Castan Centre for Human Rights Law:
Submission to Parliamentary Joint Committee
Regarding the *Corporate Code of Conduct Bill* 2000
December 2000

Background

- Over the past two years there has been a worldwide surge of interest in the nature and extent to which corporations are, or ought to be, subject to responsibilities for the protection and promotion of human rights. The range of recent international initiatives include a major "Global Compact" between corporations and civil society initiated by the UN; a new set of OECD Human Rights Guidelines for Corporations; a substantial Resolution of the EU Parliament; major human rights suits brought against multinational corporations in the US, the UK and Australia; the introduction of Bills regarding corporate human rights conduct into the US Congress and the Australian Parliament; the burgeoning phenomenon of 'ethical investment'; substantial public pressure on the WTO, World Bank and the IMF to review their responsibilities in this regard; and the proliferation of codes of conduct being developed by corporations and peak industry groups.
- Transnational corporations are well capable of abusing human rights. Well-documented examples of such abuse include instances of environmental degradation, lax worker safety records, lax consumer safety standards, collusion between brutal security forces and companies to ensure the security of the latter's installations, and exploitative labour practices.
- Normally, one would expect host States to enforce standards against corporations operating within their jurisdiction. However, for a variety of reasons, it is a fact that Western corporations can 'get away with' inadequate or abusive work practices in developing nations. These reasons include
    - a fear amongst developing nations that greater regulation will drive away foreign direct investment
    - corruption in certain developing nations (accompanied by a failure to enforce existing regulations)
    - inadequate legal machinery to lift the corporate veil, or undertake the complex investigations which may be needed to establish corporate liability.
- In light of the deficient regulatory environment found in many developing nations, it is morally incumbent upon home States to regulate the extraterritorial activities of their corporations which impact detrimentally on human rights

Corporations should support Bill

- It is likely this Bill will encounter opposition from the corporate sector, who will probably advocate a self-regulatory scheme whereby corporations monitor their own conduct via internal codes of conduct.
- However, the international trend is towards greater regulation, as evinced in the first dot point above. 'Human rights' is on the verge of becoming as important a topic for corporate personnel as the environment. Australian corporations should not be afraid of taking the lead in committing to extraterritorial human rights duties.

- Regulation can establish fundamental minimum standards of conduct, which can be voluntarily overlaid by more onerous internal duties.
- No corporation should argue that it is necessary to breach fundamental human rights when engaging in business practices, or that observance of such rights by Australian corporations will subject them to competitive disadvantage compared to other countries' corporations. (subject to qualifications below). This is simply not true. Implementation for example of the Sullivan Principles by US corporations in South Africa (under its apartheid regime) did not have a detrimental impact on US competitiveness within South Africa.
- Corporations can benefit from the implementation of this Bill as
    - it will improve the image of Australian corporations for consumers both at home and abroad (important in light of the new trend towards ethical investment)
    - it will improve relations in the foreign countries, especially with workers and people 'on the ground'. This promotes a safer and more predictable environment for investment.
    - Increase in human rights abroad usually has a direct link with improvement in economic prosperity abroad, which eventually builds up markets for Australian exports.
- Furthermore, the *Ok Tedi* litigation demonstrates that Australian corporations are already potentially liable for egregious practices committed abroad. Recent litigation in the UK, concerning claims against UK companies for work practices in Southern Africa, and in the USA, concerning the practices of oil companies in Burma and Nigeria, indicate that home-State liability for human rights abuses is becoming a reality.

Specific Comments about the Bill

- The Bill is undoubtedly designed to promote human rights abroad, and will have the knock-on effect of promoting the business reputation of Australian corporations.
- It cannot be doubted that certain developing nations would view this Bill with suspicion. In particular, such a Bill must not amount to 'protectionism' in disguise: developing nations must be able to retain *legitimate* competitive advantages. For example, it is legitimate for lower wages to be prescribed in developing nations, considering the lower cost of living. However, it is important that the Bill enforce the payment of a 'living wage', which will vary according to the cost of living in a host State. This ensures that poorer States maintain their competitive advantage in wage costs in order to attract desperately needed foreign investment. It is not a legitimate competitive advantage for human dignity to be sacrificed to such an extent that corporations can be attracted by wage rates which are far below a living wage, especially considering the ability of such corporations to pay a fair wage.
- We have reservations about the prohibition on the use of child labour (cl.9(2)). Child labour is an unfortunate reality in many developing nations, and studies have shown that children 'laid off' by foreign corporations have often gone on to more dangerous or exploitative work, such as prostitution. Australian corporations should be banned from using children in the 'most intolerable forms

of labour', in line with more recent ILO negotiations, rather than the general ban on child labour promoted under ILO Convention 138.

- The relationship between a corporation's obligations under this Bill and under local host State law must be clarified. What happens if a local law 'compels' human rights abuse by, for example, prohibiting trade unions, or the employment of women. Only cl.10(2)(b) refers to this situation. A more clear reference must be made, as to whether local laws provide a total defence, a partial defence, or no defence to causes of action under this Bill.
    - If 'local laws' provide no defence, this Bill would have the effect of virtually prohibiting corporate trade with certain States, and effectively linking human rights with trade.
    - A more cautious approach is to permit a local law defence, except in case of extreme human rights abuse (which is unlikely to be compelled by law anyway). If 'local laws' provide a defence, it may be felt that this Bill is watered down too much. However, the defence would only operate where local laws *compelled* human rights abuse. It would be of no use where local laws simply failed to compel compliance with human rights standards. In the absence of 'maximum wage' laws or 'maximum environmental standard' laws, no local law defence could be raised to justify the payment of poor wages, or the adoption of bad environmental practices.
- The Bill must also make clear the liability, if any, of a corporation for the practices of its overseas business partners. Many of the worst human rights abuses by corporations are effectively perpetrated by local business partners. Australian corporations should, at a minimum, be required to report on the human rights effects of their dealings with these business partners.
- Regarding the liability of corporations for their business partners, it may be noted that the corporation is often in a very good bargaining position, and should be able to negotiate contracts which limit the 'freedom' of their business partners to breach human rights. A duty to demonstrate 'due diligence' in dealing with offshore business partners is the appropriate duty to be imposed by this Bill.
- More incentives for 'good' behaviour should be built into the Bill – eg. greater likelihood of receiving government contracts. Certainly, a 'good' ASIC report will reflect well on a corporation's marketability, but thought should be given to more tangible benefits.

~DRAFT~

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Human Rights as Legally Binding or Merely Relevant?*

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An unholy alliance?

The apparently improbable coalition of interests of the corporate sector and its lawyers, on the one hand and human rights activists and their lawyers on the other, might be likened to what Oscar Wilde[1] said about the English hunting foxes – that is, "the unspeakable in full pursuit of the uneatable". In contrast to the objects of Wilde's wit, however, that is to do something of an injustice to both parties.

For a start it is not quite clear in the current context which is the hunter and which the hunted. Both corporations and human rights activists have at times shown predatory instincts. But also, in many ways, the story of the relationship between the two has been one of ignorance, disregard or contempt for, each other.

However, since the mid-1970s, the relationship has been changing. Although distance is still evident, today there are emerging new grounds for the pursuit of common

* I would like here to thank Christine Parker for reading and commenting on an earlier draft of this chapter and Becky Batagol for her invaluable research and editorial assistance.

[1] On the centenary of whose death in Paris on 30 November 1900, I write these words.

interests and goals. The reality is such that even if this brave new world is still more brave in hope than new in practice, without such common ground both human rights goals and corporate goals will be compromised. A number of prominent business leaders have recognised this much including Peter Sutherland, formally the Director-General of GATT/WTO and now Chairman of Goldman Sachs and Co-Chairman of BP Amoco,[2] and John Kamm, the former President of the American Chamber of Commerce in Hong Kong. In the words of the latter:

> "while it might not always be the case that trade and business are good for human rights, it most certainly is the case that a good human rights environment is always good for business, Businesses are acting in their own self-interest when they actively promote respect for human rights in countries where they operate".[3]

In a similar vein Renato Ruggiero, the former Director-General of the World Trade Organisation (WTO), has insisted that the global challenges facing us today are pieces of an interconnected puzzle:

> "We can no longer treat human rights, the environment, development, trade, health, or finance as separate sectoral issues, to be addressed through separate policies and institutions. Both nationally and internationally, we need to give more thought to how we coordinate our policy goals, harmonize an expanding web of international agreements, and commit ourselves to agreed common actions. As we enter a new century, we need a new vision of security - human security – which reflects the reality that financial crises or environmental degradation are equally threatening to global peace – and demand an equally collective response".[4]

Some major corporations too are now keen to make public statements of their awareness of, and commitment to, human rights protection – though sometimes only after being shamed or goaded into doing so. Shell, Nike and Rio Tinto Zinc,[5] for example, all make claims to this end; often citing specifically their adherence to the Universal Declaration of Human Rights. Shell, for instance, in recognising the detrimental effects of civil instability and political uncertainty on investment opportunities and reputation for corporations operating in such environments, hints at

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[2] Peter Sutherland, "The Role of the Business Sector in the Development and Protection of Human Rights", reproduced in *Human Rights Defender*, (Sept. 1998) 13.

[3] John Kamm, "The Role of Businesses in Promoting Respect for Human Rights", speech delivered to the Commission on Security and Cooperation, quoted by Mark Daly, "The New Joint Venture: Human Rights and Business" (1997) 7 *Human Rights Solidarity* 7. Kamm also detailed the reasons why he considers human rights observance is good for business – namely, that it enhances worker productivity; that it opens markets; that it promotes stability through promotion of the rule of law; that it promotes international trade, and it bolsters a company's public image, *ibid*.

[4] Speech entitled *Beyond the Multilateral Trading System*, delivered to the 20th Seminar on International Security, Politics and Economics, Institut pour les Hautes Etudes Internationales , Geneva, 12 April 1999. Available at www.wto.org/english/news_e/sprr_e/il_e.htm; accessed 23/10/2000.

[5] Foe Shell and Nike, see below; for RTZ see "The Way We Work, Human Rights Policy" ….websiteXXXXX

the need for transnational corporations to use their commercial leverage for social ends as well as economic.[6] Nike, further, actively seeks to co-operate with (some critics say co-opt) human rights NGOs to aid it in certain specific matters, such as in the development and assessment of Nike's offshore employment practices.[7]

These specifics are evidence of a significant trend, but one that is still in its early throes. The current situation can be fairly compared with business and the environment 15 – 20 years ago. Just as then few would have believed that environmental issues would be mainstreamed in corporate affairs to the extent that they now are, so today we find ourselves on a gathering wave of human rights issues flowing into boardroom discussions.

Key initiatives

International developments

At the international level a number of ground-breaking initiatives were developed during the 1970s which highlighted the social and political as well as economic roles of big businesses. The trigger – in respect of the UN, at any rate – is credited to nothing less than alleged designs that one MNE (International Telephone and Telegraph Corporation) had on the overthrow of President Allende's socialist Government in Chile.[8] In 1974 the UN established a Commission on Transnational Corporations (UNCTC)[9] which was charged with the responsibility for the formulation of "an international code of conduct for transnational corporations";[10] but the code, despite years of discussion and negotiation, was never formulated and the UNCTC was eventually disbanded. At about the same time, the ILO adopted the influencial (if non-binding) *Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy*,[11] which principles "are intended to guide governments, the employers' and workers' organizations and multilateral enterprises in taking measures and actions and adopting such social policies … as would further social progress", and to encourage "respect for relevant international standards, [*including*] the UDHR and ILO Covenants" (Principles 5 & 8). And, in 1976, the Organisation for Economic Co-operation and Development (OECD) issued a set of

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[6] See *The Shell Report 1998* under 'Issues and Dilemmas' at XXX www.shell.com/download/2872/pages/issues06html; accessed 20/10/2000. The "primary responsibility for establishing ethical frameworks" in Shell's view, however, lies with national governments and international organisations; speech by Mark Moody-Stuart, Chairman of Managing Directors of Royal Dutch/Shell Group of Companies on 19/7/2000 at www.shell.com/library/speehes/archives/2000, accessed 19/10/2000.

[7] Nike, in answer to the labor question "are NGOs involved in your process?"; www.nikebiz.com/labor/faq.shtml, accessed 19/10/2000.

[8] *Multinational Enterprises and Human Rights* (1998), Report by Amnesty International (Dutch Section) and Pax Christi International, note 13. That is, before General Pinochett actually succeeded in doing do in 1973.

[9] By Resolution 1913 (LVII) (5 December 1974) of the Economic and Social Council.

[10] By General Assembly Resolution 3202 (S-VI) (1 May 1974).

[11] Adopted on 16 November 1977 (OB Vol. LXI, 1978, Series A, No.1)

voluntary *Guidelines for Multinational Enterprises*[12] which were expressly intended to complement the ILO Tripartite Declaration. The State-party OECD Guidelines in turn followed the move in 1972 by a international peak body for private business, the International Chamber of Commerce (ICC), to adopt the *Guidelines for International Investment*. These Guidelines were subsequently modified and restated by the ICC in 1990 in *The Business Charter for Sustainable Development*. However, though the broad social responsibilities of corporations are recognised in these documents, the matter of direct human rights observance is conspicuously absent.[13]

There followed this surge of interest in the 70s, a lull in international initiatives. It was not until the late 1990s that concerted international efforts to articulate in any way the human rights responsibilities of corporations and perhaps seek to cajole them into compliance, were once again pursued. In fact, there has been an explosion of interest in the subject, if the number and variety of recent initiatives, is taken as a guide. The most prominent of these include:

United Nations[14]

- A special UN Task Force established in the wake of the international financial and economic crisis of 1997/8 recommended that the UN strongly support the development of international codes of conduct consistent with core international human rights instruments by all relevant international organisations.[15]

- The UN Sub-Commission on Prevention of Discrimination and Protection of Minorities passed a Resolution in 1998 promoting the protection of human rights as a primary objective of trade, investment and financial policy setting.[16] This has since been followed by a detailed draft human rights code of conduct for companies produced by a working group of the Sub-Commission.[17]

- In January 2000, the UN High Commissioner for Human Rights, Mary Robinson, presented a document entitled *Business and Human Rights : A Progress Report* at

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[12] OCDE/GD(97)40 (latest revision). The Guidelines form part of the OECD *Declaration on International Investment and Multinational Enterprises* (adopted 21 June 1976).

[13] For discussion of this timidity see David Forsythe, "The United Nations, Human Rights and Development" (1997) 19 *Human Rights Quarterly* 334.

[14] In addition to the initiatives here listed, both the UN General Assembly's review of progress since the 1995 Copenhagen World Summit for Social Development (*Copenhagen+5 Review*), and the UN Development Programme's Human Development Report 2000 (*Human Development and Human Rights*), pursue general 'human rights responsibilities of corporations' themes. See www.un.org/esa/socdev/geneva2000/index.html, and www. undp.org/hdro/HDR2000.html, respectively.

[15] *Report of the Task Force of the Executive Committee on Economic and Social Affairs of the United Nations*, (21 January 1999), section 6.

[16] Resolution 12/1998, at www.unhchr.org/, accessed 19/10/2000

[17] UN Document E/CN.4/Sub.2/2000/WG.2/WP.1/Add.1 (25 May 2000). This comprehensive document provides working definitions of human rights (as well as human rights abuses), as well as seeking to provide some practical guidance as to human rights protection.

the Davos meeting of the World Economic Forum in early 2000, which detailed in broad terms the necessity, challenges, opportunities and some achievements of the corporate community's protection of human rights.[18]

- In July 2000 the Secretary-General of the UN, Kofi Annan presided over the signing of *The Global Compact* by the UN, 50 multinationals and 12 peak labour organisations and NGOs. The Compact commits all the signatories, within their respective spheres of influence, to protecting and promoting human rights as expressed in a set of "nine universal principles". Specifically, these include non-discrimination in employment, the elimination of child labour and slave labour; allowing free trades unions; and, environmental protection.[19]

European Union

- In early 1999, the European Parliament adopted a resolution urging European companies doing business in developing countries to develop voluntary codes of conduct to ensure, *inter alia*, that they undertake to secure basic human rights standards, to combat corporate collusion in violations of human rights and workers in those countries.[20]

International Trade and Aid Agreements

Human rights, or social clauses, are becoming standard features of many bi-lateral and multinational trade and aid agreements, within the broad context of economic globalization.[21]

- This is the case, for example, with almost all EU agreements on trade or aid, whether the countries concerned are Western or developing.[22] Indeed, it was the Australian government's reprehensible objection to the presence of just such a standard human rights clause (declaring the intention of both parties to adhere to the principal human rights instruments of the UN) in a draft 'Framework Agreement' between Australia and the EU in 1996 that led to its eventual demise and replacement with a lower order 'Cooperation Agreement'XXX.

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[18] Available on the UNHCHR website at www.wnhchr.ch/business.htm; accessed 30/06/2000. The Progress Report has itself since been updated in preparation for the 'Global Compact' High-Level Meeting in New York on 26 July 2000. Note further, that the High Commissioner has also asked the six human rights treaty bodies, special rapporteurs and working groups to study how best to secure within their separate mandates accountability for alleged corporate human rights abuses; *Report of the United Nations High Commissioner for Human Rights*, E/1999/96 (29 July 1999), para.53.

[19] See www.unglobalcompact.org . The Compact is accompanied by a set of *Guidelines for Cooperation between the United Nations and the Business Community*; *ibid*. Accessed 7/9/2000.

[20] Resolution on EU Standards for European Enterprises Operating in Developing Countries, Minutes (EN) A4-508/98 (15 January 1999): http://www.europarl.eu.int.

[21] See further, R McCorquadale & R Fairbrother, "Globalization and Human Rights" (1999) 21 *Human Rights Quarterly* 735.

[22] See XXX (Canberra office of EU Cmmn)

Global Regulatory bodies

- The World Bank has developed democratization, good governance and institution-building agendas within its aid programs for developing nations.[23] For instance, the Bank has established a series of programs aimed at judicial reform in some developing countries on the basis that it sees the existence of "strong, accessible and independent judiciary" to be critical for both the protection of human rights and attainment of sustainable and broad-based economic growth.[24]

- The approach of the Asian Development Bank (ADB) has been similar to that of the World Bank. It too focuses on the development of a strategy of incorporating social dimensions into its projects, such as, specifically, poverty reduction, judicial reform and protecting the interests of indigenous peoples.[25]

- The World Trade Organisation (WTO) now recognizes to a limited extent that human rights issues fall within its purview, primarily in respect of claims put to it that protectionist policies are pursued by some countries under the guise of purported concerns to protect core labour rights or environmental rights.[26]

- The Organisation for Economic and Commercial Development (OECD) has recently issued its *OECD Guidelines for Multinational Enterprises: Review 2000*[27] which update the original Guidelines in its 1976 *Declaration*.[28] The Guidelines comprise recommendations addressed by Governments to multinational enterprises, in the form of "voluntary principles and standards for responsible business conduct".[29] Under the Guidelines "General Policies", corporations are urged specifically to "respect the human rights of those affected by their activities consistent with the host government's international obligations and commitments".[30]

  In stark contrast to this apparently pro-active stance on human rights protection, is the experience of the OECD-sponsored Multilateral Agreement on Investment (MAI). For one of the factors that contributed to the suspended introduction of the MAI in 1998 was the many concerns raised in respect of the its potentially adverse effect on human rights protection, especially social, environmental,

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[23] See generally Nicholas H Moller, "The World Bank: Human Rights, Democracy and Governance" (1997) 15 *Netherlands Quarterly of Human Rights* 21.

[24] A World Bank Group 'Issue Brief' entitled *Development, Human Rights and Judicial Reform*, available at www.worldbank.org/html/extdr/pb/pbhr.htm; accessed 23/10/2000.

[25] The ADB has a series of handbooks, guidelines and manuals addressing these issues which are intended to "provide guidance to Bank staff, staff executing agencies and consultants about the incorporation of social dimensions into Bank operations"; see at www.adb.org/Documents/, accessed 20/10/2000.

[26] For discussion, see WTO website: www.wto.org/wto/environ/eco.

[27] See Report by the Secretary-General, OECD Document C(2000)96/REV1

[28] See note 12 XXX, above.

[29] See Preface to Guidelines, note 27 aboveXXX, at para.1.

[30] Note 27 aboveXXX, General Policy 2.

cultural and indigenous rights, as a consequence of the restrictions it would place on governments' discretion to regulate the levels and focus of foreign investment.[31]

- The International Monetary Fund (IMF) has not had a history taking account of the social consequences of its actions. The IMF has argued that its mandate – focused as it is on international monetary cooperation and international trade – does not easily allow for such consideration. However, apparently stung by some trenchant criticism of such myopia,[32] the Fund has begun to take some steps towards addressing the social dimensions of the critical role it plays in national economies. Social and sectoral programs aimed at poverty reduction have been implemented through the vehicle of concessional lending (in the form of tailored structural adjustment facilities) to some of the world's poorest nations.[33] Still, it is revealing that the Fund makes it clear that it has no particular expertise in this respect and that it relies heavily on that of others in which it has entered into special partnership (especially, the World Bank).[34]

Reflecting on all of these international initiatives, one can say that they are being taken in the context of the perceived necessity to recognise the significant role of multinational corporations in international trade and domestic economies.[35] Gone are the days when it might be advocated that corporations should 'stay out' of domestic affairs. Even if such a circumstance were desirable, it was and is utterly unrealistic. As with all other important social actors, the challenge as regards businesses is to co-opt their considerable power to one's chosen social objectives, rather than simply stubbornly to oppose it. When we lift the sharply tailored corporate veil – though perhaps we may be forgiven sometimes for doubting it – we find many a beating human heart, each of whose owner's dignity relies on others respecting their individual human rights.

In addition to the political importance of the very existence of these various international developments, their impact may be significant in terms of international law. In respect of bilateral trade and aid agreements in particular, but also agreements between states and international organisations this is likely to be so where the human rights clauses or conditions specified in the agreements refer explicitly to established international human rights instruments. This is the case, for example, with EU trade

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[31] See, for example, Mary Rose Liverani, "Corporate Imp is squeezed back into the bottle while MAI goes on hold" (August 1998) *Law Society Journal* 62; and Parliament of the Commonwealth of Australia, Joint Standing Committee on Treaties, *Multilateral Agreement on Investment, Final Report* (March 1999), para XXX . Report available at www.aph.gov.au/house/committee/jsct/index.htm.

[32] See XXX (Orford)

[33] See IMF Factsheet entitled, dated 1 September 2000, at www.imf.org/external/np/exr/facts/prgf.htm; accessed 20/10/2000.

[34] See, IMF Factsheet entitled *Social Dimensions of the IMF's Policy Dialogue*, dated 30 March 2000, at www.imf.org/external/np/exr/facts/social.htm; accessed 20/10/2000.

[35] There abound dramatic tales and statistics of the power of MNEs, of which one will here suffice – that General Motor's sales in 1995 were greater than the GNP of 169 countries, including Saudi Arabia, South Africa, Malaysia and Norway.

and aid agreements (typically referring to the ICCPR), and the World Bank programs which now commonly refer to the need for both states and the Bank to have regard to international human rights standards. In these cases there is the prospect of the primacy of international human rights law being recognised not just over domestic laws (aside dualist qualifications,) but also over other forms of international law.

The argument for the pre-eminence of international human rights law flows from a close combination of factors. First, some long-established human rights norms, namely those enunciated in the UDHR, are also *jus cogens* principles. [36] Second, the stipulation in article 103 of the UN Charter that in the event of conflict between obligations under the Charter and obligation under any other international treaty or agreement, the Charter is always to take precedence. And, third, the fact that one of the principal obligations imposed by the UN Charter is State Parties' observation of international human rights standards.[37]

National and non-State developments

Out of this international milieu there have emerged a trend of state-based initiatives designed to regulate the human rights responsibilities of corporations, and others developed by corporations themselves. The development of a corporate social conscience is today often claimed.[38] The term 'triple bottom line' has now become common commercial parlance,[39] intended, as it is, to convey the fact that companies are not just concerned to make a profit, but also to protect the environment and to aid social progress. And even if one takes issue with the sense of the term – on the basis that the most powerful, perhaps only, incentive to pursue the last two is surely, ultimately, to boost profit, and that therefore the profit line remains 'bottom amongst equals' – one cannot deny the fact that social and environmental concerns are now at least commonly acknowledged as such in boardrooms. There now also exist dedicated sectors of 'ethical investment' within the growing body of individual investors, who in turn have helped develop institutional ethical investment. And perhaps, potentially of most significance, the 'human rights labelling' or 'ethical labelling' or 'social labelling'of products is beginning to emerge, following the path of the now ubiquitous 'eco-labelling' schemes.[40]

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[36] See generally, B Simma & P Alston, "The Sources of Human Rights Law: Custom, Jus Cogens and General Principles" (1992) *Australian Yearbook of International Law* 82.

[37] This much is expressly recognised in Article XXI of the GATT

[38] Though exactly what is meant by this and other like terms, and what are the implications, is notoriously difficult to pin down. For discussion of this point see Michael K Addo, "Human Rights and Transnational Corporations" in Michael K Addo, *Human Rights Standards and the Responsibility of Transnational Corporations* (Kluwer; 1999), pp.12-23.

[39] See J Elkington, "Triple Bottom Line Reporting: Looking for Balance" (1999) March, *Australian CPA* 69(2) 18-21.

[40] For example, 'Social Accountability SA8000' – a human rights and labour quality standard for the codes of conduct of individual corporations developed by Social Accountability International (SAI) and based on internationally recognised human rights norms. "SAI maintains close oversight of the companies it accredits to carry out SA8000 certification, ensuring their capabilities and requiring their collaboration with local experts." See www.cepaa.org/introduction.htm; accessed 24/10/2000.

These more focused developments have been ushered in largely on the back of a proliferation of individual company, sector-wide and national codes of conduct.[41] A few such codes have existed in the US and parts of Europe now for some years, but it is only more recently that interest in codes has become widespread. Leading the way today are initiatives in the textile, apparel and footwear sectors where a number of NGOs and community organizations have been instrumental. For instance, recently the Fair Labor Association (FLA) was established with the backing of the Clinton administration, which comprises federal government officials, clothes and textile manufacturers, US Colleges (as retailers) and NGOs such as the Lawyers Committee for Human Rights.[42] Under the scheme participating companies (and their contractors and suppliers) are subject to an independent monitoring system to ensure that they meet certain minimum human rights standards (especially in respect of sweat-shop labour), and in return the companies are able to affix a special FLA label to their products.[43]

In the United Kingdom the government has lent its support to initiatives in the area; for instance, by providing seed funding for a cross-industry *Ethical Trading Initiative* (ETI) involving the private sector, NGOs and Trades Unions. The ETI's aim is through ongoing collaboration to encourage "companies to work constructively with their suppliers to improve the labour standards under which their products are made", by developing best practice in implementing codes of conduct.[44] The ETI has developed a so-called "Base Code" as a template for use by companies when drawing up their own codes. And likewise, in Canada Lloyd Axworthy, the Foreign Affairs Minister, has argued strongly for "responsible trade" by pointing to the mutual reinforcement that commerce and human rights bring to each other's objects.[45]

In Australia, the FairWear campaign for the protection of the rights of homebased outworkers employed in the clothing industry in New South Wales, Queensland and Victoria has had considerable success in getting manufacturing companies to sign up to a relevant code of conduct.[46] One of the reasons for the relative success of the campaign has been the support it enjoys from the Textile, Clothing and Footwear

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[41] See generally, Damian Grace "Business Ethics and Human Rights" (1998) 4 *Australian Journal of Human Rights* 59.

[42] As reported by Thomas L Friedman in the *New York Times*, Friday 30 July 1999. See further www.fairlabor.org; accessed 23/10/2000.

[43] Participating companies include Adidas-Salomon, Eddie Bauer, Gear For Sports, Kathie Lee Gifford, LL Bean, Levi Strauss, Liz Clairborne, Nike, Phillips Van Heusen, Patagonia and Reebok. The fact of the participation of some of these is illustration of the effects of more confrontational campaigns by activists and big manufacturers using Third World labour (eg Community Aid Abroad's "NikeWatch", at www.caa.org.au/campaigns/nike/index1.html .

[44] The ETI was established in December 1997. See further www.ethicaltrade.org.

[45] As quoted by Warren Allmand, President of ICHRDD in a brief submitted to the Federal Parliament's Standing Committee on Foreign Affairs and International Trade, 24 March 1999, entitled "Trading in Human Rights: The Need for Human Rights Sensitivity at the World Trade Organization", footnote 1: www.ichrdd.ca/publicationsE/globalAllmand

[46] See http://vic.uca.org.au/fairwear/main_page.htm for lists both of those who have signed up and, those who have not (the latter is named the "FairWear Shame File"); accessed 24/10/2000.

Union of Australia which has made the signing of the code by the manufacturers a condition of the Clothing Trades Award 1982. This fact has provided to the TCFUA and FairWear a base from which to mount litigation against those who have not signed the code or have breached its conditions, including recently, for example, against Nike in the Federal Court of Australia.[47]

At the level of individual company codes, empirical evidence suggests that though their numbers are growing, policies or codes of conduct specifically covering human rights are still the exception rather than the rule for companies.[48] What is more, as this conclusion is based on surveys taken of multinational corporations (which are the most likely to possess such codes), the figure for *all* companies is certainly much smaller.

Typically, the human rights covered in these industry-wide and individual corporation codes focus on workers' rights – conditions of employment, health and safety, freedom of association and non-discrimination – as well as the rights of children, especially as regards their employment and education. However, other apposite rights guaranteed by international instruments include privacy, the rights of indigenous peoples, freedom of expression, cultural belief and practice, as well as the rights to liberty and a fair trial (some multinational corporations employ – that is, pay for - local police or even military).[49] An especially significant feature of this catalogue of rights is the fact that they range across both the classical groupings of economic, social and cultural rights and civil and political rights.

National legislation

There are now signs of substantial changes in both the form and content of individual company codes through statutory intervention. At the time of writing, legislative proposals lie before both the federal legislatures of Australia[50] and the United States[51] that would, if passed, institute a regulatory framework for corporate codes of conduct in both countries. The two Bills are broadly similar in that they are both aimed at domestic companies operating overseas and both broadly define the social

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[47] Heard before the Federal Court of Australia on 6 June 2000. The matter was subsequently settled without judgment.

[48] A 1996 survey of 150 American multinational corporations found that about 17% of them had such policies or codes (D Cassell, "Corporate Initiative: A Second Human Rights Revolution?" (1996) 199 *Fordham International Law Journal* 1963, at 1974); about the same percentage were found to have substantial human rights codes in a similar survey of 98 of the largest Canadian firms (as reported in ICHRDD brief; note 9XX, above).

[49] For example, the American conglomerate 'Enron' does so in respect of one of its power plants in India; see Arvind Ganesan, "Business and Human Rights – The Bottom Line", a Press Release of Human Rights Watch: www.hrw.org/advocacy/corporations/index.

[50] The *Corporate Code of Conduct Bill 2000*; a Private Member's Bill sponsored by Senator Vicki Bourne. See Second Reading Speech, Senate *Hansard*, 6 September 2000.

[51] *Corporate Code of Conduct Bill 2000*; HR 4596 IH. The Bill was introduced in the House of Representatives on 7 June 2000 by Congresswoman Cynthia McKinney.

responsibilities of corporations to include labour rights, environmental rights and 'human rights' (essentially anti-discrimination provisions). Both also impose compliance and reporting obligations that are backed by sanctions (criminal in the case of the Australian Bill and civil in the case of the US Bill) if not complied with. Interestingly, the American Bill includes an incentive scheme whereby preference in awards of government contracts and provision of trade and investment assistance is given to companies that have adopted the code of conduct set out in the legislation.[52]

Legal obligations

Parallel to the developments in the (still) quasi-legal field of voluntary codes of conduct there has also been movement in the field of legal obligation. Of course, there already exist significant bodies of law covering human rights to which domestic corporations are subject. Laws covering general employment conditions; non-discrimination; health and safety at work; consumer protection; privacy; the employment of children, environmental protection, and the freedom of association exist in many countries in various formats.[53] However, it is in the area of the potential to bind corporations under international human rights law that certain significant developments are occurring.

On the face of it, the possibility of obligations on corporations under international human rights law is not apparent. The classical view is that international law speaks to nations and to international organisations, not to private legal entities, and as such, it is directly upon States that obligations are placed. Surely, therefore, states cannot have legal liability for the actions of private persons or bodies directly attributable to them. Or can they? The key to unlocking this conundrum lies in the nature of the obligations provided under international human rights instruments, and to some extent also in the nature of the entity so obliged. For it is now clear that there are two forms of state obligation: direct and indirect.

Direct legal obligations

It is, in fact, incorrect to assume that the international human rights treaties refer only to the rights of individuals (and groups) and the duties of States. A number of international instruments make it clear that rights and duties exists between private individuals or bodies (that is, on a horizontal plane), as well as between the state and the individual (that is on a vertical plane). Article 29 of the UDHR, for example, stipulates that everyone has duties to the community.[54] The UDHR's Preamble more expressly articulates the nature of this duty of "every individual", and, even more tellingly, of "*every organ of society*" to "strive by teaching and education to promote

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[52] *Ibid*, section 4.

[53] Note, n the extraordinary case of South Africa's Truth and Reconciliation Commission (established by the *Promotion of National Unity and Reconciliation Act* 1995) very broad powers of scrutiny for the human rights compliance of corporations during the apartheid years; see further BS Lyons "Getting to Accountability: Business, Apartheid and Human Rights" (1999) 17 *Netherlands Quarterly of Human Rights* 135.

[54] Articles 27 – 29 of the *African Charter of Human and Peoples' Rights* (1981) go into some detail as to the nature of such individual duties.

respect for these rights and freedoms [in the UDHR] and by progressive measures, national and international, to secure their universal and effective recognition and observance". It is widely accepted that "organs of society" (as distinct from public nature of "organs of State") include private bodies of which corporations are quintessential examples.

In further support of such an interpretation, the most recent international regional human rights instrument – the exhortatory Draft Asian Human Rights Charter (1997/8) - pulls no punches in targeting the need for corporations to take responsibility for their actions:

> "States are increasingly held hostage by financial and other corporations to implement narrow and short sighted economic policies which cause so much misery to so many people, while increasing the wealth of the few. Business corporations are responsible for numerous violations of rights, particularly those of workers, women and indigenous peoples. It is necessary to strengthen the regime of rights by making corporations liable for the violation of rights".[55]

Indirect legal obligations

Indirect legal obligations arise in situations where the State is, in effect, held to be vicariously liable for the acts of private bodies within its jurisdiction. This possibility flows from a common form of the words used in international human rights instruments to denote the responsibilities of the State Party. Take, for example, Article 2(1) of the ICCPR, the first part of which reads:

> "Every State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant …".

All the other major UN and regional human rights instruments make demands of State Parties in similar terms. [56]

The dimensions of the obligations placed on states become apparent when one focuses on key terms within operative articles such as the above. From the perspective of international law what comprises the "State Party" is not confined to any one organ, but rather includes all organs and agencies of state: the parliament(s); executive(s); bureaucracy(ies) (including agencies such as police) and judiciary. All organs have equal responsibility within their individual and combined spheres of operation to implement the terms of the treaty.[57] In international law no federal 'excuse' is brooked, nor, theoretically, any other proffered constitutional limitation.[58]

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[55] Paragraph 2.8.

[56] The UN's ICESCR (article 2(1)); CERD (articles 2 & 7); CEDAW (articles 2 & 3); CAT (article 2); CROC (article 4), and the ECHR (article 1); the *American Convention on Human Rights* (article 1(1)) and the *African Charter on Human and Peoples' Rights* (article 1).

[57] This is precisely the reasoning behind the section 6 of the *Human Rights Act* 1998, which, *inter alia*, binds courts to the provisions of the Act in fulfillment of their public function, including of course their

The insistence that rights shall be "ensure[d] to all individuals" by the state is not confined to the prohibition of infringing actions that may be directly attributed to the state, but also, crucially, includes the actions of others over whom the state has or may have jurisdiction. In other words, the State may be held directly liable for "vertical" infringements (that is by the state against individuals) and held indirectly liable for "horizontal" infringements (that is by individuals or private bodies against other individuals or private bodies). [59]

When these two factors are combined certain very significant consequences may follow. It can be supposed, for instance, that the judiciary is required to ensure to all individuals that come before it the rights in the relevant Covenant.[60] Furthermore, in the case of the ICCPR, there is the additional explicit requirement directed at the judiciary in particular, that "any person whose rights or freedoms … are violated shall have an effective remedy," whether or not the violation was committed by persons acting in official or private capacities (Article 2(3)(a)).

Privatization of human rights

What is most significant about this interpretive exercise is that it is not just being undertaken in the realm of academic supposition, but is now appearing in the judgments, views and comments of the principal international human rights courts and committees. The horizontal application of human rights law - or the 'privatization' of human rights if you prefer - is now well recognized, if not yet its full potential.

Though certain UN organs have at times stressed that the reach of international human rights law extends to private actors,[61] it has been the Inter-American Court of Human Rights (in *Rodriguez v Honduras* (1988))[62] and the European Court of Human Rights (in *Plattform "Ärzte für das Leben" v Austria* (1988)[63] and *Costello-Roberts v*

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adjudication of disputes between private parties (known as 'horizontality'; see text below). See further, M Hunt, "The Horizontal Effect of the Human Rights Act" [1998] *Public Law* 423; and G Phillipson, "The Human Rights Act, 'Horizontal Effect' and the Common Law: A Bang or a Whimper?"(1999) 62 *Modern Law Review* 824.

[58] *Vienna Convention on the Law of Treaties* (1969), Article 27.

[59] For discussion of the possible horizontal effect of the ICCPR, see S Joseph, J Schultz & M Castan *The International Covenant on Civil and Political Rights: Cases, Materials and Commentary*, (Oxford University Press; 2000), pp.23-4.

[60] In this respect, see the controversial judgment of the European Court of Human Rights in *Osman v UK* (28 October 1998) and the extraordinary extra-curial criticism it provoked from Lord Hoffman, a current Law Lord: "Human Rights and the House of Lords" (1999) 62 *Modern Law Review* 159.

[61] See, for example, views of the Human Rights Committee in *Herrera Rubio v Colombia* (1987), paras 10.3 & 12, and the CEDAW Committee, General Recommendation No.19 (1992) (UN Doc. A/47/38), article 9. This seems set to increase in light of the High Commissioner for Human Rights' recent demand made of all treaty bodies: see note 17 above.

[62] *Velasquez Rodriguez v Honduras*, Series C, No. 4 (1988)

[63] Series A, No.139 (1988).

UK (1993)[64]) that have most clearly signaled the potential for such expanded State responsibility. The Inter-American Court in *Rodriguez* cogently argued that the obligation assumed by State Parties under Article 1(1) of the American Convention "to respect the rights and freedoms" therein:

> "... implies the duty of the State Parties to organize the governmental apparatus and, in general, all the structures through which public power is exercised, so that they are capable of juridically ensuring the free and full enjoyment of human rights (para.165). ... An illegal act which violates human rights and which is initially not directly imputable to a State (for example, because it is the act of a private person or because the person responsible has not been identified) can lead to an international responsibility of the State, not because of the act itself, but because of the lack of due diligence to prevent the violation or respond to it as required by the Convention" [65]

The implications of such reasoning are now being borne out in judgments of the European Court of Human Rights in such cases as *Gustafsson v Sweden* (1996)[66] and *A v United Kingdom* (1998). [67] In the latter case, the Court held that the availability within English criminal law of a defence of "reasonable chastisement" to a charge of assault (in this case of a boy with a garden cane wielded by his step-father) amounted to a dereliction in the State's duty under the Convention to safeguard the rights of all individuals within its jurisdiction, whether the threat to or breach of rights stems from state or private action. Further, the European Court of Human Rights has also made it clear that states cannot absolve themselves from such responsibility by delegating or transferring public functions to private bodies.[68]

It is still unclear how far this form of indirect responsibility, or "due diligence" obligation, goes. Certainly, it cannot mean that at international law the state becomes vicariously responsible for *every* infringement that occurs within its jurisdiction - patently that would be absurd. But where is the line to be drawn? Courts have provided only the most general of indicators. The Inter-American Court in the *Rodriguez* case characterised the legal duty placed upon states as requiring that they "take *reasonable steps* to prevent human rights violations".[69] In a similar vein the European Court of Human Rights has indicated that there exists some discretion on the part of the state in the determination of its legal obligation to protect rights against infringements by private persons (*Gustafsson*).[70] To this the Court has since added that the obligation exists only where it can be "shown that the risk [of breach] is real

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64 Series A, No. 247 (1993)

65 Note 59XX above, at para.172.

66 (1996) II, No. 9, p.637

67 (1998) VI, No. 90, p. 2692

68 See *Van der Mussele v Belgium* (Series A No.70, paras.28-30 (1983), and *Artico v Italy* (Series A No.37, paras 31-8 (1980).

69 Note 59XX above, at para.174.

70 Note 63 above, at para.54.

and that the authorities of the ... state are not able to obviate the risk by providing protection". [71]

For corporations – as for all other non-state bodies – the importance of the placing of states under some degree of responsibility to secure the protection of rights regarding both horizontal and vertical relations, lies in what the response of the state will be. For it is fair to say that where states find themselves held responsible in the international arena for the actions of private bodies within their jurisdiction then they will take preventive measures. This could take the form of new or greater state intervention through regulation, legislation or policy initiatives – such as the US and Australian codes of conduct bills discussed above [72] - in the development of industry codes of practice, whether voluntary or mandatory.

Extra-territorial legal obligations

Alongside this phenomenon of the privatization of human rights, there is another important dimension to the widening grip of human rights law. This is represented by those jurisdictions where extra-territorial laws embrace the activities of domestic corporations in other countries that can and have been used to enforce the observation of basic human rights standards. For example, in the landmark 1997 case of *Unocal*, [73] the California District Court determined that an American registered corporation could be held liable under the *Alien Tort Claims Act 1789* (ATCA)[74] for acts done in concert with, or by, a foreign government with which it was in partnership, that constituted violations of internationally recognised human rights instruments. [75] And this was so even if the foreign government (in this case the then State Law and Order Reform Council in Burma/Myanmar)[76] was protected by sovereign immunity.

In an extension of an earlier celebrated judgment in the 1984 *Tel-Oren* case, [77] which made clear that individual liability at international law was available, the Court in *Unocal* proclaimed that "[e]ven in the absence of state action, Unocal could conceivably be liable for certain violations of international law alleged by [the]

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[71] *HLR v France*, (1997) III, No. 36, p.745, at para.40.

[72] At p.XXX

[73] *John Doe I et al. v Unocal Corporation* 176 FRD 329 (C.D. Cal. 1997). The "alien" plaintiffs were Burmese trade union representatives and farmers who sought damages against Unocal and SLORC for forced labour, forced relocation and child labour.

[74] Of which statute Simma and Alston have said that it is "one of the few more likeable facets of the omnipresent tendency of US courts to usurp jurisdiction beyond limits – or at least, what most lawyers abroad would consider to be such limits"; note XXX above, at 86.

[75] The case is currently on appeal to the Ninth Circuit Court of Appeals following a recent opinion of Judge Lew of the Federal District Court that Unocal could not be held vicariously liable for the acts of the Burmese military junta: *John Doe v Unocal* 110F.Supp.2d 1294 (C.D.Cal.2000). Chevron Oil Corporation is also facing as lawsuit under the ATCA in respect of its alleged involvement in the killing of several Nigerian protestors in 1998: XXX

[76] Now the State Peace and Development Council (SPDC)

[77] *Tel-Oren v Libyan Arab Republic*, 726 F. 2d 774 (DC Cir. 1984), at 794.

plaintiff".[78] Further, the District Court adopted Judge Edward's reasoning in *Tel-Oren* that there was indeed a "handful of crimes to which the law of nations attributes individual responsibility", including piracy and slave trading, [79] and that it is well settled that the law of nations is part of federal common law.[80]

A variant of such extraterritorial reach is the potential that lies in liberalising the common law doctrine of *forum non conveniens*. The agent here is the domestic judiciary. The essential purpose of the doctrine is to operate as a jurisdictional stricture, locking out cases from being heard in domestic courts where by the circumstances of the case (usually factual) a hearing in a foreign court is deemed more appropriate; or, at any rate, the forum of the domestic court is deemed inappropriate. "It is," as Sarah Joseph has observed "a doctrine which is used, and arguably abused, by parent companies to avoid liability in their home jurisdictions for alleged offshore transgressions."[81] Yet the doctrine is quintessentially common law, in that it bestows on the domestic courts the discretion to decide whether or not to hear the matter. Recently, for example, courts in Australia and the United Kingdom (and to a lessor extent in the US)[82] have demonstrated greater leniency in the application of the doctrine, with the result that corporations (in particular those working in developing countries) are now less free to consider themselves subject to one set of rules at home and a different set when working overseas.

In Australia the High Court has effectively reinterpreted the doctrine such that it is now the case that a hearing before an Australian court will only be denied where the Australian forum is clearly inappropriate.[83] In the United Kingdom too, the basic premise of the doctrine is undergoing change such that now the question being asked is which is the most suitable forum (in which justice is most likely to be done). Thus, in *Connelly v RTZ Corporation plc*,[84] the majority of the House of Lords held, *inter alia*, that the plaintiff's case ought to be heard in the UK because of the lack of legal aid available to the plaintiff in the alternative forum (ie Namibia), and therefore the prospect that his ability to mount a case would be seriously compromised for lack of professional representation no matter what were the substance of his claims.[85] An important practical extension to this liberalised version of the doctrine in the UK was

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[78] 176 FRD 329 (C.D. Cal. 1997), at 348.

[79] *Id*. Torture is not included in this handful. Judge Edward's in *Tel-Oren* had been reluctant to include it without guidance from the Supreme Court, and the District Court in *Unocal* did not depart from that reasoning.

[80] *Ibid*, at 345.

[81] S Joseph, "Taming the Leviathans: Multinational Enterprises and Human Rights" (1999) XLVI *Netherlands International Law Review* 171, at 178.

[82] Which courts are still working in the conservative shadow of the '*Bhopal* case': *In re Union Carbide Corp'n Gas Plant Disaster* 809 F.2d 195 (1986)

[83] See, for example, the reasoning in *CSR* XX and *BHP (Ok Tedi)* XX cases. And see further Bell and Bottomley chapters in this book XX.

[84] [1997] 3 WLR 376

[85] Ibid, at XXX, per Lord Goff (final 2 pages of his judgmentXX).

recently provided in *Lubbe & Other v Cape plc*.[86] In this case the House of Lords was unimpressed by the claims of the English parent company (Cape) that it could not be held directly responsible for the actions of its South African subsidiary in whose mines the plaintiff claimed to have contracted asbestosis. As such, the United Kingdom rather than South Africa was considered the most appropriate forum in which to hear the case.[87] Given the great potential for multinational corporations to associate and disassociate themselves from their constituent parts (subsidiaries; group companies; and partners) as suits them – including when seeking to avoid legal liability – the judgments in *Cape* are set to have a far-reaching, limiting effect on corporate breaches of human rights laws.

Conclusions

A key theme of this chapter has been to stress the importance of the overlap between human rights objectives and corporate goals; certainly to the extent that both flourish within safe, stable social environments operating under the rule of law. There remains much work to be done to expose and exploit their potential coalition, rather than opposition. In particular, the message has yet to be understood that this common ground ought to be freely acknowledged precisely because it serves the best interests of both camps. What is more, from a human rights perspective, the co-option of business to the human rights cause is far more powerful and effective a force when volunteered ahead of conscripted.

That much said, the paper has also sought to make a case for the existence – albeit yet incompletely formed – of a variety of legal and quasi-legal frameworks into which corporations are being placed in an effort to ensure that they uphold human rights standards. It may be asked whether to push for legal obligations in this regard is antithetical to the 'common-interests' approach? Well, possibly "yes", but not entirely. In one crucial respect the existence of a legal sanction can act as a prophylactic. Within its preventive shadow greater human rights awareness and, thereby, hopefully, compliance will be achieved. It is the case, as has been said of the Paris Metro, that even if before you travel you intend to buy a ticket, it is the prospect of a ticket-collector at the other end that really clinches it. And so it is, ought and will further be for the work of corporations in the increasingly aware and insistent human rights contexts of global markets and local communities.

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[86] [2000] 1 WLR 1545

[87] *Ibid*, 1553-4.

TAMING THE LEVIATHANS: MULTINATIONAL ENTERPRISES AND HUMAN RIGHTS*

1. Introduction

Multinational Enterprises ['MNEs'][1] are very powerful entities in the current world order. Indeed, it is trite to note that the power of some MNEs outstrips the power of certain nation-states.[2] In view of their vast economic power and ubiquitous presence, and consequent intrusion into many aspects of people's lives, it is not surprising that MNE activity can and does occasionally impact detrimentally on the enjoyment of internationally recognised human rights.

Corporate leaders traditionally deny that their activities have anything to do with human rights, as their operations are strictly concerned with 'business'.[3] This conservative view holds that business and human rights are separate disciplines that do not overlap.[4] Indeed, this view is reflected in the general absence of human rights considerations from international business laws and institutions.[5]

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[1] MNEs may be defined as 'a cluster of corporations or unincorporated bodies of diverse nationality joined together by ties of common ownership and responsive to a common management strategy'; this definition has been adapted from D. Vagts, 'The Multinational Enterprise: A New Challenge for Transnational Law' (1970) 83 *Harvard Law Review* 739, 740, quoting Vernon, 'Economic Sovereignty at Bay' (1968) 47 *Foreign Affairs* 110, 114. It is conceded that numerous definitions for MNEs, or alternatively, 'Multinational' or 'Transnational' Corporations' (the latter terms do not however cover unincorporated entities), have been put forward by economists and international organisations; see generally P. Muchlinski, *Multinational Enterprises and the Law* (Oxford, Blackwell, 1995), 12-15. It is contended that the definition used herein accords generally with the most common definitions.

[2] See C. Grossman and D. Bradlow, 'Are We being Propelled towards a People-Centered Transnational Legal Order?' (1993) 9 *American University Journal of International Law and Policy* 1, 8-9; D. Cassel, 'International Security in the Post Cold-War Era': Can International Law Truly Effect Global Political and Economic Stability? Corporate Initiatives: A Second Human Rights Revolution?' (1996) 19 *Fordham International Law Journal* 1963, 1963 and 1979; F. Johns, 'The Invisibility of the Transnational Corporation: An Analysis of International Law and Legal Theory', (1994) 19 *Melbourne University Law Review* 893, 904; Muchlinski, above, note 1, 6-7.

[3] See the seminal article by M. Friedman, 'The Social Responsibility of Business is to Increase Profits', *New York Times (Magazine)*, 13 September 1970; see also M. Lippman, 'Transnational Corporations and Repressive Regimes: The Ethical Dilemma', (1985) 15 *California Western International Law Journal* 542, 549-550.

[4] A. Hughes, 'Is Business Everybody's Business?' (1995) 20 (2) *Alternative Law Journal* 71, 72.

[5] For example, no human rights clauses exist in the GATT agreements. However, the World Bank has recently taken a formal institutional interest in human rights, see World Bank, *Governance: The World's Experience*, (World Bank, 1994); P. Armstrong, 'Human Rights and Multilateral Development Banks: Governance Concerns in Decision Making; (1994) 88 *ASIL Proceedings* 277.

However, there is no doubt that MNEs can and do perpetrate human rights abuses, like probably all entities. The effects of MNE abuse are however amplified by the inherent power of MNEs. For example, MNEs can mistreat and exploit their workforce, or allow their sub-contractors to do so, thereby breaching labour rights.[6] MNEs may have lax rules regarding worker safety, which threaten workers' rights to health and at worst, their right to life.[7] Indeed, lax safety regulations can threaten the lives of people in the vicinity of manufacturing plants, as was evinced horribly in 1984 in Bhopal, India when toxic gas leaked out of a Union Carbide Plant, killing 2000 people and injuring over 200,000. MNE activity can cause extensive environmental damage, which can impact on numerous rights, including the rights to health, minority rights and the right to self-determination.[8] For example, Shell's oil extractions in Ogoniland in Nigeria caused grave environmental harm, with consequent impacts on the rights to food and an adequate standard of living.[9] Irresponsible marketing policies can hide the dangers of hazardous products, and pose an unacceptable threat to the life and health of consumers; relevant products might include unsafe drugs or consumables,[10] automobiles with minimal safety features, and cigarettes.[11] Security forces employed by MNEs have been accused of using disproportionate force and committing horrendous human rights violations, including killings and tortures, in order to defend MNE installations.[12] As a final example, MNEs may abuse their power and pervert the political processes within a State,

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6 See generally, 'Human Rights: Ethical Shopping', *The Economist*, 3 June 1995. Labour rights are protected under a variety of international treaty provisions, such as article 8 of the International Covenant on Civil and Political Rights [ICCPR], which prohibits slavery and forced labour; see generally, text at notes 95-121.

7 One's right to health is guaranteed under the International Covenant on Economic Social and Cultural Rights [ICESCR], article 12; the right to life is protected under ICCPR, article 6.

8 Minority rights are protected under the ICCPR, article 27, and self-determination is protected under article 1 of both Covenants. See, on MNEs and self-determination, Johns, above, note 2, 907-908.

9 The rights to food and an adequate standard of living are guaranteed in ICESCR, article 11. See generally J. Eaton, 'The Nigerian Tragedy, Environmental Regulation of Transnational Corporations, and the Human Right to a Healthy Environment', (1997) 15 *Boston University International Law Journal* 261, 264-271, and S. Skogly, 'Complexities in Human Rights Protection: Actors and Rights Involved in the Ogoni Conflict in Nigeria', (1997) 15 *Netherlands Quarterly of Human Rights* 47.

10 An example of inappropriate marketing of consumables was the marketing by Nestlé of unsuitable baby-milk products in Africa, which ultimately led to the adoption by the World Health Organisation ['WHO'] of an International Code of Marketing of Breast-Milk Substitutes 1981; see Muchlinski, above, note 1, 7, n19.

11 See generally on human rights and tobacco marketing, J. Wike, 'The Marlboro Man in Asia: US Tobacco and Human Rights', (1996) 29 *Vanderbilt Journal of Transnational Law* 330.

12 Torture is prohibited by article 7 ICCPR and the Convention Against Torture and Other Cruel Inhuman or Degrading Treatment or Punishment [CAT]. Security of the person is protected by article 9 ICCPR. See 'BP hands "tarred" in Pipeline Dirty War', *Guardian*, 17 October 1998, p.20, detailing allegations of the activities of security forces hired and armed by BP to protect its oil installations in Colombia. See, regarding allegations about Shell's security arrangements in Nigeria, Cassel, above, note 2, 1965-66.

undermining democratic rights.[13] A most dramatic example of this was the overthrow of the Allende government in 1972 in Chile, which was engineered in large part by ITT, an American MNE.[14] Less spectacular, but nevertheless anti-democratic, is the use of bribery to influence governments. Finally, MNEs can collude with rights-abusing governments, as is allegedly occurring with Unocal's engagement with the government of Burma.

MNE abuses have been highlighted more in recent times due to the increased instances of anti-corporate campaigns by non-governmental organisations ['NGOs'].[15] However, NGO vigilance, as well as an ostensible increase in corporate self-regulation through the implementation of voluntary codes of conduct,[16] has failed to adequately limit the instances of MNE abuse. The proper place for the imposition of true MNE accountability lies in the legal, rather than informal, spheres.[17] Furthermore, as truly international creatures, MNEs necessitate international attention. Thus, MNEs should be accountable in international human rights law.

However, international human rights law is not adapted to hold MNEs accountable for the human rights abuses that they perpetrate. In international human rights law, only the State is generally charged with duties to secure human rights for individuals within jurisdiction. This is symptomatic of the State-centric focus of general international law. Problems of accountability therefore arise in attributing human rights duties to non-State bodies in international law. Furthermore, problems of definition, or characterisation of certain behaviour as 'human rights abuse', also arise in attributing duties to non-governmental bodies, as this area is completely undeveloped in international human rights jurisprudence. It cannot be simply assumed that non-State actors have the same duties as States. This paper discusses these issues of accountability and characterisation in relation to the human rights duties of MNEs in Parts 2 and 3 respectively.

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[13] Democratic rights, in the form of the right to equal participation in public affairs, are protected under article 25 ICCPR. See generally, T. Franck, 'The Emerging Right to Democratic Governance' (1992) 86 *American Journal of International Law* 52.

[14] See 53 UN ESCOR (1822nd mtg) 19, 22, UN Doc. E/SR, 1822 (1972).

[15] See P.J. Spiro, 'New Global Potentates: Nongovernmental Organisations and the 'Unregulated' Marketplace', (1996) 18 *Cardozo Law Review* 957, 959-960; 'Human Rights: Ethical Shopping', *The Economist*, 3 June 1995.; 'The Fun of Being a Multinational', *The Economist*, 20 July 1996.

[16] On self-regulatory codes, see D. Orentlicher and T. Gelatt 'Public Law, Private Actors: The Impact of Human Rights on Business Investors in China', (1993) 14 *Journal of International Law and Business* 66, Appendices at 125-128, printing the internal codes of Levi-Strauss, Reebok International Ltd, and Phillips-van Heusen. See J. Johnson, 'Public-Private-Public Convergence: How the Private Actor can shape Public International Labour Standards', (1998) 24 *Brooklyn Journal of International Law* 291, 299-302, on the Apparel Industry Partnership Initiative in the United States.

[17] See European Parliament Resolution on 'EU Standards for European enterprises: towards a European Code of Conduct', 14 January 1999, paragraph F2.

2. Holding MNEs Accountable in International Human Rights Law

(a) International Human Rights Law in the Private Sphere

In international human rights law, the prime duty-bearer in international human rights law is the State. No human rights treaty imposes any direct obligations on any other entity. Nevertheless, international human rights law has made some progress towards imposing human rights duties in the non-government sphere. Human rights duties are recognised as having a tripartite character: States are required to respect, protect and ensure the enjoyment of human rights by persons within jurisdiction.[18] In order to properly fulfil its duties to protect and ensure enjoyment of human rights, States must control private entities. These duties are expressly enunciated in the international single-issue conventions,[19] and can be inferred from the general obligatory provisions of the International Covenants.[20] Finally, the 'horizontal' application of international human rights, ie. the duty of States to give effect to human rights between private parties,[21] has been confirmed in international human rights jurisprudence.[22]

States do therefore have a duty to control and limit human rights abuses in the private sphere. So, for example, a State party to the International Covenant on Civil and Political Rights ['ICCPR'] has a duty to prevent MNEs from refusing to allow employees to join trade unions,[23] and to prevent the adoption by MNEs of unsafe work practices which endanger lives.[24] Human rights duties are not imposed directly on MNEs, but indirectly, through the agency of the States in which they are operating, 'host States'.

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[18] See 'Maastricht Guidelines on Violations of Economic, Social And Cultural Rights', (1998) 20 *HRQ* 691, paragraph 6, confirming that these three duties exist with respect to all human rights; see also H. Shue, *Basic Rights: Subsistence, Affluence and United States Foreign Policy* (New Jersey, Princeton University Press, 1980), p. 57.

[19] See, eg, CAT, article 4; International Convention on the Elimination of all forms of Racial Discrimination ['ICERD'], article 2(d); Convention on the Elimination of all forms of Discrimination Against Women ['CEDAW'], article 2(e); Convention on the Rights of the Child [CRC], articles 2(2), 3(3), 19(1).

[20] Article 2(1) ICCPR requires States to 'ensure' ICCPR rights, implying a positive duty to prevent human rights abuse by private bodies; see M. Nowak, *UN Covenant on Civil and Political Rights* (Kehl, N.P. Engel, 1993), 36-38. See, with respect to the ICESCR, 'Maastricht Guidelines', above, note 18, paragraphs 6, 15(j) and 18.

[21] Nowak, above, note 20, XVIII and 37-38.

[22] See generally A. Clapham, *Human Rights and Private Bodies* (Oxford, Clarendon Press, 1993), Chapter 4.

[23] The right to form trade unions is protected by ICCPR article 22, ICESCR article 8, and the Convention concerning Freedom of Association and Protection of the Right to Organise, ILO Convention 87 (4 July 1950).

[24] The Human Rights Committee's General Comment on article 6 (the right to life) confirms that this guarantee has a positive aspect, in that persons should be protected from unnecessary threats to their life; see General Comment 6, paragraph 5, (1994) 1 (2) *International Human Rights Reports* 5.

(b) Regulation by Host States

Host States have implemented a variety of laws which operate to constrain or punish MNE human rights abuse. National regulation takes many forms; it exists in areas such as the criminal law, environmental protection, civil rights, anti-discrimination law, labour rights, consumer protection and anti-corruption legislation. However, it is problematic to rely on host States to actually hold MNEs accountable for their human rights abuses. These problems stem from the fact that MNEs are uniquely international, uniquely mobile, and uniquely powerful entities.

MNEs are sometimes more powerful than their host States. This is often the case when comparing the relative power of an MNE and a developing country.[25] The economic muscle of MNEs may allow them to resist domestic sanctions. For example, they may terminate business dealings in the sanctioning State and establish themselves in a more corporate-friendly State.[26] They may even be able to discourage sanctions by *threatening* to disengage from a State, many of which perceive that they need MNE investment to improve their economic development. Indeed, such threats are made against developed nations, as has recently occurred with Rolls Royce's threat to leave the UK if it should adopt Europe's high labour standards.[27]

Furthermore, some States lack the technical expertise to monitor and regulate corporate activities in order to, for example, decide whether a corporation's environmental practices or safety precautions are satisfactory.[28] Developing nations may also lack the legal machinery, such as resources to undergo complex discovery of documents, to unravel the corporate veil which may shield an asset-rich parent company behind an asset-poor local subsidiary.[29]

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[25] Whilst most MNE operations occur within the developed world, between one third and two fifths of all foreign direct investment occurs in the developing world, see European Parliament Resolution, above, note 17, on 'Globalisation, Foreign Investment and Development'.

[26] K. van Wezel Stone, 'Labor and the Global Economy: Four Approaches to Transnational Labour Regulation', (1995) 16 *Michigan Journal of International Law* 987, 990-994; Grossman and Bradlow, above, note 2, 8; Lippman, above, note 3, 545.

[27] See R. Gribben, 'Rolls-Royce will move if Britain adopts EU Labour Law', *Daily Telegraph*, 25 November 1998. See Muchlinski, above, note 1, 474, for comment on the UK's initial failure to sign up to the Social Provisions of the Maastricht Treaty of the European Union.

[28] Lippman, above, note 3, 545. See also T. Donaldson, 'Moral Minimums for Multinationals', in T. Donaldson and P. Werhane (eds), *Ethical Issues in Business: A Philosophical Approach*, (New Jersey, Prentice Hall, 1996), 99.

[29] See, eg, World Development Movement, 'A Law unto Themselves – Holding Multinationals to Account: Discussion Paper', September 1998, p.4.

The economic power of MNEs may therefore be abused to dissuade corruptible and/or vulnerable governments from establishing regulatory regimes to enforce human rights against corporations.[30] Where such a disparity of power exists, it seems unrealistic to depend exclusively on host States to hold MNEs accountable for human rights violations.

(c) Regulation by 'Home' States

It has been postulated above that it is unrealistic to require MNE regulation to emanate exclusively from host States. As it is generally recognised in international law that States can exercise extraterritorial jurisdiction over wrongs committed abroad by their own nationals,[31] perhaps greater regulation of MNEs should come from the home States of MNEs, their States of incorporation,[32] which are usually developed countries.[33]

For example, the developed home State is more likely to possess the requisite technical expertise to impose adequate safety standards, and to have a legal system able to cope with the proper attribution of responsibility within complex corporate arrangements.[34] Indeed, it is common for developed nations to demand greater standards of behaviour from MNEs within their jurisdictions than do developing nations.[35] It is not however common for home States to enforce such standards with regard to extraterritorial operations.

Nevertheless, home State regulation of their MNEs' extraterritorial activity does exist, as is evinced by the following recent examples.[36]

United Kingdom: Overcoming Forum non Conveniens

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30 See also 'Worldbeaters Inc.', *The Economist*, 18 January 1998.

31 Muchlinski, above, note 1, 124.

32 See *Barcelona Traction Light and Power Co Ltd Case* [1970] ICJ Rep. 3, paragraph 70.

33 See Eaton, above, note 9, at 274, n76, citing R. Fowler, 'International Environmental Standards for Transnational Corporations', (1995) 25 *Environmental Law* 1, 2, in stating that ninety per cent of the world's MNEs originate in developed nations.

34 See, eg, Eaton, above, note 9, 278, n88. However, complex jurisdictional issues do arise with regard to home State jurisdiction over foreign subsidiaries; States have very different rules regarding the existence of jurisdiction in such situations. These issues are beyond the scope of this paper. See generally, Muchlinski, above, note 1, 126-171.

35 Eaton, above, note 9, 274.

36 The following examples do not describe the entire regime for extraterritorial MNE regulation in the UK or the USA. They merely provide snapshots of how such regulation can occur.

Home States can impose accountability on their MNEs for their extraterritorial activities by permitting litigation against MNEs for alleged offshore human rights transgressions within their own jurisdictions. However, prospective plaintiffs in Anglo-American jurisdictions must get over the hurdle of *forum non conveniens*. Under this doctrine, a court has a discretion to decline to hear a case when there exists a foreign court more appropriately situated to hear the matter.[37] It is a doctrine which is used, and arguably abused, by parent companies to avoid liability in their home jurisdictions for alleged offshore transgressions. For example, the doctrine of *forum non conveniens* was used to deny relief to Indian plaintiffs in American courts against Union Carbide after the Bhopal disaster, despite ample evidence that Indian law did not provide an adequate remedy.[38]

In recent years, British courts have arguably applied the doctrine of *forum non conveniens* in a more lenient way so as to enable common law tort actions to be brought under UK jurisdiction against UK parent corporations for the actions of their subsidiaries. In *Lubbe and Ors v Cape plc*,[39] the plaintiffs, sufferers of asbestos-related illnesses, were permitted to proceed against a UK parent company for its alleged failure to issue appropriate instructions and advice to its South African subsidiary in respect of worker safety at asbestos plants. The *Lubbe* decision expands the opportunities for people to seek remedies for overseas wrongs by the subsidiaries of British MNEs in British courts. *Lubbe* may also increase the duty of parent corporations to control, and shrink their liberty to hide behind, their subsidiaries.[40] It may signal that British MNEs cannot adopt lower safety standards overseas than they would be expected to comply with in Britain.[41] If so, the decision will represent an important assault on the sanctity of the corporate veil.

In *Connelly v RTZ Corporation plc*,[42] the plaintiff brought an action against a UK parent company for its failure to adequately control working conditions at its Namibian subsidiary; these working conditions allegedly caused the plaintiff to

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37 See *Spiliada Maritime Corp v Cansulex Ltd* [1987] AC 460, and *Piper Oil v Reyno* 454 US 235 (1981). No equivalent doctrine exists in European civil law jurisdictions, Muchlinski, above, note 1, 144.

38 *In re Union Carbide Corp. Gas Plant Disaster (Bhopal Case)* 809 F. 2d 195; see also R. Kapur, 'From Human Tragedy to Human Rights: Multinational Corporate Accountability for Human Rights Violations', (1990) 10 *Boston College Third World Law Journal* 1, 3.

39 Unreported judgment of the Court of Appeal (UK), 30 July 1998.

40 The ramifications of this case are unconfirmed as the substantive elements of the case have not yet been decided.

41 Cape's own documents reveal that asbestos levels in its South African mines were much higher than would have been allowed in the UK; see 'South African Factory Staff sue British Firms', *The Independent*, 1 April 1997. See also *Ngcobo v Thor Chemicals*, unreported decision of the Court of Appeal of 9 October 1995, where the Court also refused to strike out the case for *forum non conveniens*. In *Thor*, the plaintiffs alleged that the UK parent corporation had knowingly exported unsafe work practices to South Africa, where the laws were less onerous. Thor eventually settled the case for £1.3 million, see *The Independent*, 12 April 1997.

42 [1997] 3 WLR 376

contract throat cancer. The majority in the House of Lords permitted the action to be brought in a UK court, as (i) the plaintiff was unable to obtain legal aid in the alternative forum, Namibia, and (ii) the technical and legal issues could not be adequately litigated in Namibia. The *Connelly* decision clearly expands the relevant issues regarding *forum non conveniens* beyond corporeal concerns such as site of alleged wrong to take into account more clearly the likelihood of justice being served in the relevant overseas jurisdiction. Lord Hoffman, in dissent in *Connelly*, issued a comment which may prove particularly prescient:[43]

> any multinational with its parent company in England will be liable to be sued here in respect of its activities anywhere in the world.

United States of America: The Alien Tort Claims Act

The potential for the imposition of human rights duties on MNEs by US courts is even greater than in the UK, as US courts have extensive statutory extraterritorial jurisdiction. For example, US courts have significant extraterritorial jurisdiction under the *Alien Torts Claims Act* 1789 ['ATCA'].[44] Under ATCA, US district courts can exercise extra-territorial jurisdiction with respect to claims by aliens of torts committed in violation of international law, including violations of customary human rights, such as freedoms from torture and slavery. Thus, ATCA grants rights to aliens to seek civil remedies for certain breaches of their human rights abroad. Furthermore, these remedies can be sought against foreign nationals, including foreign MNEs.

In *Doe v Unocal*,[45] the plaintiffs have launched a case under ATCA against two MNEs and their directors. Unocal, a Californian MNE, and Total SA, a French MNE, are partners in a joint venture with the military government of Burma [the State Law and Order Restoration Council, known as 'SLORC'] to build a pipeline through Burma into Thailand. The plaintiffs in *Doe* claim that the MNEs conspired with SLORC to forcibly relocate villages and enslave villagers to work on the pipeline. They also allege that the MNEs wilfully ignored evidence that SLORC tortured, raped, arbitrarily detained, and murdered villagers in their efforts to clear the area. US District Court Judge Richard Paez 'startled some members of the corporate community' by denying Unocal's motion to dismiss.[46] Earlier cases had established that ATCA liability for human rights abuses may accrue to public officials[47] and private individuals.[48] *Doe v Unocal* is the first US case to extend liability to private

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[43] Id, at 388.

[44] Other relevant statutes with extraterritorial scope include the *Foreign Corrupt Practices Act* 1976, which prohibits American companies from bribing foreign officials, and the *Torture Victim Protection Act* 1992.

[45] 963 F. Supp. 880; 1997 U.S. Dist. LEXIS 5094

[46] D. Benceviga, 'Suits Attempt to Extend Liability to Corporations', *The New York Law Journal*, 4 September 1997.

[47] *Filartiga v Peña-Irala* 630 F. 2d 876 (1980, US Court of Appeals, 2nd Cirt)

[48] *Kadic v Karadzic* 70 F, 3d 232 (2nd Cirt, 1995)

corporations for violations of international law, and not only for their own actions but for the actions of their partners and joint venturers, including foreign governments.[49]

The substantive issues of the case have not been decided yet. For example, it is uncertain how proximate the human rights abuses have to be to the MNE's activities before the MNE accrues legal responsibility under ATCA for those abuses. Similarly, it is unsettled how much information an MNE must have, or should have had, of human rights abuses before it is liable under ATCA. The case will also clarify which human rights abuses constitute 'torts' for the purpose of ATCA. Jurisdiction may be limited to only the most egregious violations, as only these are definitely protected by customary law.[50] Whilst the allegations in *Doe* may attract jurisdiction, 'lesser' rights violations may not be so actionable.

Conclusion on Home State Regulation

The level of de facto human rights accountability of MNEs certainly improves if home State regulation exists to complement or 'top up' host State regulation. However, international human rights law has not yet evolved so as to hold States responsible for the actions of their non-government citizens, including corporate citizens, abroad.[51] Home States are not currently liable in international human rights law for the delinquencies of their MNEs. Unfortunately, in the absence of such a legal obligation, home States have been reluctant to regulate the extraterritorial activities of their MNEs; they perceive that such regulation puts their corporations at a competitive disadvantage with other countries' corporations.[52]

(d) Direct International Regulation of MNEs

Direct international regulations target MNEs themselves, rather than working through the conduit of the State. So far however, the only existing direct regulation of MNEs consists of 'soft law' non-binding guidelines.[53]

The United Nations Commission on Transnational Corporations, from the 1970s until the early 90s, formulated a number of Draft Codes of Conduct for MNEs, which spelt

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[49] W. Aceves, 'Note: Doe v Unocal', (1998) 92 *American Journal of International Law* 309, 312-313.

[50] Benceviga, above, note 46.

[51] Johns, above, note 2, 895-896.

[52] See Cassel, above, note 2, 1975; Eaton, above, note 9, 276; P. Spiro, 'New Players on the International Scene', (1997) 2 *Hofstra Law and Policy Symposium* 19, 30.

[53] Johns, above, note 2, 898.

out guidelines for ethical MNE behaviour.[54] For example, draft provisions required MNEs to respect fundamental human rights, and to refrain from interfering in a State's political affairs. These provisions however were meant as signposts for appropriate behaviour rather than as binding international laws. The last draft Code appeared in 1990 and was last discussed by the UN General Assembly in 1992. In 1992, the Code was abandoned due to its apparent ambitiousness, and irreconcilable North/South differences.[55]

In contrast to the UN's failed efforts, the Organisation of Economic Cooperation and Development ['OECD'] and the International Labour Organisation ['ILO'] have both produced non-binding Codes for MNE behaviour.

The OECD Guidelines for Multinational Enterprises (1976)[56] are recommendations governing the operations of MNEs within all 29 OECD nations, and three non-members (Argentina, Brazil, and Chile). They are designed to strike a balance between national interests and those of foreign direct investors, in order to promote trust and predictability in the relationship between business, labour, and governments.[57] The Guidelines address a wide range of MNE activities. Most of these activities are essentially commercial (eg. competition, taxation and financing provisions)[58] though some of the provisions do relate to human welfare, especially those provisions regarding employment and industrial relations, and environmental protection.

Follow-up mechanisms have been established to facilitate the implementation of the Guidelines. National Contact Points serve to promote the Guidelines nationally, gather information on the municipal implementation of Guidelines, handle inquiries, and facilitate discussions between interested parties (eg representatives of labour and business) over implementation of the Guidelines. The Committee on International Investment and Multinational Enterprises ['CIME'] is a supranational body, which promotes uniform understanding of the Guidelines by supplying clarifications of the meaning of the provisions therein. CIME interpretations are generally worded, without reference to specific MNEs. The National Contact Points and CIME are assisted in their work by two advisory committees, which represent business and labour interests respectively.

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54 See, 'Draft United Nations Code of Conduct on Transnational Corporations', Annex to UN doc E/1990/94, for the latest Draft Code [hereafter 'UN Draft Code'].

55 J. Braithwaite, 'Regulation of Transnational Corporations: Towards a Code of Conduct for Australian Businesses Operating Offshore', Discussion Paper for the ICJ (Victorian Branch), January 1997, 21.

56 Reprinted in 15 *International Legal Materials* 967 (1976) [hereafter, 'OECD Guidelines'].

57 J. Karl (OECD), 'The OECD Guidelines for Multinational Enterprises' (unpublished paper for 'The Importance of Human Rights in International Business', University of Exeter, September 1998). See generally on the Guidelines, Muchlinski, above, note 1, 578-592.

58 Policies with regard to these matters can have a large impact on human rights. However, the human rights implications of these matters are not expressly addressed in the OECD Guidelines.

As a weapon against MNE human rights abuse, the OECD Guidelines suffer from a number of deficiencies. Its norms are fairly general, and therefore of limited assistance in resolving actual disputes. Furthermore, they only address MNE activities in 32 of the richest States. They do not address MNE activity in poor countries, the arena where regulation is most needed. Other deficiencies are shared by the ILO Declaration, and are discussed below.

The ILO Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy (1977)[59] contains reasonably detailed guidelines for MNEs in the field of labour relations. It contains recommendations for MNEs in the fields of employment (promotion, equality of opportunity and treatment, security of employment, training), conditions of work (wages, benefits, work conditions, safety and health considerations), and industrial relations (freedom of association and the right to organise, collective bargaining and consultation).[60] The ILO Declaration also recommends to MNEs that all of their workers have the opportunity to submit grievances without fear of reprisal.

In 1980, the Committee on Multinational Enterprises ['CoME'] was established to monitor implementation of the Declaration. CoME conducts three functions. It receives State reports on the Declaration's implementation, it conducts periodic studies on labour issues involving MNEs, and it interprets the Declaration through a disputes procedure.[61] However, the latter procedure is not judicial. CoME may only make findings of fact, rather than resolve the dispute with regard to facts and law.[62] The institutional follow-up to the Declaration does not provide for the public shaming of MNEs.

The OECD Guidelines and the ILO Declaration cannot be relied upon as principal sources of human rights accountability for MNEs. Most obviously, they are non-binding. Even their status as a soft-law vehicle for condemnation of MNEs is not utilised, as no provision is made under either instrument for the specific criticism of rogue MNEs. Secondly, they are out of date. The OECD Guidelines have been revised only three times, while the ILO Declaration never has. A general overhaul of both Codes would more clearly address post-70s concerns. Furthermore, both instruments envisage the primacy of national law, which is problematic where the national law is deficient.[63] With regard to the ILO Declaration, this problem is tempered by the fact that some, though not all, recommendations are aimed jointly or specifically at governments.

On the other hand, it seems likely that the human rights community has not utilised either code to its full extent; this may be due to a lack of publicity about the codes

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59 Reprinted in 17 *International Legal Materials* 422 (1978) [hereafter, 'ILO Declaration'].

60 See Muchlinski, above, note 1, 460-490.

61 Id, 458.

62 Id, 459.

63 Id, 460.

outside the business and trade union communities. The two codes could for example be used more in litigation as aids for interpreting statutes. Furthermore, the OECD and ILO codes provide good foundations for the future creation of international law in this area.

(e) Proposals for Reform to enhance MNE Accountability

In light of the above analysis in sections (b) to (d), it is submitted that current accountability mechanisms for MNEs are flawed. Further reform is needed to complete the framework of MNE accountability in international human rights law.

In this section, two reform options are canvassed. Firstly, the doctrine of horizontal application of rights could be extended to target MNEs via their home States rather than only host States. Secondly, a new regime could be created to impose binding international human rights obligations directly on MNEs. The relative merits of the two reform proposals are then discussed, followed by commentary on two topics relevant to both proposals, the questions of continued host State liability and the political will for reform.

Reform Option 1: Extension of Horizontal Application Doctrine to Home States

One reform option to strengthen the current framework of MNE accountability is to extend the horizontal effects of existing human rights treaties so as to hold home States liable for the offshore activities of their MNEs which detrimentally affect human rights. Such a reform would probably require the amendment of existing human rights treaties, or even the creation of a new treaty.

Under a system of 'home State liability', home States would be required to enact and enforce legislation to impose human rights duties on their MNEs with regard to their overseas activities.[64] A home State's failure to fulfil such a responsibility would amount to a breach of its international human rights obligations.

The international imposition of home State liability in respect of their MNEs' activities is not unprecedented. The OECD Bribery Convention of 1997 obliges States parties to exercise jurisdiction in respect of bribery offences committed abroad by their nationals.[65] The Bribery Convention is a significant precedent as it prescribes compulsory home State jurisdiction over particularly complex offences. Furthermore, bribery-related offences inherently involve foreign government officials, so home State liability is being imposed in a politically sensitive area. The Bribery Convention could represent the start of a drive towards greater obligatory home state control of MNEs.

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[64] It is beyond the scope of this article, and possibly premature, to discuss the ideal modalities of such legislation, such as types of remedies and rules of standing.

[65] See Convention on Combating Bribery of Foreign Public Officials in International Business Transactions [OECD Bribery Convention], 17 December 1997 (text available at http://www.oecd.org), articles 2 and 4. The OECD Bribery Convention entered into force on 15 February 1999.

The imposition of home State liability would probably prompt most home States to adopt legislation to absolve themselves of such liability. The fear of competitive disadvantage disappears if uniform international levels are prescribed as a matter of obligation. Of course, some home States might prove as corruptible or as vulnerable as host States, and therefore might fail to fulfil the proposed new responsibilities. Nevertheless, imposition of home State liability would significantly increase the level of actual MNE accountability for human rights abuse.

Reform Proposal 2: Direct Binding International Regulation

An alternative reform proposal is for international legal mechanisms to be devised which bypass the State and hold MNEs directly and legally responsible for their human rights abuses.

The World Development Movement [WDM] has put forward a proposal whereby States, home and host, could ratify a treaty giving power to an international tribunal to regulate MNEs with respect to human rights. The conferral of jurisdiction on the basis of nationality (home State) and/or territory (host States), coupled with a minimum ratification requirement, would help ensure the uniform regulation of most MNEs. The WDM proposal mirrors closely the model agreed recently for the formation of an International Criminal Court, which will have direct jurisdiction over individuals,[66] though an MNE tribunal would probably have civil rather than criminal jurisdiction.[67]

Other models are of course available.[68] For example, MNEs could be answerable before existing bodies, such as the United Nations Commission on Human Rights or the Sub-Commission on Prevention of Discrimination and Protection of Minorities, who could have power to issue public condemnations of delinquent MNEs.[69] The 'public condemnation' model is currently the primary method of enforcing human rights against existing duty-bearers, States. Such 'public shaming' could have a greater effect on MNEs than it presently does on States, as the former are market actors dependent on product demand and product attractiveness.

Relative Merits of the two Reform Proposals

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[66] See Rome Statute of the International Criminal Court, adopted 17 July 1998, UN doc. A/CONF.183/C.1/L.76, Article 12.

[67] The type of jurisdiction might vary according to the human rights abuse at issue.

[68] It is beyond the scope of this paper to discuss the relative merits of the numerous potential models for international direct regulation of MNEs.

[69] Indeed, the UN Sub-Commission has instigated a study into the relationship between human rights and MNEs; see UN Sub-Commission Resolution 1997/11

The first reform proposal regarding home State liability is more feasible, at least in the short term, as it requires only an extension of the current human rights legal regime, rather than the creation of an entirely new system. The ultimate depository of responsibility in international law remains the State, which limits the number of international 'defendants' to manageable numbers. The proposal also utilises existing machinery, ie. the domestic legal machinery of home States, to perform the complex task of attributing human rights responsibility to MNEs.

On the other hand, direct regulation of MNEs has a number of advantages. Direct regulation of MNEs would provide for more uniform interpretation of human rights duties for MNEs.[70] International regulatory bodies would also presumably be more or appear more sensitive to legitimate cultural and economic differences, and therefore may be more palatable to developing nations. Direct regulation would also pose a greater threat to MNEs with weak or corrupt home States. Finally, direct international regulation of MNEs would constitute a welcome paradigmatic shift away from the state-centric focus of international law. The nation state has lost the monopoly on global power which justified that exclusive focus.[71] Indeed, MNEs are some of the major usurpers of that power. International law, including international human rights law, must change to accommodate the reality of non-State agenda-setters, or it may lose its relevance in the true conduct of international affairs.[72]

This author comes to no firm conclusion as to which model is preferable. Both models would significantly boost MNE human rights accountability. Indeed, it may be that a combination of reform measures is the optimum long-term solution.

Continued Host State Responsibilities

The imposition of human rights duties on MNEs, either directly or via home States, must not be used as an excuse to absolve host States of their current human rights duties. Host State liability should continue to exist along side any new regimes introducing home state or direct MNE liability. Delinquent host States could still be legitimately exposed to censure for any failure to control MNEs within jurisdiction. Indeed, regulation within host States would probably increase if the competitive advantage entailed in the maintenance of inadequate regulatory regimes disappeared via the introduction of either proposed reform. Finally, mechanisms should be devised to prevent victims seeking multiple remedies in different forums against MNEs.

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70 Donaldson, above, note 28, 97.

71 See, eg, P. Alston, 'The Myopia of the Handmaidens: International Lawyers and Globalisation', (1997) 8 *European Journal of International Law* 435; Spiro, above, note 52; Grossman and Bradlow, above, note 2, especially at 6-10 and 22-25.

72 Alston, above, note 71, 440-448.

Political Will for Reform

One might easily question the existence of political will within the international community to introduce reforms which increase MNE human rights accountability. Indeed, this author does not underestimate the magnitude of political obstacles to reform.[73]

Nevertheless, there are good reasons besides moral ones for MNEs to behave ethically, and to want others to behave ethically. Ethical business practices raise staff morale, contribute to staff stability and efficiency, and lessen worker and consumer rebellion. Indeed, corporations like Bodyshop have shown that ethical business can be very profitable.[74] However, worries persist that unethical trading and investment may give delinquent corporations a market advantage over ethical corporations.[75] MNEs that want to behave ethically may welcome the introduction of international regulation which provides for a firm level playing field.

Furthermore, uniform ethical trading should help to improve economic and civil conditions in certain countries. Economic prosperity would increase the world-wide demand for commodities.[76] Civil stability makes for a more predictable and safe trade and investment environment for all MNEs.[77] However, these benefits of ethical trading may not eventuate unless all players engage in ethical trading. Again, international regulation could ensure that all players play by the rules.

3. Substantive Human Rights Duties for MNEs

Assuming that MNEs can be held accountable for breaching human rights, one must then inquire into the issue of the characterisation of human rights duties for MNEs. That is, what human rights duties should be compulsorily imposed on MNEs by international law, either directly or indirectly via the State, home or host? Such duties would constitute a minimum level of obligation for MNEs. Higher obligations could

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[73] Note, in this regard, that the Lord Chancellor's reaction to the *Connelly* decision has been to suggest legislation to reverse its effects. Lord Laing has suggested that *Connelly* paves the way for litigation which has no connection with the UK. See F. Gibb, 'How Britain can stop Exploitation Overseas', *The Times*, 10 November 1998, p. 39.

[74] M. Davies, 'Just (Don't) Do It: Ethics and International Trade', (1997) 21 *Melbourne University Law Review* 601, 619.

[75] See above, text at note 52; S. Skogly (University of Lancaster), 'Economic and Social Human Rights, Private Actors, and International Obligations' (unpublished paper for 'The Importance of Human Rights in International Business', University of Exeter, September 1998), pp. 8, 13.

[76] R. Mayne (Oxfam), 'Regulation MNEs: The Role of Voluntary and Governmental Approaches' (unpublished paper for 'The Importance of Human Rights in International Business', University of Exeter, September 1998), p.3

[77] Grossman and Bradlow, above, note 2, 20; J. Spero, 'Human Rights and our International Economic Interests' (1994) 88 *ASIL Proceedings* 274, 277; Orentlicher and Gelatt, above, note 16, 97; Skogly, above, note 75, 13.

be imposed by individual States, coerced by NGO pressure, or implemented voluntarily by MNEs themselves.

In order to identify the appropriate substantive human rights duties of MNEs, two broad issues must be addressed. Firstly, in what situations should MNEs be held personally and legally liable for human rights abuse? This issue concerns the necessary level of proximity an MNE must have to the relevant human rights abuse. Proximity may range from when an MNE commits human rights abuses itself as part of company policy, to when the MNE commits no human rights abuses itself, but is monetarily supporting oppressive regimes by virtue of its foreign direct investment.[78] The second issue concerns the actual human rights norms which an MNE should be required to respect or protect. These two issues are addressed in sections 3(a) and (b) respectively.

(a) In What Situations Should MNEs be held Personally Liable for Human Rights Abuse?

Liability for Engagement with Abusive Governments

Much of the criticism of MNE activity has related to their engagement with repressive regimes, such as those in the People's Republic of China or Burma. It is arguable that MNE investment occasionally helps to stabilise such regimes by granting them access to the financial rewards of foreign investment. This stabilisation may in turn increase the rogue State's ability to resist human rights pressure.[79] In such cases, is it appropriate to require MNEs not to invest in such States?

This raises the issue of whether economic sanctions are an appropriate way of redressing human rights abuse by a State. Many argue that 'constructive engagement' with such States is preferable to enforced isolation, as the rogue State receives greater exposure to external 'good' influences like human rights values.[80] Furthermore, a complete boycott of rogue nations could effectively abandon the oppressed, leaving them to contend with the whims of the government or unscrupulous local traders.[81] On the other hand, some regimes are such chronic abusers of human rights that it may seem intuitively unconscionable for MNEs to help prop up such governments with investment capital.

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78 See B. Frey, 'The Legal and Ethical Responsibilities of Transnational Corporations in the Protection of International Human Rights' (1997) 6 *Minnesota Journal of Global Trade* 153, 180-187; Cassel, above, note 2, 1980-1984.

79 Orentlicher and Gelatt, above, note 16, 102.

80 See id, 98-99, on the arguments in favour of constructive engagement, and 99-102 for counter-arguments.

81 Davies, above, note 74, 619.

Nevertheless, no general duty should be imposed on MNEs to refrain from investing in 'bad' States. MNEs should not be required to guess the States that are so bad as to warrant complete disengagement. Therefore, any MNE duties regarding 'engagement with governments' per se should derive from home State laws specifically barring trade and investment with named States, or from compulsory international economic sanctions against certain States.[82] Otherwise, MNEs should only be liable in international law for abuses that they perpetrate themselves.

Vicarious Liability

An MNE should be liable for abuses perpetrated by employees on their behalf, such as brutality perpetrated by security guards. An MNE may be able to avoid liability where an employee has acted totally without authority, where his/her behaviour was not reasonably foreseeable.

More difficult is the situation where the human rights abuses are committed by an MNE's business partners, joint venturers, sub-contractors, or suppliers. Many of the abuses cited in anti-MNE campaigns, such as the payment of below-subsistence wages and provision of appalling working conditions, have actually been perpetrated by an MNE's business partner;[83] the MNE does not have direct control over the impugned practices.[84] However, it is perhaps disingenuous for MNEs to argue that they have no control over their overseas business partners. Just as MNEs may choose business arrangements that limit their control, they may use their bargaining power to choose to implement contractual structures which maximise their control, and limit their business partners' 'freedom' to breach human rights.[85] Thus, an MNE should be vicariously liable for human rights abuses perpetrated by all subsidiaries and business partners, including joint venturers, sub-contractors and suppliers. Vicarious MNE liability could be avoided if an MNE acted with due care and foresight.

Human Rights abuses 'compelled' by States

A further problem arises in holding MNEs automatically liable for human rights abuses that they themselves perpetrate. MNEs may occasionally be 'required' by a host State's law to violate human rights. For example, suppose that a company operates in a State where women are forbidden to work.[86] Should the company accrue international liability or home State liability for failing to employ women, when this failure is coerced by the State's law? Is it fair to hold the company

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82 The Draft UN Code contains such a provision in paragraph 15, specifically calling on MNEs to refrain from activities which supported or sustained the (former) minority racist regime in South Africa.

83 Davies, above, note 74, at 614, notes that the allegations against sports shoe manufacturers such as Nike have generally concerned their business partners' labour practices.

84 Id, 615.

85 Id, 615-620.

86 Sex discrimination in the area of employment is contrary to both Covenants; see ICCPR article 26, ICESCR article 2(2); see also CEDAW and ILO Declaration, paragraphs 21-23.

responsible, even if jointly responsible, for a host State's laws? Perhaps responsibility should not vest in an MNE where the impugned activity is compelled by domestic law. Perhaps MNEs should be entitled to a 'local law' defence.[87]

On the other hand, one could argue that some MNEs are so powerful that they could force many States to exempt them from 'compulsory oppression', such as the example sexually discriminatory law. Indeed, enforcement against MNEs adds another prong of human rights enforcement against delinquent States; international law would be supplemented by the informal but highly persuasive exhortations of MNEs. The host States, in exempting MNEs from oppressive rules, could open the floodgates to broader domestic reform, resulting in welcome net gains for the domestic enjoyment of human rights.

In this regard, one could note the successful implementation by US businesses of 'the Sullivan Principles'. These Principles codified certain conditions for governmental export assistance for US companies operating in South Africa during the apartheid years. The Principles called for non-discrimination in the workplace despite local pressure to segregate the workforce, as well as community investment to increase opportunities for oppressed racial groups.[88] Though the Principles did not of themselves lead to the dismantling of apartheid,[89] their conscientious implementation demonstrated that MNEs could put human rights into practice despite contrary host State policies.[90]

Availability of a 'local law' defence could prompt MNEs to lobby governments to pass delinquent legislation, or prompt governments to pass oppressive laws to attract MNE investment. In the example given, such 'conspiracy' is unlikely, as MNEs would rarely benefit from refraining from hiring women. A more pertinent law in this regard would be a law that prohibited the formation of trade unions. Perhaps a compromise position should be advocated: MNEs are entitled to a 'local law' defence *so long as the MNE accrues no economic benefit from the law in question*. This compromise clearly targets the potential for MNE abuse of power, which is after all the main reason for advocating reform.

If MNEs were not powerful enough to force exemptions from delinquent laws, imposition of duties to disobey such laws would effectively force them not to invest in the relevant host State. Certain States would thus be deprived of foreign investment capital. Therefore, imposition of duties on MNEs to disobey host State laws would amount to the imposition of indirect economic sanctions on the relevant State on the basis of certain human rights laws. The use of such economic sanctions to enforce human rights against States would be a very strong enforcement measure.

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87 Such a defence would parallel the 'foreign sovereign compulsion' exemption applied by the US Department of Justice in respect of US antitrust legislation, Muchlinski, above, note 1, 132.

88 Frey, above, note 78, 175.

89 Ibid.

90 The McBride Principles were a similar initiative adopted by US companies to combat the legacy of religious discrimination in Northern Ireland, see id, 175-176.

Furthermore, they would be imposed comprehensively and in an apolitical consistent manner.[91] Nevertheless, it must be again conceded that the use of economic sanctions to enforce human rights, especially in a world where there is no essential agreement over the universality of certain human rights, [92] is a highly controversial notion.[93] It is an important point which would have to be addressed in formulating any new regimes for MNE accountability.

Finally, it is important to note the limits of any 'local law' defence. It would not operate where the relevant area of law is unregulated, or where an MNE would not breach the law by applying higher standards. For example, suppose a State has no workplace safety regulations. The 'local law' defence would not exempt an MNE from incorporating workplace safety regulations to safeguard the civil right to life or humane and non-degrading treatment. Incorporation of such regulations would not contravene the host State's law.

Bearing the above problems in mind, suggestions regarding the appropriate substantive human rights duties of MNEs are contained in the following section.

(b) What Human Rights Norms should MNEs be Required to Respect?

In identifying the substantive human rights duties of MNEs, regard will naturally be taken of the existing documents which outline MNE duties, namely the OECD Guidelines, the ILO Declaration, and the latest UN Draft Code. However, of these documents, only the ILO Declaration goes into adequate detail in describing MNE duties, and only in the discreet area of labour rights. Therefore, regard will also be had to the norms in the two International Human Rights Covenants, the International Covenant on Civil and Political Rights ['ICCPR'] and the International Covenant on Economic Social and Cultural Rights ['ICESCR']. These two Covenants provide the most definitive and authoritative interpretation of human rights obligations at the universal level.[94] Most States in the world have ratified both Covenants; this exhibits a high degree of acceptance of, and existing obligation under, them. Indeed, as these obligations also entail horizontal obligations to control non-governmental entities, MNEs should already have duties with regard to these rights in most States.

The following commentary is necessarily selective in its discussion of the human rights norms which should be respected by MNEs. Space precludes consideration of

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91 S. Livingstone, 'Economic Strategies for the Enforcement of Human Rights', A. Hegarty and S. Leonard**,** *A Human Rights Agenda for the Twenty-First Century'* (Cavendish, to be published in 1999), cites 'partiality' as one of the major criticisms of the use of trade sanctions to combat human rights abuse.

92 See Davies, above, note 74, pp.605-607; note that under article 13 of the UN Draft Code, MNEs are required to 'respect the social and cultural objectives, values and traditions or the countries in which they operate'.

93 See, eg, Livingstone, above, note 91.

94 Frey, above, note 78, 160-161; European Parliament Resolution, above, note 17, paragraph F.12.

MNE substantive obligations with regard to all rights in the above-listed instruments. Therefore, special attention will be paid to those rights which MNEs are most often accused of breaching: labour rights, environmental rights, and rights to be free from bodily harm. Other rights will be considered briefly after a more detailed discussion of those listed rights.

Labour Rights

MNEs, as the employers of millions, have an obvious impact on the enjoyment of labour rights.

The 'core' labour rights are found in the seven most important ILO Conventions.[95] These core labour rights are freedom of association, the right to organise and bargain collectively, the prohibition of discrimination, the prohibition of forced labour, and the prohibition on child labour.[96] These core labour rights can also be grounded in norms in the international Covenants.[97] Finally, the ILO Declaration has established a soft-law precedent for the imposition of labour duties on MNEs.[98] Therefore, a feasible proposition is that MNEs be required to respect core labour rights in all States.

However, the imposition of duties on MNEs with respect to labour rights might create a *de facto* link between labour rights and a State's trading rights. In order to avoid liability, MNEs, who are the main purveyors of world trade, could disengage from States that do not support or implement proper labour standards. As the formal linkage of trading rights and labour rights has been blocked in international trade negotiations by developing nations,[99] the imposition of labour duties on MNEs would be contentious. Developing nations may claim that such duties would constitute backdoor protectionism.

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[95] E. Cappuyns, 'Linking Labor Standards and Trade Sanctions: An Analysis of their Current Relationship' (1998) 36 *Colombia Journal of Transnational Law* 659, 662; Johnson, above, note 16, 309.

[96] The 'core' labour rights are reaffirmed in the *ILO Declaration on Fundamental Principles and Rights at Work and its Follow-up*, adopted 18 June 1998, Article 2.

[97] See, eg, articles 8 (freedom from slavery and forced labour), 22 (freedom of association), 24 (children's rights), and 26 (freedom from discrimination), ICCPR; see also articles 2 (freedom from discrimination) and 8 (trade union rights) ICESCR.

[98] The OECD Guidelines also include provisions relating to 'employment and industrial relations' within OECD nations. Generally, MNEs should observe labour standards that are not less favourable than those observed by comparable employers in the host State. The OECD Guidelines do not however address deficiencies in host State law, see Muchlinski, above, note 1, 477.

[99] See generally, Cappuyns, note 95; also see Muchlinski, above, note 1, 461; Johnson, above, note 16, 312-318.

The imposition on MNEs of duties to respect labour rights should not deprive developing nations of any legitimate market advantage that they enjoy.[100] However, this author believes that human dignity is a factor that must be taken into account in assessing the legitimacy of a market advantage. For example, the permissibility within a State of forced labour and slavery,[101] or of degrading working conditions which threaten a worker's health,[102] are not legitimate market advantages.

Freedom of association, the rights to organise and engage in collective bargaining ['worker's organisation rights'] are essential prerequisites for the enjoyment of other labour rights. Without a strong labour constituency, employers, including MNEs, can too easily prescribe work conditions which breach their employees' human rights.[103] Therefore, a minimum recommendation is perhaps that MNEs respect these workers' organisation rights only, on the assumption that a properly functioning labour constituency will be able to negotiate adequate standards regarding other labour matters, such as working conditions and wages.[104]

Workers' organisation rights would be one of the key rights affected by a 'local law' defence. The laws of numerous States suppress trade unions. Nevertheless, trade union bans constitute an impermissible method of attracting foreign investment as they inevitably prompt worker exploitation; foreign investors should not therefore be at liberty to take advantage of such a regime.[105]

MNE duties in the areas of minimum wages and child labour would be unlikely to be affected by a 'local law' defence. States would rarely have 'maximum wage' laws or prescribe the compulsory employment of children. Nevertheless, the imposition of duties in these areas would be controversial. The following commentary addresses the feasibility of imposing duties on MNE with regard to these two issues.

The right to a decent wage is not a core labour right, but can be gleaned from the right in article 7 ICESCR to 'just and favourable conditions of work'. The imposition of 'decent wage' duties on MNEs could arguably undermine competitive market advantages of developing nations. It is however submitted that minimum wage duties could be imposed on MNEs in such a way as to confer long-term benefits on all relevant actors: MNEs, their employees, and developing States.

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[100] *ILO Declaration on Fundamental Principles and Rights at Work and its Follow-up*, adopted 18 June 1998, Article 5.

[101] Freedom from slavery can even be classified as a customary rights, see American Law Institute, *Restatement (Third) of Foreign Relations Law*, paragraph 702.

[102] See ILO Declaration, paragraph 37; see also text below at 136-137.

[103] K. Vossler Champion, 'Who Pays for Free Trade? The Dilemma of Free Trade and International Labour Standards' (1996) 22 *North Carolina Journal of International Law and Commerce* 181, 219.

[104] See European Parliament Resolution, above, note 17, 'Towards a European Monitoring Platform', point 2.

[105] The ILO Declaration addresses some of its 'freedom of association' duties to host States rather than MNEs, at paragraphs 44, 45 and 47.

Suppose MNEs were required to pay either 'a living wage',[106] or the national minimum wage, whichever is higher. Most MNEs could certainly 'afford' to comply with such a duty.[107] The payment of wages, which were substantially higher than the prescribed minimum wage in South Africa, by US businesses implementing the Sullivan Principles indicates that MNEs have considerable room to manoeuvre in this regard before the consequent competitive disadvantage becomes significant.[108] Indeed, under the proposed reforms, the only 'competition' to benefit would be local traders, as other MNEs would be bound to pay decent wages. This was not the case for US businesses in South Africa in the 1980s, who had to compete with non-US foreign businesses. Wages in the developing world would remain lower while the cost of living remained lower, so considerable competitive advantage would be retained by the developing world. As the duty would be imposed on all MNEs, it would affect foreign investment equally in all developing States.[109] The consequent improvement to the morale and health of the workers would bring long-term benefits to the MNE by, for example, improving productivity[110] and fostering workforce stability. Furthermore, the increase in disposable income would encourage the expansion of a State's internal market,[111]increasing the demand for MNE products. Finally, the benefits to impoverished nations of MNE investment per se should not be overstated. The expansion of a foreign-led export market within a State will not effectively counter poverty if that State's domestic market remains stagnant. 'It is the domestic market in which ultimate growth for a country's economy lies'.[112]

The imposition on MNEs of standards in relation to child labour, on the other hand, is more problematic. Child labour has been one of the major targets of consumer boycotts.[113] Numerous corporations have responded by excluding suppliers who use child labour. However, many families in the third world are currently dependent on some form of income from their children. The idea that their release from work will enable them to pursue their education is a false hope in many impoverished States.

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106 The ILO Declaration states that MNEs should pay 'the best possible wages, benefits and conditions of work, within the framework of government policies'; wages 'should be adequate enough to satisfy basic needs of the workers and their families', at paragraphs 33-34.

107 See Johnson, above, note 16, 330, on 'the tremendous profit margins' of MNEs.

108 Frey, above, note 78, 1982.

109 Johnson, above, note 16, 334, notes that host governments would not support such a market initiative unless there was 'the broadest implementation possible among States, and equitable treatment to all impacted by the implemented labour standards'.

110 Id, 328-329, and 335, n209.

111 Id, 336-337, citing R. Nurkse, 'Some International Aspects of the Problem of Economic Development, in R. Kanth (ed), *Paradigms in Economic Development* (1994), at 47-50.

112 Id, 337; also see 333, n198.

113 In June 1994, the International Confederation of Free Trade Unions [ICFTU] launched a campaign to abolish child labour; see 'Human Rights: Ethical Shopping', *The Economist*, 3 June 1995

The dismissal of children, which has resulted from the stands taken by some MNEs against child labour, has apparently caused the majority of these children to turn to more dangerous and exploitative sources of income such as prostitution.[114] Imposition of a strict duty on MNEs not to hire children could therefore have disastrous consequences for those children, and for the impoverished States in which they work.[115]

The difficulty entailed in calling for the immediate ban on child labour is reflected in the poor ratification rate of the ILO Convention 138.[116] This Convention is arguably too inflexible, and sets levels of compliance which are unrealistic.[117] The ILO itself seems to have acknowledged the difficulty in implementing a comprehensive ban on child labour. It has explicitly lowered its short-term expectations by focusing on the immediate elimination of 'intolerable' forms of child labour,[118] rather than all of the forms targeted in ILO Convention 138. Intolerable child labour includes employment of children in slave-like or dangerous conditions, the employment of very young children, and sexual exploitation.[119] Therefore, immediate duties on MNEs should perhaps only be imposed with regard to intolerable forms of child labour. Beyond the level of intolerable child abuse, duties imposed on MNEs in the area of child labour should be tailored and implemented according to the economic conditions of a host State.[120] For example, the retention of MNE rights to hire children could be balanced by a duty to contribute to the education of those children.[121]

Environmental Rights

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[114] 'Human Rights: Ethical Shopping', *The Economist*, 3 June 1995, reporting on the observations of Caroline Lequesne of Oxfam after visiting Bangladesh.

[115] See also A .E. Mayer. 'Law and Ethics in Emerging Markets: An Introduction', (1997) 18 *University of Pennsylvania Journal of International Economic Law* 1153, 1160.

[116] Convention concerning Minimum Age for Admission to Employment, 26 June 1973. As of November 1998, only 67 States had ratified this Convention, and relatively few of these States parties are from the developing world. However, it must be noted that almost a quarter of these ratifications (16) have occurred in the last two years, so it may be that the Convention is finally acquiring international acceptability.

[117] B. Creighton, 'Combating Child Labour: The Role of International Labour Standards', (1997) 18 *Comparative Labour Law* 362, 386-392.

[118] See Resolution Concerning the Elimination of Child Labour, adopted at the 84th Session of the International Labour Conference in 1996 (text available at www.ilo.org).

[119] Ibid.

[120] Creighton, above, note 117, 396.

[121] This is the approach voluntarily taken by Levi-Strauss in Bangladesh, Muchlinski, above, note 1, 468-469. See also European Parliament Resolution, above, note 17, on 'Codes of Conduct and Developing Countries'.

MNEs have been criticised harshly for their apparent willingness to exploit inadequate environmental regulation in underdeveloped States. What environmental duties might be imposed in international law on MNEs?

There are a number of non-binding international declarations of the human right to a healthy environment,[122] as well as relevant regional rights in the Americas and Africa.[123] However, in the absence of a binding universal standard, it would seem that the right to a healthy environment is a mere aspiration, rather than a legal obligation, outside those regional contexts.[124] It is therefore unlikely that pure environmental duties will be imposed on MNEs in the near future in universal international law.

On the other hand, environmental duties are explicitly imposed on MNEs in a number of soft-law documents. The OECD Guidelines, the UN Draft Code, and Agenda 21 of the United Nations Conference on Environment and Development[125] recommend the adoption by MNEs of environmentally healthy practices. These duties could potentially be upgraded to hard law norms. Duties with regard to the environment can also be gleaned from the International Bill of Rights. Egregious environmental damage can be characterised as breaches of the civil rights to life,[126] liberty and security of the person,[127] privacy,[128] and the right of minorities to enjoy their culture,[129] as well as the economic and social rights to food, an adequate standard of living, and health. Thus, some environmental duties can be gleaned from existing human rights standards, and could appropriately be imposed on MNEs, in order to lower the incidence of severe environmental damage.

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[122] See, eg, Report of the UN Conference on the Human Environment ['The Stockholm Declaration'], UN doc A/CONF.48/14/Rev. 1 (1972), Principle 1; Adoption of Agreements on Environment and Development ['The Rio Declaration'], UN Doc A/CONF.151/5/Rev. 1 (1992), Principle 1.

[123] Additional Protocol to the American Convention on Human Rights ['Protocol of San Salvador 1988], Article 11(1); African Charter on Human and People's Rights 1981, Article 24.

[124] Eaton, above, note 9, 299.

[125] See, on Agenda 21, id, 274-276.

[126] See, eg, *EHP v the Netherlands* (Communication on 67/1980, reported in *Selected Decisions of the Human Rights Committee*, Volume 2, p. 20), where the Human Rights Committee agreed that the dumping of toxic waste raised 'serious issues' with regard to the right to life; the communication was inadmissible for failure to exhaust domestic remedies.

[127] See Case 715 (Brazil), in (1985) *Inter-American Yearbook on Human Rights* 264, at 279, cited in R. Desgagné, 'Integrating Environmental Values into the European Convention on Human Rights', (1995) 89 *American Journal of International Law* 263, at 266.

[128] *Lopez Ostra v Spain* series A, 303C; *Bessert v France* (HRC Communication no. 549/1993), reported in (1998) 5 *International Human Rights Reports* 703.

[129] See *Ominayak v Canada* (Communication no 167/1984), reported in (1990) *Human Rights Law Journal* 305.

The imposition of environmental standards on MNEs could lead to the *de facto* linkage of trade and the environment. This linkage however might not prove as controversial as a linkage of labour rights and trade. States are more ready perhaps to accept the argument that 'upward harmonisation of environmental standards' might be to their advantage.[130] Environmental degradation reduces the prospects for the long-term prosperity of a nation and indeed the global economy. Imposition of environmental duties on MNEs would target some of the worst polluters, as well as persons capable of paying for necessary environmental safeguards.

Finally, it is worth noting that the extractive industries, such as the oil or mining industries, probably cause the worst MNE-related environmental problems. Uniform imposition of minimum environmental duties on extractive industries is unlikely to drive relevant MNEs out of developing nations. These industries are by their nature tied to certain locations. A State either has the desired resource or it does not. Thus, new uniform international environmental laws for MNEs in the extractive industries are unlikely to drive capital away from poor States. The proposed regime would reduce competitive advantages unfairly enjoyed by the most corruptible governments in attracting MNE investment.[131]

Freedom from Bodily Harm

MNEs have been implicated in particularly egregious human rights abuses, such as the tortures and killings of human beings. Such allegations have been raised in *Doe v Unocal*. BP has recently been accused of hiring and arming security guards to defend their Columbian oil installations, resulting in the foreseeable torture and killing of anti-BP dissidents.[132] Shell was accused of hiring a 'hit squad' which killed Ogoni protesters against Shell's Nigerian operations.[133] Freedom from torture and arbitrary execution are not only protected by the ICCPR;[134] they are customary human rights.[135] MNEs must be legally required to refrain from deliberate breaches of such human rights.

Furthermore, MNEs should also be liable for instances of bodily harm that they recklessly or negligently cause by, for example, failing to implement reasonable

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130 P. Watson, 'The Framework for the new Trade Agenda', (1994) 25 *Law and Policy International Business* 1237, 1257, cited by Johnson, above, note 16, 315, n113. See also Grossman and Bradlow, above, note 2, 14-16.

131 See Eaton, above, note 9, 291, detailing how corruption severely undermined the effectiveness of Nigerian environmental laws with regard to Shell's operation in the Ogoniland.

132 See above, note 12.

133 Cassel, above, note 2**,** 1965-1966.

134 See, respectively, articles 7 and 6 ICCPR.

135 See American law Institute, above, note 101, paragraph 702.

safety standards, or selling dangerous products without warning to consumers.[136] Every human being is entitled to have his/her bodily integrity respected and protected, rather than cynically endangered by, for example, the withholding of vital information about the dangers of a toxic product, or the desire to save money by not providing adequate safety equipment.[137]

The above analysis has focussed on those rights which MNEs are most accused of abusing. Labour rights duties would protect an MNE's workers. Environmental rights duties would protect the outside world. Duties regarding freedom from bodily harm are, to an extent, subsumed by labour duties (eg. duty to provide safe working conditions) and environmental duties (eg. duties to contain hazardous emissions), though they do extend beyond the bounds of those two categories (eg. consumer protection duties). These rights are arguably already adequately protected, at least intra-territorially, in developed States.[138] The superiority of regulatory regimes in developed States is unsurprising and has already been noted above; the power differential between MNEs and developed States is less severe than that between MNEs and developing States. Indeed, the double standards employed by MNEs with regard to their operations in developed and developing States have inspired much of the criticism of their human rights impact.

Whilst international concern has focused on environmental rights, labour rights, and rights to be free from bodily harm, MNEs activity can also impact badly on the enjoyment of other rights. However, it is difficult to foresee the imposition of comprehensive international duties on MNEs with regard to other rights, particularly the outstanding rights in the two Covenants. This issue is addressed in the next section.

Other Rights: Liberal Dilemmas

Much of modern international human rights law is influenced by Western liberal theory.[139] This is evinced by the exclusive imposition of duties on States and the emphasis on the individual as the beneficiary of those duties. Imposition of human rights duties on non-governmental entities poses a fundamental liberal dilemma, as

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136 The prohibitions of torture, inhuman and degrading treatment in article 7 ICCPR and CAT, and the protection for the security of the person in article 9 ICCPR, combine to prohibit the deliberate, reckless and negligent infliction of bodily harm.

137 The ILO Declaration exhorts MNEs to adopt uniform 'best' safety practices throughout their operations, paragraph 40. The UN Draft Code calls for MNEs to adopt adequate consumer protection standards at paragraphs 37-40.

138 This is of course a generalisation. Relevant laws in developing States are not necessarily inadequate. Furthermore, developed States do not necessarily protect these rights, see, eg, note 144 below. Indeed, environmental and labour activists may feel that, whilst protection for labour and environmental rights is *better* in developed States, this protection is still inadequate.

139 H. Steiner and P. Alston, *International Human Rights in Context* (Oxford, Clarendon Press, 1996), 187 and material at 166-187; A. Robertson and J. Merrills, *Human Rights in the World* (Manchester, Manchester University Press, 2nd ed, 1994), 3.

the imposition of duties limits the liberties of those non-governmental entities. These theoretical considerations do not arise in attributing human rights duties to governments.

Delineation of MNE human rights duties is therefore problematic in liberal theory, as such delineation requires a careful balance between the commercial and even human rights of the MNE, and the rights of others. In certain cases, the balance would seem to intuitively fall against preservation of MNE rights. For example, an individual's freedom from bodily harm instinctively outweighs a corporation's right to trade at ultra-competitive levels. However, numerous 'hard cases' exist, where an MNE engages in actions which seem detrimental to human rights, but civil libertarians might balk at regulating the action in question.

Many of these 'hard cases' occur within developed nations. In these relatively affluent environments, MNE exercises of power seem less intuitively exploitative and abusive. Nevertheless, MNEs can have a serious impact on human rights enjoyment within the developed world.

For example, this author finds many of the private sector intrusions into employee privacy permitted under the law of developed States to be abusive. For example, the American Management Association reports that two thirds of its members regularly conduct electronic surveillance of their employees.[140] Nevertheless, US courts have tended to uphold the private employer's right to monitor employee activities,[141] upholding the employer's rights to ensure business efficiency over the countervailing privacy rights.[142] In contrast, the US Constitution protects employees from arbitrary invasions of their privacy by government employers.[143] It is unlikely that international law will evolve in the short term to protect employee privacy in the private sector when such protection is lacking in some of the most rights-conscious and sophisticated domestic jurisdictions.

Perhaps issues such as employee privacy can be adequately addressed if workers' organisation rights are properly respected.[144] However, MNEs can also exercise a pervasive influence over the enjoyment of 'other rights' by non-employees.

For example, Chrysler Corporation, between 1993 and 1997, demanded notification of controversial stories from magazines in return for its advertising revenue.[145]

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[140] S. Elizabeth Wilborn, 'Revisiting the Public/Private Distinction: Employee Monitoring in the Workplace' (1998) 32 *Georgia Law Review* 825, 825-826.

[141] Id, 827-828.

[142] Id, 836-837.

[143] Id, 839.

[144] Wilborn details the weakness of union power in the USA at id, 865

[145] This policy resulted in the cancellation of at least one 'controversial' story on homosexuality; see Dave Phillips, *Detroit News*, 'Chrysler drops magazine censorship policy', 14 October 1997, reproduced at http://www.detnews.com/1997/autos (accessed October 1998).

Chrysler therefore gained a form of editorial control over the contents of a substantial part of the US media. Chrysler's policy is symptomatic of the enormous power wielded by corporate advertisers over freedom of expression.[146] Unrestrained corporate censorship could lead to the oversanitisation of art and journalism. However, it is difficult to term Chrysler's actions a *violation* of the right to freedom of expression. One can easily imagine libertarian arguments in support of Chrysler's right to advertise where and when it chooses. Such arguments would not be applied to uphold a State's equivalent commercial rights at the expense of freedom of expression. Liberal theory would certainly hold that corporations are entitled to more room than governments to pursue their perceived self-interests.

Therefore, MNEs would likely be able to defeat some charges of human rights abuse by pleading that the upholding of the charge would unduly limit their own freedom to pursue their perceived self-interest. This is not a defence currently available to State duty-bearers in international human rights law.[147] Human rights claims against MNEs are likely to be subject to broader limitations than are current human rights claims against States.

The 'liberal dilemma' indicates that international human rights law, imbued with a libertarian ethic, is not well equipped to combat many of the excesses of private power. Given these shortcomings, it appears that international human rights law cannot adequately counter the threat posed by MNEs to the proper functioning of democracy. Of course, MNEs must not deliberately undermine the democratic rights of peoples[148] by engineering the overthrow of 'anti-business' governments as occurred in the Chile in the 1972 coup, or by illegitimately influencing governments by practices such as bribery. The UN Draft Code anticipates such duties, [149] while anti-corruption obligations are placed indirectly on MNEs via their home States under the OECD Bribery Convention. There is however perhaps a fine line between corrupt practices and the vigorous exercise of raw lobbying power. However, the present configuration of international human rights law, even allowing for the implementation of either reform proposal, cannot be expected to redress the fact that MNEs have more influence over governments than the average person by virtue of their inherent clout.

It is to be expected that any future international regulatory regime for MNEs would not be able to adequately redress all apparent instances of abuses of power by MNEs, at least in the short term. It is likely that the 'first wave' of any reforms would focus on combating the most blatant double standards employed by MNEs in their dealings

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146 Freedom of expression is protected by article 19 ICCPR. See also R. Abel, 'Speech and Respect' (London, Sweet and Maxwell, 1994), 56-57.

147 There are permissible limits to most human rights in international human rights law. However, no limit is essentially provided to protect a State's 'rights' per se. All limits to human rights essentially relate to protection of other people within jurisdiction. Even national security limitations, which could be mistaken for 'State rights', are essentially permitted to protect the State's people.

148 See articles 1 and 25, ICCPR.

149 Paragraphs 15-19.

with, respectively, developed and developing States. However, a long-term reform goal should be to combat MNE abuses of power per se.

The delineation of the definitive list of substantive human rights duties of MNEs will require much negotiation and consideration, incorporating expert input from the business, labour and human rights sectors. The commentary in part 3(b) was designed to identify some of the most important problems and issues regarding the substantive human rights duties of MNEs, and to act generally as a prompt for further discussion.

4. Concluding Remarks

This paper has not been designed to portray MNE activity as inherently hostile to human rights. Indeed, many argue that MNE activity leads to greater enjoyment of human rights in a given society.[150] For example, it is commonly argued that MNEs promote economic development, which enhances a population's enjoyment of all human rights.[151] In any case, the 'net' effect on human rights enjoyment of MNE activity was not the concern of this paper.

MNEs are capable of inflicting serious human rights abuse. Present methods of imposing accountability on MNEs for such abuse are deficient. There is therefore a need for reform of the international human rights regime to counter de facto MNE impunity. Efforts to impose human rights duties on MNEs must be accompanied by efforts to clarify the content of those duties.

The globalisation of economics has facilitated the growth of the de facto power of MNEs,[152] as international trade law essentially grants MNEs numerous rights and no enforceable duties. The proposed OECD Multilateral Agreement on Investment ['MAI'] was designed to confer even greater rights on foreign investors.[153] There is a need to introduce some reciprocity and impose responsibilities and duties in return for these broad-ranging rights.

Indeed, the advocacy of greater human rights regulation of MNEs is arguably at odds with the trend towards a global free market. In response, this author argues that increased profitability and market access simply do not justify decreased human dignity. Indeed, increased human welfare and dignity will improve the long-term

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150 See, eg, W.H. Meyer, 'Human Rights and MNCs: Theory Versus Quantitative Analysis', (1996) *HRQ* 368, 391-397.

151 Id, 368, quoting K. Pritchard, 'Human Rights and Development: Theory and Data', in *Human Rights and Development*, (1989) at 329; see also Cassel, above, note 2, 1980.

152 See 'Worldbeaters Inc', *The Economist*, 18 January 1998; Livingstone, above, note 91.

153 The MAI has been rejected in its present form, see 'The Sinking of the MAI', *The Economist*, 14 March 1998. An OECD Ministerial Statement on the MAI, dated 28 April 1998, noted the need for a new draft MAI to adequately redress environmental and labour issues. As of December 1998, negotiations over the MAI had stalled.

prospects of the global economy. Furthermore, the proposed MNE duties are modest enough not to undermine the viability of multinational economic ventures. For example, the proposals have been tailored so as not to undermine legitimate competitive advantages enjoyed by underdeveloped nations. They have been proposed so as to uniformly raise the ethical standards expected of global traders to satisfactory levels.

Both reform proposals specifically target MNEs. It may be argued that the selective application of international human rights law, either directly or via home States, could give rise to discrimination against MNEs. Such a result contradicts one of the major present goals of free trade advocates, the elimination of discrimination between local and foreign investors.[154]

Several responses can be made. Firstly, the discrimination would occur through the imposition of international law, rather than domestic law. External sources of discrimination already exist in the form of extant home State regulations, and in soft-law obligations like the OECD/ILO Codes and Agenda 21.[155] The existence of 'special' international regulation of MNEs accurately reflects their status as powerful, mobile international actors.

Secondly, any discrimination that did arise would normally be a result of a host State's failure to implement its own human rights obligations. Whereas the reforms target only MNEs, it must be remembered that host States remain liable in international human rights law to regulate all internal actors. Therefore, discrimination should rarely occur within a State that is properly implementing its obligations to give horizontal effect to human rights.[156]

One could argue that any resultant discrimination would cause MNEs to disengage from the relevant host States, which are more likely to be underdeveloped nations. However, the competitive advantages conferred on local traders in underdeveloped nations should not be overstated. Many such local traders would offer little real competition to big MNEs. Furthermore, competition will only arise if the MNE and the local trader operate in the same market. For example, no competition arises if the MNE operates in the export market, while the local trader focuses on the local market. If the local trader does operate in the same market, the competitive disadvantage to the MNE will accrue whether the MNE sets up in the relevant State or not. Investment in the relevant State per se will not decrease the MNE's competitiveness. If local traders did pose a serious competitive threat to MNEs, it would seem likely that those local traders would be able to afford to abide by the same human rights

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154 The elimination of such discrimination was the major aim of the MAI.

155 Agenda 21 encourages MNEs to adopt environmental policies which are not below the standards of their home State, even if the host State's law permits lower standards; see Eaton, above, note 9, 274-276.

156 Indeed, paragraph 11 of the ILO Declaration states that the principles therein are designed to reflect 'good practice' for all employers.

regime.[157] In such a case, MNEs may lobby States to introduce positive measures regarding human rights to even out the playing field. Perhaps it is undemocratic for MNEs to try to persuade governments to do anything.[158] However, MNEs do and will continue to lobby governments. The proposed reforms would harness MNE power in a positive way to introduce human rights reform within delinquent host States.

The time may be ripe for the successful advocation of reform to enhance MNE human rights accountability. The ongoing negotiation of a new MAI may offer a tantalising carrot with which to entice MNEs into accepting more regulation.[159] Moreover, in light of the recent catastrophic collapse of free market economies in South East Asia and Russia, calls for greater regulation of the global economy have emerged from many quarters, including the meeting of the Group of Seven Major Industrialised Democracies [G-7] in October 1998. Human rights advocates should take advantage of a potential 'pro-regulation' environment to push the case for greater human rights regulation of MNEs. In any case, human rights advocates must ensure the inclusion of human rights values in any reworking of the international agenda, lest human rights become an anachronistic value in the age of the global free market.[160]

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[157] For example, they would be able to pay 'living wages' in accordance with the recommendations in the text above at notes 106-112.

[158] See text after note 149. Paragraph 16 of the UN Draft Code obliges MNEs not to interfere in a host country's internal affairs. However, it is largely accepted that human rights protection is not a purely internal affair.

[159] European Parliament Resolution, above, note 17, paragraph F.30.

[160] Alston, above, note 71, especially at 442 and 447.