MULTINATIONAL CORPORATIONS AND HUMAN RIGHTS LAW: PROBLEMS AND PROPOSALS FOR REFORM

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The Human Rights Council of the United Nations has established a working group on the issue of business and human rights. Its mandate is to elaborate an international treaty of corporate human rights obligations. In light of the fact that the second session of the working group is to occur in October this year, it is timely to re-examine the barriers which victims of human rights abuses face in pursuing justice, and how an international treaty may address these. Victims of human rights abuses by multinational corporations face numerous barriers to justice, stemming from both municipal and international law. This paper outlines some of the major difficulties that victims face, and examines developments in international law to propose law reforms which, if incorporated into an international treaty, would enable greater access to justice and remedies for victims of human rights abuses.

I INTRODUCTION

In the *Barcelona Traction* judgment of 1970, the International Court of Justice remarked that the concept of corporate personality "represents a development brought about by new and expanding requirements in the economic field",[1] and offered some, albeit limited, recognition to the corporate entity in the international sphere.[2] This led to significant academic debate as to the extent of the international legal personality of corporate entities, and the scope of their obligations under international law.[3] Significantly, much debate came to centre on the human rights obligations of multinational corporations – that is to say corporations that operate in

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1 *Barcelona Traction, Light, and Power Company, Ltd (Belgium v Spain) (Judgment)* [1970] ICJ Rep 35 [*Barcelona Traction*] at [39].

2 At [38].

3 See Markos Karavias *Corporate Obligations under International Law* (Oxford University Press, Oxford, 2013) at 1–3.

multiple State jurisdictions. This debate significantly cumulated with the appointment of a Special Representative on human rights and multinational corporations, who wrote the *Guiding Principles on Business and Human Rights* (*Guiding Principles*).[4] Following the adoption of the *Guiding Principles*, the Human Rights Council established an "open-ended intergovernmental working group on transnational corporations and other business entities with respect to human rights" (the working group), whose mandate is to elaborate a binding human rights treaty on corporate human rights obligations.[5] The working group has completed its first session, and its second session is due to take place from 24-28 October 2016.[6]

In light of the moves towards the development of a treaty on multinational corporations and human rights, it is timely to re-evaluate issues relating to corporate human rights obligations. Victims of human rights abuses by corporate entities are often faced with a range of legal obstacles which inhibit their ability to access justice and appropriate remedies.[7] These remedies stem from both municipal law relating to corporate personality, and international law particularly those pertaining to jurisdiction. Despite the positive developments made in the *Guiding Principles*, which served to highlight corporate and State human rights obligations, the current international legal regime cannot effectively offer remedies to those victims of human rights abuses by multinational corporations. As such, any proposals contained in the treaty to be elaborated by the working group must focus on remedying these defects. Such proposals should centre on three key concepts identified in the *Guiding Principles*, those being the State obligation to protect human rights, the corporate obligation to respect human rights, and the right to a remedy for abuses.[8]

This paper addresses these issues in the following manner. First, the nature of multinational corporations is explored. Second, key difficulties with the regulation

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4 John Ruggie *Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises* A/HRC/17/31 (2011) (annex) *Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework* [*Guiding Principles*]. The *Guiding Principles* were endorsed by the Human Rights Council in *Human rights and transnational corporations and other business enterprises* HRC Res 17/4, A/HRC/RES/17/4 (2011) at [1].

5 *Elaboration of an internationally legally binding instrument on transnational corporations and other business enterprises with respect to human rights* HRC Res 26/9, A/HRC/RES/26/9 (2014) [HRC Res 26/9] at [1].

6 "Open-ended intergovernmental working group on transnational corporations and other business enterprises with respect to human rights" (2016) United Nations Office of the High Commissioner for Human Rights <www.ohchr.org>.

7 See generally Sarah Joseph *Corporations and Transnational Human Rights Litigation* (Hart Publishing, Oxford, 2004) at 83–99.

8 *Guiding Principles*, above n 4, at 6.

of multinational corporations in the field of human rights, stemming from both municipal and international law, are outlined. Third, the important *Guiding Principles* on business human rights obligations are discussed, and gaps in the scheme they identify are explored. Finally, this paper concludes with a series of proposals for reform to enable greater corporate accountability in the human rights field.

II THE NATURE OF MULTINATIONAL CORPORATIONS

Insofar as it is relevant for present purposes, a "corporation" is a company, recognised as such by the law, and possessing municipal legal personality.[9] A "multinational", or "transnational" corporation, then, is one that operates in multiple jurisdictions.[10] Thus, it might be incorporated in one State, but manufacture products in another. The State in which the corporation is incorporated is its "home State",[11] and the nation in which it conducts its activities is the "host State" or "territorial State".[12] For the purposes of international law, the nationality of the corporation is generally that of the home State.[13]

Multinational corporations have significant power in the global arena. A study conducted in 2000 concluded that of the 100 largest global economies, only 49 were States, the remaining 51 were corporate entities.[14] This economic power, and the de facto political power that accompanies it, means that multinational corporations are in a significant position to be able to adversely affect human rights.[15] Moreover, there are countless severe human rights violations by corporate entities which have been

9 See *Salomon v Salomon & Co Ltd* [1897] 22 AC (HL) [*Salomon*] at 51 per Lord Macnaghten for the legal personality of companies.

10 See B Kogut "Multinational Corporations" in Neil J Smelser and Paul B Baltes (eds) *International Encyclopedia of the Social & Behavioural Sciences* (Pergamon, Oxford, 2001) 10197 for an in-depth discussion of the definition and history of multinational corporations.

11 Amnesty International *Injustice Incorporated: Corporate Abuses and the Human Right to Remedy* (Amnesty International, London, 2014) at 22.

12 At 22.

13 *Barcelona Traction*, above n 1, at [70]–[72]; Peter Muchlinski "Corporations in International Law" in Rüdiger Wolfrum (ed) *The Max Planck Encyclopedia of Public International Law* (Oxford University Press, Oxford, 2012) vol 2, 797 at [19].

14 John Cavanagh and Sarah Anderson "Top 200: The Rise of Corporate Global Power" (4 December 2000) Institute for Policy Studies <www.ips-dc.org> at [1].

15 Joseph, above n 7, at 1; Menno T Kamminga "Transnational Human Rights Litigation against Multinational Corporations Post-*Kiobel*" in Cedric Ryngaert, Erik J Molenaar and Sarah MH Nouwen (eds) *What's Wrong with International Law? Liber Amicorum AHA Soons* (Brill, Leiden, 2015) 155 at 154–155.

documented.[16] The need for corporate regulation in the field of human rights, therefore, is not a mere theoretical matter. However, the regulation of corporate conduct in the field of human rights is difficult, due to several practical and legal barriers.

III THE DIFFICULTIES WITH CORPORATE REGULATION IN THE FIELD OF HUMAN RIGHTS

A Introduction

In order to fully understand the difficulty in regulating the conduct of multinational corporations in international law, it is necessary to explore both the international and the municipal nature of the corporate entity. The common law courts have long recognised the difficulties in regulating the conduct of business entities. As early as 1612, Sir Edward Coke remarked that:[17]

> … a corporation aggregate of many is invisible, immortal, and rests only in intendment and consideration of the law… They cannot commit treason, nor be outlawed, nor excommunicate, for they have no souls[.]

Issues which would act as a barrier to accessing justice within a single municipal jurisdiction, such as the doctrine of separate legal personality[18] and the inapplicability of many domestic criminal laws to business entities,[19] are magnified a thousand-fold on the international plane, where issues such as want of jurisdiction[20] and *forum non conveniens*[21] act as further barriers to access to justice.

B Corporate Personality

1 Municipal Legal Personality

The first, and most immediately obvious, difficulty facing an applicant for relief for a violation of human rights when attempting to litigate against a corporation is

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16 See Amnesty International, above n 11, at 31–112 for examples, including the Bhopal chemical plant gas leak in India, of December 1984, which resulted in thousands of death, and has since caused hundreds of thousands of non-fatal injuries.

17 *Case of Sutton's Hospital* (1612) 10 Co Rep 23a at 32b, 77 ER 960 (Exch Ch) [*Sutton's Hospital*] at 973 (citations omitted).

18 *Salomon*, above n 9, at 51 per Lord Macnaghten.

19 For example, the non-applicability of homicide law in New Zealand to companies: *The Queen v Murray Wright Ltd* [1970] NZLR 476 (CA) [*Murray Wright* (CA)] at 482 per North P, at 484 per Turner J, at 485 per McCarthy J.

20 For example, the recent decision of *Kiobel v Royal Dutch Petroleum Co* 13 S Ct 1659 (2013) [*Kiobel*].

21 Joseph, above n 7, at 87–92.

that of legal personality. The legal personality barrier operates both municipally and internationally. The company is not a natural person. It is, however, a legal one, which possesses legal rights and obligations.[22] As the company is a legal person, it has separate personality from its employees, directors and shareholders. Except in a very limited number of cases,[23] the acts of a company will not be attributable to any natural person. Although this principle of separate legal personality has ancient roots,[24] the classic statement of it comes from the decision of the House of Lords in *Salomon v Salomon & Co Ltd*, where Lord Macnaghten stated:[25]

> The company is at law a different person altogether from the subscribers to the memorandum; and, though it may be that after incorporation the business is precisely the same as it was before, and the same persons are managers, and the same hands receive the profits, the company is not in law the agent of the subscribers or trustee for them. Nor are the subscribers as members liable, in any shape or form, except to the extent and in the manner provided by the Act.

Although the classic statement of the doctrine comes from the United Kingdom, separate legal personality is a fundamental principle of common law systems around the world.[26] Separate legal personality has also been recognised by the International Court of Justice.[27] As the corporation is a separate legal person, the liability of natural persons involved with it is limited, in that they are not liable for its debts.[28] Whilst the limited liability of natural persons involved with a company is beneficial for the

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22 Julie Cassidy *Corporations Law: Texts and Essential Cases* (2nd ed, The Federation Press, Sydney, 2008) at 41–42; Gordon Walker and others *Commercial Applications of Company Law in New Zealand* (5th ed, CCH New Zealand, Auckland, 2015) at 66–68; Paul L Davies *Gower and Davies' Principles of Modern Company Law* (8th ed, Sweet & Maxwell, London, 2008) at [2-1]–[2-2].

23 See section III(C) and III(D) of this article for examples.

24 *Bligh v Brent* (1837) 2 Y & C Ex 268, 160 ER 397; Lorraine Talbot *Progressive Corporate Governance for the 21st Century* (Routledge, Oxon, 2013) at 41–42.

25 *Salomon*, above n 9, at 51 per Lord Macnaghten.

26 See indicatively *Sons of Gwalia Ltd (subject to a deed of company arrangement) v Margaretic* [2007] HCA 1, (2007) 232 ALR 232 [*Sons of Gwalia*] at [3] per Gleeson CJ; *Old Dominion Copper Mining and Smelting Co v Lewisohn* 210 US 206 (1907) [*Lewisohn*] at 212; *Austin v Michigan Chamber of Commerce* 494 US 652 (1990) [*Austin*] at 658–659; *Brunswick International (Canada) Ltd v Canada* 1999 CITT 95, (1999) 4 TTR (2d) 279 [*Brunswick*] at [35]; *Fyffes plc v DCC plc* [2005] IEHC 477, [2009] 2 IR 417 [*Fyffes*] at [154]; *Re Securitibank Ltd (No 2)* [1978] 2 NZLR 136 (CA) [*Re Securitibank*] at 158–159 per Richmond P; *Munton Brothers Ltd v Secretary of State* [1983] NI 369 (CA) [*Monton*] at 372 per Lord Lowry LCJ; *Woolfson v Strathclyde Regional Council* 1977 SC 84 (Lands Tribunal (2 Div)) [*Woolfson*] at 90.

27 *Barcelona Traction*, above n 1, at [38]-[47]; *Ahmadou Sadio Diallo (Republic of Guinea v Democratic Republic of the Congo) (Preliminary Objections)* [2007] ICJ Rep 582 [*Diallo*] at [61].

28 *Rayner (Mincing Lane) Ltd v Department of Trade* [1989] Ch 72 at 176 per Kerr LJ; Davies, above n 22, at [2-3].

conducting of business,[29] it means that, for a person claiming for violations of their human rights, there is an increased difficulty in seeking liability if the company becomes insolvent, or is a subsidiary of another company.[30] The imposition of a criminal sentence on an individual for a severe violation of human rights is also rendered difficult by this doctrine.[31]

2 International Legal Personality

The standing of corporations as subjects of international law is a further difficulty which acts as a barrier to the imposition of justice. Even in the modern international law era, some authoritative scholars continue to maintain the position that corporations do not have international legal personality.[32]

Historically, States were seen as the only entities which bore international legal personality.[33] The proposition that non-State entities cannot be the holder of rights or obligations under international law, however, is untenable in the modern era.[34] Following World War II, the Nuremberg Tribunal emphasised the importance of holding individuals accountable for internationally wrongful acts. It stated that "[c]rimes against international law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced".[35] In so stating, the Nuremberg Tribunal affirmed that duties under international law can be held by non-State entities, specifically natural persons.

Whilst, then, natural persons are subjects of international law, it is less clear whether corporate entities, being legal persons, are such subjects.[36] As the legal

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29 Davies, above n 22, at [2-14].

30 Joseph, above n 7, at 129–130.

31 The point is illustrated by the Pike River example, discussed in section III(3)(d) of this article

32 See for example James Crawford *Brownlie's Principles of Public International Law* (8th ed, Oxford University Press, Oxford, 2012) at 122.

33 See generally Antonio Cassese "States: Rise and Decline of the Primary Subjects of the International Community" in Bardo Fassbender and Anne Peters (eds) *The Oxford Handbook of the History of International Law* (Oxford University Press, Oxford, 2012) 49.

34 *Reparations for Injuries Suffered in the Service of the United Nations (Advisory Opinion)* [1949] ICJ Rep 174 at 178–179.

35 *International Military Tribunal Judgment and Sentences* (1947) 41 AJIL 172 at 221.

36 Compare Crawford, above n 32, at 122, arguing that corporations do not have international legal personality, and Ralph G Steinhardt "Multinational Corporations and Their Responsibilities under International Law" in Lara Blecher, Nancy Kaymar Stafford and Gretchen C Bellamy (eds) *Corporate Responsibility for Human Rights Impacts: New Expectations and Paradigms* (American Bar Association, Chicago, 2014) 27 at 39–40, arguing that they do.

personality of the corporate entity is uncertain, so too has been the extent of its obligations under human rights law. Whilst it is indisputable that some international human rights obligations, particularly labour rights recognised by the International Labour Organisation,[37] impose obligations on corporate entities, there has been some historic difficulty in listing other international law obligations binding on corporate entities.[38] For present purposes, however, the issue of whether a corporation has international legal personality is rather academic, as where there is an international law rule imposing an obligation on a corporation, they are obviously bound by that rule.[39] Thus, according to the practice of United States courts, which has to date been one of the most significant jurisdictions for the litigation of human rights claims against corporate entities, it is generally accepted that a human rights norm will bind a corporation where it is a rule of customary international law.[40] A similar conclusion was also reached in the *Guiding Principles*.[41]

C Piercing the Corporate Veil

Multinational corporations often operate through subsidiary companies, which hold limited assets.[42] Thus, in numerous cases, pursuing the parent company of a subsidiary is likely to prove more financially lucrative, as a parent company is more likely to have the financial resources to comply with any damages award.[43] Furthermore, if the subsidiary becomes bankrupt or is otherwise wound up, the

37 Examples include Convention (No 29) Concerning Forced of Compulsory Labour 39 UNTS 55 (opened for signature 28 June 1930, entered into force 1 May 1932), art 5(1); Convention (No 87) Concerning Freedom of Association and Protection of the Right to Organise 68 UNTS 17 (opened for signature 9 July 1948, entered into force 4 July 1950), 87, art 2; Convention (No 98) Concerning the Applications of the Principles of the Right to Organise and to Bargain Collectively 96 UNTS 257 (opened for signature 1 July 1949, entered into force 18 July 1951), arts 2-4; Convention (No 100) Concerning Equal Remuneration for Men and Women Workers for Work of Equal Value 165 UNTS 303 (opened for signature 29 June 1951, entered into force 23 May 1953), art 2; Convention (No 105) Concerning the Abolition of Forced Labour 320 UNTS 291 (opened for signature 25 June 1957, entered into force 17 January 1959), 105, arts 1-2; Convention (No 182) Concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour 2133 UNTS 161 (opened for signature 17 June 1999, entered into force 19 November 2000), 182, arts 1 and 5.

38 See generally the discussion in Justine Nolan "All Care, No Responsibility? Why Corporations Have Limited Responsibility and No Direct Accountability for Human Rights Violations under International Law" in Blecher, Stafford and Bellamy (eds), above n 36, at 11–25.

39 Karavias, above n 3, at 16.

40 *Filártiga v Peña-Irala* 630 F 2d 876 (2d Cir 1980) [*Filártiga*] at 882–884; Joseph, above n 7, at 23.

41 *Guiding Principles*, above n 4, at [11]–[12].

42 Joseph, above n 7, at 129.

43 At 129.

parent company may be the only possible defendant.[44] However, as corporations have separate legal personality, they are distinct from their shareholders, including other corporate shareholders.[45] This doctrine is the so-called "corporate veil" which acts to protect shareholders from liability for corporate actions.

In limited circumstances, a court will be willing to "pierce" the corporate veil. Although there is no one unifying principle of when common law courts will pierce the corporate veil,[46] they have traditionally been reluctant to do so unless the company is an agent of its shareholders,[47] acting fraudulently,[48] or security considerations in an armed conflict so dictate.[49] Common law courts, therefore, are generally reluctant to pierce the corporate veil in the case of human rights litigation, meaning that the prospects of successfully suing a parent corporation for a subsidiary's conduct are slim.[50] Furthermore, the doctrine is often applied in civil law systems. In most jurisdictions, whether common or civil, it acts as an almost impassable barrier when attempting to litigate against shareholders or parent companies.[51]

However, there have been some changes to this position in the common law of England, in relation to health and safety obligations.[52] In *Chandler v Cape*, the Court of Appeal held that a parent company may owe health and safety obligations to employees of a subsidiary. Those obligations arise where:[53]

> (1) the businesses of the parent and subsidiary are in a relevant respect the same; (2) the parent has, or ought to have, superior knowledge on some relevant aspect of health and safety in the particular industry; (3) the subsidiary's system of work is unsafe as

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44 Shubhaa Srinivasan "Current Trends and Future Effects in Transnational Litigation against Corporations in the United Kingdom" in Blecher, Stafford and Bellamy (eds), above n 36, at 340.

45 Davies, above n 22, at [8-8].

46 *Attorney General v Equiticorp Industries Group Ltd* [1996] 1 NZLR 528 (CA) at 541.

47 See for example *Smith, Stone and Knight Ltd v Birmingham Corporation* [1939] 4 All ER 116 (KB).

48 See for example *Gilford Motor Co Ltd v Horne* [1933] Ch 935 (CA).

49 See for example *Daimler Company v Continental Tyre and Rubber Company* [1916] 2 AC 307 (HL).

50 Joseph, above n 7, at 131.

51 See generally Hisaei Ito and Hiroyuki Watanabe "Piercing the Corporate Veil" in Mathias Siems and David Cabrelli (eds) *Comparative Company Law: A Case-Based Approach* (Hart Publishing, Oxford, 2013) 165.

52 Srinivasan, above n 44, at 339–342.

53 *Chandler v Cape plc* [2012] EWCA Civ 525, [2012] 1 WLR 3111 [*Chandler*] at [80] per Arden LJ.

> the parent company knew, or ought to have known; and (4) the parent knew or ought to have foreseen that the subsidiary or its employees would rely on its using that superior knowledge for the employees' protection. For the purposes of (4) it is not necessary to show that the parent is in the practice of intervening in the health and safety policies of the subsidiary.

While the exact position of this precedent in relation to human rights is uncertain, it indicates a move towards a willingness to pierce the corporate veil where persons suffer from poor business practice. Although there is a general reluctance to pierce the corporate veil at common law, it is important to allow litigants to pursue a cause of action against parent organisations in their home States. The parent organisation is generally more able to meet the financial penalties imposed by any court order, and barriers such as ineffective judicial systems in the host State are eliminated by home State litigation against a parent organisation.[54]

D Jurisdiction over Corporations

1 Criminal Jurisdiction

There are two undisputed grounds upon which it is accepted that a State may lawfully exercise criminal jurisdiction in public international law. First, States may exercise jurisdiction over any conduct occurring on its territory, whether in whole or in part (territorial jurisdiction);[55] and second, a State may exercise jurisdiction over its own nationals for conduct committed extraterritorially (nationality jurisdiction).[56]

Territorial jurisdiction is often considered the favoured means by which jurisdiction should be exercised,[57] such that it has been suggested that a State

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54 Srinivasan, above n 44, at 340.

55 See indicatively *R v Keyn* (1876) 2 Ex D 63 (Crim App) [*Keyn*]; *The Schooner Exchange v McFaddon* 11 US (7 Cranch) 116 (1813) [*The Schooner Exchange*] at 136 per Marshall CJ; *Compania Naviera Vascongado v SS Cristina* [1938] AC 485 (HL) [*SS Cristina*] at 496–497 per Lord Macmillan; *Amsterdam v Minister of Finance* (1952) 19 ILR 229 (Israel SC) [*Amsterdam*] at 231; *County Council of Fermanagh v Farrendon* [1923] 2 IR 180 (NI CA) [*Farrendon*] at 182–183; Crawford, above n 32, at 458; *SS Lotus (France v Turkey) (Judgment)* (1927) PCIJ (series A) No 10 [*SS Lotus*] at 23; *Liangsiriprasert v Government of the United States of America* [1991] 1 AC 225 (HK PC) [*Liangsiriprasert*] at 246–247 per Lord Wilberforce.

56 See indicatively *Public Prosecutor v Günther B and Manfred E* (1970) 71 ILR 247 (Austria SC) [*Günther B*] at 250–251; *Passport Seizure Case* (1972) 73 ILR 372 (Germany Sup Admin Ct) [*Passport Seizure Case*] at 373; *Weiss v Inspector General of the Police* (1958) 26 ILR 210 (Israel SC) [*Weiss*]; *Ekanayake v Attorney-General* (1986) 87 ILR 296 (Sri Lanka CA) [*Ekanayake*] at 300–301; *Re Gutierrez* (1957) 24 ILR 265 (Mexico SC) [*Re Gutierrez*] at 266; *R (Smith) v Oxfordshire Assistant Deputy Coroner* [2010] UKSC 29, [2011] 1 AC 65 [*Smith*] at [238] per Lord Collins.

57 *The Schooner Exchange*, above n 55, at 136 per Marshall CJ; *Issa v Turkey* (2004) 156 ILR 1 (Section II, ECHR) [*Issa*] at [67]; *Bankovic v Belgium* (2001) 11 BHRC 435 (Grand Chamber, ECHR) [*Bankovic*] at [59]; *Smith*, above n 56, at [91]-[92] per Lord Hope; *Kiobel*, above n 20; Case

asserting nationality jurisdiction must seek the permission of the territorial State before so doing.[58] Despite the fact that this notion has been subject to criticism,[59] the fact of its existence imposes difficulty for finding multinational corporations criminally liable for several reasons. First, if the host State is a developing nation, as is often the case, factors such as corruption and ineffective justice systems may impinge on the prospects of a criminal prosecution in that State.[60] Second, regardless of whether it is a principle of international law that territorial prosecutions are to be favoured or not, the fact that many national courts appear to follow this practice indicates that the prospects of any prosecutions in a home State on the basis of nationality are slim. Writing in 2004, Sarah Joseph noted that no multinational corporation had recently been prosecuted for transnational human rights abuses.[61] Indeed, some 12 years later, the criminal law still does not appear to be an effective tool for the prevention of corporate human rights violations.

Even where criminal jurisdiction is established, it is often difficult for criminal law obligations to be enforceable against corporate entities. The point is clearly illustrated by the example of "corporate manslaughter" in New Zealand. In *The Queen v Murray Wright Ltd*, the defendant company was charged with manslaughter,[62] a form of culpable homicide under the Crimes Act 1961.[63] Section 158 of the Crimes Act states that "[h]omicide is the killing of a human being *by another*, directly or indirectly, by any means whatsoever".[64] The defendant company challenged the charge, on the basis that this provision applied only to natural persons. Although the challenge was dismissed at first instance,[65] Murray Wright Ltd successfully appealed the first instance decision. The Court of Appeal held that, as a matter of law, a company could not commit homicide as defined in s 158. Section 158 states that homicide is "the killing of a human being by another",[66] which the

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C-366/10 *Air Transport Association of America v Secretary of State for Energy and Climate Change* [2012] 2 CMLR 4 (CJEU) [*Air Transport Association of America*] at [107].

58 *Bankovic*, above n 57, at [60].

59 Campbell McLachlan *Foreign Relations Law* (Cambridge University Press, Cambridge, 2014) at [8.71].

60 Joseph, above n 7, at 3.

61 At 14.

62 *The Queen v Murray Wright Ltd* [1969] NZLR 1069 (SC) [*Murray Wright Ltd* (SC)] at 1069–1070.

63 Crimes Act 1961, s 160(3).

64 Section 158 (emphasis added).

65 *Murray Wright Ltd* (SC), above n 62, at 1072.

66 Crimes Act 1961, s 158.

Court unanimously held excludes the possibility of a company being liable, as a company cannot be considered a "human being".[67] No amendments have been made to the homicide laws to provide for company liability for manslaughter, despite calls for reform.[68]

Furthermore, even where companies are held to account for harmful conduct, the doctrine of separate legal accountability often makes it difficult to hold individuals responsible for that conduct, no matter how accountable they may seem. Again, a New Zealand example perfectly illustrates the point. On 19 November 2010, the Pike River Coal Mine, located on the West Coast of the South Island, exploded. Twenty-nine miners were killed.[69] The Pike River tragedy sparked a Royal Commission, which highlighted New Zealand's "poor health and safety performance",[70] and was one of a number of catalysts which resulted in strengthening of health and safety law.[71] Unsurprisingly, the Department of Labour (now WorkSafe) initiated criminal proceedings against Pike River Coal Ltd for violations of the Health and Safety in Employment Act 1992. The defendant company was found guilty,[72] and ordered to pay $3,410,000 in reparations, together with a fine of $760,000.[73] Charges were also laid against Peter Whittall, the CEO of Pike River Coal Ltd.[74] However, these charges were later dropped on the basis that the prospects of a successful conviction were slim.[75] A judicial review of the decision to drop charges by the families of the deceased miners was unsuccessful.[76]

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67 *Murray Wright* (CA), above n 19, at 482 per North P, at 484 per Turner J, at 485 per McCarthy J.

68 See generally Mitchell Spence "No Soul to Damn? Revisiting the Case for Corporate Manslaughter in New Zealand" [2014] PILJNZ 91.

69 Graham Panckhurst, Stewart Bell and David Henry *Royal Commission on the Pike River Coal Mine Tragedy* (2012) vol 1 at 12.

70 Graham Panckhurst, Stewart Bell and David Henry *Royal Commission on the Pike River Coal Mine Tragedy* (2012) vol 2 at 248.

71 The final result of these changes being the Health and Safety at Work Act 2015.

72 *Department of Labour v Pike River Coal Ltd* [2013] DCR 523.

73 *Department of Labour v Pike River Coal Ltd* [2014] DCR 32 at [41].

74 See *Department of Labour v Whittall* [2013] DCR 430.

75 WorkSafe New Zealand "Charges against former Pike River CEO Peter Whittall not proceeding" (12 December 2013) WorkSafe New Zealand <www.business.govt.nz>.

76 See *Osborne v Worksafe New Zealand* [2015] NZHC 2991, [2016] 2 NZLR 485. Note: this decision was appealed to the Court of Appeal, the judgment is pending.

2 *Civil Jurisdiction*

The civil (as opposed to criminal) jurisdiction of States in relation to multinational corporations is determined largely by private, as opposed to public, international law. At common law, a court will have jurisdiction over a claim where the defendant has been served with the document which instigates proceedings against them.[77] The defendant must be within the territorial jurisdiction of the common law court.[78]

In principle, then, there is nothing preventing a claimant bringing a case against a defendant corporation in either the host State or the home State by the rules of private international law. However, those defendants who do try to bring such claims in the home State must face the significant procedural barrier of proving that the home State is the most convenient forum.[79] In the common law, where the court is satisfied that there is a more appropriate forum with jurisdictional competence, it is appropriate to stay the proceedings for determination in that jurisdiction.[80] This doctrine of *forum non conveniens* has seen almost all causes of action brought in the home States of multinational corporations stayed for hearing in the host State.[81]

A significant mechanism to avoid the rule of *forum non conveniens* existed in the United States. Under the so-called "Alien Tort Statute", the District Courts of the United States:[82]

> … 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.

For a period of time, this proved to be a more successful avenue for bringing claims, rather than under United States common law. It made the United States seemingly one of the most significant jurisdictions in which litigants could bring a

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77 *Spiliada Maritime Corp v Cansulex Ltd* [1987] AC 460 (HL) [*Spiliada*] at 474 per Lord Goff of Chieveley; Michael Tilbury, Gary Davis and Brian Opeskin *Conflict of Laws in Australia* (Oxford University Press, Melbourne, 2002) at 41–42; Adrian Briggs *Private International Law in English Courts* (Oxford University Press, Oxford, 2014) at [4.385].

78 Tilbury, Davis and Opeskin, above n 77, at 41–42; Briggs, above n 77 at [4.390].

79 Rachel Chambers and Katherine Tyler "The UK Context for Business and Human Rights" in Blecher, Stafford and Bellamy (eds), above n 36, at 320; *Spiliada*, above n 77, at 464–465 per Lord Templeman.

80 *Spiliada*, above n 77, at 476 per Lord Goff of Chieveley; *Gulf Oil v Gilbert* 330 US 501 (1947) [*Gulf Oil*] at 508–509.

81 Joseph, above n 7, at 88.

82 28 USC § 1350 [Alien Tort Statute].

suit of action against multinational corporations.[83] In a sense, it provided quasi-universal tort jurisdiction for violations of human rights, as the subject-matter of the dispute needed not to have occurred in United States territory.[84] However, this position was significantly altered by the 2013 *Kiobel* decision of the United States Supreme Court, which held that the Alien Tort Statute does not apply extraterritorially. In other words, although an alien may bring a tort for a violation of the laws of nations, that violation must occur within the United States.[85]

Although the *Kiobel* decision limited the prospects for litigation for human rights violations, it is difficult to argue that it was incorrectly decided. The Alien Tort Statute is exactly that: a statute. By the laws of the United States, and indeed most other common law jurisdictions, statutes are presumed not to have extraterritorial effect without explicit indication of legislative intent to the contrary.[86] This presumption is based on principles of international comity, as a legislature will generally not intend to legislate for another State's jurisdiction.[87]

Whilst the *Kiobel* decision has limited the prospect of successful litigation in the United States, other jurisdictions also offer potential litigation fora. Despite common belief, the most successful jurisdiction in which claims have been pursued against multinational corporations has been the United Kingdom,[88] and there are moves within Canadian common law to permit litigants to bring a claim against multinational corporations domiciled in Canada for extraterritorial conduct.[89] Similarly, the laws of the European Union state that where a person is domiciled in a Member State of the Union, they may be sued there.[90] This means that, where a corporation is domiciled in a European Union Member State, the proceedings cannot be stayed on the basis of the *forum non conveniens* doctrine.[91]

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83 For a historical account of litigation under the Alien Tort Statute see Joseph, above n 7, at 21–63.

84 *Filártiga*, above n 40, at 887–888.

85 *Kiobel*, above n 20, at 1666.

86 *Morrison v National Bank of Australia Ltd* 561 US 247 (2010) at 255; FAR Bennion *Bennion on Statutory Interpretation: A Code* (LexisNexis, London, 2008) at 328.

87 Bennion, above n 86, at 328.

88 Kamminga, above n 15, at 160.

89 See *Choc v Hudbay Minerals Inc* 2013 ONSC 1414, (2013) 116 OR (3d) 674 [*Choc*].

90 Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters [2012] OJ L 351/1, art 4(1).

91 Case C-281/2002 *Owusu v Jackson* [2005] ECR I-1383 [*Owusa*] at [46].

Thus, there is some support for the proposition that a corporation may be sued for extraterritorial human rights violations outside the host State. However, outside of the European Union, the *forum non conveniens* doctrine still acts as a significant barrier to potential claimants attempting to litigate in the home State. This is particularly heightened if the host State is a developing nation, or is prone to judicial corruption, as is too often the case.[92] Furthermore, if the multinational corporation has few assets in the host State, this may mean that the enforcement of any judgments issued there is impractical.

3 International Jurisdiction

Finally, there is no international forum in which an individual may sue a multinational corporation for human rights violations. International human rights jurisdictions are limited to claims against States.[93] While there have been proposals made to create an international arbitral tribunal with jurisdiction over corporate human rights abuses,[94] it is likely that such an approach would be unworkable. Arbitration fundamentally relies on the consent of parties,[95] and there is not sufficient motivation for a corporate entity to agree to be subjected to an international arbitral process in the field of human rights violations.[96] As has been noted, the manner in which domestic law is structured means that there are great difficulties in litigating against multinational corporations in municipal fora. To suggest that a defendant corporation would submit itself voluntarily to another jurisdiction where the processes would provide a more balanced method of dispute resolution[97] is tenuous. Furthermore, if States (in this context, the home and host States) are removed from the process, issues of enforcement of decision become increasingly difficult.[98] The

92 Joseph, above n 7, at 3.

93 See indicatively Convention for the Protection of Human Rights and Fundamental Freedoms 213 UNTS 221 (opened for signature 4 November 1950, entered into force 3 September 1953) [European Convention on Human Rights], arts 33-34; Optional Protocol to the International Covenant on Civil and Political Rights 999 UNTS 302 (opened for signature 16 December 1966, entered into force 23 March 1976), art 1; Optional Protocol to the International Covenant on Economic, Social and Cultural Rights 48 ILM 262 (opened for signature 10 December 2008, entered into force 5 May 2013), art 1.

94 Claes Cronstedt and others *An International Arbitration Tribunal on Business and Human Rights* (5th ed, 13 April 2015).

95 Donald Earl Childress III "Is an International Arbitral Tribunal the Answer to the Challenges of Litigating Transnational Human Rights Cases in a Post-*Kiobel* World?" (2015) 19 UCLA J Int'l L & Foreign Aff 31 at 43.

96 At 45.

97 As proposed by Cronstedt and others, above n 94.

98 Childress III, above n 95, at 45.

multinational corporation presumably has assets and/or capital in both the home and host States. If neither of these States is party to the arbitral proceedings, or the arbitral award is not recognised by their municipal legal systems, a successful claimant is in no better position than they would have been had no award been made if the defendant corporation decides not to comply with the terms of the award. Such an international body, therefore, would depend too much on the corporate will to comply with its orders to be a viable option for the resolution of the majority of disputes.

Furthermore, there is no international criminal jurisdiction wherein corporate entities may be tried. Existing international criminal fora do not have jurisdiction over human rights violations per se. Rather, international criminal fora generally have jurisdiction over crimes such as genocide, crimes against humanity, war crimes, and the crime of aggression.[99] Despite the fact that the corporation is a legal person municipally,[100] international criminal fora generally have jurisdiction over natural persons only.[101] In the very rare cases where a corporate entity is tried in an international criminal forum, this is generally for a secondary crime, such as contempt of court, rather than for a core international crime.[102] The inability of corporate entities to be tried for core international crimes in international fora is best indicated by the *IG Farben Trial*. Following World War II, 23 officials of IG Farben, a German company, were convicted of numerous crimes against international law, including the use of forced labour.[103] The Military Tribunal stated:[104]

> It can no longer be questioned that the criminal sanctions of international law are applicable to private individuals… It is appropriate here to mention that the corporate defendant, Farben, is not before the bar of this Tribunal and cannot be subjected to criminal penalties in these proceedings. We have used the term Farben as descriptive of the instrumentality of cohesion in the name of which the enumerated acts of spoliation were committed. But corporations act through individuals... one cannot

99 See indicatively Rome Statute of the International Criminal Court 2187 UNTS 90 (opened for signature 17 July 1998, entered into force 1 July 2002), art 5.

100 *Salomon*, above n 9, at 51 per Lord Macnaghten; *Sons of Gwalia*, above n 26, at [3] per Gleeson GJ; *Lewisohn*, above n 26, at 212; *Austin*, above n 26, at 658–659; *Brunswick*, above n 26, at [35]; *Fyffes*, above n 26, at [154]; *Re Securitibank*, above n 26, at 158–159 per Richmond P; *Munton*, above n 26, at 372 per Lord Lowry LCJ; *Woolfson*, above n 26, at 90.

101 See indicatively Rome Statute of the International Criminal Court, above n 99 art 25(1).

102 See *Prosecutor v Al Hadeed [Co] SAL/New TV SAL (NTV) (Judgment)* STL Contempt Judge STL-14-05/T/CJ/F0176/PRV/20150918/R005223-R005280/EN/dm, 18 September 2015, where a defendant company was found not guilty of contempt.

103 *In re Krauch* 15 Ann Dig 668 (US Military Tribunal 1948) [*IG Farben Trial*] at 679.

104 At 678.

> utili[s]e the corporate structure to achieve an immunity from criminal responsibility for illegal acts which he directs, counsels, aids, orders, or abets.

E Conclusion

As can be seen, the victim of a human rights violation seeking a remedy against a multinational corporation faces countless obstacles. The establishment of jurisdiction over conduct, whether criminal or civil, is often impossible. Furthermore, the legal personality of corporations, whilst a useful mechanism for the promotion of business, imposes increased difficulties on a person seeking to gain a remedy. Simply put, the law as it stands is inadequate to provide victims with proper redress for violations committed outside a State with an established, unbiased, legal system.

IV THE GUIDING PRINCIPLES

A Introduction

The difficulties of enforcing human rights obligations against corporate entities fell for international consideration by the Special Rapporteur John Ruggie, who issued the *Guiding Principles* in 2011. Ruggie's report was based on three key concepts:[105]

(a) State's existing obligations to respect, protect and fulfil human rights and fundamental freedoms;

(b) The role of business enterprises as specialized organs of society performing specialized functions, required to comply with all applicable laws and to respect human rights;

(c) The need for rights and obligations to be matched to appropriate and effective remedies when breached.

It is important to note that the purpose of the *Guiding Principles* was not to create new law.[106] In that respect, it sought only to clarify what the obligations of States and businesses in relation to human rights are. As such, although the *Guiding Principles* are a significant and positive step towards corporate human rights accountability, there are crucial shortcomings in the law as identified in them. In identifying what those shortcomings are, a better understanding of what a new international treaty needs to address can be established.

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105 *Guiding Principles*, above n 4, at 6.

106 At 6.

B State Obligations to Protect Human Rights

The *Guiding Principles* note that States must protect against human rights abuses by third parties, such as business enterprises, within their territory,[107] that being a basic rule of international human rights law.[108] The *Guiding Principles* stated that States should set out the expectation that all business enterprises domiciled in their jurisdiction should respect human rights in all operations,[109] with Ruggie finding no basis to say that States are generally required to regulate the extraterritorial conduct of businesses domiciled in their jurisdiction.[110] Interestingly, a similar argument was adopted by Canada, in relation to its responsibility to regulate harmful extraterritorial conduct of its mining companies, when this issue was called into question at a recent Universal Periodic Review. The Canadian delegation emphasised "the clear territorial and jurisdictional limits" to its human rights obligations, and stated that those affected by businesses operating abroad were not within these limits.[111] This argument was impliedly rejected by the Human Rights Council, which stated that Canada should "enhance the effectiveness of existing mechanisms to ensure that all Canadian corporations under its jurisdiction… respect human rights standards when operating abroad".[112]

In terms of the obligations on the State in respect of corporate human rights violations, the *Guiding Principles* identify a relatively weak obligation on home States. They should set out expectations of businesses acting extraterritorially,[113] but there is no requirement that they must set out obligations of such extraterritorial business conduct.[114] Whilst this is arguably a reflection of customary international law,[115] the extent of home State obligations is a matter which is worthy of significant consideration in any binding international treaty on business and human rights. However, as is argued in section 0, home State accountability is desirable, as it

107 At [1].

108 See for example International Covenant on Civil and Political Rights 999 UNTS 171 (opened for signature 16 December 1966, entered into force 23 March 1976), art 2(1); International Covenant on Economic, Social and Cultural Rights 993 UNTS 3 (opened for signature 16 December 1966, entered into force 3 January 1976), art 2(1).

109 *Guiding Principles*, above n 4, at [2].

110 At 7.

111 *List of issues in relation to the sixth periodic report of Canada: Replies of Canada to the list of issues* CCPR/C/CAN/Q/Add1 (2015) at [14].

112 *Concluding observations on the sixth periodic report of Canada* CCPR/C/CAN/CO/6 (2015) at [6].

113 *Guiding Principles*, above n 4, at [2].

114 At 7.

115 At 6.

enables the lowering of several of the barriers to accessing justice. Furthermore, such an approach is not inconsistent with existing international law.

C Corporate Responsibility to Respect Human Rights

According to the *Guiding Principles*, businesses should respect human rights, and address any adverse human rights impacts which they cause.[116] Those human rights refer to internationally recognised human rights, at a minimum those in the International Bill of Rights and the International Labour Organisation's *Declaration on Fundamental Principles and Rights at Work*.[117] The significance of these principles is the recognition that the obligations of businesses extend not only to respecting labour rights,[118] but also to the more conventional categories of rights contained in the International Bill of Rights.[119] Thus, as the law currently stands, irrespective of issues as to the international legal personality of corporations,[120] they have human rights obligations under international law. Those obligations require businesses to avoid adversely affecting human rights, and to address any adverse effects that they do cause.[121]

D Access to Remedy

In order to ensure that victims of human rights abuses have a remedy, States must take appropriate steps to ensure that where business-related abuses of human rights occur in their territory, those affected have access to "effective remedy".[122] Remedy is defined widely. It includes:[123]

> … apologies, restitution, rehabilitation, financial or non-financial compensation and punitive sanctions (whether criminal or administrative, such as fines), as well as the prevention of harm through, for example, injunctions or guarantees of non-repetition.

Although these remedies are indeed important, it must be noted that there will be practical difficulties with their implementation, given the present state of the law. As

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116 At [11].

117 At [12].

118 *Declaration on Fundamental Principles and Rights at Work* ILO 86th Session, 18 June 1998.

119 Consisting of *Universal Declaration of Human Rights* GA Res 217A, III (1948); International Covenant on Civil and Political Rights, above n 108; International Covenant on Economic, Social and Cultural Rights, above n 108.

120 See section III(B)(2) of this article.

121 *Guiding Principles*, above n 4, at [13].

122 At [25].

123 At 22.

has been noted, criminal proceedings against companies for violations of international human rights law are rare,[124] and civil proceeding are also subject to a range of barriers. Significantly, the *Guiding Principles* note that many barriers exist in relation to victims accessing remedies through judicial mechanisms, and that attention should be given to this by States.[125]

E Conclusion

The *Guiding Principles* act as an affirmation of several key principles. Most significantly, they affirm that business enterprises have human rights obligations under international law which extend beyond labour rights across the entire human rights spectrum.[126] That said, the *Guiding Principles* identity significant weaknesses, which make the granting of a remedy difficult as the law currently stands. First, the obligations of a State to regulate the extraterritorial conduct of corporations domiciled in their territory are limited. Whilst they should set out expectations, they are not required to exercise jurisdiction.[127] Second, the *Guiding Principles* affirm that, although victims of human rights abuses are entitled to a remedy,[128] there are significant barriers which make the imposition of this difficult.[129] As such, the *Guiding Principles*, whilst an important development in the field of corporate human rights obligations, indicate that reform is needed so that an effective regime for the protection of human rights from corporate abuse can exist.

V RESOLVING LITIGATION DIFFICULTIES BY THE PROPOSED INTERNATIONAL TREATY

A Introduction

Having considered the difficulties which arise in relation to corporate obligations for human rights violations, it falls to be determined how the working group may address these issues in the proposed international treaty. In order to implement an effective regime, any treaty must satisfy several key criteria.

First, it must take into consideration the three key concepts identified in the *Guiding Principles*, those being the obligations of the State to protect human rights,

124 Joseph, above n 7, at 14.

125 *Guiding Principles*, above n 4, at 23–24.

126 At [12].

127 At 7.

128 At [25].

129 At 23–24.

the obligation of business enterprises to respect human rights, and the right of victims to an appropriate remedy.[130]

Second, it must address, insofar as possible, the major barriers facing victims of human rights abuses. In so doing, any proposed treaty will have to go further than the *Guiding Principles* – it must be a treaty which reforms the law as stated in the *Guiding Principles*, rather than just affirming it.

Third, it must be a realistic and practical proposal. Unlike most municipal legal systems, international law has no central legislature that can enact changes to the law. As the barriers facing victims in the current legal regime largely stem from domestic laws, any solution must, so far as is practicable, permit discretion as to how States will address those barriers within their own legal systems. Furthermore, international law is inherently political. Although a proposed treaty must be one which seeks to reform the law, it should look to existing "precedents" and concessions made in other areas of the law, such that any proposals will likely be acceptable to States.

With that in mind, this section shall address the matters which must be included in an international treaty. It shall follow the three key concepts identified in the *Guiding Principles*.[131] It will start, with the right of victims to a remedy, then it will consider the obligations of corporations to respect human rights, and finally it will examine responsibility of States to protect human rights.

B The Right to a Remedy for Human Rights Abuses

1 Introduction

The *Guiding Principles* offer significant guidance in the range of remedies which may be available to victims. Significantly, the *Guiding Principles* confirm that the right to a remedy includes the right to civil and criminal remedies where these are appropriate.[132] As the *Guiding Principles* were intended to act as a statement of existing law,[133] this indicates that, as a matter of existing customary international law, these two categories of remedies are available as a matter of legal right to victims. Any future treaty, therefore, should codify this.

130 At 6.

131 At 6.

132 At 22.

133 At 6.

2 *The Appropriate Fora*

If it is accepted that a victim is entitled to civil and criminal remedies, those being remedies which can only result from judicial proceedings, the crucial issue becomes which fora are the most appropriate for the granting of these remedies.

Although there have been proposals for the implementation of an international tribunal to compensate victims of human rights abuses,[134] such a mechanism should not be included in any final treaty. It may appear desirable to have a standing body which can determine human rights disputes between individuals and corporate entities. However, there is little motivation for corporations to cooperate with an international mechanism.[135] Furthermore, it is unlikely to be politically palatable. The establishing of standing international bodies is always controversial, and can result in some States refusing to sign or ratify the constitutive instrument, as occurred with the United States following the establishment of the International Criminal Court.[136] Given that there is still uncertainty as to the international personality of corporations,[137] to attempt to create a standing tribunal before this is resolved will likely be politically unworkable.

This leaves the possibility of domestic fora. First, and most obviously, jurisdiction should be vested in the host State. Such a proposition is uncontroversial. Existing international law already vests territorial criminal jurisdiction in the host State, [138] and, civil law claims may be exercised over wrongs committed in the adjudicating State's territory.

Second, the home State must also be able to exercise jurisdiction. The exercise of criminal jurisdiction over a multinational corporation for extraterritorial conduct is consistent with public international law, which permits a State to assert criminal jurisdiction over its nationals.[139] Whilst territorial criminal jurisdiction is often the

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134 Cronstedt and others, above n 94.

135 Childress III, above n 95, at 43–45.

136 See generally Megan A Fairlie "The United States and the International Criminal Court Post-Bush: A Beautiful Courtship but an Unlikely Marriage" (2011) 29 Berkeley J Int'l L 528.

137 Crawford, above n 32, at 122; Steinhardt, above n 36, at 39–40.

138 *Keyn*, above n 55; *The Schooner Exchange*, above n 55, at 136 per Marshall CJ; *SS Cristina*, above n 55, at 496–497 per Lord Macmillan; *Amsterdam*, above n 55, at 231; *Farrendon*, above n 55, at 182–183; Crawford, above n 32, at 458; *SS Lotus*, above n 55, at 23; *Liangsiriprasert*, above n 55, at 246–247 per Lord Wilberforce.

139 *Günther B*, above n 56, at 250–251; *Passport Seizure Case*, above n 56, at 373; *Weiss*, above n 56; *Ekanayake*, above n 56, at 300–301; *Re Gutierrez*, above n 56, at 266; *Smith*, above n 56, at [238] per Lord Collins.

favoured jurisdictional basis,[140] it would be appropriate for the home State to assert criminal jurisdiction where the host State appears "unwilling or unable" to do so. Such an approach borrows from another field of international law, international criminal law. The International Criminal Court may investigate cases where an investigating State is "unwilling or unable" to carry out a prosecution.[141] The adoption of such an approach in relation to corporate human rights abuses would ensure that corporations acting in developing States with ineffective judicial systems cannot use this judicial ineffectiveness as a shield against prosecution.

The home State, too, should be a forum in which a civil claim may be pursued. As private international law generally recognises civil competence where a defendant is domiciled within the jurisdiction,[142] this proposition is not substantially controversial.[143] However, the *forum non conveniens* rule[144] would continue to act as a barrier. In this regard, a treaty rule in line with the private international law of the European Union, where the *forum non conveniens* rule is inapplicable where litigation is commenced against a corporation domiciled in the forum State,[145] is crucial. Again, this will help to ensure that a remedy is available if the host State's judicial system is unable to offer one. At the same time, it does not create quasi-universal tort law jurisdiction, which the United States Supreme Court impliedly wished to avoid in the *Kiobel* decision.[146] Thus, where a corporation domiciled in State A commits a violation in State B, State A's courts could not stay proceedings brought by a litigant based on the *forum non conveniens* doctrine. However, if the litigant sought to bring an action in State C, the courts of that State could still apply the *forum non conveniens* doctrine if States A or B were more appropriate jurisdictions for the hearing of the dispute.

3 Conclusion

In relation to the right of any victims to a remedy, the following principles should be incorporated into any international treaty on corporate human rights obligations:

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140 *The Schooner Exchange*, above n 55, at 136 per Marshall CJ; *Issa*, above n 57, at [67]; *Bankovic*, above n 57, at [59]; *Smith*, above n 56, at [91]–[92] per Lord Hope; *Kiobel*, above n 20; *Air Transport Association of America*, above n 57, at [107].

141 Rome Statute of the International Criminal Court, above n 99, art 17(1)(a).

142 Tilbury, Davis and Opeskin, above n 77, at 41–41; Briggs, above n 77, at [4.390].

143 See Kamminga, above n 15, at 160; *Choc*, above n 89.

144 *Spiliada*, above n 77, at 476 per Lord Goff of Chieveley; *Gulf Oil*, above n 80, at 508–509.

145 *Owusu*, above n 91, at [46].

146 *Kiobel*, above n 20, at 1666.

(1) Victims of corporate human rights abuses have a right to both civil and criminal remedies.

(2) Criminal and civil law remedies may both be pursued in the host State.

(3) If the host State is unwilling or unable to pursue a criminal prosecution, the home State shall be entitled to exercise criminal jurisdiction.

(4) If the victim of a human rights violation by a corporation brings a claim in the home State, it shall not be dismissed on the basis on *forum non conveniens*.

C The Obligations of Corporations to Respect Human Rights

1 The Rights Which Corporations Must Respect

Despite the controversy as to the international legal personality of corporations,[147] it is uncontroversial that they possess human rights obligations.[148] The issue which needs to be determined, therefore, is how an international treaty should list rights binding upon a corporate entity. Although those obligations include the obligation to respect work-related rights,[149] it also extends to those which are in the core international human rights documents,[150] including the Universal Declaration of Human Rights[151] and the International Covenants.[152] Thus, it could be argued that an international treaty need only state that corporate entities must respect the rights contained in these documents.

This approach, however, could give rise to difficulties. Where, for example, would that leave a potential litigant seeking to enforce the right to an adequate standard of living[153] against a corporation, in a State which is not party to the International Covenant on Economic, Social and Cultural Rights? Furthermore, the conception of human rights changes with time – a contemporary example being the increasing view that there are human rights in the environment.[154] A treaty, therefore,

147 Crawford, above n 32, at 122; Steinhardt, above n 36, at 39–40.

148 *Filártiga*, above n 40, at 882–884; *Guiding Principles*, above n 4, at [11]–[12].

149 Such as those contained in *Declaration on Fundamental Principles and Rights at Work*, above n 118.

150 *Guiding Principles*, above n 4, at [12].

151 *Universal Declaration of Human Rights*, above n 119.

152 International Covenant on Civil and Political Rights, above n 108; International Covenant on Economic, Social and Cultural Rights, above n 108.

153 International Covenant on Economic, Social and Cultural Rights, above n 108, art 11(1).

154 See for example Susan Glazebrook "Human Rights and the Environment" (2009) 40 VUWLR 293; Alan Boyle "Human Rights and the Environment: Where Next?" (2012) 23 EJIL 613; *Guerra v*

which explicitly states the rights by which a multinational corporation must abide is not the most apt solution. Rather, the better approach is for the international agreement to simply state that corporations are bound by those human rights which exist in customary international law.

There are, of course, difficulties with this approach, the key one being that there will initially be less certainty about what rights bind corporate entities. However, this approach is consistent with early jurisprudence under the Alien Tort Statute, where United States Courts looked to customary international law to see what rights would give rise to a cause of action.[155] Furthermore, the courts of other jurisdictions, both national and international, have given ample consideration to the nature of various human rights norms in the modern international law era. There is, therefore, a significant body of State practice which will be able to inform an understanding of which norms of human rights are customary. Any uncertainty which is the result of a lack of codification of human rights in the proposed treaty would be severely mitigated by existing practice, and does not outweigh the merits that an uncodified position would have in ensuring that emerging human rights become opposable to corporate entities without the need for treaty amendments or additional protocols.

2 The Obligation to Respect Rights and the Corporate Veil

If, then, the proposed treaty is to state that corporations must honour those laws recognised in customary international law, a key issue becomes who this obligation attaches to. As has been noted, the corporation is a legal person, which is separate and distinct from its shareholders, employees and any parent companies.[156] In municipal law, the corporate veil acts to protect these entities in the event that a corporation is sued. However, there are strong policy reasons for imposing liability on employees and parent companies for corporate wrongdoing.

If it is accepted that part of a victim's right to a remedy includes criminal sanctions against a corporation where appropriate, the removal of the corporate veil for cases involving human rights offences, such that individual employees are held liable, is

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Italy (1998) 26 EHRR 357 (ECHR); *Fadeyeva v Russia* (2007) 45 EHRR 10 (ECHR); *Taşkin v Turkey* (2006) 42 EHRR 50 (ECHR); *Budayeva v Russia* (15339/02) Section I, ECHR 29 September 2008.

155 *Filártiga*, above n 40, at 882–884; Joseph, above n 7, at 23.

156 *Salomon*, above n 9, at 51 per Lord Macnaghten; *Sons of Gwalia*, above n 26, at [3] per Gleeson CJ; *Lewisohn*, above n 26, at 212; *Austin*, above n 26, at 658–659; *Brunswick*, above n 26, at [35]; *Fyffes*, above n 26, at [154]; *Re Securitibank*, above n 26, at 158–159 per Richmond P; *Munton*, above n 26, at 372 per Lord Lowry LCJ; *Woolfson*, above n 26, at 90; *Barcelona Traction*, above n 1, at [38]–[47]; *Diallo*, above n 27, at [61].

attractive. As Lord Coke hinted as early as 1612,[157] the fact that corporations are soulless means that the imposition of a criminal sanction on them is difficult. Furthermore, they can only be punished in the criminal law by the imposition of a fine.

As was noted in the *IG Farben Trial*, the decisions of corporate entities are made by natural persons.[158] Thus, for many human rights violations committed by corporate persons, a natural person has made a conscious and intended decision to act in that manner. In those circumstances, the imposition of a treaty provision mandating the removal of the corporate veil to permit prosecutions of individual for severe corporate human rights violations serves several purposes. First, as it did in the *IG Farben Trial*, it prevents the corporate structure being used as a means by which natural persons can act with impunity. Second, the imposition of criminal liability on employees of the corporation who make conscious and intended decisions to violate human rights will have a higher level of deterrence than would the simple imposition of a fine against the corporation itself. Third, it ensures that, if the corporate entity is wound up before a civil or criminal case may be brought against it, there is still an avenue by which justice may be achieved for wronged individuals.

Moreover, the lifting of the corporate veil in the case of a parent-subsidiary relationship is also desirable. The parent corporation is often more able to meet the financial obligations of any award, and in some cases pursuing a claim against a subsidiary corporation is impossible, as it may be wound up or become bankrupt before litigation can fully proceed.[159] It is envisaged that a parent company would become liable in circumstances similar to those where the English law of tort would recognise a parent company liable for health and safety violations of a subsidiary.[160] In other words, a parent corporation will be liable for the conduct of a subsidiary where (1) it is largely engaged in a similar business as the subsidiary; (2) the subsidiary is engaged in practices which are in violation of human rights; and (3) the parent company should have known of this. Whilst this is a relatively new concept in English tort law, it has real benefits when applied to corporate human rights obligations.[161] In particular, it means that the corporate structure cannot be used as a means of avoiding litigation or the payment of damages to successful claimants, and

157 *Sutton's Hospital*, above n 17, at 32b.

158 *IG Farben Trial*, above n 103, at 678.

159 Srinivasan, above n 44, at 340.

160 *Chandler*, above n 53, at [80] per Arden LJ.

161 Srinivasan, above n 44, at 339–342.

also gives the wronged claimant access to a remedy where the subsidiary corporation is unable to provide one for whatever reason. Such an obligation would also go a significant way towards enabling successful home State litigation.

3 Conclusion

In relation to the corporate obligation to respect human rights, it is submitted that the proposed treaty must enact provisions giving effect to the following propositions:

(1) Corporate entities must respect all human rights that are recognised in customary international law.

(2) An individual who, with knowledge and intention, deliberately violates customary human rights shall not be protected from criminal prosecution by the corporate veil, or any other corporate structure.

(3) A parent corporation shall be liable for the violations of its subsidiaries where the parent and subsidiary are engaged in similar business, the subsidiary violates human rights, and the parent should have known of this.

D The Obligations of States to Protect Human Rights

1 Introduction

Finally, the *Guiding Principles* affirm that States must protect human rights. They affirm the rather uncontroversial principle that a host State must ensure that corporate entities conducting business in its jurisdiction respect human rights.[162] Such a proposition is trite law, and not in need of any significant discussion.

2 Home State Accountability

In relation to home States, the *Guiding Principles* could find no basis in customary international law to conclude that States are obliged to regulate the extraterritorial conduct of businesses domiciled in their jurisdiction.[163] Rather, they should set out expectations for businesses acting extraterritorially.[164] Whilst this is arguably a reflection of the law, it does not take matters far enough to ensure that the goals of any international treaty will be met. Instead, the proposed treaty must impose an obligation on home States to exercise jurisdiction over corporations where the host State does not. Any failure to do so must also invoke the international responsibility of the host State.

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162 *Guiding Principles*, above n 4, at [1].

163 At 7.

164 At [2].

Such a proposition, whilst potentially controversial, is not entirely without basis in existing international law. Following the proclaiming of the *Guiding Principles*, the Human Rights Committee of the United Nations opined that Canada was not doing enough to ensure that Canadian corporations were acting consistently with human rights laws,[165] despite Canadian arguments that their human rights obligations applied only within borders.[166] Whilst the Human Rights Committee stopped short of stating that a home State is under a legal obligation to regulate the extraterritorial conduct of corporate entities, its remarks indicate that a strictly territorial approach to State human rights responsibility is inadequate insofar as corporate conduct is concerned. Furthermore, developments in international law suggest that the exercise of jurisdiction is not only a right of States, but also a duty in certain circumstances. Such duties often arise from specific treaty provisions,[167] but it also arguably exists as a customary international law norm.[168] It has recently been argued that, as a matter of customary international law, States owe a duty to exercise jurisdiction in relation to civil claims by foreign nationals, in both criminal and civil contexts, in some circumstances.[169] Although there is nothing to suggest that human rights violations committed by corporate entities gives rise to such a duty, the fact that jurisdictional duties exist in international law indicate that a provision in the proposed treaty imposing home State jurisdictional obligations is not politically impossible. Thus, were there to be a provision obliging a home State to exercise criminal jurisdiction where the host State was unwilling or unable to do so, and to exercise civil jurisdiction at the suit of the litigant, such a proposal may not be too unrealistic to be successful. Again, the strong policy reasons of ensuring access to justice for victims and preventing corporate impunity favour the implementation of such an approach.

3 Conclusion

The following key principles in relation to State duties should form the basis of relevant provisions in any international treaty:

(1) The host State is obliged to ensure that business entities respect human rights in when operating in their territory.

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165 *Concluding observations on the sixth periodic report of Canada*, above n 112, at [6].

166 *List of issues in relation to the sixth periodic report of Canada: Replies of Canada to the list of issues*, above n 111, at [14].

167 For example Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment 1465 UNTS 85 (opened for signature 10 December 1984, entered into force 26 June 1987), arts 4–6.

168 Alex Mills "Rethinking Jurisdiction in International Law" (2014) 84 BYIL 187 at 210.

169 At 213–230.

(2) The home State is obliged to exercise criminal jurisdiction if the host State is unwilling or unable to do so.

(3) The home State must exercise its civil jurisdiction at the suit of a victim of a human rights violation.

(4) A failure of the home State to comply with these jurisdictional obligations shall entail that State's international responsibility.

VI CONCLUSION

The law relating to corporate responsibility for the violation of international human rights law is in need of significant reform. Those seeking a remedy for violations of their human rights by multinational corporate enterprises face numerous practical and legal barriers, which means that wrongs may go unremedied, and criminal conduct may go unpunished. The proposal to create a new international treaty on business and human rights[170] offers a significant opportunity to remedy this. To do so will require a treaty which reforms the law and places jurisdictional rights and obligations on both the host and home States of corporate entities. In imposing such obligations, the international community will make significant progress towards ensuring that victims of human rights violations by corporate entities will be placed in a better position to gain appropriate remedies, as is their undoubted right under existing human rights law norms.

170 HRC Res 26/9, above n 5, at [1].