



Recebido: 08.09.2016

Aceito: 06.10.2016

Publicado: 30.11.2016

A BINDING INSTRUMENT ON BUSINESS AND HUMAN RIGHTS: SOME THOUGHTS FOR AN EFFECTIVE NEXT STEP IN INTERNATIONAL LAW, BUSINESS AND HUMAN RIGHTS

UM INSTRUMENTO VINCULANTE EM DIREITOS HUMANOS E
EMPRESAS: ALGUNS PENSAMENTOS PARA UM EFETIVO
PRÓXIMO PASSO EM DIREITO INTERNACIONAL, EMPRESAS E
DIREITOS HUMANOS

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Abstract

The search for a tool to compel corporate accountability for human rights violations is longstanding. The adoption of the UN Human Rights Council Resolution on the elaboration of a binding instrument and the establishment of an intergovernmental working group represents the latest stage in the evolution of attempts to regulate multinational corporations. The move to develop a binding instrument on business and human rights is divisive. As such, it requires a thorough analysis, both of its proposed content but also of the outcome we could hope to achieve through such an instrument. This article analyses the proposed creation and content of a binding instrument as well as the conceptualisation and implementation of a binding instrument.

Keywords

Human rights. Business. United Nations Guiding Principles on Business and Human Rights. Multinational Corporations.

Resumo

A busca por uma ferramenta para compelir a responsabilidade corporativa em violações de direitos humanos é antiga. A adoção da Resolução do Conselho de Direitos Humanos da ONU para elaboração de um instrumento vinculante e o estabelecimento de um grupo de trabalho intergovernamental representa o último estágio na evolução das tentativas de regular corporações multinacionais. O movimento no sentido de desenvolver um instrumento vinculante em direitos humanos e empresas é permeado de dissenso. Como tal, requer uma análise completa tanto de seu conteúdo proposto como do resultado que nós poderíamos esperar atingir com tal instrumento. Este artigo analisa a criação e o conteúdo propostos para um instrumento vinculante assim como sua conceitualização e implantação.

Palavras-chave

Direitos humanos. Empresas. Princípios Orientadores das Nações Unidas em Empresas e Direitos Humanos. Corporações Multinacionais.

Resumen

La búsqueda por una herramienta para imponer la responsabilidad corporativa en violaciones de derechos humanos es antigua. La adopción de la Resolución del Consejo de Derechos Humanos de la ONU para elaboración de un instrumento vinculante y para el establecimiento de un grupo de trabajo intergubernamental representa la última etapa en la evolución de los intentos de regular corporaciones multinacionales. El movimiento en el sentido de desarrollar un instrumento vinculante en derechos humanos y empresas está repleto de disenso. Por eso, requiere un análisis completo tanto de su contenido propuesto, como del resultado que nosotros podríamos esperar alcanzar con tal instrumento. Este artículo analiza la creación y el contenido propuestos para un instrumento vinculante, así como su concepto e implementación.

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Palabras clave

Derechos Humanos. Empresas. Principios Rectores de las Naciones Unidas sobre Empresas e Derechos Humanos. Corporaciones Multinacionales.

1. INTRODUCTION

The search for a tool to compel corporate accountability for human rights violations is longstanding. The adoption of the UN Human Rights Council Resolution on the elaboration of a binding instrument and the establishment of an intergovernmental working group (the working group)¹ represents the latest stage in the evolution of attempts to regulate multinational corporations (MNCs). The move to develop a binding instrument on business and human rights is divisive. As such, it requires a thorough analysis, both of its proposed content but also of the outcome we could hope to achieve through such an instrument.

In my analysis of the proposed creation of a binding instrument, I focus on three issues. The first relates to the context in which the discussion of a binding instrument occurs. Here I discuss: (i) the division between those who support the Guiding Principles² and those who support a binding instrument; (ii) the importance of norm development in international human rights law and how the evolution of work on business and human rights at the UN level represents such a development; and (iii) the benefit of this process for MNCs who strive to achieve human rights standards.

The second part is an analysis of the proposed content of a binding instrument. Here I discuss: (i) the selection of rights in the proposed binding instrument; (ii) the description of gross human rights violations versus the violation of structural poverty; and (iii) the importance of a gendered approach when drafting in a binding instrument.

The third category is a discussion of the conceptualisation and implementation of a binding instrument. In this category I discuss: (i) the concepts of responsibility, duty and corporate social responsibility (CSR); (ii) the integration of human rights compliance into the entire corporate structure; and (iii) the scope of MNC's human rights obligations with reference to free, prior and informed consent.

2. THE CONTEXT OF A PROPOSED BINDING INSTRUMENT

2.1 THE DIVISION: GUIDING PRINCIPLES VERSUS A BINDING INSTRUMENT

Currently there exists a perceived conceptual binary between the UN Guiding Principles on Business and Human Rights (the GPs), on the one hand, and the pursuit of a binding instrument, on the other (SIXTO, 2015, p.3-4 and DAVITTI, 2016, p. 1-3 and BILCHITZ, 2015).³ I submit that a rigidly

¹ See resolution A/HRC/26/L.22/Rev.1 "Elaboration of an internationally legally binding instrument on transnational corporations and other business enterprises with respect to human rights" adopted by the UN Human Rights Council. Available at: < <https://documents-dds-ny.un.org/doc/UNDOC/LTD/G14/064/48/PDF/G1406448.pdf?OpenElement>>. Accessed at 11.10.2016 10h23..

² "The United Nations Guiding Principles on Business and Human Rights". Available at: < http://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf >. Accessed at 11.10.2016 10h30..

³ See: master thesis of SIXTO, Olga F. "Business and Human Rights: A Study on the Implications of the Proposed Binding Treaty". Available at: <<https://www.business-humanrights.org/sites/default/files/documents/Business%20and%20Human%20Rights.%20A%20study%20on%20the%20implications%20of%20the%20proposed%20binding%20treaty.pdf>>. Accessed at 11.10.2016 10h37; DAVITTI Daria, "Refining

fixed binary is both incorrect and destructive. The Guiding Principles, national action plans (NAPS) to implement such principles, and developments towards a binding instrument, are all part of a continuum of norm development that we have seen many times in international law (MEYERSFELD, 2010, p.1-15).⁴

The Guiding Principles created a formulation to achieve human rights compliance. That was, in the words of the Former Representative of the Secretary General on business and human rights, the end of the beginning and not the beginning of the end. Ruggie notes that the GPs

by itself, will not bring business and human rights challenges to an end. But it will mark the end of the beginning: by establishing a common global platform for action, on which cumulative progress can be built, step-by-step, without foreclosing any other promising longer-term developments.⁵

The next step is to galvanise governments to devise and implement NAPs to ensure that there is no immunity for corporate malfeasance. NAPs are in fact the perfect precursor to the adoption of a binding instrument. Almost all international human rights instruments require states to adjust their internal laws and policies to comply with the treaty in question. This is usually done through the creation of a national action plan to become compliant with the treaty. The NAPs process is in fact preparation for a binding instrument. Therefore, in terms of process, there is an important continuum of work from the adoption of the GPs, to the development of NAPs, to the adoption of a binding instrument. This continuum is one that will allow for the evolution of crisp, binding rules regarding business and human rights.

In addition to the integrity of this continuing process, there are important substantive principles regarding the development and specification of norms in international human rights law.

2.2 NORM DEVELOPMENT IN INTERNATIONAL HUMAN RIGHTS LAW

One of the questions that arises in the debate about a binding instrument is whether international law needs to be developed at all to address the harm caused by some multinational corporations. The answer is yes. We are all acutely aware of the “governance gaps” caused, in part, by the income inequality between the so-called Global North and Global South.⁶ And while the Guiding Principles impose obligations on all states to protect against corporate abuses, this injunction does not take into account the reality of certain developing states’ need to attract foreign direct investment by keeping their labour costs low and their regulatory systems weak.⁷ This creates a gap

the Protect, Respect and Remedy Framework for Business and Human Rights and its Guiding Principles”, *Human Rights Law Review* (2016): 1–21; and BILCHITZ David, “The Moral and Legal Necessity for a Business and Human Rights Treaty”. Available at: < <https://business-humanrights.org/en/treaty-on-business-human-rights-necessary-to-fill-gaps-in-intl-law-says-academic> >. Accessed 11.10.2016 10h44.

⁴ For a discussion of the principle of a norm development see MEYERSFELD Bonita, *Domestic Violence and International Law* (Oxford: Hart Publishing, 2010).

⁵ Report A/HRC/17/31, “Guiding Principles on Business and Human Rights: Implementing the United Nations “Protect, Respect and Remedy” Framework: Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, John Ruggie”, para 13. Available at: < http://www.ohchr.org/Documents/Issues/Business/A-HRC-17-31_AEV.pdf>. Accessed at 10.11.2016 11h17.

⁶ Ibid.

⁷ MEYERSFELD, Bonita, “Institutional Investment and the Protection of Human Rights: A Regional Proposal” in *Globalisation and Governance*, ed. Laurance Boule (South Africa: SyberInk, 2011), 174.

– the cause of which may be the subject of much debate – but the result of which is that hundreds of thousands of people experience human rights violations, where corporations are liable or complicit, with no access to justice.⁸ Given this global economic dissonance, it is fictional to rely purely on national legal systems to regulate transnational corporate activity. The development of international law is necessary if we are serious about attenuating human rights violations that remain unaddressed because of this gap.

The fact is that international law is indeed responding to this need: there is evidence of a norm *developing* in international law that corporations are subjects of international human rights law. We are in the midst of the amorphous process of norm-crystallization (MEYERSFELD, 2010, p. 107).⁹ The more precise, certain and authoritative international law becomes, the easier it will be to attenuate human rights violations caused by, or associated with, multinational corporations in the Global South.

In particular, we are witnessing a process of *specification* or norm development. International law is evolving towards a precise right to be free from corporate-linked human rights violations, with all its nuances, and the precise concomitant corporate *obligation* to help remedy such violations, with all *its* nuances. The evolution of this norm can be traced back to 1945, when corporate complicity in human rights violations first entered the discourse of international law through the Nuremberg Tribunals.¹⁰

There is precedent for such norm development and specification in international law. A key example is the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW).¹¹ For decades prior to the adoption of this convention, the international community resisted the development of a women's convention on the basis that the existing international human rights framework was sufficiently generic to ensure the protection of women's rights (MEYERSFELD, 2010, p.144).¹² Through the development of reasoned principles and arguments, the international community finally agreed that the human rights violations experienced by women at the hands of both state and non-state actors, was similar to – but also *different from* – the experience of men. There was thus a need for the specification of such violations, with the concomitant identification of specific and proportionate remediation.¹³ This resulted in CEDAW. CEDAW was a distillation of general

⁸ Ibid.

⁹ For a discussion of this process in respect of domestic violence and international law, see Meyersfeld *Domestic Violence in International Law*, note 4 above.

¹⁰ See Article 9 of the Charter of the International Military Tribunal - Annex to the Agreement for the prosecution and punishment of the major war criminals of the European Axis ("London Agreement"), 8 August 1945 ("Nuremberg Charter"), which states that the Tribunal may declare a group or organisation a criminal organisation. Available at: <<http://www.refworld.org/docid/3ae6b39614.html>>. Accessed 11.10.2016 12h07. For a discussion of this see STOICHKOVA Desislava, *Towards Corporate Liability in International Criminal Law* (Belgium: Intersentia, 2010), 47 – 49; RAMASASTRY Anita "Corporate Complicity: From Nuremberg to Rangoon: An Examination of Forced Labour Cases and their Impact on the Liability of Multinational Corporation," *Berkeley Journal of International Law* 20 (2002): 91; and ONGESO John P. "Corporate Criminal Liability in International Law: Nuremberg and the International Criminal Court," in *An exploration of corporate criminal liability in international law for aiding and abetting international crimes in Africa* chapter 3 .Available at: <<http://wiredspace.wits.ac.za/handle/10539/19482>>. Accessed at 11.10.2016 13h53.

¹¹ Convention on the Elimination of All Forms of Discrimination Against Women UNTS 1249 (1979):13. Available at: <<http://www.hrcr.org/docs/CEDAW/cedaw.html>>. Accessed at 11.10.2016 15h53.

¹² Meyersfeld *Domestic Violence in International Law*, note 4 above, 144.

¹³ MEYERSFELD, Bonita, "Business, Human Rights and Gender: A Legal Approach to External and Internal Considerations" in *Human Rights Obligations of Business: Beyond the Corporate Responsibility to Respect?*, eds. Surya Deva and David Bilchitz (United Kingdom: Cambridge University Press, 2013), 194.

international law principles relating to equality.¹⁴ It recreated and refined the principle of equality with reference to the specific harms endured by women.

Another example of norm development and the importance of norm specification in international law is the category of rules relating to the prohibition on trafficking (MEYERSFELD, 2010, p.144).¹⁵ There are over 14 international instruments on trafficking. The history of the development of this issue in international law is informative in the context of developing international law relating to multinational corporations. In 1904, the League of Nations adopted the International Agreement for the Suppression of the 'White Slave Traffic.'¹⁶ This was followed in 1910 by the International Convention for the Suppression of the 'White Slave Traffic.'¹⁷ In 1927, the Slavery Convention obliged states to prevent and suppress the slave trade, which included forced labour.¹⁸ This was entrenched in 1930 by the Forced Labour Convention regarding the use of forced or compulsory labour in all its forms.¹⁹ In 1934, the International Convention for the Suppression of the Traffic in Women of Full Age introduced the obligation to punish:

Whoever, in order to gratify the passions of another person, has procured, enticed or led away even with her consent, a woman or girl of full age for immoral purposes to be carried out in another country..., notwithstanding that the various acts constituting the offence may have been committed in different countries.²⁰

Almost 20 years later in 1951, the International Convention for the Suppression of the 'White Slave Traffic' was updated, expanding on the obligations of states vis-à-vis various acts that constitute trafficking.²¹ In 1957 the Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery was adopted to "intensify national as well as international efforts" towards the abolition of slavery and the slave trade.²² Although trafficking as a phrase was not included in this Convention, the list of prohibited acts includes practices which amount to trafficking.²³

¹⁴ CEDAW preamble; see also Meyersfeld *Domestic Violence in International Law*, note 4 above, 144.

¹⁵ Meyersfeld *Domestic Violence in International Law*, note 4 above, 144.

¹⁶ International Agreement for the Suppression of the 'White Slave Traffic,' *LNTS* 1 (1904): 83. Available at: <<http://hrlibrary.umn.edu/instreet/whiteslavetraffic1904.html>>. Accessed at 11.10.2016 15h54.

¹⁷ *Ibid* as amended by Protocol Amending the International Agreement for the Suppression of the White Slave Traffic, and Amending the International Convention for the Suppression of the White Slave Traffic *UNTS* 30 (1949): 23. Available at: <<http://hrlibrary.umn.edu/instreet/whiteslavetraffic1910.html>>. Accessed at 11.10.2016 15h56.

¹⁸ Slavery, Servitude, Forced Labour and Similar Institutions and Practices Convention of 1926 (Slavery Convention of 1926) *LNTS* 60 (1926): 253; Protocol amending the Slavery Convention *UNTS* 182 (1953): 51. Available at: <http://hrlibrary.umn.edu/instreet/f1sc.htm>. Accessed at 11.10.2016 15h57.

¹⁹ Forced Labour Convention: Convention (No. 29) Concerning Forced Labour *UNTS* 39 (1930): 55. Available at: <<http://www.ohchr.org/EN/ProfessionalInterest/Pages/ForcedLabourConvention.aspx>>. Accessed 11.10.2016 15h58.

²⁰ Article 1 of the International Convention for the Suppression of the Traffic in Women of Full Age *LNTS* CL (1933): 431. Available at: <https://ec.europa.eu/anti-trafficking/sites/antitrafficking/files/1933_international_convention_en_1.pdf>. Accessed at 11.10.2016 15h59.

²¹ Protocol Amending the International Agreement for the Suppression of the White Slave Traffic, and Amending the International Convention for the Suppression of the White Slave Traffic *UNTS* 30 (1949):23. Available at: <<https://treaties.un.org/doc/Publication/UNTS/Volume%2030/v30.pdf>>. Accessed at 11.10.2016 16h01.

²² Preamble to the Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery *UNTS* 266 (1956): 3. Available at: <<http://www.ohchr.org/EN/ProfessionalInterest/Pages/SupplementaryConventionAbolitionOfSlavery.aspx>>. Accessed at 11.10.2016 14h02.

²³ *Ibid* article 7(c).

Over a decade later, in 1979, states agreed that trafficking of women is a human rights violation. Trafficking was included in article 6 of CEDAW, which obliges state parties to take all appropriate measures, including legislation, to suppress all forms of traffic in women. Still further, in 1990, article 35 of the Convention on the Rights of the Child specifically obliged states to take all appropriate national, bilateral and multilateral measures to prevent the trafficking of children.²⁴ The following year in 2000 the Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography was adopted, which detailed states' obligations to prevent and protect against trafficking in children specifically.²⁵

In the same year the Protocol to Prevent, Suppress and Punish Trafficking in Persons Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime, was adopted.²⁶ This Convention aims specifically at the prevention of trafficking, particular in respect of women and children.²⁷ The Convention addresses the nuances that make trafficking a discrete form of slavery and recognising that the existing international instruments against slavery in general did not reflect the reality of this particular rights abuse. The Convention's definition of trafficking includes "the recruitment, transportation, transfer, harbouring or receipt of persons" not only by force, but also as a result of

deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation.²⁸

It is also very specific about states' obligations, which include the criminalisation of the participation in trafficking and the organisation or direction of others who commit this offence.²⁹

We can conclude that the increasing specification and detailed prohibition of certain types of human rights violation has occurred in international law. Therefore, we are at a moment where there is a need to develop specific and proportionate international law principles regarding the accountability of corporations and, specifically, MNCs. This is necessary because the harm permeates borders, allowing transnational companies to escape liability while retaining profits – and this is one of our greatest global crises.

2.3 BENEFITS FOR MULTINATIONAL CORPORATIONS

The response to this harm, which affects people in the Global South disproportionately, cannot simply be one of voluntarism and encouragement. We need to move towards a system that is

²⁴ Convention on the Rights of the Child *UNTS* 1577 (1990): 3. Available at: <<http://www.ohchr.org/en/professionalinterest/pages/crc.aspx>>. Accessed at 11.10.2016 16h04.

²⁵ Resolution A/RES/54/263 "Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography" adopted by the United Nations General Assembly. Available at <<http://www.refworld.org/docid/3ae6b38bc.html>>. Accessed at 11.10.2016 15h13.

²⁶ Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention Against Transnational Organized Crime *UNTS* 2237 (2003):319. ([hereinafter the Palermo Protocol]. Available at: <<https://treaties.un.org/doc/publication/mtdsg/volume%20ii/chapter%20xviii/xviii-12-a.en.pdf>>. Accessed at 11.10.2016 16h07.

²⁷ *Ibid* at article 2.

²⁸ *Ibid* at article 3(a).

²⁹ *Ibid* at article 5(2).

responsive to the power wielded by MNCs. At a minimum, we need to acknowledge that the focus of international human rights law is not on who is bound but on who is protected. As a result, at a minimum this process must consider the role of the following repositories of power in causing harm: (i) home states with corporations operating abroad (described by De Schutter as parent based extraterritorial obligations) (DE SCHUTTER, 2016, p.47);³⁰ (ii) host states which host the operations of MNCs; and (iii) MNCs operating outside the jurisdiction of their home state.

How the working group decides to approach the legal regulation of these repositories of power will be the substance of debate for the next several years. But the project of a binding instrument must address the power all three repositories of power that contribute to a lack of corporate accountability for human rights violations, particularly focusing on the role of powerful MNCs in exploiting governments of weak economies (MEYERSFELD, 2011, p.174).³¹

Apart from the need to address governance gaps and the consequent human rights violations, it is also important to note that a binding instrument has the potential to benefit corporations and other business entities that *do* comply with human rights standards; that *do* advance social and economic wellbeing in their business operations wherever they may be operating; and that *do* address violations when they occur with the rigour that justice requires.

Such corporations may be undermined and undercut by deviant corporations whose operations are cheaper and harmful. This is anti-competitive and places “good corporate citizens” at a disadvantage in the global marketplace. A binding instrument will create a level playing field where human rights compliant corporations are not at a competitive disadvantage. This is in contrast to the current status quo where the responsibility to respect may be abrogated unfairly by non-compliant MNCs, most often with no consequence..

3. THE CONTENT OF A PROPOSED BINDING INSTRUMENT

3.1 ALL RIGHTS SHOULD BE INCLUDED IN THE BINDING INSTRUMENT

Is a corporation's *raison d'être* to *advance* human rights or is its mandate a much narrower concept of *not violating* human rights? This is the question regarding the identity and function of MNCs: are they solely creatures of profit or do they have a social development mandate?

The profit and wealth generated by many MNCs, comes with significant political and governmental power. Is this power the equivalent of state power in practice and, if that is the case, should the power trigger state-like obligations? In reality, most modern day MNCs probably self-identify as a hybrid entity, working both as a profit-making entity, *and* also to developing communities affected by their operations (MEYERSFELD).³²

Bearing in mind this hybridity, what human rights should fall within the realm of a MNC's mandate and what rights should be included in a binding instrument? I propose that a binding instrument should not be limited to a closed list of rights. As is clear from the language in the GPs of

³⁰ DE SCHUTTER, Olivier, “Towards a New Treaty on Business and Human Rights,” *Business and Human Rights Journal* 1 (2016): 47.

³¹ MEYERSFELD, “Institutional Investment and the Protection of Human Rights, note 8 above, 174.

³² For a discussion of such undertakings in the mining sector, see MEYERSFELD, Bonita, “Empty Promises and the Myth of Mining: Does Mining Lead to Pro-Poor Development?” *Business and Human Rights Journal*, forthcoming.

“human rights abuses”, all rights should be included in the conceptualisation of duties or responsibilities of MNCs.³³ But this does not mean that all multinational and transnational corporations should be bound to fulfil all rights. It would be an impossible task to list all the possible rights for which different corporate entities could be responsible. One therefore needs a test that reasonably links the right in question to the corporation in question.

I propose a two-part test that echoes some of the principles under Pillar Two of the GPs. First, where a MNC causes a violation, or if a MNC benefits directly from a violation, irrespective of the right being violated, that corporation should be responsible for that violation. This is a retrospective and remedial test and mostly not contentious, echoing the “do no harm” principle in the GPs.³⁴ The second part of the test asks whether the operations of a MNC, operating in a particular industry, should *advance* human rights. If the operations of an MNC are likely to affect a particular set of rights, arguably the corporation will have a responsibility to ensure the protection and fulfilment of such rights. This is a prospective test and asks what rights a corporate entity may affect. Perhaps even more contentious, is the question whether the corporate responsibility / duty includes an obligation to *enhance* a set of rights. One argument is that this is the responsibility of a government and not corporate actors. However, corporations have a degree of power and resources that often exceed those of governments. It is therefore appropriate that the role of corporations in advancing human rights be consistent both with their power and with their impact.

In what circumstances, however, should a corporation be responsible for the advancement of human rights? There is precedent for this test in the South African Constitution, which has a Bill of Rights that binds the state *vis-a-vis* its citizens (vertical application), and that binds individuals, including juristic persons, *vis-a-vis* other persons (horizontal application).³⁵ The Bill of Rights “*binds a natural or a juristic person if, and to the extent that, it is applicable, taking into account the nature of the right and the nature of any duty imposed by the right.*” To determine whether a right is applicable to a juristic person, such as a corporation, one must ask two questions: (i) What is the nature of the right; and (ii) What is the nature of any duty imposed by that right. One does not ask: *who is responsible* for the right but rather: *what duty* does that right demand in order for it to be enjoyed. The entity able to affect that right is the entity with the power to affect its fulfilment. This analysis is appropriately silent about the agent responsible for the right; human rights are not about the agent responsible for their fulfilment but about the individual whose rights must be fulfilled.

3.2 THE NOTION OF POVERTY AS A GROSS HUMAN RIGHTS VIOLATIONS

Any instrument regulating cross border corporate conduct should not be limited to gross human rights violations. So-called “gross human rights violations” generally refer to extreme harm (such as torture, genocide or crimes against humanity), perpetrated by state actors in conflict situations. It is not often that corporations are proved to have links to such harms. The true, everyday

³³ Note 5 above, 3.

³⁴ *Ibid*, 13.

³⁵ Section 8(2) of the Constitution of the Republic of South Africa, 1996.

harm caused by corporate malfeasance is the exploitation or causation of the extremely dangerous, and at times lethal, structure of poverty (SOUBBOTINA with SHERAM, 2000, p.32).³⁶

Poverty *is* a gross human rights violation, sharing many of the constitutive elements of the category of "gross rights violation". Poverty is often dismissed as an economic structure and not a human rights violation. At the same time, common experiences of poverty are individually considered a human rights violation. For example, not having access to food is a human rights violation; not having access to water is a human rights violation; not having access to health or housing or justice – these are all human rights violations. If we put them together as a cumulative, this is called "poverty" but is seen as something that is the responsibility either poor governance or the choice of "lazy" and "deficient" poor people. Poverty is the collection of *all* the aforementioned rights, and many more. As such, it is a severe human rights violation and corporate entities should ensure that they neither exacerbate nor benefit from sustaining levels of poverty. Pogge explores this concept in the mining sector, noting that:

Even if there is nothing wrong with employing, on extremely ungenerous terms, someone who has other reasonable options, it may be seriously wrong to employ someone who, because of his religion or skin color, cannot find another job. By paying such a person half of what persons of different faith or color get paid... the corporation would be taking advantage of an injustice (POGGE, 2003, p.6-7).³⁷

The link between MNCs and the structural nature of poverty cannot be ignored. Of course government has a significant role in alleviating poverty (MUROMBO, 2013, p.31).³⁸ However, the role of government often eclipses the obligations of corporations; the obligations of MNCs therefore need to be emphasised.³⁹ In addition, the need for developing economies to attract foreign direct investment usually results in government conduct that may not be in the best interests of impoverished communities (MEYERSFELD, 2011, p.174).⁴⁰ Corporations often exploit the need for foreign investment and the consequent unequal power relations that ensue. A classic example of this is the accession of developing states to stabilisation clauses, which immunise the investing corporation from any changes in local laws that might have an economic impact on the project in question (SORELL, 2008, p.2).⁴¹ The government, therefore, is not always the supposed free agent, able to use corporate investment to break cycles of poverty. So while government agents are

³⁶ SOUBBOTINA, Tatyana P. with SHERAM, Katherine A., "Beyond Economic Growth Meeting the Challenges of Global Development" WBI Learning Resources Series. Available at: <http://www.worldbank.org/depweb/beyond/beyondco/beg_all.pdf>. Accessed at 11.10.2016 15h29.

³⁷ POGGE, Thomas W, "Severe Poverty as a Human Rights Violation," *UNESCO Poverty Project on Ethical and Human Rights Dimensions of Poverty: Towards a New Paradigm in the Fights against Poverty*, Philosophy Seminar at All Souls College - Oxford (March 2003). Available at: <http://portal.unesco.org/shs/en/files/4363/10980840881Pogge_29_August.pdf/Pogge+29+August.pdf>. Accessed at 11.10.2016 15h33.

³⁸ MUROMBO, Tumai, "Regulating Mining in South Africa and Zimbabwe: Communities, the Environment and Perpetual Exploitation" *Law, Environment and Development Journal* 9/1 (2013):31.

³⁹ See, for example, "Lonmin Annual Report and Accounts for the year ended 30 September 2012". Available at: <https://www.lonmin.com/annual_report_2012/introduction/events_at_marikana.html>. Accessed at 21.07.2016.

⁴⁰ Note 31 above.

⁴¹ SORELL, Tom, "Project Financing in Developing Countries, New Corporate Social Responsibility, Human Rights, and Multinational Corporations" (2008) 5 *Essex Human Rights Review* 5/1 (2008): 2.

absolutely part of the problem of failed development projects (HAMANN, 2004, p.278),⁴² the “blame game” should not eclipse the role of corporate actors.

A binding instrument must speak to the reality of poverty and the fact that almost all incidents of MNC-linked human rights abuses take place in impoverished contexts. A binding instrument must also be mindful of the fact that poverty itself is a human rights violation and construct reasonable obligations on corporations not to benefit from the cruelty linked to poverty, with a corresponding obligation on states not to allow such exploitation.

A binding instrument may address poverty in several ways. It should: (i) expressly denounce poverty as a “gross human rights violation” (although that term itself may be problematic); (ii) include practical provisions requiring corporations and states not to exploit contexts of poverty; (iii) provide for mechanisms to address the human rights violations caused by wages that do not constitute a living wage, irrespective of national minimum wage legislation;⁴³ and (iv) create obligations regarding post-operation activity that must leave affected communities in better socio-economic conditions than existed before the corporate activities began.

In order to understand the cycle of poverty and the way in which corporate conduct can meaningfully – and profitably – contribute to interrupting the cycle of poverty, one needs to be inclusive of the most marginalised and impoverished people. I therefore suggest that in-country consultations be held on the content, scope and nature of a binding instrument, especially with those adversely affected by transnational corporate activity.

3.3 A GENDERED APPROACH TO THE DRAFTING OF A BINDING INSTRUMENT

Gender refers to the norms and roles that are socially and culturally ascribed to people based on their sex. The impact of these ascribed roles and norms are differentiating and discriminatory: operations that appear facially neutral may have a negative and disproportionate impact on women.

To ameliorate this problem, I propose that the content and scope of a binding instrument should be developed from a gendered perspective. This does not mean that it must be written by or for women alone. Rather, it should not assume that there is one homogenous victim of human rights violations or that all human rights violations are experienced in the same way. Women – and other units within social structures – will experience human rights violations in the same way as – and in different ways from – men.

A gendered perspective would allow corporations and the authorities that regulate them to pry open layers of assumptions about human rights violations and how they are experienced, creating a basis for better, directed and proportionate corresponding obligations.

4. THE CONCEPTUALISATION AND IMPLEMENTATION OF A PROPOSED BINDING INSTRUMENT

⁴² See for example the analysis by HAMANN, Ralph, “Corporate Social Responsibility, Partnerships and Institutional Change: The Case of Mining Companies in South Africa” *Natural Resources Forum* 28 (2004):278.

⁴³ A living wage is understood as the minimum amount of money needed to maintain a standard of living. For a discussion of a living wage and what that standard is see ANKER, Richard, “Estimating a living wage: A methodological review” *International Labor Organization* (2011). Available at: <http://www.ilo.org/wcmsp5/groups/public/@ed_protect/@protrav/@travail/documents/publication/wcms_162117.pdf>. Accessed at 11.10.2016 11h53.

4.1 LANGUAGE: RESPONSIBILITY, DUTY AND CORPORATE SOCIAL RESPONSIBILITY

At the heart of the GPs is a distinction between the notion of “duty”, as applicable to states, and “responsibility”, as applicable to corporations. Quite apart from the distinction drawn in the GPs, the language of “responsibility”, particularly in the context of corporate social responsibility (CSR), in many ways acts as a vehicle that distorts and collapses two distinct issues, namely charity versus law. This conflation is erroneous for several reasons.

First, CSR (also known as corporate social investment or CSI) involves voluntary, selective projects, which are usually charitable in nature. These projects tend to focus on specific subject matters, such as the construction of schools, hospitals or contributions to another type of charitable project. This is distinct from compliance with international human rights law, which impose generic, wide ranging obligations to avoid violating any human right and, arguably, to advance human rights, especially where such is an explicit undertaking by corporations. International human rights law does not allow for the type of rights-selection that characterises CSR.

Second, CSR is voluntary and is not a principle of law. If we are serious about fundamental rights protection, then a “pick and choose” approach to specific charitable projects means that a corporation may simultaneously commit human rights violations by, for example, forced displacement, while undertaking a disproportionately small (and usually very public) charitable, once off project, such as building a school. While the latter is obviously welcome, a true contribution would be to build, staff and fund a school, in addition to ensuring that displacement does not violate other rights, such as the right to housing or access to water.

Therefore, there is often a disjuncture between the CSR statements of MNC and such corporations’ impact on human rights, especially in respect of socio-economic rights and local economic development. The result is that there is no way of monitoring compliance with the articulated CSR projects.

This is not to denounce completely CSR policies, which have become an important and growing practice by most corporations. However, it should not be conflated with compliance in general with human rights standards.

4.2 INTEGRATING HUMAN RIGHTS CONSIDERATIONS INTO THE ENTIRE CORPORATE STRUCTURE

Going beyond CSR demands the practical integration of all human rights standards into the entire structure of a MNC. Meaningful human rights compliance can only occur if the entire corporate structure, including subsidiaries, supply chains and franchises, are all subject to stringent human rights standards – implemented from the “top tables” of corporations, irrespective of a distinction between a corporation and its subsidiaries and irrespective of geography.

In practice this may mean appointing human rights specialists who have the same power and input into investment and project selection as actuaries, economists, risk specialists, commercial lawyers and, most importantly, key decisions makers.

But we still need to be specific about enhancing human rights compliance by articulating specific practices, to which I now turn. I cannot stress enough the importance of delineating clear and precise content to the methodology by which corporations should comply with human rights

standards. In order to understand practically what a corporation's obligations may entail, the question of prevention, mitigation and remediation should be approached in two parts.

First, how should a corporation ensure that its internal operations comply with international human rights law i.e. how it treats its employees, contractors and supply chains? Second, how should a corporation ensure that its operations externally comply with international human rights law, i.e. how it treats affected communities and sub-units within such communities, the health and wellbeing of those exposed to its operations, consumer protection, environmental considerations and other consequences of their corporate conduct?

In many ways, the internal considerations are clearly defined and conceptualised in the body of international labour law and relate, amongst others, to trade unionism, pay equity, wages, working conditions and child labour. In my view the more difficult challenge is to give specific content to, and consequences for non-accountability with, MNCs' external human rights obligations.

We have an excellent starting point in the GPs, including the due diligence process articulated under pillar two. The problem we continue to face, however, is testing the extent to, which (i) a corporation undertook a thorough investigation into how its operations may compromise human rights and (ii) if its due diligence reveals the potential for harm, whether this would result in a decision not to proceed with the project in question.

4.3 FREE PRIOR AND INFORMED CONSENT

We see this dilemma arise clearly in the framework of "free, prior and informed consent" or FPIC. In discussing FPIC, I will use the example of large-scale infrastructure development and consultation with affected communities (although it should be noted that the principles I articulate could – and should – be applicable irrespective of the industry, including food production and land grabs).

The concept of FPIC suffers from several flaws in implementation. These flaws include: (i) the timing of consultation; (ii) the methodology of consultation; and (iii) the objective of *consulting* versus *obtaining consent*, the latter suggesting that a community can refuse the project in question.

As regards the timing, community engagement may occur at different times throughout the lifespan of a corporate project. It is seldom, however, that such consultation takes place before there has been an institutional decision by the company that the project in question will be both lucrative and feasible. The company, therefore, has made an in-principle decision to proceed. It is rare that such a decision will change as a result of community consultation. So consultation takes place at a point on a timeline of a project where the most powerful players may have made a decision to progress – this is neither consultation nor the pursuit of consent.

As regards the methodology of consultation, there are three problems. It is unlikely that a company will honestly give the full gamut of information about the project to the affected communities. In addition, there is serious critique of the extent to which FPIC excludes "marginalised" sub-groups within a community (OWEN and KEMP, 2013, p. 30).⁴⁴ This is not a new concern, especially

⁴⁴ OWEN, John R. and KEMP, Deanna, "Social License and Mining: A Critical Perspective" *Resources Policy* 38 (2013): 30. The Centre for Applied Legal Studies has developed a set of standard practices of respect and interaction to guide lawyers engaging with, inter alia, mine affected communities, see the Centre for Applied Legal Studies (CALs), "Community

in respect of gendered considerations and the extent to which consultation with community leaders may or may not harness the full set of considerations that affected communities may have. Finally, delinquent corporations may take a “box-ticking” approach to consultation, taking a tokenism approach to such engagement. So the methodology used in FPIC is to have a superficial engagement with some representatives of affected communities, based on information given to affected groups that is selective and incomplete. Such information asymmetry makes it nigh impossible for a community to make an informed decision, even if such were to be taken seriously.

So how should a corporation address these deficiencies? If a MNC is serious about its commitment to social and economic development there is no justifiable reason why it should not facilitate legal representation on behalf of affected communities.

Most importantly, multinational corporations should take the views – and decisions – of the affected community seriously in its proposed operations. This is in keeping with corporate language of a “social license” to operate and ensures that decisions about development are made in partnership with affected communities; not before consulting with the affected communities.

A true commitment to, respect for, and collegial, professional engagement with, affected communities would be premised on a commitment to an equal relationship. It is only through an equal and equivalent bargaining relationship, which itself is preconditioned on symmetrical levels of knowledge and information, that meaningful bargaining can occur. Anything less is a form of exploitation and contestation, making the promise of partnering with local communities a myth and not reality.

5. CONCLUSION

The steps following the GPs, whether they be national action plans and/or a binding instrument, should be responsive to the discussed considerations. To be effective, actually respond to, and stop human rights violations, a binding instrument must specifically take into account the context of international law’s approach to corporate accountability; the proposed content of such an instrument; and the specificity of its implementation. And it must do so in haste. Human rights violations linked to corporate activity continue daily. The “be patient” mantra is no longer a justifiable reason to allow the structure of poverty to grind away, generating profits for some and causing severe human rights violations for others.

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