to the ASR and rights approaches, and evaluated.

2. Somalia as a case study

The focus on Somalia is consistent with the TWAIL leanings of this dissertation. On its journey from nomadic territory to state, Somalia has seen a number of interveners who profited from its land and resources, as well as from divisions and conflicts between clans. For much of its history, Somalia has been caught between major powers and subject to colonial negotiation. Over the past 200 years, Britain, France, Italy, Ethiopia, Egypt and the US have all attempted to influence Somali borders or the functioning of its institutions. Eventually gaining independence in 1960, the country was ruled under a dictatorship from 1969 to 1991. Somalia has since struggled to establish a governance system that is compatible with modern international law, yet cognisant of the clan system that continues to dominate Somali society. The influence of outside actors has contributed to a patchwork legal system and an extended period of violent unrest and instability for the Somali people. Although 2017 appeared promising, with increasing security and peaceful national elections, Somalia’s challenges remain significant. At the time of writing, the deadliest

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437 In 1887 Britain established a protectorate over Somaliland.

438 In 1859 France took over the port of Obock.

439 In 1892 Italy signed a treaty to occupy Mogadishu for 25 years in return for compensation.

440 From 1869 to 1884, Egypt controlled the ports of Bulhar and Berbera.
bombing in the country’s history occurred in Mogadishu, causing the death of more than 580 civilians.441

The choice of Somalia as a case study is also the result of the narrower original focus of the dissertation. In its infancy, the project contemplated addressing the attribution criteria of state responsibility specifically for PMSCs, with Somalia providing the most prevalent example of their presence. After preliminary research, I understood the value of widening the discussion to MNCs as a whole. Nevertheless, I kept the case study of Somalia as I believed that, despite its complexities, it provided the necessary fact pattern to test the model proposed in chapter six and its lessons could be extrapolated to MNCs in general. Unrest in Somalia since the early 1990s provided lucrative business opportunities for those willing to risk the investment. Various PMSCs, both national and international, emerged in Mogadishu to provide services for humanitarian workers and state representatives. The largest PMSC in the country, Bancroft Global Development, established a strong foothold by providing security for the Mogadishu airport and by securing accommodations for expatriates (which it used as footing to develop luxury real estate).442 Hart Security undertook anti-piracy operations along the coast in Puntland before withdrawing due to a civil war near its base and an uprising within its troops. Thus, Saracen was but one of many PMSCs


442 Interview with Alex Perry, January 13, 2016. Perry explained that “[a]fter they clear an area, their for-profit real estate arm goes in and buys or rents pieces of land and buildings and so on and does them up and essentially prepares the place for the influx of UN aid workers and Wildcat businesses that tend to arrive immediately after a place has been declared safe.”
operating in the country and taking full advantage of a regulatory-free environment. The presence of these companies in Somalia was not necessarily a bad thing. Bancroft was officially permitted to operate by the UN and, as Alex Perry explains, was contracted to “sort out” the African Union Mission in Somalia (AMISOM) and teach the force how to use urban warfare against Al Shabaab.

He stated that:

> [W]ith Bancroft oversight, AMISOM, particularly Uganda, became an incredibly effective fighting force, which really very few armies in the world can do that in the West or anywhere. And AMISON particularly succeeded in clearing Mogadishu which is something that the US, the UN, had failed to do for over two decades.444

The Saracen case study shows, however, that if such companies violated international obligations, there existed little to hold them accountable. This is consistent with this dissertation’s argument that systemic biases of international law play a role in maintaining this gap in regulation. The high threshold of attribution upholding international law’s corporate veil meant that home states could disregard the activities of PMSCs incorporated on their territory but working in Somalia. Using Somalia as a case study provides another opportunity to show how this occurs and how international law can be reinterpreted to better protect countries with similar challenges.

An equally important justification for choosing Somalia as a case study is simply to draw attention to the struggles of a country often only thought of when its instability threatens to trickle beyond its borders. Internationally, struggling states like Somalia were once viewed as humanitarian challenges, but after September 11, 2001, the world began to see these countries as potential havens

443 Ibid.

444 Ibid. However, another interviewee stated with respect to Bancroft “I’m always very unclear about what they actually do […] I think their setup is very interesting, and I do think in terms of accountability, transparency of their mandate, who they’re reporting to, I think is quite questionable.” Interview with Anonymous 1, April 17, 2017.
for terrorist organizations.\textsuperscript{445} In his book about piracy in Somalia, Murphy describes the shift clearly: “\textit{[P]olicy towards Somalia has been dominated to the exclusion of almost all else by the concern that its failure may result in the export of Islamist-inspired political violence.}”\textsuperscript{446} Thus, Somalia provides an example of Global North states pivoting concern for other states to a preoccupation with self. While acknowledging the germination of international terrorism as an imperative issue, it is important to keep in mind that a central principle of TWAIL is to bring attention to the struggles of subjugated populations. That the struggles of Somalia have been removed from Western conscience is scarcely an exaggeration\textsuperscript{447} and part the goal of this chapter is to highlight Somalia’s ongoing challenges. TWAIL drives this dissertation to focus on issues and approaches ignored by most and, as Roland Marchal explains in his piece about Somali piracy, “\textit{shed[s] light on a country that the international community does not seem eager to understand.}”\textsuperscript{448}


\textsuperscript{446} Murphy, \textit{ibid.} at 3. Murphy states that although there may be worrying signs, the “expectation that Somalia would become a sanctuary on par with Sudan and Afghanistan has not, so far at least, been fulfilled.”

\textsuperscript{447} Interview with Alex Perry, January 13, 2016. Perry noted the ambivalence of Western countries with respect to famine in Somalia.

3. Application of the TWAIL method to PMSCs

Statistics on the nature of the PMSC market are challenging to find. Nevertheless, certain facts provide a *prima facie* case for applying TWAIL methodology: PMSCs are largely based in developed states, much of their work is in emerging markets, and appropriate international legal and regulatory regimes regarding the industry are found wanting. Thus, PMSCs provide a none-too-subtle case for the need to use a perspective that is “profoundly shaped by the experiences of the peoples and states of the Third World.” Having written this, it is not the contention of this paper that certain minimum conditions should exist in order to legitimize an application of TWAIL. In fact, given that much of the strength of systemic biases rests in the silences they impose, it is arguable that TWAIL provides its most valuable insight in cases that, on the outset, do not manifestly appear to involve the Third World.

Various initiatives promoting the regulation of PMSCs disguise the fact that the most important drawbacks of international law with respect to the companies is the lack of effective international regulation. Peter Singer describes the state of affairs in the area as follows:

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450 See the comprehensive list in Table 1 in Kinsey, *ibid.* at 5.


454 See *ibid.* at 193 where Anghie & Chimni apply the terms “the cunning of colonialism” to represent “the ways in which the civilizing mission reproduces itself in bewilderingly different [and benevolent] forms”.

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The result is that any legal condemnation of the private trade in military services on the international level is mostly veiled. There are no possibilities of threats of company fines or dissolution, as no international laws specifically recognize the existence of the firms. There is no mechanism for dealing with clients who hire the firms.\footnote{455}

The different forms of mercenarism have nevertheless been broached in the international arena in a number of ways including the UN \textit{International Convention against the Recruitment, Use, Financing and Training of Mercenaries} (UN Convention),\footnote{456} the African Union’s \textit{Convention for the Elimination of Mercenarism in Africa} (OAU Convention),\footnote{457} OHCHR resolutions, and the work of the OHCHR Working Group on the use of mercenaries.\footnote{458} Notably absent from the above, however, is any mention of a primary source instrument (e.g. international convention) specifically pertaining to PMSCs. Insight into how this absence can be interpreted may be garnered from the way feminist legal theorists interpret the \textit{silences} of international law. For example, Hilary Charlesworth explains how silences can act as valuable indicator of issues holding little weight within the international system.\footnote{459}

A methodology sometimes employed to question the objectivity of a discipline is that of detecting its silences. All systems of knowledge depend on deeming certain issues as

\footnote{455}Singer, \textit{supra} at note 452 at 533.


\footnote{459}See Anghie & Chimni, \textit{supra} note 52 at 193 where, instead of using the term \textit{silences}, the authors state that TWAIL scholars have focused on the ways in which the methodologies of international law have either addressed Third World issues “or have precluded consideration” of the issues.
irrelevant or of little significance. In this sense, the silences of international law may be as
ing important as its positive rules and rhetorical structures.460

Although the fact that there exist no international instruments regulating a multi-million-dollar
industry that often operates in situations of emergency or armed conflict is intuitively cause for
concern, the absence is even more disquieting when considered relative to the above-mentioned
sources. Firstly, the existence of the soft-law instruments creates a mirage that the hazards of the
PMSC industry are indeed being regulated, covering up the complete absence of hard law in the
area.461 Furthermore, as explained below, the work of the UNGA and of the mercenary conventions
are valuable indicators of both the will of Third World states to reign in PMSCs and of the
ambivalence of the Global North in doing the same.

The first significant attempt to outlaw mercenaries under international law is found in the 1970
GA’s Declaration on Friendly Relations.462 Motivated by a will to make international law more
representative and to standardize relations with the “traditional members” of the world community,
Third World states garnered the two-thirds majority vote needed for the declaration with the
support of socialist states.463 Essentially meant to codify the main principles of international

460 Hilary Charlesworth, “Feminist Methods in International Law”, in Steven Ratner & Anne-Marie
Slaughter eds., The Methods of International Law: Studies in Transnational Legal Policy, No. 36 (Buffalo:
William S. Hein & Co. Inc., 2006) at 162. For context purposes, the following sentence to the quote
provided in the main text is: “Permeating all stages of the excavation of international law is the silence of
women.”

461 See Kinsey, supra at note 449 at 134.

462 Declaration on Friendly Relations, supra at note 45.

463 Antonio Cassese, International Law (Oxford: Oxford University Press, 2005) at 42, 47 [Cassese,
“International Law”]: Cassese explains that although the post-1960s international community consisted in
the majority of non-Western states (ie Third World states and socialist states), the Western minority
continued to yield enormous economic and military power. See also Dianne Otto, “Subalternity and
International Law: The Problems of Global Community and the Incommensurability of Difference” in

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relations, the declaration includes the statement that “[e]very state has the duty to refrain from organizing or encouraging the organization of irregular forces or armed bands including mercenaries, for incursion into the territory of another state.”

In addition to the Declaration on Friendly Relations, the UNGA has stated its opposition towards the use of mercenaries through GA resolutions. More recently, for example, the UNGA explicitly voiced its concerns with respect to PMSCs:

[...] Concerned by the new modalities of mercenarism, and noting that the recruitment of former military personnel and ex-policemen by private military and private security companies to serve in their employ as “security guards” in zones of armed conflict seems to be continuing,

Convinced that, notwithstanding the way in which they are used or the form that they take to acquire some semblance of legitimacy, mercenaries or mercenary-related activities are a threat to peace, security and the self-determination of peoples and an obstacle to the enjoyment of all human rights by peoples,

[...] 5. Requests all states to exercise the utmost vigilance against any kind of recruitment, training, hiring or financing of mercenaries, including nationals, by private companies offering international military consultancy and security services, as well as to impose a specific ban on such companies intervening in armed conflicts or actions to destabilize constitutional regimes;

6. Encourages states that import the military assistance, consultancy and security services provided by private companies to establish regulatory national mechanisms for the registering and licensing of those companies in order to ensure that imported services provided by those private companies neither impede the enjoyment of human rights nor violate human rights in the recipient country:


Although the Declaration on Friendly Relations represented the concerns of the Third World and is often cited in resolutions, international court decisions and academic literature, it does not impose legally binding obligations under the UN system, especially with regards to PMSCs.\footnote{Cassese, “International Law”, supra at note 463 at 196: Cassese emphasizes that the fact that a given principle is included in the Declaration on Friendly Relations does not necessarily elevate it to the level of a fundamental and legally binding principle; that principles not enshrined in instruments confirming their rank (e.g. the UN Charter) remain mere “policy guidelines” (47). More generally, in order for GA declarations to be considered law, the conditions establishing a customary rule would need to be fulfilled (196).}

Furthermore, although the numerous GA resolutions attest to the persistence of these concerns and extend them to the relatively new conceptions of mercenarism in the form of PMSCs, no customary law or hard law concerning these actors has emerged.\footnote{Singer, supra at note 452 at 533 who explains that state practice has been favourable to PMSCs. Singer states that the lack of application of the UN Convention combined with the operation of PMSCs in over fifty countries serves to reinforce their legitimacy and promotes their general acceptance.}

The OAU and UN Conventions provide another indication of the diverging priorities of the international community. The OAU Convention, adopted in 1977 to deal with the burgeoning mercenary problem in Africa,\footnote{Ibid. at 527, 528.} numbers 29 state parties and is described as “the most aggressive international codification of the criminality of mercenarism.”\footnote{Ibid. at 528.} The UN Convention, for its part, has only 32 state parties, lacks the signatures of major state powers, and took more than 10 years to reach the 22-state ratification needed for it to enter into force.\footnote{Ibid. at 531.} Neither convention is without its flaws. Among other weaknesses, the OAU Convention contains a bias that allows states to hire mercenaries to defend themselves against groups within their borders while prohibiting the practice
when used against rebel groups supported by the African Union; the UN Convention contains no monitoring mechanism and includes a list of requirements that are difficult to prove in order for an individual to be labelled a mercenary. Moreover, both conventions were concluded before private companies came to dominate mercenarism and are difficult to apply to PMSCs. Nevertheless, the existence of the OAU Convention demonstrates the significant interest of African states towards curtailing the use of private military actors. As for the UN Convention, although consideration must be given to the fact that the weaknesses of the Convention may be partially to blame for the poor adherence, the absence of the major state powers is indicative of a larger lack of will from these actors.

The international legal status of PMSCs appears to be representative of the fundamental concerns voiced by TWAIL scholars regarding the inequities of the international legal system. Although the above-mentioned instruments show that where Third World countries have a means to voice their views they have generally condemned the practises of private actors, their voices continue to be muffled in primary sources of law, where Global North countries not wishing to regulate PMSCs exercise their power by instilling the silence. An inherent imbalance of the international system lies in the relative weakness of the means of expression available to Third World states, which is a direct result of adherence to the UN Charter and its accompanying Statutes of the International Court of Justice. Article 38 of the ICJ statute establishes international conventions, customary law, customary law,

472 Ibid.

473 See Caroline Holmqvist, Private Security Companies: The Case for Regulation, SIPRI Policy Paper No. 9 (Stockholm: Stockholm International Peace Research Institute, 2005) at 44, see footnote 206 where the author states that the AU is considering updating the OAU Convention to take present day circumstances into account.
and general principles of law as the primary sources of international law.\textsuperscript{474} A strong argument exists that the proliferation of PMSC activity negates any emerging customary law and risks legitimizing PMSCs rather than prohibiting them.\textsuperscript{475} Furthermore, as postcolonial theorist Dianne Otto explains, attempting to use global interstate agreements to challenge international law is an illusory approach for emerging states,\textsuperscript{476} as Global Powers will simply not participate in initiatives that go against their interests or political will. This reasoning is clearly reflected in the fact that the US and the UK, for example, would likely resist initiatives to ban PMSCs as they support the industry and use PMSCs in many of their foreign policy initiatives.\textsuperscript{477}

In conclusion to this section, the silences with respect to the PMSC industry within international law are upheld by the accepted manner of viewing the companies within the private security field, which in turn negates the political will to regulate the industry. The lack of political will towards sincere regulation is, however, proper to Global North states and not developing countries. Given that the international legal system has been built around stronger states, the voice (or rather the silence) of these states holds greater weight than that of others. Thus, PMSCs provide an example of how international law favours strong states and contributes to continued colonialism.

\textsuperscript{474} Article 38(1) of the \textit{Statute of the International Court of Justice}, 1 U.N.T.S. xvi.

\textsuperscript{475} Although the GA has called for the regulation of private military actors, as is shown above, states have done little to enforce the international mercenary conventions. Combined with the fact that the companies continue to flourish and are entering new fields, it is difficult to see how the required state practice for the prohibition of PMSCs is present. In essence, as is explained by Singer, \textit{supra} at note 452 at 533, there seem to be greater chances of the opposite occurring.

\textsuperscript{476} Otto, \textit{supra} at note 453 at 152.

\textsuperscript{477} Singer, \textit{supra} at note 452 at 544; see also Kinsey, \textit{supra} at note 449 at 149.
4. Case study interviews

Interview data can uncover information unobtainable through documentary records, confirm information from other sources, and provide details about events that are described in more general terms elsewhere.\textsuperscript{478} For this reason, and despite the existence of scholarly works describing the fragility of Somalia and the presence of PMSCs on its territory, corroborating evidence from interviews with knowledge-holders was sought. Interviews took place once preliminary research on Somalia was completed. Information gathered served to triangulate findings and to prompt further research on selected topics.\textsuperscript{479} Thus, interviews for the case study consist of but one component of a multi-method research approach.\textsuperscript{480} The number of interviewees, the lines of questioning, the time devoted to this source of information and the reporting of information were determined in recognition of the role of interviews as a complementary source.

4.1 Methodology for Case Study Interviews

Semi-structured interviews on the topic of law and security in Somalia and the presence of PMSCs around 2010 were conducted over internet audio or video (Skype and Whatsapp) between December 15, 2015 and September 15, 2018. The interviews lasted between thirteen to thirty-five minutes. Over forty potential interviewees were invited by email for interviews and eleven accepted to participate.


\textsuperscript{479} \textit{Ibid.} Lynch describes triangulation in Multi-method research as bringing “different forms of data to bear to answer the same question.”

\textsuperscript{480} \textit{Ibid.} at 33. Lynch reminds her readers that “[i]nterviews need not, of course, be the only or even the main source of data for a research project. Interviews can be equally useful playing a supporting or co-starring role.
Participants were informed upon contact that they were being recruited to contribute to research for a Ph.D. dissertation. They were also notified that their session would be recorded to facilitate transcription and analysis of the information provided. Two interviewees requested that their interviews not be recorded. Notes were therefore taken during these interviews instead. Participants were informed that the research findings would be available to the public. They were also informed that the results could be published in journal articles and books. Interviewees were therefore asked for permission to include their names in the dissertation and any publications. Four of eleven participants requested to remain anonymous. One interviewee requested that the interview take place by an exchange of emails.

Permission to conduct interviews for the dissertation was received from the University of British Columbia (UBC) Behavioural Research Ethics Board. All interviewees were asked to sign consent forms, an example of which has been included in Part D-Annex of the dissertation. Participants were provided the researcher’s contact information as well as that of the UBC Office of Research Services. A written presentation of research findings will be provided to interested participants. Two participants requested to approve the information attributable to them in the dissertation.

The interviews consisted of seven main questions designed to extract facts about security, the state of law, and PMSCs in Somalia. Although I took at a fair amount of margin to uncover the most information possible, I was careful to maintain neutrality to ensure unbiased information. I departed from the main questions by sharing the topic of the study, by allowing some deviation

481 The questionnaire is included in Part D–Annex.
during the interview, and through following-up to clarify or confirm responses. The primary method of reporting the findings in this chapter is by referencing findings throughout the main text, along with the interviewee’s name, expertise, and interview date (as apposed to an allotted section for interview findings). Interviews are also referenced in footnotes, serving to support or confirm data from other sources.

The list of all participants is provided in Part D-Annex. Potential interviewees were selected considering relevant elements of the research topic. Information needing to be reinforced by interviews included PMSCs present in Somalia, access to justice, and strength of Somali institutions. Selected individuals were contacted after research into their publications, involvement in organizations, or occupations. The rejection rate of the first set of invitations necessitated revaluation and a new list of potential participants. Authors, journalists, and NGO representatives having spent time in Somalia availed themselves following the second round of invitations, as well as a director of an NGO, and a Somali refugee.

With respect to sample size, the original goal was to interview twenty participants. However, out of 40 potential interviewees contacted only 10 interviews were secured. This amount was initially disappointing. Irving Seidman writes that there are two criteria to determine whether sample size

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482 Mats Alvesson suggests that while strict neo-positivism allows for little deviation from the structure of the interview and is best suited for empirical writings, it also encourages superficial responses. In contrast, unscripted follow-up questions and closer personal interactions with interviewees, aspects associated with interactional rationalism, encourage participants to move away from answers they feel are expected from them. Mats Alvesson, *Interpreting Interviews*, SAGE Publications Inc., London, 2011 at 12.

483 *Supra* at note 478 at 38.
is satisfactory. The first being sufficiency and the second being saturation of information. Sufficiency is understood as representing a number of interviews that permit the participation of representatives of the range of participants in the issue, making the population outside the sample comfortable that the sample is representative of them. Two of the participants are authors, two are professors, one is a journalist, one is an NGO researcher, two are UN representatives, one is the former Director of an NGO, one is a political analyst, and one is a Somali refugee. All save two participants have spent time in Somalia and two are Somali nationals. The individuals are all accomplished and knowledgeable with respect to Somalia.

Saturation, for its part, is considered the point at which interviewees repeat similar information, that is, when participants stop bringing new information to the study. An in-depth study of the Saracen case would undoubtedly benefit from more subjects. However, for the purpose of applying the models from the earlier chapters, the information from ten participants was sufficient.

5. MNC at issue: Saracen International

Of the larger PMSCs present in Somalia in 2011, the involvement of Saracen with the Puntland Maritime Police Force (PMPF) is likely the clearest example of a non-Somali based company working in the sector. Originally established in the British Virgin Islands in 1995, Saracen has

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484 Irving Seidman, Interviewing as Qualitative Research, Teachers College Press, New York, 2006, at 55.
485 Ibid.
486 Ibid.
487 Subsequently operating under the name Sterling Corporate Services.
488 Pedro Barge Cunha, “Somalia as a Market for Private Military and Security Companies: definitions, agents and services”, in State and Societal Challenges in the Horn of Africa: Conflict and processes of
allegedly offices in South Africa, Uganda, the DRC, and Angola, with its involvement in Somalia beginning shortly after the subsidiary Saracen International was registered as an offshore company in Lebanon in March of 2010. While leading an operation described as the “largest externally supported military activity in Somalia, after AMISOM,” the company allegedly breached an international arms embargo established by the UNSC. The violation of the embargo was linked to the company’s arming of their 1000 soldier-strong PMPF, led by former South African military personnel including seasoned contractors from wars in Iraq and Angola. The force was the creation of the founder of the PMSC Blackwater, Erik Prince, who brokered the initial funding for the project. Hired by the state of Puntland under the pretense of training a

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490 Ibid. at 273, Annex 6.3, para. 1.


492 Prince gained notoriety along with his company after the Nisour Square massacre during the Iraq war.

coast guard force, the company suspended operations in 2011, claiming to maintain a presence only to secure equipment already in the country. Yet, Saracen subsequently imported an additional 15,000 tons of military material into Puntland and even managed to have the state port closed for 10 days while the material was unloaded. According to the UN Somalia and Eritrea Monitoring Group (SEMG), by the end of 2011 the company’s assets, personnel and operations had been transferred to Dubai registered Sterling Corporate Services (SCS). Both incarnations of the company supplied “large-scale military training, technical assistance and support to the Puntland Maritime Police Force.” The SEMG’s description of the company provides an idea of what it considered “large-scale”: a well equipped elite force of approximately 1,000 individuals with room for 1,500; a transport aircraft; 3 reconnaissance aircraft; 4 helicopters; a control tower;

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494 Katharine Houreld of the Associated Press reported that Mohamed Farole, the son of the President of Puntland, stated that greater security in the region could also bring more investors to the region. Katharine Houreld, “North Somali government using private company to train militia”, Toronto Star, December 1, 2010 online https://www.thestar.com/news/world/2010/12/01/north_somali_government_using_private_company_to_t rain_militia.html [Accessed 14 September 2018].

495 Ivor Powell, supra at note 491 at 2.

496 Ibid.

497 The Monitoring Group discusses the background of the company in its case study at Annex 5.3.a., SEMG 2011 Report, supra note 493 at 236: “6. Sterling Corporate Services Free-Zone Establishment (FZE) is allegedly incorporated with the Dubai Silicon Oasis Authority, a technology park and free zone specialized in the IT sector and located in Dubai, where SCS claims to rent an office (D 105). However, neither the Dubai Department of economic development company registry, the Dubai Chamber of Commerce, nor the business directory of the Dubai Silicon Oasis Authority acknowledges Sterling Corporate Services FZE as a registered entity.” Also see James Bridger and Jay Bahadur, “The Wild West in East Africa” (May 30, 2013) Foreign Policy online http://foreignpolicy.com/2013/05/30/the-wild-west-in-east-africa/ [Accessed 25 November 2017], “In 2012, Saracen International was forced to rebrand itself as Sterling Corporate Services, following bad press and harsh criticism from the United Nations.”

498 Ibid.
airstrip; 70 tents; 3 vessels; and 3 rigid-hulled inflatable boats.\textsuperscript{499} The SEMG was forthright in its disapproval of the force from the start, labelling it the “most brazen”, “large-scale” and “protracted” violation of the UN arms embargo on Somalia.\textsuperscript{500} Given the size of the organization and violations, they devoted significant sections of their 2010 and 2011 reports to Saracen.

6. Portrait of a fragile state

Given that a condition for the proposed reconsideration of attribution is the inability of the host state to regulate MNCs on its territory, a discussion of the fragility of Somalia leading up to, and during, the period of the case study is addressed below. Chapter six noted that considerations for the determination of fragility for the application of adjusted attribution criteria include the ability of a state to refuse the presence of legal persons on its territory; its ability to regulate corporate operations; and its ability to provide recourse for victims of violations. The section below briefly reviews Somalia’s modern history up to 2012, with the subsequent section addressing Somalia’s fragility following the chapter six criteria.

6.1 Somalia from Mahammad Barre to 2012

Mahammad Siad Barre took over the country in a military coup in 1969. Initially promising a Somalia free of clan influence, he would ultimately rely on creating divisions and the support of his own clan in his bid to retain power in the latter part of his presidency.\textsuperscript{501} Barre’s increasingly

\textsuperscript{499} List created by reviewing the SEMG reports for 2010 (SEMG 2010 Report, \textit{supra} note 489) and 2011 (SEMG 2011 Report, \textit{supra} note 493).

\textsuperscript{500} SEMG 2011 Report, \textit{supra} note 493 at 236.

\textsuperscript{501} \textit{Ibid.} Barre introduced a unified Somali Civil Code in 1973 that contained provisions that curtailed both sharia and Somali customary law. Sections of the code abolishing lineage rights over land, water resources, and grazing were meant to reduce the influence of the country’s clans. Helen Chapin Metz,
arbitrary and authoritarian rule instigated the establishment of opposition groups in the mid-80s, who became increasingly intent on overthrowing his rule. His two-decade long authoritarian regime ended in 1991 when the United Somali Congress (USC) overthrew him amidst a destructive civil war, signaling the breakdown of the modern state of Somalia.502.

The USC began its attempt at governing by forming an interim provisional administration.503 The representatives of the northern part of Somalia refused to recognize the interim president’s legitimacy and declared an independent Republic of Somaliland in the former British controlled area of the country. Infighting amongst the USC and opposition to the interim government in other parts of the country rendered even temporary governing impossible.504 Fighting intensified in November 1991 between USC factions supporting the interim President and those supporting the leader of the Somali National Alliance, General Mohamed Farah Aidid.505 Aidid’s followers contested the USC Mogadishu-based leadership under the pretext that the interim government was formed without consultation with other groups opposed to the Barre regime.506


506 *Ibid.* The expert’s report notes that fighting during this period “resulted in widespread death and destruction, forcing hundreds of thousands of civilians to flee their homes and causing a dire need for emergency humanitarian assistance” with almost 4.5 million people in the country threatened by severe malnutrition; See also Gardner & El Bushra, *supra* note 502 at 233.
In April of 1992, the UN force United Nations Operation in Somalia (UNOSOM) was established under SCR 751. Somalia nevertheless remained without a government and divided under rival militias. In December 1992, SCR 794 authorized the use of all necessary means to establish a secure environment for humanitarian relief in Somalia. The Unified Task Force (UNITAF), a US-led multinational peacekeeping force, was deployed in Mogadishu under Operation Restore Hope. Early in 1993, disarmament and national reconciliation agreements were signed by 15 of the warring parties and on March 23rd the UNSC passed SCR 814. The resolution saw the size and mandate of UNOSOM expanded under UNOSOM II, an arms embargo established under SCR 733 reaffirmed, an emphasis put on the “crucial importance of disarmament”, and a demand that ceasefires be respected. UN agencies and affiliates were to continue to provide humanitarian assistance, with the additional goals of creation of political institutions, economic rehabilitation,

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509 Gardner & El Bushra, supra note 502 at 233.


511 SCR 814 (1993), ibid. at B para. 5 and 6.; UNOSOM II had 28,000 personnel, including 22,000 troops and 8,000 logistic and civilian staff. See also Robert C. DiPrizio, Armed Humanitarians (Baltimore: The Johns Hopkins University Press, 2002) 48.

512 SCR 814 (1993), ibid. at B para. 7.

and national reconciliation. With lack of success of UNOSOM II and following the particularly violent Battle of Mogadishu, the UNSC passed SCR 954 on November 4, 1994, withdrawing peacekeeping troops and setting the date of March 31, 1995 as the termination of the operation.

An attempt at a national representative government was made in 2004 with the formation of the Transitional Federal Government (TFG) of the Republic of Somalia. Although the existence of a new representative body appeared encouraging, the TFG was influenced by warlords, corrupt politicians, and bribery and excluded civic actors and peace facilitators. Despite being internationally recognized and functioning as the nation's federal government until 2012, the TGF saw limited success. Within Somalia it suffered from a lack of credibility as its close ties to Ethiopia harmed its legitimacy and significantly undermined its authority. A critical report by the SEMG stated that the TFG lacked vision, was corrupt, and diverted attention from positive elements of transition while exacerbating frictions and focusing on monopolizing power. The TFG declared a state of emergency in 2009 after an intensification of fighting against Al Shabab.

514 This was to be achieved through economic relief, repatriation of refugees, re-establishment of institutions and civil administration, re-establishment of police forces among other aspects.


516 In August of 2004 a Transitional Federal Charter was adopted with a 275-member parliament inaugurated in Kenya. The TFG was the result of the Arta Conference and would be replaced under the Garowe Principles in 2012. Andrew Palmer, The New Pirates; Modern Global Piracy from Somalia to The South China Sea (London: I.B. Tauris & Co Ltd, 2014) at 44.


518 Ibid.

519 Palmer, supra at note 516 at 37; Bradbury & Healy, supra at note 445 at 14.

520 SEMG 2010 Report, supra note 489 at 16.
Fighting continued throughout 2009 and into 2010, to the point where, in the midst of a severe famine, the UN World Food Program withdrew its staff from southern Somalia.521 In August of 2012 a new parliament was sworn in and a month later activist Hassan Sheikh Mohamud was elected president. Along with AU forces, government forces recaptured the last major city held by Al Shabab.

6.2 Fragility assessment for attribution

The first consideration for the determination of fragility noted in chapter six is the ability of the host state to accept or reject the presence of MNCs on its territory. While not directly related to MNCs, the number of countries alleged to have violated the arms embargo during the period of the case study (upwards of twenty) suggests a general absence of control over the territory.522 Even if the existence of conflict is not a prerequisite for fragility for the purpose of this dissertation, it is difficult to see how the important level of destruction and conflict in Somalia did not affect the country’s ability to control who operated within its borders. In describing Somalia as an “absence of state,” Alex Perry put the degree of the conflict into perspective in his description of the country’s capital, Mogadishu:

What never went away in Somalia, I mean people tended to think of Somalia as, probably from the pictures of Mogadishu, just unparalleled devastation. I mean Mogadishu was just breathtaking in its destruction you know. Every single building had been leveled. I have never seen anything like it. It’s impressive actually that people can apply such destruction. And so that gives you the impression of something that is a completely failed state. But, actually, it was an absence of state.523


522 SEMG 2010 Report, supra at note 489 at 282. The countries noted are France, Kenya, Sudan, the US, Ethiopia, Djibouti, Eritrea, South Africa, Uganda, United Arab Emirates, Egypt, France, Germany, Malaysia, Saudi Arabia, Kuwait, Jordan, Iran, Sudan, and Turkey.

523 Alex Perry, Interviewed on January 18, 2016.
Other interview participants also noted the degree to which Somalia’s central government in Mogadishu failed to exercise control over the country. Professor Benjamin Powell explained that the “monopoly government has failed to control any significant portion of [Somalia], and has for over 25 years now.” With respect to entities operating in Somalia circa 2010, Said, a photographer and farmer who fled Somalia in 2012, stated that “you could not count” the number of unregistered companies in Somalia between 2010 and 2012. He added that this is something Somalia is only beginning to bring under control. Finally, the SEMG on Somalia and Eritrea repeatedly voiced its concern over international PMSCs operating without permits in Somalia, stating the following in its 2011 report:

54. The activities of private security companies and their state or corporate sponsors is of growing concern. Two such companies are currently engaged in support to private Somali militias (a third company ceased operations in early 2011), whose primary purpose is to safeguard narrow commercial and political interests. The extension and possible expansion of this trend over the long term could have grave implications for the security and stability of Somalia.

Considering the state of emergency declared by the TFG in 2009, the continued fighting and the accompanying famine noted in the previous section, and considering the points above, it is doubtful that the central government in Mogadishu was able to control the existence of corporations on its soil. With respect to Saracen specifically, the TFG announced in January of 2011 that it was prohibiting the company’s operations anywhere in Somalia. According to the Associated Press,

524 Benjamin Powell, Interviewed on March 24, 2016.
525 Said, Interviewed on August 18, 2018.
526 SEMG 2011 Report, supra at note 493 at 20, para. 54.
527 SEMG 2010 Report, supra at note 489 at 283.
the Minister of Information in Mogadishu, Abdulkareem Jama, insisted that the decision was binding on all Somali territories and all parts of Somalia. Nevertheless, the regional Puntland government allowed Saracen to continue to operate with Mogadishu unable to enforce its decision.

The second consideration for fragility mentioned earlier inquires into the state’s ability to regulate corporations on its soil. Author James Fergusson described the judicial system and capacity of law enforcement in Puntland, where Saracen was based, during the period of the case study. Although his comments refer to the problem of piracy, they are broad enough to extrapolate to enforcing regulation on entities in general:

The lack of capacity cannot be overestimated […] and it was always very striking to me, kind of an illustration of what a really long civil war does to a country. You know, things that you take for granted like places to lock people up, had disappeared. And the courts and the whole system that you would need to try someone to bring him to justice, there were no police, there were no prisons, there were no court systems, there was nothing. It was completely uncovered space. And that was the tragedy of Somalia. They knew full well the damage that piracy was doing. They didn't like it for moral reasons and religious reasons. They could see that it wasn't doing the reputation of the country any good at all and they are very proud people and there was actually nothing they could do about it at the time because they just didn't have the capacity.

Professor Powell warned, however, that considering Somalia a “failed state” was not synonymous with the absence of law. He explained that “rules and norms that people follow, that have someone to judge them and then someone to enforce them are not synonymous with the state.” He further explained that Somalia had laws and that the traditional customary legal system of Somalia

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530 Benjamin Powell, Interviewed on March 24, 2016.
“expanded and filled the void” once the state collapsed.\textsuperscript{531} Professor Powell added that “there is at least some indication that the [customary legal system] provide[d] a tolerable level of the enforcement of the law.”\textsuperscript{532} He explained, however, that Somalia’s customary law poorly incorporates outsiders into its folds, an important distinction considering this dissertation’s focus on MNCs.\textsuperscript{533}

Alex Perry’s comments on corruption within Somalia provided further insight into conditions in the country during the case study. Perry stated that although Somalia has seen progress over the past ten years, “[…] corruption is appalling and the same kind of criminality that existed among the warlords still exists. [M]uscle still very much counts as to who you are and how you are respected and if you are able to get stuff done.”\textsuperscript{534} This aspect was echoed by Said, who explained that for Somalis, clans can impact who may operate and under what circumstance. Said further explained that those belonging to majority clans could essentially operate businesses without limits.\textsuperscript{535} While corruption was not noted as a component of fragility for the proposed attribution test, the high level of corruption in Somalia created a scenario where existing regulation need not be enforced. Perry outlined how the form of corruption has changed during the last decade:

[…] For the first time ever since 2011 you have a government in which not one of the ministers was a warlord or an ex-warlord. But, in some ways it’s a reflection that the game has changed because the warlords were only really in it for the money and now there is massive amounts of aid and development assistance on offer. The game isn’t about smash

\begin{itemize}
\item \textsuperscript{531} Ibid.
\item \textsuperscript{532} Ibid.
\item \textsuperscript{533} Ibid.
\item \textsuperscript{534} Alex Perry, Interviewed on January 18, 2016.
\item \textsuperscript{535} Said, Interviewed on August 18, 2018.
\end{itemize}
and grab, it's about wearing a suit and corrupting. But essentially, there is still a distinct lack of public service.\textsuperscript{536}

He then provided an example of how companies operated free of regulation in Somalia:

In some ways Somalia was Adam Smith's perfect dream. Because business was still working. I mean I interviewed a guy in 2007 who was a telecom entrepreneur. He had set up a whole bunch of aerials and got a mobile phone network working and actually to make an international call from Somalia it was the cheapest rate on the planet. I was asking him, I mean this was a guy who is 23 who was a graduate of Berkeley in California. I asked him so what's the difference between running a business in the West and here. And he said the commute is a pain […] because he has 14 guards for people shooting that at him, but on the other hand he pays no tax and he can stick a mast wherever he wants, whenever he wants to so he stuck one on the dome of the presidential palace, which is the highest point in Somalia.\textsuperscript{537}

Fergusson supported this by stating that “even during the highest point of the war Somalia was exporting a huge amount of mangoes and camels to Saudi Arabia. There was commerce, it was simply unregulated.”\textsuperscript{538}

Although the above notes that Somali customary law (known as Xeer) was present during the case study, it did not transfer easily to from regulating interaction between individuals to foreign corporations. Furthermore, Latitia Bader, Senior Researcher, Africa Division, Human Rights Watch highlighted that traditional methods of conflict resolution where also upended by instability in the country. Bader explained that “the whole clan system in South-Central has been completely destabilized because of the war as well, it’s no longer implementable, because clans have moved areas, dynamics, power structures have changed, and so, that’s all very complicated.”\textsuperscript{539}

\begin{flushleft}
\textsuperscript{536} Alex Perry, Interviewed on January 18, 2016.

\textsuperscript{537} Ibid.

\textsuperscript{538} James Fergusson, Interviewed on January 25, 2016.

\textsuperscript{539} Latitia Bader, Interviewed on March 20, 2016.
\end{flushleft}
Considering the above, both the state’s incapacity to control the entry of MNCs to Somalia and to regulate them points toward satisfying the proposed definition of fragility.

The final consideration to address was noted as access to justice. Bader underscored important barriers with respect to access to remedy and the absence of accountability for the acts of foreign companies in Somalia:

[Somalia has] not prioritized accountability either. Both in terms of access and Somalis knowing that there could be or there should be avenues for accountability for abuses from foreign companies and actors […] it doesn’t seem to be anyone’s priority, basically. And obviously it comes back to my concern in terms of the personnel security companies you’re talking about, we have used them. When I go to Mogadishu, I stay at a hotel, and when I move around, I’m going around with a security company. And I think, at a time where, in theory, the effort is around building accountable government structures, the proliferation – and this is not only in the private security sector, but across the board – of security forces which have similar mandates, it is very unclear who they actually report to and it is a massive problem.540

In other remarks about the Somali judicial system, one interviewee noted the confusion created by arbitrary application of the law and outdated legislation that are difficult to apply to corporate responsibility:

[…] civilian courts are not protected, and so are more unwilling to take on certain cases, especially to do with al-Shabab. But you also have civilian courts which are just not present in the towns that are vacated […] One of the problems you have across the board, is that legislation is very old. It’s the Italian Criminal Code, and it’s the Italian Military Criminal Code, and these are from a completely different era. They’re misunderstood, they’re used depending on the mood of the judge in question […]

You do have some courts that are functioning. They are using laws that are incredibly out of date, which are not made to deal with the crimes that are now relevant, and obviously terrorism is one of the big ones, but very much even issues around, whether its corporate responsibility, foreign responsibility, the legislation does not deal with those sorts of issues.541

540 Anonymous 4, Interviewed on September 15, 2018

541 Ibid.
The participant concluded by voicing general concern for institutions and the legal system in Somalia:

[Somalia is a failed state] on many levels both in terms of what exists in terms of institutions, but also on the legal front, it is absolute - the few times that I’ve had to do research where I’ve tried to understand the legal system - it has been an absolute headache. And the problem is, you try and understand, but it’s also not what the courts stick to.\textsuperscript{542}

In conclusion to this section, there existed pockets of different forms of norms between 2010 and 2012 in Somalia. The accounts provided above nevertheless show that Somalia had very little control over corporate entities entering the country. They also show that when law was present, it was difficult to apply to MNCs and was often paired with high levels of corruption. Somalia is therefore considered a fragile state for the purpose of the attribution test. With this determined, the following section addresses the alleged violation by Saracen.

7. Violation of international obligation by Saracen

7.1 Introduction

In January 1992, the UNSC enacted an arms embargo on Somalia, obliging all UN member states to implement complete bans on the delivery of weapons and military equipment to the country.\textsuperscript{543}

In 2011 and 2012, the SEMG noted embargo violations by France, Kenya, Sudan, the US, Ethiopia, Djibouti, Eritrea, South Africa, Uganda, UAE, Egypt, France, Germany, Malaysia, Saudi Arabia,

\textsuperscript{542} Ibid.

\textsuperscript{543} Resolution 733 (1992) Somalia, SC Res. 733, UN SC, UN Doc. S/RES/733 (1992) para 5 [SCR 733 (1992)] states that: “…all states shall, for the purposes of establishing peace and stability in Somalia, immediately implement a general and complete embargo on all deliveries of weapons and military equipment to Somalia until the Council decides otherwise.”
Kuwait, Jordan, Iran, Sudan, and Turkey. In addition to states, the monitoring group alleged that a number of PMSCs had violated the embargo for failing to obtain authorization from the SEGM Committee pursuant to SCR 751 (1992) and 1907 (2009). The following sections assess the legal aspects of the arms embargo breach by Saracen including what international obligations were violated, which actors were involved, and how the acts of the company could be attributable to states under the scenarios discussed above. The first section addresses whether a violation of an SCR can be considered a violation of an international obligation under state responsibility. The specific SCR violations by Saracen are subsequently discussed. Finally, the premise of attribution of Saracen’s acts to the UAE and South Africa are examined under a reading of article 8 ASR, in consideration of the rights approach, and under the proposed emerging approach.

7.2 Breach of Security Council resolutions as violations of international obligations

The details of the weapons embargo violation by Saracen were cited above. The first aspect to determine is whether a violation of UNSC sanctions are considered a breach of an international obligation. Recall from section three of chapter one that the obligations subject to state responsibility comprise of all the primary obligations of states under international law. A common classification of SCRs is to recognize that they are the result of the power given to the UNSC under Article 41 of the UN Charter. The article stipulates that the UNSC may call upon members to apply

544 SEMG 2011 Report, supra at note 493 at 282.

545 Ibid. at 21, para. 59.

546 In May 2010 and February 2011 Saracen/Sterling provided military training, equipment, and vehicles to a military force on Somali territory during an arms embargo established by the UN. The company deployed armed foreign security personnel in an operation that became the largest externally supported military activity in Somali other than AMISOM, SEMG 2010 Report, supra note 489 at 273.
measures other than the use of force to give effect to its decisions.\textsuperscript{547} While the Commentaries do not specifically refer to SCRs, they state that because the UN Charter is a treaty, its obligations are “from the point of view of their origin, treaty obligations.”\textsuperscript{548} Moreover, Article 25 of the UN Charter stipulates that all member states agree to carry out decisions of the UNSC in accordance with the UN Charter.\textsuperscript{549} Thus, breaches of an obligation set out in a SCR would, in turn, be a violation of Article 25. As a result, SCRs should simply be considered a source falling within treaty law under Article 38 of the ICJ Statutes. Stefan Talmon supports this view by suggesting that “the fact that the ICJ has been able to apply resolutions of the Council without remarking upon the incompleteness of Article 38 strongly suggests that binding Council resolutions [are] regarded as coming within the scope of the traditional sources of international law.”\textsuperscript{550}

\begin{footnotesize}
\begin{itemize}
\item\textsuperscript{547} UN Charter, supra note 40 at Art. 41.
\item\textsuperscript{548} ASR and Commentary, supra note 26 at 56, Art. 12, para. 8.
\item\textsuperscript{549} UN Charter, supra note 40 at Art. 25.
\item\textsuperscript{550} Stefan Talmon, “The Security Council as World Legislature” (2005) 99:1 The American Journal of International Law, 175 at 179; Others see resolutions as being independent from their founding organizations. Skubiszewski, for one, explains that enactment of law by international organizations should not be classified as treaty law for, although states provide consent under Article 25, the resolutions themselves are not subject to the law of treaties as the founding Charter is. Thus, per Skubiszewski, the fact that resolutions are removed from the components that make up treaties and are not subject to the same “rules” disqualifies them from being classified as a treaty source. Nevertheless, this second approach does not contest that resolutions themselves are a source of international law – indeed, according to Skubiszewski they are a “new source of law”, Krzysztof Skubiszewski, “International Legislation”, in Rudolf Bernhardt ed., Encyclopedia of Public International Law: International Organizations In General Universal International Organizations And Cooperation, Inst 5 (Amsterdam: North-Holland Publishers, 1983) at 102.
\end{itemize}
\end{footnotesize}
7.3 Security Council resolutions in question

In its 2011 report, the SEMG voiced concern about the failure of parties, including Saracen, to abide by obligations set out in embargo resolutions on Somalia by supporting the PMPF. The relevant SCRs include SCR 733 (1992), SCR 1425 (2002), and SCR 1844 (2008). The original arms embargo resolution for Somalia, SCR 733 (1992), remains in place today and is the base upon which subsequent embargo resolutions were built. Although brief, the resolution is clear and its applicability to all states indisputable. Paragraph five of the resolution obliges states to halt delivery of weapons to Somalia. It does not, however, explicitly cover precautions states should take to stop third parties on their territory from delivering weapons.

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5. Decides, under Chapter VII of the Charter of the United Nations, that all states shall, for the purposes of establishing peace and stability in Somalia, immediately implement a general and complete embargo on all deliveries of weapons and military equipment to Somalia until the Council decides otherwise.

Ten years later, SCR 1425 (2002) further defined the obligations of the embargo. The resolution added a ban on financing of acquisition and delivery of weapons and broadened the prohibition of arms transfers to include a ban on training related to military activities. The prohibition of financing in paragraph one shows an attempt by the UNSC to hold states or entities circumventing SCR 733 by remaining at arms length of the actual importing responsible. Moreover, the terms “direct or indirect” in paragraph two imply wider state obligations as compared to SCR 733:

1. Stresses that the arms embargo on Somalia prohibits financing of all acquisitions and deliveries of weapons and military equipment;

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551 SEMG 2011 Report, supra note 493 at 236 (footnote omitted).

552 Although SCR 1772 (2007) addresses the arms embargo it has been excluded from the list as it was not directly relevant to the Saracen/Sterling case. SCR 1772 allowed for an exception to the embargo in order to supply AMISOM.

553 SCR 733 (1992), supra note 543.
2. Decides that the arms embargo prohibits the direct or indirect supply to Somalia of technical advice, financial and other assistance, and training related to military activities.\textsuperscript{554}

In 2008, under SCR 1844 (2008), the UNSC added yet more obligations. The inclusion of “shall take the necessary measures” in SCR 1844 significantly increases the obligations of states. Whereas states were to refrain from acting under the previous SCRs, 1844 obliges them to take positive steps to ensure that the supply of weapons, training, and financial assistance do not occur:

7. Decides that all Member states shall take the necessary measures to prevent the direct or indirect supply, sale or transfer of weapons and military equipment and the direct or indirect supply of technical assistance or training, financial and other assistance including investment, brokering or other financial services, related to military activities or to the supply, sale, transfer, manufacture, maintenance or use of weapons and military equipment, to the individuals or entities designated by the Committee pursuant to paragraph 8 below;

8. Decides that the provisions of paragraphs 1, 3 and 7 above shall apply to individuals, and that the provisions of 3 and 7 above shall apply to entities, designated by the Committee;

    (a) as engaging in or providing support for acts that threaten the peace, security or stability of Somalia, including acts that threaten the Djibouti Agreement of 18 August 2008 or the political process, or threaten the TFIs or AMISOM by force;

    (b) as having acted in violation of the general and complete arms embargo reaffirmed in paragraph 6 above;

    (c) as obstructing the delivery of humanitarian assistance to Somalia, or access to, or distribution of, humanitarian assistance in Somalia.\textsuperscript{555}

A state’s failure to implement one of the resolutions above would constitute a violation of an international obligation, leading to an IWA and triggering state responsibility.


7.4 Involvement of local and national government

As a final preliminary point, the involvement of the local and national governments of Somalia with Saracen’s mission is briefly addressed. Counsel for SCS, Saracen’s successor, claimed that weapons waiver certificates were communicated to the UN by both Puntland and the TFG, with both jurisdictions approving the import and therefore providing an exception to the embargo of weapons for SCS.\footnote{Letter from Steptoe and Johnson LLP on behalf of its client, Sterling Corporate Services, to Ambassador Hardeep Singh Puri, Chairman, United Nations Security Council Committee, concerning Somalia and Eritrea, July 31, 2012.} This was not the case, however, for the earlier actions of Saracen.\footnote{Robert Pelton, Interviewed on March 27, 2017; Anonymous 1, Interviewed on April 4, 2017.} Statements from TFG representatives also demonstrate that the central government did not support Saracen’s involvement in Puntland.\footnote{Supra note 528.} The SEMG confirmed that the PMPF reported to the President of Puntland.\footnote{SEMG 2011 Report, supra note 493 at 22, para 63; Anonymous 4, Interviewed on September 15, 2018.} Yet the SEMG further explained that the PMPF “has no basis in Puntland’s constitution or domestic legislation, operating instead as an elite force outside any legal framework, engaged principally in internal security operations, and answerable only to the Puntland presidency.”\footnote{SEMG 2011 Report, \textit{ibid.} at 236 para 4.} As demonstrated above, the Mogadishu-based central government at the time specifically prohibited Saracen from operating within the country but controlled little more than parts of the capital.\footnote{As noted above by Benjamin Powell, the central Somali government failed to control any significant geographic portion of the county. Benjamin Powell, Interviewed on March 24, 2016.}
To better illustrate the points discussed throughout this dissertation, two scenarios are discussed below. The first scenario considers the latest SCRs in its analysis of the violation of the arms embargo by Saracen. The second scenario considers the hypothetical case that only SCR 733 (1992) exists. This second scenario permits a better discussion of the arguments presented throughout the paper, specifically the aspect of applying an attribution test that is tailored to account for the violations of international obligations by MNCs in fragile states.

7.5 Scenario 1: May 2010 and February 2011 violations of arms embargo by Saracen

SCR 1844 (2008) provides an easier target for the case study in the form of more home state obligations that hold higher burdens for states. Given that financing, advice, and assistance by states are prohibited in SCR 1844 (2008) as in the more recent SCRs and given the broader need for states to “take all necessary measures” to prevent violations, the latest SCR explicitly enforces positive obligations on states. Whereas under SCR 733 (1992) states were required to refrain from acting, under 1844 they could incur state responsibility for not taking measures to ensure the effectiveness of the UNSC sanction.

i) Assistance, training, and supply of weapons

Saracen’s violations of the arms embargo included not only the importing of a list of weapons and military material, but also the training of the PMPF. SCR 1844 (2008) stipulates in paragraph 7 that members “shall take the necessary measures to prevent the direct or indirect supply, sale or transfer of weapons […] and the direct or indirect supply of technical assistance or training […] related to military activities or to the supply, sale, transfer, manufacture, maintenance or use of weapons and military equipment.” Paragraph 8, for its part, states that the above applies to both
individuals and entities that support acts that threaten the peace, security, or stability of Somalia or that have acted in violation of the general and complete arms embargo.\textsuperscript{562} This part of the resolution creates primary obligations that risk being breached by states that take insufficient measures to prevent weapons transfers from occurring or assistance or training of groups from taking place.

Determining the country of attribution is not immediately clear in Saracen’s case. Saracen was registered in 2010 in Lebanon by a Ukranian national of Palestinian origin, Jamal Muhammad Balassi, who serves as both Chairman of the Board of Governors and Managing Director of the company.\textsuperscript{563} Balassi’s two partners claimed to know nothing of Saracen’s activities. A translation of a file on Saracen from the Ministry of Justice of Lebanon indicates that Balassi’s partners had records for bad cheques and breaching fiduciary duty.\textsuperscript{564} According to the SEMG, Balassi was also employed by a consultancy company linked to Erik Prince and registered a similar subsidiary company in Liberia to perform purchases for Saracen International.\textsuperscript{565} Accordingly, it is appropriate to acknowledge that the Lebanese wing of Saracen was set up as a shell company. Focusing on the state in which the company’s center of management existed it is therefor more fitting in this case. The controlling wing of Saracen for the Puntland operation was based in South Africa and had South African directors (Lafras Luitingh and Bill Pelser, veterans of the PMSC industry).\textsuperscript{566} Not only did the company import enough military equipment to support a force of

\textsuperscript{562} SCR 1844 (2008), \textit{supra} note 555.

\textsuperscript{563} SEMG 2010 Report, \textit{supra} note 489 at 273.

\textsuperscript{564} A copy of the translation can be viewed in the annex of the SEMG’s 2010 Report, \textit{Ibid.} at 288.

\textsuperscript{565} \textit{Ibid.}

\textsuperscript{566} The SEMG stated in its 2011 report that Saracen and Sterling Corporate Services operations ultimately originate in South Africa. SEMG 2011 Report, \textit{supra} note 493 at 259, para 72.
1000 soldiers, it was responsible for the training and operations of the PMPF. While these facts create a presumption towards the responsibility of South Africa for allowing an entity to breach the resolution, it can be rebutted though a verification of whether the state took measures to prevent the occurrence of the acts is needed. The term “necessary measures” does not impose a guarantee that an event will not occur. All South Africa would need to show to avoid committing a violation of an international obligation is that it took all reasonable measures to keep the incident from occurring.

The fact that South Africa is one of few countries in the world that has legislation obliging PMSCs to register in a national database and forbids both legal and natural citizens from participating in combat for private gain is a significant aspect when considering whether necessary measures have been met. In response to the involvement of South African private soldiers in Iraq, South Africa reinforced its Regulation of Foreign Military Assistance Act (Act No. 15 of 1998) by strengthening the extraterritorial application clauses in the Prohibition of Mercenary Activities and Regulation of Certain Activities in Country of Armed Conflict Act of 2006. Under this legislation, PMSCs in South Africa must be licensed to operate in accordance with an export licensing regime and must receive permission to accept contracts outside of the country. The act stipulates its prohibition and extraterritorial jurisdiction clauses as follows:

Prohibition of Mercenary Activity

2. (1) No person may within the Republic or elsewhere—

(a) participate as a combatant for private gain in an armed conflict;

(b) directly or indirectly recruit, use, train, support or finance a combatant for private gain in an armed conflict;

(c) directly or indirectly participate in any manner in the initiation, causing or furthering of—

(i) an armed conflict; or

(ii) a coup d’état, uprising or rebellion against any government; or

(d) directly or indirectly perform any act aimed at overthrowing a government or undermining the constitutional order, sovereignty or territorial integrity of a state.

(2) Any person who contravenes subsection (1) is guilty of an offence.

Prohibition and regulation of certain assistance or rendering of services in country of armed conflict or regulated country

3. (1) No person may within the Republic or elsewhere—

(a) negotiate or offer to provide any assistance or render any service to a party to an armed conflict or in a regulated country, unless such a person has been granted authorisation in terms of section 7 to negotiate or offer such assistance or service;

(b) provide any assistance or render any service to a party to an armed conflict or in a regulated country, unless such assistance is provided or such service is rendered in accordance with an agreement or arrangement authorised in terms of section 7;

(c) recruit, use, train, support or finance any person to provide assistance or render any service to a party to an armed conflict or in a regulated country, unless such person has been authorised in terms of section 7 to recruit, use, train, support or finance such a person;

(d) recruit, use, train, support or finance any person to provide assistance or render a service to a party to an armed conflict or in a regulated country unless such a person is recruited, used, trained, supported or financed in accordance with an agreement or arrangement authorised in terms of section 7; or

(e) perform any other act that has the result of furthering the military interests of a party to an armed conflict or in a regulated country, unless such a person has been authorised in terms of section 7.

(2) Any person who contravenes subsection (1) is guilty of an offence.

[...]
Extra-territorial jurisdiction

11. (1) Any act constituting an offence under this Act and that is committed outside the Republic by—

(a) a citizen of the Republic;

(b) a person ordinarily resident in the Republic;

(c) a company incorporated or registered as such under any law, in the Republic; or

(d) any body of persons, corporate or unincorporated, in the Republic, must be regarded as having been committed in the Republic and the person who committed it may be tried in a court in the Republic which has jurisdiction in respect of that offence.

(2) (a) Any act that constitutes an offence under section 2 of this Act and that is committed outside the Republic by a person, other than a person contemplated in subsection (1), against the Republic, its citizens or residents must be regarded as having been committed in the Republic if that person is found in the Republic.

(b) A person contemplated in paragraph (a) may be tried for such an offence by a South African court if there is no application for the extradition of the person or if such an application has been refused.

(3) Any offence contemplated in subsection (1) or (2), is, for the purpose of determining the jurisdiction of a court to try the offence, regarding as having been committed at—

(a) the place where the accused is ordinarily resident;

(b) the accused's principal place of business; or

(c) the place where the accused was arrested.

(4) Where a person is charged with conspiracy or incitement to commit an offence or as an accessory after the fact, the offence is regarded as having been committed not only at the place where the act was committed, but also at every place where the conspirator, inciter or accessory acted or in the case of an omission, should have acted.\(^{568}\)

The above therefore provides a *prima facie* defence for South Africa in a case where it is accused of violating SCR 1844 (2008). Of course, whether South Africa enforces the legislation must be taken into consideration. Some cases have been heard before the South African Constitutional

\(^{568}\) Extraterritorial aspects related to companies have been underlined by the author.
Court, yet most prosecutions have been settled through plea bargains. Moreover, the licensing authority has issued relatively few permits compared to the increasing number of South African PMSCs operating outside of the state.\textsuperscript{569} Regardless of the existing legislation, the SEMG was unsatisfied with South Africa’s efforts noting in their 2011 report that:

71. During the course of its mandate, the Monitoring Group has noted that technical assistance, vehicles, material and equipment provided to the PMPF in Puntland originated from, or transited, ports and airports located in the UAE, Uganda, Ethiopia and South Africa. The Monitoring Group is unaware of any action taken by the governments concerned to fulfil their obligations under resolution 1844 (2008) by preventing such activities.

72. This is particularly disturbing with respect to South Africa, from which Saracen/SCS operations ultimately originate. The “Prohibition of Mercenary Activities and Regulation of Certain Activities in Country of Armed Conflict Act, 2006” of the Republic of South Africa completely prohibits, in paragraph 2, any person to “participate as a combatant for private gain in an armed conflict” or any person to “directly or indirectly recruit, use, train, support or finance a combatant for private gain in an armed conflict” and applies to all South African citizens and residents. The Monitoring Group therefore urges the South African Government to determine not only whether SCS/Saracen’s activities may constitute a violation of applicable Security Council resolutions, but also whether they constitute potential violations of domestic South African law.\textsuperscript{570}

Because of the necessary measures threshold described above, the state is not expected to net all scenarios. However, while South Africa is at the forefront of extraterritorial legislation regulating PMSCs, the timid application of the law keeps it from contributing its full potential to preventing acts such as those of Saracen. For this reason, even under consideration of lower liability standards, South Africa should not be considered to have taken the necessary measures (i.e. all reasonable measures) to prevent violations of the embargo.

\textsuperscript{569} Taljaard, \textit{supra} note 567 at 174.

\textsuperscript{570} SEMG 2011 Report, \textit{supra} note 493 at 259, para 71 and 72.
The UAE could also find itself exposed given the transfer of registration of the company under SCS in late 2011 and given the continued training of the PMPF. Counsel for SCS stated that the company was “incorporated pursuant to the rules of the Dubai Silicon Oasis Authority (DSOA) [and that] SCS received from the DSOA both a certificate of formation (registration number DSO-FZE-0132) and a service license (license number 541).”\(^{571}\) The law firm also insisted that permission from the UN was received for the training of the PMPF by SCS.\(^ {572}\) If this was not the case, the complete absence of any precautions by the UAE would confirm its violation of the international obligation set out under the SCR.

**ii) Financing**

The UAE’s interest in Puntland is allegedly linked to the economic benefits for the Gulf state of having control of the Gulf of Aden.\(^ {573}\) While some contest the claim that the UAE financed the 2011 weapons transfers, circumstantial evidence and interviews support the theory that the UAE was financially involved before Saracen transferred its shares to Dubai based SCS.\(^ {574}\) Moreover, if the link between the weapons purchase and the UAE is unconvincing, the country nevertheless violated the second paragraph of SCR 1425 (2002) by providing financial assistance to “to military activities”.\(^ {575}\) This assertion is consistent with the view adopted by the SEMG. While the material

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\(^{571}\) Steptoe and Johnson LLP, *supra* note 556.

\(^{572}\) *Ibid.*


\(^{574}\) Robert Pelton, Interviewed on March 27, 2017.

size of the Puntland force (described above) was impressive, the amount of the contribution and the temporal participation of the UAE was proof of substantial financial backing. Though concrete numbers are difficult to confirm, James Bridger and Jay Bahadur claim that approximately fifty million dollars was given in start-up funds with monthly payments of 1.2 million dollars continuing after June 2012, when Saracen became SCS. In their 2012 report, the SEMG quoted the sum of “tens of millions of dollars to establish, train and equip” the force. While the government of the UAE officially denied involvement, the funds to Saracen allegedly flowed through an Islamic charity fund (zakat) with the donations from high ranking UAE state officials, including Crown Prince Sheikh Mohammed bin Zayed Al Nahyan (who was also the commander of the UAE armed forces). Maritime security consultant James Bridger traces the UAE’s involvement from the initial hiring of Saracen in 2010, through its transformation to SCS, and finally to its continued support of the force post-SCS (after a brief halt in 2012). While Bridger does not disclose the precise amounts of the contribution, he states that the UAE’s support is what allowed Saracen to grow the PMPF into a significant force, as opposed to the previous private security failures in

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576 Bridger & Bahadur, supra note 497.

577 SEMG 2011 Report, supra note 493 at 200, para 12.

578 Robert Young Pelton “Puntland Marine Force in Disarray”, supra note 575; SEMG 2011 Report, ibid. at 22. The SEMG also stated in their 2011 report that the UAE denied funding the PMPF “[d]espite evidence to the contrary” see para 3 at 236.

Thus, the financial support from the UAE was clearly vital to the force’s success. In its criticism of the UAE’s involvement, the SEMG described the force as a “flagrant breach of the sanctions regime on Somalia, characterized by a disturbing lack of transparency, accountability or regard for international law.”

The IWA in this case is therefore the violation of SCRs 1425 (2002) and 1844 (2008) by the UAE. Since these are direct violations by the state, no instructions, directions, or control of Saracen by the UAE need be discussed nor must aspects of due diligence on the territory of the home state be addressed. The temporal aspects of the violations are satisfied as both resolutions were clearly in force during the time the financial support was given. In discussing Saracen and the support of the UAE in its 2011 report, the SEMG clearly demonstrated its disapproval of the project. The possibility exists that, once an IWA becomes public, a state will take corrective measure on its own. In cases where the behaviour persists, other states may act to secure cessation of the illegal act and reparation for damages. Finally, it is important to note that not only the injured state may do so. The Commentaries states that it is “necessary to recognize that a broader range of states may have a legal interest in invoking responsibility and ensuring compliance with the obligation in question.” In fact, depending on circumstances and the type of breach, there are cases where all states may invoke responsibility, and this regardless of whether they have been injured by the

580 Ibid.
581 SEMG 2011 Report, supra note 493 at 22, para 64.
582 Ibid. at 236, para 5.
583 ASR and Commentary, supra note 26 at 254.
violation. This is important in cases of fragile states as there may simply not be the institutional means for an injured state to raise the issue at the international level.

7.6 Scenario 2: Only applying SCR 733 (1992)

To better incorporate the analysis of chapters four to six into the case study, the hypothetical situation that only SCR 733 (1992) exists is applied. Regardless of the absence of the other SCRs, there would still be a violation of the arms embargo and a breach of an international obligation. The violation, however, would have only been due to the delivery of weapons and military equipment to Somalia rather than financing or assistance. Given that Saracen, a company, committed the act, the question of whether the violation is attributable to a state and, in consequence, considered an IWA becomes a matter to investigate. The issue will be addressed in three parts: 1) by applying the scenario following the ASR and its Commentaries as outlined in chapter four, 2) by applying the rights approach from chapter five, and 3) by applying the contemporary approach proposed in chapter six.

i) Applying attribution under the ASR

States allegedly involved in the arming of Saracen in Puntland include the original home state of the company, South Africa, and the state that funded the project, the UAE. As explained to above, Saracen has subsidiaries in numerous countries. Although the company that operated in Somalia was registered in Lebanon, its operations were mainly run out of South Africa and its

\[\text{Ibid.}\]
representatives in Puntland were long-time South African employees of the company. The UAE’s funding of Saracen was also detailed in the previous section.

It is clear that there was no evidence that Saracen could be considered an organ of the states of South Africa or the UAE under Articles 4 or 5, leaving attribution to be considered under Article 8. For attribution under Article 8 to apply, instructions, directions, or control by a state over an entity must be shown. There is no indication of instructions or directions from either state. For control to be present under the ASR, the higher degree of effective control would need to be present.\textsuperscript{585} Keeping in mind the \textit{Nicaragua} decision where the court stated that participation, even if decisive in the “financing, organizing, training, supplying and equipping” of an entity would be insufficient without enforcing the perpetration of the specific acts, it is clear the UAE’s involvement could not link it to the violation under Article 8.\textsuperscript{586} Furthermore, as cited above, the Commentaries highlighted that simply having a company registered in its territory is not a consideration for responsibility.\textsuperscript{587} Thus, no responsibility can be attributed to South Africa for the sole reason that the Puntland operation was effectively being run by the South African branch of the company. The high degree of control required under the ASR means that even funding the entire operation does not bring a state within range of state responsibility. It is telling that the UNSC felt compelled to pass several embargo resolutions over the years, specifying additional obligations

\textsuperscript{585} That is, the issuance of directions concerning specific operations, the ordering of those operations, or the enforcement of each specific operation.

\textsuperscript{586} \textit{Nicaragua v. United States of America} (Merits), \textit{supra} note 142 at para 115.

\textsuperscript{587} ASR and Commentary, \textit{supra} note 26 at 112 para 6, Commentary to Article 8.
that it considered part of the embargo.\textsuperscript{588} This attests to the value of positive obligations of states in relation to fragile jurisdictions.

\textbf{ii) Responsibility under the rights-based approach}

The rights approach discussed in chapter five demonstrated a limited potential for positive obligations of human rights law to apply outside of the territory of the home state. However, its restriction to rights-based norms demonstrates one of the advantages of considering state responsibility, which incorporates all primary obligations. It would be difficult to argue that the violation of the arms embargo could somehow be considered to fall under an aspect of human rights protection with specific repercussions on citizens in Somalia. In the case study at bar, any violation by Saracen of human rights law would have come from the training of the PMPF or their operations against piracy. Even if it were shown that rights abuses occurred, no control existed on behalf of the UAE or South Africa. Without control over an individual or territory, it would be impossible to argue that either state had positive obligations within a jurisdiction that included Puntland. While human rights law can be considered a forerunner for the development of positive obligations of a home state, its jurisdiction remains difficult to extend into a fragile state. Under both the ASR and rights approaches, the breach of the SCR would not engage state responsibility.

\textbf{iii) Attribution under the emerging approach}

Following the adjusted attribution criteria proposed in chapter six, aspects to be considered are: i) the legal personality of the offender; ii) the determination of the home state; iii) the fragility of the

\textsuperscript{588} For example, in Resolution 1425(2002), the UNSC incorporates financing into the definition of the pre-existing arms embargo rather than adding it as a new obligation: “Stresses that the arms embargo on Somalia prohibits financing of all acquisitions and deliveries of weapons and military equipment”.

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host state; iv) the link between the violating MNC and the home state; and v) any due diligence steps taken by the home state.

a) South Africa

It has been established that Saracen violated the arms embargo established under SCR 733 (1992). It was also established above that the Puntland operation was controlled by South African based Saracen under the direction of South African citizens, thus establishing South Africa as the home state. The fragility of the host state was also outlined above. The central Somali government’s incapacity to control the entry of MNCs to Somalia and to regulate them, as well as an absence of effective remedy in cases of violation of any existing norms led to the conclusion that Somalia should be considered a fragile state for the purpose of attribution.

The next step entails considering the nexus between Saracen and South Africa. Rather than consider aspects of effective control as done in the ASR scenario, under the emerging approach, the fact that the violation occurred in a fragile state leads to an evaluation of the “involvement” between the home state and Saracen. The SEMG’s criticism of South Africa for not intervening to inhibit Saracen’s activities was outlined in section 7.5 above. Yet this alleged lack of action by the state does not contribute to attribution as no evidence of state support provided by South Africa to Saracen was uncovered. The only aspect coming close to assistance is found within an SEMG report that notes the use of South African ports and airports during the shipping of the military equipment that violated the embargo.589 Cleary, this does not amount to support. Furthermore, no

589 See quote in section 7.5 i) above. SEMG 2011 Report, supra note 493 at 259, para 71 and 72.
evidence of use of government programs in the form of fiscal incentives or export promotion similar to the programs presented in chapter six by Saracen were found.

Given that no involvement on behalf of South Africa with Saracen was found, due diligence steps taken by the home state need not be addressed. Had Saracen benefited from assistance from South Africa, the existence of the South African legislation described section 7.5 above would have been a significant aspect to consider. The legislation’s requirement of registration of PMSCs in a national database and the proscription of legal and natural citizens from participating in combat for private gain, if applied effectively, could be considered noteworthy due diligence steps taken by the home state. In conclusion to this subsection, following the emerging criteria presented in chapter six, the violation of the arms embargo established under SCR 733 (1992) by Saracen could not be attributable to South Africa.

b) The United Arab Emirates

In its 2011 report, the SEMG noted concern surrounding the operations of SCS and the failure of implicated states to take measures “to prevent this sustained, large-scale violation of the Somalia arms embargo.”590 Recall that in 2011, Saracen’s assets, personnel and operations were transferred to Dubai registered SCS and that both incarnations of the company supplied military training, technical assistance and support to the PMPF.591 Counsel for SCS claimed they had filed importation certificates with the UN and Somalia,592 disputing the SEMG’s view that SCS’s

590 SEMG 2011 Report, supra note 493 at 8.
591 Ibid. at 236.
592 Steptoe and Johnson LLP, supra note 556.
involvement in developing the PMPF constituted a violation of the arms embargo on Somalia. The letter noted that the SEMG claim rested on a view that the project was not properly “notified” to the UN in accordance with UN procedures, to which the law firm disagreed:

As a substantive matter, the SEMG cannot and does not dispute that SCS and Puntland representatives provided innumerable briefings to the UN and other stakeholders. Nor does the SEMG dispute that, as detailed below, Puntland and Somalia’s central government (the Transitional Federal Government, or “TFG”) each provided formal “notifications” to the UN regarding the PMPF project, and did so in accordance with UN procedures. Rather, the SEMG suggests that a formal notification had to originate from the United Arab Emirates (UAE) because the UAE funded the PMPF project. This hyper-technical view is simply inconsistent with relevant UN rules and contrary to the UN’s larger objectives with respect to Somalia.\(^{593}\)

For the purpose of the case study, the SEMG’s view that the UAE’s failure to properly notify the UN entailed a violation of the arms embargo is adopted. An interview participant supported the SEMG’s assertion by stating that “no one understands why the UAE did not communicate the certificates [to the UN]."\(^ {594}\) Applying the emerging attribution criteria once again, it is clear that SCS operated as a MNC, having been registered in Dubai and having operated in Somalia. The earlier argument that factors in addition to country of incorporation should be taken into account when determining the home state makes the determination of SCS’s home state more nuanced. It may at first seem inconsistent that Lebanon was not considered a home state for Saracen’s operations but that the UAE is for SCS. The argument in support of this variance is the significant support provided to the company’s operations by the UAE and the country’s initial involvement in establishing the PMPF. The SEMG noted in its 2010 report that the initiation of private security support to Puntland occurred at a 2009 meeting involving the owner of Saracen South Africa, its

\(^{593}\) \textit{Ibid.}

\(^{594}\) Anonymous 1, Interviewed on April 4, 2017.
CEO, Erik Prince, and officials from Abu Dhabi in the UAE. While the registration of Saracen and SCS in Lebanon and Dubai respectively was possibly meant to skirt South Africa’s PMSC legislation, the UAE was nevertheless heavily involved in the operations of SCS. This is in contrast to Lebanon, where the country’s Public Prosecutor investigated Saracen upon learning of the arms embargo violation. The registration of SCS in Dubai is therefore considered sufficient to identify the UAE as a home state.

With the UAE identified as a home state, and with the fragility of Somalia already shown, the following step is to consider the link between the violating corporation and the home state. Unlike the case of South Africa, the link between the SCS and the UAE was substantial. In fact, section 7.5 ii) above demonstrated that the UAE’s support was determinative of the project. Recall the figures involved from section 7.5, including fifty million dollars in start-up funds and monthly payments of 1.2 million dollars. Given the support, the final criterion is to determine whether the UAE took any due diligence measures. The one due diligence measure the UAE could have taken to keep SCS from violating the arms embargo was the relatively easy process of properly notifying the UN of the arms transfer. In addition to not doing this, no other evidence of due diligence efforts was found with respect to the UAE. Given that the IAW by SCS occurred in a fragile state, that the UAE’s financing was seminal to Saracen’s operations, and that no diligence steps were taken by the UAE, the embargo violation committed by Saracen can be attributed to the UAE under the emerging attribution criteria.

595 SEMG 2010 Report, supra note 489 at 274.

596 Ibid. at 288.

597 Bridger & Bahadur, supra note 497; SEMG 2011 Report, supra note 493 at 200, para 12.
In conclusion to this section, applying the emerging approach to a case study demonstrates its feasibility but also raises its weaknesses. Determining the home state could be problematic in certain instances, especially when dealing with smaller companies attempting to cloud their operations. Further study into what should be taken into account for home state determination would be useful. Such studies could include investigation into aspects such as whether more than one state could be considered a home state. Also, further study into how countries that have contributed to a scenario but not considered a home state is needed. Whether or not such states could be found responsible under complicity would provide for informative follow-up work.

The determination of fragility can also benefit from some refinement. Indeed, in consideration of TWAIL, finding the right balance between encouraging states to provide regulation where normative gaps have been identified and avoiding overbreadth and violating the sovereignty of weaker states is a delicate task. While some may argue for more interventionist approaches, this dissertation promotes a more conservative approach, relying on true inability of a host state to act rather than encompassing instances where host states are simply unwilling to do so.

7. Conclusion

The chapter began by outlining why Somalia was chosen for the case study. It was explained that Somalia provided a good example of a struggling state with MNCs on its territory and that, in keeping with TWAIL, the country deserved to have attention directed towards its struggles. The chapter then explained how international law silently supports the use of PMSCs through a TWAIL analysis of the industry. The fragility of Somalia and the complexity of a mix of norms and colonial
legal influences was subsequently demonstrated mainly through the use of interviews. The criteria for what constitutes a fragile state from chapter six was applied to Somalia, leading to the determination of fragility for the period of the case study from 2010 to 2012. Violations of various UN arms embargos by the PMSC Saracen/SCS were then considered. In order to isolate the fact pattern to better apply the model developed in chapter 6, the ASR approach, rights-based approach, and emerging approach were considered under the arms embargo from 1992. The chapter concluded that no attribution to any state would have occurred under the ASR and under the rights-based approach. The emerging approach saw attribution occur with respect to the UAE due to the country’s overwhelming financial support of SCS and lack of due diligence measure.

Somalia provided a complex scenario. The difficulty of assessing what norms existed during the case study, the number of countries involved in the IWA considered, and the added challenge of applying SCRs culminated in a complicated set of factors. Indeed, a case study of human rights abuses by an extraction company, for example, would likely have provided a simpler fact pattern and been more appropriate to test the true validity of the emerging approach. Nevertheless, a benefit of choosing the above scenario lay in its demonstration of the wide net that state responsibility can cast. It bears repeating that while determining the right attribution test is challenging, state responsibility has the advantage of considering all primary obligations of law.

The proposed test would benefit from more development, reflection, and precision. Nevertheless, the principles they are conceived from were not arbitrarily chosen and are discussed at length above. Still, it is important to stress that, no matter what test is adopted, deciding bodies should consistently be returning to examine the status of customary law.
Finally, it also bears noting that between 1992 and present, the UNSC added positive obligations to its sanctions to make the Somali arms embargo more effective. The embargo began by simply proscribing the delivery of weapons and military equipment by member states. However, the UNSC was compelled to include more extensive positive obligations on states including the obligation to take necessary measures to keep individuals or entities from financing or advising groups. While all cases differ, the changes reinforce the merits of states taking positive measures to prevent possible violations of law by entities under their power – something home states would be obliged to do in order to protect fragile states under the contemporary approach.
CHAPTER 8 – Conclusion

1. Introduction

This dissertation approached a normative problem from a TWAIL perspective in an effort to identify reasons for the problem and to propose a solution that would contribute to equality within international law. It explained features of the existing system of international law, the limits of the law’s protection, as well as changes that could improve the system. Its analysis was therefore based in both descriptive and prescriptive normative elements. Ultimately, the dissertation advocated in favour of a more equitable future for international law while grounding its solution in existing normative features. It revealed that the draft articles developed by the ILC were ill-equipped to deal with the growing number and strength of MNCs. It further revealed that the same draft articles played a critical role in stunting the natural development of CIL and the evolution of norms that have the potential of influencing the legislative behavior of states toward their MNCs. The importance of the dissertation’s revelations is not only based in its advocacy toward closing a normative gap, but in doing so in a manner that negates an application of international law that favours the states of the Global North. This conclusion first recaps the main points of the seven chapters. It then reviews TWAIL’s contribution to the dissertation, discussing both the benefits and drawbacks of using the method. A summary and analysis of key findings of the dissertation is then performed before outlining potential applications of the research findings. Finally, the conclusion closes by suggesting future directions for research in the field.
2. Summary of the dissertation and conclusions regarding the goals presented in the introduction

The dissertation began by outlining the significance of the problem at hand, citing concern over human rights abuses by MNCs in fragile states. It stated its intent to show: 1) how international law contributes to the impunity of MNCs for such violations, and 2) whether an equitable application of the doctrine of state responsibility could contribute to more comprehensive regulation of MNCs in fragile states. The chapter briefly introduced TWAIL and described its influence on the dissertation. It revealed that a proper understanding of how international law contributes to systemic inequalities between states considers aspects that not only create the inequalities but that keep them in place. A narrow application of the doctrine of state responsibility based on tradition views of international law was identified as a significant contributing factor to inequality by tolerating an overly strong corporate veil in international law.

Chapter two described TWAIL and provided a definition of fragile states proper to this dissertation. It justified a critical approach to international law and called for heightened vigilance toward international law being applied in a discriminatory manner by powerful states. The chapter noted that various criteria could be considered to establish a state as fragile, but that the deciding factors for the purposes of this dissertation were the presence of effective national institutions and access to justice. That is, a state’s fragility was assessed in relation to whether it could control MNCs on its territory through legislation and institutions and whether it could provide access to justice for its citizens when laws were violated.
Chapter three provided an understanding of the evolution of state responsibility. The chapter noted that the concepts of state responsibility and sovereignty of states evolved together and outlined the steps leading to the creation of the ASR. The possibility of an arbitrary distinction between the categories of primary and secondary obligations of international law by the ILC was identified as relevant to further discussions of altering the criteria for attribution under state responsibility. The chapter also juxtaposed the continuous and organic evolution of state responsibility throughout history with the work of the ILC codification and the creation of the draft articles.

Chapters four and five explored the difficulties of holding states responsible for the acts of a corporate citizen abroad. Chapter four also outlined how the ASR benefit Global North states. It first laid out the high threshold required under the ASR to impute responsibility for acts of entities to home states. It then demonstrated how the draft codification is commonly referred to in a manner similar to a treaty and how this contributes to the crystallization of the draft articles. A TWAIL discussion then indicated the repercussions such a crystallization has on fragile states and showed that, unsurprisingly, Global North states continue to voice support for the draft articles, from which they benefit. Chapter five showed that IHRL does little to solve the problem of gaps in regulation of MNCs in fragile states. The chapter explained that the limits of IHRL are normally drawn at a state’s border and that state obligation extend beyond this in few scenarios. Nevertheless, recent cases focusing on the ability to control provided insight for the chapter six proposal for modified attribution criteria.

Chapter six began by arguing that disagreement among states and lack of progress towards a convention on state responsibility suggest that CIL is not accurately reflected by the ASR. The chapter used declarations of states, examples of domestic legislation controlling MNC behavior
abroad, as well as new concepts of sovereignty to argue that CIL has evolved beyond the narrow interpretations of the ASR. The chapter concluded by proposing a fairer application of state responsibility that considers the fragility of states and support offered to MNCs by their home state when ascribing responsibility. A defence of due diligence was incorporated within the criteria, allowing the home state to absolve itself of responsibility by taking appropriate safeguards to control MNC behavior abroad.

Chapter seven applied the concepts of chapters four to six to a case study, considering state responsibility within the scenario of a violation of an international obligation by a MNC in Somalia. The chapter provided a TWAIL analysis of the PMSC industry before applying the state fragility analysis from chapter six to Somalia and considering violations of various UN arms embargos by the PMSC Saracen/SCS. The chapter concluded that attribution of the PMSCs acts to the state would not have occurred under the ASR nor under the rights-based approach. It concluded, however, that under the emerging approach attribution to the state could have occurred with respect to the UAE due to the county’s financial support of SCS and lack of due diligence measure. The chapter revealed difficulties with respect to the model, namely with respect to the determination of fragility of the host state and determination of the home state.

3. TWAIL’s contribution to the dissertation

A TWAIL lens helped circumvent the common practice of assigning responsibility exclusively to fragile states for lack of control over their territory. Instead, the dissertation concentrated on mechanisms of international law that take advantage of weaker states. Through TWAIL, the
dissertation’s concern was the plight of fragile states while its focus was on revealing systemic biases in international law that contribute to subjugation of fragile states by the Global North.

TWAIL also contributed to the structure of the dissertation and the choice of Somalia as a case study. Since the dissertation first needed to demonstrate a legal gap existed, it did so through descriptive chapters identifying hidden mechanisms of international law contributing to the subjugation of fragile states. A normative chapter contesting the draft articles and recommending an interpretation of state responsibility that considers imbalances between states further reflected the hallmarks of TWAIL. Finally, the choice of Somalia as a case study stemmed not only from Saracen’s arms embargo violation but also from a desire to draw attention to Somalia’s lengthy struggle against the influence of stronger states.

Aspects of the dissertation’s conclusion related to TWAIL are reflected in the new proposed attribution criteria. TWAIL’s concern with the workings of the international system led to a condemnation of international law’s corporate veil and its protection of home states from the actions of companies formed under their legislation. This, in turn, prompted the consideration of state responsibility and attribution under the ASR, of support for the draft articles from Global North states, and of the authority the ASR are given by courts and commentators. Inspired by the need to promote equality in international law, a proposition for what fair attribution criteria may resemble was predicated upon the argument that CIL of state responsibility had moved beyond the restrictive readings of the ASR (the proposal nevertheless attempted to remain within the possibilities of developing customary law). The dissertation’s conclusion that the fragility of host states and home state support to MNCs should be considered when determining attribution is therefore the result of applying TWAIL at different steps throughout the dissertation. Finally, even
among commentators that advocate in favour of increasing home state vigilance for MNCs, few question the legitimacy of the ASR and few argue that it is possible to have a different view of attribution. The dissertation’s focus on TWAIL helped produce this original content.

A weakness of TWAIL that surfaced in the dissertation is its narrow focus. In its attempt to alleviate the struggles of Third World states by uncovering biases in international law, an overreliance on TWAIL risks discounting related subtleties. While focusing on one concern at a time may be a valid approach, failing to acknowledge how other initiatives address normative gaps or not recognizing how some developing countries contribute to them oversimplifies complex problems. The example of Peruvian legislation facilitating the operation of mining companies in chapter two provided an example of this. The case showed that, in some instances, states may lower their environmental or labour standards or purposely remove themselves from regulating MNCs to attract foreign investment. In these scenarios, as well as instances of government corruption, subjugated states may play a role in the legislative voids on their territory. Although economic pressure may account for some of these practices, it does not negate the fact that blame must be shared in such cases.

Similarly, TWAIL’s purpose of correcting imbalances risks keeping the approach from considering other initiatives. While fixing systemic bias in international law is a valid long-term goal, those applying TWAIL should also be prepared to consider the benefits and drawbacks of using other methods to address normative gaps, even if these initiatives initially appear inconsistent with the TWAIL narrative. This dissertation addressed other approaches in a limited manner. It cautioned that industry-led initiatives may be primarily motivated by a semblance of concern for corporate responsibility rather than actual concern and highlighted the limits of IHRL. It also noted
international initiatives related to guidelines and recommendations to states for better regulation of MNCs. Still, further evaluation of initiatives like the UNGP or industry codes like the 2010 International Code of Conduct for Private Security Service Providers could help fine tune arguments with respect to what should be considered when attributing corporate behavior to a home state. The introduction to this dissertation highlighted that differing initiatives have contributed to confusion over the regulation of MNCs. An example of this complexity was provided in the discussion of the simultaneous application of IHRL and state responsibility in chapter five. While the proposal of this dissertation presents a convincing and fair method to address MNCs in fragile states, the manner in which TWAIL inspired solution can incorporate other initiatives provides fodder for future study.

4. Summary and analysis of the key findings

4.1 The draft articles and CIL

Despite being descriptive and analytical, the first chapters of the dissertation provided key findings that contributed to the greater conclusion. The thread that legitimized the suggestion of new attribution criteria was established through the findings of chapters two through five. Overreliance on the text of the ASR showed that contemplation of aspects that normally contribute to the formation of customary law are being ignored. Moreover, the chapter noted that the treatment of the ASR as a quasi-treaty text contributed to a crystallization of the ILC’s interpretation of state responsibility. I argued that this interpretation, one that renders it prohibitively difficult to link a MNC’s behavior to its home state, favours Global North states as the majority of MNCs are based

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in these states. The support for the ASR by the Global North versus the desire voiced by most states to open the draft articles to renegotiation was noted as a sign that the draft articles should not be considered representative of present day CIL. As mentioned above, capturing evolving CIL in a codification at a time when the rules favoured the Global North is a manifestation of the TWAIL concern of systematic subjugation in international law. The dissertation’s proposed solution to the problem is based in the argument that customary law has evolved beyond the rules represented in the ASR - or, at least, would have evolved beyond them had the draft articles not played their role in inhibiting the development of CIL. A precaution must nevertheless be taken with this argument. While actual CIL may prove more equitable than what is reflected in the draft articles, it is not immune to the biases of international law. In his work on Third World perspective of CIL, Chimni explains how CIL can sustain systemic interests of global capitalism. He shows how customary law is formed by stronger states, albeit with the support of the majority of states:

A CIL norm is more likely to emerge when there is a coalition of powerful states with “convergent interests” manifesting relevant state practice. This generally happens when states at similar levels of development, such as the advanced capitalist nations, pursue common goals. But in a greatly expanded community of states in the postcolonial era even a handful of powerful states cannot create CIL. They have to convince other states to accept a particular norm as being of value in realizing common interests. For a CIL rule to emerge, it has to be voluntarily accepted by a majority of states, or at least not be actively opposed by them. While the element of power plays an important role in this process, it is also a function of the dominance or hegemony of certain ideas and beliefs.599

Thus, when considering customary law as a solution, attention should be paid to how representative CIL is to Third World states. Chimni proposes a postmodern conception of CIL that comprises of “deliberative reasoning rather than mere coordination of states” for its formation.600 The approach values resolutions of international organizations and practices of civil society in the formation of

599 Chimni, supra note 206.

600 Ibid.
CIL rather than an overreliance on state practice. If customary law evolves in this manner, it would serve well as a solution as proposed above. However, if it continues to be dominated by powerful states, the indications of its evolution as shown in chapter six may not bear fruit.

4.2 The proposed solution and determining CIL

Chapter six argued that fragility of the host state and assistance provided to an offending MNC from the home state should be considered when determining whether the behavior of a MNC could be attributable to a state. As noted above, these criteria were proposed bearing in mind developments in international law commonly ignored due to overreliance upon the ASR. This included, among others, declarations of states, international initiatives and domestic legislation meant to regulate MNCs, and changing views related to the principle of sovereignty of states. Although a wide variety of issues were discussed in support of the argument that CIL had progressed beyond the draft articles, it would be an exaggeration to claim that the dissertation identified specific new rules. Simply, in its proposed solution, the dissertation attempted to stay within the boundaries of where it believed current CIL to be. The difficulty of narrowing down emerging CIL of state responsibility any further is party attributable to the ASR. With courts and scholars commonly referencing the draft articles rather than investigating the state of CIL, determining customary law’s current reach would involve a significant undertaking that fell outside of the scope of this dissertation. As noted in the conclusion to chapter six and below, a reassessment of customary law on the matter would provide valuable for future research.

4.3 The flexibility of the attribution and the proposed solution

Although the flexibility of the attribution criteria is discussed only briefly in chapter six, it merits mention as an important component of the research. The fact that some courts have at least
acknowledged that the criteria for attribution can depend on the specific scenario provided the first opening for the proposed solution. Of course, the wide application of attribution proposed in this dissertation is a far bigger step than, for example, the difference between overall and effective control. For this reason, the dissertation justified its “leap” by demonstrating changes in fundamental aspects of international law, including a shift in the perception of state sovereignty. While other commentators have also alluded to the flexibility of the mechanism, linking it to the criteria of fragile states and support from the home state is original to this dissertation. The determination of the fragility of a state, and indeed the term itself, remains controversial and vague in international law. For this reason, rather than relying solely on one of the many fragile state indices, the dissertation consulted their measures and developed its own approach in chapter six. Naturally, should the proposed criteria from this dissertation be considered by a court, valuable jurisprudence further detailing what is to be considered a fragile state for the purpose of attribution could be developed by using the chapter six criteria as a base. The discussion on support from the home state also provided little more than an introduction to the topic. Further research in the form of interviews with respect to how home states support their corporate citizens could help provide insight into the many ways that home states assist MNCs. Although there exists open-source information about export credit and trade commissioner services, some details of the services could not be found through government websites. For example, the extent to which contracts between EDC and the companies it underwrites contain CSR clauses is unknown and protected from Access to Information Requests. As noted in chapter six, trade commissioners at embassies and high commissions offer a range of services throughout the world. Understanding the extent of due diligence they perform, if any, would provide a better idea of how states help prepare MNCs to operate abroad and what safeguards are taken. Finding representatives willing to discuss such matters while forgoing anonymity may be challenging. Nevertheless, speaking to representatives
of government services, representatives of businesses that have used such services, and other stakeholders could provide further insight.

5. **Potential application of the research findings**

Along with the recent French duty of care legislation and the potential Swiss legislation, the research findings should encourage states to take effective measures to set limits to the behaviour of their MNCs abroad, and this, especially when they provide support to such businesses. Moreover, the research findings should encourage states to exercise increased vigilance when their corporate citizens operate in fragile states. While it is difficult to show precisely where CIL stands on the matter, the dissertation mapped out a trend of where the responsibility of home states is headed. With this in mind, any potential application of the findings should begin by encouraging those applying the ASR to do so in a more judicious manner. Bringing CIL back into discussions of the draft articles, regardless of the topic, would begin the process of modernizing state responsibility and would provide a better indication of the true status of the doctrine.

The demonstration of the unfavorability of the ASR towards developing states and their crystalizing effect should also inspire states that have been pushing for treaty negotiations on state responsibility to continue to do so. The dissertation could prove useful to the deliberations surrounding the *Legally Binding Instrument to Regulate, in International Human Rights Law, the Activities of Transnational Corporations and Other Business Enterprises*. The fourth session of the Open-ended Intergovernmental Working Group on Transnational Corporations and Other Business Enterprises with Respect to Human Rights took place in October 2018. The session focused on the Zero Draft version of the instrument, as well as a draft optional protocol to the treaty. Certain
obligations within the draft instrument are consistent with those discussed in chapter six, including the presence of due diligence measures with respect to “all persons with business activities of transnational character” within the domestic legislation of home states. The chapter six arguments in support of emerging responsibilities and the increasing willingness of states to assume extraterritorial obligations could contribute to the treaty negotiations, providing the 90 participating states with an understanding of what is already being done by some states and how the treaty discussions are running parallel to other developments in international law.

6. Possible future research directions

Certain future directions were alluded to in the earlier sections of this dissertation. These included further research into CIL, more investigation into how home states enable MNCs, and further contemplation of how different corporate responsibility initiatives may operate together. All of these would lead to a refinement of the proposed attribution criteria. While some may consider the proposal in this dissertation to be progressive, others may consider it too conservative. As explained in chapter six, this dissertation includes fragility of states in its attribution criteria in order to respect the concept of sovereignty of states. Where a host state has the means of regulating a MNC on its territory, attribution would not be triggered. This conservative approach was proposed not only to respect the concept of sovereignty of states, but to remain within what was determined to be the confines of CIL. A future research direction could explore a more aggressive approach that reconsiders the definition of fragility for the purpose of the criteria or whether it should even remain part of the test. This would simplify the attribution criteria and lower the threshold of the test. Although doing so would risk overreaching with respect to state responsibility, it would further

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601 Zero Draft, supra at note 314.
close the regulatory gap by triggering attribution to home states in cases where host states are unwilling (and not simply unable) to regulate MNCs on their territory. Such an approach would provide a larger common denominator of rights protection, although would possibly require a higher degree of involvement from the home state.

Finally, the dissertation does not address how state responsibility might be triggered beyond discussing IWAs and attribution. That is, further research could discuss which state might use the rules to contest another state’s behaviour. An injured state - a fragile state - may not have the capacity to raise the issue with the home state of the offending MNC. Recall that the definition used for fragility in the proposed criteria includes the unenforceability of law. Thus, chances are high that fragile states would simply not have functioning institutions to invoke their rights. Furthermore, the host state may simply have other priorities related to coping with its fragility. This said, invoking state responsibility may not be as onerous as it first appears. As noted in the introduction, states need not employ courts to use the doctrine. A violation of an IWA attributable to a state allows the injured state to take countermeasures and request reparations. State responsibility also allows for a third state to invoke the doctrine, which could provide for an interesting scenario where concerned states apply the doctrine on behalf of another. Further research into the various scenarios would help provide a better assessment of the utility of using state responsibility to close the identified normative gap.

7. Conclusion
The dissertation promotes a particular application of international law and argues against the manner in which the law is currently being applied by important institutions within the international system. The crystalizing forces behind the ASR in the form of an uncontested application of the
draft articles by courts continue to make their mark, rendering the arguments of this dissertation urgent and increasingly important. Furthermore, over the period of writing this dissertation, the number and frequency of violations of international law by MNCs did not decrease. Chapter six nevertheless showed that there have been increasing domestic efforts to better regulate the behavior of MNCs abroad. The topic therefore remains relevant and states are now showing interest in the matter. This dissertation’s contribution to the debate can therefore have a tangible outcome.
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<tr>
<td>1</td>
<td>Latitia Bader</td>
<td>March 20, 2016</td>
<td>Senior Researcher, Africa Division, Human Rights Watch</td>
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<td>Alex Perry</td>
<td>January 18, 2016</td>
<td>Author and correspondent. Author of The Rift: A New Africa Breaks Free</td>
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<td>3</td>
<td>James Fergusson</td>
<td>January 25, 2016</td>
<td>Author, The World's Most Dangerous Place: inside the outlaw state of Somalia</td>
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<td>Benjamin Powell, Ph.D.</td>
<td>March 24, 2016</td>
<td>Director of the Free Market Institute at Texas Tech University, Professor of economics in the Rawls College of Business</td>
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<td>5</td>
<td>Robert Pelton</td>
<td>March 27, 2017</td>
<td>Journalist</td>
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<td>Christopher Kinsey, Ph.D.</td>
<td>December 15, 2015</td>
<td>Professor and security expert at King's College London</td>
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<td>Fields of study include The Privatisation of Security, Strategic Thought, New Wars, Security Sector Reform</td>
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<td>Said</td>
<td>August 18, 2018</td>
<td>Somali Refugee</td>
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<td>April 4, 2017</td>
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<td>September 15, 2018</td>
<td>Participant requesting anonymity</td>
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</table>
Case study interviews questionnaire

INTERVIEW QUESTIONS

Principal Investigator:
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Tel: +1 604 822-3752, Email: goold@law.ubc.ca

Researcher:
Brendan Naef, Ph.D. Candidate, The University of British Columbia
Tel: +1 604 726-7220, Email: brendan.naef@me.com

The interviews conducted as part of this research project will cover various aspects of the roles played by Private Military and Security Companies (PMSC) in Somalia as of 1991.

The interviews will be conducted with representatives of non-governmental organizations, academic institutions, policy institutes, as well as others with reputed knowledge of PMSCs in Somalia.

MODULE 1: INTRODUCTORY QUESTIONS

Once the date and location of the interview are recorded, all interviewees will be asked the following introductory questions.

1. What is your name?
2. What organization are you affiliated with?
3. What is your current position within the organization?
4. Where are you based?

MODULE 2: SECURITY QUESTIONS

1. What is your main area of interest with respect to Somalia?
2. To what extent are you familiar with the security situation in Somalia from 2000 to present?
3. With the same period in mind, what control did the central government have over the different regions of Somalia?
4. Please describe the country’s legal system at the time.
5. To what extent are you familiar with the private security industry specifically?
6. Do you interact with members or representatives of the industry or of private security companies? Please explain.
7. What is your view of their presence in Somalia?

CONCLUSION

1. Do you have any final comments you would like to make before we conclude the interview?
CONSENT FORM
The Responsibility of States for the Actions of Transnational Corporations Abroad

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Researcher:
Brendan Naef, Ph.D. Candidate, The University of British Columbia
Tel: +1 604 726-7220, Email: bnaef@mail.ubc.ca

Purpose:
This project will explore the regulation of transnational corporations from the angle of the international law of state responsibility. A case study of Somalia will explore the involvement of Private Military and Security Companies (PMSC) in efforts to bring stability to the region. The case will examine local law enforcement, local legislation, as well as what countries the PMSCs involved hail from, whom they are composed of, and from where they receive their major funding. Their performance record while in Somalia will also be reviewed.
Why are we requesting an interview with you?
You are being invited to take part in this study because of your knowledge of the PMSC industry and its involvement in Somalia or because of your knowledge of other aspects of the country.

Should you choose to take part in the study, here is how we’ll proceed:
• The study will involve an interview of up to 20 minutes in length, with the possibility of a 20 minute follow-up interview at a later date.
• The interview can take place over the phone or by Skype.
• Once you agree to participate, you will receive an email from Brendan Naef in order to make an appointment for the phone call.
• With your consent, the interview will be audio-recorded. If you object to being recorded, the interviewer will take handwritten notes instead.
• You may also be asked to provide documentation where relevant in respect to interview questions.

What will we do with the information?
The research findings will contribute to Brendan Naef’s Ph.D. thesis, which will be available to the public. The results may also be published in journal articles and books.

Potential Risks and requests for confidentiality:
What is discussed during the interview may be attributable to you. Nevertheless, we have no reason to believe there is anything in this study that could harm you or be bad for you. You may request that your answers remain confidential. In such a case, your confidentiality will be respected and information that discloses your identity will not be released without your consent unless required by law. The recordings of your answers and all associated documents will be identified only by code and will be kept in a locked filing cabinet. Subjects wishing to remain anonymous will not be identified by name in any reports of the completed study.

Potential Benefits:
A written presentation of research findings will be provided to interested participants.

Confidentiality:
Research team members able to access the data from your interview include Brendan Naef (Ph.D. Student), Benjamin Goold (Principal Investigator), Benjamin Perrin, and Catherine Dauvergne (Ph.D. committee members).

Audio-recorded files will be kept on an external hard drive that will be stored in a locked compartment for at 5 years within a UBC facility. After that date, the data files will be deleted. Only the principal investigator and the researcher (Brendan Naef) will have access to those files.
Contact:
If you have any questions or desire further information with respect to this study, you may contact the Researcher (Brendan Naef) using the contact number or email address above.

If you have any concerns about your treatment or rights as a research subject, you may contact the Research Subject Information Line in the UBC Office of Research Services at +1 604-8228598 or by e-mail to RSIL@ors.ubc.ca.

Consent:
Your participation in this study is entirely voluntary and you may refuse to participate or withdraw from the study at any time without jeopardy. Your signature below indicates that you have received a copy of this consent form for your own records.
Your signature indicates that you consent to participate in this study.

____________________________________________________
Subject Signature                       Date

____________________________________________________
Printed Name of the Subject
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