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Miriam Mafessanti

CORPORATE MISBEHAVIOR & INTERNATIONAL LAW: ARE THERE ALTERNATIVES TO "COMPLICITY"?

Miriam Mafessanti[*]

OVERVIEW

The emergence of the phenomenon today known as the transnational or multinational corporation (MNC)[1] has been matched by the emergence of MNC accountability as a significant international issue. With the rise of the MNC and the onslaught of globalization, a legal vacuum was born whereby MNCs could create subsidiaries and exploit legal technicalities to avoid accountability in either home or host state countries. However, as the power of MNCs increase, the conduct of their business activities reveals the wide variety of violations committed in the name of profit, and the issue of accountability has come to the fore.

In 2008 the International Commission of Jurists Expert Legal Panel (ICJ Panel) published its three-volume report entitled *Corporate Complicity and Legal Accountability*[2] (Report). The Report was a study of the circumstances in which MNCs could be held accountable for gross human rights abuses and how to hold them accountable. At the international level, the Report focuses entirely on the criminal notion of "complicity" and thus questionably envisages international

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[*] B.Arts/LL.B (University of New South Wales, Australia), Adv. LL.M in Public International Law, *cum laude* (University of Leiden, The Netherlands). I wish to thank Larissa van den Herik for invaluable guidance and suggestions.

[1] I use the terms MNC, corporation, private or business sector interchangeably in this article. The UN Draft Code of Conduct on Transnational Corporations, art. 20, defines an MNC as "an economic entity operating in more than one country or a cluster of economic entities operating in two or more countries—whatever their legal form, whether in their home country or country of activity, and whether taken individually or collectively." U.N. ESCOR, *Code of Conduct on Transnational Corporations*, Organizational Sess. UN Doc. E/1988/39/Add.1 (1988).

[2] Int'l Comm'n of Jurists (ICJ), *Corporate Complicity and Legal Accountability*, vols.1-3, 2008, *available at* http://icj.org/IMG/Volume_1.pdf, http://icj.org/IMG/Volume_2.pdf, & http://icj.org/IMG/Volume_3.pdf [hereinafter *ICJ Report*].

criminal law (ICL) as apt for addressing MNC misbehavior.[3] In fact, a fair amount of literature concerning MNC accountability under international law discusses accountability through the lens of the criminal law concept of complicity, "aiding and abetting," or both.[4]

In contrast to the Report and the academic trend to date, this article questions whether ICL is the most apt mechanism for dealing with MNC misconduct, in light of the fact that most breaches of international law by MNCs do not actually lead to the commission of international crimes (generally understood as genocide, crimes against humanity, and war crimes). Rather, the most common and flagrant MNC violations relate to violations in independent fields of law, for example, human rights, labor law, and environmental law.[5] The article therefore analyzes whether each of the latter branches of law offers independent mechanisms at the international level adequate to address specific instances of MNC misconduct. To do so, the article first examines which international obligations, if any, can be said to either apply directly or indirectly to MNCs with respect to each field of law, focusing on both soft and hard law obligations.

Accordingly, the article is divided into two parts. Part I addresses three independent categories of law, human rights law, labor law, and environmental law (sections 1 through 3). The first subsection of each of these sections examines the pertinent substantive obligations in each field—both hard and soft law in origin—while the second subsection of each section discusses existing accountability mechanisms, if any. The last section of Part I explores several

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[3] Vol.3 of the *ICJ Report* focuses on civil liability, which is a uniquely domestic law phenomenon and therefore falls outside the scope of this paper.

[4] See Andrew Clapham & Scott Jerbi, *Categories of Corporate Complicity in Human Rights Abuses*, 24 HASTINGS INT'L & COMP. L. REV. 339 (2001); Andrew Clapham, *Extending International Criminal Law Beyond the Individual to Corporations and Armed Opposition Groups*, 6 J. INT'L. CRIM. JUST. 899 (2008); Anita Ramasastry & Robert C. Thompson, *Commerce, Crime and Conflict: Legal Remedies for Private Sector Liability for Grave Breaches of. International Law: A Survey of Sixteen Countries,* FAFO-report 536 (2006), http://www.fafo.no/pub/rapp/536/536.pdf [hereinafter FAFO Report].

[5] George Andreopoulos, Giuliana C. Andreopoulos & Alexandros Panayides, *On the Responsibility of MNCs: Some Reflections*, 7 INT'L BUS. & ECON. RES. J. 61, 63 (2008) available at http://www.cluteinstitute-onlinejournals.com/PDFs/971.pdf. Other breaches of international law are possible; for example, breaches of the principle of non-intervention in the domestic affairs of a state and the right to self-determination. See Fleur E. Johns, *The Invisibility of the Transnational Corporation: An Analysis of International Law and Legal Theory*, 19 MELB. U. L. REV. 893, 904-08 (1994).

independent soft law frameworks established by various international organizations and agencies that target businesses and encompass duties pertinent to the three legal fields under examination.

Part II analyzes why the ICJ Report focused on ICL as the sole framework by which to assess MNC misconduct at the international level. Part II thus examines the field of ICL and questions if this ICL focus is justified. Beginning with an analysis of complicity, the article shows that not all references to corporate complicity envisage liability under ICL. A second section reviews the concept of ICL-related complicity and demonstrates that the substantive scope of ICL is constricted to a very well defined range of potential MNC misconduct, thus limiting its viability as a general solution for all MNC violations. The next section illustrates that ICL is nevertheless well structured to accept the concept of MNC accountability when compared to other fields of international law. Finally, the article compares human rights law with the ICL framework to reveal how they overlap and can provide parallel means of redress for certain criminal acts.

The article concludes that ICL is not the most apt legal tool for addressing all MNC violations if only by reason of its limited subject matter. Alternatively, specialized mechanisms exist under international law that provide direct and indirect MNC accountability for a wider range of international law violations than those criminalized by ICL. This network of mechanisms may be the only answer to meeting the potential variety of MNC misconduct, and it certainly illustrates the complexity of the issue.

Ultimately, the limited scope of ICL's subject-matter does not prejudice the potential of ICL as an accountability mechanism for MNC misconduct given its individualized, as opposed to state-centric, focus. Thanks to its focus on individual actors rather than states, ICL is more accommodating to the notion of direct criminal liability for MNCs than, for example, human rights law, which to date focuses uniquely on state actors.

As a word of warning, this article does not discuss remedies that exist in domestic jurisdictions, such as those under the United States' Alien Tort Claims Act (ATCA) and under the French Penal Code. Thus, also outside the scope of this article is a discussion on the debate surrounding the proper duties of a home state versus a host state; voluntary codes of conduct adopted by corporations; and initiatives by

non-governmental organizations (NGOs).[6] Its focus is purely on the adequacy of existing instruments and frameworks at the international level and, occasionally, the regional level.[7]

I. INTERNATIONAL LAW AND MNCS

A. INTRODUCTION: DIRECT V. INDIRECT OBLIGATIONS

The last twenty years has brought about a shift towards recognizing the responsibility of MNCs as actors on the international field, alongside states. The conventional idea that only states, as the traditional guardians of human rights, can be held accountable for human rights violations has been under challenge for some time now. While states retain their primary position, international bodies have increasingly recognized that MNCs also shoulder certain responsibilities even though development in this direction has been patchwork.[8] The argument that MNCs should bear responsibility for violations derives from their sheer size and economic capacities. Since the annual revenues of the wealthiest MNCs can often surpass the gross domestic product of developing countries,[9] the argument postulates that their power and authority necessarily entails duties, liabilities, and responsibilities. Leaving aside academic debates as to whether MNCs are or may be subjects of international law, the real question of interest is how should MNCs be held responsible?

When states control MNCs or otherwise delegate elements of governmental authority to MNCs, the issue of MNC accountability becomes less controversial. In such situations, the MNC is arguably

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[6] *See, e.g.*, Amnesty International, *Human Rights Guidelines for Companies* (1998), *available at* http://www.amnesty.org.uk/business/pubs/hrgc.shtml; Friends of the Earth International, *Towards Binding Corporate Accountability*, *available at* http://www.foei.org/en/what-we-do/corporate-power/global/towards.html.

[7] For a comprehensive overview of extrajudicial mechanisms dealing with human rights grievances caused by MNCs, see generally Caroline Rees, *Grievance Mechanisms for Business and Human Rights: Strengths, Weaknesses and Gaps*, Corporate Social Responsibility Initiative (John F. Kennedy Sch. of Gov't, Harv. U., Working paper No. 40, 2008).

[8] Hum. Rts. Council, Business and Human Rights: Mapping International Standards of Responsibility and Accountability for Corporate Acts, UN Doc. A/HRC/4/35 (Feb. 9, 2007) [hereinafter Hum. Rts. Council Report].

[9] Jonathan Clough, *Not-So-Innocents Abroad: Corporate Criminal Liability for Human Rights Abuses*, 11 AUSTL. J. HUM. RTS. 1 (2005).

either a *de jure* or *de facto* organ of the state. This is most commonly illustrated by the American practice of outsourcing prison-related tasks to private companies. Here, the secondary rules of attribution of conduct serve to hold the state responsible for abuses of prisoners' rights.[10] The real controversy over MNC accountability arises when MNCs undertake purely commercial activities independently of any governmental contract or authorization. In such circumstances, how can MNCs be accountable under international law? Are they subject to international law obligations independently of their relationship with the host state?

A review of existing international law instruments demonstrates that MNC obligations under international law primarily arise in two ways: indirectly or directly.[11] Indirect obligations arise as a direct corollary of the primary obligations agreed to by state parties in traditional hard law instruments, such as conventions and treaties. Since state parties agree to protect or to refrain from engaging in certain activities, they must also ensure that private actors within their jurisdiction comply with those obligations.[12] Some international law instruments expressly provide for such state responsibility.[13]

Secondly, although traditional international law did not create direct obligations for MNCs, the number of international law instruments that either specifically target or include MNCs as duty-holders is growing. Although the notion of enforceable, direct hard law

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[10] *Responsibility of States for Internationally Wrongful Acts*, 2001 Y.B. OF THE INT'L L COMM'N, U.N. Doc. A/56/49 (Vol. I) /Corr.4.

[11] *See* Carlos M. Vazquez, *Direct vs. Indirect Obligations of Corporations under International Law*, 43 COLUM. J. TRANSNAT'L L. 927 (2005).

[12] *See* International Council On Human Rights Policy, *Beyond Voluntarism: Human Rights and the Developing International Legal Obligations of Companies*, (2002), *available at* http://www.ichrp.org/files/reports/7/107_report_en.pdf [hereinafter ICHRP].

[13] For example, the 1982 UN Convention on the Law of the Sea obligates state parties to ensure that activities "forming the common heritage of mankind," whether carried out by state enterprises or natural or juridical persons, comply with the convention; otherwise, damage caused by the failure of the state party shall entail liability. United Nations Convention on the Law of the Sea Art.139(1)-(2), Dec. 10, 1982, 1833 U.N.T.S. 397. *See generally*, Philip Alston, Mara R. Bustelo & James Heenan, *The EU and Human Rights* 559 (Academy of European Law, Oxford U. Press, 1999) (interpreting the "common heritage of mankind," under Art. 136 of the Convention on the Law of the Sea, as "the seabed and ocean floor and subsoil thereof, beyond the limits of national jurisdiction").

obligations is somewhat contentious in certain fields,[14] numerous international soft law instruments are a potential source of corporate responsibilities. Such instruments are generally categorized as soft law because they are only quasi-legal instruments.[15] While soft law instruments are generally regarded as not legally binding, they are nevertheless regarded as reflecting a certain consensus among the relevant state parties concerned. Hence their soft law status does not deprive them altogether of any legal standing. Rather, such soft law provides a necessary element—state practice—which may in the future serve as a catalyst for the emergence of new norms of customary international law.[16] In the words of Special Representative of the Secretary-General (SRSG) John Ruggie, "As [soft law arrangements] strengthen their accountability mechanisms, they also begin to blur the lines between the strictly voluntary and mandatory spheres for participants. Once in, exiting can be costly."[17] Hence, there is the possibility that with time, soft law norms will mature into international legal principles that define corporate responsibility.

1. HUMAN RIGHTS

a. Human Rights Obligations

Serious abuses of human rights by MNCs may frequently arise as complicity[18] in abuses by host governments and non-state armed groups, usually in communities lacking adequate institutional mechanisms for human rights protection.[19] However, MNCs, particularly those engaged in specific commercial activities such as manufacturing (which depends on cheap labor), resource extraction (usually in less developed countries), and infrastructure activities (raising health and environmental issues), are also prone to committing direct human rights violations.[20] The most common transgressions include[21] violations of rights concerning non-discrimination;[22] life,[23]

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[14] ICHRP, *supra* note 12, at 13.

[15] For purposes of international law, "soft law" is defined as "[g]uidelines, policy declarations, or codes of conduct that set standards of conduct but are not legally binding." BLACK'S LAW DICTIONARY 1519 (9th ed. 2009).

[16] ICHRP, *supra* note 12, at 73-74; PETER MUCHLINSKI, MULTINATIONAL ENTERPRISES AND THE LAW 110-12 (2d ed. Oxford Univ. Press 2007).

[17] Hum. Rts. Council Report, *supra* note 8, ¶ 61.

[18] *See infra* Part II.

[19] Andreopoulos et al., *supra* note 5, at 63.

[20] ICHRP, *supra* note 12; MUCHLINSKI, *supra* note 16, at 507.

[21] Andreopoulos et al., *supra* note 5, at 63.

liberty, and security of person;[24] freedom of opinion and expression;[25] freedom of association;[26] favorable working conditions;[27] health;[28] and self-determination,[29] all of which have been codified in several seminal UN instruments at the international level. While those instruments did not specifically envisage creating binding obligations for MNCs, several of those documents nevertheless provide a legal basis for doing so.

The 1948 Universal Declaration of Human Rights (UDHR) is often regarded as the starting point for human rights. Insofar as its preamble states "that every individual and *every organ of society* . . . shall strive . . . to promote respect for these rights and freedoms," it has been argued that the phrase "every organ of society" encompasses MNCs and renders them responsible for promoting and securing the human rights set forth in the UDHR.[30] Moreover, it has been argued that Article 30 can also be construed as a positive obligation on MNCs not to interfere with the rights contained in the UDHR.[31]

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[22] Universal Declaration of Human Rights, G.A. Res. 217A (III), U.N. GAOR, 3d Sess., 1st plen. mtg., U.N. Doc. A/810 (Dec. 12, 1948), art. 2 [hereinafter UDHR]; International Covenant on Civil and Political Rights, G.A. Res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16), at 52, U.N. Doc. A/6316 (Mar. 23, 1976) [hereinafter ICCPR]; International Covenant on Economic, Social and Cultural Rights, G.A. res. 2200A (XXI), 21 U.N.GAOR Supp (No. 16), at 49, U.N. Doc. A/6316 (Jan. 3, 1976), art.2. [hereinafter ICESCR].

[23] UDHR, *supra* note 22, art. 3; ICCPR, *supra* note 22, art. 6.

[24] UDHR, *supra* note 22, art. 3; ICCPR, *supra* note 22, art. 9.

[25] UDHR, *supra* note 22, art. 19; ICCPR, *supra* note 22, art. 19.

[26] UDHR, *supra* note 22, art. 20; ICCPR, *supra* note 22, art. 22.

[27] UDHR, *supra* note 22, art. 23; ICESCR, *supra* note 22, art. 7.

[28] UDHR, *supra* note 22, art. 25; ICESCR, *supra* note 22, art. 12.

[29] ICCPR, *supra* note 22, art. 1; ICESCR, *supra* note 22, art. 1.

[30] UDHR, *supra* note 22 (emphasis added). *See* Alston, *supra* note 13, at 560; ICHRP *supra* note 12, at 58-59; Louis Henkin, *The Universal Declaration at 50 and the Challenge of Global Markets*, 25 BROOK. J. INT'L L 17, 25 (1999); Beth Stephens, *The Amorality of Profit: Multinational Corporations and Human Rights*, 20 BERKELEY J INT'L L 45, 77 (2002).

[31] ICHRP, *supra* note 12, at 60. Art. 30 provides: "Nothing in this Declaration may be interpreted as implying for any State, *group or person* any right to engage in any activity or to perform any act aimed at the destruction of any of the rights and freedoms set forth herein" (emphasis added). *Id. See also* Dinah Shelton, *Globalization and the Erosion of Sovereignty in Honor of Professor Lichtenstein: Protecting Human Rights in a Globalized World*, 25 B.C. INT'L & COMP. L. REV. 273, 284 (2002).

While the legal status of the UDHR is highly contested,[32] the fact that the UDHR does not provide for any enforcement mechanism against every organ of society does not detract from its value or the existence of its substantive obligations.[33] Even if the UDHR is not in itself legally binding, the preamble of every human rights treaty drawn up under UN auspices has endorsed it, thereby binding all UN member states that have ratified such treaties.[34] Additionally, the affirmation of the UDHR by 171 states at the 1993 UN World Conference on Human Rights in Vienna renders it difficult for MNCs to argue that they fall outside the scope of the UDHR's obligations.[35] Lastly, some of the principles of the UDHR are arguably *jus cogens* norms or at the very least customary international law.[36]

Other specialized human rights treaties, such as the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR), have also established a comprehensive body of substantive international law to protect the rights of the individual, including the right to paid labor and sanitary working conditions.[37] While these instruments do not directly impose obligations on MNCs, they nevertheless impose on states the general obligation to ensure the enjoyment of the rights therein and to prevent abuse of those rights by non-state actors. To this end, the various monitoring bodies of the respective instruments have interpreted a state's obligations widely to encompass overseeing MNC conduct.

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[32] On one hand, some argue it is only a non-binding instrument with no legal force whose only purpose is to set a benchmark against which the behavior of States, and today *inter alia*, MNCs, can be measured. W. Mwangi & H.P. Schmitz, *"Global Compact, Little Impact?": Explaining Variation in Corporate Attitudes Towards Global Norms,* (paper presented at the 2007 Annual Convention 'Politics, Policy, and Responsible Scholarship' of the International Studies Association (ISA), Chicago, February 28-March 4 2007); *see also* ICHRP, *supra* note 13, at 12. In the other camp, it is argued that despite its non-binding nature, the UDHR represents customary international law insofar as it has been adopted by the UN General Assembly in a Resolution.

[33] ICHRP, *supra* note 12, at 59.

[34] *Id.* at 61.

[35] *Id.*

[36] *See* Lisa L. Turner & Lynn G. Norton, *Civilians at the Tip of the Spear,* 51 A.F. L. REV. 1, 75 (2001) (positing how many provisions of the UDHR reflect customary international law).

[37] *See supra* notes 22-29 and accompanying text. *See also infra* Part I.A.2.

For example, the Human Rights Committee—established under the ICCPR as its monitoring mechanism—has confirmed that the ICCPR poses "positive obligations on states parties to ensure Covenant rights," which requires states protect citizens "not just against violations of Covenant rights by its agents, but also against acts committed by private persons or entities."[38] Moreover, states can breach ICCPR obligations if they permit or fail "to take appropriate measures or to exercise due diligence to prevent, punish, investigate or redress the harm caused by such acts by private persons or *entities*."[39] Even the ICCPR's *travaux préparatoire* indicate that many states envisaged that the instrument would protect human life against "unwarranted actions by public authorities *as well as by private persons*."[40]

Similarly, the UN Committee on Economic, Social and Cultural Rights (CESCR) has stated, "While only States are parties to the Covenant and ultimately accountable for compliance with it, all members of society—[including] *the private business sector*—have responsibilities in the realization of the right to adequate food."[41] The CESCR found a similar responsibility applied to MNCs with respect to the right to health[42] and the right to work.[43] Concerning the latter, the General Comments to the CESCR even say that a state's failure to protect citizens against human rights infringements by corporations was equivalent to a breach of their positive obligations to protect citizens' Article 7 rights.[44] And because water is necessary for both adequate living standards[45] and attainable standards of physical and mental health,[46] the CESCR extends states' duties to preventing "third parties,"

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[38] U.N. Hum. Rts. Comm., *General Comment 31 [80]: The Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, §8, U.N. Doc. CCPR/C/21/Rev.1/Add.13 (May 26, 2004).

[39] *Id.* (emphasis added).

[40] ICHRP, *supra* note 12, at 48 n.125 (emphasis added).

[41] U.N. Comm. on Econ. Soc. & Political Rights [UNCESCR], *General Comment 12: The Right to Adequate Food (Art. 11)*, §20, U.N. Doc. E/C.12/1999/5 (May 12, 1999) (emphasis added) [hereinafter *General Comment 12*].

[42] *See* UNCESCR, *General Comment 14: The Right to the Highest Attainable Standard of Health*, §42, U.N. Doc. E/C.12/2000/4 (Aug. 11, 2000) [hereinafter General Comment 14].

[43] *See* UNCESCR, *General Comment 18: The Right to Work*, §52, U.N. Doc. E/C.12/GC/18 (Feb. 6, 2006) [hereinafter *General Comment 18*].

[44] *See Id.* § 32.

[45] *See* ICESCR, *supra* note 22, art. 11.

[46] *See* ICESCR, *supra* note 22, art. 12.

including corporations, from interfering with or "denying equal access to adequate water; and polluting and inequitably extracting from water resources."[47] Paradoxically, notwithstanding recognition of the role that MNCs can play with respect to various ICESCR rights, the CESCR has repeatedly reiterated the long-established view that such enterprises are "not bound" by the ICESCR,[48] which leads to doubts as to whether the CESCR itself considers corporate obligations to be legal ones.[49]

In contrast to the three instruments discussed above, later UN conventions, discussion of which follows, address the role of non-state actors more directly. These later conventions pose indirect obligations on states to control the conduct of MNCs, failing which a complainant may seek to engage the state's international responsibility before the pertinent human rights body. Additionally, the human rights bodies overseeing the implementation of these conventions have also increasingly advocated for the responsibility and participation of non-state actors in furthering such instruments' goals.[50] The 1965 UN Convention for the Elimination of All Forms of Racial Discrimination (CERD) obliges states to "prohibit and bring to an end . . . racial discrimination *by any persons, group or organization.*"[51] The Committee on the Elimination of Racial Discrimination has further asserted that "[t]o the extent that private institutions influence the exercise of rights or the availability of opportunities, the state party must ensure that the result has neither the purpose nor the effect of creating or perpetuating racial discrimination."[52] Further, the General Assembly has issued two declarations proclaiming that, in addition to states, "institution[s], group[s] and individual[s]" are prohibited from

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[47] UNCESCR, *General Comment No. 15: The Right to Water (Arts. 11 and 12 of the Covenant)*, §23, U.N. Doc. E/C.12/2002/11 (Jan. 20, 2003) [hereinafter General Comment 15].

[48] *See General Comment 12*, *supra* note 41, §20; *General Comment 14*, *supra* note 42, §42; *General Comment 18*, *supra* note 43, §52.

[49] *See* Hum. Rts. Council Report, *supra* note 8, ¶¶ 40-41, at 13.

[50] *See* ICHRP, *supra* note 12, at 47-49 (including, for example, the Comm. on the Elimination of Discrimination Against Women, *General Recommendation 19*; the Comm. on the Elimination of Racial Discrimination, *General Recommendation 20*; and the Human Rights Comm.).

[51] International Convention on the Elimination of All Forms of Racial Discrimination art. 2(1)(d), Dec. 21, 1965, 660 U.N.T.S. 195, 5 I.L.M. 352, 354 [hereinafter CERD Convention] (emphasis added).

[52] Comm. on the Elimination of Racial Discrimination [CERD], *General Recommendation 20: Non-discriminatory Implementation of Rights and Freedoms (Art. 5)*, §5, U.N. Doc. A/51/18 (Mar. 15, 1996).

discriminating, be it on grounds of race or religion.[53] Equally, the 1979 UN Convention for the Elimination of Discrimination against Women (CEDAW) requires states "[t]o take all appropriate measures to eliminate discrimination against women *by any person, organization or enterprise*."[54] The UN Committee that monitors implementation of the treaty has stipulated that "[s]tates may . . . be responsible for private acts if they fail to act with due diligence to prevent violations of rights or to investigate and punish acts of violence, and for providing compensation."[55]

The Convention on the Rights of the Child[56] (CROC) places positive obligations on states to protect children, even in the private sphere. While recognizing that parents or guardians have the primary responsibility for children, states nevertheless are legally obligated to regulate private institutions that care for children;[57] to abolish traditional practices prejudicial to the health of children;[58] and to protect children from economic exploitation and hazardous work.[59] Moreover, the Optional Protocol on the sale of children, child prostitution, and child pornography obligates state parties to hold even individuals responsible for violating its prohibitions, be it by criminal, civil or administrative means.[60] The Committee on the Rights of the Child has also advocated in its General Comments for extensive state obligations vis-à-vis the private sector.[61] States are "urged" to regulate many private actors, including preventing marketing companies from

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[53] *See* U.N. Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief, G.A. Res. 36/55, art. 2(1), U.N. Doc. A/RES/36/55 (Nov. 25, 1981); U.N. Declaration on the Elimination of All Forms of Racial Discrimination, G.A. Res. 1904 (XVIII), art. 2(1), U.N. Doc. A/RES/18/1904 (Nov. 20, 1963).

[54] Convention on the Elimination of All Forms of Discrimination against Women art. 2(e), Dec. 18, 1979, 1249 U.N.T.S. 13, 19 I.L.M. 33, 36 (emphasis added).

[55] Comm. on the Elimination of Discrimination against Women [CEDAW], *General Recommendation 19: Violence against Women*, §9, U.N. Doc. A/47/38 (Jan. 30, 1992).

[56] Convention on the Rights of the Child, Nov. 20, 1989, 1577 U.N.T.S. 3, 28 I.L.M. 1456 [hereinafter CROC].

[57] *Id.* at 1459, art. 3(3).

[58] *Id.* at 1466, art. 24(3).

[59] *Id.* at 1468-69, art. 32.

[60] Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography, G.A. Res. 54/263, Annex II, arts. 3-4, U.N. Doc. A/RES/54/263 (May 25, 2000).

[61] Vuyelwa Kuuya, *Corporate Complicity in Human Rights Abuses, A Discussion Paper*, Lauterpacht Centre for International Law, §1, at 5.

promoting "unhealthy products and lifestyles" (e.g., alcohol and tobacco) that harm the health and development of children,[62] and preventing agricultural and entertainment companies (television, film, media and advertising) from involving children in harmful work.[63]

The most concrete obligations concerning MNCs involve those imposed by the International Labour Organisation (ILO) treaties relevant to workers' rights, including obligations regarding collective bargaining, the right to join trade unions,[64] freedom from forced labor,[65] and unhealthy and unsafe working environments.[66] Although they directly regulate the employer-employee relationship, ILO treaties nevertheless envision that states, as opposed to private employers and public institutions, will ensure the enjoyment of various employee rights.[67]

Moreover, declarations adopted by the heads of government at three UN world conferences concerning the environment,[68] women,[69] and social development[70] implicitly accept that companies should

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[62] CROC, General Comment No. 4: Adolescent Health and Development in the Context of the Convention on the Rights of the Child, §25, U.N. Doc. CRC/GC/2003/4 (July 1, 2003).

[63] CROC, General Comment No. 7: Implementing Child Rights in Early Childhood, §36(e), U.N. Doc. CRC/C/GC/7/Rev.1 (Sept. 20, 2006).

[64] Int'l Lab. Org. [ILO], *Right to Organise and Collective Bargaining Convention*, Convention 98, June 8, 1949, 96 U.N.T.S. 257.

[65] ILO, *Abolition of Forced Labour Convention,* Convention 105, June 25, 1957, 320 U.N.T.S. 291.

[66] ILO, *Occupational Safety and Health Convention,* Convention 155, June 3, 1981, 1331 U.N.T.S. 279.

[67] *See* ICHRP, *supra* note 12, at 49; Kuuya, *supra* note 61, at 6.

[68] *See* ICHRP, *supra* note 12, at 65 n.184; U.N. Conference on Environment and Development, June 3-14, 1992, *Rio Declaration on Environment and Development*, UN Doc. A/CONF.151/26 (vol. I), 31 I.L.M. 874 (June 13, 1992) [hereinafter *Rio Declaration*].

[69] ICHRP, *supra* note 12, at 65 n.185. Fourth World Conference on Women, Sept. 4-15, 1995, *The Beijing Declaration and Platform for Action*, UN Doc. A/CONF. 177/20 and A/CONF. 177/20/Add. 1 (Sept. 15, 1995). This declaration specifically obliges the private sector, employers, and enterprises to prevent violence against women and strengthen women's economic capacity. *Id.* §§125-126, 177.

[70] ICHRP, *supra* note 12, at 66 n.186. World Summit for Social Development, Copenhagen, Den., Mar. 12, 1995, *Copenhagen Declaration on Social Development and Programme of Action*, U.N. Doc. A/CONF.166/9 (Mar. 12, 1995). Section 45 of this declaration obliges the private sector to "ensure gender equality, equal opportunity and non-discrimination . . . with full respect for applicable international instruments" while §12 "encourag[es]

shoulder certain responsibilities alongside their governments. The declarations went so far as to establish explicit business goals for companies, thus clearly charging the private sector to take on certain internationally agreed responsibilities.[71] Although the declarations adopted by the respective conferences are not legally binding, they were adopted by heads of states or ministers of the vast majority of countries and therefore arguably represent a global consensus of states.

Additionally, the Organization for Economic Cooperation and Development (OECD)[72] has also published Guidelines for Multinational Enterprises that address human rights (OECD Guidelines).[73] Although the OECD, with only 31 member states, is not a truly international organization in the sense of the UN and its specialized agencies, its member governments have promulgated a series of agreements between themselves, as well as guidelines specifically targeting multinational enterprises.[74] The most recently revised OECD Guidelines of 2000 introduced as a "General Policy" that "enterprises should . . . [r]espect the human rights of those affected by their activities consistent with the host government's international obligations and commitments."[75] Despite this attempt to impose international law obligations on MNCs, given the patchwork ratification of human rights treaties, an assessment measured against

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transnational and national corporations to operate in a framework of respect for the environment . . . with proper consideration for the social and cultural impact of their activities." *Id.* §§ 12, 45.

[71] ICHRP, *supra* note 12, at 65.

[72] The OECD, with 31 member states, is an international organization with an economic, social, and environmental focus. Its policies aim to promote and increase sustainable economic growth and employment, maintain financial stability, and promote sound economic expansion both within its member states as well as in cooperation with non-member states.

[73] *See infra* Part I.A.4.b.

[74] E.g., Amanda Macdonald, Hilke Molenaar & Peter Pennartz, The IRENE Report 2000: Controlling Corporate Wrongs: The Liability of Multinational Corporations: Legal Possibilities, Initiatives, and Strategies for Civil Society (Law, Social Justice, & Global Dev. 2000).

[75] *See* OECD Guidelines for Multinational Enterprises, June 21, 1976, 15 I.L.M. 9, *as amended by* OECD Doc. DAFFE/IME(2000) 20 (2000) [hereinafter OECD Guidelines]. *See also* Comm. on Int'l Investment and Multinational Enterprises, *OECD Guidelines for Multinational Enterprises: Text, Commentary and Clarifications*, OECD Doc. DAFFE/IME/WPG(2000)15/FINAL, Oct. 31, 2001, Ch. II, ¶ 2, at 11, *available at* http://www.olis.oecd.org/olis/2000doc.nsf/LinkTo/NT00002F06/$FILE/JT00115758.PDF [hereinafter CIME Report].

the host state's international obligations does not provide a satisfactory level of uniform accountability.

Lastly, the former UN Sub-Commission on the Promotion and Protection of Human Rights (SCHR) was quite active in establishing human rights standards for MNCs. In 2002 it prepared the Draft Fundamental Human Rights Principles for Business Enterprises,[76] followed in 2003 by the adoption of the 2003 UN Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights.[77] Both instruments seek to provide an independent framework imposing on MNCs the entire range of human rights obligations insofar as such rights may be applicable. The SCHR complemented the draft Norms with its 2006 "Draft UN Guiding Principles on Human Rights and Extreme Poverty."[78] Article 5 of the Guiding Principles envisages that "States, as well as *all the organs of society* at the local, national, regional and international level, have an obligation to take effective action to eliminate extreme poverty."[79] Under Article 6, states and, inter alia, national and transnational enterprises "have a responsibility to take into account and fully respect human rights . . . Infringements of these rights by the above-mentioned entities . . . should be regarded as violations of human rights and their perpetrators should be held responsible, with the corresponding legal consequences."[80]

The foregoing illustrates a strong trend towards subjecting MNCs to human rights obligations. However, by virtue of the state-centric nature of human rights,[81] such obligations are usually only applicable within the territory of a signatory state and thus MNC activities within

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[76] U.N. Sub-Comm'n on the Promotion and Prot. of Human Rights [SCHR], *Draft Fundamental Human Rights Principles for Business Enterprises,* U.N. Doc. E/CN.4/Sub.2/2002/X/Add.1,E/CN.4/Sub.2/2002/WG.2/WP.1/Add.1 (Discussion Draft Nov. 2001).

[77] SCHR, *Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights*, U.N. Doc. E/CN.4/Sub.2/2003/12/Rev.2 (2003) [hereinafter U.N. Draft Norms]. See Section 4.C. for further discussion on the Draft Norms.

[78] U.N. Hum. Rts. Council, SCHR, Resolution 2006/9: Implementation of Existing Human Rights Norms and Standards in the Context of the Fight against Extreme Poverty, U.N. Doc. A/HRC/2/2, U.N. Doc. A/HRC/Sub.1/58/36 (Sept. 11, 2006).

[79] *Id.*, art. 5 (emphasis added).

[80] *Id.*, art. 6.

[81] *See infra* Part II for further discussion.

that state. With the exception of the OECD Guidelines,[82] there is little requiring states to regulate the activities of their MNCs operating abroad.[83] Hence, such regulation generally falls entirely to host countries (usually developing countries) that are parties to the relevant UN conventions. Considering the inconsistent ratification of the core human rights treaties by developing countries, it is evident that the existing UN human rights instruments and supporting bodies only offer limited protection. Despite this, there is an increasing trend towards encouraging extraterritorial regulation provided it does not interfere with the internal affairs of the other state.[84]

b. Accountability Mechanisms

Having reviewed the various frameworks, which arguably provide a legal basis for MNC accountability, the question becomes: how can the obligations of MNCs actively be enforced? A review of human rights enforcement mechanisms shows that although (quasi-judicial) treaty bodies and courts are increasingly aware of the threat that MNCs pose to human rights and the lacuna concerning MNC accountability, the state ultimately remains the principal actor—and violator—in the international field.[85] Since discussions to date on the establishment of an international civil court with universal jurisdiction over both natural and legal persons allegedly breaching international human rights norms[86] remain wishful, and the jurisdiction of existing

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[82] See *infra* Part I.A.4.b.

[83] For a failed attempt, see Corporate Code of Conduct Act, 2000, (Austl.). The Corporate Code of Conduct Act attempts to impose standards on the conduct of Australian corporations which undertake business activities in other countries, and for related purposes. *Id. See also,* U.N. High Comm'r for Human Rights, *Workshop on Attributing Corporate Responsibility for Human Rights under International Law*, Co-convened by N.Y.U. Ctr. for Human Rights & Global Justice and Realizing Rights: The Ethical Globalization Initiative, Nov. 17, 2006, at 3, *available at* http://www.business-humanrights.org/Documents/Workshop-Corp-Responsibility-under-Intl-Law-17-Nov-2006.pdf; Hum. Rts. Council Report, *supra* note 8, at 5-7, 13.

[84] Special Representative of the Secretary General, *Protect, Respect and Remedy: A Framework for Business and Human Rights*, ¶ 19, U.N. Doc. A/HRC/8/5 2008 (Apr. 7, 2008), *available at* http://www.unglobalcompact.org/docs/issues_doc/human_rights/Human_Rights_Working_Group/29Apr08_7_Report_of_SRSG_to_HRC.pdf [hereinafter SRSG Ruggie, *Report*].

[85] Kuuya, *supra* note 61, § 3.

[86] *See* Mark Gibney, *On the Need for an International Civil Court*, 26 Fletcher F. of World Aff. 47 (2002); Int'l Legal Resources Centre, *Corporate*

human rights bodies is limited to assessing alleged violations by states, the only solution to ensuring that globalization and privatization of state functions do not result in a legal human rights vacuum has been for international courts and bodies to devise astute legal theories. Several judicial decisions, discussed in the following sections, illustrate the intricate relationship that exists between the state and its MNCs and how courts have used positive obligations to broaden states' human rights responsibilities to encompass actions taken in the private sphere.

i. *UN Treaty Bodies*

The UN has eight human rights treaty bodies, each created in order to monitor implementation of its core international human rights treaty, as discussed above. Each committee oversees the progressive implementation of its founding instrument by its member states and reviews the reports submitted by its member states pursuant to their monitoring obligations. Only five of the committees, namely the CCPR,[87] CERD, CAT, CEDAW, and CRPD, can also receive petitions from individuals about the conduct of member states.[88] Hence, where MNC misconduct is arguably linked to state action, complaints to the pertinent human rights body may provide an effective accountability mechanism. Unfortunately, the possibility to complain to treaty bodies is only available to those state parties who agree to submit to their jurisdiction.[89] The bodies have the power to recommend that victims receive compensation or other remedies, and in cases of urgency, they may order provisional measures, thereby halting potentially harmful, irreversible state action.[90]

Liability for Human Rights Violations, submitted to the U.N. by Ethical Funds, Inc. (2004), *available at* http://www2.ohchr.org/english/issues/globalization/business/docs/ethical2.doc.

[87] Otherwise known as the Human Rights Council (HRC), formerly the Human Rights Committee.

[88] *See* ICHRP, *supra* note 12, at 83-84. Only the Committee on the Rights of the Child and the Committee on Economic, Social and Cultural Rights do not provide for an individual complaints mechanism.

[89] For example, the complaint mechanism under the ICCPR is only open to those state parties that have signed the Optional Protocol to the ICCPR. As of 2009, 113 of the 165 ICCPR state parties have signed this Protocol. U.N. Treaty Collection, Optional Protocol to the International Covenant on Civil and Political Rights, http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-5&chapter=4&lang=en (last visited May 10, 2010).

[90] ICHRP, *supra* note 12, at 84.

In addition to the complaints mechanisms, the CAT and the CEDAW have an investigative power lacking in other UN bodies. At the request of any person or organization, including NGOs, or by their own initiative, either committee may investigate, within their respective fields of competence, alleged systematic violations by states.[91] While investigations admittedly only occur in severe cases, this investigative mechanism could well prove worthwhile when states allegedly fail to protect citizens, or in the case of CEDAW specifically women, against systematic or grave violations of human rights by companies.[92]

The Human Rights Committee (HRC) has issued decisions illustrating the fine relationship between private business activities, citizens' rights, and state responsibility under the ICCPR. In *Hopu v. France*[93] the applicants, descendants of the owners of an ancestral burial ground, filed a complaint concerning the construction of a new luxury hotel development by a government-owned company in Tahiti on the burial grounds. They claimed that the construction of the hotel complex on the contested site, which represented an important place in their history, culture, and life, would arbitrarily interfere with their privacy and their family lives.[94] The HRC agreed with the applicants and found that France, which was ultimately responsible for Tahiti, violated the applicants' right to family and privacy under Articles 17 and 23 by failing to consider the importance of the burial grounds for the applicants when it decided to lease the site for the future hotel complex.

Similarly, the case of *Länsman v. Finland*[95] demonstrates how a people's cultural rights need to be balanced against state programs that encourage development or allow economic activity by private enterprises. Like in *Hopu*, the HRC had to determine whether private business activities—here, quarrying stone—carried out by a private company pursuant to a government contract—here, with Finland—violated the applicants' right to enjoy their own culture under the ICCPR.[96] The applicants, reindeer breeders of Sami ethnic origin,

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[91] *Id.*

[92] *Id.* at 85.

[93] Communication from France, Views of the Human Rights Committee under art. 5, para. 4, of the Optional Protocol to the International Covenant on Civil and Political Rights, U.N. Doc. CCPR/C/60/D/549/1993 (June 4, 1993).

[94] *Id.* § 10.3.

[95] Communication from Finland, Views of the Human Rights Committee under art. 5, para. 4, of the Optional Protocol to the International Covenant on Civil and Political Rights, U.N. Doc CCPR/C/52/D/511/1992 (June 11, 1993).

[96] *Id.* § 9.1.

claimed the activities of quarrying and transporting the stone through their reindeer herding territory would disturb their reindeer herding activities and the complex system of reindeer fences formed by the natural environment.[97] Contrary to *Hopu*, the HRC found that the Finnish government had considered the applicants' rights prior to granting the quarrying permit such that the quarrying of stone did not breach the applicants' right to enjoy their own culture pursuant to Article 27.[98]

ii. *Regional Human Rights Decisions*

Similarly, regional human right courts, the Inter-American Court of Human Rights, the European Court of Human Rights (ECHR), and the Inter-African Court of Human Rights, also rely on the doctrine of positive obligations[99] to adjudicate complaints touching on private sector disputes.[100] With an ever-increasing notion of what the state's duty to protect entails, these courts have found states responsible for the misconduct of private business actors, notwithstanding their lack of jurisdiction over business entities.

In Europe, the ECHR has held states responsible for violations in classic private disputes, just as it has in dealing with disputes involving the privatization of government services. For example, in *Young v. United Kingdom*, the applicants were dismissed by their employer because of their refusal to join one of three trade unions pursuant to a

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[97] *Id.* § 2.5.

[98] *Id.* § 9.6.

[99] In contrast to "negative obligations" which are obligations for a state to refrain from statal interference, "positive obligations" require a state to be active in securing the effective exercise of rights, i.e. it does not suffice for the state to withhold from omission. A.I.L. Campbell, *Positive Obligations under the ECHR: Deprivation of Liberty by Private Actors*, 10 THE EDINBURGH L. R. 399 (2006), at 399-400 *available at* http://www.euppublishing.com/doi/pdfplus/10.3366/elr.2006.10.3.399.

[100] *See* Velasquez-Rodriguez v. Honduras, 1988 Inter-Am. Ct. H.R., (ser. C) No. 4 (July 29, 1988). Although it did not deal with private business, the decision of the Inter-American Court of Human Rights was the first to espouse the "due diligence test." The Court held that this test requires that a state must have taken reasonable or serious steps to prevent or respond to an abuse by a private actor, including investigating and providing a remedy such as compensation. Hence, the test assesses the efforts and willingness of a state to act. *Id.*

closed shop agreement.[101] Despite the UK's argument that the applicants' dismissal arose from a purely private dispute, which consequently did not engage its responsibility, the ECHR found the UK responsible for merely having legislation in force allowing for dismissal of the applicants.[102]

Further, the ECHR jurisprudence in *Costello-Roberts v. United Kingdom* precludes the possibility that states can contract out of their obligations under international law by privatization. In certain circumstances, even after privatization, state responsibility remains engaged.[103]

The ECHR has similarly given a wide interpretation to the right to privacy and home life enshrined in Article 8 of the European Convention on Human Rights[104] such that MNC misconduct resulting in environmental pollution can amount to a Convention violation. For example, in *López Ostra v. Spain*, the ECHR found that the Spanish government failed to actively protect the applicants from the detrimental environmental effects of a waste treatment facility next to their home, which adversely affected their private and family life.[105] Similarly, in *Guerra v. Italy*, the ECHR reiterated the state's positive obligation to protect its citizens from environmental pollution.[106] The applicants lived in the vicinity of a private agricultural company responsible for the release of toxic fumes (including arsenic compounds). The ECHR found Italy had violated the applicants' right to private and family life both because they were not informed of the risks they and their families might face if they continued to live next to

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[101] *See* Young v. United Kingdom (No. 44), App. No. 7601/76, Eur. Ct. H.R. (ser. A) (1981).

[102] *Id.* § 49 ("Although the proximate cause of the events giving rise to this case was the 1975 agreement between British Rail and the railway unions, it was the domestic law in force at the relevant time that made lawful the treatment of which the applicants complained. The responsibility of the respondent State for any resultant breach of the Convention is thus engaged on this basis.").

[103] Costello-Roberts v. United Kingdom, 427 Eur. Ct. H.R. (ser. A) 27 (1993) (holding that "a State could not absolve itself from responsibility by delegating its obligations to private bodies or individuals").

[104] Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 1, 1998, 213 U.N.T.S. 222.

[105] *See* López Ostra v. Spain, 16798/90 Eur. Ct. H.R. (ser. A) at 46 (1994).

[106] Guerra v. Italy (No. 64), 1998-I Eur. Ct. H.R. 152-53, 164 (1998).

the factory and because they were not informed how to proceed in the event of an accident at the nearby factory.[107]

In the case of *Awas Tingni*, the applicants brought a complaint to the Inter-American Court of Human Rights in an attempt to stop timber harvesting in their ancestral rainforest. [108] As in the HRC cases, the case turned on the potential grant by the government of a concession to a private company.[109] The Inter-American Court considered that Nicaragua had violated Article 21 of the American Convention on Human Rights,[110] which provides for the right of the members of the Mayagna Awas Tingni Community to the use and enjoyment of their property.[111] The court decided Nicaragua failed to delimit the extent of the territory belonging to the Community and "granted concessions to [private] third parties to utilize the property and resources located in an area which could correspond" to native lands belonging to the Community.[112]

Further, the decision of the African Commission on Human and Peoples' Rights (an organ of the African Charter on Human and Peoples' Rights) in *Social and Economic Rights Action Centre v. Nigeria* (*Ogoni*) highlights the interrelation between state and business responsibilities.[113] Here, two NGOs filed a petition with the African Commission on behalf of the Ogoni people complaining about a series of human rights violations allegedly committed by Shell Petroleum Development Corporation (SPDC) against the Ogoni people.[114] Relying on jurisprudence from the Inter-American Court of Human Rights and the ECHR, the African Commission stated that "governments have a duty to protect their citizens by protecting them

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[107] *Id.* § 60.

[108] *See* Awas Tingni Indigenuous Cmty. v. Nicaragua, 2001 Inter-Am. Ct. H.R. (ser. C) No. 79, ¶ 153 (Aug. 31, 2001).

[109] *Id.* ¶ 6.

[110] American Convention on Human Rights, O.A.S. T.S. No. 36, 1144 U.N.T.S. 123, *entered into force* July, 18 1978, *reprinted in* Basic Documents Pertaining to Human Rights in the Inter-American System, OEA/Ser.L.V/II.82 doc.6 rev.1 at 25 (1992).

[111] *Awas Tingni*, 2001 Inter-Am. Ct. H.R. (ser. C) No. 79, ¶ 153.

[112] *Id.*

[113] Soc. & Econ. Rts. Action Ctr. v. Nigeria, Afr. C.H.P.R., Comm. No. 155/96, (2001), *available at* http://www1.umn.edu/humanrts/africa/comcases/155-96b.html (noting, inter alia, Shell allegedly provided private security forces in Nigeria with the weapons which were used to suppress minority groups) [hereinafter Ogoni].

[114] *Id.*§§ 1-9.

from damaging acts that may be perpetrated by private parties"[115] and that this entails positive action on the part of governments. The Commission found Nigeria breached its obligations under the African Charter by failing to enforce its laws and by condoning and facilitating the operations of Shell in Ogoniland.[116] Despite the apparently progressive nature of this decision, it is noteworthy that Nigeria's state oil company, the Nigerian National Petroleum Company, was the majority shareholder in SPDC.[117]

The foregoing jurisprudence illustrates that human rights bodies are attempting to stretch the nexus between the corporation and the government in an attempt to engage state responsibility. In situations where the state is a major shareholder in a private company (*Ogoni*) or grants a license to a private company (*Hopu, Länsman*, and *Awas Tingni*) to the detriment of citizens' rights, the nexus that engages states responsibility is apparent. The nexus becomes more tenuous, however, where the private action is completely unrelated and independent of state action. Nevertheless, even in these circumstances, the ECHR has proved willing to stretch a state's positive obligations to the extreme, for example by engaging state responsibility even where the nexus with state action is negligible (*Young* and *Costello-Roberts).*

2. LABOR LAW

a. Labor Law Obligations

Labor law violations are another of the most widespread genres of MNC violations and usually involve exploitation of local labor forces in foreign developing countries. Common violations include inadequate payment of wages, use of child labor, and imposing extremely long working hours without paying insurance and benefits.[118] Although labor law violations may closely overlap with certain human rights violations,[119] there are other independent legal frameworks of relevance to this area warranting independent discussion.

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[115] *Id.* § 57.
[116] *Id.* §§ 69-70.
[117] *Id.* § 1.
[118] Andreopoulos et al., *supra* note 5, at 63.
[119] That is, labor-related protections under the ICESCR, as discussed above, *supra* notes 22, 27-29.

A principle instrument is the 1977 Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy[120] (Tripartite Declaration) adopted by the International Labour Organisation (ILO) in response to the need to regulate MNC conduct and relations with host countries, mostly in the developing world. The Tripartite Declaration targets, inter alia, MNCs and seeks to transpose to MNCs the obligations that states hold under various ILO Conventions.[121] The Tripartite Declaration urges MNCs to obey its detailed provisions on equality of opportunity, employment security, wages, benefits and working conditions, health and safety, freedom of association, and collective bargaining.[122] Accordingly, Paragraph 8 urges:

> All the parties [i.e., governments, employers, and multinational enterprises] should respect . . . relevant international standards. They should respect the Universal Declaration of Human Rights and the corresponding International Covenants adopted by the General Assembly of the United Nations as well as the . . . principles [of the ILO].[123]

The 1977 OECD Guidelines buttress the Tripartite Declaration.[124] Section IV of the OECD Guidelines specifically concerns "Employment and Industrial Relations." The obligations that the OECD imposes on MNCs include maintaining the freedom of association and the right to collective bargaining, contributing to the effective abolition of child labor, eliminating all forms of forced or compulsory labor, and respecting non-discrimination in employment.[125]

The OECD Guidelines exhort that "[e]nterprises should, *within the framework of applicable law*, regulations and prevailing labour relations and employment practices" respect the right to freedom of association and collective bargaining.[126] If this were to be interpreted as setting national law as the minimum standard that MNCs need to

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[120] ILO, Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy, 17 I.L.M. 422, para. 6 (1978) (amended 2000, 2006) [hereinafter Tripartite Declaration].

[121] *Id.* para. 1.

[122] *Id.*

[123] *Id.* para. 8.

[124] *Id.* para. 7.

[125] CIIME Report, *supra* note 75, at 18-20, Ch. IV, ¶¶ 1, 22-24.

[126] CIIME Report, *supra* note 75, at 18 (emphasis added).

obey, the guidelines would be self-defeating considering that most violations occur by MNCs operating in developing countries, i.e., where the local standards are already significantly more lax. However, according to the commentary to the guidelines, the reference to "applicable law" acknowledges that MNCs are subject to more obligations than merely those of the domestic jurisdiction in which they operate and which may include "supra-national levels of regulation of employment and industrial relations matters."[127]

At the regional level, another agreement that seeks to offer protection to workers is the 1994 North American Agreement on Labour Cooperation (NAALC),[128] concluded as an addition to the North American Free Trade Agreement[129] (NAFTA) between Mexico, Canada, and the United States. "The NAALC was the first international labor agreement . . . linked to a trade agreement."[130] Indeed, the World Trade Organization still has not managed to arrange one.[131]

The NAALC aims to enhance and enforce basic workers' rights. It established a set of Objectives (Part 1), Obligations (Part 2), and Labor Principles (Annex 1) that its three state parties are committed to promote, but it does not create any direct obligations for MNCs operating in the territory of its state parties. However, it does provide for an individual complaints mechanism, which results in indirect MNC accountability.[132]

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[127] *Id.* ¶ 19, at 19.

[128] North American Agreement on Labor Cooperation, art. 8, Sept. 13, 1993, 32 I.L.M. 1993 [hereinafter NAALC].

[129] North American Free Trade Agreement, 32 I.L.M. 289 (1993), 32 I.L.M. 605 (1993) [hereinafter NAFTA]. *See infra* Part I.A.3.

[130] Secretariat of the Comm'n for Labor Cooperation, The NAALC, http://www.naalc.org/index.cfm?page=147 (last visited May 26, 2010).

[131] Beyond declaring an "existing collaboration" between the WTO and ILO Secretariats at the First WTO Ministerial Conference in 1996 in Singapore and the Fourth WTO Ministerial Conference in Doha in 2002, the debate continues as to whether the WTO is the correct institution to impose labor standards. *See* Understanding the WTO: Cross-cutting and New Issues, Labour Standards: Consensus, Coherence and Controversy, http://www.wto.org/english/thewto_e/whatis_e/tif_e/bey5_e.htm (last visited May 26, 2010).

[132] *See infra* Part I.A.2.b. and Part I.A.3.b.

b. Accountability Mechanisms

At the international level, no single body directly regulates MNCs regarding labor rights violations. Even the ILO, which one would expect to be well-suited to safeguard the rights it advocates, is relatively toothless.[133] Notwithstanding its Tripartite Declaration concerning MNCs, the ILO lacks direct enforcement powers vis-à-vis MNCs.[134] At best, the ILO's supervisory mechanisms, designed to oversee the implementation and application of ILO conventions by its member states, only make MNCs accountable indirectly. The ILO's supervisory mechanism provides for a two-tiered grievance system.[135] The first level allows workers or employer groups to lodge complaints—dubbed "representations"—about a member state's compliance with a given convention it has ratified,[136] while the second level provides for complaints by other governments, official ILO delegates, or the ILO Governing Body itself.[137]

Resolving workers' complaints is predominantly a political process[138] whereby the ILO seeks the consent of the concerned state to send a Direct Contacts Mission to engage in an informal "dialogue,"[139] concluding with the publication of a report. In cases of special concern, i.e., cases of "continued failure to implement," a Commission of Inquiry may be appointed to investigate the allegations.[140] The Commission reports its findings and may make recommendations concerning how the member can make its laws and practices consistent

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[133] Brian Langille, *What Is International Labour Law For?*, INT'L INST. LAB. STUD., Mar. 2005, at 14, *available at* http://www.oit.org/public/english/bureau/inst/download/langille.pdf.

[134] Terry Collingsworth, *The Key Human Rights Challenge: Developing Enforcement Mechanisms*, 15 HARV. HUM. RTS. J. 183, 184 (2002); Cristopher M. Kern, *Child Labor: The International Law and Corporate Impact*, 27 SYRACUSE J. INT'L L. & COM. 177, 189-90 (2000). *See also infra* Part I.A.4.a.

[135] ILO, Complaints - Applying and Promoting International Labour Standards, http://www.ilo.org/global/What_we_do/InternationalLabourStandards/ApplyingandpromotingInternationalLabourStandards/Complaints/lang--en/index.htm.

[136] ILO Constitution, arts. 24-25, May 10, 1944. *See generally* Kimberly Ann Elliott, *The ILO and Enforcement of Core Labour Standards*, INST. FOR INT'L ECON., No. 00-6, July 2000, 1, at 2.

[137] ILO Constitution, arts. 26-34 (1944).

[138] ICHRP, *supra* note 12, at 91.

[139] *Id.* at 90; Elliott, *supra* note 136, at 4-5.

[140] ILO Constitution, art. 26(3) (1944).

with the relevant convention.[141] If the member persists in its non-compliance, "the governing body may recommend . . . such action as it may deem wise and expedient to secure compliance therewith" under Article 33.[142]

Since the ILO's birth in 1919, only eleven Commissions of Inquiry have been appointed, and Article 33 was employed for the first time in 2000 when workers filed a complaint against Myanmar concerning alleged forced labor practices.[143] In that case, the Commission of Inquiry found "widespread and systematic use" of forced labor in Myanmar, and the ILO Governing Body recommended sanctions against a member state for the first time in its history.[144] The complaint against Myanmar subsequently gave rise to the infamous suit *Doe v. Unocal*,[145] in which the primary issue was Unocal's accountability for alleged complicity in using forced labor provided by the Myanmar government to prepare for the construction of a gas pipeline.[146]

In sum, the ILO, notwithstanding its provision of indirect accountability for MNC misconduct, is somewhat toothless because while it allows for the lodgment of complaints, it does not provide for enforceable adjudicative decisions. The ILO can only bind the member states that ratify the various ILO conventions, but even then it is not equipped with an enforcement mechanism against recalcitrant states, let alone MNCs. Consequently, the ILO mechanism depends upon the "good will" of the concerned member state to take action in reply to the Commission of Inquiry.

At the regional level, NAALC provided for the creation of the Commission for Labor Cooperation,[147] which is exclusively devoted to

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[141] *Id.* art. 28.

[142] *Id.* art. 33.

[143] *See* ILO, Report of the Commission of Inquiry Appointed under Art. 26 of the Constitution of the ILO to Examine the Observance by Myanmar of the Forced Labour Convention, 1930 (No. 29), 38 I.L.M. 255 (1999), available at http://www.ilo.org/global/What_we_do/InternationalLabourStandards/Applyingandpromoting InternationalLabourStandards/Complaints/lang--en/index.htm.

[144] *Id.*

[145] Doe v. Unocal Corp., 963 F. Supp. 880 (C.D. Cal. 1997).

[146] *See* Rachel Chambers, *The Unocal Settlement: Implications for the Developing Law on Corporate Complicity in Human Rights Abuses*, 13 HUM. RTS. BR. 14 (2005), *available at* http://www.globalpolicy.org/images/pdfs/09unocal.pdf. Although the case was eventually settled, it was the first US case to hold that ATCA actions could apply to private corporations.

[147] NAALC, *supra* note 128; *see infra* Parts I.A.3.a-b.

labor rights and labor-related matters. Notwithstanding its lack of direct applicability to MNCs, it provides for both domestic and international mechanisms to ensure the effective enforcement of existing and future domestic labor standards and laws.[148] As will be seen, the NAALC provides for three tiers of labor rights, with different levels of enforceability.[149]

At the domestic level, the National Administrative Office (NAO) is the heart of the mechanism for receiving complaints by individuals. The NAO is established within each state party's labor ministry,[150] and its purpose is, inter alia, "to receive and respond to" the public's (individual's and NGO's) complaints concerning any state party's alleged failure to enforce certain labor laws.[151] Individuals and NGOs are only permitted to lodge complaints with their local NAO concerning alleged violations of Tier 1 rights, which include freedom of association, the right to organize, the right to bargain collectively, and the right to strike.[152] Considering Tier 1 rights encompass three of the ILO's four fundamental principles, it is surprising that NAALC only provides for "consultation," i.e. where NAO's can consult with the state or recommend the ministers of states to consult with each other.[153]

Even if the main subject of an NAO complaint is a state party, the corporate activities of a private actor are usually implicated. To illustrate, a complaint against the alleged failure of Mexico to enforce labor rights laws, specifically the freedom of association, minimum employment standards, and occupational health and safety standards, concerned the Matamoros Garment S.A. de C.V. factory in Mexico.[154] Hence, the mechanism provides a limited degree of indirect MNC

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[148] *See* Secretariat of the Comm'n for Labor Cooperation, The NAALC, *supra* note 130.

[149] ICHRP, *supra* note 12, at 94-95.

[150] NAALC, *supra* note 128, art. 9, §1.

[151] Secretariat of the Comm'n for Labor Cooperation, The Nat'l Administrative Offices, http://www.naalc.org/index.cfm?page=153.

[152] NAALC, *supra* note 128, art. 49 (stating that "labor laws" include: freedom of association and protection of the right to organize; the right to bargain collectively; and the right to strike).

[153] *See* ICHRP, *supra* note 12, at 96.

[154] *See* US National Administrative Office, Bureau of International Labor Affairs, US Dep't of Labor, Public Report of Review of NAO Submission, Aug. 3, 2004, No. 2003-01, *available at* http://www.dol.gov/ILAB/media/reports/nao/pubrep2003-1.htm#2a. The NAO's report insipidly recommended only ministerial consultations with the Government of Mexico pursuant to art.22 of NAALC.

accountability. Notably, however, the NAO process is neither judicial nor adversarial. It cannot investigate at its own motion or, for example, precipitate a subpoena of evidence. Its task is merely passive fact-finding, and the process concludes with a report of the NAO's findings.[155] At a minimum the NAO will conduct consultations with either the NAO office of the accused state party[156] or with that state's ministers.[157]

The second mechanism for enforcing existing and future domestic labor standards and laws available under NAALC may be characterized as international since only states, not workers, can lodge complaints, this time concerning purported violations of Tier 2[158] and Tier 3[159] rights. Concerning Tier 2 rights, states may request the establishment of an Evaluation Committee of Experts (ECE), which will only result in a Final Report with non-binding recommendations.[160] It is only with respect to Tier 3 violations that states may request the establishment of an arbitration panel with quasi-judicial powers and the prospect of sanctions against the violating state.[161]

As of September 2007, thirty-four complaints have been made under the NAALC's NAO mechanism. Disappointingly, none have surpassed the first phase of ministerial-level consultations or led to monetary sanctions.[162] Notwithstanding the numerous criticisms that can be leveled at the NAALC's complaints mechanism,[163] indirect

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[155] *See* US Dep't of Labor, Public Reports of Review, http://www.dol.gov/ilab/media/reports/nao/public-reports-of-review.htm (last visited June 1, 2010).

[156] NAALC, *supra* note 128, art. 21.

[157] *Id.* art. 22.

[158] *Id.* art. 49 (listing the following as a part of "labor laws": prohibition of forced labor; elimination of employment discrimination; right to equal pay for men and women; compensation in cases of occupational injuries and illnesses; and protection of migrant workers).

[159] *Id.* (listing the following as a part of "labor laws": labor protection for children and young persons; employment standards for example, concerning minimum wages, overtime pay, etc; and prevention of occupational injuries and illnesses).

[160] NAALC , *supra* note 128, arts. 23-26.

[161] *See* ICHRP, *supra* note 12, at 97-98. *See also* Secretariat of the Comm'n for Labor Cooperation, Evaluation Committees of Experts and Arbitral Panels, http://www.naalc.org/naalc/ece.htm.

[162] *See* U.S. Dep't of Labor, Bureau of International Labor Affairs, http://www.dol.gov/ILAB/programs/nao/status.htm.

[163] *See* ICHRP, *supra* note 12, at 96.

regulation of MNC misconduct is better than no regulation at all. Nevertheless, it is unfortunate that its reach is geographically limited to its three member states.

3. INTERNATIONAL ENVIRONMENTAL LAW

a. Environmental Obligations[164]

Environmental disasters like the incidents at Chernobyl and Bhopal and the *Exxon Valdez* oil spill highlight that MNC accountability is an issue of considerable importance to environmental law. Recognizing this, there is significant environmental regulation of MNCs at the national level that derives from Multilateral Environmental Agreements (MEAs) concluded at the international level.[165] In comparison, there is relatively little direct MNC regulation at the international level. In recent years, noting that some of the most concerning practices of MNCs operating in developing countries involved serious environmental disorder, such as toxic waste dumping[166] and natural resource exploitation,[167] which also prejudiced human rights, specifically the right to health, the right to life, and often minority rights, the field of human rights law has increasingly enveloped environmental issues. While numerous human rights courts increasingly regard environmental issues as constituting an essential component of fundamental human rights and have occasionally dealt with them as such,[168] there nevertheless remain specialized environmental instruments, of both hard and soft law, that deserve independent discussion.

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[164] This section has been reproduced and expanded into a separate article; therefore, for further discussion of corporate governance in International Environmental Law, see Miriam Mafessanti, *Responsibility for Environmental Damage under International Law: Can MNCs Bear the Burden? . . . And How?*, 17 BUFF. ENVTL. L.J. ___ (forthcoming 2010).

[165] *See* MUCHLINKSI, *supra* note 16, at 556-66.

[166] *See* Sebastian Knauer, Thilo Thielke & Gerald Traufetter, *Toxic-Waste Ship "Probo Koala": Profits for Europe, Industrial Slop for Africa*, SPIEGAL, Sept. 18, 2006, http://www.spiegel.de/international/Spiegel/0,1518,437842,00.html; Nigeria Waste Imports from Italy (NIGERIA), Trade and Environment Database, *available at* http://www1.american.edu/TED/NIGERIA.HTM (discussing the 1987 case of toxic waste dumping in Koko, Nigeria).

[167] *See, e.g.*, Ogoni, Afr. C.H.P.R., Comm. No. 155/96.

[168] *See supra* Part I.A.1.b.ii.

The most significant codifications of environmental responsibilities at the international level targeting MNCs directly are contained in two soft law codes: Agenda 21[169] and the environmental portion of the OECD Guidelines.[170] The UN Norms encompass similar environmental obligations which target MNCs directly but go further by also providing for accountability.[171] Agenda 21 (the Agenda) is a program first adopted by 178 governments at the 1992 UN Conference on Environment and Development (familiarly known as the Earth Summit), in Rio de Janeiro.[172] Agenda 21 has been dubbed as "the most influential repository of MNE responsibilities in the environmental field."[173] Chapter 30 of the Agenda, "Strengthening the Role of Business and Industry," recognizes these groups as "full participants in the implementation and evaluation of activities related to Agenda 21."[174]

First, the Agenda calls on businesses to use their technological capabilities to "play a major role in reducing impacts on resource use and the environment."[175] In this spirit, businesses are expected to generally contribute to "cleaner production," i.e., the more efficient use of resources and production with less environmental impact and damage,[176] and bear general obligations such as "establish[ing] world-wide corporate policies on sustainable development, [and] arrang[ing] for environmentally sound technologies to be available to affiliates . . . in developing countries."[177]

Second, the Agenda advocates that "business and industry should increase self-regulation, guided by appropriate codes, charters and initiatives integrated into all elements of business planning and decision-making"[178] and should be encouraged "to report annually on

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[169] ICHRP, *supra* note 12, at 65 n.184 (citing Conference on Environment and Development, June 13, 1992, *Rio Declaration on Environment and Development*, U.N. Doc. A/CONF.151.26 (June 13, 1992)).

[170] *See infra* Part I.A.4.

[171] *See* U.N. Econ. & Soc. Council, Comm'n on Hum. Rts., SCHR., Economic, Social and Cultural Rights, §4.C., U.N. Doc. E/CN.4/Sub.2/2003/12/Rev.2 (Aug. 26, 2003). *See infra* Part I.A.4.c.for discussion.

[172] *Rio Declaration*, *supra* note 68.

[173] MUCHLINSKI, *supra* note 16, at 567.

[174] *Rio Declaration*, *supra* note 68, ¶ 30.1.

[175] *Id.* ¶ 30.2.

[176] *Id.* ¶ 30.7 – 30.16.

[177] *Id.* ¶ 30.22.

[178] *Id.* ¶ 30.26.

their environmental records."[179] Moreover, with reference to hazardous waste generation and disposal, businesses are encouraged to "introduce policies and make commitments to adopt standards of operation ... equivalent to or no less stringent than standards in the country of origin,"[180] thereby referring to obligations in existing conventions.[181]

The General Assembly reaffirmed the content and progress of Agenda 21 in 1997, five years after its adoption, and again in 2002 at the World Summit on Sustainable Development (Earth Summit 2002) in Johannesburg.[182] The revision of the OECD Guidelines in 2000 also reflected the principles of Agenda 21 by the inclusion of a section concerning the environmental performance of MNCs.[183] In addition to Agenda 21, Chapter V of the OECD Guidelines[184] expressly affirms the principles and objectives of the Aarhus Convention[185] and generally advocates that businesses integrate the protection of the environment into the conduct of their business activities by collecting material as to the impact of their activities on the environment, regular monitoring, maintenance of contingency plans, and the adoption of new technologies and operating procedures.[186]

Finally, the final substantive section of the UN Draft Norms concern "[o]bligations with regard to environmental protection."[187] According to the Norms, businesses are to respect "national and

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[179] *Id.* ¶ 30.10(a).

[180] *Id.* ¶ 20.9.

[181] Bamako Convention on the Ban of the Import into Africa and the Control of Transboundary Movement and Management of Hazardous Wastes Within Africa, Jan. 29, 1991, 30 I.L.M. 773 [hereinafter Bamako Convention]; African, Caribbean and Pacific States-European Economic Community, Final Act, Minutes, and Fourth ACP-EEC Convention of Lomé, Dec. 15, 1989, 29 I.L.M. 783 [hereinafter Lomé IV Convention].

[182] Plan of Implementation of the World Summit on Sustainable Development, § 1, *available at* http://www.un.org/esa/sustdev/documents/WSSD_POI_PD/English/WSSD_PlanImpl.pdf.

[183] *See* OECD Declaration on International Investment and Multinational Enterprises, Paris, June 27, 2000, DAFFE/IME(2000)/20, at 15-16.

[184] *See infra* Part I.A.4.b.

[185] *See* Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters, June 25, 1998, 38 I.L.M. 517 [hereinafter Aarhus Convention].

[186] *See* CIIME Report, *supra* note 75, ¶ 30, ch. V ¶¶ 1-2, 56.

[187] U.N. Draft Norms, *supra* note 77, *at* ¶ 1. *See* section I.A.4.c. for further discussion on the Draft Norms.

international law" as well as the precautionary principle.[188] They are obliged to "pursue the wider goal of sustainable development," and, according to the Commentary, MNCs "shall ensure that the burden of negative environmental consequences shall not fall on vulnerable racial, ethnic and socio-economic groups."[189] Moreover, they are obliged to undertake environmental impact assessments vis-à-vis their commercial activities and, most significantly, to "be fully accountable for any negative environmental consequences."[190] In this spirit, environmental assessments are to be made publicly available and submitted to the pertinent international bodies.[191]

Turning to hard law, as noted above, there is little direct regulation of general MNC activities at the international level.[192] On balance, like with human rights, environmental regulation places a heavy onus on state responsibility. The few obligations imposed directly on MNCs for the most part arise under liability instruments and are generally limited to obligations such as the maintenance of compulsory insurance coverage for ship owners.[193]

Other than liability-related obligations, only a few additional hard-law instruments refer, and then only indirectly, to the role of MNCs in furtherance of the treaty's objectives. For example, the Preamble to the Stockholm Convention on Persistent Organic Pollutants[194] recognizes the key contribution of the private sector "to achieving the reduction and/or elimination of emissions and discharges

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[188] The precautionary principle is one of the fundamental pillars of environmental law. As defined in Principle 15 of the *Rio Declaration,* it provides that "[w]here there are threats of serious or irreversible environmental damage, lack of full scientific certainty should not be used as a reason for postponing measures to prevent environmental degradation." *Rio Declaration, supra* note 68, Principle 15.

[189] U.N. Econ. & Soc. Council (ECOSOC), Comm'n on Hum. Rts. Commentary on the Norms on the Responsibilities of Transnational Corporations and other Business Enterprises with regard to Human Rights, ¶ 14, cmt. (c), U.N. Doc. E/CN.4/Sub.2/2003/38/Rev.2 (Aug. 26, 2003) [hereinafter *Commentary on the Norms*].

[190] U.N. Draft Norms, *supra* note 77, ¶ 14.

[191] *Commentary on the Norms*, *supra* note 189, ¶ 14, cmt. (c) and (d).

[192] MUCHLINKSI, *supra* note 16, at 566.

[193] *See infra* Part I.A.3.b.

[194] Stockholm Convention on Persistent Organic Pollutants, pmbl., July, 31, 2006, 2006 O. J. (L 209) 3, 3 [hereinafter Stockholm Convention].

of persistent organic pollutants."[195] More significantly, the Kyoto Protocol[196] recognizes that "private and/or public entities" may participate in the "clean development mechanism" established under Article 12,[197] the aim of which is to provide a standardized instrument for emissions offsetting for state parties. The effect is therefore to subject MNCs in a limited way to the state's international obligations.

The 1989 Basel Convention,[198] developed in response to the demands from developing countries for the international community to regulate the trade of hazardous wastes to less developed countries, also criminalizes the illegal traffic of hazardous wastes by all persons, natural or legal.[199] At the international[200] and regional levels,[201] further agreements also restrict the trans-boundary movement of waste, notably *to* Africa, and extend the prohibitions to MNCs.

Finally, NAFTA merits discussion.[202] As its name suggests, NAFTA primarily concerns regional integration by the reduction of trade obstacles. However, to assuage concerns that an increase in trade would result in a commensurate fall in environmental protections in those jurisdictions whose environmental regulations and laws were slipshod,[203] environmental protection and the strengthening and enforcement of environmental laws and regulations were included in

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[195] Rupert F. Pollard, *Environmental Law and International Business*, NATURAL WATERS, http://www.naturalwaters.org.uk/documents/Enviro%20Paper.pdf (last visited June 1, 2010).

[196] Kyoto Protocol to the United Nations Framework Convention on Climate Change, 37 I.L.M. 22, U.N. Doc. FCCP/CP/1997/L.7/Add 1 (1998).

[197] *Id.* art. 12(9).

[198] U.N. Env. Programme Conference of Plenipotentiaries on the Global Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal, Mar. 22, 1989, 28 I.L.M. 649 [hereinafter Basel Convention]; 1999 Basel Protocol on Liability and Compensation for Damage resulting from Transboundary Movements of Hazardous Wastes and their Disposal, *not yet in force*, http://www.basel.int/meetings/cop/cop5/docs/prot-e.pdf.

[199] Basel Convention, *supra* note 198, art. 4(3) (providing that such illegal traffic is criminal); art. 9(5) (requiring states to outlaw it in national laws); art. 2(14) (defining "Persons" as any natural or legal person).

[200] Lomé IV Convention, *supra* note 181, art. 39 (prescribing a full ban on all exports of hazardous wastes from any destination to Africa).

[201] Bamako Convention, *supra* note 181, art. 1(16), defining a "Person" as any natural or legal person.

[202] NAFTA, *supra* note 129.

[203] Stephen P. Mumme, *NAFTA and Environment*, FOREIGN POLICY IN FOCUS, Oct. 1, 1999, http://www.fpif.org/reports/nafta_and_environment.

NAFTA's preamble as being amongst its goals. NAFTA is complemented by the North American Agreement on Environmental Cooperation (NAAEC),[204] the purpose of which is to guarantee that the liberalization of trade practices is compatible with the states' existing obligations under international environmental law. In sum, the NAAEC requires its parties to ensure domestic law assures a high level of environmental protection thus ensuring that domestic standards will not be lowered to attract investment.[205] Although neither NAFTA nor NAEEC create any direct obligations for MNCs operating in the territory of its state parties, they do create complaints mechanisms that provide for indirect MNC accountability.[206]

b. Accountability Mechanisms

One of the cornerstones of environmental law is the "polluter pays" principle. For that reason, despite the lack of direct regulation of MNC activities generally at the international level, numerous instruments provide for the civil liability of MNCs when they engage in prohibited activities (even where there is no resultant damage, akin to strict liability offenses), as well as for compensation where there is resultant damage.[207] Those instruments generally require registered owners of vessels to maintain compulsory insurance coverage and to regulate certain categories of environmental damage. Three examples follow.

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[204] North American Agreement on Environmental Cooperation, Can.-Mex.-U.S., art.14, Sept. 8-14, 1993, 32 I.L.M. 1480; *See also* U.N. Env. Programme, *Guidelines for Enhancing Compliance with Multilateral Agreements*, UNEP Res. 95/10 (Feb. 9, 2001), *available at* http://www.unep.org/DEC/docs/UNEP.Guidelines.on.Compliance.MEA.pdf.

[205] North American Agreement on Environmental Cooperation, Can.-Mex.-U.S., art.3, Jan. 1, 1994, *available at* http://www.naaec.gc.ca/eng/agreement/agreement_e.htm [hereinafter NAAEC].

[206] *See infra* Part I.A.3.b.

[207] *See* MUCHLINKSI, *supra* note 16, at 571-72; D. Craig, *Environmental Law - Corporate Responsibilities and Commercial Transactions*, *in* ENVIRONMENTAL OUTLOOK: LAW AND POLICY 223, 224-25 (Boer, Fowler, Gunningham eds., 1994); Alexandre Kiss & Dinah Shelton, *Strict Liability In International Environmental Law*, *in* LAW OF THE SEA, ENVIRONMENTAL LAW AND SETTLEMENT OF DISPUTES: LIBER AMICORUM JUDGE THOMAS A. MENSAH 1131–51, 1140 (Geo. Wash. U. Law Sch. Pub. Law & Legal Theory Working Paper No. 345) (T. M. Ndiaye & R. Wolfrum, eds. 2007), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1010478&rec=1&srcabs=266365.

A convention imposed strict civil liability for oil pollution on the "owner of a ship"[208] (most usually a corporation) as early as 1969. Another convention established an international fund from which compensation would be paid as a backup in case liability under the former convention could not be established.[209] In 1992, a Protocol consolidated the two conventions and expanded the geographical scope of the fund to include pollution damage caused in the exclusive economic zone (EEZ).[210] Three similar conventions provide for civil liability of owners in cases of oil pollution arising from exploration of the seabed,[211] the carriage of noxious substances at sea,[212] and pollution created by bunker oil.[213] Compensation claims for pollution damage are brought directly against the ship's registered owner, insurer, or other persons providing financial security for the owner's liability for pollution damage.[214]

Further, individuals affected by the trans-boundary impact of industrial accidents on international waterways, for example fishermen or operators of downstream waterworks, have a legal right to adequate and prompt compensation against companies under the 2003 Protocol on Civil Liability and Compensation for Damage Caused by the Transboundary Effects of Industrial Accidents on Transboundary Waters.[215] The Protocol ties actions arising under both the Convention

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[208] Int'l Convention on Civil Liability for Oil Pollution Damage, Brussels, Nov. 29, 1969, 973 U.N.T.S. 3, art. 4, *as replaced by* the Protocol of Nov. 27, 1992.

[209] Int'l Convention on the Establishment of an International Fund for Compensation of Oil Pollution Damage, Brussels, Dec. 18, 1971, *as replaced by* the Protocol of Nov. 27, 1992 [hereinafter Fund Convention].

[210] *Id.*

[211] Int'l Convention on Civil Liability for Oil Pollution Damage Resulting from the Exploration for and Exploitation of Seabed Mineral Resources, London, May 1, 1977, 16 I.L.M. 1451.

[212] Int'l Convention on Liability and Compensation for Damage in Connection with the Carriage of Hazardous and Noxious Substances by Sea, London, May 3, 1996, 35 I.L.M. 1406, IMO Doc. LEG/CONF.10/8/2 [hereinafter HNS Convention].

[213] Int'l Convention on Civil Liability for Bunker Oil Pollution Damage, London, Mar. 23, 2001, IMO Doc. LEG/CONF.12/DC/1.

[214] Int'l Convention on Civil Liability for Oil Pollution Damage, *supra* note 208, art. 3(1); Int'l Convention on Civil Liability for Oil Pollution Damage Resulting from the Exploration for and Exploitation of Seabed Mineral Resources, art. 3(1), *supra* note 211.

[215] U.N. Econ. Comm'n for Eur., Protocol on Civil Liability and Compensation for Damage Caused by the Transboundary Effects of Industrial

on the Protection and Use of Transboundary Watercourses and International Lakes[216] and the Convention on the Transboundary Effects of Industrial Accidents[217] and provides for strict liability.

Finally, nuclear liability was regulated by a series of treaties even before Chernobyl occurred[218] and is primarily embodied in two instruments. The first, the 1960 (Paris) Convention on Third Party Liability,[219] aimed to balance competing needs, namely providing victims with compensation while protecting the nuclear industry from ruinous claims.[220] It is coupled with the 1963 Brussels Supplementary Convention, which sought to extend liability limits. The second instrument is the 1963 Vienna Convention on Civil Liability for Nuclear Damage.[221] After 1986's Chernobyl disaster, the 1988 Joint Protocol[222] united the two Conventions, seeking to provide one common civil nuclear liability regime. Under this common scheme, operators of the nuclear installations are exclusively and absolutely liable for nuclear accidents. Unfortunately, the conventions do not apply to nuclear incidents arising in non-contracting states or to damage suffered in the territory of non-contracting states.[223]

Accidents on Transboundary Waters, U.N. Doc. MP.WAT/2003/1, U.N. Doc. CP.TEIA/2003/3 (May 21, 2003).

[216] U.N. Econ. Comm'n. for Eur., Convention on the Protection and Use of Transboundary Watercourses and International Lakes, Mar. 17, 1992, 1936 U.N.T.S. 269, 31 I.L.M. 1312 [hereinafter Helsinki Convention].

[217] Helsinki Convention, *supra* note 216, 31 I.L.M. at 1330.

[218] *See* Julia A. Schwartz, *International Nuclear Third Party Liability Law: The Response to Chernobyl*, OECD Nuclear Energy Agency, 2006, *available at* http://www.nea.fr/html/law/chernobyl/SCHWARTZ.pdf.

[219] Paris Convention on Third Party Liability in the Field of Nuclear Energy, July 29, 1960, 55 A.J.I.L. 1082, *as amended by* the Additional Protocol of Jan. 28, 1964 and the Protocol of Nov. 16, 1982.

[220] Kiss & Shelton, *supra* note 207, at 1141.

[221] Vienna Convention on Civil Liability for Nuclear Damage, May 21, 1963, 2 I.L.M. 727, entered into force in 1977.

[222] International Atomic Energy Agency: Diplomatic Conference to Adopt a Protocol to Amend the Vienna Convention on Civil Liability for Nuclear Damage and to Adopt a Convention on Supplementary Funding, Sept. 12, 1997, 36 I.L.M. 1454.

[223] *See generally* Kiss & Shelton, *supra* note 207, at 1141-42; Schwartz, *supra* note 218, at 44-45; Ian Hore-Lacy, *Civil Liability for Nuclear Damage*, Encyclopedia of Earth, Dec. 11, 2009, http://www.eoearth.org/article/Civil_liability_for_nuclear_ damage. The liability regime was further revised to increase the amount and availability of compensation for victims in the 1997 Convention on Supplementary Compensation for Nuclear Damage and the

At the regional level, conventions concluded under the auspices of the Council of Europe (COE) also impose the "polluter pays" principle on legal persons.[224] Similarly, the 2004 EU Parliament and Council Directive on environmental liability with regard to the prevention and remediation of environmental damage[225] also forces industrial polluters to pay for environmental damage. Moreover, in 1998 the COE concluded its first convention introducing corporate criminal liability for environmental law breaches.[226] Its preamble recognizes that "imposing criminal or administrative sanctions on legal persons can play an effective role in the prevention of environmental violations."[227] Subsequently, in 2003, the Council of the European Union adopted a "Framework Decision" requiring member states to impose liability on legal entities for environmental offenses.[228] Although the Framework Decision encourages criminal liability, member states *have the option* of imposing criminal or civil fines and other "effective, proportionate and dissuasive sanctions," such as disqualification from certain industrial or commercial activities, or even judicial supervision and winding-up of the corporation.[229]

The Aarhus Convention provides an alternative means of redress.[230] Insofar as the Convention obliges states to implement and develop means of redress at the domestic level for both violations of its procedural requirements and violations of any national environmental laws,[231] it is not strictly-speaking an international mechanism for

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2004 Protocols to Amend the Paris Convention and the Brussels Supplementary Convention. *See* Schwartz, *supra* note 218, at 49-57.

[224] Convention on Civil Liability for Damage Resulting from Activities Dangerous to the Environment, art. 2(6), *opened for signature* June 21, 1993, Europ. T.S. No.150 ("'Person' means any individual or partnership . . . , whether corporate or not").

[225] Directive 2004/35/CE of the European Parliament and Council Apr. 21, 2004, 2004 O.J. (L 143) 56.

[226] Convention on the Protection of Environment through Criminal Law, art. 9, *opened for signature* Apr. 11, 1998, 1998 Europ. T.S. No. 172 [hereinafter Convention on the Protection of Environment]. Article 2 provides that the Convention applies to the activities of persons, including corporations. *Id.* Art.9 recommends that member states impose criminal liability on corporations, although states can opt for imposing administrative sanctions. *Id.* art. 2.

[227] *Id.*

[228] Council Framework Decision 2003/80/JHA on the Protection of the Environment through Criminal Law, Jan. 27, 2003, 2003 O.J. (L.29) 55.

[229] *Id.* art. 7.

[230] Aarhus Convention, *supra* note 185.

[231] *Id.* art. 9.

accountability. Nevertheless, the Convention prescribes that each state party must ensure that "members of the public have access to administrative or judicial procedures to challenge acts and omissions by private persons and public authorities which contravene provisions of its national law relating to the environment."[232] To that end, the Convention also requires the availability of "adequate and effective remedies" which are "fair, equitable, timely and not prohibitively expensive"[233] and calls on state parties to consider "the establishment of appropriate assistance mechanisms to remove or reduce financial and other barriers to access to justice."[234] While the idea behind the Convention is to fill the accountability lacuna, its effectiveness nevertheless depends on national implementation measures, which in many instances have been found to be lacking.[235] At the international level, the Aarhus Convention is the first environmental treaty establishing a Compliance Committee that allows for individual complaints. However, complaints concern the failure of state parties to comply with the Convention's requirements rather than directly concerning MNC violations.

NAFTA also has relevance to MNC accountability insofar as Chapter 11, Article 1114(2) concerns environmental measures. This provision allows a state party that believes that another party has relaxed its domestic health, safety, or environmental measures in order to encourage investment to "request consultations with the other Party and the two Parties shall consult with a view to avoiding any such encouragement."[236] Articles 2006 to 2017 provide for alternatives to consultation when the parties cannot reach agreement. Although the complaints mechanism ultimately concerns a reported state's failure to comply with its legal obligations, the mechanism allows states to indirectly contest corporate activities in that state, even before the activities begin—for example, where a state party grants a government license to a private company that may precipitate a breach of domestic health, safety, or environmental laws. A weakness of this mechanism is that the Article only provides state parties with standing to bring such complaints, not individuals or NGOs.[237] Another weakness is that even

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[232] *Id.* art. 9(3).

[233] *Id.* art. 9(4).

[234] *Id.* art. 9(5).

[235] *See* JusticeandEnvironment.org, *Implementation of the Aarhus Convention in EU Member States*, 2006, http://www.justiceandenvironment.org/wp-content/wp-upload/JE2006Aarhuslegalanalysis.pdf.

[236] NAFTA, *supra* note 129, art. 1114(2).

[237] *Id.*

when a state complains about the relaxation by another state of its legal obligations, the matter merely proceeds to an arbitral panel that issues a non-binding final report.

The NAEEC has also established the Commission for Environmental Cooperation (CEC) with a mandate to conduct ongoing environmental assessment of NAFTA's impact on the environment and to promote the effective enforcement of environmental law.[238] Under the NAEEC, there are two ways that a NAFTA state party can be the subject of CEC scrutiny for an alleged failure to enforce its environmental laws. The first is the "Citizen Submissions on Enforcement Matters" (SEM) process provided for by Articles 14 and 15 of the NAEEC.[239] Article 14 provides, "Any person or [NGO] may make submissions to the Secretariat asserting a [NAEEC] Party's failure to effectively enforce its environmental laws."[240] While the complaints mechanism allows complaints addressing state failure, it indirectly concerns corporations. An active file under consideration by the Secretariat, which concerns wetlands in Manzanillo, Mexico, illustrates this mechanism.[241] In the case, a Mexican organization alleges that the Mexican government is failing to effectively enforce its environmental laws with regard to the protection of the Laguna de Cuyutlán, Manzanillo.[242] Specifically, the complaint alleges Mexican authorities should not have granted favorable environmental impact authorizations to two infrastructure projects, one filed by the Federal Electricity Commission and another operated by a private actor, Z Gas del Pacifico.[243] Thus the SEM process indirectly subjects corporate activity to international inspection.[244]

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[238] Comm'n for Envtl. Cooperation, http://www.cec.org/ (follow "About the CEC" hyperlink, then follow "the Council" hyperlink) (last visited June 1, 2010).

[239] NAAEC, *supra* note 205, art. 14-15.

[240] *Id.* art. 14.

[241] Comm'n for Envtl. Cooperation Secretariat, *Wetlands in Manzanillo Article 14(1) Determination*, SEM-09-002 (Oct. 9, 2009), *available at*: www.cec.org/Storage/84/8024_09-2-DETN_14_1_en.pdf.

[242] Comm'n for Envtl. Cooperation, Humedales en Manzanillo Submission, Feb. 2, 2009, 1-2, http://www.cec.org/Storage/83/7902_09-2-SUB_es.pdf.

[243] *Id.* ¶¶ 2.3-2.4.

[244] The NAAEC provides for state parties to call each other to task where there is allegedly "a persistent pattern of failure by that other Party to effectively enforce its environmental law." The scheme envisages consultation and eventual arbitration with a final report which makes a finding as to a state's

Like the NAALC's NAO mechanism,[245] the SEM process is neither judicial nor adversarial,[246] nor does it seek to provide compensation or remedies for victims.[247] At best, the CEC may prepare a factual record of the allegation in question, which the Council may make publicly available.[248] However, the CEC Secretariat cannot make determinations or "rulings" in the record as to whether a party is failing to effectively enforce its environmental law obligations.[249] The CEC's lack of teeth nullifies the incentive for NGOs to file complaints about poor governmental compliance with legal obligations.[250] A revision of the system allowing the CEC to hold states accountable for their compliance breaches would prove more effective and more akin to the human rights bodies discussed above.

The second NAEEC mechanism occurs at the international level, like with NAFTA, and can be utilized when a state engages in a "persistent pattern of failure to effectively enforce its environmental law."[251] Apart from some lengthier procedural differences,[252] this method mirrors the process provided for by NAFTA by allowing a fellow state party to enter into consultations and failing a successful outcome, by referring the complaint to an arbitral panel. As noted by one review of the efficiency of this mechanism, "it was designed so that it would seldom be used."[253] Apart from its burdensome procedures, it suffers from the same weakness as its sister mechanism under NAFTA,

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inaction and provides for the eventual implementation of an action plan to remedy the defaulting states' breaches. NAAEC, *supra* note 205, arts. 22-36.

[245] NAALC, *supra* note 128.

[246] Comm'n for Envtl Cooperation, http://www.cec.org/ (follow "Citizen Submissions on Enforcement Matters" hyperlink) (last visited June 1, 2010).

[247] ICHRP Report, *supra* note 12, at 93.

[248] Aarhus Convention, *supra* note 185, art.15.

[249] For active files and completed fact records, see Comm'n for Envtl. Cooperation, http://www.cec.org/ (follow "Citizen Submissions on Enforcement Matters" hyperlink, then follow "Registry of Citizen Submissions" hyperlink) (last visited June 1, 2010).

[250] Gary Clyde Hufbauer , Daniel C. Esty , Diana Orejas , Luis Rubio & Jeffrey J. Schott, *NAFTA and the Environment: Seven Years Later* (2000), *available at* Peterson Institute for Int'l Economics, http://www.piie.com/publications/chapters_preview/322/iie2997.pdf [hereinafter Hufbauer, et al.].

[251] NAAEC, *supra* note 205, art. 22.

[252] For a detailed analysis of the procedural differences, see Hufbauer, et al., *supra* note 250, at 20-21.

[253] *Id.* at 18.

namely that only states may request the establishment of an arbitration panel.[254]

This review indicates that civil liability of MNCs is a more commonly accepted concept under international environmental law. Although the numerous liability conventions are marked by their own particularities, namely with respect to territorial application or the extent or amount of liability that may be imposed and the types of damage that may be protected, it is laudable that such regimes exist. On the other hand, compensation claims assure remedies for victims but not necessarily MNC accountability because MNCs do not suffer punishment. Liability conventions aside, international law does not generally regulate MNC misconduct; thus, regulation predominantly occurs at the domestic level. And as discussed, while human rights enforcement mechanisms also offer a possibility for lodging complaints for breaches of environmental law at the international level, they do not create direct MNC accountability but rather state responsibility for MNC misconduct.

4. SOFT LAW FRAMEWORKS & INTERNATIONAL INSTITUTIONS

This section looks particularly at the accountability mechanisms of the ILO Tripartite Declaration and the OECD Guidelines and introduces additional soft law frameworks such as the UN Draft Norms and the UN Global Compact. It also discusses the policies of the World Bank Group because the contribution of international financial institutions to MNC accountability should not be overlooked.

a. ILO Tripartite Declaration

The Tripartite Declaration's (the Declaration) obvious weakness is that adherence to it by MNCs is voluntary;[255] thus, it is not legally binding. In fact, the Tripartite Declaration limits itself to encouraging enterprises to establish an internal mechanism for the examination of employee grievances, pursuant to a procedure outlined in

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[254] ICHRP Report, *supra* note 12, at 93-94.

[255] *See* Tripartite Declaration Concerning Multinational Enterprises and Social Policy, at 3, para.7, 83 ILO Official Bull., Series A, No. 3 (2000), *available at* http://www.ilo.org/global/Themes/Employment_Promotion/MultinationalEnterprises/lang--en/docName--KD00121/index.htm [hereinafter Tripartite Declaration 2000].

Recommendation No. 130.[256] The Tripartite Declaration provides only limited opportunities for individual complaints.

Although the Declaration initially did not fully provide for any follow-up procedures, the situation gradually changed beginning with the establishment of the Committee on Multinational Enterprises in 1980, followed in 1993 by the establishment of the Subcommittee on Multinational Enterprises.[257] The mandate of the Subcommittee is "to conduct periodic surveys on the effect given to" the Tripartite Declaration and "to consider requests for the interpretation of the provisions" of the Tripartite Declaration.[258] Governments can lodge requests for interpretation, as can workers or worker organizations, but general citizen groups cannot.[259] The interpretation mechanism arguably provides for some degree of MNC accountability because an interpretation request must "aris[e] from an actual situation;"[260] thus, an MNC's conduct can come under direct examination. However, even if a request is admissible, the subsequent process is not judicial, does not give rise to any judgment concerning the actions of a MNC, and does not provide for any remedies for victims.[261] Therefore, even if a reply to a request for interpretation is published, its utility is limited to clarifying what is intended by the Declaration's standards.[262] Moreover, since the process is lengthy, the utility is more likely limited to future situations than the one at hand.[263]

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[256] *Id.* para. 58 (citing Recommendation (No.130) dealing with examining grievances in an attempt to reach a settlement).

[257] MUCHLINKSI, *supra* note 16, at 475.

[258] ILO, *Governing Body—Subcommittee on Multinational Enterprises,* http://www.ilo.org/empent/Informationresources/lang--en/WCMS_101252/index.htm (follow "Employment Center" hyperlink; then follow "Departments" hyperlink; then follow "EMP/ENTERPRISE" hyperlink) (last visited June 1, 2010).

[259] Tripartite Declaration 2000, *Procedure for the Examination of Disputes Concerning the Application of the Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy by Means of Interpretation of Its Provisions*, *supra* note 255, para. 5 (a)-(c), at 19-20.

[260] *See id.* para. 1, at 19.

[261] MUCHLINKSI, *supra* note 16, at 475; ICHRP Report, *supra* note 12, at 103.

[262] MUCHLINKSI, *supra* note 16, at 475.

[263] ICHRP Report, *supra* note 12, at 103.

b. OECD Guidelines

In 1976 the OECD published its *Declaration on International Investment and Multinational Enterprises* and its four related instruments that also sought to impose direct obligations on MNCs. In sum, the OECD instruments advocated non-interference by an MNC into the affairs of its host country (in light of the alleged involvement of an American company in the overthrow of the Allende government in Chile)[264] and established guidelines concerning foreign investment.[265] The associated OECD *Guidelines for Multinational Enterprises* (Guidelines), drafted in the same year[266] and most recently revised in 2000,[267] are wide-ranging recommendations by governments addressed to multinational enterprises pertaining to employment, industrial relations, environmental considerations, information disclosure and transparency (bribery), competition, taxation, and other aspects of corporate activity.[268] The Guidelines were intended to be recommendations to OECD investors as to how to conduct their operations in other OECD countries.[269] While portions of the OECD Guidelines pertinent to each of the sub-sections of the current article were discussed above, whether a sufficient enforcement mechanism exists begs discussion.

For some critics, the Guidelines' principal weakness is that, like the ILO Tripartite Declaration, observance of the Guidelines by enterprises "is voluntary and not legally enforceable" by express stipulation.[270] The commentary to the Guidelines declares them "supplementary standards of behaviors of a non-legal character, particularly concerning the international operations of these

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[264] *See* Jan Huner, *The OECD Guidelines and the MAI, in* LIABILITY OF MULTINATIONAL CORPORATIONS UNDER INTERNATIONAL LAW 197, 201 (Menno T. Kamminga & Saman Zia-Zarifi eds. Kluwer Academic Publishers 2000); John M. Kline, *TNC Codes and National Sovereignty: Deciding When TNCs Should Engage in Political Activity*, TRANSNATIONAL CORPORATIONS, Vol. 14, No. 3 (Dec. 2005), 31-32, *available at* http://www.unctad.org/en/docs/iteiit20059a2_en.pdf.

[265] OECD Guidelines, *supra* note 75.

[266] *Id.*

[267] *Id.*

[268] *See* Duncan McLaren, *The OECD's revised Guidelines for Multinational Enterprises: A step towards corporate accountability*, June 2000, Friends of the Earth: Past Briefings, http://www.foe.co.uk/resource/briefings/oecd_guidelines_multinational.html.

[269] Huner, *supra* note 264, at 198.

[270] CIIME Report, *supra* note 75, at 8, ¶ 1.

enterprises."[271] Despite this attempt to clearly categorize the Guidelines as policy and not law, the Guidelines were nevertheless adopted by a high-level, inter-governmental ministerial body representing the OECD's (then) twenty-nine member states. According to SRSG Ruggie, "The OECD Guidelines are currently the most widely applicable set of government-endorsed standards related to corporate responsibility and human rights."[272] Moreover, the Guidelines specifically focus on minimum standards for MNCs,[273] in contrast to the Tripartite Declaration, that targets states as well as MNCs.

Like the ILO Tripartite Declaration, the OECD Guidelines do not provide for an effective enforcement mechanism but do provide a mechanism for complaints (known as "specific instances").[274] The Guidelines provide mandatory implementation obligations for states as well as for the establishment of National Contact Points (NCPs), which constitute the Guidelines' enforcement mechanism.[275] The NCPs, like the NAALC's NAOs, are constituted by local government offices in each of the OECD's 30 member states as well as its 11 non-member states that nevertheless adhere to the Guidelines.[276] The NCPs promote the Guidelines and handle the complaints.[277] In contrast to the ILO mechanism, the OECD complaint mechanism is open to all interested parties in a case of violation, thus including victims, trade unions, NGOs, and even political parties.[278] Moreover, and again in contrast to

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[271] *Id.* at 9, 12.

[272] Although Ruggie went on to note that "their current human rights provisions not only lack specificity, but in key respects have fallen behind the voluntary standards of many companies and business organizations [and that] a revision of the Guidelines . . . would be timely." U.N. Hum. Rts. Council, *Promotion and Protection of All Human Right, Civil, Political, Economic, Social and Cultural Rights, Including the Right To Development*, ¶ 46, U.N. Doc. A/HRC/8/5 2008 (Apr. 7, 2008) (prepared by John Ruggie).

[273] CIIME Report, *supra* note 75, Preface, ch. I, ¶ 1, at 6, 8.

[274] OECD Guidelines for Multinational Enterprises, 2008, at 34, http://www.oecd.org/dataoecd/56/36/1922428.pdf (last visited June 1, 2010).

[275] CIIME Report, *supra* note 75, at 43, Ch. II; ICHRP, *supra* note 12, at 67; Huner, *supra* note 264, at 200-05.

[276] To date, the eleven non-OECD states include Argentina, Brazil, Chile, Egypt, Estonia, Israel, Latvia, Lithuania, Peru, Romania, and Slovenia. *See* Business and Society Exploring Solutions, OECD Nat'l Contact Points, http://baseswiki.org/en/OECD_National_Contact_Points (last visited June 1, 2010) [hereinafter OECD Nat'l Contact Points].

[277] *Id.*

[278] *Id.*

the ILO mechanism, OECD complaints target the MNC entity[279] and not states.

Generally speaking, a complaint should be lodged with the NCP in the state of the violation. However, in the event violations occur in a non-OECD state (which is likely given that OECD states are dominated by developed countries), complaints may be lodged in the home state of the MNC.[280] This flexibility therefore allows complaints to be lodged against both MNCs originating from an OECD country, as well as its related entities, which may operate in non-OECD territories.[281] Furthermore, this flexibility has meant that violations occurring as a result of MNC operations in Ecuador and Belize, India, the Philippines, and Ghana (all non-OECD countries), were able to be lodged with the NCPs in the MNCs' home states of Denmark, Netherlands, Norway, and Sweden, respectively.[282]

The purpose of each NCP is "to offer its good office[] to help the parties resolve the issue . . . by facilitating access to consensual, non-adversarial means of resolution, such as conciliation or mediation."[283] Thus possible outcomes include the parties agreeing to remediation or compensation.[284] Conversely, if no agreement is reached following these efforts, the NCP issues a statement of whether a breach of the Guidelines has occurred, and it may make recommendations concerning how a company can improve its compliance with the OECD Guidelines.[285] Although, strictly speaking, there is no "right of appeal," the OECD's Committee on International Investment and Multinational Enterprises (CIIME), may review the recommendation or interpretation of an NCP.[286] An NCP may also seek guidance from CIIME if it has doubts about the interpretation of the Guidelines.[287] The Guidelines recognize that claims of alleged violations of OECD

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[279] *Id.*

[280] *Id.*

[281] *Id.*

[282] *See* OECD, ANNUAL REPORT ON THE OECD GUIDELINES FOR MULTINATIONAL ENTERPRISES: ENHANCING THE ROLE OF BUSINESS IN THE FIGHT AGAINST CORRUPTION 18-20 (2003).

[283] OECD Nat'l Contact Points, *supra* note 276.

[284] *Id.*

[285] *Id.*

[286] *Id.*; ICHRP, *supra* note 12, at 100.

[287] OECD Nat'l Contact Points, *supra* note 276.

Guidelines could damage a company's reputation, so they provide for the possibility of keeping complaints confidential.[288]

When the Guidelines were first adopted in 1976, trade unions enthusiastically used them to complain about labor rights violations, and approximately 40 decisions stood by 1980.[289] Enthusiasm died soon thereafter when it was realized that CIIME's decisions were not domestically enforceable; consequently, the complaint mechanism fell into disuse and was regarded as ineffective.[290] In reply, the mechanism was strengthened in 2000.[291] One of the Guidelines' earliest claimed success stories concerns the 2001 complaint against a subsidiary of the Canadian/Swiss company, First Quantum, operating in Zambia. The company allegedly threatened to have squatters removed by force from mining land sold to it pursuant to a government privatization contract.[292] After Oxfam Canada complained to the Canadian NCP and detailed how First Quantum had fallen afoul of the OECD Guidelines in several respects, the NCP brought the matter to the attention of First Quantum, and within 6 months, the subsidiary in question reached an agreement with the ex-miners association, allowing the squatters to remain.[293]

More recently, significant complaints include those lodged by NGOs in 2006 with the Dutch NCP against Shell regarding its operations in the Philippines and Brazil[294] as well as the complaint by the German Clean Clothes Campaign lodged with the German NCP

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[288] ICHRP, *supra* note 12, at 68; OECD Watch, *The Confidentiality Principle, Transparency and the Specific Instance Procedure*, Feb. 2006, http://www.raid-uk.org/docs/Guidelines/Trans_Conf_Brief.pdf.

[289] ICHRP, *supra* note 12, at 100-01.

[290] Noting that despite the initial enthusiasm lasting until the 1980s, only two cases were presented under the Guidelines in the 1990s. *See* IRENE Report, *supra* note 74, at 6.

[291] *See* Decision of the Council on the OECD Guidelines for Multinational Enterprises, Procedural Guidance on National Contact Points, OECD Doc. C (2000)96/FINAL, at 4-5, *available at* http://www.oecd.org/document/39/0,3343,en_2649_34889_1933095_1_1_1_1,00.html.

[292] OECD Watch, Guide to the OECD Guidelines for Multinational Enterprises' Complaint Procedure: Lessons *from Past NGO Complaints*, Nov. 2006, 28, *available at* http://oecdwatch.org/publications-en/Publication_1664. *See also* Laura Bogomolny, *The Aliens are Coming (To Sue You)*, Corporate Knights, Globalization Issue, 2004, *available at* http://www.corporateknights.ca/magazine-issues/52-2004globalization-issue/145-the-aliens-are-coming-to-sue-you.html.

[293] Bogomolny, *supra* note 292.

[294] OECD Watch, *OECD Complaints against Shell*, May 16, 2006, http://oecdwatch.org/news-en/oecd-complaints-against-shell.

concerning alleged labor rights violations in two Indonesian supplier factories of Adidas.[295] Perhaps most famous is the 2002 UN Expert Panel mandated by the UN Security Council to gather information on all corporate activities of illegal exploitation of natural resources and other forms of wealth of the Democratic Republic of Congo (DRC).[296] The resultant report considered that 85 companies operating in the DRC (of which 57 operated in OECD countries) had contravened the Guidelines; consequently, the report pushed the shamed companies and the governments of their home nations into action.[297] Most importantly, the UN Expert Panel explained that it defined "illegality" as "the violation of international law, including 'soft' law"[298] The UN Security Council subsequently requested the Expert Panel to provide the relevant information to the OECD's CIIME and to the concerned NCPs for further action.[299] Although files were sent to the respective NCPs, the NCPs' subsequent inaction and failure to trigger investigations into the allegations of MNC misconduct caused the NCP and OECD system to come under fire. [300] While some NCPs defended their inaction by arguing difficulty in obtaining further evidence on misconduct from the UN Panel, others opined that their role was that of a mediator and not to investigate and decide if an MNC had breached the Guidelines in their DRC operations.[301] In both cases, the NCPs nevertheless fell short of their international obligations "to conduct

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[295] Clean Clothes Campaign, *Outcome of OECD Complaint Case of German Clean Clothes Campaign against Adidas Disappointing*, Sept. 1, 2004, http://www.cleanclothes.org/resources/ccc/corporate-accountability/full-package-approach-to-labour-codes-of-conduct/618.

[296] *See* Kuuya, *supra* note 61, at 29-32.

[297] *See* U.N. Sec. Council, Final Report on the Illegal Exploitation of Natural Resources and Other Forms of Wealth of the Democratic Republic of Congo, Anx. III, U.N. Doc. S/2002/1146, (Oct. 16, 2002).

[298] The Secretary-General, Report of the Panel of Experts on the Illegal Exploitation of Natural Resources and Other Forms of Wealth of the Democratic Republic of Congo, ¶ 15(d), Apr. 12, 2001, http://www.un.org/News/dh/latest/drcongo.htm.

[299] S.C. Res.1457, ¶ 14, U.N. Doc. S/RES/1457 (Jan. 24, 2003).

[300] *See* Anna Neistat & Peter Bouckaert, *The Curse of Gold: Democratic Republic of Congo*, Human Rights Watch, June 1, 2005, http://www.hrw.org/en/reports/2005/06/01/curse-gold.

[301] Rights & Accountability in Development (RAID), *Unanswered Questions: Companies, Conflict and the Democratic Republic of Congo*, Mar. 2004, at 4, 7, http://www.raid-uk.org/docs/UN_Panel_DRC/Unanswered_Questions_Full.pdf.

their own investigations, including as appropriate through judicial means, in order to clarify credibly the findings of the Panel."[302]

Notwithstanding it weaknesses, this is the only mechanism at the international level which allows for the direct monitoring of MNC conduct as a result of individual complaints.[303] Hence, there remains the possibility that more cases concerning MNC misconduct could be presented to the OECD, even if the effect is limited to shaming MNCs by virtue of bad publicity.

In 1998 the OECD Ministers also adopted the OECD Principles of Corporate Governance, which were revised in 2004.[304] The principles include twelve standards pertinent to, inter alia, MNCs and transparency and concern issues relevant to a company's decision-making processes, such as environmental, anti-corruption, or ethical concerns. They are modeled on other OECD instruments such as the *Guidelines for Multinational Enterprises and the Convention on Combating Bribery of Foreign Public Officials in International Transactions*.[305] Relevantly, Principle IV espouses that where stakeholder interests are protected by law, stakeholders should have the right to communicate their concerns about any illegal and unethical business activities, as well as the opportunity to obtain effective redress for violation of their rights.[306] However, the Principles of Corporate Governance are also non-binding.[307]

c. UN Draft Code of Conduct, UN Norms, and SRSG Ruggie

In the 1990's, endeavoring to produce an international code governing the conduct of MNCs, the now defunct UN Commission on Transnational Corporations produced a *Draft Code of Conduct on Transnational Corporations*.[308] Although the Draft Code of Conduct ultimately did not come to fruition,[309] the idea of a code of conduct

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[302] S.C. Res.1457, ¶ 14, U.N. Doc. S/RES/1457 (Jan. 24, 2003).

[303] ICHRP, *supra* note 12, at 101.

[304] OECD, OECD Principles of Corporate Governance, 2004, *available at* http://www.oecd.org/dataoecd/32/18/31557724.pdf.

[305] *See id.* at 12.

[306] *Id.* at 21.

[307] *Id.* at 13.

[308] U.N. ESCOR, *Draft United Nations Code of Conduct on Transnational Corporations*, Spec. Sess., Supp. No. 7, Annex II, U.N. Doc. E/1983/17/Rev.1 (1983), *republished at* 23 I.L.M. 62 (1984).

[309] The Draft Code of Conduct failed due to disagreements between North/South countries about international law and on the inclusion of standards

governing MNC accountability was not discarded. The Draft Code of Conduct was the forerunner to the UN (Draft) Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights[310] (Norms) and their associated Commentary,[311] which the now superseded UN Sub-Commission of Human Rights adopted in August 2003.[312]

The Norms were a highly ambitious codification of MNC responsibilities that went significantly further than the previously discussed soft law frameworks. While recognizing the primary responsibility of states in guaranteeing human rights, the Norms attributed the full gamut of state duties under various human rights treaties – such as to respect, protect, promote, and fulfill human rights – to corporations within their "spheres of influence."[313] Substantively, this attribution encompassed five categories of human rights:[314] "traditional" civil and political human rights;[315] economic and social

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of treatment for Transnational Corporations (TNCs). The Secretary-General, U.N. Sub-Comm'n on Prevention of Discrimination and Protection of Minorities, *The Impact of the Activities and Working Methods of Transnational Corporations on the Full Enjoyment of all Human Rights, in particular Economic, Social and Cultural Rights and the Right to Development, Bearing in Mind Existing International Guidelines, Rules and Standards Relating to the Subject-Matter*, ¶¶ 61-62, U.N. Doc. E/CN.4/Sub.2/1996/12, July 2, 1996.

[310] U.N. Draft Norms, *supra* note 77. *See* MUCHLINKSI, *supra* note 16, at 507. For an introduction to and oversight of the development of the Norms, see Larry C. Backer, *Multinational Corporations, Transnational Law: The United Nations' Norms On The Responsibilities Of Transnational Corporations As A Harbinger Of Corporate Social Responsibility In International Law*, 101 COLUM. HUM. RTS. L. REV. 287 (2005). For criticism of the Norms and an account of its substantive and operational shortcomings, see Surya Deva, *UN's Human Rights Norms for Transnational Corporations and Other Business Enterprises: An Imperfect Step in the Right Direction*? 10 ILSA J. INT'L & COMP. L. 493 (2004).

[311] *Commentary on the Norms*, *supra* note 189.

[312] U.N. ECOSOC, *Draft Report of the Sub-Comm'n on the Promotion and Protection of Hum. Rts.*, 59th Sess., 22d plen. mtg. at 52, U.N. Doc. E/CN.4/Sub.2/2003/L.11 (Aug. 13, 2003).

[313] U.N. Draft Norms, *supra* note 77, ¶ 1. *See also* Justine Nolan, *With Power Comes Responsibility: Human Rights and Corporate Accountability*, 28 U. NEW S. WALES L.J. 581 (2005).

[314] *See* MUCHLINSKI, *supra* note 16, at 521-24.

[315] U.N. Draft Norms, *supra* note 77, ¶ 12 (providing for the rights of equality, freedom from forced labor, freedom of association, to education, freedom of thought, freedom of opinion and expression).

rights as conventionally encompassed by the ILO;[316] "third generation' collective rights";[317] provisions specifically pertinent to the challenges MNCs face in establishing their commercial operations abroad, such as securing appropriate security arrangements for their business;[318] and duties touching upon broader issues of corporate social responsibility.[319]

As for accountability mechanisms, the Norms encompassed a rigorous and multi-layered approach to enforcement, starting with a degree of self-regulation. The Norms required businesses to internalize the Norms into their business practices; incorporate the Norms into future commercial contracts[320] such as to bind all parties to the "rules of the game";[321] periodically report on the progress of their implementation, which is a requirement for both MNCs and states; and conduct regular "human rights impact assessments" in order to assess the impact of their activities on human rights.[322] Further, the Norms envisaged periodic monitoring and verification of business compliance with the Norms "by the UN, or even other international and national

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[316] *Id.* (including rights such as employment security, wages, benefits and working conditions, health and safety, freedom of association and collective bargaining).

[317] *Id.* ¶ 1 (providing for rights such as the right to development and the duty to promote, respect and protect " . . . the rights and interests of indigenous peoples and other vulnerable groups").

[318] *Id.* ¶ 4. This means that "security arrangements shall be used only for preventive or defensive services;" "[s]ecurity personnel shall not violate the rights of individuals while exercising the rights to freedom of association and peaceful assembly;" shall refrain from contracting with individuals or State security forces or contract security firms "known to have been responsible for human rights or humanitarian law violations;" and corporations using public security forces to "consult regularly with host governments" and/or "nongovernmental organizations and communities concerning the impact of their security arrangements on local communities." *Commentary on the Norms*, *supra* note 189, ¶ 4, cmt. (b)-(e).

[319] Such as the duty to "act in accordance with fair business, marketing and advertising practices, . . . to ensure the safety and quality of the goods and services they provide," and not to "produce, distribute, market, or advertise harmful or potentially harmful products for use by consumers." Arguably, this was introduced in order to counter abusive marketing practices by MNCs in developing countries, such as the marketing of tobacco products by British American Tobacco, and baby milk products by Nestle. *See Id.* ¶ 13.

[320] U.N. Draft Norms, *supra* note 77, ¶ 15.

[321] Kuuya, *supra* note 61, at 33.

[322] U.N. Draft Norms, *supra* note 77, ¶ 16.

mechanisms already in existence or yet to be created."[323] To achieve these monitoring duties, states were primarily responsible for providing the "necessary legal and administrative framework" to ensure implementation of the Norms, and state responsibility may have been triggered in lieu of MNC responsibility in cases of lapses in compliance.[324] Perhaps most significantly, the Norms obliged businesses to "provide prompt, effective and adequate reparation" to be administered by either national courts, international tribunals, or both.[325] Thus, the Norms explicitly provided a direct right of compensation for victims, a provision which is otherwise only provided for in ATCA.[326]

While the Norms could have been regarded as a first step towards a binding international treaty, they were met with uproar from the business community concerning their purported binding nature[327] and received a cool reception by the UN Sub-Commission's parent body, claiming "this document has not been requested by the Commission and, as a draft proposal, has no legal standing."[328] The UN High Commissioner for Human Rights subsequently declared the Norms had no legal standing, and since 2004, there has been no further work done with respect to the Norms.[329] Instead, in 2005, at the request of the UN High Commissioner for Human Rights,[330] the Secretary-General appointed a Special Representative of the Secretary General (SRSG) to report on the responsibilities of transnational corporations. The SRSG is still in the process of completing his mandate.[331] From the outset, the SRSG has taken a significantly

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[323] *Id.*

[324] *Id.* ¶ 19; *see also* Deva, *supra* note 310, at 514.

[325] U.N. Draft Norms, *supra* note 77, ¶ 18.

[326] Carolin Hillemanns, *UN Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with regard to Human Rights*, 4 GERMAN L.J. 1065, 1078 (2003).

[327] Nolan, *supra* note 313, at 581-82.

[328] U.N. ECOSOC, Comm'n on Hum. Rts., 60th Sess., 49th plen. mtg., U.N. Doc. E/CN.4/DEC/2004/116 (Apr. 20, 2004) (ruling on the responsibilities of transnational corporations and related business enterprises with regard to human rights).

[329] *See* Backer, *supra* note 310, at n.186.

[330] U.N. ECOSOC, Comm'n on Hum. Rts., *Human Rights and Transnational Corporations and Other Business Enterprises*, U.N. Doc. E/CN.4/2005/L.87 (Apr. 15, 2005).

[331] In June 2008, the UN Human Rights Council extended the mandate of the SRSG until 2011. *See* SRSG, *Prepared Remarks by SRSG John G. Ruggie, Public Hearings on Business and Human Rights, Sub-Committee on Human*

different stance on the issue of MNC responsibility—more modest and pragmatic—than was proposed by the Norms.[332]

SRSG John Ruggie, in addition to the business and international community, was critical of the Norms for several reasons. Firstly, he opined that the elevation by the Norms of MNCs to the role of states, insofar as they thrust all state-based human rights obligations on MNCs, had "little authoritative basis in international law – hard, soft or otherwise."[333] Secondly, the concept of an MNC's "sphere of influence" was elusive and resulted in "imprecision in allocating human rights responsibilities to States and corporations." [334] Thus, from the outset the SRSG distanced himself from the Norm's utopian ideas.

In contrast to the Norms, SRSG Ruggie adopted a much more modest and pragmatic approach to MNC obligations based on three pillars: the state's duty to protect its citizens, the MNCs responsibility to respect human rights, and the need to ensure effective access to remedies.[335] Thus, the SRSG's three pillars clearly sidestep the biggest criticism leveled upon the Norms, namely that they failed to distinguish between state and MNC responsibilities. The SRSG embraces the traditional view of states as the primary protector of human rights obligations and only envisages a narrower (and more realistic) role for MNCs limited to *respect* for human rights, as opposed to contributing to their realization.[336] Moreover, in contrast to the Norms' "imprecise and expansive responsibilities," the SRSG has pushed for a definition of "the specific responsibilities of companies with regard to all

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*Rights, European Parliament, (*April 16, 2009) (*prepared by* John G. Ruggie), *available at* http://www.reports-and-materials.org/Ruggie-remarks-to-European-Parliament-16-Apr-2009.pdf.

[332] I thank Larissa van den Herik for a clarification in respect to this point. *See* Jens Martens & Elisabeth Strohscheidt eds., *Problematic Pragmatism—The Ruggie Report 2008: Background, Analysis and Perspectives*, June 2008, at 3-4, *available at* http://www.cidse.org/uploadedFiles/Publications/Publication_repository/policy_paper_Misereor_background_Ruggie_report_june08_EN.pdf.

[333] U.N. ECOSOC, *Interim Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises*, ¶ 60, U.N. Doc. E/CN.4/2006/97 (Feb. 22, 2006) [hereinafter SRSG Ruggie, *Interim Report*].

[334] *Id.* at ¶ 66. Larissa van den Herik, *Corporate Policy, Corporate Liability and Human Rights: The State of the Art*, 4 (Paper presented to a conference on Transnational Business and International Criminal Law, Humboldt Universität zu Berlin, May, 14-16 2009).

[335] SRSG Ruggie, *Report*, *supra* note 84.

[336] *Cf.* U.N. Draft Norms, *supra* note 77, ¶ 1.

rights."[337] In defining a company's specific responsibilities, the SRSG advocates a "due diligence" process that outlines "the steps a company must take to become aware of, prevent and address adverse human rights impacts."[338] Based in part on information gained from an earlier study, the recommendation revealed that MNCs in different sectors were more likely than others to commit certain human rights violations,[339] thus illustrating the need for each MNC to exercise due diligence to ensure that it does not contribute to or benefit from specific human rights abuses.

When it comes to accountability mechanisms, the difference between the Norms and the SRSG's approach is even more patent. While one of the central pillars of SRSG Ruggie's approach is the provision of effective remedies for rights violations, in contrast to the Norm's ambitions for a wide-ranging and legally binding set of rules, the SRSG has nevertheless refrained from reinventing the wheel under international law to put a remedial system in motion. Instead, in recognition of the fact that "judicial mechanisms are often under-equipped to provide effective remedies for victims of corporate abuse,"[340] the SRSG advocates strengthening domestic judicial systems; reducing the obstacles to accessing justice; and reviving alternative non-judicial structures, such as the OECD, NCPs, and National Human Rights Institutes[341] because "[t]he actual and potential importance of these institutions cannot be overstated."[342]

The SRSG's only innovation directly concerning MNCs has been a proposal to establish a "global ombudsman function that could receive and handle complaints" against MNCs.[343] As expected, this

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[337] SRSG Ruggie, *Report*, *supra* note 84, ¶ 51.

[338] *Id.* ¶ 56.

[339] *See* SRSG Ruggie, *Interim Report*, *supra* note 333, ¶¶ 24-29. The oil, gas, and mining sectors, the food and beverage industry, the apparel and footwear industry, and the information and communication technology sector are identified as the most common offenders of human rights. *Id.* ¶ 25. van den Herik, *Corporate Policy*, *supra* note 334, at 5.

[340] SRSG Ruggie, *Report*, *supra* note 84, ¶ 88.

[341] *Id.* ¶¶ 91, 99.

[342] *Id.* ¶ 97.

[343] *Id.* ¶ 103. Other "international" proposals do not focus on MNCs *per se* but rather on state obligations. *See* Martens & Strohscheidt, *supra* note 332, at 13-14. They include fostering sustainability reporting, including human rights-related clauses in newly negotiated Bilateral Investment Treaties between governments and MNCs, as well as making satisfaction of human rights obligations a prerequisite to the grant of governmental export credits. *Id.* at 13.

proposal, like the Norms, was met with severe criticism from the business community.[344] This aversion and the other recent developments in MNC regulation discussed here show that both states and MNCs are far from ready to accept a greater role for MNCs insofar as human rights protection is concerned, least of all in connection with a direct complaints mechanism at the international level.

d. UN Global Compact

The Global Compact (GC), established in 1999, was primarily the brainchild of former UN Secretary-General Kofi Annan, who throughout his tenure sought to introduce businesses into the UN framework as "partners" in hopes of fostering corporate behaviors that would respect "the principles enshrined in the UN Charter."[345] The GC encourages MNCs to respect, in their corporate practices, its ten "core principles," including support and respect for human rights, respect for basic labor rights, and the adoption of anti-corruption and pro-environmental principles.[346] Like the UN Norms, the GC principles lack clarity and precision as to precisely *which* human rights MNCs should support and respect.[347]

Notwithstanding its good intentions, the GC is a voluntary scheme without any mandatory enforcement or monitoring mechanisms.[348] Participation in the GC requires an MNC to do little more than send to the UN Secretary-General an expression of intent to integrate GC principles into the corporation's operations, publicly promote the GC principles in its publications, publish a summary of how the company is working to advance the GC principles in its annual report, and participate in GC policy dialogues and operational activities.[349] Lobbying by GC critics urging the UN to formally

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[344] Martens & Strohscheidt, *supra* note 332, at 12.

[345] Jackie Smith, *Power, Interests, and the United Nations Global Compact*, (Paper presented at ISA's 49th Annual Convention, Bridging Multiple Divides (March 26, 2008)), http://www.allacademic.com/meta/p_mla_apa_research_citation/2/5/2/0/9/p252098_index.html.

[346] *See* U.N. Global Compact: The Ten Principles, http://www.unglobalcompact.org/AboutTheGC/TheTenPrinciples/index.html (last visited June 1, 2010).

[347] *See* Nolan, *supra* note 313, at 588.

[348] UN Procurement Div., The Global Compact, http://www.un.org/Depts/ptd/global.htm (last visited June 1, 2010).

[349] *See id.*

monitor claims of corporate compliance with the GC's human rights and environmental sustainability norms has been met with resistance by the business community,[350] and the UN has acquiesced to the resistance of its "corporate partners."[351] Thus, insofar as the GC overtly denies any responsibility for monitoring or ensuring corporate compliance with global norms,[352] it serves little purpose in filling the accountability lacuna under international law.[353]

In response to critics' allegations that the GC also allowed MNCs to profit from beneficial publicity derived from their proclaimed but unverified allegiance to UN principles,[354] the GC introduced "integrity measures" in 2005 to protect against misuse of the UN name.[355] The measures allow individuals, groups, and organizations to complain about systematic and egregious abuse of the GC's principles against companies that claim to adhere to them.[356] The aim behind the measures is to engage the company in "dialogue" about the questioned behavior in order to encourage resolution.[357] The consequence for companies that refuse to engage in "dialogue" include being labeled as "not-communicating" or being disassociated with the GC, i.e., by removal from the GC's website.[358] The UN does not intend for the measures to affect its formal stance that the GC "is not now and does not aspire to become a compliance based initiative,"[359] and the measures do not otherwise affect regulatory or legal procedures in any jurisdiction.[360] Lastly, while GC participation has increased since its inception in 2000,[361] "such corporate participation represents a very

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[350] Smith, *supra* note 345, at 6.

[351] *Id.* at 8.

[352] *Id.*; *see also* U.N. Global Compact: Integrity Measures, http://www.unglobalcompact.org/AbouttheGC/IntegrityMeasures/index.html (last visited June 1, 2010) [hereinafter Integrity Measures].

[353] Smith, *supra* note 345, at 8.

[354] *Id.* at 6.

[355] *Id.* at 15.

[356] *Id.* cmt. 49.

[357] *Id.* cmts. 55, 49.

[358] Integrity Measures, *supra* note 352.

[359] *Id.*

[360] *Id.*

[361] There are currently approximately 5,936 listed business participants. *See* UN Global Compact, Participant Search, http://www.unglobalcompact.org/participants/search (last visited June 1, 2010) [hereinafter Participant Search].

small tip of a very large iceberg"[362] when compared to the total number of existing MNCs worldwide.[363]

The GC does provide for annual self-reporting under its "Communication on Progress" (COP) mechanism, which requires member MNCs to detail their efforts to institutionalize the GC principles.[364] However, of the companies currently participating in the GC, 5,936,[365] 1,251, or one-fifth, are non-communicating participants, i.e. have failed to report by the deadline in a given year.[366] Since 2006, the GC withdrew the memberships of 778 companies for their failures to file the requisite performance reports.[367]

The lack of reliable mechanisms for reporting non-compliance with the principles indicates that the GC is not proving to be an effective mechanism for MNC accountability. This weakness is aggravated considering that the GC was espoused as an initiative of the UN Secretariat and not the General Assembly. Consequently, the GC is not accountable to any UN organ other than its own Global Compact Office, which, despite being endorsed by the UN General Assembly[368] and otherwise generally being associated with the UN name, operates in a vacuum within the UN operational and legal framework.[369]

More recently, the Second Global Compact Leaders Summit in 2007, attended by political leaders and business leaders from diverse companies such as Coca-Cola, Levi Strauss & Co., Läckeby Water Group, Nestlé S.A., SABMiller, and Suez,[370] adopted the twenty-one

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[362] Smith, *supra* note 345, at 10.

[363] "In 2005, there were approximately 77,000 MNCs, with 770,000 foreign affiliates." Jonathan Clough, *Punishing the Parent: Corporate Criminal Complicity in Human Rights Abuses*, 33 BROOKLYN J. INT'L L. 899, 899.

[364] Integrity Measures, *supra* note 352.

[365] A participant search of the GC Database allows visitors to search for the total number of participants, as well as those who are either active or non-communicating. *See* Participant Search, *supra* note 361 (last visited June 1, 2010).

[366] U.N. Global Compact, Non-Communicating Participants, http://www.unglobalcompact.org/COP/non_communicating.html (last visited June 1, 2010)

[367] Smith, *supra* note 345, at 11.

[368] *See* G.A. Res. 60/215, ¶¶ 8-10, U.N. Doc. A/RES/60/215 (Mar. 29, 2006).

[369] Smith, *supra* note 345, at 15.

[370] The Global Compact Leaders Summit, Geneva, Switz., July 5-6, 2007, *Facing Realities: Getting Down to Business*, Annex 4 [hereinafter *Facing Realities*].

point Geneva Declaration.[371] The Geneva Declaration expounds that "globalization, if rooted in universal principles, has the power to improve our world fundamentally—delivering economic and social benefits to people, communities and markets everywhere."[372] In that spirit, the Declaration confirms the principles of the GC and urges that business should commit to its ten principles.[373]

e. The World Bank Group

The World Bank Group (Group) is collectively formed by the International Bank for Reconstruction and Development (IBRD) (informally, the World Bank), the International Development Association (IDA), the International Finance Corporation (IFC), the Multilateral Investment Guarantee Agency (MIGA), and the International Center for the Settlement of Disputes.[374] While the first two institutions primarily lend funds to the governments of developing nations,[375] the third and fourth institutions lend to private parties.[376] The Group's overall goal is to alleviate poverty in developing countries and promote economic development that is environmentally and socially responsible via infrastructure projects.[377] Recognizing that the Group's institutions are major providers of financial and technical assistance, UN agencies have urged the Group to harness its influence to further compliance with international law.[378] The UN Sub-

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[371] UN Global Compact, News & Events: UN Global Compact Leaders Summit 2007, http://unglobalcompact.org/NewsAndEvents/event_archives/Leaders_Summit_2007.html (last visited June 1, 2010).

[372] *Facing Realities*, *supra* note 368, Annex 3, pmbl., para. 2.

[373] *See id.* para. 10.

[374] The World Bank, About Us, paras. 2-4, http://web.worldbank.org/WBSITE/EXTERNAL/EXTABOUTUS/0,,pagePK:50004410~piPK:36602~theSitePK:29708,00.html (last visited June 1, 2010)

[375] *Id.*

[376] *See* Int'l Fin. Corp. [IFC], About IFC: What We Do, http://www.ifc.org/ifcext/about.nsf/Content/WhatWeDo (last visited June 1, 2010); Multilateral Investment Guarantee Agency [MIGA], http://www.miga.org/about/index_sv.cfm?stid=1736 (last visited June 1, 2010).

[377] The World Bank, About Us, *supra* note 374.

[378] ECOSOC, Comm'n on Hum. Rts., *Report of the Sub-Commission on Prevention of Discrimination and Protection of Minorities on its Forty-Sixth Session*, Aug. 1-26, 1994, UN Doc. E/CN.4/1995/2, E/CN.4/Sub.2/1994/56 (October 28, 1994) [hereinafter *Report of Sub-Commission on Prevention of Discrimination and Protection of Minorities*]. "The Commission on Human Rights, noting resolution 1994/37 of 26 August 1994 of the Sub-Commission

Commission on Promotion and Protection of Human Rights has also urged UN financial agencies, such as the IBRD and IDA,[379] to integrate human rights into their mandates.[380]

Accordingly, the Group's individual institutions have also introduced programs dedicated to creating and promoting an ethical code for businesses.[381] The Group's institutions have produced guidelines that concern several independent fields and outline certain requirements that must be satisfied before and during project financing.[382] These guidelines and their underlying policies address environmental protection, sustainable development, and the protection of indigenous peoples and reflect general principles of international law although they do not explicitly refer to them.[383] In order to strengthen the guidelines and increase borrower accountability, the Group provides two grievance mechanisms that allow for individual complaints concerning major projects.[384] The Inspection Panel (Panel), established in 1994, receives complaints concerning loans under the

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on Prevention of Discrimination and Protection of Minorities, endorses the requests of the Sub-Commission and decides to: [...] (e) Request the international financial institutions, in particular the World Bank, the International Monetary Fund and the World Trade Organization, to develop independent mechanisms designed to ensure that international human rights standards are taken fully into account in the adoption of all relevant policies, projects and practices and that these standards are fully respected in this regard." *Id.*

[379] The IBRD and IDA have a special relationship with the UN and are collectively recognized as an independent specialized UN agency. World Bank, About Us *supra* note 374.

[380] *Report of Sub-Commission on Prevention of Discrimination and Protection of Minorities*, *supra* note 376. "4. Encourages the United Nations Children's Fund, the United Nations Development Programme, the regional commissions, the United Nations Centre for Human Settlements (Habitat), the World Bank, the International Monetary Fund, the World Trade Organization and other relevant international programmes and agencies to integrate human rights concerns into their respective mandates" *Id.*

[381] ILO, *Governance, International Law & Corporate Social Responsibility*, Research Series 116, 1-2 (2008) [hereinafter ILO, *Governance*].

[382] ICHRP, *supra* note 12, at 106. *See* The World Bank—IBRD & IDA: Working for a World Free of Poverty, Topics in Development, http://www.worldbank.org/html/extdr/thematic.htm (last visited June 1, 2010).

[383] Susan Park, *Assessing the Accountability of the World Bank Group* 3, 11-12 (Paper presented at the annual meeting of the ISA's 49th Annual Convention, Bridging Multiple Divides, San Francisco, March 26, 2008).

[384] *See* ICHRP, *supra* note 12, at 106.

IDA or IBRD.[385] After the Group created the Panel, other development banks established similar accountability mechanisms.[386] The establishment of a Compliance Advisor/Ombudsman (CAO) to govern complaints concerning the IFC and the MIGA followed the establishment of the Panel 1999.[387] Each mechanism will be discussed in turn below.

i. *The IBRD and the Panel*

The Panel receives complaints on alleged violations by borrowers of IBRD policies touching a range of issues. The IBRD has formulated an Environment Strategy, which acknowledges the links between the environment, poverty, and development.[388] The Environment Strategy aims to improve the quality of life, improve the quality of growth, and protect the quality of the regional and global commons.[389] The IBRD has also drafted Operational Policies (OPs) and Bank Procedures (BPs) which guide the Bank's lending operations and ensure that potentially adverse environmental and social

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[385] The Inspection Panel, About Us, http://web.worldbank.org/WBSITE/EXTERNAL/EXTINSPECTIONPANEL/0,,menuPK:64129249~pagePK:64132081~piPK:64132052~theSitePK:380794,00.html (last visited June 1, 2010).

[386] *See, e.g.*, Business and Society Exploring Solutions, the Inter-American Development Bank, http://baseswiki.org/en/Inter-American_Development_Bank_(IDB),_Independent_Investigation_Mechanism (handling 5 complaints since 1994); the Asian Development Bank, http://baseswiki.org/en/Asian_Development_Bank_(ADB):_Accountability_Mechanism ("replacing the Inspection Function" which was established in 2005 with its Accountability Mechanism on May 29, 2003); the European Bank for Reconstruction and Development; http://baseswiki.org/en/European_Bank_for_Reconstruction_and_Development_(EBRD) (handling 1-2 complaints with its Independent Recourse Mechanism since 2004); the African Development Bank http://baseswiki.org/en/African_Development_Bank_(AfDB):_Independent_Review_Mechanism ("provid[ing] people adversely affected by a project financed by the Bank Group with an independent mechanism through which they can request the Bank Group to comply with its own policies and procedures").

[387] Compliance Advisor Ombudsman, About the CAO, http://www.cao-ombudsman.org/.

[388] *See* The World Bank, *Making Sustainable Commitments: An Environment Strategy for the World Bank*, July 17, 2001, http://siteresources.worldbank.org/ENVIRONMENT/Resources/244380-1250028593656/6382907-1252510780845/6428643-1255012678534/WBG-Environment-Strategy-2001-Full.pdf.

[389] *Id.*

consequences are identified, minimized, and mitigated.[390] For example, the OP 4.01 and BP 4.01 on Environmental Assessment[391] provide a framework for the associated environmental "safeguard policies,"[392] such that Bank-funded projects are screened for their potential environmental impacts, extending to potential physical, biological, socio-economic, and cultural resources impacts.[393] Thus, the IBRD has tied lending to states with the condition of continuous compliance with obligations imposed by environmental agreements.[394] If a borrower breaches the condition, the IBRD can cancel the loan and demand its repayment.[395]

The IBRD has also developed a series of Indigenous Peoples and Physical Cultural Resources policies, including its 2005 Revised OP 4.10 on Indigenous Peoples.[396] These policies promote consultation with, and participation of, indigenous peoples in IBRD-financed operations in order to ensure that adverse impacts to such groups are minimized or mitigated, if not avoided altogether.[397] Additionally, OP 4.12 on Involuntary Resettlement aims to improve or, at a minimum, restore the standards of living of people whose homes or livelihoods are

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[390] The World Bank, Operational and Safeguard Policies, http://web.worldbank.org/WBSITE/EXTERNAL/TOPICS/ENVIRONMENT/0,,contentMDK:20124313~menuPK:549278~pagePK:148956~piPK:216618~theSitePK:244381,00.html (last visited June 1, 2010).

[391] *See* World Bank, Operational and Safeguard Policies, Environmental Assessment,http://web.worldbank.org/WBSITE/EXTERNAL/TOPICS/ENVIRONMENT/EXTENVASS/0,,menuPK:407994~pagePK:149018~piPK:149093~theSitePK:407988,00.html (last visited June 1, 2010).

[392] *See id.*

[393] *Id.*

[394] *See* Peter H. Sand, *Institution-Building to Assist Compliance with International Environmental Law: Perspectives*, 56 ZAÖRV HEIDELBERG J. INT'L L., 774, 774-81 (1996); Mohammed Abdelwahah Bekhechi, *Some Observations Regarding Environmental Covenants and Conditionalities in World Bank Lending Activities*, 3 Max Planck U.N.Y.B.L. 287, 287-314 (1999).

[395] Dr. Nele Matz, *Financial and Other Incentives for Complying with MEA Obligations*, *in* ENSURING COMPLIANCE WITH MULTILATERAL ENVIRONMENTAL AGREEMENTS: A DIALOGUE BETWEEN PRACTITIONERS AND ACADEMIA 301-18, 313 (Beryerlin, Stoll, & Wolfrum eds., 2006).

[396] *See* The World Bank, Policies, *OP 4.10—Indigenous Peoples*, http://web.worldbank.org/WBSITE/EXTERNAL/PROJECTS/EXTPOLICIES/EXTOPMANUAL/0,,contentMDK:20553653~pagePK:64141683~piPK:64141620~theSitePK:502184,00.html (last visited June 1, 2010).

[397] *Id.*

destroyed or adversely affected by IBRD-financed projects.[398] The policy recommends compensation and resettlement measures and requires that borrowers prepare adequate resettlement planning instruments prior to IBRD appraisal of proposed projects.[399]

The Panel also receives complaints regarding alleged violations of the IRBD's policies on labor rights. In December 2006, after years of refusing to make financial lending conditional upon respect for labor standards, the IBRD announced that it would pursue cooperation with various other development banks for purposes of progressing and implementing the fundamental principles codified in the 1998 ILO Declaration.[400] This commitment illustrates the IBRD's progressive move towards including international labor standards in its financing operations, as well as towards closer cooperation between the ILO and the IBRD.[401] Indeed, the ILO has noted that there is an increasing trend amongst development banks to include international labor standards in their lending operations.[402] The IBRD has also established a Global Child Labour Program to proactively address the issue of child labor.[403] Moreover, the IBRD has increasingly engaged in dialogue with trade unions to further develop its labor policies.[404]

The Panel is the complaints mechanism for breaches of IBRD guidelines. The Panel was born from the realization that project-

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[398] *See* The World Bank, Involuntary Resettlement, http://web.worldbank.org/WBSITE/EXTERNAL/TOPICS/EXTSOCIALDEVELOPMENT/EXTINVRES/0,,menuPK:410241~pagePK:149018~piPK:149093~theSitePK:410235,00.html (last visited June 1, 2010).

[399] *Id.*

[400] *See* ILO, *Governance*, *supra* note 381, at 88, n.16 (citing official minutes of the meeting of 13 December 2006 in Washington DC between Mr. Paul Wolfowitz and representatives of the International Trade Union Confederation). *See also* Hans-Michael Wolffgang & Wolfram Feurhake, *Core Labour Standards in World Trade Law: The Necessity for Incorporation of Core Labour Standards in the World Trade Organisation*, 36 J. WORLD TRADE 36(5) 883 (2002).

[401] Wolffgang & Feurhake, *supra* note 400, at 888-89.

[402] ILO, *Governance*, *supra* note 381, at 89.

[403] *See* The World Bank, Child Labor, http://web.worldbank.org/WBSITE/EXTERNAL/EXTABOUTUS/EXTWEBARCHIVES/0,,MDK:22199444~menuPK:64654237~pagePK:64660187~piPK:64660385~theSitePK:2564958,00.html (last visited June 4, 2010).

[404] *See* Meetings Between the International Trade Union Movement (ITUC/GLOBAL UNIONS) and the IMF and World Bank, Washington, Dec. 10-11, 2007, http://siteresources.worldbank.org/INTLM/Resources/GU-IFI_JointReport_12-07.pdf.

financing often overlooked environmental and social considerations as well as the needs of locally-affected communities.[405] Consequently, the Panel allows a party negatively affected by a specific IBRD guideline or IDA-financed project to seek redress by lodging a "Request for Inspection," technically a complaint against the IBRD itself for an alleged breach of its own environmental or social policies.[406] The Panel is an independent, fact-finding body that reports directly to the Board of Directors of the IBRD.[407] If the Board of Directors approves a recommendation by the Panel to investigate the alleged violation, the Panel has full authority to do so.[408] An investigation consists of an in-country visit, during which the Panel meets with the complainants and those responsible for the project, confidentially interviews IBRD staff, and reviews related IBRD files.[409] The Panel's investigation may take up to a year and concludes with the presentation of its final report as to whether IBRD policies have been complied with in the specific circumstances.[410] In turn, the IBRD's senior management gives recommendations, usually in the form of an Action Plan, as to how to remedy any breach of IBRD's policies.[411] Strictly speaking, the Panel has no independent authority—its reports are non-binding, and it cannot offer complainants any remedies.[412] Its main strength is to pressure Management to reform or to withdraw from a given project.[413] To date, the Panel's focus concerns alleged violations of the IBRD's environmental policies and involuntary resettlement policy.[414]

Insofar as the IBRD's main clients are developing countries, not private actors, the Panel is not the best suited mechanism for providing direct MNC accountability. Indeed, the IBRD guidelines and directives are only intended to check the IBRD's external accountability, i.e., the IBRD's accountability vis-à-vis project-affected individuals. [415] Thus, the guidelines and standards are not legally binding on third party

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[405] Park, *supra* note 383, at 11-12.

[406] Business and Society Exploring Solutions, World Bank Inspection Panel, http://baseswiki.org/en/World_Bank_Inspection_Panel (last visited June 4, 2010) [hereinafter BASES, Panel].

[407] *Id.*

[408] *Id.*

[409] *Id.*

[410] *Id.*

[411] *Id.*

[412] BASES, Panel, *supra* note 406.

[413] ICHRP, *supra* note 12, at 109.

[414] Park, *supra* note 383, at 14.

[415] ICHRP, *supra* note 12, at 106-07.

MNCs.[358] However, in cases in which the Panel finds the IBRD has breached its policies through lending connected with MNC misconduct, resulting in either the IBRD's withdrawal from the project or the blocking of the MNC's participation in future IBRD-funded projects,[416] the Panel is a suitable mechanism for ensuring MNC conduct does not fall afoul of accepted standards, even if it cannot provide judicial remedies.[417]

ii. *The IFC, MIGA, and the CAO*

In contrast to the IBRD, whose traditional clients are developing states, the IFC and MIGA contract with private sector clients. The IFC and MIGA seek to directly condition the activities of their private sector partners by imposing performance standards, the satisfaction of which is a prerequisite to the grant of IFC investment funds.[418] The IFC has specifically developed eight Performance Standards, which define MNC roles and responsibilities for managing projects and requirements for receiving and retaining IFC support. [419] These standards touch issues faced by MNCs in diverse areas, including social and environmental impact; labor and working conditions; community health, safety, and security; land acquisition and involuntary resettlement; indigenous Peoples; and cultural heritage.[420] The IFC reviews all projects proposed for direct financing against its Performance Standards.[421] The Performance Standards are complemented by other IFC policy-setting documents, such as its Policy on Social and Environmental Sustainability[422] and its

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[358] *Id.*

[416] *Id.*

[417] *Id.* at 108-09.

[418] Hum. Rts. Council Report, *supra* note 8, at 15-16; Business and Society Exploring Solutions, Compliance Advisor/Ombudsman (CAO), http://baseswiki.org/en/World_Bank_Group:_Compliance_Advisor/Ombudsman_(CAO) (last visited June 4, 2010) [hereinafter BASES, CAO].

[419] IFC, *Performance Standards and Guidance Notes on Social & Environmental Sustainability*, Apr.30, 2006, http://www.ifc.org/ifcext/sustainability.nsf/AttachmentsByTitle/pol_PerformanceStandards2006_full/$FILE/IFC+Performance+Standards.pdf.

[421] *Id.* ¶ 1.

[421] *Id.*

[422] *Id.* ¶ 2.

Environmental, Health, and Safety Guidelines (EHS Guidelines).[423] The IFC claims that its Environmental and Social (E&S) Review Procedure, an internal procedure which is tantamount to due diligence, ensures respect of its Performance Standards vis-à-vis all of its investments activities.[424] The IFC Performance Standards are mandatory for the IFC and contractually binding on its MNC clients.[425] Similarly, the IFC's sister agency, the MIGA, has developed Environmental and Social Review Procedures and Safeguard Policies, modeled on the Performance Standards of the IFC, which bind its private sector clients.[426] The MIGA otherwise follows the IFC's Performance Standards and EHS Guidelines.[427]

MNC compliance with both IFC and MIGA standards is subject to review by the CAO.[428] The CAO may hear complaints from anyone adversely affected by the actual or potential social or environmental effects of either an IFC or MIGA-funded project.[429] The CAO office represents a two-tiered mechanism. First, the Ombudsman assesses a complaint and the office seeks a solution under the Ombudsman's guidance. The complaining party and the parties involved in the project may agree to any resolution under the Ombudsman's supervision.[430] In the event that the conciliation process under the Ombudsman is unsuccessful, the complaint may be forwarded to the CAO's Compliance section which results in public findings, not against the MNC in question, but against the IFC or MIGA.[431] That is, like

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[423] IFC, Environmental, Health, and Safety Guidelines, http://www.ifc.org/ifcext/sustainability.nsf/Content/EHSGuidelines (last visited June 4, 2010).

[424] IFC, *IFC Environmental and Social Review Procedures*, Version 4.0, Aug. 14, 2009, 8-9, *available at* http://www.ifc.org/ifcext/sustainability.nsf/AttachmentsByTitle/pol_ESRP2009/$FILE/ESRP2009.pdf.

[425] BASES, CAO, *supra* note 418.

[426] MIGA, Projects, Environmental & Social Safeguards, ¶ 5, http://www.miga.org/policies/index_sv.cfm?stid=1683 (last visited June 4, 2010).

[427] *Id.*

[428] CAO, How We Work: Compliance, http://www.cao-ombudsman.org/howwework/compliance/ (last visited June 4, 2010).

[429] CAO, How We Work: Ombudsman, http://www.cao-ombudsman.org/howwework/ombudsman/ (last visited June 4, 2010).

[430] BASES, CAO, *supra* note 418.

[431] *Id.*

with the Panel, the CAO only assesses the IFC or MIGA's compliance with its own standards and policies.[432]

iii. *Fraud, Corruption, and the Department of Institutional Integrity*

The IBRD established the Integrity Vice Presidency (INT) in 2001 to combat fraud and corruption by parties involved in IBRD lending, including its staff.[433] To this end, the IBRD's 2004 Procurement Guidelines[434] and Consultants Guidelines[435] seek to standardize contracts that IBRD borrowers enter into with third parties for purposes of the project for which the money was borrowed. The sets of guidelines regulate a borrower's procurement of goods and services and its selection and employment of consultants, respectively. In addition to advocating that procurement and consultant contracts be granted after taking into consideration quality and costs, both sets of guidelines prohibit general fraud and corruption (actual and attempted) in any step of the realization of the lending project. The sets of guidelines require not only the borrower but also bidders, suppliers, contractors, and subcontractors,[436] as well as consultants and their subcontractors,[437] to observe the highest standard of ethics during the pursuit and execution of IBRD-financed contracts and thereby forbid a range of criminal acts.[438]

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[432] *Id.*

[433] The World Bank, Integrity Vice Presidency, http://web.worldbank.org/WBSITE/EXTERNAL/EXTABOUTUS/ORGANIZATION/ORGUNITS/EXTDOII/0,,contentMDK:20542001~pagePK:64168427~piPK:64168435~theSitePK:588921,00.html (last visited June 4, 2010).

[434] IBRD/The World Bank, *Guidelines: Procurement Under IBRD Loans and IDA Credit*, May 2004, *revised in* Oct. 2006 & May 2010, http://siteresources.worldbank.org/INTPROCUREMENT/Resources/Procurement-May-2004.pdf [hereinafter *Procurement Guidelines*].

[435] IBRD/The World Bank, *Guidelines: Selection and Employment of Consultants by World Bank Borrowers*, May 2004, *revised in* Oct. 2006, http://siteresources.worldbank.org/INTPROCUREMENT/Resources/Consultant-May-2004.pdf [hereinafter *Consultants Guidelines*].

[436] *Procurement Guidelines*, *supra* note 434, at 10-11.

[437] *Consultants Guidelines*, *supra* note 435, at 8-9.

[438] Inter alia, bid manipulation, collusion, coercive practices, fraudulent bids, cost or labor mischarges, product substitution, using substandard or inferior parts or materials, bribery or acceptance of gratuities and abuses of authority. For a complete list, see The World Bank, Integrity Vice Presidency, Report Suspected Fraud or Corruption, http://web.worldbank.org/WBSITE/EXTERNAL/EXTABOUTUS/ORGANIZATION/ORGUNITS/EXTDOII/0,,co

While some commentators claim that guidelines do little more than encourage compliance by borrowers,[439] in 2006, the IBRD reformed and expanded its sanctions process[440] and provided a new two-tiered sanction mechanism.[441] Under this system, suspected breaches of the guidelines can be reported to the INT, which can investigate alleged fraud or corruption.[442] If the INT concludes that wrongdoing has occurred, the responsible parties are subjected to administrative sanctions overseen by the sanctions process's second tier, the Office of Evaluation and Suspension (OES).[443] Sanctions may include debarment, either permanent or temporary.[444] Debarment means that such companies are thereafter disqualified from World Bank financing. The objective is to prevent and deter fraud and corruption in projects financed by the IBRD.[445] At the present date, 161 companies are debarred under this procedure.[446] Further, the 2006 amendments now provide for sanctions against companies that undertake "[o]bstructive practices" in an attempt to hinder corruption allegations, for example by destroying evidence of corruption or intimidating

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ntentMDK:20659616~menuPK:1702202~pagePK:64168445~piPK:64168309~theSitePK:588921,00.html (last visited June, 2010).

[439] ICHRP, *supra* note 12, 106.

[440] The World Bank, Information Note for Borrowers, *Sanctions Reform: Expansion of Sanctions Regime Beyond Procurement and Sanctioning of Obstructive Practices*, July 28, 2006, http://siteresources.worldbank.org/PROJECTS/Resources/40940117379534022 1/SanctionsReformNoteBorrowers.pdf [hereinafter *Sanctions Reform Information Note*].

[441] The World Bank, Sanctions System at the World Bank, http://web.worldbank.org/WBSITE/EXTERNAL/EXTABOUTUS/ORGANIZATION/ORGUNITS/EXTOFFEVASUS/0,,menuPK:3601066~pagePK:64168427~piPK:64168435~theSitePK:3601046,00.html (last visited June 4, 2010).

[442] *Id.*

[443] The World Bank, INT, Sanctions System Flowchart, http://siteresources.worldbank.org/INTOFFEVASUS/Resources/Sanctions_Process_Flowchart_with_ETS_7.16.09.pdf?resourceurlname=Sanctions_Process_Flowchart_with_ETS_7.16.09.pdf (last visited June 4, 2010).

[444] The World Bank, INT, Sanctions and Debarments, List of Debarred Entities, http://web.worldbank.org/WBSITE/EXTERNAL/EXTABOUTUS/ORGANIZATION/ORGUNITS/EXTDOII/0,,contentMDK:21182440~menuPK:2452528~pagePK:64168445~piPK:64168309~theSitePK:588921,00.html (last visited June 4,2010).

[445] *Id.*

[446] The World Bank, World Bank Listing of Ineligible Firms, Fraud and Corruption, http://web.worldbank.org/external/default/main?pagePK=64148989&piPK=64148984&theSitePK=84266&theSitePK=84266&contentMDK=64069844&querycontentMDK=64069700&sup_name=&supp_country=&sort_on=SUPP_NAME&sort_order=ascending&sort_data=text (last visited June 4, 2010).

witnesses.[447] Moreover, under the IBRD's and the IDA's standard loan agreements, fraud and corruption warrant either suspension[448] or cancellation[449] of the loan.

5. CONCLUSIONS ON CURRENT DIRECT AND INDIRECT OBLIGATIONS PLACED ON MNCS

Part I has shown that numerous fields of law provide a legal basis for applying international law obligations to MNCs both directly and indirectly. Additionally, it has shown that, while numerous multilateral instruments at the international and regional level have provisions concerning corporate criminal liability for a variety of specific international offenses,[450] human rights law, environmental law and labor law each offer their own specific mechanisms governing MNC conduct, each meeting with qualified degrees of success.

In the field of human rights, notwithstanding numerous universal and human rights instruments, MNC accountability can only be achieved indirectly through regulation of states.[451] Relevant UN human rights bodies increasingly advocate that MNCs shoulder responsibilities; however their General Comments and Recommendations are plagued by ambiguity insofar as they dub MNC obligations as voluntary in the same breath. Further, the only instrument that envisaged direct accountability, the UN Norms, has no legal standing and has been discredited by both the UN High Commissioner for Human Rights and the current SRSG.

The availability of remedies for labor violations is no better than for human rights violations. Notwithstanding the existence of the ILO, MNC accountability is largely only possible via indirect means. The same holds true under the NAALC and its NAOs.

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[447] *Sanctions Reform Information Note*, *supra* note 440, at 5.

[448] IBRD, *General Conditions for Loan s*, § 7.02 (c), July 1 2005, *as amended through* Feb. 12, 2008, http://siteresources.worldbank.org/INTTOPGENCON/Resources/IBRD_GC_05_Feb08.pdf [hereinafter *IBRD General Conditions*]; Int'l Dev. Assoc. [IDA], *General Conditions for Credits and Grants*, § 6.02(c), July 1, 2005, *as amended through* Oct. 15, 2006, http://siteresources.worldbank.org/INTTOPGENCON/Resources/IDA_GC_05_Rev.pdf [hereinafter *IDA General Conditions*].

[449] *IBRD General Conditions*, *supra* note 448, § 7.03 (c); IDA §6.03(c).

[450] Bert Swart, *International Trends towards Establishing Some Form of Punishment for Corporations*, 6 J. INT'L CRIM. JUST. 947, 949 (2008); Stephens, *supra* note 30, at 69. *See supra* Part II.A. & nn. 476-78.

[451] *See* SRSG Ruggie, *Report*, *supra* note 84, ¶¶ 9, 18.

The issue of MNC liability appears to have found better footing in the field of environmental law insofar as the "polluter pays" principle is a fundamental cornerstone, and numerous international instruments impose liability on "operators," usually corporations. All other MNC regulation, for example under NAFTA, the NAEEC, and the Aarhus Convention, is indirect, secondary, and only enforceable in domestic legal systems, thus making effective enforcement dependent upon adequate legal structures and remedies at the domestic level.

As for soft-law frameworks, despite a plethora of criticisms, their utility should not be under-estimated. The most respected instruments to date are the oft-cited ILO Tripartite Declaration and the OECD Guidelines. While the former only provides for requests for interpretation, the latter's individual complaint system allows for direct complaints against a broad range of MNC misconduct (human rights and labor-related violations) as opposed to indirect complaints of a state's failure to comply with its international obligations. Moreover, the utility provided by the OECD Guidelines' extra-territorial application overcomes its drawbacks, namely that their effectiveness depends on political pressure and a state's willingness to act or that they have not yet provided a uniform degree of success. The Draft Fundamental Human Rights Principles for Business Enterprises and the UN Global Compact otherwise provide all-inclusive codifications of companies' obligations under international law. Despite their present non-binding nature and limited participation as far as the Global Compact is concerned, they undoubtedly increase awareness of the trend towards MNC accountability and could even set the stage for a future convention on MNC accountability.[452]

With regard to the major international financial institutions, notwithstanding the potential that each of the Group's procedures offers in terms of MNC accountability, two observations are important. First, neither the Panel nor the CAO provides for direct MNC accountability. Rather each ensures the IBRD's accountability vis-à-vis project-affected individuals. Each allows for complaints concerning the actual or potential adverse effects of major development projects and thereby only indirectly affects companies engaged in their implementation, who may then be found guilty of misconduct and find their project funding

[452] *See also* Halina Ward, *Corporate Accountability in Search of a Treaty? Some Insights from Foreign Direct Liability.* No. 4, Royal Inst. of Int'l Affairs, May 2002, at 9-10.

withdrawn.[453] Notably, the IBRD's power in cases of fraud and corruption by MNCs is significantly more robust.

Secondly, both the Panel and the CAO are, strictly-speaking, designed to ensure compliance with IBRD mandated policies and guidelines, rather than general principles of international law concerning corruption, labor, or the environment.[454] However, insofar as IBRD policies and guidelines are clearly based on general principles of international law,[455] such a distinction may well be academic.

The foregoing demonstrates that considerable attempts have been made across various fields of law to bring MNCs into the fold of international law and thereby fill the MNC-accountability lacuna. Despite these attempts, the unilateral application of international law norms to MNCs remains a contested debate, in some fields more so than others. Given such controversy, it is hardly surprising that attempts to develop corporate accountability mechanisms at the international level have also been so fragmented. The foregoing review best illustrates the conclusion of SRSG Ruggie: "[T]his patchwork of mechanisms remains incomplete and flawed," and it "must be improved in its parts and as a whole."[456] The question remains: How?

II. COMPLICITY, CORPORATIONS, AND INTERNATIONAL CRIMINAL LAW: IS THIS THE WAY FORWARD?

The patchwork and field-specific nature of international law norms discussed in Part I illustrate the complexity of finding one overarching framework for MNC accountability. The sheer variety of norms mirrors the extensive variety of MNC activities and the numerous ways that MNC activities can touch the lives of the societies in which they operate both directly (employees and their families) and indirectly (the public effects of their activities). Consistent with this extreme variety of manners of corporate affectation and of international law norms, there is a range of available means—albeit limited in number and underdeveloped—to hold MNCs responsible under international law.

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[453] ICHRP, *supra* note 12, at 108-09.

[454] Park, *supra* note 383, at 8.

[455] *Id.*

[456] SRSG Ruggie, *Report*, *supra* note 84, at ¶ 87 (discussing the availability of damage compensation instruments in the field of human rights).

In connection with this framework of varying accountability mechanisms, it is necessary to question why the ICJ's Expert Panel Report focuses on MNC "complicity" as the primary means of securing MNC accountability. Does it envisage international criminal law (ICL), in which complicity predominantly appears, as the framework through which all MNC wrongful acts can best be regulated? In order to answer that question, section A will review the norms of international criminal law, which apply to MNCs. Sections B and C will respectively analyze the evolution of the term complicity and its various current usages as well as complicity in the ICL context. Section D will assess whether ICL is a suitable framework for MNC accountability. Finally, section E will analyze the extent to which ICL-related crimes can be regulated by alternative means.

A. INTERNATIONAL CRIMINAL LAW & MNCS

In addition to the norms of international law discussed in Part I, ICL equally provides direct obligations for MNCs. While a recognizable body of ICL does exist, the precise parameters of this body of law are often unclear. ICL often distinguishes between two categories of offenses under international law: violations of *jus cogens*,[457] which are considered offenses against the international community by virtue of their sheer gravity; and transnational or international crimes, which affect at least two states and are criminalized under international conventions.

Some authors argue that respect for *jus cogens* norms directly binds MNCs.[458] Although the group of *jus cogens* prohibitions is not fixed, at a minimum it includes prohibitions on genocide, crimes against humanity, slavery, piracy, torture, and apartheid.[459] According to the ICJ, these "peremptory norms of international law" derive from "the principles and rules concerning the basic rights of the human

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[457] "A mandatory or peremptory norm of general international law accepted and recognized by the international community as a norm from which no derogation is permitted." BLACK'S LAW DICTIONARY 937 (9th ed. 2009).

[458] Menno T. Kamminga & Saman Zia-Zarifi, *Liability of Multinational Corporations Under International Law, in* LIABILITY OF MULTINATIONAL CORPORATIONS UNDER INTERNATIONAL LAW 1, 8-9 (Menno T. Kamminga & Saman Zia-Zarifi eds., 2000).

[459] M. Cherif Bassiouni, *Crimes, in* INT'L CRIMINAL LAW VOL. 1 41 (Transnational Publishers, Inc., 2d ed. 1999); *ICJ Report, supra* note 2, vol. 2, at 4.

person"[460] or from "elementary considerations of humanity."[461] Under this view, *jus cogens* norms share the same cornerstones as human rights law. Although no text explicitly imposes such prohibitions on MNCs, recent U.S. judicial decisions have held that non-state actors such as MNCs, like states, are obligated not to violate these norms and face liability if they do.[462] While individual officers of MNCs may be prosecuted before the International Criminal Court (ICC), at present, MNCs may not.[463] Instead, MNCs that breach these norms may face liability in any state under the principle of universal jurisdiction.[464] Indeed, considering the lacuna in the ICC's jurisdiction as compared to the number of countries that have enacted domestic legislation pursuant to international human rights obligations, such as the statute of the ICC[465] and the conventions against genocide and torture,[466] corporate

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[460] Barcelona Traction, Light and Power Co., Ltd. (Belgium v. Spain) (Second Phase), 1970 I.C.J. 3, 32 (Feb. 5).

[461] Corfu Channel (United Kingdom and Northern Ireland v. Albania) 1949 I.C.J. 4, 22 (Apr. 9).

[462] Kadic v. Karadzic, 70 F.3d 232, 241-43 (2d Cir. 1995) (concluding that genocide and war crimes were *jus cogens* norms which could not be derogated by states or private individuals); Doe v. Unocal, 395 F.3d 932, 932 (9th Cir. 2002) (finding Unocal could be liable for "aiding and abetting" the Myanmar military in committing violations of international law, where forced labor was the modern day equivalent of slavery and, therefore, a violation of a *jus cogens* norm).

[463] France's proposal to give the ICC jurisdiction over both natural and legal persons was rejected. *See generally* Larissa van den Herik, *Subjecting Corporations to the ICC Regime: Analyzing the Legal Counterarguments,* J. INT'L CRIM. JUST. (forthcoming). Nevertheless, the possibility of a review of the Int'l Criminal Ct. Statute after July 1, 2009 provides an opportunity for states to reconsider this option. U.N. Diplomatic Conf. on Plenipotentiaries on the Establishment of an Int'l Crim. Ct., *Rome Statute of the International Criminal Court*, art.121, UN Doc. A/CONF.183/9, (July 17, 1998), 37 I.L.M. 999 (1998) [hereinafter *Rome Statute*].

[464] Anita Ramasastry, *Corporate Complicity from Nuremberg to Rangoon: an Examination of Forced Labor Cases and their Impact on the Liability of Multinational Corporations*, 20 BERKELEY J. INT'L L. 91, 154 (2002).

[465] FAFO Report, *supra* note 4, at 15; Coalition for the Intn'l Crim. Ct., Chart on the Status of Ratification and Implementation of the Rome Statute and the Agreement on Privileges and Immunities (APIC), http://www.coalitionfortheicc.org/documents/Global_Ratificationimplementation_chartApr2010_%283%29.pdf (last visited June 4, 2010).

[466] *See* Convention on the Prevention and Punishment of the Crime of Genocide, Dec. 9, 1948, 102 Stat. 3045, 78 U.N.T.S. 277 (discussing genocide); Convention against Torture and Other Cruel, Inhuman, or

liability for grave violations remains primarily a matter for domestic criminal law prosecution.[467] The domestic legislation usually does not distinguish between natural and legal persons,[468] thus making the prohibitions in questions equally applicable to MNCs.

International law also provides for the criminalization of transnational or international offenses, which indirectly affect MNCs. International law increasingly classifies certain acts as international crimes and requires criminal prosecution at the domestic level.[469] An estimated 17 multilateral instruments exist at the international and European level with provisions concerning corporate criminal liability for a variety of specific international offenses.[470] Such instruments criminalize the bribery of foreign public officials,[471] the financing of terrorism,[472] transnational organized crime,[473] and corruption.[474] Each

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Degrading Treatment or Punishment, Dec. 10, 1984, 1465 U.N.T.S. 85, 23 I.L.M. 1027 (discussing torture).

[467] *See* FAFO Report, *supra* note 4.

[468] *Id.* at 16, 27.

[469] Doug Cassel, *Corporate Aiding and Abetting of Human Rights Violations: Confusion in the Courts*, 6 NW. U. J. INT'L HUM. RTS. 304, 316-17, 325.

[470] *See* Swart, *supra* note 450, at 949.

[471] OECD, Convention on Combating Bribery of Foreign Public Officials in Int'l Bus. Transactions, art.2, OECD Doc. DAFFE/IME/BR(97)20, Nov. 21, 1997 (providing "[e]ach party shall take such measures as may be necessary, in accordance with its legal principles, to establish the liability of legal persons"); *Id.* art. 3.2 (providing for substitute sanctions in jurisdictions where criminal responsibility is not applicable to legal persons (that is, corporations)).

[472] U.N. Int'l Convention for the Suppression of the Financing of Terrorism, G.A. Res. 54/109, art. 5(3), U.N. Doc. A/RES/54/109 (Dec. 9, 1999) (mandating "effective, proportionate and dissuasive criminal, civil or administrative sanctions") [hereinafter Financing Terrorism Convention].

[473] U.N. Convention against Transnational Organized Crime (Palermo Convention), G.A. Res. 55/25, art. 10(1), U.N. Doc. A/RES/55/25 (Jan. 8, 2001) (specifying "[e]ach State Party shall adopt such measures as may be necessary, consistent with its legal principles, to establish the liability of legal persons for participation in serious crimes involving an organized criminal group") [hereinafter Palermo Convention]. The Convention also provides that states must impose "effective, proportionate and dissuasive criminal or non-criminal sanctions, including monetary sanctions." *Id.* art.10(4)

[474] U.N. Convention Against Corruption, GA Res. 58/4, art. 26(1)-(2), U.N. Doc. A/RES/58/4 (Nov. 21, 2003) (providing "1. Each State Party shall adopt such measures as may be necessary, consistent with its legal principles, to establish the liability of legal persons for participation in the offenses established in accordance with this Convention. 2. . . . the liability of legal persons may be criminal, civil or administrative.").

convention requires state parties to adopt measures to hold corporations criminally liable and to impose either criminal sanctions or, in the event criminal liability does not exist under domestic law, non-criminal sanctions (namely civil or administrative liability) on "legal persons."[475] The conventions equally provide for secondary liability for MNCs that aid and abet violators.[476] A state's failure to exercise jurisdiction over companies who violate such conventions can entail state responsibility.[477]

At the European level, the Council of Europe (COE) [478] and the European Union (EU)[479] have introduced similar conventions outlawing certain activities and requiring domestic criminalization which often extends to MNCs.[480] Other framework decisions of the EU,[481] whose criminalization provisions extend to MNCs, include the 1998 COE Convention on the Protection of Environment through Criminal Law[482] and the 2007 COE Convention on the Protection of

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[475] Cassel, *supra* note 469, at 316.

[476] Financing Terrorism Convention, *supra* note 472, art. 5(a) (accomplice liability), 5(c) (intentionally contributing to commission of crime by a group with a common purpose); Palermo Convention, *supra* note 471, art. 5(1)(b) (aiding or abetting).

[477] Alston et al., *supra* note 13, at 559.

[478] Criminal Convention on Corruption art. 18, Jan. 27, 1999, 1999 Europ. T.S. No. 173 ("Each party shall adopt such legislative and other measures as may be necessary to ensure that legal persons can be held liable for the criminal offenses of active bribery, trading in influence and money laundering.").

[479] *See* Joint Action on Corruption in the Private Sector, 1998 O.J. (L 358) 2-4; Convention on the Fight against Corruption Involving Officials of the European Communities or Officials of Member States of the European Union of June 25, 1997, 1997 O.J. (C 195) 2-11; Convention on the Protection of the European Communities' Financial Interests of July 26, 1995, 1995 O.J. (C 316) 49-57 (aiming to make fraud against the European Community a crime under community law); *see also* the Second Council Protocol of June 19, 1997 to the Convention on the Protection of the European Communities' Financial Interests, art.3, 1997 O.J. (C 221) (imposing liability on legal persons).

[480] See Sara Beale & Adam Safwat, *What Developments in Western Europe Tell Us about American Critiques of Corporate Criminal Liability*, 8 BUFF. CRIM. L. REV. 89, 126-36 (2005).

[481] Framework decisions align the laws and regulations of the EU's Member States. Europa: Gateway to the European Union, Glossary, *Decision and framework decision*, http://europa.eu/scadplus/glossary/framework_decisions_en.htm (last visited June 4, 2010).

[482] Convention on the Protection of Environment, *supra* note 226.

Children against Sexual Exploitation and Sexual Abuse.[483] The European instruments dictate that, irrespective of whether states independently accept the concept of corporate criminal liability at the domestic level, they must subject serious MNC misconduct to repressive sanctions that are "effective, proportionate and dissuasive" in the words of the European Court of Justice and the European Court of Human Rights.[484]

B. EVOLUTION OF THE TERM 'COMPLICITY' AND ITS CURRENT LINK TO ICL

Before assessing any advantages that ICL, including particularly its concept of complicity, offers in terms of MNC accountability, a close examination of complicity is necessary. In the words of Amnesty International, "the concept of complicity is nuanced and multilayered, with different meanings in different contexts,"[485] As recognized by the ICJ Expert Panel, the notion of complicity did not originally denote any connection with criminal law.[486] Generally, human rights organizations, policy makers, and government experts used the term in laymen's speech merely to convey an MNC's (shameful) implication in "acts that are negative and unacceptable."[487] This etymology is confirmed by its use by the NGO, Human Rights Watch (HRW). According to HRW, its use of the word complicity to describe the actions of the Shell corporation in Nigeria and Enron in India was not intended, nor was it a part of the organization's goal, to argue that the MNCs were criminally liable for their actions and thus subject to prosecution.[488] In fact, HRW consciously went so far as to eschew the use of "accomplice" and "aiding and abetting" for fear of connoting criminal liability. As a human rights organization, HRW simply used the term complicity to convey that the MNCs were implicated in human rights abuses by states that hosted the MNCs and that bore human

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[483]Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse, Oct. 25, 2007, 2007 Europ. T.S. No. 201.

[484] Swart, *supra* note 450, at 953.

[485] Irene Khan, Secretary-General, Amnesty Int'l, Understanding Corporate Complicity: Extending the Notion Beyond Existing Laws, Speech at the Business Human Rights Seminar (Dec. 8, 2005), http://www.amnesty.org/en/library/asset/POL34/001/2006/en/4c856377-fa0a-11dd-b1b0-c961f7df9c35/pol340012006en.html.

[486]*ICJ Report*, *supra* note 2, vol. 2, at 1-2.

[487] *Id.*

[488] *See* Ken Roth, *Is Corporate Liability a Form of Complicity? What is Really a Corporate Entity?*, 6 J. INT'L. CRIM. JUST. 947, 947-79, 959 (2008).

rights obligations.[489] By using complicity, HRW hoped to do no more than appeal to the public's sense of morality in order to shame the MNCs.[490] However, with time "business complicity" and "corporate complicity" became used more generally to denote undesirable business involvement in predominantly human rights abuses.[491]

However, complicity[492] has a criminal law meaning which is closely linked to the concept of "aiding and abetting.[493] Aiding and abetting places (secondary) responsibility for commission of a criminalized act on an actor having a lesser involvement in the commission of the act itself.[494] Since almost all legal systems in the world have in their criminal codes[495] provisions concerning complicity, aiding and abetting, or both,[496] the term is naturally a concept of criminal law. When international criminal law was born after World War II, the concept of aiding and abetting was naturally also introduced.[497]

Under ICL and other criminal law systems, the notion of complicity, or accomplice liability, is a broad category of secondary liability which encompasses several modes of participation such as instigating, ordering, planning, or conspiring to commit a crime and extends to superior responsibility where a superior fails to prevent or punish the commission of a crime.[498] Although each of these modes of complicity may be charged as independent crimes, generally speaking, in the view of the International Law Commission (ILC) all of these forms of criminal participation are forms of complicity.[499]

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[489] *Id.*

[490] *Id.*

[491] *ICJ Report*, *supra* note 2, vol. 2.

[492] Defined as "association or participation in a criminal act; the act or state of being an accomplice." BLACK'S LAW DICTIONARY 324 (9th ed. 2009).

[493] *ICJ Report*, *supra* note 2, vol. 2, at 2.

[494] To aid and abet is "[t]o assist or facilitate the commission of a crime, or to promote its accomplishment." BLACK'S LAW DICTIONARY 81 (9th ed. 2009).

[495] FAFO Report, *supra* note 4, at 17-22.

[496] John G. Ruggie, U.N. SRSG for Business & Hum. Rts., Remarks at Business & Human Rights Seminar, Old Billingsgate, London, Dec. 8, 2005, at 2. "Aiding and abetting is a crime in most jurisdictions." BLACK'S LAW DICTIONARY 81 (9th ed. 2009).

[497] Robert Cryer, Håkan Friman, Darryl Robinson, & Elizabeth Wilmshurst, AN INTRODUCTION TO INTERNATIONAL CRIMINAL LAW AND PROCEDURE 310 (2007).

[498] *Id.* at 312-30.

[499] *See ICJ Report*, *supra* note 2, vol. 2, at 2; U.N. Int'l L. Comm'n, *Draft Code of Crimes Against the Peace and Security of Mankind*, [1996] 2 Y.B. Int'l

To illustrate how the terms complicity and aiding and abetting have been used interchangeably over the years, it suffices to compare Principle VII of the 1950 Nuremberg Principles, which affirmed that "[c]omplicity in the commission of a crime against peace, a war crime, or a crime against humanity as set forth in Principle VI is a crime under international law,"[500] with the 1996 ILC Draft Code of Crimes[501] and the 1998 Rome Statute for the ICC,[502] which criminalize aiding and abetting in, inter alia, the same core crimes (and genocide).

To add to this confusion, in addition to its colloquial and criminal law usages, complicity is a commonly used term under America's infamous ATCA although this act provides for civil, not criminal, liability.[503] Most recently, ATCA has supported a spate of cases alleging MNC complicity in human rights violations.[504] In contrast to the ICL concept of complicity however, ATCA finds civil liability, akin to torts, for violations of the law of nations.[505]

Significantly, the ICJ Report recognizes the confusion over the term complicity and draws an express distinction between its colloquial and criminal law connotations. Thus, in Volume 2 of the report, the ICJ expressly discusses the various concepts of liability under ICL and, inter alia, aiding and abetting, whilst in Volume 3, it discusses the broader notion of complicity—meaning undesirable involvement in

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L. Comm'n 26, U.N. Doc. A/CA.4/SER.A/1996/Add.1. (Part. 2) [hereinafter ILC Draft Code of Crimes]. Pursuant to Chapter 2, Article 2(3)(d), an individual who "knowingly aids, abets or otherwise assists, directly and substantially, in the commission of such a crime, including providing the means for its commission" is criminally responsible.

[500] *Principles of International Law Recognized in the Charter of the Nuremberg Tribunal and in the Judgment of the Tribunal*, [1950] 2 Y.B. Int'l L. Comm'n 377, UN Doc. A/CN. 4/SER.A/1950/Add. 1.

[501] ILC Draft Code of Crimes, *supra* note 499.

[502] *Rome Statute*, *supra* note 463. Article 25, § 3(c) provides that a person may be held criminally liable and subject to punishment for assisting or attempting to assist in the commission of a crime. *Id.*

[503] Alien Tort Claims Act, 28 U.S.C. § 1350 (2006) (providing "[t]he district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States.").

[504] For a review of major ATCA litigation cases, see Cassel, *supra* note 469, at 305-06.

[505] For an overview, see Tarek F. Maassarani, *Four Counts of Corporate Complicity: Alternative Forms of Accomplice Liability Under the Alien Tort Claims Act*, 38 INT'L L. & POL. 39, 39-65 (2006); *ICJ Report*, *supra* note 2, vol. 3.

another's act—against the existing framework of civil liability at the domestic level.[506] In light of the differing usages of this term, it is evidently erroneous to automatically assume that all references to corporate complicity necessarily entail criminal liability. To the contrary, as will be shown, ICL has a relatively restricted scope, which cannot remedy the full range of traditional MNC violations.

C. ICL-RELATED COMPLICITY

Under ICL, complicity is most commonly linked to crimes against humanity, war crimes, genocide,[507] and aggression (known as the core crimes). The war crimes trials, which occurred post-WWII, illustrated that complicity in Nazi activities extended to non-state actors, such as prominent industrialists.[508] Cases brought against the individual leaders of companies alleged complicity in genocide[509] and aggression.[510]

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[506] *ICJ Report*, *supra* note 2, vol. 3, at 1.

[507] Convention on the Prevention and Punishment of the Crime of Genocide art. 3, Dec. 9, 1948, 78 U.N.T.S. 277; S.C. Res. 827, U.N. SCOR, 48th Sess. 3217th mtg., U.N. Doc. S/RES/827 (May 25, 1993); S.C. Res. 955, U.N. SCOR, 49th Sess., 3453d mtg., U.N. Doc. S/RES/955 (Nov. 8, 1994).

[508] *See* United States v. Krupp, *in* 9 TRIALS OF WAR CRIMINALS BEFORE THE NUREMBERG MILITARY TRIBUNALS UNDER CONTROL COUNCIL LAW NO. 10 1 (1950) (charging the Krupp firm and twelve of its officials for participation in corporate use of slave labor and other crimes of war); United States v. Flick, *in* 6 TRIALS OF WAR CRIMINALS BEFORE THE NUREMBERG MILITARY TRIBUNALS UNDER CONTROL COUNCIL LAW NO. 10 1 (1952) (charging steel industrialist Friedrich Flick and five associates with use of slave labor and other war crimes); United States v. Krauch, *in* 7-8 TRIALS OF WAR CRIMINALS BEFORE THE NUREMBERG MILITARY TRIBUNALS UNDER CONTROL COUNCIL LAW NO. 10 1 (1953) (charging all directors of I.G. Farbenindustrie A.G. who knowingly complied with corporate policy with unlawful employment of slave labor and other crimes of war); *In re* Tesch (Zyklon B case) 13 Ann. Dig. 250 (Brit. Mil. Ct. 1946), *reprinted in* 1 U.N. WAR CRIMES COMM'N, LAW REPORTS OF TRIALS OF WAR CRIMINALS 93, 93 (1947) [hereinafter L.R.T.W.C.].

[509] *See* Prosecutor v. Nahimana, Case No. ICTR 99-52-T, Judgment and Sentence, (Dec. 3, 2003) (charging Nahimana for, among other things, complicity in Genocide for broadcasting messages on national radio which incited ethnic hatred and murders of the Tutsi people).

[510] *Krauch*, *supra* note 508; *Krupp*, *supra* note 508. The defendants were not ultimately convicted because they lacked the necessary knowledge. *See* Kevin J. Heller, *Retreat from Nuremberg: the Leadership Requirement in the Crime of Aggression*, 18 EUR. J. INT'L. L. 477, 477-97 (2007).

In addition to its role in ICL, several other international law instruments provide for complicity, namely for the international crimes of torture or other cruel, inhuman, or degrading treatment;[511] people trafficking for the purpose of prostitution;[512] and enforced disappearance.[513]

Complicity in ICL accordingly applies to an altogether different league of violations than those discussed in Part I, not to mention that the relevant crimes under ICL are rarely governable by the alternative accountability mechanisms discussed in Part I. Although no international forum is currently capable of holding MNCs accountable for violations of core crimes, due in part to the ICC's lack of jurisdiction over legal persons, the increasing number of domestic jurisdictions enacting implementing legislation pursuant to international conventions and recognizing criminal liability of corporations for ICL crimes ensures that MNC immunity is a dying phenomenon.[514]

Notwithstanding the possible expansion of ICC jurisdiction to encompass legal persons, because the scope of ICL is constricted to a very well defined range of activities, ICL does not dominate the discussion about suitable mechanisms for regulating all MNC misconduct. However, this is not to say that ICL is not conceptually well suited to regulating MNC accountability. The next section illustrates why this field of international law, when compared to others, is conceptually well suited to regulating MNCs.

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[511] Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment art. 4, Dec. 10, 1984, 1465 U.N.T.S. 85, S. Treaty Doc. No. 100-20 (1988).

[512] Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others art. 17, Dec. 2, 1949, 96 U.N.T.S. 271.

[513] Convention for the Protection of All Persons from Enforced Disappearance art. 6, G.A. Res. 61/177, U.N. Doc. A/RES/61/177 (Dec. 20, 2006).

[514] *ICJ Report*, *supra* note 2, at 5; FAFO Report, *supra* note 4, at 15-16. Although evidentiary and procedural obstacles, for example, corporations law concerning the lifting of the corporate veil and the plea of forum non conveniens, render it difficult to obtain effective legal redress even at the domestic level. *Id.*

D. IS ICL A SUITABLE FRAMEWORK FOR MNC ACCOUNTABILITY?

Seeing that the core crimes under ICL derive from "elementary considerations of humanity"[515] and commission of the underlying acts "shock[s] the conscience of mankind,"[516] their criminalization is not surprising. The heinous quality of such crimes, coupled with their large scale character, provides the added element of gravity warranting criminalization. In comparison, less heinous violations of international law, i.e. violations of environmental and labor laws and human rights violations of lesser severity, have not been criminalized. Instead, each field provides for alternative accountability mechanisms, as studied in Part I.

What then accounts for the increasing trend for various international instruments, some not directly or uniquely concerning protection of human dignity, not only to prohibit but even favor criminalization of other MNC behaviors such as corruption, environmental abuse, and the financing of terrorism?[517] Do the drafters of these documents regard these acts as more severe and offensive to society than other violations? Or does this move towards corporate criminal liability evidence a view that domestic criminal law as best suited to deal with MNC misconduct? And why then do international human rights and labor law instruments not follow this trend of criminalization?

In considering whether ICL is an appropriate accountability means for MNC misconduct, it is necessary to consider first whether MNCs are proper subjects of criminal liability under ICL and second whether the traditional ICL structures can apply *mutatis mutandis* to situations in which the accused is an MNC. Without delving into the academic debates as to whether MNCs can or should be subject to criminal liability in general,[518] numerous domestic jurisdictions, not

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[515] Corfu Channel (United Kingdom and Northern Ireland v. Albania) 1949 I.C.J. 4, 22 (Apr. 9).

[516] Prosecutor v. Dusko Tadic, Case No. IT-94-1-AR72, Decision on the Defense Motion for Interlocutory Appeal on Jurisdiction, para. 57 (Oct. 2, 1995).

[517] *See supra* notes 472-74, 482.

[518] Ronald C. Slye, *Corporations, Veils, and International Criminal Liability*, 33 BROOK. J. INT'L L. 955, 955-73 (2008). In sum, the principle arguments against the application of criminal liability to MNCs are several. First, while criminal law's evident goal is to punish wrongdoers, its traditional punishments are not easily translated to MNCs since an entity cannot be

only recently but for decades, have accepted criminal liability of corporations.[519] By contrast, criminal liability at the international level is somewhat less settled,[520] even if there is arguably no significant impediment to treating MNCs as subjects of international law.[521] Indeed, if MNCs are capable of holding rights under certain international instruments,[522] there is no reason why they should not incur the countervailing liabilities.[523] In fact, considering their direct liability for environmental damage, it would be surprising that MNCs should altogether escape liability for mass atrocities.[524]

Turning to the second issue, compared to other fields of international law discussed in Part I (with the limited exception of environmental law) the structure of criminal law offers an advantage vis-à-vis MNC liability because it is not state-centric.[525] As the oft-cited Nuremberg authority infamously posits, "crimes . . . are committed by men, not abstract entities."[526] Using this rationale, the court pierced the veil of the state and held individual state leaders responsible for the atrocities committed during World War II (WWII).

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imprisoned. To counter this argument, fines and deregistration have been developed as punishments although their adequacy is debatable. Second, it is argued that criminal law's deterrent effect is underpinned by shame and remorse, neither of which an MNC is capable of feeling, with the end-goal being incapacitation. When one considers the harmful effects of bad publicity on MNCs and its flow-on effects to their activities, then this objection can be disposed of. Third, and most importantly perhaps, as recognized at Nuremberg, how can MNCs as "fictitious beings, with no physical presence and no individual consciousness" have the necessary *mens rea* to be criminally responsible? Domestic jurisdictions have elaborated several means to address these evidentiary issues, either by attribution of a single employee's acts to the MNC, imposing liability for the acts of senior management where the aggregate of information establishes *mens rea*, or by analyzing an MNC's 'corporate culture' to assess whether its internal procedures were negligent. *Id. See also* V.S. Khanna, *Is the Notion of Corporate Fault a Faulty Notion?: The Case of Corporate Mens Rea*, 79 B.U. L. Rev. 355 (1999).

[519] FAFO Report, *supra* note 4.

[520] Slye, *supra* note 518.

[521] *Id.*

[522] *E.g.*, Campbell, *supra* note 99; NAFTA, *supra* note 129. *See also* Barcelona Traction, Light and Power Co., Ltd. (Belgium v. Spain) (Second Phase), 1970 I.C.J. 3, 33 (Feb. 5).

[523] *See* Slye, *supra* note 518, at 959.

[524] *Id.*

[525] *See* van den Herik, *Corporate Policy*, *supra* note 334, at 7.

[526] International Military Tribunal (Nuremberg): Judgment and Sentences, *reprinted in* 41 AM. J. INT'L L. 172, 221 (1947).

Since then, and in contrast to international human rights or labor law, ICL has always placed respect for its obligations firmly on the shoulders of the individual, not the state.

Paradoxically then, how can ICL provide a suitable framework for direct MNC accountability? Is it not ironic that while Nuremberg advocated the breaking of the collective in favor of the individual, insofar as criminal responsibility is concerned, modern trends suggest reversing in favor of the collective, this time the MNC?[527] The short answer is no. To suggest that MNCs can be criminally responsible is not to suggest a move away from individual responsibility, but rather a widening of the reach of responsibility such as to include the existence of liability for legal persons, i.e. MNCs, in parallel to physical persons. Recognizing MNC liability under ICL is not antithetical to the individualized and non-state-centric character of ICL considering that MNCs have legal personality.[528] Due to this individual personality, MNCs are no more than an individual of a different character, namely a *legal* person. ICL is therefore open to embracing MNCs as a subject that can be liable for wrongful acts, just as individuals can. For that reason, ICL, contrary to other fields of law which will be discussed below, is not adverse to the concept of MNC accountability.

In comparison, direct criminalization of MNCs for human rights violations is non-existent, so it suffices to analyze the foundations of human rights law to understand why. Human rights law developed predominantly after WWII because of the perceived need to counterbalance the potential horrors of state power—specifically, to protect individuals from incursions by the state into their private lives.[529] For that reason, instruments enshrining human rights were developed providing citizens with legal claims against states, and states, then viewed as the only bearers of international law obligations, were tasked with the fulfillment and protection of their citizens' human rights.[530] States today are still expected to prevent human rights violations as well provide effective ex post facto measures to address violations when they occur.[531]

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[527] Slye, *supra* note 518.

[528] See Karsten Nowrot, *New Approaches to the International Legal Personality of Multinational Corporations: Towards a Rebuttable Presumption of Normative Responsibilities*, 79 PHIL.L. J. 563 (2004) (reviewing MNCs and international legal personality).

[529] Christopher J. M. Safferling, *Can Prosecution be the Answer to Human Rights Violations?*, 5(12) GERMAN L.J. 1469, 1471 (2004).

[530] *Id.*

[531] *See, e.g.*, the ICCPR *supra* note 22, arts. 2(2) & 2(3)(a).

On the other hand, because in the modern era MNCs can influence individuals (potentially detrimentally) as much as states can, there has been a move towards recognizing the need to protect human rights from abuses from this new entity and to subject the growing power of MNCs to human rights obligations.[532] Despite this trend, as Part I.A.1.a demonstrates, states formally remain the sole guardian of human rights, even if human rights courts attempt to erode the traditional divide by increasingly interpreting states' public law duties as embracing the private law realm.[533]

The primary challenge faced in placing human rights obligations directly on MNCs is delineating the extent of such obligations and strictly codifying what is expected of MNCs.[534] MNCs, unlike states, cannot be expected to guarantee the full spectrum of traditionally state-sponsored human rights obligations, to illustrate, the right to education, for the simple reason that they do not enjoy full territorial or public powers.[535] Instead the extent of an MNC's obligations should depend on the extent of power it exercises.[536] The extent to which MNCs can be responsible for certain human rights obligations, if any, is certainly a much-contested debate, and the outcome may likely be fact specific, depending principally on the size and activities of the MNC in question.[537] Despite the clear trend towards developing MNC responsibility in this field and the numerous attempts to date to codify human rights obligations, given the resistance of the business community to such codifications, there will not likely be an answer to this debate any time soon.[538]

Turning to labor law obligations, contrary to common expectations, such obligations are not placed on the shoulders of MNCs despite their direct relationship as employers. Since the 19th century, international labor law developed as a means of social justice in response to the need to protect workers from the heavy burdens of industrialization. Industrialization resulted from international

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[532] ICHRP *supra* note 12, at 1-2.

[533] Sarala Fitzgerald, *Corporate Accountability for Human Rights Violations in Australian Domestic Law*, 11(1) AUSTL. J. HUM. RTS. 2 (2005), *available at* http://www.austlii.edu.au/au/journals/AJHR/2005/2.html.

[534] *See* van den Herik, *Corporate Policy*, *supra* note 334, at 8.

[535] *Id.* at 4-5.

[536] *Id.* at 5.

[537] *Id.*

[538] *Id.*at 4-5.

competition between employers and between countries[539] and from inequalities in bargaining power between employers and employees.[540] Since the state that protects labor rights is disadvantaged in profitability compared to the state that places a higher value on economic self-interest, the traditional means of ensuring internationalized minimum standards for employees has been for states to enter into binding international agreements to impose top-down minimum labor standards, thereby thwarting a "race to the bottom" in labor standards.[541] Thus, the protection of workers' rights, like human rights, has traditionally, and still today, fallen to states. In that vein, many labor law rights are encompassed within human rights instruments.[542] Consequently, notwithstanding the strong movement toward MNC accountability for human and labor rights violations, MNC accountability struggles to find its place in primarily state-centric fields. For the moment, MNC misconduct in these fields remains primarily tied to the responsibility of the MNC's home state. Therefore, there is a need for a conceptual shift before these fields are fully able to embrace the concept of MNC accountability.

In comparison to human rights law, and as noted in Part I.A.3.b., environmental law is receptive to the concept of MNC accountability. The "Polluter Pays Principle" (PPP) is an internationally accepted cornerstone of environmental law,[543] which requires "operators" or "owners" responsible for pollution to pay for it. The PPP embraces civil liability, the rationale being that while the state could legislate to preserve the environment, civil liability is a necessary complement that acts as a disincentive for operators or owners to fail to comply with environmental law.[544] Therefore, it is clear that unlike the field of human rights law, there is no conceptual difficulty in accepting MNC accountability under environmental law since it is accepted as a vital aspect of environmental regulation. Moreover, unlike in the field of human rights law, in which the division between MNC and state

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[539] ILO, Bureau for Workers' Activities, International Labour Law, *Purpose of International Labour Law*, http://actrav.itcilo.org/actrav-english/telearn/global/ilo/law/lablaw.htm#Competition (last visited June 6, 2010).

[540] Langille, *supra* note 133, at 8.

[541] *Id.* at 12-13.

[542] See ICHRP, *supra* note 12, 28-34.

[543] *Rio Declaration*, *supra* note 68, Principle 16.

[544] *See* LAL KURUKULASURIYA & NICHOLAS A. ROBINSON, TRAINING MANUAL ON INTERNATIONAL ENVIRONMENTAL LAW 51-59 (UNEP 2006).

responsibility is yet to be ironed out, environmental law provides for the existence of MNC liability in parallel to state responsibility.[545]

Therefore, two fields of international law, criminal and environmental law, have the necessary foundations to embrace the concept of direct MNC liability in their respective spheres of application. This is not to say that either field of law lends itself to providing an overall structure for MNC accountability, nor that one or the other is necessarily better suited for founding such accountability. This is clear in light of the obvious substantive limitations of each field, i.e., direct liability provided for under environmental law regulates a very thin slice of MNC conduct, as does the branch of ICL. While the range of individual acts encompassed by each core crime are crimes in their own right at the domestic level,[546] at the international level, the individual acts only qualify as a core crime when their unique and specific contextual elements are established. For example, multiple murders will only be classified as crimes against humanity if they were committed as part of a widespread or systematic attack. Similarly, murder may only classify as a war crime if it was committed in a context of armed conflict. Again, the same act of murder may only classify as genocide if it was executed with the intent to destroy, in part or in whole, specific human groups. For that reason, MNCs accused of individual murders or disappearances will not be convicted for one of ICL's core crimes unless the necessary contextual elements are made out. Thus, in the absence of such contextual elements, responsibility can accrue at best under the relevant domestic criminal law and then only with respect to the specific act in question.

The foregoing illustrates that, notwithstanding the comparative conceptual ease by which ICL could accept MNCs as subjects, ICL is not substantively sufficient to unilaterally regulate all MNC misconduct. To the extent that ICL is a self-contained field regulating only a limited number of core international crimes, it cannot provide a means of redress for all international law violations, for example, of human rights or labor law.

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[545] *Id.*

[546] For example, crimes against humanity encompasses the acts of murder, extermination, enslavement, deportation or forcible transfer, imprisonment, torture, rape, sexual slavery, enforced prostitution, forced pregnancy, forced sterilization or any other form of sexual violence, enforced disappearances and arbitrary detention and apartheid.

E. DO OTHER ACCOUNTABILITY MECHANISMS ADDRESS "ICL-BEHAVIOR"?

Human rights law does not suffer the same shortcomings as ICL in connection with MNC accountability. Compared to the confined scope and rigid nature of ICL, which is underpinned by the maxim *nullum crimen sine lege* requiring strict interpretation of its norms,[547] human rights law, despite its conceptual shortcomings in connection with MNC accountability, provides a much broader accountability framework by which to adjudicate MNC violations. In recognition of the object and purpose of human rights law to protect the individual, human rights courts are traditionally willing to give an expansive interpretation to the substance of certain human rights. This is clear when one considers pioneering human rights jurisprudence that views environmental and labor law[548] breaches as human rights violations.

In the same spirit, certain criminal acts can constitute human rights violations insofar as the relevant state has failed to prevent offenses against or fulfill its obligations toward citizens. For example, enforced disappearances[549] and extrajudicial killings[550] have been found to violate the right to life,[551] the right to personal integrity,[552] and the right to personal liberty.[553] Although both examples concerned criminal acts committed by government actors, noting that the human rights courts have not shied away from adjudicating other human rights

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[547] Beth van Shaack, *Crimen Sine Lege: Judicial Lawmaking at the Intersection of Law and Morals*, 97 GEO. L.J. 119, 122-23.

[548] *E.g.*, Wilson v. United Kingdom, App. Nos. 30668/96, 30671/96, and 30678/96, 35 Eur. Ct. H.R. 523 (2002) (the ECHR found that the applicants' rights of freedom to association were violated by legislation which allowed employers to offer pay raises to workers who agreed to accept employee contracts not negotiated by trade unions); Siliadin v France, App. No. 73316/01, 2005-VII Eur. Ct. H.R. 545 (2005) (highlighting the obligation of States to protect individuals, here a domestic migrant worker, from an unfair outcome in the employment relation). *See* Virginia Mantouvalou, *Servitude and Forced Labour in the 21st Century: The Human Rights of Domestic Workers*, 35 INDUS. L. J. 395 (2006).

[549] Velasquez-Rodriguez v. Honduras, Inter-Am. Ct. H.R., (ser. C) No. 4 (July 29, 1988).

[550] Barrios Altos v. Peru, 2001 Inter-Am. Ct. H.R., (ser. C) No. 87 (Mar. 14, 2001).

[551] American Convention on Human Rights, *supra* note 110, art. 4.

[552] *Id.* art. 5.

[553] *Id.* art. 7.

issues in the private business sector, [554] there is no reason why they should hesitate in the case of graver abuses committed by MNCs. Therefore, to the extent that a direct case against an MNC cannot be brought under ICL (for lack of the necessary contextual elements perhaps), human rights courts may well have jurisdiction.

The weakness in relying upon human rights courts as an accountability mechanism, however, lies in the fact that MNC liability can only be invoked indirectly through state responsibility. Yet, before state responsibility can successfully be invoked, it is necessary to show knowledge and neglect on the part of the state for failing to prevent or subsequently failing to punish the disobedient MNC. Moreover, in contrast to the ICL context, since the jurisdiction of human rights bodies under existing human rights mechanisms is limited to states, any responsibility will be that of the state, rather than the MNC.

F. CONCLUSIONS ON ICL COMPLICITY AND MNC ACCOUNTABILITY

While in theory nothing precludes MNCs from being solely and primarily responsible for international law violations, the ICJ Expert Panel focused on complicity predominantly because most complaints against MNCs allege that they are implicated with another actor (usually the state) in the perpetration of human rights abuses.[555] As noted, the ICJ Report nevertheless drew a distinction between ICL complicity discussed in Volume 2 of its Report and complicity in tort and civil actions considered in Volume 3. This two-layered approach not only illustrates the complexity of the MNC accountability debate but also that ICL is not viewed as the sole means by which MNC misconduct can be reined in. The ICJ presumably recognizes that one framework, such as ICL, is insufficient to deal with the variety of forms that MNC violations assume, hence its broad interpretation of complicity and study of the topic under both international and domestic law.

Regardless, neither variation of complicity provides the only accountability mechanism for MNC misconduct. Insofar as international law mechanisms are concerned, the fact that a significant section of academic work concentrates on ICL-complicity as the core

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[554] Costello-Roberts v. United Kingdom., App. No. 13134/87, 427 Eur. Ct. H.R. (ser. A) 27 (1993); Awas Tingni Indigenuous Cmty. v. Nicaragua, 2001 Inter-Am. Ct. H.R. (ser. C) No. 79 (Aug. 31, 2001).

[555] *ICJ Report*, *supra* note 2, vol. 2, at 1.

mechanism for ensuring MNC accountability does not suggest that it is the sole means, as Part I illustrates. As shown, the focus of core ICL crimes is extremely limited and does not encompass complicity for other international law violations in the absence of a specific international convention. Accordingly, most violations fall outside the scope of ICL and are determined by the assortment of independent mechanisms discussed in Part I, if not solely under domestic law in the first place. The likely explanation for the Panel's predominant focus on ICL rests simply with the need to begin regulating the most serious and egregious of international abuses committed by MNCs, but this policy choice does not otherwise preclude the existence of parallel mechanisms to deal with entirely separate categories of international violations.

What then is the way forward? Is it better to allow for a multiplicity of international law mechanisms to deal with various violations, or should there be a move towards the development of an international convention on corporate criminal liability? Although the latter is preferable, the response of the business sector to the arguably overly ambitious UN Norms is a powerful reminder that states and governments are not yet ready to take such grandiose steps. For the foreseeable future, the development of international instruments binding on MNCs remains a utopian idea, and the issue of direct accountability will primarily continue to be regulated at the domestic level. Nevertheless, although significant work lies ahead, such as convincing MNCs of the value of respecting international law obligations; convincing states of the value of ensuring compliance of their MNCs with international law obligations, both at home and abroad; and strengthening domestic mechanisms and creating international law mechanisms which target MNCs, the trend towards MNC accountability has nevertheless gathered momentum in recent decades and the issue has gained a firm foothold as a matter of concern on the international agenda. As such, it is only a matter of time until the status of MNCs on the international stage evolves from object of international law to subject, with all the rights and liabilities that this entails.[556]

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[556] BIN CHENG, INTRODUCTION TO SUBJECTS OF INTERNATIONAL LAW, IN INTERNATIONAL LAW: ACHIEVEMENTS AND PROSPECTS 23 (Mohammed Bedjaoui ed., UNESCO 1991).