MULTINATIONAL CORPORATIONS AND THEIR HUMAN RIGHTS ABUSES: THE QUEST FOR AN INTERNATIONALLY BINDING TREATY

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Abstract

The rise to power of multinational corporations (MNCs) during the era of globalisation has resulted in their establishment as formidable players in the international arena. In their pursuit for profit maximisation, MNCs tend to operate in the developing world where they are often involved or implicated in human rights violations. As the current corporate social responsibility (CSR) initiatives aimed at addressing global corporate abuses are non-binding on MNCs, the UN has initiated a treaty-drafting process with the aim to adopt a business and human rights (BHR) treaty. Once signed and ratified by States, this treaty will impose direct legally binding obligations on MNCs vis-à-vis universal human rights standards. This development has resulted in much controversy and disagreement amongst States, with predominantly industrialised States opposing this treaty's adoption. Consequently, the question is whether implementing a BHR treaty is justified. Providing an answer to this question requires a two-fold analysis. First, whether a BHR treaty is necessary in order to end the impunity of MNCs and second, whether adopting this treaty is politically feasible.

CHAPTER 1: INTRODUCTORY CHAPTER

1.1 INTRODUCTION

The era of globalisation has seen the sharp rise of multinational corporations (hereafter 'MNCs').[1] MNCs exert more economic power than many States, making them formidable players in the international arena.[2] Consequently, they have the potential to utilise their power in a positive manner; foreign direct investment from corporations can stimulate economic growth, development and employment, thereby contributing (directly or indirectly) to the improvement of human rights situations around the world.[3]

Conversely, MNCs can exert their power and influence in a manner that violates the fundamental human rights of global citizens.[4] There are countless examples where MNCs have been connected to the deaths, torture, enslavement and forced displacement of thousands. In fact, recent research suggests that it is MNCs who are responsible for some of the most flagrant human rights abuses in the world today.[5] This, coupled with the dramatic decline of State power over the last century, has resulted in a position of relative corporate impunity.[6]

This situation has given rise to extensive scholarly debate about an appropriate means to adequately hold MNCs accountable for their human rights violations. The perceived inadequacy of domestic laws to properly govern the business activities of MNCs has moved the focus to the level of international law.[7] In this regard, various corporate social responsibility (CSR) initiatives have been implemented over the decades in an attempt to regulate MNC

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[1] Freddy Duncan Mnyongani *Accountability of Multinational Corporations for Human Rights Violations under International Law* (published LLD thesis, University of South Africa, 2016) at 3.
[2] Maciej Zenkiewicz 'Human Rights Violations by Multinational Corporations and UN Initiatives' (2016) 12 (121) *REV INT'IL & POL* at 124.
[3] Larissa van den Herik & Jernej Letnar Cernic 'Regulating Corporations under International Law' (2010) 8 *J INT'L CRIM JUST* at 726.
[4] Ibid.
[5] See *Business and Human Rights Resource Centre* available at https://www.business-humanrights.org/en/ , accessed on 22 January 2023.
[6] Lee McConnel 'Assessing the Feasibility of a Business and Human Rights Treaty' (2017) 66(1) *International and Comparative Law Quarterly* at 143.
[7] Jan Wouters & Anna-Luise Chane 'Multinational Corporations in International Law' (2015) *Working Paper No. 129* at 4.

behaviour. These have been termed as 'soft law' due to their non-binding and voluntary in nature.[8]

Despite these soft law attempts at regulating businesses, many MNCs continue to pursue their primary objective of profit maximisation at the expense of human rights. This situation has been termed as the 'governance gap'[9] as MNCs are involved or implicated in human rights atrocities but face no legal consequences for their actions. It has been argued that this is due to the fact that under international law, MNCs are not bound by any direct obligations to respect human rights standards. Accordingly, there has been a growing discontent over the current state of the voluntary CSR initiatives.[10]

In recognition of this accountability vacuum, the Human Rights Council (HRC) in 2014 established a procedure to draft a treaty on business and human rights.[11] Once in force, and signed and ratified by States, this treaty will place directly binding obligations on States as well as on MNCs themselves. However, many industrialised States and certain scholars have raised concerns about implementing such a treaty, claiming that the existing CSR initiatives are satisfactory at regulating MNC behaviour,[12] and that the current lack of consensus means any attempt at drafting a treaty is not worthwhile.[13]

1.2 STATEMENT OF THE PROBLEM

MNCs are formidable players in the international arena and pose a serious threat to the enjoyment of human rights, particularly in the developing world where they operate. The ongoing discussions for a BHR treaty to impose binding obligations on MNCs has been called into question by certain scholars and States. One of the points of contention is that a BHR treaty is not necessary as there are already global CSR initiatives that regulate MNCs under international law. Another argument is that the pursuit to adopt a BHR treaty is a futile

[8] Chrispas Nyombi & Tom Mortimer 'Is a multilateral treaty on business and human rights justified?' (2017) 23(4) *Int. T.L.R* at 7.
[9] Wouters & Chane op cit note 7 at 12.
[10] Nyombi & Mortimer op cit note 8 at 1.
[11] Business and Human Rights Resource Centre 'Binding Treaty' available at https://www.business-humanrights.org/en/bigissues/bindingtreaty/#, accessed 15 January 2023.
[12] John Ruggie 'A UN Business and Human Rights Treaty?' (2014) 3 *Issue Brief, Harvard Kennedy School.*
[13] John Ruggie 'Quo Vadis? Unsolicited Advice to Business and Human Rights Treaty Sponsors' (2014) available at https://www.ihrb.org/other/treaty-on-business-human-rights/quo-vadis-unsolicited-advice-to-business-and-human-rights-treaty-sponsors, accessed 15 January 2023.

undertaking as universal participation cannot be achieved. The question, therefore, is whether a BHR is justified, both on the grounds of necessity and practicality.

1.3 OBJECTS AND PURPOSE OF THE RESEARCH

The objective of this research is to determine whether a BHR treaty is justified. This dissertation will answer this question by considering whether there is a need for such a treaty. It will do so by analysing the existing CSR framework to determine whether it adequately regulates MNC behaviour. The dissertation will then ask whether the current lack of State consensus makes pursuing a BHR worthwhile.

1.4 DELIMITATIONS

It is not the intention of this dissertation to cover the myriad of issues that arise in relation to the regulation of MNCs under international law. Thus, for the purposes of this paper, certain delimitations are required:

(a) When discussing 'MNC accountability', this dissertation is referring to the entity itself as well as its corporate executives.

(b) The dissertation does not delve into the issue of whether MNCs should be granted international criminal capacity.

(c) Nor does the dissertation embark on analysis as to whether MNCs are regarded as subjects of international law.

(d) This dissertation will not analyse the role domestic law has to play in holding MNCs accountable. Therefore, the national courts – civil and criminal – is beyond the scope of the analysis. The paper will, however, make reference the use of the domestic courts only insofar as the 'duty to protect' enunciated in the Guiding Principles makes reference to the role of the 'host' and 'home' states.

(e) The dissertation only addresses the regulation of MNCs, and not other non-state actors or business enterprises.

(f) Despite the distinction between an MNC and a TNC, Wouters and Chane note that the terms are often used synonymously.[14] This dissertation will therefore use the terms 'MNC' and 'TNC' interchangeably. The term 'corporation' may also be used when referring to a single entity within an MNC.

(g) The research is not concerned with the exact nature of rights that MNCs infringe upon. Reference to 'human rights' or 'fundamental rights' should be taken to encompass the broad range of rights guaranteed by the Universal Declaration of Human Rights (UDHR).[15]

(h) Although there is a distinction between the 'developing' and 'least developed world', this paper will not differentiate between the two. Thus, terms such as 'developing States' includes should be viewed as encompassing those nations that are not considered 'developed' or 'industrialised'.

(i) It must be noted that there are numerous flaws that scholars have pointed out with the Guiding Principles and the other CSR initiatives. Nonetheless, this dissertation will only address some of their primary disadvantages so as to demonstrate their inadequacy at regulating MNCs under international law.

(j) It is acknowledged that a BHR treaty is but one of the many proposals aimed at closing the 'governance gap'. Scholars have suggested various other solutions such as, *inter alia*, a WTO-UN partnership,[16] enhancing bilateral investment treaties (BITs),[17] and amending the Rome Statute so as to grant the International Criminal Court (ICC) jurisdiction over legal persons.[18] Nonetheless, the scope of this dissertation is specifically focused on the proposed solution of a BHR treaty.

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[14] Wouters & Chane op cit note 7 at 6.
[15] UN General Assembly *Universal Declaration of Human Rights* (1948) 217 A(III), available at https://www.un.org/en/about-us/universal-declaration-of-human-rights, accessed 15 January 2023.
[16] S. Deva 'Human Rights Violations by Multinational Corporations and International Law: Where from Here?' (2005) *Connecticut Journal of International Law* at 22.
[17] Sharon Hang 'Investing in Human Rights: Using Bilateral Investment Treaties to Hold Multinational Corporations Liable for Labor Rights Violations' (2014) 37(4) *Fordham International Law Journal.*
[18] Kathryn Haigh 'Extending the International Criminal Court's Jurisdiction to Corporations: Overcoming Complementarity Concerns' (2008) 14 (1)*Australian Journal of Human rights.*

(k) Regarding this BHR treaty, the research will not engage in an analysis of the exact contents of the latest draft.

(l) Finally, although there are countless arguments for and against adopting a BHR treaty, considering all of these contentions is beyond the scope of the research. The paper only seeks to present some of the primary contentions that have been raised.

1.5 RESEARCH METHODOLOGY

The research methods used for writing this dissertation will be conducted via online research, specifically using online databases via the University of Cape Town's virtual library. The sources relied upon are primarily peer-reviewed academic journals, written by legal scholars who have expertise in the field of international business and human rights law. Where relevant, reference shall also be made to news articles so as to ensure that the research is up to date with global affairs. As a large part of this dissertation will be written while I complete my studies at Stockholm University, Sweden, some resources supplied by Stockholm University may also be relied upon.

1.6 STRUCTURE

Chapter 2 introduces the topic of MNCs under international law. It begins by providing a definition of these entities and traces their rise since the globalisation period. Thereafter, the dissertation examines what human rights obligations, if any, MNCs are required to adhere to under international law. To contextualise the threat MNCs pose to the enjoyment of human rights and the various ways in which MNCs are involved or implicated in human rights violations, the Chapter discusses some infamous examples of corporate abuses that have occurred in the developing world.

Chapter 3 undergoes a critical analysis into the predominant CSR instruments that have been implemented over the decades to address corporate abuses. In this regard, the chapter will analyse the following instruments: the 1976 Organization for Economic Co-operation and Development (OECD) Guidelines for Multinational Enterprises,[19] the 1977 International Labor

[19] OECD, *Declaration on International Investment and Multinational Enterprises*, OECD/LEGAL/0144/.

Organization (ILO) Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy,[20] the 2000 UN Global Compact,[21] the 2003 Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights,[22] and the UN Guiding Principles on Business and Human Rights (Guiding Principles).[23] The focus of this chapter is specifically geared towards answering the question as to whether these CSR initiatives go far enough in ensuring MNCs are held accountable for their business practices that amount to human rights infringements.

Chapter 4 begins by briefly outlining the process that led up to the latest draft for a business and human rights treaty. It then undergoes a two-part analysis to determine whether adopting this treaty is justified. First, it considers whether there is a need for such a treaty. Second, it asks whether, considering the current lack of State consensus, adopting this treaty is a worthwhile pursuit. To answer these questions, the chapter will consider arguments for and against a BHR treaty.

Chapter 5 will serve as a conclusion. It will briefly summarise some of the main points raised throughout the dissertation and will conclude by answering the research question as to whether a BHR treaty is justified.

[20] International Labour Organisation *Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy* (2017) Fifth Edition available at https://www.ilo.org/public/libdoc/ilo/2006/106B09_303_engl.pdf, accessed 15 January 2023 at para 20.
[21] United Nations Global Compact 2000.
[22] U.N. Office of the High Commissioner for Human Rights, Sub-Commission on the Promotion and Protection of Human Rights *Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights* (2003) U.N. Doc. E/CN.4/Sub.2/2003/I 2/Rev.2.
[23] Special Representative of the Secretary-General 'Guiding Principles on Business and Human Rights: Implementing the United Nations 'Protect, Respect and Remedy' Framework' (2012) A/HRC/17/31 *Human Rights Council*.

CHAPTER 2: MNCS UNDER INTERNATIONAL LAW

2.1 INTRODUCTION

This chapter begins by providing a suitable definition of an MNC for the purposes of the dissertation. It briefly examines how the legal concepts of 'separate legal personality', 'limited liability' and 'company groups' facilitated MNCs' rise to economic power during the globalisation period making them formidable players on the global stage. It thereafter considers what obligations, if any, MNCs are placed under *vis-à-vis* human rights under international law. Finally, the chapter contextualises the threat MNCs pose to citizens living in the developing world by highlighting some infamous examples of corporate abuse.

2.2 DEFINING MNCS

Providing a definition of an 'MNC' is no easy task as the discussion about MNCs has been characterised by numerous terminologies'.[24] The UN framework originally defined the term as 'enterprises which own or control production or service facilities outside the country in which they are based.'[25] This definition changed into 'TNC' to highlight the cross-border operation of the respective corporation and to distinguish it from such MNCs which are 'owned and controlled by entities from several countries'.[26]

This distinction was later abandoned, and the UN Draft Norms adopted the definition for a TNC as an 'economic entity operating in more than one country or a cluster of economic entities operating in two or more countries – whatever their legal form, whether in their home country or country of activity, and whether taken individually or collectively'.[27] To confuse matters further, the OECD Guidelines and the ILO instruments use the term 'MNC', describing these entities as follows:

> 'These enterprises operate in all sectors of the economy. They usually comprise companies or other entities established in more than one country and so linked that they may co-ordinate

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[24] Wouters and Chane op cit note 7 at 5.
[25] Report of the Group of Eminent Persons to Study the Impact of Multinational Corporations on Development and on International Relations (1974) UN Doc E/5500/Rev.1, ST/ESA/6, 25.
[26] Wouters and Chane op cit note 7 at 5.
[27] Draft Norms op cit note 22 at para 20.

> their operations in various ways. While one or more of these entities may be able to exercise a significant influence over the activities of others, their degree of autonomy within the enterprise may vary widely from one multinational enterprise to another. Ownership may be private, State or mixed'.[28]

Despite these varying definitions, it has already been noted in the delimitations section that the terms 'MNC' and 'TNC' will be used interchangeably. In terms of defining an MNC/TNC, Deva provides a useful description by drawing on the fundamental characteristics mentioned in the previous definitions:

> '[a]n economic entity, in whatever legal form, that owns, controls, or manages operations, either alone or in conjunction with other entities in two or more countries. The central element of this definition is the control exercised by a corporation of operations outside the country in which it is established. Such control could be exercised in various ways, including ownership of shares, control over the Board of Directors, or through management of operations and affairs'.[29]

In this regard, an MNC should be taken to refer to a corporation that is registered and operates in more than one State at a time, with its headquarters in one State and its wholly or partially owned subsidiaries operating in other states. A common feature of this structure involves the parent company situated in a developed State and its subsidiaries located within States that are developing.[30] As a consequence, units within MNCs are able to closely cooperate and, at the same time, can prevent the parent company in the home State from being held liable from the high-risk activities conducted by its subsidiaries acting abroad.[31]

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[28] OECD Guidelines for Multinational Enterprises, part I, ch I, at 4; see ILO Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy at 6.
[29] S. Deva op cit note 16 at 3.
[30] Wouters and Chane op cit note 7 at 6.
[31] Jenny Blanck *Regulating transnational corporations: the role of the home state* (published LLM thesis, Uppsala Universitet, 2013) at 14.

2.3 THE RISE OF MNCS IN A GLOBALISED WORLD

Tracing the rise of MNCs involves the starting point of the classic case of *Salomon*,[32] which created a distinction between a company and its incorporators. This distinction became known as 'separate legal personality' which is the legal concept that a corporation is a separate legal 'person', entirely distinct from the natural persons who work for, direct or who are shareholders in that corporation.[33] This means that it is the corporation itself that has the legal capacity to acquire rights and incur legal obligations, which are separate from the rights and responsibilities of its corporate executives. It has been said that separate legal personality boosted the drive for the corporate enterprise, thus strengthening the corporate model at the heart of capitalism.[34]

It logically followed that if a corporation was a separate legal person in the eyes of the law, its shareholders could only be liable to the extent of their investment in that corporation. This principle became known as 'limited liability' which allowed entrepreneurs to start a business without jeopardising all their belongings if the business failed or fell into debt as a result of contractual or tort claims.[35] Of course, separate legal personality also meant that the shareholders of a company could be other legal persons. Thus, by the end of the 19th century, the US passed legislation that permitted companies to own other companies.[36]

This legal scenario is now referred to as a 'company group', where the corporation investor (the 'parent') invests and controls other business enterprises (the 'subsidiary'). Due to the principle of limited liability, the parent company is isolated from the liabilities of its subsidiary.[37] English case law now confirms that wholly-owned subsidiaries are generally considered as separate and independent from the parent company – a principle which presently represents a cornerstone of common law's corporate rules.[38]

Subsequently, separate legal personality and limited liability, coupled with technological advancements and trade liberalisation provided the perfect breeding ground for MNCs. These

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[32] *Salomon v A Salomon & Co Ltd* [1896] UKHL 1, [1897] AC 22.
[33] Blanck op cit note 31 at 13.
[34] Jahid Hassan et al 'International business and human rights: time for hard law' (2016) *I.C.C.L.R* 27(10) at 1.
[35] Blanck op cit note 31 at 14.
[36] Ibid.
[37] Ibid.
[38] Adeline Michoud 'Aiming for Corporate Accountability's Heart: a Discussion on the Relevance of Corporate Veil Piercing' (2019) 134 *BLR* at 136.

entities grew exponentially and today they continue to locate themselves within multiple States, making them formidable players across the globe. In fact, research indicates that MNCs have now become increasingly wealthier than many States. Research conducted in 2015 by Global Justice Now found that 69 of the world's top 100 economic entities are corporations rather than countries.[39] Well-known MNCs have GDPs that exceed those of certain States. For instance, Walmart is larger than 161 countries including Israel, Poland and Greece.[40] Ford is larger than South Africa and Toyota is larger than Norway.[41] It is said that one-third of world trade is simply transactions among various units of the same corporation.[42]

This is facilitated by the fact that MNCs are composed of extremely complex arrangements of subsidiaries and joint ventures of several different nationalities that operate in multiple jurisdictions.[43] They are made up of numerous business enterprises of various legal forms and display diverse forms of integration.[44] They have 'no coherent existence as a legal entity but are a political and economic reality which articulates itself in a confusing variety of legal forms and devices'.[45] MNCs have the capacity to easily move places of production and assets between nation States. Their management units are thus structured independently of jurisdictional borders and lose every tie to a nation State bar the nexus of incorporation.[46]

2.4 OBLIGATIONS OF MNCS *VIS-À-VIS* HUMAN RIGHTS?

Since MNCs are formidable players in the global arena, a central debate concerns the question of whether MNCs are subjects of international law, that is, whether they are 'capable of possessing international rights by bringing international claims'.[47] Traditionally, international law viewed sovereign States as its 'subjects', whereas individuals and non-State actors, such as MNCs, could at most be its 'objects'.[48]

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[39] Pat Sweet 'Corporations dominate world's top 100 economic entities' (2015) available at https://www.accountancydaily.co/corporations-dominate-worlds-top-100-economic-entities, accessed 15 January 2023.
[40] Maciej Zenkiewicz op cit note 2 at 124.
[41] Ibid
[42] Ibid.
[43] Blanck op cit note 31 at 14.
[44] Gralf-Peter Calliess 'Transnational Corporations Revisited' (2011) 18 *Indiana Journal of Global Legal Studies* at 601.
[45] Wouters and Chane op cit note 7 at 6.
[46] Ibid.
[47] *Reparation for Injuries Suffered in the Service of the United Nations* (Advisory Opinion) [1949] ICJ Rep at 179.
[48] M.N. Shaw *International law* 5 ed (2003) Cambridge University Press at 177.

However, this began to change after WWII, where the international community came to the realisation that individuals, in their own capacity, should have both rights and obligations under international law.[49] The UN therefore reached an agreement that a human being has certain inalienable rights which must be protected everywhere and at all times.[50] So began the construction of the human rights doctrine. In 1948, the UDHR was adopted which was the first legal document to set out the fundamental human rights to be universally protected.[51]

The end of WWII also resulted in civil society stressing the importance of incorporating human rights within the international framework of corporate social responsibility (CSR).[52] This is intertwined in the UDHR as the Preamble notes that 'every organ of society shall strive by teaching and education to promote respect for these rights and freedoms'.[53] The language of the UDHR therefore acknowledges that non-State actors, such as MNCs, have an impact on human rights. Nonetheless, the UDHR was only a declaration and was therefore non-binding, which meant that it merely imposes ethical duties on MNCs.[54]

Subsequent human rights conventions were drafted during the mid-20th century. At this time, however, MNCs were a relatively unknown phenomenon and States were still viewed as the most likely perpetrators of human rights violations.[55] Therefore, although these treaties acknowledge that non-State actors are capable of infringing human rights, they place obligations on States to protect against human rights abuses. An example is the Convention on the Elimination of all Forms of Racial Discrimination which says that 'each State Party shall prohibit and bring an end, by all appropriate means, including legislation required by circumstances, racial discrimination by any persons, group or organisation'.[56] Moreover, Art 2(e) of the Convention on the Elimination of All Forms of Discrimination Against Women

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[49] Blanck op cit note 31 at 11.
[50] *UDHR* op cit note 15.
[51] Ibid.
[52] Hassan op cit note 34 at 3.
[53] *UDHR* op cit note 15 (Preamble).
[54] C Nyombi & A Yiannaros 'Corporate Personality, Human Rights and Multinational Corporations' (2016) 27(7) *International Company and Commercial Law Review* at 5.
[55] Blanck op cit note 31 at 12.
[56] UN General Assembly *International Convention on the Elimination of All Forms of Racial Discrimination* (1965) Resolution 2105 (XX) at Art 2(1)(*d*).

(CEDAW) provides that State parties must undertake 'all appropriate measures to eliminate discrimination against women by any person, organisation or enterprise'.[57]

These existing human rights treaties accord with the traditional notion of international law which views the States as subjects. Therefore, States remain the primary human rights protectors under international law and are accordingly placed under a legal duty to ensure MNCs refrain from engaging in human rights abuses. In other words, the language of these treaty provisions imposes direct obligations on States but indirect obligations on MNCs.

These indirect obligations on MNCs is also evident when considering the Principles of State responsibility. Customary international law and the ILC articles provide that a State can incur international responsibility for the breach of an international obligation in instances where the wrongful actions of non-state actors are attributable to that State.[58] McCorquodale and Simons provide a succinct summary of the current legal position:

> 'Actions by non-state actors, including corporations, can be attributed to a State, and give rise to a State's responsibility under general international law, where an international obligation is breached (such as under a human rights treaty).[59] The activities of a corporate national (and its subsidiaries) acting extraterritorially can be attributed to the home State where the corporation is exercising elements of governmental authority, or where it is acting under the instructions, direction or control of the State'.[60]

Despite the fact that MNCs have been placed under indirect obligations in some human rights treaties and the rules on State responsibility, current international law still considers States as the primary duty bearers, obligated to respect and fulfill human rights and to ensure their protection against abuses by private actors. MNCs thus have no direct legal obligations in respect of human rights; their sole objective being the maximisation of profit.[61] Although States have enacted domestic laws to regulate company behaviour operating in their territory, they have not yet implemented directly binding human rights

[57] UN General Assembly *Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW)* (1979) Resolution 34/180 at Art 2(e).
[58] International Law Commission *Articles on the Responsibility of States for Internationally Wrongful Acts* Report of the International Law Commission on the Work of its 53rd session, A/56/10, August 2001, UN GOAR.
[59] Robert McCorquodale & Penelope Simons 'Responsibility beyond Borders: State Responsibility for Extraterritorial Violations by Corporations of International Human Rights Law' (2007) 70 *MOD. L. REV* at 624.
[60] Ibid.
[61] Maciej op cit note 2 at 122.

obligations on MNCs under international law.[62] Consequently, the transfer of powers may not have been accompanied by a corresponding transfer of accountability.[63]

2.5 THE ABILITY TO VIOLATE HUMAN RIGHTS

The lack of legal obligations for MNCs under international law with respect to human rights has dire consequences. To contextualise this problem, it is useful to examine some flagrant examples of MNC involvement in human rights violations. There are various ways in which MNCs can be involved in these abuses.[64] MNCs and their managers can be directly and primarily responsible or they can provide goods, technologies and services to governments who use these resources in repressive ways.[65] MNCs may also provide information, logistical or financial assistance to human rights abusers.[66] Moreover, MNCs can be complicit in human rights abuses by virtue of their investments in projects, joint ventures or regimes with poor human rights records or connections to known abusers.[67]

An example of an MNC being directly responsible for human rights violations is the alleged involvement of Shell supporting the Nigerian government in the torture and killing of activists who engaged in peaceful protests against Shell's environmental damages to the Niger Delta.[68] Shell was charged with complicity in human rights abuses against the Ogani people in Nigeria, including summary execution, crimes against humanity, torture, inhumane treatment, arbitrary arrest, wrongful death, assault, battery and infliction of emotional distress.[69] It was alleged that the corporation and its subsidiary conspired with the Nigerian government to ensure the arrest and execution of a group of activists, known as the 'Ogani 9', who were hanged in 1995 after a trial before a special military tribunal based on fabricated charges.[70] According to the plaintiffs, Shell provided financial and logistical support to the Nigerian

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[62] *Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, John Ruggie: Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework* (2010) para 55.

[63] Nicolas Zambrana Tevar 'Shortcomings and Disadvantages of Existing Legal Mechanisms to Hold Multinational Corporations Accountable for Human Rights Violations' (2012) 4 *Cuadernos Derecho Transnacional* at 399.

[64] Jennifer Zerk *Corporate liability for gross human rights abuses: Towards a fairer and more effective system of domestic law remedies* (2012) a report prepared for the Office of the UN High Commissioner for Human Rights.

[65] Ibid at 16.

[66] Ibid.

[67] Ibid.

[68] Wolfgang Kaleck & Miriam Saage-Maass 'Corporate Accountability for Human Rights Violations amounting to International Crimes' (2010) 8 *J. INT'L CRIM. Just* at 704.

[69] Ibid.

[70] Ibid at 705.

police and bribed witnesses to produce false testimonies.[71] In a 2009 settlement, Shell paid $15.5 million to one group of activists' families but continued to deny any involvement. This year, a group of Nigerian widows lost their case after suing Shell over the deaths of their husbands who were part of the Ogani 9.[72]

MNCS and their managers' negligence have also contributed to human rights violations. An example is the 'Bhopal Gas Tragedy', which is considered one of history's worst industrial disasters.[73] On 3 December 1984, about 45 tons of the toxic gas methyl isocyanate leaked from an insecticide plant owned by Union Carbide India Limited (UCIL).[74] The gas covered surrounding neighbourhoods, killing thousands of people in the process. Over and above the estimated death toll of between 15 – 20 000 civilians, roughly half a million survivors suffered from blindness, respiratory problems and other illnesses as a result of the gas.[75] Studies show that to this day, around 120 000 people are still suffering because of the leak.[76] Evidence suggests that the executives of UCIL were aware about the potentially unsafe conditions of the factory but failed to implement adequate safety measures.[77] Compensation paid to the victims and relatives of the deceased has been argued to be wholly inadequate,[78] thousands continue to suffer morbidities from the leak and pollutants continue to contaminate the water and soil in the surrounding Indian towns.[79]

Certain MNCs utilise child labour as children generally require less pay and thus make for more profitable employment.[80] Child labour is defined by the International Labour Organisation (ILO) as work that deprives children of their 'childhood, potential and their

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[71] Ibid at 704.
[72] Anna Holligan 'Ogani nine: Nigerian widows lose case against oil giant shell' (2022) *BBC News* available at https://www.bbc.com/news/world-europe-60851111, accessed 15 January 2023.
[73]Apoorva Mandavilli 'The World's Worst Industrial Disaster is Still Unfolding' (2018) *The Atlantic* available at https://www.theatlantic.com/science/archive/2018/07/the-worlds-worst-industrial-disaster-is-still-unfolding/560726/, accessed 15 January 2023.
[74] Ibid.
[75] Ibid.
[76] Anniki Laine 'Integrated Reporting: Fostering Human Rights Accountability for Multinational Corporations' (2015) 47 *The Geo. Wash. Int'l L. Rev* at 639.
[77] See Ingrid Eckerman *The Bhopal Saga—Causes and Consequences of the World's Largest Industrial Disaster* (2005) *India: Universities Press.*
[78] Amnesty International, 'Injustice Incorporated: Corporate Abuses and the Human Right to Remedy' (2014) 48-49.
[79] Danish Siddiqui & Nita Bhalla 'Bhopal's toxic legacy lives on, 30 years after industrial disaster'(2014) *Thomson Reuters Foundation* available at https://www.reuters.com/article/us-india-bhopal-widerimage-idUSKCN0JC0WD20141128 , accessed 17 January 2023.
[80] Amy Humphries and Juliette Guiot 'Child Labour' (2012) *Human Rights Youth Forum* available at https://mismun2012.wikispaces.com/file/view/Child+Labour.doc, accessed 16 January 2023 at 5.

dignity that is harmful to physical and mental development'.[81] An MNC known for its use of child labour is Apple. A report from The Information indicated that Apple discovered that Suyin Electronics – one of its Chinese-based suppliers – relied on child labour on multiple occasions but refused to cut ties with the company for a further three years.[82] Former members of Apple's suppliers told The Information that the company has refused or has been cautious to cease doing business with suppliers that repeatedly violate its labour policies as doing so would hurt its profits.[83]

There have also been allegations of MNCs being involved in international crimes. On 5 January 2009 and 15 March 2010, NGO Al-Haq lodged a complaint with the Office of the Public Prosecutor (Rotterdam, Netherlands) against two Dutch Companies and two managing directors alleging war crimes in Israel by virtue of the companies' contributions to the construction of an annexation wall and Israeli settlements in the Occupied Palestinian Territory.[84] After a criminal investigation into the matter, the Public Prosecutor dismissed the matter on the grounds that the contribution was minor and that follow up investigations would not be a good use of Dutch investigative and police resources.[85]

Crimes against humanity is another crime that MNCs have been allegedly involved in. An example is the case study of Total's alleged complicity in human rights abuses in Myanmar. In 2002, four Burmese nationals filed a complaint with the Belgian courts under the now repealed Belgian law on Universal Jurisdiction of 1993, alleging that Total was complicit in crimes against humanity such as torture and forced labour committed by the Myanmar military regime.[86] They alleged that this abuse was linked to the construction and operation of the Yadana Gas Pipeline. The case was dismissed on the ground that the plaintiffs were not Belgian nationals and therefore lacked standing.[87] In 2007, the Belgian federal prosecutor launched a new investigation following changes in the law, but the case was eventually dropped.[88]

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[81]International Labour Organisation 'What is Child Labour' (2015) available at http://www.ilo.org/ipec/facts/lang--en/index.htm , accessed 16 January 2023.

[82] Tyler Sonnemaker 'Apple knew a supplier was using child labor but took 3 years to fully cut ties, despite the company's promises to hold itself to the "highest standards", report says' (2021) *Business Insider* available at https://www.businessinsider.com/apple-knowingly-used-child-labor-supplier-3-years-cut-costs-2020-12?r=US&IR=T, accessed 17 January 2023.

[83] Ibid.

[84] Zerk op cit note 65 at 20.

[85] Ibid.

[86] Ibid.

[87] Ibid.

[88] Ibid.

Sometimes MNCs choose to invest and do business with governments who commit human rights violations. In 2002, a group of South Africans, represented by the Khulumani Support Group, sued about 20 banks and corporations for doing business in South Africa during the apartheid.[89] The claim was brought before the US federal court. Their main argument was that the defendants operated in key industries during the apartheid era which influenced and furthered abuses against black South Africans.[90] The plaintiffs claimed they suffered human rights infringements such as extrajudicial killings, torture and rape, and alleged that the companies were complicit in the commission of these offences.[91] The US Court of Appeals in 2013 for the Second Circuit returned the matter to the lower court and recommended dismissing the case. It did so on the basis of the US Supreme Court's decision in *Kiobel v Shell*.[92]

These examples demonstrate how MNCs can use their power in various ways to commit human rights infringements. Furthermore, they illustrate the challenge of holding MNCs to account as their operational flexibility and detachedness from domestic bonds results in national legislators failing to put adequate checks on the power of MNCs.[93] Their power, coupled with the challenge of policing these universal entities that transcend conventional notions of territorial application has given birth to a sense of impunity.[94] The atrocities committed at the hands of MNCs may go unpunished and victims may not be duly compensated if the wrongdoer is merely an abstract legal entity, domiciled in a tax haven and whose owners and/or managers are nowhere to be found.[95]

2.6 CONCLUSION

This chapter has traced the rise of MNCs during the period of globalisation, demonstrating that these entities are some of the most powerful actors on the planet. It has explained how separate legal personality and limited liability have allowed MNCs to locate themselves across multiple jurisdictions, making their regulation incredibly difficult. Where MNCs operate, there have been countless allegations levelled against them for being involved, directly or indirectly, in

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[89] 'Apartheid reparations lawsuits (re So. Africa)' (2002) *Business and Human Rights Resource Centre* available at https://www.business-humanrights.org/en/latest-news/apartheid-reparations-lawsuits-re-soafrica/#, accessed 17 January 2023.
[90] Ibid.
[91] Ibid.
[92] *Kiobel v. Royal Dutch Petroleum Co.* 569 U.S. 108 (2013).
[93] Wouters and Chane op cit note 7 at 6.
[94] Tevar op cit note 64 at 399.
[95] Ibid.

the commission of human rights abuses. Although international law has recognised that individuals have rights and duties, this has only occurred partially with respect to legal persons such as corporations.[96] Ultimately, it is the sovereign State who bears the primary responsibility of protecting and fulfilling human rights obligations. To this day, there exists no directly binding obligations on MNCs to respect human rights.

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[96] Emeka Duruigbo 'Corporate Accountability and Liability for International Human Rights Abuses: Recent Changes and Recurring Challenges' (2008) *Northwestern Journal of International Human Rights* 6(2) at 222.

CHAPTER 3: INTERNATIONAL REGULATION OF MNCS

3.1 INTRODUCTION

The continued involvement of MNCs in human rights atrocities has resulted in increasing calls to place them under direct obligations to ensure that they are better regulated when conducting their business activities abroad. In response, various external guidelines and codes of conduct have been implemented over the decades. These may be drafted and approved within international organisations, individual governments or NGOs and do not require any ratification or consensus. This chapter critically analyses some of the most ambitious of these CSR initiatives and assesses their advantages and disadvantages. In particular, it examines whether these initiatives are successful at adequately regulating MNCs under international law, so as to prevent them from being involved in corporate abuses.

3.2 CORPORATE SOCIAL RESPONSIBILITY INITIATIVES

3.2.1 UN Draft Code of Conduct for Transnational Corporations

The rise of MNCs and international business saw many scholars in the 1970s voicing concern over MNCs' ability to operate beyond the reach of States' national sovereignty.[97] There was an attempt during the 1970s to the early 1990s to develop a broad code of conduct for MNCs. In 1974 the UN Economic and Social Council (ECOSOC) adopted resolutions to establish a UN intergovernmental commission and a UN centre on transnational corporations.[98] Thus began the creation of a code of conduct for MNCs, with the latest draft being produced in 1990. The UN Sub-Commission on the Promotion and Protection of Human Rights established a group to 'conduct relevant background research concerning transnational corporations and human rights'.[99] The group presented its findings to the Sub-Commission as 'Draft Norms on the Responsibilities of Transnational Corporations and Other Business Enterprise with Regard to Human Rights.'[100]

[97] Michoud op cit note 34 at 199.
[98] See E.S.C. Res. 1908 (LVII), U.N. ESCOR, 57th Sess., Supp. No. 1 (1974).
[99] See UN Sub-Commission on the Promotion and Protection of Human Rights 'The Effects of the Working Methods and Activities of Transnational Corporations on the Enjoyment of Human Rights' Res. 2001/3, U.N. Doc. E/CN.4/Sub.2/RES/2001/3 (2001).
[100] Draft Norms op cit note 22.

The code sets out six types of rights or obligations that must be observed by MNCs: (1) the right to equal opportunity and non-discriminatory treatment; (2) the right to security of persons; (3) the rights of workers; (4) respect for national sovereignty and human rights; (5) obligations regarding consumer protection; and (6) obligations with regard to the protection of the environment.[101]

When implementing the Norms, MNCs are to adopt, disseminate and implement internal rules of operation in compliance with the Norms.[102] Further, MNCs are to report to all the stakeholders on their implementation and incorporate the Norms into all their business dealings or terminate their business activities with those partners.[103] The implementation of the Norms is to be monitored through reporting requirements for States adopting general comments and recommendations.[104]

The Draft Norms were an innovative initiative as they sought to apply direct human rights obligations on MNCs, elevating them to fully-fledged duty bearers under international human rights law.[105] They were seen as the most promising human rights norms for MNCs for multiple reasons.[106] First, the Norms attempt to draw a comprehensive list of obligations.[107] Second, to deduce these obligations, the Norms clearly refer to the UN Charter, the UDHR and other international conventions.[108] Third, the Norms change the nature of the obligations by using the word 'shall' instead of 'should'.[109]

Unfortunately, there were disagreements among States which resulted in the 1990 Draft never being finalised and not being adopted by the UN General Assembly. The Draft Norms were heavily criticised as they were said to provide an inappropriate shift from governments' obligations, place an inconsiderate burden on companies in terms of payment of reparations, and have the potential to lead to the dangerous privatisation of human rights.[110] Particular points of contention was that the code focussed on the rights of host States to expropriate MNC

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[101] Ibid at 14.
[102] Ibid at 15.
[103] Ibid.
[104] Ibid at 16.
[105] Wouters and Chane op cit note 7 at 14.
[106] Ibid.
[107] Ibid.
[108] Ibid.
[109] Ibid.
[110] Zenkiewicz op cit note 2 at 133.

property, the jurisdiction of States and the legal status of the code.[111] Regarding this last point, developing States were eager for the rules of the code to be mandatory on MNC behaviour whereas developed States preferred more general language that was voluntary.[112]

A question that has been asked is whether these Norms are voluntary or binding. Weissbrodt argues that they are not a voluntary initiative, but neither are they a treaty.[113] This is because the legal authority of the Norms arises mainly from their sources in treaties and customary international law and is thus a restatement of international legal principles that applies to companies.[114] However, this opinion is controversial[115] and most scholars contend that the Norms are not and have never been binding.[116]

Despite the abandonment of the project, the Norms are said to have played an important role in shaping the debate regarding CSR.[117] Nonetheless, they 'still fall short of what is required for evolving and effective international regulatory regime of corporate human rights responsibility'.[118]

3.2.2 OECD Guidelines

A significant attempt at introducing international standards for MNCs was the OECD Declaration on Investment and Multinational Enterprise 1976.[119] The OECD creates guidelines for business practice. They continue to remain contemporary and relevant as evidenced by subsequent revised versions presented in the 21st century.[120] Guidelines issued in 2000 outlined that MNCs should respect the human rights of individuals affected by their activities.[121] Another revised version in 2011 added a new chapter detailing MNCs' relationship with human rights. This chapter specifically requires that MNCs mitigate the risks of committing human

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[111] Sean D. Murphy 'Taking Multinational Corporate Codes of Conduct to the Next Level' (2005) 43 (389) *COLUM. J. Transnat'l L.* at 404.
[112] Ibid.
[113] David Weissbrodt and Maria Kruger 'Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights' (2003) 97 *American Journal of International Law* at 914.
[114] Zenkiewicz op cit note 2 at 132.
[115] Ibid.
[116] Tevar op cit note 64 at 405.
[117] Zenkiewicz op cit note 2 at 133.
[118] S. Deva 'UN's Human Rights Norms for Transnational Corporations and Other Business Enterprises: an Imperfect Step in the Right Direction?' (2004) 10 *ILSA Journal of International and Comparative Law* at 495.
[119] OECD Guidelines op cit note 19.
[120] Chris Nyombi & Tom Mortimer 'Regulating multinational corporations: what are the limitations in existing international initiatives?' (2017) 24(1) *International Trade Law & Regulation* at 29.
[121] OECD 'Declaration on International Investment and Multinational Enterprises' *OECD/LEGAL/0144*.

rights abuses against individuals affected by their business activities and to remedy any human rights abuses that have occurred.[122]

The OECD Guidelines have their advantages. For instance, they have been used by various labour groups to put pressure on MNCs. Although the Guidelines may signify a positive step towards the realisation of human rights in the realm of profit-making, Oshionebo notes an inherent feature of the Guidelines that hinders their effectiveness is that they are non-binding.[123] Both the 2000 and 2011 editions repeat the wording of the original document verbatim: 'observance of the Guidelines by enterprises is *voluntary* and *not* legally enforceable' [emphasis added].[124]

Some scholars, however, note the possible consequence of MNCs suffering reputational and financial damage should they contravene the Guidelines. For instance, both Nike and Gap lost profits and shareholder investment upon the revelation that their subcontractors were using child labour for production.[125] One could thus use this example to argue that it is in MNCs' best interests to adhere to the Guidelines. Yet, Mortimer correctly points out that Nike and Gap's employment of child labour was discovered by a specific campaign which could not plausibly hold all MNCs to account.[126] In other words, unless it is uncovered that MNCs are involved in abusive human rights practices, it is likely that they will continue their business ventures without facing any reputational or financial consequences.

On a more positive note, there have been attempts aimed at ensuring that MNCs are more transparent to the public. For example, the Guidelines attempt to hold MNCs accountable by encouraging contracting States of the OECD to establish National Contact Points (NCPs).[127] These are to further the effectiveness of the Guidelines and are to operate in accordance with the core criteria of visibility, accessibility, transparency and accountability.[128] NCPs aim to function in an impartial manner while maintaining an adequate level of accountability to the

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[122] OECD Guidelines for Multinational Enterprises 2011 Edition at (II)(10).
[123] Evaristus Oshionebo 'The OECD Guidelines for Multinational Enterprises as Mechanisms for Sustainable Development of Natural Resources: Real Solutions Or Window Dressing?' (2013) *LEWIS & CLARK LAW REVIEW* at 573.
[124]OECD Guidelines at page 17.
[125] Nyombi & Mortimer op cit note 119 at 5.
[126] Ibid.
[127] OECD Guidelines op cit note 19 at 68.
[128] Ibid at 71.

adhering government.[129] When evaluating whether an MNC has breached the Guidelines, the NCPs may seek advice from the Committee on International Investment on Multilateral Enterprises (CIME).[130] As the 38 current States party to the Guidelines are the most advanced States with most of the world's MNCs, the NCPs could act as a suitable mechanism for applying the Guidelines.[131]

The problem is that the NCPs and the CIME have no enforcement powers. As stated in the Guidelines, 'the non-binding nature of the Guidelines precludes the Committee from acting as a judicial or quasi-judicial body'.[132] The NCPs also lacks enforcement abilities due to its reliance on the good faith of parties in order to evaluate claims.[133] Instead, the NCPs only have advisory and consultative responsibilities.[134] Furthermore, these bodies are not permitted to reveal firms' names to the public,[135] thereby failing to ensure that MNCs are fully transparent.

3.2.3 ILO Tripartite Declaration of Principles

In the field of international labour law, the ILO has taken on a significant role in creating codes of conduct. In 1977, the ILO established the Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy.[136] Its aims are, *inter alia*, to encourage the positive contribution which MNCs can make to economic and social progress and the realisation of decent work for all.[137] The Declaration has specific objectives such as the elimination of forced labour, abolition of child labour and the promotion of equality of opportunity and employment.[138] Like the OECD Guidelines, the Declaration can also be seen as contemporary and relevant to international law as it has undergone two amendments in the 21st century: in the years 2000 and 2006.

But the wording of the Declaration clearly reveals its non-binding nature. None of the provisions expressly require MNCs to abide by the Declaration, nor do they prescribe any

[129] Ibid.
[130] Ibid.
[131] Nyombi & Mortimer op cit note 119 at 35.
[132] OECD Guidelines op cit note 19 at (II)(44).
[133] Ibid at para 21.
[134] Surya Deva op cit note 33 at 5.
[135] Tevar op cit note 64 at 404.
[136] Tripartite Declaration op cit note 20.
[137] Ibid at 2.
[138] Ibid 9.

enforcement mechanism to prosecute MNCs for their abusive practices.[139] The wording is thus voluntary and merely imposes ethical obligations on MNCs.[140] For instance, it mentions that parties are only 'recommended to observe on a voluntary basis'.[141]

An advantage of the Declaration is that it requires parties to complete a survey regarding their experience of implementing the guidelines.[142] However, the absence of a legal mandate means MNCs cannot be compelled to do so.[143] Having no enforcement mechanism also means that there is no evidence outlining whether an MNC has filled out the survey correctly.[144] Finally, like the OECD Guidelines, the names of MNCs cannot be revealed.[145] This results in a lack of transparency to the public regarding MNCs' business activities.

3.2.4 UN Global Compact

The UN Global Compact was established in the year 2000 and opts for a principles-based approach to doing business.[146] The aim of the Global Compact is to 'embrace, support and enact, within their sphere of influence, a set of core values in the areas of human rights, labour standards, the environment, and anti-corruption'.[147] It lays out 10 principles, which are derived from the UDHR, the International Labour Organization's Declaration on Fundamental Principles and Rights at Work, the Rio Declaration on Environment and Development, and the United Nations Convention Against Corruption.[148] The principles include, *inter alia*, the idea that businesses should support and respect the protection of international proclaimed human rights, and that businesses must ensure they are not complicit in human rights abuses.[149]

Once a company joins the Global Compact, it is to not only commit itself to the ten principles, but also obliges itself in three ways.[150] First, the company must make changes to its

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[139] Nyombi & Mortimer op cit note 119 at 6.
[140] Joris Oldenziel 'The Added Value of the UN Norms: A Comparative Analysis of the UN Norms for Business With Existing International Instruments' (2005) *Amsterdam: SOMO* at 15.
[141] Tripartite Declaration op cit note 20 at 7.
[142] Nyombi & Mortimer op cit note 119 at 6.
[143] Ibid.
[144] Ibid.
[145] Tevar op cit note 64 at 405.
[146] Global Compact op cit note 21.
[147] Ibid.
[148] Ibid.
[149] Ibid.
[150] UN Global Compact 'What's the Commitment?' available at https://www.unglobalcompact.org/participation/join/commitment#, accessed 18 January 2023.

business operations so that the principles become part of its management, strategy, culture, and everyday operations.[151] Second, it must publish its annual report or similar corporate report with a description of the ways which it is supporting the principles (known as the 'Communication on Progress' [COP] report).[152] Third, the company is to publicly advocate the Global Compact and its principles via communications such as press releases, speeches and broadcasts.[153]

The principles articulated in the Global Compact are significant as they originate from norms that most of the world's States have either accepted or ratified.[154] Moreover, the Global Compact has over 21000 members from 162 states – giving it the global reach to prosecute MNCs for abuses.[155] It is the world's largest non-binding corporate responsibility initiative.[156]

However, critics note that although there has been an increased participation in the Global Compact over the years, this number represents a small proportion of what was estimated.[157] When considering the regional distribution of participants, critics contend that the initiative is not so global after all.[158] Furthermore, although the Global Compact contains a wide range of human rights principles, they have been described as too broad and vague, not making mention of any specific criteria of performance.[159] Deva argues that 'the language of the principles is so general that insincere corporations can easily circumvent or comply with them without doing anything to promote human rights or labour standards'.[160] This vagueness creates a challenge to the successful prosecution of MNCs which fail to act in accordance with the Global Compact.[161]

Another problem with the wording is highlighted by Nolan who asserts that the Global Compact adopts a descriptive rather than a prescriptive approach, as it defines requisite behaviour only in terms of actions that 'embrace, support and enact' rights.[162] This gives the

[151] Ibid.
[152] Ibid.
[153] Ibid.
[154] Nyombi & Mortimer op cit note 8 at 7.
[155] Global Compact op cit note 21.
[156] Nyombi & Mortimer op cit note 8 at 7.
[157] Zenkiewicz op cit note 2 at 137.
[158] Ibid.
[159] Joris Oldenziel op cit note 139 at 12.
[160] Surya Deva 'Global Compact: A Critique of UN's Public-Private Partnership for Promoting Corporate Citizenship'(2006) 34 S*yracuse Journal of International Law & Commerce* at 3129.
[161] Nyombi & Mortimer op cit note 8 at 7.
[162] Justine Nolan 'The United Nations' Compact with Business: Hindering or Helping the Protection of

Global Compact more of a promotional rather than a protectionist character.[163] Furthermore, the Global Compact is non-binding and instead encourages voluntary corporate practices to support human rights standards. This voluntary nature means it is not a viable means of enforcing corporate accountability.[164]

Critique can also be levelled at the Global Compact's COP. This is because the Global Compact Office does not regulate or monitor companies' submissions, resulting in very few signatories reporting following the guidelines.[165] Deva conducted a survey and found that almost 25% of the participants to the Global Compact are listed as non-communicating.[166] Thus, nearly one quarter of the participants to the Global Compact failed to develop a COP. Deva thus concludes that 'many corporations have become party to the Global Compact either without realising what it entails or are consciously embracing the Compact as a public relations exercise'.[167]

Related to this last point is the notion of 'symbolic conformity', which is a concept developed by Jamili. This is essentially when organisations under pressure to adopt particular structures or procedures opt to respond in a 'ceremonial manner', changing their formal structures to signal conformity but then protect internal units, which allows them to operate independently of these pressures.[168] These organisations thus dissociate formal structures from work activity to avoid the detection of inconsistencies and the loss of legitimacy.[169] To demonstrate how this theory works in practice, Jamili conducted a study based on interviews with managers of a sample of MNCs in Asia and Europe in relation to their compliance with International Accountability Standards.[170] He concludes the following:

> 'the majority of organisations are choosing to respond in a ceremonial manner, making changes in their formal structures to signal conformity, but then buffering internal units and operations from the necessity of conformity. Ceremonial conformity allows organisations to

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Human Rights' (2005) 24 *University of Queensland Law Journal* at 460.
[163] Ibid.
[164] Ibid at 464.
[165] Joris Oldenziel op cit note 139 at 12.
[166] Surya Deva op cit note 159 at 140.
[167] Ibid.
[168] Dima Jamali 'MNCs and International Accountability Standards through an Institutional Lens: Evidence of Symbolic Conformity or Decoupling' (2010) 95 *Journal of Business Ethics* at 625.
[169] Ibid.
[170] Ibid.

reap the social benefits of adoption without compromising managerial freedom, autonomy, or entailing serious or substantive adjustments.'[171]

Building on this notion, Zenkiewicz suggests that 'ceremonial conformity' happens in connection with the Global Compact's obligations.[172] He suggests further that the practice of ceremonial conformity hinders not only the Global Compact initiative, but potentially any set of rules regarding business and human rights.[173]

3.2.5 Guiding Principles

The Guiding Principles (GPs) are the most recent and authoritative statement regarding business and human rights. A more in-depth analysis into this initiative is thus required. The development of the GPs began with the UN Secretary General appointing John Gerard Ruggie as Special Representative of the Secretary-General to find relationships between human rights and MNCs so as to create a policy framework.[174] Over the years, Ruggie produced substantial work on the topic which can be divided into three different phases.

The first phase was intended to identify and clarify the existing standards and practices regarding the corporate responsibility and accountability of MNCs and other business enterprises with regard to human rights. As a result, 'Business and Human Rights: Mapping International Standards of Responsibility and Accountability of Corporate Acts'[175] was published in 2007. The second phase involved Ruggie's recommendations in his 2008 report titled: 'Protect, Respect and Remedy: A Framework for Business and Human Rights.'[176] During the third phase, Ruggie was requested to operationalise this report and provide practical recommendations for its implementation. Thus, in 2011, he submitted his final report titled: 'Guiding Principles on Business and Human Rights: Implementing the United Nations 'Protect, Respect and Remedy Framework'.[177]

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[171] Ibid.
[172] Zenkiewicz op cit note 2 at 138.
[173] Ibid at 139
[174] Mortimer op cit note 8 at 8.
[175] Special Representative of the Secretary-General 'Report on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, John Ruggie, Business and Human Rights: Mapping International Standards of Responsibility and Accountability for Corporate Acts' (2007) A/HRC/4/035 *Human Rights Council*.
[176] Special Representative of the Secretary-General 'Report on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, John Ruggie, Protect, Respect and Remedy: a Framework for Business and Human Rights' (2008) A/HRC/8/5 *Human Rights Council*.
[177] Guiding Principles op cit note 23.

The GPS are based on three pillars, namely, the State duty to *protect*, the MNC responsibility to *respect*, and the rights of victims to have access to a *remedy*.[178] The first pillar requires States to 'protect' human rights and in doing so must implement laws which support human rights, outline consequences for breaches of these rights, and advise MNCs on the issues of human rights.[179] This pillar therefore places a duty on the State to protect its citizens, and in doing so should implement CSR regulations as human rights abuses commonly occur in their territory.[180] This accords with the notion that States, as subjects under international law, bear the primary responsibility for human rights protection.

In terms of the second pillar, the GPs recommend that MNCs implement a policy commitment to respect human rights, a process that could remedy human rights abuses, and a procedure that identifies the impact of their business practices on human rights.[181] Thus, an important part of this principle is due diligence which should include assessing actual and potential human rights abuses, integrating and acting upon the findings, tracking responses, and communicating how impacts are addressed.[182]

The third principle articulated in the GPs is to provide a 'remedy' that grants victims of corporate abuse access to judicial protection.[183] The pillar further requires States to consider ways to facilitate access to effective State-based judicial and non-judicial mechanisms dealing with corporate human rights violations.[184]

The GPs are said to represent the first authoritative framework adopted by the UNHRC to address the 'complex global challenges of business and human rights'.[185] Importantly, the GPs set out the responsibilities of the host and home States regarding the regulation of MNCs. Although hailed by many, others have raised some concerns regarding their efficacy at regulating MNCs in the international sphere.

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[178] Guiding Principles op cit note 23 at IA.
[179] Nyombi & Mortimer op cit note 8 at 9.
[180] Ibid.
[181] Guiding Principles op cit note 23 at IIA(15).
[182] Ibid.
[183] Ibid at IIIA.
[184] Ibid at IIIB.
[185] John Ruggie 'Progress in Corporate Accountability' (2013) *Institute for Human Rights and Business.*

One of the primary concerns with the GPs is that the three pillars rely too heavily on domestic justice systems to successfully prosecute MNCs.[186] Although the host State remedies are, in theory, available to victims of human rights abuses, the reality is not so straight forward. Sukanya argues that 'host States are not capable […] of adequately policing MNC activity regarding human rights issues'.[187] This is because they are often unable or unwilling to protect its citizens from the abusive practices of MNCs.

States are often unwilling to regulate the activities of corporations within their jurisdiction as they offer foreign direct investment.[188] States are therefore reluctant to impose stricter standards for human rights as MNCs could simply re-locate to jurisdictions with less (or no) standards, especially other developing nations that are desperate for investment. States therefore face the constant threat of MNCs switching countries which is facilitated by globalisation and the mobility of capital.[189] This phenomenon has been termed as a 'race to the bottom' where States compete vigorously to attract and retain foreign direct investment.[190]

An example is the Burmese government. In Burma, forced labour is criminalised under the Wards and Village Tracts Administration Act and Penal Code Section 374, as well as under section 559 of the country's Constitution. Yet, according to numerous US State Department Human Trafficking Reports, the Burmese government is not effectively applying these laws as evidenced by the Burmese military's continued use of forced labour.[191] Although the Burmese government appears to know about these allegations, the gas development projects have become a lifeline for the Burmese authorities.[192] The country predicts that State-owned Myanma Oil and Gas Enterprise (MOGE) will earn roughly $1.5 billion from oil and gas projects in 2021-2022, with 50 percent of Burma's foreign currency coming from natural gas

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[186] Uta Kohl 'Corporate Human Rights Accountability: The Objections of Western Governments to the Alien Tort Statute' (2014) 63 *I.C.L.Q* at 665.
[187] P Sukanya 'And Justice for All? Globalization, Multinational Corporations and the Need for Legally Enforceable Human Rights Protections' (2003-2004) *University of Detroit Mercy Law Review* at 499.
[188] Blanck op cit note 31 note18.
[189] Tebello Thabane 'Weak extraterritorial remedies: The Achilles heel of Ruggie's 'Protect, Respect and Remedy' Framework and Guiding Principles' (2014) 1 *AHRLJ* at 50.
[190] EM Macek 'Scratching the corporate back: Why corporations have no incentive to define human rights' (2002) 11 *Minnesota Journal of Global Trade* at 101.
[191] Seunghyun Nam 'Reducing the Governance Gap for Corporate Complicity in International Crimes' (2019) 45 *Brook. J. Int'l L* at 215.
[192] Ibid at 216.

and revenues.[193] This indicates that where foreign direct investment is involved, States are often reluctant to take action against MNCs despite their involvement in human rights violations.

The inability of a host State to regulate MNCs refers to the objective incapability of a State to fulfill its human rights obligations for internal or external reasons.[194] For example, the areas of a State that have been occupied or have been subjected to foreign control means the State would not be able to take effective action against human rights violations occurring at the hands of MNCs.[195] Insurgent or separatist groups who take complete control over a portion of a State's territory also pose enforcement problems.[196] Finally, host States sometimes lack economic recourse and/or functioning governmental structures which further adds to the inability to comply with its human rights obligations.[197]

An example is the Democratic Republic of the Congo (DRC) and its justice system which lacks impartiality and independence. In 2007, a Congolese local court tried three individual company members for complicity in war crimes related to the Kilwa incident of 2004.[198] After the individuals were acquitted, certain human rights organisations have argued that this was due to corruption, a lack of judicial capacity, and political interference in the DRC's justice system.[199]

Even in a situation where a host state is willing and/or capable of protecting human rights in its territory, the special nature of MNCs present further enforcement problems. MNCs are often structured so that they maximise profits while minimising their risk of liability.[200] For instance, it might be that the subsidiary (situated in the host State) has little or no assets which means that victims will have no access to proper compensation.[201] Should the host State's national legislation provide an exception to the principle of limited liability – which would allow the shareholders to be liable for the payment of compensation to the victims – a court's judgment in the host State can only be executed against the parent corporation in the home

[193] Burma – Oil and Gas available at https://www.trade.gov/country-commercial-guides/burma-oil-and-gas#, accessed on 18 January 2023.
[194] Blanck op cit note 31 at 19
[195] Ibid.
[196] Ibid.
[197] Ibid.
[198] Adam McBeth 'Crush by an Anvil: A Case Study on Responsibility for Human Rights in the Extractive Sector' (2008) 11 *YALE HUM. RTs. & DEV. L. J.* at 131.
[199] Ibid at 145.
[200] Thabane op cit note 185 at 51.
[201] Blanck op cit note 31 at 19.

State if supported by the courts of the home State.[202] This is a problem as certain domestic jurisdictions do not conform to the principle of criminal liability.[203] Moreover, States have different approaches regarding the nature of the legal sanctions applicable in offences committed by corporations.[204] Therefore, such cooperation required between the host and home State becomes extremely problematic.

If the host State is unwilling or unable to regulate the business activities of MNCs operating in their territory, or if it is willing and able to take action but is faced with the aforementioned hurdles, can victims rely on the home State to prosecute MNCs? The GPs mention that States are not necessarily obliged to regulate 'the extraterritorial activities of businesses domiciled in their territory or jurisdiction', but are also not prohibited from doing so.[205] Given that the host State may lack effective control, the GPs provide that 'where transnational corporations are involved, their home States thereof have roles to play in assisting both those corporations and host States to ensure that businesses are not involved in human rights abuse'.[206] Therefore, home governments could potentially exercise jurisdiction over the parent company for the conduct of its subsidiary under existing national laws.[207] However, the home government is not under any legally binding obligation in this regard.

Just like the host State, the home State's accessibility is also not uncontested as it faces some conceptual challenges.[208] One of the issues is that the home State remedies infringe on the sovereignty of the host State.[209] It is trite law that States are sovereign and equal under international law and therefore have the right to determine their own national rules without the interference of other governments. Nonetheless, the case of *Lotus*[210] heard in the International Court of Justice (ICJ) illustrates that home States are not necessarily precluded from entertaining violations occurring within the territory of the host States.[211] It seems, however, that host States and corporations still vigorously defend territorial boundaries.[212]

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[202] Ibid at 19.
[203] Olivier De Shutter 'Towards a New Treaty on Business and Human Rights' (2015) 1 *Business and Human Rights Journal* at 18.
[204] Ibid.
[205] Guiding Principles op cit note 23 at IA(2).
[206] Ibid at IA(7).
[207] Nam op cit note 187 at 223.
[208] Tebello op cit note 185 at 53.
[209] Ibid.
[210] *S.S. Lotus (Fr. v. Turk)*, 1927 P.C.I.J. (ser. A) No. 10 (Sept. 7).
[211] Tebello op cit note 185 at 53.
[212] Ibid.

Another conceptual obstacle arises when examining the *forum non conveniens* principle. This is a common law doctrine where a court recognises that another court where the case might have been brought is a more appropriate venue and thus transfers the case to that court. As was seen in *Bhopal*, the court in the US declined jurisdiction as it was proved that the court in India was the more appropriate forum.[213] Although determining appropriateness of the forum consists of many factors, the overarching consideration is which State (home or host) has the most real and substantial connection with the corporation.[214] Therefore, *forum non conveniens* has shown to be a near insurmountable impediment for victims of corporate-related human rights abuse seeking access to the home State's courts.[215] MNCs are said to rely on the doctrine as their first line of defence as it shields them from liability for injuries abroad.[216]

Although some courts have dismissed the doctrine, such as in the case of *Wiwa v Royal Dutch Petroleum*,[217] separate legal personality and limited liability pose further problems for victims seeking justice via the home State. MNCs ensure they escape liability by allocating the risky aspects of their business to foreign subsidiaries which hold minimal assets.[218] Deva notes that that in almost all the cases lodged before the home States, the two vintage points of separate personality and limited liability are invoked by corporations to avoid liability.[219] Michoud argues that if subsidiaries generate damages in the course of their business activities, the parent company cannot be held responsible, even though the very instructions and policy prescribed by the parent caused the damage.[220]

A court could, therefore, rely on the doctrine of 'piercing the corporate veil'. This is a practice where a court disregards the principle of limited liability to hold the shareholders or directors of a company personally liable. In the case of company groups – a common feature of MNCs – a court could therefore pierce the corporate veil in order to hold the parent company liable for the actions of its subsidiaries operating in the host State. However, practice reveals that this doctrine is resorted to only in exceptional circumstances. Piercing the veil is also applied in an inconsistent manner and is thus not very useful to victims who want to access the

[213] Ibid at 55.
[214] 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* (2005) at 13.
[215] Tebello op cit note 185 at 55.
[216] Ibid.
[217] *Wiwa v Royal Dutch Petroleum*, 226 F 3d 88, 92 (2nd Cir 2000).
[218] Tebello op cit note 185 at 56.
[219] Deva op cite note 16 at 96.
[220] Michoud op cit note 34.

home State's courts.[221] This has led some scholars to make the argument that the GPs do not adequately address the problem of overcoming the corporate veil. De Schutter, for instance, notes that although the GPs include a human rights diligence requirement, the extent to which this requirement imposes responsibility on a corporation to ensure that other entities with which it has an investment link comply with human rights remains unspecified.[222]

Theoretical obstacles aside, there are also practical realities that make it challenging for victims to seek legal redress through the home State. Practice reveals that corporations strongly oppose greater regulation of private business activities abroad due to the negative impact such regulations may have on their competitiveness.[223] For example, US companies have expressed opposition to the reporting requirements issued by the US government for investments in Burma. Consequently, home governments are reluctant to punish MNCs' extraterritorial business activities, especially when large economic costs and benefits are involved.[224]

There have, however, been some instances where victims were successful in taking action against corporations in the home State. An example is *Unocal*,[225] which was a case brought against Unocal by relying on the Alien Tort Statute (ATS). It was alleged that the company was complicit in the abuse of villagers by the Burmese government.[226] The judgment was revolutionary as it recognised corporate liability of forced labour based on the complicity standard that the company 'knowingly' assisted the military in perpetrating the abuses.[227] However, the recent case of *Kiobel*[228] means it will be more difficult to hold foreign companies liable using the sufficient nexus requirement.[229] Furthermore, the Second Circuit in *Kiobel* reversed previous judgments by holding that the ATS does not reach corporate entities, which has given rise to some debate about whether the ATS allows for corporate liability.[230] In any case, most countries in Europe and Asia do not provide such a wide extraterritorial scope that the US does when it comes to allowing civil courts to exercise jurisdiction over parent companies for extraterritorial acts.

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[221] Tebello op cit note 185 at 56.
[222] De Shutter op cit note 199 at 47.
[223] Nam op cit note 187 at 223.
[224] Nam op cit note 187 at 223.
[225] *Doe v. Unocal*, 395 F.3d 932 (9th Cir. 2002).
[226] Ibid.
[227] Nam op cit note 187 at 224.
[228] *Kiobel v. Royal Dutch Petroleum Co*., 621 F.3d 111 (2d Cir. 2010), cert. granted, 565 U.S. 961 (2011).
[229] Nam op cit note 187 at 224.
[230] Ibid.

Overall, the GPs do not go far enough to allow for victims of corporate abuse to approach the courts in the home State. Thabane argues that the GPs ought to have elaborated on the 'governance gaps' to assist home States to implement governance mechanisms to ensure their corporations do not violate human rights abroad.[231] The GPs therefore fail to clearly articulate the accessibility of home State remedies and rather provide an unbalanced emphasis on host State judicial remedies, which, as shown, are often unavailable or unattractive to victims of corporate abuses.[232] He even goes so far as to say that this results in a perpetuation of corporate impunity, especially in the developing world where most MNCs are attracted to novel markets, natural resources, commodities and favourable tax systems.[233]

Probably the most common critique levelled against the GPs is that they, just like the other CSR initiatives, do not impose any enforceable legal obligations on MNCs and focus too much on voluntary initiatives corporations may choose not to implement.[234] Weissbrodt alleges that Ruggie was supposed to develop standards but has instead attempted to derail the standard-setting process and bow to the corporate refusal to accept any standards except for voluntary codes.[235] Teitelbaum makes the following point in this regard:

> 'the Guiding Principles of Mr. Ruggie are, therefore, mere orientations. They lack a binding nature for both States and corporations; complying in his way with the demand, reiteratively displayed, of large transnational corporations'.[236]

The GPs have also been criticised for suffering from ambiguities and lack of success at addressing the legal obstacles that prevent victims of corporate abuse from seeking protection or redress.[237] A prime example is their failure to address the separate legal personality doctrine which prevents holding the parent company liable for the actions of its subsidiaries in foreign jurisdictions. Although they acknowledge that separate legal personality is a legal hurdle,[238] it

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[231] Thabane op cit note 185 at 57.
[232] Ibid.
[233] Ibid at 60.
[234] Ibid at 91.
[235] David Weissbrodt 'Keynote Address: International Standard-Setting on the Human Rights Responsibilities of Business' (2008) 26 *Berkeley Journal of International Law* at 390.
[236] Alejandro Teitelbaum 'Observations on the Final Report of the Special Representative of the UN Secretary General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, John Ruggie' (2011) *The Jus Semper Globar Alliance* at 7.
[237] Arvind Ganesan 'Dispatches: A Treaty to End Corporate Abuses?' (2014) *Human Rights Watch* available at < https://www.hrw.org/news/2014/07/0 1/dispatches-treaty-end-corporate-abuses>, accessed 18 January 2023.
[238] Guiding Principles op cit note 23 at 16.

does not propose any solutions to overcome it. Moreover, the GPs leave it to companies to determine what their human rights responsibilities are on a case-by-case basis with reference to other international law, rather than setting robust global standards for business.[239]

The language of the GPs has also been heavily criticised. For example, the GPs mention that home States are 'not prohibited from' or 'are permitted to' take measures to ensure access to remedies.[240] Scholars have argued that this language is timid and unambitious in a context where victims of abuse by MNCs routinely face insurmountable obstacles to remedies in their own countries and have no other place to turn to for help.[241] Additionally, the GPs have been argued to limit CSR to a duty to 'respect'.[242] This terminology does not go far enough as corporations should have a legal obligation to improve and promote human rights.[243] It means that an MNC in breach of the GPs does not necessarily face legal consequences, meaning victims of corporate abuse are unable to seek redress of a breach of human rights at the international level.[244]

Conclusively, '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 and home State.'[245] Despite the continued efforts to introduce an international legal framework for MNCs, there remain 'gaps in understanding what the international community expects when it comes to human rights'.[246]

Despite the aforementioned flaws with Ruggie's work, Zenkiewicz highlights two main achievements. First, he argues that the GPs contributed to a greater shared understanding of business and human rights challenges among stakeholder groups.[247] Second, they have secured

[239] Deva op cit note 16 at 113.
[240] Tebello op cit note 185 at 70.
[241] 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?* (2012).
[242] Steven Bittle & Laureen Snider 'Examining the Ruggie Report: Can Voluntary Guidelines Tame Global Capitalism?' (2013) 21(2) *Critical Criminology* at 182.
[243] Ibid.
[244] Giorgia Papalia 'Doing Business Right: the Case for a Business and Human Rights Treaty (2018) 3 *Perth International Law Journal* at 101.
[245] Thabane op cit note 185 at 57.
[246] Nolan op cit note 161 at 458.
[247] Zenkiewicz op cit note 2 at 149.

a wide-stakeholder support for the ‘Protect, Respect and Remedy’ Framework and the GPs for its implementations as the foundation for better managing those challenges.[248]

The GPs have further been extremely influential for other institutions to introduce or amend existing instruments regarding business and human rights. These include the OECD, the World Bank’s International Financial Corporation, the European Commission and the International Organisation for Standardisation. Furthermore, the GPs were endorsed within the UN system as an example for the Global Compact. Conclusively, Zenkiewicz makes the point that Ruggie’s critics and supporters agree on one thing: ‘the legal posturing towards human rights, multinational corporations and corporations are in general more nuanced’.[249] As will be demonstrated below, the GPs have been used by the UN Working Group in its development of a draft treaty on business and human rights.

3.3 CONCLUSION

This chapter has shown that the existing CSR initiatives do not adequately regulate MNCs for their human rights violations. Among many of their problems, the most pressing issue is that the initiatives are non-binding and thus lack an effective enforcement mechanism that victims of corporate abuse can rely on to take action against MNCs. As a consequence, MNCs have the ability to make profits while neglecting local communities and the environment.[250] Hence, despite the continued efforts to introduce an international legal framework for MNCs, there are still ‘gaps in understanding what the international community expects when it comes to human rights’.[251] Generally speaking, it can be said that too much emphasis has been put on listing MNCs’ obligations in the field of human rights, without giving much thought to the way to enforce those obligations.[252]

[248] Ibid at 150.
[249] Ibid at 151.
[250] Hassan op cit note 34 at 4.
[251] Nolan op cit note 161 at 458.
[252] Nam op cit note 187 at 405.

CHAPTER 4: A BUSINESS AND HUMAN RIGHTS TREATY

4.1 INTRODUCTION

It has been demonstrated thus far that there exists a 'governance gap' when it comes to regulating MNCs under international law. The Human Rights Council (HRC) has recognised this gap when it decided to establish a procedure to draft a business and human rights treaty in 2013. This chapter provides a brief overview of this process. Thereafter, it will consider whether adopting such a treaty is justified. To determine this, the chapter will undergo a two-step analysis: first, whether there is a *need* for a BHR treaty and second, whether adopting a treaty is *worthwhile*. Discussing these two enquiries requires the engagement with some of the primary concerns scholars have raised for and against a BHR treaty.

4.2 OVERVIEW

The process for a BHR treaty began in 2013, when Ecuador (supported by South Africa) proposed to the UN Human Rights Council (UNHRC) Proposal 26/9 entitled 'Elaboration of an internationally binding instrument on transnational corporations and other business enterprises with respect to human rights'.[253] The proposal was adopted by the Council in 2014 and requires the development of an 'intergovernmental working group' (IGWG) to 'elaborate an internationally binding instrument on Transnational Corporations and Other Business Enterprises with respect to human rights'.[254]

In 2017, the Chair issued Elements for the draft legally binding instrument and, in 2018, the IGWG presented the Zero Draft.[255] Stakeholders then provided input on the Zero Draft during the fourth session of the IGWG. In 2019, the Revised Draft[256] was published and in 2020 the Second Revised Draft[257] was released. The latest version at the time of writing is the

[253] UNHRC 'Elaboration of an international legally binding instrument on transnational corporations and other business enterprises with respect to human rights' (2014) *UNHRC Res. 26/9.*
[254] UNHRC 'Binding Treaty' available at https://www.business-humanrights.org/en/big-issues/binding-treaty/, accessed 18 January 2023.
[255] OEIGWG Chairmanship Zero Draft 16.7.2018 Legally Binding Instrument to Regulate, in International Human Rights Law, the Activities of Transnational Corporations and Other Business Enterprises.
[256] OEIGWG Chairmanship Revised Draft 16.7.2019 Legally Binding Instrument to Regulate, in International Human Rights Law, the Activities of Transnational Corporations and Other Business Enterprises.
[257] OEIGWG Chairmanship Second Revised Draft 06.08.2020 Legally Binding Instrument to Regulate, in International Human Rights Law, the Activities of Transnational Corporations and Other Business Enterprises.

Third Revised Draft[258] which was published in the year 2021. The Third Revised Draft formed the basis for the discussions at the IGWG's 8th session which took place from 24-28 October 2022.

Although the precise scope and the context of the proposed provisions of Third Draft are not central to the discussion, it is crucial to understand what the treaty aims to achieve. Article 3 stipulates that the treaty will impose legally binding obligations on business enterprises.[259] Consequently, should this treaty be adopted, it will not only be binding on party States, but will also directly bind MNCs themselves.

That the BHR treaty will directly bind MNCs under international law is incredibly contentious. The last time this was attempted was during the drafting of the Draft Norms which were abandoned largely as a result of the disagreement between developed and developing nations regarding whether the obligations should have a binding force or not. These disagreements are present regarding the BHR treaty, with many developing States from Africa, Asia and Latin America supporting its adoption, and Western powers (generally) arguing that the voluntary CSR are satisfactory.

4.3 IS A BHR TREATY JUSTIFIED?

4.3.1 Outline

As noted, determining whether a BHR treaty is justified must be broken into two parts. The first part considers the necessity of having a treaty and the second considers whether adopting such an instrument is politically feasible. Only once both of these legs have been met can it be said that a BHR treaty is worthwhile pursuing. For instance, even if a treaty is needed it does not necessarily follow that the procedure for adopting a treaty is a practical solution, as there is the potential obstacle of States not giving their consent. Consequently, the ensuing analysis begins by considering the need for such a treaty, with specific focus on why its binding nature is crucial for closing the governance gap. Thereafter, it proceeds with discussing whether a lack of State consensus warrants the discontinuation of the treaty-drafting process.

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[258] OEIGWG Chairmanship Third Revised Draft 17.08.2021 Legally Binding Instrument to Regulate, in International Human Rights Law, the Activities of Transnational Corporations and Other Business Enterprises.
[259] Ibid at Art 3.2.

4.3.2 The significance of bindingness

Many scholars contend that a BHR treaty is necessary and are in support of the ongoing negotiations. The most often cited justification for a BHR treaty is due to its bindingness. Nyombi and Mortimer, for example, argue that a treaty is needed as it is legally binding on its participants which means it could push signatories to agree on mandatory regulation for MNCs.[260] Bindingness is significant for a number of reasons, as discussed below.

4.3.2.1 Creating a level playing field

First, binding obligations on MNCs can contribute to creating a 'level playing field' between MNCs. To elaborate on this, it has already been shown how the existing CSR initiatives are merely voluntary and do not impose direct legal obligations on MNCs in the international sphere. The lack of any legal compulsion means that corporate compliance with human rights tends to be inconsistent and sporadic.[261] Relying purely on these voluntary initiatives to solve the problem of corporate abuse is not a viable option as it depends on the goodwill of MNCs in accepting the standards.

Although some MNCs do comply with the GPs, many do not and choose to resort to business practices that are more profitable, such as child labour. As a consequence, competitor MNCs could be disincentivised to follow the guidelines as doing so means they are denied the same opportunities to maximise their profit. Having a binding treaty could therefore assist in creating a 'level playing field' between MNCs that already comply with human rights standards and those that do not, thereby ensuring that MNCs who respect human rights are not at a competitive disadvantage.[262]

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[260] Nyombi and Mortimer op cit note 8 at 7.
[261] Justine Nolan 'Mapping the Movement: the Business and Human Rights Regulatory Framework' in Baumann-Pauly, Dorothee and Justine Nolan (eds), Business and Human Rights: From Principles to Practice (2016) *Taylor and Fran*cis at 96.
[262] Papalia op cit note 241 at 98.

4.3.2.2 Access to remedies through domestic reformation

A binding treaty is also necessary to ensure there is reformation in the domestic sphere of States. This is important when considering the fact that only a small number of States have developed national action plans that align with the GPs.[263] These commitments are said to 'fall short of what is required to address the full extent of the issues in the business and human rights context'.[264] A BHR treaty is therefore necessary as treaties, in general, demonstrate a greater sense of commitment than soft-law initiatives.[265] Where the GPs and other CSR initiatives function more as an educational tool, having a treaty would impose legally binding obligations on States which would work as a practical means of enforcing MNCs and State commitments.[266]

A treaty thus works better than soft law at prompting domestic reform. Previously, it was discussed how victims of corporate abuse are not always able to rely on the 'host' State's judicial system as these could have weak human rights laws. A treaty is therefore useful as, once a State signs and ratifies it, it will be legally compelled to reform its domestic laws to align with the human rights standards stipulated in the BHR treaty. This would in turn give more meaning to the GPs' emphasis on the host State's duty to protect its citizens from harmful business practices.

Subsequently, the recognition of binding obligations on MNCs is crucial for the right to have an accessible remedy.[267] Absent an understanding of the legal obligations MNCs bear in relation to human rights, it is not possible for victims to claim access to a legal remedy against these enterprises.[268] Bilchetz therefore criticises the GPs as they recognise that victims should have access to a *legal* remedy but they do not expressly recognise binding *legal* obligations of corporations for violations of human rights in the second pillar.[269] Thus, although access to a remedy is a fundamental right under international law, a remedy cannot be made available without a recognition of a prior legal obligation.[270] Conclusively, a treaty that explicitly

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[263] Nolan op cit note 261 at 96.
[264] Papalia op cit note 241 at 99.
[265] Alan Boyle 'Some Reflections on the Relationship of Treaties and Soft Law' (1999) 48 *International Law Quarterly* at 901.
[266] Papalia op cit note 241 at 99.
[267] Ibid.
[268] Ibid.
[269] David Bilchitz 'The Necessity for a Business and Human Rights Treaty' (2015) *SSRN* at 7.
[270] Ibid.

recognises that MNCs have legally binding obligations is a crucial precondition for providing legal remedies to individuals.[271]

4.3.2.3 Balancing commercial and human rights obligations

An argument for bindingness can also be made when examining MNCs' obligations *vis-à-vis* commerce versus fundamental rights. The problem arises when commercial legal regimes clash with the demands of human rights law. As there is currently no clarity as to the legal obligations of MNCs in international law with respect to human rights, and with most statements of responsibility existing in the soft law instruments, it is the commercial obligations that will likely trump those human rights norms.[272] Thus, binding obligations on MNCs are necessary when considering the rapid pace at which international law has developed in relation to commerce and trade across sovereign borders.[273] The GPs lack the capacity to address the imbalance between commercial and human rights obligations as they have a weak normative force under international law.[274]

Having a treaty would solve this imbalance as it would ensure States expressly recognise that MNCs have hard obligations in respect of human rights with a similar (or greater) level of bindingness as commercial regimes have.[275] Subsequently, the fundamental nature of human rights requires that they be contained in a binding instrument in order to be recognised as being on at least the same level of importance as other corporate obligations.[276]

4.3.2.4 Binding on all agents

Bilchetz notes that if rights are concerned with protecting the fundamental interests of persons, then it logically follows that they ought to have binding consequences on *all* agents who have the capacity to impact on them.[277] Papalia makes a similar argument in this regard:

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[271] Ibid.
[272] David Bilchetz 'The Moral and Legal Necessity for a Business and Human Rights Treaty' (2016) *Business and Human Rights Journal* at 215.
[273] Ibid at 214.
[274] Ibid at 215.
[275] Ibid.
[276] Ibid.
[277] Ibid at 206.

> 'The normative importance and universality of fundamental human rights renders it appropriate that they should be contained in the most authoritative mechanism possible under international law, and that legally binding obligations are imposed on all agents who have the capacity to impact upon them, including businesses.'[278]

Although the exact nature and distribution of obligations amongst agents may vary, a necessary consequence of the institutionalisation of human rights in international law is that multiple agents – including MNCs – are to be bound by their requirements.[279] As discussed, MNCs have had an increased capacity since globalisation to have an adverse impact on human rights. A binding treaty would therefore provide a clear recognition and articulation of the significant normative position that fundamental rights under international law impose legally binding obligations on MNCs.[280]

But is there a need to impose binding obligations on MNCs if States are already placed under such obligations? It is well-established under international law that State responsibility requires States to be placed under a 'duty to protect'.[281] This means that States are under a legal obligation to ensure that MNCs refrain from infringing on the fundamental rights of their civilians. This is one of Ruggie's contentions for not adopting a treaty. However, this approach has been rejected on theoretical and practical grounds.

From a theoretical perspective, it is crucial to recognise that if States are required to ensure third parties – including MNCs – comply with binding human right requirements, it necessarily follows that the third parties are themselves obligated to comply with such requirements.[282] If there is no binding obligation on MNCs to comply with such requirements under international law, there would be no reason for the State to ensure that they do so.[283] As Wettstein notes, 'if corporations did not have prior moral obligations to individuals, the State's derivative responsibility to hold them accountable would be empty and meaningless'.[284] Bilchetz concludes with the following:

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[278] Ibid.
[279] Ibid at 206.
[280] Ibid.
[281] *Velásquez Rodríguez v Honduras* 4 (147) Inter-American Court of Human Rights (1998) at para 13.
[282] Bilchetz op cit note 269 at 208.
[283] Ibid.
[284] Florian Wettstein 'Multi-National Corporations and Global Justice: Human Rights Obligations of a Quasi-Governmental Institution' (2009) *Stanford: Stanford University Press* at 285.

> 'Recognizing corporate obligations in relation to fundamental rights thus helps clear up confusion and align existing law with the correct normative position. That, in turn, has the benefit of coherence and, indeed, could have significant expressive value in preventing businesses from claiming any impunity under international law.'[285]

There are also practical problems with relying on the 'State duty to protect' argument to oppose a BHR treaty. This can be demonstrated by looking at the case of *Socio-Economic Rights Action Centre v Nigeria*,[286] where the Commission held that the Nigerian government had a duty to protect its citizens against violations of their rights by oil companies. Bilchitz suggests that it was puzzling for the Commission to focus solely on the actions of the government as it was the oil companies who bore the primary responsibility for the occurring violations.[287] He notes that it seems fundamentally unfair that the primary agent responsible for a harm is not capable of being held accountable.[288] He therefore submits that only a treaty has the authority to shift this situation by recognising expressly that MNCs are bound by international law.[289]

Relying on the 'duty to protect' argument is also problematic as it fails to address circumstances where it is not possible to seek remedies against MNCs within a particular State as a result of the breakdown of governance and a weak legal system.[290] The reality is that States often fail to comply with their 'duty to protect' obligations. An example highlighted in this dissertation is the situation in Burma, where the government appears to have ignored the corporate abuses taking place within their country. Therefore, relying on regional and international mechanisms for relief is not always successful in achieving concrete relief.[291] Bilchetz notes that a BHR treaty has the authoritative nature to establish that MNCs are bound by international human rights regardless of whether States comply with their 'duty to protect' obligations.[292]

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[285] Bilchetz op cit note 269 at 208.
[286] Communication 155/96 *African Commission on Human and Peoples' Rights* (2001) African Human Rights Law Reports 60.
[287] Bilchetz op cit note 269 at 209.
[288] Ibid.
[289] Ibid.
[290] ibid at 210.
[291] Ibid.
[292] Ibid.

4.3.2.5 Norm development

A treaty imposing binding obligations on MNCs is further significant from the perspective of norm development. Should a BHR treaty come into force and recognise that MNCs have binding obligations, this is not the end of the matter as questions remain concerning the exact nature and extent of these obligations.[293] As was highlighted during the discussion regarding the GPs, one of their flaws is that they fail to determine the precise obligations of MNCs in respect of fundamental rights.[294] They mention that MNCs generally have a responsibility to respect human rights which means they should avoid infringing on human rights and should address adverse human rights impacts with which they are involved.[295]

The problem is that, under regional and international law, the mere infringement of a fundamental right is not sufficient to determine that an actionable wrong has been committed.[296] It must further be determined whether there are any justiciable grounds for the infringement and whether the benefits achieved are proportional to the harms caused.[297] The application of the existing rights to companies is extremely complex and therefore there needs to be development of a jurisprudence which considers a number of issues.[298] These include the application of particular rights to MNCs, the interpretation and meaning of the obligations imposed by particular rights upon MNCs, and the determination of when MNCs may be justified in infringing fundamental rights.[299]

A further dilemma created by the GPs is that they impose negative obligations with a very limited role on positive ones. This is premised on the notion that MNCs' relation to human rights is itself very limited and needs to be distinguished from that of the State.[300] This idea has been the subject of much literary criticism as scholars such as Arnold contend that there are sound reasons why corporations should indeed be recognised as having a wide range of positive obligations in relation to fundamental rights.[301]

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[293] Ibid.
[294] Ibid.
[295] See Guiding Principles at Principle 11.
[296] Bilchetz op cit note 269 at 210.
[297] Ibid.
[298] Ibid at 211.
[299] Ibid.
[300] Steven R Ratner 'Corporations and Human Rights: A Theory of Legal Responsibility' (2001) 111 *Yale Law Journal* at 518.
[301] See Denis G. Arnold 'Corporations and Human Rights Obligations' (2016) 1 *BHRJ* 255.

Subsequently, there is the need to establish and clarify the nature and exact scope of MNCs' obligations, both negative and positive, in relation to fundamental rights. Bilchetz submits that the answer to this problem is to establish an internationally binding instrument as this could set up a mechanism which would be able to provide guidance across the world as to the implications of fundamental rights for MNCs. This, he argues, will help determine a 'common, consistent and objective base standard that could be applied to the entire global business environment today'.[302]

4.3.2.6 Closing the 'governance gap'

A treaty could also assist in filling the gaps left by the GPs. Papalia cites some of the issues that the treaty could address, namely, clarifying whether the State's duty to protect should be extended to extraterritorial responsibility, address technical difficulties that arise when extraterritorial jurisdiction is exercised, deal with the interplay between State sovereignty and extraterritoriality, and provide for cooperation on matters regarding evidence collection, certification of statements and assisting victims with legal representation.[303] A BHR treaty may further help clarify issues regarding when and how the 'host', 'home' or 'other connected' States should act to ensure accountability when MNCs commit human rights violations.[304] Addressing these issues could ensure there is more legal certainty and clarity for States, businesses and potential victims of human rights abuses.[305]

Other problems with regulating MNCs under international law concerns their structure. As noted, MNCs are composed of a complex web of entities expanding across multiple jurisdictions, results in regulation difficulties. This has been termed by scholars as the 'accountability gap'. The problems identified that contribute to this gap are, *inter alia*, (1) MNCs transcend the territorial nature of the State-centric system, (2) there are weak governance zones, particularly in the developing States, and (3) separate legal personality and limited liability.

[302] Bilchetz op cit note 269 at 212.
[303] Papalia op cit note 241 at 102.
[304] John Morrison 'A Business and Human Rights Treaty? Strategies are needed to close accountability gaps' (2014) *Institute for Human Rights and Business* available at a-business-and-human-rights-treaty-smart-strategies-are-needed-to-close-acc>, accessed 19 January 2023.
[305] Papalia op cit note 241 at 101.

It is argued that the best way to address these obstacles is through a treaty. A BHR treaty could mandate signatory States to commit themselves to enact laws to ensure the successful prosecution for offenses committed on foreign soil. These laws would operate similarly to the ATS laws which allows claimants to bring civil disputes in US courts against MNC subsidiaries operating in the jurisdiction of other States.[306] A treaty is necessary in this regard because if a State passes such laws individually this will make their country less desirable for MNCs to invest. The collective adoption of such laws through a BHR treaty would, however, prevent this imbalance from occurring.

A treaty could furthermore aid in closing the governance gap by creating an international mechanism (or court) which could adjudicate and/or criminal claims against MNCs where they have violated human rights.[307] This mechanism would be granted jurisdiction over MNCs operating in multiple jurisdictions or in jurisdictions where the judicial system is not operating effectively.[308]

A treaty serves these purposes well due to its strong normative force. The soft-law CSR initiatives could still play an important role in outlining the implications of human rights for MNCs.[309] But relying solely on voluntary initiatives will not be sufficient as they depend on the goodwill of MNCs to accept emerging standards. As has been demonstrated, however, many MNCs simply choose to ignore these standards or comply with them but only as a matter of ceremonial conformity.

4.3.2.7 Beyond State-centricity

A crucial argument for adopting a treaty is the need for MNCs to be regulated under international law.[310] Over the years, the concept of CSR has risen to prominence which is the driving force behind the creation of standards in relation to the interaction of business and society.[311] Having a treaty would codify these standards and hold MNCs directly liable under

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[306] See Bilchetz op cit note 269 for full argument.
[307] Ibid at 219.
[308] Ibid.
[309] Ibid at 212.
[310] Daniel Uribe and Kinda Mohamadieh 'Building a Binding Instrument on Business and Human Rights' (2017) *Business and Human Rights Resource Centre* available at < https://www.business-humanrights.org/en/building-a-binding-, accessed 19 January 2023. instrument-on-business-and-human-rights>.
[311] Papalia op cit note 241 at 102.

international law should they violate any of these rights.[312] This is appropriate when one considers the immense growth in economic and political power of MNCs over the previous decades – power often surpassing that of sovereign States. It has been demonstrated already how MNCs abuse their power by violating human rights, particularly in developing countries with weaker human rights laws. Their defiance of jurisdictional boundaries means there is a need for a framework for the cooperation among States and for there to be a set of common standards that can be binding on all States. The best way to do so is through an internationally binding instrument.

Having binding obligations on MNCs is thus important as it ensures that there is a move beyond the State-centric nature of international law. Under the rules on State responsibility, a State will be legally responsible for acts conducted by individuals or non-State actors if those actions can be attributed to that State. The problem is that an MNC could violate a human right in a manner that could not previously have been reasonably foreseen which means the State will not meet the requirements for liability.[313] The State 'duty to protect' is not an absolute obligation and is articulated in a manner that requires the State to exercise reasonable due diligence to ensure that it establishes mechanisms from preventing third parties from committing human rights violations.[314] A BHR could impose direct obligations on MNCs and States, which would therefore give recognition to the fact that MNCs are powerful players in the international arena and are capable of committing human rights abuses.

The advantage of a BHR treaty, therefore, is that it can move beyond the imposition of State-centric obligations, as seen by the attribution model of State responsibility.[315] The attribution of wrongful conduct to States needs to be supplemented by complicity and due diligence provisions to ensure that responsibility could be assigned to multiple actors.[316] Complicity provisions are thus useful as they could bypass the obstacles that arise when trying to allocate responsibility for a single wrongful act.[317] Moreover, State conduct that does not meet this complicity standard could still be captured by due diligence obligations within existing treaties.[318] By adopting this holistic approach that encompasses existing international

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[313] Bilchetz op cit note 269 at 209.
[314] *Rodriguez v Honduras* op cit note 278 at paras 172 and 174.
[315] Lee McConnell 'Assessing the Feasibility of a Business and Human Rights Treaty' (2017) 66 *INT'l & COMP. L.Q.* at 179.
[316] Ibid.
[317] Ibid.
[318] Ibid.

responsibility regimes, it is possible to draw a conceptual distinction between the distinct wrongful acts of multiple perpetrators.[319] This could help with assessing the causal contributions of multiple actors in implementing a system remediation framed in terms of joint and several liability.[320]

Thus, although a BHR treaty will not absolve States of their primary responsibility as the bearers of human rights duties, it serves to create a triangular relationship obliging MNCs to adhere to strict due diligence requirements, and provide remedies to victims of human rights abuses caused directly or indirectly by them.[321] States would be under a legal obligation to facilitate and enforce corporate due diligence as well as grant victims access to justice, such as through the provision of legal aid, physical security, effective jurisdiction, corporate and personal sanctions, and even mutual legal assistance.[322]

4.4 IS ADOPTING A BHR TREATY WORTHWHILE?

4.4.1 Outline

Numerous arguments have been made for the need to have a BHR treaty. The next step is to consider whether adopting such a treaty is a politically feasible option. Resolution 26/9 passed with less than half the members of the UNHRC. Only twenty States were in favour, fourteen States opposed such a treaty and thirteen abstained. It is significant to note that those in favour were predominantly developing nations, those against were mainly European States, the US and Japan, and those who abstained were also developing along with the UAE and the Saudi Arabia. Based on the State responses to the 2003 Draft Norms, it appears likely that a BHR treaty would fail to attract widespread participation and ratification, particularly amongst larger economies.[323]

Having a legally binding instrument is therefore not always in the interests of powerful home States. Similarly, certain host States are reluctant to strengthen their regulatory grip out of fear

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[319] Ibid.
[320] Ibid.
[321] Ilias Bantekas 'The emerging un business and human rights treaty and its codification of international norms' (2021) 12(1) *George Mason International Law Journal* at 1.
[322] Ibid.
[323] Jolyon Ford & Claire Methven O'Brien 'Empty Rituals or Workable Models? Towards a Business and Human Rights Treaty' (2017) 40 *U.N.S.W.L.J.* at 1237.

of losing out on foreign direct investments.[324] A BHR treaty that requires States to improve their regulation of corporate activities, including those of all suppliers, requires the active participation of a large portion of the international community.[325] If not, some States could see their self-exclusion as constituting a competitive advantage over other States.[326] Thus, it is crucial that enough political leverage is exercised against potential opt-out States to ensure that there is universal participation.[327]

4.4.2 Lack of consensus

However, scholars such as Ruggie do not think that universal participation can be achieved. He notes that a major problem arising in relation to a BHR treaty is its inability to command consensus amongst a wide variety of nations given the existing divisions that have opened up over the resolution to commence negotiations.[328] He describes his approach as 'principled pragmatism', contending that prior to initiating any treaty-drafting process, States must first be confident that it will be effective at addressing the issue.[329] There is the argument that pursuing a BHR treaty will create more divisive and controversial debate that will continue for a long period or gain few ratifications. The only States that will ratify the treaty are those that lack the power to address corporate abuses.[330]

Papalia counters these arguments by contending that neither the lack of consensus nor the length it takes to draft a BHR treaty is a sufficient reason to argue against its development.[331] The fact that no consensus currently exists between States is not a good enough reason to prevent a process which could address significant problems in international law.[332] Thus, 'if fears of a lack of consensus were allowed to prevail over desires for improvement, then some of the most important developments in international law would never have taken place.'[333] The Montreal Protocol on Substances that Deplete the Ozone Layer, Additional Protocol II to the

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[324] Kenneth J. Vandevelde 'The Economics of Bilateral Investment Treaties' (2000) 41 *HARV. INT'L L.J.* at 469.
[325] Bantekas op cit note 318 at 6.
[326] Ibid at 6.
[327] Ibid.
[328] Ruggie op cit note 13.
[329] John Ruggie 'International Legalization in Business and Human Rights' (2014) *Speech delivered at Harvard Kennedy School of Government*.
[330] John Ruggie 'Life in the Global Public Domain: Response to Commentaries on the UN Guiding Principles and the Proposed Treaty on Business and Human Rights' (2015) *Harvard Kennedy School* at 4.
[331] Papalia op cit note 241 at 104.
[332] Ibid at 103.
[333]Ibid at 104.

Geneva Conventions, the creation of the World Trade Organisation and the Marrakesh Agreement, and the establishment of the International Criminal Court are all examples of developments that began with sharp disagreement between States which have, over time, garnered greater consensus.[334] Moreover, the concept of *ius cogens* (a peremptory norm of international law) divided the Vienna Conference on the Law of Treaties but today it is widely accepted.[335] Furthermore, some important shifts have already occurred in the realm of business and human rights, notably the large-scale acceptance of the GPs.[336]

Additionally, the fact that the more powerful States are reluctant to adopt a BHR treaty – currently home to the world's largest MNCs – should not be a reason to dismiss the treaty process when one considers future trends. This is because the distribution of world economic powers is shifting with many of the world's largest corporations being based in the developing world. Research conducted in 2013 by the McKinsey Global Institute predicts that nearly half of the world's largest corporations will be based in emerging markets.[337] Apart from Brazil, each of the 'BRICS' countries supported the resolution to establish the OEIWG to elaborate on a treaty.[338] This is significant as these countries represent the major emerging national economies.[339] Should these States, and others, ratify the treaty and thus require corporations to adhere to its provisions, this could be a significant contribution to human rights protection and would be at least 'distinctly embarrassing' for developed countries to oppose its adoption.[340] Additionally, corporations that have a territorial nexus to States that refuse to be party to the treaty may still be held accountable if they operate in the States which have ratified the treaty.[341] Over time, therefore, the provisions stipulated in the BHR treaty are likely to become the *de facto* international standard applicable to MNCs, resulting in the opposition of developed States as being less relevant.[342]

In addressing the concern that very few States, particularly developed States, will become party to a BHR treaty, Le Vega argues that adopting such a treaty will still provide certain

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[334] Bilchetz op cit note 269 at 224.
[335] Ibid.
[336] Ibid at 225.
[337] Richard Dobbs et al 'Urban World The Shifting Global Business Landscape' (2013) *McKinsey Global Institute* at 55.
[338] Elaboration of an International Legally Binding Instrument op cit note 250.
[339] Papalia op cit note 241 at 105.
[340] Ibid at 105.
[341] Ibid at 106.
[342] Ibid.

benefits. Firstly, the treaty will aid in the development of international law regarding accountability for human rights violations by corporate actors that have so far evaded responsibility.[343] Secondly, the States that do become party to the treaty will take steps to enforce the treaty at the domestic level, thereby culminating in newly established laws dealing with accountability for violations that have so far not been addressed.[344] Finally, a BHR treaty would provide an international procedure for reviewing compliance with the treaty which, in turn, will result in further development of the international standards for addressing liability for corporate actors.[345]

It should finally be pointed out that consensus does not necessarily indicate that progress is being made.[346] Consensus can result in the dilution of standards, and the consensus built around the GPs appears to have come at the cost of a weak effect and lack of State action.[347] In the long term, this is not desirable for the realisation of human rights.[348] Conclusively, it is arguably more important to ensure human rights are respected and promoted by corporations as opposed to the aspiration for consensus at the cost of undermining these rights.[349]

4.4.3 Time-consuming

Another contention which is somewhat interlinked to the lack of consensus being reached is the problem that the treaty-drafting process is going to be time-consuming. Treaties can often take decades before they can come into force. Thus, there is concern that adopting a BHR treaty is not worthwhile, especially since developed States do not support its adoption.

However, this cannot be a sufficient reason to dismiss a BHR treaty altogether. Nyombi and Mortimer note that international conventions always take time to receive universal acceptance.[350] To demonstrate their point, the scholars make reference to the time it took to establish the European Union as we know it today:

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[343] Connie De La Vega 'International Standards on Business and Human Rights: Is Drafting a New Treaty Worth It?' (2017) 40(2) *Hastings International and Comparative Law Review* at 197.
[344] Ibid.
[345] Ibid.
[346] Surya Deva 'Regulating Corporate Human Rights violations: Humanizing Business' (2012) *London, New York*: *Routledge* at 239.
[347] Papalia op cit note 241 at 106.
[348] Papalia.
[349] Papalia.
[350] Nyombi and Mortimer op cit note 8 at 7.

> 'The European Coal and Steel Community, created by the Treaty of Paris in 1951, and both the European Economic Community and the European Atomic Energy Community established by the Treaty of Rome in 1957, are regarded as the foundations of the EU. However, only six States in Europe were founding members of these treaties. It was a gradual process of States joining treaties that developed into what is now the EU, established by the Treaty of Maastricht, and amended by the Treaty of Lisbon. The EU currently has 28 Member States; therefore the treaty has been almost unanimously accepted, as most of Europe's States have signed it.'

The scholars therefore assert it is unlikely a CSR treaty will receive immediate universal acceptance.[351] The international community, they argue, should aim to establish a treaty that could hold MNCs accountable for abuses, and then progressively encourage States to join this legally binding instrument.[352]

Regarding the fact that some powerful States do not yet support a legally binding instrument, history reveals that these States have always been slow in ratifying international conventions. For example, Germany only ratified the Convention on the Elimination of All Forms of Discrimination Against Women four years after it came into force.[353] The US took seven years to ratify the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.[354] Mortimer and Nyombi highlight that despite State reluctance to join these treaties, they are regarded as crucial human rights norms, with their principles being effectively protected from abuses due to the treaties' legally binding nature on its members.[355] Therefore, a BHR treaty does not need to be signed and ratified by powerful industrial countries in order to have an international effect.

Le Vega makes an argument along similar lines by drawing on lessons from the Convention on Migrant Workers[356] which has not been ratified by many developed countries. She notes how the drafting of this treaty helped merge standards regarding migrant workers'

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[351] Ibid.
[352] Ibid.
[353] Ibid at 8.
[354] Ibid.
[355] Ibid.
[356] UN General Assembly *International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families* (1990) A/RES/45/158.

rights into a binding instrument that helped develop the law on the topic.[357] A similar benefit can be seen through the discussion held by the Working Group tasked with elaborating on the process for drafting the treaty on business and human rights. During the first meeting, the discussions revolved around the need to define the word 'transnational', the question of whether the treaty should provide direct responsibility for businesses and the need for accountability. Le Vega admits that although no decisions have been made, the discussions have helped identify what a treaty might cover and what should ultimately result in a treaty that will provide standards for the furtherance of human rights protection.[358] Consequently, that a treaty might take time to negotiate and ratify does not mean the treaty should not be adopted. The lengthy process could give States time to identify and agree on a suitable content and scope for the BHR treaty.

4.4.4 Too ambitious?

One final point concerns whether all of the issues relating to business and human rights can be captured within the content and scope of a BHR treaty. Is adopting this sort of treaty too ambitious? Ruggie seems to think so by raising the concern that the field of business and human rights encompasses too many complex areas of national and international law for a single treaty to resolve across the full range of human rights that are internationally recognised.[359] He therefore argues that:

> 'Any attempt to do so would have to be pitched at such a high level of abstraction that it would be largely devoid of substance, of little practical use to real people in real places, and with high potential for generating serious backlash against any form of further international legalisation in this domain…'

Tasioulas counters this line of reasoning by asking: 'But why is the single set of responsibilities articulated by the GPs any less subject to this objection? Surely, they too are supposed to be 'comprehensive and actionable''?[360] That the relationship between business and human rights covers a wide range of issues is the exact reason why a BHR treaty is necessary.[361]

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[357] De La Vega op cit note 342 at 467.
[358] Ibid.
[359] Ruggie op cit note 13.
[360] John Tasioulas 'Human Rights, No Dogmas: The UN Guiding Principles on Business and Human Rights' (2015) *SSRN*.
[361] Bilchetz op cit note 269 at 222.

Establishing a treaty will provide a legal framework and general principles that will help solve these complex issues.[362] Moreover, having a treaty is not supposed to address *every* issue that arises in the complex arena of business and human rights, but is rather meant to create the legal basic structure in terms of which legal matters would be resolved.[363] This will then impact States' domestic laws that concern the relationship between corporations and human rights.[364]

Furthermore, the process of developing international standards in the past has often proceeded from the general to the particular.[365] History demonstrates that States have the tendency to first agree on broad, comprehensive declarations and conventions which have later inspired more specific standards.[366] An example is the UDHR which formed the groundwork for the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights. It thus seems reasonable that a comprehensive and broad treaty would then be able to give greater coherence to the creation of more specific treaties in the future due to the development of a solid foundation.[367]

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[362] Ibid.
[363] Ibid.
[364] Ibid.
[365] Papalia op cit note 241 at 110.
[366] Ibid.
[367] Ibid.

CHAPTER 5: CONCLUSION

This dissertation began by tracing MNCs' rise to power during the era of globalisation. The rapid growth of MNCs can be largely attributed to trade liberalisation and advances in technology coupled with the dual legal concepts of separate legal personality and limited liability. The nature of MNCs entails extremely complex arrangements of enterprises that operate across multiple jurisdictional boundaries around the globe. They have established themselves as formidable players in the international arena, often wielding more economic power than many States. This reality defies the traditional notion that States are the primary actors under international law.

Despite their rise to power, it has been shown that MNCs under international law are not placed under any direct legally binding obligations to respect human rights. The prevailing belief under international law views States as its subjects and therefore as the primary human rights duty-bearers. Although certain treaties and the rules on State responsibility recognise that MNCs have the potential to impact human rights, they are designed to hold States solely internationally responsible for any human rights violations committed by MNCs. Consequently, MNCs' rise to power has not been accompanied by a sense of legal accountability.

The dissertation thereafter explored how this lack of corporate accountability poses a serious threat to the enjoyment of human rights around the globe. It did so by highlighting some infamous examples where MNCs have been involved or implicated (directly or indirectly) in flagrant human rights atrocities. In all of the examples, the MNC perpetrator evaded accountability, thereby highlighting the problem MNCs pose to global citizens.

The next chapter of the dissertation proceeded with an analysis of some of the more ambitious CSR initiatives aimed at regulating MNCs. Although these CSR attempts mark positive developments in the field of business and human rights, they are non-binding instruments that serve merely as guidelines that MNCs should adhere to. The dissertation therefore concluded that the initiatives are not adequate at holding MNCs liable for their human rights violations as they do not provide an effective enforcement mechanism. Thus, the

dissertation submitted that there exists a governance gap when it comes to regulating MNCs under international law.

Closing this governance gap, it has been argued, requires the adoption of a BHR treaty which, if signed and ratified by states, will place MNCs under direct legal obligations to adhere to human rights standards. The dissertation has asserted that the existing discussions for a BHR treaty can be justified on two grounds. First, considering the lack of a legally binding instrument under international law, a BHR treaty is necessary to this effect. Second, despite the existing lack of universal acceptance amongst States to accept a BHR treaty, pursuing its adoption is still a worthwhile endeavor.

The primary reason why a BHR treaty is needed is because it will be the first instrument under international law that will bind MNCs directly to respect human rights. Having a binding treaty can create a level playing field between MNCs that comply with human rights standards and those who choose to opt out from doing so. The treaty's binding force could also prompt domestic reform as States party to it will be legally obligated to align its national laws with the treaty's human rights obligations. By recognising that MNCs have legally binding obligations, a BHR treaty will serve to provide victims of corporate abuse with access to a legal remedy. Moreover, a BHR treaty will ensure that States explicitly acknowledge that MNCs have hard obligations *vis-à-vis* human rights with a similar, if not greater, level of bindingness as their commercial obligations. Finally, a BHR treaty expressly recognises that non-State actors and not only States, have the capacity to impact on human rights and will therefore impose binding obligations on *all* agents.

That all agents are bound to comply with human rights is also a significant development as the 'State duty to protect' fails to take into account the circumstances where States have a weak governance or failed legal system to take action against MNCs. There are also many instances where actions of MNCs might not be attributed to the State. Having a BHR therefore allows other actors such as MNCs to be held directly accountable for their human rights violations. By doing so, a treaty would mark a significant step away from the State-centric nature of international law and would give recognition to the fact that MNCs are formidable actors on the global stage.

Furthermore, this dissertation argued that a BHR treaty and its binding nature could assist with the development of norms in the field of business and human rights, with far more success

than the existing soft-law initiatives. This is because the strong normative force of a treaty could initiate the implementation of norms in the domestic sphere. Finally, a treaty could help close the accountability gap by addressing certain problems unresolved by the GPs.

After concluding that a BHR treaty is needed, the dissertation argued that adopting such a treaty was also worthwhile. The current lack of consensus amongst States should not be seen as a sufficient reason to oppose adopting a BHR treaty, as many treaties came into force despite many States originally opposing their adoption. That more powerful States appear to oppose a BHR treaty was also shown not to be a concern as the economic powers are shifting, with some of the most powerful MNCs being located in the developing States.

Establishing a BHR treaty is not too ambitious as its aim is not to encompass every single issue in the realm of business and human rights. Instead, the treaty would provide legal framework with broad principles that could address these issues. In turn, States would then enact more specific laws at the domestic level.

To conclude, a BHR treaty is justified on the grounds of necessity and feasibility. It is submitted that the ongoing negotiations for such an instrument should therefore continue. Whether this treaty will ever be adopted, only time will tell.

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