

Corporate Accountability for Dignity Rights Abuses Under Domestic Law

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Question presented: Whether corporations and/or corporate officers may be held accountable for violations of human dignity rights under domestic law, and how this informs the potential establishment of an international treaty regarding corporate accountability for human right abuses ('Zero Draft').

Brief Answer: Holding corporations accountable under domestic law for violating dignity rights is problematic. By and large, most states elevate corporate interests over other interests, including advancing human dignity. The Zero Draft provides an opportunity for considerations of harmonizing corporate interests and human dignity under domestic law.

Abstract

This paper examines how corporations and corporate officers, can be held accountable for violation of dignity-based rights, and how the zero drafts can help shape future development in this area. Some corporations wield powers that exceed state powers. This paper addresses how corporations and corporate officers may be held accountable under domestic law. It seeks to address the issue of victims being silent because they don't have enough resources in their care or don't know how to go about holding these corporations accountable in a competent court for violating their right. The ATCA (Alien Tort Claims Act) which allows foreign citizens to institute legal action in US court relating to human right abuse abroad provided an opportunity for the victims, however, the Supreme court has held that foreign corporations cannot be held accountable under ATCA. The state of Delaware is the state where the majority of the multinational corporations allegedly involved in human rights violations are incorporated, the Delaware General corporate law will be examined to see how Corporate entity or its officers are held liable for the abuse of corporate power. As stated in this paper, most of this responsibility will be shifted on the state under the proposed Zero Draft which will help by encouraging more victims to speak out against corporations. It will also help corporations to ensure a proper discharge of their functions and to respect the dignity right of persons where they are domiciled.

Introduction

Corporate accountability for human rights violation is a source of discussion worldwide.¹ The main issue is whether corporations can be held accountable for human right abuses. It is a general knowledge that some major corporations in terms of structure and finances

¹ Case Western Reserve Journal of International Law, Volume 50, Issues 1 & 2 Spring 2018.

are highly profitable and for this reason makes them susceptible to mistake and abuses². The sole purpose of establishing a business is to make a profit³. Under the law, corporations are legal persons that can sue and be sued in their own name.⁴ This paper examines different human rights abuses committed by corporations and how domestic laws and the court addressed such abuse.

The advent of globalization in the last few decades has spurred the growth of multinational corporations, which are business entities with the ability to operate on the global arena and transcend the regulatory capacity of a single state.⁵

Human dignity as a right encompasses the right of a person or group to be valued, respected, treated ethically, free from harm and inhuman and degrading treatment⁶. The activities of some corporations especially the multinational corporations particularly in developing countries have been associated with human dignity rights abuses towards local communities, such as providing poor working conditions, poor wages, polluting the environment which affects access to clean water, and the rights to life, land, housing and adequate living standards, among others⁷. The actions of the corporations in those developing countries are in some cases protected by the state which makes the state complicit in such abuse⁸. This makes the machinery put in the place by the state to make corporation account for such abuses unenforceable in some cases as the state protects such corporation in court.

Part I briefly discusses the United Nations Guiding Principles on Business and Human Rights. The Guiding principles are divided into three parts and briefly discuss the responsibility of the state and corporations under human right. The provisions of the Guiding principles are not binding on the state. This has led to discussions around the world on the creation of a legally binding instrument among the states. The Zero Draft is being negotiated to stand in as a legally

² Erik Sherman, "10 Lessons from the Biggest Business" December 14, 2016. <https://www.inc.com/erik-sherman/countdown-2017-how-to-learn-from-biggest-business-mistakes-in-2016.html>

³ M. Friedman, "The social responsibility of business is to increase its profits" The New York Times Magazine, September 13 (1970), pp. 32-33.

⁴ Sanford A. Schane, The Corporation Is A Person: The Language of a Legal Fiction, 61 Tul. L. Rev. 563 (1987)

⁵ Peter T. Muchlinski *Multinational Enterprises and the Law* (Oxford University Press, 2nd Ed, 2007) 8-4+4. See also, Emeka Duruigo 'Corporate Accountability and Liability for International Human Rights Abuses: Recent Changes and Recurring Challenges' (2008) 6 *Northwestern Journal of International Human Rights* 222, 229-231.

⁶ Jeremy Waldron, Dignity, Rights, and Responsibilities, 43 Ariz. St. L.J. 1107 (2011)

⁷ David Kinley *Civilizing Globalisation: Human Rights and the Global Economy* (Cambridge University Press, 2009) 148-149. See also, Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and other Business Enterprises *Interim Report* E/CN4/2006/97 (22 February 2006).

⁸ Olson, Danielle (2015) "Corporate Complicity in Human Rights Violations Under International Criminal Law," *International Human Rights Law Journal*: Vol. 1: Iss. 1, Article 5. Available at: <https://via.library.depaul.edu/ihrj/vol1/iss1/5>

binding instrument to regulate international Human Rights law and the activities of transnational corporations and other business enterprises.

Part II considers the constitutions of developing country, including Nigeria's. It is important to consider the constitution of the country in order to understand the stance of domestic law as touching the violation of dignity rights by corporations. The Nigerian society is one of the most impacted by the activities of multinational corporations. The human dignity provision under 1999 constitution of Nigeria is considered under this part as an instrument used to hold Shell corporation accountable for abuses committed in the Niger Delta region of Nigeria in the case between *Gbemre v. Shell Corporation* and others.

Part III discusses the receptivity of human rights claims in courts in the United States under the Alien Tort Statute (ATCA). The Majority of the cases brought to the US courts pertaining to corporate liability under the ATCA were not successful.

Part IV surveys the Delaware General Corporate Law to infer any provisions under the domestic Law that can make corporations liable for human right abuses. Obviously, there is no such law in the Delaware General Corporate Law (DGCL), but this part will discuss generally the liability of corporations and its officers under the DGCL.

Part V of this paper considers the impact the above has in the new legally binding document that regulates international human rights law and the activities of transnational corporations and other business enterprises (Zero Draft). The Zero Draft for the first time would recognize the right of victims of corporate abuse and place responsibility on the state actor to ensure that victims of corporate abuse have access to justice.

I. The Role of the United Nations Guiding Principles on Business and Human Rights

The Guiding Principles were unanimously endorsed by the UN Human Rights Council in June 2011, supported by governments from all regions of the world. One of the major and widely recognized contributions of the Guiding Principles has been to set out the duties of States and the responsibilities of companies to ensure that businesses operate with respect for human rights.

The Guiding Principles are founded on three pillars:

1. **The State duty to protect human rights** against abuse by third parties, including business, through appropriate policies, legislation, regulations, and adjudication;

2. **The corporate responsibility to respect human rights**, meaning to act with due diligence to avoid infringing on the rights of others and address adverse impacts with which they are involved;
3. **The need for greater access to effective remedy**, both judicial and non-judicial, for victims of business-related human rights abuse⁹.

Since their endorsement, the Guiding Principles have driven a convergence in standards on business and human rights across the international arena, reinforcing their position as the authoritative global standard on business and human rights¹⁰. The corporate responsibility to respect human rights, as set out in the second pillar of the Guiding Principles, is a standard of conduct for companies. The Guiding Principles make clear that companies should have in place:

- A statement of their policy commitment to respect human rights;
- A human rights due diligence process to:
 - assess their actual and potential human rights impacts;
 - integrate the findings and take action to prevent or mitigate potential impacts;
 - track their performance;
 - communicate their performance;
- Processes to provide or enable remedy to those harmed, in the event that the company causes or contributes to a negative impact¹¹.

The Guiding principles have helped by providing a framework and a standard of conducts for corporations. Few corporations in recent time have a statement of policy on their website stating their commitment to respect of human right¹². According to the Corporate Human Rights Benchmark (CHRB) the average overall score for 2018 is 27%, with nearly two thirds of companies scoring under 30% and over a quarter of companies scoring under 10%. Seven years after the UNGPs were agreed and launched, the 2018 Benchmark finds many companies in high-risk sectors are not demonstrating a respect for human rights¹³.

⁹ <https://www.ungpreporting.org/resources/the-ungps/>

¹⁰ Id.

¹¹ Id.

¹² See Coca Cola Human Rights Policy, <https://www.coca-colacompany.com/our-company/human-rights-policy>

¹³ <https://www.corporatebenchmark.org/sites/default/files/documents/CHRBKeyFindings2018.pdf>

Recently, BP, Equinor, Shell and Total CEOs announce that they have agreed to join forces to create a collaborative approach to human rights supplier assessments in the energy industry¹⁴. Participating companies recognize the importance of working with suppliers that respect human rights, in line with the UN Guiding Principles on Business and Human Rights.¹⁵ The Guiding principles are not binding/are voluntary, which led to the idea of a legally binding treaty for business and human rights.

II. Court Decisions in Nigeria concerning Constitutionally Based Claims for Dignity Rights Violations by Corporations or Corporate Officers.

Research has shown that there are limited case laws where corporations are held accountable for the violations of human dignity right, however, this section considers the one and only case law available under the Nigerian Jurisprudence. The Nigerian constitution explicitly states the context in which an individual's dignity can be violated, providing;

“Every individual is entitled to respect for the dignity of his person, and accordingly –

- (a) no person shall be subject to torture or to inhuman or degrading treatment;
- (b) no person shall be held in slavery or servitude; and
- (c) no person shall be required to perform forced or compulsory labor.”

The discovery of oil transformed the nation's economy and has, for the past five decades or more, provided approximately 90% of foreign exchange earnings and 80% of the federal revenue¹⁶. As of this date, the nation's economy depends and runs solely on foreign exchange earnings from the sale of crude oil and natural gas. It is, therefore, no surprise that the Nigerian economy was thrown into a deep recession by the 2015/2016 slump in the oil prices in the international spot market¹⁷. The Nigerian National Petroleum commission which is owned by the Nigerian Government partners with transnational corporations like Shell, Exxon Mobil, Chevron to extract crude oil to meet daily maximum capacity. The oil corporations are usually put under pressure by the federal government to maximize oil production; therefore, they are left to operate almost unregulated. Oil spill/environmental pollution is a frequent occurrence and gas flaring is

¹⁴ Joint industry human rights supply chain engagement, <https://www.shell.com/media/news-and-media-releases/2018/joint-industry-human-rights-supply-chain-engagement.html>. Sep 24, 2018

¹⁵ Id.

¹⁶ Oil still accounts for 92% of Nigeria's earnings <https://punchng.com/oil-still-accounts-for-92-of-nigerias-earnings-investigation/> September 17, 2017.

¹⁷ Id.

continuous. According to Professor Okorodudu-Fubara, “energy production processes in the energy industries like petroleum, coal, gas, electricity etc., generate diverse sorts of land, air and water pollution as well as hazardous waste disposal problems which degrade the quality of the environment resulting in adverse health implications for man and threatens the immediate and future potential of the ecosystem.”¹⁸ The people living in the community are left to suffer for the negligence by the corporations. This led to assorted legal actions in and outside Nigeria by members of the affected community.

A. Mr. Jonah Gbemre V. Shell Development Company Nigeria Limited and other

Gbemre filed this lawsuit against the Nigerian government and shell on behalf of the iwherekhan community of the Niger Delta. The lawsuit challenges the practice of shell development company Nigeria limited in gas flaring which violates the right to clean poison free, pollution free and healthy environment, and most of all the dignity right of persons living in the community.

The court held that the practice of gas flaring is unconstitutional as it violates the guaranteed fundamental rights to life and human dignity of persons provided in the constitution of the Federal Republic of Nigeria and the African Charter on human and peoples right.¹⁹

This case successfully provided a precedent for holding corporations accountable for dignity right abuse under Nigerian law. The decision in this case significantly recognized fundamental rights protection as an objective which other regulations must meet to be valid under the law. It invalidates legislation by the federal government which allows gas flaring as those corporations deem fit. Gbemre, though, hasn’t made many changes and the multinational corporations continue to flare gas in the Niger Delta region.²⁰

III. Receptivity to Human Rights claims in the United States under the ATCA

The Alien Tort Claims Act (ATCA) reads: "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 US". District courts in the US District since 1980 have allowed foreign citizens to seek remedies in US court regarding Human Rights violation committed outside the

¹⁸ Okorodudu-Fubara (Professor of Business Law, Obafemi Awolowo University, Ile-ife), Statutory Scheme for Environmental Protection in the Nigerian Context: Reflections of Legal Significance for Energy Sector, NIGERIAN CURRENT L. REV. 1–39 (1996).

¹⁹ Gbemre v. Shell Petroleum Development Company and others, FHC/B/CS/53/05; (2005) AHRLR 151 (2005)

²⁰ Gas Flaring in Nigeria: A Human Rights, Environmental and Economic Monstrosity, The Climate Justice Program. https://friendsoftheearth.uk/sites/default/files/downloads/gas_flaring_nigeria.pdf

US under this statute. The case between *Filartiga v. Pena-irala*²¹ paved way for the conceptualization of the Alien Tort Statute in the US court. There, the plaintiff sued a former Paraguayan police Inspector Americo Pena-Irala under this statute over the killing of Joelito Filartiga. The 2nd Circuit of the US Court of Appeals held that the court had jurisdiction and Pena-Irela was ordered to pay \$10.4 million in damages to Filartiga's family.

This case signaled to the rest of the world that the US courts are open to entertaining cases of victims of Human Rights abuses around the world and then paved way for human rights lawyers to bring cases against corporations in US court. The 1996 case of *Doe v. Unocal* encouraged more victims of corporate human right abuse in foreign countries to seek justice in the US court under the Alien Tort Statute. These lawsuits come with massive costs, and mostly cost temporary if not permanent damage to the reputation of the corporation involved. This led to the settlement of the victims involved in these abuses to safeguard the growth and reputation of the company involved.

In cases where local redress mechanisms do not offer a realistic prospect of remedy, claimants will frequently look to the legal systems of the "home State"²² of the business enterprise allegedly involved in the abuse.²³ However, establishing the jurisdiction of a preferred domestic judicial mechanism can be a significant obstacle in relation to cases where the alleged human rights abuses took place, or the damage arose, in another jurisdiction.²⁴ It can also be a significant source of delay to legal proceedings.

In recent times, there has been a split in the US court decision as to whether corporations can be held liable under the ATCA.

Kiobel v. Royal Dutch Petroleum

Nigerian nationals residing in United States sued Dutch, British, and Nigerian corporations pursuant to ATCA, alleging that corporations aided and abetted Nigerian

²¹ *Filartiga v. Pena-Irela*, 630 F.2d 876 (2d Cir. 1980).

²² The Home state of a corporation is the country where the company is incorporated, while the host state is a different country where the corporation performs business activities in form of a subsidiary company.

²³ Dr. Jennifer Zerk, "Corporate liability for gross human rights abuses Towards a fairer and more effective system of domestic law remedies."

²⁴ For a discussion of possible bases of jurisdiction in these cases see International Law Association, Sofia Conference (2012): International Civil Litigation and the Interests of the Public, copy available from www.ila-HQ.org. For a discussion of the State practice of EU Member States see the University of Edinburgh, Study of the Legal Framework on Human Rights and the Environment Applicable to European Enterprises Operating Outside the European Union, 2010, copy available at http://ec.europa.eu/enterprise/policies/sustainable-business/files/business-human-rights/101025_ec_study_final_report_en.pdf

government in committing violations of the law of nations in Nigeria. The US District Court for the Southern District of New York, Kimba M. Wood, J., 456 F.Supp.2d 457, dismissed claims in part and certified order for interlocutory appeal. Parties cross-appealed. The Court of Appeals for the Second Circuit, Cabranes, Circuit Judge, 621 F.3d 111, affirmed in part and reversed in part, dismissing entire complaint. Certiorari was granted²⁵. The Supreme Court, Chief Justice Roberts, held that:

1 principles underlying presumption against extraterritoriality constrain courts exercising their power under ATCA, and

2 ATCA did not apply to violations of the law of nations occurring within territory of sovereign other than United States.²⁶

The decision of the Supreme court in the case of *Kiobel v. Royal Dutch* shows that the ATCA will not be applicable to cases of corporate abuse that occurred outside the United States. This reduces the ability to hold a corporation liable for the violation of dignity based right under the ATCA.

Furthermore, in the *Jesner v. Arab Bank, PLC*, the Supreme Court, Justice Kennedy, held that absent further action from Congress, it would be inappropriate for courts to extend ATCA liability to foreign corporations²⁷. The decision of the court, in this case, will further hinder the use of the ATCA to hold corporations accountable for human dignity right under domestic law.

Considering the Supreme court decisions in the *Kiobel v. Royal Dutch company* case and the recent *Jesner v, Arab Bank PLC*, the ATCA is not the solution to holding corporations accountable for the violation of Dignity right. The recent case laws have shown that corporations cannot be held accountable for corporate abuse under the ATCA.

IV. The potential for related claims under Delaware General Corporate Law (DGCL).

²⁵ *Kiobel v. Royal Dutch Petroleum Co.*, 569 U.S. 108, 133 S. Ct. 1659, 185 L. Ed. 2d 671 (2013).

²⁶ *Id.*

²⁷ *Jesner v. Arab Bank, PLC*, 138 S. Ct. 1386, 200 L. Ed. 2d 612 (2018).

The Delaware General Corporate Law (DGCL) is important to be considered in this part to see how corporations or its officers can be held liable for human rights abuse under the DGCL.

The State of Delaware is a leading domicile for US and international corporations. More than 1,000,000 business entities have made Delaware their legal home, including more than 66% of the Fortune 500 company²⁸. Delaware Law does not hold corporations, corporate officers or subsidiaries accountable for human rights abuses. However, there are provisions in the DGCL that can be used to hold corporation, its officers or subsidiary accountable for wrongful acts. The following provisions examines corporations or corporate officers' legal liability under the DGCL:

1. Inspection of Books and Records of the Corporation
2. Revocation or forfeiture of Corporate Charter
3. Piercing the Corporate veil

1. Inspection of books and Records of the Corporation

The DGCL allows shareholders to inspect the books and records of the corporation, in doing this, the shareholder must prove a proper purpose and that he is not motivated because of personal interests not related to share ownership. S.220(b) of the DGCL specifically states that "any stockholder, in person or by attorney or other agents, shall, upon written demand under oath stating the purpose thereof, have the right during usual hours for business to inspect for any proper purpose, and to make copies and extracts from the corporation's books and records"²⁹. The provision of s.220(b) of the DGCL can help by means of giving an opportunity to a concerned shareholder to go through the books and records of the company in a way to identify any illegal activities that might have been perpetrated by the directors or officers in the name of the Corporation. This can be used to prove that a corporation or its subsidiary has violated the dignity right of a set or class of people working (directly or indirectly) with the corporation. However, only the shareholder of a company has access to the books and records of the company and a proper purpose must be shown before it can be accessed. There is no Dignity right provision in the Delaware General Corporate Law (DGCL), but the provision of Section 220 allows shareholders to inspect the books and records of the company to hold the directors to

²⁸ corp.delaware.gov/aboutagency/

²⁹ Id.

account. The following case gives an example of how a shareholder can go about using that power. It must be noted that the issues in this case clearly points to a violation of dignity right of some children in Africa but the plaintiff, in this case, was unable to show a proper purpose to access the books and records of the company and the case was dismissed.

Louisiana Municipal Police Employees' Retirement System v. The Hershey Company

A large portion of the world's cocoa originates in two countries in which illegal child labor often is used on farms, including cocoa farms. The plaintiff, a stockholder of the Hershey Company (“Hershey”), is aware that much of Hershey's cocoa is sourced in these two countries, and the stockholder believes that Hershey may purchase some of that raw material directly from growers, and therefore may be complicit in the illegal activity or have knowledge that the company's products are tainted by the illegal conduct of the grower. The stockholder, armed with little more than the undisputed facts that (i) Hershey is a major player in the chocolate industry that uses cocoa beans and products derived from cocoa beans, (ii) child labor is endemic in two countries that produce a large portion of the cocoa beans, and (iii) some of Hershey's cocoa beans and cocoa-derived products originate in those countries, demanded to inspect an expansive list of books and records. The company refused to allow the inspection and moved to dismiss the Section 220 complaint filed by the stockholder.

The question this case presents is whether illegal conduct within one sector of an industry provides a credible basis from which the Court may infer that wrongdoing or mismanagement may have occurred at a company in that industry. This is not a novel question, having been addressed, for example, in two other cases involving the stockholder who filed this action. In this case, because the stockholder failed to sustain its minimal burden of providing credible evidence from which the Court may infer mismanagement or wrongdoing at Hershey, rather than within the cocoa supply chain, “I recommend that the Court dismiss the complaint”³⁰.

The Inspection of books and records claim if successful is to allow the stockholder to get the information to be able to bring a derivative lawsuit on behalf of the corporation itself against the individual wrongdoers for money lost by the corporation because of the corporate individual’s wrongdoing³¹.

³⁰ Louisiana Mun. Police Employees' Ret. Sys. v. Hershey Co., No. CV 7996-ML, 2013 WL 6120439, at *1 (Del. Ch. Nov. 8, 2013).

³¹ Paul L. Regan, Professor of Corporate Law, Widener University Delaware Law School.

Any monetary recovery from these corporate fiduciaries does not go to the stockholder plaintiff but to the corporate treasury to restore the corporation (and indirectly) the stockholders' investment. No money from this derivative award will go to actual victims of human rights violations unless the Corporation was already held liable to the victims and the stockholders now sue the corporate officers/directors for these corporate losses from the officers/directors causing the human right violations and resulting corporation liability³².

2. Revocation or forfeiture of Corporate Charter

The provision of Section 284(a) of the DGCL gives the court of chancery the power to revoke a corporate charter for any misuse of its corporate powers or privileges³³. It can be sustained in cases of fraud, immorality or violations of statutory law. *Young v. the National Association for the Advancement of White People*³⁴, *Craven v. Fifth Ward Republican Club*³⁵, Delaware courts have ruled that "continued serious criminal violations by corporate agents in the course of the discharge of their duties could very well constitute the misuse of a charter." In this regard, the court can use the provision of section 284(A) to withdraw the charter of any corporation that has been found to have breached economic, social and cultural rights. This section may very well be the perfect remedy which can be used to hold corporations incorporated in Delaware accountable for abuses committed by the corporation, but the effect will be the dissolution of the company and no recovery for victims of the abuse unless a viable ATCA claim could be brought at the same time.

Revocation or forfeiture might show other corporation that the stakes are high in this area and that multinational corporations should be extremely proactive and vigilant in ensuring corporate accountability with overseas operations to ensure compliance with local and international Human Rights law and the corporation values and principles for conducting business and trade.

3. Piercing the Corporate Veil

³² Id.

³³ S. 284(a) Upon motion by the Attorney General, the Court of Chancery shall have jurisdiction to revoke or forfeit the charter of any corporation for abuse, misuse or nonuse of its corporate powers, privileges or franchises. The Attorney General shall proceed for this purpose by complaint in the Court of Chancery.

³⁴ 35 Del.ch. 10, 109 A.2d 29 (1954).

³⁵ 37 Del.Ch. 524,528, 146 A.2d 400, 402 (1958).

In the US today, most business owners choose to form corporations or limited liability companies (LLC) so as to avoid personal liability for the debts of the company. This shields the owner of the business from being held personally liable for a wrongful act committed in the name of the Corporation. Piercing the corporate veil doctrine is used to describe the action of a court to hold corporate shareholders and LLC liable for the liabilities of a corporation. The court may allow piercing of the corporate veil whenever there is an evidence of a wrongdoing committed in the name of the corporation. In the case of *United States V. Bestfoods*, the US brought this action for the costs of cleaning up industrial waste generated by a chemical plant. The issue before the court under Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA)³⁶, is whether a parent corporation that actively participated in, and exercised control over, the operations of a subsidiary may, without more involvement, be held liable as an operator of a polluting facility owned or operated by the subsidiary. The court held that the parent company cannot be held liable for the actions of the subsidiary unless the corporate veil is pierced. However, a parent company that actively participated in, and exercised control over, the operations of the facility itself may be held directly liable as an operator of the facility³⁷.

In this regard, if a piercing is allowed, the parent company may be held liable for actively participating in the abuse committed by the subsidiary company. In practice, it is difficult to establish the liability of a parent company in cases where the subsidiary is more directly involved in the abuse. In most cases, the court is reluctant in finding the parent company liable.³⁸

V. The Extent to which the Zero Draft provides Relief for Dignity Rights Violation

The [Zero Draft](#) is a legally binding instrument to regulate international human rights law and the activities of transnational corporations and other business enterprises. The content of the draft is divided into three (3) sections and fifteen (15) articles altogether. Section I gives the preamble and the statement of purpose. Section II containing 11 articles discusses the statute of

³⁶ U.S.C. s.9601.

³⁷ For further information; *Corporations and Other Business Organizations: Cases, Materials, Problems*, Linda O. Smiddy, Lawrence A. Cunningham. Eighth Edition on Page 468.

³⁸ Zerk, *Multinationals and Corporate Social Responsibility: Limitations and Opportunities in International Law* (Cambridge University Press, 2006), pp. 215-240.

limitations, applicable laws, rights of victims, legal liability, mutual legal assistance, consistency with international law and so on. The last section discusses the institutional arrangements and the final provisions of the draft.

Recognizing that state actors are not doing enough to ensure justice for the victims of human right abuse by corporations, the Zero Draft proposed to address the issues that are often encountered in corporate liability for dignity right abuse, such issues will include:

1. Few constitutions recognize the direct application of human dignity rights. Most states consider legislation, common law and other political and administrative measures as enough to guarantee the protection of people within their jurisdiction from violations of their rights by third parties.³⁹
2. It is generally believed that the host state has the capacity to control and regulate corporations in their respective state, however, some state has lost much of their capacity to control and regulate certain corporations. Corporations now wield many powers that states find it difficult to regulate them. With these powers, private actors can easily stifle regulation and accountability by threatening to relocate.⁴⁰
3. Victims in most cases do not have access to enough funds, lack of awareness of rights and how to assert them, lack of access to lawyers, legal aid etc. discourage them and in most cases the victims are forced to settle the case.

This paper will only discuss the two most important aspect of the Zero Draft which includes:

- A. Rights of victims under the Zero Draft, and
- B. The responsibility of the state

A. Rights of Victims

The most fundamental issue which concern victims of Human dignity right abuse is addressed by the proposed Zero Draft under article 8 (Rights of Victims). The issue of cost of litigation which is one of the major barriers in instituting a legal proceeding against corporations is addressed in Article 8 (5)(6)(7).

³⁹ Danwood Mzikenge Chirwa, “The Doctrine of State Responsibility as Potential means of Holding Private Actors Accountable for Human Rights.”

⁴⁰ Id.

Article 8(5) establish the right of victims to be provided with proper and effective legal assistance by the state throughout the legal proceedings. It also guarantees the rights of victims to be heard in all stages of proceedings while complying with all relevant domestic law. Victims of abuse in most cases are not literate to understand their rights as guaranteed under their domestic law and as such don't know how to enforce their right in the appropriate domestic court. The provisions of this section give the state party the responsibility to educate the victims as to their right and the processes involved in the legal proceedings against the accused.

The major problem encountered by victims is lack of funds to pursue their right in domestic court. Corporations have access to enough financial resources to delay trial and frustrate victims pursuing justice for abused right in the domestic court. Article 5(d) provides relief for victims who don't have access to enough funds to pursue lawsuit against gigantic corporations. It provides that the state party is to determine the need for legal assistance while taking into consideration the economic resources available to the victims.

Article 5(6) further states that, the "inability of the victims to cover administrative and further cost will not be a barrier in commencing a legal action against the corporation." The state party shall assist victims with the necessary cost without asking for a warranty as a condition for commencing proceedings.⁴¹ The State party under the provision of article 5(7) will establish an International Victims Fund under this convention to provide legal and financial assistance to victims.⁴²

According to the 2005 Basic Principles: -

"Victims should be treated with humanity and respect for their dignity and human rights, and appropriate measures should be taken to ensure their safety, physical and psychological well-being and privacy, as well as those of their families. The State should ensure that its domestic laws, to the extent possible, provide that a victim who has suffered violence or trauma should benefit from special consideration and care to avoid his or her re-traumatization in the course of legal and administrative procedures designed to provide justice and reparation."⁴³

⁴¹ Article 5(6) of the proposed Zero Drafts

⁴² Id.

⁴³ 2005 Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, Chapter VI.

The Zero Draft also recognizes the dignity right of victims under article 8(10). Victims are often subjected to ill-treatment in the course of seeking justice. This provision mandates either the state party or the third party to respect the dignity of the victims and ensure their safety.⁴⁴

B. The responsibility of State Actor

The Zero Draft mandates the host state to ensure that either natural or legal persons can be held criminally, civil or administratively liable for violations of human rights⁴⁵. This will ensure the strict adherence of the court to holding corporations accountable under the domestic law. Multinational corporations are the main target of this provision. As it was observed in the *Jesner's* case where it was held that foreign corporations cannot be held liable under the ATCA, this will ensure that transnational corporations do not escape liability for abuse committed in the host state.

Also, Article 9 mandates the state actor to ensure that all corporate entity comply with the legislation of the jurisdiction which they are domiciled. Strict adherence to the domestic law of the state where the corporation is domiciled will ensure corporate accountability.

“State Parties shall ensure in their domestic legislation that all persons with business activities of transnational character within such State Parties’ territory or otherwise under their jurisdiction or control shall undertake due diligence obligations throughout such business activities, taking into consideration the potential impact on human rights resulting from the size, nature, context of and risk associated with the business activities”.⁴⁶

Finally, the Zero Draft also addresses the issue of jurisdiction. It has become a common norm to bring human rights abuse cases against corporations to the United States especially under the ATCA with the hope of getting justice. Research has shown that majority of this cases brought under ATCA were dismissed on grounds of forum non conveniens⁴⁷ and none of the parties is either domiciled or incorporated in the US. Jurisdiction is one of the most important issues put into consideration before filing an action against a corporate entity. Article 5(1) of the

⁴⁴ Id.

⁴⁵ Article 10(1) of the Zero Draft.

⁴⁶ Article 9 of the Zero Drafts.

⁴⁷ 226 F 3d 88 (2nd Cir, 2000); discussed in Aaron Xavier Fellmeth ‘*Wiwa v Royal DutchPetroleum Co: A New Standard for the Enforcement of International Law in US Courts*’ (2002) 5 *Yale Human Rights and Development Law Journal* 241.

Zero Drafts confers jurisdiction on the court of the state where the acts or omissions that resulted in the violation occurred or the court of the state where the natural or legal person alleged to have committed the acts or omission is domiciled.⁴⁸

The above provisions of the Zero Draft will ensure accountability of corporations if passed as a legally binding instrument to regulate the activities of transnational corporations and other business enterprises among states. It must be noted that the provisions of the Zero Draft are also applicable to domestic companies.

Conclusion

Human dignity as a right is a very important concept which protects and gives value to the human person. Joshua Margolis⁴⁹ proposes the advancement of dignity along with honesty as candidates for central aims of business ethics research. In his argument for a new approach to business ethics he suggests that the current aims of business ethics as constraining economic actors may be misguided.⁵⁰ He urges business ethics to engage with a psychological pragmatism that advances human dignity through economic activities.⁵¹ In Africa today, almost all the state has human dignity right provision in their constitution but there are no case laws in which corporations had been held accountable for the violation of dignity right except the case in Nigeria. This means as it stands today corporations are untouchable even while they continue to violate people's right in different states. The Gbemre's case should be used as an example (even though the judgment was not enforced), to show that without the judicial remedy it is difficult to enhance respect for dignity rights by corporations. Settlement in most of these cases didn't yield any positive result since almost all these corporations have the financial capacity to buy their way out of anything.

State actors need to do more to ensure compliance of these corporations with the rule of law where they are domiciled and when they don't, they should be held accountable in domestic court whenever possible.

The recognition of victims right under the Zero Draft is a historic feat which for the first time gives victims the opportunity to get justice against mighty corporations that has held them

⁴⁸ Id.

⁴⁹ Joshua Margolis is Professor of Business Administration in the Organizational Behavior unit, Faculty Chair of the Christensen Center for Teaching and Learning, and course-head for the required first-year MBA course, Leadership and Organizational Behavior.

⁵⁰ M. Pirson, K. Goodpaster, C. Dierksmeier. Human Dignity and Business, (Business Ethics Quarterly, 2016).

⁵¹ Id.

hostage in their own homes. The control and regulation of this corporations will ensure peace, economic prosperity, more profits for the corporation, society and the state at large.

The Zero Draft recognizes the rights of victims and gives more responsibility to the state in cases of violation by a corporation if passed to become a binding instrument among the states, it will be the first step to resolving dignity right violations in different states as there will also be the issue of ratification and enforcement by states.