

CORPORATE RESPONSIBILITY IN INTERNATIONAL LAW: WHICH WAY TO GO?

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The debates about the relationship between human rights and business are voluminous. Many scholars argue for direct corporate responsibility in international law and seek to find ways to attribute such responsibility to corporations without the consent or practice of States. This has proved very problematic. Other scholars dismiss calls for direct corporate responsibility stating reasons such as State sovereignty, lack of personality and difficulties with notions of ‘corporate’ as opposed to ‘individual’ or ‘state’ responsibility. All these scholars work on the assumption, that the determination of whether corporate responsibility should be direct or not in international law, can be based on acts or practices outside State consent or practice. This article will argue that for corporations to be held responsible under international law, the way forward is to consider how States can be convinced to reach agreements which directly impose responsibility on corporations. After all, international law is State-structured, and perhaps rightly so.

I. INTRODUCTION

When the United Nations Sub-Commission’s Draft Norms on the Responsibility of Transnational Corporations and other Business Enterprises with Respect to Human Rights (Draft Norms)¹ were approved in 2003, they were hailed as a useful statement of the scope of human rights obligations on private companies.² Nevertheless, critics were quick to point out that the norms go beyond current international law’s obligatory requirements of State responsibility.³

In 2005, the UN Special Representative to the Secretary General (SRSG) on the issue of human rights and transnational corporations and other business enterprises was appointed to deal with the impasse between the critics and proponents of the Draft Norms.⁴ In the SRSG’s interim report to the human rights commission, he agreed that the Draft Norms

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¹ United Nations Sub-Commission, *Draft Norms on the Responsibility of Transnational Corporations and other Business Enterprises with Respect to Human Rights (Draft Norms)*, U.N. Doc E/CN.4/Sub.2/2003/12/Rev.2 (2003).

² See Amnesty International’s *Public Statement on United Nations: Human rights responsibilities of transnational corporations and other business enterprises*, online: <<http://web.amnesty.org/library/Index/ENGPOL300122003?open&of=ENG-200>>.

³ For examples, see Canada’s *Submission to the High Commissioner for Human Rights on the Responsibilities of Business with Regard to Human Rights*, online: <<http://www.ohchr.org/english/issues/globalization/business/docs/canada.doc>>. Also, see C. M. Vasquez, “Direct vs. Indirect Obligations of Corporations under International Law” (2005) 43 Colum. J. Transnat’l L. 927 at 929 where Vasquez highlights such criticisms.

⁴ See Commission on Human Rights Sixty-First Session, U.N. Doc E/CN.4/2005/L.87, Agenda 17 (2005). The SRSG, John Ruggie, was initially appointed for two years. He was required to submit an interim report in 2006 and a final report in 2007 to the Commission on Human Rights. The mandate of the SRSG include:

(a) identifying and clarifying standards of corporate responsibility and accountability for transnational corporations and other business enterprises with regard to human rights;

contained useful statements but concluded that the ‘norms exaggerated legal claims and conceptual ambiguities’ and created confusion and doubt.⁵

In a later report, the SRSG concluded that in the areas of human rights other than international crimes, legal responsibility is greatly debatable, but there is much potential for the use of soft law standards and initiatives in the future development of corporate responsibility.⁶

The severity and prevalent occurrences of human rights violations by Multinational Corporations (MNCs) especially in developing countries coupled with the relative lack of host state regulation and/or enforcement in those situations suggest corporations should be regulated under international law.

Regulation, for the purposes of this article, includes accountability/responsibility and enforcement issues. The question seems to be—how should corporations be regulated for human rights violations? Scholars have argued for regulation by national law, either through the host state or home state.⁷ Most agree that national regulation by whatever form is inadequate, bearing in mind the structure of the MNC which has roots in many countries and so may require different laws and approaches.⁸ Others have argued for self-regulation, which seems to be the preferred method, but has proven inappropriate in holding MNCs responsible.⁹ Still others have argued for international regulation.

This article will be concerned with international regulation. To date, most discussions on the responsibilities of MNCs in relation to human rights emphasise that international law has taken pains to articulate relevant norms, and the problem lies with enforcing such norms.¹⁰ Although most human rights treaties are addressed to States, there seems to be two assumptions regarding non-state actors, including corporations: (1) that there are specific human rights norms applicable and directed at such non-state actors and (2) universally accepted human rights norms apply directly to States as well as non-state actors, including MNCs.¹¹

With regard to assumption 1, it is true that there are specific norms which apply to non-state actors and under which responsibility could be directly imputed. These include war crimes, crimes against humanity and the like. However, with regard to assumption 2,

- (b) elaborating the role of States in effectively regulating and adjudicating the role of transnational corporations and other business enterprises with regard to human rights, including through international cooperation;
- (c) researching and clarifying the implications for transnational corporations and other business enterprises of concepts such as ‘complicity’ and ‘sphere of influence’;
- (d) developing materials and methodologies for undertaking human rights impact assessments of the activities of transnational corporations and other business enterprises;
- (e) compiling a compendium of best practices of States and transnational corporations and other business enterprises.

⁵ Commission on Human Rights Sixty-Second Session, U.N Doc E/CN.4/2006/97 (2006), para 57-59. The useful elements included a summary of rights that may be affected by business, both positively and negatively, as well as the collation of source documents from international human rights instruments and voluntary initiatives.

⁶ The SRSG has requested for his mandate to be extended for another year to deal with all the issues in his mandate. See Human Rights Council Fourth Session, U.N Doc A/HRC/4/35 (2007).

⁷ For example, see M. Sornarajah, *The International Law on Foreign Investment* (Cambridge: Cambridge University Press, 2004) at 169, where he argues that the home state should exert control over the activities of their corporate nationals operating overseas.

⁸ For example, see P. Blumberg, “Accountability of Multinational Corporations: The Barriers Presented by Concepts of the Corporate Juridical Entity” (2001), 24 *Hastings Int’l & Comp. L. Rev.* 297, where he discusses the inherent limitations of the US legal system (and of other Western legal systems) in achieving corporate accountability on the international level and in effectively enforcing legal restraints on corporate behaviour abroad.

⁹ Corporate Social Responsibility is typically associated with self-regulation.

¹⁰ See B. Stephens, “The Amoralism of Profit: Transnational Corporations and Human Rights” (2002) 20 *Berkeley J. Int’l L.* 45.

¹¹ *Ibid.* at 82-90.

the responsibility to protect citizens from human rights violations by third parties under international law lies on the State concerned.

Using corporate abuses in developing countries which typically tend to violate economic, social and cultural rights as a basis, this article will approach the debate on the relationship between business and human rights with reference to the failure of States to fulfil their primary obligation to protect their citizens from human rights violations by third parties, specifically the MNC. The argument is that in such instances, direct responsibility under international law must be considered. Those who dismiss direct responsibility do not adequately consider the situation in developing countries and the evolving approaches in international law.

The way forward is through the use of treaty law which clearly maps out what corporations should be responsible for and the methods by which such responsibility can be enforced. Effective enforcement would necessitate such treaties recognising that MNCs have a limited capacity for responsibility and allowing international organizations or NGOs with a recognised status and limited capacity to report erring corporations before specialised agencies or bring cases in specialised courts. The big hurdle would be convincing States to recognise such capacity in clearly defined situations involving responsibility and to sign such treaties. The role any NGO with recognised status would play must be carefully scrutinised so as to address the problems of NGO authority, legitimacy and regulatory capture under international law.

Part II discusses human rights generally and showcases the kind of human rights breached by corporations which call for direct corporate responsibility through State consent or practice. It also discusses the current attempts to regulate MNCs and the inadequacy of such attempts.

Part III addresses the primary reasons raised in arguing that corporations should not be directly responsible under international law - namely, State sovereignty; lack of personality; and difficulty with notions of 'corporate' responsibility. Apart from the fact that such reasons do not adequately reflect the situation in developing countries and the evolution of approaches in international law, they also ignore the reality that all these problems can easily be solved with State consent or practice.

In essence, the point is, if States can be convinced to sign treaties regulating corporations directly in international law, most of the problems on the legal authority for direct responsibility in the relationship between business and human rights would be solved. Admittedly, problems of enforcement would still exist. But as examples from other regulatory attempts by international law show, with the right amount of will power, enforcement can also prove quite effective.

Part III also addresses the unintended consequences of imposing direct responsibility on MNCs. These include claims of a 'race to the bottom'; States free-riding on corporate responsibility; and the perceived uncertainty that international corporate responsibility would bring to international law. It attempts to show how such consequences can be addressed by highlighting the significance of using treaty law as the primary source of international law.

II. HUMAN RIGHTS AND MNCs

The global economy needs MNCs. But there is also a need to keep them in check when they violate important human rights norms. This is especially pertinent in developing countries where States have been typically known to fail to regulate such corporations.

A. *What are Human Rights?*

The list of substantive rights is ever-expanding due to the need to respond to changing needs and perspectives and react to the emergence of new threats to human dignity and

well-being.¹² For example, the right to an environment that permits a life of health and well being and the right to development were once seen as rights still in the process of discovery and formulation.¹³ They are now recognised rights. The African [Banjul] Charter on Human and Peoples' Rights¹⁴ (African Charter) recognises both rights. The right to development is now enshrined in a primary document, the 1986 Declaration on the Right to Development.¹⁵

Human rights are rights universal to mankind. They derive from the inherent dignity of the human person or groups of persons ('peoples')—suggesting that they can either be individual or collective/group rights,¹⁶ non-derogable in nature. Such rights include those relating to the security and liberty of the person, such as the right to life; civil and political rights such as the right to freedom of thought, conscience and religion; economic, social and cultural rights such as the right to work; and what have been called third generation or solidarity rights such as the right to development and the right to self-determination.

B. *What Rights are Addressed in this Article?*

In this article, rights relating to the security and liberty of persons, and economic, social and cultural rights are considered, since they are the rights MNCs are most likely to violate. MNCs have typically been associated with rights-violations in the extractive industries of developing countries, where complicity has occurred through partnership with repressive governments, and violation of labour rights in factories supporting the apparel and footwear industries.¹⁷

A case study which outlines such rights-violations is the 1996 *Ogoni* case in Nigeria.¹⁸ The Center for Economic and Social Rights and Social and Economic Rights Action Center, a Nigeria-based human rights organization, jointly submitted a legal communication to the African Commission on Human and Peoples' Rights regarding violation of economic and social rights in Nigeria. The petition broke new ground at the Commission, which had yet to consider any of the economic and social guarantees contained in the African Charter. The petition focused on *violations of the rights to health, housing and food* in Nigeria's oil-producing region and was intended to (1) draw attention to the massive environmental and social problems underlying the execution of Ken Saro-Wiwa and other local activists; (2) broaden the range of human rights concerns considered by the Commission; and (3) provide a model communication for other human rights and social justice advocates in Africa.

The communication was submitted in the aftermath of the killings of Saro-Wiwa and eight others and against a backdrop of a rapidly deteriorating human rights and security situation in the country. It specifically alleged that the operations of the Nigerian military government through its State oil company—the Nigerian National Petroleum Company, a majority shareholder in a consortium with Shell Petroleum Development Corporation—had

¹² See P. Alston, "Conjuring up new human rights: a proposal for quality control" (1984) 78 Am. J. Int'l L. 607.

¹³ See E. Lawson, *Encyclopedia of Human Rights* (Washington DC: Taylor & Francis, 1996).

¹⁴ OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982).

¹⁵ Declaration on the Right to Development, G.A. Res. 41/128, U.N.Doc. A/41/53 (1986).

¹⁶ The African Charter refers to human and peoples' rights. The International Bill of Human Rights also refer to rights which can only be collective in nature, such as the right to self-determination.

¹⁷ H. J. Steiner & P. Alston, *International Human Rights in Context: Law, Politics, Morals: Text and Materials* (Oxford: Oxford University Press, 2000) at 1357, which refers to the Human Rights Watch World Report 2000 illustrating the various types of rights violated by MNCs in different sectors.

¹⁸ *The Social and Economic Rights Action Center for Economic and Social Rights v. Nigeria*, Communication No. 155/96 (2001).

caused environmental degradation and health problems among the Ogoni people resulting from contamination of the environment. Additionally, the petition alleged several acts of murder, intimidation and harassment committed by members of the Nigerian military.¹⁹

The African Commission, in discussing Article 21, which dealt with the right of peoples to freely dispose of their wealth and natural resources, cited the *Union des Jeunes Avocats/Chad* case in support of the proposition that governments have a duty to protect their citizens, not only through appropriate legislation and effective enforcement, but also from damaging acts that may be perpetrated by private parties.

This illustrates the positive action expected of governments in fulfilling their obligation under international human rights law. It also cited (1) the *Velasquez Rodriguez v. Honduras* case, brought before the Inter-American Court of Human Rights, which held that a State would be in clear violation of its obligation to protect the human rights of its citizens if it allowed private persons or groups to act freely and with impunity to the detriment of the rights recognised, and (2) the *X and Y v. Netherlands* case, brought before the European Court of Human Rights, which pronounced that there is an obligation on authorities to ensure that enjoyment of human rights by citizens is not interfered with by any other private person. The Commission concluded:

The Government of Nigeria facilitated the destruction of the Ogoniland. Contrary to its Charter obligations and despite such internationally established principles, the Nigerian Government has given the green light to private actors, and the oil Companies in particular, to devastatingly affect the well-being of the Ogonis. By any measure of standards, its practice falls short of the minimum conduct expected of governments, and therefore, is in violation of the African Charter.²⁰

The *Ogoni* case highlights the traditional approach to human rights. States are responsible for ensuring that third parties such as MNCs do not violate human rights. However, it also illustrates the point that States are unlikely to be able to protect their citizens from third party acts which violate human rights norms when they are complicit in such acts. In such situations, it may be better to hold the State responsible for failing to fulfil its primary obligation and the MNC responsible for breaching the particular human rights norm. Unfortunately, the commission did not consider this fact. Alternatively, it could be argued that the commission did not have much choice because the State-centered structure of international human rights law holds States solely responsible for violations. Perhaps if the NGO which brought the case had been able to take the erring corporation to a suitably-created agency which had the right to look into violations by the corporation, protection against subsequent future violations may be better guaranteed.

Another example of human rights violations of concern can be found in the 2003 reports that Asia Pulp and Paper (APP), one of the largest paper companies in the world, was implicated in persistent violations of the rights of local communities living on Riau's forest concessions.²¹ The rights abused included indigenous land rights and other rights central to the communities' livelihood. APP was not held responsible because Indonesia, which was itself complicit, did nothing to bring it to justice.

¹⁹ *Ibid.* See also J. Oloka-Onyango, "Reinforcing Marginalized Rights in an age of Globalization: International Mechanisms, Non-state Actors, and the Struggle for Peoples' Rights in Africa" (2003) 18 Am. U. Int'l L. Rev. 851 at 866, for discussions on the *Ogoni* Case.

²⁰ Communication No. 155/96 (2001), *supra* note 18.

²¹ See Human Rights Watch, "Without Remedy: Human Rights Abuse and Indonesia's Pulp and Paper Industry", Jan. 2003, online: <<http://www.hrw.org/reports/2003/indon0103/index.htm>>.

C. Regulatory Attempts for Corporate Responsibility

Current attempts to regulate MNCs have been in the form of codes, guidelines, standards, and initiatives (soft law).²² There is no hard law to regulate MNCs.

1. Soft law

There is much soft law²³ including:

(a) *UN Global Compact*: The UN Global Compact was an initiative of the then-UN Secretary-General, Kofi Annan, launched in 2000 to address, amongst others, environmental issues, human rights and worker's rights. The Global Compact was the first initiative to emerge from the UN Secretary-General's office that dealt specifically with corporate responsibility by companies. It sought to promote development through good corporate citizenship and was a voluntary initiative, with a clear focus on learning and dialogue.²⁴

There are 10 principles. Principle 1 and 2 relates to human rights and urges businesses to support and respect international human rights within the sphere of their influence and make sure their own corporations are not complicit in human rights abuses.²⁵ The terms 'sphere of influence' and 'complicity' have been subjects of debate. Steven Ratner has noted that corporations should be held responsible within their sphere of influence when their duty is performed pursuant to a contractual relationship with a government, there is an affected population, and the corporations have actual knowledge of the identity of the perpetrators as well as the nature of the abuses they are likely to perpetrate.²⁶

However, the SRSG, whose mandate included researching and clarifying the implications of concepts such as 'complicity' and 'sphere of influence' for transnational corporations and other business enterprises, stated in his interim report that he would address these issues in his final report.²⁷ In a February 2007 report, the SRSG stated that further work on corporate spheres of influence was required to see if it can become a useful policy tool.²⁸

In any event, a major problem with the global compact is that it is voluntary in nature and therefore corporations may choose not to apply it. Sol Picciotto notes that the UN Global Compact was criticised by activists as no more than an attempt to lend the legitimacy of the UN to corporate public relations hype.²⁹

²² For an explanation of the conceptual difference between hard law and soft law, see Thio Li-ann, "Soft law and the Management of Religious Liberty and Order: The 2003 Declaration on Religious Harmony" (2004) *Sing. J. Legal Stud.* 414 at 434, where she states:

'Soft law is better apprehended when contrasted with 'hard law' which refers to legal obligations created and changed by formal legal process, such as legislative enactment or other secondary 'rules of recognition'. This process identifies which facts are legally relevant and attract legal consequences. Breaches in hard law found legal action before judicial bodies empowered to order remedies. Soft law norms are created by informal processes, being in nature moral-political obligations. While promoting the values of social actors, these are subject to looser internal 'sanctions' inducing compliance, such as peer pressure or generated expectations.'

²³ This paper does not attempt to cover them all and will discuss only a few which may fall under international regulatory attempts. For details on more codes see D. Leipziger, *The Corporate Responsibility Code Book* (Sheffield: Greenleaf Publishing, 2003).

²⁴ Leipziger, *ibid*, at 72.

²⁵ See United Nations Global Compact, online: <<http://www.unglobalcompact.org>>.

²⁶ Symposium, "The Multinational enterprise as a global citizen" (2001) 21 *N.Y.L.Sch.J.Int'l & Comp. L.* 1 at 15; S. Ratner, "Corporations and Human Rights: A Theory of Legal Responsibility" (2001) 111 *Yale L. J.* 443.

²⁷ See Commission on Human Rights Sixty-First Session, *supra* note 4 at para. 6.

²⁸ See Human Rights Council Fourth Session, *supra* note 6 at para. 9.

²⁹ See S. Picciotto, "Rights, Responsibilities and Regulation of International Business" (2003) 42 *Colum. J. Transnat'l L.* 131 at 142.

(b) *Extractive Industry Transparency Initiative*: The Extractive Industry Transparency Initiative (EITI) was another voluntary initiative among governments, international organisations, companies, NGOs and businesses. It aimed to ensure that revenues from extractive industries contributed to sustainable development and poverty reduction. The CEO of Royal Dutch/Shell Group, Jeroen van der Veer, said:

The revenues raised from a country's natural resources ought to be a force for good but in many cases the misuse of these revenues can result in poverty, corruption and conflict. The greater transparency over these revenues, promoted by the EITI, is one way of helping to tackle these problems. When a country adopts the principles of EITI, it means the companies operating in that country declare the payments they make to the government and the government declares the corresponding receipts. This provides local people and groups with greater opportunity to question how this money is being spent. In this way, EITI helps to improve the management of those resources and promote better governance".³⁰

The EITI seeks regular publication and auditing of payments from companies to government.³¹ The UK Department for International Development has identified the establishment of an effective validation mechanism to assess country implementation; broaden government participation; and increase financial support as a key challenge for the initiative.³²

(c) *Voluntary Principles on Security and Human Rights*: The Voluntary Principles on Security and Human Rights is a US-UK led initiative between business and civil society groups. The principles are designed to provide practical guidance to ensure that the security arrangements of the extractive industry accord with human rights standards. The principles address matters relating to risk assessment and engagement with private and public security forces.³³

As the title suggests, the Voluntary Principles are 'voluntary' in nature and so corporations may choose not to apply them, with no legal consequences whatsoever. A commentator notes that the principles have faced difficulties stemming from the refusal of companies to agree on criteria for expulsion for non-compliance. He continues: "[t]he lack of enforcement capacity has led some skeptics to argue that these initiatives are nothing more than corporate "greenwash" that enable corporations to argue that they are taking CSR (corporate social responsibility) issues seriously but are in reality not fundamentally changing the ways they operate".³⁴

(d) *OECD Guidelines for Multinational Enterprises*: The Organisation for Economic Co-operation and Development (OECD) Guidelines for Multinational Enterprises are recommendations addressed by governments to multinational enterprises operating in or from the 33 adhering countries.³⁵ The Guidelines provide voluntary principles and standards for responsible business conduct consistent with applicable laws. The Guidelines aim to

³⁰ Jeroen van der Veer, 17 Mar. 2005, online: <www.shell.com/static/media-en/downloads/speeches/jvdveiti.pdf>.

³¹ See "What is EITI", online: <<http://www.eitransparency.org>>.

³² See Report of the United Nations High Commissioner for Human Rights on the Sectoral Consultation Entitled "Human Rights and the Extractive Industry", E/CN.4/2006/92 (10-11 Nov. 2005), item 17 (expert presentations), online: <<http://www.globalpolicy.org/reform/business/2005/1219promotion.pdf>>.

³³ The governments of Netherland and Norway have also joined the initiative. See The Voluntary Principles on Security and Human Rights, online: <<http://www.societyandbusiness.gov.uk/voluntary.shtml>>.

³⁴ Chris Slack, "Putting Teeth into Corporate Responsibility", online: <<http://www.policyinnovations.org/ideas/innovations/data/CSR>>.

³⁵ The 33 adhering countries are made up of 29 member countries—namely Australia, Austria, Belgium, Canada, Czech Republic, Denmark, Finland, France, Germany, Greece, Hungary, Iceland, Ireland, Italy, Japan, Luxembourg, the Netherlands, New Zealand, Norway, Mexico, Poland, Portugal, Spain, Sweden, Switzerland, Turkey, U.K, U.S.; and 4 non-member countries—namely Argentina, Brazil, Chile and Slovak Republic. See *The OECD Guidelines for Multinational Enterprises*, Revision 2000, online: <<http://www.oecd.org/dataoecd/56/36/1922428.pdf>>.

ensure that the operations of these enterprises are in harmony with government policies, strengthen the basis of mutual confidence between enterprises and the societies in which they operate, improve the foreign investment climate and enhance the contribution to sustainable development made by multinational enterprises.³⁶

The general policies of the guidelines are that enterprises should take fully into account established policies in the countries in which they operate, and consider views of other stakeholders. With particular reference to human rights, enterprises are obliged to respect the human rights of those affected by their activities consistent with the host government's international obligations and commitments.³⁷

The commentary to the guidelines states that obeying domestic law is the first obligation of enterprises. However, the guidelines are supplementary principles articulating standards of behaviour of a non-legal character.³⁸ Apart from the fact that the guidelines are non-binding, a serious problem with the OECD guidelines is that it assumes (arguably incorrectly) that the laws in the MNC's country of operation are appropriate and efficient.

(e) *Corporate guidelines*: There are numerous corporate guidelines dealing with human rights violations, such as Shell's statement of general business principles. The Shell principles came into existence in 1976, but were revised in 1997 due to heightened public interest in human rights and the concept of sustainable development. While Shell sees its responsibility to society as including express support for fundamental human rights in line with the legitimate role of business and to give proper regard to health, safety and the environment consistent with their commitment to contribute to sustainable development,³⁹ a 2003 confidential report commissioned as part of Shell's efforts to help develop a 'peace and security strategy' in the Niger Delta said, interestingly, that Shell 'feeds' violence in the area, and may have to leave the area by 2009.⁴⁰ It is still to be seen how corporate guidelines with no externally binding monitoring obligations can be effective tools for ensuring corporate responsibility.

2. *Hard laws*

The discussions above suggest that soft laws by themselves are inadequate to ensure corporate responsibility. There seems to be the need for hard laws which have enforcement mechanisms and appropriate sanctions for abuse. National law has proved ineffective especially in developing countries where they either do not exist or are not enforced. Therefore, the focus is shifting to international law.

However, to date, there is no international legally binding regulation which holds MNCs accountable for violations of human rights. The Draft Norms⁴¹ which apply to all corporations—MNCs and other business enterprises were perhaps the most promising attempt to regulate MNCs internationally. They integrated human rights, labour rights, the environment, development, anti-bribery issues and consumer protection, and according to the Lawyers' Committee on Human rights, presented the most comprehensive, action-oriented restatement of existing human rights laws applicable to global businesses to date. Taken as a whole, they confirm in fundamentally new ways (i) the many laws that do apply,

³⁶ See *The OECD Guidelines for Multinational Enterprises*, *ibid*, Preface to the Guidelines.

³⁷ *Ibid*, General Policies at 19.

³⁸ *Ibid*, Commentary at 39.

³⁹ See online: <http://www.shell.com/static/royal-en/downloads/sgbp/sgbp_300805.pdf>.

⁴⁰ See Mark Tran, "Shell 'may have to leave Nigeria'", *Guardian Unlimited* (11 June 2004), online: <<http://business.guardian.co.uk/story/0,3604,1236805,00.html>>.

⁴¹ *Supra* note 1.

and (ii) how they could be applied and implemented in practice with respect to business conduct.⁴²

However, the interim report of the SRSG found that the legal authority advanced for the norms, and the principle by which the norms propose to allocate human rights responsibilities between States and firms, were particularly problematic.⁴³

Therefore, it may be said that despite the good intentions of the Draft Norms, the criticisms regarding the legitimacy of its binding approach, the nature of its monitoring and enforcement mechanisms, and the claim that it goes beyond the current international law on State responsibility⁴⁴ may suggest the need to look elsewhere for legal authority for direct corporate responsibility.

The argument presented in this article is that perhaps what is needed is a multilateral treaty between States which would clearly map out what norms apply to MNCs and how such norms may be enforced. Enforcement action could be taken by specialised agencies to which IGOs or recognised NGOs could take erring corporations. Perhaps the non-binding status of the Draft Norms, which tried to boycott State consent or State practice and therefore had no legal basis for direct responsibility, was the wrong approach to take under international law.

3. *The role of NGOs as ‘police’*

It must be said that the use of non-state actors such as NGOs to enforce corporate responsibility is not entirely uncontroversial, particularly in relation to the basis of their authority and legitimacy to ‘police’ MNCs and the possibility of regulatory capture by such NGOs.

The terms NGO and Civil Society Organisation (CSO) are frequently used interchangeably. Judith Richter notes that the term ‘NGO’ indicates organisations that are not part of the state machinery and was first coined in 1945 to denote groups and organisations enjoying a consultative status with the UN’s main body, the Economic and Social Council and its subsidiary bodies (with the explicit exclusion of the UN General Assembly, Security Council and the International Court of Justice). CSO, on the other hand, broadly refers to any organisation that is not public and the number of organisations categorised under this term is greater than the number of organisations categorised as NGOs.⁴⁵

Richter adds that the term ‘civil society organisation’ crept into UN policy documents as part of the governance discourse and rarely distinguished citizen and business groups. Today, NGOs or CSOs cover a range of groups and organisations including business interest organisations. Calls have been made to exclude the business sector from the category of CSOs.⁴⁶

It would seem reasonable to heed such calls in a discussion on the need to regulate corporations directly for human rights violations in international law. There is a need to streamline the type of organisations that would be recognised to ‘police’ MNCs.

More importantly though, there is the need to clarify the authority and legitimacy of such streamlined NGOs. NGOs do not have international legal personality. Early attempts to develop international law on NGO recognition have proved futile.⁴⁷ Nevertheless, authority for NGO action in taking erring MNCs before specialised courts or agencies could

⁴² Leipziger, *supra* note 23 at 107.

⁴³ Commission on Human Rights Sixty-Second Session, *supra* note 5 at para. 59.

⁴⁴ See Amnesty International’s Public Statement, *supra* note 2 and accompanying text.

⁴⁵ See J. Richter, *Holding Corporations Accountable: Corporate Conduct, International Codes and Citizen Action* (New York: Zed Books, 2001) at 33. Charnovitz states that the origin of the term NGO goes back to just after World War I, and cites comments by Dwight W. Morrow in 1919; see S. Charnovitz, “Nongovernmental Organizations and International Law” (2006) 100 Am. J. of Int’l L 348 at 351.

⁴⁶ J. Richter, *ibid.* at 34.

⁴⁷ Charnovitz, *supra* note 45 at 356.

arguably be based on the African Commission on Human and People's Rights which allows states, individuals, and NGOs with observer status to submit communications alleging a violation of the African Charter. The *Ogoni* case discussed in part II is an example of such communications submitted by NGOs on behalf of the victims of human rights violations.

The protocol of the African Court on Human and People's Right gives NGOs recognised by the African Union standing to initiate cases directly, provided that at the time of ratifying of the Protocol or thereafter, the State in question has made a declaration accepting the jurisdiction of the Court to hear such cases.⁴⁸ This can be distinguished from the practice of the European Court of Human Rights, which only allows an NGO to bring a case if the NGO itself claims to be a victim.⁴⁹

Likewise, the creation of any multilateral treaty attempting to enforce corporate responsibility for human rights violations should explore avenues whereby streamlined NGOs can institute a case against a MNC provided state parties accept the jurisdiction of the specialised court. The key to such authority is in State consent.

NGOs are now often engaged in the review and promotion of state compliance with international obligations, as well as the monitoring of human rights, humanitarian and environmental law.⁵⁰ Rory Sullivan notes the broader implications of the debate on business and human rights, where one set of non-state actors (NGOs) work to define norms and legal obligations for another set of non-state actors (companies), with limited involvement by government. He observes that "this contest of influences, which is duplicated in many other corporate social responsibility debates, is likely to be an ever more common approach to the development of soft, and probably hard, international law obligations".⁵¹

One other important aspect of NGOs and their authority to police MNCs is the question of regulatory capture. It has been noted that corporate interests and NGOs try to capture the emergence of new binding standards of corporate responsibility by being involved in the drafting and adopting of non-binding codes and guidelines.⁵²

Many have raised the point that NGOs are unaccountable bodies exercising influential power and sometimes not working in the best interest of society, but are advancing their own agendas. These are legitimate concerns which would continue to dominate the business and human rights debates. However, in this article, no attempt would be made to extensively discuss the issue of regulatory capture by non-state actors.⁵³

D. Enforcement Attempts

Under the current international Human Rights law framework, enforcement mechanisms—albeit weak—are in place to remedy human rights violations. Human rights obligations can

⁴⁸ See Article 5(3) and 34(6) of the *Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights*, June 9, 1998, OAU Doc. OAU/LEG/EXP/AFCHPR/PROT (III), online: <<http://www1.umn.edu/humanrts/africa/courtprotocol2004.html>>.

⁴⁹ See Art 34 of the *Convention for the Protection of Human Rights and Fundamental Freedoms*, ETS No. 155, online: <<http://conventions.coe.int/Treaty/en/Treaties/Html/005.htm>>. See also Charnovitz, *supra* note 45 at 354.

⁵⁰ Charnovitz, *ibid*.

⁵¹ R. Sullivan, "The influence of NGOs on the normative framework for business and human rights", in S. Tully ed., *Research Handbook on Corporate Legal Responsibility* (Cheltenham: Edward Elgar, 2005).

⁵² See P. Muchlinski, "Human rights, social responsibility and the regulation of international business: The development of international standards by intergovernmental organizations" (2003) 3 *Non-state Actors and International Law* 123 at 130.

⁵³ See Sullivan, *supra* note 51 at 298-299, where he discusses questions on the legitimacy of NGOs to influence legal norms for corporations.

be implemented through action within the national system of the State concerned, by other States in international relations or by international bodies.⁵⁴

International law holds States responsible for human rights violations by third parties, including MNCs. Currently, many States have laws in place which can hold MNCs responsible for corporate activities that affect human rights such as health and safety at work, environmental protection and labour rights. They also have methods of enforcing such laws—either through the courts or other enforcement bodies.

However, in developing States, the argument is that such laws are either non-existent or ineffective and the systems of enforcement may be equally ineffective or inadequate. These are reflected in a variety of circumstances—for instance, where States are perpetrators of human rights abuse with the MNCs being complicit; where State governments are afflicted by corruption and bad governance; where States are too poor to legislate and enforce the relevant laws; and where States fear “the race to the bottom”.⁵⁵

As a result, the use of extraterritorial domestic jurisprudence focusing on the human rights implications of actions taken by corporations overseas is on the increase.⁵⁶ A widely known example of extraterritorial domestic jurisprudence is the US Alien Torts Claims Act (ATCA), enacted in 1789 which empowers U.S. district courts to hear civil claims of foreign citizens for injuries caused by actions in violation of the law of nations or a treaty of the U.S. ATCA has been used innovatively to provide the potential for judicial remedy as it makes MNCs directly responsible for complicity in human rights violations and allows for reparation.⁵⁷

The case of *Doe v. Unocal*⁵⁸ is widely regarded as having the greatest impact on the scope and interpretation of the ATCA. It was the first case which recognised that the ATCA could be used to hold a MNC liable for violations of universally-recognised human rights standards, committed jointly by the MNC and its foreign business partners.⁵⁹

In *Doe v Unocal*, Earth Rights International, the centre for constitutional rights and two California based law firms assisted 11 Plaintiffs from Burma in bringing a lawsuit against Unocal and others. The lawsuit alleged that Unocal, a MNC which was in a joint venture with the Myanmar Ministry for Oil and Gas Enterprise and Total, was complicit in human rights crimes against humanity, forced labour, torture, loss of homes and property, as well as rape. The argument was that since the Burmese government’s military and intelligence personnel were using force deemed illegal under international law to the benefit of the joint venture, and since Unocal had knowledge of this and was making payments to the

⁵⁴ See Hurst Hannum ed., *Guide to International Human Rights Practice* (New York: Transnational Publishers, 2004) at 12.

⁵⁵ See Vasquez, *supra* note 3 at 931, on how the reliance on national law seems inadequate because corruption, economic power of corporations and poverty requires relaxation of regulations to attract foreign investment. The ‘race to the bottom’ will be discussed in Part III.

⁵⁶ For an overview, see D. Kinley and J. Tadaki, “From Walk to Talk: The Emergence of Human Rights Responsibilities for Corporations at International Law” (2004) 44 VA. J. Int’L. 931 at 937. The article discusses the extraterritorial domestic jurisprudence because it is the formal method directly applicable to MNCs and therefore of relevance to this paper, concerned with direct responsibility of MNCs for human rights violations where the host state will not provide remedies.

⁵⁷ For a discussion on the role of multinational corporations in the committing of human rights abuses and using U.S. courts to pursue perpetrators, see J. Sarkin, “The Coming of Age of Claims for Reparations for Human Rights Abuses Committed in the South” 1 SUR—International Journal on Human Rights, online: <<http://www.surjournal.org/eng/index1.php>>. Note the discussions were in relation to issues of colonialism and apartheid.

⁵⁸ 963 F.Supp.880 (C.D. Cal. 1997).

⁵⁹ See S. M. Hall, “Multinational Corporations’ Post-Unocal Liabilities for Violations of International Law” (2002) 34 Geo. Wash. Int’l. L. Rev 401. See also T. Bridgeford, “Imputing Human Rights Obligations on Multinational Corporations: The Ninth Circuit Strikes Again in Judicial Activism” (2003) 18 Am. U. Int’l L. Rev. 1009 for a general discussion on ATCA and *Doe v Unocal*.

personnel,⁶⁰ these personnel were Unocal's agents. The military government on its part was able to plead sovereign immunity. The issues in *Doe v Unocal* have been considered in other cases including *Wiwa v. Royal Dutch Petroleum Co.*⁶¹

Although the Unocal case illustrates an option for pursuing direct corporate liability claims, there are limitations to its use, such as issues of jurisdiction and interpretation.⁶² The direct responsibility of MNCs brought about by ATCA is still an emerging area of law. There are controversies over the scope of its application and to date, no US-based MNC has yet been subject to an enforceable judgment in the U.S for acts performed abroad.⁶³ In fact, the *Unocal* case was settled out of court.⁶⁴ As recent as October 2006, a US federal court urged an appellate court to clarify key issues of corporate liability using ATCA.⁶⁵

In addition, ATCA applies to civil tort claims in the U.S only. It does not apply to potential claims in other jurisdictions which may be the headquarters of some MNCs. Therefore, it is safe to say, although ATCA is very useful, it is not a panacea for corporate violation of human rights.

III. DIRECT CORPORATE RESPONSIBILITY UNDER INTERNATIONAL LAW

A. *Reasons Given Against Direct Corporate Responsibility*

The primary reasons given for why corporations should not be directly held responsible under international law are: (1) the effect it would have on State sovereignty; (2) lack of legal personality under international law and (3) the difficulty that notions of 'corporate' responsibility—as opposed to 'individual' or 'state' responsibility—pose in international law. I argue that such reasons do not adequately reflect situations in developing countries. Nor do they take into account evolving international law approaches which seek to hold corporations responsible for human rights violations.

1. *Effect on state sovereignty*

State sovereignty is a basic principle of international law. It means that the State has the power to rule over matters considered to be within its national jurisdiction. Article 2(7) of the UN Charter states:

Nothing contained in the present Charter shall authorise the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state or shall require the Members to submit such matters to settlement under the present Charter; but this principle shall not prejudice the application of enforcement measures under Chapter VII.⁶⁶

Human rights was once considered a domestic affair to be regulated nationally, but now it is widely accepted that human rights can override national sovereignty and necessitate international intervention. Indeed, there are *jus cogens* (peremptory norms of international

⁶⁰ See C. Carey, "Unocal Corporation can be liable for Human Rights abuses in Burma" (1999) 7 Human Rights Brief.

⁶¹ 226 F.3d 88 (2d Cir. 2000).

⁶² Oloka-Onyango, *supra* note 19 at 903 -904.

⁶³ Hall, *supra* note 59.

⁶⁴ See Lisa Girion, "Unocal to Settle Rights Claims", *Los Angeles Times* (14 Dec. 2004), online: <<http://www.globalpolicy.org/intljustice/atca/2004/1214unocal.htm>>.

⁶⁵ See Julie Kay, "11th Circuit asked to Clarify Corporate Liability", *Daily Business Review* (30 Oct. 2006), online: <<http://www.law.com/jsp/ihc/PubArticleIHC.jsp?id=1161939931304>>.

⁶⁶ *Charter of the United Nations*, June 26, 1945, 59 Stat. 1031, T.S. 993, 3 Bevans 1153, entered into force Oct. 24, 1945.

law) such as torture, genocide, and the prohibition on the use of force. These would apply to corporations and there has even been talk about the prospect of the International Criminal Court (ICC) holding corporations liable for complicity in human rights crime.⁶⁷ But generally, for other universally-recognised human rights, the primary obligation is on States to ensure human rights are not violated by third parties.

If corporations breach economic, social and cultural rights such as the right to health, food, housing, or local communities,⁶⁸ issues of State responsibility and sovereignty are raised. States assert that only they may possess an obligation in international law to ensure that third parties such as corporations do not violate human rights norms within their jurisdiction.

However, one must not get weary of sounding the call that some States cannot or will not ensure the obligations are fulfilled. As has been mentioned, reasons for failure to ensure the observance of obligations under international law in relation to human rights include corruption and bad governance, fear of a race to the bottom and genuine inability due to poor resources.⁶⁹ In these situations, since the State has either refused or is unable to fulfil its obligations under international human rights law, then State sovereignty cannot be an argument for the proposition that all matters involving human rights are purely internal domestic affairs.

The failure of States to fulfil these obligations should arguably lead to calls for direct corporate responsibility for human rights violations under international law. Opponents of calls for direct corporate responsibility have argued that the case put forward for direct regulation of corporations by international law is incomplete. Scholars such as Vasquez, while acknowledging that the draft norms would represent a fundamental shift in international law if implemented, notes that international law places direct obligations on non-state actors only in few circumstances. Vasquez says those in favour of direct corporate responsibility base arguments primarily on “the claim that private corporations have become increasingly powerful in recent decades and this increasing power has resulted in deterioration of human rights—hence corporations should have increasing responsibilities under international law”.⁷⁰ However, he notes that the imposition of direct legal obligations on private parties, backed by an effective mechanism, would represent a significant disempowering of States and is therefore less likely to be enforced, because it infringes State sovereignty. More significantly, this very attempt to expand the State-ordered international legal order may either block or reduce the evolution of international law where State consent is absent or not forthcoming.⁷¹ He suggests that such a reduction is not something international law should encourage. In answer to these assertions, this article argues that:

- (a) It is not only the power and status of the MNCs which should be taken into consideration. Of importance is the persistent failure of MNCs to respect human rights and of the failure of governments to protect human rights particularly in the developing world. MNCs should be held directly responsible in international law when they abuse human rights laws, especially where such abuse is made possible because of their financial status and power, as well as the State’s failure to fulfil their primary obligation to protect their citizens from rights-violations.
- (b) If it is widely accepted that human rights overrides State sovereignty arguments, then when States fail to protect their citizens from third-party human rights violations because of corruption or bad governance, international law should dis-empower such States from having the sole responsibility of ensuring corporations do not abuse human rights.

⁶⁷ News Release, “Talisman advised—Further Abuses could result in prosecution in ICC”, *Corporate Watch*, (30 April 2002), online: <<http://www.corpwatch.org/article.php?id=2478>>.

⁶⁸ See Section II Part A of this article, ‘What rights are addressed in this article?’.

⁶⁹ See Section II Part D, *ibid*, ‘Enforcement Attempts’.

⁷⁰ Vasquez, *supra* note 3 at 948.

⁷¹ *Ibid*, at 950.

International law should create avenues whereby both States and relevant non-state parties can be held directly responsible. The State should be held responsible for failure to protect its citizens from human rights violations. The MNC, on the other hand, should be held responsible for its failure to respect human rights. An added advantage of this approach is that international law would also facilitate the elimination or reduction of corruption, as well as promote transparency and good governance.

- (c) If the failure of States to fulfil its human rights obligations under international law is due to fear of a race to the bottom or a genuine inability to protect as a result of poor resources, international law should create avenues whereby the guilty MNCs would not be able to run to a more 'conducive' environment. The race to the bottom implies that states competing for foreign investment capital from MNCs have an incentive to provide lax regulatory standards (especially in the area of environmental and labour laws) either in order to attract prospective investors, or because of the fear that the capital they desire will be invested in another state.⁷² Numerous scholars have doubted the existence of a race to the bottom amidst claims by many that it exists.⁷³ This article will not go into the merits of such claims. The point is that a call for direct corporate responsibility in international law may prevent a race to the bottom. This can be achieved by the multilateral treaty already discussed which clearly maps out for what and how MNCs can be held responsible. Such a treaty, however, may need to take an approach different from the current approach taken by many treaties, which gives State parties the responsibility to create and enforce laws. Under this multilateral treaty, norms would have to be made uniform and be consistently applicable in different states. Accredited NGOs and international organisations may need to be granted the rights to enforce such norms by taking guilty corporations to specialised agencies or courts. Although this would be new and unusual for international law, it may be the way to go to address the situation of corporate responsibility for human rights norms in developing countries.

2. *Lack of legal personality under international law*

Traditionally, States are the primary subjects of international law. They have legal personality, i.e. rights and duties enforceable at law. However, it is now accepted that certain international organisations such as the United Nations (UN) possess rights and duties of their own and have a distinctive legal personality.⁷⁴ In the case against Israel following the assassination of Count Bernadotte, a UN official, the ICJ delivered an Advisory Opinion in 1949 in which it stated that the UN was a subject of international law and could enforce its rights by bringing international claims.⁷⁵ The case recognised that there were 'degrees' of personality. Shaw notes that such a ruling can be applied to embrace other international institutions, like the ILO, Food and Agriculture Organisation, each of which have a juridical character of their own.⁷⁶

Increasingly, it is becoming clear that there are other entities, such as NGOs and MNCs, worthy of limited personality in international law. In the area of foreign investment law, MNCs have limited personality under the International Centre for Settlement of Investment

⁷² See K. R. Gray, "Foreign Direct Investment and Environmental Impacts—Is the Debate Over?" (2002) 11[3] RECIEL 306. See also Richard Revesz, "Rehabilitating Interstate Competition: Rethinking the "Race-to-the-bottom" Rationale for Federal Environmental Regulation" (1972) 47 N.Y.U.L. Rev 1210, where he challenges the race to bottom argument and shows that federal regulation is likely to promote undesirable effects.

⁷³ See *ibid.*

⁷⁴ See M. Shaw, *International Law* (Cambridge: Cambridge University Press, 2003).

⁷⁵ See *Advisory Opinion of the International Court of Justice Concerning Reparation for Injuries Suffered in the Service of the United Nations*, I.C.J. Rep. 149 (April 11, 1949).

⁷⁶ *Supra* note 74 at 46.

Disputes. The practice of dispute resolution directly between foreign investors and host states has become fairly established within the international legal framework. MNCs are able to enter into direct contracts with States, which may include choice of law, stabilisation and arbitration clauses detrimental to such States.

Unfortunately, in the context of human rights violations committed by MNCs, MNCs have no legal personality that allow them to be held directly responsible for their actions. Responsibility for rights-violations committed by MNCs are imputed to the State, which is held responsible for its apparent failure to protect its citizens from rights-violations. Yet, MNCs play a strong role in international relations as they have immense financial clout in many global economies and wield a strong influence on the commercial policy of many governments. If personality is conceived of as participation in and some form of acceptance by the international community,⁷⁷ MNCs need only garner community acceptance to be regarded as legal entities under international law, since their participation in international law is no longer questionable. Yet, while it is generally accepted that the U.N and its specialised agencies are part of the international community, the same cannot be said for MNCs at present. This paper argues for the qualified recognition by States of the need to grant MNCs capacity to be held directly responsible under international law.

The Encyclopaedia of Public International Law suggests that a wider meaning of international legal community may include “all organised entities endowed with the capacity to take part in international legal relations”.⁷⁸ These include, *inter alia*, States, international organisations and institutions possessing the status of legal capacity in international relations, as well as organised groups or corporate entities of various kinds whose legal capacity to take part in international relations is recognised by States.⁷⁹

The Encyclopedia goes on to say that the composition of the international legal community arises from the consensus of existing members of international society who create new laws and either alter or terminate existing norms.⁸⁰ Although MNCs do not directly create laws, it can be argued that they do take part in international relations, influencing governments as well as economic and political outcomes. Accordingly, States should at least recognise MNCs as capable of participating in international affairs and of fulfilling clearly-identified responsibilities. States should endow MNCs with sufficient personality to be accorded direct duties in international human rights law.

Responsibility for human rights protection should still lie principally with the State, but when States fail to fulfil this obligation, MNCs should have direct responsibility for the violation of specific human rights norms, which must be clearly articulated. It is important to note, however, that the MNC’s responsibility for violation of rights is different from the State’s responsibility for human rights protection. Once the MNC is seen as capable of limited rights and duties relating to responsibility under international law, qualifying NGOs or international organisations should be allowed to report cases of human rights violations to specialised agencies or bring cases in specialised courts under international law.

3. *Difficulty with ‘corporate’ responsibility*

While State responsibility and individual criminal responsibility for international crimes are established principles under international law,⁸¹ corporate responsibility is a more controversial concept under international law because international law grapples with the concept

⁷⁷ *Ibid* at 176.

⁷⁸ See R. Bernhardt, *Encyclopedia of Public International Law Volume II, E-I* (Amsterdam: Max Planck Institute for Comparative Law and International Law, 2003) at 1252.

⁷⁹ *Ibid.*, Volume IV Q-Z, 711.

⁸⁰ Volume II, *Ibid* at 1168.

⁸¹ Basic textbooks on international law refer to these principles. For an example, see Shaw, *supra* note 74.

of holding corporations responsible as opposed to holding individuals responsible. In international law, individuals have duties not to commit international crimes.⁸² International crimes are defined as offences which compel international repression,⁸³ and include, *inter alia*, crimes against peace, war crimes and crimes against humanity. The International Military Tribunal in Nuremberg has stated that “crimes against international law are committed by men, not by abstract entities, [and] only by punishing individuals who commit such crimes can the provision of international law be enforced”.⁸⁴

However, Clapham believes corporations may have similar duties under international criminal law as they ‘have enough legal capacity to enjoy rights and duties on the international stage’.⁸⁵ The International Criminal Court (“ICC”) has jurisdiction over the most serious crimes and criminals which generally include natural persons such as leaders, organisers and instigators.⁸⁶ Proposals that the ICC also exercise jurisdiction over corporate bodies were seriously considered at the Rome Conference, but these proposals were ultimately not implemented. During the ICC deliberations, the whole notion of ‘corporate’ criminal responsibility was simply considered ‘alien’, raising issues of complementarity, as well as procedural issues relating to assets and third party rights.⁸⁷

The prospect of holding corporations liable for complicity in human rights crimes has been raised in provisions of the Rome Statute of the ICC, which makes officers and employees of private companies who facilitate aid or abet a crime covered by the court criminally liable.⁸⁸ However, in international law, corporate criminal responsibility has yet to be extended to the corporation as a whole entity.⁸⁹

Many have argued for an extension of the Rome Statute of the ICC to cover legal persons, which would extend criminal responsibility to corporations for rights-violations. However, given that many global corporations are American, the US refusal to be a signatory to the ICC leaves victims of abuse at the hands of US corporations without any means of redress.⁹⁰ Barnali advocates the use of a specialised tribunal as the enforcing arm of a constituent treaty or norms outlining corporate responsibilities for transnational harm.⁹¹

While violations of economic, social and cultural rights by MNCs do not qualify as international crimes, the arguments made advocating corporate responsibility for international crimes are also applicable to corporate responsibility for violations of socioeconomic rights. In essence, MNCs should be recognised as having limited capacity to bear responsibilities.

What would perhaps be more challenging is devising the means for determining when the MNCs should be responsible—i.e. whose act would trigger corporate responsibility? This has proved to be a particular challenge for domestic laws, given that some States recognise

⁸² See A. Clapham, “State Responsibility, Corporate Responsibility and Complicity in Human Rights Violations”, in Lene Bomann-Larsen & Oddny Wigen eds., *Responsibility in World Business: Managing Harmful Side-Effects of Corporate Activity* (New York: United Nations University Press, 2004).

⁸³ W. Schabas, *An Introduction to the International Criminal Court* (New York: Cambridge University Press, 2001).

⁸⁴ See Trial of German Major War Criminals (Goering et al), reproduced in (1947) 41 Am. J. Int’l L. 172 at 233.

⁸⁵ *Supra* note 82 at 52.

⁸⁶ *Supra* note 83 at 21.

⁸⁷ See M. T. Kamminga & S. Zia-Zarifi eds., *Liability of Multinational Corporations Under International Law* (Boston, Massachusetts: Kluwer Law International, 2000).

⁸⁸ *Corporate Watch*, *supra* note 67.

⁸⁹ Clapham, *supra* note 82, where he says that the use of international criminal law against corporations is not dependent on an amendment to the ICC statute. He argues that this branch of international law is already applicable against corporations, even if jurisdiction is limited for the moment to domestic courts. See also Kamminga, *supra* note 87 at 160.

⁹⁰ See B. Choudry, “Beyond the Alien Tort Claims Act” (2005) 26 Northwestern J. Int’l L & Bus. 43. Choudry notes that under Art 12(1) of the Rome statute and other international treaties, jurisdiction is exercised over only those who have ratified the treaty or who have consented to it.

⁹¹ Choudry, *ibid* at 71.

criminal corporate responsibility, while other States only recognise civil or administrative corporate responsibility. Determining when corporate responsibility would be triggered would also be a challenge at international law.

A useful example of discussions involving corporate criminal responsibility would be the extensive work carried out by the OECD Convention on bribery. The US, in response to a question in the Phase 1 questionnaire on the implementation of the OECD on whether criminal responsibility should be based on strict liability or dependable on a culpable act by a representative of the company, stated that:

...A corporation is held accountable for the unlawful acts of its officers, employees, and agents under a *respondeat superior* theory when the employee acts (i) within the scope of his or her duties and (ii) for the benefit of the corporation. In both instances, these elements are interpreted broadly... Thus, a corporation is generally liable for the acts of its employees with the limited exception of acts that are truly outside the employee's assigned duties or which are contrary to the corporation's interests... Corporate criminal liability is premised on the act of *any* corporate employee, not merely high-level executives. Participation, acquiescence, knowledge, or authorisation by higher level employees or officers, however, will be relevant to the determination of the appropriate sanction. Under the applicable sentencing guidelines, higher fines may be imposed when a corporation's management participates in or fails to take appropriate steps to prevent unlawful conduct.⁹²

In the UK, corporate criminal liability is based on the common law doctrine of identification⁹³ which is derived from the dicta of Lord Reid in *Tesco Supermarket Ltd v Natrass*:

A living person has a mind which can have knowledge or intention or be negligent and he has hands to carry out his intentions. A corporation has none of these: it must act through living persons, though not always one or the same person. Then the person who acts is not speaking or acting for the company. He is acting as the company and his mind which directs his acts is the mind of the company...He is an embodiment of the company or, one could say, he hears and speaks through the persona of the company, within his appropriate sphere, and his mind is the mind of the company. If it is a guilty mind then that guilt is the guilt of the company.⁹⁴

Brent Fisse has argued for corporations to have a separate legal personality, as opposed to identification doctrine by which corporate responsibility is derived from its officers.⁹⁵ There is also the theory of imputation which holds corporations vicariously liable for acts and intents of its employees acting on behalf of the corporation which are then imputed to the entity.⁹⁶ These distinctions in domestic law seem to render the possibility of establishing corporate responsibility in international law all the more problematic. However, these problems are not insurmountable.

When international law considers corporate responsibility for violation of identifiable human rights norms, it should bear in mind that responsibility may be civil, administrative or criminal. International law would then have to devise the basis on which the corporation would be liable. The controlling mind doctrine, or a variant of that doctrine, is arguably

⁹² See Response of the United States to the Phase 1 Questionnaire DAF/IME/BR(98)8/ADD1/FINAL (30 October 1998), online: <<http://www.usdoj.gov/criminal/fraud/fcpa/firstqu.htm>>.

⁹³ See C. M. V. Clarkson & H. Keating, *Criminal Law: Text and Materials* (London: Sweet & Maxwell, 2003).

⁹⁴ *Tesco Supermarket Ltd v Natrass* [1972] A.C. 153 at 170 (HL).

⁹⁵ B. Fisse, "Recent Developments in Corporate Criminal Law and Corporate Liability to Monetary Penalties" (1990) 13 U.N.S.W.L.J. 1.

⁹⁶ N. Jorgensen, *The Responsibility of States for International Crimes* (New York: Oxford University Press, 2000).

better suited for corporate responsibility in international law in line with individual responsibility for international crimes which targets senior state officials. Issues of corporate responsibility of corporations for their subsidiaries would need to be addressed. Nevertheless, with State consent and willingness, corporate responsibility under international law—a thorny issue at the forefront of debates about human rights and business—can be established.

International law also grapples with corporate responsibility because traditionally, corporate responsibility was confined to domestic law. The argument is that since corporations are the creations of States, they should be regulated by States. However, Addo⁹⁷ notes that corporate regulation by States via domestic law is clearly inadequate in regulating corporate behaviour in an era of expanding corporate power and influence.

In domestic law, corporate governance, which focuses on the relationship between the corporations and its shareholders, is used to address corporate responsibility issues. It addresses the core areas of board responsibility such as strategy, performance, conformance and accountability to shareholders.⁹⁸ Traditional notions of corporate governance are based on the twin models of shareholder primacy and shareholder maximisation. The main objective of these models is to increase the wealth of shareholders, within the limits of the company's resources and capabilities. Shareholders retain ultimate control of the corporate governance machinery and the duties of those appointed by the shareholders are owed exclusively to the latter.⁹⁹

When the Enron, WorldCom and similar corporate scandals broke out, they affected shareholders and employees. These scandals, however, did not raise wider questions about corporate responsibility to society.¹⁰⁰ The post-Enron era, which tightened regulation of corporate governance, dealt with reforms that strengthened the roles of independent directors, audits and certification of corporate accounts.¹⁰¹

Corporate responsibility in international law focuses on stakeholder primacy. Stakeholders are persons who affect or are affected by the actions and activities of organisations and who corporations should be responsible to.¹⁰² Michael S. Baramin in the preface to the *Research Handbook on Corporate Legal Responsibility* quoted Dahl who said 'every corporation should be thought of as a social enterprise whose existence and decisions can be justified only insofar as they serve public or social purposes'.

For the purposes of international regulation, the principles guiding traditional corporate governance are inadequate. Douglas Branson notes:

Traditional corporate governance theory, structure and practice deal with solving problems thought to be generated by the separation of ownership from control in large publicly held corporations. They are simply irrelevant to the problems posed by the growth of large, sprawling multinational entities.¹⁰³

Another commentator notes that on the transnational and international level, corporations are discussed within the core fields of international law and, increasingly, human rights law.

⁹⁷ M. Addo, *Human Rights Standards and the Responsibility of Transnational Corporations* (Boston: Kluwer, 1999).

⁹⁸ See B. Horrigan, "Comparative corporate governance developments and key ongoing challenges from Anglo-American perspectives" in S. Tully ed., *Research Handbook on Corporate Legal Responsibility* (UK: Edward Elgar, 2005) at 22, citing an Australian CEO's views on accountability to shareholders as including progress reports, seeking to align the collective interests of shareholders, boards and management.

⁹⁹ L. C. Backer, "Multinational Corporations, Transnational Law: The United Nations' Norms on the Responsibilities of Transnational Corporations as a Harbinger of Corporate Social Responsibility in International Law" (2006) 37 *Colum. H.R.L. Rev* 287.

¹⁰⁰ See J. Sabapathy, "In the dark all cats are grey: corporate responsibility and legal responsibility" in S. Tully ed., *Research Handbook on Corporate Legal Responsibility*, *supra* note 99 at 236.

¹⁰¹ Horrigan, *supra* note 98 at 28.

¹⁰² *Supra* note 100.

¹⁰³ D. M. Branson, "The Very Uncertain Prospect of 'Global' Convergence in Corporate Governance" (2001) 34 *Cornell Int'l L.J* 321.

At this level, the domestic law framing of the issue of corporate social responsibility (CSR)—the extent to which the corporation may or must take into account effects of its actions on others and the limitation of ultimate corporate purpose to shareholders—is increasingly rejected.¹⁰⁴ It is also useful to note that in corporate governance literature, corporate governance is increasingly being perceived as needing more than a mono-dimensional focus on the relationship between a corporation and its shareholders.¹⁰⁵

Therefore, it would seem that corporate responsibility can no longer be confined to domestic law. Domestic law seems inadequate to ensure corporate responsibility. Globalisation which has brought the world closer together has brought matters previously confined to domestic law under international law. Globalisation is driven by MNCs and affects human rights, especially socioeconomic rights. The relevance of international law to corporate responsibility is now being appreciated. It is therefore useful to clarify the relationship that international law may have with corporate responsibility.

B. *Unintended Consequences of Direct Corporate Responsibility*

There are definitely unintended consequences of imposing direct corporate liability under international law. These include the ‘race to the bottom’ argument—that MNCs would relocate to countries that are more conducive to their investment purposes. However, empirical evidence suggests that a race to the bottom does not exist.¹⁰⁶ Kevin Gray notes that the absence of State regulation may be attributed more to institutional deficits, limited resources or simply a lack of political will. He says:

Although there is some anecdotal evidence that companies may locate to countries lacking a strict environmental regulation, or exempts thereof, as an incentive, data indicating consistent patterns of these phenomena are not present. As a result, it is problematic to surmise definitely that there is, in fact, environmental regulatory competition between countries to attract foreign investment.

Nevertheless, should the race to the bottom become established in developing countries, it seems that there are many factors in reality a MNC would have to consider before relocating, such as production costs and access to markets. While the chances of such relocation may be more likely in the apparel industry where regulation involves labour laws for unskilled workers, it is unlikely in the extractive industry—a capital-intensive industry with huge prospects of profit and geographical limitations. Therefore, it may be safe to say that the race to bottom as an unintended consequence is more apparent than real.

Furthermore, should race to bottom be a real threat, direct corporate responsibility which is applicable across board, as would be the case if the suggestions in this article are accepted, will considerably reduce the chances of corporations finding countries which are more ‘conducive’. In addition, the work of international civil society and IGOs such as the ILO is admirable and worthy of mention as it would perhaps continue to have an added effect in putting corporations in check.

Another unintended consequence may be States free-riding on corporate responsibility. It cannot be overemphasised that international corporate responsibility is not meant to take the place of State responsibility, but rather to hold corporations responsible for rights-violations in situations where States will not or cannot protect the rights of citizens. Critics might say, how does one then distinguish between a State which is free-riding and a State which cannot or will not comply? The answer, though somewhat superficial, is that in many instances a free-riding State would have the mechanisms in place to hold corporations responsible, but

¹⁰⁴ Horrigan, *supra* note 98 at 22.

¹⁰⁵ Horrigan, *ibid.*

¹⁰⁶ Gray, *supra* note 72 and accompanying text.

simply chooses to exercise its right to prosecute violating corporations as and when it likes. On the other hand, the State which cannot or will not hold corporations responsible have obvious issues which may include corruption, bad governance and possible complicity in human rights violations. Such States may also have justifiable fears of a race to the bottom or poor resources to create and enforce laws.

Another unintended consequence may be the perceived uncertainty international corporate responsibility would bring to international law. In response to this, suffice it to say that the article does not argue for a complete revamp of international law. Rather, it asserts that State consent is required for direct corporate responsibility and there are justifiable reasons which should compel States to consent. The propositions presented in this article would work under a State-centered approach to international law and so the perceived uncertainty may be more apparent than real.

C. *Relevant Sources of International Law*

Under a State-centered approach to international law, the primary sources of international law—treaty law and customary law — would still be needed for the creation and imposition of direct corporate responsibility on MNCs.

Treaties are usually between States participating and consenting to bind themselves legally to act in a particular way or to set up particular relations between themselves. As a general rule, international treaties provide a source of law only for contracting States. States that have not signed, ratified or acceded to a treaty are not obliged to its terms unless the treaty codifies or constitutes customary international law.¹⁰⁷

Currently in international law, there are no relevant multilateral treaties regulating MNCs.¹⁰⁸ The International Centre for Settlement of Disputes (ICSID) is a mechanism for the settlement of investment disputes between States and foreign investors through arbitration, and gives MNCs legal personality to bring arbitration cases. However, the use of the ICSID is merely procedural in nature, and does not provide for direct regulation of MNCs or direct corporate responsibility under international law.

States should sign treaties which would directly hold corporations responsible. The Rome Statute of the ICC has created a precedent for holding individuals responsible for violations of egregious crimes, even though the parties to the treaty are States. The only difficulty at present is in overcoming State reluctance to sign a treaty that imposes direct corporate responsibility.

For a custom to be accepted and recognised in international law, it must have concurrence of the major powers in that particular field. Customary international law is thus established by virtue of a pattern of claim, absence of protests by States particularly interested in the matter at hand and acquiescence by other States.¹⁰⁹ Principles involved in custom must be obligatory and express an *opinio juris*. Currently, the principles in international human rights law which arguably fall under customary international law are pretty rigid. They include most sections of the Universal Declaration of Human Rights.¹¹⁰ The chances of direct corporate responsibility for human rights violations being included under customary international law is very slim, because major powers in international law are unable to agree

¹⁰⁷ See Arts 34 and 38 of the *Vienna Convention on the Law of Treaties*, 1155 U.N.T.S 331. See also J. O'Brien, *International Law* (London: Cavendish Publishing Limited, 2001) at Chapter 3 for a summary of accepted principles finding treaties as a source of international law.

¹⁰⁸ See Part II of this article, 'Regulatory Attempts for Corporate Responsibility'.

¹⁰⁹ Shaw, *supra* note 74 at 76, 84.

¹¹⁰ See Address by Hans Corell, "The 1998 Tällberg Workshop: Human Rights and the Free Market—Is the Business of Human Rights Also the Business of Business?" (26 June 1998), online: <http://www.un.org/law/counsel/english/address_06_26_98.pdf>. Corell states that the UDHR is generally accepted to have binding force as customary international law.

on the need and parameters for such responsibility. Many States prefer to think that State responsibility is adequate. They also fear that their sovereignty would be eroded. It would also be difficult to obtain acceptance and recognition for direct corporate responsibility, because the need for direct responsibility would be most obvious in developing countries. One writer notes, in this regard, that because members of the world community are deeply divided economically and politically, it is difficult for general rules to receive the support of a bulk of diverse States, or to ascertain whether a new rule has emerged.¹¹¹

IV. CONCLUSION

The legal authority for direct corporate responsibility cannot be divorced from State practice or consent which is required for the creation of laws in international law. In creating laws, there is the need to look back at the sources of international law.

Where the State refuses or will not protect its citizens from third-party violations, responsibility for ensuring such violations are adequately dealt with should not be attributed to the State in question. Direct responsibility under international law can be attributed to MNCs expressly through treaty, which can clearly articulate applicable norms and avenues or mechanisms for enforcing such norms. The arguments raised against the imposition of direct corporate responsibility, such as the preservation of State sovereignty, the limited personality of MNCs under international law and difficulty with the notion of 'corporate' responsibility vis-à-vis individual responsibility can be legitimately dealt with.

Ultimately, issues of direct corporate responsibility are in the hands of the States and perhaps, rightly so.

¹¹¹ See D. Harris, *Cases and Materials on International Law* (London: Sweet & Maxwell, 2004) at 41. Harris refers to Antonio Cassese, *International Law* (New York: Oxford University Press, 2001) at 124-125.

