

Weak extraterritorial remedies: The Achilles heel of Ruggie's 'Protect, Respect and Remedy' Framework and Guiding Principles

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Summary

The United Nations Protect, Respect and Remedy Framework and its Guiding Principles were adopted at the back of a long history of failed UN attempts to deal with corporate-related human rights abuses and ineffective corporate initiated voluntary measures. The need for the Framework and Guiding Principles was heightened by the current climate of neo-liberal globalisation which allows powerful multinational corporations to operate in countries that are sometimes unable to rein them in due to various factors, including sheer corruption; the need to attract and retain foreign direct investment; and archaic legal systems that are unable to deal with intricate corporate structures. This article critically examines the availability of remedies for victims of corporate-related abuses who, for one or more of the above reasons, are unable to access justice in the host state and look towards the home state for a remedy. It argues that by failing to address hurdles to accessing home state remedies, such as the principle of forum non conveniens, state sovereignty, separate legal personality and limited liability, the Framework and Guiding Principles have failed to clearly define circumstances under which, and means by which, multinational corporations will be held liable under the laws of their home states for human rights violations committed beyond their home borders – by their subsidiaries or so-called 'foreign hands'. Consequently, victims are likely to be without remedies which are unavailable in the host state. Thus, for victims of corporate-related abuses, the more things change, the more they stay the same.

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1 Background: Globalisation and corporate-related abuses

The end of the Cold War and advances made in technology saw a surge in globalisation.¹ The contemporary world is characterised by this phenomenon. Although a contested concept, globalisation is about the destruction of territorial boundaries in the name of free trade and the easy movement of finance, labour and increased production.² Other than the economy (profits) and technology, it is also driven by forces of religion and empire.³ These forces all work in concert to transform the world into a global village. They constrict distance and increase mobility, while at the same time homogenising cultures and rendering territorial borders irrelevant. Thus, the world is in a constant state of villigisation.⁴ The pursuit of advantage, or profit, is ultimately at the heart of globalisation. Globalisation has negative and positive effects on society and life.⁵ It is for this reason that some have described it as 'a multi-levelled phenomenon, currently underpinned by the ideology of neoliberalism'.⁶ O'Connell⁷ calls it neo-liberal globalisation, and argues that it is irreconcilable with human rights protection, both in theory and practice. He agrees with Tabb⁸ that this is because this form of globalisation is based on the neoliberal agenda which, amongst other things, calls for deregulation and openness to foreign direct investment and small government, which in the end only benefit powerful countries and their corporations.⁹ This, it is argued, leads corporations to have an insatiable appetite for risk and profit that in the end characterise this neoliberal globalisation model. Major multinational corporations (MNCs) opt to operate where they can reap maximum profits. They operate in virgin markets, resource or commodity-rich countries,

1 A Mazrui *Pan-Africanism and the origins of globalisation* (2001) http://igcs.binghamton.edu/igcs_site/dirton12.htm (accessed 4 November 2011). Mazrui makes the point that the word 'globalisation' might be new, but 'global interdependence' is a centuries-old phenomenon.

2 See K de Feyter *Human rights: Social justice in the age of the market* (2005). See also U Baxi *The future of human rights* (2002) 139, who conceives globalisation in terms of the three D's, representing deregulation, denationalisation and disinvestment.

3 Mazrui (n 1 above).

4 See M McLuhan & BR Powers *The global village: Transformations in world life and media in the 21st century* (1989).

5 For a critique of the negative impact of globalisation, particularly in the Third World, see A Anghie 'Time present and time past: Globalisation, international financial institutions, and the Third World' (2000) 32 *New York University Journal of International Law and Politics* 243.

6 A Pollis 'Human rights and globalisation' (2004) 3 *Journal of Human Rights* 343.

7 P O'Connell 'On reconciling irreconcilables: Neo-liberal globalisation and human rights' (2007) 7 *Human Rights Law Review* 483 489.

8 W Tabb *Economic governance in the age of globalisation* (2005) 3, cited in O'Connell (n 7 above).

9 See O'Connell (n 7 above) 490, citing A Saad-Filho & Dohnston 'Introduction' in A Saad-Filho & D Johnston (eds) *Neoliberalism: A critical reader* (2005) 1.

countries with archaic legal systems often unable to deal with intricate legal entities, and those besieged by corruption and political instability.¹⁰ Unfortunately, some of these countries are also ostensibly fertile ground for corporate-related human rights abuses and are mainly found in the developing world.

Aware of this reality, in 2003 the United Nations (UN), through the erstwhile Human Rights Commission, commissioned Draft Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights, with the aim of, *inter alia*, pronouncing on the human rights obligations of business.¹¹ It was clear at the time that corporations had metamorphosed into intricate 'ogre' entities, with considerable financial and political power, and could not therefore be left unregulated and unaccountable. The power of corporations in modern society is substantial. By way of illustration, Standard and Poor, a single MNC, has the power to determine countries' credit ratings, thus affecting each country's ability to borrow money and take care of its citizenry.¹² To further illustrate this power of MNCs, the world economy was recently brought to its knees by the collapse of Wall Street, which resulted in serious aftershocks in countries across the world – leading to people losing their homes and not being able to feed their families and educate their children.¹³ It is a truism that some modern MNCs wield more power than entire countries. Of the world's 100 biggest economies, 40 are corporations, and 60 are states.¹⁴ In 2012, the revenues of Royal Dutch Shell exceeded the gross domestic product

10 See International Commission of Jurists Report *Corporate complicity and legal accountability: Facing the facts and charting a legal path* (2008) 1-2.

11 See UN Economic and Social Council (ECOSOC) Sub-Commission on Promotion and Protection of Human Rights *Norms on the responsibilities of transnational corporations and other business enterprises with regard to human rights* UN Doc E/CN.4/Sub.2/2003/12/Rev.2. See also ECOSOC Sub-Commission on the Promotion and Protection of Human Rights *Commentary on the norms on the responsibilities of transnational corporations and other business enterprises with regard to human rights*, UN Doc E/CN.4/Sub.2/2003/38/Rev.2; L Backer 'Multinational corporations, transnational law: The United Nation's Norms on Responsibilities of Transnational Corporations as a harbinger of corporate social responsibility in international law' 2005 *Columbia Human Rights Review* 101-192. The author saw these norms being able to reduce the ability of states to resist emerging international law norms. See also T Sorell 'The UN norms' in J Dine & A Fagan (eds) *Human rights and capitalism: A multidisciplinary perspective on globalisation* (2006) 284-299.

12 Standard and Poor is a MNC with a presence in 23 countries. It is a market intelligence organisation that offers investors information on other corporations and countries' credit ratings and indices. It also offers investment research and risk evaluations and solutions; <http://www.standardandpoors.com/about-sp/main/en/us> (accessed 6 January 2012).

13 For an inside story of the collapse of one of the major players on Wall Street, Lehman Brothers, see L McDonald & P Robinson *A colossal failure of common sense: The inside story of the collapse of Lehman Brothers* (2009).

14 See Corporate Cloud 2013: Time for responsible capitalism, <http://www.globaltrends.com/knowledge-center/features/shapers-and-influencers/190-corporate-cloud-2013-time-for-responsible-capitalism> (accessed 29 September 2013).

(GDP) of 171 countries.¹⁵ Commenting on the power of the modern MNC, Grossman and Bradlow tersely observed that:¹⁶

[G]rowth in corporate power raises a significant problem for traditional international law. First, it means that whatever the international legal status of states may be, the sovereign has less power, measured in terms of control over human, natural, financial and other resources, than those corporations that it is supposedly regulating. This suggests that in fact the sovereign is no longer 'master of its own territory'.

It is this colossal power and the ever-growing corporate-related human rights violations that warrant far-reaching control and remedies, wherever possible.¹⁷ In the main, given that business and capital-exporting countries were vehemently opposed to the 2003 UN draft norms, while non-governmental organisations (NGOs), some countries, and indeed some elements of business were supportive, the Special Representative of the UN Secretary-General for Business and Human Rights (SRSG), John Ruggie, was appointed to find common ground between stakeholders.¹⁸ He was tasked largely with identifying and clarifying standards of corporate responsibility and accountability regarding human rights; elaborating on states' roles in regulating and adjudicating corporate activities; clarifying concepts such as 'complicity' and 'sphere of influence'; developing methodologies for human rights impact assessments; and considering state and corporate best practices.¹⁹ After much consultation, the SRSG produced the Protect, Respect and Remedy Framework which was adopted by the UN (Ruggie's Framework).²⁰ He was then asked to provide guidance on the implementation of the framework, which he did by developing the Guiding Principles on Business and Human

15 As above.

16 C Grossman & D Bradlow 'Are we being propelled towards a people-centred transnational legal order?' (1993) 9 *American University Journal of International Law and Policy* 8-9.

17 Justice Louis Brandeis described corporations, as far back as 1933, as 'Frankenstein monsters', given that they were capable of doing a lot of harm to ordinary citizens. See *Louis K Liggett Co & Others v Lee, Comptroller & Others* 288 US 517 (1933) 567, cited in J Bakan *The corporation: The pathological pursuit of profit and power* (2004) 19.

18 See OHCHR Report 2005 E/CN.4/2005/91, para 19.

19 UN Human Rights Commission Resolution 2005/69 ap.ohchr.org/documents/E/.../resolutions/E-CN_4-RES-2005-69.doc (accessed 5 October 2011).

20 The journey is chronicled in the following SRSG's reports: *Interim Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises*, UN Doc E/CN.4/2006/97 (2006) <http://www1.umn.edu/humanrts/business/RuggieReport2006.html>; *Business and Human Rights: Mapping International Standards of Responsibility and Accountability for Corporate Acts* A/HRC/4/035 <http://www.business-humanrights.org/Documents/SRSG-report-Human-Rights-Council-19-Feb2007.pdf>; *Protect, Respect and Remedy: A framework for business and human rights* UN Doc A/HRC/8/5 (2008) <http://www.reports-and-materials.org/Ruggie-report-7-Apr-2008.pdf>; *Guiding Principles on Business and Human Rights: Implementing the United Nations 'Protect, Respect and Remedy' Framework* UN Doc A/HRC/17/31 <http://www.business-humanrights.org/media/documents/ruggie/ruggie-guiding-principles-21-mar-2011.pdf> (accessed 25 April 2011).

Rights: Implementing the United Nations Protect, Respect, and Remedy Framework (GPs).²¹

As previously observed, globalisation thrives where there is little or no regulation. Corporations' insatiable need to maximise profits leads them to avoid accountability, as they may go to the extreme measures to realise this goal.²² Its prime environment is fertile ground for what may be termed globalised corporate-related human rights violations. The GPs correctly acknowledge that it is unrealistic to expect that MNCs will always be held accountable in the host state.²³ This is because host states are at times unwilling and/or unable to hold these MNCs to account because of corruption, lack of legal capacity or political instability. When this happens, the home state becomes relevant.

The fundamental question, however, is whether the GPs clearly define circumstances under which, and by means of which, MNCs may be held liable under the laws of their home states for human rights violations committed beyond their home borders – by their subsidiaries or so-called 'foreign hands'.²⁴ The Framework and GPs are here critically assessed with a view to answering this fundamental question. I argue that the Framework and GPs have not placed enough emphasis on host state remedies, thus worsening the plight of those who are unable to access remedies in the host state. In the home state, the parent company has enough resources to make good the wrongs of its subsidiaries committed in the host state. I also argue that by not guiding victims that cannot access the host state, the GPs are perpetuating the *status quo* of corporate impunity. Finally, I speculate about the reasons for the lack of guidance on how to access home state remedies given these well-known hurdles.

21 Annexed to the SRSG final report to the Human Rights Council (A/HRC/17/31) and adopted by the Council through Resolution 17/4 of 16 June 2011. Special Representative of the Secretary-General, Protect, Respect and Remedy: A framework for business and human rights, UN Doc A/HRC/8/5, 9 (2008) (2008 Framework Report); Special Representative of the Secretary-General, Guiding principles on business and human rights: Implementing the United Nations 'Protect, Respect and Remedy' Framework, UN Doc A/HRC/17/31 (2011) (GPs).

22 This view, however, is refuted by the International Chamber of Commerce (ICC), which claims that MNCs 'are not necessarily attracted to countries with low wages and weak environment protection', or to countries with 'the lowest tax levels'. On the contrary, so the argument continues, evidence shows that the majority of US-based MNCs direct their foreign investment to other developed countries. However, as Deva rightly observes, the ICC argument fails to grasp the 'race to the bottom hypothesis', which is essentially that developing countries contest with each other with the hope of attracting FDI and that there is little race to be talked of where the contest is not between countries with similar levels of development. See S Deva 'Human rights realisation in the era of globalisation: The Indian experience' (2006) 12 *Buffalo Human Rights Law Review* 96.

23 See commentary to GP 2.

24 According to Deva, corporate hands include subsidiaries, affiliate sister concerns, contractors, joint ventures, and other business partners of similar identity. See S Deva 'Acting extraterritorially to tame multinational corporations for human rights violations: Who should bell the cat?' (2004) 5 *Melbourne Journal of International Law* 47.

2 Long haul towards the Framework and Guiding Principles: Home state remedies in perspective

The journey towards the elaboration of the Framework and the subsequent adoption of the GPs is well documented.²⁵ The SRSG undertook this journey diligently and successfully conducted extensive stakeholder consultations.²⁶ Of particular importance, for our purposes, is the 14 September 2010 expert meeting that the SRSG convened at the Harvard Kennedy School in the United States of America. This was to explore the role and limits of extraterritoriality in the business and human rights domain – especially in relation to countries in which MNCs are domiciled.²⁷ Leading experts on the subject advised the SRSG on how to navigate the extraterritorial jurisdictional jungle. They observed that corporations preferred to be held liable in the host state rather than in the home state and that, should they be held liable in the latter, they would most likely prefer criminal or administrative regimes as opposed to exposure to private civil suits. One of the obvious reasons for this preference is the far-reaching nature of civil suits.²⁸ However, experts warned that victims have a clear interest in obtaining remedies, and that this has to be paramount. In fact it is argued that this should be the fundamental concern, because the SRSG's mandate was about the protection of human rights from violation by MNCs, and instituting mechanisms to remedy such violations.

The experts also addressed the issue of liability of corporate groups, noting that the issues of separate legal personality and courts' reluctance to pierce the corporate veil are still challenges to holding corporations liable for their subsidiaries' wrongdoings committed

25 See n 20 above. See D Bilchitz 'The Ruggie framework: An adequate rubric for corporate human rights obligations' (2010) 7 *International Journal of Human Rights* 199-229; RJ Anderson 'Reimagining human rights law: Toward global regulation of transnational corporations' (2010) 88 *Denver University Law Review* 183-236. For a discussion of both the 2008 Framework Report and the Guiding Principles, see JH Know *The Ruggie rules: Applying human rights law to corporations* (2011) http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1916664 (accessed 20 November 2012); SA Aaronson & I Higham "'Re-righting business': John Ruggie and the struggle to develop international human rights standards for transnational firms' (2011) http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1922224 (accessed 20 November 2012).

26 Ruggie's consultations raised and canvassed a plethora of issues around business human rights obligations. He convened numerous consultative meetings in many countries, and also received and reviewed written submissions from various stakeholders across the globe. Most of the reports and submissions are available at <http://www.business-humanrights.org/SpecialRepPortal/Home> (accessed 10 January 2012).

27 'Exploring extraterritoriality in business and human rights: Summary note of expert meeting' 14 September 2010, the Mossavar-Rahmani Centre for Business and Government, Harvard Kennedy School, Cambridge MA, USA <http://www.business-humanrights.org/media/documents/ruggie-extraterritoriality-14-sep-2010.pdf> (accessed 13 October 2011).

28 As above.

abroad. They suggested that this challenge may be overcome by exposing the 'singleness' of the corporation, by pointing to its own initiated, centralised and uniform reporting across the group – as evidence of a single 'enterprise'. They also raised the problem of political sensitivities between the home and host state, when the former attempts to exercise jurisdiction. Although difficult to agree on, they suggested that reasonableness factors may be developed to guide the home state in avoiding actual or perceived interference.²⁹ Disappointingly, GP 2 merely requires states to make their expectations clear that business enterprises domiciled in their territory or jurisdiction respect human rights in all their operations, but does not provide guidance and depth on what states must do. GP 2 mentions only one reasonableness factor in passing, and does not offer any depth and clarity on other factors proposed by the experts. It should be borne in mind that one of the aspects of the mandate was to 'identify and clarify' standards and practices. Borrowing from the field of anti-corruption measures, the experts suggested that the home state should prevent and redress violations contributed to or perpetrated by corporations in their territory and/or under their jurisdiction.³⁰ This suggestion is also not embraced by the GPs.

With the experts' advice in mind, the question then is: To what extent does the final product produced by the SRSG bear witness of this advice? It will be argued later that the GPs are inadequate on home state remedies because of the apparent challenges of sovereignty and the strong opposition by corporations, and possibly the SRSG's avoidance of controversy for the sake of 'consensus'. Indeed, from early on, the SRSG questioned the very existence and efficacy of a remedy against corporations.³¹ This stance later changed, but it was rather curious given that, if there was no right to remedy for victims the state would not be expected to protect it, nor would the corporations be required to respect it under the Framework. Foundational principle 25 and GP 26 and 27 eventually provide for state-based remedies, but it is argued that the SRSG's initial views on remedies explain the somewhat superficial attention given to remedies in general, and extraterritorial remedies in particular. Before being given the mandate, the SRSG once rightly observed that '[b]usiness typically dislikes binding regulations until it sees their

29 These factors include an assessment of whether there are multilateral or unilateral measures, as the former are more acceptable, and whether there is international consensus on the wrongfulness of the activity. See also Summary note of expert meeting (n 27 above).

30 They envisioned this in the event of the adoption of a binding instrument. However, some advised that binding instruments are difficult to attain, and advised that this would be a progressive step, and therefore there was nothing stopping the SRSG from incorporating it in the Framework and GPs (n 27 above).

31 At para 88 of A/HRC/8/5 of 7 April 2008, the report states that '[j]udicial mechanisms are often under-equipped to provide effective remedies for victims of corporate abuse'. It suggests further that victims may lack a basis in domestic law on which to found a claim for compensation.

necessity or inevitability. Governments often support the preferences of corporations domiciled in their countries and/or compete for foreign investment.³² One would, therefore, have expected that he would remedy this in the Framework and GPs but, alas, they seem to reinforce those views. One is tempted to conclude that this was done for the sake of consensus.

3 Inaccessibility of home state remedies under the Guiding Principles

The availability of host state judicial remedies to victims of corporate-related human rights abuses is mostly uncontested. This is because of the almost sacrosanct principle of territoriality on which this is premised. This principle essentially gives the host state authority to prescribe rules governing persons (natural and juristic), as well as to regulate events occurring in its territory. It also gives the host state authority to avail its judicial remedies, in the event of a contravention.³³ Although these host state remedies theoretically are available to victims, in practice sometimes they are unavailable due to the host state's unwillingness to act against corporations, driven by its desire to protect foreign direct investment (FDI). States are under the constant threat that MNCs will pack up and go, because globalisation and the mobility of capital make it easy for them to switch countries.³⁴ It is because of this reality that host states sometimes turn a blind eye to corporate violations.³⁵ This phenomenon has been described as a 'race to the bottom', where states vigorously compete to attract and retain FDI.³⁶ It is also viewed as a form of 'dependency',

32 J Ruggie 'Business and human rights: The evolving international agenda' (2007) 4 *The American Journal of International Law* 822.

33 SL Seck 'Exploding the myths: Why home states are reluctant to regulate', keynote address for Mining Watch Canada Conference: Regulating Canadian Mining Companies Operating Internationally (20 October 2005) 6.

34 As one business leader remarked, corporations owe no allegiance to countries in which they were born. Such countries, the argument goes, need to remain attractive to the company in order for it not to relocate to other countries. See Bakan (n 17 above) 22.

35 D Chirwa 'Towards binding economic, social and cultural rights obligations of non-state actors in international and domestic law: A critical survey of emerging norms' unpublished PhD thesis, University of the Western Cape, 2005 212.

36 See EM Macek 'Scratching the corporate back: Why corporations have no incentive to define human rights' (2002) 11 *Minnesota Journal of Global Trade* 101 104; S Ratner 'Corporations and human rights: A theory of legal responsibility' (2001) 111 *Yale Law Journal* 460. The 'race to the bottom' happens where a host state relaxes its standards in order to attract investment. See also P Muchlinski *Multinational enterprises and the law* (2006) 105. See also Deva (n 22 above).

because MNCs exploit weaker host states with no remedial action.³⁷ Host states sometimes are unwilling to avail judicial remedies to victims because of sheer corruption.³⁸ Some have even gone to the extent of enacting legislation to make it an offence for their own nationals to pursue an MNC in its home state.³⁹ There are, however, genuine instances where the host state is unable to provide judicial remedies, because it is plagued by armed conflict and therefore incapable of controlling its territory effectively. It may also be due to a lack of the necessary human and financial resources, or simply the required expertise to fight a subsidiary of a powerful MNC. MNCs are often structured in such a way that they maximise profits while minimising their risk to liability. One way of achieving this is by operating very lean structures in the host state, and with no significant assets there. This may therefore render the host state unattractive for victims, particularly where there are serious violations that warrant substantial compensation.

It is under these circumstances of unwillingness, incapacity or plain unattractiveness of the host state that victims look to the home state for remedies. Cases that arose in Nigeria, India, South Africa and, recently, Bangladesh, illustrate this point. In *Kiobel v Royal Dutch Petroleum Company*, Dr Barinem Kiobel and others from Ogoniland lodged a class action against Royal Dutch and its subsidiary, Shell Petroleum Nigeria, in the United States (US), citing corruption in the host state's judiciary.⁴⁰ The plaintiffs sought damages for torture and extrajudicial executions. The issue before the US Supreme Court was '[w]hether and under what circumstances the Alien Tort Statute ... allows courts to recognise a cause of action for violations of the law of

37 See E Benvenisti 'Exit and voice in the age of globalisation' (1999) 98 *Michigan Law Review* 167. From Benvenisti's perspective, national courts and legislatures in the home state are also aware that if they impose strict regulatory rules on MNCs operating abroad, the MNCs may leave the country and set up where their competitors are based; thus, these institutions are also caught in what he calls the 'prisoner's dilemma' of protecting domestic interests. See also M Monshipouri *et al* 'Multinational corporations and the ethics of global responsibility: Problems and possibilities' (2003) 25 *Human Rights Quarterly* 973. See also Deva (n 22 above). See, lastly, JL Dunoff & JP Trachtman 'Economic analysis of international law' (1999) 24 *Yale Journal of International Law* 1 54- 55.

38 J Ruggie 'Business and human rights: The evolving agenda' (2007) 101 *American Journal of International Law* 819.

39 Papua New Guinea enacted the Compensation (Prohibition of Foreign Legal Proceedings) Act 1995, designed to protect BHP from potential liability for environmental damage accessioned at the Tedi River Basin. Legislation cited in S Joseph *Corporations and transnational human rights litigation* (2004) 5.

40 The Alien Tort Claims Act was passed by the United States Congress in 1789. It provides district courts with original jurisdiction over 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. It has increasingly been used by victims of corporate abuses to launch civil suits in the US for human rights violations committed outside the US. See J Jarvis 'A new paradigm for the Alien Tort Statute under extraterritoriality and the universality principle' (2003) 30 *Pepperdine Law Review* 671. See also *Kiobel v Royal Dutch Petroleum Co*, *Wiwa v Royal Dutch Petroleum*, *Wiwa v Anderson*, and *Wiwa v Shell Petroleum Development Company*, full court documents available at <http://ccrjustice.org/> (accessed 10 January 2014).

nations occurring within the territory of a sovereign other than the United States'.⁴¹ Unfortunately, the Supreme Court held that there was a presumption against extraterritoriality and therefore the ATS could only apply extraterritorially when the case 'touches and concerns' the US with 'sufficient force'.⁴² In dismissing the claims as not actionable in the US, the Supreme Court held that the US would be a 'uniquely hospitable forum for the enforcement of international norms' because the action was brought by foreigners against a foreign company for violations that happened outside the US.⁴³

In the case of the Indian Bhopal disaster, the victims sought remedies in the US citing, among others, inadequate assets to meet their claim in India, and the unsophisticated nature of the legal system there to dispose of a case of that magnitude.⁴⁴

In South Africa, after initiating a case in 2004 and taking several years to move it through the court system, gold miners who had contracted silicosis and tuberculosis in South African gold mines approached a United Kingdom high court for remedies largely because of this delay.⁴⁵ The case was dismissed in 2013 due to a lack of jurisdiction but is currently being appealed before the UK Court of Appeal.⁴⁶ The case instituted in South Africa was settled in 2013.⁴⁷ In similar instances, victims of corporate abuses during the apartheid era sued corporations that aided and abetted the apartheid system in the US courts, because of the unavailability and/or unattractiveness of

41 See *Hempe & Others v AASA Co* 132 S Ct 1738, 1738 (2012) (order directing re-argument), <http://www.supremecourt.gov/orders/courtorders/030512zr.pdf> (accessed 14 November 2013).

42 See *Kiobel* (n 41 above) 1669.

43 See *Kiobel* (n 41 above) 1659 1669. See also a critique of the *Kiobel* decision in A Colangelo 'The Alien Statute and the Law of Nations in *Kiobel* and Beyond' (2013) 44 *Georgetown Journal of International Law* 1329.

44 The government of India passed a law that allowed it to represent victims before the US courts, mainly because it was aware that the assets of Union Carbide in India could not meet the amount of \$3,1 billion it had claimed. The case was initiated in the US but later referred back to India, where it was settled. Some 'activist petitioners', however, lament the settlement and argue that victims could have recovered substantially more damages had the case been fully pursued in the US system. See M Galanter 'Bhopal's past and present: The changing legal response to mass disaster' (1990) 10 *Windsor Yearbook of Access to Justice* 151 153-155.

45 *Hempe & Others v AASA* South Gauteng High Court, Johannesburg, Case 18273/04 and *Vava & Others v Anglo American South Africa Ltd* Claim HQ11X03245 (UK). See also R Meeran 'Tort litigation against multinational corporations for violation of human rights: An overview of the position outside the United States' (2011) 3 *City University of Hong Kong Law Review* 38.

46 See <http://www.leighday.co.uk/News/2013/July-2013/UK-Court-decision-in-gold-miner%E2%80%99s-silicosis-cases> (accessed 11 February 2014).

47 The parties reached a confidential settlement in September 2013, that is, after nine years of litigation and delays. See <http://www.lrc.org.za/lrc-in-the-news/2916-2013-09-25-anglo-american-settles-silicosis-suit> (accessed 5 February 2014).

remedies in the host state.⁴⁸ The cases are currently before the US District Court and parties have been given an opportunity to file supporting papers on corporate liability under the ATS in light of the recent Supreme Court decision in *Kiobel*.⁴⁹

These cases represent classic examples of the unavailability of remedies in the host state, due to corruption, inadequate assets, and the sheer unattractiveness of the legal system to dispose of the case concerned.

The important question at this juncture is whether the Guiding Principles have provided guidance to victims such as those in the cases cited above on how to access the home state. Before delving into this question, it is important to acknowledge that, unlike the host state, the home state's accessibility is also not uncontested – it faces some conceptual challenges. The first is that home state remedies infringe on the host state's sovereignty. Secondly, in almost all cases where MNCs are charged with human rights violations in the courts of the home state, MNCs rely on the doctrine of *forum non conveniens* to 'defeat-delay-frustrate' actions initiated by victims of their violations committed in the host state.⁵⁰ Thirdly, they rely on the twin principles of separate legal personality and limited liability. Finally, they rely – albeit to a limited extent – on the principle of international comity. A few misconceptions surrounding these impediments are discussed in turn below.

States are sovereign, equal entities in the eyes of international law. They have the right to decide on their individual political, social and economic paths, without any interference from other states. It may be argued, however, that the *Lotus* case in the Permanent Court of International Justice shows that home states are not necessarily precluded from entertaining violations that occur within the territories of host states – by either applying their law or availing their courts – as

48 Major corporates like Daimler, Ford, General Motors and IBM have been sued before the US courts under the ATS, for the support and assistance they provided to the South African apartheid government in committing human rights violations. The basis for the cases is that these corporations aided and abetted the apartheid government in extrajudicial killing, torture, cruel, inhuman or degrading treatment, and denationalisation. See *In Re South African Apartheid Litigation*, 02-MDL-1499, US District Court, Southern District of New York (Manhattan), 8 April 8 2009. For a discussion of the litigation, see M Saage-Maaß & W Golombek 'Transnationality in court: *In Re South African Apartheid Litigation* 02-MDL-1499, US District Court, Southern District of New York (Manhattan), April 8, 2009' (2010) 2 *European Journal of Transnational Studies* 5.

49 See *In Re South African Apartheid Litigation* Order 02 MDL 1499 (SAS) <http://www.lawfareblog.com/wp-content/uploads/2013/12/Judge-Scheindlin-Order.pdf> (accessed 12 February 2014).

50 S Deva 'Corporate Code of Conduct Bill 2000: Overcoming hurdles in enforcing human rights obligations against overseas corporate hands of local corporations' (2004-2005) 8 *Newcastle Law Review* 92.

corporations always argue.⁵¹ It is clear that a reliance on territoriality is also problematic, as globalisation has eroded the nation state and its boundaries although host states still jealously protect it, while corporations religiously defend it.⁵² Indeed, the goal posts are constantly shifted when victims seek justice – all in the name of state sovereignty. Baxi passionately asks:⁵³

[F]or *whom*, and *when* the 'nation-state' has 'ended' ... [t]he so-called borderless world remains cruelly *re*-bordered for the violated victims ... Myanmar is thus borderless for Unocal, though not for Aung San Su Kyi and the thousands of Burmese people she symbolizes. India is borderless for Union Carbide and Monsanto but not for the mass disaster-violated Indian humanity. Ogoniland is borderless for Shell but becomes the graveyard of human rights and justice for a Ken Saro Wiwa, and the people's movement martyred alongside him.

A closer look at how MNCs function reveals that they often have centralised reporting, and that their headquarters – situated in the home state – usually provide an overall strategic vision for the entire enterprise. Seck argues that this vision-setting process should be seen as 'territorially-based' in the home state.⁵⁴ The centralised reporting on the other hand exposes the single 'enterprise' nature of the MNC.⁵⁵ This would then mean that by availing its judicial remedies, the home state would actually be responding to events taking place within its territory, albeit partly so. The availing of home state remedies should not be interpreted as an encroachment on the host state's sovereignty, but rather as 'the home state acting more responsibly within an interconnected international system'.⁵⁶

The doctrine of *forum non conveniens* has proved to be a near insurmountable impediment for victims of corporate-related human

51 It was decided in *SS 'Lotus' (France v Turkey)* 1927 PCIJ (ser A) No 10 18-19 that '[f]ar 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 [principle of territoriality] leaves them in this respect a wide measure of discretion which is only limited in certain cases by prohibitive rules'.

52 The government of South Africa opposed apartheid litigation in the US because it had competence to deal with its own issues of reconciliation, reparation and transformation, without outside interference, instigation or instruction. In his declaration, the then Minister of Justice stated that '[i]t is the government's submission that as these proceedings interfere with a sovereign's efforts to address matters in which it has the predominant interest, such proceedings should be dismissed'. Minister Maduna's declaration is available at <http://www.info.gov.za/view/DownloadFileAction?id=70180> (accessed 11 November 2013).

53 U Baxi *The future of human rights* (2002) 136-137.

54 SL Seck 'Exploding the myths: Why home states are reluctant to regulate' keynote address for MiningWatch Canada Conference: Regulating Canadian Mining Companies Operating Internationally (20 October 2005) 6.

55 On the 'enterprise theory', see the seminal work by PI Blumberg *The multinational challenge to corporation law: The search for a new corporate personality* (1993).

56 Expert Report (n 27 above).

rights abuses seeking access to the home state's courts.⁵⁷ Cassels has noted that this 'doctrine shields multinationals from liability for injuries abroad'.⁵⁸ In fact, MNCs use it as their very 'first line of defence'.⁵⁹ In terms of this doctrine, a court in the home state will decline jurisdiction if it is proved that a court in the host state is the more appropriate forum, as was the case in *Bhopal*.⁶⁰ Different factors are taken into consideration in order to determine the appropriateness of the forum. However, the overarching consideration is which – between the host and the home state – has the 'most real and substantial connection' with the corporation.⁶¹ Aware of the misuse by MNCs, courts have now warned that this doctrine is 'an exceptional tool to be employed sparingly'.⁶²

In the event that victims overcome the *forum non conveniens* hurdle, they further face the challenge of separate personality and limited liability. It is a basic tenet of corporate law that shareholders are separate from the corporation and, by extension, the parent corporation is separate from its subsidiary.⁶³ Corporations have a tendency to insulate themselves from liability by allocating the risky aspects of the business to foreign subsidiaries which hold only

57 See P Prince 'Bhopal, Bougainville and OK Tedi: Why Australia's *forum non conveniens* approach is better' (1998) 47 *International and Comparative Law Quarterly* 573; KL Boyd 'The inconvenience of victims: Abolishing *forum non conveniens* in US human rights litigation' (1998) 39 *Virginia Journal of International Law* 41; MJ Rogge 'Towards transnational corporate accountability in the global economy: Challenging the doctrine of *forum non conveniens* in *Re: Union Carbide, Alfaro, Sequihua and Aguinda* (2001) 36 *Texas International Law Journal* 299.

58 J Cassels *The uncertain promise of law: Lessons from Bhopal* (1993) 273, cited in Deva (n 22 above). See also KL Boyd 'The inconvenience of victims: Abolishing *forum non conveniens* in US human rights litigation' (1998) 39 *Virginia Journal of International Law* 41.

59 See Rogge (n 57 above).

60 The Indian victims of the gas leak at Union Carbide Corporation's pesticides plant in Bhopal were denied access to the US courts on the basis that the Indian courts were better placed to deal with the matter. For a critique of the application of this doctrine to the facts of the case, see U Baxi (ed) *Inconvenient forum and convenient catastrophe: The Bhopal case* (1986) 1-30; U Baxi 'Mass torts, multinational enterprise liability and private international law' (1999) 276 *Hague Recueil* 301.

61 Seck (n 54 above) 13.

62 See *Mujica v Occidental* 381 F Supp 1134 (CD Cal 2005). See also the dismissal of the doctrine in the case of *Wiwa v Royal Dutch Petroleum*, 226 F 3d 88, 92 (2nd Cir 2000), cited in J Davis *Justice across borders: The struggle for human rights in the US courts* (2008) 177-178.

63 This rule was developed in *Salomon v Salomon & Co* [1897] AC 22 51, where Lord MacNaughten held: 'The company is at law a different person altogether from the subscribers to the memorandum and, although it may be that after incorporation the business is precisely the same as it was before, and the same persons are managers, and the same hands receive the profits, the company is not in law the agent of the subscribers or the trustee for them. Nor are subscribers as members liable, in any shape or form, except to the extent and in the manner provided by the Act.'

minimal assets.⁶⁴ Courts have, however, come up with tools designed to curb the negative effects of the twin principles of separate personality and limited liability.⁶⁵ They depart from these principles if they are used as a mere façade aimed at perpetrating fraud or other illegality. Thus, they pierce the corporate veil to impute liability on the real perpetrators. In practice, these tools are not very helpful to victims of corporate abuses because of the inconsistent manner in which they are applied. Deva has compellingly suggested that⁶⁶

[t]he principles of separate personality and limited liability were evolved to serve certain public purposes, including the promotion of entrepreneurship so as to contribute to individual/societal development. But at the same time they should not be used to defeat another equally important social objective, ie the promotion of human rights. It is important, therefore, to balance the business concerns of corporations represented by these two principles with the concerns of human rights activists. Such a balancing will not [only] allow corporations to play a key role in the development of society but will also ensure that these principles do not become corporate tools for systematic avoidance/evasion of legal responsibility for human rights violations by exploiting a series of legal fictions.

In almost all the cases lodged before the home state, the twin 'vintage' principles of separate personality and limited liability are invoked by corporations to avoid liability.⁶⁷ It is therefore fair to ask whether the GPs have given clarity on how the balance suggested by Deva can be achieved, in the interest of promoting entrepreneurship and curbing corporate impunity. GP 26 rightly provides that '[s]tates should take appropriate steps ... to reduce legal, practical and other relevant barriers that could lead to a denial of access to remedy'. However, the GP does not go further to elaborate on how these legal and practical barriers, such as separate personality and limited liability, can be reduced.

As far as the principle of international comity is concerned, home state courts decline to exercise jurisdiction on events that occurred in the host state out of respect for the latter's laws, policies, traditions and aspirations.⁶⁸ This principle is based on the sovereign equality of states, and is meant to ensure order and fairness among states. It has

64 According to H Hansmann & R Kraakman 'Toward unlimited shareholder liability for corporate torts' (1991) 100 *Yale Law Journal* 1879 1891, there is 'strong empirical evidence [that] indicates that increasing exposure to tort liability has led to the widespread reorganisation of business firms to exploit limited liability to evade damage claims'.

65 These include the piecing of the corporate veil, principles of agency and *alter ego*. See Deva (n 22 above) 101.

66 Deva (n 24 above) 104-105.

67 Deva (n 24 above) 96. See also the cases of *Hempe & Others v AASA* and *Kiobel v Royal Dutch Petroleum Co*, *Wiwa v Royal Dutch Petroleum*, *Wiwa v Anderson*, and *Wiwa v Shell Petroleum Development Company* and *Bhopal* where the defendant companies invoked these principles.

68 ZA Jennifer 'Extraterritorial jurisdiction: Lessons for the business and human rights sphere from six regulatory areas' (2010) Corporate Social Responsibility Initiative Working Paper 59 160.

been observed that the principle of international comity is rather vague, and difficult to define in precise terms.⁶⁹

Turning to the question of home state remedies in the GPs, it has to be noted that commentary on GP 2 provides, in part, that home states *are not prohibited from or are permitted to* take measures to ensure access to remedies.⁷⁰ This language has been criticised for being ‘timid and unambitious in a context where victims of abuse by multinational corporations routinely face insurmountable obstacles to remedy in their own countries and have no other place to turn for help’.⁷¹ The GPs ought to have specifically provided clear guidance on how to navigate each of the procedural and substantive impediments to home state remedies they so ably identified. They also ought to have elaborated on the ‘governance gaps’ to assist home states to implement governance mechanisms to ensure that their corporations do not violate human rights abroad.⁷²

The other obvious weakness of the GPs is an over-emphasis on non-judicial mechanisms as well as voluntary mechanisms, which do not always afford victims adequate protection against corporate-related human rights abuses, as opposed to an emphasis on legally-binding remedies. The GPs ought to have provided comprehensive remedies that are effective and legally binding and consistent with human rights obligations of states and corporations both in the host state and home state. They have further failed to take into account the power imbalances in terms of resources and information between victims of corporate abuses and MNCs.⁷³ All these omissions represent a serious failure to ensure access to justice for victims of corporate abuses, particularly those in host states.

4 Who benefits from the Framework and Guiding Principles paradigm?

At the risk of asking the obvious, the question is whether the Framework and GPs are too corporate-friendly to the disadvantage of victims. Before attempting to answer this, it is useful to catalogue corporate responses to various attempts made to regulate them throughout history. The first attempt to regulate corporations can be traced back to the late 1600s in England, after the collapse of many

69 As above.

70 My emphasis.

71 G Quijano ‘Is the right to remedy under international law sufficiently protected in the 2011 UN Guiding Principles on Business and Human Rights?’ paper presented at International Conference on the ‘Protect, Respect and Remedy’ Framework: Charting a future or taking the wrong turn for business and human rights? 23-24 January 2012, Constitution Hill, Johannesburg, South Africa (on file).

72 As above.

73 RC Blitt ‘Beyond Ruggie’s Guiding Principles on Business and Human Rights: Charting an embracive approach to corporate human rights compliance’ (2012) 48 *Texas International Law Journal* 52.

'perverted' corporations that sold valueless stock to ignorant buyers.⁷⁴ The English Parliament, in 1720, in response outlawed the corporation due to the constant failures of many to return 'fabulous profits' to their naïve investors who had been wooed to buy stock in bogus companies which would flourish for a while due to speculation of good returns before going under.⁷⁵ However, it was not long before they were allowed to operate again.⁷⁶ In the US, President Roosevelt introduced regulatory reforms in 1934 to curb the greed and mismanagement of corporations believed to have caused the Great Depression. However, this was unacceptable to corporations and they actually plotted a *coup* to overthrow his administration.⁷⁷ It would seem, from their inception, corporations have always been inimical to regulation.

As well, corporations such as the British East India Company, the Dutch East India Company and the Hudson's Bay Company exploited the southern hemisphere's natural resources, using child labour and forced prison labour, particularly during the colonial period.⁷⁸ Mafeje once asked:⁷⁹

[T]here is a continued plunder of resources by the developed countries well beyond their borders and yet they reserve the right to shut out the victims of their centuries-old exploitation of overseas territories. Could there be a worse form of global injustice?

By failing to clearly articulate how home state remedies may be accessed, the Framework and GPs fail to answer the age-old question posed by Mafeje. Turning to efforts to regulate MNCs in modern times, during the decolonisation period the colonised states tried to reverse the exploitation through various measures such as nationalisation, but these were vehemently opposed by corporations. Ratner provides a useful account of how the host states attempted to regulate MNCs during the decolonisation period. He observes that⁸⁰

[h]ost states sought to rein in the power of TNEs by drafting a multinational code of conduct for transnational corporations ... In 1974, the United Nations established a Centre for Transnational Corporations to prepare the Code; it completed a draft in 1983 and another in 1990. While recognizing some rights for investors, these Codes emphasized the need for foreign investors to obey host country law, follow host country

74 Bakan (n 17 above) 6.

75 Bakan (n 17 above) 7.

76 Bakan (n 17 above) 8.

77 Bakan (n 17 above) 20.

78 See, eg, W Rodney *How Europe underdeveloped Africa* (1982); M Meredith *The state of Africa: A history of fifty years of independence* (2006); DC Dowling 'The multinational's manifesto on sweatshops, trade/labour linkage, and codes of conduct' (2000-2001) 8 *Tulsa Journal of Comparative and International Law* 52.

79 A Mafeje 'Democracy, governance and new democracy in Africa: Agenda for the future', paper presented at African Forum for Envisioning Africa, Nairobi, Kenya, 26-29 April 2002, <http://www.worldsummit2002.org/texts/ArchieMafeje2.pdf> (accessed 10 July 2012).

80 Ratner (n 36 above) 467 (footnotes omitted).

economic policies, and avoid interference in the host country's domestic political affairs. In a response to this development, the Organization for Economic Cooperation and Development (OECD), the principal international institution composed of wealthy states, drafted its own set of guidelines for multinational enterprises. These contained far fewer and weaker obligations on TNEs and were not intended to be binding.

Thus, MNCs got away with it again during the decolonisation period. The accelerated globalisation and consequent globalised corporate abuses of the 1990s subsequently saw the UN take a stand and commission the drafting of the 2003 UN Draft Norms. As already stated, these Draft Norms sought to move beyond voluntarism, and progressively articulated binding obligations for corporations.⁸¹ They were, however, vehemently rejected by major corporations and the SRSG.⁸² The trend here is that, on the one hand, major corporations and capital-exporting countries totally reject strong measures (the 1983 and 1990 codes and the 2003 Draft Norms) while, on the other, they accept and embrace seemingly weaker ones (OECD guidelines and the SRSG's Framework and Guidelines). Being mainly exposed to the host state is a great victory for MNCs, given that they usually operate lean structures in the host state, with minimal assets.⁸³ According to the Framework, a company's failure to meet its social responsibilities can subject it to the courts of public opinion – comprising employees, communities, consumers, civil society, as well as investors – and occasionally to charges in actual courts.⁸⁴ This is, however, wholly inadequate from the perspective of a victim of host state corporate abuses, who wants actual remedies in the home state but has no guidance from the GPs on how to actuate those remedies. It is, therefore, tempting to conclude that on the issue of access to a remedy, MNCs are winners and victims are losers, in the bigger scheme of things.

81 On the failure and/or inadequacy of voluntarism, see International Council on Human Rights Policy *Beyond voluntarism: Human rights and the developing international legal obligations* (2002). See also S Deva 'The UN global compact for responsible corporate citizenship: Is it still too compact to be global?' (2006) 146 *Corporate Governance Law Review* 151, where the author, *inter alia*, laments the 'directional uncertainty, lack of enforcement and independent monitoring, misuse as a marketing tool, and amorphous role of states' as far as the UN Global Compact is concerned.

82 See Sorell (n 11 above) 284; and Ruggie (n 21 above).

83 In the *Bhopal* case (n 44 above), the court ended up settling only \$470 million in India, compared to the initial amount of \$3,1 billion that was claimed before the US courts.

84 See Report of the Special Representative of the Secretary-General (John Ruggie) on the issue of human rights and transnational corporations and other business enterprises, titled 'Protect, Respect and Remedy: A framework for business and human rights' A/HRC/8/5 7 April 2008 54.

5 Concluding remarks

The mandate of the SRSG was, in essence, to rein in the modern MNC in this age of neoliberal globalisation and robust capitalism. Whether the Framework and GPs achieved this is debateable. Some have described them as 'minimalist', while others have argued that they represent the status quo where companies are encouraged, but not obliged, to respect human rights.⁸⁵ On his part, the SRSG saw the whole process as underpinned by 'principled pragmatism'.⁸⁶ I investigated a specific question: whether the GPs offer any guidance to victims of corporate-related abuses who fail to obtain justice in the host state, and look to the home state for redress. It goes without saying that the home state is not easily accessible, due to the known hurdles presented by age-old legal concepts misused by corporations in order to avoid liability. As already argued some of these challenges are overemphasised. The home state is seen mostly as possessing the greatest potential for victims of corporate abuses, because the MNC is headquartered there, with substantial assets to make good its wrongdoings.⁸⁷

The Framework and GPs have failed to clearly articulate the accessibility of home state remedies. Rather, they have provided a somewhat unbalanced emphasis on host state judicial remedies and non-judicial mechanisms, which are sometimes clearly unavailable or unattractive to victims of corporate abuses. Consequently, as critical as it may sound, there is a perpetuation of corporate impunity, particularly in the developing world where most multinationals are attracted to virgin markets, natural resources, commodities and favourable tax systems.

85 U.N. Human Rights Council: Weak Stance on Business Standards, Human Rights Watch (16 June 2011) <http://www.hrw.org/en/news/2011/06/16/un-human-rights-council-weak-stance-business-standards> (accessed 7 April 2014).

86 See Bilchitz (n 25 above) and SRSG (2006) Interim Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, UN Doc E/CN.4/2006/97 (22 February 2006) <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G06/110/27/PDF/G0611027.pdf?OpenElement> (accessed 12 November 2011).

87 S Joseph 'Taming the Leviathans: Multinational enterprises and human rights' (1999) 46 *Netherlands International Law Review* 176-178.