

‘Did You Ever Expect a Corporation to Have a Conscience?’¹: Human Rights Obligations of Transnational Corporations

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‘Where there is great power, there is great responsibility . . .’²

Abstract

The most egregious human rights violations today are not caused by corrupt dictators or tyrannical governments. Instead, corporations are responsible for the deaths, torture, enslavement, and forced displacement of thousands. Transnational corporations wield more financial and political power than many States, yet there is no enforceable legal regime to hold corporations to account for their actions. Existing non-binding instruments of international law and corporate guidance are weak and ineffective, failing to implement a system of corporate accountability for human rights violations. Current legal doctrine presents a major obstacle to imposing human rights duties on corporations: as non-State actors, corporations are not recognized as international legal persons, and thus bear no obligations to uphold human rights law. However, a close examination of international legal doctrine indicates that corporations do in fact possess legal personality sufficient to render them capable of possessing rights and obligations. Thus, it is possible to hold corporations responsible for human rights obligations, as demonstrated by application of the tripartite typology of ‘respect, protect, and fulfil.’

Keywords

Human rights – business – transnational corporations – TNCs – Ruggie Guiding Principles – Universal Declaration of Human Rights – Tripartite human rights framework.

1. Introduction

¹ John C Coffee, “No Soul to Damn: No Body to Kick” An Unscandalized Inquiry into the Problem of Corporate Punishment’ (1981) 79 Mich L Rev 386, 386 (quoting First Baron Edward Thurlow, Lord Chancellor of England, as he expressed frustration: ‘Did you ever expect a corporation to have a conscience, when it has no soul to be damned, and no body to be kicked?’).

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² Winston Churchill, HC Deb 28 February 1906, vol 152, cols 1233-39.

Just before midnight on 2 December 1984, a deadly cloud of methyl isocyanate (MIC) gas crept through the streets of Bhopal, a city in the Madhya Pradesh state in central India.³ A gas leak at the nearby Union Carbide India Limited (UCIL) pesticide plant had released the toxic MIC, and the deadly gas cloud was blown through the streets of Bhopal.⁴ Exposure to the toxic gas caused choking, circulatory collapse and pulmonary edema.⁵ People awakened by these symptoms attempted to flee and 'chaos and panic broke out in the city'⁶ as thousands tried to escape.

By the following morning, thousands had died.⁷ The immediate death toll is conservatively estimated to be around 3,800 people.⁸ Many of the dead were children who had, due to their shorter stature, inhaled more of the dense gas as it flowed close to the ground. There is no official final death toll;⁹ however, it is commonly cited by human rights organizations that between 8,000 to 10,000 deaths occurred within the first 72 hours of exposure to the MIC gas.¹⁰ In the decades since, approximately 15,000 people have died from MIC-related diseases and disabilities,¹¹ and more than 120,000 people continue to suffer severe health problems.¹²

The Bhopal Disaster is considered the world's worst industrial catastrophe and one of the most egregious business-related human rights violations.¹³ However, just as troubling as the devastating loss of human life is the ongoing lack of accountability of UCIL. The pursuit for justice in the Bhopal Disaster is plagued by inadequate financial compensation for survivors and relatives of the deceased,¹⁴ ongoing untreated medical issues,¹⁵ and continuing environmental pollution:¹⁶ '[s]ome three decades after the gas leak, it is clear that those affected have not had access to an effective remedy.'¹⁷

³ Amnesty International, *Clouds of Injustice, Bhopal Disaster 20 Years On* (Amnesty International 2004) 7 'Al: Bhopal'.

⁴ Ibid 7-8.

⁵ Ibid 10.

⁶ Mark Tully, '1984: Hundreds Die in Bhopal Chemical Accident' *BBC* (London 3 December 1984) <http://news.bbc.co.uk/onthisday/hi/dates/stories/december/3/newsid_2698000/2698709.stm> accessed 23 April 2016 (interviewing a survivor of the Bhopal Disaster: 'We were choking and our eyes were burning. We could barely see the road through the fog, and sirens were blaring. We didn't know which way to run. Everybody was very confused. Mothers didn't know their children had died, children didn't know their mothers had died and men didn't know their whole families had died.')

⁷ Al, Bhopal (n 3)10.

⁸ The Bhopal Medical Appeal, 'What happened?' (2014) <<http://bhopal.org/what-happened/union-carbides-disaster/>> accessed 24 April 2016.

⁹ Deshdeep Saxena, 'Bhopal Gas Tragedy: 27 years on, death toll still unknown' *The Times of India* (Mumbai 29 October 2011) <<http://timesofindia.indiatimes.com/city/indore/Bhopal-gas-tragedy-27-years-on-death-toll-still-unknown/articleshow/10532402.cms>> accessed 23 April 2016.

¹⁰ Bhopal Medical Appeal (n 8).

¹¹ Al, Bhopal (n 3) 12.

¹² Bhopal Medical Appeal (n 8).

¹³ Al, Bhopal (n 3) 10; see also Bhopal Medical Appeal (n 8). See generally Bridget Hanna et al, *The Bhopal Reader: Twenty Years of the World's Worst Industrial Disaster* (Rowman & Littlefield 2005).

¹⁴ Amnesty International, *Injustice Incorporated: Corporate Abuses and the Human Right to Remedy* (Amnesty International 2014) 48-49; see also Bhopal Medical Appeal (n 8) ('. . . many felt cheated by their compensation –\$300-\$500 – or about five years' worth of medical expenses. Today, those who were awarded compensation are hardly better off than those who weren't.').

¹⁵ Al, *Injustice Incorporated* (n 14) 52-53.

Unfortunately, corporations are rarely held accountable for human rights violations caused by their operations, despite the fact that transnational corporations (TNC) are some of the most flagrant human rights abusers in the world today.¹⁸ In the infamous *Kiobel v. Royal Dutch Petroleum Co.* lawsuit, Royal Dutch Petroleum/Shell was sued in United States federal court by a group of Nigerians from the Ogoni region for violent suppressions of environmental demonstrations and alleged complicity in the 1994 torture and extrajudicial killings of members of a campaign group.¹⁹ However, the case was rejected by the United States Supreme Court for lack of jurisdiction,²⁰ and the plaintiffs have yet to receive a remedy for the deaths of their family members. Victims of arbitrary imprisonment and torture in Azerbaijan, Kazakhstan, and Uzbekistan have been denied compensation after TeliaSonera, a Swedish telecommunications company, provided direct network access to state security forces, exposing the locations of dissident journalists.²¹

There is a glaring failure to hold corporations accountable for their actions. Many large TNCs are more powerful, both financially and politically, than States.²² Corporations hold a vast potential to affect a wide range of rights, whether positively or negatively,²³ including 'anti-discrimination law, health and safety law, privacy law,

¹⁶ See Generally Greenpeace, *The Bhopal Legacy – Toxic contaminants at the former Union Carbide factor site Bhopal, India: 15 years after the Bhopal Accident* (Greenpeace 1999) (reporting that the soil and water around the UCIL plant and surrounding shanty towns are severely contaminated with heavy metals and persistent organic pesticides).

¹⁷ Al, *Injustice Incorporated* (n 14) 63.

¹⁸ See Center for Constitutional Rights, *Holding Corporations Accountable* (Center for Constitutional Rights 2010) <<http://ccrjustice.org/corporate-human-rights-abuse>> accessed 25 April 2016 (listing examples of corporate engagement or complicity in the violation of human rights, such as Blackwater security corporation firing on civilians in Iraq and Caterpillar, Inc. for selling bulldozers to the Israeli Defense Force with knowledge that the equipment would be used to demolish Palestinian homes in violation of international law).

¹⁹ 133 S Ct 1659, 1664 (2013).

²⁰ *Ibid* 1675-76. There is concern that the limitation of the scope of the US Alien Torts Claim Act, which enabled American Federal Courts to have jurisdiction over civil actions by foreign victims of a violation of the law of nations, will encourage a culture of impunity and restrict access to judicial remedy. See European Coalition for Corporate Justice, 'The decision released by the U.S. Supreme Court in the *Kiobel v. Shell* case highlights the need for European states to take measures to protect human rights against business' (19 April 2013) <<http://www.corporatejustice.org/The-decision-released-by-the-U-S.html>> accessed 25 April 2016.

²¹ See 'TeliaSonera Spying Scandal' *Helsinki Times* (Helsinki 31 May2012) <<http://www.helsinkitimes.fi/finland/finland-news/domestic/2414-teliasonera-spying-scandal.html>> accessed 25 April 2016; See also *The Black Box Documentary* (Sveriges Television [SVT] television broadcast, April 2012).

²² Christopher Albin-Lackey, *Without Rules: A Failed Approach to Corporate Accountability in Human Rights Watch: World Report 2013* (Human Rights Watch 2013) 29 ('In 2011 alone, oil and gas behemoth ExxonMobil generated revenues of US\$467 billion—the size of Norway's entire economy. Wal-Mart, the world's third-largest employer with more than 2 million workers, has a workforce that trails only the militaries of the United States and China in size.'). See generally Sarah Anderson and Hohn Cavanagh, 'Top 200: The Rise of Corporate Global Power', (Institute for Policy Studies 4 December 2000) (observing that of the 100 largest economies in the world, 51 are corporations while only 49 are countries). For instance, Wal-Mart, the 12th richest economic entity, is 'bigger than 161 countries, including Israel, Poland, and Greece.' *Ibid* para 1.

²³ ECOSOC Sub-Commission on the Promotion and Protection of Human Rights 'Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights', UN Doc E/CN.4/Sub.2/2003/12/Rev.2, 3 (13 August 2003) (noting 'that

consumer protection law, environmental law, anti-corruption law, humanitarian law, [and] criminal law. . .'.²⁴

Under current international law, however, corporations are not recognized as holding human rights obligations.²⁵ There is no legal regime of human rights law governing the actions of corporations; they operate in a legal vacuum. Despite horrific human rights abuses committed by TNCs, international human rights law has yet to develop an enforceable human rights mechanism governing corporations.

To address this gap in international human rights law, this paper advances arguments for an enforceable regime of corporate human rights obligations. Part 2 defines TNCs, evaluating and subsequently dismissing as insufficient the existing frameworks that attempt to regulate the human rights responsibilities of corporations, Part 3 provides the legal basis for the argument that corporations possess human rights obligations, making them liable under international law for human rights abuses, and proposes two alternative processes to achieve this result. The paper concludes in Part 4 on a humanitarian note, emphasising the need for a legal regime that will impose human rights obligations on corporations in order to ensure the fulfilment of human rights.

2. Transnational Corporations, Human Rights, and Existing Regulatory Instruments

A TNC is a business enterprise that consists of entities located in different States,²⁶ operating under a 'system of decision-making that permits coherent policies and a common strategy.'²⁷ Due to the large-scale nature of the operation of such corporations, the process of allocating responsibility for human rights violations is fraught with challenges.²⁸ Over the past 50 years there have been several attempts by the United Nations (UN) and other intergovernmental bodies to regulate the compliance of TNCs with international law.

Relevant to the field of business and human rights are the 1976 Organisation for Economic Co-operation and Development (OECD) Guidelines for Multinational

transnational corporations . . . have the capacity to foster economic well-being, development, technological improvement and wealth, as well as the capacity to cause harmful impacts on the human rights and lives of individuals through their core business practices and operations. . .').

²⁴ John Ruggie, *A UN Business and Human Rights Treaty? An Issues Brief by John G. Ruggie* (Institute for Human Rights and Business 2014) 3 <<http://www.ihrb.org/commentary/board/business-and-human-rights-treaty-international-legislation.html>> accessed 25 April 2016.

²⁵ See Ian Brownlie, *Principles of Public International Law* (5th edn, OUP 1998) 66; see also Francois Rigaux, 'Transnational Corporations' in *International Law: Achievements and Prospects* (UNESCO 1991) 121, 129.

²⁶ Andrew Clapham, 'Human Rights Obligations of Non-State Actors' (1st edn, OUP 2009) 199; see also AI, *Injustice Incorporated* (n 14) 11.

²⁷ United Nations Conference on Trade and Development 'Transnational Corporations Statistics' (2013) <[http://unctad.org/en/Pages/DIAE/Transnational-corporations-\(TNC\).aspx](http://unctad.org/en/Pages/DIAE/Transnational-corporations-(TNC).aspx)> accessed 25 April 2016; see also UNCTAD, 'Definitions: Transnational Corporations (TNC)' (2014) <[http://unctad.org/en/Pages/DIAE/Transnational-corporations-\(TNC\).aspx](http://unctad.org/en/Pages/DIAE/Transnational-corporations-(TNC).aspx)> accessed 25 April 2016 ('Transnational corporations are . . . enterprises comprising parent enterprises and their foreign affiliates.').

²⁸ See AI, *Injustice Incorporated* (n 14) 11.

Enterprises,²⁹ the 1977 International Labor Organization (ILO) Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy,³⁰ the 2000 UN Global Compact,³¹ the 2003 Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights (UN Norms),³² and the 2011 UN Guiding Principles on Business and Human Rights (Guiding Principles).³³ However, none of these instruments are binding treaties, and instead are considered 'soft law,' international norms that do not impose binding legal obligations.³⁴

Most recently, on 25 June 2014, the UN Human Rights Council (UNHRC) passed a resolution to develop a binding treaty holding TNCs responsible for human rights abuses.³⁵ The current debate is whether the proposed treaty augments the existing Guiding Principles framework,³⁶ or whether it is simply redundant, empty rhetoric.³⁷ The overarching issue, however, is whether either approach addresses the lack of enforceable corporate human rights obligations or whether an alternative solution needs to be found.

A. The Three Pillars of the Guiding Principles

The Guiding Principles revolutionized the debate about corporations and human rights. Proposed by the then-UN Special Representative on Business and Human Rights, John Ruggie, and adopted by the UNHRC in 2011,³⁸ the Guiding Principles provided a framework for the allocation of responsibilities for upholding human rights between States and corporations.³⁹ The Guiding Principles were initially an attempt to close the 'governance gaps'⁴⁰ between the economic power of corporations and the capacity of

²⁹ OECD, 'Guidelines for Multinational Enterprises' OECD Doc.C(76)99 (1976).

³⁰ ILO, 'Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy' 240th Sess., O.B.Vol.LXI, Series A, No. 1, ILO.Doc.28197701 (1978).

³¹ UN Global Compact (July 2000) <<http://www.unglobalcompact.org/>> accessed 25 April 2016.

³² UN Norms (n 23).

³³ OHCHR, 'Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework' HR/Pub/11/04 (2011).

³⁴ Andrew T Guzman and Timothy L Meyer, 'International Soft Law' (2010) 2 J. Legal Analysis 171, 172.

³⁵ UNHRC, 'Elaboration of an international legally binding instrument on transnational corporations and other business enterprises with respect to human rights' (24 June 2014) Agenda Item 3, UN Doc A/HRC/26/L.22.

³⁶ Treaty Alliance 'Press Release: Resolution on binding human rights standards passes in Human Rights Council' (27 June 2013) <<https://www.globalpolicy.org/component/content/article/221-transnational-corporations/52651-treaty-alliance-press-release-on-resolution-on-binding-human-rights-standards.html>> accessed 25 April 2016. See Treaty Alliance 'Global Movement for a Binding Treaty', <<http://www.treatymovement.com/>> accessed 25 April 2016.

³⁷ Access, 'Access voices concern about resolution on business and human rights treaty' (26 June 2014) <<https://www.accessnow.org/blog/2014/06/26/access-voices-concern-about-resolution-on-business-and-human-rights-treaty>> accessed 25 April 2016.

³⁸ UNHRC, 'Human Rights and Transnational Corporations and other Business Enterprises' (6 July 2011) HRCRes.17/4, UN Doc A/HRC/RES/17/.

³⁹ See generally, Guiding Principles (n 33).

⁴⁰ John Ruggie, former UN Special Representative for Business and Human Rights, Statement at the 63rd Session of the UN General Assembly, Agenda Item 64(b) (Oct. 24, 2008) (transcript available at <http://www.hks.harvard.edu/news-events/news/testimonies/john-ruggie-testimony-oct>).

States to manage the ‘adverse consequences’⁴¹ of powerful companies. The term ‘governance gap,’ also known as an ‘accountability gap,’ refers to the lack of a formal international legal regime governing TNC human rights obligations.⁴² This lack of regulation encourages the growth of ‘permissive environments for wrongful acts by companies without adequate sanctioning or reparation;’⁴³ the legal framework implemented by the Guiding Principles is intended to bridge these governance gaps in relation to human rights and business.⁴⁴

(i) Making Progress in Business and Human Rights

The Guiding Principles represent the first authoritative framework adopted by the UNHRC to address the ‘complex global challenges of business and human rights.’⁴⁵ The Guiding Principles are an innovative approach because they address the multinational corporate group as a whole, applying to all business enterprises ‘regardless of their size, sector, location, ownership and structure.’⁴⁶

The Guiding Principles consist of a tripartite framework composed of the ‘three pillars’ of ‘protect, respect, and remedy.’ The first pillar, the duty of the State to protect, reiterates the rule of international human rights law that States are under a positive obligation to protect against human rights abuses from all parties, whether State agents or corporations.⁴⁷ The Guiding Principles do not shift the duty to protect, as it is an obligation that is considered the ‘fundamental duty of [S]tates.’⁴⁸ The second pillar, the corporate responsibility to respect, requires that corporations avoid infringing on human rights while conducting business operations.⁴⁹ This responsibility to respect is an internationally recognised principle of minimum conduct that is expected of corporations.⁵⁰ The third pillar, access to remedy, provides a structural framework for providing both judicial and non-judicial remedies and grievance mechanisms.⁵¹

Combined, these three pillars represent significant progress, as the framework is an ‘innovative normative platform that transcends the stale mandatory vs. voluntary dichotomy, while drawing on both; having its elements widely incorporated in public

⁴¹ Ibid.

⁴² Ibid.; see also Amnesty International, *Close the Accountability Gap: Corporations, Human Rights and Poverty* (Amnesty International 2009) 3.

⁴³ Ruggie Statement (n 40).

⁴⁴ Ibid.

⁴⁵ John Ruggie, *Progress in Corporate Accountability* (Institute for Human Rights and Business 2013) <<http://www.ihrb.org/commentary/board/progress-in-corporate-accountability.html#footnote-1>> accessed 25 April 2016 (responding to Christopher Albin-Lackey’s article in the Human Rights Watch 2013 World Report), See Albin-Lackey (n 22).

⁴⁶ Guiding Principles (n 22)1; AI, *Injustice Incorporated* (n 14)147.

⁴⁷ Guiding Principles (n 33) Principle 1, Commentary.

⁴⁸ Interview with John Ruggie for Business Ethics, *The Magazine of Corporate Responsibility* (30 October 2011) (transcript of interview available at <<http://business-ethics.com/2011/10/30/8127-un-principles-on-business-and-human-rights-interview-with-john-ruggie/>> accessed 25 April 2016) (‘The bedrock of the Guiding Principles is that they do not attempt to privatize human rights protection: it’s a fundamental duty of states.’).

⁴⁹ Guiding Principles (n 33) Principle 2, Commentary.

⁵⁰ This consensus was explicitly recognized by the UN Human Rights Council in May 2011. UNHRC Resolution (n 38)1.

⁵¹ Guiding Principles (n 33) Principles 25-31.

governance and private management systems; and then for the major stakeholder groups to build on it, using the full array of instruments available to each.⁵²

(ii) The Fatal Flaw of the Guiding Principles

While they represent an innovative approach, the critical flaw of the Guiding Principles is that they do not impose enforceable legal obligations on corporations.⁵³ In 2011, before their endorsement by the HRC, the Guiding Principles were censured as potentially 'undermining efforts to strengthen corporate responsibility and accountability for human rights.'⁵⁴ Notably, Amnesty International, Human Rights Watch and other prominent rights groups strongly criticised the Guiding Principles for failing to 'adequately reinforce the central importance and established guarantees under international law of the human right to an effective remedy . . .'.⁵⁵

The Guiding Principles fail to provide a mechanism for enforcement and focus too heavily on voluntary initiatives corporations may choose not to implement. These voluntary measures fail to 'provide an appropriate and adequate means of safeguarding human rights against business abuse.'⁵⁶ Additionally, despite claims of providing a comprehensive framework for States and businesses to adopt, the Guiding Principles fail to provide guidance on overcoming obstacles to justice, such as potential victims of violations' 'large imbalances in power, resources, and information compared with business actors.'⁵⁷ Overall, rights groups advocated for a re-drafting of the Guiding Principles that would take steps to ensure effective legally binding remedies capable of enforcement.⁵⁸

In addition, while the Guiding Principles are commended for introducing the concept of human rights due diligence to corporations that seem willing to accept this principle, where a 'decade ago . . . [the corporations] would have disputed the idea they even have human rights responsibilities,'⁵⁹ human rights organizations hesitate to consider the Guiding Principles a 'panacea.'⁶⁰ Unfortunately, despite the potential of the Principles to create a dialogue between businesses and governments, their ultimate downfall is that they are simply not 'enough'⁶¹ due to their voluntary nature. Voluntary initiatives, where the subjects choose whether or not to implement the measures, suffer from 'crucial limitations'⁶² where they are 'only as strong as their corporate members choose to make them' and do not apply to companies that abstain.⁶³

⁵² Ruggie, Progress (n 45).

⁵³ See Human Rights Watch, 'Press Release: UN Human Rights Council: Weak Stance on Business Standards' (16 June 2011) <<http://www.hrw.org/news/2011/06/16/un-human-rights-council-weak-stance-business-standards>> accessed 25 April 2016.

⁵⁴ International Federation for Human Rights, *Joint Civil Society Statement on the Draft Guiding Principles for Business and Human Rights* (International Federation for Human Rights 2011) 1 <<http://www.fidh.org/en/globalisation-human-rights/business-and-human-rights/Joint-Civil-Society-Statement-on,9066>> accessed 25 April 2016.

⁵⁵ Ibid 3.

⁵⁶ Ibid.

⁵⁷ Ibid.

⁵⁸ Ibid 1.

⁵⁹ See Albin-Lackey (n 22) 3.

⁶⁰ Ibid 4.

⁶¹ Ibid 5.

⁶² Ibid.

⁶³ Ibid.

However, proponents of the ‘business case,’ the theory that profit-motive will encourage socially responsible business, believe that the desire to appear socially responsible in order to gain more business is sufficient for corporate compliance with human rights measures.⁶⁴ Yet, responsible behaviour and adherence to human rights standards are not always inherently good for business; indeed, while behaving responsibly may benefit some specific corporations,⁶⁵ it may be easier for larger corporations to ignore human rights standards in the pursuit of profits. Unfortunately, ‘the market for virtue is not sufficiently important to make it in the interest of all . . . [companies] to behave more responsibly,’⁶⁶ and corporate human rights responsibility cannot be left to the whims of the market.⁶⁷ Thus, while ‘human rights need business,’⁶⁸ it is not the case that business needs human rights, necessitating the adoption of enforceable corporate human rights obligations.

While there is ‘no single silver bullet solution’⁶⁹ to addressing the difficulties in regulating corporate compliance with human rights, the international community needs to recognize the weaknesses of the Guiding Principles and establish a system that imposes a regime of enforceable accountability. Responding to these concerns, Ecuador submitted the resolution proposing the establishment of a legally binding instrument governing TNCs and human rights.⁷⁰

B. The Proposed Treaty Governing Businesses and Human Rights

In September 2013, Ecuador proposed establishing a new working group addressing human rights and business. Shortly thereafter, over 600 human rights and civil action organizations joined a treaty alliance to support Ecuador’s proposal. This ‘global movement for a binding treaty,’⁷¹ known as the Treaty Alliance, declared, ‘[n]ow is the time to join the chorus of global civil society calling for new strong international law and send the right message that powerful corporations must not violate human rights.’⁷² In

⁶⁴ See David Vogel, *The Market for Virtue: The Potential and Limits of Corporate Social Responsibility* (Brookings Institution Press 2005) 16-17.

⁶⁵ *Ibid* 50-51.

⁶⁶ *Ibid* 17.

⁶⁷ Pall A Davidsson, ‘Legal Enforcement of Corporate Social Responsibility Within the EU’ (2002) 8 *Colum.J.Eur.L.* 529, 552 (‘Certain aspects of CSR are so critical to human welfare that they cannot be left to the discretion of the private sector.’).

⁶⁸ See Nicola Jägers, *Corporate Human Rights Obligations: in Search of Accountability* (Intersentia 2002) v (quoting Mary Robinson, the former High Commissioner for Human Rights: ‘Business needs human rights and human rights need business.’).

⁶⁹ John Ruggie, ‘The Protect, Respect, and Remedy Framework: Implications for the ILO’, presented at the International Labour Conference, Geneva (3 June 2010) 6 (transcript available online at

<http://www.ilo.org/wcmsp5/groups/public/@ed_emp/@emp_ent/@multi/documents/genericdocument/wcms_142560.pdf> accessed 25 April 2016).

⁷⁰ UNHRC Treaty Resolution (n 35).

⁷¹ International Justice Resource Center, ‘In Controversial Landmark Resolution, Human Rights Council Takes First Step Toward Treaty on Transnational Corporations’ Human Rights Obligations’ (July 15, 2014) <<http://www.ijrcenter.org/2014/07/15/in-controversial-landmark-resolution-human-rights-council-takes-first-step-toward-treaty-on-transnational-corporations-human-rights-obligations/>> accessed 25 April 2016.

⁷² Treaty Alliance, ‘Statement’ (June 2014) <<http://www.treatymovement.com/statement>> accessed 25 April 2016.

calling for the development of an international treaty, the Treaty Alliance emphasized the 'applicability of human rights obligations to the operations of transnational corporations and other business enterprises.'⁷³ It also called for State parties to impose legal liability on businesses for acts or omissions that violate human rights, to provide access to an effective remedy, and to develop an international monitoring and accountability mechanism.⁷⁴

Unfortunately, despite the early promise represented by the creation of a new treaty governing corporate human rights obligations, the proposed treaty is not the best solution in creating an enforceable corporate human rights regime. First, notwithstanding the initial strong support from the human rights and civil sectors, the resolution came under strong censure from notable jurists and human rights organizations.⁷⁵ In addition to the foreseeable barrage of opposition from powerful business entities and their Western supporters, other critics addressed the potential setback represented by the proposal. The International Organisation of Employers stated that it 'deeply regrets the adoption of the Ecuador initiative'⁷⁶ as it delays the implementation of the existing Guiding Principles and is thus a 'genuine setback to the efforts underway to improve the human rights situation and access to remedy on the ground.'⁷⁷ Ruggie responded in a press statement, voicing his support for the Guiding Principles as the method that would yield the most benefits.⁷⁸ Ruggie emphasised the need for the 'principled pragmatism' of the Guiding Principles,⁷⁹ stressing that a treaty could take years to develop.

In addition, it will be almost impossible for State parties to agree on meaningful legal liability standards; whatever provisions the treaty mandates will simply reflect the lowest 'common denominator,' falling short of the current high voluntary standards embodied in the General Principles.⁸⁰ Ruggie continues his harsh opprobrium,⁸¹ citing concerns about potential polarisation, lack of business support, long delays for victims of business-related human rights abuses,⁸² extraterritorial jurisdiction issues, and a dearth of political will to implement this internationally binding treaty.

⁷³ Ibid.

⁷⁴ Ibid.

⁷⁵ See Business & Human Rights Resource Centre, 'UN Human Rights Council adopts two resolutions on business & human rights – includes our analysis of recent developments' (28 June 2014) <<http://business-humanrights.org/en/un-human-rights-council-adopts-two-resolutions-on-business-human-rights-includes-our-analysis-of-recent-developments>> accessed 25 April 2016 (noting the various reactions to the controversial resolution, including Human Rights Watch's statement that 'the UN's decision to move ahead with the development of an international treaty... is compromised by the opposition of key governments and its narrow mandate.').

⁷⁶ International Organisation of Employers, 'Consensus on Business and Human Rights is Broken with the Adoption of the Ecuador Initiative' (26 June 2014) <<http://www.ioe-emp.org/index.php?id=1238>> accessed 25 April 2016.

⁷⁷ Ibid.

⁷⁸ John Ruggie, *A Business and Human Rights Treaty? International Legislation as Precision Tools* (Institute for Human Rights and Business 2014) para 1 <<http://www.ihrb.org/commentary/business-and-human-rights-treaty-international-legislation-as-precision-tools.html>> accessed 25 April 2016.

⁷⁹ Ibid para 3.

⁸⁰ Ibid para 6.

⁸¹ Ibid para 7.

⁸² Ibid para 8 (noting 'that the negotiations on the non-binding Declaration on the Rights of Indigenous Peoples took twenty-six years, and it only deals with one set of rights for one category of people, not with all rights, for all people, all states, and all business enterprises.').

Another obstacle is the fact that the area of business and human rights is ‘not so discrete an issue area as to lend itself to a single set of detailed treaty obligations.’⁸³ It involves vastly different bodies of law, ranging from ‘both international and domestic labor law, environmental protection, criminal law, humanitarian law, and health and safety laws.’⁸⁴ Considering this range, there is a worry that ‘no single treaty could possibly resolve these complex interactions’ and that an attempt to implement such a treaty would ‘simply produce confusion and conflicting outcomes, not uniform practices.’⁸⁵

Lastly, the proposed mandate for a treaty governing the human rights accountability of corporations runs the risk of simply dissolving into empty rhetoric.⁸⁶ Critics lambasted the nations supporting the proposed mandate as human rights offenders hoping to ‘obscure their own corruption’ and complicity with business operations violating human rights on their own soil.⁸⁷ Pointing to the historical tendency of abusive States to ‘foster meaningless global human rights legislation and institutions,’⁸⁸ it can be ‘assumed their support is part of a strategy of obfuscation.’⁸⁹

Faced by such challenging obstacles, the proposed treaty does not represent the best method to impose human rights accountability mechanisms on corporations. Thus, considering the failure of both the proposed treaty and the Guiding Principles to create an enforceable legal regime, the requisite solution requires proving that, under established international law, corporations do in fact bear positive obligations to protect human rights law and may be governed by existing legal conventions.

3. Calling Upon ‘Every Organ in Society’⁹⁰: The Corporate Obligation to Contribute to the Realisation of Human Rights

Throughout the last century, TNCs grew in economic power and political influence, often surpassing States.⁹¹ As a consequence, such corporations have the vast potential to

⁸³ Ruggie, Issues Brief (n 24) 3.

⁸⁴ Ruggie, Precision Tools (n 78) para 11.

⁸⁵ Ibid para 12.

⁸⁶ Ibid para 5 (‘One would think that this approach would have lost its appeal by now, given its repeated failure to produce meaningful results. . . Even if [the] . . . campaign were to succeed in launching a treaty process, it would likely end in largely symbolic gestures . . .’).

⁸⁷ Aaron Rhodes, ‘The False Promise of an International Business and Human Rights Treaty’ *Freedom Rights Project* (10 July 2014) <<http://www.freedomrights.info/activities/aaron-rhodes-in-huffingtonpost-the-false-promise-of-an-international-business-and-human-rights-treaty/>> accessed 25 April 2016 (‘The measure was co-sponsored by Ecuador, a country where ‘children . . . are engaged in the worst forms of child labor. . .’).

⁸⁸ Ibid.

⁸⁹ Ibid.

⁹⁰ UDHR, G.A. Res. 217 (III) A, Doc.A/RES/217(III) (10 December 1948) Preamble (‘Now, therefore the General Assembly proclaims this Universal Declaration of Human Rights as a common standard of achievement for all peoples and all nations, to the end that every individual and every *organ of society*, keeping this Declaration constantly in mind, shall strive by teaching and education to promote respect for these rights and freedoms and by progressive measures, national and international, to secure their universal and effective recognition and observance . . .’) (emphasis added).

⁹¹ See Albin-Lackey (n 30) 29; see also Anderson and Cavanagh (n 22).

influence human rights in the territories in which they operate.⁹² Beginning in the years directly following World War II, where senior officials of German companies were convicted for assisting the Nazi regime in committing the atrocities of the Holocaust,⁹³ increasing international concern over business-related human rights abuses⁹⁴ has led to dynamic developments in international regulation. However, despite efforts to regulate business human rights compliance, progress has been hindered by the fact that under international law, TNCs do not bear direct legal obligations.⁹⁵

The issue is whether legal standards that were originally intended to apply to the relationship between the State and private individuals can operate in the context of a non-State actor and private individuals.⁹⁶ Under international law, States bear the primary responsibility to enforce human rights standards.⁹⁷ Despite this traditional structure, there is a 'growing acceptance that corporations have an important role to play.'⁹⁸ A clear international consensus recognises the fact that corporations must, at an

⁹² See UN Norms (n 23) 3.

⁹³ International Commission of Jurists, *Corporate Complicity & Legal Accountability, Volume 1: Facing the Facts and Charting a Legal Path* (International Commission of Jurists 2008) 1 ('These business leaders . . . supplied poisonous gas to concentration camps knowing it would be used to exterminate human beings; actively sought slave labour to work in their factories . . . and enriched their companies by plundering property in occupied Europe.').

⁹⁴ *Ibid* ('The international community has been shocked at reports from all continents that companies have knowingly assisted governments, armed rebel groups, or others to commit gross human rights abuses. Oil and mining companies that seek concessions and security have been accused of giving money, weapons, vehicles and air support that government military forces or rebel groups use to attack, kill and 'disappear' civilians. . . Companies have reportedly given information that has enabled a government to detain and torture trade unionists or other perceived political opponents. . . Others are accused of propping up rebel groups that commit gross human rights abuses, by buying conflict diamonds, while some have allegedly encouraged child labour and sweatshop conditions by demanding that suppliers deliver goods at ever cheaper prices.').

⁹⁵ See Brownlie (n 25) 66.

⁹⁶ See Philip Alston, 'The "Not-a-Cat" Syndrome: Can the International Human Rights Regime Accommodate Non-State Actors?' in Philip Alston (ed), *Non-State Actors and Human Rights* (OUP 2005) 1, 5-6.

⁹⁷ See UNHRC Treaty Resolution (n 35) 2 (stressing 'that the obligations and primary responsibility to promote and protect human rights . . . lie with the State . . .') Global Compact (n 31) Principle 1 ('Governments have the primary responsibility to protect human rights.'). Guiding Principles (n 33) Principle 2, Commentary ('States must protect against human rights abuse within their territory and/or jurisdiction by third parties, including business enterprises.').; see also David Jason Karp, *Responsibility for Human Rights: Transnational Corporations in Imperfect States* (CUP 2014) 2 (defining the 'state-centric' view where primary responsibility for protecting individuals rests with the national governments).

⁹⁸ See Global Compact (n 31) Principle 1 (observing that 'individuals and organizations also have important roles to play in supporting and respecting human rights. . . The business community has a responsibility to respect human rights, that is, not to infringe human rights, in the context of their own activities and their business relationships.').; see also Joseph Lazno and Maria Prandi, 'Corporate Social Responsibility and Human Rights', in Ramon Mullerat (ed), *Corporate Social Responsibility: the Corporate Governance of the 21st Century*, (2005) 209, 209; Jernej Letnar Černic, 'Corporations and Human Rights: Towards Binding International Legal Obligations?' in Jernej Letnar Černic and Tara Van Ho (eds) *Business and Human Rights* (2013) 1, 11 (noting that '[e]ven though states have primary responsibility to ensure that human rights are respected, protected, and fulfilled , this does not absolve corporations . . . from a direct responsibility to respect, at the very minimum, human rights. Corporations are obliged, at the very least, to refrain from interfering the individual's enjoyment of their rights.').

absolute minimum, respect all human rights while conducting business operations, with this minimum duty of 'do no harm' applying to all business enterprises.⁹⁹

However, beyond this minimum duty there is growing support for the argument that corporations bear positive legal obligations to contribute to the realisation of human rights.¹⁰⁰ In developing a system of accountability for the human rights violations of corporations, two alternative interpretations of existing legal doctrines permit the imposition of positive legal obligations on TNCs. The first method involves the application of the Universal Declaration of Human Rights (UDHR) and its customary international law provisions to the activities of TNCs in order to hold these companies accountable. The second approach addresses the doctrine that corporations are mere objects of international law, bearing no human rights obligations. By establishing that corporations are indeed subjects of international law, and thus, as a result, carry rights and duties, it is possible to impose binding human rights obligations on TNCs. Both approaches test the viability of applying existing human rights obligations on TNCs in order to create a system of accountability for their human rights transgressions. While the application of the UDHR fails to provide a sufficient basis for this system of corporate accountability, it is, however, possible to successfully argue that corporations are subjects of international law and thus bear human rights obligations.

A. Transnational Corporations and the Universal Declaration of Human Rights

In 1945, following the atrocities of World War II and the Holocaust, the fledgling UN proposed the drafting of an international bill of rights in order to ensure the 'maximum possible safeguard'¹⁰¹ against a repetition of the horrors of the Holocaust. Thus, the UDHR was born. At the time of its drafting, the UDHR was an aspirational declaration of human rights entitlements based on the important concept of human dignity, and was not considered to give rise to binding legal obligations.¹⁰² Since then, however, the UDHR is considered to have become part of customary international law.¹⁰³ If the UDHR mandate encompasses corporations, it would be possible to apply its human rights provisions to establish a binding human rights regime regulating corporations.

(i) Whether the Universal Declaration of Human Rights Encompasses Corporations

Unlike subsequent UN declarations and resolutions, the UDHR is not limited in its scope: the Preamble explicitly states that the UDHR is intended as a:

common standard of achievement for all peoples and all nations,
to the end that every individual and every organ of society . . .
shall strive . . . to promote respect for these rights . . .

⁹⁹ UNHRC Resolution (n 38)1; see also AI, *Injustice Incorporated* (n 14)21.

¹⁰⁰ See Amnesty International, *Human Rights Principles for Companies* (Amnesty International January 2008) 1.

¹⁰¹ Commission on Human Rights, Drafting Committee: First Session, 'Summary Record of the Seventh Meeting' UN Doc E/CN.4/AC.1/SR.7 (19 June 1947) 5 (quoting Geoffrey Wilson in the record of the first planning session of the UDHR Drafting Committee).

¹⁰² See Hersch Lauterpacht, *International Law and Human Rights*, (FA Praeger 1950) 414-416.

¹⁰³ As argued below (n 113).

While the term ‘organs of society’ is undefined in the UDHR, there is support for this term encompassing corporations. The UN Commission on Human Rights recognized that ‘transnational corporations and other business enterprises, as organs of society, are . . . responsible for promoting and securing the human rights set forth in the Universal Declaration of Human Rights.’¹⁰⁴ In addition, there is evidence indicating that the drafters of the UDHR intended to transcend the traditional dichotomy of State and individual in allocating human rights responsibility. Reaffirming this principle of the universality of the UDHR is the *travaux préparatoires*, the official records of negotiation.¹⁰⁵ Under Article 32 of the Vienna Convention on the Law of Treaties,¹⁰⁶ these negotiation records may be useful in clarifying the intentions of a treaty. An earlier draft of the Preamble highlights the deliberate intent in widening the scope of the UDHR’s application. Instead of employing the all-encompassing language found in the Preamble today, the earlier draft limited its aim of ‘translat[ing] [human rights] into reality’ solely to States.¹⁰⁷ Thus, the specification in the final draft, where the responsibility for the rights contained within the Declaration belong to ‘every individual and every organ of society,’ rather than limiting responsibility to States, emphasises the universal application of the UDHR. Furthermore, Article 29 of the UDHR declares that ‘everyone has duties to the community,’ encompassing non-State actors.

TNCs are important ‘organs of society’ in the territories in which they operate. They own property, generate income, pay taxes, consume and produce goods and services, and heavily influence the lives of employees and locals. Thus, as ‘organs of society,’ TNCs should be included under the expansive scope of the UDHR and subsequently be expected to uphold its provisions.

(ii) Whether the Universal Declaration of Human Rights Creates Binding Legal Obligations

At the time of its drafting, the UDHR constituted an unenforceable international statement of rights, declaratory rather than binding in nature, intended only to reflect the international community’s commitment to prevent a repetition of the atrocities of the Holocaust. Indeed, it was the consensus at that time that it ‘would have been a rather daring statement to assert then [in 1948] that the Declaration was a legally binding instrument.’¹⁰⁸ However, it soon became apparent that the UDHR carried significantly more legal weight than originally intended: ‘[n]o sooner had the Declaration been adopted when it started to be used as a yardstick to measure the compliance by Governments with the international standards of human rights.’¹⁰⁹ A combination of State

¹⁰⁴ UN Norms (n 23) 1.

¹⁰⁵ See William A Schabas (ed), *The Universal Declaration of Human Rights: The Travaux Préparatoires*, (CUP 2013).

¹⁰⁶ Vienna Convention on the Law of Treaties (adopted 22 May 1969, entered into force 27 January 1980) 1155 UNTS 331, art 32.

¹⁰⁷ UNCHR, Temporary Working Group of the Drafting Commission, *Report of the Drafting Committee to the Commission on Human Rights*, UN Doc E/CN.4/21 (1 July 1947) 70 (‘Now, therefore, we the Peoples of the United Nations have resolved to define in a solemn Declaration the essential rights and fundamental freedoms of man, so that this Declaration . . . may constantly remind them of their rights and duties and that the United Nations and the Member States may constantly be inspired by the principles so formulated to translate them into reality.’).

¹⁰⁸ Egon Schwelb, *Human Rights and the International Community: The Roots and Growth of the Universal Declaration of Human Rights* (Quadrangle 1964) 36-37.

¹⁰⁹ *Ibid* 38.

practice¹¹⁰ and subsequent UN declarations and conventions¹¹¹ treated the UDHR as binding in nature, and by 1963 it could no longer be claimed that the UDHR had only 'moral force.'¹¹² As a result, it is widely accepted by scholars that the UDHR has entered customary international law¹¹³ and imposes binding human rights obligations.

(iii) Applying the Universal Declaration of Human Rights' Provisions to Corporations

By their very nature, corporations particularly influence specific human rights provisions contained within the UDHR. Thus, corporations should take care to 'adhere to these international standards.'¹¹⁴ In its 1998 publication, *Human Rights Principles for Companies*, Amnesty International articulated an 'introductory checklist' outlining the human rights responsibilities to which companies should pay especial attention.¹¹⁵ This checklist, based on existing international legal standards contained within international conventions, should be incorporated by businesses in order to adhere to human rights law. In addition, Amnesty International recommends corporations implement monitoring systems to ensure compliance with the human rights principles expounded upon in the checklist.¹¹⁶ This list of human rights principles is comprised of security, community engagement, freedom from discrimination, freedom from slavery, health and safety, freedom of association and the right to collective bargaining, fair working conditions, and the duty to monitor human rights.¹¹⁷ During the past few decades, human rights litigation brought against TNCs emphasises the importance of corporate compliance with human rights measures governing security, freedom from slavery, and fair working conditions.

Under Articles 3,5, and 9 of the UDHR, every person has the right to life, liberty and security of person, the right to be free from torture and cruel, inhuman or degrading treatment or punishment, and no one may be subjected to arbitrary arrest or detention. Through these articles, the UDHR constrains the ability of States and other actors, including corporations, to enforce security measures. Under this principle, 'all companies should ensure that any security arrangements protect human rights and are consistent with international standards for law enforcement.'¹¹⁸ Corporations must employ security

¹¹⁰ Ibid 38-39 (citing examples of state practice within the UN, including the invocation of the UDHR in incidents relating to forced labor and 'customs and practices inconsistent with the physical integrity and dignity of women.').

¹¹¹ See UNGA Res 1514 (XV) (14 December 1960) 'Declaration on the Granting of Independence to Colonial Countries and Peoples', art. 7; see also Convention Concerning the Abolition of Forced Labour (ILO Convention 105) (adopted 25 June 1957, entered into force 17 January 1959) 320 UNTS 291, Preamble, para 6.

¹¹² Schwelb (n 108) 47.

¹¹³ See Antonio Augusto Cançado Trindade, 'Universal Declaration of Human Rights' *United Nations Library of International Law* (2008) 2 <<http://legal.un.org/avl/ha/udhr/udhr.html>> accessed 25 April 2016. See also Peter Henner, *Human Rights and the Alien Tort Statute* (American Bar Association 2009) 122; Eric Heinze, *Waging Humanitarian War: The Ethics, Law, and Politics of Humanitarian Intervention* (SUNY 2009) 65; Louis B Sohn, 'The Human Rights Law of the Charter' (1977), 12 *Tex.Int'l.L.J.* 129, 133; JP Humphrey, 'The Universal Declaration of Human Rights: Its History, Impact, and Judicial Character' in BG Ramcharan (ed) *Human Rights. Thirty Years after the Universal Declaration* (Brill 1979) 21, 37.

¹¹⁴ AI, *Human Rights Principles* (n 100) 3.

¹¹⁵ Ibid.

¹¹⁶ Ibid 9.

¹¹⁷ See generally *ibid*.

¹¹⁸ AI, *Human Rights Principles* (n 100) 9, para 2.

procedures that include measures to prevent ‘excessive force, as well as torture, or cruel, inhuman or degrading treatment.’¹¹⁹ In addition, it is emphasised that any complaint about security procedures or personnel ‘should be promptly and independently investigated.’¹²⁰ The need for firmer rules restricting corporate use of security forces—is demonstrated by the history behind the *Kiobel* case, where Royal Dutch Petroleum/Shell was allegedly complicit in the actions of its private security forces in the torture and extrajudicial killings of members of an environmental campaign group, Movement for the Survival of the Ogoni People.¹²¹ By applying the human rights principles enshrined within Articles 3, 5, and 9 of the UDHR to corporations, it is possible that a legal ground of action would have existed to hold Royal Dutch Petroleum/Shell legally accountable for the heinous acts of its security forces, a preferable alternative to the current legal limbo in which the plaintiffs find themselves.

Article 4 of UDHR prohibits slavery in all its manifestations:

‘[n]o one shall be held in slavery or servitude; slavery and the slave trade shall be prohibited in all their forms.’

This strict prohibition requires active compliance. Corporations must deliberately engage with and monitor their subsidiaries and business partners to ensure they are not enjoying the benefits of slave labour, bonded labour, or any form of forced labour.¹²² The unfortunate case of *Doe v. Unocal* brought global attention to the issue of modern slavery.¹²³ In *Unocal*, Burmese villagers sought redress for abuses suffered at the hands of the Burmese military government during the construction of the Unocal pipeline project.¹²⁴ Villagers brought a class action suit against American transnational corporation Unocal, state-owned Myanmar Oil and Gas Enterprise (MOGE), and the Burmese military junta government.¹²⁵ Because of the pipeline project, villagers endured forced relocation, sexual assault and rape, torture, and forced labour programmes.¹²⁶ The US Ninth Circuit Court of Appeals found that Unocal’s knowledge of the Burmese government’s habit of using forced labour, combined with their continued business relationship, were sufficient to amount to participation in slavery.¹²⁷ Applying Article 4 UDHR to TNCs would impose an obligation on corporations to prevent future use of slave labour in their business operations.

The legal obligations requiring corporations to ensure fair working conditions are found under Articles 23 and 24 of the UDHR. These articles mandate the provision of equal pay for equal work, just and favorable remuneration, the oft-maligned right to rest and leisure, and the reasonable limitation of working hours. TNCs should ensure that all these conditions are met, while simultaneously taking measures to ensure that their subsidiaries, partners, or subcontractors do not infringe these rights.¹²⁸ Of the rights affected by corporate operations, it is this right to fair working conditions that is most frequently violated, considering that corporations hold direct control over these aspects

¹¹⁹ Ibid.

¹²⁰ Ibid.

¹²¹ *Kiobel* (n 19)1664.

¹²² AI, Human Rights Principles (n 100) 10, para 5.

¹²³ See generally 395 F.3d 932 (9th Cir. 2002).

¹²⁴ Ibid 936.

¹²⁵ Ibid.

¹²⁶ Ibid 939-40.

¹²⁷ Ibid 953.

¹²⁸ AI, Human Rights Principles (n 100) 10, para 8.

of their employees' lives. Holding corporations responsible for fair working conditions under the applicable provisions of the UDHR would guarantee that violations are taken seriously and appropriate remedies are provided to the victims.

(iv) The Universal Declaration of Human Rights Ultimately Fails as a Basis for Corporate Human Rights Obligations

The above analysis demonstrates that it is possible to create a system of human rights obligations through the application of the UDHR to TNCs in areas where corporations have a troubled history. However, despite the initial appeal of this approach - where the customary international law mandates of the UDHR encompass corporations and impose legal obligations upon companies to respect the UDHR's human rights provisions - there is a troubling lack of precedent in treating the UDHR as binding. While scholars have frequently voiced support for treating the UDHR as binding customary international law, neither States nor international or domestic courts of law have accepted the UDHR as binding.¹²⁹ A dramatic departure from the existing legal regime, currently under which corporations are not subject to international human rights law, requires a stronger foundation than a UN declaration with an uncertain status in international law, solemnizing the commitment to uphold human rights.¹³⁰

Therefore, in spite of the tempting allure of the UDHR's potential ability to govern corporations under its all-encompassing doctrine, this approach is too disputed and labyrinthine¹³¹ and so it is necessary to employ a system that overcomes the complexity of establishing a legal relationship between TNCs and individuals.

B. Reinterpreting Legal Doctrine to Impose Human Rights Obligations on Transnational Corporations

Traditionally, TNCs have not been recognized as subjects of international law.¹³² As non-State actors, TNCs are viewed as mere objects of international law,¹³³ and the creation of an international regulatory regime imposing human rights responsibilities on

¹²⁹ See Heinze (n 113) 65.

¹³⁰ Vojin Dimitrijevic, 'Customary Law as an Instrument for the Protection of Human Rights' (2006) Istituto per gli Studi di Politica Internazionale, 22 ('The complexity that accompanies the conviction that there is a rule of customary international law . . . shows that customary norms of any law cannot be grasped only from the traces left on paper by those who believe in their existence . . . and implement them. . .').

¹³¹ Ibid 23.

¹³² Nicola Jägers, 'The Legal Status of the Multinational Corporation Under International Law' in Michael K Addo (ed) *Human Rights Standards and the Responsibility of Transnational Corporations* (Kluwer 1999) 259, 262.

¹³³ Definitions of objects of international law include, Higgins' 'An object of international law is an entity that does not bear responsibilities or duties under international law, but is instead governed by international law. An example of an object of international law is State territory and modes of territorial acquisition.' See R Higgins, *Problems and Process: International Law and How We Use It*, (OUP 1994) 196; See also the ICJ's Reparations for Injuries Advisory Opinion: 'A subject of international law is an individual, body or entity, recognized or accepted as being capable of possessing and exercising rights and duties under international law. Rights and obligations attach directly to a subject of international law. An entity is a subject of international law, or something to which international law applies, if it has international legal personality.' *Reparation for Injuries Suffered in the Service of the United Nations* (Advisory Opinion) [1949] ICJ Rep 178, 179.

businesses requires a 'radical departure' from the rigid structure of existing international legal doctrine, which does not currently accept the legal personality of TNCs.¹³⁴ Thus, to establish that TNCs bear human rights duties, it is necessary to prove that TNCs do possess this international legal personality and are consequently subjects of international law. In addition, once the legal capacity of TNCs is established, it is crucial to limit the scope of responsibility, as corporations cannot reasonably be expected to take on the roles of States and bear obligations to promote every human right within the territories of their operations.

(i) The Legal Personality of Corporations under International Law

An entity in possession of legal personality possesses certain rights and duties under international law.¹³⁵ A subject of international law is an 'entity capable of possessing international rights and duties and having the capacity to maintain its rights by bringing international claims.'¹³⁶ In the *Reparations for Injuries* case before the International Court of Justice (ICJ), the ICJ formulated this definition in its confirmation that non-State actors, such as international organisations like the UN, may be granted international legal personality.¹³⁷ However, the ICJ neglected to provide clear guidance to determine whether an entity possessed sufficient rights and duties to be considered a subject of international law, rather than simply an object.¹³⁸ An examination of the treatment of corporations under existing legal regimes indicates that corporations do in fact possess rights and duties under international law, allowing the logical conclusion that TNCs are subjects under international law and possess international legal personality.

Regarding the rights of TNCs, historical practice shows a tendency under foreign investment law to protect the investments of companies. Under these rules, TNCs are often granted rights relating to expropriation and non-discrimination in comparison to domestic companies.¹³⁹ Furthermore, TNCs often possess the capacity to enforce these rights. Numerous tribunals allow corporations to bring claims: corporations are permitted to submit disputes to binding arbitration at the International Center for the Settlement of Investment Disputes (ICSID)¹⁴⁰ and may seek recompense from foreign governments for trade interference through the North American Free Trade Agreement's (NAFTA) dispute settlement mechanism.¹⁴¹

In addition, existing multilateral conventions impose direct duties on TNCs. While many international instruments apply indirect obligations on corporations,¹⁴² both the International Convention on Civil Liabilities for Damage Resulting from Activities to the

¹³⁴ David Kinley and Junko Tadako, 'From Talk to Walk: The Emergence of Human Rights Responsibilities for Corporations at International Law (2004) 44 Va.J.Int'l.L. 931, 944-45.

¹³⁵ See Brownlie (n 25) 57.

¹³⁶ Ibid.

¹³⁷ ICJ Reparations (n 134) 179.

¹³⁸ Jägers (n 68) 24.

¹³⁹ UNCTAD, 'The Social Responsibility of Transnational Corporations' UN Doc UNCTAD/ITE/IIT/Misc.21 (1999) 9.

¹⁴⁰ See generally Convention on the Settlement of Investment Disputes Between States and Nationals of Other States (ICSID Convention) (adopted 18 March 1965, entered into force 14 October 1966) 4 ILM 524.

¹⁴¹ See discussion on *Methanex Corp. v. United States of America* by William Greider 'The Right and U.S. Trade Law: Invalidating the 20th Century' *The Nation* (New York 15 October 2001). <<http://www.thenation.com/article/right-and-us-trade-law-invalidating-20th-century>> accessed 25 April 2016.

¹⁴² See UN Norms (n 23) Preamble.

Environment,¹⁴³ and the International Convention on Civil Liability for Oil Pollution Damage,¹⁴⁴ impose direct obligations on corporations.

Furthermore, the now-defunct UN Norms sought to impose directly liability on TNCs '[w]ithin their respective spheres of activity and influence' to promote, respect, and protect human rights under both international and domestic law.¹⁴⁵ While unenforceable, the UN Norms confirm that the international community supported the argument that corporations may bear direct duties under international law.

Thus, it may be established that TNCs are capable of 'possessing international rights and duties and having the capacity to maintain . . . [their] . . . rights by bringing international claims.'¹⁴⁶ Consequently, TNCs are in possession of international legal personality and may be considered subjects of international law, permitting the imposition of human rights obligations.

(ii) The Scope of Human Rights Duties of Corporations

Traditionally, under international human rights law, the State bears responsibility for the protection of human rights within its jurisdiction.¹⁴⁷ However, international law must evolve in recognition of the changing dynamic between human rights and non-State actors. The development of TNCs as entities in possession of international legal personality and their capacity to bear duties indicates that State sovereignty is becoming 'pluralistic and limited.'¹⁴⁸ States no longer hold an exclusive role in the realisation of human rights; TNCs share in this responsibility.¹⁴⁹

Limiting the Scope of Liability

With this expansion of the distribution of human rights duties amongst international players, where States no longer bear sole responsibility for these duties, it is 'neither necessary nor desirable for TNCs to possess full legal personality on a par with [S]tates.'¹⁵⁰ As stated by the ICJ in the *Reparations for Injuries* case, 'the subjects of law in any legal system are not necessarily identical in their nature or in the extent of their rights, and their nature depends upon the needs of the community.'¹⁵¹ In recognition of this, the UN Global Compact stipulated that corporations bear moral obligations to

¹⁴³ Convention on Civil Liability for Damage Resulting from Activities Dangerous to the Environment (adopted 8 March 1993, entered into force 21 June 1993), CETS 150, art. 2, para 6.

¹⁴⁴ International Convention on Civil Liability for Oil Pollution Damage (CLC) (adopted 29 November 1969, entered into force 19 June 1975) 973 UNTS 3, art.1, para 2.

¹⁴⁵ See UN Norms (n 23) para 1; ECOSOC Sub-Commission on the Promotion and Protection of Human Rights, 'Commentary on the Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regards to Human Rights' UN Doc E/CN.4/Sub.2/2003/38/Rev.2 (2003) para 1(b).

¹⁴⁶ Brownlie (n 25) 57.

¹⁴⁷ See *Velásquez Rodríguez Case*, Inter-American Court of Human Rights Series C No 4 (29 July 1988) doc. 13, para 174.

¹⁴⁸ Tania Voon, 'Multinational Enterprises and State Sovereignty Under International Law' (1999) 21 *Adel.L.Rev.* 219, 246.

¹⁴⁹ Peter J Spiro, 'New Players on the International Stage' (1997) 2 *Hofstra.L.&Pol'y.Symp.* 19, 24-25.

¹⁵⁰ Kinley and Tadako (n 135) 945.

¹⁵¹ ICJ *Reparations* (n 134), para 178.

promote and protect the human rights within their respective 'spheres of influence.'¹⁵² Designed to assist companies to support and respect human rights within and beyond the workplace, this concept of the 'sphere of influence' seeks to establish the scope of corporate responsibility for human rights issues.¹⁵³ This scope is based on the extent of the corporation's influence, depending on factors such as the human right at issue, the size of the company, and the proximity between the company and the potential victims.¹⁵⁴ The concept implies that the more control or influence a corporation holds over a particular situation involving human rights abuses, the greater the business responsibility to act.¹⁵⁵

The concept of 'sphere of influence' is considered worryingly ambiguous.¹⁵⁶ Upon examination, different dimensions of 'influence' arise with the concept of 'sphere of influence',¹⁵⁷ including proximity, causation, control, benefit, and political influence.¹⁵⁸ Despite this concern, it is this wide range of options that grants the concept of 'sphere of influence' a necessary elasticity: it offers a flexible means of capturing the diverse and varying channels through which corporations affect human rights, whether indirectly or directly.

As an elastic tool of measurement, the 'sphere of influence' may be applied to a particular corporation to determine the variety of manners in which it affects human rights in its operations. This influence may manifest in a myriad of ways. Logically, a TNC would owe the greatest duties to its workers, consumers, and members of the local community. For instance, a corporation's proximity to its employees may mean that the business has a duty to take reasonable steps to protect its employees from human rights abuses by the State.¹⁵⁹ In addition, a TNC's influence, leverage, and contractual relationship with its business partners, subsidiaries, and subcontractors may create a duty obliging the TNC to ensure that those with whom they work do not violate human rights.¹⁶⁰ Lastly, where a TNC operates in remote areas and exercises de facto control over a territory, the company's wide sphere of influence would require the company to fulfil a broad range of duties akin to those of the government unable to fulfil them.¹⁶¹

Thus, applying the concept of the sphere of influence limits the scope of TNCs' human rights responsibilities, reasonably restricting the potential liability of a corporation

¹⁵² UN Norms (n 23), para 1.

¹⁵³ OHCHR & UN Global Compact, 'Briefing Paper on the Global Compact and Human Rights: Understanding Sphere of Influence and Complicity' in *Embedding Human Rights into Business Practice*, (2004) 14, 18.

¹⁵⁴ *Ibid.*

¹⁵⁵ See *ibid.*

¹⁵⁶ UNHRC, 'Promotion and Protection of All Human Rights, Civil, Political, Economic, Social, and Cultural Rights, Including the Right to Development: Clarifying the Concepts of "Sphere of Influence" and "Complicity"'; Report by Special Representative of the Secretary General, Mr J Ruggie (15 May 2008) UN Doc A/HRC/8/16, para 4.

¹⁵⁷ *Ibid* para 12.

¹⁵⁸ Ethical Corporation: Business Intelligence for Sustainability, 'Business and human rights – Beyond corporate spheres of influence' *EC Newsdesk* (12 November 2007) < <http://business-humanrights.org/en/business-and-human-rights---beyond-corporate-spheres-of-influence> > accessed 25 April 2016.

¹⁵⁹ OHCHR Briefing Paper (n 162)17-18; International Council on Human Rights Policy, *Beyond Voluntarism: Human rights and the developing international legal obligations of companies* (International Council on Human Rights Policy February 2002) 138.

¹⁶⁰ Jägers (n 68) 83.

¹⁶¹ See ICHRP, *Voluntarism*, (n 160)138.

to matters over which it possesses influence, whether based on physical proximity, causation, leverage, control, benefit, or political influence.

(iii) Corporations and the Tripartite Duties to Respect, Protect, and Fulfil

Under the tripartite typology,¹⁶² the fulfillment of any human right involves the performance of multiple types of obligations.¹⁶³ Within this framework, human rights entail three distinct levels of obligations, structured as the obligations to respect, protect, and fulfil human rights.¹⁶⁴ The obligation to respect imposes a negative duty upon the State to do no harm, requiring it to abstain from interfering with the rights of an individual.¹⁶⁵ The State must refrain from acts that would deprive individuals of their rights.¹⁶⁶ The obligation to protect imposes a positive duty upon the State to protect the individual from interference by third parties.¹⁶⁷ Lastly, the obligation to fulfil is 'central to the realisation of economic, social, and cultural rights.'¹⁶⁸ It imposes a positive duty upon the State, requiring the State to actively take necessary measures, such as implementing legislation or social policies, to ensure the satisfaction of an individual's needs.¹⁶⁹

This tripartite framework was developed to structure the responsibility of States, with specific references being made to the State obligations.¹⁷⁰ However, despite the fact that this approach aligns with traditional human rights theory where only States bear obligations regarding human rights, this does not prevent corporations from sharing in the responsibility to perform these obligations, as 'all members of society share responsibility for the realisation of human rights.'¹⁷¹ Thus, the tripartite typology may be applied as an analytical tool to determine the human rights obligations of TNCs.

The Corporate Obligation to Respect

The obligation to respect requires the State, and by extension its organs and agents, to abstain from actions that violate the integrity or the freedom of the individual.¹⁷² It is a negative obligation upon States and other entities not to interfere. This obligation to respect, by its negative nature, is the least controversial in its applicability to

¹⁶² Henry Shue, *Basic Rights – Subsistence, Affluence and U.S. Foreign Policy* (Princeton 1980) 52. Shue's initial framework was refined by the Special Rapporteur on the Right to Food, Asbjørn Eide, in his 1987 report, altering the original framework to consist of the obligations to respect, protect, and fulfil human rights. See ECOSOC 'The New International Economic Order and the Promotion of Human Rights: Report on the Right to Adequate Food as a Human Right, Report by Special Rapporteur on the Right to Adequate Food as a Human Right (1987) UN Doc E/CN.4/Sub.2/1987/23, para 66.

¹⁶³ Shue (n 163) 52.

¹⁶⁴ Eide (n 163) para 66. See also Matthew Craven, *The International Covenant on Economic, Social and Cultural Rights: A perspective on its development* (Clarendon 1995) 109.

¹⁶⁵ Craven (n 165) 109.

¹⁶⁶ Ibid.

¹⁶⁷ Ibid.

¹⁶⁸ Ibid 113.

¹⁶⁹ Ibid 109.

¹⁷⁰ See generally Eide (n 163).

¹⁷¹ Ibid para 65; see also Shue (n 163) 52.

¹⁷² Eide (n 163) para 87.

corporations, as demonstrated by the fact that various corporate codes of conduct explicitly recognise this obligation to respect human rights throughout their operations.¹⁷³ A TNC must refrain from direct interference with the rights of its employees and must respect the rights of people residing on the land where the company operates.¹⁷⁴ Furthermore, this duty of non-interference extends to the larger community, where a corporation must abstain from activities that severely damage the environment.¹⁷⁵

A corporation's violations of this duty often occur in the context of complicity in a partnership.¹⁷⁶ This tense dynamic between business partners is demonstrated in the aforementioned *Unocal*, the famous case brought against Unocal, MOGE, and the Burmese Military Junta government.¹⁷⁷ The plaintiffs claimed that MOGE, as a business partner of Unocal, used forced labour in the construction of the Yadana pipeline in the Burmese wilderness and that Unocal had been complicit in this human rights violation.¹⁷⁸ The US District Court for the Southern District of New York found that Unocal's knowledge of the Burmese government's habit of using forced labour combined with the corporation's continued business relations with MOGE despite this knowledge were sufficient to amount to participation in slavery.¹⁷⁹ The finding of complicity with such an egregious human rights violation in the *Unocal* case highlights the importance of the corporate duty to respect human rights in business relationships and refrain from conducting business with States and State agencies that violate human rights.

The Corporate Obligation to Protect

The second obligation of the tripartite typology, the obligation to protect, requires taking the measures necessary to prevent other individuals or groups from violating the human rights of the individual.¹⁸⁰ Similarly to the obligation to respect, this positive obligation to protect often arises in the context of the corporation's relationship with third parties, particularly contractors, subcontractors, suppliers, and other business partners.¹⁸¹ Under the obligation to protect, TNCs are under a positive duty to ensure these business

¹⁷³ See for example PepsiCo, 'Global Code of Conduct' (2013) 10 <<http://www.pepsico.com/Company/Global-Code-Of-Conduct.html>> accessed 25 April 2016; L'Oréal Group, 'Code of Business Ethics: The Way We Work' (2007) 1 <<http://loreal-dam-front-resources-corp-en-cdn.brainsonic.com/ressources/afile/130406-b9642-resource-code-of-ethics-english.pdf>> accessed 25 April 2016; KMPG, 'Human Rights Statement' (2009) <<https://home.kpmg.com/xx/en/home/about/citizenship/human-rights-statement.html>> accessed 25 April 2016.

¹⁷⁴ Jägers (n 68) 80.

¹⁷⁵ See *ibid* 80; See also Eide (n 163) para 67.

¹⁷⁶ See Global Compact (n 31) Principles 1, 2. See also *Presbyterian Church of Sudan, et al v. Talisman Energy, Inc. and the Republic of the Sudan*, US District Court for the Southern District of New York, 244 F.Supp.2d 289 (2003) (accusing the Canadian energy company, Talisman, of supporting the forceful displacement and genocide of people in Sudan by the Sudanese government in order to conduct oil extraction).

¹⁷⁷ See *Unocal* (n 123).

¹⁷⁸ *Ibid*.

¹⁷⁹ *Ibid* 953.

¹⁸⁰ Eide (n 163) para 68. The obligation to protect typically involves the State developing and adopting national legislation. *Ibid* 29. While corporations are not capable of adopting legislation to protect the human rights of individuals, companies may realise this obligation through other methods. See GJH van Hoof, 'The Legal Nature of Economic, Social and Cultural Rights: a Rebuttal of Some Traditional Views' in Philip Alston and Katerina Tomaševski (eds), *The Right to Food* (Martinus Nijhoff 1984) 97, 106.

¹⁸¹ See Jägers (n 68) 83.

partners do not violate human rights. A TNC may satisfy this obligation by incorporating specific human rights provisions in contracts with these at-risk business partners. In addition, a TNC may restrict its potential business relationships to partners that adopt certain human rights standards. Many companies have recognized this obligation to protect in their respective corporate codes of conduct, requiring business partners to maintain certain human rights standards,¹⁸² demonstrating that they are capable of taking steps to meet the positive obligation to protect.

The Corporate Obligation to Fulfil

The obligation to fulfil requires the adoption of measures necessary to guarantee that the opportunities for the satisfaction of the human rights of each person exist.¹⁸³ This obligation encapsulates the dual obligations to ensure and to promote.¹⁸⁴ The obligation to fulfil is a positive obligation, requiring action to implement the legislation, programmes, and other measures necessary to ensure human rights. Thus, considering the level of direct action required, imposing the obligation to fulfil on TNCs is 'controversial.'¹⁸⁵ However, corporations bear responsibilities towards the societies in which they operate that extend beyond simply respecting and protecting human rights.¹⁸⁶ The obligation to fulfil requires corporations to take active measures to promote and ensure the human rights within their sphere of influence.¹⁸⁷ Corporations should implement a coherent human rights policy throughout the corporate structure to promote an environment where human rights may be fully realised.

(iv) Applying the Tripartite Typology to Human Rights within the Sphere of Influence of Transnational Corporations

To determine the viability of corporate human rights obligations under the tripartite typology to 'respect, protect, and fulfil,' it is helpful to apply the framework to specific human rights with which corporations have a troubled relationship. History has established that TNCs can have especially egregious influences upon the right to life and the right to be free from slavery. The 'respect, protect, and fulfil' schema highlights the failures of TNCs to abide by international human rights law in these areas under their sphere of influence. Furthermore, the tripartite typology assists in the development of a framework that may prevent future abuses by corporations.

Corporations and the Right to Life

¹⁸² See for example, Johnson & Johnson, 'Statement on Human Rights' (December 2012) <<http://www.jnj.com/caring/citizenship-sustainability/strategic-framework/statement-on-human-rights>> accessed 25 April 2016 (We endeavor to . . . avoid complicity in the human rights abuses of others.); IKEA, 'People & Planet Positive: IKEA Group Sustainability Strategy for 2020' (2012) <http://www.ikea.com/ms/en_GB/about-the-ikea-group/people-and-planet/index.html> accessed 25 April 2016; Levi Strauss & Co., 'Our Partners in Progress: Public Policy' (2014) <<http://levistrauss.com/who-we-are/#culture>> accessed 25 April 2016 ('We leverage the power of our trade relationships to strengthen implementation and enforcement of labor laws and workplace standards in countries where we have a business presence.').

¹⁸³ Eide (n 163) para 69.

¹⁸⁴ Van Hoof (n 181) 106.

¹⁸⁵ See Jägers, (n 68) 84.

¹⁸⁶ ICHRP, Voluntarism, (n 160) 139.

¹⁸⁷ Norms Commentary, (n 146) Article 1, Commentary.

The right to life is one of the most fundamental human rights, from which no derogation is permitted.¹⁸⁸ Under the duty to respect the right to life, a corporation must refrain from any action that infringes on this right and causes loss of life. Blatant examples where corporations have failed to respect the right to life range from catastrophic environmental pollution,¹⁸⁹ to the alleged use of death squads in Colombia.¹⁹⁰ Evidently, TNCs are capable of violating the duty to respect the right to life.

The duty to protect the right to life obliges a transnational corporation to ensure its business partners do not violate the right to life. Violations of this duty frequently occur in the context of corporations and the security arrangements made with private armed forces. An infamous incident where a transnational corporation has failed to satisfy this requirement concerns Chevron's oil extraction operations in Nigeria.¹⁹¹ In 1998, Nigerian security forces, hired and equipped by Chevron, killed Nigerian activists who had taken control of an offshore oil platform in protest over the rampant environmental damage and social injustices caused by the offshore drilling.¹⁹² The Nigerian security forces are 'notorious' for their use of excessive violence and human rights abuses.¹⁹³ In situations where corporations engage private security groups, the companies must actively develop a relationship that anticipates and prevents any violation of the right to life. In order to fulfil the obligation to protect the right to life, corporations must formulate and enforce contracts prohibiting human rights abuses, establish screening policies that will exclude security forces 'notorious' for excessive violence from the hiring process, provide necessary training to security forces in their employ, and promptly investigate any allegations of excessive force or abusive practices.¹⁹⁴

Under the duty to fulfil, a TNC bears the responsibility to promote the right to life. While the obligation to fulfil applies more to the promotion of social, economic, and cultural rights,¹⁹⁵ - with the right to life traditionally categorized as a civil and political right,¹⁹⁶ - a corporation may still contribute to the development of an environment that is conducive to respect for the right to life.¹⁹⁷

Corporations and the Right to be Free from Slavery

¹⁸⁸ See UNCHR (1981) GAOR, 36th Sess., Supp. No.40, Annex VII, General Comment 5/13, UN Doc A/36/40, para 1; UNCHR General Comment 29 (2001) State of Emergency, art.4, UN Doc CCPR/C/21/Rev.1/Add.11 para 7.

¹⁸⁹ See generally AI, Bhopal, (n 3); see also Stuart Kirsch, 'Cleaning up Ok Tedi: Settlement Favors Yonggom People', 4 J. The Journal of the International Institute, 1 <<http://quod.lib.umich.edu/jjii/4750978.0004.104?view=text;rgn=main>> accessed 25 April 2016.

¹⁹⁰ See generally *SinalTrainal v. The Coca Cola Company, et al*, US District Court for the Southern District of Florida, 256 F.Supp.2d 1345 (2003).

¹⁹¹ See Human Rights Watch, *The Price of Oil: Corporate Responsibility and Human Rights Violations in Nigeria's Oil Producing Communities* (Human Rights Watch January 1999) 11.

¹⁹² Ibid.

¹⁹³ Ibid 14.

¹⁹⁴ See AI, Human Rights Principles (n 100) para 2.

¹⁹⁵ See Craven, (n 165) 8-9.

¹⁹⁶ International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171, art 6 [ICCPR].

¹⁹⁷ See Jägers (n 68) 90.

Freedom from slavery is one of the most fundamental human rights, considered a *jus cogens* norm and guaranteed by many international instruments.¹⁹⁸ Under the obligation to respect the prohibition of slavery and forced labour, a TNC cannot make use of or enjoy the benefits of forced labour or slavery. Abusive corporate practices reaping the benefits of forced child labour are frequent in the apparel industry.¹⁹⁹ Additional failures to respect the right to be free from slavery occur in the agricultural industry, with, for example, the exposure of the use of child-slaves on cocoa plantations in Côte d'Ivoire.²⁰⁰

The obligation to protect mandates TNCs to avoid being complicit in violation of this right. Thus, a corporation must take measures to ensure that its business partners do not employ slave labour. A complex supply chain, however, can make it difficult to determine if one of a corporation's many subcontractors or distant business partners is employing slave labour.²⁰¹ Thus, corporations must implement monitoring and investigative mechanisms to provide assurance that business partners are not in violation. In addition, to minimize the risk in working with business partners, a corporation should take steps to condense the supply chain, instead contracting directly with a partner that it knows abides by the prohibition against slavery and forced labour.

The obligation to fulfil the right to be free from slavery and forced labour requires TNCs to promote an environment where this right may be fully realised.²⁰² This may take on the form of conducting seminars for business partners, to educate on the prohibition and the various disguises that modern slavery can wear. In the alternative, a TNC can implement incentives to encourage business partners to actively avoid slave labour, creating an atmosphere where the use of slavery is bad for business.

Applying the tripartite typology of 'respect, protect, and fulfil' to two of the most common corporate human rights abuses, the violation of the right to life and the right to be free from slavery, demonstrates the ability of corporations to impact human rights within their spheres of influence. Thus, a focused reinterpretation of international law, where corporations are now considered subjects of international law, is an effective means of proving that human rights obligations may be binding upon corporations.

4. Conclusion

Under current legal theory, it is often argued that TNCs are not international legal persons, and therefore, as mere objects of international law, have no obligations to the international community. Blatant human rights abuses committed by corporations have long been a concern. The international community's response thus far, however, has

¹⁹⁸ Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery (adopted 7 September 1956, entered into force 30 April 1957) 226 UNTS 3.

¹⁹⁹ See generally The National Labor Committee, *Child Labor is Back: Children are Again Sewing Clothing for Major U.S. Companies* (The National Labor Committee 2006).

²⁰⁰ See Humphrey Hawksley, 'Ivory Coast cocoa farms child labour: Little change' *BBC* (London 10 November 2001) <<http://www.bbc.co.uk/news/world-africa-15681986>> accessed 25 April 2016.

²⁰¹ International Finance Corporation, 'Good Practice Note: Addressing Child Labor in the Workplace and Supply Chain' (June 2002) 9 <https://www.scribd.com/fullscreen/16907676?access_key=key-2oqnn2931f6f53uk9alu> accessed 26 April 2016.

²⁰² See Jägers (n 68) 90.

been ineffective, with several 'soft law' attempts ultimately failing to regulate corporate adherence to human rights standards. In addition, the two most recent regulatory frameworks, the 2011 Guiding Principles and the human rights and business treaty proposed by Ecuador in June 2014, are ineffective and inadequate, failing to successfully implement a system of corporate accountability for human rights violations.

Despite these past failures to govern corporate human rights compliance, this paper has argued that it is not necessary to create a new human rights instrument specific to corporations. Instead, as demonstrated by this paper, it is possible to apply well-established concepts of international law to corporations in order to hold them accountable for their human rights transgressions. Thus, the focus shifts from constructing a new and potentially controversial human rights treaty, to instead operating within an existing structure of international legal doctrine. By interpreting international legal doctrine in a manner that accepts TNCs as possessing sufficient international legal personality and thus being subjects of international law, it may be established that TNCs bear human rights obligations, and may be held accountable in existing human rights frameworks. Thus, under the tripartite typology of 'respect, protect, and fulfil,' TNCs, as subjects of international law capable of bearing rights and duties, are accountable for the human rights within their respective spheres of influence.

Under the framework set forth in this paper for changes to the interpretation and application of international human rights law, transnational corporations will no longer operate in a legal vacuum, owing nothing to the international community, but will instead be held accountable for their actions, thus putting the 'corporate world on notice that they cannot just move about the world, rape, pillage, and plunder, and then walk away . . .'²⁰³ It is of fundamental importance that the human rights accountability of corporations be established because current 'international human rights law simply does not hear the voices'²⁰⁴ of those abused by corporations. It is time the world listened.

²⁰³ David Crane, 'Accountability for Crimes Against Humanity: Sierra Leone' Briefing at the U.S. Holocaust Museum (16 May 2013) (transcript available at <<http://www.rscsl.org/Clippings/2004/2004-05/pc2004-5-17.PDF>> accessed 26 April 2016).

²⁰⁴ Robert McCorquodale, 'Overlegalizing Silences: Human Rights and Nonstate Actors' (2002) 96 *Am.Soc'y.Int'l.L.Proc.* 384, 384.