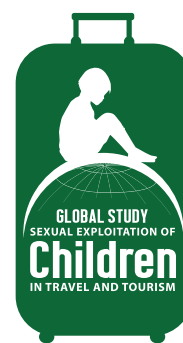


EXPERT PAPER

A FOURTH OPTIONAL PROTOCOL TO THE CONVENTION ON THE RIGHT OF THE CHILD:



ESTABLISHING A NEW STANDARD FOR CORPORATE VIOLATIONS OF INTERNATIONAL CHILD LAW

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1 HUMAN RIGHTS AND THE MULTINATIONAL CORPORATION

Globalization has resulted in transnational corporate expansion, blurring the lines of state borders and fueling the global economic system through foreign investment.¹ The power of the economic market affects every organ and individual of society. Markets can exert powerful positive forces generating economic growth, reducing poverty, and increasing demand for the rule of law, thereby contributing to the realization of a broad spectrum of human rights.² Markets can also be destructive to societies and economies. For example, in 2013 the International Labor Organization (ILO) reported that approximately 168 million children worldwide are in child labour – almost 11% of the world’s child population.³ In the context of the sexual exploitation of children in travel and tourism, children can be harmed in a multitude of ways, as victims of traditional child sex tourism or through other more non-traditional means such as the use of new technologies in the creation of child abuse imagery. The Global Study on the Sexual Exploitation of Children in Travel and Tourism provides countless examples of harm inflicted by the omission and commission of the markets in general and the private sector more specifically.

States, civil society organizations and corporations themselves have attempted to address human rights violations of the private sector through domestic law, international law, and civil regulation. Significant gaps exist in the effectiveness of each approach, leaving the world with no single effective response to rights violations by corporations. This paper will analyze each model and propose a new option for holding the private sector accountable, grounded in international law but drawing on lessons provided by other paradigms. Specifically, this paper proposes a binding Fourth Optional Protocol to the United Nations Convention on the Rights of the Child (UNCRC), modeled as a conceptual evolution of current attempts to incorporate the Corporate Social Responsibility (CSR) movement into non-binding international instruments that would bridge current gaps in the international protection of children’s rights.

Presently, there is no method for approaching corporate violations of children’s rights that involve international participation as well as domestic accountability schemes -- particularly targeting CSR mechanisms -- which hold corporations accountable. International law has historically shifted the burden of accountability and protection to domestic law; yet, states that attract multi-national corporations (MNCs) are often developing countries that not only lack legislation that protects children from harm, but also offer poor implementation and enforcement strategies towards any laws that do exist to protect children. It is therefore

1 Aaron A. Dhir, “Realigning the Corporate Building Blocks: Shareholder Proposals as a Vehicle for Achieving Corporate Social and Human Rights Accountability”, *American Business Law Journal* 43:2 (2006), 366.
2 John Ruggie, *Just Business: Multinational Corporations and Human Rights* (W.W. Norton & Company, Inc., New York, 2013), 201.
3 International Labour Office, *International Programme on the Elimination of Child Labour (IPEC), Marking Progress against Child Labour Global Estimates and Trends 2000-2012* (International Labour Office, Geneva, 2013), vii.

necessary to implement a Fourth Optional Protocol to the CRC that promotes an integration of CSR instruments to hold corporations accountable while protecting children from rights violations by corporate entities.

In its Resolution 26/9, the United Nations' Office of the High Commissioner for Human Rights has noted the problem and has identified the need for an "internationally legally binding instrument on transnational corporations and other business enterprises with respect to human rights"⁴. Although Resolution 26/9 is directed at human rights generally, not specifically children's rights, the Human Rights Council has recognized that "the obligations and primary responsibility to promote and protect human rights and fundamental freedoms lie with the state, and that states must protect against human rights abuse within their... jurisdiction by third parties, including transnational corporations" and that "transnational corporations and other business enterprises have a responsibility to respect human rights... [and] that civil society actors have an important and legitimate role in promoting corporate social responsibility"⁵. While Resolution 26/9 encompasses many of the important goals needed to strive for corporate accountability, a Fourth Optional Protocol is necessary to provide a platform that specifically addresses children's rights through corporate accountability and domestic legal interference with corporate activities.

The goal of the paper is not to suggest that international law is the only available avenue to address today's challenges. Rather, it is to demonstrate how international law can evolve to become an effective tool of rights-protection. The focus is here on the rights of the child – the most vulnerable participant in the global market. Prior to exploring the current accountability regime, it is important to introduce the global standard for international children's rights, the UNCRC. Within the broad range of international law, the UNCRC has a unique focus on children. It was ratified in November 1989 and came into force in September 1990. Currently, there are 191 states that are party to the UNCRC. It is the first binding international instrument setting out the civil, political, economic, social and cultural rights of children, defined as individuals below the age of 18.⁶

The UNCRC covers all aspects of the child's wellbeing, recognizing that children have an inherent right to life and survival, to an identity, to a nationality, to be heard, to freedom of thought, conscience and religion, to health, and to an education. The Committee on the Rights of the Child, established under UNCRC Article 43(1), examines the progress made by state parties in achieving the realization of the obligations undertaken in the Convention, thereby determining which rights fall under the language of the Convention. Pursuant to Article 44, the Committee considers reports submitted by states and publishes concluding observations with general recommendations as to how states can improve the condition of children in their countries.

Three Optional Protocols to the UNCRC have already been adopted by the UN. Together, they prohibit the conscription or compulsory recruitment of children under the age of 18 for military service or the direct involvement of children in military conflict, prohibit the sale of children, child prostitution and child pornography, and create a procedure allowing individuals to make complaints under the UNCRC to the Committee.

4 UN General Assembly Resolution, "26/9 Elaboration of an international legally binding instrument on transnational corporations and other business enterprises with respect to human rights", UN Doc. A/HRC/RES/26/9, (2014).

5 *Ibid.*

6 Article 1, UN Convention on the Rights of the Child (1989).

2 CURRENT ACCOUNTABILITY REGIME

International law places the ultimate responsibility on states to protect individuals in their jurisdiction from human rights abuses of non-state actors, including MNCs.⁷ The transnational nature of the corporation and the increasing complex structure of subsidiary and contractual relationships have imposed a number of obstacles preventing effective state regulation.⁸ Host states, where corporations are likely to invest, are often developing countries with minimal regulation, corruption and weak judicial systems.⁹ The laws in home states, where parent corporations are incorporated, typically do not apply to violations that occur outside their borders.¹⁰ A “governance gap” has been created as a result of international law placing the duty on states to regulate MNCs and states’ inability to do so effectively.¹¹

If human rights are violated by the private sector, international law could, in theory, offer other forms of accountability. The central problem is that international human rights law has historically been perceived as binding only upon states only.¹² Three models are generally proposed to fill the void created by the non-applicability of international treaties and conventions to non-state actors. The first requires drafting domestic legislation that would allow one party to sue another for violations of international human rights law, even where the alleged crimes were not committed in their territory. The second involves civil regulation, such as voluntary corporate codes of conduct. The third model suggests the creation of an international treaty that would specifically bind MNCs for violations of international human rights law.¹³ Each approach must draw on the lessons provided by the alternative models.

7 Emeka Duruigbo, “Corporate Accountability and Liability for International Human Rights Abuses: Recent Changes and Recurring Challenges,” *Northwestern Journal of International Human Rights* 6 (Spring 2008), 223.

8 Debosmita Nandy and Niketa Singh, “Making Transnational Corporations Accountable for Human Rights Violations”, *NUJS Law Review* 2 (2009), 79.

9 Andreas Georg Scherer, Dorothee Baumann-Pauly, and Anselm Schneider, “Democratizing Corporate Governance: Compensating for the Democratic Deficit of Corporate Political Activity and Corporate Citizenship”, *Business & Society* 52, No. 3, (2013), 474.

10 Patrick Macklem, “Corporate Accountability under International Law: The Misguided Quest for Universal Accountability”, *International Law FORUM du droit international* 7 (2005), 283.

11 *Ibid.*, 293.

12 OHCHR, “Leaflet No 2: Indigenous Peoples, the UN and Human Rights”, 3, accessed 25 November 2015, <http://www.ohchr.org/Documents/Publications/GuideLeaflet2en.pdf>.

13 International Council on Human Rights Policy, *Beyond Voluntarism: Human rights and the developing international obligations of companies* (Versoix, Switzerland: ICHRP, 2002); Cristina Baez, “Multinational Enterprises and Human Rights,” *University of Miami International Legal Review* 8 (2000), 183; Jenness Duke, “Enforcement of Human Rights on MNCs: Global Climate, strategies and trends for compliance,” *Denver Journal of International Law and Policy* 28 (2000) 339.

2.1 STATE REGULATION

States generally recognize that corporations should be liable for egregious conduct as a general legal principle.¹⁴ States regulate conduct through legislation and policies according to civil liability, criminal sanctions, and government incentives to motivate companies, investors, and consumers to support socially responsible behaviour.¹⁵ Most states regulate corporate activity in areas that affect human rights, such as criminal law, anti-discrimination, occupational safety, labour standards, and environmental protection.¹⁶

The current status of domestic law, in both developed and developing countries, fails to provide an adequate framework capable of regulating corporations in a globalized world particularly with respect to violations against children. First, regulation by home states of corporate actors does not apply outside their territory, and host states often lack an effective forum to hold corporations accountable.¹⁷ Second, difficulties lie in establishing corporate liability of corporations for complicity in human rights violations committed by a third party through their business dealings.¹⁸

Certain measures have been taken by states to hold corporations accountable for their actions outside their home territory. These include extraterritorial legislation,¹⁹ acknowledgment by courts of universal jurisdiction in specific circumstances,²⁰ and judicial adoption of more flexible approaches to procedural barriers preventing litigation of transnational corporate abuses.²¹

2.1.1 Extraterritorial Legislation

A number of states have implemented legislation to broaden the scope of liability for corporate actors outside state boundaries. There is general consensus that states have the right to exercise jurisdiction to regulate corporations on the grounds of territoriality and nationality.²² This has been interpreted to grant power to states to govern the actions of MNCs headquartered in their territory over abuses that occur in foreign states.²³ States are also able to create regulations that apply to foreign corporations who commit violations within their territory.²⁴ Some governments have adopted legislation permitting domestic jurisdiction for certain crimes, granting power to regulate for injuries to citizens caused by a non-national individual or entity outside the state's territory.²⁵

14 Doe v. Exxon Mobile Corp, 654 F (3d) 11 (App DC Cir 2011), 84.

15 Surya Deva, "Acting Extraterritorially to Tame Multinational Corporations for Human Rights Violations," *Melbourne Journal of International Law* 5 (2004), 44.

16 David Kinley and Junko Tadaki, "From Talk to Walk: The Emergency of Human Rights Responsibilities for Corporations at International Law", *Virginia Journal of International Law* 44, No. 4, (2004), 935.

17 Surya Deva, "Corporate Code of Conduct Bill 2000: Overcoming Hurdles in Enforcing Human Rights Obligations Against Overseas Corporate Hands of Local Corporations," *Newcastle Law Review* 8:1 (2004), 99.

18 *Ibid.*, 97.

19 Barnali Choudhury, "Beyond the Alien Tort Claims Act: Alternative Approaches to Attributing Liability to Corporations for Extraterritorial Abuses," *Northwestern Journal of International Law & Business* 26 (2005), 45.

20 Cedric Ryngaert, *Jurisdiction in International Law*, OUP Oxford, (2015), 2-3.

21 Kinley and Tadaki, "From Talk to Walk", 944.

22 Recommended citation: John Braithwaite and Peter Drahos, *Global Business Regulation*, (Cambridge University Press, 2000), 44.

23 Nandy and Singh, "Transnational Corporations," 83.

24 Benjamin Perrin, "Taking a Vacation from the Law? Extraterritorial criminal jurisdiction and section 7(4.1) of the Criminal Code," *Canadian Criminal Law Review* 13 (2009), 180.

25 Paul Dubinsky, "Human Rights Law Meets Private Law Harmonization: The Coming Conflict," *Yale Journal of International Law* 30 (2005), 267.

Many states have enacted extraterritorial legislation for serious human rights violations beyond those with *jus cogens*²⁶ status through an extension of territorial and national jurisdiction. In the United States (US) both nationals and foreigners can bring a tort action against MNCs for corporate abuses that take place outside its territory. A claim can be made in relation to commonplace torts, such as wrongful death, battery, and negligence as a transitory tort.²⁷ Transitory torts refer to situations when the wrongdoer's act creates an obligation following it across national boundaries. The tort must be considered unlawful in the state where it was committed and that country's laws must be consistent with US policy in order for the court to claim jurisdiction over the matter.²⁸

A number of countries have implemented extraterritorial legislation to extend liability for certain criminal offences to corporations.²⁹ Canada, the United Kingdom, the US and Australia have all implemented extraterritorial legislation imposing liability on nationals for acts of child sex tourism and other offences relating to the sexual exploitation of children.³⁰ State cooperation through the enactment of mutual assistance agreements, host state consent, or police-to-police assistance has strengthened the effectiveness of extraterritorial laws.³¹

2.1.2 Universal Jurisdiction

Universal jurisdiction generally invokes jurisdiction over certain conduct committed by foreigners against foreigners occurring outside its territory with little to no connection to the state exercising jurisdiction.³² The modern application of universal jurisdiction has been reserved for holding states accountable for abuse of power and human rights violations under international law. Yet, it was originally accepted in order to hold non-state actors accountable for acts of piracy and slave trade due to the transnational nature of the crimes and inability for domestic law to hold offenders culpable.³³ The gap in governance of MNCs has led to a resurgence of the use of universal jurisdiction in domestic courts.³⁴

Universal jurisdiction is more likely to be accepted in criminal proceedings, particularly with the implementation of the Rome Statute by the International Criminal Court.³⁵ The Rome Statute defines the most serious crimes of international concern to include genocide, crimes against humanity, war crimes and crimes of aggression.³⁶ Unfortunately the powers of the court are restricted to hearing claims against natural persons who are nationals of state parties to the convention and for crimes committed on the territory of state parties.³⁷

26 *Jus cogens* are also described as peremptory norms of general international law and defined in Article 53 of the Vienna Convention as "a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international character. Vienna Convention on the Law of Treaties (1969).

27 Choudhury, "Beyond the Alien Tort Claims Act," 49.

28 Nandy and Singh, "Transnational Corporations," 85.

29 Megan Donaldson and Rupert Watters, 'Corporate Culture' as a Basis for the Criminal Liability of Corporations (Australia: Allens Arthur Robison, 2008), 4. This report was prepared by the law firm of Allens Arthur Robison for submission to the United Nations Special Representative of the Secretary General for Business and Human Rights.

30 Government of the United Kingdom, Sexual Offences Act, 2003, Ch. 42; Government of the United Kingdom, Policing and Crime Act, 2009, Ch. 26, ss. 23-24; Government of Australia, (Child Sex Tourism) Amendment Act 1994, No. 105 of 1994; Government of Australia, Measures to Combat Serious and Organized Crime Act 2001, No. 136 of 2001, sch. 3; Government of Australia, Crimes Legislation Amendment (Sexual Offences against Children) Act 2010, No. 42 of 2010; Government of the United States of America, Trafficking Victims Protection Act of 2000, No. 106-386; Government of the United States of America, Prosecutorial Remedies and Other Tools to End the Exploitation of Children Today Act of 2003, No. 108-21; Government of Canada, Criminal Code, RSC. 1985, c C-46, s. 7(4.1).

31 Deva, "Acting Extraterritorially," 44.

32 International Bar Association, Report of the Task Force on Extraterritorial Jurisdiction (February 2009), 14. A copy of this report can be downloaded from <<http://tinyurl.com/taskforce-etj-pdf>>.

33 Dubinsky, "Human Rights," 272.

34 Anette Brunovskis and Guri Tylidum, Crossing Borders: An Empirical Study of Transnational Prostitution and Trafficking in Human Beings (Oslo: FAFO, 2004), 80.

35 Dubinsky, "Human Rights," 257.

36 International Criminal Court, Rome Statute (2002), Art. 5.

37 Rome Statute, Arts. 25, 12(2).

Universal jurisdiction exercised to adjudicate civil actions is more contentious, given the lack of connection between the subject matter of the dispute and the forum.³⁸ Courts of common law have been particularly hesitant to recognize jurisdiction over such matters, with the exception of the United Kingdom. Claims by foreign residents can be made for violations of customary international law through its adoption into British common law. British courts have extended jurisdiction to adjudicate corporate abuses abroad where there is no other forum that has competent jurisdiction to hear the claim, or is found to be incompetent to do so.³⁹ Even where a more appropriate forum is found to have jurisdiction to hear the matter, English courts reserve discretion to hear the matter to ensure “substantive justice” is served.⁴⁰

2.1.3 The Alien Tort Claims Act

The Alien Tort Claims Act (ATCA)⁴¹ is an American statute which, at least for a time, provided a unique forum to litigate alleged corporate violations of human rights in American courts – even when events occurred outside of the US, involving non-American actors. A recent Supreme Court decision has significantly narrowed ATCA’s reach.

The statute provides that American district courts “shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations...”⁴² Beginning in 1980, ATCA became a “prominent vehicle for international human rights litigation,” including suits against corporations.⁴³ In *Doe v. Unocal*, for example, a group of Burmese villagers won standing to pursue litigation in California against Unocal and its Californian parent company for alleged human rights violations in Burma⁴⁴ (Unocal eventually settled).⁴⁵ By 2012, six to ten ATCA cases concerning alleged violations of international human rights standards were being filed annually against corporations in American federal courts, often for alleged human rights abuses in foreign countries.⁴⁶

In 2013, the US Supreme Court greatly limited the scope of the ATCA. In *Kiobel v. Royal Dutch Petroleum*, Nigerian plaintiffs alleged that Royal Dutch had aided and abetted Nigerian government attacks against Ogoni villages, resulting in human rights abuses including torture, rape and murder.⁴⁷ A majority of the Court held that the statute is subject to a “presumption against extraterritoriality.”⁴⁸ To overcome the ‘presumption,’ a plaintiff’s claim must “touch and concern” the US with “sufficient force.”⁴⁹ In regards to corporate liability, the Court held that the “mere presence” of a corporation in the US will not displace the presumption against extraterritoriality.⁵⁰ The plaintiff’s claims were thereby dismissed because “[a]ll the relevant conduct took place outside the United States.”⁵¹

38 International Bar Association, *Extraterritorial Jurisdiction*, 15.

39 Choudhury, “Beyond the Alien Tort Claims Act,” 54.

40 *Ibid.*, 55.

41 Government of the United States of America, *Alien Tort Claims Act*, 28 USC s 1350 (2006) (originally enacted in An Act to Establish the Judicial Courts of the United States, ch 20, 1 Stat 73 s 9 (1789)).

42 *Ibid.*

43 Ernest A. Young, “Universal Jurisdiction, the Alien Tort Claims Statute, and Transnational Public-law Litigation,” *Duke Law Journal*, 64:1023 (2015), 1026.

44 *Doe v. Unocal*, 963 F Supp 880 (C.D. Cal. 1997).

45 Duncan Campbell, “Energy giant agrees settlement with Burmese villagers,” *The Guardian*, 15 December 2004, accessed 26 August 2015 from: <http://www.theguardian.com/world/2004/dec/15/burma.duncancampbell>.

46 Ernest A. Young, “Universal Jurisdiction”, 1026, quoting Donald Earl Childress III, “The Alien Tort Statute, Federalism, and the Next Wave of Transnational Litigation,” *Georgetown Law Journal* 100:709 (2012), 713.

47 *Kiobel v. Royal Dutch Petroleum Co.*, 133 S. Ct. 1659 (2013), 1662.

48 *Ibid.*, 1669

49 *Ibid.*, 1665.

50 *Ibid.*

51 *Ibid.*, 1669.

The full implications of the Kiobel decision are not clear. “Sufficient force” warrants further definition, and corporate liability has not been ruled out completely.⁵² Nevertheless, after Kiobel, ATCA is largely considered to be severely constrained in its application to claims involving alleged human rights abuses occurring in countries other than the US.⁵³

2.1.4 Corporate Liability

States have implemented differing frameworks to determine the form and scope of corporate liability.⁵⁴ Most countries employ the derivative liability model; the state of mind of employees or agents reflects the corporations’ state of mind.⁵⁵ There are two approaches to determine corporate culpability using this model. Identification, used in Canada and the UK, attaches liability to a corporation where senior management or senior employees have been liable for a criminal act for the benefit of the corporation.⁵⁶ Vicarious liability requires an agent of the corporation to commit a crime for the benefit of the corporation while acting within their capacity as an employee.⁵⁷

Derivative liability is desirable to state regulators because it is predictable, with clearly defined standard⁵⁸ however, it has been criticized for “failing to secure convictions in relation to large corporations, even in high profile and allegedly uncontroversial cases”.⁵⁹ Vicarious liability is more successful in securing convictions but maintains the requirement of individual accountability and imposes practical challenges of substantiating claims.⁶⁰

The alternative “organizational liability” model, recently emerging in Australia and Switzerland, shifts the focus of the inquiry from individual offenders within the corporation to the actions of the organization itself. “A corporation is found liable because its ‘culture’, policies, practices, management or other characteristics encouraged or permitted the commission of the offence”.⁶¹ The organizational model more accurately reflects complex corporate structures, but is unpredictable given the lack of definition of “corporate culture” and whether the culture of one branch or division of a company can extend to others.⁶²

Canada outright rejected the organizational model due to its unpredictable nature and potential difficulties in conducting factual investigations.⁶³ The majority of countries have adopted narrow methods of attaching liability to corporations and seem unlikely to change course.

52 Amy Smith & Carrie Lowery, “Kiobel v. Royal Dutch Petroleum Co.: Radical Revision or Original Intent of the Alien Tort Statute,” *Southern Law Journal* 24 (2014), 305.

53 See Young, “Universal Jurisdiction” and Smith & Lowery, “Kiobel.”

54 Donaldson and Watters, *Corporate Culture*. Many of the frameworks adopted by countries overlap, using a combination of models and approaches to establish corporate criminal liability.

55 *Ibid.*

56 *Ibid.*

57 Donaldson and Watters, *Corporate Culture*, 6.

58 *Ibid.*, 64.

59 *Ibid.*

60 *Ibid.*, 66.

61 *Ibid.*, 4.

62 *Ibid.*, 70.

63 *Ibid.*, Appendix 7.

2.1.5 Separate Personality Doctrine and Limited Liability

The complex relationship between MNCs and their subsidiaries, contractors, or other agents working outside the territory of incorporation has made it exceptionally difficult to successfully litigate claims against a MNC. Victims and their advocates seek claims against parent corporations for several reasons. First, victims want the true perpetrators of their abuse to be held accountable. Complex structures make it difficult to determine where the “power centre” of the corporation lies.⁶⁴ The headquarters of a corporation may be in one state, shareholders in another, while the corporation is operating worldwide.⁶⁵ Therefore, plaintiffs seek to hold the parent corporation responsible, claiming they are liable for the actions of their subsidiaries.⁶⁶ Secondly, suing a subsidiary or subcontractor is often fruitless as they are not financially capable of compensating victims for the damages suffered.⁶⁷ This may be due to the large number of victims seeking compensation or because of a parent corporation’s deliberate attempt to make the subsidiary incapable of paying by strategically moving funds out of the subsidiary.⁶⁸ Lastly, there may be no available means of redress against a subsidiary incorporated in a host state. Developing countries may not have the legal infrastructure capable of handling such a claim and the government is often unlikely to ensure perpetrators are held accountable.⁶⁹

Parent corporations often use the principles of separate personality and limited liability to avoid responsibility for acts committed by those who they conduct business with.⁷⁰ The separate personality principle recognizes that a corporation is a distinct legal entity from its shareholders and owners.⁷¹ Limited liability protects investors from risks of business.⁷² Parent companies are therefore distinct legal entities from their subsidiaries and are not directly liable for their actions.⁷³ An exception to limited liability is where there is evidence that the parent corporation has sufficient control over the subsidiary to be considered the parent company's agent.⁷⁴ The threshold to meet this standard varies across jurisdictions depending on the legislation enacted extending liability to corporations. Additionally, where the subsidiary is seen as a sham or puppet of the parent corporation, then the corporate structure may be liable for the actions of its subsidiary.⁷⁵

64 Deva, “Bill 2000,” 97.

65 John Ruggie, “Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises: ‘Protect, respect, and remedy: a framework for business and human rights’”, UN Doc. A/HRC/8/5 (2008), para 13-14.

66 *Ibid.*, para 90.

67 Deva, “Bill 2000”, 97.

68 *Ibid.*, 98.

69 *Ibid.*

70 Deva, “Bill 2000”, 96. See also John Ruggie, “Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises: ‘Mapping International Standards of Responsibility and Accountability for Corporate Acts’”, UN Doc. A/HRC/4/035 (2007), para 29.

71 Deva, “Bill 2000,” 99.

72 *Ibid.*

73 Ruggie, “Report 2008”, para 13.

74 *Ibid.*

75 Deva, “Bill 2000,” 100.

2.1.6 Barriers to Litigation

The majority of cases brought by victims of corporate human rights violations which occurred in the host state territory have been dismissed by domestic courts, even in states said to be more lenient in such matters such as the US and Australia.⁷⁶ The majority of claims are dismissed through the application of the principle of *forum non conveniens*, comity and the political doctrine and separate personality questions.

The doctrine of *forum non-conveniens* “provides the court discretionary power to decline jurisdiction when it appears that the case may be more appropriately tried elsewhere”.⁷⁷ The plaintiff must establish that there is a real and substantial link between the victim, the defendant, and the incident of abuse, in order for the court to exercise its personal jurisdiction over the matter.⁷⁸ Even when a link can be established, a court may refuse to hear the case where a more suitable forum is capable of providing fair proceedings in which justice will be served.⁷⁹ This principle is often used by companies to shield themselves from liability of alleged transgressions occurring in foreign territories or those committed by subsidiaries or subcontractors.⁸⁰ Corporations will also use the transnational nature of the claim in attempt to persuade the courts not to exercise their jurisdiction by highlighting the costs and political barriers associated with collecting evidence and the courts’ lack of expertise in applying the applicable law.⁸¹

The principle of comity instructs the court to give deference to the laws and interests of the foreign country in certain circumstances.⁸² Similarly, the political question doctrine provides discretion to a judge to dismiss a case out of concern a decision will interfere with state policy.⁸³ In *R. v. Khadr*, the Supreme Court of Canada stated that deference “ends where clear violations of international law and fundamental human rights begin”.⁸⁴ The principles of comity, order and fairness are to be used to guide courts in their determination of private international law issues and not as a tool to prevent claims of human rights abuses by MNCs from being heard on their merits.⁸⁵

2.1.7 Conclusion

In summary, corporations often have operations in developing countries with minimal regulation and oversight by the state government. These countries are often unwilling or unable to hold MNCs accountable for human rights violations.⁸⁶ Host states have implemented measures through extraterritorial legislation and the principle of universality to extend their jurisdiction over violations of human rights by corporations outside their territory by alien claimants.⁸⁷ Domestic courts have expressed the need to exercise jurisdiction in order for victims of corporate abuses to achieve substantive justice.⁸⁸ Despite this recognition, claims continue to be dismissed on procedural grounds due to the transnational nature of the actions or as a result of the inability to attach liability to the parent corporation.⁸⁹

76 Deva, “Bill 2000,” 92.

77 Nandy and Singh, “Transnational Corporations,” 85.

78 *Ibid.*, 84-85.

79 *Ibid.*, 85.

80 Deva, “Bill 2000,” 95.

81 *Ibid.*

82 Nandy and Singh, “Transnational Corporations,” 85.

83 *Ibid.*

84 *Canada (Justice) v. Khadr*, 2008 SCC 28, [2008] 2 SCR 125 at para 52

85 *Spar Aerospace Ltd. v. American Mobile Satellite Corp.*, 2002 SCC 78, [2002] 4 SCR 205, para 21.

86 Andreas Georg Scherer, Dorothee Baumann-Pauly, and Anselm Schneider, “Democratizing Corporate Governance”, 475.

87 Choudhury, “Beyond the Alien Tort Claims Act,” 45.

88 *Ibid.*

89 Choudhury, “Beyond the Alien Tort Claims Act,” 68.

2.2 CIVIL REGULATION

Civil regulation has emerged in response to the perception that globalization is creating an imbalance between the size and power of MNCs and markets and the ability or willingness of states to regulate their actions.⁹⁰ In contrast to state-based regulation, civil regulatory mechanisms involve private, non-state or market-based systems.⁹¹ Civil regulation operates apart from state governance but seeks to enhance compliance of domestic law and international human rights standards by pressuring MNCs “into internalizing some of their negative social and environmental externalities” and accepting a corporate duty to respect human rights.⁹²

CSR refers to how companies integrate social, environmental, and economic concerns into their values and operations. According to the Harvard University business program, CSR “encompasses not only what companies do with their profits, but also how they make them.”⁹³ International organizations such as the World Business Council for Sustainable Development, the Organization for Economic Cooperation and Development (OECD), and Business for Social Responsibility (BSR), along with many national governments, outline the following elements of CSR: human rights; business ethics; employee rights; environmental protection; community involvement; full disclosure; and stakeholder rights. The World Business Council for Sustainable Development has defined CSR as “the commitment of businesses to contribute to a sustainable development by working with employees, their families, and the local communities and society at large to improve their quality of life.”⁹⁴

A number of corporate, inter-firm, industry, and international codes of conduct have been adopted by domestic and transnational corporations.⁹⁵ Over 10,000 companies have signed the UN Global Compact, for example, committing corporations to take active measures to respect human rights.⁹⁶ The travel and tourism industry has established a code of conduct to prevent the commercial sexual exploitation of children through the commitment of over 1300 companies.⁹⁷ A number of corporations have created and implemented their own corporate codes of conduct, such as The Gap, Levi Strauss, and Nike.⁹⁸ Regulations may require corporations to incorporate specific practices and policies, monitor, and report, exposing the impact of business operations and responses to eliminate and prevent human rights abuses or environmental degradation.⁹⁹

90 David Vogel, "Private Regulation of Global Corporate Conduct", *Business & Society* 49:1 (2010), 69.

91 *Ibid.*

92 *Ibid.*

93 Beth Kytte and John Gerard Ruggie, "Corporate Social Responsibility as Risk Management: A Model for Multinationals" (Working Paper No. 10, Corporate Social Responsibility Initiative, Harvard University, 2005), 9.

94 Ramon Mullerat (ed), *Corporate Social Responsibility: The Corporate Governance of the 21st Century* (Kluwer International Bar Association Series, 2011), 4.

95 *Ibid.*

96 "Business Participation", United Nations Global Compact, accessed 18 June 2015, https://www.unglobalcompact.org/howtoparticipate/Business_Participation/.

97 See TheCode.org, accessed 18 June 2015, www.thecode.org. The Code is cofounded by the Swiss Government and the private tourism industry, supported by the ECPAT international Network, and provided advisory assistance by UNICEF and UNWTO (*Ibid.*).

98 See Frederick B. Jonassen, "A Baby-Step to Global Labor Reform: Corporate Codes of Conduct and the Child", *Minnesota Journal of International Law* 17:7 (2008).

99 Kevin T. Jackson, "Global Corporate Governance: Law and Reputational Accountability", *Brooklyn Journal of International Law* 41 (2010), 73, 76.

2.2.1 Market Forces and Corporate Motivation

Under the common shareholder primacy model, the corporation's sole purpose is to maximize the wealth of its shareholders.¹⁰⁰ Corporate directors owe a fiduciary duty to shareholders to maximize profits.¹⁰¹ The shareholder model lacks appreciation of the impact of corporate actions on non-shareholders, viewing expenditures in the public good as a breach of the director's duty.¹⁰²

A number of alternative models of the corporation have developed, many of which consider the interests of stakeholders other than those of the shareholders.¹⁰³ The Supreme Court of Canada's 2008 BCE decision radically broke from the traditional corporate model to hold that directors must consider a broad range of stakeholders, including creditors, consumers, governments and the environment, as falling within the "best interests" of the corporation.¹⁰⁴ Nevertheless, the ultimate goal of most corporations is financial profit; thus, the adoption of CSR policies is only beneficial if doing so generates a financial return equivalent or greater to costs incurred.¹⁰⁵ Corporations are assumed to adopt CSR measures as risk management, preventing possible costs of uncovered ethical breaches.¹⁰⁶ Literature has offered conflicting conclusions as to whether incorporating ethical policies and practices has any financial benefit to corporations.¹⁰⁷

Theoretically, consumer demand is capable of motivating corporate adoption of CSR policies if consumers are willing to pay more for products associated with ethical business practices.¹⁰⁸ This assumes that there is consumer demand for CSR and that demand is strong enough to influence corporate market share value. A number of factors influence consumer demand and activism to motivate corporate change, such as the violation uncovered, the population harmed, the company or industry involved, and the extent to which the company can be seen as culpable for the action.¹⁰⁹ For example, the exploitation of children may provoke greater sympathy by the public, resulting in increased pressure on the company to take action.¹¹⁰

Although consumers often report that they are willing to pay more for products and services from responsible corporations, consumer purchasing patterns suggest otherwise.¹¹¹ An empirical study conducted by the Economic Foundation for Sustainable Business found that corporate executives find consumers to be the least proactive amongst all corporate stakeholders. The majority of consumers are generally unwilling to pay more for sustainable products.¹¹²

The link of consumer demand to corporate financial performance appears to lie in "reputational capital". Participation in CSR initiatives has been found to attract customers and enhance customer loyalty.¹¹³ The emergence of "cause marketing" is evidence of attempts to attract customers to purchase specific products that are directly linked to

100 Dhir, "Realigning the Corporate Building Blocks", 369-370.

101 *Ibid.*, 370.

102 Archie B. Carroll and Kareem M. Shabana, "The Business Case for Corporate Social Responsibility: A Review of Concepts, Research and Practice", *International Journal of Management Reviews* 12:1 (2010), 91.

103 Forest L. Reinhardt, Robert N. Stavins, and Richard H. K. Vietor, "Corporate Social Responsibility through an Economic Lens", *Journal of Environmental Economics and Policy* 2:2 (2008), 220-221.

104 *BCE Inc. v 1976 Debentureholders*, 2008 SCC 69, 3 SCR 560.

105 Carroll and Shabana, "Corporate Social Responsibility", 98.

106 *Ibid.*

107 *Ibid.*

108 Matthew Haigh and Marc T. Jones, "The Drivers of Corporate Social Responsibility: A Critical Review", *Business Review, Cambridge* 5:2 (2006), 248.

109 *Ibid.*

110 Jonassen, "Global Labor Reform", 50.

111 Haigh and Jones, "Drivers".

112 Ulrich Steger, "Economic Foundation of Sustainable Development Business", *Corporate Governance: International Journal of Business in Society* 7:2 (2007), 169.

113 Carroll & Shabana, "Corporate Social Responsibility", 99.

charitable action on behalf of the company.¹¹⁴ Corporate reputation impacts employee recruitment and retention.¹¹⁵ Companies that engage and support the communities that they work in and abide by ethical standards are likely to have better relationships with governmental and non-governmental organizations.¹¹⁶ This may help to “develop a stable, rule-based society in host states, which in turn promotes the smoother and more profitable operation of business”.¹¹⁷

A corporation's reputation is one of its most valuable assets. Thus, “naming and shaming” for violations of adopted CSR policies arguably represent the strongest sanction a corporation can face, a tarnished reputation. This motivation is in turn easily supported by the profit maximization model.¹¹⁸

2.2.2 Ethical Investments

The growing number of ethical investment firms has helped to entrench corporate responsibilities within the market. Investment decisions within such firms are dependent on social and environmental factors and considered determinative of overall performance.¹¹⁹ Ethical investors rate companies based on a broad range of factors and suggest that firms who score higher will outperform those firms that do not.¹²⁰ Investment by these specialized firms puts increased pressure on corporations to avoid tarnished reputations for fear of disinvestment.¹²¹ Shareholders who value ethical investment are assumed to be more likely to pressure executives to adopt codes of conduct supporting core human rights standards.¹²² This holds true for other types of investors who adhere to ethical standards for investment, such as public pension funds, religious institutions, and professional and labour unions.¹²³ According to the Forum for Sustainable and Responsible Investment, “sustainable, responsible and impact investing” assets expanded from \$3.74 trillion U.S. at the start of 2012 to \$6.57 trillion U.S. at the start of 2014.¹²⁴

2.2.3 Corporate Codes

The late 1990's saw an increasing number of corporations implement voluntary codes of conduct as complicity in human rights abuses increasingly became publicized.¹²⁵ Notable public campaigns involving The Gap, FIFA, Levi Strauss, Nike, and Kathy Lee Gifford, among others, brought human rights issues such as child labour to centre stage. Corporations initially denied liability, claiming that human rights are the ultimate responsibility of the state and international bodies.¹²⁶ Continued investigations and media coverage of corporate human rights violations pressured MNCs to reconsider business practices and policies, and adopt internal codes of conduct addressing human rights standards and guidelines for ethical business practice.¹²⁷ The April 2013 collapse of a commercial building housing several garment factories producing apparel for brands including Joe Fresh, Benetton, and Walmart killed 1,129 workers and renewed public focus on CSR codes.¹²⁸

114 *Ibid.*, 98.

115 *Ibid.*

116 *Ibid.*

117 Kinley and Tadaki, “From Talk to Walk”, 953

118 Deva, “Bill 2000”, 114-115.

119 Jamies L. Gunderson, “Multinational Corporations as Non-State Actors in the Human Rights Arena” in George J. Andreopoulos, Zehra F. Jabasakal Arat & Peter H. Juviler (eds.), *Non-State Actor in the Human Rights Universes* (Bloomfield, CT: Kumarian Press Inc., 2006), 87.

120 *Ibid.*

121 *Ibid.*, 88.

122 *Ibid.*

123 *Ibid.*

124 “US Sustainable, Responsible and Impact Investing Assets Grow 76 Percent in Two Years”, The Forum for Sustainable and Responsible Investment, 20 November 2014, http://www.ussif.org/blog_home.asp?Display=55.

125 Jonassen, “Global Labor Reform”, 42.

126 Kinley and Tadaki, “From Talk to Walk”, 953.

127 *Ibid.*

128 Mary Jane Bolle, Specialist in International Trade and Finance, “Bangladesh Apparel Factory Collapse: Background in Brief”, 10 January 2014, 5-6, accessed 2 December 2015, <https://www.fas.org/sgp/crs/row/R43085.pdf>.

An unfortunate follow-on effect of such disasters is too-hasty corporate responses to allegations of human rights without forethought to societal consequences.¹²⁹ Terminating contracts with suppliers, for example, results in many individuals, including children, left without means of employment. Such situations have led to children turning to commercial sexual exploitation.¹³⁰ Child labour is not in itself a violation of human rights so long as children are employed under certain minimum conditions outlined in ILO Convention No. 182.¹³¹ Article 32 of the UNCRC outlines conditions and criteria for child labour.¹³² In one instance, Levi Strauss implemented a progressive program in Bangladesh in which child labourers continued to receive pay from the suppliers while they attended school and were promised a job at the plant when they turned 14 years of age.¹³³

It has been noted that the self-regulatory and voluntary nature of corporate codes of conduct minimizes their effectiveness, particularly in relation to monitoring and enforcement.¹³⁴ Conflict between a corporation's short-term profit objective and the potential costs of human rights policies leaves critics claiming that codes are merely public relations tools which cannot be relied upon to regulate corporate behaviour.¹³⁵ There is no assurance that corporations have adopted an effective monitoring procedure to ensure compliance. Codes of conduct consisting of broad principles and vague standards make it difficult for policies to be integrated into business practice or to use the code to hold the corporation accountable for apparent violations.¹³⁶ If violations are found, victims are left to rely on the company for remedy, assuming a procedure for redress has been adopted.

Corporations who commit to ethical business practice are often more willing to permit third party monitoring of operations and to raise awareness of and educate employees on human rights issues.¹³⁷ The Gap, for example, established an independent monitoring system after it adopted its own code of conduct in response to an investigation exposing severe human rights violations within factories contracted to manufacture their products in El Salvador.¹³⁸ The Gap discontinued business with the manufacturers until they complied with the code and the government of El Salvador agreed to launch a legitimate investigation into the abuses with assurances that labour disputes would be resolved fairly.¹³⁹ The company recruited local religious, human rights, and labour organizations to monitor compliance.¹⁴⁰

Although corporate codes of conduct do not directly impose the threat of legal sanctions, entrenching such standards can form a base for future legal regulation. As corporations "strengthen their accountability mechanisms, they also begin to blur the lines between the strictly voluntary and mandatory spheres for participants. Once in, exiting can be costly."¹⁴¹ The process of international lawmaking has been further described as in some instances beginning with private codes setting expectations of conduct, before evolving into more formal lawmaking.¹⁴²

129 Ofelia Calcetas-Santos, "Rights of the Child: Report of the Special Rapporteur on the sale of children, child prostitution and child pornography", UN Doc. E/CN.4/2001/78, para 67.

130 *Ibid.*, para 68.

131 *Ibid.*, para 68; International Labour Organization (ILO), Worst Forms of Child Labour Convention, C182 (1999).

132 Article 32, UN Convention on the Rights of the Child (1989).

133 Jonassen, "Global Labor Reform", 45.

134 Choudhury, "Beyond the Alien Tort Claims Act," 63.

135 Steven R. Ratner, "Corporations and Human Rights: A Theory of Legal Responsibility", (The Yale Law Journal 111:443, 2001), 532.

136 Kinley and Tadaki, "From Talk to Walk", 955.

137 Jonassen, "Global Labor Reform", 47.

138 Jonassen, "Global Labour Reform", 42.

139 *Ibid.*

140 *Ibid.*

141 John Ruggie, "Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises: 'Mapping International Standards of Responsibility and Accountability for Corporate Acts'", UN Doc. A/HRC/4/035 (2007), para 61.

142 Ratner, "Corporations and Human Rights", 533.

2.2.4 Conclusion

Civil regulations, through influence over corporate reputation, shareholder investment, and corporate codes of conduct, are valuable tools capable of pressuring corporations into taking responsibility for negative impacts on individuals and communities. That said, soft law initiatives are not an effective substitute to formal regulation. Markets need rules, customs, and institutions to allow them to function smoothly and provide economic stability.¹⁴³ Corporate regulation requires independent monitoring and enforcement with the threat of sanctions in order for corporations to adhere to ethical standards. In order for the reaction of civil society to corporate abuses to effectively move markets, corporate responsibility must become embedded within the market and an expectation valued by consumers and corporate stakeholders.¹⁴⁴ Civil regulations function alongside domestic regulation, working to promote compliance and further development to narrow the gap in governance of corporate behaviour.

Current domestic and international law is incapable of regulating a globalized economy or holding corporations responsible for unethical business practices and participation in the violation of human rights.¹⁴⁵ The horizontal expansion of MNCs to developing nations through a complex network of arm's length business transactions has allowed corporations to exist within a "legal vacuum," easily avoiding the threat of legal sanction.¹⁴⁶ The current state of international law does not apply directly to corporations beyond suggesting their duty as 'organs of society' to act in respect of human rights.¹⁴⁷ The obligation falls on states to protect individuals within their jurisdiction from human rights violations by non-state actors.¹⁴⁸ The majority of human rights violations involving corporations occur in developing countries where governments are unable or unwilling to hold MNCs accountable for human rights violations.¹⁴⁹ Home states are reluctant to accept personal jurisdiction over these matters. Governments are cautious not to infringe state sovereignty through enacting extraterritorial legislation or supporting the recognition of universal jurisdiction for grave human rights violations.¹⁵⁰ Further difficulties arise in attaching liability to the parent corporations for corporate violations by their subsidiaries or suppliers resulting in the dismissal of claims on the basis of *forum non conveniens*.¹⁵¹ Although states have made efforts to adapt policies and procedures to open their doors to victims in order for corporations to be held accountable for their actions, plaintiffs are often unable to meet the procedural thresholds necessary to have their claims heard on their merits.¹⁵²

143 John Ruggie, "Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises: 'Protect, respect, and remedy: a framework for business and human rights'", UN Doc. A/HRC/8/5 (2008), para 2.

144 *Ibid.*

145 Andreas Georg Scherer, Dorothee Baumann-Pauly, and Anselm Schneider, "Democratizing Corporate Governance", 474-475.

146 *Ibid.* at 911.

147 Nandy and Singh, "Transnational Corporations," 80.

148 Ruggie, "Report 2007", para 15.

149 *Ibid.*

150 Nandy and Singh, "Transnational Corporations," 85.

151 Deva, "Bill 2000," 95.

152 Choudhury, "Beyond the Alien Tort Claims Act," 68.

3 FORMING THE CURRENT REGIME

The legal community has taken great strides in attempt to compel MNC accountability for international human rights violations through the use of various legal vehicles, ranging from internal and external corporate codes of conduct, to domestic and international human rights regulations. While the legal mechanisms discussed in this paper may suggest the possibility of successfully ensuring human rights accountability of MNCs, their effectiveness is limited on the basis that an MNC violation must satisfy certain specific conditions in international law.

Regulating the actions of an MNC has proven to be a challenge because they are capable of outgrowing the legal systems which govern them. MNCs continue to have a high degree of flexibility in terms of international conduct, and have arguably been successful for the most part in maneuvering beyond the reach of legal vehicles responsible for controlling human rights behaviour.

A new paradigm must be created, overcoming the inadequacy of corporate codes of conduct in controlling the behaviour of MNCs, due to: Ineffective means of monitoring and enforcement; the limited scope of actionable human rights claims against MNCs recognized by customary international law and jus cogens norms; the challenges before domestic courts in establishing personal jurisdiction over MNC defendants in light of forum non conveniens. This paper considers a new Optional Protocol to the UNCRC as one way to achieve this goal in relation to children's rights. Such a protocol must bridge the gap between the UNCRC and other international CSR standards. This section will provide a framework of the content of such an Optional Protocol, drawing on international child law and situating it in the CSR debate.

3.1 CORPORATE SOCIAL RESPONSIBILITY MEETS CHILDREN'S RIGHTS

International children's law has tried to involve the private sector in a variety of mechanisms including norms, codes, compacts, and principles. The legal spectrum also includes formal conventions and treaties that bind state actors. The UNCRC is the oldest and most encompassing convention and it is the mechanism through which state actors are judged regarding their commitment to children's law.

At the present time no international standard – be it treaty, convention, protocol or declaration – exists that specifically addresses CSR and child protection. (As noted above, in June 2014 the UN Human Rights Council passed Resolution 26/9, establishing a working group to develop an internationally legally binding instrument on transnational corporations and other business enterprises with respect to human rights.¹⁵³) That said, several key documents have been drafted that could include children's rights by extrapolating the focus on human rights more generally. Some examples follow.

The United Nations Global Compact asks companies to embrace universal principles and partner with the UN. It was launched in 1999 at the World Economic Forum in Davos, Switzerland and serves as a platform for the UN to engage with global business. The Global Compact outlines 10 principles, which focus on human rights, labour, the environment, and corruption. Membership requirements include public support of these principles, outlined in a letter from the corporation's CEO to the Secretary-General of the UN.

Although the UN does not police the membership, there are several expectations placed on participants. This includes public advocacy of the Global Compact and full implementation of the principles to the business's strategy, culture and operations. Participants are also expected to publish annual reports outlining how they are supporting the Global Compact. Two key principles in the Global Compact are that businesses should support and respect the protection of internationally proclaimed human rights within their sphere of influence, and make sure that they are not complicit in human rights abuses.¹⁵⁴

The UN Human Rights Council has endorsed the Guiding Principles on Business and Human Rights in 2011, which create a global standard for preventing and addressing negative impacts on human rights linked to business activity. The Guiding Principles focus on the state duty to protect human rights, corporate responsibility to respect human rights, and access to remedies for victims of business-related abuses. While the Guiding Principles are the first corporate human rights responsibility initiative endorsed by the UN, they do not create legal obligations on states or corporations.¹⁵⁵

153 UN Human Rights Council Resolution, "Elaboration of an international legally binding instrument on transnational corporations and other business enterprises with respect to human rights", UN Doc. A/HRC/26/L.22/Rev.1 (2014).

154 United Nations Global Compact, "The Ten Principles", accessed 18 June 2015, <http://www.unglobalcompact.org/AboutTheGC/TheTenPrinciples/index.html>.

155 United Nations Global Compact, "Our Integrity Measures", accessed 3 December 2015, <https://www.unglobalcompact.org/about/integrity-measures>.

The UN Norms on the Responsibility of Transnational Corporations were approved in August 2003. They represent a comprehensive global document regarding companies' human rights obligations and responsibilities. The Norms do not introduce new obligations for businesses. They reaffirm and reinforce past declarations, such as the Global Compact, made with regard to human rights responsibilities of business enterprises. The Norms directly refer to the "rights of workers," and reference compulsory labour, children's rights, working environment, remuneration, and freedom of association.¹⁵⁶ They point to the obligation to respect a child's right to be protected from economic exploitation.¹⁵⁷ The Norms do not outline more specific obligations regarding the abolition of child labour, compulsory labour or non-discrimination.¹⁵⁸ The Norms are not a formal treaty; however, the content of the Norms make it a document with the character of an "authoritative recommendation."¹⁵⁹

The Norms over-use the word "shall." Doing so creates a comprehensive list of obligations, and illustrates how it is possible to use binding obligations on non-state actors through international law. States remain the primary duty-bearers for the promotion, fulfillment and protection of human rights, but the Norms recognize that transnational corporations also have a responsibility "as organs of society, [...] for promoting and securing the human rights set forth in the Universal Declaration of Human Rights."¹⁶⁰

The Organization for Economic Cooperation and Development (OECD) Guidelines for Multinational Enterprises (Guidelines) are far-reaching recommendations addressed by governments to MNCs operating in or from adhering countries. They contain voluntary principles and standards for responsible business conduct in areas such as employment and industrial relations, human rights, environment, information disclosure, bribery, consumer interests, science and technology, competition, and taxation.¹⁶¹

The International Labor Organization (ILO)'s Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy¹⁶² and the Declaration on Fundamental Principles and Rights at Work¹⁶³ are voluntary sets of recommendations. Both address employment, training, working conditions and industrial relations, and contain some form of follow-up mechanism. The Tripartite Declaration addresses MNCs, while the Fundamental Principles addresses states.

3.2 IDENTIFYING GAPS IN CSR AND INTERNATIONAL LAW

Despite the UNCRC and its Optional Protocols and the breadth of international statements in the domain of CSR, what exists contains significant gaps. Reviewing these gaps is a useful exercise because they highlight how a new Optional Protocol could strengthen the regime. The current inadequacies can be grouped into two areas.

156 Economic and Social Council, "United Nations Norms on the Responsibilities of Transnational Corporations and other Business Enterprises with regard to Human Rights", UN Doc. E/CN.4/Sub.2/2003/12/Rev.2 (2003), paras 6-9.

157 *Ibid*, para 6.

158 *Ibid*, paras 5-9.

159 *Ibid*.

160 *Ibid*, preamble.

161 OECD, OECD Guidelines for Multinational Enterprises, (OECD Publishing, 2011) online: <http://dx.doi.org/10.1787/9789264115415-en>.

162 International Labour Organization, Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy (3d) (Geneva, Switzerland: International Labour Office, 2001).

163 International Labour Conference, Declaration on Fundamental Principles and the Rights at Work, 18 June 1998, adopted at the International Labour Conference, 86th Sess.

First, CSR mechanisms are products of particular social environments and are often framed by what businesses themselves want instead of what children's law requires. They can be vague and are most likely to be followed by businesses and MNCs in states where children's rights are frequently incorporated into business practices. Adhering businesses are largely in developed countries that already have domestic laws in place to govern children's rights. Current CSR mechanisms are less likely to be followed by the companies that most need to address how their actions affect children, and can be used as a public relations ploy. Consequently, "corporate codes, however stringent and robust they may appear, are the offspring of corporate discretion to afford human rights a privileged and hallowed position."¹⁶⁴

Second, responsibility for who is in charge of international children's law is often unclear. The effectiveness of international children's law is undermined by gaps in understanding that plays the primary regulatory role. These gaps exist between international and national legal systems as well as between the private and public sectors.

Common criticisms of codes and other similar mechanisms focus on three main areas: Vague language; voluntariness; and weak monitoring and enforcement procedures. A new Optional Protocol to the UNCRC will need to address these shortcomings.

3.2.1 Vague Language Mitigates Effectiveness

Current CSR mechanisms often employ broad terminology that speaks more to interests or welfare than to rights. Rights based language arguably provides a stronger discourse. That said, "The articulation of rights is only the beginning of a social conflict in which vested interests and traditional imbalances of power are challenged through various legal, para-legal, and non-legal practices."¹⁶⁵ Lawmakers should consider their use of language and how it impacts the effectiveness of the completed legal document.

Language issues are not a new problem in children's rights discourse. The meaning of key terms has rarely been stable and has often resulted in confusion. For example, even the term "children" did not gain its current meaning in the US until the 1970s, when children became full legal persons. Before then it was difficult to conceive of children's rights as separate from their parents' rights.¹⁶⁶ Children are still not understood as separate beings in many countries that are signatories to the UNCRC. A new Optional Protocol would have to use language that emphasizes the core rights of children while incorporating different cultural understandings of "children."

In addition to defining 'children,' many CSR legal mechanisms also use other terms whose meanings are difficult to directly define. Instead of trying to clearly define these terms, the legal documents frequently side-step the issue and instead use vague statements. This tendency results in language that lacks meaning and therefore lacks enforceability. For example, the Guidelines ask MNCs to take "adequate steps" and display "good corporate

164 Olga Martin-Ortega and Rebecca Wallace, "The Interaction Between Corporate Codes of Conduct and International Law: A Study of Women and Children in the Textile Industry", in Stephen Tully (ed), *Research Handbook on Corporate Legal Responsibility* (Cheltenham, UK: Edward Elgar Publishing, 2005), 302.

165 Stephen J Toope, "The Convention on the Rights of the Child: Implications for Canada" in Michael Freeman (ed), *Children's Rights: A Comparative Perspective* (Brookfield, Vermont: Dartmouth Publishing, 1996), 51.

166 *Ibid.*, 41.

governance.” In both cases there is no direct reference as to what these terms mean in practice. The Norms also use vague language and further include references to treaties or instruments of law that are of low legal importance.¹⁶⁷ For example, the term “sphere of influence” is introduced in the Norms, yet no real description of its meaning or how the term should be implemented is included. Such ambiguous language can reduce the impact of how a legal document is understood and used. Precise language and crisp meaning should be trademarks of a new Optional Protocol.

Frequent permissive language augments the weak nature of current children’s rights law. ‘Should’ is more common than ‘shall.’ The Guidelines are, again, a prime example. The Guidelines “encourage” MNCs to “respect” human rights, instead of requiring that they do so. The Norms are one mechanism that moves towards more mandatory language by its use of obligatory ‘shall’ statements. The Norms have been criticized as being both over-reaching in scope while including uncertain obligations. A new Optional Protocol would need to strike an appropriate balance between using strong shall statements and ensuring that these statements are attainable. A mandatory document that is unattainable may be just as weak as an overly permissive document.

3.2.2 The Perils of Voluntariness

CSR legal mechanisms are largely voluntary. It can be argued that public pressure has increasingly encouraged businesses and corporations to incorporate CSR into their business practices; being pressured to do something is not the same as being required to do something. Consequently, “the topography of international business activity is [therefore] now punctuated by the plethora of voluntary codes.”¹⁶⁸

Critics of voluntary agreements between corporations have argued that “the guarantee of such [human] rights should not spawn a multinational industry whereby the alleged adherence to human rights is reduced to another quality check akin to ticking a box.”¹⁶⁹ The arguments against voluntary corporate action comprising the majority of international children’s law are strengthened because international law is only meant to create state-based legal obligations. Businesses and corporations can easily sign an agreement. It looks good to agree, but the agreement essentially means very little. The standards included are therefore often very general and are, arguably, meant only to appeal to the wider public.

Another challenge of voluntary codes is that even well intentioned organizations often do not go beyond the drafting stage. The International Business Ethics Institute (IBEI) realizes that “[c]odes of conduct alone do not effectively promote responsibility and integrity into the workplace or sufficiently communicate a corporate commitment to integrity”.¹⁷⁰ Training for employees is also necessary for employees to understand and apply the code’s values in the organization.

A strong Optional Protocol to the UNCRC linking state actors to the private sector would help to address some of the downfalls of purely voluntary CSR legal mechanisms. Bringing the two sectors together would address accountability and instill public confidence that CSR and, more specifically, children’s rights are being considered as more than public relations instruments. While this protocol may displace the need for some of the mechanisms currently in place, it is likely more beneficial to have one strong document than many weak documents.

¹⁶⁷ Michael Karlsson and Max Granstrom, “Business and Human Rights: The Recent Initiatives of the UN” in Ramon Mullerat, “Corporate Social Responsibility: The Corporate Governance of the 21st Century”, 292.

¹⁶⁸ Martin-Ortega and Wallace, “Corporate Codes of Conduct”, 302.

¹⁶⁹ Ibid.

¹⁷⁰ Mark E. Hecht, “Private Sector Accountability in Combating the Commercial Sexual Exploitation of Children”, (2008), 73, citing International Business Ethics Institute, Institutional Program Assistance Education and Training, (2004).

3.2.3 Weak Monitoring and Enforcement Procedures

Weak monitoring is one of the most frequent critiques of CSR legal mechanisms. This largely derives from the fact that voluntary mechanisms are policed internally. The signatories are also the enforcers, and the signatories want to appear as though they are fulfilling the goals of the documents they have signed. Consequently, there is no strong rationale to enforce strict monitoring procedures. Regulating private sector providers who voluntarily enact codes of conduct is also challenging for governments because the effect of private sector actions on children can vary and does not necessarily correspond to government planning.¹⁷¹ The Norms, the Global Compact, and the Guidelines discussed above have all been critiqued for weak (or lack of) monitoring and enforcement.

State-based human rights treaties are monitored externally. Treaty-monitoring bodies only deal with state parties to the specific treaty and there is an obligation on such states to cooperate. For example, the Committee on the Rights of the Child is tasked with monitoring the state signatories to the UNCRC. Treaty-monitoring bodies have a reporting or monitoring procedure. Monitoring procedures generally require governments to present periodic reports to international bodies about how well they are implementing a particular international legal obligation. Reporting is required with ratification; all state parties to a treaty must submit periodic reports on their progress in making the treaty a reality. Such reports usually involve general claims about the particular government's success or challenges in living up to its international legal obligations. At the end of the reporting process, the treaty body will usually issue a set of recommendations.

Additionally, some of the treaty-monitoring bodies have a communication procedure, also known as a complaint procedure or petition. In very broad terms, communication procedures generally permit an individual or a group to go before an international committee or body with a complaint about a particular incident or allegation of discrimination. In such instances, the international body will ask the government involved to provide a particular remedy to the specific group or individual bringing the complaint. The newest Optional Protocol to the UNCRC was approved in December 2011 by the UN General Assembly and will allow individual children to submit complaints regarding specific violations of their rights under the UNCRC and the first two Optional Protocols.

Similar procedures are largely lacking from the monitoring and enforcement of voluntary codes and norms. For example, although the Global Compact is administered through the UN, it is not a regulatory instrument, and, therefore, neither the UN agencies, nor the Global Compact Office, have the authority to monitor or enforce adherence to the ten principles.¹⁷² Early on, this attracted criticism, so the Secretary-General adopted several "integrity measures." Two measures are particularly worth noting. The first concerns a participant's annual communication on progress.¹⁷³ If a company fails to complete this component for two consecutive years, it will be labelled "inactive," and will be barred from participating in events or using the Global Compact name and logo until the company complies.¹⁷⁴ The second measure concerns the allegation of systemic or egregious abuse. In such cases, the Global Compact Office plays a role, but will not involve itself in legal claims brought against a participating company.¹⁷⁵ The "integrity measures" do not include direct sanctions against companies that violate the ten principles.

171 "The Private Sector as Service Provider and Its Role in Implementing Child Rights", Submission to the Committee on the Rights of the Child Theme Day, (Save the Children UK, Geneva, September 20, 2002).

172 United Nations Global Compact, "Overview of the UN Global Compact", 1 December 2011, <http://www.unglobalcompact.org/AboutTheGC/index.html>.

173 United Nations Global Compact, "Communicating Progress", 21 December 2010, http://www.unglobalcompact.org/COP/communicating_progress.html.

174 Ibid.

175 Ibid.

Monitoring and enforcement procedures for other voluntary CSR mechanisms are often even weaker. For example, corporations which are signatories to the Norms are required to provide workers with a mechanism by which they may file complaints in case the Norms are violated.¹⁷⁶ Additionally, the two major components to the Tripartite Declaration's follow-up procedure include only that the Governing Body conducts a "quadrennial survey" and the Tripartite Declaration includes an interpretation mechanism in which governments of member states may request the International Labour Office to interpret the meaning of specific provisions when disputes arise.¹⁷⁷ These surveys do not determine compliance or judge measures undertaken by or within member states.¹⁷⁸

3.3 DRAWING INTERNATIONAL AND NATIONAL LAW TOGETHER

As noted above, the distinction between international law and national law sometimes creates "governance gaps". For example, governance and law making are largely driven by states; however, globalization results in situations where businesses act outside of the reach of states yet are not effectively constrained within international law. John Ruggie, past Special Representative to the UN Secretary General on Business and Human Rights, stated in his April 2008 report that "the root cause of the business and human rights predicament today lies in the governance gaps created by globalization."¹⁷⁹

The question of who is meant to apply international children's law is important. Despite the increasing reach of international law, national law still retains an important role. For example, "the fundamental role of the state as the key instrument by which international law finds its domestic voice... has persevered."¹⁸⁰ That said, states are often wary or antagonistic toward international organizations such as the UN.¹⁸¹ A proper balance would allow for human rights obligations to be shared between states and international organizations. Domestic law reform is needed if domestic courts are to play a useful role in remedying international human rights abuses.¹⁸²

3.4 ACCOUNTABILITY AND COOPERATION BETWEEN PUBLIC AND PRIVATE ACTORS

Ruggie's 2008 report emphasizes the concept of "protect, respect, remedy." In his view, states have the primary duty to protect against human rights violations, but since companies have the potential capacity to impact human rights they should consider recognized rights.¹⁸³ He further discusses how the corporation's responsibility to respect is independent of the state's responsibility to protect. Ruggie goes on to state that "because the responsibility to respect is a baseline expectation, a company cannot compensate for human rights harm by performing good deeds elsewhere."¹⁸⁴

176 University of Minnesota Human Rights Library, "Commentary on the Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights, UN Doc E/CN.4/Sub.2/2003/38/Rev.2", *2003), 16(e-f), accessed 3 December 2015, <http://www1.umn.edu/humanrts/business/commentary-Aug2003.html>.

177 International Labour Conference, Declaration on Fundamental Principles and the Rights at Work, *supra* note 163.
178 *Ibid.*

179 *Ibid.*

180 David Kinley, "Corporate Social Responsibility and International Human Rights Law" in Ramon Mullerat (ed), *The Corporate Governance of the 21st Century* (Kluwer Law International, The Hague, 2005), 233.

181 *Ibid.*, 233.

182 Justice Ian Binnie, "Legal Redress for Corporate Participation in International Human Rights Abuses: A Progress Report", *The Brief* 38 (Summer 2009), 50.

183 Olufemi Amao, *Corporate Social Responsibility, Human Rights and the Law: Multinational Corporations in Developing Countries* (New York: Routledge, 2011), 46.

184 *Ibid.*, 46-47.

The state duty to “protect” can include fostering corporate cultures that promote adherence to human rights, remedying state policy incoherencies (i.e., commitments that are not followed by implementation), and utilizing tools and resources at an international level.¹⁸⁵ These actions would be integral to states involved in a protocol linking state responsibilities and business practices. Respect emphasizes corporate responsibility to do no harm and remedy emphasizes the need for more effective access to remedies for the victims of human rights abuses. Remedy has, arguably, been addressed by the adoption of the third Optional Protocol, which provides a communications procedure. The link between respect and protect could be addressed by the proposed Optional Protocol.

In addition to the “protect, respect, remedy” regimen, some existing human rights treaties can be read as calling on states to regulate the behavior of non-state actors. This can be necessary because “companies are not as a matter of law or politics directly accountable to the public in the manner that states are.”¹⁸⁶ Such human rights treaties include the Convention on the Elimination of all Forms of Discrimination Against Women (CEDAW) that requires states “to take all appropriate measures to eliminate discrimination against women by any person, organization, or enterprise” and the UN Convention Against Racial Discrimination that obliges states to “prohibit and bring to an end...racial discrimination by any persons, group, or organization.”¹⁸⁷ Further, the UNCRC includes the wording that states are legally obliged to “ensure the child is protected in the private sphere.”¹⁸⁸ These statements are particularly important because public services previously provided by government are increasingly being privatized and “a state should not be able to absolve itself of human rights responsibilities by delegating such functions to private enterprises.”¹⁸⁹ The proposed Optional Protocol would therefore expand on the already positive wording in the CRC that links public and private actors. Drawing together these two spheres can only serve to create a stronger legal framework for children’s rights.

3.5 REFLECTIONS ON THE PROBLEMS FACED IN DRAFTING THE RUGGIE PRINCIPLES

The Ruggie Guiding Principles that emerged from the “protect, respect, remedy” framework faced various challenges, particularly with regards to a conceptual approach of how to draft uniform guidelines and general reception of the principles. The need for this framework was based on the observation that no initiatives to address business and human rights “had reached sufficient scale to truly move markets; they existed as separate fragments that did not add up to a coherent or complementary system.”¹⁹⁰ There were several theories as to why; perhaps the lack of an authoritative focus around expectations and actions of relevant stakeholders or simply the difficulty of organizing on such a large scale.¹⁹¹ In developing the Guiding Principles, Ruggie needed to acknowledge and address these underlying issues, as well as the pertinent implementation challenges.

185 Karlsson and Granstrom, “Business and Human Rights”, 297.

186 Binnie, “Legal Redress”, 46.

187 International Council on Human Rights Policy, *Beyond Voluntarism*, 47.

188 *Ibid*, 48.

189 *Ibid*, 53.

190 John Ruggie, “Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises: ‘Guiding Principles on Business and Human Rights: Implementing the United Nations “Protect, Respect and Remedy” Framework’”, UN Doc. A/HRC/17/31 (2011), para 5.

191 *Ibid*.

In an interview, Ruggie stated that one of the biggest hurdles was “[d]ealing with all rights; all states; all businesses, national and transnational, large and small; and getting all of that diversity into a simple and coherent Framework, with guidance on how it should be implemented.”¹⁹² He noted that every stakeholder wants to maximize their individual interests and concerns, and accommodating every entity involved is impossible.¹⁹³ In addition, implementation techniques vary in effectiveness depending on the context, and the Guiding Principles were not intended “as a tool kit, simply to be taken off the shelf and plugged in”.¹⁹⁴ Thus, the Guiding Principles offer a “sliding-scale approach for corporations based on their size and, ostensibly, their location”.¹⁹⁵ This is in keeping with Ruggie’s observation that, “When it comes to means for implementation... one size does not fit all”.¹⁹⁶ This approach to the Guiding Principles was criticized for not going far enough to regulate corporate actors and for failing to establish a “global standard” for corporate responsibility.¹⁹⁷

Another issue that arose in the development of the Ruggie Principles was the fact that international law deems that the advancement of human rights is exclusively in the hands of domestic legislative frameworks.¹⁹⁸ This allows governments to decide whether or not human rights obligations should be mandated within the business context of their state, which is often a conflict of interest, particularly for countries that are suffering economically.¹⁹⁹ This made it difficult for Ruggie to develop actionable recommendations that would be widely accepted and implemented.

The obstacles encountered in drafting the Ruggie Principles will almost certainly be similar to the challenges that will be faced in the development of a fourth Optional Protocol. A lack of an authoritative focus and the difficulty of accommodating multiple stakeholders are two factors that will be equally as difficult for a fourth Optional Protocol to maneuver. Implementation will also present challenges, particularly since the “one size does not fit all” adage applies in the children’s rights context as well, especially when considerations of cultural beliefs in different areas of the world are taken into account. In terms of reliance on domestic legal frameworks, a fourth Optional Protocol would also stress the need for states to implement laws into the private sector revolving around children’s rights, which still leaves the decision of whether or not to mandate these laws in the hands of government officials.

On the other hand, one major criticism of the Ruggie Principles from the Child Rights Information Network, an NGO dedicated to the promotion of children’s rights, was the lack of a “substantive discussion of the rights particular to children that have long been a matter of international law... [an omission that] is especially troubling because the [mandate] required giving ‘special attention to persons belonging to vulnerable groups, in particular children’”.²⁰⁰ This critique exemplifies the need to create a form of global corporate accountability that is specifically focused on children’s rights, given the increased vulnerability of children.

192 The Fletcher Forum of World Affairs, “Business and Human Rights: Together at Last?: A Conversation with John Ruggie”, *The Fletcher Forum of World Affairs* 35, No. 2 (Summer 2011), 118-119, accessed 27 November 2015, http://www.fletcherforum.org/wp-content/uploads/2013/12/Ruggie_FA.pdf.

193 *Ibid.*

194 Ruggie, “Guiding Principles”, para 15.

195 Robert Blitt, “Beyond Ruggie’s Guiding Principles on Business and Human Rights: Charting an Embrasive Approach to Corporate Human Rights Compliance”, *Texas International Law Journal* 48:1, (Fall 2012), 43.

196 Ruggie, “Guiding Principles”, para 15.

197 Blitt, “Beyond Ruggie’s Guiding Principles”, 52-53.

198 Susan Ariel Aaronson, Ian Higham, “‘Re-righting Business’: John Ruggie and the Struggle to Develop International Human Rights Standards for Transnational Firms”, *Human Rights Quarterly* 35, No. 2 (May 2013), 338.

199 *Ibid.*

200 Blitt, “Beyond Ruggie’s Guiding Principles”, 54.

3.6 HOW EXISTING INTERNATIONAL LAW CAN INFORM A NEW OPTIONAL PROTOCOL

There are three examples of how current international law can inform the development of a new Optional Protocol to the UNCRC. Some current law references how international law creates state obligations to non-state actors. Some international mechanisms include useful communications procedures that could increase the effectiveness of a proposed Optional Protocol. Many existing international statements provide useful and overarching statements on children's law that can inform the content of a new Optional Protocol.

First, precedent for creating state obligations to non-state actors is present in certain UN committee statements. The UN committee that oversees implementation of CEDAW stated that "discrimination under the Convention is not restricted to action by or on behalf of governments...under general international law and specific human rights covenants, States may also be responsible for private acts". The UN committee monitoring the International Covenant on Civil and Political Rights (ICCPR) stated that states should protect people's privacy from "all such interferences and attacks whether they emanate from State authorities or from natural or legal persons."

Taking a wide perspective it is evident that "international human rights law typically charges the state with the responsibility to ensure that it polices all human rights transgressions within its jurisdiction, no matter the legal character of the perpetrator, the responsibility is held to cover both actions by the state and non-state organs alike."²⁰¹

Articles 23 and 24 of the ICCPR provide a clear example of calling for a positive obligation from states; in this case states must protect the family unit and children. This obligation is expanded upon in General Comment 16, which states that "states are under an obligation to protect the family from any interference whether they emanate from state authorities or from natural or legal persons."²⁰² The ICCPR can be further read as creating an obligation for states to adopt legal and other measures to ensure rights in the covenant are real and effective by including measures that ensure respect from the state and other social institutions including private parties.²⁰³

Second, some international mechanisms have created communications procedures that could be adapted to apply to the proposed Optional Protocol. For example, the ILO Fundamental Principles has a governing body that helps craft priorities and action plans that will be implemented in the future. The ILO also uses National Contact points to ensure domestic understanding (this could be particularly useful for an Optional Protocol that would have to be adapted to many national law systems). Additionally, the Convention on Transnational Organized Crime provides for mutual legal assistance amongst states and has a communications procedure where individuals or groups can go before an international committee with a complaint or allegation of discrimination.

Finally, existing international statements, particularly the UNCRC, provide extensive overviews of children's rights. Together with other statements in broader international covenants the rights of children and family are referenced. This language should be used when developing the proposed Optional Protocol. It would be particularly important to draw on past language in order to avoid some of the pitfalls of a lack of awareness of different cultural approaches to the child, while maintaining a strong conception of rights.²⁰⁴

201 Kinley, "Corporate Social Responsibility", 234.

202 Richard Burchill, "Rights of the Family and Children" in Alex Conte and Richard Burchill, ed, *Defining Civil and Political Rights: The Jurisprudence of the United Nations Human Rights Committee* (2d) (Surrey, UK: Ashgate Publishing Ltd.), 220.

203 *Ibid.*

204 Toope, "Implications for Canada", 44.

4 A FOURTH OPTIONAL PROTOCOL

Drafting a complete version of a Fourth Optional Protocol is beyond the scope of this paper. The following section identifies key components that would be required for a new Protocol. A statement is identified, based on the CSR principles that currently exist but modified through a lens of children's rights, followed by discussion of the statement's purpose and how it could be interpreted by states and intergovernmental organizations.

A preamble for the protocol would require states to develop laws and regulations directed at business enterprises with a view to protecting and respecting the rights of the children enshrined in the UNCRC. International law has outlined that states have the primary responsibility to promote, secure the fulfillment of, respect, ensure respect of and protect human rights.²⁰⁵ Business enterprises play important and influential roles in world economies and transactions. Their potential to act as a positive influence on the lives of children is significant. Business enterprises exist as organs within society and as such, they bear an inherent responsibility to protect and promote children's rights.

Further, the nature of business enterprises means confining them to a certain jurisdiction is difficult, if not impossible. Extraterritorial legislation and international cooperation are required to fulfill the goals of a new protocol.

4.1 PRINCIPLES

4.1.1 Legal and Administrative Frameworks

Principle: States shall establish and reinforce the necessary legal and administrative frameworks for ensuring that the requirements of the Protocol be implemented by business enterprises.²⁰⁶

Discussion: Legal and administrative frameworks ensure accountability and represent the backbone of this Protocol. They indicate the rules and regulations by which business enterprises are expected to operate. They serve to show what lines cannot be crossed and what form of penalty will be used to remedy those situations. Each party will devise a framework that suits the specific needs of their nation, but all must be informed by the principles found in the UNCRC and the "protect, respect and remedy" framework.

Legal and administrative frameworks put in place by governments must have the effect of being operational throughout the jurisdiction of the state. States have the responsibility of ensuring this.

²⁰⁵ As outlined in Economic and Social Council, "United Nations Norms on the Responsibilities of Transnational Corporations and other Business Enterprises with regard to Human Rights", UN Doc. E/CN.4/Sub.2/2003/12/Rev.2 (2003).

²⁰⁶ Trevor Buck, et al., *International Child Law*, 2nd ed, (Routledge, New York, 2011), 46-51.

4.1.2 Formal Policy Requirement

Principle: States shall require business enterprises to put policies in place which serve to acknowledge and respect children's rights.²⁰⁷

Discussion: Not only will business enterprises be bound by legal and administrative frameworks set up by the states in which they operate, but they will also be responsible for creating their own formal policies with regard to the protection of children's rights. The content of each policy will vary as there are many different types of business enterprises. It should be tailored to the needs of that specific enterprise and its interactions with children. An understanding of international children's rights standards, the implementation of training programs for staff, and consultation with non-governmental organizations (NGOs) would be beneficial in the creation and implementation of policies.²⁰⁸

A formal policy should also include carrying out human rights due diligence for the purpose of, "assessing actual and potential impacts, integrating and acting upon the findings, tracking responses, and communicating how impacts are addressed."²⁰⁹ The Guidelines point out that this due diligence should be exercised according to each business enterprise's, "size, nature and context of operations and severity of risks of adverse human rights impacts."²¹⁰ Due diligence should be an ongoing process in order for problems to be recognized as quickly as possible.

Internal and external monitoring systems, as outlined below, will serve to hold business enterprises accountable for their policy implementation. These mechanisms will be put in place to ensure that policies move beyond their value in the theoretical world to achieving actual effects in the business world.

4.1.3 Internal Monitoring Systems

Principle: States shall require business enterprises to develop reporting and communications structures with regard to children's rights impacts.

Discussion: An operational monitoring system is largely what separates policies that look good on paper from policies that are effective in execution. The extent of monitoring will depend on what degree of risk each business enterprises runs with regards to children's rights violations.

Putting monitoring systems in place should not be perceived negatively by business enterprises. There are rewards associated with having records of positive social impacts, and pitfalls of tarnished reputations avoided. Results should be reported in a timely fashion in order to maintain their relevancy.

207 "The Global Sullivan Principles of Corporate Social Responsibility", mallenbaker.net: Corporate Social Responsibility News and Resources, accessed 18 June 2015, <http://www.mallenbaker.net/csr/CSRfiles/Sullivan.html>.

208 Set out in Human Rights Principles for Companies (Amnesty International, January 1998), AI Index: ACT 70/01/98.

209 Ruggie, "Report 2011", para 2.

210 OECD, OECD Guidelines.

4.1.4 External Monitoring Systems

Principle: States shall be required to independently monitor business enterprises' children's rights impacts.

Discussion: The need for independent monitoring is a key theme throughout existing literature.²¹¹ External monitoring ensures that business enterprises are held accountable for the measures they are reported to be undertaking.

External monitoring in this Optional Protocol differs from other suggestions because it would not need to be carried out by the UN. States will set up monitoring mechanisms as a part of their administrative framework for ensuring the rights in the UNCRC are being upheld.

Effective monitoring requires that surveying is carried out in a timely fashion, documented accurately and then made accessible to the bodies that should see it. Reporting must be done frequently in order for information to be current and new situations to be effectively investigated and remedied. Transparency is necessary in order to grant the process credibility and assure stakeholders that they are getting the full picture. Eliminating any potential for corruption in this system is essential.

4.1.5 Support from Governments to Business Enterprises

Principle: States shall provide support and guidance to business enterprises in order to further children's rights.

Discussion: Governments cannot expect business enterprises to come up with policies and monitoring systems that adequately address children's right impacts without effective assistance and information. Specialists in that area need to help enterprises with policy creation and periodic monitoring. States play an important role in this process by allowing relevant NGOs to operate in their jurisdictions and engage with business enterprises.²¹²

4.1.6 Sustainable Supply Chain Management

Principle: States shall require all business enterprises to exercise sustainable supply chain management.

Discussion: The Global Compact defines supply chain sustainability as, "the management of environmental, social and economic impacts, and the encouragement of good governance practices, throughout the lifecycles of goods and services."²¹³ Understanding the lifecycles of goods and services can be the biggest challenge in this process as they can span across cultures, languages and jurisdictions. That being said, it is essential that business enterprises are behaving in accordance with the UNCRC throughout their supply chain or all real accountability is lost.

211 UN Committee on the Rights of the Child, "General Comment No. 16 (2013) on State obligations regarding the impact of the business sector on children's rights", UN Doc. CRC/C/GC/16, (2013), para 34.

212 Amnesty International, "Human Rights Principles for Companies", (Amnesty International, January 1998) AI Index: ACT 70/01/98.

213 UN Global Compact and Business for Social Responsibility, "Supply Chain Sustainability: A Practical Guide for Continuous Improvement", (2010), accessed 3 December 2015, http://www.bsr.org/reports/BSR_UNGC_SupplyChainReport.pdf.

4.1.7 Accountability and Liability in Business Enterprises

Principle: States shall hold business enterprises liable for any abuses committed by their enterprise which violate the rights protected in the CRC.

Discussion: As a part of their legal frameworks for the implementation of this Optional Protocol, states must assert that officers and persons working for business enterprises are responsible to respect the laws and policies put in place by the state and business enterprise, respectively.²¹⁴ Undertaking to determine liability in situations where it may be difficult is a critical responsibility of each state.

The Council of Europe's Convention on Cybercrime approached the issue of corporate accountability by mandating that:

*Each party shall adopt such legislative and other measures as may be necessary to ensure that legal persons can be held liable for a criminal offence committed for their benefit by any natural person, acting either individually or as a part of an organ of the person...Each Party shall take the measures necessary to ensure that a legal person can be held liable where the lack of supervision or control by a natural person has made possible the commission of a criminal offence...for the benefit of that legal person by a natural person acting under its authority.*²¹⁵

These types of provisions ensure that a legal person can be held liable when a natural person acting as a part of its organization has committed an offence. This type of liability trickles throughout business enterprises operations in order to ensure that liability can be ascertained.

4.1.8 International Cooperation

Principle: States shall cooperate with each other to the widest extent possible for the purposes of protecting, respecting and remedying children's rights found in the UNCRC.

Discussion: The transnational nature of many business enterprises' operations means that various countries can be implicated in a single rights violation. States must cooperate in order to carry out investigations, determine liability, and bring perpetrators to justice. Uniform applications of legislation and international instruments (such as treaties, protocols, and even definitions) can significantly ease the process of international cooperation.²¹⁶

214 Trevor Buck, et al., *International Child Law*, 46-51.

215 Council of Europe, "Convention on Cybercrime", European Treaty Series, No. 185, (Budapest, 2001), accessed 3 December 2015, http://www.europarl.europa.eu/meetdocs/2014_2019/documents/libe/dv/7_conv_budapest_7_conv_budapest_en.pdf.

216 *Ibid.*

4.1.9 Host State vs. Home State Discrepancies

Principle: States operating as “home” states for business enterprises must require such business enterprises to operate abroad according to the Protocol regardless of the regulations of the “host” state.

Discussion: The “home” state versus “host” state distinction can have a significant impact on if and where children’s rights violations are prosecuted. The UN General Comment No. 16 outlines that “host” states bear the primary responsibility to protect, respect and fulfill children’s rights in their jurisdictions.²¹⁷ This becomes problematic when “host” states ignore rights violations whereas “home” states would like to act. Conflicts can only be resolved on a case-by-case basis and it will require significant international cooperation to ensure that remedies are effectively executed in these scenarios. The discussion of jurisdictional issues below further explores this theme.

4.1.10 Jurisdictional Issues

Principle: States shall adopt such legislative and other measures as may be necessary to establish jurisdiction over any offence established in accordance with this Optional Protocol, when the offence is committed:

- In its territory; or
- On board a ship flying the flag of that party; or
- On board an aircraft registered under the laws of that party; or
- By one of its nationals, if the offence is punishable under criminal law where it was committed or if the offence is committed outside the territorial jurisdiction of any state;²¹⁸ or
- By business enterprises operating abroad when there is a reasonable link between the state and the conduct concerned.²¹⁹

Discussion: Enabling states to establish jurisdiction in places where their business enterprises operate will facilitate investigations into alleged children’s rights violations. This principle goes hand-in-hand with the discussion of “home” state versus “host” state obligations. The Convention on Cybercrime adds that, “When more than one party claims jurisdiction over an alleged offence established in accordance with this convention, the parties involved shall, where appropriate, consult with a view to determining the most appropriate jurisdiction for prosecution.”²²⁰ This is a clear example of an opportunity in which extensive international cooperating would be needed.

217 UN Committee on the Rights of the Child, “General Comment No. 16 (2013) on State obligations regarding the impact of the business sector on children’s rights”, UN Doc. CRC/C/GC/16, (2013).

218 Council of Europe, “Convention on Cybercrime”, art. 22(1)(d).

219 See UN Committee on the Rights of the Child, “General Comment 16”, para 43.

220 Council of Europe, “Convention on Cybercrime”, art. 22(5).

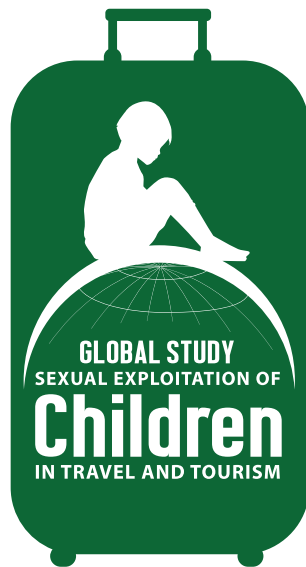
5 CHALLENGES AND LIMITATIONS OF A FOURTH OPTIONAL PROTOCOL

Undoubtedly, a Fourth Optional Protocol will encounter similar challenges and limitations as those faced in the development of Ruggie's Guiding Principles. Beyond the underlying issue that there needs to be more of an authoritative focus in terms of expectations and actions expected of the relevant stakeholders, there is the overwhelming challenge of organizing procedures and implementation standards that can be applied across a broad range of stakeholders, accounting for different situations and approaches. In order to create a platform of accountability, a Fourth Optional Protocol would need to be binding to corporate entities. To do so, it is necessary for states to implement and enforce the requirements laid out in the protocol. Hence, there is a certain level of reliance on domestic legal frameworks.

6 CONCLUSION

Corporate violations of human rights harm individuals, societies, markets and often, corporations themselves. To date, domestic law, international law, and voluntary civil regulation have been used largely in isolation to address such abuses. By incorporating aspects of the CSR movement into a binding international treaty which in turn addresses challenges in domestic litigation, international law can evolve to bridge gaps in rights protection. Specifically in the field of children's rights, a new Optional Protocol to the UNCRC including effective internal and external monitoring, obligations on states to prosecute violators, frameworks for international cooperation, and recognition of jurisdictional hurdles would effectively combine elements of the domestic, international and civil paradigms.

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