CLOSING THE GAP

Bridging the Conceptual Gap between Multinational Corporations and Human Rights

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Introduction

In the words of Sundhya Pahuja and Anna Saunders, the second half of the twentieth century staged a 'series of encounters between rival practices of world making, each of which travelled with rival accounts of international law'.[1] Anti-colonial disputes, the Cold War, the rise of developmental issues and the increasing popularity of neoliberalism are only some of the events that generated these competing views of the international legal order. These events brought different coalitions across the Global North and Global South, and different 'alliances of interest between 'public' and 'private' actors'.[2] At the heart of the system that emerged during this period lie two fundamental elements: the modern multinational corporation and human rights. How to conceptualize multinational corporations (MNCs) and how to define their relation to the law and the State was part of these rival stories.

In this dissertation I explore the co-emergence of multinational corporations and the consolidation of the discourse on human rights at the level of the United Nations throughout the second half of the twentieth century and analyze the resulting conceptual gap that created tensions in the international legal order. In particular, I will examine how this encounter, which became evident as calls for a New International Economic Order (NIEO) were being advanced within the UN, came to eventually produce the idea of 'Corporate Social Responsibility' (CSR). I will show that CSR emerged from the failure of the NIEO, particularly in relation to the roles and responsibilities of private actors in the global economy and how this can be traced to the limits of initiatives addressing the tensions between human rights claims and the interests of multinational corporations. This dissertation will provide its readers with a fruitful understanding of the crucial role that international law played in this development and further, what implications this had on the political and economic level.

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[1] Pahuja, Sundhya. Saunders, Anna. *Rival Worlds and the place of the Corporation in International Law* in Dann and Von Bernstorff *(eds). Decolonisation and the Battle for International Law* (OUP, 2018) p.1
[2] *Ibid.*

The first section of this dissertation critically examines the lack of direct use of human rights language in the UN literature focusing on MNCs and their role in world development from the 1960s to the 1970s. This will include an analysis of the report entitled 'Multinational Corporations in World Development'.[3] I demonstrate the emphasis and enthusiasm for multinational corporations that was displayed at the level of the United Nations and how from this standpoint, the concepts of the corporation and human rights were kept separate due to their respective supporters during the Cold War. I then focus on the attempts by the Organization for Economic Co-operation and Development (OECD), the International Labor Organization (ILO) and the 'Group of 77' (G77) to bridge this conceptual gap through the imposition of policies and initiatives, though without major success.

The second section of this dissertation critically analyzes the influence which the oil crisis and the rise of neoliberalism had on the shift of the global legal architecture, ultimately promoting the birth of the new developmental state. The dissertation focuses at this point on the new legal structures' attempt to merge the concepts of multinational corporations and human rights through the emergence of the third generation of human rights.[4] To do so, I will engage in theoretical approaches by legal scholars such as Samuel Moyn and Antonia Darder.

In the third section of this dissertation, I will investigate the concept of Corporate Social Responsibility (CSR) and analyze the extent of its application and limitations. CSR is a concept of international private business self-regulation that aims at merging human, socio-economic, and political rights into the world of the corporation. As a response to the concerns for human rights violations by corporate actors, CSR slowly came to the forefront of the global business scene to enable the continuation of the operation of multinational enterprises. In my analysis I demonstrate how CSR aspired to close a gap between human rights and corporate action in a way that would harmonize them through

[3] UN, *Multinational Corporations in World Development* ST-ECA/190
[4] Linarelli, John. Salomon, Margot. Sornarajah M. *The Misery of International Law*. (OUP, 2018) p.245

a multitude of soft law initiatives. This will lead me onto the question of whether direct regulations can apply to MNCs under international law and a discussion of the UN Global Compact which at the time was the world's largest and most far-reaching CSR initiative.[5] Finally, this dissertation will close with the most recent developments in the global legal order to tackle the conceptual gap between MNCs and human rights, namely through the United Nations Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises[6] and the development of the Guiding Principles.

Dawn of co-existence

The United Nations lies at the heart of the international regime with its normative, institutional and procedural human rights activities.[7] By adopting the Universal Declaration of Human Rights in 1948, the UN created a milestone document in the history of human rights. The Declaration has had an enormous influence on the world both in terms of 'spreading the philosophy of human rights, and in terms of inspiring legal texts and decisions'.[8] New states have used the Declaration as a basis for their constitutions while domestic and international courts have invoked the Declaration in their judgments.[9] As human rights law developed, the International Covenant on Economic, Social and Cultural Rights, followed by the International Covenant on Civil and Political Rights, were both drafted under the auspices of the United Nations, adopted in 1966 and entered into force in 1976. Together, these three instruments make up the 'International Bill of Human Rights'.[10]

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[5] Ruggie, John. *Just Business.* (W.W. Norton & Company, 2013) p.70
[6] United Nations Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises E/CN.4/Sub.2/2003/12/Rev.2
[7] Alston, Philip. Mégret, Frédéric. (eds) *The United Nations and Human Rights: A Critical Appraisal* (Second Edition, OUP, 2020) p.1
[8] Clapham, Andrew. *Human Rights: A Very Short Introduction* (OUP, 2007) p.42
[9] (n.8) p.108.
[10] *ibid .* p.109

Throughout the 1960s and 1970s, the world became a stage for global changes that altered the legal order. The end of colonialism dawned in the Global South. During the height of the Cold War, the West found itself facing the Soviet Bloc and its mission of 'exporting revolution'.[11] Leaders of nationalist resistance movements received military as well as financial aid from the Soviet Bloc which intensified anti-colonial mobilization for self-determination.[12]

Simultaneously, globalization was increasing rapidly, with multinational corporations emerging onto the global scene with heightened awareness of their existence as an entity with legal personality. As outlined by Sornarajah, their distinct bases of power allowed them to assert their interests through the law. With their economic resources often exceeding those of their host state, MNCs had the ability to sculpt and manipulate legal outcomes through arbitration processes concerning foreign investment protection. This was done by exerting lobbying pressure on a host state which might be reluctant or even unable to object to the activities of MNCs.[13]

The Report 'Multinational Corporations in World Development', drafted by the UN Secretariat's Department on Economic and Social Affairs in 1973, studies 'the role of multinational corporations and their impact on the process of development, especially that of developing countries [...] [and] international relations'.[14] From the outset, the Report identifies the emerging phenomenon of the MNC in international economic affairs and how its size and spread has multiplied, and identifies the wide array of its activities and its use of natural resources which 'rival traditional economic exchanges between nations'.[15] It is surprising therefore, that a Report from the Department on Economic and Social Affairs, does not contain the term 'human rights' once throughout the entire document.

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[11] Allina, Eric. *Imperialism and the Colonial Experience* in Paul A. Haslam, Jessica Schafer and Pierre Beaudet, *Introduction to International Development* (3rd Edition, OUP, 2017), pp. 24-42. p.39
[12] *Ibid.* p. 40
[13] Sornarajah M. *International Law on Foreign Investment* (CUP, 2010) p.5
[14] United Nations Department of Economic and Social Affairs, *Multinational Corporations in World Development*, 1973 ST-ECA/190 p.VI
[15] *ibid.* p.1

In the Report's introduction we see that the UN makes a clear distinction between the differing views of impacts MNCs have on host countries. While they 'are depicted in some quarters as key instruments to maximizing world welfare, [they] are seen in others as dangerous agents of imperialism'.[16] The fact that the United Nations recognized the potential neo-colonial nature of multinational corporations further highlights the need for guidance on human rights violations by MNCs. The Report's reluctance to engage in the area of human rights provides a first glimpse into the divergence of the concepts of multinational corporations and human rights.

An explanation for this obscure behavior by the UN can be formed when analyzing the previously mentioned Conventions, on Civil and Political Rights and on Economic, Social and Cultural Rights. This intentional reluctance by the United Nations was to avoid tensions between the respective supporters of both Conventions, the United States and the Soviet Union repectively. The US pushed for the development of civil and political rights, reflecting the protection of the freedom and liberties of individuals. Stemming from a Western philosophy, John Locke identified that in a 'state of nature' humans had 'natural rights' including the right to life, liberty and property. Similar ideas from French legal philosophers such as Rosseau, Montesquieu and Voltaire argued that such rights emerge from the inherent nature and virtue of man.[17] As stated by Joseph and Castan, 'natural rights theories were highly influential [...] particularly in the revolutionary fervor of the United States'.[18]The advancement of civil and political rights reflect the capitalist ideology of the United States as they conform to the libertarian nature of Western capitalist societies.[19]

The Soviet Union however pushed for the advancement of economic, social and cultural rights. These include the right to work, the right to an adequate standard of living and the

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[16] *ibid.*
[17] Joseph, Sarah. Castan, Melissa. *The International Covenant on Civil and Political Rights: Cases, Materials*. (3rd Edition, OUP, 2013) p.4
[18] *ibid.* p.5
[19] *ibid.*

right to physical health. Contrary to the civil and political rights, these rights were based on the idea of equality, one that is deeply rooted in the political ideology of socialism. As the US would not commit to a proposition that there is a right to social goods, the US has never ratified this Convention.[20] As I stated before, the Soviet Bloc promoted the right of self-determination by providing military and financial aid to indigenous political activists in their fight for independence, an idea enshrined in Article 1 of the Covenant which states that: **'**All peoples have the right to self-determination'.[21] For the Soviets 'national self-determination was an adjunct to revolutionary communism'.[22] They envisioned self-determination as the tool for the transition from dismantling a colonial empire and in turn establishing a socialist state.[23]

However, while the United Nations was reluctant to adhere to human rights in the framework of multinational corporations, other international institutions were motivated to develop this area. The OECD attempted to impose human rights on MNCs by adopting the *Guidelines for MNCs* (hereinafter 'OECD Guidelines') in 1976. [24] These were 'voluntary recommendations for business practices relating to human rights, disclosure of information, anti-corruption, labour relations, taxation, the environment and consumer protection'.[25] The intention of the Guidelines was to strengthen the international investment climate by improving the relationship and confidence between MNCs and their host countries. National Contact Points (NCPs) were created that bore the responsibilities of enforcing and promoting the Guidelines in host countries, any natural person could make a claim related to the violation of the Guidelines.[26] This aspect of the Guidelines

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[20] Alston, Philip. *U.S. Ratification of the Covenant on Economic, Social And Cultural Rights: The Need for an Entirely New Strategy*. The American Journal of International Law Vol.84, No.2 (CUP,1990) pp.365-393, p.4

[21] UN General Assembly, *International Covenant on Economic, Social and Cultural Rights*, 1966, Article 1

[22] Simpson, Gerry. *The Diffusion of Sovereignty: Self-Determination in the Post-Colonial Age* (Ashgate Publishing, 2000) p.266

[23] *Ibid.*

[24] Organisation for Economic Cooperation and Development, *OECD Guidelines for Multinational Enterprises*, 1976

[25] Carasco, Emily. Singh, Jang. *Towards Holding Transnational Corporations Responsible for Human Rights.* European Business Review Vol.22, No.4, (Emerald Publishing Group, 2010). p.4

[26] Cernic, Jernei. *Corporate Responsibility for Human Rights: A Critical Analysis of the OECD Guidelines for Multinational Enterprises* Hanse Law Review, Vol.4, No.1, (2008). p.16

provided a promising enforcing mechanism that was accessible to the public. Although the Guidelines were formally adopted by member states as a corporate responsibility instrument, they were subject to widespread criticism in the international legal order. As explained by Cernic, the Guidelines are ambiguous while the NCPs are limited in their influence on host states. Even though the Guidelines outlined the need to respect human rights, the obligations were not framed in mandatory terms.[27]. Since the Guidelines lacked legal basis, the OECD was unable to assert sanctions on corporations that were not complying with them As a result, critics of the Guidelines labeled them as weak and ineffective. However, it was the intention of the OECD to *guide* rather than to legislate, the reasoning being, as described by Sanchez, that voluntary versus legally binding standards are less of a dichotomy and more a continuum.[28] Although they were only voluntary, corporations would be under scrutiny and potentially harm their reputation if they violated the Guidelines.[29] Clearly, as the OECD relied on the assumption that corporations adopted them, the Guidelines were hardly successful in the international legal order.

The ILO attempted to bridge this gap a year later in 1977 when it adopted the *Tripartite Declaration of Principles Concerning MNCs and Social Policy.* These, like the Guidelines, attempted to 'encourage the positive contribution the MNEs can make to economic and social progress'.[30]. Article 8 emphasizes the respect for the Universal Declaration and the International Covenants. However, its voluntary and non-binding nature, as well as its weak monitoring process made this instrument as frail as the OECD Guidelines.[31]

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[27] *Ibid.* p. 12

[28] Sanchez, Juan Carlos Ochoa. "*The Roles and Powers of the OECD National Contact Points Regarding Complaints on an Alleged Breach of the OECD Guidelines for Multinational Enterprises by a Transnational Corporation.*" Nordic Journal of International Law (2015) Vol.84, No.1, pp: 89-126 p. 18

[29] Bolt, Cassidy. "*Leveraging Reputation in Implicit Regulation of MNEs: An Analysis of the OECD Guidelines for Multinational Enterprises' Capacity to Influence Corporate Behavior.*" Corporations and International Law, 20 Jan. 2018, Available at: sites.duke.edu/corporations/2018/01/20/leveraging-reputation-in-implicit-regulation-of-mnes-an-analysis-of-the-oecd-guidelines-for-multinational-enterprises-capacity-to-influence-corporate-behavior/#_ftn6.

[30] (n.26) p.5

[31] Cernic, Jernej. *Corporate Responsibility for Human Rights: Analyzing the ILO Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy*, Miskolc Journal of International Law, Vol.6, No.1, (2009) pp:24-34. p.33

The lack of responsibility and perseverance stemming from international organizations and their disappointing attempt at bridging the gap between multinational corporations and human rights forced national and regional change. On the one hand, developing nations began taking matters into their own hands. To portray unity and solidarity throughout the 'Third World' the G77 took a strong initiative. The coalition was formed in 1964 by 77 developing member countries with the primary intention of promoting its members' economic and humanitarian interests through cooperation at the level of the United Nations. In the late 1970s the Group expressed its concern at the 'imbalance of negotiating power between TNCs [transnational corporations] and their host countries and inability on the part of the latter to control the activities of the TNCs within their territories'.[32] Simultaneously, home countries wanted to ensure that their investments abroad would be protected, 'specifically from expropriation without a commitment to compensation based on international law'.[33] In accordance with the principles and concerns of the freshly adopted NIEO, developing countries raised the issue of the dominance of MNCs over natural resources and strongly urged the UN for a reaffirmation of their sovereignty over their resources. The NIEO was an attempt by Third World developing states, in the wake of decolonization, to deploy international law to achieve economic justice and improvements in the areas of development and socio-economic rights.[34] Pushed by the G77, the United Nations General Assembly (UNGA) member states devised a set of NIEO proposals in 1974 including (1) that developing states are entitled to control and regulate all activities of MNCs within their territory; and (2) that international trade must be based on equitable, stable and remunerative prices for raw materials.[35]

However, despite its impressive aims and careful compilation, the NIEO was not a success. It failed 'to displace the power and advantage held by influential states', it failed to alter international law which favoured the economic interests of capital-exporting states

[32] (n.25) p.3
[33] (n.25) p.3
[34] (n.13) p.22
[35] Declaration for the Establishment of a New International Economic Order UN General Assembly A/RES/S-6/3201, 1974

and, most importantly, it demonstrated the Third World's acceptance of the economic ideology of the capitalist mindset, inflating the value of foreign capital including the exploitation of local labour in developing countries.[36]

Consequently, the UN set up the United Nations Commission on Transnational Corporations which drafted a code of conduct for TNCs, one of the first formalized instruments drafted by the UN that set an obligation upon MNCs to respect human rights in host countries.[37] However while developing countries insisted on the idea of adopting an international instrument that was binding on MNCs, developed countries were not prepared to go beyond the voluntary sets of guidelines that were already in place.[38]

On the other hand, due to the ineffectiveness of the international institutions, some MNCs that sought to abide by human rights law attempted to create some provisions themselves. An example of this are the *Sullivan principles.* Leon Sullivan, former member of the General Motors' Board of Directors designed a set of principles including the elimination of discrimination based on race, and the concept of equality in the workplace, for MNCs to follow. The aim of the principles was that by engaging in human rights concepts like dignity and respect, MNCs could be a direct lever for the elimination of apartheid in South Africa. However, like the previously established soft law on obligations on multinational corporations, these principles were voluntary and unlike the OECD Guidelines which had the NCPs, there was no enforcement mechanism. The great majority of MNCs that adopted his principles did so with the sole motive of being able to continue to prosper in South Africa.[39]

In summary, throughout the 60s and 70s, there were attempts at a variety of levels to bring together the concepts of human rights and multinational corporations. Though it was largely absent on the level of the United Nations until the late 1970s there were a multitude

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[36] (n.4)
[37] (n.25) p.3
[38] Sagafi-nejad, Tagi. Dunning, John. *The UN and Transnational Corporations: From Code of Conduct to Global Compact* (Indiana University Press, 2008) p.94
[39] (n.25) p.4

of first steps by international institutions to bridge this gap. The NIEO was the first set of concrete economic principles that were prescribed in international law 'articulating a form of justice based not on domination of one people over another'.[40] It was a rejection of colonialism, representing an 'effort to assert the sovereign autonomy of the non-western world'.[41] It exemplified the importance of linking human rights and development, and the fundamental values of duties of international cooperation. However, there was still much to be done as the new decade of the 1980s saw a drastic restructuring of the global trade and investment system ultimately ending in massive international debt and a drastic increase in foreign direct investment.

A Change in the Global Legal Architecture

An accumulation of capital obtained by the main oil producing states in the Middle East led to the establishment of the Organization for Petroleum Exporting Countries (OPEC) Cartel in 1972. With the intention of creating a monopoly and obtaining major profits, the members of OPEC drastically raised the price of oil by approximately 400%. OPEC members kept the money in banks in the United States or Europe which developing countries regularly borrowed in the forms of aid and loans.[42] However, now banks were lending at higher interest rates to these countries as they were deemed less creditworthy than developed countries. As a result of sovereign debt and the surplus problem in the international banking system, developing states were forced to rely on foreign direct investment (FDI), as opposed to private borrowing. The very principle that developing states wanted to control with the establishment of the NIEO was now negated by Western states selling MNCs to the developing world as necessary for their survival.[43]

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[40] (n.13) p. 22
[41] (n.13) p.23
[42] Weiping, Wu. Hooshang, Amirahmadi. *Foreign Direct Investment in Developing Countries*. The Journal of Developing Areas, Vol.28, No.2 (1994), pp.167-190 p.177
[43] (n.13) p.100

Simultaneously to the effects of the oil crisis, the political ideology of neoliberalism emerged on the global scene. Conservative governments gained power in western countries, communism collapsed in the Eastern Europe seeing them move towards market economics and Latin America implemented stabilization policies to boost their economies.[44] This process saw neoliberalism became an enemy for structural equality, political inclusion, economic access and human rights.[45]

Prior to the implementation of neoliberal policies, the relationship between multinational corporations and their host state was formed through the conflict between the host country's national developmental interests as opposed to the corporation's global investment interests. The state being the more powerful actor, attempted 'to channel its private investments to serve its own developmental objectives'.[46] However, as argued by Michael Peters, neoliberalism provides 'a universalist foundation for an extreme form of economic rationalism'[47], which according to Paul Haslam, was a re-forming of the modern state rather than the perceived notion of the state 'unambiguously withering away'.[48] As a result, power shifted from host countries towards multinational corporations as the era was characterized by liberalization of foreign investment rules.[49] This can be verified by the United Nations World Investment Report of 2000 which showed that out of the 1035 changes made in national legislation regarding Foreign Direct Investment (FDI) from 1991 to 1999, only 5.9% were directed at restricting FDI.[50]

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[44] Campbell, John. Pederson, Ove. *The Rise of Neoliberalism and Institutional Analysis* (Princeton University Press, 2001) p.1
[45] Darder, Antonia. *Neoliberalism in the Academic Borderlands: An On-going Struggle for Equality and Human Rights*, Journal of the Educational Studies Association Vol.48, No.5, (2012) pp:412-426, p.2
[46] Haslam, Paul Alexander. (2007) *The Firm Rules: Multinational Corporations, Policy Space and Neoliberalism*, Third World Quarterly, Vol.28, No.6, 2007, pp:1167-1183, p.1
[47] (n.45)
[48] (n.46)
[49] (n.46) p.2
[50] United Nations Commission on Trade and Development, *World Investment Report 2000: Cross-border Mergers and Acquisitions and Development, Geneva.* United Nations, 2000, p.6

Now more than ever before, the existence and nature of human rights were jeopardized in the sphere of multinational corporations that were led by neoliberal politics. Yet when analyzing human rights and neoliberalism, the two concepts have a plethora of similarities that run counter to this assertion. Samuel Moyn states that human rights and neoliberalism share (1) a predecessor and (2) a target, namely the welfarist West and the post-colonial nation state seeking economic autarky respectively.[51] Both concepts emerged and were formalized in the West. As a target, developing countries need both economic (neoliberalism) and social (human rights) elements to establish economic control. Furthermore, the two concepts share key foundational building blocks. Firstly, the principle of prioritizing the individual 'whose freedoms matter more than the collectivist endeavours' and secondly, their shared antipathy of the state due to their rejection of its moral credentials.[52]

As described by Darder, neoliberalism is characterized by a rampant greed that subsumes any notions of equality and public responsibility.[53] At the heart of this lies the ultimate subversion of human rights.. When faced with the powers of global capitalism, human rights struggle to maintain themselves in the Third World. A prime example countering this thesis is the idea that human rights are a handmaiden to neoliberal policies. The argument follows that human rights are so tightly related to the role of a freely functioning market that there could be no socio-economic rights without extreme capitalism.[54] Unfortunately under this notion, human rights fall victim to being seen as dependent upon the capitalist order. An illusion was created that multinational corporations had become a concept that enhanced and promoted human rights in the developing World. What Wolfgang Streeck termed as 'non-market notions of social justice' became impossible to secure. Any attempt to place social commitments over

[51] Moyn, Samuel. *Powerless Companion: Human rights in the Age of Neoliberalism*. Law and Contemporary Problems, Vol.77, No.4, (2014), pp:147-170. p.11
[52] *Ibid.*
[53] (n.45) p.2
[54] (n.13) p. 247

economic ones were expelled leaving market pressures to form human obligations and be governed by the dictatorship of neoliberalism.[55]

The World Bank and the IMF, backed by the United States and other western states, became key in the project for liberalization, privatization, and market-friendly policies, known as the Washington Consensus. MNCs were given the protection they needed, be it proprietary or intellectual property rights in order for them to flourish. The interests of human rights on the other hand were not regarded. Though they were excelling and growing more than ever before, human rights had done so 'on a discrete track spearheaded internationally through the UN'.[56] Directed by developing states, human rights were intentionally dealt with by the United Nations while international economic law was being dealt with by the international institutions where they hold the balance of power.[57]

Simultaneously, the developing world saw the third generation of human rights emerge as a result of anti-colonialist movements throughout the post-Second World War era, where newly born independent nations voiced their concerns over having to repeat their colonial past and so demanded the world to acknowledge a new set rights. These included the right to self-determination, the right to a healthy environment and the right to participation in cultural heritage. These rights are reflected in Declarations and Conventions such as the Declaration on the Granting of Independence to Colonial Countries and Peoples of 1960, the Proclamation of Teheran of 1968 and the Stockholm Declaration of 1972.[58] What makes this generation of human rights exceptional however is that while they reflect neither the traditional individualistic approach of the first generation, nor the socialist tradition of the second generation, they simultaneously demand certain recognitions from the state while being able to be invoked against the state. Most importantly though, as articulated by Vasak, the third generation of human

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[55] *ibid.*
[56] (n.13) p.102
[57] (n.13) p.102
[58] Marks, Stephen. *Emerging Human Rights: a New Generation for the 1980s.* Rutgers Law Review. Vol.33, No.2, (1981) pp:435-453 p.7

rights ‘can be realized only through the concerted efforts of all the actors in the social scene: the individual, the State, public and private bodies and the international community’.[59] In other words, these rights belong to the community as a collective, rather than to an individual.[60]

Drafted in 1986 by the UNGA, the Declaration on the Right to Development [61] (DRD) calls for effective international cooperation towards development objectives through the enhancement of human rights and the distribution of benefits.[62] The DRD gained inspiration from the NIEO as it relied on providing equal national opportunity through measures of fair distribution of natural resources and income. Alongside neoliberal policies, the two contradicting concepts were forced to work in tandem. Foreign investment in the developing world could proceed under the neoliberal ideology, as long as it did not infringe the DRD. Interestingly, the right to development was coined by the former UN Independent Expert on the Right to Development, Arjun Sengupta, as ‘growth with equity’. Growth should not only focus on the economic aspect, but also emphasize human rights and the principles of justice. This focus on equity, would require a ‘a change in the structure of production and distribution in the economy to ensure growth was equitable’, including the required international cooperation and not having to rely on the market.[63] Though the United Nations are promoting and enhancing the development of human rights, they are disregarding the fact that their work should be focused more on the human rights aspects entailed in the market, rather than solving human rights issues outside of the market framework.

The development of human rights and the regulatory frameworks supporting multinational corporations attended very different interests. The new global legal architecture that was born as a result of the oil crisis and the rise of neoliberalism during the 1970s reorganized the relations between the Global South and the Global North. At this point in history,

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[59] (n.58) p.8
[60] Dickerson, Claire. *Human Rights: The Emerging Norm of Corporate Social Responsibility.* Tulane Law Review, Vol.76, No.5-6, (2002), pp:1431-1460 p.17
[61] UN General Assembly, The Right to Development Res/41/128
[62] (n.13) p.247
[63] (n.13) p.245

human rights and the regulation of corporations, with their distinctive genealogies, were forced to come together. The failure of this exercise could not be challenged until the late 1980s when the emergence of the third generation of human rights provided another opportunity for the merging of the two concepts. The outcomes of these new sets of discussions produced a more clearly defined relationship between human rights and multinational corporations which, although more sophisticated, was still unable to produce a satisfactory result.

Nevertheless, the right to development began to take root in the corporate world. For the sake of their reputations, corporations were forced to appreciate the power held by vulnerable individuals that could act together as a strong collective.[64] As stated by Claire Dickerson, multinationals became more aware of their relationship with human rights not only as regards to the individual but rather to the society as a collective.[65] These were the first formalized steps to the recognition of what came to be known as Corporate Social Responsibility (CSR).

The Heterodox Approach

What became apparent in the sphere of business and human rights were two situations, (1) that states were either unable or unwilling to implement human rights; and (2) that multinational corporations acting in such states were unprepared to deal with the risks of harming human rights through their activities. This was seen especially in the private extracting sector such as oil, gas and coal with using aggressive means to exploit remote areas and leaving large physical and social footprints. Local communities began resisting

[64] (n.60) p.31
[65] (n.60) p.27

the activities by the multinationals and the language of human rights became increasingly popular in challenging corporate norms.[66]

Some of the world's largest MNCs had become culprits of violating human rights standards, including Nike, Shell or Yahoo. Nike was guilty of child labour while Shell misused public funds to practice corruption and theft at all levels. [67] The effects were reflected in local communities that resorted to violence and criminal behaviour, significantly affecting the living conditions of these areas.

In the early 90s, some corporations began adopting measures to comply with responsible business conduct. CSR was a voluntary form of business self-regulation that attended the current societal goals. It involved the creation of monitoring schemes that regulated the workplace standards and policies of the global supply chains. However, what caused CSR to emerge, was not only the pressure exerted by nationals that felt their human rights had been impinged, but also the political ethos itself that had taken over the world. With its emphasis on privatization and deregulation, neoliberalism promoted CSR initiatives in order for corporations to gain self-control and rely less on direct government initiatives. Due to its voluntary nature, CSR was not conceived as a regulatory instrument but rather instead as a learning forum to promote strategies that enhanced socially responsible policies. This included the enhancement of human rights, environmental protection and anti-corruption efforts. [68]

CSR had progressed to the forefront of the global business scene by morphing out of corporate philanthropy.[69] Corporations began adopting voluntary schemes that not only adhered to social policy, but at times even went beyond the standard set by local requirements, which occasionally created conflict between the two. [70] Unilateral corporations produced company codes in the early 1990s with companies such as Gap

[66] (n.5) p.xxvi
[67] (n.5) p.4
[68] (n.5) p.xxvii
[69] (n.5) p.68
[70] (n.5) p.69

and Nike adopting theirs in 1992. This involved internal audit teams and ethics officers to be established, verifying that contractors were complying with their company's codes of conduct. Gradually, social audit teams emerged onto the global scene. As one of the most prominent, the Fair Labour Association (FLA) monitored the working conditions for some of the top athletic brands such as Nike, Puma and Patagonia. In the food industry, the label of Fair Trade emerged, ensuring for local farmers the social, economic and environmental standards they deserved.

Corporations adopted CSR measures mainly to improve their reputation. However, perhaps a greater incentive for corporations to adopt CSR measures lies in the financial risks posed by community pushback as a result of human rights violations. These pushbacks cause delays in design, operation, construction, siting, granting of permits etc. Further, they can create problems and relations with local labour markets, higher costs for financing, insurance and reduced output.[71] In a study of a large multinational company that wished to remain anonymous, Goldman Sachs found that it had accrued $6.5 billion in such costs over a two year period.[72] A great percentage of these costs could be related back to the staff time in managing conflicts that arise in communities as a result of human rights violations. In some instances between 50% and 80% of an assets manager's time can be devoted to these issues. Thus, it is clear that in this lose-lose situation, where MNCs violate human rights and thus incur losses, it makes sound corporate sense to adopt some sort of CSR measures to relieve them of this spiral.[73]

Despite the improvements and the clear step forward which the business world took in addressing human rights, CSR consisted of limitations and fragmentations that challenged its success. CSR was built on the underlying assumption that it is an effective mechanism for corporations to positively reconnect with the community they are based in. Thus, in practice, CSR operates under the presumption that society has granted

[71] (n.5) p.137
[72] (n.5) p.138
[73] (n.5) p.139

authority to corporations with naturally applying legal responsibilities.[74] In the year 2000 John Ruggie conducted research in the Fortune Global 500 and a wider range of corporations to assess the extent and success of voluntary initiatives promoting human rights. Staff monitoring schemes had evolved, demands by socially responsible investors had grown and large public sector funds all aided in this development. However, the research also proved that 'company based initiatives fell short as a stand-alone approach'.[75] Most companies still did not have the capabilities of managing human rights risks and instead were acting on a reactive based notion. Moreover, it was within the company's discretion to decide which human rights the company would address and furthermore how to define its measures. Thus, their voluntary nature could often be used as a camouflage to delay real reform.[76]

A logical response to such a broad limitation would be to impose direct obligations under international law upon MNCs. Though only states and international organizations have legal standing in international law, the general view on this contention is that it would be possible to impose obligations upon MNCs due to their major economic and political influence as explained earlier, and their capabilities of influencing the enjoyment of human rights.[77] However, as explained by Zerk, the challenge lies in 'developing jurisprudence which refines and makes precise the vague aspirational statements [...] in the CSR debate'.[78] However, as the law stands, the most promising and efficient method for applying obligations on multinational corporations remains to be the national courts. Yet the fact that claims must be raised as a tort-based litigation proving a violation of domestic tort principles rather than claiming a violation under international human rights casts doubt over this method.

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[74] Eslava, Luis. *Corporate Social Responsibility & Development: a Knot of Disempowerment.* Sortuz. Oñati Journal of Emergent Socio-legal Studies, Vol.2, No.2 (2008) pp.43-71 p.12
[75] (n.5) p.76
[76] Engle, Eric. *Corporate Social Responsibility (CSR): Market-Based Remedies for International Human Rights Violations?* Willamette Law Review Vol.40 No.103 (2004) p.7
[77] Zerk, Jennifer. *Multinationals and Corporate Social Responsibility.* (CUP, 2006) p.304
[78] *Ibid.*

An interesting exception to this is the US Alien Tort Statute of 1789. The tort states that district courts 'have original jurisdiction of any civil action by an alien for a tort only, committed in violations of the law of nations or a treaty of the United States'.[79] The original intention of the statute was to establish a civil remedy for violation of international law norms such as piracy, mistreatment of ambassadors and the violation of safe conducts.[80] This piece of legislation lay dormant until the 1980s when human rights lawyers discovered its potential for foreign plaintiffs to raise a claim for certain human rights abuses against an individual of any nationality, or a corporation as long as they had a presence in the United States. The question whether the Act could be enforced against a corporation was considered in 2012 in the U.S. Supreme Court case of *Kiobel.*[81] The court held that there was a presumption against extraterritoriality applying to claims under the Statute. There is therefore no application of the statute abroad unless it is explicitly stated in the international law which is the subject of the claim.[82]

As stated by John Ruggie in his advice to the Human Rights Council in 2007 'no single silver bullet can resolve the business and human rights challenge. A broad array of measures is required, by all relevant actors.'[83]

Ultimately, as a measure to seek guidance on the matter, this led to the UN Global Compact in 2000, the largest global CSR initiative.[84] The UN Global Compact was a strategic policy initiative posed by the former UN Secretary General Kofi Annan that aimed at improving corporate conditions in areas such as human rights, environmental protection and labour rights.[85] It was a prospective and hopeful initiative that was designed as a learning forum to develop, implement and disclose sustainability principles

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[79] 28 U.S.C. §1350
[80] (n.5) p.193
[81] *Kiobel v Royal Dutch Petroleum* 569 U.S. 108 (2012)
[82] *ibid.* Available here: https://webcache.googleusercontent.com/search?q=cache:DqBCZRsmUbEJ:https://www.supremecourt.gov/opinions/12pdf/10-1491_l6gn.pdf+&cd=3&hl=en&ct=clnk&gl=at p.14
[83] (n.5) p.77
[84] (n.5) p.70
[85] Meyer, William. Stefanova, Boyka. *Human Rights, the UN Global Compact, and Global Governance.* Cornell International Law Journal, Vol.34, No.3 (2001) pp:501-522. p.4

among corporate actors.[86] At its time, the Global Compact was the most far-reaching, non-governmental set of policies aimed at catalyzing the voluntary nature in the corporate citizenship movement.[87] Legal scholars such as Meyer and Stefanova felt the Global Compact could shape the relationship between MNCs and human rights through 'rewarding responsible TNCs [MNCs], while shaming at least some of the irresponsible TNCs [MNCs] into better promoting human rights'.[88] Their only concern about the extent of the success of the Global Compact lay, in the Global Compact's voluntary nature. Comparing it to the OECD Guidelines implemented 25 years earlier, an initiative like the Global Compact will only be successful if there is commitment to the initiative at all levels of the international system. Thus, the main task is to put a human face on globalization through the values and principles shared by the people, the corporation and the state.[89]

However, Aravalo and Fallon dispute this. Published in 2008, their Report uses the *Compact Quarterly and UNGC Annual Review* to critique the Global Compact's activities and practices throughout its eight years of existence. Published by local networks and the UN respectively, they evaluate new businesses adhering to the Global Compact, as well as Global Compact practices and responses. Aravalo and Fallon found that after evaluating the various progress reports, the Global Compact falls short of being a successful initiative.

According to the UNGC Annual Review, there are a multitude of gaps existing in the Global Compact framework. Research instruments for instance, under the principles of human rights and labour protection, have been deemed as inadequate as participants have failed to voice their concern over the protection of such rights within their corporation. The Global Compact has solely used online surveys to administer data, which smaller businesses are often unwilling or unable to provide. The methodology

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[86] (n.5) p.xxvii
[87] Arevalo, Jorge. Fallon, Francis. *Assessing Corporate Responsibility as a Contribution to Global Governance: The Case of the UN Global Compact.* Corporate Governance International Journal of Business in Society Vol.8, No.4 (2008) p.1
[88] (n.85) p.5
[89] (n.5) p.11

applied by the Global Compact was ambiguous and did not show the extent of the success of CSR initiatives.[90] Alavaro and Fallon argue that it would be highly beneficial for the Global Compact to re-think its methodology process of evaluating its success by introducing a chronological component into its future research models. [91] It would allow for a clearer comparison not only for participants of the Global Compact, but also for the comparison with non-Compact companies in the area of corporate responsibility.[92]

As a result of this poor research methodology, the Global Compact has difficulty assessing its direct influence on the broad and voluntary concept of CSR. There are key principles of CSR that fail to receive the attention they deserve in the scope of the work of the Global Compact. However, this is not to say that the Global Compact has been an outright failure. The Annual Review, though lacking any quantifiable data, has provided a wide array of case studies providing evidence for the practical influence of the Global Compact on participants. These include various programs in education and working relationships the Global Compact has encouraged and facilitated. It can undoubtedly be said therefore, that the Global Compact is making a difference, even if it is only in these cases.

Until shortly after the turn of the millennium, neither company codes nor multilateral initiatives such as Global Compact, successfully achieved the necessary, concrete obligations in regard to human rights and environmental protection demands. This was set to change with the arrival of the United Nations Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises (Norms). Drafted in 2003, the United Nations Sub-Commission on the Promotion and Protection of Human Rights attempted to merge the concepts of MNCs and human rights and transform these newly developed principles into hard law. The intention was to impose human rights obligations upon companies through the domestic legal systems of their host countries. The Norms clearly express that ‘states retain primary, overarching responsibility for human rights protection’ and that corporations are identified as ‘Duty-bearers’ based on that

[90] (n.87) p.5
[91] (n.87) p.3
[92] (n.87) p.5

expectation of following human rights principles.[93] The expectations expressed by the Norms are supported by enforcement mechanisms for their implementation which address the requirements that MNCs must adopt in terms of their internal practice. Furthermore, there are a multitude of rights that go beyond what is traditionally accepted as international human rights law. Examples include rights associated with consumer protection, the environment or corruption which are covered by different areas of the law.[94] However, the Norms failed to achieve promising results. Described as a 'train wreck' by John Ruggie, the Norms fell under heavy criticisms for a plethora of reasons.

Firstly, the Norms fall under heavy scrutiny for attempting to impose obligations upon corporations, while simultaneously imposing parallel obligations on the state. The intention was to address the fact that MNCs operate in a legal vacuum due to their status of acting as a multinational. To alleviate this issue, it was thought that binding MNCs to hard international law would be the best option. On the one hand, minimalists argue that binding multinational corporations to international law is not an appropriate method as this would go beyond the concept of soft law initiatives such as Global Compact. This argument is developed by stating that binding corporations to international law would 'privatise human rights'. The Norms would be placing obligations on an entity that was never democratically elected, nor eligible to make reasonable decisions in regard to human rights at the level of international law.[95] On the other hand, maximalists lobby for a judicial body solely focused on the practice of multinational corporations and argue that corporations should be bound by international law.[96]

Secondly, there was severe backlash against the Norms from states, corporations and businesses who argued that there was a lack of consultation from the Sub-Commission when drafting the Norms. However, this argument has since been disputed by institutions

[93] Kinley, David. Chambers, Rachael. "*The United Nations Human Rights Norms for Corporations: The Private Implications of Public International Law*" Human Rights Law Review Vol.6, No.3 (2006) pp:447-497; p.7
[94] *ibid.*
[95] (n.93)
[96] (n.93) p.6-7

such as the Corporate Europe Conservatory or the scholars Weissbrodt and Kruger.[97] In regard to the discontent presented by states, many argued that there was a lack of involvement on their behalf in the Norms' development. As stated by Kinely, Nolan and Zerial, it is of vital importance that in issues revolving around CSR and their wide variety of stakeholders, everyone's voice must be heard when protecting human rights.[98]

Thirdly, issues were raised regarding the language used by the Norms. Terms like 'sphere of influence'[99] and 'complicity' were deemed as vague and unclear.[100] It is agreed upon, even by supporters of the Norms, that such terms must be defined more definitively and where possible, draw definitions from more grounded areas of the law like criminal law, tort or contract law. This attitude towards the Norms from corporations shows the extent of their distrust and the scare factor used to attempt to dismantle the Norms.[101]

However, even though the Norms failed as a concept, it is argued by Kinley, Nolan and Zerial that 'the Norms have been a beneficial and fruitful initiative, reinvigorating debate on business and human rights'.[102] Previous to the imposition of the Norms, CSR had found itself in a position that was stagnant, focusing solely on codes of conduct that should be implemented by corporations using a bottom-up approach. The Norms altered the position of CSR to now provide a top-down approach and provided human rights activists with hope that human rights protection in regard to multinational corporations was now in the hands of the United Nations. However, the reactions to the Norms from the CSR community varied.

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[97] (n.93) p.5
[98] Kinley, David. Nolan, Justine. Zerial, Natalie. *The Politics of Corporate Social Responsibility: Reflections on the United Nations Human Rights Norms for Corporations* Company and Security Law Journal Vol.25, No.1 (2007) pp:30-42 p.6
[99] *Ibid.* p.8
[100] Buhmann, Karin. *Navigating from 'train wreck' to being 'welcomed': negotiation strategies and argumentative patterns in the development of the UN Framework.* Surya Deva and David Bilchitz (eds.) *Human Rights Obligations of Business: Beyond the Corporate Responsibility to Respect?*, (CUP, 2013) pp:29-57 p.11
[101] (n.98) p.8
[102] (n.98) p.2

CSR had been a newly emerging concept which was still unclear when fitted into the international legal order. It was still in its early years of development with highly broad-reaching initiatives in the fields of both soft and hard law. The playing field for CSR was simply too big for such an underdeveloped concept to handle. Further, it was attempted to implement CSR through domestic laws and quasi-legal initiatives raised to the level of international law. It is therefore often perceived that the implementation of the Norms were an attempt to remedy CSR by uniting these various aspects into one document at the level of the United Nations. The Norms conjoined national and international levels of CSR while maintaining that states continued to hold the primary responsibility of ensuring that businesses protect human rights.

The world was a 'deeply divided arena of discourse and contestation lacking shared knowledge, clear standards and boundaries; fragmentary and often weak governance systems concerning business and human rights in states and companies alike'.[103] A range of governments still expressed their demand for further attention to be given to the relationship between human rights and the practices of multinational corporations. Thus, the United Nations appointed a team led by John Ruggie to establish the *Guiding Principles.* Rather than establishing a new international framework as was previously attempted with the Norms, Ruggie was 'urged [...] to focus on identifying and promoting good practices and providing companies with tools to enable them to deal voluntarily with the complex cluster of business and human rights challenges'.[104] Ruggie moved away from the traditional 'mandatory approach' which involved the compliance of national laws in correspondence to a corporation's voluntary measures and practices, to a heterodox approach. This heterodox approach was devised to create an environment of mixed reinforcing policy measures that provided cumulative change and large-scale success. The Guiding Principles lay on three foundations: (1) the state duty to protect against human rights abuses; (2) the responsibility by corporations to respect human rights and the implied obligation of acting in due diligence; and (3) the need for greater access to remedies for victims.

[103] (n.5) p.xxxv
[104] (n.5) p.xx

However, there are two things that the Guiding Principles fail to accomplish. Firstly, to create binding international law and instead rely on normative contributions which further elaborate the implications of existing standards. Secondly, the Guiding Principles 'fail to ensure the right to an effective remedy and the need for States' measures to prevent abuses committed by their companies overseas'.[105] Amnesty International goes further by reiterating that aside from lacking accountability measures, the Guiding Principles should mandate a due diligence approach rather than only recommending it, as this would solve internal as well as extraterritorial accountability issues. Alongside Amnesty International, Human Rights Watch criticized the Guiding Principles for not adopting a global standard in corporate responsibility, and instead resort to a 'sliding scale' based on a corporation's size and geographic location.[106]

However, when compared to other governance regimes in the past and present, the Guiding Principles seem to be a robust framework. Although various human rights organizations and NGOs identify neglect of human rights in the framework of MNCs, the Guiding Principles reiterate business as an instrument to contribute to societal welfare.[107] Thus, it acts as a basis for the empowerment of society and a benchmark to judge practices and conduct of corporations and governments.[108]

Conclusion

The discourse of the co-emergence of multinational corporations and human rights certainly took the world by storm. The ever-growing globalization of the multinational corporation and the evolution of the concept of human rights were born attending different

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[105] Blitt, Robert C. "*Beyond Ruggie's Guiding Principles on Business and Human Rights: Charting an Embracive Approach to Corporate Human Rights Compliance*." Texas International Law Journal, Vol.48, No.1 (2012) p.33-62. p.22

[106] *Ibid.* p.53

[107] Addo, Michael. *The Reality of the United Nations Guiding Principles on Business and Human Rights.* Human Rights Law Review Vol.14, No.1 (2014) pp:133-147 p.15

[108] (n.5) p.xliv

aims in the global legal order. Their greatest challenge however was not necessarily their harmonization and co-existence, but more importantly co-existing under the intentional gap that was created through the world's largest and most influential actor, the United Nations.

This was clearly visible in the 1960s and 1970s. Throughout the various Reports and Declarations that were passed through the international institution, the two concepts were kept separate. While the United Nations was enthusiastic for the growth of both MNCs and human rights, it intentionally avoided discussing the harmonization of both concepts. Due to the underlying pressures imposed on the United Nations by the tensions from the Cold War, the UN was left in a legal vacuum unable to merge the two distinctive genealogies. The global international legal order was unaware of the extent of the importance of such a gap being eradicated before adopting a resolution as complex as the NIEO. Thus, from this point onwards, the NIEO was therefore already bound to be unsuccessful. Not only had international law not developed enough to impose such obligations upon MNCs, the corporations themselves were not aware of the ramifications and necessity for abiding human rights obligations as I showed in the third section of this dissertation. Enthusiasm for further initiatives such as the push by the G77 or the United Nations Commission on Transnational Corporations was only short lived. The events of the 1980s greatly disrupted the already turbulent environment of the global international legal order creating a greater gap between the concepts of multinational corporations and human rights.

The 1980s became a stage which saw a great change in the global legal structure. The NIEO was an already broken concept from the outset as the conceptual gap had already created a disparity in the relationship between MNCs and human rights. This meant that although they were not aware of it at the time, the Global South could not rely on the imposition of the NIEO. Fostering the Western neoliberal policies, the conceptual gap between MNCs and human rights was now well established. For human rights to become a globally instructed concept, MNCs are a useful tool to spread, promote and enhance human rights across the globe. This of course is under the condition that the MNC does

not violate human rights. From the other perspective MNCs rely on human rights in terms of their societal and financial risks. It becomes clear that when this is not realized by the proponents of both concepts, it can lead to major discrepancies and disparities as was proven in the Global South during this period. If there had not been this conceptual gap, and instead there had been a clear and devised relationship between MNCs and human rights, the effects of the oil crisis and neoliberalism would not have left the detrimental mark in developing countries that they did, potentially allowing the NIEO to prevail. However, the ongoing persistence of developing countries and their call for the third generation of human rights to gain prominence forced MNCs to catch up with their relationship to human rights. What emerged, were essentially the first initiatives and practices of CSR.

CSR was heavily affected by the fact that it relied on the voluntary nature of businesses to adhere to as well as practice CSR. Even though corporations had an incentive to adopt CSR measures, weak monitoring systems allowed violations to still occur on a grand scale. The issue was that the multinational corporation as a concept was still unclear and lacked definition and that tying MNCs down with hard international law was not possible due to the diversity of MNCs. CSR allowed for too large a divergence from the issue at hand and required to approach human rights at a different angle. This was the key reason for the partial success of the Guiding Principles. Ruggie's unconventional, heterodox approach provided clarity and distinct concepts that individuals, business and states could adhere to. Although the conceptual gap has still not vanished, the UN has after an array of various attempts, managed to narrow the gap that it had created almost sixty years ago by continuously forcing society to rethink and redefine the relationship.

What exactly lies in the future is uncertain and impossible to foresee. It can be said with great certainty however, that if initiatives such as Global Compact or the Guiding Principles are enhanced and given more attention, the world will be faced with a much clearer and concise relationship between multinational corporations and human rights. Focusing on monitoring mechanisms, methodological research and greater transparency

and accountability among all actors involved will undoubtedly seal the conceptual gap that has caused the international legal order to experience such unsettling times.

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