

## **Multi-National Corporations and their Human Rights Obligations –A Legal Assessment of Ruggie Principles and other the UN Initiatives**

Muhandiram, N.S. L.

*Lecturer, The Open University of Sri Lanka*

[lmniroshika@gmail.com](mailto:lmniroshika@gmail.com)

### **Abstract**

Failure of creating a direct human rights obligation for the conduct of Multi-National Corporation is one of the pressing global issues of the 21<sup>st</sup> century. It has further intensified the influential role of MNCs across the globe. Although regulation of private entities has been recognized concerning war crimes, crimes against humanity, and forced labor but, there is no legal obligation for private entities to be accountable for human rights violations that they are involved in. Nonetheless, under the auspicious of United Nations Organizations few initiatives have been taken to regulate the activities of MNCs concerning their effects on human rights. The Code of Conduct for Transnational Corporations, the UN Global Compact, Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights and Guiding Principles of Business and Human Rights (hereinafter Ruggie Principles) are significant in this regard. However, neither any such standards nor the Guiding Principles which is considered as the most authoritative statement of human rights duties of MNCs identify or emphasize direct human rights obligations of MNCs. They merely impose the indirect obligation of MNCs to respect, protect, and remedy human rights. Hence, the purpose of this paper is to assess the legal effects of the obligations created by these UN initiatives focusing more on Guiding Principles. This is normative research based on international legal instruments on human rights. The paper will argue that imposing due diligence on MNCs as a standard of conduct does not maintain a legal duty but, rather help to escape their responsibility. In conclusion, the paper will suggest to have a legally binding framework to regulate MNCs to protect, respect and remedy human rights for direct human rights obligation.

**Keywords:** Human Rights, Direct Obligation, Indirect Obligation, Ruggie Principles, Due Diligence

### **INTRODUCTION**

Failure for creating a direct human rights obligation for the conduct of private entities is one of the pressing global issues of the 21<sup>st</sup> century. Although private entities are accountable for war crimes, crimes against humanity and forced labor there is no legal obligation for private entities to be accountable for human rights violation that they are involved in. However, with the change of global affairs, Multi-National Corporation (hereinafter MNCs) play an influential role among other private entities across the world. Apart from influencing in almost all the sphere of modern life, from policy-making of the national State to maintaining international security are carried out with the involvement of MNCs(Ghani 2015,p.63). The bargaining power and political power of MNCs in the globalized world are claimed to be superior to many States (Ghani 2015,p 63; Markiewicz 2017 p 65). For

instance in 2015, with the world's top 100 economic entities 69 are MNCs, and only the rest consist of States (World Bank 2017). The value of the top 10 MNCs is less than the value of 180 countries. On the other hand, landmark incidents across the world concerning the misconduct of MNCs as forced labor utilized by big oil companies in Burma, soil and water sources contamination by oil companies in Ecuador, human rights violations of indigenous people happened due to mining companies in Guatemala, Bhopal gas tragedy in India and labor rights violation by Coca Cola Company in Colombia have generated the need of establishing a standard of minimizing negative effects on human rights.

Nevertheless, the protection of human rights is primarily a duty of the State (Schutter 2010). Even as per the social contract theory, the people transfer certain rights to the State in order to obtain security and protection for their human rights. (Hobbes, 1651) The State has the primary duty to regulate the conduct of individuals and actors of the government. Individuals include natural persons as well as the legal persons. Since MNC can be identified as a legal person State has a duty to regulate the conduct of MNCs. Human rights bodies and Regional human rights bodies have frequently affirmed that individual rights are protected by the State not only against the government agents but also against the private entities.<sup>4</sup> This regulatory power of the State does not limit to the territorial jurisdiction but, if the conduct of non-state actors leads to human rights violation of another State subsequently, the obligation extends to preventing that also. The Committee on Economic, Social and Cultural Rights has accepted the State's duty of preventing violations of human rights by corporations in aboard without diminishing the obligation of the host State under the Covenant. (ESCR Committee Report, 2011) Maastricht Principles on Extra-Territorial Obligations of States of 2011, clarify the home State's duty to abstain MNCs from violating the economic, social and cultural rights of the people of the host State. Hence, the gradual acceptance of the extraterritorial obligation of States intensifies the need of direct and indirect obligation of MNCs to respect, protect and remedy human rights. The direct obligation of MNCs on human rights means MNCs are directly obliged to respect, protect and remedy human rights without acting through States. However, minimum expertise and less bargaining power of developing and least developed countries have excluded MNCs from governmental scrutiny (Ratner 2001).

Contemporarily, there is no binding obligation for MNCs to protect, respect or remedy human rights. Under the auspicious of United Nations Organizations (hereinafter the UN) several initiatives have been taken to formulate several standards to regulate the activities of MNCs concerning their effects

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<sup>4</sup>This was exemplified in cases as *Young, James and Webster v. the United Kingdom* (ECtHR) judgment of 13 August 1981, Series A, No. 44, para. 49, or *X and Y v. the Netherlands*, judgment of 26 March 1985, Series A, No. 91, para. 27 ; 9(IACHR) *Velásquez-Rodríguez v. Honduras* (Merits), Judgment of 29 July 1988, Series C No. 4, para. 172

on human rights. Some initiatives have attempted to create an obligation through States that of indirect obligation and some have attempted to develop a direct obligation. Among those attempts, 'Guiding Principles of Business and Human Rights' (hereinafter as Ruggie Principles) is known as the most authoritative statement of human rights duties of States and MNCs adopted at the UN level. (Schutter, 2014) Hence, the purpose of this study is to assess the legal effects of the obligations created by these UN initiatives focusing more on Guiding Principles. Also, the paper seeks to find out possible avenues that can be explored to solve the issue of human rights obligations of MNCs. The paper first discusses the meaning of MNCs and their historical evolution in global affairs.

### **WHAT IS MEANT BY MNC?**

Multi-National Corporations means any corporation that has its management headquarters in one country and operates in several other countries. (International labour office, 2014) It is advantageous for a company to become a MNC in several ways like ability to increase market share in overseas, accessibility of cheap labor, land and other resources, non-applicability of tax and other trade barriers. Historically, MNCs were closely coupled with the colonialism to exploit the natural resources, especially in Asia and Africa. British India Trading Company is the first MNC in global phase founded in 1600 to exploit human and natural resources (Ghani 2015). MNCs were used to expand the dominion authority. Even after the dissolution of colonial world order economic and political effects of corporate exploitation are still continuing today through different ways. Klaus A. Sahlgren identifies MNCs as 'poisonous flowers on the dung heap of a dying capitalism'. However, the role of MNC in the globalized world cannot be undermined and what requires is proper regulation of their activities.

Regulating MNCs have become challenging since there is no conformity of imposing them direct obligation or indirect obligation on human rights concerns. Some scholars are of the view that imposing a direct obligation on MNC for human rights violation may diminish the sovereign regulatory power of the State. (Zenkiewicz 2016; Arnold 2016). Furthermore, as the US court has decided in *Kiobel v Royal Dutch Petroleum* case, no corporation has ever been subjected to any form of liability under the customary international law. They believe that it may switch the attention from State to MNCs that of private entities and it may dilute the State authority (Vhunquez 2005). On the other hand, some argue against the indirect obligations that corrupt governments and lax regulations are barriers for making MNCs accountable for their abuses of human rights (Zenkiewicz 2016). As Ratner suggests, if it can be identified the rights and duties of corporations in some areas there is no notional bar to recognize broad duties of corporations in the field of human rights. However, with no effective mechanism to regulate MNCs, implementation can be expected only from a stable and regulated society which is Utopian.

## **THE UN AND MNCS**

With the headship of the UN, several initiatives have been taken to address the tension on human rights obligations by regulating the conduct of MNCs. Proposal on the code of conduct for Transnational Corporations, Global Compact, Norms on Responsibilities of Transnational Corporations and Other Business Enterprises with regard to Human Rights and Ruggie Principles are significant in this regard. The following section explores them in detail.

### **Code of Conduct for Transnational Corporations**

In 1974, as a multilateral approach, the UN acknowledged the need of introducing a code of conduct for the transnational corporations in the programme of action on Establishment of New International Economic Order in the General Assembly. Further, with the recommendation of the group of persons who appointed to study the impact of MNCs the Economic and Social Council (Hereinafter as ECOSOC) established the Commission on Transnational Corporations as an advisory body to the Council to assist it in dealing with drafting a Code of Conduct of MNCs. (ECOSOC Resolution 1913, 1974) Although it purposed *inter-alia*, to introduce an effective, comprehensive and universally accepted code of conduct allowing developmental objectives of developing countries the efforts were never become successful due to contradictory views of developing and developed countries (Sauvant 2015).

### **The UN Global Compact**

The UN Global Compact is another initiative announced by the World Economic Forum in 1999. It is a framework which the businesses are expected to align their activities with universally proclaimed human rights in the area of labor, environment and anti-corruption. The two principles that the Global Compact mainly identified on human rights are, business should support and respect the protection of universal rights and business should make sure that there is not complicity of human rights abuses. Governments, companies, business associations, and civil organizations are expected to integrate these principles. Participation of more than 8700 corporate bodies from 130 countries confirms the significance of a mechanism which addresses the human rights obligation of MNCs. However, these principles are criticized for being too general thus, practically, members do not comply with their minimum participation, that of sending communications on progress and communication on engagement. Professor Deva alleges that MNCs become parties to this initiative to reap the social reputation and public reliance (Deva 2004). This symbolic conformity doesn't incorporate any substantial change or impose any direct obligation on human rights to the operation of such entity.

## **Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights**

In 2003, the UN Sub Commission on Promotion and Protection of Human Rights approved landmark instrument called “Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights” drafted by the Working Group on the Working Methods and Activities of Transnational Corporations. This initiative recognized the obligation of companies not to contribute directly or indirectly to human rights abuses, not to benefit from human rights abuses, refrain from discouraging efforts of promoting human rights and assess human rights impact. Notably, the Norms intended to make responsible parties to liable for reparations, restitution, compensation and rehabilitation. Some scholars viewed this text as a groundbreaking initiative to make MNCs accountable for human rights violations (Deva 2004; Zenkiewicz 2016) Nonetheless, the Human Rights Commission observed the Norms as mere ‘useful elements and ideas’ that did not have any legal standing (Miretski and Bachmann 2012). Subsequently the Norms were abandoned and the task of regulating the MNCs was shifted to other UN organs.

### **RUGGIE PRINCIPLES**

In 2004, the Human Rights Commission recommended the ECOSOC to request the office of the United Nations High Commissioner for Human Rights (hereinafter UNHRC) to compile a report setting out the scope and legal status of existing initiatives and standards relating to the responsibility of transnational corporations and related business enterprises with regard to human rights.(ECOSOC Decision 2004/116) Significantly, the report identified that there are gaps in understanding the nature and scope of the human rights responsibilities of business. Appointing Professor John Ruggie as the UN Special Representative on Business and Human Right, the Secretary-General mandated him to deal with this issue.

His work can be identified in three stages. Firstly, he came up with the Report on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises to identify and clarify the existing standards regarding corporate responsibility and accountability for a corporate act on human rights.<sup>5</sup> Secondly, his mandate was extended to make recommendations and in 2008 he submitted, the report titled "Protect, Respect and Remedy: A Framework for Business and Human Rights" to the council. Remarkably, it recognizes three core principles; the State’s duty to protect human rights against the abuses by third parties, corporate responsibility to respect human rights, and access by

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<sup>5</sup> He drafted the "Report on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, John Ruggie, Business and Human Rights: Mapping International Standards of Responsibility and Accountability for Corporate Acts", *Human Rights Council, A/HRC/4/035*, 9 February 2007

victims to an effective remedy. The Council unanimously adopted his recommendation. Subsequently, he was mandated to operationalize the framework and in 2011 he submitted the report on "Guiding Principles on Business and Human Rights: Implementing the United Nations' Protect, Respect and Remedy Framework."

In 2011, the UNCHR has announced the Guiding Principles as "...an unprecedented step.." for the first time a global standard for preventing and addressing the risk of adverse impact on human rights linked to business activity". The Principles have been integrated into the OECD Guidelines for Multinational Enterprises as non-binding principles and standards for responsible business conduct in a global context. Moreover, European Commission has adopted a National Action Plan for the Implementation of the Guiding Principles but, so far only eight countries (the United Kingdom, The Netherlands, Italy, Denmark, Finland, Litany, Sweden and France) have adopted this.

### **State's duty to Protect Human Rights**

The first set of principles mainly identifies the State as the base for protecting human rights. It is a fundamental notion of international human rights law. In other words, it creates an indirect obligation for MNCs. When implementing the State's duty to protect human rights against the abuse by the third party it requires States to take appropriate steps to prevent, investigate, punish and redress such abuse through effective policies, legislation, regulations and adjudication.(Principle 01) The State has a duty to regulate the extraterritorial activities of business domiciled in their territory.

However, enforcing law against private entities, assessing the adequacy of such law periodically, not to create any constraints by corporate law and providing effective guidance for private enterprises as referred in the General Principles requires more resources and expertise which the developing States are lagging behind from realizing. On the other hand linking scrutiny and oversight of human rights with responsible State agencies relating to business such as export credit agencies and official investment insurance or guarantee agencies theoretically make sound but, practically this requires effective initiatives and reforms within the agencies to make them more credible and productive in terms of human rights obligations as their original mandate is not to protect human rights.

With respect to Bilateral Investment Treaties (BIT) and other investment treaties mere acceptance of reserving State regulatory power on human rights is not adequate to reconcile the balance between host State and MNCs. Investor- state dispute settlement mechanism is more prone to protect the interest of the investors hence, if the human rights obligations are not precisely mentioned in the BITs it would be difficult to protect human rights against the investors' rights.

Further, General Principles states that when States deal with business-related issues with multilateral institutions human rights law obligations should neither restrain nor hinder the duty to protect human rights. But when multilateral institutions themselves have not taken human rights concerns into their mandate it will be impractical for member states to bring up human rights concerns. Moreover, even States are allowed to make reservations to the international core conventions. Hence, it raises a legitimate question as to how a State can regulate human rights obligations of private entities when the State itself has made reservations to international human rights instruments.

Therefore, for the implementation of State's duty to protect human rights against the abuse by the third party requires subject expertise and more resources to make the State agencies more accountable business to empower them in this regard. Relating to BITs, regulatory power of the host State should be precisely mentioned the categories of human rights that the BIT purposes to protect ie, environment, public health or etc.<sup>6</sup> Further, in order to accomplish the State's duty, first multilateral institutional should integrate human rights obligations into their mandate irrespective of the area they employ on. On the other hand, if the State and business community have to bear the cost of implementation mere inspirational kind of Guiding Principles will not start implementing across the world alike.

### **Corporate Responsibility**

The second principle is the corporate responsibility to respect human rights. It accepts the voluntary obligation of private entities separating from States to avoid infringements while complying with national law and regulations on protecting human rights. Importantly, responsibility lies regardless of their size, sector, operational context, ownership and structure that facilitate in creating universal corporate social responsibility in future. The General Principles presents human rights due diligence which include assessing actual and potential human rights impacts, integrating and acting upon the findings, tracking responses, and communicating how impacts are addressed. Significantly, General Principles recognizes respect of human rights at the minimum as those expressed in the International Bill of Human Rights and the principles concerning fundamental rights set out in the International Labour Organization's Declaration on Fundamental Principles and Rights at Work. This again creates a valid question about the availability of reservation on those instruments for the MNCs.

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<sup>6</sup> Also Patrick Dumberry views that since the majority of the countries have ratified *Universal Declaration of Human Rights* (1948), *United Nations International Covenant on Civil and Political Rights* (1966), *ILO Declaration on Fundamental Principles and Rights at Work* (1998), *United Nations Convention Against Corruption* (2003), and the *Rio Declaration on Environment and Development* (1992) it would be easy to convince the countries for incorporating these instruments in BITs :How to Incorporate Human Rights Obligations in Bilateral Investment Treaties? <<https://www.iisd.org/itn/2013/03/22/how-to-incorporate-human-rights-obligations-in-bilateral-investment-treaties/>>

But in reality, this principle requires more groundwork to be done to incentivize private entities to comply with this principle. The integration of human rights should not be limited to its reputational or moral sense but also in a legal sense. Furthermore, responsibility may differ with the size and sector and severity of the operation should be determined based on them. For instance, effect of fragile sectors like mining would be different from a local firm operating within a country (Zenkiewicz 2016). Also, to prevent and mitigate adverse human rights impact, business enterprises should integrate the findings from their impact assessments across relevant internal functions and processes. Integration is a comprehensive process which needs to be considered internal decision-making, budget allocations and oversight processes. Hence, though it seems that direct obligation on human rights has been imposed on MNCs in reality it is not.

### **Access to Remedy**

The third principle is access to remedy which provides that States must take appropriate steps to ensure access to effective remedy through judicial, administrative, legislative or other appropriate means. Remedy may include apologies, restitution, rehabilitation, financial or non-financial compensation and punitive sanctions as well as the prevention of harm through, for example, injunctions or guarantees of non-repetition. It can process through State-based or non-State-based, judicial or non-judicial process which grievances concerning business-related human rights abuse can be raised and remedy can be sought. Not only from the side of the State, should industries, multi-stakeholders and other private entities also ensure the implementation of effective grievances mechanism.

This principle also requires raising awareness or facilitating the access to the public from the grass root level. Ostensibly, operational level grievance mechanisms confirm the accountability of private entities. However, with whom such mechanism consists of has not been described and it has to respect the notion of natural justice.

Notably, General Principles are known as soft law, which doesn't create any binding obligation for both State and MNCs (Annan 2015). Instead it represents an essential practice and a framework for MNCs to follow in their activities (Markiewicz 2017). While appreciating Ruggie's work in terms of human rights concerns, it can be challenged based on the fact that it has not seriously taken the reality of bargaining power and political power of MNCs and on the other hand the capacity of the State. It is said that Prof. Ruggie was main architect of the Global Compact and his work as Special



Rapporteur has pursued the ultraliberal ideological orientations and practices of the said creature. (Teitelbaum 2011)

### **WHAT IS NEXT?**

Aftermath of Ruggie's work, Government of Ecuador, the African Group, the Arab Group, Pakistan, Sri Lanka, Kyrgyzstan, Cuba, Nicaragua, Bolivia, Venezuela and Peru made a statement in 2013 emphasizing the necessity of legally binding framework to regulate MNCs which renders the justice and remedy for the victims. Civil societies also issued a joint statement calling a legally binding instrument. A legal binding treaty could eradicate challenges in Ruggie's work and also provide considerable equal status for States disregarding their bargaining power.

Consequently, On 26 June 2014, the Human Rights Council adopted a resolution establishing an Open-Ended Intergovernmental Working Group on Transnational Corporations and other Enterprises (hereinafter as IWG) to elaborate of an international legally binding instrument on transnational corporations and other business enterprises with respect to human rights. The resolution was passed by the fierce opposition of US and EU<sup>7</sup> but with affirmative votes of 20 members of HRC.<sup>8</sup> The Draft Report and the conclusions of the IWG was submitted to the UNHRC in March 2018. This was criticized as the 'zero draft' as it imposes responsibility on the State to ensure that transnational businesses within their jurisdiction undertake human rights due diligence measures. The revised draft of the international treaty was again released on July 2019 and considered as a 'mature text' than its predecessor. The treaty is expected to apply to all business enterprises including national or transnational. Delegates, NGOs and academics debated on the draft treaty provisions due to its lack of enforcement mechanism. Liability of companies for abuse of human rights, piercing the corporate veil, due diligence, extraterritorial jurisdiction, jurisdiction over the activities of business partners, reversal of the burden of proof are some of the elements that have been intended to incorporate in. Making this draft a legal binding treaty is still doubtful as it requires the consent of all the parties.

On the other hand, the Universal Declaration of Human Rights (hereinafter the UDHR) can be used as a standard to create obligation for MNCs to respect human rights. The application of the UDHR is not only confined to governments. It is a common standard of achievement for all peoples and all nations. Every individual and every organ of society shall strive by progressive measures to secure

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<sup>7</sup> Countries that opposed are Austria, Czech Republic, Estonia, France, Germany, Ireland, Italy, Japan, Montenegro, South Korea, Romania, Macedonia, the UK, and the U.S.

<sup>8</sup> Affirmative votes were given by Algeria, Benin, Burkina Faso, China, Congo, Cote d'Ivoire, Cuba, Ethiopia, India, Indonesia, Kazakhstan, Kenya, Morocco, Namibia, Pakistan, Philippines, Russia, South Africa, Venezuela, and Vietnam

their universal and effective recognition and observance among the people of the member States.(UDHR Preamble, 1948) As Louis Henkin viewed, the UDHR applies to everyone including MNCs as the phrase every individual and every organ of society includes juridical persons and excludes no one: any company, market, or cyberspace(Zenkiewicz2016). Hence, imposing a direct obligation on MNCs to respect the UDHR for everyone including MNCs can be entertained. Though it does not create any direct obligation incorporating the UDHR into the future instruments that deal with this field can form a moral obligation towards MNCs to respect it as it is the foundation of international human rights law.

## CONCLUSION

MNCs are the drivers of economic development and economic integration. The bargaining power and political power of MNCs and also the reluctance of States have made it difficult to form a hard law obligation regulating the activities of MNCs with regard to human rights. The trouble-free way would be preparation of a legally binding treaty regarding MNCs obligation on human rights. The Norms on TNCs were identified by one of the drafters as ‘non- voluntary set of norms binding upon corporations’. Although General Principles are praised as unprecedented step, it is merely a guideline which requires higher moral and ethical standard from the State and MNCs to comply with. Scholars are skeptical on ongoing Treaty framework due to the responses made by some of the developed countries. Creation of direct obligation of human rights towards MNCs is not a formation of a new norm in international law. The evolution of world affairs should be sensitized by international law and international law should also be evolved accordingly. Although this consideration might make the distinction between private law and public law more ambiguous, influential role of MNCs cannot be undermined and MNCs cannot only be accountable through States. Therefore, there is still much to be done for the protection of human rights by the State and MNCs.

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