

## “Corporate Human Rights Violations: Possibilities of Extending Liabilities on Multinational Enterprises”<sup>1</sup>

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### **Abstract**

*The massive emergence of multinational enterprises (MNEs) has become an explicit phenomenon of the current economic order of trade liberalization and economic globalization. As the theory of economic liberalism suggests a limited interference by government in economy, the MNEs have significantly and independently exercised their economic power on the principle of free market beyond the government's control to impact on people's daily life. The huge participation of MNEs in the global economic has also contributed to the globalization process which is fuelled by profit-making activities and serving business ends. In aiming for the profit maximization, social and human rights responsibilities have sometimes been abandoned and sidelined. As the consequences of this phenomenon, growing number of MNEs have come under fire in recent years for alleged human rights abuse. Among major rights being violated are that of economic, social and cultural rights, civil and political rights and the rights protected under international humanitarian law. Considering the negative impacts of MNEs, there have been mounting concerns and calls for a mechanism to control the MNEs' behaviour. This includes the attempt to legally regulate the actions of MNEs so that they will not violate human rights principles in their business activities. As human rights are generally perceived as government's obligation, both domestic and international legal regimes offer no specific mechanism to enforce human rights obligations on corporate entities, especially the MNEs. MNEs therefore remain immune to liability and victims remain without redress. This paper aims at filling these gaps by providing some mechanisms, be they on voluntary basis or legally binding, in order to stop the corporate human rights abuses. At the preliminary stage, the present paper will begin with a brief introduction to the concept of MNEs, followed by an analysis on major corporate human rights violations. Finally, this paper will provide some mechanisms that can be used to hold MNEs accountable for their human rights violations.*

### **i. Introduction and Definition of MNEs**

It was generally understood that the enormous emergence of MNE has become the ultimate product of the current global economic order which was influenced by the principles of market liberalization and economic globalization. MNE's operations are overwhelmingly based on the idea of profit-maximization which recognizes minimal or zero moral obligation for people in the countries where they operate, even those they touch directly such as their employees and consumers. Thus, it is commonplace for MNEs to be associated with various human rights violations within the sphere of their business activities. Before assessing the corporate human rights violations, it is vital to begin the discussion with a brief introduction to the MNEs. In a very simple word, a multinational enterprise can be defined as an economic firm whose affiliates and subsidiaries are located in more than one country. According to Dunning<sup>3</sup>, a multinational enterprise (MNE) is an enterprise that engages in foreign direct investment (FDI) and owns or controls value-adding activities in more than one country.

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<sup>3</sup> John H. Dunning, *Multinational Enterprises and the Global Economy* (Addison-Wesley, Wokingham 1993) p. 3.

This is the threshold definition of an MNE, and one that is widely accepted in academic and business circles, by data collecting agencies such as the Organization for Economic Cooperation and Development (OECD), the United Nations Centre on Transnational Corporations (UNCTC) and by most national governments. Generally speaking, the MNE is one of several institutions that engage in international business, within which it has two close relations. The first is the international trading firm, like which it exchanges goods and services across national boundaries, but unlike which it transacts this internally before or after adding value to them from the assets it owns or controls in a foreign country. Second, like a domestic multi-activity or diversifies firm, it engages in multiple economic activities, but unlike this type of firm it undertakes at least some of these in a country, or countries, other than the one in which it is incorporated. However, in a strictly legal sense, an MNE can be defined as a group of corporate entities, each having its own juridical identity and national origin, but each in some way interconnected by a system of centralized system of management and control, normally exercised from the seat of primary ownership. As the MNEs have massively involved in international flow of capital, material, good and technology through their transboundary business operations, academics and legal scholars have considered them as a type of corporate entity as falling within the scope of international law and, consequently, possessing certain rights and duties under international law.<sup>4</sup>

This implies that MNEs might be held accountable for the abuse of human rights in which they have involved, directly or indirectly. However, the international law is virtually silent with this respect and has neither articulated the human rights obligations of corporations nor provided mechanisms to enforce such obligations.<sup>5</sup> In addition, the division of accountability between states is often unclear leaving an accountability vacuum in which neither takes responsibility. Theoretically, an MNE has two distinctive features. First, it organizes and coordinates multiple value-adding activities across national boundaries and, second, it internalizes the cross-border markets for the intermediate products arising from these activities. This implies that institutions other than MNE shall not engage in both cross-border production and transactions. Furthermore, an MNE may be privately or publicly owned and managed. Its assets may be owned and controlled by citizens or institutions of a single country such as Virgin Atlantic and Mars; nationally controlled but internationally managed and owned, such as Ford and Sony; or internationally owned and controlled, such as Royal Dutch-Shell. In practise, most MNEs are nationally controlled but internationally owned, although the extent and form of their cross-border equity and non-equity participation varies a great deal between industries and firms and even within the same firm over time.<sup>6</sup> From historical point of view, the term 'multinational' is believed to have been attributed for the first time in relation to a corporation by David E. Lilienthal, who, in April 1960, gave a paper to the Carnegie Institute of Technology on 'Management and Corporation, 1985', which was later published under the title 'The multinational corporations' (MNC).

MNC, in its shortest possible definition, is a business enterprise which 'owns and controls income-generating assets in more than one country'.<sup>7</sup> However, in defining this term, there were some terminological confusion between MNC and MNE, as the result of the non-uniformity of the usage. This will become more visible when one compares the distinctions between the definition of MNE given by economists and those that have entered into United Nation usage. As for the economists, they have favoured a simple all-embracing formula, defining as a 'multinational enterprise' any corporation which 'owns (partly or wholly), controls and manages income generating assets in more than one country'.<sup>8</sup> Thus, the MNE is a firm that engages in direct investment outside its home country. The term 'enterprise' is favoured over 'corporation' as it avoids restricting the object of study to incorporated business entities and to corporate group based on parent-subsidiary relation alone.<sup>9</sup> On the contrary, the United Nations (UN) has moved away from this simple formula towards a distinction between 'multinational corporations' (MNCs) and 'transnational corporations' (TNCs). In their report, the UN Group of Eminent Persons adopted the simple economist's definition of MNCs as 'enterprise which own or control production or service facilities outside the country in which they are based. Such enterprises are not always incorporated or private, but they can also be co-operatives or state-owned entities'.<sup>10</sup>

<sup>4</sup> Cynthia Day Wallace, *The Multinational Enterprise and Legal Control: Host State Sovereignty in an Era of Economic Globalization*. (Kluwer Law International, The Hague 2002) p.9

<sup>5</sup> Harvard Law Review Association, 'Corporate Liability for Violations of International Human Rights Law' (2001) 114 Harv. L. Rev. p. 2025

<sup>6</sup> John H. Dunning, *Multinational Enterprises and the Global Economy* (n 3) pp.4-5.

<sup>7</sup> John H. Dunning (ed), *Economic Analysis and the Multinational Enterprise* (George Allen and Unwin, London, 1974) p.13.

<sup>8</sup> N. Hood and S. Young, *The Economics of the Multinational Enterprises* (Longman, London 1979) p.3.

<sup>9</sup> Peter Thomas Muchlinski, *Multinational Enterprises and the Law* (1<sup>st</sup> Edition Blackwell, Oxford 1995) p.12

<sup>10</sup> UN Doc. E/5500/Add 1 (Part I) 24 May 1974. The report is reproduced in 13 ILM 800 (1974) p.25

However, during the discussion for the report at the 57<sup>th</sup> Session of ECOSOC in 1974, several representatives argued in favour of the term transnational corporations. This term, it was said, better expressed the essential feature of operation across national borders than did the term multinational. That term should be reserved for enterprises which were jointly owned and controlled by entities from several countries.<sup>11</sup> In sum, the UN practise distinguishes between *transnational* as ‘enterprises owned and controlled by entities or person from one country but operating across national borders’, and *multinational* as ‘those enterprises owned and controlled by entities or persons from more than one country’.<sup>12</sup> By contrast, the politically and economically more homogeneous of states belonging to the OECD arrived, in 1976, at an agreed definition of the MNE for the purposes of the OECD Guidelines on Multinational Enterprises. According to the OECD Guidelines, multinational enterprises

Usually comprise companies or other entities whose ownership is private, state or mixed, established in different countries and so linked that one or more of them may be able to exercise a significance influence over the activities of others, and, in particular, to share knowledge and resource with the others.<sup>13</sup>

Hence, the crucial characteristic of an MNE is, according to this definition, the ability of one company to control the activities of another company located in another country. Other factors are not decisive. Thus, the sharing of knowledge and resources among companies or other entities would not be enough, by itself, to indicate that such companies or entities constitute an MNE.<sup>14</sup>

## ii. MNEs and Human Rights

Indeed, it is evident that human rights play important roles to ensure the survival of MNEs and their business ends. The UN Human Rights Commissioner, Mary Robinson, has been asked; “why should business care about human rights?” She answered by saying that, “business needs human rights and human rights needs business”.<sup>15</sup> The rationale behind this, according to her, was twofold; first, business cannot flourish in an environment where fundamental human rights are not respected and, second, corporations or business that do not themselves observe the fundamental human rights of their employees, or of the individuals or communities among which they operate, will be monitored and their reputation will suffer. Issues about human rights should not be seen as peripheral by business and corporations as compliance to human rights principles will, after all, reflect their reputations. Therefore, there should be a symbiotic relationship between corporations’ profit-making agenda and the human rights norms. The scope of human rights norms and principles should be well understood by those companies in order to ensure that they are not complicit in the human rights abuses.

Human rights, as everyone understood, are based on respect for the dignity and worth of all human beings and seek to ensure freedom from fear and want. Rooted in ethical principles and usually inscribed in a country’s constitutional and legal framework, human rights are essential to the well being of every man, woman and child. Premised on fundamental and inviolable standards, they are universal and inalienable. However, the overwhelming aura of economic globalization has put human rights of some people under fire. Special care should be taken on establishing effective formula to solve this problem. Obviously then, one question will arise; “how do we manage the MNEs, then, if human rights issue does matter to them?” This question will bring us to the next stage of discussion, that is, the solutions and measures to solve corporate human rights violation. In so doing, the MNEs need to revise their traditional image of private corporations to be recognized as integrated parts of society. They have to have their own ‘code of conduct’ that underlines an array of conducts they need to comply with, which eventually will ensure that they are socially responsible entities within the society within which they operate.

Apart from the code of conduct which is voluntary in nature, another possible measure is by imposing legally binding rules on the MNEs.

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<sup>11</sup> Peter Muchlinski, *Multinational Enterprises and the Law* (n 9) p.13

<sup>12</sup> Cynthia Day Wallace, *Legal Control of the Multinational Enterprise* (Martinus Nijhoff, The Hague 1983) pp.10-13

<sup>13</sup> OECD Guidelines for Multinational Enterprises, 21 June 1976, introduction, para. 8. See also OECD, *The OECD Declaration and Decision on International Investment and Multinational Enterprises 1991 Review* (OECD, Paris, 1992) p. 104

<sup>14</sup> Ibid. p. 48.

<sup>15</sup> Mary Robinson, ‘The business case for human rights’ in Financial Times Management, *Visions of Ethical Business*, Financial Times Professional (London 1998).p. 14.

The direct route to imposing obligations on MNEs can be supplemented by arguing that a state has a duty to control the operations of the MNEs operating within their jurisdictions and/or subsidiaries operating abroad over which a resident company exercise control. This argument is based on the state's responsibility to protect human rights, i.e. prevent violations of rights by private individuals.<sup>16</sup> However, most companies are far wealthier and economically more powerful than some governments, especially in developing countries resulting to their incapability to control the big companies within their territory. As initiative of individual state may be ineffective, multilateral-based treaties, be it at international or regional level, can be a fruitful solution. Nevertheless, despite the fact that some treaties could be interpreted as applying to non-state actors, most of the development of international law has focused on state actors.

As the events of corporate human rights violations have increased worldwide, so too have various attempts to establish international standards for corporate actions.<sup>17</sup> This includes the UN Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights, the OECD Guidelines and the UN Global Compact. These attempts can be perceived as a crucial step toward ensuring international corporate responsibility. Indeed, relationship between MNEs and human rights is very vital and needs specific mechanism to reconcile the both. The ultimate target is therefore to create a win-win situation by maximizing the goods that companies do while eliminating the abuses they commit. Above all, managing and controlling MNE's conduct is about identifying, establishing and adopting policies and initiatives to minimize the negative effects of MNEs whilst at the same time harnessing its positive effects. In any event, focus on managing MNEs also evinces another realisation, which is that, whatever view one holds of it, MNEs are the creation of economic globalisation which is indeed an inevitable and present reality, hence the necessity of developing effective strategies for addressing its consequences.<sup>18</sup>

### iii. MNEs' Impact on Human Rights

In recent decades, MNEs have gained unprecedented economic power and geographic scope exceeding the governments' power. Indeed, whether one thinks of businesses as critical for the prosperity and economic success of the community or focuses upon the problems they may cause, MNEs are certainly powerful forces in local communities, around the nation and throughout the world. The three hundred largest corporations account for more than one-quarter of the world's productive assets.<sup>19</sup> For example, General Motors Corporation's sales in a single year are greater than the gross national product of 179 countries.<sup>20</sup> This magnificent power has given MNEs enormous influence over the enjoyment of a broad range of human rights. The MNEs are increasingly subject to high-profile consumer boycotts over their alleged complicity in human rights abuses. The resource extraction companies have, for example, been accused of providing logistical and financial assistance to repressive state security forces and relying on those forces for protection in countries such as Burma, Colombia, Nigeria and Sudan.<sup>21</sup> According to Nicola Jagers<sup>22</sup>, MNEs play a threefold part regarding human rights. First, they can be direct violators of human rights. For example, by making use of forced labour.

Secondly, they can indirectly violate human rights by supporting a regime that violates human rights. A clear example to explain this was that the violations of human rights by The Royal Dutch/Shell in the Delta Niger, Nigeria. Thirdly, beside the fact that MNEs may frequently threaten an effective enjoyment of human rights, they can also be a positive influence, albeit very little, by raising the standard of living and improve respect for economic, social and cultural rights. The range of rights being commonly infringed by the corporate entities are economic, social and cultural rights; civil and political rights; and rights protected under international humanitarian law, rights of which enumerated in various international treaties and customary international law.<sup>23</sup>

<sup>16</sup> Janet Dine, *"Companies, International Trade and Human Rights"*. Cambridge University Press (2005), p. 168.

<sup>17</sup> D. Weissbrodt, 'Business and Human Rights' (2005) 74(1) UCLR p. 55

<sup>18</sup> 'Gbenga Bamodu, 'Managing Globalization: UK Initiatives and a Nigerian Perspective' in Janet Dine and Andrew Fagan (eds), *Human Rights and Capitalism: A Multidisciplinary Perspective on Globalization* (Edward Elgar Publishing Cheltenham, UK 2006). p. 147.

<sup>19</sup> Medard Gabel and Henry Bruner, *Global Inc.: An Atlas of the Multinational Corporations* (The New Press, New York 2003) p.5

<sup>20</sup> Ibid. p. 2.

<sup>21</sup> Scott Pegg, 'An Emerging Market for the New Millennium: Transnational Corporations and Human Rights' in Jedzej George Frynas and Scott Pegg (ed.) *Transnational Corporations and Human Rights* (Palgrave Macmillan, New York, 2003), p. 1.

<sup>22</sup> Nicola Jagers, 'The Legal Status of the Multinational Corporations under International Law' in M. Addo (ed.), *Human Rights and Transnational Corporations* (Kluwer, The Hague, 1999), p. 260.

<sup>23</sup> Harvard Law Review Association, 'Corporate Liability for Violations of International Human Rights Law' (n 5) p.2026

However, some care must be taken in speaking of corporate human rights violations because corporations are not seen as bearing legal obligation under international law. Putting aside for a while whether corporate interference with these rights is, or should be, legally actionable under domestic or international law, this section explains how corporate activity can interfere with the enjoyment of human rights.

#### a. Economic, Social and Cultural Rights

The enjoyments of Economic, Social and Cultural rights<sup>24</sup> are among major rights being frequently interfered by MNEs' business activities. This includes the right to the enjoyment of just and favourable conditions of work such as fair wages and equal remuneration for work of equal value and safe and healthy working conditions.<sup>25</sup> This is particularly evident when the MNEs pay exceedingly low wages, use forced labour or force employees to work under hazardous conditions without adequate safeguards. In respect to social rights, the corporations may interfere with the right to the enjoyment of the highest attainable standard of physical and mental health<sup>26</sup> by dumping toxic waste or causing widespread pollution. One of the most visible examples of this kind of human rights abuses occurred in Bhopal, India, in 1984, when forty-one tons of *methyl isocyanate* were released from a plant owned by Union Carbide Corporation.<sup>27</sup> As the results, at least 15 000 people were killed and more than 170 000 people were disabled. Local water and soil still remain contaminated, and birth defects continue to be reported.<sup>28</sup> Similarly, MNEs that destroy the habitats of indigenous peoples interfere with the rights of all peoples to freely pursue their economic, social and cultural development, including the right not to be deprived of their own means of subsistence.<sup>29</sup>

#### b. Civil and Political Rights

The traditional view of human rights limits them to civil and political rights<sup>30</sup> in the *Universal Declaration of Human Rights* adopted and proclaimed by the General Assembly of the United Nation, 1948. Included among these are the right to life, liberty and security; the right not to be discriminated against on the basis of race, colour, sex, language, religion, social class or political opinion; the right to vote, freedom of speech and freedom of press; the right to be free from arbitrary invasion of privacy, family or home; and legal rights such as the right to due process of law and the presumption of innocence until proven guilty. The human rights abuse by Royal Dutch/Shell Company in Nigeria is the best example to explain this kind of human rights violation. In *Wiwa v. Royal Dutch Petroleum Co.*<sup>31</sup>, the plaintiff alleged that the Royal Dutch/Shell recruited the Nigerian military to suppress opposition to the company's oil exploration activities in Nigeria's Ogoni region.<sup>32</sup> This includes the acts of arresting, jailing and torturing two leaders of opposition movement, Ken Saro-Wiwa and John Kpuien, which later have been hanged on fabricated murder charges. The plaintiff further claimed that Royal Dutch/Shell has instigated, planned and facilitated the human rights abuses that the Nigerian military inflicted on the Ogoni people. The company's complicity in this series of human rights violations was evident in the fact that it has allegedly provided money, weapons and logistical support to the military. If those allegations credited, they would suggest that the company interfered the plaintiffs' rights to life,<sup>33</sup> freedom from torture,<sup>34</sup> freedom from arbitrary arrest and detention,<sup>35</sup> and a fair trial.<sup>36</sup>

#### c. Rights Protected Under International Humanitarian Law

In addition, MNE also may play a variety of roles in the most severe human rights violations, such as genocide, crimes against humanity, and war crimes, which generally occur in the context of systematic mass violence.

<sup>24</sup> The discussion that follows draws on the human rights enumerated and defined in the International Covenant on Economic, Social and Cultural Rights, Dec. 16, 1966, 993 U.N.T.S. 3 [hereinafter ICESCR] (entered into force Jan. 3, 1976).

<sup>25</sup> UN, ICESCR, Article 7.

<sup>26</sup> Ibid. Article 12(1)

<sup>27</sup> Amnesty International, 'Union carbide Corporation (UCC) DOW Chemical and the Bhopal Communities in India' (General Article) (2005) AI Index: ASA 20/005/2005

<sup>28</sup> D. Weissbrodt, 'Business and Human Rights' (n 17) (p. 56)

<sup>29</sup> UN, ICESCR, Article 1(1)

<sup>30</sup> The discussion that follows draws on the human rights enumerated and defined in the International Covenant on Civil and Political Rights, Dec. 19, 1966, 999 U.N.T.S. 171 [hereinafter ICCPR] (entered into force Mar. 23, 1976).

<sup>31</sup> 226 F.3d 88 (2<sup>nd</sup> Cir. 2000)

<sup>32</sup> Ibid. at 92.

<sup>33</sup> UN, ICCPR (n 28) Article 6(1)

<sup>34</sup> Ibid. Article 7.

<sup>35</sup> Ibid. Article 9.

<sup>36</sup> Ibid. Article 14.

This also may include manufacturing prohibited classes of weapons for the use of enemy troops or civilian populations. Apart from that, corporations may also involve themselves in warfare itself by selling the services of private security forces,<sup>37</sup> which are as capable as committing war crime as any public army. Additionally, corporations, in particular financial institutions may participate in a state's "plunder of public or private property" by laundering the proceeds of such acts. In this regards, a number of recent cases against Austrian, French, German, and Swiss financial institutions have highlighted the role that financial institutions can play in acts of plunder of public or private property.<sup>38</sup>

#### iv. Managing MNEs

As indicated above, economic globalisation was tremendously evolved through the activities of MNEs. Thus, there has, not surprisingly, been an escalating voice and concerns from various quarters calling for a delimitation of the responsibilities of MNEs to reflect their increasing influence in society. The traditional notion that only states and state agents can be held accountable for violations of human rights is being challenged as the economic and social power of MNEs appear to rise in the wake of the increasing integration of the global economy that they have helped to bring about.<sup>39</sup> Calls for corporate responsibility and accountability have apparently been known throughout the development of MNEs as far back as Cicero in 44 BC.<sup>40</sup> This is to ensure that they are not complicit in human right violations which may happen if there is no specific human rights standard imposed on them. Indeed, corporations have been growing very rapidly and are vastly richer and more powerful than most of the states that seek to regulate them. Obviously, then, only a global approach to regulation will now succeed. In general, there are two main ways that MNEs can be held accountable for their human rights performance; through legal liability under national or international law, and voluntarily through codes of conduct and self-regulation.

##### a. Legal Liability

Holding MNEs accountable can either be directly or indirectly. Indirectly, MNEs can be controlled by holding governments or states to account for their behaviour. This is because, states are obliged to protect the rights of people in their jurisdiction, and this implies that they must regulate companies operating or domiciled in their jurisdiction.<sup>41</sup> This duty requires states to ensure that proper national laws are in place to control corporations, in this way states fulfil their duty to protect human rights. There are two possible ways of monitoring national laws in which this indirect obligation must be enforced. First, by ensuring that rights enshrined in international treaty obligations are present in national law together with a functioning legal system to enforce them. The second is by ensuring that the legal system is indeed functioning, i.e. that it does not contain loopholes which corporations can exploit to behave in a way which violates human rights.<sup>42</sup> In addition, bringing states to account on these responsibilities can force them to put pressure on companies. So, it is important to pressure both MNEs' home states to ensure that they act responsibly in other countries, and the host states where MNEs operate to formulate and implement appropriate legislation regulating business activity in their jurisdiction and not to collude with MNEs.

There are a number of potential advantages to the legal approach. As the International Council on Human Rights Policy<sup>43</sup> points out;

Voluntary codes rely entirely on business expediency or a company's sense of charity for their effectiveness. By contrast, legal regimes emphasize principle of accountability and redress, through compensation, restitution and rehabilitation for damage caused. They provide a better basis for consistent and fair judgments (for all parties, including companies).

International legal codes can establish coherent universal standards and can also provide a 'level playing field' for all businesses, something cannot be done by an array of codes of conduct.

<sup>37</sup> Juan Carlos Zarate, 'The Emergence of a New Dog of War: Private International Security Companies, International Law, and the New World Disorder' (1998) 34 *Stan. J. Int'l L.* 75

<sup>38</sup> See for example, *Bodner v. Banque Paribas*, 114 F. Supp. 2d 117

<sup>39</sup> Peter Thomas Muchlinski, 'Human Rights and Multinationals: Is there a problem?', 77(1) *International Affairs* (2001) p. 31.

<sup>40</sup> For an excellent review of the treatment of the subject of the corporate social responsibility over the centuries, see, Joanne Ciulla, "Why is Business Talking About Ethics? Reflections on Foreign Conversations", 1991 *California Management Review*, p. 67.

<sup>41</sup> IRENE, 'Controlling Corporate Wrong: The Liability of Multinational Corporations' (Seminar Report) (2000) p. 2

<sup>42</sup> Janet Dine "Companies, International Trade and Human Rights". (n 16) (p. 180)

<sup>43</sup> International Council on Human Rights Policy. 2002. 'Beyond Voluntarism: Human Rights and the Developing International Legal Obligations of Companies – Summary', Versoix, Switzerland. International Council on Human Rights Policy. p. 5.

Finally, there is some evidence that business leaders prefer obligation and clarity instead of voluntarism and confusion.<sup>44</sup> While the extant of international legal framework impose legal obligations to respect human rights mainly on states and intergovernmental organisations (IGOs), there is no logical reason that MNEs cannot bear human rights-related obligations.<sup>45</sup> This is because, the preamble of the UDHR is addressed not only to states but also to ‘every individual and every organ of society’. Therefore, it is not possible for non-states actors including MNEs whose action have a strong impact on the enjoyment of human rights by the larger society, to absolve themselves from the duty to uphold international human rights standards. On the other hand, imposing regulations directly on MNEs offers greater possibilities for winning actual redress for victims of abuses by MNEs. While approaches in the host country are usually fruitless, approaches can be made under either domestic or international law;

#### **i. at the level of MNE’s home state**

A number of cases in industrialized countries where MNEs are domiciled, principally the UK, the USA, Canada and Australia are slowly increasing the space within which it is possible for claimants from host countries to hold MNEs legally accountable in their home countries. For example, in recent United States District Court case of *Doe v. Unocal* it was held, for the first time,<sup>46</sup> that MNEs could, in principle, be directly liable for violations of human rights under the Alien Tort Claims Act (ATCA).<sup>47</sup> Although the case has failed on the facts and is subject to an appeal, the principle that a private non-state actor can be sued before the US courts for alleged violations of human rights was not questioned.<sup>48</sup> The ATCA, a 200-year old law is considered the most useful instruments in the United States to date which gives the US courts jurisdiction to hear cases of human rights abuses (violations of customary international law) occurring anywhere in the world as long as the US courts have jurisdiction over the defendant. This covers a limited range of charges of severe human rights abuses, namely slave labour, collusion in genocide, collusion in torture, and collusion in extrajudicial murder.<sup>49</sup>

#### **ii. at the regional level**

Some approaches were identified at different regional levels, including the European Union, the North American Free Trade Agreement (NAFTA) and the Organization of Economic Co-operation and Development (OECD). The European Union, for example, have made their best effort, through a resolution in the European Parliament entitled ‘EU Standards for European Enterprises: Towards a European Code of Conduct’, to extend certain existing legal provisions to cover actions by MNEs. Indeed, the EU has been interested in issues of corporate responsibility since the 1970s and has issued a series of Directives, mostly on working conditions, with relevance to MNE behaviour. Existing EU mechanisms for accountability include the European Court of Human Rights and the human rights provisions contained in the Amsterdam (1997) and Maastricht (1992) treaties.

#### **iii. at the international level**

In addition to home state and regional levels, MNEs also can be held accountable through various international instruments. These instruments, like the OECD Convention on Corruption, need to be accompanied by international institutions with the power to supervise and enforce the implementation of binding standards. International human rights law, which can apply to international as well as national companies, offers some opportunities for calling companies to account, but to date has been more widely used in relation to states. In fact, international institutions may also provide a basis for creating legal obligations for MNEs. For instance the UN Human Rights Committee found that a French tourism project in Tahiti violated the International Covenant on Civil and Political Rights (ICCPR).

#### **b. Non-legal Means**

Semi legal and non-legal means of pressuring companies such as social responsibility standards are also very important, and can lead to economic punishment for companies, which is a good deterrent. NGO activities such as working on standards and codes, raising public awareness, solidarity with claimants, research and evident-gathering, advocacy with governments and companies can complement legal work.

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<sup>44</sup> Ibid. pp. 6 and 14.

<sup>45</sup> Peter Thomas Muchlinski, ‘Human Rights and Multinationals: Is there a problem?’ (n 39) p. 32.

<sup>46</sup> 963 F.Supp. 880 US Dist Ct, C.D. Cal, 25 March 1997, noted in *AJIL* 92, 1998. pp. 309-14.

<sup>47</sup> 28 USC s. 1350.

<sup>48</sup> Peter Thomas Muchlinski, ‘Human Rights and Multinationals: Is there a problem?’ (n 39) pp. 41-2.

<sup>49</sup> IRENE, ‘Controlling Corporate Wrong: The Liability of Multinational Corporations’ (n 41) p. 4

Among social responsibility standards to corporation have been the ILO Tripartite Declarations of Principle Concerning Multinational Enterprises and Social Policy of 1977,<sup>50</sup> and the OECD Guidelines for Multinational Enterprises of 1976.<sup>51</sup> However, these instruments are non-binding, and therefore create no legal duties to observe the standards contained therein.<sup>52</sup> Furthermore, voluntary approaches to improving corporate conduct have taken place at both collective and individual levels. Collectively, there has been a proliferation of voluntary approaches in the past few years. The United Nation, for example, has developed the Global Compact which comprises ten basic principles covering human rights, labour standards, environment and anti-corruption which companies are asked to embrace.<sup>53</sup> These principles are drawn from existing documents such as the UDHR, the Declaration of the ILO on fundamental principles and rights, the Rio Declaration from the 1992 UN Conference on Environment Development and the UN Convention Against Corruption. On the other hand, numerous individual corporations have also enacted their own codes of conduct governing their employees and business operations. A recent inventory by the OECD, for example, list 246 individual corporate codes of conduct.<sup>54</sup>

However, all of these voluntary initiatives suffer from a number of weaknesses. First, meaningful self-regulation is likely to be undertaken only by a small number of companies.<sup>55</sup> Second, public commitments may not always translate into changed corporate behaviour and third, such voluntary efforts depend upon the continued vigilance of concerned citizens, consumers, NGOs and investors. In sum, the proven inability of many MNEs to adhere their own codes of conducts and the vague, unenforceable and poorly-defined nature of most collective efforts, such as the Global Compact, illustrate the limitations to a purely voluntary approach. However, given these limitations, a voluntary code of conduct has certain advantages over a binding code. In this regard, Alex Wawryk<sup>56</sup> argues that, in countries where law enforcement mechanism are weak, self-regulation by MNEs under voluntary codes of conduct may actually be more effective than national or international codes forced on MNEs against their will. Second, like the declaratory tradition in international law before it, the corporate declaratory tradition is likely to evolve and develop in the coming years.

#### v. **Conclusion**

From the preceding analysis, it is fairly evident that the emergence of major MNEs has numerous implications for the promotion and protection of all human rights. This implies that there is a need for a critical reconceptualization of the policies and instruments of international trade, investment and finance. Such reconceptualization must cease treating human rights issues as peripheral to their formulation and operation. The institutional mechanisms developed to establish norms and resolve disputes in the context of overlapping jurisdictions and conflicting values will in practice determine whether MNE proves to be a friend or foe to human rights. Additionally, what is also required is a more balanced approach, which ensures that human rights principles are integrated into the rule-making processes from the outset. The primacy of human rights law over all other regimes of international law is a basic and fundamental principle that should not be departed from.<sup>57</sup>

In addition, the MNEs can also improve their ability to promote human rights by developing an explicit company policy on human rights, providing effective training for their managers and their staff in international human rights standards, consulting non-government organizations, including Amnesty International, on the level and the nature of human rights abuses in different countries and establishing a clear framework for assessing the potential impact on human rights of all the company's and its sub-contractors' operation. Indeed, corporate human rights violations are a significant problem facing the international community. As the unilateral attempts may be a fruitless approach, a multilateral approach is needed to address the problem of corporate violations of human rights.

<sup>50</sup> ILO, Declaration on Fundamental Principles and Rights at Work (Geneva: ILO, 18 June 1998).

<sup>51</sup> OECD Guidelines for Multinational Enterprises, 27 June 2000 (Paris: OECD, 2000) and on [www.oecd.org/daf/investment/guidelines/mnetext/htm](http://www.oecd.org/daf/investment/guidelines/mnetext/htm)

<sup>52</sup> Thomas Muchlinski, 'Human Rights and Multinationals: Is there a problem?' (n 39) pp. 36-7.

<sup>53</sup> Available at <http://www.unglobalcompact.org>

<sup>54</sup> Gereffi et al. 'The NGO-Industrial Complex', *Foreign Policy* (July/August 2001). p. 57.

<sup>55</sup> Jessica Woodroffe, 'Regulating Multinational Corporations in a World of Nation States' in Michael K. Addo (ed), *Human Rights Standards and the Responsibility of Transnational Corporations* (Kluwer law International, The Hague 1999) 132

<sup>56</sup> Alex Wawryk, 'Regulating Transnational Corporations through Corporate Codes of Conduct' In Jedzej George Frynas and Scott Pegg (ed.) *Transnational Corporations and Human Rights* (Palgrave Macmillan, New York, 2003), p. 1.

<sup>57</sup> "Globalization and Its Impact on the Full Enjoyment of Human Rights" UN Press Release, *E/CN.4/Sub.2/2000/13*, <http://www.globalpolicy.org/soecon/un/wtonite.htm>

An effective solution requires international agreement not only on the human rights obligations of corporations, but also on an effective enforcement mechanism. Some unilateral attempts like the recent ATCA cases against corporations should be viewed by international community as a call to collective action.<sup>58</sup> However, there are generic limitations to any legal approach in regulating corporate behaviour. As Michael Addo<sup>59</sup> argues, societal expectations of corporate behaviour today ‘far exceed what the law expressly requires of them at the moment’. Legal regulations have a valuable role to play in regulating corporate behaviour. The limits to the legal approach, however, mean that a gap will necessarily remain between what concerned citizens expect from corporations and what the law explicitly requires of them.<sup>60</sup> Above all, the achievement of human rights and social justice is a higher value than the protection of free markets. With these principles in mind, we can help ensure that economic globalisation and the MNEs will advance human rights.<sup>61</sup> The symbiotic and win-win relationship of both MNEs and human rights must be established. The issue to ponder, therefore, becomes maximizing the goods that companies do while eliminating the abuses they commit.

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<sup>58</sup> Harvard Law Review Association, ‘Corporate Liability for Violations of International Human Rights Law’ (n 5) pp.2047-8

<sup>59</sup> Michael K. Addo, ‘Human Rights and Transnational Corporations: An Introduction’ in Michael K. Addo (ed), *Human Rights Standards and the Responsibility of Transnational Corporations* (Kluwer law International, The Hague 1999) p.13

<sup>60</sup> Scott Pegg, ‘An Emerging Market for the New Millennium: Transnational Corporations and Human Rights’ (n 21)pp. 20-1.

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