Regulating multinational corporations: What are the limitations in existing international initiatives?

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Abstract

Human rights and international business are two concepts that rarely go hand in hand, largely owing to their conflicting purpose. On one hand, human rights are generally there to safeguard humans from abuse, whether from the state or international actors such as corporations. On the other hand, international business, driven by multinational corporations, is premised on capitalist ideals around profit maximisation. However, there is a growing recognition that the human rights element can no longer be ignored, largely because of the negative externalities that corporations often pass on to wider communities, without sufficient safeguards or obligations imposed on them. This article examines the state of current international initiatives and argues that the soft law element renders them largely ineffective. The authors therefore support a movement towards a binding treaty on business and human rights.

Introduction

Since the late 20th century, there has been growing discontent over the state of current corporate social responsibility (CSR) initiatives designed to hold multinational corporations (MNCs)[1] accountable for the abuses they commit when

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[1] One of the first and most recognised definitions of an MNC came from David Lilienthal, who indicated that it was "corporations … which have their home in one country but which operate and live under the laws and customs of other countries as well": quoted in David Fieldhouse, "The Multinational Corporation" in Alice Teichova et al. (eds), *Multinational Enterprises in Historical Perspective* (Cambridge: Cambridge University Press, 1986), p.10. However, this definition may be outdated, since some corporations are beginning to have multiple national origins, such as Royal Dutch Shell and the Anglo-Dutch corporation Unilever. Thus, it could be more appropriate to define an MNC as any corporation that manages, owns and controls inbound fabricating assets in excess of a single state. A similar approach was taken by Neil Hood and Stephen Young, *The Economics of Multinational Enterprise* (London: Longman, 1979), p.3, which was subsequently supported by John Dunning, *Multinational Enterprises and the Global Economy* (Reading, MA: Addison Wesley, 1993), pp.3–4.

operating in their global business capacity.[2] However, throughout this period, the commitment to creating binding international law rules has not waned but rather intensified. At the time of writing, there are continued discussions led by the United Nations Forum on Business and Human Rights for the purposes of

> "implement[ing] the Guiding Principles [on Business and Human Rights] and promot[ing] dialogue and cooperation on issues linked to business and human rights, including challenges faced in particular sectors, operational environments or in relation to specific rights or groups, as well as identifying good practices".[3]

Moreover, in 2016, the United Nations (UN) Human Rights Council at the 31st session explored the prospect of a CSR treaty, which continues to be negotiated at UN level.[4] The underlying goal is to create a treaty concerning business and human rights. The aim of this article is threefold. First and foremost, it examines the post-war initiatives designed to regulate the activities of MNCs. Secondly, it examines the main international initiatives that are in force today and their limitations, before reaching a circumspect conclusion.

CSR through the imperfect lens of political history

The origin of what is now known as human rights can be traced back to an historical rule of law, which limited the sovereigns' absolute power.[5] One of the earliest and best-known records of human rights was Magna Carta, which was incorporated into UK law in 1215.[6] Magna Carta protected rights that are crucial in international law, for example, equity before the law, property rights and religious freedoms. However, the term "human rights" was not coined in international law until after the drastic loss of human life and the environmental devastation of the Second World War.[7] In the aftermath, the UN was created, which conveyed human rights to the heart of international law.[8]Article 1(3) of the UN Charter states that one of the purposes and principles of the UN is

[2] Michael Barnett, "Stakeholder Influence Capacity and the Variability of Financial Returns to Corporate Social Responsibility" (2007) 32 *Academy of Management Review* 794, 807. The author indicated that although CSR is voluntary, businesses should look to follow CSR, as it could help profits; Chrispas Nyombi, Andreas Yiannaros and Rhidian Lewis, "Corporate Personality, Human Rights and Multinational Corporations" (2016) 27 I.C.C.L.R. 234, 247, 248; Maria Gonzalez-Perez and Liam Leonard, *International Business, Sustainability and Corporate Social Responsibility* (Bingley: Emerald, 2013), pp.153, 154; Markos Karavias, *Corporate Obligations under International Law* (Oxford: Oxford University Press, 2013), pp.83, 114, 115; Ciprian Radavoi and Yongmin Bian, "Enhancing the Accountability of Transnational Corporations: The Case for 'Decoupling' Environmental Issues" (2014) 16 Env. L. Rev. 168, 173; Dima Jamali and Ramez Mirshak, "Business-Conflict Linkages: Revisiting MNCs, CSR, and Conflict" (2010) 93 *Journal of Business Ethics* 443, 445, 446.

[3] The next session was on 27–29 November 2017, Geneva (Switzerland). See *http://www.ohchr.org/EN/Issues/Business/Forum/Pages/ForumonBusinessandHumanRights.aspx* (Accessed 17 November 2017].

[4] UN Human Rights Council, 31st Session (Geneva, 29 February to 24 March 2016), Report on the first session of the open-ended intergovernmental working group on transnational corporations and other business enterprises with respect to human rights, with the mandate of elaborating an international legally binding instrument, on 5 February 2016. This document can be found at "Report on the first session of the open-ended intergovernmental working group on transnational corporations and other business enterprises with respect to human rights, with the mandate of elaborating an international legally binding instrument", *https://documents-dds-ny.un.org/doc/UNDOC/GEN/G16/018/22/PDF/G1601822.pdf?OpenElement* [Accessed 11 June 2017].

[5] Rhona Smith, *Textbook on International Human Rights*, 6th edn (Oxford: Oxford University Press, 2014), p.5.

[6] Smith, *Textbook on International Human Rights* (2014), p.5.

[7] Smith, *Textbook on International Human Rights* (2014), p.5.

[8] Charter of the United Nations, 1 U.N.T.S. XVI, 24 October 1945 (UN Charter). The UN has 193 Member States, and each of these States is a member of the UN General Assembly.

> "to achieve international co-operation in solving international problems of an economic, social, cultural, or humanitarian character, and in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion".[9]

Furthermore, arts 55 and 56 indicate that all members must follow the wishes of the UN by promoting "universal respect for, and observance of, human rights and fundamental freedoms".[10] The global reach of the UN is undeniable, since nearly all entities that are recognised as states are members of this organisation and therefore adhere to the protection of human rights. Moreover, the UN established various internal institutions, such as the United Nations Commission on Human Rights in 1946, a political body that protects, monitors and supervises the implementation of human rights.[11] Additionally, the UN adopted the Universal Declaration of Human Rights (UDHR), which was the first instrument that set out protected fundamental freedoms.[12] It was reaffirmed in the Vienna Declaration and Programme of Action that the UDHR is the cornerstone of international human rights law.[13] Furthermore, although 8 out of the 56 states of the UN abstained from the UDHR in 1948,[14] all current 193 states of the UN have accepted the Declaration as a condition of membership. The UDHR is so important that 10 December is still celebrated in many states as international human rights day, and the *Guinness Book of Records* believes that the UDHR is the "most translated document" on earth.[15] Despite the UDHR's overwhelming global human rights achievements, it has not led to the development of CSR rules that could hold MNCs accountable for abuses.

The UDHR is not a legally binding instrument; thus it can only act as a persuasive mechanism in enforcing and protecting international human rights. However, the norms of the UDHR are crystallised in customary international law, since its terms are cited frequently by international actors, such as state governments and courts.[16] This notion could be further supported by the fact the UDHR defines human rights very similarly to that of the peremptory international norms in the provisions of the UN Charter.[17] Furthermore, the norms of the UDHR are enriched in two binding

[9] United Nations, Charter of the United Nations, 24 October 1945, 1 U.N.T.S. XVI, art.1(3).

[10] United Nations, Charter of the United Nations, 24 October 1945, 1 U.N.T.S. XVI, art.55, art.56.

[11] See its successor the Human Rights Council created in 2006, which is an inter-governmental body that protects and promotes human rights.

[12] United Nations General Assembly in Paris on 10 December 1948, General Assembly resolution 217(III) A. The Declaration is part of the UN, which means all 193 UN Member States must submit to the Declaration.

[13] UN Doc A/CONF 157/23 (1993), 25 June 1993, endorsed by GA Res 48/121 of 14 February 1994.

[14] The following states voted in favour of the Declaration: Afghanistan, Argentina, Australia, Belgium, Bolivia, Brazil, Burma, Canada, Chile, China, Colombia, Costa Rica, Cuba, Denmark, the Dominican Republic, Ecuador, Egypt, El Salvador, Ethiopia, France, Greece, Guatemala, Haiti, Iceland, India, Iran, Iraq, Lebanon, Liberia, Luxembourg, Mexico, Netherlands, New Zealand, Nicaragua, Norway, Pakistan, Panama, Paraguay, Peru, Philippines, Thailand, Sweden, Syria, Turkey, the UK, the US, Uruguay, Venezuela. The following states abstained: Belarus, Czechoslovakia (Czech Republic and Slovakia), Poland, Saudi Arabia, South Africa, Ukraine, USSR (apart from Belarus and Ukraine, which were UN members and part of the USSR—the other states were: Russia, Armenia, Azerbaijan, Estonia, Georgia, Kazakhstan, Kyrgyzstan, Latvia, Lithuania, Moldova, Tajikistan, Turkmenistan, and Uzbekistan), Yugoslavia (Bosnia Herzegovina, Croatia, Macedonia, Montenegro, Serbia, Slovenia, and also the entity Kosovo).

[15] Francesca Klug, "The Universal Declaration of Human Rights: 60 Years On" [2009] P.L. 205, 206.

[16] Louis Sohn, "The New International Law: Protection of the Rights of Individuals rather than States" (1982) 32 *American University Law Review* 1, 15–17; Klug, "The Universal Declaration of Human Rights" [2009] P.L. 205, 206.

[17] Sarah Joseph and Adam McBeth, *Research Handbook on International Human Rights Law* (Cheltenham: Edward Elgar Publishing Ltd, 2010), p.316.

treaties, the International Covenant on Civil and Political Rights (ICCPR)[18] and the International Covenant on Economic, Social and Cultural Rights (ICESCR).[19] Thus, the principles of the UDHR are cemented in binding legal mandates that most states are parties to, which means the UDHR is extremely influential in the recognition and protection of international human rights. Moreover, the UDHR, ICCPR and ICESCR are collectively named the International Bill of Human Rights, which demonstrates their importance in the development of human rights.

Furthermore, after the creation of the UHDR in 1948, no new standards were adopted until 1965,[20] with the exception of the Declaration on the Granting of Independence to Colonial Countries and Peoples,[21] relating to decolonisation and the rise of self-determination. However, the period around the 1980s saw a rise of core human rights development with the introduction of the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW),[22] the Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (CAT),[23] and the Convention on the Rights of the Child (CRC).[24] Although academics, for example Sarah Joseph and Adam McBeth, suggest that those developments were "another lull in standard setting", these developments nevertheless contributed to the rapid advancement of international human rights, since many states uphold the human rights that the conventions aim to recognise and protect.[25] However, there were some developments that could be classified as a "lull in standard setting", for example, the Declaration on the Elimination of Intolerance based on Religion or Belief,[26] the Declaration on the Right to Development (DRD),[27] and the Declaration on the Rights of Indigenous People,[28] which all failed to gain binding recognition in international law. Furthermore, the

[18] Opened for signature 16 December 1966, 993 U.N.T.S. 3 (entered into force 3 January 1976). Some of the rights that the treaty protects are; the right to life, freedom of speech, freedom of religion, electoral rights, freedom of assembly, and rights to a fair trial and due process. This treaty has 168 state parties.

[19] Opened for signature 16 December 1966, 999 U.N.T.S. 171 (entered into force 23 March 1976). The ICESCR aims to protect rights such as the right to; health, education, an adequate standard of living and labour rights. This treaty has 164 state parties.

[20] International Convention on the Elimination of All Forms of Racial Discrimination (CERD), Opened for signature 7 March 1966, 660 U.N.T.S. 195 (entered into force 4 January 1969). The treaty outlines that its members must promote understanding among all races and eliminate racial discrimination. It has 177 state parties.

[21] GA Res. 1514 (VX) of 14 December 1960, UN Doc A/4684 (1960). 89 states voted in favour, none voted against but 9 abstained: Australia, Belgium, Dominican Republic, France, Portugal, South Africa, Spain, the UK and the US. Except for the Dominican Republic, the rest of those abstaining states were major colonial powers.

[22] Adopted by GA Res. 34/180 of 18 December 1979. Opened for signature 18 December 1979, 1249 U.N.T.S. 13 (entered into force 3 September 1981). It is considered an international bill of rights for women, and therefore it aims to protect the rights of women. It has 189 state parties. The US and Palau have signed but not ratified the convention, whereas the Holy See, Iran, Somalia, Sudan and Tonga have not even signed the convention.

[23] Adopted by GA Res. 39/46 of 10 December 1984. Opened for signature 10 December 1984, 1465 U.N.T.S. 85 (entered into force 26 June 1987). It is an international human rights treaty, under the review of the United Nations. Its purpose is to prevent torture and other acts of cruel, inhuman, or degrading treatment around the world. States must prevent torture in any territory under their jurisdiction and are not allowed to transport individuals to any other state where there is a belief they will be tortured. The convention has 159 state parties.

[24] Adopted by GA Res. 44/25 of 20 November 1989. Opened for signature 20 November 1989, 1577 U.N.T.S. 3 (entered into force 2 September 1990). The convention outlines children's economic, civil, social, political, health and cultural rights. According to the Convention a child is any human being under the age of 18, unless the age of majority is attained earlier under a state's domestic legislation. It has 196 state parties, and the only UN member that is not a party to the convention is the US. Other entities party to the convention are the Cook Islands, Niue, the State of Palestine, and the Holy See.

[25] Joseph and McBeth, *Research Handbook on International Human Rights Law* (2010), p.3.

[26] GA Res. 36/55 of 25 November 1981. This declaration aims for freedom of religion or belief.

[27] GA Res. 41/128 of 4 December 1986. The declaration outlines that every individual should have economic, social and cultural development rights.

[28] GA Res. 61/295 of 13 September 2007. Although the declaration is not binding, it was adopted by a majority of 144 states in favour, 4 votes against (Australia, Canada, New Zealand and the US) and 11 abstentions (Azerbaijan, Bangladesh, Bhutan, Burundi, Colombia, Georgia, Kenya, Nigeria, Russian Federation, Samoa and Ukraine).

1990s and 2000s saw the adoption of optional protocols, which can only be considered advisory.[29] It is likely that this soft law approach or crust to international human rights law has rubbed off international CSR, thereby hindering any move towards binding rules.

From a global economic perspective, corporations are growing in power and influence.[30] Some MNCs have enough economic power to influence the domestic politics of States, which could lead to the overthrow of democratically elected government.[31] Although MNCs began to develop in the 16th and 17th centuries, with the introduction of European colonial trading companies,[32] the modern structure of MNCs that supports productive integration across borders did not appear until the mid-19th century.[33] However, this is not to say that abuses committed by MNCs did not occur before the 19th century. One of the most notable examples of historic MNC abuse was instituted by the British-owned East India Company in the 18th century.[34] The East India Company was originally formed to trade in silks and spices. However, owing to the lack of regulation in India to monitor MNC practices, the East India Company quickly turned from a friendly trading company into a destructive power that took over Southeast Asia with its 260,000 strong army. The company was obsessed with profit, and thus had little regard for human rights when maximising their assets, which resulted in human rights abuses. However, despite a huge British contribution to the modern industrial economy, which is evident from their investment in products in North America, most of these

[29] See, Second Optional Protocol to the ICCPR, aiming at the abolition of the death penalty, adopted by GA Res 44/128 of 15 December 1989, opened for signature 15 December 1989 (entered into force 11 July 1991); Optional Protocol to the CEDAW, adopted by GA Res. 54/4 of 6 October 1999, opened for signature 10 December 1999 (entered into force 22 December 1999); Optional Protocol Convention on the Rights of the Child on the Sale of Children, Child Pornography and Child Prostitution, adopted by GA Res. 54/263 of 25 May 2000, opened for signature 15 May 2000 (entered into force 18 January 2002); Optional Protocol Convention on the Rights of the Child on the Involvement of Children in Armed Conflict, adopted by GA Res. 54/263 of 25 May 2000, opened for signature 25 May 2000 (entered into force 12 February 2002); Optional Protocol to the CAT, adopted by GA Res. 57/199 of 18 December 2002, opened for signature 4 February 2003 (entered into force 22 June 2006).

[30] Peter Muchlinski, *Multinational Enterprises and the Law*, 2nd edn (Oxford: Oxford University Press, 2007), p.3; Richard Barnet and Ronald Muller, *Global Reach: The Power of Multinational Corporations* (New York: Simon and Schuster, 1974); Naomi Klein, *No Logo: Taking Aim at the Brand Bullies* (Toronto: Knopf Canada, 1999), p.327; David Korten, *When Corporations Rule the World* (West Hartford, Conn: Kumarian Press, 1995).

[31] This occurred when the American MNC ITT contributed to the overthrow of the socialist Allende government of Chile. It could be considered as one of the events that occurred because of the cold war of communism and capitalism, between mainly the US and Soviet Union: see discussion in Theodore Morgan, *Multinational Corporations and the Politics of Dependence: Copper in Chile* (Princeton, NJ: Princeton University Press, 1977), pp.252–253; Anthony Sampson, *The Sovereign State: The Secret History of ITT* (London: Coronet, 1973), Ch.11; US Congress Senate Subcommittee on Multinationals: *Hearing on Multinational Corporations and US Foreign Policy*, 93rd Congress 2nd Session (US Government Printing Office 1974); Muchlinski, *Multinational Enterprises and the Law* (2007), pp.3, 4.

[32] Francis Mann, *Studies in International Law* (Oxford: Oxford University Press, 1973), pp.200–203; Cecil Carr, *Select Charters of Trading Corporations* (London: Selden Society, 1913); Michael Likosky, *The Silicon Empire: Law Culture and Commerce* (Aldershot: Ashgate, 2005), pp.61–68; *Nabob of the Carnatic v East India Company* (1791) 1 Ves. Jr 70; Michael Farelly, "Recent Questions of International Law: The British Government and the Chartered Companies in Africa" (1984) 10 L.Q.R. 254; Ex-Rajah of Coorg v East India Company (1860) 29 Beav. 300; Bohdan Havrylyshyn, "The Internationalisation of Firms" (1971) 5 J.W.T.L. 72.

[33] Mira Wilkins, *The Emergence of Multinational Enterprises: American Business Abroad From the Colonial Era to 1914* (Cambridge, MA: Harvard University Press, 1970). Wilkins indicated that American MNCs which have contemporary MNC abilities of international divisions of productivity began to appear in the middle of the 19th century; Lawrence Franko, *The European Multinationals* (London: Harper and Row, 1976). Franko emphasised that the first real European MNCs were created in the mid-19th to the late 19th century; Ann Carlos and Stephen Nicholas, "Giants of an Earlier Capitalism: The Chartered Trading Companies as Modern Multinationals" (1988) 62 Bus. Hist. Rev. 398. The rapid development of technology, management and manufacturing in the 19th century contributed to the current evolution of MNCs: Alfred Chandler, *Scale and Scope: The Dynamics of Industrial Capitalism* (Cambridge, MA: Harvard University Press, 1990); John Dunning, *Multinational Enterprises and the Global Economy* (Wokingham: Addison Wesley, 1993), Ch.5.

[34] Phillip Lawson, *The East India Company: A History* (London: Longman Group, third impression 1997).

companies would not meet the contemporary definition of an MNC. This is because, although these companies were incorporated in Britain and comprised British directors, their assets were located and managed overseas, which meant that they would conduct no operations in Britain or in more than one state. It was not until the middle of the 19th century that the modern structure of MNCs began to form.[35] It is argued by some academics that the first contemporary manufacturing MNC was the American Singer Sewing Machine Company.[36] This development supported the growth of MNCs.[37]

However, the outbreak of the First World War in 1914 significantly hindered the expansion of MNCs, since most companies and MNCs were taken over by their respective governments with the goal of winning the war. Following the First World War, there was not much MNC development, since there was a lack of political and economic stability in the international community. First, there were massive changes in state politics, such as the Bolshevik Revolution in Russia, the adoption of fascist economic policies in Italy and Germany, and the break-up of states, for example, the collapse of Austro-Hungary and the Ottoman Empire.[38] Secondly, there was a breakdown of international financial markets in the late 1920s and early 1930s, known as the great depression.[39] These two concerns and the increasing threat of another war meant that the creation of MNCs was not advisable, since investment in foreign markets would be extremely difficult and unstable. Instead, companies in Europe were nationalised and businesses of the same nationality merged together to create large corporations, which were then used to create cartels in the international markets to weaken competitors.[40] Although

[35] Muchlinski, *Multinational Enterprises and the Law* (2007), p.10. Muchlinski believed that the mid-19th century was the catalyst for the development of contemporary MNCs.

[36] Christopher Tugendhat, *The Multinationals* (London: Pelican, 1971), p.33. Furthermore, although the American Samuel Colt set up a company in 1852 in the UK to manufacture revolvers, the investment failed and the factory was sold off in 1857. Despite the fact that the investment failed, some academics consider this as the first MNC; see discussion in Mira Wilkins, *The Emergence of Multinational Enterprises: American Business Abroad from 1914 to 1970* (Cambridge, MA: Harvard University Press, 1970), pp.37–45.

[37] Chandler, *Scale and Scope* (1990), pp.71–79. Chandler indicated that the US was open to create MNCs, since US recession in the domestic market made foreign markets more attractive, and the combination of new antitrust laws and stock market conditions encouraged companies to be merged into a giant corporation, the MNC, maintaining interests in both home and overseas markets; Wilkins, *The Emergence of Multinational Enterprises* (1970), pp.37–45. Wilkins highlights the importance of America in the development of MNCs.

[38] Joseph Wilczynski, *The Multinationals and East-West Relations* (London: Macmillan, 1976), p.108. Foreign companies that operated in the USSR could only operate as joint ventures with the Soviet State and its companies under Lenin's New Economic Plan. This was subsequently liquidated by Stalin, probably because of his fears of international influence in Soviet politics, which he single-handedly dictated from Lenin's death to his own death, For further discussion on Stalin's interesting reign over the USSR, see Michael Lynch, *Access to History: Stalin's Russia 1925–1953*, 4th edn (London: Hodder Education, 2008), Wendy Goldman, *Inventing the Enemy: Denunciation and Terror in Stalin's Russia* (Cambridge: Cambridge University Press, 2011), and John Hostettler, *Law and Terror in Stalin's Russia* (Chichester: Barry Rose, 2003); Pierre Jacquemot, *La Firme Multinationale: Une Introduction Economique* (Paris: Collection Gestion Economica, 1990), p.25. Jacquemot indicated that in the early 20th century important regions of the world were closed off to private foreign investment. For a discussion on Italy's domestic and foreign policy, see Denis Smith, *Mussolini* (London: Granada, 1983), pp.133–142, 219–220. Smith discusses the rise of fascism in Italy and its effects on policy and investment; for a discussion on German domestic and foreign policy, see Richard Overy, "German Multinationals and the Nazi State in Occupied Europe" in *Multinational Enterprises in Historical Perspective* (1986), p.299. Overy discusses the rise of fascism in Germany and its effects on policy and investment.

[39] Tugendhat, *The Multinationals* (1971), p.39.

[40] Franko, *The European Multinationals* (1976), pp.95–96. The Swedish combine, Match, obtained national production monopolies in host states by taking control of local competitors and thus attaining market control: Geoffrey Jones, *Multinationals and Global Capitalism: from the Nineteenth to the Twenty First Century* (Oxford: Oxford University Press, 2005), pp.57–60, 90–92, 122–123. The German combine IG Farben negotiated agreements with its Swiss competitors: Harm Schroter, "A Typical Factor of German International Market Strategy: Agreements Between US and German Electrotechnical Industries up to 1939" in *Multinational Enterprises in Historical Perspective* (1986), p.160. German and US businesses negotiated market sharing agreements in the elector-technical sector: Chandler,

American companies could not create cartels in the US, they nevertheless formed cartels in Europe, since the Webb-Promerene Act 1918[41] gave them the ability to create overseas cartels provided there was no adverse effect on competition in the US.[42]

However, cartels delayed the development of MNCs. The introduction of cartels made creating MNCs extremely difficult, since many countries had exclusive participation for certain companies, which meant that businesses could not freely expand their manufacturing capabilities in other states. In contract, cartels kept alive the development of MNCs and globalisation, since they provided a mechanism for foreign companies to interact with each other and invest in foreign markets when they was no other way to do so, since most states were pursuing the foreign policy of isolationism, which meant that they avoided international affairs. Furthermore, when international investment in the late 1930s began to exceed the pre-war statistics, this led to US and British companies gradually setting up subsidiaries in Europe, which the Second World War quickly put an end to.[43] When the Second World War concluded in 1945, the growth of MNCs was no longer drastically disrupted. However, the aftermath of the Second World War was challenging for European and Japanese industries, since the assets of domestic and overseas companies in these regions were commonly destroyed, expropriated, or nationalised.[44] In contrast, US companies emerged virtually unscathed from the Second World War, as they had evaded the destruction and seizure of assets that most European companies had experienced, since the war did not take place in North America. Furthermore, the US companies produced large sums of the equipment used in the war, and thus their industries were experiencing high investment and were better resourced than their competitors in Europe, for the development of new technology, products, and the discovery of new markets.[45]

Moreover, there were many reasons for US companies to create MNCs after the Second World War[46] First, the Marshall Plan 1948 gave American aid to Europe's shattered economies, which brought opportunities for US companies to

Scale and Scope (1990), pp.356–366, 564–584; Richard Overy, "German Multinationals and the Nazi State in Occupied Europe" in *Multinational Enterprises in Historical Perspective* (1986), p.299; Leslie Hannah, *The Rise of the Corporate Economy*, 92nd edn (London: Methuen, 1983), p.38; Tugendhat, *The Multinationals* (1971), pp.41–44. European companies set up international cartels in the oil, steel and rayon sectors.

[41] Webb-Promerene Act 1918 s.2. For more information on the significance of this act, see *US v United States Alkali Export Association Inc* 86 F. Supp. 59 (1949).

[42] Franko, *The European Multinationals* (1976), pp.97–98. Franko argued that robust US antitrust laws rendered the creation of cartels illegal; Tugendhat, *The Multinationals* (1971). Shell Anglo-Persian (BP) and Standard Oil of New Jersey created a cartel in 1928 to protect their non-US interests. US businesses in 1933 entered the Second International Steel Cartel with British, Australian, Chinese and Polish companies.

[43] John Dunning, "Changes in the Level and Structure of International Production: The Last One Hundred Years" in Mark Casson (ed.), *The Growth of International Business* (London: George Allen and Unwin, 1983), pp.92, 93. In 1938 there was 50% more foreign direct investment than in the pre-war period of 1914. Furthermore, UK and US direct investment grew, with the UK holding 39.8% of the world's capital stock, while the US held 27.7%; For a discussion on British companies in the inter-war period, see Geoffrey Jones, "Origins Management and Performance" in Geoffrey Jones (ed.), *British Multinationals: Origins Management and Performance* (Aldershot: Gower Business History Series 1986); For discussion on American companies in the inter-war period, see Mira Wilkins, *The Maturing Multinational Enterprises: American Business Abroad From 1914 to 1970* (Cambridge, MA: Harvard University Press, 1974).

[44] David Shepard, Aubrey Silberston and Roger Strange, *British Manufacturing Investment Overseas* (London: Methuen, 1985), p.13: 40% of British overseas assets were lost owing to the events of the Second World War.

[45] Raymond Vernon, *Sovereignty at Bay* (London: Pelican, 1971), pp.91–101. The investment given to American companies in the Second World War meant that they were able to fund and develop new products.

[46] Neil Hood and Stephen Young, *The Economics of Multinational Enterprise* (London/New York: Longman, 1979), pp.11–12; Tugendhat, *The Multinationals* (1971); Vernon, *Sovereignty at Bay* (1971), pp.91–101.

invest in Europe.[47] Secondly, the new international financial trading system established by the World Bank (International Bank for Reconstruction and Development (IBRD)),[48] International Monetary Fund (IMF),[49] and General Agreements on Tariffs and Trade (GATT),[50] recognised the US dollar as the dominant currency for international dealings, and the removal of tariff barriers to trade significantly decreased the cost of cross-border trade. Additionally, the removal of these restrictions enabled companies to set up manufacturing industries in more than one state, thereby encouraging the creation of MNCs. Thirdly, the US Government allowed tax-free profits for companies investing abroad.[51] Fourthly, significant advancement in international communication and transport enabled improved control of subsidiaries operating abroad. Fifthly, European governments encouraged US investment to raise employment and the standard of living. Thus, there is no surprise that the US led the development in MNC creation after the Second World War. The dominance of US companies is evident, as from 1938 to 1960 they contributed two-thirds of both the overall international investment and the creation of new subsidiaries. Furthermore, by 1960 they had overwhelmingly overtaken the UK as holding the highest total world stock at 49.2 per cent, whereas the UK was second, holding 16.2 per cent.[52]

However, in the 1950s, Europe was starting to recover from the devastation of the Second World War, as European companies were beginning to contribute meaningfully to international investment and create subsidiaries in foreign jurisdictions.[53] Moreover, the creation of the European Economic Community in 1957[54] breathed fresh life into European industrialisation and investment. Furthermore, the total amount of world stock that the US and UK held was declining in the 1960s, and although in the mid-1970s the US contributed to 50 per cent of total foreign direct investment (FDI), in 1985 it had fallen to 25 per cent.[55] In contrast, Western Europe in 1985 contributed 50 per cent of FDI, and it was not just Europe that was rising.[56] Japan in the 1950s began investing in Latin America, and in the 1960s started to invest in its neighbouring states.[57] Furthermore, the relaxation of exporting restrictions in Japan's economic policy in the 1970s led to

[47] In contrast, the Truman Doctrine 1948 discouraged investment in communist states, such as the USSR.

[48] World Bank (International Bank for Reconstruction and Development, IBRD) 1944.

[49] International Monetary Fund (IMF) 1945.

[50] General Agreement on Tariffs and Trade, opened for signature 30 October 1947, 55 U.N.T.S. 194 (entered into force 1 January 1948).

[51] This is no longer in operation for US companies.

[52] Dunning, "Changes in the Level and Structure of International Production" in Casson (ed.) *The Growth of International Business* (1983), pp.93–94. Moreover, in 1960 France was third with 6.1% of the total world stock while Germany had 1.2% and Japan 0.7%. See fn.143 for more information.

[53] Franko, *The European Multinationals* (1976). In the 1950s German companies were beginning to buy back their previously confiscated foreign industries, particularly in Latin America, and rebuild their international sales network. The Italian companies Fiat and Olivetti started setting up subsidiary manufacturing industries in Europe and Latin America; Julien Savary, *French Multinationals* (London: Francis Pinter, 1984), p.2. French companies began to make a significant impact on the motor and tyres sector, and the export markets in general.

[54] European Union, Treaty Establishing the European Community (Consolidated Version), Rome Treaty, 25 March 1957. In 1993, the EEC was renamed the European Community (EC), and in 2009 it was absorbed into the European Union (EU).

[55] Dunning, "Changes in the Level and Structure of International Production" in *The Growth of International Business* (1983), p.94. There was a rise in the total world stock held by Germany, Switzerland and Japan.

[56] UNCTC, *Transnational Corporations in World Development: Trends and Prospects* (New York: United Nations, 1988, UN Doc ST/CTC/89), p.74.

[57] Terutomo Ozawa, *Multinationalism, Japanese Style: The Political Economy of Outward Dependency* (Princeton, NJ: Princeton University Press, 1979), pp.13–14. In the 1950s, Japan made investments in the production of iron, steel and mining in mostly Mexico, Argentina and Brazil. In the 1960s, Japan invested in Singapore, Thailand, Taiwan and Hong Kong.

a rapid rise in Japanese investment, particularly in the developed states of Western Europe and America, which lowered restrictions on Japanese imports.[58] Consequently, Japanese investors were making healthy profits in the developed states and thus continued investing, especially in the US.[59] Although the US was no longer comfortably superior with regard to FDI, it was now superior in securing foreign investments within its territory.[60] This is evident from the fact that foreign investment in the US multiplied by 7.5 between 1975 and 1986, since the US economy maintained good prospects while the international economy stalled, and the depreciation of the dollar made investment in the US cheap.[61]

In contrast, the 1990s marked the growth of investment in developing states, and by the 21st century the emergence of BRIC, made up of Brazil, Russia, India and China, led to new waves in the international investment market.[62] China became the leading developing host state for investment in 1996, and by 2003, China had overtaken the US as the world's leading host state for investment.[63] However, even with the recent developments, the Western states and Japan have some of the most powerful MNCs in the world.[64] MNCs are able to bring states that do not have many corporations or investors into the global economy. This is especially evident since services in developed states are the continuingly dominant sector over manufacturing and raw material; therefore these MNCs that mainly concentrate on manufacturing need to invest in other states to maintain profits.[65] However, considering the rapid rise of MNCs, it is surprising that there are no international binding rules that guard against MNCs committing human rights and environmental

[58] Ozawa, *Multinationalism, Japanese Style* (1979), p.16. The relaxation of strict governmental controls and restrictions on capital export encouraged Japanese direct foreign investment; Michael Yoshino, "Japan as Host to the International Corporation" in Charles Kindleburger (ed.), *The International Corporation* (Cambridge, MA: MIT Press, 1977), p.373. The US gave Japanese investors fewer restrictions on importing Japanese goods to the US; Lawrence Franko, *The Threat of Japanese Multinationals: How the West can Respond* (New York: Wiley Series on Multinationals, 1983), p.71. The European states gave Japanese investors fewer restrictions on importing Japanese goods to Europe; Louis Turner, "Industrial Collaboration with Japan" (RIIA/RKP Chatham House Papers No.34, 1987). Japanese collaboration with American and European industrial companies has been common since the late 1990s.

[59] In the US, Japanese investors made healthy profits in the manufacturing and services sector.

[60] Edward Graham and Paul Krugman, *Foreign Direct Investment in the United States*, 2nd edn (Washington, D.C.: Institute for International Economics, 1991). In 1990, the UK was the largest US investor at 26.8%, Japan was second with 20.7%, the Netherlands third, holding 15.9%, and Canada fourth with 6.9%.

[61] UNCTC, *Transnational Corporations in World Development: Trends and Prospects* (New York: United Nations, 1988, UN Doc. ST/CTC/89), p.74; However, the US invested in Europe to create MNCs which would counteract the Single European Market 1992 that made it harder for foreign traders operating outside Europe to secure investments in Europe.

[62] UNCTAD, *World Investment Report 1993* (New York: United Nations 1993), pp.16–18. The developing states which hosted the most investment were in the order as follows: Singapore, Mexico, China, Brazil, Malaysia, Hong Kong, Argentina, Thailand, Egypt and Taiwan. Most of these states were in East Asia, which suggests that investment was heading to these regions. This statement is supported by UNCTAD, *World Investment Report 1997* (New York and Geneva: United Nations 1997), pp.208–209, which showed growing investment in East Asia at the end of the 1990s: see also UNCTAD, *World Investment Report 1992* (New York: United Nations, 1992), pp.11–17.This rise in investment in developing states was mainly down to the stagnation in the economy of the developed states. MNCs believed that it was better to invest in developing states than developed states at this time.

[63] UNCTAD, *World Investment Report 1994* (New York and Geneva: United Nations, 1994), pp.9–18; UNCTAD, *World Investment Report 1995* (New York and Geneva: United Nations, 1995), p.12; UNCTAD, *World Investment Report 2005* (New York and Geneva: United Nations, 2005), p.xiii; Xiaoyang Zhang, "China's draft Foreign Investment Law: an envisioned new model for regulating foreign capital" (2016) 22 Int. T.L.R. 73.

[64] If MNCs of other states are going to overtake the MNCs of these traditional investment powerhouses, they need to distribute foreign direct investment in other states, instead of relying on investment from the corporations of other states to grow; for a similar discussion see Nagesh Kumar, *Emerging Multinationals* (London: Routledge, 2007); Zhang, "China's draft Foreign Investment Law" (2016) 22 Int. T.L.R. 73.

[65] UNCTAD, *World Investment Report 2004* (New York and Geneva: United Nations 2004). Around the beginning of the 21st century, the service industry equated to 72% GDP in developed state economies, 57% in Central and East European states, and 52% in developing states.

abuses. Although there have been contemporary developments through the introduction of free trade agreements (FTA), the Regional Economic Integration Organisation (REIO)[66] and the World Trade Organization (WTO),[67] these only regulate and place legal obligations in investment.[68]

Global initiatives for regulating MNC activity

This section aims to assess the current CSR initiatives, in chronological order, to determine whether they could adequately hold MNCs accountable for abuses.

OECD Guidelines

The OECD Guidelines were established in 1976, becoming the first CSR initiative that proposed to hold MNCs accountable for abuses.[69] These guidelines were designed for MNCs to contribute to social and economic progress,[70] and for states to follow international law standards when governing the undertakings of MNCs.[71] To achieve these outcomes, the OECD Guidelines sought for MNCs to enhance society when initiating FDI in other states. This meant that MNCs should not only pursue business or commercial related policies, but should also consider how their investment could benefit society, and the best ways of using their investment to society's advantage. Some of the guidelines issued were for MNCs to pursue improved industrial and employment relations, for example, to respect employees' right to trade unions, to abolish child labour, and to employ and train local people.[72] Furthermore, it was outlined that MNCs should protect the environment, which could be achieved by setting up policies that pursue improved environmental performance, to review these policies, and to assess and tweak their continuing relevance to current environmental issues.[73] Additionally, MNCs should contribute to the local development of science and technology, which could address local needs, and to employ and train locals.[74] Moreover, MNCs must avoid and combat bribery, pay taxes to enhance the host state in which they are operating, protect consumer interests, such as the safety and quality of goods, and avoid anti-competitive practices, for example price fixing.[75]

These guidelines could be considered significant, since they have been expanded in the 21st century, which means that they are still contemporary and relevant. In

[66] Regional Economic Integration Organisation (REIO) 1996.

[67] World Trade Organization (WTO) 1995.

[68] FTAs have chapters on freedom of investments; REIOs aim to implement free movement of investment, and the WTO outlines and protects the rights of the investor.

[69] The Organisation for Economic Co-operation and Development (OECD) Declaration and Decision on International Investment and Multinational Enterprises (1976) 15 I.L.M. 967.

[70] OECD Declaration and Decision on International Investment and Multinational Enterprises (1976) 15 I.L.M. 967, para.2; "OECD Guidelines on Multinational Enterprises" (2011), para.2, *http://www.oecd.org/corporate/mne/48004323.pdf* [Accessed 18 November 2017].

[71] OECD Declaration and Decision on International Investment and Multinational Enterprises (1976) 15 I.L.M. 967, para.9; "OECD Guidelines on Multinational Enterprises" (2011), para.9, *http://www.oecd.org/corporate/mne/48004323.pdf* [Accessed 18 November 2017].

[72] "OECD Guidelines on Multinational Enterprises" (2008), pp.17–18, *http://www.oecd.org/corporate/mne/1922428.pdf* [Accessed 18 November 2017].

[73] "OECD Guidelines on Multinational Enterprises" (2008), pp.19–20, *http://www.oecd.org/corporate/mne/1922428.pdf* [Accessed 18 November 2017].

[74] "OECD Guidelines on Multinational Enterprises" (2008), p.23, *http://www.oecd.org/corporate/mne/1922428.pdf* [Accessed 18 November 2017].

[75] "OECD Guidelines on Multinational Enterprises" (2008), pp.21, 22, 24, 25, *http://www.oecd.org/corporate/mne/1922428.pdf* [Accessed 18 November 2017].

2000, a revised version was presented outlining that MNCs should respect the human rights of the individuals affected by their activities,[76] and further revision in 2011 added a whole chapter on an MNC's relationship with human rights.[77] The 2011 edition built upon the 2000 version, since it required MNCs to mitigate the risks of committing human rights abuses against individuals affected by their business activities, and to remedy any human rights abuse. However, although these guidelines strive to integrate CSR into international law, their significance is limited since they are not binding.[78] Furthermore, the 2000 and 2011 editions confirm that these guidelines are only soft law by repeating the exact wording of the original document that "observance of the Guidelines by enterprises is voluntary and not legally enforceable".[79] Moreover, the domestic laws of states overrule these guidelines; therefore, if there is a conflict of rules, the domestic laws would prevail.[80] Thus, the guidelines only offer MNCs encouragement to have CSRs, which means there will be no consequences for MNCs that contravene the guidelines, apart from reputational damage. However, MNCs have a desire to enhance their reputation to avoid a public backlash which could weaken profits. Nike and Gap lost profits and shareholder investment when it was revealed that their sub-contractors were using child labour in third-world states; therefore, it is in an MNC's interests to follow the guidelines.[81] However, there is no tool used to evaluate whether CSR standards are implemented in business practices.[82] Nike and Gap's association with child labour was discovered by a specific campaign which could not conceivably hold all MNCs accountable.[83]

Conversely, the guidelines attempt to hold MNCs accountable for abuses by urging all the contracting states of the OCED to set up national contact points (NCPs) to allow claims to be made against an MNC for failing to follow the guidelines.[84] These NCPs must strive for visibility, accessibility, transparency and accountability; therefore, states must ensure that the public are aware of the availability of the NCPs and publish information about them. States need to ensure the public can access the NCPs, and the dealings or activities of the NCP should be made public when possible.[85] The NCPs will seek advice from the Committee

[76] "OECD Declaration and Decisions on International Investment and Multinational Enterprises, OECD" (2000) p.20, Pt II, Ch.2, art.2, *http://www.oecd.org/daf/inv/mne/1922428.pdf* [Accessed 18 November 2017].

[77] "OECD Guidelines for Multinational Enterprises" (2011), Pt I, Ch.IV, *http://www.oecd.org/daf/inv/mne/48004323.pdf* [Accessed 18 November 2017].

[78] OECD Declaration and Decision on International Investment and Multinational Enterprises (1976) 15 I.L.M. 967.

[79] "OECD Declaration and Decisions on International Investment and Multinational Enterprises" (2008), p.12, *http://www.oecd.org/daf/inv/mne/1922428.pdf*; OECD Guidelines on Multinational Enterprises (2011), p.17, *http://www.oecd.org/corporate/mne/48004323.pdf* [Both accessed 18 November 2017].

[80] "OCED Guidelines for Multinational Enterprises" (2011), p.17, Pt I, para.2, *http://www.oecd.org/daf/inv/mne/48004323.pdf* [Accessed 18 November 2017].

[81] Dwight Justice, "The International Trade Union Movement and the New Codes of Conduct" in Rhys Jenkins et al. (eds), *Corporate Responsibility and Labour Rights* (London: Earthscan Publications, 2002), p.327; Kenneth Amaeshi, Onyeka Osuji and Paul Nnodim, "Corporate Social Responsibility in Supply Chains of Global Brands: A Boundaryless Responsibility? Clarifications, Exceptions and Implications" (2008) 81 *Journal of Business Ethics* 223, 223; Klein, *No Logo* (1999), p.327.

[82] Sol Picciotto, "Rights, Responsibilities and Regulation of International Business" (2003) 42 C.J.T.L. 131, 142; Joris Oldenziel, *The Added Value of the UN Norms: A Comparative Analysis of the UN Norms for Business with Existing International Instruments* (Amsterdam: SOMO Centre for Research on Multinational Corporations, April 2005), pp.11, 12, 13.

[83] Naomi Klein, *No Logo* (1999), p.327.

[84] "OCED Guidelines for Multinational Enterprises" (2011), Pt II, pp.68, 71–74, 77–88, *http://www.oecd.org/daf/inv/mne/48004323.pdf* [Accessed 18 November 2017].

[85] "OCED Guidelines for Multinational Enterprises' (2011), Pt II, p.79, *http://www.oecd.org/daf/inv/mne/48004323.pdf* [Accessed 18 November 2017].

on International Investment and Multinational Enterprises (CIME) when evaluating whether an MNC has breached the guidelines.[86] Despite only 35 of the world states being current members of the OECD, most of these are the world's most advanced states, which have most of the world's MNCs.[87] This means that NCPs could act as a suitable mechanism in preventing MNC abuses and maintaining the application of the OECD guidelines, as it covers most of the world's MNCs, for example, Western Europe, North American, and Japanese MNCs.[88] However, a severe limitation of the NCPs and the CIME is that they have no enforcement powers. The CIME lacks enforcement powers, since "the non-binding nature of the Guidelines precludes the Committee from acting as a judicial or quasi-judicial body".[89] Furthermore, NCPs lack enforcement powers, as they rely heavily on the good faith of the parties in order to evaluate claims.[90] Moreover, if the parties act in good faith, the NCP can only outline recommendations for them to follow.[91] Thus, the NCP only performs advisory, clarification, and consultative roles; therefore, these guidelines only act as mere moral initiatives, which means that they are not a major deterrent to MNCs bent on human rights or environmental abuses.

ILO Tripartite Declaration of Principles

The Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy was set up in 1977 by the International Labour Organisation (ILO), an agency of the UN, to guard against MNC abuses in labour standards and social policy issues, since MNCs are extremely influential in the economies of most states and in international economic relations.[92] The entities that should follow these guidelines are states, MNCs and employers.[93] It contains guidelines on employment, which aims to lower unemployment, for there to be equality of opportunity and treatment in employment to lower discrimination, and security

[86] "OECD Guidelines on Multinational Enterprises" (2008), pp.33–35, *http://www.oecd.org/corporate/mne/1922428.pdf* [Accessed 18 November 2017].

[87] The states that are parties to the OECD are: Australia, Austria, Belgium, Canada, Chile, Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Iceland, Ireland, Israel, Italy, Japan, Korea, Latvia, Luxembourg, Mexico, Netherlands, New Zealand, Norway, Poland, Portugal, Slovak Republic, Slovenia, Spain, Sweden, Switzerland, Turkey, the UK, the US. Furthermore, the OECD works closely with emerging economies such as Brazil, China, and India, and developing economies in Africa, Asia, Latin America and the Caribbean.

[88] For a discussion on the world's MNCs, see section "CSR through the imperfect lens of political history" above.

[89] "OCED Guidelines for Multinational Enterprises" (2011), Pt II, p.88, para.44, *http://www.oecd.org/daf/inv/mne/48004323.pdf* [Accessed 18 November 2017].

[90] "OCED Guidelines for Multinational Enterprises" (2011), PtII, p.81, para.21, *http://www.oecd.org/daf/inv/mne/48004323.pdf* [Accessed 18 November 2017]

[91] "OCED Guidelines for Multinational Enterprises" (2011), Pt II, pp.84–85*http://www.oecd.org/daf/inv/mne/48004323.pdf* [Accessed 18 November 2017].

[92] Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy, ILO, 279th Sess., 17 November 2000 (2002) 41 I.L.M. 187, pp.1–2, *http://www.ilo.org/wcmsp5/groups/public/---ed_emp/---emp_ent/documents/publication/wcms_101234.pdf* [Accessed 18 November 2017].

[93] Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy, ILO, 279th Sess., 17 November 2000 (2002) 41 I.L.M. 187, pp.1–2, *http://www.ilo.org/wcmsp5/groups/public/---ed_emp/---emp_ent/documents/publication/wcms_101234.pdf* [Accessed 18 November 2017].

and stability for employees in employment.[94] There are further guidelines that cover the training of workers, conditions at work and industrial relations.[95]

Despite the Tripartite Declaration being formed back in 1977, it could be considered contemporary, since it was amended twice in the 21st century in 2000 and 2006, which means that it maintains relevance in international law.[96] One of these amendments was to abolish child labour, whereby MNCs "should respect the minimum age for admission to employment or work".[97] Furthermore, the Tripartite Declaration might be significant, as it urges all parties to respect the Universal Declaration of Human Rights (UDHR),[98] one of the key mechanisms that protects human rights.[99] However, although the Tripartite Declaration protects fundamental human rights norms, its effectiveness in preventing MNCs committing abuses is limited, as it is entirely voluntary.[100] The Declaration indicates that parties are only "recommended to observe on a voluntary basis",[101] and "in keeping with the voluntary nature of the Declaration, all of its provisions, whether derived from ILO Conventions and Recommendations or other sources, are recommendatory".[102] There are no express provisions in the guidelines that require MNCs abide by the Tripartite Declaration, or any enforcement mechanism that could prosecute MNCs for abuses. Although parties are obliged to complete a survey regarding their experience of implementing the guidelines,[103] MNCs cannot be forced to follow the Tripartite Declaration as it lacks the essential legal mandate, and requires public influence for wrongdoers to correct their behaviour.[104] Furthermore, the survey is limited as there is no evidence outlining whether an MNC has filled out the survey correctly, since the Declaration lacks the monitoring capabilities to ensure MNCs abide by the guidelines, which means MNCs could mislead when following the guidelines.

[94] Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy, ILO, 279th Sess., 17 November 2000 (2002) 41 I.L.M. 187, pp.4–6, paras 13–28, *http://www.ilo.org/wcmsp5/groups/public/---ed_emp/---emp_ent/documents/publication/wcms_101234.pdf* [Accessed 18 November 16 May 2017].

[95] Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy, ILO, 279th Sess., 17 November 2000 (2002) 41 I.L.M. 187, pp.6–10, *http://www.ilo.org/wcmsp5/groups/public/---ed_emp/---emp_ent/documents/publication/wcms_101234.pdf* [Accessed 18 November 2017].

[96] Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy" (2000)*http://www.ilo.org/wcmsp5/groups/public/---ed_emp/---emp_ent/---multi/documents/publication/wcms_094386.pdf* [Accessed 18 November 2017]; Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy, ILO, 279th Sess., 17 November 2000 (2002) 41 I.L.M. 187, *http://www.ilo.org/wcmsp5/groups/public/---ed_emp/---emp_ent/documents/publication/wcms_101234.pdf* [Accessed 18 November 2017].

[97] Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy, ILO, 279th Sess., 17 November 2000 (2002) 41 I.L.M. 187, para.36, *http://www.ilo.org/wcmsp5/groups/public/---ed_emp/---emp_ent/documents/publication/wcms_101234.pdf* [Accessed 18 November 2017].

[98] United Nations General Assembly in Paris on 10 December 1948, General Assembly Resolution 217(III) A. The Declaration is part of the UN, which means all 193 UN Member States must submit to the Declaration.

[99] Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy, ILO, 279th Sess., 17 November 2000 (2002) 41 I.L.M. 187, para.8, *http://www.ilo.org/wcmsp5/groups/public/---ed_emp/---emp_ent/documents/publication/wcms_101234.pdf* [Accessed 18 November 2017].

[100] Oldenziel, *The Added Value of the UN Norms* (April 2005), p.15; Phillip Rudolf, "Tripartite Declaration of Principles Concerning Multinational Enterprises" in Ramon Mullerat (ed.), *Corporate Social Responsibility: The Corporate Governance of the 21st Century* (Alphen aan den Rijn: Wolters Kluwer, 2005), p.219.

[101] Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy, ILO, 279th Sess., 17 November 2000 (2002) 41 I.L.M. 187, p.13, *http://www.ilo.org/wcmsp5/groups/public/---ed_emp/---emp_ent/documents/publication/wcms_101234.pdf* [Accessed 18 November 2017].

[102] Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy, ILO, 279th Sess., 17 2000 (2002) 41 I.L.M. 187, para.8, *http://www.ilo.org/wcmsp5/groups/public/---ed_emp/---emp_ent/documents/publication/wcms_101234.pdf* [Accessed 18 November 2017].

[103] "ILO Tripartite Declaration Follow-up Survey"*http;//www.ilo.org/empent/Informationresources/WCMS_101251/lang—en/index.htm* [Accessed 16 May 2016].

[104] Rudolf, "Tripartite Declaration of Principles Concerning Multinational Enterprises" in *Corporate Social Responsibility* (2005), p.219.

UN Global Compact

The United Nations Global Compact was founded in 2000 on the principle that public-private collaboration is crucial to discovering permanent solutions to persistent global challenges.[105] There are 10 principles associated with the UN global compact, which cover human rights, labour, the environment, and anti-corruption.[106] The two human rights principles aim for MNCs to respect and support the protection of human rights, and to avoid committing acts or omissions that violate human rights. There are three environmental principles that, first, aim to deter MNCs from undertaking business practices that may harm the environment; secondly, encourage MNCs to promote and commence business policies that command enhanced environmental responsibility; and thirdly, support the development of environmentally friendly technology. The only principle on anti-corruption outlines the abolition of all forms of corruption, while the four labour principles deal with issues such as the prevention of forced and compulsory labour.[107] However, some of these principles, especially the human rights principles, are very broad.[108] This vagueness has had an impact on the effective application of the Global Compact, since it is harder to prosecute MNCs which act contrary to the compact. Nonetheless, these principles are derived from influential human rights instruments, such as the UDHR,[109] the Rio Declaration on Environment and Development,[110] the International Labour Organization's Declaration on Fundamental Principles and Rights at Work,[111] and the United Nations Convention Against Corruption.[112] Thus, the significance of the principles cannot be underestimated, since these principles originate from norms that most of the world's states have either accepted or ratified.[113]

Furthermore, the UN Global Compact has over 13,000 members from 165 states, which means that it has the potential to prosecute MNCs for abuses owing to its global reach.[114] It is the largest non-binding corporate responsibility initiative in the world.[115] Although the Compact has great potential because of the large number

[105] United Nations Global Compact (31 January 1999). It was launched in July 2000 after it was introduced by the UN Secretary-General, Kofi Annan, in Davos on January 1999. The aim of the UN Global Compact is to promote among the business participants in the initiative, 10 agreed principles of responsible corporate citizenship that embrace the UN's universal values in four areas of action: human rights, labour, environment and anti-corruption: "United Nations Global Compact", *https://www.unglobalcompact.org/about* [Accessed 18 November 2017].

[106] "The Ten Principles of the UN Global Compact", *https://www.unglobalcompact.org/what-is-gc/mission/principles* [Accessed 18 November 2017].

[107] The other three labour principles deal with the elimination of child labour, the removal of discrimination from employment, and calling for the rights of freedom of association and collective bargaining to be upheld.

[108] Oldenziel, "The Added Value of the UN Norms" (April 2005), p.11.

[109] United Nations General Assembly in Paris on 10 December 1948, General Assembly Resolution 217(III) A. The Declaration is part of the UN, which means all 193 UN Member States must submit to the Declaration.

[110] Rio Declaration on Environment and Development (1992), UN Doc. A/CONF151/26 (Vol.I)/31 I.L.M. 874 (14 June 1992). It proclaims 27 principles, and has over 170 state parties

[111] International Labour Organization (ILO), ILO Declaration on Fundamental Principles and Rights at Work (1988), Adopted at its 86th Session, Geneva, 18 June 1998. Paragraph 2 indicates that all 187 state parties of the ILO must promote and act in accordance with the freedom of association and the effective recognition of the right to collective bargaining. Furthermore, they must eliminate all forms of forced or compulsory labour, eliminate discrimination in employment and occupation, and adhere to the effective abolition of child labour.

[112] Convention against Corruption, Adopted by GA Res. A/58/422 on 31 October 2003 (entered into force 14 December 2005). It is the first binding international anti-corruption instrument, which has 71 articles divided into 8 chapters, It has 178 state parties, and the only UN states that have not ratified the convention are: Andorra, Barbados, Belize, Chad, Equatorial Guinea, Eritrea, Japan, Monaco, North Korea, Saint Kitts and Nevis, Saint Vincent and the Grenadines, Samoa, San Marino, Somalia, Suriname, Syria, and Tonga.

[113] See footnotes directly above for further description.

[114] "United Nations Global Compact", *https://www.unglobalcompact.org/* [Accessed 18 November 2017].

[115] "United Nations Global Compact", *https://www.unglobalcompact.org/about* [Accessed 18 November 2017].

of participants and states that are parties to it, it cannot be considered a threat to MNC practices unless it is binding or sufficiently enforceable.[116] Its significance is further restricted, like many soft law initiatives, by the enforcement mechanisms which require MNCs to specify that they adhere to the guidelines without actually endorsing them in practice.[117] For instance, although MNCs are required to produce an annual report detailing how they have progressed or implemented one of the 10 principles in their business practices, very few members correctly abide by these reporting requirements.

The Compact has been criticised for its lack of credibility.[118] This is because member participation is extremely low, as only 14 per cent had participated in international meetings, and only 14 per cent had ventured on to the Global Compact website to make submissions on the online learning forum.[119] Furthermore, the members that participated in these activities frequently failed to illustrate how they incorporated the Compact's principles into their business practices. In response to these pejorative findings, a new sanctioning mechanism entitled "Integrity Measures" was established.[120] This new review instrument meant that if an MNC failed to convey its "communication on progress" report within a year, it would be considered as "non-communicating", and if the MNC failed to communicate this report within two years, it would be delisted from the UN Global Compact, and its name published for non-compliance. Although these processes signify progress from the previous regime that unanimously failed to ensure that MNCs abide by their agreed CSR standards, a number of academics remain unconvinced on whether MNCs could be sufficiently held accountable for abuses under the Compact, especially since past CSR initiatives failed to do so owing to their vague and non-binding nature.[121]

Furthermore, in 2010, the UN Joint Inspection Unit reviewed the Global Compact to assess its role and success.[122] The Inspection Unit revealed that despite the establishment of the "Integrity Measures", the introduction of the "Communication on Progress" as the reporting and self-evaluation mechanism failed to deliver acceptable monitoring and verification of standards.[123] Furthermore, the Inspection Unit concluded that without clear management of complaints, the initiative lacked the "teeth" to deter abuses. In contrast, the review discovered that the Compact

[116] Justine Nolan, "The United Nations' Compact with Business: Hindering or Helping the Protection of Human Rights?" (2005) 24 *University of Queensland Law Journal* 445, 446.

[117] Minna Halme, Peter Dobers and Nigel Roome, "Corporate Responsibility: Reflections on Context and Consequences" (2009) 25 *Scandinavian Journal of Management* 1, 2; Oldenziel, "The Added Value of the UN Norms" (April 2005), pp.11–12.

[118] McKinsey & Co, "Assessing the Global Compact's Impact" (11 May 2004).

[119] McKinsey & Co, "Assessing the Global Compact's Impact" (11 May 2004), p.16.

[120] "United Nations Global Compact Note on Integrity Measures", *https://www.unglobalcompact.org/docs/about_the_gc/Integrity_measures/Integrity_Measures_Note_EN.pdf* ; "United Nations Global Compact Basic Guide Communication on Progress", *https://www.unglobalcompact.org/docs/communication_on_progress/Tools_and_Publications/COP_Basic_Guide.pdf* [Both accessed 18 November 2017].

[121] Oldenziel, "The Added Value of the UN Norms" (April 2005), pp.11, 13; Halme, Dobers and Roome, "Corporate Responsibility" (2009) 25 *Scandinavian Journal of Management* 1, 2.

[122] UN Joint Inspection Unit, "United Nations Corporate Partnerships: The Role and Functioning of the Global Compact" (2010), Doc. No.JIU/REP/2010/9 (Geneva: 2010), *https://www.unjiu.org/en/reports-notes/archive/United%20Nations%20corporate%20partnerships%20-The%20role%20and%20functioning%20of%20the%20Global%20Compact.pdf* [Accessed 18 November 2017].

[123] UN Joint Inspection Unit, "United Nations Corporate Partnerships" (2010), pp.iii-iv, *https://www.unjiu.org/en/reports-notes/archive/United%20Nations%20corporate%20partnerships%20-The%20role%20and%20functioning%20of%20the%20Global%20Compact.pdf* [Accessed 18 November 2017].

had contributed significantly to the private sector.[124] The Global Compact was praised for being a major landmark in the development of the relationship between the private sector and the UN. The assessment of the Global Compact exposed a lack of the coherency that could produce adequate entry conditions for potential members, and an effective monitoring system that could determine whether its members had implemented the principles.[125] The Inspection Unit stressed that the lack of a clear regulatory and institutional framework had drawn so much criticism that it could limit the effectiveness of the Compact and damage its reputation.

The UN Draft Norms

In 2000, the UN Sub-Commission on the Promotion and Protection of Human Rights created a taskforce to evaluate the regulatory frameworks and activities employed by MNCs.[126] This development led to the creation of the Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights (UN Draft Norms). The UN Draft Norms directed MNCs to respect, promote and protect both nationally and internationally recognised human rights.[127] The Draft Norms borrowed principles from numerous instruments that adopted international codes of conduct for corporations, and fundamental human rights norms, such as the Convention on the Prevention and Punishment of the Crime of Genocide,[128] the Rio Declaration on the Environment and Development,[129] the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment,[130] the International Covenant on Economic, Social and Cultural Rights,[131] and the International Covenant on Civil and Political Rights.[132] The importance of the Draft Norms is further highlighted by the fact its

[124] UN Joint Inspection Unit, "United Nations Corporate Partnerships" (2010), p.1, para.2, *https://www.unjiu.org/en/reports-notes/archive/United%20Nations%20corporate%20partnerships%20-The%20role%20and%20functioning%20of%20the%20Global%20Compact.pdf* [Accessed 18 November 2017].

[125] UN Joint Inspection Unit, "United Nations Corporate Partnerships" (2010), pp.iii-iv, *https://www.unjiu.org/en/reports-notes/archive/United%20Nations%20corporate%20partnerships%20-The%20role%20and%20functioning%20of%20the%20Global%20Compact.pdf* [Accessed 18 November 2017].

[126] 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, UN Doc E/CN4/Sub2/RES/2001/3 (2001).

[127] *Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights*, UN Doc. E/CN.4/Sub.2/2003/12/Rev.2 (2003), para.1.

[128] UN General Assembly, Convention on the Prevention and Punishment of the Crime of Genocide, 9 December 1948, United Nations, Treaty Series, Vol.78, p.277, opened for signature 9 December 1948 (entered into force 12 January 1951). State parties must punish and prevent all actions of genocide, whether carried out in a time of war or peace. It has 147 state parties.

[129] Rio Declaration on Environment and Development (1992), UN Doc. A/CONF151/26 (Vol.I) / 31 I.L.M. 874 (14 June 1992). It proclaims 27 principles, and has over 170 state parties.

[130] Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Adopted by GA Res. 39/46 of 10 December 1984, opened for signature 10 December 1984, 1465 U.N.T.S. 85 (entered into force 26 June 1987). It is an international human rights treaty, under the review of the United Nations. Its purpose is to prevent torture and other acts of cruel, inhuman, or degrading treatment around the world. States must prevent torture in any territory under their jurisdiction and are not allowed to transport individuals to any other state where there is a belief they will be tortured. The convention has 159 state parties.

[131] International Covenant on Economic, Social and Cultural Rights, Opened for signature 16 December 1966, 999 U.N.T.S. 171 (entered into force 23 March 1976). The ICESCR aims to protect rights such as the right to; health, education, an adequate standard of living and labour rights. This treaty has 164 state parties.

[132] International Covenant on Civil and Political Rights, Opened for signature 16 December 1966, 993 U.N.T.S. 3 (entered into force 3 January 1976). Some of the rights that the treaty protects are; the right to life, freedom of speech, freedom of religion, electoral rights, freedom of assembly, and rights to a fair trial and due process. This treaty has 168 state parties.

understanding of MNC business behaviour is analogous to the reputable UDHR in its enunciation of fundamental human rights standards.[133]

Furthermore, the Draft Norms were intended to be legally binding on MNCs.[134] However, the Draft Norms were abandoned,[135] since there were concerns that they would limit state responsibility and state sovereignty,[136] as the human rights obligations on MNCs were addressed to states.[137] Instead, the failed Global Compact[138] was modified in the hope that its principles would be taken more seriously.[139] However, it is still not legally binding; therefore, although regarded by some academics as significant,[140] most regard it as a lost cause, since it fails to impose human rights obligations on MNCs.[141]

Ruggie Principles

Despite the failure of the UN Norms and other CSR initiatives, enthusiasm in the international community for binding international CSR rules did not wane. The UN Secretary-General appointed John Gerard Ruggie, the co-author of the Global Compact, to the position of Special Representative of the Secretary-General to find relationships between human rights and MNCs in order to establish a policy framework.[142] This included clarifying and classifying the human rights for which MNCs should be held accountable and responsible, and to assess how states have regulated MNCs when protecting human rights, for the purpose of addressing the governance gaps between MNCs and human rights created by globalisation.[143] The

[133] Denis Arnold, "Transnational Corporations and the Duty to Respect Basic Human Rights" (2010) 20 *Business Ethics Quarterly* 371, 375.

[134] *Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights*, UN Doc. E/CN4/Sub2/2003/12/Rev2 (2003), paras 15–16; Arnold, "Transnational Corporations and the Duty to Respect Basic Human Rights" (2010) 20 *Business Ethics Quarterly* 371, 376.

[135] Harmen van der Wilt, "Corporate Criminal Responsibility for International Crimes: Exploring the Possibilities" (2013) 12 *Chinese Journal of International Law* 43, 45.

[136] Larry Backer, "On the Evolution of the United Nations 'Project-Respect-Remedy' Project: The State, the Corporation and Human Rights in a Global Governance Context" (2011) 9 *Santa Clara Journal of International Law* 37, 46.

[137] Simon Chesterman, "Lawyers, Guns, and Money: The Governance of Business Activities in Conflict Zones" (2010/2011) 11 *Chicago Journal of International Law* 321, 327.

[138] United Nations Global Compact (31 January 1999).

[139] *Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights*, UN Doc. E/CN4/Sub2/2003/12/Rev2 (2003), *https://www1.umn.edu/humanrts/links/norms-Aug2003.html* [Accessed 18 November 2017].

[140] Celia Wells and Juanita Elias, "Corporate Complicity in Rights Violation" in Phillip Alston (ed.), *Non State Actors and Human Rights* (Oxford: Oxford University Press, 2005), p.151.

[141] David Kinely, Justine Nolan and Natalie Zerial, "The Norms are Dead! Long Live the Norms! The Politics behind the UN Human Rights Norms for Corporations" in Doreen McBarnet, Aurora Voiculescu and Tom Campbell (eds), *The New Corporate Accountability: Corporate Social Responsibility and the Law* (Cambridge: Cambridge University Press, 2007), p.459; Oliver de Schutte, "The Accountability of Multinationals for Human Rights Violations in European Law" in *Non State Actors and Human Rights* (2005), p.227.

[142] UN ESCOR, Commission on Human Rights, 61st Session, Agenda Item 17, Promotion and Protection of Human Rights, UN Doc E/CN.4/2005/L.87 (2005). In this session the UN Sub-Commission requested the UN Secretary-General to assign a Special Representative of the Secretary-General (SRSG) to the issue of MNCs and human rights; Jan Wouters and Ann-Luise Chane, "Multinational Corporations in International Law", Working Paper No.129 (December 2013), p.15. This source confirms that John Ruggie was appointed UN Special Representative of the Secretary-General.

[143] "Special Representative of the Secretary-General on human rights and transnational corporations and other business enterprises", *http://www.ohchr.org/EN/Issues/Business/Pages/SRSGTransCorpIndex.aspx*. The other relationships that John Ruggie was required to find between human rights and MNCs was to research and clarify the implications for MNCs of concepts such as "complicity" and "sphere of influence"; to develop materials and methodologies for undertaking human rights impact assessments of the activities of MNCs; to compile a compendium of best practices of states and MNCs; see Mary Varner, "Conference Report: Applying The Guiding Principles — the Ius Commune Meeting and Current Scholarship on the Ruggie Framework' (2012) 9 *EC Law* 158, 158; Bhandary Mangalpady, "Relationship between Business Corporations' and Human Rights: A Legal Analysis", *SSRN*, *http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1987032* [Both accessed 18 November 2017].

end-result was the creation of three fundamental principles based on protection, respect and remedy, which became known as the UN Guiding Principles on Business and Human Rights (Ruggie Principles).[144] The Ruggie Principles outlined that states have an obligation to protect human rights under international law, and MNCs have a responsibility to respect human rights and the requirement of an effective remedy for victims who have suffered human rights abuses.

First, states must protect human rights; therefore, they must implement legislation that supports human rights, outline consequences for breaches of human rights that would deter MNCs from committing abuses, and advise MNCs on the issues of human rights. One of the advantages of the Ruggie Principles is that states could independently incorporate human rights into their respective legal systems instead of relying on an inflexible international system, since conceivable CSR solutions could fluctuate from various societies, especially when comparing developed states with third-world states which have differing legal systems in terms of efficiency and development.[145] Thus, a flexible system would avoid the complications associated with incorporating international law into each of the world's unique domestic legal systems.

Furthermore, it is the duty of the state to protect its citizens, and states should remain the exclusive bearers of human rights norms, since human rights abuse commonly occurs in the territory of a state and therefore the state should implement CSR regulations. However, although academics such as Markos Karavias[146] and Catherine Pedamon[147] support the theory that states should apply CSR regulations,[148] some domestic courts, particularly in third-world states, where the majority of abuses occur, have legal systems that cannot adequately address human right abuses committed by MNCs.[149] This means that an MNC which has committed an abuse could escape adequate prosecution, leaving the victim with an unsatisfactory remedy. Thus, the Ruggie Principles place excessive reliance on the domestic justice system of states to prosecute MNCs appropriately.[150] The limitations of this reliance are evident from the principle of corporate personality, which allows a parent company to incorporate subsidiary companies in other states without being held liable for the abuses that the subsidiary commits.[151] Thus, litigation against the subsidiary company would be held in the state where the abuse occurred. However, problems arise especially in third-world states when the legal system is

[144] *UN Guiding Principles on Business and Human Rights* (2011); United Nations Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and other Business Enterprises, '*Protect, Respect, and Remedy: a Framework for Business and Human Rights*', UN DocE/CN4/2006/97 (February 2006).

[145] Chizu Nakajima, "The Importance of Legally Embedding Corporate Social Responsibility" (2011) 32 C.L. 257, 259.

[146] Markos Karavias, *Corporate Obligations under International Law* (Oxford: Oxford University Press, 2013), p.66.

[147] Catherine Pedamon, "Corporate Social Responsibility: A New Approach to Promoting Integrity and Responsibility" (2010) 31 C.L. 172, 176.

[148] See also Milton Friedman, "The Social Responsibility of Business is to Increase its Profits" (1970) *NY Times* (Magazine), September 13, 1970, p.32; David Kinley and Junko Tadaki, "From Talk to Walk: the Emergence of Human Rights Responsibilities for Corporations at International Law" (2004) 44 *Virginia Journal International Law* 931, 953.

[149] Steven Ratner, "Corporations and Human Rights: A Theory of Legal Responsibility" (2001) 111 *Yale Law Journal* 443, 461.

[150] Uta Kohl, "Corporate Human Rights Accountability: The Objections of Western Governments to the Alien Tort Statute" (2014) 63 I.C.L.Q. 665, 695, 696.

[151] For further discussion see Part1.1 and Part2.4; *Salomon v Salomon & Co Ltd* [1897] A.C. 22 HL at 29–32 (Lord Halsbury LC), 51–54 (Lord Macnaghten).

not sufficiently devolved to adequately prosecute an MNC for its abuses. This is evident from the Bhopal gas disaster, when the Indian legal system failed to adequately reimburse the victims.[152]

Additionally, states could have difficulties in protecting human rights when these rights conflict with the obligations they have under bilateral investment treaties (BITs).[153] States may prefer abiding by their obligations under BITs over their international obligation to protect human rights. Moreover, as a result of rapid globalisation, it is uncertain which states would bear the responsibilities for an MNC's human rights abuses, since they operate in several jurisdictions simultaneously.[154] Furthermore, states could be prevented from prosecuting an MNC that commits human rights atrocities in other states that have relaxed their human rights regulations to encourage investment, since prosecuting the MNC would question that other state's policies and laws, which would in turn breach the important principle of state sovereignty. The principle of state sovereignty is so highly regarded in international law that the UN Draft Norms were abandoned, as there were fears that they would limit the principle; therefore, states could be unable to universally protect human rights in the ways that the Ruggie Principles expects.[155]

In comparison, MNCs are only required to respect human rights. The second Principle outlined that MNCs must avoid committing or contributing to human rights abuses, and remedy any abuses caused.[156] Moreover, MNCs are required to discover business techniques that would mitigate the risk of committing human rights abuses in their corporate practices. In order for MNCs to respect human rights, the Ruggie Principles recommended that MNCs implement a policy commitment to respect human rights, a process that could remedy human rights abuses, and a procedure that identified the impact of their business practices on human rights.[157] However, the Ruggie Principles failed to clarify exactly how far down the supply chain of an MNC this respect for human rights was required.[158] Despite the clear desire of the Ruggie Principles to hold MNCs accountable for the human rights abuses they commit in their business practices,[159] greater clarification is essential to avoid these current ambiguities.

The purpose of the final Principle is to establish a remedy that grants victims of abuses access to judicial protection. However, although the Principles specify that states should examine, punish, and redress abuses, and that MNCs should

[152] See Part2.4 and Part1.1 for further discussion; *Union Carbide Corp v Union of India* (1991) 4 S.C.C. 584; Kenneth Amaeshi, Paul Nnodim and Osuji Onyeka, *Corporate Social Responsibility, Entrepreneurship, and Innovation* (Abingdon: Taylor & Francis, 2013), pp.3, 33, 47; Antonio Nicita and Matteo Winkler, "The Cost of Transnational Accidents: Lessons from Bhopal and Amoco" (2009) 43 J.W.T. 683, 684 704, 705; Joe Jackson and Maeve McLoughlin "Bhopal Disaster: Still Waiting for the Clean Up" (2008) 406 E.N.D.S. 32, 33, 35.

[153] Abdi Aidid and Stephen Clarkson, "Researching International Norm Diffusion: Brazilian and Latin American Resistance to Investor-State Dispute Settlement", Annual Congress of the International Studies Association, San Francisco (6 April 2013).

[154] Varner, "Conference Report: Applying the Guiding Principles" (2012) 9 *EC Law* 158, 159.

[155] Van der Wilt, "Corporate Criminal Responsibility for International Crimes" (2013) 12 *Chinese Journal of International Law* 43, 45.

[156] UNHRC, "Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and other Business Enterprises, John Ruggie" (2001) UN Doc. A/HRC/17/31, para.13.

[157] UNHRC, "Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and other Business Enterprises, John Ruggie" (2001) UN Doc. A/HRC/17/31, para.15.

[158] Varner, "Conference Report: Applying the Guiding Principles" (2012) 9 *EC Law* 158, 160.

[159] UNHRC, "Report of the Special Representative of the Secretary-General on the Issues of Human Rights and Transnational Corporations and other Business Enterprises, John Ruggie" (2001) UN Doc. A/HRC/17/31, para.12.

react to suspected abuses,[160] there remain unanswered questions, such as the capability of a judiciary to evaluate the efficiency of a remedy from the perspective of a victim.[161] Furthermore, as discussed above, some states cannot adequately prosecute MNCs for their abuses, as their legal systems require further development; therefore, states cannot be trusted to provide remedies for victims of MNCs abuses. Thus, although the Ruggie Principles elucidated contemporary international human rights and outlined how they could be incorporated into practice, their significance is limited, since the objectives it aims to achieve may be easily disregarded by its observers, and some of its principles are uncertain.[162]

Furthermore, the Ruggie Principles are not legally binding, as they do not intend to "create new international law obligations".[163] In contrast, some commentators have praised the Ruggie Principles for comprehensively bringing human rights issues to international attention, and clarifying the distinction between the obligations of states and the responsibility of MNCs.[164] However, the significance of the Ruggie Principles is limited, as the UN Secretary-General has suggested that the Principles may not significantly develop since relevant international actors lack capacity on issues such as business and human rights.[165] Although efforts have been made to build such a capacity,[166] the Ruggie Principles remain non-binding.[167]

Conclusion

From the analysis carried out this article, it is clear that the CSR initiatives fail to hold MNCs accountable for abuses. Although each initiative identified crucial human rights obligations that MNCs should respect, these initiatives are limited as they are mere soft law. Thus, MNCs could simply claim that they abide by the CSR initiatives for the benefit of improving their reputation, while disregarding them in their corporate operations. Moreover, even if there was proof that an MNC has committed an abuse, the initiatives lack the enforcement powers to prosecute. It is a shame that these initiatives lack teeth, as most have admirable international

[160] United Nations Special Representative of the Secretary-General on the Issues of Human Rights and Transnational Corporations and other Business Enterprises, "Protect, Respect, and Remedy: A Framework for Business and Human Rights", UN Doc. E/CN4/2006/97 (February 2006), para.12; see "The UN 'Protect, Respect, and Remedy' Framework for Business and Human Rights", para.17, *http://www.reports-and-materials.org/sites/default/files/reports-and-materials/Ruggie-protect-respect-remedy-framework.pdf* [Accessed 18 November 2016].

[161] Varner, "Conference Report: Applying the Guiding Principles" (2012) 9 *EC Law* 158, 161.

[162] United Nations Special Representative of the Secretary-General on the Issues of Human Rights and Transnational Corporations and other Business Enterprises, "Protect, Respect, and Remedy: A Framework for Business and Human Rights", UN Doc. E/CN4/2006/97 February 2006, para.12; see "The UN 'Protect, Respect, and Remedy' Framework for Business and Human Rights", *http://www.reports-and-materials.org/sites/default/files/reports-and-materials/Ruggie-protect-respect-remedy-framework.pdf* [Accessed 18 November 2017].

[163] "Guiding Principles on Business and Human Rights", p.1, *http://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf* [Accessed 18 November 2017].

[164] Susan Aaronson and Ian Higham, "'Re-righting Business': John Ruggie and the Struggle to Develop International Human Rights Standards for Transnational Firms" (2013) 35 *Human Rights Quarterly* 333, 336.

[165] Human Rights Council, "Contribution of the United Nations system as a whole to the advancement of the business and human rights agenda and the dissemination and implementation of the Guiding Principles on Business and Human Rights", Doc. No.A/HRC/21/21 (2 July 2012), para.6.

[166] Human Rights Council, "Contribution of the United Nations system as a whole to the advancement of the business and human rights agenda and the dissemination and implementation of the Guiding Principles on Business and Human Rights", Doc. No.A/HRC/21/21 (2 July 2012), paras 23–27; Human Rights Council, Summary of discussions of the Forum on Business and Human Rights, prepared by the Chairperson, Makarim Wibisono, UN Doc. A/HRC/FBHR/2013/4 (2–4 December 2013).

[167] Jan Wouters and Anna-Luise Chane, "Multinational Corporations in International Law", Working Paper No.129 (December 2013), p.17. The author pointed out that the Ruggie Principles did not have enough substance, as they were excessively focused on processes. Additionally NGOs have criticised the Ruggie Framework for imposing non-binding obligations on businesses.

reach, since many states and MNCs are members. This means that the binding, hard law element promised under the multilateral treaty on business and human rights currently being negotiated at the UN level presents a good opportunity for infusing human rights into international business once and for all.