

The International Legal Personality of the Multinational Enterprise and the  
Governance Gap Problem

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## **Abstract**

This thesis examines the concept of legal personality in public international law, noting in particular its definition, importance in legal theory and emergence within the legal system. Examining the rights of investors in current international investment law, as well as the duties of private persons which stem from customary international law, the thesis argues that multinational enterprises (MNEs) meet the definition of legal persons under public international law since they are entities granted direct international law rights and duties within this legal system. The thesis concludes with a brief profile of the governance gap in MNE legal accountability under domestic and international legal systems, a gap which results from the incongruity between the international scope of MNE operations and the largely national scope of regulatory apparatuses. The thesis presents several ways in which the legal personality of MNEs under public international law may contribute to the amelioration of the governance gap.

## **Résumé**

Cette thèse porte sur le concept de la personnalité juridique en droit international public, plus particulièrement sur sa définition, son importance dans la théorie juridique ainsi que ses origines. L'étude des droits des investisseurs dans le droit actuel des investissements internationaux, ainsi que celle des obligations des personnes privées découlant du droit international coutumier, m'amènent à soutenir que les entreprises multinationales (EMN) correspondent à la définition des personnes morales en vertu du droit international public, puisqu'elles sont des entités se voyant directement conférer des droits et imposer des devoirs du droit international. Cette thèse conclut sur une brève description des lacunes en matière de gouvernance de la responsabilité juridique des EMN dans le cadre des systèmes juridiques national et international. Ces lacunes résultent de l'inadéquation entre la dimension internationale des activités des EMN et la portée nationale de leur réglementation. Enfin, nous verrons de quelles différentes façons la personnalité juridique des EMN en droit international public peut contribuer à combler ces lacunes en matière de gouvernance.

## Chapter 1 - Multinational Enterprise Personality in International Law: Theory

### 1.1 Thesis Introduction

*[...] the Court has come to the conclusion that the Organization is an international person. That is not the same thing as saying that it is a State, which it certainly is not [...]. It does not even imply that all its rights and duties must be upon the international plane, any more than all the rights and duties of a State must be upon that plane. **What it does mean is that it is a subject of international law and capable of possessing international rights and duties and that it has capacity to maintain its rights by bringing international claims.***<sup>1</sup>

At the heart of this thesis is a simple proposition. Multinational enterprises (MNEs) now have international law rights and duties, as well as the ability to bring international claims. These rights and duties show that MNEs hold the *capacity* for rights and duties under international law, indicating that MNEs meet the definition for legal personality under international law. In other words, MNEs' rights and duties are evidence of their legal personality under international law. As entities with legal personality, MNEs are unique subjects of public international law.

This thesis is two pronged and argues, first, that states have granted MNEs international legal personality through the bestowal of MNE-enforceable rights and duties under this legal system. Second, I argue that MNEs' international personality may help to ameliorate the MNE governance gap<sup>2</sup> since such personality acknowledges the way that

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<sup>1</sup> *Reparation for Injuries Suffered in the Service of the United Nations*, Advisory Opinion, [1949] I.C.J. Rep. 174 at 179, online: <<http://www.icj-cij.org/docket/files/4/1835.pdf>> [emphasis added] [*Reparations Case*].

<sup>2</sup> The governance gap is described by UN Special Rapporteur John Ruggie:

The root cause of the business and human rights predicament today lies in the governance gaps created by globalization - between the scope and impact of economic forces and actors, and the capacity of societies to manage their adverse consequences. These governance gaps provide the permissive environment for wrongful acts by companies of all kinds without adequate sanctioning or reparation.

Human Rights Council, *Protect, Respect and Remedy: a Framework for Business and Human Rights: Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises*, John Ruggie, UN HRCOR, 2008, UN Doc. A/HRC/8/5 (7 April 2008) at 3, online: <<http://www.reports-and-materials.org/Ruggie-report-7-Apr-2008.pdf>> at 3 [Ruggie, "Protect, Respect and Remedy"]; See generally Georgette Gagnon, Audrey

MNEs operate as centrally controlled actors and how they require comprehensive regulation as such.

This introductory section of Chapter 1 describes what is meant by subject, legal personality and MNE. Turning first to the terms of subject and legal personality, it should be noted that these two concepts are closely linked. The word “subject” refers to an entity with legal personality, a type of entity sometimes also called a “legal person”. For its part, legal personality refers to an entity’s capacity for rights and duties within a legal system. The relationship between subjecthood and legal personality is outlined in a definition presented by Bin Cheng:

Subjects of international law, also known as *international persons*, are entities that are endowed with international legal personality, which is the capacity to bear rights and duties under the international legal system.<sup>3</sup>

In slight variation, Brownlie presents subjecthood in terms of rights and duties, but adds the requirement of capacity for enforcement of such rights and duties in the international law system. Brownlie writes, “A subject of the law is an entity capable of possessing international rights and duties and having the capacity to maintain its rights by bringing international claims.”<sup>4</sup> Similarly, in his discussion of legal personality indicators, Shaw refers to capacity and competence to enforce claims.<sup>5</sup>

This thesis synthesizes the above views and employs the following definitions:

1. A subject of international law is an entity with legal personality.

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Macklin & Penelope Simons, eds., *The Governance Gap*, (London: Routledge, 2009) [Gagnon, Macklin & Simons, *The Governance Gap*].

<sup>3</sup> Bin Cheng, “Introduction to Subjects of International Law” in Mohammed Bedjaoui, ed., *International Law: Achievements and Prospects*, (Paris: Martinus Nijhoff Publishers, 1991) 23 at 23 [emphasis in original].

<sup>4</sup> Ian Brownlie, *Principles of Public International Law*, 4<sup>th</sup> ed. (Oxford: Clarendon Press, 1990) at 58.

Menon summarizes: “According to text-book writers, a subject of international law is an entity capable of possessing international rights and duties and endowed with the capacity to take legal action in the international plane.” P.K. Menon, “The International Personality of Individuals in International Law: A Broadening of the Traditional Doctrine” (1992) 1 J.Transnat’l L. & Pol’y 151 at 154.

<sup>5</sup> Malcolm Shaw, *International Law*, 4<sup>th</sup> ed. (Cambridge, U.K.: Cambridge University Press, 1987) at 138 [Shaw, *International Law*].

2. Legal personality is the capacity for rights and duties under international law and the capacity to make claims within this legal system in relation to such rights and duties.<sup>6</sup>

Legal personality is thus a requirement for subjecthood. Varying qualitatively across subjects<sup>7</sup>, “legal personality does not connote the possession of the same rights and obligations.”<sup>8</sup> This thesis contends that MNEs’ subjecthood is different from that held by states, as MNEs hold rights and duties which are different from those of states.<sup>9</sup> There is an inescapable element of judgement involved in the recognition of legal personality and subjecthood, as Shaw describes:

Personality is a relative phenomenon varying with the circumstances. It will always involve a test of judgement and perception of the situation at hand and the overall context of the current nature and requirements of the international community at large.<sup>10</sup>

Having presented the terms of subject and legal personality, I now turn to defining what is meant by multinational enterprise (or MNE). Economically, at its simplest a MNE is a business enterprise which “owns and controls income generating assets in more than one country.”<sup>11</sup> Ownership is thus not the single determinative indicator of a MNE’s scope. Rather it is *central control* exercised upon the MNE’s internationally distributed

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<sup>6</sup> See e.g. Brownlie, *supra* note 4 at 58. I am seeking to apply the highest definitional standard of legal personality found in the literature.

<sup>7</sup> Shaw, *International Law*, *supra* note 5 at 138.

<sup>8</sup> Cheng, *supra* note 3 at 25.

<sup>9</sup> For instance, the legal personality of MNEs and states under international law differs in that the latter has the right to conclude treaties, while the former does not. See *Anglo-Iranian Oil Co. Case (United Kingdom v. Iran)*, Judgment of July 22<sup>nd</sup>, 1952, [1952] I.C.J. Rep. 93 at 98, online: <<http://www.icj-cij.org/docket/files/16/1997.pdf>>. In the *Reparations* case the ICJ observed at p. 178 that:

The subjects of law in any legal system are not necessarily identical in their nature or in the extent of their rights, and their nature depends upon the needs of the community. Throughout its history, the development of international law has been influenced by the requirements of international life, and the progressive increase in the collective activities of States has already given rise to instances of action upon the international plane by certain entities which are not States.

*Reparations Case*, *supra* note 1 at 178. Accord *Western Sahara*, Advisory Opinion, [1975] I.C.J. Rep. 12 at 63 para. 148, online: <<http://www.icj-cij.org/docket/files/61/6195.pdf>>.

<sup>10</sup> Shaw, *International Law*, *supra* note 5 at 138.

<sup>11</sup> John H. Dunning, “The Distinctive Nature of the Multinational Enterprise” in John H. Dunning, ed., *Economic Analysis and the Multinational Enterprise* (London: Routledge, 1974) 13 at 13.

components which is the hallmark of an MNE's economic scope.<sup>12</sup> MNEs typically take the form of corporate networks, comprised of a parent company with equity interests in subsidiary and affiliate companies.<sup>13</sup> Equity linkages are not the only way that MNE components may be connected, however. Common control may be exerted upon MNE components through other mechanisms, the diversity of which is limited only by human legal ingenuity. Such mechanisms may include contractual arrangements (*i.e.*, licensing agreements), partnerships or trust instruments.

In everyday speech, the term multinational corporation tends to be used much more commonly than multinational enterprise to describe MNEs.<sup>14</sup> Multinational enterprise is a more legally accurate term, however, as there is no international means of incorporation and an MNE is not technically one corporation. It is telling, however, that multinational corporation is the more common term, as it suggests a popular acknowledgement and understanding of the centrally-controlled nature of these international actors. The term multinational enterprise presents such organizations in a more technical light, in one removed from such organizations' corporate character and their presence around the world as unified actors.

For the purposes of this thesis, MNEs are thus international business enterprises, centrally controlled, which may or may not be organized in the form of equity ownership networks. As this definition is admittedly broad, it is perhaps useful to note some

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<sup>12</sup> Cynthia Day Wallace writes of the centralized control which characterizes MNEs:

What we ultimately have in the MNE, then, is a single enterprise composed of a number of affiliated business establishments, each functioning simultaneously in different countries, and typically characterized by centralized control and decentralized decision-making, resulting in a kind of 'unity in diversity'. And of all the essential or possible criteria one might mention, the one that is common to every form of multinational enterprise – and a *sine quo non*, even where there is a high degree of decentralized autonomy according to affiliates, – is: central control.

Cynthia Day Wallace, *The Multinational Enterprise and Legal Control: Host State Sovereignty in an Era of Economic Globalization* (The Hague, Martinus Nijhoff Publishers: 2002) at 156. See also OECD, *OECD Guidelines for Multinational Enterprises* (Paris: OECD, 2008) at 17-18, online:

<<http://www.oecd.org/dataoecd/56/36/1922428.pdf>>.

<sup>13</sup> According to UNCTAD terminology, entities at least 10% owned by a parent company are referred to as affiliates, whereas those with equity at least 50% owned by a parent company are subsidiaries. UNCTAD, *World Investment Report 2008*, UNCTAD, 2008, UN doc. UNCTAD/WIR/2008 (2008) at 249, online: <[http://www.unctad.org/en/docs/wir2008\\_en.pdf](http://www.unctad.org/en/docs/wir2008_en.pdf)> [UNCTAD, *World Investment Report 2008*].

<sup>14</sup> From personal observation, the term MNE or multinational enterprise appears to be rarely if ever used outside of academic and business circles, while the term multinational corporation is commonly used in everyday speech with reference to high visibility MNEs such as McDonalds, Walmart, Shell, *etc.*

practical information on MNEs' existence in the contemporary global economy. There are an estimated 79 000 MNEs in the world today.<sup>15</sup> There is intense stratification within this number, however, as it is estimated that the top 500 MNEs are responsible for over 90% of the world's foreign direct investment stock and nearly 50% of world trade.<sup>16</sup> Overall, MNEs are responsible for about two thirds of world trade, with one third of world trade being intra-MNE trade (*i.e.*, trade among corporate affiliates).<sup>17</sup> MNEs' share of global output (GDP) has more than doubled since 1982.<sup>18</sup> In sum, this type of business organization is the backbone of the global economy and includes within its ranks an elite class of MNEs with massive economic weight resulting in ubiquitous cultural and political presence.<sup>19</sup>

Having briefly described what is meant by subject, legal personality and MNE, I now return to outlining the contents of this thesis. As mentioned above, the primary goal of this thesis is to assess the enforceable rights and duties of MNEs under international law and to highlight MNEs' current legal personality and subjecthood. The thesis argues

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<sup>15</sup> UNCTAD estimates in its 2008 World Investment Report that approximately 79 000 MNEs control 790 000 foreign affiliates worldwide. UNCTAD, *World Investment Report 2008*, *supra* note 13 at xvi.

<sup>16</sup> Alan M. Rugman, *The Oxford Handbook of International Business* (Oxford: Oxford University Press, 2009) at 169.

<sup>17</sup> Debra Johnson & Colin Turner, *International Business* (Routledge, London: 2003) at 101.

<sup>18</sup> In 2002 value-added by MNEs (3.4 trillion USD) accounted for approximately 10% of global GDP, constituting twice the 1982 percentage. UNCTAD, *World Investment Report 2003*, UNCTAD, 2003, U.N. Doc UNCTAD/WIR/2003 (2008) at 23, online: <[http://www.unctad.org/en/docs/wir2003\\_en.pdf](http://www.unctad.org/en/docs/wir2003_en.pdf)>.

<sup>19</sup> Regarding elite MNEs' economic weight, it is notable that the largest MNEs generate more value-added annually than many of the world's states. UNCTAD's 2002 ranking of MNEs and states alongside one another according to value-added annually revealed that 29 of the world's 100 largest economies were MNEs rather than states. For example, the first MNE on the list at number 45 was ExxonMobil, which produced approximately 63 billion USD in value-added for 2000, exceeding the GDP of countries such as Pakistan and the Czech Republic. UNCTAD, *World Investment Report 2002*, UNCTAD, 2002, UN Doc. UNCTAD/WIR/2002 (2003) at 90, online: <[http://www.unctad.org/en/docs/wir2992\\_en.pdf](http://www.unctad.org/en/docs/wir2992_en.pdf)> [UNCTAD, *World Investment Report 2002*]. The cultural pervasiveness of various MNEs is evidenced by their brand presence and popular recognition around the world. For example, restaurant brands with wide international diffusion include, Subway (87 countries), McDonalds (100+ countries) and KFC (80+ countries). *Subway Country Count*, online: <<http://www.subway.com/subwayroot/Applications/Reports/CountryCount.aspx>>; *McDonalds About*, online: <<http://www.mcdonalds.com/corp/about.html>>; *KFC About*, online: <<http://www.kfc.com/about/>>. The political importance of elite MNEs is evidenced by their direct participation in major conferences such as the World Economic Forum. The closing Davos news release reflects this political importance, writing, "The world's business and government leaders only have a short time to develop effective solutions to the current economic crisis[.]" World Economic Forum, News release, "Global leaders urge collaboration and swift action at close of Annual Meeting in Davos" (1 February 2009), online: <[http://www.weforum.org/en/media/Latest%20Press%20Releases/AM09\\_PR\\_Closing](http://www.weforum.org/en/media/Latest%20Press%20Releases/AM09_PR_Closing)>.

further that broader acknowledgement of MNEs' international legal personality will assist in efforts to reduce the MNE governance gap.

This thesis is organized in the following manner. Chapter 1 continues with a description of how legal personality is regarded and constructed within different theoretical approaches to international law. Next, Chapter 2 examines MNEs' direct rights under current public international law, primarily those arising from MNEs' status as investors under bilateral investment treaties (BITs) and other treaties. Chapter 3 examines MNE duties under international law. Chapter 4 concludes the thesis by exploring the role that MNE personality may have in ameliorating the governance gap.

## **1.2 Legal Personality and Subjecthood within International Law Theory**

Subjecthood is a foundational topic in international law. A particular observer's understanding of the meaning of international law subjecthood will have important implications for his or her views on the nature of international law generally (and *vice-versa*), including his or her understanding of international law's purpose, sources, scope of application and basic character. There are several divergent theoretical orientations regarding the nature and scope of international law and adherents to different schools of thought harbour different views on whether or not international law is structurally capable of accepting MNEs as unique international law persons.<sup>20</sup>

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<sup>20</sup> Patrick Dumberry writes:

Il y a des auteurs pour qui la principale raison de refuser d'accorder une personnalité juridique internationale aux entreprises est avant tout *structurelle* et se fonde sur la nature intrinsèque de l'ordre juridique international. Dès lors, ces auteurs pour la plupart n'abordent tout simplement pas la question de savoir si tel statut peut être reconnu aux entreprises, et ce dans la mesure où une telle question ne peut qu'entraîner une réponse négative. Des raisons structurelles sont aussi à la base du raisonnement des auteurs qui sont réfractaire à l'idée même de reconnaître un tel statut particulier aux personnes privées.

Patrick Dumberry, "L'entreprise, sujet de droit international?" (2004) 108:1 R.G.D.I.P. 103 at 106, online: <[http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1285140](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1285140)> (emphasis in original).

There are many different theories of and about international law<sup>21</sup> and there are various ways of categorizing such theories.<sup>22</sup> The focus of this section will be to examine several of the broad theoretical approaches to international law, in particular those which present divergent conceptions of international legal personality, and the creation and recognition thereof. I will review (1) the natural law paradigm, (2) the state-centered positivist paradigm, and (3) the post-war system-oriented approach. Following this, I will discuss which theoretical orientation I subscribe to, and outline how precisely, according to my selected approach, I find that MNEs have international legal personality.<sup>23</sup>

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<sup>21</sup> A rough listing of critical approaches might include the following approaches: (1) Critical Legal Studies, (2) Marxist, (3) Kantian, (4) TWAIL (Third World Approaches to International Law), and (5) Feminist. Other (sometimes overlapping) theoretical approaches to international law which are not per se critical approaches, include (A) the New Haven school (comprised of policy-oriented, social practice based analysis), (B) law and economics (including rational choice and game theory) and (C) international relations and international law (various interdisciplinary approaches drawing on institutionalist, realist and/or liberalist IR perspectives). See e.g. on (1) Martti Koskeniemi, *From Apology to Utopia: The Structure of International Legal Argument* (Helsinki: Lakimiesliiton Kustannus, 1989); on (2) China Miéville, *Between Equal Rights: a Marxist Theory of International Law* (Leiden: Brill, 2005); on (3) Fernando R. Tesón, *A Philosophy of International Law* (Boulder, Colorado: WestviewPress, 1998); on (4) Antony Anghie, *Imperialism, Sovereignty and the Making of International Law* (Cambridge: Cambridge University Press, 2005); on (5) Hilary Charlesworth, Christine Chinkin & Shelley Wright, "Feminist Approaches to International Law" (1991) 85:4 A.J.I.L. 613; on (A) Myres S. McDougal & W. Michael Reisman, "International Law in Policy-Oriented Perspective" in Ronald St. J. Macdonald & Douglas M. Johnston, eds., *The Structure and Process of International Law* (The Hague: Martinus Nijhoff Publishers, 1983) 103-130; on (B) Eric A. Posner and Alan O. Sykes, "An Economic Analysis of State and Individual Responsibility Under International Law" (2007) 9 Am. L. 7 Econ. Rev. 72; on (C) Anne-Marie Slaughter, "International Law and International Relations Theory: A Prospectus" in Eyal Benevisti & Moshe Hirsch, eds., *The Impact of International Law on International Cooperation* (New York: Cambridge University Press, 2004) 16, online: <<http://www.princeton.edu/~slaughtr/Articles/IRILProspectus.pdf>>.

<sup>22</sup> For example, Oriol Casanovas y La Rosa presents theory as fitting within three basic categories: 1. Voluntarist Positivism (in which law arises exclusively from the will of states); 2. Objectivism (in which law is based not on voluntary acceptance – but rather is comprised of identifiable rules supported by a foundation of international custom); and 3. Critical Approaches (which critique the now dominant, liberalist, objectivist approach). Oriol Casanovas y La Rosa, *Unity and Pluralism in Public International Law* (Leiden: Martinus Nijhoff Publishers, 2001) at 21-25.

<sup>23</sup> My labels for these theoretical paradigms are similar, but not identical to those enumerated by Fergus Green, who uses "Natural Law and Anthropocentric Theories", "Positivism, Realism and State-Centrism" and "Policy-Oriented and Pragmatic Theories". Fergus Green, "Fragmentation in Two Dimensions: The ICJ's Flawed Approach to Non-State Actors and International Legal Personality" (2008) 9 Melbourne Journal of International Law 47 at 50-53.

### 1.2.1 Natural Law

Early international law authors, perhaps most notably Hugo Grotius, allotted natural law a place of great importance within international law sources.<sup>24</sup> In these early years of international law, states were not held to be the exclusive subjects of international law, and non-state actors had the ability to participate directly in the international law system. As Noyes and Janis summarize, “The classical law of nations of the 17th and 18th centuries gave individuals legal rights and duties, but ... the narrow positivist doctrine of the 19th and early 20th centuries treated individuals as mere objects of international law.”<sup>25</sup>

Broadly speaking, a natural law approach to international law views the individual as a subject of international law,<sup>26</sup> and furthermore does not regard state consent as the exclusive source of international law.<sup>27</sup> As Green summarizes, “Natural law theorists posit the individual as the primary unit of international law, which is considered to be based on normative foundations of justice.”<sup>28</sup> As is briefly outlined below, the normative foundations of justice employed by natural law scholars vary from early Greek philosophical frameworks to Kantian thought and beyond.<sup>29</sup>

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<sup>24</sup> Alfred Verdross & Heribert Franz Koeck, “Natural Law: The Tradition of Universal Reason” in Ronald St. J. Macdonald & Douglas M. Johnson, eds., *The Structure and Process of International Law* (The Hague: Martinus Nijhoff Publishers, 1983) 15 at 25 & 31-37. The authors note that scholars within this early natural law tradition included Samuel Pufendorf and Emerich de Vattel.

<sup>25</sup> Mark W. Janis & John E. Noyes, *Cases and Commentary on International Law*, 3rd ed. (Saint Paul, Minnesota: Thomson West, 2006) at 339.

<sup>26</sup> Norgaard lists Hans Kelsen, Alfred Verdross, Hersch Lauterpacht and Paul Guggenheim as holders of the view that individuals along with states may be subjects of international law. Norgaard lists Léon Duguit, Hugo Krabbe and Georges Scelle as exponents of the view that only individuals are true subjects of international law. Carl Aage Norgaard, *The Position of the Individual in International Law*, (Copenhagen: Munksgaard, 1962) 41 & 72-75.

<sup>27</sup> Verdross & Koeck, *supra* note 24 at 31-37.

<sup>28</sup> Green, *supra* note 23 at 52.

<sup>29</sup> Fernando Tesón, for example, develops a natural law theory of international law drawing on Kantian thought. Fernando R. Tesón, *supra* note 21. Verdross & Koeck note the long heritage of natural law thought, including its lineage from Greek philosophy, “Among those who believe that law has not the task to create, but only to realize justice, the scholars of natural law certainly rank first; and their tradition is unbroken from the time of the ancient Greeks to the present.” Verdross & Koeck, *supra* note 24 at 17.

While a natural law approach offers valuable insight as to the basis for international law, my treatment of natural law theory here will be quite cursory, since examination of this perspective's full analytical basis for international law, including reference to and explanations of the range of literature relied upon by natural law scholars, is simply outside the scope of this thesis. In addition, while not natural law theories, *per se*, there also exists a range of theories which fall into the category of non-positivist "critical approaches" to international law, such as feminist approaches to international law, third world approaches to international law, critical international legal studies and Marxist approaches to international law, which I must similarly elect not to present in detail, for the simple reason that to include a fulsome presentation of such theories in this particular project is not feasible.<sup>30</sup>

As mentioned, a natural law theoretical approach has been evident in international law scholarship from the early years of the discipline until the present day.<sup>31</sup> According to Verdross and Koeck, Grotius held that a rule of natural law could be identified "by demonstrating its conformity with a rational and social nature" and establishing that the rule was observed among all or almost all nations.<sup>32</sup> During the time that positivism gained influence in the 19<sup>th</sup> and early 20<sup>th</sup> centuries, natural law conceptions of international law continued to develop, although not as a dominant theoretical perspective.<sup>33</sup> In the mid-twentieth century, scholarship that was not in adherence to strict positivism gained visibility; scholars such as Hersch Lauterpacht diverged from the strict positivist tradition by noting that there was no rule of international law which held that individuals could not be subjects of international law.<sup>34</sup>

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<sup>30</sup> Janis & Noyes, *supra* note 25.

<sup>31</sup> Verdross & Koeck, *supra* note 24 at 31-37. Rosalyn Higgins notes that Plutarch and Francisco de Vitoria, writing well before Grotius "wrote in terms that effectively acknowledged that non-state entities had internationally recognized legal rights." Higgins, *supra* note 37 at 49.

<sup>32</sup> Verdross & Koeck, *supra* note 24.

<sup>33</sup> Verdross & Koeck, *ibid.*.

<sup>34</sup> Norgaard, *supra* note 26 at 46. For example, Lauterpacht reviewed the *Jurisdiction of the Courts of Danzig* case of the PCIJ and noted that the decision, "laid down, in effect, that no considerations of theory can prevent the individual from becoming the subject of international law rights if States so wish." Hersch Lauterpacht, *International Law and Human Rights* (London: Stevens and Sons Limited, 1950) at 29. *Jurisdiction of the Courts of Danzig* (1928), Advisory Opinion, P.C.I.J. (Ser. A) No 15, at 17. See also, Alexandra Kemmerer, "Turning Aside. On International Law and Its History" in Miller & Bratspies, *infra* note 60, 71 at 73.

Some natural law scholarship criticizes positivism and other approaches for their lack of a moral or normative grounding, including a lack of a concept of justice. Tesón juxtaposes positivism with a Kantian based natural law approach to international law, writing:

...[I]nternational law purports to set standards of international behaviour. Judgements of legality are evaluations of diplomatic history according to that standard. It is insufficient to verify that many governments ignore the precepts of justice and conclude that justice should be discarded. The better view *includes moral analysis as an integral part of international law*. The alternative positivist paradigm, by clinging to the deceptively simple notion of unrestrained practice of states as the touchstone for legitimacy, ends up surrendering to tyranny and aggression, the evils that international law was intended to control in the first place.<sup>35</sup>

The recent scholarship of Janne Nijman constitutes an extensive re-evaluation of the concept of international legal personality. Her work includes a thorough historical review of the concept of legal personality.<sup>36</sup> In her analysis, she builds on Gottfried Leibniz's theory of relative sovereignty, or the view that state sovereignty has a normative requirement.<sup>37</sup> Nijman ultimately concludes that:

[T]he individual is the legal personality *par excellence* of international law, i.e., the law of mankind. Yes, states are international legal persons, but they are secondary persons; individual human beings are the primary legal persons in international law. The individual is both the source and the final destination of the law of nations. ILP [International Legal Personality] forms the *cords* between the individual human being and the universal human society, and because of it, the international community and international law must guarantee the right to have rights, the right to

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<sup>35</sup> Tesón, *supra* note 21 at 26 [emphasis added].

<sup>36</sup> Scholarship relevant to the development of the notion of legal personality which is reviewed by Nijman includes that of René Descartes, Hugo Grotius, Samuel Pufendorf and Thomas Hobbes. Janne Nijman, "Leibniz's Theory of Relative Sovereignty and International Legal Personality: Justice and Stability or the Last Great Defence of the Holy Roman Empire" (2004) Institute for International Law and Justice Working Paper 2004/2, online: <<http://www.iilj.org/publications/2004-2nijman.asp>>.

<sup>37</sup> Janne Nijman, *The Concept of International Legal Personality: An Inquiry into the History and Theory of International Law*, (Cambridge: Cambridge University Press, 2004); See also Anthony Carty, "International Legal Personality and the End of the Subject: Natural Law and Phenomenological Responses to New Approaches to International Law" (2005) 6 Melbourne Journal of International Law 534.

political participation, i.e., the right to speak out and raise one's *voice*. This could be the new function of ILP.<sup>38</sup>

Under the natural law based approach to international law, represented above in the words of Tesón and Nijman, inquiry into the definition of legal personality is primarily an intellectual task, rather than a review of juridical principles or sources.<sup>39</sup> Philosophical ideals provide the guidance for this inquiry and this idealism has led to criticism of the natural law orientation as being alienated from the actual practice of international law.<sup>40</sup> Despite such criticisms, this theoretical orientation constitutes a long established foil to positivism<sup>41</sup> and the concept of natural law reveals its perennial analytical value by figuring implicitly or explicitly in important elements of international law practice.<sup>42</sup>

MNE personality, from a natural law perspective, may thus be derived from a normative framework of justice.<sup>43</sup> A normative framework based on Emmanuel Kant, such as that presented by Tesón, above, which holds that individual freedom is a norm to be valued since it ultimately facilitates peace and holds that "All exercise of power must be morally legitimate"<sup>44</sup>, could be used to develop a theory of MNE personality in various ways. For example, a natural law driven theory of MNE legal personality could be based

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<sup>38</sup> Nijman, *ibid.* at 473 reprinted in Robert Kolb, "Review: The Concept of International Legal Personality: An Inquiry into the History and Theory of International Law" (2007) 18:4 E.J.I.L. 775 [emphasis in original].

<sup>39</sup> As Carty describes in his review of Nijman's book, "The crucial argument, difficult for the mainstream international lawyer, is that Nijman defines this process [of inquiring into legal personality] as an intellectual task." Carty, *supra* note 37 at 536.

<sup>40</sup> As Green describes, "While natural law theories can serve as interesting intellectual projects, they have been criticized for being oversimplistic and for lacking sufficient basis in the reality of international relations." Green, *supra* note at 23.

<sup>41</sup> Critical legal scholar Martii Koskenniemi, in his work *From Apology to Utopia: The Structure of International Legal Argument* presents the anormative positivist approach and the norm-based natural law approach as constituting opposite and commonly-flawed ends of a spectrum. Carty describes Koskenniemi's argument as being "that the structure of international law, understood synchronically as a normative framework without foundation, must swing aimlessly between the non-law of state power and the non-law of foundationless normative standards." Carty, *supra* note 37 at 449. See Koskenniemi, *supra* note 21.

<sup>42</sup> For example, the preambular language of the Universal Declaration of Human Rights presents an orientation toward natural law universalism: "Whereas recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world[.]" *Universal Declaration of Human Rights*, GA Res. 217(III), UN GAOR, 3d Sess., Supp. No. 13, UN Doc. A/810 (1948) 71, online: <<http://www.un.org/en/documents/udhr/>>.

<sup>43</sup> Tesón, *supra* note 21 at 105.

<sup>44</sup> Tesón, *ibid.* at 2.

on the view that individual freedom is currently being violated due to a *lack* of multinational enterprise legal personality, making this lack of personality incompatible with international law based on a normative order which values individual freedom.

Purely natural law inspired legal reasoning has so far been unable to become manifested in international law practice and mechanisms which address MNE violations of human rights. Such natural law reasoning has not transcended contrasting approaches to international law (such as positivism) which disregard predominantly normative or justice-based foundations of international law. The weakness of a natural law based conception of international law is evidenced in the way that calls for multinational enterprise accountability, arguably developed under natural law reasoning, have so far been realized only as toothless “soft law” documents, albeit soft law created by high profile international organizations and entities.<sup>45</sup>

In my view, the natural law based analysis of MNE legal personality is of unquestionable intellectual value. Unfortunately, time has shown that mainstream international law practice tends to force natural law conceptions of international law to remain on the sidelines. For this reason, natural law will not be the framework within which my argument is predominantly developed.

### *1.2.2 Positivism*

The theoretical paradigm of positivism holds that international law is based on state consent and that international law is created in an almost contractual fashion by states.<sup>46</sup> For many years, a distinct but related idea was highly influential within positivism which held that only states were subjects of public international law. However, in the face of post World War II international law developments, the idea that only states may be subjects of international law has softened; it has not remained tenable to maintain that

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<sup>45</sup> *OECD Guidelines for Multinational Enterprises*, *supra* note 12; ILO, *Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy* (1978), 17 I.L.M. 423, online: ILO <<http://www.ilo.org/public/english/standards/norm/sources/mne.htm>>.

<sup>46</sup> See e.g. Casanovas y La Rosa, *supra* note 22 at 21.

only states are structurally capable of being international law subjects considering that international organizations were recognized by the ICJ as having legal personality in 1949, and individuals were recognized as having legal personality in the form of potential international criminal law culpability during the Nuremberg trials.<sup>47</sup> As Green notes, current day positivist authors rather tend to acknowledge that international organizations and individuals are limited exceptions to the rule that only states are subjects of international law.<sup>48</sup>

It is worthwhile to sketch briefly a historical trajectory of positivist international law thought. This view, typified by the holding that law is created positively through exercise of the will of states, has exercised great influence in international law practice, and reached its zenith during the early 20<sup>th</sup> century.<sup>49</sup> The early disciplinary importance of natural law was eventually eclipsed by positivism, with the influence of authors including Jeremy Bentham, Joseph Story, John Austin, Alberico Gentili and Cornelius van Bynkershoek.<sup>50</sup> It was at this time that the idea arose within positivism that international law, by definition, had only states as its subjects. Writing in 1789, Bentham defined international law as law relating to transactions between sovereigns, contrasting it with internal law which he held governed the individual subjects of sovereigns.<sup>51</sup> This orthodox positivist view of international law, which held that it was a legal system strictly for states, created by states, took hold in the 1800's and was the dominant view of international law until the mid 20<sup>th</sup> century.<sup>52</sup> At this time, particularly in the aftermath of

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<sup>47</sup> *Reparations Case*, *supra* note 1; *Judgment of the International Military Tribunal for the Trial of German Major War Criminals* (30 September and 1 October 1946) (International Military Tribunal) online: <<http://avalon.law.yale.edu/imt/judgen.asp>>.

<sup>48</sup> Green, *supra* note 23 at 51.

<sup>49</sup> Casanovas y La Rosa, *supra* note 22 at 21.

<sup>50</sup> Bentham categorized the two types of law according to the type of subjects that they governed, developing the influential notion that international law had only states as subjects. Bentham's reasoning was built upon by both Story and Austin. Mark Janis, "Individuals as Subjects of International Law" (1984) 17 Cornell Int'l L. J. 61, reprinted in *Janis & Noyes*, *supra* note 25 at 364 [Janis, "Individuals as Subjects"]. On Alberico Gentili and Cornelius van Bynkershoek and positivism's emergence generally, see, Jianming Shen, "The Basis of International Law: Why Nations Observe" (1998) 17 Dick. J. Int'l L. 287 at 309-331.

<sup>51</sup> As Janis writes: "Legal positivism had taken the eighteenth century law of nations, a law common to individuals and states, and transformed it into public and private international law. The former was deemed to apply to states, the latter to individuals." Janis, "Individuals as Subjects", *ibid.* at 364.

<sup>52</sup> Casanovas y La Rosa, *supra* note 22 at 21. 20<sup>th</sup> Century positivists including H.L.A. Hart maintained adherence to Bentham's "subject approach" to international law. Janis, "Individuals as Subjects", *supra* note 50 at 364.

World War II and the Nuremberg Trials, orthodox positivism's limitations were revealed and new approaches to international law began to emerge.<sup>53</sup>

Despite this softening in the prominence of strict positivism, and evident non-adherence to its prescribed "states only" approach<sup>54</sup>, positivism was profoundly influential and remains very visible today<sup>55</sup>, shaping textbook discussions of international legal subjecthood.<sup>56</sup> Variations of orthodox positivist reasoning<sup>57</sup> continue to arise in scholarship<sup>58</sup>, although contemporary international law practice, particularly with the rise of human rights law and the recognized subjecthood of international organizations, has moved away from the notions that only states have international law subjecthood<sup>59</sup>, or that international law is exclusively created by state consent.<sup>60</sup>

There is thus a striking difference between current international law practice and international law as is prescribed by the orthodox strand of positivist theory which only accepts states as international law subjects. It is perhaps surprising, then, that a positivist division between states and individuals, with states presented as being the solely legitimate subjects of international law, continues to arise today in the arguments concerning the rights and duties of MNEs. As Backer cites, an official U.S. response to

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<sup>53</sup> Janis describes, "The trials of Nazi war criminals after the Second World War highlighted the limitations of positivism. Faced with the excesses of a seemingly "civilized" state, those formulating and applying international law discarded any pretence that international rules applied only to state behaviour." Janis, "Individuals as Subjects", *ibid.* at 364.

<sup>54</sup> Shaw, *supra* note 5 at 139.

<sup>55</sup> Ratner and Slaughter comment that positivism "remains the lingua franca of most international lawyers". Steven R. Ratner & Anne Marie Slaughter, "Appraising the Methods of International Law: A Prospectus for Readers" (1999) 93 Am. J. Int'l L. 291 at 293 [Ratner & Slaughter, "Appraising the Methods of International Law"].

<sup>56</sup> See e.g. Hugh M. Kindred, et al., *International Law Chiefly as Interpreted and Applied in Canada* 6<sup>th</sup> ed., (Toronto: Emond Montgomery Publications Ltd., 2000) at 12.

<sup>57</sup> As Menon describes, "The orthodox positivist doctrine is identified with the extreme assertion of State sovereignty leading to the thesis that only States create rule of international law, that such rules are valid only for States and that no place is left for the individual." Menon, *supra* note 4 at 155.

<sup>58</sup> Ratner & Slaughter, "Appraising the Methods of International Law", *supra* note 55 at 293.

<sup>59</sup> Former President of the International Court of Justice Rosalyn Higgins rejected the notion that individuals are mere objects of international law in her 1994 text. Rosalyn Higgins, *Problems & Process: International Law and How We Use It* (Oxford: Oxford University Press, 1994) at 49.

<sup>60</sup> The application of *jus cogens* norms does not require state acceptance as such norms are universal and non-derogable. See, *Vienna Convention on the Law of Treaties*, 23 May 1969, 1155 U.N.T.S. 331. Art. 53. On the broad acceptance of the notion of *jus cogens* norms see: Leila Nadya Sadat, "Individual Progress in International Law: Considering Amnesty" in Russell Miller & Rebecca Bratspies, eds., *Progress in International Law* (Leiden: Martinus Nijhoff Publishers, 2008) 335 at 342.

the *United Nations Draft Articles on the Human Rights Responsibilities of Transnational Corporations*<sup>61</sup> included the following:

[T]he Norms are flawed for reasons of international law. By attempting to establish duties and obligations for business entities, which are non-State actors, this exercise goes well beyond the present state of international law as well as international legal process... This exercise, therefore circumvents all recognized law making processes by attempting to impose international obligations on entities that have neither accepted them nor played a part in their creation.<sup>62</sup>

This U.S. argument has strong positivist overtones, suggesting that only states hold rights and duties at international law, and disregards the fact that non-state actors such as individuals now hold duties at international law that they themselves did not create. That the U.S. response employs, during the present day, this orthodox positivist argument against MNE responsibility under international law (and by extension against MNE personality) suggests that much legal analysis remains to be done, analysis which clearly underscores the contemporary inadequacy of such orthodox positivist arguments.

As the preceding pages suggest, positivism would reject this thesis argument, that MNEs have international law personality, on at least two bases. First, orthodox positivism would first hold that, by definition, international law has states as exclusive subjects, and that MNEs are by their non-state status excluded from the international law system. This argument can be directly refuted by current international law practice which undoubtedly affords international organizations legal personality, and also clearly extends limited subjecthood to individuals.<sup>63</sup> A second positivist argument against MNE personality would cite the requirement of state consent for the creation of international law and argue

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<sup>61</sup> Sub-Commission on the Promotion and Protection of Human Rights, *Draft Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights*, UN ESCOR, UN Doc. E/CN.4/Sub.2/2003/12 (2003), online:

<[http://www.unhchr.ch/huridocda/huridoca.nsf/\(Symbol\)/E.CN.4.Sub.2.2003.12.Rev.2.En](http://www.unhchr.ch/huridocda/huridoca.nsf/(Symbol)/E.CN.4.Sub.2.2003.12.Rev.2.En)> [*Draft Norms of the Responsibilities of Transnational Corporations*].

<sup>62</sup> Memorandum from U.S. Mission to Int'l Orgs., Memorandum to Mr. Dzidek Kedzia, chief of Research and Right to Development Branch, Office of the International National High Commissioner for Human Rights, re: Note Verbale from the OHCHR of August 3, 2004 (GVA 2537) (Sept. 30, 2004), cited in Larry Catá Backer, "Multinational Corporations, Transnational Law: The United Nations' Norms on the Responsibilities of Transnational Corporations as a Harbinger of Corporate Social Responsibility in International Law" (2006) 37 Colum. H.R.L. Rev. 287 at 377.

<sup>63</sup> *Reparations Case*, *supra* note 1. On individual subjecthood see e.g. Kindred et al., *supra* note 56 at 52.

that MNEs do not have personality because states have not explicitly granted MNEs such legal personality.<sup>64</sup> My counter to this is that states have indeed granted their consent to create MNE personality. This state consent has been granted through the terms of concluded BITs and other instruments which establish direct international law rights for MNEs, as well as the capacity to bring international claims in relation to such rights, and thus establish MNEs' legal personality at international law.<sup>65</sup>

To address this second positivist argument, while remaining within the assumptions of the positivist paradigm, I point to the quantity and quality of such investment agreements as demonstrating the scope of states' consent, and argue that such practices constitute evidence of the sovereign will required to establish MNE legal personality. I furthermore refer to international law practice since World War II and argue that *explicit* state consent regarding the precise creation of international legal personality is not legally required particularly given the example set by the ICJ in the *Reparations Case*. In this case, the ICJ found that explicit state consent was not required for the establishment of the legal personality of international organizations but that implicit, presumed state consent was sufficient for that purpose.<sup>66</sup> In bestowing certain characteristics to the UN in the UN Charter, UN member states implicitly willed the creation of an entity with legal

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<sup>64</sup> Shaw, writing in 1997 seems suggest that a declaratory instrument by states is all that is stopping MNEs from having international law personality. Shaw writes, "Should [...] a Code come into effect containing duties directly imposed upon transnational corporations, as well as rights ascribed to them as against the host states, it would be possible to regard them as international persons. This, however, has not yet occurred." Shaw, *International Law*, *supra* note 5 at 177.

<sup>65</sup> For example, the Netherlands – China BIT outlines international claims standing for investors at Article 10(3):

[...] each Contracting Party gives its unconditional consent to submit the dispute at the request of the investor concerned to:

- a) the International Centre for Settlement of Investment Disputes, for settlement by arbitration or conciliation under the Convention on the Settlement of Investment Disputes between States and Nationals of other States, opened for signature at Washington on 18 March 1965; or
- b) an ad hoc arbitral tribunal, unless otherwise agreed upon by the parties to the dispute, to be established under the Arbitration Rules of the United Nations Commission on International Trade Law (UNCITRAL).

*Agreement on encouragement and reciprocal protection of investments between the Government of the People's Republic of China and the Government of the Kingdom of the Netherlands*, 26 November 2001, online: <[http://www.unctad.org/sections/dite/ia/docs/bits/china\\_netherlands.pdf](http://www.unctad.org/sections/dite/ia/docs/bits/china_netherlands.pdf)>.

<sup>66</sup> On presumptive personality as supported by the *Reparations Case* decision, see Jan Klabbers, *An Introduction to International Institutional Law* (Cambridge: Cambridge University Press, 2002) at 56.

personality.<sup>67</sup> Similarly, the broad network of BITs and other instruments both bilateral and regional, which bestow certain characteristics to MNEs as rights-holders, shows an implicit consent on the part of contracting states to grant MNEs legal personality.<sup>68</sup>

Having completed this review of subjecthood and legal personality within positivism, it is my view that this paradigm offers a greater challenge to this thesis argument than the other theoretical approaches described. That said – this challenge is not insurmountable. If BITs and other treaties are found to reveal state consent which is sufficient to create legal personality for MNEs (legal personality in the form of MNE rights, duties and capacity for international law claims) then the challenge that positivism poses to this thesis will be met.

As regards the few states<sup>69</sup> which have not ratified investment instruments granting MNEs the capacity for international law rights, an argument can be made that such states have tacitly recognized the personality of MNEs.<sup>70</sup> This is certainly a debatable holding from a strict positivist perspective, although one that is not impossible to maintain, given the possibility that silence may signify tacit recognition of legal personality.<sup>71</sup> As is discussed in section 1.23 below, under the system-oriented approach consent is less

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<sup>67</sup> *Green*, supra note 23 at 70. Green notes further that “In practice, the dominant approach of the Court appears to be that international organisations possess those ‘implied powers’ necessary for the *effective achievement* of their *objects and purposes*.” *Green*, supra note 23 at 56. See also, *Reparations Case*, supra note 1 at 180, where the ICJ held that “...the rights and duties of an entity such as the Organization must depend upon its purposes and functions as specified or implied in its constituent documents and developed in practice.”

<sup>68</sup> On the customary significance of bilateral investment treaties generally, see e.g. Cai Congyan, “International Investment Treaties and the Formation, Application and Transformation of Customary International Law Rules” (2008) 7:3 Chinese Journal of International Law 659.

<sup>69</sup> Only 18 UN members states do not appear to have signed investment treaties establishing investor rights, see *infra* note 145.

<sup>70</sup> On tacit recognition Cheng *supra* note 3 at 37-38.

<sup>71</sup> Ben Cheng notes that silent recognition of subjecthood occupies a grey area in contemporary practice, writing:

In strict law, therefore, in a horizontal legal system, in the absence of clear evidence of a rule to the contrary having emerged, legal personality remains essentially subjective and consequently relative. This is not to say, however, that in practice with the increasing intensity of the multilateral relationship, mutual acceptance of one another’s international legal personality, especially in the case of States, is not usually inferred from mere silence, particularly with the passage of time, without mentioning such situations in being co-parties to multilateral agreement and co-members of international organization, where mutual recognition, at least *pro tanto*, must be assumed.

Cheng *supra* note 3 at 37-38.

strictly required for the establishment of legal personality *vis-à-vis* third party states than is the case under a positivist perspective. The system-oriented approach examines international law as a system not based only on direct consent, but also based on a foundation of custom, driven by the needs of the international community.

### *1.2.3 System-Oriented Approach*

Following World War II, another broad theoretical approach to international law developed which diverged from both natural law and positivism, although at times revealed itself to contain elements of both. Employing what the approach's critics find to be an unconscious and contradictory mix of positivism, naturalism and other perspectives, this approach sees international law primarily as an ever-developing system of norms which facilitate international policy.<sup>72</sup> Quite influenced by liberalist thinking<sup>73</sup>, this third broad school of international law thought is the pragmatic, rules-based and practice-oriented approach to international law which has gained prominence since World War II. For simplicity, I will refer to this pragmatic approach as the international legal system-oriented approach to international law, although I recognise that this term has its limitations and may not address all elements of this post war approach.

Several developments occurred following World War II that forced international law to break from the dominant positivist mould that it had been cast in during the preceding years. First, the horrors of the war led to developments in international criminal law, including individual culpability for crimes against humanity, and such law was underpinned not by positivist consent, but by universalist reasoning drawing on natural law.<sup>74</sup> Second, with the establishment of the United Nations, a new era of multilateral law

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<sup>72</sup> Casanovas y La Rosa, *supra* note 22 at 23.

<sup>73</sup> On the influence of liberalism in post World War II international law thought see, Don Suh, "Situating Liberalism in Transnational Legal Space" (2002) 12 Duke J. of Comp. & Int'l L. 605 at 610-612.

<sup>74</sup> The preamble of the 1951 Genocide Convention is of note for its universalist and natural law oriented language. *Convention on the Prevention and Punishment of the Crime of Genocide*, 9 December 1948, 78 U.N.T.S. 277 (entered into force 12 January 1951), online:

<<http://treaties.un.org/doc/Publication/UNTS/Volume%2078/volume-78-I-1021-English.pdf>>. On objectivism in the development of international human rights law post World War II see John F. G. Hannaford, "Truth, Tradition, and Confrontation: A Theory of International Human Rights" in Donald M.

making began, and the recognition of the legal personality of international organizations, by the ICJ in the 1949 *Reparations Case*, was a watershed decision that was inexplicable from a strict positivist perspective, since in the decision the ICJ sanctioned a notion of legal personality for international organizations that gave them subjecthood even as against non-member (i.e., *not explicitly consenting*) states.<sup>75</sup> A third clear divergence from positivism in the post war period occurred in 1969, when the Vienna Conference that ultimately led to the *Vienna Convention on the Law of Treaties* endorsed the notion of non-derogable, *jus cogens* norms, customary rules of international law that the positivist will of states could not diminish.<sup>76</sup>

There are multiple names for this post-war approach which diverged from positivism and has since gained dominance. Scholars such as Casanovas y La Rosa have labelled this paradigm the “objectivist”<sup>77</sup> paradigm, presenting it as an approach that sees international law as being in part objectively identifiable and in this sense distinct from the positivist view that law is created through subjective state consent. Another theory which fits within the rubric of this post-war perspective is the International Legal Process<sup>78</sup> approach, which is described as a perspective which underscores the international community’s emphasis on the establishment of legal rules and institutions.<sup>79</sup> Another permutation of

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McRae & Charles B. Bourne, eds., *Canadian Yearbook of International Law*, Vol. 31 (Vancouver: UBC Press, 1993) 151 at 153-155.

<sup>75</sup> *Reparations Case*, *supra* note 1 at 185. Amerasinghe notes that “the Court, though referring to the near-universality of the UN, did not categorically make it a condition for the incidence of the objective personality.” Chittharanjan Felix Amerasinghe, *Principles of the Institutional Law of International Organizations*, 2<sup>nd</sup> ed. (Cambridge: Cambridge University Press, 2005) at 90. The most widespread interpretation of the *Reparations Case* holds that the ICJ judged the UN’s founding member states to have implicitly bestowed personality upon the UN, leading to the view that international organisations hold presumptive personality; under the doctrine of presumptive personality, organisations are presumed to hold personality unless their founding members deem otherwise. A second theory of international organisation personality is that of objective personality (discussed later in this sub-section), which holds that such personality was objectively created by the UN’s founding members in their creation of an entity with certain characteristics including a will of its own. Klabbbers, *supra* note 66 at 54-56.

<sup>76</sup> Danilenko notes that acceptance of *jus cogens* at the 1969 Vienna Conference was perceived as a crisis in legal positivism. Gennadii Mikhaïlovich Danilenko, *Law-making in the International Community* (Leiden: Martinus Nijhoff Publishers, 1993) at 215.

<sup>77</sup> Casanovas y La Rosa, *supra* note 22 at 21.

<sup>78</sup> This approach is associated with a prominent text of the same name. see Abram Chayes, Thomas Ehrlich & Andreas Lowenfeld, *International Legal Process: Materials for an Introductory Course* (New York: Brown & Co., 1968).

<sup>79</sup> Ratner & Slaughter summarize the International Legal Process school as having seen “the key locus of inquiry of international law as the role of law in constraining decision makers and affecting the course of

this approach, which notes that this perspective remains focused on the law's practical function within an international policy environment, is labelled as the "functionalist" perspective.<sup>80</sup> Finally, though in some ways more a theory *about* international law than a theory *of* international law, the New Haven school of international law, adopts a social behavioural approach to understanding international law's role in the development of international policy.<sup>81</sup>

Overall, the system-oriented approach views international law as a forum for the successive development of international rules, rules which ultimately rest on a foundation of custom. In contrast to positivism, the system-oriented perspective has a flexible approach to the function of state consent in creating international law. Some, such as Casanovas y La Rosa find that this relaxation of the requirement of consent has developed to the point that consent is not required for the imposition of rules upon states.<sup>82</sup> However, even where consent is not readily evident, such as in the case of *jus cogens* norms, there are theories of consent which explain that states pre-accept such rules by consenting in advance to rules which are supported by sufficient practice.<sup>83</sup> In sum, however, the system-oriented approach to international law diverges from positivism in that state consent is less focused upon than is the international norms-creation process itself. As Casanovas y La Rosa summarizes,

This approach to Public International Law is characterised by the importance which it attributes to the rules and the process of creation of its legal rules. [...] International custom forms the basis of a legal system which has adopted the legislative model through multilateral codifying treaties and the resolutions of the international organisations. The legal system has a hierarchical structure by virtue of the existence of imperative rules, or rules of *ius cogens*, which predominate over the

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international affairs." Ratner & Slaughter, "Appraising the Methods of International Law", *supra* note 55 at 294.

<sup>80</sup> Russell A. Miller, "Paradoxes of Personality: Transnational Corporations, Nongovernmental Organizations and Human Rights in International Law" in Miller & Bratspies, *supra* note 60, 381 at 386.

<sup>81</sup> See e.g. McDougal & Reisman, *supra* note 21.

<sup>82</sup> As Casanovas y La Rosa writes, "This approach to Public International Law is characterised by the importance which it attributes to the rules and the process of creation of its legal rules. These rules are imposed on States and are not the result of voluntary acceptance." Casanovas y La Rosa, *supra* note 22 at 22.

<sup>83</sup> On framework customs see John Finnis, *Natural Law and Natural Rights* (Oxford: Clarendon Press, 1980) at 244.

will of States. The subjective entities also possess an objective character, given that the recognition of States has a declarative character. These States are no longer the only subject entities because international intergovernmental organisations also have an international personality, not only in the eyes of the States which recognise them but objectively vis-à-vis third parties.<sup>84</sup>

The system-oriented approach is thus a framework that emphasizes institutionalization and permits successive rules of international law to build up upon each other, without continual reference to the principle of direct state consent as legitimation for each rule.<sup>85</sup> As mentioned, custom is the legitimating foundation for international law according to this approach, and hence topics such as *jus cogens* which lack ready explanation under strict positivism are not similarly problematic from a system-oriented perspective.<sup>86</sup> Under this paradigm, international law's development is driven by the collective needs<sup>87</sup> and policy objectives of the international community. There is a malleability to this approach, by which international law is permitted to be influenced by the policy objectives of international law players and is furthermore seen as a responsive system, albeit one limited by the form and function of law-making structures within the international legal system (e.g., multilateral treaty-making at the UN). This malleability of international law, as it is conceived within the system-oriented approach, exposes

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<sup>84</sup> Casanovas y La Rosa, *supra* note 22 at 22.

<sup>85</sup> On the shift away from a strict positivist orientation in ICJ decisions see, Edward McWhinney, *The International Court of Justice and the Western Tradition of International Law: The Paul Martin Lectures in International Relations and Law* (Dordrecht: Martinus Nijhoff Publishers, 1987) at 129. McWhinney references the “*South West Africa, Second Phase* in 1966, which, in the angry political condemnation that it provoked and the Court’s own subsequent prudent reaction to that outcry, marked the death-knell of legal positivism and heralded a new, policy-oriented approach to judicial decision-making in the Court.”

<sup>86</sup> Danielenko outlines the shift from strict positivism required in order to explain *jus cogens*:

The apparent contradiction between the idea of *jus cogens* and the consensual nature of the formation of international law in principle may be resolved in two ways. The first would presuppose that [...] [i]nternational rules of *jus cogens* would bind only those subjects of law who have accepted and recognized them. The second possibility involves the introduction into the international system of a new law-making procedure which does not require the consent of individual states for the emergence of preemptory rules.

Danilenko finds that there is broader support for this second explanation, “according to which *jus cogens* norms reflecting the fundamental interests of the international community should bind all states without exception, notwithstanding their possible dissent.” Danilenko, *supra* note 76 at 219.

<sup>87</sup> Note the mention of the needs of the international community in the *Reparations Case*, “The subjects of law in any legal system are not necessarily identical in their nature or in the extent of their rights, and their nature depends upon the needs of the community.” *Reparations Case*, *supra* note 1 at 178.

international law to criticism that it is shaped by the interests of power, and is lacking in true legal character.<sup>88</sup>

In the system-oriented approach to international law, the international legal system itself defines whether or not an entity has legal personality.<sup>89</sup> Comparing legal persons with actors in a play, Bin Cheng writes, “The lawyer’s prime concern.[...] is with finding out whom *the legal system* has cast to appear on the stage of the law.”<sup>90</sup> The legal system itself is thus regarded the author of which entities do and do not have international law personality. In other words, as Bin Cheng explains:

...from the legal point of view, the ‘players’ in the legal arena are only those that the legal system recognizes as capable of playing a direct role in the legal system, to whom it can directly address its rules. It is in this sense that legal personality is defined as the *capacity* to bear rights and duties under a legal system.<sup>91</sup>

Holding that the international legal system itself is the determiner of which entities have legal personality presents a circularity in logic that Brownlie notes:

A subject of the law is an entity capable of possessing international rights and duties and having the capacity to maintain its rights by bringing international claims. This definition, though conventional, is unfortunately circular since the *indicia* referred to depend on the existence of a legal person. All that can be said is that an entity of a type recognized by customary law as *capable* of possessing rights and duties and of bringing international claims, and having these capacities conferred upon it, is a legal person. If the first condition is still not satisfied, the entity concerned may still have legal personality of a very restricted kind, dependent on the agreement or acquiescence of recognized legal person and opposable on the international plane only to those agreeing or acquiescent.<sup>92</sup>

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<sup>88</sup> Casanovas y La Rosa, *supra* note 22 at 23. See generally Koskeniemi, *supra* note 21.

<sup>89</sup> Discussing the International Legal Process approach to international law, Neil Craik notes that “process-oriented scholarship breaks from formal positivist conceptions of law in that it seeks to locate the legitimacy of law within law itself.” Neil Craik, *The International Law of Environmental Impact Assessment: Process, Substance and Integration* (Cambridge: Cambridge University Press, 2009) at 18. Craik cites the legendary Hart-Fuller debate on this issue of internalized legitimacy, citing: H. L. A. Hart, “Positivism and the Separation of Law and Morals” (1958) Harvard L. Rev. 593; Lon Fuller, “Positivism and Fidelity to Law – A Reply to Professor Hart” (1958) 71 Harvard L. Rev. 630.

<sup>90</sup> Cheng, *supra* note at 3 [emphasis added].

<sup>91</sup> Cheng, *supra* note at 3 [emphasis added].

<sup>92</sup> Brownlie, *supra* note 4 at 58 [emphasis in original]. It may be argued that this circularity is inherent to all positivist conceptions of the character of law. This circularity may avoid being operationally problematic as long as the legal system remains flexible enough to shift with changing practices.

It is thus necessary to break this definition's circularity by examining in greater detail how the international legal system actually confers capacity for rights and duties upon an entity, or in other words how an entity becomes "of a type recognized by customary law as *capable* of possessing rights and duties and of bringing international claims."<sup>93</sup> A review of the literature reveals two main legal theories of how an entity gains capacity for international law rights and duties within the post-war system-oriented approach to international law: (1) objective personality based on identifiable characteristics, and (2) subjective personality based on the intent of states.<sup>94</sup>

#### 1.2.3.1 Objective Personality

According to the objective personality theory personality arises from the *characteristics* of an entity, not state recognition of personality. Objective personality theorists challenge subjective personality theorists along the following line of questioning: if state recognition is needed for personality, how did the first state come into being? Subjective personality theorists counter with the holding that at least two states are required for an international law system.<sup>95</sup> Objective personality theorists and subjective personality theorists thus have a fundamental difference in views regarding the nature of the international law system. While subjective theorists adopt a somewhat positivist, state-consent based explanation for international law, objectivists grant the international legal system a life of its own, independent of state recognition. What is the source of this legal system's life? Two options are evident. First, natural law reasoning, based on philosophy can provide an explanation for existence of the legal system (see preceding sub-section on natural law).

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<sup>93</sup> *Ibid.*

<sup>94</sup> A third theory, influenced by realism and developed by Guido Acquaviva, maintains that the sole determinative characteristic of a subject of international law is sufficient power to demand recognition. Guido Acquaviva, "Subjects of International Law: A Power-Based Analysis." (2005) 38 Vand. J. Transnat'l L. 345 at 394

<sup>95</sup> Cheng, *supra* note 2 at 32.

A second option is that on a subterranean level, state consent validates the establishment and operation of the international law system, but on a practice level this state consent is subsumed by the self-governance of the legal system itself. For subjectivists, state consent, however subtle, underwrites the legitimacy of each new development in international law. For objectivists, however, state consent perhaps breathed life into the international law system when it was created, and on a meta-level keeps the system alive<sup>96</sup>, but consent is not necessarily required for each step that allows international law to keep growing.<sup>97</sup> The international law system that has developed since its birth, validated by successive custom and norms creation, continues to grow *according to its own rules* and in so doing drags sovereign states along with or without their identifiable consent at each step.

According to objective personality theory, certain *characteristics* establish an entity's personality.<sup>98</sup> Adherents to this theory hold that international organizations have international personality, not fundamentally because of states' *implied intention* that they have international personality, but because international organizations have *characteristics* that international law itself deems to connote personality.<sup>99</sup>

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<sup>96</sup> On framework customs see Finnis, *supra* note 83.

<sup>97</sup> Objectivists might point to the fact that customary law is not necessarily based on active consent. The persistent objector rule holds that a state must explicitly and consistently demonstrate that it is a persistent objector to avoid being bound by an otherwise established customary rule. See e.g., Christian Tomuschat, "Obligations Arising for States Without or Against Their Will" (1993) 241 Rec. des Cours 195 at 284-90; see also John Currie, *Public International Law* (Toronto: Irwin Law, 2001) at 176 [Currie, *Public International Law* (2001)].

<sup>98</sup> Brownlie lists several indicative characteristics. See Brownlie, *supra* note 4 at 681.

<sup>99</sup> The objective theory of personality "associates the international personality of organizations with certain criteria, the existence of which endows the organization with personality on the basis of general international law. The foundation of international personality is, it is said, not the will of the members but is to be identified in general international law." Amerasinghe, *supra* note at 75. Amerasinghe cites Finn Seyerstad, "International Personality of Intergovernmental Organizations" (1964) 4 *Indian Journal of International Law* 1. For a discussion of objective personality and subjective personality see also August Reinisch, *International Organizations before National Courts* (Cambridge: Cambridge University Press, 2000) at 56-57.

### 1.2.3.2 Subjective Personality

Subjective personality finds that capacity for personality within the international legal system flows from the will of states, whether this is in the form of an official act of recognition, or in the form of presumed or implied state intention. According to this view, it is not the characteristics of an entity which ultimately establish its legal personality it is the *will* of states in granting such characteristics which legally provides the source of an entity's capacity for legal personality. This is the theory of personality I subscribe to in this thesis, and it is described in greater detail in the summary section 1.2.3.3, below.

An overall reliance on subjective personality theory, that is that state intent is required for the establishment of legal personality, is evident in most literature on the topic of subjecthood, even when authors initially appear to subscribe to an objective theory of personality. For instance, Cheng reasons that that capacity for rights and duties is granted to an entity by the international law system when the entity is the direct and intended addressee of international law rights and duties.<sup>100</sup> However, while an initial reading of Cheng's reasoning suggests that personality can be found simply through review of the entity's characteristics (*i.e.*, verification of whether the entity has direct international law rights and duties) this initially objective approach is amended later in Cheng's work. It becomes apparent in his work that merely being the direct addressee of international law rights and duties is actually not sufficient to be an entity "of a type recognized by customary law as *capable* of possessing rights and duties and of bringing international claims."<sup>101</sup> Specifically, in his discussion of state contracts, Cheng reasons that while such contracts, concluded by private corporations and host states, do allot direct international law duties to private entities, this does not bestow legal personality to such corporations, due to the limiting *intention of the co-contracting state*.<sup>102</sup> Therefore,

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<sup>100</sup> Cheng, *supra* note 3 at 29.

<sup>101</sup> *Ibid.*

<sup>102</sup> Cheng writes, "...the reasons why the private party is not regarded as a proper international person are that both parties regard the arrangement as purely for the purpose of a specific agreement, that it is non-political, and that there is no intention of bringing the private party onto the real inter-State area." *Ibid.* at 33.

Cheng's discussion of legal personality finds that capacity for rights and duties is fundamentally a product of the will of states, and in so doing he subscribes to a subjective theory of international legal personality.

#### 1.2.3.3 Summary of the System-Oriented Approach

At least with regard to the *creation* of international organizations<sup>103</sup>, the objective theory of personality has remained sidelined by the more mainstream theory of subjective personality.<sup>104</sup> Within the post-war system-oriented approach, the most widespread interpretation of the *Reparations Case* holds that the ICJ judged the UN's founding member states to have implicitly bestowed personality upon the UN, leading to the view that international organizations hold presumptive personality; under the doctrine of presumptive personality, organizations are presumed to hold personality unless their founding members deem otherwise.<sup>105</sup>

The dominant view thus appears to be that the creation of a legal personality is fundamentally a subjective process. However, it must be clarified *how* this subjective process of implied will is realised. Upon review of the *Reparations Case*, two options are evident. First, it is possible that this implied will flows strictly from the terms of the UN Charter, and that the ICJ finds the implied will to create legal personality merely through treaty interpretation, without reference to custom. A second option is that the ICJ finds the implied will to grant legal personality through not just treaty interpretation, but also finds the implied granting of personality through reference to custom. For instance, the ICJ potentially interpreted the characteristics granted to the UN by its member states as signifying on a customary level the intended grant of legal personality by such states. In a manner consistent with my selection of the international legal system-oriented approach to international law, I find this second description of how the implied will to establish legal personality operates to be the more convincing model.

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<sup>103</sup> The concepts of "peoples" and self determination offer further illustrations of the application of objective vs. subjective theories of personality. See e.g. Green, *supra* note 23 at 59-60.

<sup>104</sup> Klabbers, *supra* note 66 at 55.

<sup>105</sup> Klabbers, *supra* note 66 at 55.

The former option, which relies on treaty interpretation alone, fits within a strict positivist understanding of legal personality. In my view, treaty interpretation alone is not a comprehensive explanation for how the ICJ arrives at its identification of the legal personality of international organizations. For instance, treaty interpretation by itself does not adequately explain the legal personality of international organizations which exists between such organizations and non-member states.<sup>106</sup> A treaty cannot create rights or obligations as against non-party states, and thus treaty terms alone cannot be relied upon to establish the legal personality of international organizations as against non-member states. While one possible solution to this is that silence on the part of non-members may be construed as tacit acceptance of the legal personality of international organizations<sup>107</sup>, I find that a more comprehensive understanding of the ICJ's reasoning would extend beyond analysis of treaty interpretation alone to include review of the customary conceptions of legal personality which were also at play in the decision.

I subscribe to the second option outlined above, which understands the implicit will to establish legal personality found in the *Reparations Case* as being built upon not just treaty interpretation but also upon the customary establishment of personality within the international legal system. The ICJ wrote in this decision that “fifty States, representing the vast majority of the members of the international community, had the power, in conformity with international law, to bring into being an entity possessing objective international personality, and not merely personality recognized by them alone, together with the capacity to bring international claims.”<sup>108</sup> This passage suggests the creation of an international legal personality for international organizations not just on the level of the application of a particular treaty, but also on the level of custom. Silence may count as state consent to the establishment of custom and except for states which are persistent objectors, a customary norm once established will operate as against all states within the

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<sup>106</sup> For example, Bin Cheng holds that even fifty states do not have the legal power to create an entity with objective legal personality even as against non-member states. He notes Art. 34 of the *Vienna Convention on the Law of Treaties* which holds that “A treaty does not create either obligations or rights for a third State without its consent. Cheng, *supra* note 3 at 37.

<sup>107</sup> See Cheng, *supra* note 3 at 37-38 (note excerpt at footnote 51).

<sup>108</sup> *Reparations Case*, *supra* note 1 at 185.

international system. Recognition that the establishment of legal personality has customary elements permits transcendence of the rule that treaties may not create obligations as amongst non party states. The implied will to establish personality, recognizable under custom, must necessarily correspond to custom supported by the dual elements of state practice and *opinion juris*.<sup>109</sup>

The view that implied will to establish international organizations' legal personality has its base in custom (in addition to treaty) fits within the system-oriented approach, a framework that focuses on the successive formation and process of the legal system itself. As discussed, unlike under strict positivism, custom rather than direct consent provides the foundation for international law according to this system-oriented approach.

To summarize, while the system-oriented approach appears initially to rely on the international law system itself to determine whether or not an entity has legal personality, in truth the system-oriented approach favours a subjective approach to legal personality which draws the establishment of legal personality from the will of states. This is a subtle approach that permits states' will to create a legal person to be presumed on basis of legally significant state actions. In the *Reparations Case* state will to create the legal personality of international organizations was held to have been achieved on a customary level in addition to a strictly treaty law level, since the founding states established in custom the legal personality of the UN even as against non-member states.

### **1.3 Chosen Theoretical Framework: The International Legal System-Oriented Approach and its Subjective Theory of Legal Personality**

In this thesis I employ the now mainstream system-oriented approach to international law. This approach requires assessment of present day international law rules and institutions, which have custom as their ultimate foundation. This analytical process is contextualized by a passage in the work of Bin Cheng, who comments that legal personality at international law is evidenced by the existence of rights and duties:

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<sup>109</sup> See e.g. Currie, *Public International Law* (2001), *supra* note 97 at 163-175.

International legal personality being the capacity to bear rights and obligations under international law, the easiest way of ascertaining whether an entity has or does not have international personality, where such legal personality has not, expressly or implicitly, been granted by a rule of law, or *vis-à-vis* the parties concerned, by consent, recognition or acquiescence, would be to find out, as did the International Court of Justice in its Advisory Opinion on *Reparations for Injuries Suffered in the Service of the United Nations*, if it is in fact in possession of any rights or duties under international law.<sup>110</sup>

As discussed, this analytical process appears to be wholly objective at first, *i.e.*, requiring only a review of the legal system and subsequent identification of direct international law rights and duties. However, from a system-oriented perspective, the test for legal personality is actually more complex than mere identification of rights and duties. Rather, subjective attribution of personality, even in the sometimes subtle form of presumed state intention<sup>111</sup>, appears to remain the consensus view of how capacity for legal personality is established in the legal system. Therefore, adopting a system-oriented perspective, I argue that MNEs are legal persons, entities with the capacity for legal rights, duties and claims at international law. MNEs are entities with this capacity not merely because they have direct international law rights and duties, but also because these rights and duties were granted to them by states along with implicit legal personality. In the *Reparations Case*, the ICJ found that state consent to grant legal personality was to be presumed in the presence of other state-granted significant characteristics.<sup>112</sup> State-ratified BITs grant MNEs the characteristics of rightsholders and claim initiators at international law, and legal personality accompanies such characteristics. BIT language and practice does not present credible state intention to the contrary, and MNE personality thus follows state-willed rights and duties.

My argument is consistent with a subjective theory of international personality; I argue that states used subjective will to grant MNE rights and duties with a legally

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<sup>110</sup> *Ibid.* at 38.

<sup>111</sup> *Ibid.* at 36.

<sup>112</sup> *Reparations Case*, *supra* note 1 at 182. The ICJ held that “Under international law, the Organization must be deemed to have those powers which, though not expressly provided in the Charter, are conferred upon it by necessary implication. as being essential to the performance of its duties.”

presumable intention that MNEs would have the legal personality required to make use of their international rights and duties. Unlike in the state contract scenario, which is only quasi-international because it involves just one state in an *ad-hoc* system, states have not granted rights to MNEs with the intention that international legal personality is not to follow such rights. Rather, personality is implicitly attached to states' granting of international law rights to MNEs, rights bestowed under BIT text and practice. I thus argue that a subjective theory of personality explains MNEs' entry into the international law system, framing my thesis within a system-oriented approach to international law.

On a final note, a troubling tension should be highlighted which arises when the application of objective and subjective theories of personality yields different conclusions as to an entity's legal subjecthood. This is particularly evident when states grant characteristics which are indicative of personality from an objective personality standpoint, while at the same time they subjectively withhold the attribution of legal personality. For instance, in the context of state contracts, various authors maintain that the current system permits states to grant direct international law rights without granting international law personality.<sup>113</sup> Several questions arise. For instance, what are the legally permissible frontiers of such an intended separation of rights from personality? In other words, to what extent can the will of a state permit an entity to hold direct international law rights and duties *without* holding legal personality? Is it logically possible to hold rights and duties without having the *capacity* for rights and duties? Overall, how much flexibility do states have in specifying whether their *intent* in granting direct international law rights does or does not include the granting legal personality? At what point does the persuasive weight of "intent" become outweighed by state practice, such as legally governed interactions with rights-bearing "non-persons"?

State intent to grant rights without legal personality may be persuasive on a state contract level, which only implicates a two-party relationship, involving only one state.

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<sup>113</sup> Cheng, *supra* 3 note at 33. Brownlie similarly describes the perceived *ad-hoc* international law nature of state contracts, writing "...corporations can and do make agreements, including concession agreements, with foreign governments, and in this connection in particular, jurists have argued that the relations of states and foreign corporations *as such* should be treated on the international plane. Brownlie *supra* note 4 at 67.

However, an intent to bifurcate international law rights from international legal personality becomes less plausible once more than one state participates in establishing the rights granting instrument; with two or more states involved in the granting of international law rights, the character of the rights-granting instrument changes from a plausibly ad-hoc quasi-international law state contract scenario, to an instrument that narrates an international law framed relationship between states and other legal persons, all players which are undeniably active as rights-holders within this legal system.

A state's ability to intentionally grant rights separately from legal personality will thus be moderated by the state's practice subsequent to the granting of such rights. For instance, Cheng comments on the legal personality of the United Nations that "The extent of the rights and duties of such an international person, as well as the extent of such personality, in term of both its material and temporal scope, depends, in each individual case, on the original intent *and subsequent practice*."<sup>114</sup>

Building on the scholarship outlined above, for MNE legal personality to be established under a system-oriented perspective, it must be demonstrated that MNEs are the addressees of direct rights and duties within the international law system. Furthermore, under a subjective theory of legal personality, it must be shown that in granting such rights and duties to MNEs there is an implicit intention on the part of states, evidenced by a lack of tenable contrary intention, that legal personality accompanies such rights and duties. State intention must also be assessed in the light of post-treaty practice. As I will describe in Chapter 2, BITs and other agreements make MNEs the addressees of direct international law rights, and such rights are not granted in a fashion which plausibly divorces them from legal personality. Various characteristics of BITs underscore their status as instruments which grant legal personality to MNEs within public international law, including BITs' networked nature (i.e., with one state concluding multiple treaties), substantive commonalities across BITs, operational connections between BITs such as facilitated by interpretations of Most Favoured Nation

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<sup>114</sup> Cheng, *supra* note 3 at 36 [emphasis added].

obligations<sup>115</sup>, systemic breaching of the corporate veil among MNE components to facilitate arbitral claims (thereby empowering the MNE to act as a unified legal player in the international law system)<sup>116</sup> and investor nationality determination practice which construes BITs as portals for MNE investor access internationally.<sup>117</sup>

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<sup>115</sup> See e.g. *Maffezini v. Spain* (2000), Jurisdiction Award of 25 January 2000, (ICSID ARB/97/7), online: <[http://ita.law.uvic.ca/documents/Maffezini-Jurisdiction-English\\_001.pdf](http://ita.law.uvic.ca/documents/Maffezini-Jurisdiction-English_001.pdf)>.

<sup>116</sup> See e.g. *Azurix Corp v. Argentina* (2003), Jurisdiction Award of 8 December 2003, (ICSID ARB/01/12) at para. 67, online: <<http://ita.law.uvic.ca/documents/Azurix-Jurisdiction.pdf>>; *Enron Corp and Ponderosa Assets LP v. Argentina* (2004), Jurisdiction Award of 14 January 2004, (ICSID ARB/01/3) at para. 37, online: <<http://ita.law.uvic.ca/documents/Enron-Jurisdiction.pdf>>; *Waste Management Inc v. Mexico* (2004), Final Award of 30 April 2004, (ICSID ARB(AF)/00/3) at para. 77, online: <[http://ita.law.uvic.ca/documents/laudo\\_ingles.pdf](http://ita.law.uvic.ca/documents/laudo_ingles.pdf)>; *Siemens AG v. Argentina* (2004), Jurisdiction Award of 3 August 2004, (ICSID ARB/02/8) at para. 122, online: <<http://ita.law.uvic.ca/documents/SiemensJurisdiction-English-3August2004.pdf>>.

<sup>117</sup> *Aguas del Tunari, S.A. v. Bolivia* (2005), Decision on Respondent's Objections to Jurisdiction of 21 October 2005, (ICSID ARB/02/3) at para. 332, online: <[http://ita.law.uvic.ca/documents/AguasdelTunari-jurisdiction-eng\\_000.pdf](http://ita.law.uvic.ca/documents/AguasdelTunari-jurisdiction-eng_000.pdf)>.

## Chapter 2: MNE Rights under International Law

The preceding pages have introduced my argument that MNEs have been granted direct international law rights and duties and corresponding international legal personality. But what precisely *are* these MNE rights? How have they been bestowed upon MNEs? A response to such questions will be the substance of this chapter. Put briefly, the most significant rights that MNEs now possess under international law are those granted to them under bilateral investment treaties (BITs) and other investment treaty instruments which guarantee certain substantive rights and furthermore provide MNEs with the ability to enforce their rights through international arbitral claims. BITs and other international investment instruments therefore grant MNEs rights and claim capacity<sup>118</sup> at international law, two hallmarks of legal personality. MNE duties under international law, a third component of legal personality will be examined in Chapter 3.

Primarily, international law rights have been allocated to MNEs through a specific class of treaties which establish investor-host state dispute arbitration. In approximate terms, this class of treaties is currently comprised of at least 2608 BITs and various trade agreements with investment provisions.<sup>119</sup> These treaties, including the North American Free Trade Agreement, the Energy Charter Treaty and the Arab Investment Treaty, operate to bring investors, natural persons and MNEs alike, into the international law system; such treaties contain state consent to arbitrate future arbitral investment claims and the causes of such arbitral actions are outlined in the treaty terms.<sup>120</sup> For ease of exposition, I will mainly use the term of BITs to refer to treaties which establish investor-state arbitration, but in so doing I do not intend to exclude non-BIT treaties, such as the

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<sup>118</sup> The ICJ in the *Reparations Case* defined claim capacity in the following terms:

Competence to bring an international claim is, for those possessing it, the capacity to resort to the customary methods recognized by international law for the establishment, the presentation and the settlement of claims. Among these methods may be mentioned protest, request for an enquiry, negotiation, and request for submission to an arbitral tribunal[.]

*Reparations Case*, *supra* note 1 at 177.

<sup>119</sup> UNCTAD, *World Investment Report 2008*, *supra* note 13 at xvii.

<sup>120</sup> Most investment agreements contain an investor-state dispute resolution mechanism. See OECD, *Improving the System of Investor-State Dispute Settlement: An Overview*, Working Paper on International Investment No. 2006/1, (2006) at 4, online: <<http://www.oecd.org/dataoecd/3/59/36052284.pdf>>.

regional trade agreements noted above, which also provide the legal basis of investor MNE rights and claim capacity.

BITs began to be negotiated in the 1960s, during the decline of colonialization, particularly in Africa.<sup>121</sup> There was a significant delay between the initial negotiations of BITs and the first BIT investment arbitration, *Asian Agricultural Products v. Sri Lanka* which was commenced in 1987 pursuant to a UK – Sri Lanka BIT.<sup>122</sup> During this lag in time, there was nonetheless a substantial quantity of investment arbitrations between host states and investors which owed their legal basis not to BITs but to state contracts. State contracts, specific agreements entered into between a host state and investor, often contained arbitration clauses, which were triggered in the case of a dispute.<sup>123</sup> While state contract arbitrations were regularly held at ICSID, the World Bank’s International Centre for the Settlement of Investment Disputes, an institution that later came to administer BIT arbitration proceedings, state contract arbitrations differed strikingly from BIT arbitrations in their legal foundations, due to the fact that they were based on arbitration clauses in investment contracts, rather than investment treaty regimes.

*Asian Agricultural Products* was decided in 1991 and during the early part of the 1990’s BIT arbitrations remained few. By the end of the decade, however, treaty based investment arbitration began to increase substantially. Investors began, in particular, to exercise recourse to the dispute resolution mechanism of NAFTA’s Chapter 11, and this added to the visibility of investor-state arbitration as a means of dispute settlement even as facilitated by other treaty regimes. By the end of the decade an increasing number of new treaty investment claims were brought each year.<sup>124</sup> Argentina’s financial crisis of 2001 added more than 40 treaty-based investment claims, many of them administered by

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<sup>121</sup> For a description of the historical development of BITs see Andrew Newcombe & Lluís Paradell, *Law and Practice of Investment Treaties*, (Austin: Wolters Kluwer Law & Business, 2009) 1-70.

<sup>122</sup> *Asian Agricultural Products Ltd v. Sri Lanka* (1990), Award of 27 June 1990 (ICSID ARB/87/3), online: <<http://ita.law.uvic.ca/documents/AsianAgriculture-Award.pdf>>.

<sup>123</sup> State contract internationalization theory is not universally accepted. See e.g. Peter Muchlinski, *Multinational Enterprises and the Law*, (Oxford: Oxford University Press, 2007) at 580.

<sup>124</sup> Luke Eric Peterson, *Investment Treaty News: 2006 – A Year in Review* (Winnipeg: International Institute for Sustainable Development, 2007) at 3, online: <[http://www.iisd.org/pdf/2007/itn\\_year\\_review\\_2006.pdf](http://www.iisd.org/pdf/2007/itn_year_review_2006.pdf)> [Luke Eric Peterson, *Investment Treaty News: 2006*].

ICSID.<sup>125</sup> In December 2008, at least 318 known investment treaty disputes had been initiated against 78 respondent states.<sup>126</sup> In addition to these known disputes are treaty arbitrations whose existence has not been made known by either the state or the investor. There is therefore an unknown quantity of additional treaty-based arbitrations whose existence has not been announced.<sup>127</sup>

The significance of the number of investment treaty disputes arbitrated between investors and states in this comparatively brief time since 1991 cannot be overstated. One may compare this quantity of international law dispute settlement with other forms of international law adjudication. The WTO, lauded as a very prolific administrator of dispute settlement, has seen the launching of 390 disputes since 1995, as of January 19, 2009.<sup>128</sup> Approximately 24% of these disputes have been solved by party agreement or otherwise resolved without resort to adjudication<sup>129</sup>, leaving a total number of adjudication-resolved WTO disputes at approximately 296. As mentioned, the total number of *publicly known* investment treaty disputes launched as of December, 2008 is 318, making the number of known investment treaty disputes higher than the approximate number of trade disputes adjudicated by the prolific WTO. It is furthermore notable that most of these investment disputes were initiated after January 2000.<sup>130</sup>

While investment treaties are written to facilitate arbitral claims made by either natural or corporate persons, it appears that substantially more claims have been launched

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<sup>125</sup> UNCTAD, *Latest Developments in Investor-State Dispute Settlement*, UNCTAD, 2008, IIA MONITOR No. 1 (2008), UNCTAD/WEB/ITE/IIA/2008/3 at 3, online: <[http://www.unctad.org/en/docs/iteia20083\\_en.pdf](http://www.unctad.org/en/docs/iteia20083_en.pdf)>.

<sup>126</sup> UNCTAD, *Latest Developments in Investor-State Dispute Settlement*, UNCTAD, 2009, IIA Monitor No. 1 (2009), UNCTAD/WEB/DIAE/IIA/2009/6 at 2, online: <[http://www.unctad.org/en/docs/webdiaeia20096\\_en.pdf](http://www.unctad.org/en/docs/webdiaeia20096_en.pdf)> [UNCTAD, *Latest Developments in Investor-State Dispute Settlement* (2009)].

<sup>127</sup> Peterson, *Investment Treaty News: 2006*, *supra* note 124 at 1.

<sup>128</sup> Each new WTO dispute is numbered consecutively. The request for consultations in a 390<sup>th</sup> dispute was received on January 19, 2009. *China – Grants, Loans and other Incentives (Complaint by Guatemala)* (2009) WTO Doc. WT/DS390/1 (Request for Consultations), online: <[http://www.wto.org/english/tratop\\_e/dispu\\_e/cases\\_e/ds390\\_e.htm](http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds390_e.htm)>.

<sup>129</sup> Peter van den Bossche, *The Law and Policy of the WTO*, 2<sup>nd</sup> ed., (Cambridge: Cambridge University Press, 2008) at 173.

<sup>130</sup> Luke Eric Peterson, *Investment Treaty News: 2006*, *supra* note 124 at 3.

by corporate persons than natural persons.<sup>131</sup> Considering the key role that MNEs play in the global economy, as discussed in Chapter 1, it is perhaps not surprising that they have also exercised considerable recourse to investment treaty dispute settlement. Recalling the broad definition of an MNE presented in Chapter 1, as an international business enterprise, *centrally controlled*, which may or may not be organized in the form of an equity ownership network, is it worthwhile to note that some of the largest and most publicly identifiable elite MNEs are among those which have launched BIT arbitral claims.<sup>132</sup>

## 2.1 The Scope and Substance of BIT Rights

Regarding the scope of BIT rights, it is clear that BITs and the other investment instruments noted above are each distinct international treaties. However, despite their technically individualized nature, in practice BITs have in important ways come to be treated by arbitrators and commentators as comprising one body of investment law.<sup>133</sup> There are at least three reasons for BITs' conceptualization as a body of law, rather than as strictly separate instruments. First, and perhaps most importantly, there is considerable commonality among the substantive obligations and even the textual language found in many BITs, owing in part to the way that some countries use "Model" BITs in their treaty negotiation strategies.<sup>134</sup> BITs are commonly noted as having the following broad

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<sup>131</sup> As of April 2009, an UNCTAD Database contains entries for 321 investment treaty disputes and roughly 37 of these appear by the name or description of the investor to have been initiated by natural persons. UNCTAD, "UNCTAD Database of Treaty-Based Investor-State Dispute Settlement Cases", online: <<http://www.unctad.org/iia-dbcases/cases.aspx>>.

<sup>132</sup> See e.g. *IBM World Trade Corporation v. Republic of Ecuador* (2003), Decision on Jurisdiction of 22 December 2003, (ICSID ARB/02/10), online: <<http://ita.law.uvic.ca/documents/IBMvsRDE.pdf>>; *Compañía de Aguas del Aconquija S.A. and Vivendi Universal v. Argentina* (2000), Award of 21 November 2000, (ICSID ARB/97/3), online: <<http://ita.law.uvic.ca/documents/Eaux-Award.pdf>>; *Siemens v. Argentina*, *supra* note 116; *Mobil Investments and Murphy Oil Corporation v. Canada* (2007), Notice of Arbitration of 1 November 2007, online: <<http://www.international.gc.ca/trade-agreements-accords-commerciaux/assets/pdfs/MobilMurphy.pdf>>.

<sup>133</sup> There is a tension within the discipline between those who maintain strictly that each BIT is a wholly distinct legal system (*lex specialis*), and those who acknowledge the development of general principles of investment law. In my view, the first perspective is overly formalistic and disregards widespread practice in the field. For a summary and analysis of this central tension in international investment law see Campbell McLachlan, "Investment Treaties and General International Law" (2008) 57 I.C.L.Q. 361 at 362-365.

<sup>134</sup> See e.g. United States of America, *2004 Model BIT*, online: <[http://www.ustr.gov/assets/Trade\\_Sectors/Investment/Model\\_BIT/asset\\_upload\\_file847\\_6897.pdf](http://www.ustr.gov/assets/Trade_Sectors/Investment/Model_BIT/asset_upload_file847_6897.pdf)>.

categories of substantive obligations: non-discrimination (national treatment and most favoured nation treatment), fair and equitable treatment, observance of obligations (umbrella clauses), free transfer of payments, compensation for losses due to civil disorder and compensation for expropriation.<sup>135</sup>

A second reason why BITs have in some ways come to constitute a body of law is that arbitrators turn to previous BIT awards as support for their decisions, even when such previous awards have been issued in disputes arising out of completely different investment treaties. Arbitrators have even cited non-BIT awards as support for their decisions, such as state-contract arbitrations.<sup>136</sup> Lines between different BITs have thus become blurred through arbitral awards which cite as guidance other arbitral awards which owe their legal legitimacy to entirely different treaty apparatuses.<sup>137</sup> Reliance on external awards for arbitral guidance may be explained as a form of treaty interpretation;<sup>138</sup> each BIT exists within the customary international law framework of treaty interpretation, as encapsulated in Art. 31 of the *Vienna Convention of the Law of Treaties*, which requires that a treaty be interpreted in good faith in the light of its object and purpose.<sup>139</sup>

A third reason for BITs' transformation on some level to a cohesive body of law, from being merely discrete two-state treaties, is that the obligation of Most Favoured Nation (MFN) treatment connects one BIT's obligations to all the other BITs that a particular state has ratified. This can even extend specific dispute settlement provisions in BITs to

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<sup>135</sup> Muchlinski, *supra* note 123 at 682-698.

<sup>136</sup> For instance, *Autopista* has been cited in BIT cases even though it was an ICSID arbitration held pursuant to a concession contract. *Autopista Concesionada de Venezuela, C.A. v. Venezuela* (2001), Jurisdiction Award of 27 September 2001, (ICSID ARB/00/5) cited n. 28 in *Tokios Tokelès v. Ukraine* (2004), Decision on Jurisdiction of 29 April 2004, (ICSID Case No. ARB/02/18), online: <[http://ita.law.uvic.ca/documents/Tokios-Jurisdiction\\_000.pdf](http://ita.law.uvic.ca/documents/Tokios-Jurisdiction_000.pdf)>.

<sup>137</sup> See generally Jeffery P. Commission, "Precedent in Investment Treaty Arbitration: A Citation Analysis of a Developing Jurisprudence" (2007) 24:2 L. Int'l Arb. 129.

<sup>138</sup> See e.g. *Tokios Tokelès v. Ukraine*, *supra* note 136 at 27; *Mondev International Ltd v. United States of America* (2002), Award of 11 October 2002, (ICSID ARB(AF)/99/2) at para. 43, online <<http://ita.law.uvic.ca/documents/Mondev-Final.pdf>>; *Maffezini v. Spain*, *supra* note 115 at para. 27; *Waste Management, Inc. v. United Mexican States* (2001), Award of 2 June 2000, 40 I.L.M. 56, (ICSID ARB(AF)/98/2) at n. 2.

<sup>139</sup> *Vienna Convention on the Law of Treaties*, *supra* note 60.

other treaties which include MFN.<sup>140</sup> MFN obligations included in BITs equalize the level of investment protection up to the highest level contained in the BITs signed by a particular country. If a state has signed several BITs, the MFN obligations contained therein theoretically meld these multiple BITs into one standard of protection guaranteed by the state to all of its BIT trading partners' investors. The significance of this process is amplified by the large number of BITs that some individual states have signed.<sup>141</sup>

Turning now to the substance of rights for investors, notably for MNE investors, there are several rights which appear with slight variations across the body of BIT law.<sup>142</sup> Below, I briefly discuss seven substantive BIT rights which appear in most of the more than 2600 BITs and other investment agreements which have, as of 2009, been signed by 174 UN member states.<sup>143</sup>

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<sup>140</sup> *Maffezini v. Spain*, *supra* note 115 at para. 56. See generally Muchlinski, *supra* note 123 at 631-635.

<sup>141</sup> Germany, China, Switzerland and the United Kingdom have each ratified more than 100 BITs. UNCTAD, *Recent Developments in International Investment Agreements*, UNCTAD, 2008, IIA Monitor No. 2 (2008), UNCTAD/WEB/DIAE/IA/2008/1 at 3, online: <[http://www.unctad.org/en/docs/webdiaeia20081\\_en.pdf](http://www.unctad.org/en/docs/webdiaeia20081_en.pdf)>.

<sup>142</sup> Muchlinski, *supra* note 123 at 682-698.

<sup>143</sup> UNCTAD reports the total as of 2008 to be 2608 BITs. UNCTAD, *World Investment Report 2008*, *supra* note 13 at xvii. As mentioned, a cross referencing between the UN's 192 state members and those listed UNCTAD's BIT database suggests that only the following 18 states have not signed a BIT or similar investment agreement: Andorra, Bahamas, Bhutan, Congo, Fiji, Kirabati, Liechtenstein, Luxembourg, Maldives, Marshall Islands, Micronesia, Monaco, Nauru, Palau, Saint Kitts and Nevis, Samoa, Tuvalu, Vanuatu. See UN, "UN Members", online: <<http://www.un.org/en/members/>>; UNCTAD, "Country Specific Lists of BITs", online: <<http://www.unctad.org/Templates/Page.asp?intItemID=2344&lang=1>>. Almost universally, therefore, individual UN member states have concluded treaties which grant the capacity of MNEs for international law rights. Assessments of BITs' scope which only compare the total number of bilateral trading relationships possible globally to the total number of BITs in existence under represent investment treaties' magnitude within the international legal system and within the international economy more generally. For instance, in a world of 192 states there are mathematically 18336 bilateral relationships possible ( $x=n(n-1)/2$  or  $x=192(192-1)/2$ ). Some would then find the coverage of BITs within the international legal system by calculating the percentage of this global bilateral relationships total which current BITs represent (2608 of 18336 is 14.2%). However, this percentage is skewed in its representation of the coverage of investor rights within the international system because it ignores the application of those treaties with multiple state members which also establish investor-state arbitration (such as the Energy Charter Treaty, the Asian Investment Treaty, the NAFTA, the Arab Investment Treaty or the Central America Free Trade Agreement). For instance, it does not take into account the 1128 bilateral relationships which exist between the 48 members of the Energy Charter Treaty, relationships which are subject to investor-state arbitration coverage. A meaningful calculation of the extent to which investor-state arbitration has been established within the international legal system must therefore take multiple membership treaties into account. As well, it should consider the effects of MFN clauses within treaties, which may operate to transfer access to investment arbitration among agreements. On a final note, given the disparity in size and annual trade which exists among the world's states, a meaningful analysis of the coverage of investor rights within the international economy would not only focus on the qualitative numbers of trading relationships covered by treaties, but would systematically calculate the trading

### 2.1.1 Right to National Treatment

The first investor right I will discuss is the right to national treatment, an investor's right to enjoy a level of treatment not inferior to that enjoyed by domestic business enterprises engaged in a similar activity.<sup>144</sup> In other words, states must grant investors "treatment no less favourable than that accorded in like situations to domestic enterprises."<sup>145</sup> This BIT right has been interpreted as guaranteeing investors the right to be free from both *de facto* or *de jure* discrimination.<sup>146</sup>

The obligation of national treatment was seen as early as the 12<sup>th</sup> and 13<sup>th</sup> centuries in the Hanseatic League treaties.<sup>147</sup> Despite this long lineage, national treatment remains strictly a treaty obligation and not a part of customary international law.<sup>148</sup> National treatment provisions are widespread in BITs and it is unusual for a BIT not to contain a right to national treatment.<sup>149</sup>

Various investment treaty arbitral awards have addressed the right to national treatment.<sup>150</sup> When it comes to making a successful case against a state for infringement

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significance of each relationship and thus address the extent to which world trade is conducted within investor-state arbitration jurisdiction. On the bilateral relationships possible among a defined number of states see Tarcisio Gazzini, "The Role of Customary International Law in the Field of Foreign Investment" 8:5 *World of World Investment and Trade* 691.

<sup>144</sup> Muchlinski, *supra* note 123 at 621. As a 2004 UNCTAD report summarizes "National treatment can be defined as a principle whereby a host country extends to foreign investors treatment that is at least as favourable as the treatment that it accords to national investors in like circumstances." See UNCTAD, *International Investment Agreements: Key Issues: Volume I*, UNCTAD, 2004, UNCTAD/ITE/IIT/2004/10 (Vol. I) at 161, online: <[http://www.unctad.org/en/docs/iteiit200410\\_en.pdf](http://www.unctad.org/en/docs/iteiit200410_en.pdf)> [UNCTAD, *Key Issues: Volume I*].

<sup>145</sup> OECD, *National Treatment for Foreign-Controlled Enterprises* (Paris: OECD, 2005) at 106 cite in Muchlinski, *supra* note 123 at 627.

<sup>146</sup> Muchlinski, *supra* note 123 at 622.

<sup>147</sup> Andrea K. Bjorkland, "National Treatment" in August Reinisch, ed., *Standards of Investment Protection* (Oxford, Oxford University Press: 2008) 29 at 30.

<sup>148</sup> Bjorkland, *ibid.* at 31; see also Muchlinski, *supra* note 123 at 625.

<sup>149</sup> UNCTAD, *National Treatment*, UNCTAD, 2009, Series on Issues in International Investment Agreements (1999), UNCTAD/ITE/IIT/11(Vol.IV) at 161-80, online: <[http://www.unctad.org/en/docs/iteiit200410\\_en.pdf](http://www.unctad.org/en/docs/iteiit200410_en.pdf)>.

<sup>150</sup> See e.g. *S.D. Myers Inc. v. Canada* (2002), Final Award of 30 December 2002 (UNCITRAL), online: <<http://ita.law.uvic.ca/documents/SDMyersFinalAward.pdf>>; *Siemens v. Argentina*, *supra* note 116.

of an investor's right to national treatment, an investor must establish (1) that discrimination has occurred, and (2) that such discrimination has occurred in circumstances which are alike to those circumstances faced by domestic investors.<sup>151</sup> This right is subject to specific and general exceptions, outlined in the treaty.<sup>152</sup> The scope of an investor's right to national treatment also varies by treaty, with some BITs extending national treatment to the pre-establishment phase of an investment, rather than post-establishment.<sup>153</sup> In effect, BITs which grant national treatment at the pre-establishment stage of an investment act to guarantee investors a right of admission and establishment in the host country.<sup>154</sup>

### *2.1.2 Right to Most Favoured Nation Treatment*

Another right accorded to investors under BITs and other investment treaties is the right to most favoured nation (MFN) treatment. Put colloquially, the MFN obligation requires states not to “play favourites” among the trading partners with which they have signed trade and investment treaties containing an MFN obligation. In the investment treaty context, many of the more than 2600 BITs in existence, along with the other investment treaties mentioned above, contain an MFN obligation. MFN, like national treatment, is a right that relates to freedom from discrimination. This MFN obligation operates to create a right for investors to launch a claim in arbitration against a host state if the host state treats the investor less favourably than investors from another home state. Furthermore, in the context of an on-going arbitration, the presence of an MFN clause in the treaty upon which the arbitration is legally based can operate to augment the substantive or procedural content of this BIT, in order to render its contents at least equally favourable to the investor provisions contained in other investment treaties.

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*Champion Trading Company and others v. Arab Republic of Egypt* (2003), Decision on Jurisdiction of 21 October 2003 (ICSID Case No. ARB/02/9).

<sup>151</sup> See Bjorkland, *supra* note 147 at 38-54.

<sup>152</sup> See e.g. Muchlinski, *supra* note 123 at 625. See also General exceptions may be based on reasons including public health, order and morals, and national security. See also UNCTAD, *Key Issues: Volume I*, *supra* note 144 at 189

<sup>153</sup> Bjorkland, *supra* note 147 at 32.

<sup>154</sup> Anna Joubin-Bret, “Admission and Establishment in the Context of Investment Protection” in Reinisch, *Standards of Investment Protection*, *supra* note 147, 9 at 11.

This right, similarly to national treatment, does not have a history based in customary international law or diplomatic protection, but rather has been created through treaty law. Despite the inclusion of MFN obligations in treaties over many years, there is no customary obligation to provide MFN treatment.<sup>155</sup>

In cases such as *Maffizini v. Spain*, the MFN obligation of a host state has been interpreted to require that the investor-state arbitration mechanism found in a different treaty be imported into the BIT at issue.<sup>156</sup> In this award, which has been followed in some subsequent awards<sup>157</sup> but has not found unanimous approval,<sup>158</sup> an investor right to MFN treatment enables dispute settlement rights contained in other investment treaties to be imported into the BIT containing the MFN clause. Other awards have also discussed whether umbrella clauses can be imported into a BIT via a MFN provision.<sup>159</sup>

The clear limits of the MFN principle remain to be delineated.<sup>160</sup> Despite the limits that have been found to the MFN principle<sup>161</sup>, this is a challenging area of investment

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<sup>155</sup> See e.g. Andreas R. Ziegler, “Most-Favoured-Nation (MFN) Treatment” in Reinisch, *Standards of Investment Protection*, *supra* note 147, 59 at 63. See also Muchlinski, *supra* note 123 at 628.

<sup>156</sup> *Maffezini v. Spain*, *supra* note 115; As Ziegler summarizes, “An Argentinean investor in Spain requested the application of the MFN clause contained in Article IV(2) of the Spain/Argentina BIT to benefit from the allegedly more favourable provision in the Chile/Argentina BIT (no waiting period of 18 months until an arbitral tribunal can be seized.)” Ziegler, *ibid.* at 68.

<sup>157</sup> Awards which have accepted the notion that MFN may include dispute settlement provisions include: *Siemens A.G., v. The Argentine Republic*, *supra* note 116 at para. 120; *Gas Natural v. Argentina* (2005), Decision on Preliminary Questions on Jurisdiction of 17 June 2005 (ICSID ARB/03/10) at para. 28, online: <<http://ita.law.uvic.ca/documents/GasNaturalSDG-DecisiononPreliminaryQuestionsonJurisdiction.pdf>>. See also, Zielger, *ibid.* at 84-85.

<sup>158</sup> Awards which have rejected the notion that MFN includes dispute settlement provisions include, *Salini Costruttori S.p.A. and Italstrade S.p.A. v. The Hashemite Kingdom of Jordan* (2004), Decision on Jurisdiction of 29 November 2004 (ICSID ARB/02/13), online: <<http://ita.law.uvic.ca/documents/SalinivJordanAward-IncludingAnnex.pdf>>. See also, Zielger, *ibid.* at 84-85.

<sup>159</sup> *Impregilo S.p.A. v. Pakistan* (2005), Decision on Jurisdiction of 22 April 2005 (ICSID ARB/03/3) at para. 233, online: <<http://ita.law.uvic.ca/documents/impregilo-decision.pdf>>.

<sup>160</sup> Muchlinski, *supra* note 123 at 632-635.

<sup>161</sup> *Plama Consortium Ltd v. Bulgaria* (2005), Decision on Jurisdiction of 8 February 2005 (ICSID ARB/03/24) at para. 189, online: <<http://ita.law.uvic.ca/documents/plamavbulgaria.pdf>>; see also Muchlinski, *supra* note 123 at 634.

law, and public international law in general. For this reason, the United Nations International Law Commission is currently reviewing the MFN principle.<sup>162</sup>

### *2.1.3 Right to Fair and Equitable Treatment*

Unlike national treatment and most favoured nation treatment, fair and equitable treatment has its basis originally in customary international law, although it has arguably outgrown the scope of its customary basis.<sup>163</sup> Under customary international law, even before the creation of BITs, states were obliged to grant foreign nationals an internationally guaranteed minimum standard of treatment. The 1921 *Neer* arbitration, between the United States and Mexico established that the international standard of treatment was breached if there was an outrage to the standards of justice generally accepted by states.<sup>164</sup> This denial of justice or “outrage” standard has not necessarily rested static over time, however. Over the years the customary level of the minimum standard of treatment has shifted with state practice and *opinion juris*.<sup>165</sup>

The fair and equitable standard is contained in many investment treaties and can arguably be presented as either a codification of the customary international minimum standard, or a higher, treaty-based standard of treatment to which investors are entitled. In the NAFTA context, several years after the agreement entered into force, all three NAFTA parties issued a “Joint Statement of Interpretation” which clarified that, for NAFTA purposes, the intention of the NAFTA parties was that the fair and equitable treatment standard in the treaty was to be a codification of the customary international

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<sup>162</sup> ILC, *Most-Favoured-Nation Clause-Report of the Working Group*, UN doc. A/CN.4/L.719 (2007) para. 4.

<sup>163</sup> See e.g. Ioana Tudor, *The Fair and Equitable Treatment Standard in the International Law of Foreign Investment*, (Oxford: Oxford University Press, 2009) at 65.

<sup>164</sup> *L. F. H. Neer and Pauline Neer (U.S.A.) v. United Mexican States* (1926), 4 Reports of International Arbitral Awards 60, online: <[http://untreaty.un.org/cod/riaa/vol\\_IV.htm](http://untreaty.un.org/cod/riaa/vol_IV.htm)>.

<sup>165</sup> See e.g. *Mondev International Ltd v. United States of America*, *supra* note 138 at 125; see also Katia Yannaca-Small, “Fair and Equitable Treatment Standard: recent Developments” in Reinisch, *Standards of Investment Protection*, *supra* note 147, 111 at 114-115.

minimum standard of treatment.<sup>166</sup> Other treaty parties have not been as explicit as NAFTA members and significant divergences in opinion continue to exist concerning the relationship between fair and equitable treatment standards contained in BITs, and the customary international minimum standard of treatment. As Bjorkland summarizes:

There has been a vigorous debate about whether the fair and equitable treatment standard is a subset of the international minimum standard or whether it operates as a discreet obligation that confers more rigorous obligations onto State Parties to the treaty incorporating such an obligation.<sup>167</sup>

Various legal tests have developed in investment arbitrations to ascertain the normative content of the fair and equitable treatment standard found in BITS.<sup>168</sup> As Yannaca-Small summarizes:

Tribunals... have identified a certain number of recurrent elements which they consider as constituting the normative content of the fair and equitable treatment standard, according to the specific facts of each case. These elements can be analysed in four categories; (a) vigilance and protection; (b) due process including non-denial of justice; (c) lack of arbitrariness and non-discrimination; and (d) transparency and stability, including the respect of the investors' reasonable expectations.<sup>169</sup>

I will now describe these four aspects of the fair and equitable standard in greater detail. First, investors have been held to have the right to a host state's exercise of vigilant protection with regard to their investment, a standard of state conduct regarded by some arbitrators to be derived from customary international law.<sup>170</sup> Second, a denial of justice,

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<sup>166</sup> North American Free Trade Commission, *Notes of Interpretation of Certain Chapter 11 Provisions*, (31 July 2001), online: <<http://www.international.gc.ca/trade-agreements-accords-commerciaux/diff-NAFTA-Interpr.aspx?lang=en>>.

<sup>167</sup> Bjorkland, *supra* note 147 at 32 n. 17; see also, *Enron v. Argentina* (2007), Award of 22 May 2007, (ICSID No. ARB/01/3) at para. 258, online: <<http://ita.law.uvic.ca/documents/Enron-Award.pdf>> (holding that the treaty standard was additional to that found in customary international law); see also *M.C.I. Power Group L.C. v. Ecuador* (2007), Award of 31 July 2007, (ICSID No. ARB/03/6) online: <<http://ita.law.uvic.ca/documents/MCIEcuador.pdf>>, (finding that the BIT standard referred for the standard found in customary international law).

<sup>168</sup> For another listing of the elements of the fair and equitable treatment standard, see generally Tudor, *supra* note 163.

<sup>169</sup> Yannaca-Small, *supra* note 165 at 118.

<sup>170</sup> Yannaca-Small, *ibid.* at 118. Yannaca-Small cites the following cases on the obligation of vigilance and protection, as part of the fair and equitable treatment standard: *Asian Agricultural Products Ltd. v. Sri Lanka*, *supra* note 122; *American Manufacturing & Trading Inc., v. Republic of Zaire* (1997), Award of 21 February 1997, (ICSID No. ARB/93/1) 36 ILM 1534, online: <<http://ita.law.uvic.ca/documents/AmericanManufacturing.pdf>>; *Wena Hotels v. Egypt* (2000), Award of 8

another concept with clear customary international law foundations, has been held to constitute a violation of the fair and equitable treatment standard.<sup>171</sup> Third, arbitrary or discriminatory conduct has been seen as a breach of the standard.<sup>172</sup>

Turning to elements of the fair and equitable standard which have a less clear relationship to customary international law, an investor's right to a stable and transparent investment environment, as described by an investor's "legitimate expectations", has emerged as a fourth facet of the fair and equitable treatment standard.<sup>173</sup> Yannaca-Small traces this genre of legal analysis from *Metalclad v. Mexico*, followed by the award in *Tecmed v. Mexico*.<sup>174</sup> She noted that subsequent awards have found that bad faith is not necessarily required on the part of the host state in order for a breach of this standard to be established; rather, objective analysis is required regarding whether there has been a betrayal on the part of the host state concerning the legitimate expectations of the foreign investor.<sup>175</sup> Some arbitrators have found that, in order for there to have been a breach of

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December 2000, (ICSID No. ARB/98/4), online: <<http://ita.law.uvic.ca/documents/Wena-2000-Final.pdf>>; *Occidental v. Ecuador* (2004), Award of 1 July 2004, (LCIA No. UN 3467) online: <[http://ita.law.uvic.ca/documents/Oxy-EcuadorFinalAward\\_001.pdf](http://ita.law.uvic.ca/documents/Oxy-EcuadorFinalAward_001.pdf)>.

<sup>171</sup> Yannaca-Small, *supra* note 165 at 119. Yannaca-Small notes the relevance of the following investment treaty cases to the denial of justice element of the fair and equitable treatment standard: *Waste Management v. Mexico*, *supra* note 116; *Loewen Group, Inc. and Raymond L. Loewen v. United States* (2003), Award of 26 June 2003, (ICSID ARB(AF)/98/3), online: <<http://ita.law.uvic.ca/documents/Loewen-Award-2.pdf>>. *International Thunderbird Gaming Corporation v. Mexico* (2006), Award of 26 January 2006, (UNCITRAL), online: <<http://ita.law.uvic.ca/documents/ThunderbirdAward.pdf>>.

<sup>172</sup> *CMS Gas Transmission Company v. Argentina* (2005), Award of 12 May 2005, (ICSID No. ARB/01/8) online: <[http://ita.law.uvic.ca/documents/CMS\\_FinalAward\\_000.pdf](http://ita.law.uvic.ca/documents/CMS_FinalAward_000.pdf)>; *S.D. Myers Inc. v. Canada* (2000), Partial Award of 13 November 2000, (UNCITRAL), online: <[http://ita.law.uvic.ca/documents/PartialAward\\_Myers\\_000.pdf](http://ita.law.uvic.ca/documents/PartialAward_Myers_000.pdf)>.

<sup>173</sup> Yannaca-Small summarizes the relationship of "legitimate expectations" to customary international law: Transparency, stability, and legitimate expectations are, among the interpretative elements of fair and equitable treatment, the only ones not 'well grounded' in customary international law but which emerge from general principles and the recurrent opinions of arbitral tribunal in the last few years. It is too early to say whether we are witnessing a sign of evolution of the international custom as it is also too early to establish a definitive list of elements for the interpretation of the 'fair and equitable treatment' standard since the jurisprudence is still constantly evolving.

Yannaca-Small, *supra* note 165 at 130.

<sup>174</sup> *Metalclad Corporation v. Mexico* (2000), Award of 30 August 2000, (ICSID No. ARB(AF)/97/1), online: <<http://ita.law.uvic.ca/documents/MetalcladAward-English.pdf>>; *Tecnicas Medioambientales Tecmed, S.A. v. Mexico* (2003), Award of 29 May 2003, (ICSID No. ARB(AF)/00/2), online: <[http://ita.law.uvic.ca/documents/Tecnicas\\_001.pdf](http://ita.law.uvic.ca/documents/Tecnicas_001.pdf)>.

<sup>175</sup> Yannaca-Small, *supra* note 165 at 123-25; see *Occidental v. Ecuador*, *supra* note 170; See also *LG&E Energy Corp. v. Argentina* (2006), Decision on Liability of 3 October 2006, (ICSID No. ARB/02/1), online: <[http://ita.law.uvic.ca/documents/ARB021\\_LGE-Decision-on-Liability-en.pdf](http://ita.law.uvic.ca/documents/ARB021_LGE-Decision-on-Liability-en.pdf)>; *Enron v. Argentina* (2007), *supra* note 167; *Saluka v. The Czech Republic* (2006), Partial Award of 17 March 2006 (UNCITRAL) online: <<http://ita.law.uvic.ca/documents/Saluka-PartialawardFinal.pdf>>; *CMS Gas*

the fair and equitable treatment standard, legitimate expectations must have been formed on the basis of an explicit promise or guarantee from the host state.<sup>176</sup>

Some have described claims for breach of the fair and equitable treatment standard as being “expropriation light”<sup>177</sup> claims in that state conduct which is not expropriation may sometimes be captured as sanctionable under the “fair and equitable treatment” requirement contained in BITs.

Fair and equitable treatment claims make up a significant proportion of investment treaty claims. In the words of Christoph Schreuer:

It is clear that the FET [fair and equitable treatment] standard is currently the most promising standard of protection from the investor’s perspective. In an investment dispute the burden of proof for an investor to demonstrate a violation of FET is lighter than to establish an expropriation. Not to invoke FET where it is available under an applicable treaty would probably have to be considered as amounting to malpractice.<sup>178</sup>

In sum, investors’ right to fair and equitable treatment has been interpreted in arbitral decisions to include protection from a wide range of state conduct. The relationship between the customary minimum standard of treatment, traditionally regarded as the standard elucidated in the *Neer* claim, and the fair and equitable standard, has been the subject of significant controversy.<sup>179</sup>

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*Transmission Company v. Argentina*, *supra* note 172. Yannaca-Small notes that the arbitrators in the CMS case declared that the legitimate expectations element of the fair and equitable treatment standard had become part of customary international law. Yannaca-Small, *supra* note 165 at 124, citing *CMS Gas Transmission Company v. Argentina*, *supra* note 172 at para. 284.

<sup>176</sup> *Parkerings-Compagniet AS v. Lithuania* (2007), Final Award of 11 September 2007, (ICSID No. ARB/05/8) online: <<http://ita.law.uvic.ca/documents/Pakerings.pdf>>.

<sup>177</sup> Yannaca-Small, *supra* note 165 at 112.

<sup>178</sup> Christoph Schreuer, “Introduction: Interrelationship of Standards” in Reinisch, *Standards of Investment Protection*, *supra* note 147, 1 at 2; Schreuer cites *PSEG v. Turkey* (2007), Award of 19 January 2007, (ICSID No. ARB/02/05) at para. 238 online: <<http://ita.law.uvic.ca/documents/PSEGGlobal-Turkey-Award.pdf>> .

<sup>179</sup> See e.g. M. Sornarajah, “The Fair and Equitable Standard of Treatment: Whose Fairness? Whose Equity?” in Federico Ortino *et al.*, eds., *Investment Treaty Law: Current Issues II*, (London: British Institute of International and Comparative Law, 2007) 167.

#### 2.1.4 Right to Full Protection and Security

Many BITs grant investors a certain level of physical host state protection, a standard which has its roots in the international minimum standard found in customary international law.<sup>180</sup> This standard of treatment is similar to the fair and equitable treatment standard, but is likely not equivalent. As Schreuer summarizes:

... tribunals are at odds as to whether full protection and security is an autonomous standard or a subspecies of fair and equitable treatment. Some tribunals regard the two standards as more or less equivalent, while others emphasize their distinction.<sup>181</sup>

Traditionally, this right extended only to physical protection of an investment.<sup>182</sup> BITs employ a variety of textual formulations in incorporating full protection and security into the treaty scope. Some link this obligation to fair and equitable treatment, blending the two standards; others present this standard as being distinct from fair and equitable treatment.<sup>183</sup> Overall, the right to full protection and security “refers uncontroversially to physical harm to the investment, to be prevented by employing police powers.”<sup>184</sup> The extent to which this standard of protection extends to non-physical security remains the subject of debate.<sup>185</sup>

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<sup>180</sup> Moss lists several awards that have regarded BIT formulations of the right to full protection and security as being at least equivalent to custom. Giuditta Cordero Moss, “Full Protection and Security” in Reinisch, *Standards of Investment Protection*, *supra* note 147 at 136. See also, *Asian Agricultural Products Ltd v. Sri Lanka*, *supra* note 122 at paras. 46-53; *American Manufacturing & Trading Inc., v. Republic of Zaire*, *supra* note 170 at paras. 6.06-6.07; *Noble Ventures Inc. v. Romania* (2005), Award of 1 October 2005, (ICSID No. ARB/01/11) at para. 164, online: <<http://ita.law.uvic.ca/documents/Noble.pdf>>.

<sup>181</sup> Schreuer, *supra* note 178 at 2. On tribunals which see the two standards as similar Schreuer cites: *Wena Hotels Ltd. v. Arab Republic of Egypt*, *supra* note 170 at paras. 84-95; *Occidental v. Ecuador*, *supra* note 170 at para. 187; *PSEG v. Turkey*, *supra* note 178 at paras. 257-259. On awards which emphasize the differences between the two standards, Schreuer lists: *Azurix Corp. v. Argentina* (2006), Award of 14 July 2006, (ICSID No. ARB/01/12) at paras. 407-408, online: <<http://ita.law.uvic.ca/documents/AzurixAwardJuly2006.pdf>>.

<sup>182</sup> Moss, *supra* note 180 at 132.

<sup>183</sup> Moss, *ibid.* at 134. Awards addressing the right to full protection and security in the context of physical safety include *PSEG v. Turkey*. *PSEG v. Turkey*, *supra* note 178.

<sup>184</sup> Moss, *supra* note 180 at 150.

<sup>185</sup> Moss, *ibid.* at 142.

### 2.1.5 Right to Compensation for Expropriation

Another BIT right which has its roots in customary international law is the right to compensation for expropriation. While the level of compensation and the conditions under which expropriation is lawful have been subject to debate, expropriation is a topic that customary international law has addressed extensively. A general rule developed in customary international law deeming expropriation to be lawful when it is done for a public purpose<sup>186</sup> in a non-discriminatory fashion.<sup>187</sup> Furthermore, the “Hull Rule”<sup>188</sup> on compensation for expropriation, holding that compensation was required to be prompt, adequate and effective, has been regarded by some as being customary law, although this has been mitigated by state expropriation practice in the latter half of the 20<sup>th</sup> century.<sup>189</sup>

Where BIT practice diverges from customary international law on expropriation, however, it is the concept of indirect expropriation, whereby a state may be found to have expropriated an investment, not through direct seizure or forcible nationalization, but indirectly through a regulatory measure which adversely affects the investment. Indirect expropriation has generated much reasoning and deliberation within investment awards.<sup>190</sup> In contrast, direct expropriation has diminished from its customary importance with successive BIT practice.<sup>191</sup>

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<sup>186</sup> August Reinisch, “Legality of Expropriations” in Reinisch, *Standards of Investment Protection*, *supra* note 147, 171 at 178. Reinisch notes that this was affirmed in the *General Assembly Declaration on Permanent Sovereignty over Natural Resources*. GA Res. 1803(XVII), UN GAOR, 17<sup>th</sup> Sess., (1962) 15. Reinisch highlights BIT awards which have deliberated on the legality of public purpose in expropriation, including the following: *Siemens v. Argentina*, *supra* note 116 at para. 273; *ADC Affiliate Limited and ADC & ADMC Management Limited v. Hungary* (2006), Award of 2 October 2006, (ARB/03/16) at para. 432, online: <<http://ita.law.uvic.ca/documents/ADCvHungaryAward.pdf>>.

<sup>187</sup> On discrimination in expropriation see Reinisch, “Legality of Expropriations”, *ibid.* at 187-191; See also *ADC Affiliate Limited and ADC & ADMC Management Limited v. Hungary*, *ibid.* at para. 367.

<sup>188</sup> This doctrine takes its name from US Secretary of State Cordell Hull, who in 1938 expressed this formulation of the compensation standard in the context of an expropriation dispute with Mexico. See e.g. Matthew C. Porterfield, “International Expropriation Rules and Federalism” (2004) 23:3 *Stan. Envtl. L.J.* 3 at 36. See also Reinisch, “Legality of Expropriations”, *ibid.* at 194.

<sup>189</sup> Reinisch, “Legality of Expropriation”, *ibid.*

<sup>190</sup> On indirect expropriation see e.g. *Compana de Aguas del Aconquija, S.A. and Vivendi Universal v. Argentina* (2007), Award of 20 August 2007, (ARB/97/3) online: <<http://ita.law.uvic.ca/documents/VivendiDecisiononStayofEnforcement2008.pdf>>.

<sup>191</sup> As Schreuer writes:

Traditionally, the most important standard was expropriation. In fact, there was a time when investor protection was virtually synonymous with protection against uncompensated expropriation. Recently,

Indirect expropriation has been found by BIT tribunals primarily through the “sole effects” doctrine, whereby the *effects* of a state measure are assessed for their impact on an investment.<sup>192</sup> Some investment awards have characterized the effects of a state’s indirect expropriation as being a “substantial deprivation” of an investor’s investment.<sup>193</sup> As Hoffman summarizes:

... the existing case law shows that the main criterion in order to determine whether or not certain measures taken by a government amount to an indirect expropriation is the degree of the interference. It must lead to a ‘substantial’ or ‘radical’ deprivation of the owner’s right...<sup>194</sup>

Hoffmann notes that this “deprivation” related reasoning has been employed in awards rendered in various investment treaty arbitrations.<sup>195</sup>

#### 2.1.6 Right to States’ Observance of their Assumed Obligations

An interesting right contained in many BITs relates to “umbrella clauses” which operate to hold a breach of contractual obligations as being within the ambit of the BIT. As Muchlinski explains, this type of BIT article “ensures an additional measure of contractual stability by making the observance of obligations owed to the investor a treaty

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the practical relevance of expropriation in investment disputes has receded. Direct expropriations have become rare. Cases involving claims for indirect expropriations through regulatory measures are much more prevalent.

Schreuer, *supra* note 178 at 1.

<sup>192</sup> Anne K. Hoffmann, “Indirect Expropriation” in Reinisch, *Standards of Investment Protection*, *supra* note 147 at 156-159.

<sup>193</sup> Hoffmann, *ibid.*

<sup>194</sup> Hoffmann, *ibid.* at 158.

<sup>195</sup> See Hoffman, *ibid.* at 157-8. Hoffman cites the following awards: *Pope and Talbot v. Canada* (2000), Interim Award of 26 June 2000, (UNCITRAL) at para. 96, online:

<<http://ita.law.uvic.ca/documents/InterimAward.pdf>>; *Metalclad v. Mexico*, *supra* note 174 at para. 103;

*CME v. Czech Republic* (2001), Partial Award of 13 September 2001, (UNCITRAL) at para. 606, online:

<<http://ita.law.uvic.ca/documents/CME-2001PartialAward.pdf>>; *SD Myers v. Canada* (2000), Partial

Award of 13 November 2000, (UNCITRAL) at para. 283, online:

<<http://ita.law.uvic.ca/documents/SDMeyers-1stPartialAward.pdf>>; *Tecnicas Medioambientales Tecmed*

*S.A. v. Mexico*, *supra* note 174 at para. 115; *Generation Ukraine v. Ukraine* (2003), Award of 16 September 2003, (ICSID No. ARB/00/9 (at para. 20.32, online at:

<[http://ita.law.uvic.ca/documents/GenerationUkraine\\_000.pdf](http://ita.law.uvic.ca/documents/GenerationUkraine_000.pdf)>.

standard, thereby reinforcing the existing contractual duties owed to the investor.”<sup>196</sup> Umbrella clauses hold generally that parties must adhere to their contractual commitments. For instance, the Hong Kong – Japan BIT holds that “Each Contracting Party shall observe any obligations it may have entered into with regard to investments of investors of the other Contracting Party.”<sup>197</sup>

It is significant that those BIT decisions which employ umbrella clauses to raise a breach of contract to a treaty law violation are in a sense ensuring the “internationalization” of state contracts as seen in early investment contract arbitrations such as the *Sapphire* case.<sup>198</sup> As noted by Nolan and Baldwin, “The decisions by several tribunals that have allowed breaches of contracts to be brought pursuant to an observance of obligations clause can be understood to conclude that the umbrella clause has the effect of expressly internationalizing contractual obligations.”<sup>199</sup>

To provide a brief background on the theory of state contract internationalization, this concept holds that, despite any designation of applicable law contained in a state contract, international law is superimposed onto the contractual parties’ choice of law and “applies automatically as the overriding governing law.”<sup>200</sup> A notable consequence of internationalization realized by international investment agreements is that it may cause a breach of a state contract to be deemed a breach of the state’s international law obligations, a marked departure from the general international law norm which holds that contractual breaches in and of themselves are not violations of international law.<sup>201</sup>

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<sup>196</sup> Muchlinski, *supra* note 123 at 684.

<sup>197</sup> *Agreement between the Government of Hong Kong and the Government of Japan for the Promotion and Protection of Investment*, May 15, 1997, Art. 2(3), online: <[http://www.meti.go.jp/policy/trade\\_policy/epa/images/080428trade-policy/hongkong\\_e.htm](http://www.meti.go.jp/policy/trade_policy/epa/images/080428trade-policy/hongkong_e.htm)>. See Michael D. Nolan & Edward G. Baldwin, “The Treatment of Contract-Related Claims in Treaty-Based Arbitration” (2006) 21:6 *Mealey’s International Arbitration Report* 1 at 4.

<sup>198</sup> *Sapphire International Petroleum Ltd. v. National Iranian Oil Co.* (1967) 35 I.L.R. 136, at 171-73.

<sup>199</sup> Nolan & Baldwin, *supra* note 197.

<sup>200</sup> A.F.M. Maniruzzaman, “State Contracts in Contemporary International Law: Monist versus Dualist Controversies” (2001) 12:2 E.J.I.L. 309 at 309.

<sup>201</sup> UNCTAD, *State Contracts*, UNCTAD/ITE/IIT/2004/11 (2004), at 9, online: <[http://www.unctad.org/en/docs/iteiit200411\\_en.pdf](http://www.unctad.org/en/docs/iteiit200411_en.pdf)>.

Some have traced the first application of the theory of state contract internationalization to the 1967 *Sapphire* arbitration.<sup>202</sup> The arbitral award in this dispute found that the concession agreement at issue exhibited both a public law and private law character, leading the tribunal to opine that “this contract has therefore a quasi-international character, which releases it from the sovereignty of a particular legal system.”<sup>203</sup> In the 1978 *Texaco* arbitration<sup>204</sup> a state contract was similarly internationalized, as the arbitrator found that the presence of a stabilization clause had the legal effect of giving the contract containing it an international character, leading the nationalizations at issue to be deemed violations of international law.<sup>205</sup>

The “automatic” internationalization of state contracts, as expressed in the *Sapphire* award, remains controversial.<sup>206</sup> A review of the literature suggests that the internationalization of state contracts, as determined in defiance of express contractual wording, remains subject to debate.<sup>207</sup>

With regard to the operation of BIT umbrella clauses, several disputes are of note. Umbrella clause interpretations are mixed, however. For example, there are notable differences between the treatments of contractual claims seen in the *SGS v. Pakistan*<sup>208</sup> award, as compared with the *SGS v. Philippines*<sup>209</sup> award. Briefly put, the former did not assume jurisdiction over contractual claims via application of the BIT umbrella clause, while the latter did so.<sup>210</sup>

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<sup>202</sup> *Sapphire International Petroleum Ltd. v. National Iranian Oil Co.*, *supra* note 198 at 171-173.

<sup>203</sup> *Ibid.* See Addullah Al Faruque, “The Rationale and Instrumentalities for Stability in Long-term State Contracts: The Context for Petroleum Contracts” (2006) 7:1 Journal of World Investment and Trade 86.

<sup>204</sup> *Texas Overseas Petroleum Co. and California Asiatic Oil co. v. Government of the Libyan Arab Republic*, 17 I.L.M. 3 (1978). See also, *Liamco v. Libya*, 62 I.R.L. 141 (1977).

<sup>205</sup> *Texas Overseas Petroleum Co. and California Asiatic Oil co. v. Government of the Libyan Arab Republic*, *ibid.*; See Faruque, *supra* note 203 at 326-7.

<sup>206</sup> Faruque, *supra* note 203.

<sup>207</sup> As one author summarizes, “There is a vast volume of literature either promoting or criticizing this approach [of internationalization] and there is little benefit gained from reviewing it.” Nagla Nassar, “Internationalization of State Contracts: ICSID, The Last Citadel” (1997) 14:3 J. Int’l Arb. 185 at 194.

<sup>208</sup> *SGS Société Générale de Surveillance S.A. v. Pakistan* (2003), Award on Jurisdiction of 6 August 2003, (ICSID No. ARB/01/13) online: <[http://ita.law.uvic.ca/documents/SGSvPakistan-decision\\_000.pdf](http://ita.law.uvic.ca/documents/SGSvPakistan-decision_000.pdf)>.

<sup>209</sup> *SGS Société Générale de Surveillance S.A. v. Philippines* (2004), Award on Jurisdiction of 29 January 2004, (ICSID No. ARB/02/6) online: <[http://ita.law.uvic.ca/documents/SGSvPhil-final\\_001.pdf](http://ita.law.uvic.ca/documents/SGSvPhil-final_001.pdf)>.

<sup>210</sup> *SGS Société Générale de Surveillance S.A. v. Philippines*, *ibid.* See also, UNCTAD, *State Contracts*, *supra* note 201 at 21.

*Eureko v. Poland*<sup>211</sup> followed the approach expressed in *SGS v. Philippines* and held that the plain meaning of the umbrella clause permitted the tribunal to assume jurisdiction over the contract claims in and of themselves.<sup>212</sup> In *Fedax v. Venezuela*, the tribunal invoked an umbrella clause to find that Venezuela's failure to pay promissory notes as stipulated in a contract amounted to a BIT violation.<sup>213</sup> *Noble Ventures v. Romania*<sup>214</sup> read the umbrella clause at issue to elevate a breach of contract to an international law treaty violation, following the approach noted above of *Eureko v. Poland* and *SGS v. Philippines*. Perhaps more interesting is the holding of *Joy Mining Machinery v. Egypt*, which gave effect to an umbrella clause, but stipulated that purely commercial contractual obligations could not be elevated to international law obligations.<sup>215</sup> The *Vivendi* annulment held that the tribunal had jurisdiction over contract-related claims, finding that the state's actions in relation to contractual performance could constitute BIT stipulated violations.<sup>216</sup>

Tribunals in other disputes have elected not to read umbrella clauses as elevating claims of contractual breach to treaty claims, namely *El Paso Energy v. Argentina*<sup>217</sup> which followed the approach seen in *SGS v. Pakistan*.<sup>218</sup>

Overall, investors have the right, under BITs with umbrella clauses as they have been interpreted in several awards, to have their contractual terms respected by host states. State contracts are not treaties, under the reasoning of the ICJ in the *Anglo-Iranian Oil*

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<sup>211</sup> *Eureko v. Poland* (2005), Partial Award and Dissenting Opinion of 19 August 2005, online: <<http://ita.law.uvic.ca/documents/Eureko-PartialAwardandDissentingOpinion.pdf>>.

<sup>212</sup> *Eureko v. Poland*, *ibid* at paras. 246 & 253-256.

<sup>213</sup> *Fedax v. Venezuela* (1997), Decision on Jurisdiction of 11 July 1997, (ICSID No. ARB.96/3) at para. 26, online: <<http://ita.law.uvic.ca/documents/Fedax-1997-Last.pdf>>.

<sup>214</sup> *Noble Venture Inc. v. Romania*, *supra* note 180.

<sup>215</sup> *Joy Mining Machinery Limited v. Arab Republic of Egypt* (2004), Award of 6 August 2004, (ICSID No. ARB/03/11) at (paras. 71-82) 78-89, online: <[http://ita.law.uvic.ca/documents/JoyMining\\_Egypt.pdf](http://ita.law.uvic.ca/documents/JoyMining_Egypt.pdf)>.

<sup>216</sup> *Vivendi v. Argentina* (2002), Decision on Annulment of 3 July 2002, (ICSID No. ARB/97/3) online: <[http://ita.law.uvic.ca/documents/vivendi\\_annulEN.pdf](http://ita.law.uvic.ca/documents/vivendi_annulEN.pdf)>.

<sup>217</sup> *El Paso Energy v. Argentina* (2006), Award of 27 April, 2006, (ICSID No. ARB/03/15) at para. 82, online: <<http://ita.law.uvic.ca/documents/elpasoEN.pdf>>.

<sup>218</sup> *SGS v. Pakistan*, *supra* note 208.

*Co. case.*<sup>219</sup> Nonetheless, BITs can make state contracts into agreements which are enforceable by investors under public international law, making the difference between state contracts and treaties less and less appreciable.

#### *2.1.7 Right to Free Transfer of Payments*

Many BITs govern the repatriation of earnings and contain provisions which grant investors the right to transfer earnings across borders. This is an interesting right, from a technical perspective, because it fits perfectly with the operational requirements of multinational enterprises, which, by their very nature, require the ability to transfer monies between corporate entities located in different countries in order to manage their MNE-wide strategies.

BIT Provisions on capital transfer mobility range in form and substance, most notably for the extent to which caveats to capital mobility are directly noted in the capital mobility provisions themselves.<sup>220</sup> Some provisions allow for free transfer of capital abroad without evident restrictions, while other formulations contain explicit caveats in the capital mobility provisions, including the requirement that capital transfers be completed in a method consistent with domestic host state law, as well as outlining exceptions for balance of payments crises.<sup>221</sup> Capital mobility restraints which conflict with the terms of a BIT may be assessed in the light of overarching host state defences such as “necessity”.<sup>222</sup> Furthermore, a state’s imposition of capital mobility restraints may trigger a perceived breach of one of the aforementioned treatment standards, such as the fair and equitable treatment standard as it is determined by the legitimate expectations of an investor<sup>223</sup> or may be found to constitute indirect expropriation of an investment.<sup>224</sup>

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<sup>219</sup> *Anglo-Iranian Oil Co. Case (United Kingdom v. Iran)*, *supra* note 9.

<sup>220</sup> Abba Kolo & Thomas Walde, “Capital Transfer Restrictions under Modern Investment Treaties” in *Reinisch Standards of Investment Protection*, *supra* note 149, 205 at 213-217.

<sup>221</sup> Kolo & Walde, *ibid.* at 214-215.

<sup>222</sup> Kolo & Walde, *ibid.* at 217. See also *CMS v. Argentina* (2007), Annulment Award of 25 September 2007, (ISCID No. ARB/01/8) at paras. 120-130, online: <<http://ita.law.uvic.ca/documents/CMSAnnulmentDecision.pdf>>.

<sup>223</sup> Kolo & Walde, *ibid.* at 235.

<sup>224</sup> Kolo & Walde, *ibid.* at 227.

### *2.1.8 Summary of Investor Rights: Noting the Divergences from Custom*

There are thus at least seven broad investor rights which are contained in BITs and other investment agreements. Some of these rights were originally based in customary international law, but have been expanded upon through BIT terms and practice. First, fair and equitable treatment bears similarity to the minimum standard of treatment found in customary law, exemplified in the denial of justice standard identifiable in the *Neer* claim. Second, the right to full protection and security also has its origins in customary international law.

Standards of state conduct have been expanded upon through BIT language and arbitral interpretations; for instance, the doctrine of legitimate expectations arose with investment treaty arbitral practice, and was not seen in customary law on diplomatic protection, but is a central part of current treaty-based investment law. Also, rules on compensation for expropriation also have a history based in customary law, but the customary form of such principles has been diverged from in BIT practice; causes of action for indirect or regulatory expropriation, not seen in pre-BIT custom, have developed in recent years and gained indisputable importance in BIT practice.

Other BIT investor rights have no basis in custom and are purely treaty-based. National treatment and MFN rights are examples of treaty-based rights which are not customary international law norms. As well, umbrella clauses and the right to free transfer of capital are exclusively treaty-based concepts.

## 2.2 BIT Rights as Direct Investor Rights

The precise characterization of investors' rights under BITs and other treaties has been the subject of some debate. Two main competing conceptualizations are evident.<sup>225</sup> First, there is the view that does not allow for investors' direct international law rights under BITs and instead conceptualizes BITs as a form of diplomatic protection.<sup>226</sup> This view holds that investors enjoy at most a right of standing, a right to make a claim under a BIT, without holding any substantive international rights; in this way investors are the private enforcer of their home states' direct rights under international law.<sup>227</sup> This view of investor rights is referred to as the *derivative rights* theory of investor rights, since it holds that investor "rights" are merely indirect and are derived from the direct rights of their home state. This derivative view downplays the fact that investors are awarded direct monetary compensation if they are successful in treaty claim. The derivative rights explanation of investors' role in investment treaty arbitration is consistent with a strict positivist view of international law which emphasizes the role of states as primary subjects of international law, and minimizes the legal personality of non-state actors.

A contrasting conceptualization of the investor-state process sees investors as the direct rightsholders of the BIT system. This *direct rights* theory conceives of investors as holding direct international law rights under BITs in terms of both procedural and substantive rights in relation to BIT contents.<sup>228</sup> It thus characterizes investors as holding direct rights under international law. As Douglas notes, this view builds on the notion that a treaty may grant individuals direct rights, as supported by decisions including *LeGrand* and *Jurisdiction of the Courts of Danzig*.<sup>229</sup> The direct rights theory is furthermore supported by scholarly views of such decisions, including Hersch Lauterpacht's

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<sup>225</sup> Zachary Douglas, "The Hybrid Foundations of Investment Treaty Arbitration" (2003) 74 Brit. Y.B. Int'l L. 151 at 168.

<sup>226</sup> As Douglas notes, "The present tendency is for states to see elements of the international law of diplomatic protection lurking in the shadows cast by investment treaties." Douglas, *ibid.* at 153.

<sup>227</sup> Douglas, *ibid.* at 168.

<sup>228</sup> Douglas outlines both options. Douglas, *ibid.* at 181-184.

<sup>229</sup> *Legrand Case (Germany v. United States)*, Judgement on the Merits of 27 June 2001 [2001] 40 ILM 1069 at paras. 77-8; *Jurisdiction of the Courts of Danzig*, *supra* note 34 at 17-19. Cited in Douglas, *ibid.* at 183.

interpretation of the *Danzig* case in which he held that “There is nothing in international law to prevent individuals from acquiring directly rights under a treaty provided that this is the intention of the contracting parties.”<sup>230</sup>

Both the derivative and direct theories of investor rights are legally possible, as Douglas notes:

...in deciding between the competing ‘derivative’ and ‘direct’ theories the starting point must be that international legal theory allows for both possibilities. There is no impediment to states in effect delegating their procedural right to bring a diplomatic protection claim to enforce substantial rights of the states concerned within a special treaty framework. On the other hand, there is no reason why an international treaty cannot create rights for individuals and private entities.<sup>231</sup>

If both rights theories are possible, which theory do BITs actually embody? Furthermore, how can this underlying theoretical model of BIT rights be identified? I argue that the underlying model of BIT rights can be discovered by appraising the assumptions suggested by BIT text, practice and awards. In the following paragraphs I assess BITs’ operation and foundational language and assess whether the direct or derivative model more closely matches the assumptions evident in BITs practice.

As is the case with the possible legal personality of MNEs, discussed in Chapter 1, a commentator’s selected theoretical framework, whether based in positivism, natural law or another perspective, will influence his or her views as to which entities may have direct rights under international law, and his or her views as to the fundamental character of BITs given the customary backdrop of diplomatic protection. Assuming that an observer’s chosen theoretical framework equally permits the possibility of direct or derivative investor rights, which characterization appears more probable on the basis of practical assessment of the BIT dispute resolution process? Like Zachary Douglas, upon

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<sup>230</sup> Lauterpacht, *supra* note 34.

<sup>231</sup> Douglas, *supra* note 225 at 168.

review, I find that the direct rights model is more persuasive than the derivative model in providing the theory of how investors' BIT rights operate.<sup>232</sup>

### 2.2.1 Evaluating the Derivative Rights Model

Turning first to the derivative model, are there aspects of the BIT regime that suggest that this model is in fact the one underlying the system, and that investors are not granted international law rights themselves? The most obvious aspect of the BIT regime that suggests the accuracy of a derivative model is the BIT system's similarity to diplomatic protection; the linkages between diplomatic protection and investment arbitration are intuitively evident and investment treaty arbitration is often characterized as an elaboration upon diplomatic protection, one which seeks to ameliorate diplomatic protection's inadequacies, especially those stemming from its discretionary nature.<sup>233</sup> As Newcombe and Paradell summarize, "The extent to which international law relating to diplomatic protection, such as the rules relating to continuous nationality, are relevant to [International Investment Agreement] claims remains unsettled."<sup>234</sup>

For example, the NAFTA award *Loewen v. United States* characterised investment agreements as embodying diplomatic protection consistent with a derivative theory of investor rights.<sup>235</sup> At para. 233 of the Award, the tribunal presents NAFTA as a development upon diplomatic protection which retains diplomatic protection's character as a *state's* right:

NAFTA claims have a [...] character, stemming from a corner of public international law in which, by treaty, the power of States under that law to take international measures for the correction of wrongs done to its national has been

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<sup>232</sup> Douglas, *ibid.* at 168 & 182. Douglas writes at 182, "[T]he functional assumption underlying this investment treaty regime is clearly that the investor is bringing a cause of action based on the vindication of its own rights rather than those of its national state."

<sup>233</sup> Douglas, *ibid.* at 182.

<sup>234</sup> Newcombe & Paradell, *supra* note 123 at 7. Newcombe & Paradell cite Douglas, *ibid.*

<sup>235</sup> *Loewen Group, Inc. and Raymond L. Loewen v. United States*, *supra* 171; cited in Douglas, *ibid.* at 162-163. See also M. Sornarajah, "State Responsibility and Bilateral Investment Treaties" (1986) 20 J. World Trade 79 at 93; cited in Douglas, *ibid.* at 162-163.

replaced by an ad hoc definition of certain kinds of wrong, coupled with specialist means of compensation.<sup>236</sup>

The tribunal continued by noting that, “There is no warrant for transferring rules derived from private law into a field of international law where claimants are permitted for convenience to enforce what are in origin the rights of Party states.”<sup>237</sup>

Aside from the Loewen award, however, there does not appear to be any other investment treaty awards which clearly present BIT rights as being state rather than investor rights. Instead, despite the surface similarities between diplomatic protection and investment treaty arbitration, the operation of investment treaties suggests that BITs are a distinct departure from the customary right of diplomatic protection, and are in some ways even incompatible with diplomatic protection. For instance, as Berman notes, recourse to diplomatic protection has been eclipsed by BIT practice, with the Washington Convention even elucidating that the diplomatic protection claims cannot be pursued simultaneously with ISCID claims.<sup>238</sup> There is no reason, per se, why the exclusivity of state rights that characterises diplomatic protection should transfer automatically to BITs. Furthermore, as noted above, many of the rights contained in BITs, such as those relating to national or MFN treatment, indirect expropriation, fair and equitable treatment determined by investors’ legitimate expectations, umbrella clauses or capital mobility provisions, were not part of the customary law of diplomatic protection and represent a substantial departure from customary law.

Diplomatic protection, discussed in the *Barcelona Traction* and *Mavrommatis* decisions, among others, is a customary right of a state to seek protection of their nationals abroad.<sup>239</sup> As the International Law Commission’s draft articles hold:

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<sup>236</sup> *Loewen Group, Inc. and Raymond L. Loewen v. United States*, *supra* 171 at para. 233.

<sup>237</sup> *Loewen Group, Inc. and Raymond L. Loewen v. United States*, *ibid.*

<sup>238</sup> Sir Frank Berman, “The Law on Diplomatic Protection in Investment Arbitration” in Ortino, et al., *supra* note 181, 67 at 70. *Convention on the Settlement of Investment Disputes between States and Nationals of Other States*, 18 March 1965, Art. 27, online <<http://www.jus.uio.no/lm/settlement.of.investment.disputes.between.states.and.nationals.of.other.states.convention.washington.1965/>> (entered into force 14 October, 1966).

<sup>239</sup> *Case Concerning the Barcelona Traction, Light and Power Company, Limited (Belgium v. Spain)*, [1970] I.C.J. Rep. 3 at 9, online: <<http://www.icj-cij.org/docket/files/50/5387.pdf>> [*Barcelona Traction*]; *Mavrommatis Palestine Concession Case* (1924), P.C.I.J. (Ser. A) No. 2 at 12.

[D]iplomatic protection consists of the invocation by a State, through diplomatic action or other means of peaceful settlement, of the responsibility of another State for an injury caused by an internationally wrongful act of that State to a natural or legal person that is a national of the former State with a view to the implementation of such responsibility.<sup>240</sup>

This state right to provide diplomatic protection is connected to the corollary state obligation to provide treatment towards aliens that meets the minimum standard of treatment required under customary international law.<sup>241</sup> In diplomatic protection, injury to an alien is in a sense construed as a vicarious injury to the state occurring in international law.

It is significant that diplomatic protection is a wholly discretionary right, and that is it unequivocally the right of a state and not an individual, according to the PCIJ's *Mavrommatis* award.<sup>242</sup> The award contains the following statement, "By taking up the case of one of its subjects and by resorting to diplomatic action or international judicial proceedings on his behalf, a State is in reality asserting its own rights – its right to ensure, in the person of its subjects, respect for the rules of international law."<sup>243</sup> This constitutes an important difference from the BIT regime, whereby states hold no discretion over particular investors' pursuit of claims at international law.

In sum, BITs are often presented as an elaboration upon states' customary right of diplomatic protection<sup>244</sup>, but it is not clear whether this means that BITs continue to embody the fundamental nature of diplomatic protection: that is – whether the rights at

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<sup>240</sup> International Law Commission, *Draft articles on Diplomatic Protection*, UN GAOR, 61<sup>st</sup> Sess., Supp. No. 10, UN Doc. A/61/10 (2006) Art. 9, online:

<[http://untreaty.un.org/ilc/texts/instruments/english/draft%20articles/9\\_8\\_2006.pdf](http://untreaty.un.org/ilc/texts/instruments/english/draft%20articles/9_8_2006.pdf)>. See also Berman, *supra* note 238 at 68.

<sup>241</sup> The minimum standard of treatment was historically held to be the *Neer* standard, but has developed since then. See *L. F. H. Neer and Pauline Neer (U.S.A.) v. United Mexican States*, *supra* note 164.

<sup>242</sup> *Mavrommatis Palestine Concession Case*, *supra* note 239 (1924). See also Douglas, *supra* note 225 at 164-165.

<sup>243</sup> *Mavrommatis Palestine Concession Case*, *ibid*.

<sup>244</sup> See e.g. William S. Dodge, "Investor-State Dispute Settlement Between Developed Countries: Reflections on the Australia-United States Free Trade Agreement" (2006) 39:1 Vand. J. Trans. L. 1 at 36; See also Stephan Schill, "Arbitration Risk and Effective Compliance: Cost-Shifting in Investment Treaty Arbitration" (2006) 7:5 Journal of World Investment and Trade 653 at 681-82.

issue are still held exclusively by states. In my view, BITs diverge markedly from diplomatic protection both in structure and substance and these divergences render BIT arbitration distinct from the assumptions which underpin diplomatic protection. Specifically, BITs' divergence from diplomatic protection is seen in how BITs (1) present a separate dispute settlement system from diplomatic protection, one that usually cannot be pursued concurrently with diplomatic protection; (2) introduce new and different substantive investment rights, such as the right to national treatment; and (3) entirely remove a home state's discretion in relation to investment claims.

As noted above, investment treaty arbitration's most striking difference from diplomatic protection is seen in how states do not have discretion over BIT claim rights. Diplomatic protection lent itself readily to identification as a concept implicating state rights exclusively since it was by its nature a *discretionary* right.<sup>245</sup> In contrast, states have no control over the BIT claim process. Is it tenable to maintain that, despite this complete lack of control, states are still the *exclusive* holder of BIT rights, and that investor claimants hold no international law rights themselves?

In my view, the answer is a clear no. Unlike in a diplomatic protection scenario, in BIT arbitration investors are addressed, in direct treaty language, as participants in the international law system. Investors are not brought into the BIT system as passive beneficiaries, with their status resulting only from their injury having constituted a vicarious injury to their home state, actionable on the international law level. In fact, the notion of vicarious injury to the home state, of intrinsic importance in diplomatic protection, is strikingly absent from the BIT investor-state arbitration mechanism.<sup>246</sup>

In addition to the clear differences between BIT arbitration and diplomatic protection, the exclusive rights concept of diplomatic protection, by many accounts dating from the PCIJ's 1924 ruling in the *Mavrommatis* decision arguably dates from an earlier time, when strict positivism reigned unchallenged and mainstream international law personality

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<sup>245</sup> *Barcelona Traction*, *supra* note 239 at para. 79.

<sup>246</sup> Douglas, *supra* note 228 at 170.

of individuals and international organizations was unfathomable. Recalling the positivism discussion found in Chapter 1, during the 19<sup>th</sup> century and early part of the 20<sup>th</sup> century positivism peaked as the dominant paradigm in international law practice and included the idea that states were the exclusive subjects of international law; it is within this climate that the *Mavrommatis* reasoning should be understood. Today the idea that only states are subjects of international law has lost its mainstream status and the concept that individuals can hold their own international law rights is not nearly as controversial as it was in the early 20<sup>th</sup> century.

Overall, I find the exclusivity of the derivative theory of BIT rights unconvincing for two reasons. First, it is unconvincing because certain international law assumptions have changed since the strict positivism heyday of the early 20<sup>th</sup> century, the time at which the *Mavrommatis* decision was rendered.<sup>247</sup> Second, I find it unconvincing on a practical level that states would be the exclusive holders of rights that they have no discretion over.<sup>248</sup> Third, I can find no plausible legal mechanism by which these purportedly exclusive rights are transferred to investors for procedural purposes without granting investors international law rights of their own. Investors clearly have some substantive and procedural rights in the BIT process, to make claims and potentially to be awarded monies. The derivative theory of BIT rights would present such investor rights as being wholly non-international (private rights if the *Loewen* wording is followed) but this holding is in direct confrontation with the fact that no sources for investor rights in the BIT process are evident beyond the those outlined in the direct terms of a BIT treaty. In the law directly before arbitral panels, there is no mechanism evident whereby a state transfers its purportedly exclusive international law rights to investors, in effect converting these rights into non-international law rights for investors.

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<sup>247</sup> *Mavrommatis Palestine Concession Case*, *supra* note 239.

<sup>248</sup> The Dugard Report notes a “clear inconsistency between the rule of customary international law on the diplomatic protection of corporate investment, which envisages protection only at the discretion of the national State and only, subject to limited exception, in respect of the corporation itself, and the special regime for foreign investment established by bilateral and multilateral investment treaties, which confers rights on the foreign investor, either as a corporation or as a shareholder, determinable by an international arbitration tribunal.” International Law Commission, *Fourth report on diplomatic protection by Mr. John Dugard, Special Rapporteur*, UN GAOR, UN Doc. A/CN.4/530 (2003), at para. 93, online: <[http://daccessdds.un.org/doc/UNDOC/GEN/N03/280/66/PDF/N0328066.pdf](http://daccessdds.un.org/doc/UNDOC/GEN/N03/280/66/PDF/N0328066.pdf?)>; cited in Douglas, *supra* note at 182.

In the BIT process, there thus appears to be no legal mechanism which enables investors' participation in the process outside of investors' being the direct addressees of international law rights under BIT provisions. National implementing legislation for BITs is unsuitable for transferring state rights into purportedly non-international law investor rights since implementing legislation has never to this author's knowledge been referred to as comprising the vital applicable law in an investment dispute which gives investors their substantive rights and procedural standing. Furthermore, domestic implementing legislation is only a fixture of dualist rather than monist states.

Nationality in BIT arbitration is similarly not formulated to perform this task, of transferring state rights to investors in a way that grants investors no international law rights of their own. In the BIT process, nationality is not implemented as a legal mechanism which transfers exclusive international law state rights to investors, and in so doing converting these rights into a non-international law form. Merely on the basis of their nationality, as is in fact practically determined by *arbitrators* and not home states in the dispute resolution process<sup>249</sup>, investors are not made to be carriers of states' exclusive rights as they participate in the BIT arbitration. Arbitral awards, particularly those concerning corporate investors, where nationality is not queried beyond place of incorporation due to BIT terminology, furthermore suggests that nationality is not a functional conduit for the conversion of states' exclusive rights to MNEs in non-international form.<sup>250</sup> Some arbitrators have even interpreted states' intent in concluding BITs as being the encouragement of investment, regardless of genuine source nationality.<sup>251</sup> This genre of BIT interpretation furthermore does not support the view that nationality is the means by which a state transfers its exclusive rights to investors.

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<sup>249</sup> Arbitrators have in fact found nationality status which conflicts with state determinations of nationality. *Hussein Nauman Soufraki v. United Arab Emirates* (2004), Decision on Jurisdiction of 7 July 2004, (ISCID ARB/02/7), online: <[http://ita.law.uvic.ca/documents/Soufraki\\_000.pdf](http://ita.law.uvic.ca/documents/Soufraki_000.pdf)>.

<sup>250</sup> *Tokios Tokelès v. Ukraine*, *supra* note 136; *Aguas del Tunari, SA. v. Republic of Bolivia*, *supra* note 117 at para. 332; *Saluka Investments BV v. Czech Republic* (2004) Decision on Jurisdiction over the Czech Republic's Counterclaim of 7 May 2004, (UNCITRAL), online <<http://ita.law.uvic.ca/documents/Saluka-DecisiononJurisdiction-counterclaim.pdf>>; *Saluka Investments BV v. Czech Republic* (2006), *supra* note 177; *ADC Affiliate Limited and ADC & ADMC Management Limited v. Hungary*, *supra* note 186.

<sup>251</sup> *Aguas del Tunari, SA. v. Republic of Bolivia*, *ibid.* at para. 332.

In general, the derivative rights theory holds that states have granted investors the role of enforcing states' international law rights. According to this view, investors have been identified by states as having this role because they are most well placed to do so, providing for an efficient international law enforcement process. This efficiency argument, however, offers no explanation for why BIT rights must be interpreted as being *exclusively* those of held by states. Certainly investors may be enforcing state rights, but they are also enforcing their own rights.<sup>252</sup> Investors have evident substantive rights which are the topic of the BIT process. The BIT process does not contain any source of investors' substantive or procedural rights except for terms of the BIT treaty, which overwhelmingly suggests that investors' rights are direct international law rights, and not derivative rights.

### 2.2.2 Investment Treaty Arbitration: Direct Investor Rights in Action

Judging by BIT practice, it is most convincing that investors' rights are direct rather than derivative. Aside from *Loewen*, BIT awards do not characterize the rights of investors as being the rights of their home states. Instead, awards and treaty language supports the notion of investor rights.<sup>253</sup>

Douglas contrasts the derivative and direct models of investor rights and identifies various issues as being indicative of the superiority of the direct model in terms of accurately describing the nature and operation of BITs. Douglas notes at least five

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<sup>252</sup> See e.g. Schill, *supra* note 244 at 681-682.

<sup>253</sup> Douglas notes that:

[I]nvestment treaties also adopt terminology consistent with the vesting of rights in foreign nationals and legal entities directly. The standard obligations relating to minimum standards of investment protection are couched in terms of a legal relationship between the host state and the foreign investor. The United States model BIT holds that '[e]ach [state] Party shall accord a national most favored nation treatment to covered investments...' The Austrian model BIT is even more direct: 'An investor of a Contracting Party which claims to be affected by expropriation by the other Contracting Party shall have the right...'.

Douglas *supra* note 228 at 183 [internal footnotes excluded]; English Court of Appeals in *Ecuador v. Occidental Petroleum* held that "The fundamental assumption underlying the investment treaty regime is clearly that the investor is bringing a cause of action based upon the vindication of its own rights rather than those of its national state." *Ecuador v. Occidental Petroleum* [2005] E.W.C.A. Civ. 116 at para. 20; cited by Schill, *supra* note 244 at 681.

indicators which suggest that investors' rights are direct. He notes that that home states (1) lack functional control over investors' BIT claims<sup>254</sup>, (2) retain no damage interest in investment treaty claims<sup>255</sup>, (3) usually do not require a genuine nationality connection with complainant investors<sup>256</sup> and (4) permit investors to conclude forum selection clauses, thus granting investors the ability to remove ostensible state rights from the international sphere.<sup>257</sup> As a fifth indicator of the accuracy of the direct rights theory over the derivative rights theory, Douglas notes that the municipal procedural law and enforcement proceedings of BIT arbitrations do not indicate that the subject of such arbitrations are state, rather than investor rights.<sup>258</sup>

The derivative model is not an accurate characterization of BIT investor rights due to the myriad ways that BIT arbitration diverges from the customary law system of diplomatic protection, a mechanism which did operate via derivative rather than direct rights. As Douglas summarizes:

The foregoing analysis of the principal features of diplomatic protection under customary international law and investment treaty arbitration reveals their fundamental divergence. Given that the *raison d'être* of the investment treaty mechanism for the presentation of international claims may well be a response to the inadequacies of diplomatic protection, this should not come as a surprise. The functional assumption underlying the investment treaty regime is clearly that the investor is bringing a cause of action based upon the vindication of its own rights rather than those of its national state. In these circumstances it is untenable to superimpose the *Mavrommatis* formula of diplomatic protection over triangular relationship between investor, its national state and the host state of the investment outdoors in order to rationalize, arbitration without privity, under investment treaties.<sup>259</sup>

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<sup>254</sup> Douglas, *ibid.* at 169.

<sup>255</sup> Douglas notes that "The financial burden of presenting in investment treaty claim falls exclusively on investor. Damages recovered in the award are to the account of the investor and the national state has no legal interest in the compensation fixed by the arbitral tribunal." Douglas notes furthermore the potential lack of common interests between home state and investors, presenting instances where home states have opposed the claims of their investors. He notes home state submissions *GAMI Inc. v. Mexico* and *Mondev International Ltd. v. United States*. Douglas, *ibid.* at 170.

<sup>256</sup> Douglas, *ibid.* at 172.

<sup>257</sup> Douglas, *ibid.* at 176.

<sup>258</sup> Douglas, *ibid.* at 177.

<sup>259</sup> Douglas, *ibid.* at 182. The ICJ itself does not appear to equate diplomatic protection with investment treaty arbitration, writing that the latter has eclipsed the former, "[...] in contemporary international law, the protection of the rights of companies and the rights of their shareholders, and the settlement of the associated disputes, are essentially governed by bilateral or multilateral agreements [...] In that context, the

In disagreeing with the notion that claim rights in investment treaty arbitration remain exclusively state rights, as is the case in diplomatic protection claims, Douglas presents two models of direct investor rights in investment arbitration. He suggests that either (1) both the substantive and procedural rights involved in BIT arbitration are directly those of the investor or (3) only the procedural rights are held directly by an investor and the substantive rights remain those of the host state.<sup>260</sup> Douglas does not expand at length on the latter option. In my view, the separation of procedural from substantive rights, without clear textual guidance from investment treaties themselves, is artificial and unsupported.

The idea that the substantive rights underlying BIT claims would be exclusively those of the home state, while the procedural rights would be those of the investor, is exposed to the same criticisms of the derivative rights theory which are outlined above in section 2.1.2.1. Specifically, BITs create legal regimes distinct from diplomatic protection and the assumptions active in diplomatic protection claims do not automatically apply. BITs in fact establish different rights than those guaranteed under customary law. In addition, there is nothing in international law which would bar investors from being granted treaty-based rights, as the *Danzig* case supports.<sup>261</sup> Finally, there are elements of BIT practice which suggest that the substantive rights at issue are those of the investor and not those of the home state. For instance, home states' retain no interest in an arbitrator-identified injury, and enforcement of BIT awards is not through international law channels, but via domestic judicial institutions.<sup>262</sup>

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role of diplomatic protection somewhat faded [...]” *Case concerning Ahmadou Sadio Diallo (Guinea v Congo) (Preliminary Objections)*, Judgement of 24 May 2007, I.C.J. General List No 103, at para 88, online: <<http://www.icj-cij.org/docket/files/103/13856.pdf>>. Cited in McLachlan, *supra* note 133 at 363.

<sup>260</sup> Douglas, *ibid.* at 181-184.

<sup>261</sup> *Jurisdiction of the Courts of Danzig*, *supra* note 34.

<sup>262</sup> Douglas, *supra* note 225 at 179-181.

### 2.3 Investor Rights are MNE Rights

As mentioned, investors under BIT legal regimes may generally be either natural person or corporate person investors. Corporate claimants in investor state treaty disputes have included several prominent MNEs including UPS, IBM, Vivendi, Enron, Siemens, Bechtel, Dow Chemical and ExxonMobil.<sup>263</sup> Certainly, it is clear that since MNEs contain corporate persons within their control networks, MNEs may make use of BIT investor-state dispute mechanisms as investor claimants. However, there are several other elements of BIT practice which make BITs very well suited to MNE participation as claimants. In fact, the operation of the BIT network of treaties as they are currently formulated presents MNEs with unprecedented opportunity to participate in the international legal system as rightsholding legal persons. Two elements of BIT law and practice will be profiled here for their particular significance in permitting MNEs to engage in the international law system as unified entities. First, MNEs may pursue claims from any desired level within their equity ownership chains, since derivative shareholder claims are permitted under the terms and practice of BITs. Second, MNEs may pursue claims from any home nation location within their ownership chain since usually BITs define nationality by state of incorporation and tend not to pierce the veil to reveal third state control or ownership.<sup>264</sup>

These two elements examined below are in addition to the other overarching characteristics of BITs which act to effectively broaden BITs' scope from a strictly

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<sup>263</sup> On UPS, IBM, Vivendi, Enron, Siemens, Bechtel, Dow Chemical and ExxonMobil see e.g. respectively: *United Parcel Service v. Canada* (2007), Award of 24 May 2007, (UNCITRAL) online: <<http://ita.law.uvic.ca/documents/UPS-Merits.pdf>>; *IBM World Trade Corporation v. Ecuador*, *supra* note 132; *Compañía de Aguas del Aconquija S.A. and Vivendi Universal v. Argentina*, *supra* note 132; *Enron v. Argentina* (2007), *supra* note 167; *Siemens v. Argentina*, *supra* note 116; *Aguas del Tunari, S.A. v. Bolivia*, *supra* note 117; *Dow Agrosciences LLC v. Canada Chemical v. Canada* (2009), Notice of Arbitration of 31 May 2009, online: <<http://www.international.gc.ca/trade-agreements-accords-commerciaux/assets/pdfs/DowAgroSciencesLLC-2.pdf>>; *Mobil Investments and Murphy Oil Corporation v. Canada*, *supra* note 132.

<sup>264</sup> *Tokios Tokelès v. Ukraine*, *supra* note 136; *Aguas del Tunari, S.A. v. Bolivia*, *ibid.* at para. 332; *Saluka Investments BV v. Czech Republic* (2004), *supra* note 250; *Saluka Investments BV v. Czech Republic* (2006), *supra* note 175; *ADC Affiliate Limited and ADC & ADMC Management Limited v. Hungary*, *supra* note 186.

bilateral character. As mentioned, the sheer number of BITs which have been concluded internationally, along with the fact that many states have concluded multiple semi-identical BITs, tends to amplify the practical significance of BITs beyond their basic two state level. Furthermore, the operation of the MFN obligation contained in many BITs alters the substantive and procedural contents of BITs up to the highest level of investment protection offered by the given state in one of its BITs.

### *2.3.1 MNE Rights under BITs: Systemic Breaching of the Corporate Veil among MNE Components to Facilitate Arbitral Claims*

One reason that MNEs are unique holders of international law rights within the BIT system is that many BITs and BIT arbitrations have not limited the class of investors which can make a claim under a BIT to the investor which directly holds the foreign investment at issue. In other words, the fact that indirect ownership of an investment is sufficient to provide standing as an investor claimant under most BITs means that MNEs can commence BIT arbitration proceedings in relation to one of their corporate entities from presumably anywhere along the MNE corporate ownership chain. This unique element of BITs empowers MNEs to act within the international system as the unified economic entities that they are.

Various arbitrations have validated the rights of direct or indirect shareholders to make claims in relation to investments (*i.e.*, shareholders at various levels of a corporate ownership chain). This is largely because of common BIT language that includes “share” within the terms of what constitutes an investment, without further qualification such as the requirement of direct ownership.<sup>265</sup> Disputes which have seen the claims of indirect investment shareholders arbitrated include *Azurix Corp v. Argentina*, *Enron Corp and Ponderosa Assets LP v. Argentina*, *Waste Management Inc v. Mexico* and *Siemens AG v.*

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<sup>265</sup> John Savage, “Investment Treaty Arbitrations and Asia: Review of Developments in 2005 and 2006” (2007) 3:1 Asia Int’l Arb. J. 1 at 16.

*Argentina*.<sup>266</sup> Majority ownership, and investment control has not been a requirement for such claims, as seen in *Lanco International Inc v. Argentina*, *CMS Gas Transmission Co v. Argentina* and *LG&E Energy Corp v. Argentina*.<sup>267</sup> This right of indirect, or partial shareholder standing has been moderated by the fact that damages awarded have been limited to the proportion of the shareholder's interest in an investment.<sup>268</sup>

### 2.3.2 MNE Rights under BITs: BITs as Portals for MNEs via Multiple Nationalities

A second reason why BITs uniquely empower MNEs to operate as economic wholes within the international system as rightsholders is that many BITs and BIT arbitrations have permitted nationality to be determined on the basis of the state of incorporation, without third state control (or at times even domestic control<sup>269</sup>) being regarded as a challenge to this nationality. There has thus not been a requirement of a genuine link between a corporate person and their state of incorporation, in order for the investor nationality requirements contained in a BIT to be satisfied. This means that as long as one MNE corporate component is incorporated in a BIT-party state, the MNE may make use of the BIT, even if the MNE has its corporate headquarters in a different country. Nationality requirements in BITs have at times thus been drafted and interpreted in ways that permit MNEs to engage in the international law system using any of their multiple nationalities, such nationalities as are determined by the place of incorporation of any of their corporate components. In this way, BITs permit MNEs to act as expansive but centrally-controlled rightsholders across the international law system.

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<sup>266</sup> *Azurix Corp v. Argentina*, *supra* note 116 at para. 67; *Enron Corp and Ponderosa Assets LP v. Argentina*, *supra* note 116 at para. 37; *Waste Management Inc v. Mexico*, *supra* note 116; *Siemens AG v. Argentina*, *supra* note 116.

<sup>267</sup> *Lanco International Inc. v. Argentina* (1998), Jurisdiction Award of 8 December 1998, (ICSID ARB/97/6) at para. 9, online <<http://ita.law.uvic.ca/documents/Lanco-Final.pdf>>. *CMS Gas Transmission Co v. Argentina* (2003), Jurisdiction Award of 17 July 2003, (ICSID ARB/01/8) at para. 43, online: <[http://ita.law.uvic.ca/documents/cms-argentina\\_000.pdf](http://ita.law.uvic.ca/documents/cms-argentina_000.pdf)>; *LG&E Energy Corp, LG&E Capital Corp and LG&E International Inc v. Argentina* (2004) Jurisdiction Award of 30 April 2004, (ICSID ARB/02/1), at para. 50, online <<http://ita.law.uvic.ca/documents/lge-decision-en.pdf>>.

<sup>268</sup> *Impregilo S.p.A. v. Pakistan*, *supra* note 159.

<sup>269</sup> *Tokios Tokelès v. Ukraine*, *supra* note 136.

In cases of host state nationals' control of a BIT claimant, there have been a few awards that have looked beyond the place of incorporation in order to determine corporate nationality. This was seen recently in the *TSA Spectrum de Argentina S.A. (TSA) v. Argentina*<sup>270</sup> dispute, as well as in the *Loewen*<sup>271</sup> claim against the United States under NAFTA Chapter 11. In addition, some tribunals have also commented on what would constitute egregious corporate behaviour leading the tribunal to reject corporate nationality as determined by place of incorporation.<sup>272</sup> In *Tokios Tokelès v. Ukraine* the tribunal indicated that it would have pierced the veil of investor had the corporation been incorporated for the *sole purpose* of bypassing the host state courts.<sup>273</sup> Such awards appear to draw their reasoning from the holding in *Barcelona Traction*<sup>274</sup>, that abuse of the corporate person (*i.e.*, through fraud) may justify piercing of the corporate veil to reveal third state control.<sup>275</sup> Overall, however, it is unlikely that abuse of the corporate form will be found in cases of MNE component claimants under third state control, considering that the demonstration of abuse of the corporate person would be a very high threshold test to meet, and one that would be unlikely to be demonstrable within the regular course of MNE business.

In the following disputes, a corporate investor's veil has not been pierced to reveal host country or third state control and the investor's nationality has not been determined by factors additional to the place of incorporation: *Tokios Tokelès v. Ukraine*, *ADC Affiliate v. Hungary*, *Saluka v Czech Republic* and *Aguas v. Bolivia*.<sup>276</sup> For example, in *ADC Affiliate v. Hungary*<sup>277</sup> Hungary's claims that the genuine country of nationality of the investor was Canada and not Cyprus, were dismissed by the tribunal. While the tribunal noted the risks of treaty shopping, it determined that the terms of the BIT

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<sup>270</sup> *TSA Spectrum de Argentina S.A. (TSA) v. Argentina* (2008), Award of 19 December 2008, (ICSID No. ARB/05/5), online: <<http://ita.law.uvic.ca/documents/TSAAwardEng.pdf>>

<sup>271</sup> *Loewen Group, Inc. and Raymond L. Loewen v. United States*, *supra* note 171;

<sup>272</sup> *Tokios Tokelès v. Ukraine*, *supra* note 136 at para. 56; *Aguas del Tunari, SA. v. Republic of Bolivia*, *supra* note 117 at para. 321.

<sup>273</sup> *Tokios Tokelès v. Ukraine*, *ibid.* at para. 56.

<sup>274</sup> *Barcelona Traction*, *supra* note 239.

<sup>275</sup> *Barcelona Traction*, *ibid.* at para. 56.

<sup>276</sup> *Tokios Tokelès v. Ukraine*, *supra* note 136; *Aguas del Tunari, SA. v. Republic of Bolivia*, *supra* note 117 at para. 332, <[http://www.worldbank.org/icsid/cases/AdT\\_Decision-en.pdf](http://www.worldbank.org/icsid/cases/AdT_Decision-en.pdf)>; *Saluka Investments BV v. Czech Republic* (2004), *supra* note 250; *Saluka Investments BV v. Czech Republic* (2006), *supra* note 175; *ADC Affiliate Limited and ADC & ADMC Management Limited v. Hungary*, *supra* note 186.

<sup>277</sup> *ADC Affiliate Limited and ADC & ADMC Management Limited v. Hungary*, *ibid.*

required that it look no further than the state of incorporation in determining the nationality of the investor.<sup>278</sup> Similarly, in *Saluka v Czech Republic*<sup>279</sup>, the Japanese bank Nomura set up a “special-purpose vehicle”<sup>280</sup> in the Netherlands, a subsidiary which then brought a claim under a Netherlands – Czech Republic BIT. The Czech Republic disputed the nationality of Saluka, arguing that it did not have a genuine economic connection to the Netherlands. The tribunal refused to challenge Saluka’s nationality, holding that it was not able to read nationality requirements into the BIT which were not already contained therein.<sup>281</sup>

The essence of the place of incorporation approach to corporate investor nationality and its ramifications for MNEs is evident in the *Aguas v. Bolivia* award, arbitrated under a Netherlands – Bolivia BIT.<sup>282</sup> In this dispute, the tribunal rejected Bolivia’s complaint that the investor claimant did not have a significant economic presence in the Netherlands, but was actually controlled by the U.S. corporation, Bechtel.<sup>283</sup> The tribunal pronounced that nothing would be wrong with such investor conduct:

This decision reflects the growing web of treaty based referrals to arbitration of certain investment disputes. Although titled ‘bilateral’ investment treaties, this case makes clear that which has been clear to negotiating states for some time, namely that through the definition of ‘national’ or ‘investor’, such treaties serve in many cases more broadly as portals through which investments are structured, organized, and, most importantly, encouraged through the availability of a neutral forum. The language of the definition of ‘national’ in many BITS evidences that **such national routing of investments is entirely in keeping with the purpose of the instruments and the motivations of the state parties.**<sup>284</sup>

BITs have thus been characterized as portals by which investors of any “true” nationality may access the dispute settlement system through their corporate components’ nationality, as is determined by place of incorporation. This is thus a regime that is very well suited to MNEs engaged in global or regional strategies who seek to coordinate their

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<sup>278</sup> *ADC Affiliate Limited and ADC & ADMC Management Limited v. Hungary*, *ibid.* at para. 357.

<sup>279</sup> *Saluka Investments BV v. Czech Republic* (2006), *supra* note 175.

<sup>280</sup> *Saluka Investments BV v. Czech Republic*, *ibid.* at para. 71.

<sup>281</sup> The claim resulted from alleged harm to Saluka’s investment, namely shares it held in a Czech bank. *Ibid.* at para. 241.

<sup>282</sup> *Aguas del Tunari, SA. v. Bolivia*, *supra* note 117 at para. 217.

<sup>283</sup> *Aguas del Tunari, SA. v. Bolivia*, *ibid.* at para. 217.

<sup>284</sup> *Aguas del Tunari, SA. v. Bolivia*, *ibid.* at para. 332 [emphasis added].

economic activities across borders. In sum, especially given the disregard for third state control in the determination of nationality, BITs permit MNEs to act as unified rightsholders in the international law system.

#### 2.4 MNE Rights and the Formation of MNE Legal Personality

This chapter has outlined the rights granted to MNEs by BITs and other investment agreements which establish international investment arbitration between investors and host states. At least seven MNE investor rights are commonly found in BITs. These rights are both procedural and substantive, and are held by investors directly. Unlike in diplomatic protection, BIT investor rights are not exclusively held by investors' home states. Rather, in BIT arbitrations, investors initiate claims of their own accord and on their own behalf. It is well established in contemporary international law that treaties may grant rights to non-state actors and BITs are an illustration of this legal possibility.

Muchlinski notes factors relating to international political economy which have framed the emergence of investor rights via BITs and other treaties:

...[T]he desire for foreign direct investment may prompt the host state to accept international methods of dispute settlement as a means of displaying concern for the rights of the foreign investor, thereby helping to create a 'good investment climate'. Consequently, in practice, the majority of host states have accepted international methods for the settlement of disputes with foreign investors operating within their jurisdiction, **thereby giving direct rights of international action to investors that are independent of their protecting national state.**<sup>285</sup>

BIT text and practice has permitted MNEs to engage in the international law system in a way that gives legal agency to MNEs as unified actors with international reach. Specifically, MNEs may exercise their investment treaty rights from any level of their ownership chain, due to BIT terminology that permits indirect claims in arbitration. Furthermore, third state control is not a barrier to the assumption of appropriate nationality, as it is usually determined by place of incorporation alone. MNEs may access BITs as claimants using any of their multiple nationalities, attributed according to the state of incorporation of their various corporate components.

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<sup>285</sup> Muchlinski, *supra* note 123 at 708 [emphasis added].

MNEs rights under BITs have lead to a significant proportion of the more than 318 known BIT disputes launched to date.<sup>286</sup> As mentioned, BITs and other investment agreements establishing such rights have been ratified by at least 174 UN member states.<sup>287</sup> In creating more than 2600 BITs and other international agreements, states have wilfully granted MNEs direct rights under public international law, and have granted MNEs the legal personality required to enact their legal rights. This reasoning is consistent with my selected system-oriented theoretical framework, explained in Chapter 1, which considers the practice of the international community, as was assessed by the ICJ in the *Reparations Case*, and notes that state consent to create legal personality may be presumed in the presences of states' wilful bestowal of certain legal characteristics. In the context of MNEs, BIT party states have granted MNEs legal agency as international law rightsholders; it is presumable that legal personality follows the allocation of such rights. The following chapter will examine the converse side of MNE legal personality: the international law duties of MNEs.

My characterization of MNEs, as international law subjects with legal personality and direct international law rights and duties, contrasts sharply with most mainstream characterizations of MNE personality under international law. Public international law textbooks tend to cover personality in international law early on in their contents. In a fashion following quite strict positivism, states are presented as the pre-eminent subjects of international law, and international organizations as quasi-subjects under the reasoning of the ICJ in the *Reparations Case*.<sup>288</sup> The status of the individual is next, and individuals are noted to have human rights under international law and a narrow range of duties, including an obligation not to grossly violate human rights or commit international crimes.

Textbooks then come to corporations, creatures of domestic statute that have very limited legal personality under public international law. They are regarded as corporate

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<sup>286</sup> UNCTAD, *Latest Developments in Investor-State Dispute Settlement* (2009), *supra* note 126.

<sup>287</sup> UNCTAD, "Country Specific Lists of BITs", *supra* note 143.

<sup>288</sup> *Reparations Case*, *supra* note 1.

persons, nationals of their states of incorporation and in that sense quite similar to natural person individuals.<sup>289</sup> Multinational enterprises are, from a mainstream international law perspective, “...merely a series of linked artificial legal persons that have been constituted as such within the domestic legal systems of several states.”<sup>290</sup>

The view presented in this thesis is thus admittedly unorthodox. However, I contend that the application to MNEs of the definition of international legal personality can lead to no other result than the identification of MNEs’ rights, duties, claim capacity and resulting international legal personhood.

The real problem in acknowledging MNE personhood is finding support in international law for piercing the corporate veil and recognizing MNEs as wholes, rather than as fragments. However, in my view, there is practical legal support for an enterprise wide conception of the MNE considering that MNEs exercise their rights as unified wholes within the international investment law system. As mentioned, BITs permit MNEs to act as unified rightsholders, in a manner consistent with their economic unity, by permitting indirect claims and using nationality definitions that largely ignore third state control.

Put otherwise, one challenge to my argument is the contention that MNE are not themselves entities. If one minimizes the fact that MNEs are unified economic enterprises to the extent that one is able to maintain the view that MNEs cannot and do not exist legally as unified entities, then they cannot be entities with legal personality under international law because, so this view goes, MNE are not entities.

Thus far it is only soft law instruments which have overtly acknowledged and conceptualized MNEs as unified legal entities.<sup>291</sup> That said – disregard for the corporate veil has become common practice in investment treaty arbitration in instances where

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<sup>289</sup> Crown corporations, by way of their direct control by a state, derive some international law status additional to that usually held by corporations. See e.g. Currie, *Public International Law* (2001), *supra* note 97 at 64.

<sup>290</sup> Currie, *ibid.*

<sup>291</sup> See e.g. OECD, *OECD Guidelines for Multinational Enterprises*, *supra* note 12 at 17-18.

maintaining the veil would hinder investors from access to dispute settlement.<sup>292</sup> This suggests that an impenetrable corporate veil is no longer the norm in international law.<sup>293</sup>

It is clear that I am not addressing this issue of MNE personality from a formalist positivist perspective that would, in order for the establishment of legal personality, require a deliberate statement by states, likely in the form of a multilateral treaty, which positively outlined the legal personality of MNEs – a sort of binding OECD Multinational Enterprise Guidelines document.<sup>294</sup> My view is that such an act is not required for the legal personality of MNEs to be established at international law, and that in fact this type of behaviour was not how the legal personality of international organizations was established. The legal personality of international organizations was first recognized conclusively in the *Reparations* case, where the ICJ found states *implied intention* for international organizations to have legal personality. Thus, a strictly formalistic view of international law personality establishment has not been supported by past practice with regard to international organizations, suggesting that an overt declaration by states on MNEs legal personality is similarly not needed for MNE personality to exist.

The precise nature of MNEs' international legal subjecthood will no doubt be delineated more clearly by states in the coming years. States will continue to cooperate in developing coordinated regulatory policy in the face of MNEs' international operations. At this point, it is evident that MNEs resemble individuals more closely than states in their private character, but (the larger) MNEs resemble states more than individuals in

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<sup>292</sup> See e.g. *Azurix Corp v. Argentina*, *supra* note 116 at para. 67; *Enron Corp and Ponderosa Assets LP v. Argentina*, *supra* note 116 at para. 37; *Waste Management Inc v. Mexico*, *supra* note 116; *Siemens AG v. Argentina*, *supra* note 116.

<sup>293</sup> See e.g. *Case Concerning Elettronica Sicula (ELSI) (United States of America v. Italy)*, Judgement of 20 July 1999, [1989] I.C.J. Rep. 15.

<sup>294</sup> Reflecting a formalist approach, Bantekas writes:

The international legal personality of non-state entities must be premised on precise legal capacity emanating from customary law or binding treaties. All duties and obligations therein must be not only directly and clearly addressed to the particular non-state entity, but some form of enforcement mechanism must also be available.[...] Apart from some aspects of EC law relating to competition, international treaties have not endowed multinational corporations with legal personality, and the absence of duties in this respect has had a negative impact on the non-financial performance of MNEs.

Ilias Bantekas, "Corporate Social Responsibility in International Law," (2004) 22 B.U. Int'l L.J. 309 at 313 [internal footnotes excluded].

their power and access to resources. I do not intend to espouse the view that the rights and power of MNEs under international law ought to be increased. Rather, I argue that MNEs are incorporated into public international law as entities subservient to states<sup>295</sup>, private entities subject to a *public* rule of law, that is – as entities within the purview of public international law.

There has been considerable resistance to the idea that MNEs may have legal personality under international law<sup>296</sup>, although this view has not been unanimous.<sup>297</sup> This is, not surprisingly a politically charged area of study, with passionate views held by many either supporting or denouncing the conduct of many MNEs in the global economy, and there is great suspicion among some that recognising MNE personality will only further contribute to MNE power. For instance, referencing the polarizing issue of MNE power, in a text published in 1991, Rigaux presents MNEs as being squarely outside of the direct application of public international law:

The transnational groups of corporations have taken advantage of the fragmentation of the jurisdiction divided among different states to build up a private transnational economic power-structure which has managed to keep itself beyond the reach of concurrent (or competing) state jurisdictions. The transnational group of corporations is no more a primary or secondary subject of international law than are legally separate corporations of which it is composed. The power of these groups and their capacity to negotiate with states – often from a position of strength – cannot give them the status of subjects of international law, which could be conferred on them only by the concerted volition of states.<sup>298</sup>

I have some sympathy for Rigaux's characterization, particularly his view that power alone does not bestow personality, considering that the converse of this would be lack of legal personality for the powerless. Despite the strengths in Rigaux's argument, however, it is also evident that there have been some significant developments in the international

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<sup>295</sup> Measured MNE personality within international law is not a new or novel suggestion. See e.g. Jonathan I. Charney, "Transnational Corporations and Developing Public International Law" (1983) 4 Duke L.J. 748 at 788; see also Fleur Johns, "The Invisibility of the Transnational Corporation" (1994) Melbourne U.L. Rev. 893 at 922.

<sup>296</sup> Miller, *supra* note 80 at 387-388.

<sup>297</sup> See e.g. Johns, *supra* note 295 at 901 (discussing subjecthood in the context of internationalized state contracts); see also Dumberry, *supra* note 20.

<sup>298</sup> Francois Rigaux, "Transnational Corporations" in Bedjaoui, *supra* note 3, 121 at 129.

law practice *vis-à-vis* transnational corporations since publication of Rigaux's piece in 1991, and some facts do not mesh with his views. Most importantly, in the eighteen years since 1991, at least 318 arbitrations between states and investors have been launched pursuant to international investment agreements.

Rigaux notes that the status of subjects of international law can only be conferred on transnational enterprises by the concerted volition of states.<sup>299</sup> Eighteen years after the publication of Rigaux's chapter, and with more than 2600 BITs established, it is evident that the vast majority of states have granted direct rights (and thus the *capacity* for such rights) to investing MNEs with such concerted volition.

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<sup>299</sup> Rigaux, *ibid.* at 129.

### Chapter 3: MNE Duties under International Law

MNE duties represent a vast subject that has generated much literature in recent years.<sup>300</sup> Attempting to address this topic in a short space, I will not examine here in detail several topics which are nonetheless germane to the subject. For instance, I will not address the self governance of MNEs, (i.e., via codes of conduct) nor will I examine industry codes or private certification programs.<sup>301</sup> Similarly important, but largely unaddressed here is the role of private international law in determining the accountability of MNEs, such as the impact of jurisdiction concepts like territoriality and *forum non conveniens* upon national courts' assumption of jurisdiction.<sup>302</sup> I will also not discuss international soft law developments concerning MNE duties.<sup>303</sup>

I will also not address in detail the human rights responsibilities of states *vis-à-vis* corporate oversight, in particular those which arise from states' obligation to protect citizens from human rights abuses.<sup>304</sup> I will not address this topic in detail despite the fact

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<sup>300</sup> For a comprehensive pre-2005 bibliography see Mary Ramsey, "Bibliography" in Philip Alston, ed., *Non-State Actors and Human Rights* (Oxford: Oxford University Press, 2005) 351. Recent monographs and edited volumes include: Oliver de Schutter, ed., *Transnational Corporations and Human Rights* (Portland: Hart Publishing, 2006); Gagnon, Macklin & Simons, *The Governance Gap*, *supra* note 2; David Kinley, ed., *Human Rights and Corporations* (Farnham, England: Ashgate Publishing, 2009); Elisa Morgera, *Corporate Accountability in International Environmental Law* (Oxford: Oxford University Press, 2009); Bindu Preet Sahni, *Transnational Corporate Liability: Accountability for Human Injury* (London: Cameron May, 2006); Jennifer A. Zerk, *Multinationals and Corporate Social Responsibility: Limitations and Opportunities in International Law* (Cambridge: Cambridge University Press, 2006).

<sup>301</sup> See e.g. Forest Stewardship Council, *FSC Principles and Criteria for Forest Stewardship*, 1996, online: <[http://www.fsc.org/fileadmin/web-data/public/document\\_center/international\\_FSC\\_policies/standards/FSC\\_STD\\_01\\_001\\_V4\\_0\\_EN\\_FSC\\_Principles\\_and\\_Criteria.pdf](http://www.fsc.org/fileadmin/web-data/public/document_center/international_FSC_policies/standards/FSC_STD_01_001_V4_0_EN_FSC_Principles_and_Criteria.pdf)>; Social Accountability International, *Social Accountability 8000*, 2008, online: <[http://www.sa-intl.org/\\_data/n\\_0001/resources/live/2008StdEnglishFinal.pdf](http://www.sa-intl.org/_data/n_0001/resources/live/2008StdEnglishFinal.pdf)>.

<sup>302</sup> See e.g. Trevor Farrow, "Globalization, International Human Rights, and Civil Procedure" (2003) 41:3 *Alta. L. Rev.* 671; *Lubbe and Others v. Cape Plc.* [2000] 4 All ER 268; [2000] 1 WLR 1545 (H.L.).

<sup>303</sup> For instance, the Kimberley Process uses certification standards to minimize the presence of conflict diamonds in the global diamond industry. Kimberley Process Secretariat, *Kimberley Process Certification Scheme*, 2002, online: <<http://www.kimberleyprocess.com>>; ILO, *Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy*, *supra* note 75; United Nations, *The Global Compact*, online: <[www.unglobalcompact.org/Portal/default.asp](http://www.unglobalcompact.org/Portal/default.asp)>; OECD, *OECD Guidelines for Multinational Enterprises*, *supra* note 12; Sub-Commission on the Promotion and Protection of Human Rights, *Draft Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights*, *supra* note 41.

<sup>304</sup> See generally Robert McCorquodale & Penelope Simons, "Responsibility Beyond Borders: State Responsibility for Extraterritorial Violations by Corporations of International Human Rights Law" (2007)

that, in my view, state oversight, or lack thereof, is at the heart of the MNE accountability dilemma. The regulation of MNEs by home and host states will be discussed in greater detail in Chapter 4 of this thesis.

In this chapter I rather focus upon the application of public international law to MNEs and outline the direct duties that international law places upon MNEs as private actors. Section 3.1 serves as an introduction. Section 3.2 presents the public international law duties of private individuals, including corporate persons, such as a duty not to commit piracy. Section 3.3 profiles the treatment of corporate persons found in several multilateral treaties. Section 3.4 provides a brief conclusion.

### **3.1 Introduction: Recalling the Legal Characterization of MNEs under Public International Law**

While there have been holistic MNE definitions seen in soft international law which reflect the unified economic nature of such actors<sup>305</sup>, for the most part mainstream international law conceptualizes – in my view erroneously – MNEs strictly in terms of their corporate components.<sup>306</sup> Each nationally incorporated company within the MNEs' ownership structure is a corporate individual, potentially benefiting from the diplomatic protection of its state of incorporation.<sup>307</sup>

The nature of the connections between the corporate persons within an MNE is a contentious topic, and a central theme in this thesis, particularly since it affects the flow of liability and accountability among MNE components.<sup>308</sup> It has also featured prominently in the jurisdictional rulings of investor-state arbitral panels.<sup>309</sup> As I argued in Chapter 2, MNEs are now able to exercise their investment law rights in a fashion that at

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70 Mod. L. Rev. 598; August Reinisch, "The Changing International Legal Framework for Dealing with Non-state Actors" in Alston, *Non-state Actors and Human Rights*, *supra* note 300, 37 at 79.

<sup>305</sup> See e.g. OECD, *OECD Guidelines for Multinational Enterprises*, *supra* note 12, at 17-18.

<sup>306</sup> See Currie, *Public International Law* (2001), *supra* note 97 at 63.

<sup>307</sup> International Law Commission, *Draft Articles on Diplomatic Protection*, *supra* note 240.

<sup>308</sup> See e.g. Philip Blumberg, "Accountability of Multinational Corporations: The Barriers Present by Concepts of the Corporate Juridical Entity" (2001) 24 *Hastings Int'l & Comp. L. Rev.* 297.

<sup>309</sup> Disputes which have led to scrutiny of the corporate veil, or similar discussions, include the following: *Aguas del Tunari, SA. v. Bolivia*, *supra* note 117; *Saluka Investments BV v. Czech Republic* (2004), *supra* note 250; *Saluka Investments BV v. Czech Republic* (2006), *supra* note 175.

times effectively dissolves the entity boundaries between corporate components.<sup>310</sup>

Despite the contentiousness of the nature of the connections between MNE components<sup>311</sup>, it must be recognized that on one level MNEs are composites of multiple corporate persons. As a composite of multiple corporate persons, a MNE's duties are comprised of its corporate components' duties. This is true regardless of how liability is in practice localized to precise corporations within the MNE. Rather, on a conceptual level, a MNE's corporate components' duties are the MNE's duties.

If a MNE's duties are found by assessing those of its corporate components, what then are the international law duties of such corporate components? Under public international law, corporate persons are largely equated with natural persons, with both holding status as individuals, nationals with potential entitlement to diplomatic protection.<sup>312</sup> This type of treatment parallels that seen in the domestic systems which grant corporations their legal personhood; many such systems conceptualize corporate persons and natural persons as being equivalent to one another in multiple ways.<sup>313</sup> The distinct personhood of the corporation is in fact the *raison d'être* for the domestic incorporation process.

Given the comparability of corporate and natural persons on various legal levels, both holding international law status as individuals, it is logical that both types of private persons are subject to the duties that customary international law holds for private

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<sup>310</sup> On indirect investment claims standing see: *Azurix Corp v. Argentina*, *supra* note 116 at para. 67; *Enron Corp and Ponderosa Assets LP v. Argentina*, *supra* note 116 at para. 37; *Waste Management Inc v. Mexico*, *supra* note 116 at para. 77; *Siemens AG v. Argentina*, *supra* note 116 at para. 122.

<sup>311</sup> See e.g. Sandra K. Miller, "Piercing the Corporate Veil Among Affiliated Companies in the European Community and in the U.S.: A Comparative Analysis of U.S., German and U.K. Veil-Piercing Approaches" (1998) 36 Am. Bus. L.J. 73.

<sup>312</sup> International Law Commission, *Draft articles on Diplomatic Protection*, *supra* note 240.

<sup>313</sup> On a domestic law level, it is notable that several key provisions of the constitutionally weighted Canadian Charter of Rights and Freedoms apply to both natural and corporate persons. See *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1995] 3 S.C.R.. Stephens notes the nearly equivalent treatment of natural and corporate persons in US tort law. Beth Stephens, "Corporate Accountability: International Human Rights Litigations Against Corporation in US Courts" in Menno T. Kamminga and Saman Zia-Zarifi, eds., *Liability of Multinational Corporations under International Law*, (The Hague: Kluwer Law International, 2000) 209 at 219.

individuals.<sup>314</sup> No tenable arguments to the contrary are evident in the literature.

Individuals, natural and corporate alike, hold duties under international law, in many instances duties rooted in custom and echoed in treaty. As is discussed below, neither (1) the sometimes disputed nature of corporate criminality, nor (2) the sparse enforcement record of international law remove the duties that international law places upon private persons, both corporate and natural.

International law scholarship chronicles how individuals, when acting in their private capacity, have a duty under international law not to: (1) commit piracy, (2) commit slavery or engage in the slave trade, (3) breach a blockade/carry contraband, (4) commit apartheid, (5) commit genocide, (6) commit crimes against humanity, or (7) commit war crimes. In addition, as a state actor (in other words, when acting on behalf of a state<sup>315</sup>) individuals have a duty not to commit (8) crimes against peace or (9) other offences such as torture.<sup>316</sup> These nine duties are examined in section 3.2 below. As is discussed in

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<sup>314</sup> See Anita Ramasastry, “Corporate Complicity: From Nuremberg to Rangoon, An Examination of Forced Labour Cases and their Impact on the Liability of Multinational Corporations” (2002) 20 Berkeley J. Int’l L. 91 at 96. For the purposes of Alien Tort Claims Act claims, corporate persons have been held to the same standards as natural persons for the purposes of liability for breaches of the law of nations. See e.g. *Sosa v. Alvarez-Machain* 542 U.S. at 692 (2004) at 732 n.20; see also *In re South African Apartheid Litigation*, 02 M.D.L. 1499; \_ F. Supp.2d, 2009 W.L. 960078 (S.D.N.Y. 8 April 2009) at 28-31 & 139, online: <<http://www.nylj.com/nylawyer/adgifs/decisions/040909scheindlin.pdf>> [*In re South African Apartheid Litigation* (8 April 2009)].

As Clapham writes:

As long as we admit that individuals have rights and duties under customary international human rights law and international humanitarian law, we have to admit that legal persons also have the necessary international legal personality to enjoy some of these rights and conversely be prosecuted or held accountable for violations of their international duties.

Andrew Clapham, “The Question of Jurisdiction Under International Criminal Law over Legal Persons: Lesson from the Rome Conference on an International Criminal Court” in Kamminga & Zia-Zarifi, *supra* note 313, 139 at 190.

<sup>315</sup> Both Daes and Norgaard also use the terminology “organ of a state”. See UN, *Status of the Individual and Contemporary International Law: Promotion, Protection and Restoration of Human Rights at National, Regional and International Levels: Study by Erica-Irene A. Daes*, (New York: United Nations, 1992) at 4 [Daes]; Norgaard, *supra* note 26 at 197.

<sup>316</sup> Daes, *ibid.* at 40-42; Norgaard, *ibid.* at 82-95; It is worth noting the obligation of individuals not to commit war crimes, genocide or crimes against humanity has developed to apply to individuals acting in their private capacity as well as in their capacity as organs of a state. See e.g. Christine Chinkin, “Monism and Dualism: the Impact of Private Authority on the Dichotomy Between National and International Law” in Janne Nijman & André Nollkaemper, eds., *New Perspectives on the Divide between National and International Law* (Oxford: Oxford University Press, 2007) 134 at 146.

section 3.2, all of these duties are manifestations of *jus cogens* norms, save for (3) that of breach of blockade/carriage of contraband.<sup>317</sup>

Before outlining the duties of private persons under public international law, it will be convenient first to discuss (1) corporate criminality and (2) enforcement. First, I turn to the extent to which corporate criminality has been recognized under international law. Some authors have held that corporate criminality has not achieved a state of recognition as a general principle within international law, citing a lack of uniformity in the domestic treatment of corporate criminality.<sup>318</sup> For two reasons, such views do not bar the extension of individual duties under international law to corporate persons. First, corporate criminality's status under domestic legal systems and under public international law is clearly open to debate. Second, breaches of international law do not only have to be adjudicated in criminal settings, but may also be characterized as civil or administrative breaches.

Turning to the first reason, the view that corporate criminality is not a general principle of public international law, and that it lacks support in many domestic legal systems, is open to debate and emerging practice presents support for a contrary position. Certainly, international law has been noted at times to be a backwards looking and slowly changing discipline, due to the fact that custom develops over time and multilateral treaties often have long negotiation and ratification processes.<sup>319</sup> Such discipline-wide propensity for conservatism aside, however, what presence does the concept of corporate criminality currently have in domestic and international law? Concerning the domestic level, a 2006 FAFO study surveyed the laws of 16 countries and found that the majority

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<sup>317</sup> Cherif Bassiouni, "International Crimes: Jus Cogens and Obligations Erga Omnes" (1996) 59 L. & Contemp. Probs. 63 at 68.

<sup>318</sup> Bantekas and Nash write that "*general* corporate criminal liability does not exist in international law" maintaining that corporate criminality does not exist in most legal systems and "even where it does exist, the objective and subjective elements are significantly divergent." Ilias Bantekas & Susan Nash, *International Criminal Law*, 3<sup>rd</sup> ed., (London & New York: Routledge-Cavendish, 2007) at 47 [emphasis in original]. The authors do note in contrast to their primary holding that "What we do have, however, is the seed of exceptional corporate criminal liability regionally or with regard to particular international offences." Bantekas & Nash at 48.

<sup>319</sup> See e.g. Richard Brent & William Blair, "General Introduction: Some Problems Relating to the Role of International Law" in William Blair & Richard Brent, eds., *Banks and Financial Crime: The International Law of Tainted Money* (Oxford: Oxford University Press, 2009) 33 at 34.

of them did in fact include the concept of corporate criminality within their legal systems, noting that “[...] state practice within domestic laws of many countries, across a variety of legal systems and traditions, has expanded criminal laws to include legal persons.”<sup>320</sup> As Wells and Elias note, there are several approaches by which legal systems conceptualize corporate intent and/or the mental element required for criminal (*mens rea*) or civil liability; these include identification liability (corporate knowledge as judged by the actions of key officers) and attribution based on corporate culture.<sup>321</sup>

On the international law level, the existence of a principle of corporate criminality is also arguable. As Clapham describes, “The Nuremberg judgments involving industrialists and business people involved an implicit finding that the relevant corporations for which they worked had committed international war crimes.”<sup>322</sup> The three industrialist trials at Nuremberg, *The United States of America vs. Alfred Krupp, et al.*<sup>323</sup> (the I.G. Farben trial), *The United States of America vs. Friedrich Flick, et al.*<sup>324</sup> and *The United States of*

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<sup>320</sup> As the report summarizes:

The results of the survey indicate that it is the prevailing practice to apply criminal liability to legal persons among 11 of the countries surveyed (Australia, Belgium, Canada, France, India, Japan, the Netherlands, Norway, South Africa, the United Kingdom and the United States). In five countries (Argentina, Germany, Indonesia, Spain and the Ukraine), current jurisprudence does not recognize such liability as a conceptual matter. In two of those countries (Argentina and Indonesia), the national legislature has ignored conceptual issues and has adopted specific statutes making legal persons liable for important crimes[.]

Anita Ramasastry & Robert C. Thompson, *Commerce, Crime and Conflict: Legal Remedies for Private Sector Liability for Grave Breaches of International Law A Survey of Sixteen Countries* (Oslo: FAFO, 2006) at 13, online: <<http://www.fafo.no/pub/rapp/536/536.pdf>>.

<sup>321</sup> Celia Wells and Juanita Elias “Catching the Conscience of the King: Corporate Players on the International Law State” in Alston, *Non-State Actors and Human Rights*, *supra* note 300, 141 at 156-156. Relatedly, the FAFO report notes that, “While the manner in which a business entity or legal person may be found liable for a crime may vary from jurisdiction to jurisdiction, some of the key features found in most domestic legislation include requirement that an employee have a certain status within a company and be acting within his scope of employment (when committing an illegal act).” Ramasastry & Thompson, *ibid.*

<sup>322</sup> Clapham, *supra* note 314 at 120.

<sup>323</sup> *Trial of Alfred Felix Alywn Krupp von Bohlen und Halback and Eleven Others*, Case No. 58, Judgment of the Tribunal on Counts II and III (17 November 1947 - 30 June 1948) (US Military Tribunal at Nuremberg), (The United Nations War Crimes Commission, *Law Reports of Trials of War Criminals*, vol. 10 (London: Published for the United Nations War Crimes Commission by H.M.S.O., 1949) at 130-158) [*United States v. Alfred Krupp et al.*].

<sup>324</sup> *Trial of Friedrich Flick and Five Others*, Case No. 48, The Judgment of the Tribunal (20 April – 22 December 1947) (US Military Tribunal at Nuremberg), (The United Nations War Crimes Commission, *Law Reports of Trials of War Criminals*, vol. 9 (London: Published for the United Nations War Crimes Commission by H.M.S.O., 1949) at 16-30) [*United States v. Friedrich Flick*].

*America vs. Carl Krauch, et al.*<sup>325</sup>, along with the “Zyklon-B” trial heard by a British Military Tribunal at Hamburg<sup>326</sup>, all involved the charging of owners and directors for their companies’ conduct. In other words, such tribunals assessed corporate conduct as they adjudicated the charges against corporate directors and owners. While the corporations themselves were not directly accused at Nuremberg, language such as that seen in the I.G. Farben trial shows that the tribunal viewed the corporation as a legal entity with the capacity to violate international law:

Where private individuals, *including juristic persons*, proceed to exploit the military occupancy by acquiring private property against the will and consent of the former owner, such action not being expressly justified by any applicable provisions of the Hague Regulations, is in violation of international law.<sup>327</sup>

It was precisely because of I.G. Farben’s conduct as a company that several directors were ultimately charged with war crimes and crimes against humanity.<sup>328</sup>

Particularly given the language and rulings of the industrialist trials at Nuremberg, the fact that the Rome Statute does not extend International Criminal Court (ICC) jurisdiction to corporate persons should not be overstated as establishing that corporations have no capacity to breach international law (presumably in either a criminal or non-criminal capacity). The non-inclusion of corporate persons within ICC jurisdiction is not perceived by all as a reflection of the limits of international law’s application to corporate persons. The Rome Statute was seen as a regression in that regard by some, with Chinkin noting

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<sup>325</sup> *The I.G. Farben Trial. Trial of Carl Krauch and Twenty-two Others*, Case No. 57, The Judgment of the Tribunal (14 August 1947 – 29 July 1948) (US Military Tribunal at Nuremberg), (The United Nations War Crimes Commission, *Law Reports of Trials of War Criminals*, vol. 10 (London: Published for the United Nations War Crimes Commission by H.M.S.O., 1949) at 30-63) [*U.S. v. Krauch, et al., (The I.G. Farben Case)*].

<sup>326</sup> *The Zyklon B Case. Trial of Bruno Tesch and Two Others*, Case No. 9, (1 - 8 March 1946) (British Military Court, Hamburg), (The United National War Crimes Commission, *Law Reports of Trials of War Criminals*, vol. 1 (London: Published for the United Nations War Crimes Commission by H.M.S.O., 1947) at 93-104) [*The Zyklon B Case*].

<sup>327</sup> *U.S. v. Krauch, et al., (The I.G. Farben Case)*, *supra* note 325 at 44, cited in Clapham, *supra* note 314 at 167 [emphasis added by Clapham].

<sup>328</sup> *U.S. v. Krauch, et. al, (The I.G. Farben Case)*, *ibid.* De Schutter notes that “[T]he war trials held after the Second World War led to the conviction of certain German industrialists, notably the directors of I.G. Farben, whose criminal liability was based on the finding that *the company* had committed war crimes.” [emphasis in original]. Olivier De Schutter, “The Accountability of Multinationals for Human Rights Violations in European Law” in Alston, *Non-State Actors and Human Rights*, *supra* note 300, 227 at 233.

that the non-inclusion of corporate persons “went against at least the spirit of Nuremberg.”<sup>329</sup>

In sum, three sources of support suggest that the principle of corporate criminality has a place in international law. First, the FAFO study suggests that there is considerable support in domestic legal systems for the concept of corporate criminality. Second, the Nuremberg trials of industrialists for their companies’ transgressions implicitly support the notion of criminality of corporations under international law. A third source of support for corporate criminality as a general principle of law flows from the example set by treaties such as the extensively ratified (172 state parties) Basel Convention (see section 3.3 below) which declares the illegal transfer of hazardous waste to be criminal at Article 4(3) and defines a person which may perform such transfers as a carrier to be any “natural or legal person”.<sup>330</sup> The Convention’s 172 state parties are furthermore required at Article 9(5) to pass domestic legislation which prevents and punishes the illegal transport of hazardous substances executed by such persons.<sup>331</sup> These three areas of support suggest that corporate criminality has a place within international law as a general principle of law, and at the very least demonstrate that there is no outright bar to the concept of corporate criminality under public international law.

A second reason why the status of corporate criminality is not a bar to international law duties of corporate persons is that international duties do not necessarily have to be construed as being strictly criminal in nature. Breaches of international law may also lead to civil proceedings, as has been manifested in US Alien Tort Claims Act court proceedings.<sup>332</sup> In other words, a breach of international law does not always require criminal capacity. Instead, related legal proceedings may be civil or administrative in nature. Rather than a legal capacity for criminality, what determines the existence of legal

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<sup>329</sup> Chinkin, “Monism and Dualism: the Impact of Private Authority on the Dichotomy Between National and International Law” *supra* note 316 at 150.

<sup>330</sup> *Global Convention on the Control of Transboundary Movements of Hazardous Wastes*, 22 March 1989, 1673 U.N.T.S. 126, at Art. 2 & 4, online: <<http://www.basel.int/text/con-e-rev.pdf>>.

<sup>331</sup> *Global Convention on the Control of Transboundary Movements of Hazardous Wastes*, *ibid.* at Art. 9(5); see *Parties to the Basel Convention*, online: <http://www.basel.int/ratif/convention.htm>.

<sup>332</sup> 28 U.S.C. § 1350; see e.g., *Doe I v. Unocal Corp.*, 963 F. Supp. 880 (C.D. Cal. 1997).

duties is whether international law directly bestows specific duties on a certain class of entities, in this instance, private persons.

Finally, the lack of enforcement<sup>333</sup> seen currently and historically in relation to the international law duties of individuals, whether as against natural or legal persons, does not wholly negate the existence or importance of such duties. Nor does a lack of criminal enforcement history nullify the option that corporate persons may have criminal capacity in international law or otherwise hold duties under public international law. Rather, regardless of enforcement, the existence of the duties of both natural persons and corporate persons remains an integral part of public international law. Such obligations create the legal character of such entities and shape how such entities are perceived by the law generally as well as by states. Such characterizations furthermore resonate within domestic legal systems. Despite its lack of coercive enforceability, international law's treatment of individuals remains an important framework of analysis and may lead to enforcement at the domestic level. Furthermore it is an important source of moral suasion and is a valuable mode of narration of world affairs. Moreover, lack of enforcement in international law is not only seen in relation to the duties of individuals, but is also a problem which exists in relation to the duties of states.

### **3.2 Direct Duties of Corporate Individuals under Public International Law**

The direct duties of individuals are found in a combination of custom and treaty law. In several cases, treaty provisions echo and co-exist with customary rules, including *jus cogens* norms.<sup>334</sup> For example, the *Restatement on Foreign Relations of the United States* lists *jus cogens* norms as including prohibitions against slavery and the slave trade, systemic racial discrimination, genocide, the murder or disappearance of individuals, torture or other cruel, inhuman, or degrading treatment or punishment, prolonged arbitrary detention and the use of force contrary to the principles of the United Nations

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<sup>333</sup> August Reinisch, "The Changing International Legal Framework for Dealing with Non-state Actors", *supra* note 304 at 82.

<sup>334</sup> Ferdinandusse notes that "it is often reiterated that genocide, crimes against humanity and war crimes are '*jus cogens* crimes'." Ward N. Ferdinandusse, *Direct Application of International Criminal Law in National Courts* (The Hague: TMC Asser Press, 2006) at 182.

Charter.<sup>335</sup> Presenting a Soviet view in 1990, Mullerson writes that “The majority of authoritative international lawyers assert, and justifiably, that at least the ban on such actions as slavery and slave-trading, genocide, apartheid, torture, mass killing, prolonged arbitrary detention or systematic race discrimination has become a customary norm of international law.”<sup>336</sup> Similarly, Bassiouni notes that “The legal literature discloses that the following international crimes are *jus cogens*: aggression, genocide, crimes against humanity, war crimes, piracy, slavery and slave-related practices, and torture.”<sup>337</sup> While *jus cogens* norms most directly govern state conduct they also affect individual duties in that they directly impose duties on individuals not to act in breach of *jus cogens* norms.<sup>338</sup>

My listing of individual duties below is derived mainly from a 1992 United Nations commissioned report on the status of the individual, completed by Rapporteur Erica-Irene Daes.<sup>339</sup> It is furthermore supported and complemented by Carl Aage Norgaard’s work on the subject, published in 1962.<sup>340</sup> Despite my initial reliance on these two sources, the contents of this section are found in various permutations in the words of many authors. For example, Steinhardt describes these duties as they apply to corporate persons, writing:

Consider first the body of *per se* violations that are wrongful with or without state action [...]: piracy, slavery, genocide, certain war crimes, *etc.* Every corporation must be considered on notice that conduct that falls within this extraordinary category will be wrongful, and they may face a variety of sanctions for engaging in it.<sup>341</sup>

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<sup>335</sup> American Law Institute, *Restatement of the Law (3d) Restatement of Foreign Relations Law of the United States* (St. Paul, MN : American Law Institute Publishers, 1987) at § 702, cmts. h, k, n.

<sup>336</sup> Rein A. Mullerson, “Human Rights and Individuals as a Subject of Int’l Law, a Soviet View” (1990) 1:1 E.J.I.L. 33 at 39, online: <<http://ejil.oxfordjournals.org/cgi/reprint/1/1/33>>.

<sup>337</sup> Bassiouni, *supra* note 317 at 68.

<sup>338</sup> Ferdinanusse notes further that the *jus cogens* status of such crimes affects individuals since, “States cannot agree to repeal individual criminal responsibility for the [peremptory] core crimes.” Ferdinanusse, *supra* note 334 at 182. As Orakhelashvili explains, “As individual criminal responsibility for *jus cogens* crimes is part of *jus cogens*, the rest of the jurisdictional framework such as universal jurisdiction and the duty to prosecute are merely specific implications of this fact[.]” Alexander Orakhelashvili, *Peremptory Norms in International Law* (Oxford; New York: Oxford University Press, 2008) at 298 [underlining added].

<sup>339</sup> Daes, *supra* note 315.

<sup>340</sup> Norgaard, *supra* note 26.

<sup>341</sup> Ralph G. Steinhardt, “Corporate Responsibility and the International Law of Human Rights: The New Lex Mercatoria” in Alston, *Non-State Actors and Human Rights*, *supra* note 300, 177 at 216.

Textbook authors including Malcolm Shaw also describe international law's imposition of direct obligations upon individuals.<sup>342</sup> Shaw notes individual responsibility for crimes outlined in international instruments such as the *Genocide Convention*.<sup>343</sup> As well, he cites the Nuremberg Charter's allocation of individual responsibility for crimes against peace, war crimes and crimes against humanity.<sup>344</sup>

### 3.2.1 Duty Not to Commit Piracy

As discussed in Chapter 1 of this thesis, early conceptions of international law did not limit its direct application to states almost exclusively, unlike the more state-centric approach to international law which gained prominence in the 19<sup>th</sup> and 20<sup>th</sup> centuries.<sup>345</sup> It is thus not surprising that among the oldest rules of international law is a rule which applies directly to private individuals, that of the prohibition against piracy.<sup>346</sup> Customary international law grants jurisdiction to all states for the arrest of those committing piracy on the high seas.<sup>347</sup>

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<sup>342</sup> Shaw, *International Law*, *supra* note 5 at 185-186.

<sup>343</sup> Shaw notes, "As far as obligations are concerned, international law has imposed direct responsibility upon individuals in certain specified matters." Shaw, *ibid.* at 184.

<sup>344</sup> Shaw reports that "The provisions of the Nuremberg Charter can now be regarded as part of international law, particularly since the General Assembly in 1946 affirmed the principles of this Charter and the decision of the Tribunal." Shaw, *ibid.* at 185. see *Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, and Charter of the International Military Tribunal*, 8 August 1945, 82 U.N.T.S. 280, online: <<http://www.icrc.org/ihl.nsf/FULL/350?OpenDocument>> [*London Charter of the International Military Tribunal*]; see also *Affirmation of the Principles of International Law Recognized by the Charter of the Nürnberg Tribunal*, GA Res. 95(1), UN GAOR, 1st Sess., UN Doc. A/236 (1946) 1144. (11 December 1946), online: <<http://www1.umn.edu/humanrts/instree/1946a.htm>>; on the *Principles of International Law Recognized in the Charter of the Nürnberg Tribunal and in the Judgment of the Tribunal* see International Law Commission, *Formulation of Nurnberg Principles, Report by J. Spiropoulos, Special Rapporteur*, UN Doc. A/CN.4/22 in International Law Commission, *Yearbook of the International Law Commission*, 1950, vol. II (New York: United Nations, 1957) 181 at 191-195, online: <[http://untreaty.un.org/ilc/publications/yearbooks/Ybkvolumes\(e\)/ILC\\_1950\\_v2\\_e.pdf](http://untreaty.un.org/ilc/publications/yearbooks/Ybkvolumes(e)/ILC_1950_v2_e.pdf)>.

<sup>345</sup> Chinkin, "Monism and Dualism: the Impact of Private Authority on the Dichotomy Between National and International Law" *supra* note 316 at 134.

<sup>346</sup> Daes, *supra* note 315 at 43.

<sup>347</sup> Daes, *ibid.* at 43.

The customary definition of piracy was augmented by the 1958 High Seas Convention<sup>348</sup>, an instrument later incorporated within the *United Nations Convention on the Law of the Sea* (UNCLOS).<sup>349</sup> Piracy persists today in a form ranging from small time, sporadic attacks to internationally organized piracy which includes seizure of ships, false vessel registration and sale of stolen cargo.<sup>350</sup> This second form of piracy, which may even extend to defrauding insurance companies<sup>351</sup>, most likely employs the corporate form at some stage of the organizational chain. Such organized crime touches upon the application of UN Conventions which are discussed in part 3.3, below.

In sum, piracy remains a long-standing example of individual responsibility under public international law, with a basis in custom and codification in treaty. A duty not to commit piracy extends to both natural and corporate persons as there are no evident grounds for excluding either class of individual from this customary duty. Furthermore, piracy has been noted by some to constitute a *jus cogens* crime<sup>352</sup>, suggesting that piracy prohibition's applicable scope may not be circumvented. Regardless of its *jus cogens* status, it is certain that the individual duty not to commit piracy is a centuries-old legal principle based in customary international law.

### 3.2.2 Duty Not to Commit Slavery or Forced Labour nor to Engage in the Slave Trade

The prohibition against slavery and the slave trade is a *jus cogens* norm with a basis in custom, and reflected in the text of various treaties, including the *1926 Slavery Convention*.<sup>353</sup> As with those engaged in piracy, slave traders developed a customary law

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<sup>348</sup> *Convention on the High Seas*, 29 April 1958, 450 U.N.T.S. 11 at 82, (entered into force 30 September 1962) Art. 15, online:

<[http://untreaty.un.org/ilc/texts/instruments/english/conventions/8\\_1\\_1958\\_high\\_seas.pdf](http://untreaty.un.org/ilc/texts/instruments/english/conventions/8_1_1958_high_seas.pdf)>.

<sup>349</sup> *United Nations Convention on the Law of the Sea*, Art. 101, online:

<[http://www.un.org/Depts/los/convention\\_agreements/texts/unclos/unclos\\_e.pdf](http://www.un.org/Depts/los/convention_agreements/texts/unclos/unclos_e.pdf)> [hereinafter, UNCLOS]

<sup>350</sup> Bantekas & Nash, *supra* note 318 at 174-179.

<sup>351</sup> *Ibid.* at 175.

<sup>352</sup> Bassiouni, *supra* note 317 at 68.

<sup>353</sup> *Slavery Convention*, 25 September 1926, 60 L.N.T.S. 253 (entered into force 9 March 1927).

status as perceived enemies of all humankind.<sup>354</sup> While individual states began banning slavery and the slave trade in the early 1800's (e.g., Great Britain banned slavery throughout most of her empire in 1833<sup>355</sup>) the slave trade persisted, facilitated on a practical level by the freedom of the high seas. Given the practical inability of individual nation states to unilaterally end slavery, understandably "the acts of slavery and the slave trade were recognized even at the beginning of the 19th century to be essentially of an international character."<sup>356</sup>

In addition to slavery constituting an independent offence under international law, it can also constitute a crime against humanity (see 3.26 below). As mentioned, following World War II three trials were held in Nuremberg at a United States Military Tribunal which tried German industrialists for, among other offences, their use of slave labour under the Nazi regime, *The United States of America vs. Alfred Krupp, et al.*<sup>357</sup>, *The United States of America vs. Friedrich Flick, et al.*<sup>358</sup> and *The United States of America vs. Carl Krauch, et al.*<sup>359</sup> In these cases, former directors were charged for their companies' use of many thousands of forced labourers in factory production and other operations. The significant use of slave labour by elite companies during World War II, including by such well known contemporary companies as Siemens, led to a prolonged claims process following the war.<sup>360</sup> IBM has also been the subject of lawsuits in the US and Switzerland in relation the company's provision of punch card technology to the Nazis, technology used for population classification.<sup>361</sup> Strikingly, German subsidiaries of

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<sup>354</sup> Robert McCorquodale, "The Individual in International Law" in Malcolm Evans, ed., *International Law*, 2<sup>nd</sup> ed. (Oxford: Oxford University Press, 2006) 307 at 314.

<sup>355</sup> *Slavery Abolition Act, 1833* (U.K.), 3 & 4 Will. IV, c. 73.

<sup>356</sup> Daes, *supra* note 315 at 42. Robertson remarks that the 1885 Treaty of Berlin forbade slave trading. Geoffrey Robertson, *Crimes Against Humanity: The Struggle for Global Justice* (New York: The New Press, 2000) at 209; see *General Act of Conference at Berlin*, 1885, Article VI, online: <<http://ocid.nacse.org/qml/research/tfdd/toTFDDdocs/4ENG.htm>>.

<sup>357</sup> *United States v. Alfred Krupp*, *supra* note 323.

<sup>358</sup> *United States v. Friedrich Flick*, *supra* note 324.

<sup>359</sup> *U.S. v. Krauch, et. al. (The I.G. Farben Case)*, *supra* note 325.

<sup>360</sup> See generally Benjamin B. Ferencz, *Less Than Slaves: Jewish Forced Labor and the Quest for Compensation*, (Indiana University Press: Bloomington, 2002).

<sup>361</sup> The US ATCA case was dropped to facilitate voluntary payments and the Swiss case was dismissed, as it was judged that too much time had passed since the events at issue. See *Extrait de l'arrêt de la Ire Cour civile dans la cause Gypsy International Recognition and Compensation Action (GIRCA) contre International Business Machines Corporation (IBM)* (recours en réforme) 4C.113/2006, 14 August 2006, online:

Ford and General Motors are held to have also employed slave labour during the Third Reich in their production of German war materials.<sup>362</sup> In 2000, class action lawsuits against the Swiss banks holding deposits made by the companies using slave labour during the Nazi era led to a court approved settlement requiring payment by such banks to surviving slave labourers and their heirs.<sup>363</sup>

Returning to slavery as an independent offence (outside of the crimes against humanity context), a more recent example of how private person legal duties can be triggered by the use of slave labour is seen in the Unocal case. It is worth noting that in 2005 the Californian oil company Unocal settled with Burmese plaintiffs, paying an undisclosed sum.<sup>364</sup> This settlement was in relation to US Alien Tort Claims Act (ATCA) litigation which alleged that the company aided and abetted forced labour exacted by the Burmese government in the construction of infrastructure for a Unocal pipeline project.<sup>365</sup> Cases such as *Unocal* and the German industrialist cases reflect the direct customary duty which exists upon corporate persons neither to engage in slavery nor to aid and abet enslavement.

Several treaties are worth mentioning in the context of international law's prohibition of slavery and the slave trade. The League of Nations facilitated the development of the *1926 Slavery Convention*, and the League's role outlined in this treaty was transferred to

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<[http://www.polyreg.ch/d/informationen/bgeleितentscheide/Band\\_132\\_2006/BGE\\_132\\_III\\_661.html](http://www.polyreg.ch/d/informationen/bgeleितentscheide/Band_132_2006/BGE_132_III_661.html)>; Anita Ramasastry, "A Swiss Court Decides to Allow Gypsies' Holocaust Lawsuit to Proceed" *Findlaw's Writ* (8 July 2004) online: <<http://writ.news.findlaw.com/ramasastry/20040708.html>>.

<sup>362</sup> See e.g. *Iwanowa v. Ford*, 67 F. Supp.2d 424 (Dist. N.J. 1999) at 439-441; see also Reinhold Billstein et al., *Working for the Enemy: Ford, General Motors and Forced Labor in Germany During the Second World War*, trans. by Nicholas Levis, (Berghahn Books: New York, 2000).

<sup>363</sup> Swiss companies which directly used slave labour their operations are also required to provide compensation under the judgment. *In re Holocaust Victim Assets Litigation*, 105 F. Supp.2d 139 (E.D.N.Y. 2000), online:

<[http://swissbankclaims.com/Documents/DOC\\_19\\_OrderApprovingSettlement07\\_26\\_00.pdf](http://swissbankclaims.com/Documents/DOC_19_OrderApprovingSettlement07_26_00.pdf)>.

<sup>364</sup> EarthRights International, News Release, "Final Settlement Reached in Doe v. Unocal" (21 March 2005) online:

<[http://www.earthrights.org/legalfeature/final\\_settlement\\_reached\\_in\\_doe\\_v\\_unocal.html](http://www.earthrights.org/legalfeature/final_settlement_reached_in_doe_v_unocal.html)>; See also Rachel Chambers, "The Unocal Settlement: Implications for the Developing Law on Corporate Complicity in Human Rights Abuses" (2005) 13:1 Human Rights Brief 14, online:

<<http://www.wcl.american.edu/hrbrief/13/unocal.pdf?rd=1>>.

<sup>365</sup> See e.g. *Doe I v. Unocal Corp.*, *supra* note 332.

the UN in a 1953 Protocol<sup>366</sup> amending the convention. In 1956 a supplementary convention banned ‘practices similar to slavery’ such as debt bondage, to which no treaty reservations were permitted given the *erga omnes* nature of the subject matter.<sup>367</sup> Further relevant instruments include *The Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others*<sup>368</sup>, which entered into force in 1951, as well as provisions of UNCLOS which permit the boarding of a foreign vessel where there are reasonable grounds to suspect involvement in the slave trade.<sup>369</sup> As well, the ILO’s *Convention concerning Forced or Compulsory Labour*<sup>370</sup> bears upon the issue of slavery. More recently, the *United Nations Convention against Transnational Organized Crime*<sup>371</sup>, entered into force in 2003, along with its accompanying *Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children*.<sup>372</sup>

Slavery has not ended and many people in the world today are slaves. As reported by the US State Department, “The International Labor Organization [...] estimates that there are 12.3 million people in forced labor, bonded labor, forced child labor, and sexual

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<sup>366</sup> *Slavery Convention*, *supra* note 353; *Protocol amending the Slavery Convention signed at Geneva on 25 September 1926*, 23 October 1953, 182 U.N.T.S. 51, online: <<http://www2.ohchr.org/english/law/protocolslavery.htm>>.

<sup>367</sup> See Robertson, *supra* note 356 at 209; *Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery*, 7 September 1956, 226 U.N.T.S. 3, online: <<http://www1.umn.edu/humanrts/instree/f3scas.htm>>.

<sup>368</sup> *Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others*, 2 December 1949, 96 U.N.T.S. 271 (entered into force 25 July 1951) online: <<http://www.unhchr.ch/html/menu3/b/33.htm>>.

<sup>369</sup> UNCLOS, *supra* note 349 at Art. 110.

<sup>370</sup> *Convention concerning Forced or Compulsory Labour (ILO No. 29)*, 10 June 1930, 39 U.N.T.S. 55 (entered into force 1 May 1932), online: <<http://www.ilo.org/ilolex/cgi-lex/convde.pl?C029>>. Robertson notes that this convention “justified the conviction at Nuremberg of Albert Speer and other architects of Nazi deportation and forced labour schemes, which were devised quite literally to work Jews to death.” Robertson, *supra* note 356 at 235.

<sup>371</sup> *United Nations Convention against Transnational Organized Crime* in GA Res. 55/25, UN GAOR, 15 November 2000, Annex I, UN Doc. A/55/383 (2000) at 5, online: <<http://www.unodc.org/documents/treaties/UNTOC/Publications/TOC%20Convention/TOCebook-e.pdf>> (entered into force 29 September 2003).

<sup>372</sup> *Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children* in GA Res. 55/25, UN GAOR, 15 November 2000, Annex II, UN Doc. A/55/383 (2000) at 41 (entered into force 25 December 2003), online: <<http://www.unodc.org/documents/treaties/UNTOC/Publications/TOC%20Convention/TOCebook-e.pdf>>.

servitude at any given time; other estimates range from 4 million to 27 million.”<sup>373</sup> One form of slavery is “trafficking”, by which people are moved within a country or internationally. *The Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children* defines “Trafficking in human beings as”:

[...] the recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation. Exploitation shall include, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs.<sup>374</sup>

Recent reports by the United Nations Office on Drug and Crime<sup>375</sup>, as well as the US State Department<sup>376</sup> present a grim picture of the scope of present-day trade in humans.

Trafficking is vastly profitable for traffickers, as is reported to be a quickly growing form of international crime, generating an estimated \$31.6 billion per year in criminal proceeds.<sup>377</sup> It would be unthinkable for such financial flows to be managed without recourse to the corporate form, such as through the use of front companies or money laundering organizations. Corporate persons thus engaged in modern slavery are in clear breach of the duty that international law places on individuals not to commit slavery or participate in the slave trade.

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<sup>373</sup> U.S., Department of State, *Trafficking in Persons Report 2008* (Publication No. 11407) (Washington D.C.: United States Government Printing Office, 2008) at 7, online:

<<http://www.state.gov/g/tip/rls/tiprpt/2008/#>> at 7. The report continues on the same page:

Annually, according to U.S. Government-sponsored research completed in 2006, approximately 800,000 people are trafficked across national borders, which does not include millions trafficked within their own countries. Approximately 80 percent of transnational victims are women and girls and up to 50 percent are minors. The majority of transnational victims are females trafficked into commercial sexual exploitation. These numbers do not include millions of female and male victims around the world who are trafficked within their own national borders—the majority for forced or bonded labor.

<sup>374</sup> *Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children*, *supra* note 372, at Art. 3.

<sup>375</sup> United Nations Office on Drugs and Crime, *Global Report on Trafficking in Persons* (Vienna: UNODC, 2009), online: <[http://www.unodc.org/documents/Global\\_Report\\_on\\_TIP.pdf](http://www.unodc.org/documents/Global_Report_on_TIP.pdf)>.

<sup>376</sup> Department of State, *Trafficking in Persons Report 2008*, *supra* note 373.

<sup>377</sup> Patrick Belser, *Forced Labour and Human Trafficking: Estimating the Profits* (Geneva: International Labour Office, 2005) at 17, online: <[http://www.ilo.org/wcmsp5/groups/public/---ed\\_norm/---declaration/documents/publication/wcms\\_081971.pdf](http://www.ilo.org/wcmsp5/groups/public/---ed_norm/---declaration/documents/publication/wcms_081971.pdf)>.

The precise scope of a corporate person's duty not to engage in slavery is contentious. The long supply chains which characterize present day international trade are seen by some to be a buffer which insulates a corporate person from their duty not to participate in slavery. Key in such arguments is the idea of a lack of requisite knowledge or lack of control over the conduct of suppliers. Ultimately, the validity of such arguments will be borne out by their perceived plausibility.<sup>378</sup> This is currently being seen in many industries including the cocoa industry, where knowledge of slavery in cocoa farms has been made public and known to confection-producing MNEs.<sup>379</sup> Chocolate bar producers are being pushed to change their practices towards proactively ensuring that they are not buying cocoa produced by slave labour.

In sum, given the *jus cogens* status of the prohibition against slavery, and the customary international law foundation of an individual's duty not to commit slavery or engage in the slave trade, a non-derogable duty upon natural and corporate persons clearly exists which requires such persons not to commit slavery or engage in the slave trade; this duty extends to a requirement not to aid or abet slavery or the slave trade, as supported by the Swiss bank and Unocal litigation examples.<sup>380</sup> In addition, in some forms slavery is also prohibited under custom and treaty as a crime against humanity (see 3.26 below).

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<sup>378</sup> The practical application of an individual corporation's legal duty not to commit slavery, as it relates to supply chains in particular, will doubtlessly vary from case to case, particularly considering the fact that current "enforcement" in the international context is largely through moral suasion and advocacy. Soft law documents may, however, reflect the direction that the law is taking, as well as future nuance which may become adopted into hard law. See e.g. Suzanne Mubarak Women's International Peace Movement, *Athens Ethical Principles*, 23 January 2006, online:

<[http://www.endhumantraffickingnow.com/Who\\_we\\_are/History/Pages/Athens\\_Ethical\\_Principles.aspx](http://www.endhumantraffickingnow.com/Who_we_are/History/Pages/Athens_Ethical_Principles.aspx)>

<sup>379</sup> See e.g. Humphrey Hawksley, "Mali's children in chocolate slavery" *BBC News* (12 April 2001), online: <<http://news.bbc.co.uk/2/hi/africa/1272522.stm>>.

<sup>380</sup> *In re Holocaust Victim Assets Litigation*, *supra* note 363; *Doe I v. Unocal Corp.*, *supra* note 332.

### 3.2.3 Duty Not to Breach a Blockade or Carry Contraband

Other customary international law duties of individuals, which will only be mentioned briefly here, include the duty of ship owners and operators not to breach a military blockade or carry war contraband.<sup>381</sup> On the former, Norgaard summarizes that “It is an old and established rule of customary international law that men of war of a belligerent may seize neutral ships breaking the blockade.”<sup>382</sup> On the latter, he notes that “[a]nother well established rule of customary international law provides that a man of war of a belligerent state may, under certain conditions, seize a neutral ship carrying contraband.”<sup>383</sup> The scope of contraband goods in this instance has been open to some debate, but generally refers to the “illegal supply of goods covered by an embargo to an enemy state or group of states.”<sup>384</sup> Ship ownership by corporate persons is a long established practice<sup>385</sup>, and there is no indication that customary rules on contraband and military blockades would not apply to corporate persons as well as natural persons.

### 3.2.4 Duty Not to Commit Apartheid

The crime of apartheid is established in the *International Convention on the Suppression and Punishment of the Crime of Apartheid* (Apartheid Convention), which entered into force in 1976.<sup>386</sup> This convention has been ratified by 107 states (including China and Russia) but has been largely unsupported by Western States.<sup>387</sup> Article 1 of the

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<sup>381</sup> Norgaard, *supra* note 26 at 94. Daes, *supra* note 315 at 44.

<sup>382</sup> Norgaard, *ibid.* at 94.

<sup>383</sup> *Ibid.*

<sup>384</sup> “Contraband of War” in Edmund Jan Osmańczyk & Anthony Mango, eds., *Encyclopedia of the United Nations and International Agreements*, 3d ed. (New York, Routledge, 2003) at 447.

<sup>385</sup> See e.g. Roman Tomasic, Stephen Bottomley & Rob McQueen, *Corporations Law in Australia*, 2d Ed., (Annandale, Australia: Federation Press, 2002) at 260.

<sup>386</sup> *International Convention on the Suppression and Punishment of the Crime of Apartheid*, 30 November 1973, 1015 U.N.T.S. 243 (entered into force 18 July 1976), online:

<<http://www.unhchr.ch/html/menu3/b/11.htm>> [*Apartheid Convention*].

<sup>387</sup> On ratification status see United Nations Treaty Collection, “Chapter IV: Human Rights” *Multilateral Treaties Deposited with the Secretary-General*, online:

<[http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=IV-7&chapter=4&lang=en](http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-7&chapter=4&lang=en)>.

treaty declares “that *apartheid* is a crime against humanity and that inhuman acts resulting from the policies and practices of *apartheid* and similar policies and practices of racial segregation and discrimination, as defined in Article II of the Convention, are crimes violating the principles of international law.”<sup>388</sup> Furthermore, in Article 1 parties to the convention “declare criminal those organizations, institutions and individuals committing the crime of *apartheid*.” Article 2 of the convention lists various manifestations of the crime of *apartheid*<sup>389</sup>, and Article 3 includes directly aiding and abetting acts of apartheid as grounds for criminal responsibility.<sup>390</sup> Using the broad language of “organizations, institutions and individuals” the Apartheid Convention thus establishes private individual responsibility for the crime of apartheid, including the aiding and abetting thereof.<sup>391</sup>

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<sup>388</sup> *Apartheid Convention*, *supra* note 386 at Article I.

<sup>389</sup> Article II holds that the crime of apartheid:

- [...] shall apply to the following inhuman acts committed for the purpose of establishing and maintaining domination by one racial group of persons over any other racial group of persons and systematically oppressing them:
- (a) Denial [...] of the right to life and liberty of person:
  - (i) By murder [...];
  - (ii) By the infliction [...] serious bodily or mental harm, by the infringement of their freedom or dignity, or by subjecting them to torture or to cruel, inhuman or degrading treatment or punishment;
  - (iii) By arbitrary arrest and illegal imprisonment [...];
- (b) Deliberate imposition on a racial group or groups of living conditions calculated to cause its or their physical destruction in whole or in part;
- (c) Any [...] measures calculated to prevent a racial group or groups from participation in the political, social, economic and cultural life of the country [...] including the right to work, the right to form recognized trade unions, the right to education, the right to leave and to return to their country, the right to a nationality, the right to freedom of movement and residence, the right to freedom of opinion and expression, and the right to freedom of peaceful assembly and association;
- (d) Any measures [...] designed to divide the population along racial lines by the creation of separate reserves and ghettos for the members of a racial group or groups, the prohibition of mixed marriages among members of various racial groups, the expropriation of landed property belonging to a racial group or groups or to members thereof;
- (e) Exploitation of the labour of the members of a racial group or groups, in particular by submitting them to forced labour;
- (f) Persecution of organizations and persons, by depriving them of fundamental rights and freedoms, because they oppose apartheid.

*Apartheid Convention*, *ibid.* at Art. II.

<sup>390</sup> *Apartheid Convention*, *ibid.* at Art. II.

<sup>391</sup> See also proposals for establishing an international court to enforce the convention, a court with jurisdiction over legal persons. Commission on Human Rights, *Study on ways and means of insuring the implementation of international instruments such as the Convention on the Suppression and Punishment of the Crime of Apartheid, including the establishment of international jurisdiction envisaged by the Convention*, UN ESCOR, 37<sup>th</sup> Sess., UN Doc. E/CN.4/1426 (19 January 1981). See Clapham, *supra* note 317 at 173.

While the crime of apartheid was conceptualized with South Africa in mind, the crime is not limited in geographical application and has been endorsed in a non-geographical manner in other treaties.<sup>392</sup> As Dugard notes, this includes the 1977 Additional Protocol I of the Geneva Conventions of 1949<sup>393</sup>, which listed apartheid as a “grave breach” of the Protocol, as well as the Rome Statute, which lists the “crime of apartheid” as a crime against humanity.<sup>394</sup> The International Law Commission’s *Draft Code of Crimes against the Peace and Security of Mankind*<sup>395</sup> adopted in 1996, listed “systemic discrimination” as a crime against humanity, noting in its commentary that this terminology referred to the crime of apartheid using a “more general denomination”.<sup>396</sup>

That states are bound by customary international law not to commit apartheid is evident from the aforementioned *jus cogens* norm concerning systemic race discrimination.<sup>397</sup> The extent to which individuals are bound not to commit apartheid under customary international law<sup>398</sup>, and not the *Apartheid Convention* directly, is a question worth investigating. Specifically, is individual responsibility for apartheid applicable in a private individual sense, or must the individual act in association with a state in order for a customary international duty to apply? That is to say, does customary individual responsibility for apartheid entail a state action requirement? There is support

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<sup>392</sup> John Dugard, “Convention on the Suppression and Punishment of the Crime of Apartheid” in *Historic Archives* (New York: United Nations Audiovisual Library of International Law, 2008) online: <[http://untreaty.un.org/cod/avl/pdf/ha/cspca/cspca\\_e.pdf](http://untreaty.un.org/cod/avl/pdf/ha/cspca/cspca_e.pdf)>.

<sup>393</sup> The first Additional Protocol of the Geneva Conventions of 1949 recognized apartheid as a “grave breach” of the Protocol. *Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I)*, 8 June 1977, 1125 U.N.T.S. 3, Art. 85.4(c), (entered into force 7 December 1979), online:

<<http://www1.umn.edu/humanrts/instree/y5page.htm>>.

<sup>394</sup> In 1998, the Rome Statute of the International Criminal Court included the “crime of apartheid” as a form of crime against humanity at Art. 7. *Rome Statute of the International Criminal Court*, 17 July 1998, 2187 U.N.T.S. 90, Art. 7, (entered into force 1 July 2002), online:

<[http://www1.umn.edu/humanrts/instree/Rome\\_Statute\\_ICC/Rome\\_ICC\\_toc.html](http://www1.umn.edu/humanrts/instree/Rome_Statute_ICC/Rome_ICC_toc.html)>.

<sup>395</sup> International Law Commission, *Draft Code of Crimes against the Peace and Security of Mankind*, 1996 in *Yearbook of the International Law Commission*, 1996, vol. II (Part Two), UN Doc. A/51/10 (New York: United Nations, 1998) at 15, online:

<[http://untreaty.un.org/ilc/texts/instruments/English/draft%20articles/7\\_4\\_1996.pdf](http://untreaty.un.org/ilc/texts/instruments/English/draft%20articles/7_4_1996.pdf)>.

<sup>396</sup> *Yearbook of the International Law Commission*, 1996, *ibid.* 49.

<sup>397</sup> American Law Institute, *Restatement of the Law (3d) Restatement of Foreign Relations Law of the United States*, *supra* note 335 at § 702, cmts. h, k, n; Mullerson, *supra* note 336 at 39.

<sup>398</sup> International Law Commission, *Report of the International Law Commission on the work of its forty-fourth session*, UN Doc. A/47/10 in *Yearbook of the International Law Commission*, 1992, vol. II (Part Two), UN Doc. A/CN.4/SER.A/1992/Add.1 (Part 2) (New York: United Nations, 1998) 1 at para. 70, online: <[http://untreaty.un.org/ilc/publications/yearbooks/Ybkvolumes\(e\)/ILC\\_1992\\_v2\\_p2\\_e.pdf](http://untreaty.un.org/ilc/publications/yearbooks/Ybkvolumes(e)/ILC_1992_v2_p2_e.pdf)>.

for the holding that individual responsibility for the crime of apartheid under customary law may not have a state action requirement. Recalling the soft law and treaties on the matter, it is notable that the 1996 ILC *Draft Code of Crimes* did not include a state action requirement for individual responsibility for crimes against humanity, of which systemic race discrimination is a listed form.<sup>399</sup> Nor is there a state action requirement for criminal responsibility for apartheid under the Rome Statute.<sup>400</sup>

Customary law aside, the *Apartheid Convention* establishes private individual responsibility for this crime within its 107 parties, a duty which is doubtlessly applicable to corporate persons as well as natural persons. On a customary level, the extent of individual responsibility is unclear. The *jus cogens* status of systemic racial discrimination *vis-à-vis* state conduct, as well as the inclusion of the crime of apartheid as a crime against humanity in the Rome Statute, as a violation of the 1979 Protocol to the Geneva Convention and via indirect reference in the ILC's 1996 Draft Code of International Crimes, suggest that, at a minimum, individual responsibility as a state actor exists at a customary level, and suggests potential private individual responsibility without state action. Even if it is maintained that custom provides for individual responsibility only in the presence of a private individual's responsibility not to aid or abet this international crime may be applicable, a possibility sanctioned in *In re South African Apartheid Litigation*.<sup>401</sup> Also, when corporations take on state actions, as for instance as contracted public service providers, they place themselves in the role of state

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<sup>399</sup> *Draft Code of Crimes against the Peace and Security of Mankind*, 1996, *supra* note 395 at Art. 18.

<sup>400</sup> *Rome Statute of the International Criminal Court*, *supra* note 397 at Art. 25. Despite such examples, the April 8, 2009 judgement *In re South African Apartheid Litigation* issued by a New York District Court reviewed the Rome Statute and the *Apartheid Convention* (neither of which the US is a party to) for guidance as to the existence of customary private individual responsibility for the crime of apartheid and ruled that there was insufficient guidance in international law to show the establishment of a customary private individual duty not to commit apartheid. Since this appears to be the first ruling on the prohibition of apartheid in customary international law, either at a domestic or international forum, there is considerable scope for this ruling to be adjusted in subsequent judicial practice. Since the New York judgement did not discuss the ILC Draft Articles, nor did it place apartheid within the context of being a crime against humanity under the Rome Statute, a convention which does not require state action for individual responsibility for such crimes, there is certainly scope for an alternative holding to be established which contrasts with that seen in the New York court, one finding that apartheid is a crime that does not require state action for individual responsibility to be established. It is notable, however, that despite finding a state action requirement for the crime of apartheid, the New York judgement permitted claims of private aiding and abetting of state agent apartheid. *In re South African Apartheid Litigation* (8 April 2009), *supra* note 314 at 28-31 & 139.

<sup>401</sup> *In re South African Apartheid Litigation*, *ibid*.

actors, triggering individual duties under international law allotted to those acting as an organ of a state.<sup>402</sup>

### 3.2.5 Duty Not to Commit Genocide

The 1948 *Convention on the Prevention and Punishment of the Crime of Genocide*<sup>403</sup> has 140 state parties.<sup>404</sup> The convention declares genocide<sup>405</sup> a crime for individuals in either a state action or private capacity.<sup>406</sup> The high number of convention signatories has led to it becoming part of customary international law.<sup>407</sup> The prohibition against genocide is also a *jus cogens* norm, binding states with a non-derogable obligation not to commit genocide. Genocide is furthermore a *jus cogens* crime meaning that states do not have the power to repeal the criminality of acts of genocide.<sup>408</sup> Genocide also falls within the category of crimes against humanity, and individual criminality for genocide is outlined in international instruments additional to the *Genocide Convention* including the Rome Statute.<sup>409</sup>

Given the scope of state signatories to the genocide convention, along with the treatment of this crime in customary international law and other treaties, private

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<sup>402</sup> Steven Ratner, “Corporations and Human Rights: A Theory of Legal Responsibility” (2001) 111 Yale L.J. 443 at 497.

<sup>403</sup> *Convention on the Prevention and Punishment of the Crime of Genocide*, *supra* note 74.

<sup>404</sup> On ratification status see United Nations Treaty Collection, “Chapter IV: Human Rights” *Multilateral Treaties Deposited with the Secretary-General*, online:

<[http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=IV-1&chapter=4&lang=en](http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-1&chapter=4&lang=en)>

<sup>405</sup> Genocide is defined in the convention at Article 2 as:

any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such: killing members of the group; causing serious bodily or mental harm to members of the group; deliberately inflicting on the group conditions of life, calculated to bring about its physical destruction in whole or in part; imposing measures intended to prevent births within the group; [and] forcibly transferring children of the group to another group.

*Convention on the Prevention and Punishment of the Crime of Genocide*, *supra* note 74 at Art. 2.

<sup>406</sup> *Convention on the Prevention and Punishment of the Crime of Genocide*, *ibid.* at Art. 4.

<sup>407</sup> See UN General Assembly Resolution 96(1) of 11 December 1946, stating that “Genocide is a crime under international law which the civilized world condemns, and for the commission of which principals and accomplices – whether private individual, public officials of statesmen, and whether the crime is committed on religious, racial, political or any other grounds are punishable”. See *The Crime of Genocide*, GA Res. 96(1), UN GAOR, 1st Sess., UN Doc. A/236 (1946) 1144. (11 December 1946)

<sup>408</sup> Bassiouni, *supra* note 317 at 68.

<sup>409</sup> *Rome Statute of the International Criminal Court*, *supra* note 394 at Art. 6.

individuals, including corporate persons, acting either in a private or state actor capacity, have an undeniable and direct duty under international law not to commit genocide. This extends to a responsibility not to aid or abet genocide, as Article 3 of the convention furthermore lists “complicity in genocide” as being within the ambit of the crime.<sup>410</sup>

The term “genocide” arose during the time of World War II, and given this timing the Nuremberg trials did not adjudicate specific charges of genocide, but rather adjudicated charges of war crimes, crimes of aggression and crimes against humanity, discussed below. UN Security Council tribunals such as the International Criminal Tribunal for Rwanda and the International Tribunal for the Former Yugoslavia have, however, adjudicated charges of genocide.<sup>411</sup> That there have not been specific charges of genocide initiated in an international tribunal against corporate persons should not be construed as meaning that corporate persons are excluded from the duty not to commit genocide, including not to be complicit in genocide. Rather, the language of the Genocide Convention (addressing “private persons”) as well as the customary significance of this crime means that corporate and natural persons alike, acting in a private or state capacity, must not commit genocide. The Nuremberg trials did not employ the term “genocide” but much of their subject matter was clearly that of genocide. Thus, the trials at Nuremberg discussed below with regard to war crimes and crimes against humanity support the holding that private individuals, including corporations, have an international law duty not to commit genocide, nor to be complicit in genocide.

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<sup>410</sup> *Convention on the Prevention and Punishment of the Crime of Genocide*, *supra* note 74 at Art. 3. See generally Chile Eboe-Osuji, “‘Complicity in Genocide’ versus ‘Aiding and Abetting Genocide’ Construing the Difference in the ICTR and ICTY Statutes” (2005) 3:1 *Journal of International Criminal Justice* 56.

<sup>411</sup> See e.g. *Prosecutor v. Krstić*, IT-98-33-A, Appeals Chamber Judgement (19 April 2004) (International Criminal Tribunal for the Former Yugoslavia, Appeals Chamber), online: <<http://www.un.org/icty/krstic/Appeal/judgement/krs-aj040419e.pdf>>; *The Prosecutor v. Juvenal Kajelijeli*, ICTR-98-44A-T, Appeals Judgement (23 May 2005) (International Criminal Tribunal for Rwanda, Trial Chamber), online: <<http://69.94.11.53/default.htm> The Prosecutor v. Juvenal Kajelijeli>.

### 3.2.6 Duty Not to Commit Crimes Against Humanity

The London Charter establishing the International Military Tribunal at Nuremberg defined crimes against humanity in the following fashion:

CRIMES AGAINST HUMANITY: namely, murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the war; or persecutions on political, racial or religious grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country where perpetrated.<sup>412</sup>

In 1946, shortly following the Nuremberg Judgment<sup>413</sup>, the UN General Assembly unanimously adopted a resolution affirming “the principles of international law recognised by the Charter of the Nuremberg Tribunal and the judgement of the tribunal[.]”<sup>414</sup> and later requested that the International Law Commission (ILC) draft a document consolidating such principles.<sup>415</sup> Principle VI of the ILC’s *Principles of International Law Recognized in the Charter of the Nürnberg Tribunal and in the Judgment of the Tribunal* states that crimes against humanity, as defined in the London Charter, are punishable under international law and Principle VII states that complicity in the commission such a crime is also a crime under international law.<sup>416</sup> In conjunction with such events and instruments, the prohibition of crimes against humanity is generally regarded to have become part of customary international law.<sup>417</sup>

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<sup>412</sup> *Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, and Charter of the International Military Tribunal*, *supra* note 344 at Art. 6(c).

<sup>413</sup> “General” in *Judgment of the International Military Tribunal for the Trial of German Major War Criminals*, online: <<http://avalon.law.yale.edu/imt/judgen.asp>>, *supra* note 47.

<sup>414</sup> *Affirmation of the Principles of International Law Recognized by the Charter of the Nürnberg Tribunal*, *supra* note 344.

<sup>415</sup> *Formulation of the Principles Recognized in the Charter of the Nurnberg Tribunal and in the Judgment of the Tribunal*, GA Res. 177(2), UN GAOR, 2nd Sess., online: <<http://www.un.org/documents/ga/res/2/ares2.htm>>.

<sup>416</sup> *Principles of International Law Recognized in the Charter of the Nürnberg Tribunal and in the Judgment of the Tribunal*, *supra* note 344.

<sup>417</sup> René Provost, *International Human Rights and Humanitarian Law* (Cambridge: Cambridge University Press, 2002) at 69. Provost cites the following: American Law Institute, *Restatement of the Law (3d) Restatement of Foreign Relations Law of the United States*, *supra* note 335 at para. 702(a); *Prosecutor v. Akayesu*, ICTR-96-4-T, Judgment (2 September 1998) at para. 495 (International Criminal Tribunal for Rwanda, Trial Chamber I); Ian Brownlie, *Principles of Public International Law*, 5<sup>th</sup> ed. (Oxford: Clarendon, 1998) at 563.

The ILC's 1996 *Draft Codes of Crimes Against the Peace and Security of Mankind* contains a definition of crimes against humanity at Art. 18.<sup>418</sup> In addition, the Rome Statute of the International Criminal Court<sup>419</sup>, as well as the establishing statutes of the UN International Criminal Tribunal for the former Yugoslavia (ICTY)<sup>420</sup> and the UN International Criminal Tribunal for Rwanda (ICTR)<sup>421</sup> all contain definitions of crimes against humanity. While the international instruments outlining the meaning of crimes against humanity vary slightly, a common picture of such crimes emerges, from such documents as well as from cases at international fora which have adjudicated charges of crimes against humanity. The picture shows a definition which is nuanced from that presented in the London Charter. First, it has become apparent that crimes against humanity may be committed either in war time, or not.<sup>422</sup> Furthermore, what defines crimes against humanity is that they are specific crimes committed as a part of a "widespread or systematic"<sup>423</sup> attack upon a civilian population by a state or other organization.<sup>424</sup> For instance, under the Rome Statute Article 7.1, a crime against humanity must be "[...] part of a widespread or systematic attack directed against any civilian population" and under Article 7.2 such an attack must be "pursuant to or in

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<sup>418</sup> *Code of Crimes against the Peace and Security of Mankind*, 1996, *supra* note 395.

<sup>419</sup> *Rome Statute of the International Criminal Court*, *supra* note 394 at Art. 7.

<sup>420</sup> International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991, *Updated Statute of the International Criminal Tribunal for the Former Yugoslavia*, as amended 29 September 2008 by UN Security Council Resolution 1837, at Art. 5, online:

<[http://www.icty.org/x/file/Legal%20Library/Statute/statute\\_sept08\\_en.pdf](http://www.icty.org/x/file/Legal%20Library/Statute/statute_sept08_en.pdf)>

<sup>421</sup> International Criminal Tribunal for Rwanda, *Statute of the International Criminal Tribunal for Rwanda*, as amended 13 October 2006, at Art. 3, online: <<http://69.94.11.53/ENGLISH/basicdocs/statute/2007.pdf>>

<sup>422</sup> As the Appeals Chamber of the ICTY held in *Tadic*, "It is by now a settled rule of customary international law that crimes against humanity do not require a connection to international armed conflict. Indeed, [...] customary international law may not require a connection between crimes against humanity and any conflict at all." *Prosecutor v. Dusko Tadic*, IT-94-1-T, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction (2 October 1995) at para. 141 (International Criminal Tribunal for the Former Yugoslavia, Appeals Chamber), online: <<http://www.un.org/icty/tadic/appeal/decision-e/51002.htm>>.

<sup>423</sup> The language "widespread and systematic" is found in the Rome Statute at Article 7. *Rome Statute of the International Criminal Court*, *supra* note 394 at Art. 7.

<sup>424</sup> *Rome Statute of the International Criminal Court*, *supra* note 394 at Art. 7.1. Furthermore, the *Draft Code of Crimes against the Peace and Security of Mankind*, 1996 adopted by the International Law Commission defines a crime against humanity at Art. 18 in the following fashion, "A crime against humanity means any of the following acts, when committed in a systematic manner or on a large scale and instigated or directed by a Government or by any organization or group [...]" *Draft Code of Crimes against the Peace and Security of Mankind*, 1996, *supra* note 395 at Art. 18.

furtherance of a State or organizational policy to commit such attack.”<sup>425</sup> In sum, for crimes such as murder to constitute crimes against humanity they must be part of a systemic attack against civilians which is the result of a state or other organization’s policy.

The aforementioned instruments, as well as the legal decisions concerning crimes against humanity have revealed that such crimes may be committed by an individual acting either in a private or state capacity.<sup>426</sup> In addition, the motives of an individual for committing a crime against humanity do not need to match the motives of the broader widespread attack against a civilian population within which the individual’s act is committed, so long as the individual is aware that his or her act is part of a broader systemic attack.<sup>427</sup> As Provost reports, in the *Tadic* case the UN ICTY Appeals Chamber regarded cases following World War II as supporting its ruling that an individual’s crimes “may be committed for motives wholly unrelated to a campaign against a civilian population.”<sup>428</sup> This means that:

[...] a disgruntled husband who denounces his wife to the police in order to be with his mistress, or the tenant who does the same to get rid of his landlord, do indeed commit crimes against humanity if in so doing they knowingly participate in a campaign against a civilian population.<sup>429</sup>

The prohibition of crimes against humanity, which has now achieved customary status, means that individuals, including both corporate and natural persons, acting either in a private capacity or as state organs, have an international law duty not to commit crimes against humanity, including not to knowingly aid or abet the committal of crimes against humanity. For instance, under the ILC’s Draft Code of Crimes at Article 2(3)d liability extends to a person that “Knowingly aids, abets or otherwise assists, directly and

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<sup>425</sup> *Rome Statute of the International Criminal Court*, *ibid.* at Art. 7.

<sup>426</sup> Provost, *supra* note 417 at 70-71.

<sup>427</sup> Provost, *ibid.* at 71.

<sup>428</sup> Provost, *ibid.* at 71; *Prosecutor v. Dusko Tadic*, IT-94-1-T, Appeals Judgment (15 July 1999) at paras. 238-272 (International Criminal Tribunal for the Former Yugoslavia, Appeals Chamber) online: <<http://www.un.org/icty/tadic/appeal/judgement/index.htm>>.

<sup>429</sup> Provost, *ibid.* at 71-72. Provost cites additionally: *Prosecutor v. Kupreskic*, IT-95-16-T, Judgment (14 January 2000) at paras. 551-555 (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber) online: <<http://www.un.org/icty/kupreskic/trialc2/judgement/index.htm>>.

substantially, in the commission of such a crime, including providing the means for its commission[.]”<sup>430</sup> Under the Rome Statute, liability for crimes against humanity extends to a person which “For the purpose of facilitating the commission of such a crime, aids, abets or otherwise assists in its commission or its attempted commission, including providing the means for its commission[.]”<sup>431</sup> The criminality of aiding and abetting crimes against humanity has also been established in the jurisprudence of UN Security Council criminal tribunals.<sup>432</sup>

Since the widespread or systematic attack which provides the required context for the commission of crimes against humanity may be the result of either state or non-state policy, and the motive of a person’s committal of crimes against humanity may or may not match the motive of the broader systemic attack against a civilian population, there are diverse scenarios in which crimes against humanity may be found to have occurred. For instance, if a private actor wages a systemic attack, via hired security forces, against civilians and atrocities such as those listed in the Rome Statute<sup>433</sup> or London Charter<sup>434</sup> (i.e., murder or other enumerated crimes) crimes against humanity may be found to have occurred. Alternatively, if a state wages a systemic attack against civilians, driven by racism, using private mercenaries which commit the enumerated crimes, such private mercenaries may be committing crimes against humanity even though they do not have racist motives themselves, but are motivated solely by material gain. To provide a further example, a state may wage a racist attack against a civilian population, and in so doing may inflict the enumerated crimes upon the population; this state and its agents may be furthermore directly funded by a private actor (who has knowledge of the systemic attack against civilians and the committal of the enumerated crimes) who is aiding and abetting the crimes against humanity not out of racism, but out of a tangential motivation, such as a pecuniary interest related to the status of the persecuting state.

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<sup>430</sup> *Draft Code of Crimes against the Peace and Security of Mankind, 1996, supra* note 395 at Art. 2(3)d.

<sup>431</sup> *Rome Statute of the International Criminal Court, supra* note 394 at Art. 25(3)c.

<sup>432</sup> See generally Cory Wanless, “Corporate Liability for International Crimes under Canada’s Crimes Against Humanity and War Crimes Act” (2009) 7:1 *Journal of International Criminal Justice* 201 at 292.

<sup>433</sup> *Rome Statute of the International Criminal Court, supra* note 394 at Art. 7.

<sup>434</sup> *London Charter of the International Military Tribunal, supra* note 344 at Art. 6(c).

An interesting example of how private persons may be implicated in charges of crimes against humanity is the aforementioned *In re Holocaust Victim Assets Litigation*<sup>435</sup>, which ultimately led to settlement between Holocaust survivors and Swiss banks and other institutions. One ruling in the litigation summarizes the basis of the claims:

Plaintiffs alleged that, before and during World War II, they were subjected to persecution by the Nazi regime, including genocide, wholesale and systematic looting of personal and business property and slave labor. Plaintiffs alleged that, in *knowingly* retaining and concealing the assets of Holocaust victims, accepting and laundering illegally obtained Nazi loot and transacting in the profits of slave labor, Swiss institutions and entities, including the named defendants, collaborated with and *aided the Nazi regime in furtherance of war crimes, crimes against humanity, crimes against, peace, slave labor and genocide*.<sup>436</sup>

Such charges thus allege both collaboration with those directly executing the widespread attack against civilians and enumerated crimes and aiding of those directly committing the crimes against humanity.

Other post World War II precedents are also worthy of note for their illustration of private person commission of crimes against humanity. Following the judgment of the International Military Tribunal at Nuremberg, twelve further trials were held at Nuremberg before allied military tribunals which adjudicated charges of crimes against humanity and war crimes. As noted above in the slavery context, three trials of industrialists implicated in Nazi policy were included within such proceedings: the *Krupp* case, the *I.G. Farben* case and the *Flick* case.<sup>437</sup> All three cases were prosecutions of directors and officers of corporate groups which had systemically used slave labour and had been otherwise involved in Nazi policy. In all three cases, convictions of crimes

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<sup>435</sup> *In re Holocaust Victim Assets Litigation*, *supra* note 363; see also Michael J. Bazylar, *Holocaust Justice: The Battle for Restitution in America's Courts*, (New York: NYU Press, 2005).

<sup>436</sup> *In re Holocaust Victim Assets Litigation*, *ibid* at 2.

<sup>437</sup> *United States v. Alfred Krupp et al.*, *supra* note 326; *United States v. Krauch, et al.*, (*The I.G. Farben Case*), *supra* note 328; *United States v. Friedrich Flick*, *supra* note 327.

against humanity were rendered, in particular with regard to the enslavement of civilians.<sup>438</sup> Friedrich Flick was also charged for his financial contributions to the SS.<sup>439</sup>

To conclude, there is a diversity of situations within which crimes against humanity may arise, given their legal construction as various listed crimes (i.e., murder, slavery, rape, forcible transfer) committed by private or state actors within a context of a systemic attack against a civilian population (an attack which is part of a state or non-state policy).<sup>440</sup> As reflected in legal scholarship, treaties, tribunal judgements and other international law documents<sup>441</sup>, the duty not to commit crimes against humanity is a customary duty which international law places upon private persons, and includes aiding and abetting crimes against humanity, whether the aid occurs at the level of the widespread attack upon civilians element of such crimes, or at the specific commission of the enumerated crimes such as murder, slavery, etc..

Therefore, if a corporation has knowledge<sup>442</sup> that it is aiding and abetting the commission of crimes against humanity, such as by funding state or non-state security forces which are themselves performing the crimes against humanity, the corporation is in breach of its duty under public international law not to commit crimes against humanity. Knowledge of the conduct of a potential business partner in relation to a widespread

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<sup>438</sup> *United States v. Alfred Krupp et al.*, *ibid.*; *United States v. Krauch, et al.*, (*The I.G. Farben Case*), *ibid.*; *United States v. Friedrich Flick*, *ibid.*.

<sup>439</sup> *United States v. Friedrich Flick*, *ibid.*

<sup>440</sup> See e.g. Ferdinandusse, *supra* note 337 at 11-12. The International Law Commission's 1996 draft code definition of crimes against humanity perhaps reflects a contemporary enumeration of the crimes which may compose crimes against humanity under customary international law:

(a) Murder; (b) Extermination; (c) Torture; (d) Enslavement; (e) Persecution on political, racial, religious or ethnic grounds; (f) Institutionalized discrimination on racial, ethnic or religious grounds involving the violation of fundamental human rights and freedoms and resulting in seriously disadvantaging a part of the population; (g) Arbitrary deportation or forcible transfer of population; (h) Arbitrary imprisonment; (i) Forced disappearance of persons; [and] (j) Rape, enforced prostitution and other forms of sexual abuse; (k) Other inhumane acts which severely damage physical or mental integrity, health or human dignity, such as mutilation and severe bodily harm.

*Draft Code of Crimes against the Peace and Security of Mankind*, 1996, *supra* note 395 at Art. 18.

<sup>441</sup> On crimes against humanity and the aiding and abetting thereof see e.g. *Rome Statute of the International Criminal Court*, *supra* note 397 at Art. 7 & 25(3)c.; *Principles of International Law Recognized in the Charter of the Nürnberg Tribunal and in the Judgment of the Tribunal*, *supra* note 344 at Principles 6-7. On the customary international law status of crimes against humanity see e.g. *Wiwa v. Royal Dutch Petroleum*, 2002 U.S. Dist. LEXIS 3293 (S.D.N.Y. 22 February 2002) at 9-10, online: <<http://www.derechos.org/nizkor/econ/shell28feb02.html>>.

<sup>442</sup> Note the corporate intent conceptualizations presented earlier. See *supra* note 321.

attack upon a civilian population, and associated commission of murder, rape, torture or other enumerated crimes, should deter a corporation which seeks to be law-abiding from entering into a business relationship with this potential business partner, a relationship which will aid the ability of this potential business partner to commit such crimes against humanity. For example, if a state forcibly clears a tract of land of its civilian inhabitants, in order to offer this land as a mining concession deal, the company that knowingly funds the state's widespread attack upon a civilian population and forcible relocation, is likely committing crimes against humanity itself by knowingly aiding and abetting such crimes against humanity.

When businesses contract with parties which are engaged in systemic attacks against civilians, and committing crimes such as murder, rape or forcible transfer, they are placing themselves in a position of materially aiding the commission of crimes against humanity and being perpetrators themselves. The role of Swiss banks for their aiding of Nazi crimes against humanity (and aforementioned corresponding legal settlement) is an illustrative example of the material aid of crimes against humanity. In sum, individual corporations hold a direct duty in their private capacity under public international law not to commit crimes against humanity and the definition of committing a crime against humanity includes aiding and abetting crimes against humanity.<sup>443</sup> Thus, corporate persons, including MNEs as composites of such persons, have a direct, customary international law duty not to aid and abet crimes against humanity.

### 3.2.7 Duty Not to Commit War Crimes

A seventh duty upon individuals under international law is the duty not to commit war crimes. This duty is different from that of not committing crimes against humanity in that

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<sup>443</sup> See e.g. *Affirmation of the Principles of International Law Recognized by the Charter of the Nürnberg Tribunal*, *supra* note 344; see also *Principles of International Law Recognized in the Charter of the Nürnberg Tribunal and in the Judgment of the Tribunal*, *supra* note 344 at Principles 6-7. For a nuanced discussion of the relationship between investors and states see Sarah Joseph, *Corporations and Transnational Human Rights Litigation* (Portland, Oregon: Hart Publishing, 2004) at 38 & 48-52. See also, FAFO & International Alert, *Red Flags* (London & Oslo: FAFO & International Alert, 2008), online: <[http://www.redflags.info/index.php?page\\_id=11&style\\_id=0](http://www.redflags.info/index.php?page_id=11&style_id=0)>.

war crimes occur during times of armed conflict, whereas crimes against humanity may occur during either war or peace time.<sup>444</sup>

There is a customary element to war crimes, one which has developed over humanity's long experience with warfare. Customary law on war crimes has also been codified and nuanced through treaties and other international instruments. Such instruments include the UN General Assembly Resolution of 11 December 1946 which affirmed the ILC's Nuremberg Principles, a document which at Principle 6 declared the illegality of war crimes, and at Principle 7 held that "Complicity in the commission of a crime against peace, a war crime, or a crime against humanity as set forth in Principle VI is a crime under international law."<sup>445</sup> Like crimes against humanity, war crimes have been addressed in instruments including the ILC's *Draft Code of Crimes Against the International Peace and Security of Mankind*, the Statute of the International Criminal Tribunal for the Former Yugoslavia and the Rome Statute of the International Criminal Court.<sup>446</sup> The London Charter provides a succinct definition of war crimes at Article 6 (b):

WAR CRIMES: namely, violations of the laws or customs of war. Such violations shall include, but not be limited to, murder, ill-treatment or deportation to slave labor or for any other purpose of civilian population of or in occupied territory, murder or ill-treatment of prisoners of war or persons on the seas, killing of hostages, plunder of public or private property, wanton destruction of cities, towns or villages, or devastation not justified by military necessity<sup>447</sup>

Other treaties delineate the laws and customs of war, some predating the London Charter. As the Nuremberg Judgement states, the acts described in the London Charter were already covered in the *Hague Convention of 1907* (Articles 46, 50, 52, and 56) and

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<sup>444</sup> See e.g. Robertson, *supra* note 356 at 295.

<sup>445</sup> *Principles of International Law Recognized in the Charter of the Nürnberg Tribunal and in the Judgment of the Tribunal*, *supra* note 344 at Principles 6-7.

<sup>446</sup> See e.g. *Principles of International Law Recognized in the Charter of the Nürnberg Tribunal and in the Judgment of the Tribunal*, *ibid.* at Principle 6; *Draft Code of Crimes against the Peace and Security of Mankind*, 1996, *supra* note 395 at Art. 20; *Updated Statute of the International Criminal Tribunal for the Former Yugoslavia*, *supra* note 423 at Art. 3; *Rome Statute of the International Criminal Court*, *supra* note 397 at Art. 8.

<sup>447</sup> *London Charter of the International Military Tribunal*, *supra* note 344 at Art. 6 (b).

the *Geneva Convention of 1929* (Articles 2, 3, 4, 46 and 51).<sup>448</sup> The Geneva Conventions of 1949 echo the language of the London Charter, above, listing some of the same acts as those contained in Charter Article 6 (b) in the Geneva Conventions' descriptions of a "grave breach" act requiring prosecution before member states' national courts and related provision of effective penal sanctions.<sup>449</sup> The 1977 Protocols I and II to the Geneva Conventions of 1949 furthermore provide a basis for an individual duty under public international law not to commit war crimes.<sup>450</sup>

Originally, individual responsibility for the war crimes included a state action requirement.<sup>451</sup> However, individual responsibility for war crimes now extends to non-state actors acting in a private capacity, as seen in the Rome Statute and in UN Security Council Tribunal judgements.<sup>452</sup>

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<sup>448</sup> "Judgement : The Law Relating to War Crimes and Crimes Against Humanity" in *Judgment of the International Military Tribunal for the Trial of German Major War Criminals*, online: <<http://avalon.law.yale.edu/imt/judlawre.asp>>, *supra* note 47; *Convention (IV) respecting the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land. The Hague, 18 October 1907.*, 18 October 1907, 205 Consol. T.S. 277 (entered into force 26 January 1910); *Geneva Convention of 27 July 1929 Relative to the Treatment of Prisoners of War, Geneva July 27, 1929.*, 27 July 1929, 118 L.N.T.S. 343 (entered into force 19 June 1931), online: <<http://www.icrc.org/IHL.NSF/FULL/305?OpenDocument>>.

<sup>449</sup> *London Charter of the International Military Tribunal*, *supra* note 344 at Art. 6 (b); *Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, August 12, 1949.*, 12 August 1949, 75 U.N.T.S. 31, Arts. 49-50, online: <<http://www.icrc.org/ihl.nsf/COM/365-570001?OpenDocument>> (entered into force 21 October 1950); *Convention (II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea. Geneva, 12 August 1949.*, 12 August 1949, 75 U.N.T.S. 85, Arts. 50-51; *Convention (III) relative to the Treatment of Prisoners of War. Geneva, 12 August 1949.*, 12 August 1949, 75 U.N.T.S. 135, Arts. 129-130, online: <<http://www.unhchr.ch/html/menu3/b/91.htm>> (entered into force 21 October 1950); *Convention (IV) relative to the Protection of Civilian Persons in Time of War. Geneva, 12 August 1949.*, 12 August 1949, 75 U.N.T.S. 287, Arts. 146-147, online: <<http://www.unhchr.ch/html/menu3/b/92.htm>>. Shaw notes in particular a twofold significance of the 1949 Conventions. First, they do not limit the application of the grave breaches provisions to state actors. Second, at Common Article 3, the conventions expressly regulate non-international armed conflicts, establishing directly binding rules upon non-state armed groups. See Shaw, *International Law*, *supra* note 5 at 186.

<sup>450</sup> *Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I)*, 8 June 1977, 1125 U.N.T.S. 3, Arts. 11, 51, 54 & 85, online: <<http://www.unhchr.ch/html/menu3/b/93.htm>>; *Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II)*, 8 June 1977, 1125 U.N.T.S. 609, Art. 4(2), online: <<http://www1.umn.edu/humanrts/instree/y6page.htm>> (entered into force 7 December 1978).

<sup>451</sup> See e.g. Norgaard *supra* note 26 at 83.

<sup>452</sup> See e.g. Chinkin, "Monism and Dualism: the Impact of Private Authority on the Dichotomy Between National and International Law" *supra* note 316 at 146.

Individuals have been found to be in breach of their duty not to commit war crimes in various international fora, including UN Security Council Tribunals, the International Military Tribunal at Nuremberg and other post-World War II military tribunals.<sup>453</sup> For example, the aforementioned *Flick* and *I.G. Farben* U.S. military trials led to individual charges of war crimes.<sup>454</sup> In the *Trial of Bruno Tesch and two others*, a British Military Tribunal at Hamburg found the owner of a company which supplied Zyklon-B to Nazi camps guilty of war crimes, holding that a civilian may breach international law's duty upon individuals not to commit war crimes. In the words of the court:

The decision of the Military Court in the present case is a clear example of the application of the rule that the provisions of the laws and customs of war are addressed not only to combatants and to members of state and other public authorities, but to anybody who is in a position to assist in their violation. The activities with which the accused in the present case were charged were commercial transactions conducted by civilians. The Military Court acted on the principle that any civilian who is an accessory to a violation of the laws and customs of war is himself also liable as a war criminal.<sup>455</sup>

It is not clear from the judgement whether Bruno Tecsh was charged as a civilian who functionally become an organ of the state, and thus acted in a state capacity, or if he was charged as a civilian culpable as a result of actions taken in his private capacity (i.e., acts of complicity). Either construction appears possible. Regardless, current international law poses a duty upon individuals acting either in a state or private capacity not to commit war crimes, including not to aid and abet war crimes.<sup>456</sup> This duty is reflected in custom, treaty, commentary and international judgements and other instruments.<sup>457</sup>

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<sup>453</sup> See e.g. *Prosecutor v. Radislav Krstic*, IT-98-33-A, Judgment (19 April 2004) at 87 (International Criminal Tribunal for the Former Yugoslavia, Appeals Chamber) online: <<http://www.icty.org/x/cases/krstic/acjug/en/krs-aj040419e.pdf>>.

<sup>454</sup> *United States v. Friedrich Flick*, *supra* note 324; *U.S. v. Krauch, et al.*, (*The I.G. Farben Case*), *supra* note 325.

<sup>455</sup> *The Zyklon B Case*, *supra* note 326 at 103.

<sup>456</sup> See e.g. *Principles of International Law Recognized in the Charter of the Nürnberg Tribunal and in the Judgment of the Tribunal*, *supra* note 344 at Principles 6-7; *Rome Statute of the International Criminal Court*, *supra* note 397 at Art. 7 & 25(3) c.

<sup>457</sup> Steinhart, *supra* note 341 at 196. Higgins notes that "The Nuremberg Trials made clear and the UN General Assembly has formally affirmed, that the individual - and not only the state - is under international law duties concerning the waging of wars of aggression, crimes against humanity and war crimes" [internal footnotes excluded]. Rosalyn Higgins, "Conceptual Thinking about the Individual in International Law" (1978) 4:1 *British Journal of International Studies* 1 at 15.

### 3.2.8 Duty Not to Commit Crimes Against Peace

It is worthwhile to note briefly another form of individual duty which exists under public international law, the duty not to commit crimes against peace, or in other words not to commit the crime of aggression. This individual duty is the corollary of the customary prohibition on the use of force outlined in Article 2 of the United Nations Charter.<sup>458</sup> In custom, as reflected in treaties and other instruments<sup>459</sup>, there exists an individual duty, albeit arguably customarily in the form of state organ rather than private capacity<sup>460</sup>, that requires individuals not to commit the crime of aggression. The crime of aggression was among the charges at the main Nuremberg tribunals as well as subsequent Nuremberg tribunals and related military trials. It is also contained in the Rome Statute as a crime that the International Criminal Court will have jurisdiction over once the international community agrees upon an acceptable definition.<sup>461</sup> While the Rome Statute does not define the crime of aggression, other descriptions of the crime of aggression are contained in the ILC's Nuremberg Principles (called "crimes against peace") adopted by the UN General Assembly, as well as in the London Charter establishing the International Military Tribunal.<sup>462</sup>

In sum, there exists a customary international law duty upon individuals, at least those acting in a state capacity<sup>463</sup>, not to breach the prohibition of the use of force as outlined in

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<sup>458</sup> *Charter of the United Nations*, 26 June 1945, 1 U.N.T.S. 16, Arts. 2(3) & 2(4), online: <<http://www.unhchr.ch/html/menu3/b/ch-cont.htm>> (entry in to force 24 October 1945).

<sup>459</sup> *Rome Statute of the International Criminal Court*, *supra* note 397 at Art. 5; *Principles of International Law Recognized in the Charter of the Nürnberg Tribunal and in the Judgment of the Tribunal*, *supra* note 344 at Principle 6.

<sup>460</sup> Norgaard, *supra* note 26; Daes, *supra* note 315 at 41. There is no state action required in the Rome Statute, however. See *Rome Statute of the International Criminal Court*, *ibid.* at Art. 5.

<sup>461</sup> *Rome Statute of the International Criminal Court*, *ibid.* at Art. 5(2).

<sup>462</sup> *Principles of International Law Recognized in the Charter of the Nürnberg Tribunal and in the Judgment of the Tribunal*, *supra* note 344 at Principle 6; see also *London Charter of the International Military Tribunal*, *supra* note 344 at Art. 6.

<sup>463</sup> Whether an individual acting in a private capacity can aid and abet another's commission of a crime which has a state action requirement appears to be an unsettled point of international law. US domestic ATCA cases have permitted claims related to private individual's aiding and abetting of crimes which have a state action requirement. See Sarah Joseph, *Corporations and Transnational Human Rights Litigation*, *supra* note 446 at 38 & 48; Note that apartheid case cited above did not accept that apartheid was a private capacity individual crime, but rather required state action, nonetheless permitted claims of aiding and abetting a apartheid to continue in the lawsuit. *In re South African Apartheid Litigation* (8 April 2009), *supra* note 314.

the United Nations Charter. This duty is blunted by the need for further consensus on the definition of the crime. The uneasy nexus between international law and international power politics is particularly stark when one discusses the legal construction and application of the crime of aggression.<sup>464</sup> Despite this, the duty upon private persons under international law not to plan, initiate or execute an international campaign of illegal force is clearly part of customary international law and reflected in the UN Charter.

### 3.2.9 *Duty Not to Commit Torture or other Breaches of International Law*

Most of the duties outlined above have applied to persons acting in a private capacity, while one duty, that related to crimes against peace has been presented as applying to individuals acting as an organ of the state. In other words, the prohibition against crimes against peace appears to require a state action element in order to be within the purview of public international law. Like the prohibition against committing crimes against peace, there are other duties upon individuals which may require a nexus with state agency in order to trigger individual responsibility under public international law. For instance, while there is scholarship that supports the view that torture is a *jus cogens* crime under customary international law, potentially without a state action requirement, the Convention Against Torture (CAT) appears to directly prohibit torture conducted by individuals acting in connection with a state, without directly prohibiting torture done without any connection to a state.<sup>465</sup> This means that under the CAT an individual is prohibited from torturing on behalf of a state. Under custom alone it is unclear whether there is a state action requirement to the prohibition against torture, and adequate analysis of this question is unfortunately beyond the scope of this thesis. In addition, there is support for the idea that a private individual is also prohibited from aiding and abetting a

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<sup>464</sup> Robertson discusses the element of hypocrisy in Nuremberg aggression charges. Robertson, *supra* note 356 at 213-214.

<sup>465</sup> See e.g. Bassiouni, *supra* note 317 at 68. See Robertson, *ibid.* at 231-232; *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, 10 December 1984, 1465 U.N.T.S. 85, online: <[http://www.unhchr.ch/html/menu3/b/h\\_cat39.htm](http://www.unhchr.ch/html/menu3/b/h_cat39.htm)>. (entered into force 26 June 1987); see generally Rachel Lord, "The Liability of Non-State Actors for Torture in Violation of International Humanitarian Law: An Assessment of the Jurisprudence of the International Criminal Tribunal for the Former Yugoslavia" (2003) 1:4 Melbourne Journal of International Law 112, online: <[http://mjil.law.unimelb.edu.au/issues/archive/2003\(1\)/04Lord.pdf](http://mjil.law.unimelb.edu.au/issues/archive/2003(1)/04Lord.pdf)>.

state actor's commission of torture, although this idea is complex enough to merit an entire additional thesis examination on its own.<sup>466</sup> If torture is committed in a manner that leads it to fall within the category of either a war crime, or a crime against humanity, no state action is needed in order for a private person to have a duty not to commit such torture under international law.

In addition to a duty not to commit torture, international law likely also places other duties upon individuals acting in a state capacity. Joseph notes that ATCA judgements in the US:

[...] have found that rape, summary execution, torture, cruel inhuman and degrading treatment, pollution of international waters contrary to UNCLOS, crimes against humanity, rights to associate and organise, and racial discrimination are presently proscribed by the law of nations only when state action is present.<sup>467</sup>

A precise examination of how individual liability accrues to persons (acting as state organs) who commit any or all of the above acts is beyond the scope of this paper, as is a fulsome analysis of the legal duty upon private persons not to aid and abet such state behaviour. That said, *jus cogens* crimes such as torture<sup>468</sup> seem unequivocally to merit a holding that such behaviour is not permitted under international law either by individuals acting on behalf of a state, or by private individuals aiding and abetting torture by a state agent.

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<sup>466</sup> See e.g. Sarah Joseph, *Corporations and Transnational Human Rights Litigation*, *supra* note 443 at 38 & 48-52.

<sup>467</sup> Sarah Joseph, *Corporations and Transnational Human Rights Litigation*, *ibid.* at 48 [footnotes excluded]. As discussed, this crimes against humanity reading in ATCA jurisprudence contrasts with international law fora which has not kept a state action requirement. Chinkin, "Monism and Dualism: the Impact of Private Authority on the Dichotomy Between National and International Law" *supra* note 316 at 146.

<sup>468</sup> Bassiouni, *supra* note 317 at 68.

### **3.3 Additional Duties of Corporate Persons Established in Treaty**

In addition to the duties on natural and corporate person which flow from customary international law, various treaties also impose duties upon individuals. Profiled in this section are treaties which establish duties for corporate persons specifically.

In contrast to direct duties on individuals with a basis in customary international law, treaty-based duties of individuals are quite open to the criticism that they are actually state duties requiring that states ensure particular conduct on the part of persons within their jurisdiction. In other words, in a fashion similar to the derivative vs. direct investor rights debate discussed in Chapter 2, treaty duties of individuals may be regarded as not actually targeting individuals, but merely creating derivative duties for individuals which are an indirect by-product of treaty obligations of states. Due to this vulnerability of treaty-based individual duties, my argument that MNEs hold legal personality relies more upon the duties of corporate persons evident in customary international law than the duties of corporate persons established in treaty. Depending on the wording of treaties, the view that duties are derivative rather than direct may not always be sustainable, however, particularly where treaty language focuses not on states, but on private individuals. Moreover, the mention of corporate persons in binding international instruments is in and of itself significant because it reflects the international legal system's deepening acknowledgement of corporate actors. One's view as to whether a treaty creates individual duties or only state duties will also depend upon one's primary theoretical framework (e.g., one's orientation towards positivism or natural law) as well as one's association with either a dualist or monist approach to explaining the application of international law within states.

This section has attempted to focus upon treaties which are multilateral with a significant number of signatories. Therefore, although relevant to the international establishment of individual duties, regional treaties and EU agreements have not been surveyed in detail in this section. Two categories of treaty obligations are briefly

presented in this section, those related to (1) financial crime; and (2) environmental regulation.

### 3.3.1 UN Conventions Relating to Financial Crime

Three conventions require mention for their extension of liability to corporate persons for financial offences. The first treaty to be noted is the 1999 *International Convention for the Suppression of the Financing of Terrorism* which entered into force in 2002 and, as of April 2009, had seen ratification by 167 states.<sup>469</sup> This treaty declares at Article 2 that a person commits an offence if the person finances terrorism and furthermore declares at Article 5 that a legal entity must be exposed to potential domestic legal liability when a person responsible for the management or control of that legal entity finances terrorism.<sup>470</sup> This treaty thus establishes potential liability for corporations where officers or directors commit the offence of financing terrorism.

A second treaty of note for its provisions in relation to corporations is the 2000 *United Nations Convention against Transnational Organized Crime* or Palermo Convention (which entered into force in 2003 and currently has 149 state parties<sup>471</sup>), and its three protocols relating to human trafficking, illicit firearms and migrant smuggling.<sup>472</sup> The

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<sup>469</sup> *International Convention for the Suppression of the Financing of Terrorism*, 9 December 1999, 39 I.L.M. 268, online: <<http://untreaty.un.org/english/Terrorism/Conv12.pdf>>; On ratification status see United Nations Treaty Collection, "CHAPTER XVIII: Penal Matters" *Multilateral Treaties Deposited with the Secretary-General*, online:

<[http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=XVIII-11&chapter=18&lang=en](http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XVIII-11&chapter=18&lang=en)>.)

<sup>470</sup> See *International Convention for the Suppression of the Financing of Terrorism*, *ibid.* at Arts. 2 & 5. Art. 5 (1) of the convention holds that:

Each State Party, in accordance with its domestic legal principles, shall take the necessary measures to enable a legal entity located in its territory or organized under its laws to be held liable when a person responsible for the management or control of that legal entity has, in that capacity, committed an offence set forth in article 2. Such liability may be criminal, civil or administrative.

<sup>471</sup> *United Nations Convention against Transnational Organized Crime*, *supra* note 374. On ratification status see United Nations Treaty Collection, "CHAPTER XVIII: Penal Matters" *Multilateral Treaties Deposited with the Secretary-General*, online:

<[http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=XVIII-12&chapter=18&lang=en](http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XVIII-12&chapter=18&lang=en)>.

<sup>472</sup> *Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children*, 15 November 2000, (entered into force: 25 December 2003), (Status: Parties: 128); *Protocol against the Illicit Manufacturing of and Trafficking in Firearms, Their Parts and Components and Ammunition*, 31 May 2001 (entered into force: 3 July 2005) (Status: Parties: 79); *Protocol against the Smuggling of Migrants by Land*,

convention declares at Article 10<sup>473</sup> that states must establish potential liability of legal persons within their domestic systems for participation in crimes to which a penalty of at least four years applies, as well as for several offenses outlined in the convention, namely “participation in an organized criminal group”, “laundering of the proceedings of crime”, “corruption” and “obstruction of justice”.<sup>474</sup> This widely ratified treaty thus clearly supports the notion of corporate liability for criminal offences, but unlike the previous convention imposes a duty or obligation only on the state.

A third treaty of note is the 2003 *United Nations Convention against Corruption* or Merida Convention, which entered into force in 2005 and has 136 parties as of April 2009.<sup>475</sup> As with the *Convention for the Suppression of the Financing of Terrorism* and the *United Nations Convention against Transnational Organized Crime*, the Merida convention at Article 26 requires the establishment of legal person liability under national law for convention offences.<sup>476</sup> Offences under the convention include bribery in both the public and private sector as well as embezzlement and misappropriation of property.<sup>477</sup>

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*Sea and Air*, 15 November 2000 (entered into force: 28 January 2004) (Status: Parties: 119); all three online: <http://www.unodc.org/documents/treaties/UNTOC/Publications/TOC%20Convention/TOCebook-e.pdf>

<sup>473</sup> *United Nations Convention against Transnational Organized Crime*, *supra* note 374 at Arts. 2 & 10. Art. 10 (“Liability of legal persons”) of this convention holds that

1. Each State Party shall adopt such measures as may be necessary, consistent with its legal principles, to establish the liability of legal persons for participation in serious crimes involving an organized criminal group and for the offences established in accordance with articles 5, 6, 8 and 23 of this Convention. [...]

4. Each State Party shall, in particular, ensure that legal persons held liable in accordance with this article are subject to effective, proportionate and dissuasive criminal or non-criminal sanctions, including monetary sanctions.

<sup>474</sup> *United Nations Convention against Transnational Organized Crime*, *ibid.* Arts. 5, 6, 8 & 23.

<sup>475</sup> *United Nations Convention against Corruption*, 31 October 2003, in GA Res. 58/4, UN GAOR, 58<sup>th</sup> Sess., UN. Doc. A/RES/58/4 (2003), online: <[http://www.unodc.org/documents/treaties/UNCAC/Publications/Convention/08-50026\\_E.pdf](http://www.unodc.org/documents/treaties/UNCAC/Publications/Convention/08-50026_E.pdf)> (entered into force 14 December 2005) (reprinted in 43 I.L.M 37); On ratification status see United Nations Treaty Collection, “CHAPTER XVIII: Penal Matters” *Multilateral Treaties Deposited with the Secretary-General*, online: <[http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=XVIII-14&chapter=18&lang=en](http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XVIII-14&chapter=18&lang=en)>.)

<sup>476</sup> *United Nations Convention against Corruption*, *ibid.* at Art. 26. The wording closely resembles that seen in the *United Nations Convention against Transnational Organized Crime*. See *United Nations Convention against Transnational Organized Crime*, *supra* note 374 at Art. 10.

<sup>477</sup> *United Nations Convention against Corruption*, *ibid.* at Arts. 15, 16, 17, 18 & 21; See also Cheon-Ann Png, “International Legal Sources I-The United National Conventions, in William Blair & Richard Brent, eds., *Banks and Financial Crime: The International Law of Tainted Money*, *supra* note 319,41 at 48-49.

In addition to treaties, the UN has also addressed the issue of financial support for terrorism through the UN Security Council, employing an executive approach. The Security Council, in the form of the Resolution 1267 Committee<sup>478</sup>, maintains a list of entities and natural persons with reported links to either the Taliban or Al-Qaida. The list contains more than 500 entries, including what appear to be approximately 40 corporate persons.<sup>479</sup> When a natural person or entity is included on this list, UN Member states are obliged to freeze the entity or natural person's assets. Corporate persons may thus be the direct target of Security Council resolution established asset-freezes.

### 3.3.2 Conventions Relating to Environmental Regulation,

Among the treaties related to environmental regulation which concern corporate persons is the *Global Convention on the Control of Transboundary Movements of Harzardous Wastes*, also known at the Basel Convention.<sup>480</sup> With 172 state parties, this treaty defines 'person' as 'any natural or legal person' and declares the illegal transport of harzardous wastes by such persons to be criminal. The treaty places a duty upon member states to pass legislation which prevents and punishes the illegal transport of hazardous substances executed by such persons.<sup>481</sup>

Turning to another field, the *Protocol of 1992 to Amend the International Convention on Civil Liability for Oil Pollution Damage, 1969*<sup>482</sup> along with the *Protocol of 1992 to*

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<sup>478</sup> Establishes Security Council Committee; imposes limited air embargo and funds and financial assets embargo on the Taliban, UN Security Council Res. 1267, UN Doc. S/RES/1267 (15 October 1999), online: <<http://www.un.org/Docs/sc/committees/1267/1267ResEng.htm>>.

<sup>479</sup> The Consolidated List established and maintained by the 1267 Committee with respect to Al-Qaida, Usama bin Laden, and the Taliban and other individuals, groups, undertakings and entities associated with them, UN Security Council Resolution 1267 Committee, (last updated 27 May 2009), online: <<http://www.un.org/sc/committees/1267/pdf/consolidatedlist.pdf>>.

<sup>480</sup> *Global Convention on the Control of Transboundary Movements of Hazardous Wastes*, *supra* note 331.

<sup>481</sup> *Global Convention on the Control of Transboundary Movements of Hazardous Wastes*, *ibid.* at Art. 2, 4, 9 (5); On ratification status see United Nations Treaty Collection, "CHAPTER XXVII: Environment" *Multilateral Treaties Deposited with the Secretary-General*, online: <[http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=XVIII-14&chapter=18&lang=en](http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XVIII-14&chapter=18&lang=en)>.

<sup>482</sup> *Protocol of 1992 to Amend the International Convention on Civil Liability for Oil Pollution Damage, 1969*, 27 November 1992, online: <<http://www.jus.uio.no/lm/imo.civil.liability.oil.pollution.damage.protocol.1992/doc#34>> (entered into force 30 May 1996).

*Amend the International Convention on the Establishment of an International Fund For Compensation for Oil Pollution Damage, 1971*<sup>483</sup> operate to create a system whereby private companies or other entities which receive oil transported by sea at member state ports are required to pay into a fund for redistribution to victims of oil spill pollution.<sup>484</sup>

### 3.4 Conclusion

This chapter has outlined nine customary duties held by MNEs as composites of corporate persons under public international law. For instance, a longstanding prohibition upon piracy and slavery applies to natural and corporate persons alike. Post World War II legal developments also have placed war crimes and crimes against humanity squarely in the realm of customary international law, with natural and corporate person duties evident in relation to both. Genocide has furthermore also taken its place as an international crime *vis-à-vis* all individuals, corporate persons or otherwise. These and other duties upon MNEs are outlined in the chart below. All of these duties relate to *jus cogens* crimes, manifestations of *jus cogens* norms, except for (3) Breach of Blockade/ Carriage of Contraband. While Breach of Blockade/ Carriage of Contraband is not *jus cogens*, it is nonetheless a private person duty established in customary international law, created by state practice and *opinio juris*.

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<sup>483</sup> *Protocol Of 1992 To Amend The International Convention On The Establishment Of An International Fund For Compensation For Oil Pollution Damage, 1971*, 29 November 1992, online: <<http://www.jus.uio.no/lm/imo.fund.compensation.oil.pollution.damage.protocol.1992/landscape.pdf>>; (entered into force 30 May 1996).

<sup>484</sup> *Protocol Of 1992 To Amend The International Convention On The Establishment Of An International Fund For Compensation For Oil Pollution Damage, 1971*, *ibid.* at Art. 29.

*The Duties of Private Persons under Customary International Law: Summary Chart*

Duty [not to commit...]	Applicable to Individual in Private Capacity?	Applicable to Individual Acting in State Capacity?	Corresponds to <i>jus cogens</i> crime? (Bassiouni listing <sup>485</sup> )	Customary International Law Status of Individual Duty?
1. Piracy	Yes	N/A (pirates are independent of states)	Yes	Yes
2. Slavery	Yes	Yes	Yes	Yes
3. Breach of Blockade/ Carriage of Contraband	Yes	N/A (private duty on ship owners and operators)	No	Yes
4. Apartheid (Systemic Racial Discrimination)	Yes under Apartheid Treaty and Rome Statute; Yes also under custom if committed as crime against humanity	Yes	Yes (as crime against humanity)	Yes (as crime against humanity)
5. Genocide	Yes	Yes	Yes	Yes
6. Crimes Against Humanity	Yes	Yes	Yes	Yes
7. War Crimes	Yes	Yes	Yes	Yes
8. Crime of Aggression	Unclear	Yes	Yes	Yes
9. Torture	Unclear	Yes	Yes	Yes

In addition, this chapter has presented evidence for the fact that corporations have the capacity for duties in relation to international criminal law and other areas of international law. Multilateral treaties profiled here, such as the 1999 *International Convention for the Suppression of the Financing of Terrorism*, establish the principle of corporate liability for internationally agreed upon offences.

The legal duties of corporate persons, and of the MNEs they constitute, are an important element of MNE personality under public international law. As Chapter 4 discusses, the duties and rights of MNEs under public international law, and the legal personality that they reflect, are an important development for the furtherance of the rule of law within the global economy.

<sup>485</sup> Bassiouni, *supra* note 317 at 68.

## Chapter 4: The Application of MNE Personality to the Governance Gap Problem

### 4.1 The Thesis Revisited

I have argued in this thesis that rights are conferred to MNE investors under public international law via treaties which enumerate substantive investor rights and grant investors the procedural rights required to enforce such substantive rights at international law through binding arbitration. This conferral of rights has been effected on a massive scale. Most of the more than 2600 Bilateral Investment Treaties<sup>486</sup> (BITs) currently in force enable investor-state arbitration<sup>487</sup>, as do influential regional and sectoral treaties such as the Energy Charter Treaty (48 ratifying states<sup>488</sup>), the NAFTA, the Arab Investment Treaty<sup>489</sup> and the ASEAN investment treaty.<sup>490</sup>

From a practical perspective, investor rights are obvious and are widely discussed in investment law literature.<sup>491</sup> The precise legal characterization of such rights has also been reviewed in this thesis. I subscribe to the view that investor rights are direct international law rights.<sup>492</sup> I disagree with a competing characterization which holds that BITs do not grant investors direct rights, but only grant home state rights. This latter derivative rights theory views investors as mere enforcers of their home state rights, as acting without themselves holding international law rights. This derivative rights explanation is appropriate for diplomatic protection claims, in which investors have no

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<sup>486</sup> UNCTAD, *World Investment Report 2008*, *supra* note 13 at xvii.

<sup>487</sup> OECD, *Improving the System of Investor-State Dispute Settlement: An Overview*, *supra* note 120 at 4.

<sup>488</sup> See Energy Charter Secretariat, "Status of Membership - Energy Charter Treaty 08 May 2007" online: <[http://www.encharter.org/fileadmin/user\\_upload/document/Public\\_ratification\\_Treaty.pdf](http://www.encharter.org/fileadmin/user_upload/document/Public_ratification_Treaty.pdf)> (Ratifications as of May 2007).

<sup>489</sup> *Unified Agreement for the Investment of Arab Capital in the Arab States*, 26 November 1980, (2004) 1:4 Transnational Dispute Management, online: <[http://www.transnational-dispute-management.com/samples/freearticles/tv1-4-article\\_1.htm](http://www.transnational-dispute-management.com/samples/freearticles/tv1-4-article_1.htm)> (entered into force 7 September 1981); see also Walid Ben Hamida, "The First Arab Investment Court Decision" (2006) 7:5 Journal of World Investment and Trade 699.

<sup>490</sup> *Agreement among the Government of Brunei Darussalam, the Republic of Indonesia, Malaysia, the Republic of the Philippines, the Republic of Singapore and the Kingdom of Thailand for the Promotion and Protection of Investments*, 15 December 1987, online: <<http://www.aseansec.org/6464.htm>>.

<sup>491</sup> See Part II of McLachlan et al, entitled "Substantive Rights", Campbell McLachlan, Laurence Shore & Matthew Weiniger, *International Investment Arbitration*, (Oxford: Oxford University Press, 2007) at 197.

<sup>492</sup> Douglas, *supra* note 225 at 182.

international law agency themselves but are wholly reliant on the discretionary action of their home state. However, it is not a satisfactory characterization of investment treaty arbitration, a process which is significantly removed from diplomatic protection.<sup>493</sup>

Rather than investors lacking discretion with regard to claims, in investment treaty arbitration it is home states which lack discretion regarding the launch of claims. In pursuing investment treaty arbitration, investors are without doubt exercising some rights on their own and these rights are not domestic law rights but are public international law rights.<sup>494</sup> Insisting that investors have no legal rights themselves, in the face of the aforementioned more than 318 (publicly known) treaty arbitrations which have been initiated by investors, would arguably be an unthinkable stance for those who favour common sense over legal magicry.

What is particularly interesting about the investment law rights which are granted to corporate investors is that such rights have been interpreted to operate in a way that gives shape to the MNE as a unified economic actor. Claims are permitted to proceed initiated by corporate investors which are not the direct owners of the home state investment at issue, but rather are one or several layers of corporate ownership away from the investment. With indirect ownership of an investment seemingly sufficient<sup>495</sup> to grant investor standing under most BITs<sup>496</sup>, MNEs can commence BIT arbitration proceedings in relation to one of their corporate entities from presumably anywhere along the MNE corporate ownership chain. This approach to treaty arbitration enables MNEs to act

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<sup>493</sup> See e.g. *infra* note 232.

<sup>494</sup> See *Convention on the Settlement of Investment Disputes between States and Nationals of Other States*, *supra* note 241 at Art. 42. As well, the *Vienna Convention on the Law of Treaties* is cited in investment treaty awards which interpret investor rights. This would not occur if arbitrations were pursuant to domestic law rights. See e.g. *Enron Corp and Ponderosa Assets LP v. Argentina*, *supra* note 116 at para. 32. Furthermore, as McLachlan explains,

“[...] where the obligations in question are those created under international law, as in the case of treaty obligations, there is no doubt that the applicable law is potentially international law as a whole. As the Annulment Committee in *MTD v Chile* put it: ‘... the Tribunal had to apply international law as a whole to the claim, and not the provisions of the BIT in isolation.’

McLachlan, *supra* note 133 at 370. McLachlan cites *MTD Equity v. Chile* (2007), Annulment Award of 21 March 2007, (ICSID Case No ARB/01/7) at paras. 61-62, online: <[http://ita.law.uvic.ca/documents/MTD-Chile\\_Ad\\_Hoc\\_Committee\\_Decision.pdf](http://ita.law.uvic.ca/documents/MTD-Chile_Ad_Hoc_Committee_Decision.pdf)>.

<sup>495</sup> For example, indirect claims have been arbitrated in disputes including the following: *Azurix Corp v. Argentina*, *supra* note 116 at para. 67; *Waste Management Inc v. Mexico*, *supra* note 116 at para. 77. *Siemens AG v. Argentina* (2004), *supra* note 116 at para. 122.

<sup>496</sup> John Savage, “Investment Treaty Arbitrations and Asia: Review of Developments in 2005 and 2006”, *supra* note 268 at 16.

within the international system as the unified economic beings that they are. Furthermore, the dominant approach in arbitration is to take investor nationality at face value, without piercing the veil to reveal disqualifying ownership or control from a non-BIT state.<sup>497</sup> This is the “multiple claims” scenario the ICJ in *Barcelona Traction* sought to avoid in its ruling.<sup>498</sup> This allowance of indirect claims, combined with a face value approach to nationality, empowers MNEs to operate as unified players within the investment law system, letting them initiate claims from anywhere along their corporate ownership chain in relation to their investments.

What are the ramifications of such investment law rights for MNEs? In my view, such rights, combined with the direct customary law duties upon corporate persons discussed in Chapter 3, reflect the establishment in international law of the capacity of MNEs for right and duties, and thus the establishment of the legal existence and personality of MNEs under public international law. The widespread status of MNEs’ capacity for rights is seen in the way that BITs have been ratified by 174 UN member states.<sup>499</sup> The majority of these treaties grant MNEs the ability to arbitrate claims against host countries when they perceive that their international law rights have been violated.<sup>500</sup> Such treaties are in addition to resolutions pertaining to MNEs which have been passed at the UN General Assembly, as well as instruments adopted at other organizations with very broad state membership, such as the ILO.<sup>501</sup>

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<sup>497</sup> *Tokios Tokelès v. Ukraine*, *supra* note 136; *Aguas del Tunari, SA. v. Republic of Bolivia*, *supra* note 117 at para. 332; *Saluka Investments BV v. Czech Republic* (2004), *supra* note 250; *Saluka Investments BV v. Czech Republic* (2006), *supra* note 175; *ADC Affiliate Limited and ADC & ADMC Management Limited v. Hungary*, *supra* note 186.

<sup>498</sup> *Barcelona Traction*, *supra* note 239 at para. 56.

<sup>499</sup> See *supra* note 145. UN, “UN Members”, *supra* note 143; UNCTAD, “Country Specific Lists of BITs”, *supra* note 143.

<sup>500</sup> UNCTAD, *Latest Developments in Investor-State Dispute Settlement* (2009), *supra* note 126 at 2.

<sup>501</sup> See e.g. *United Nations Declaration against Corruption and Bribery in International Commercial Transactions*, GA Res. 51/191, UN GAOR, 6 December 1996, UN Doc. A/RES/51/191, online: <<http://www.un.org/documents/ga/res/51/a51r191.htm>>. At item 6, this resolution, “Encourages private and public corporations, including transnational corporations, and individuals engaged in international commercial transactions to cooperate in the effective implementation of the Declaration”; see also ILO, *Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy*, *supra* note 75.

As noted in previous chapters, as of December 2008, at least 318 known investment treaty disputes had been initiated against 78 respondent states.<sup>502</sup> Given that the vast majority of states have signed BITs and other investment treaties which extend rights to MNE investors, as well as states' demonstrated cooperation in treaty arbitrations, an argument can be made that the state granted *capacity* of MNEs for international rights is sufficiently supported by state practice and *opinion juris* to have become part of customary international law.<sup>503</sup> To be clear, I am not arguing that the precise rights contained in specific BITs are now custom, but that investors' *capacity* for international law rights has developed within customary law, extending MNE legal personality in public international law even as against the few states which do not appear to have ratified a BIT or similar agreement.<sup>504</sup> As discussed earlier in the context of the *Reparations Case* there is a customary element to the willed establishment of legal personality, since treaty interpretation alone does not explain the universal operation of international organization legal personality as against non-member states. Furthermore, custom aside, MNEs' capacity for rights and duties clearly exists in relation to the 174 states which themselves have ratified rights granting treaties.

A pervasive definition of legal personality under public international law is the capacity for rights and duties within this legal system.<sup>505</sup> In this thesis I have described the direct rights and duties of MNEs under public international law. In Chapter 1, I identified my adopted theoretical framework as the system-oriented approach to law, which defines international law in terms of its present day international law rules and institutions, which themselves have custom as their ultimate foundation. According to the "objective theory" of legal personality within this framework, the demonstration of

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<sup>502</sup> UNCTAD, *Latest Developments in Investor-State Dispute Settlement* (2009), *supra* note 126 at 2.

<sup>503</sup> On custom's composition of the dual elements of state practice and *opinion juris*, see e.g. Currie, *Public International Law* (2001), *supra* note 97 at 163-175. Note also the role of tacit consent in the establishment of legal personality. See *supra* note 108.

<sup>504</sup> There are only 18 such UN Members. See *supra* note 143. UN, "UN Members", *supra* note 143; UNCTAD, "Country Specific Lists of BITs", *supra* note 143. Substantive investment law rights belong to the MNE but are adjudicated under procedural rights attributable to specific corporate components. This may be compared to how, in the corporate criminal liability context, the internal components of a particular corporation (i.e., its natural person directors and officers) may be subject to incarceration while the corporation itself cannot.

<sup>505</sup> See e.g. Cheng, *supra* note 3 at 23

characteristics such as state allocated rights and duties is sufficient to establish legal personality within international law.<sup>506</sup> Rather than this objective theory, however, I have chosen the subjective theory of personality. As a predominant interpretation of the *Reparations Case*<sup>507</sup>, the subjective theory of personality holds that legal personality is created as a result of the implied will of the international community.<sup>508</sup> This implied will to establish personality operates not exclusively on the level of the treaty instrument which grants a particular international law right or duty, but also operates on the level of custom. The implied state will to create legal personality must operate on a customary level in order to establish legal personality even as against states which are not parties to a particular treaty. It is worthwhile to recall that that silence may constitute tacit agreement to the development of a customary norm, such as a norm regarding MNEs' legal capacity for international law rights and duties.

In my view, the subjective theory of legal personality applies to MNEs in the following fashion. The duties of MNEs flow from customary international law which contains duties for private persons, both natural and corporate. On the rights side, states have developed literally thousands of treaties which make corporate MNE components the holders of substantive rights and claim capacity which they are encouraged to exercise in a way that empowers their collective identity as members of MNE ownership chains.<sup>509</sup> States have done this in a manner that shows an implied will to grant legal personality to MNEs. Employing the implied will reasoning found in the *Reparations Case*, MNEs are thus legal persons under public international law.

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<sup>506</sup> See e.g. Finn Seyerstad, "International Personality of Intergovernmental Organizations: Do their Capacities Really depend upon their Constitutions?" (1964) 4 *Indian Journal of International Law* 1.

<sup>507</sup> *Reparations Case*, *supra* note 1 at 185.

<sup>508</sup> On presumptive personality as supported by the *Reparations Case* decision, see Klabbers, *supra* note 66 at 56.

<sup>509</sup> For example, this is achieved through the admission of indirect investment claims, *see supra* note 498.

## 4.2 MNE Personality and the Amelioration of the Governance Gap

Having thus summarized my thesis argument, the question remains: what is the point of trumpeting the existence of MNEs' international law personality? Does this legal personality hold any particular significance for international law or the international community more generally? The answer is a resounding yes. Perhaps most notably, and the subject of this remaining chapter, the legal personhood of MNEs is important for its application to a global problem which has become known as the governance gap in MNE accountability.<sup>510</sup>

There is an accountability gap in MNE oversight which results from the incongruence between MNEs' extraterritorial operations and states' largely territorially bound oversight. This is exacerbated by the power and wealth disparity which exists between some MNEs and some states<sup>511</sup>, along with the practical inability of some states to govern within their borders due to lack of resources or civil unrest. As UN Special Rapporteur Professor John Ruggie summarizes:

The root cause of the business and human rights predicament today lies in the governance gaps created by globalization - between the scope and impact of economic forces and actors, and the capacity of societies to manage their adverse consequences. These governance gaps provide the permissive environment for wrongful acts by companies of all kinds without adequate sanctioning or reparation.<sup>512</sup>

An unfortunate corollary of gaps in MNE oversight today is the connection between some MNEs' operations and human rights violations.<sup>513</sup> As compiled by Professor Ruggie in

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<sup>510</sup> See e.g. Gagnon, Macklin & Simons, *The Governance Gap*, *supra* note 2; Mathias Koenig-Archibugi, "Transnational Corporations and Public Accountability" (2004) 39 *Government and Opposition* 1; Ruggie, "Protect, Respect and Remedy", *supra* note 2 at 3, para. 3; OECD, *Annual Report on the OECD Guidelines for Multinational Enterprises: Conducting Business in Weak Governance Zones* (Paris: OECD, 2006).

<sup>511</sup> Note UNCTAD's listing of the world's largest economies (both MNE and state). See UNCTAD, *World Investment Report 2002*, *supra* note 19 at 90.

<sup>512</sup> Ruggie, "Protect, Respect and Remedy", *supra* note 2 at 3, para. 3.

<sup>513</sup> See e.g. Human Rights Council, *Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises Addendum: Corporations and Human Rights: A Survey of the Scope and Patterns of Alleged Corporate-Related Human Rights Abuse*, UN HRCOR, 2008, UN Doc. A/HRC/8/5/Add.2 (23 May 2008), online: <<http://www.reports-and-materials.org/Ruggie-2-addendum-23-May-2008.pdf>> [Ruggie, *A Survey of the*

2008, contemporary human rights complaints concerning MNE conduct are wide-ranging in their substance, relating to both labour and non-labour issues, concerning all types of industries and implicating all manner of MNEs from Fortune 500 companies to small enterprises.<sup>514</sup>

Just as the people who manage them and invest in them, MNEs come in all varieties, with varying attitudes to business ethics and law. Business sense will encourage some but by no means all MNEs to diminish transaction costs, as well as to make use of business opportunities, in a manner that places the law of the market above the spirit or letter of the “real” law, let alone soft law or moral obligations. What unites MNEs is that they are all obliged to respond to market forces in some fashion.

The governance gap weakens the rule of law as it applies to MNEs, leading to holes in prescription and enforcement. This inadequate oversight and enforcement in respect of MNEs affects the global economy broadly since it perniciously lowers the bar on what type of behaviour is generally acceptable. For instance, the impact of strong vs. weak state governance on MNE behaviour is seen in how some MNEs have comported

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*Scope and Patterns of Alleged Corporate-Related Human Rights Abuse*]. There is now a large amount of literature discussing MNEs and human rights violations. See e.g. D. M. Chirwa, “The Long March to Binding Obligations of Transnational Corporations in International Human Rights Law” (2006) 22 S.A.J.H.R. 76; Surya Deva, “Human Rights Violations by Multinational Corporations and International Law: Where from here?” (2003) 19:1 Conn. J. Int’l L. 1; David Kinley & Junk Tadaki, “From Talk to Walk: The Emergence of Human Rights Responsibilities for Corporations at International Law” (2004) 44:4 Va. J. Int’l L. 931; Steven R. Ratner, “Corporations and Human Rights: A Theory of Legal Responsibility”, *supra* note 405; Maria McFarland Sanchez-Moreno, & Tracy E. Higgins, “No Recourse: Transnational Corporations and the Protection of Economic, Social, and Cultural rights in Bolivia” (2004) 27:5 Fordham Int’l Law J. 1663; Beth Stephens, “The Amoral of Profit: Transnational Corporations and Human Rights” (2002) 20:1 Berkeley J. Int’l L. 45.

<sup>514</sup> The report analysed 320 cases of human rights abuse allegations posted on the Business and Human Rights Resource Center web site from 2005 to 2007, finding that, “Firms from a broad range of sectors have been alleged to abuse or contribute to the abuse of one or more human rights - covering the full range of human rights, including civil and political; economic, social and cultural; and labour-related rights.” Ruggie, *A Survey of the Scope and Patterns of Alleged Corporate-Related Human Rights Abuse*, *ibid.* at 29. Furthermore, 59% of complaints related to alleged direct human rights abuses by companies, while the remaining related to indirect human rights abuses. Ruggie, *A Survey of the Scope and Patterns of Alleged Corporate-Related Human Rights Abuse*, *ibid.* at 16. See also Ruggie, *A Survey of the Scope and Patterns of Alleged Corporate-Related Human Rights Abuse*, *ibid.* at 9, para. 7.

themselves very differently “abroad” than at “home”.<sup>515</sup> To provide a simple analogy on enforcement’s influence on levels of generally acceptable behaviour, if there ceased to be effective enforcement of the posted speed limits on highways, the average speed would foreseeably increase. People would become less concerned about negative sanctions, and the generally acceptable behaviour on highways would deviate substantially from the posted limits. In cases of a lack of prescriptive law, an analogy could be that speed limits in certain areas do not exist, letting people drive as fast as they wish, without concern for external legal norms.

While the highway example presents the role of prescription and enforcement on human behaviour in a somewhat benign light, as having narrow effects, the effects of the MNE governance gap can be broad and harmful, to a degree dependent upon the severity of the lack of oversight as well as the extent to which civilians are vulnerable to the effects of the lack of oversight.<sup>516</sup> The governance gap is quite pronounced in cases of militarized commerce, where the rule of law is especially weak.<sup>517</sup> The legal personality of MNEs is of application to the reduction of the governance gap on both the international and domestic legal levels, in a manner described below.

#### *4.2.1 MNE Personality: Implications for International Level Approaches to the Governance Gap*

On the international plane, MNE personality presents at least three positive prospects for addressing the governance gap. First, such personality permits MNEs to enter the international legal system on a conceptual level and thus be potentially regulated within it. Second, MNE personality, and its associated legal duties, provides a basic benchmark of non-optional conduct which is applicable internationally and may be enforced in the

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<sup>515</sup> Strategies to deal with such discrepancy in behaviour at home and abroad have included the US *Foreign Corrupt Practices Act* originally passed in 1977. See *Foreign Corrupt Practices Act*, 15 U.S.C. §§ 78 (1998), online: <<http://www.usdoj.gov/criminal/fraud/docs/statute.html>>.

<sup>516</sup> See e.g. Craig Forcese, “Militarized Commerce’ in Sudan’s Oilfields: Lessons for Canadian Foreign Policy” (2001) 8:3 Canadian Foreign Policy 37.

<sup>517</sup> See. e.g. Gagnon, Macklin & Simons, *The Governance Gap*, *supra* note 2; Craig Forcese, “Deterring ‘Militarized Commerce’: The Prospect of Liability for ‘Privatized’ Human Rights Abuses” (2000) 31:2 Ottawa L. Rev. 171; Stephen J. Kobrin, “Oil and politics: Talisman Energy and Sudan” (2004) 36:2-3 N.Y.U.J. Int’l L. & Pol. 425.

short-term by state and public pressure. Third, with MNE legal personality established at international law, states are forced to move beyond preliminary discussions of whether MNEs legally exist toward discussions of how the existence of MNEs affects states' international law responsibilities.

On the first prospect, MNE personality will help to address the governance gap by providing a legal “handle” for the MNE as an actor, permitting the international legal system to engage with MNEs conceptually and practically. A broader recognition of the change that has occurred in international law (that of the emergence of MNE legal personality) will help to ameliorate the governance gap by identifying MNEs as entities with legal personality and legal duties they must perform. In other words, a great obstacle to MNE accountability is the current (erroneous) lack of recognition that MNEs actually exist on a legal level. “Walmart” or “Shell” are commonly understood layperson’s terms that would appear (inaccurately) to have no corresponding legal significance in mainstream international law doctrine, insofar that there is no official legal entity which is acknowledged to match the term “Walmart” or “Shell”. With acknowledgement of MNEs as legal persons, it will be possible to measure MNE conduct against that required by international law. Public international law understanding of the legal existence of MNEs is likely a required first step towards increased accountability on the international level.<sup>518</sup>

In time, international law may thus develop to more effectively and directly regulate MNEs. This would be in a manner that is distinct from both public pressure on MNEs and international law processes involving home and host states. The current international law

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<sup>518</sup> Wells and Elias note the placement of MNEs as persons within the international law system as a central prerequisite to accountability:

Multinational corporations are accused both of direct human rights abuses and of colluding in various ways with repressive states [...] In the fourth section therefore, we examine the concept of complicity and explore the ways in which it might be used to hold multinational corporations to account in international law. As we argue, however, it is not the marriage of criminal law principles and international law *but it is the adoption of the corporation as a fully accepted member of the ‘legally responsible’ family* that presents the greatest obstacle here.

See Wells & Elias *supra* note 321 at 143 [emphasis added].

landscape is quite deficient in the direct regulation of MNEs<sup>519</sup> but this could conceivably change, as Reinisch observes:

[...] the broadening of the spectrum of entities considered to be in a position to enjoy rights and obligations, including procedural standing before international dispute-settlement systems, demonstrates that human rights mechanisms for non-state actors are no longer wholly inconceivable on the international level.<sup>520</sup>

In more practical terms, however, how does MNE personality apply to the governance gap reduction on the international level? A second prospect for countering the governance gap relates to the following. MNE personality, along with the associated customary international law duties of corporate individuals not to commit war crimes, crimes against humanity, slavery or the other legal offences outlined in the previous chapter, furthers MNE accountability because it places a base level of legal operating requirements on MNEs, as persons within the international law system. Formal enforcement of MNE duties aside, the mere fact that MNEs are persons with such duties means that states, stakeholders and other parties may put pressure on all MNEs to comply with their international law duties, changing MNE conduct toward that required by law.

Put otherwise, while international law enforcement vis-à-vis MNEs is not currently set up to operate using “coercive” power, it is set up to operate using “conditioned” power.<sup>521</sup> Public and state expectations, based on MNEs’ legal person status and associated legal duties, can operate to change the international terms of operation for MNEs. Such pressures, legitimated by law, are certainly not equal in form or effect to coercive enforcement of legal rules. However, particularly given the weight of the rhetorical value of a *bone fide* legal duty, such pressures will likely have some ameliorating effect on the governance gap. The internal and external expectations on

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<sup>519</sup> For example, Alston notes that “international law’s capacity adequately to regulate the cross-boundary activity of TNCs lags considerably behind the social and economic realities of globalized production and trade.” See Philip Alston, “The ‘Not-a-Cat’ Syndrome: Can the International Human Rights Regime Accommodate Non-State Actors?” in Alston, *Non-state Actors and Human Rights*, *supra* note 300, 3 at 30.

<sup>520</sup> August Reinisch, “The Changing International Legal Framework for Dealing with Non-state Actors” *supra* note 304 at 85.

<sup>521</sup> John Kenneth Galbraith, *The Anatomy of Power* (Boston: Houghton Mifflin, 1983) at 4-6. Galbraith notes three types of power: rewards based power, punishment based power and conditioned power. The third type of power is ingrained in the common expectations of those which control and those which are controlled.

MNEs which accompany their international law duties are different from those accompanying voluntary norm codes like the *Global Compact*<sup>522</sup>, quite simply because compliance with the direct duties of international legal persons is not optional.

MNE personality based on capacity for rights and duties thus permits international law to move beyond the political paralysis and glacial speed which has often characterized states' formal attempts to address MNEs conduct, even in soft law form.<sup>523</sup> MNE personality permits international politics concerning MNE instruments to be transcended, revealing international law's obvious duties on private persons. Such duties have customary roots that only the most brazen would suggest do not apply to MNEs as composites of corporate individuals. Simply put, there are international law rules which MNEs they must adhere to. No aiding and abetting of crimes against humanity is permitted under international law.<sup>524</sup> The same is true for war crimes and genocide.<sup>525</sup>

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<sup>522</sup> United Nations, *The Global Compact*, *supra* note 303.

<sup>523</sup> For example, at the UN the political contentiousness of this topic has led to decades-long and ultimately unadopted drafting processes. In 1974 the United Nations Economic and Social Council set up the Commission on Transnational Corporations, charged with drafting a binding Code of Conduct for TNCs. This code was drafted and redrafted over many years but was not ultimately not adopted by the General Assembly in 1992. See *Report of the Secretary-General*, 2 July 1996, UN Doc. E/CN.4/Sub.2/1996/12, at paras. 60-62, online:

<<http://daccessdds.un.org/doc/UNDOC/GEN/G96/130/58/PDF/G9613058.pdf?OpenElement>> More recently, the soft law *Draft Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights*, were considered but ultimately not approved by the UN Commission on Human Rights in 2004. This was following work on the norms which had commenced in August 1998 with the formation of working group within the *U.N. Sub-Commission on the Promotion and Protection of Human Rights* concerning the activities of business enterprises with regard to human rights. See Commission on Human Rights, *Draft 60<sup>th</sup> Session Report*, 22 April 2004, UN Doc.

E/CN.4/2004/L.11/Add.7, at 81, online:

<[http://www.unhchr.ch/huridocda/huridoca.nsf/e06a5300f90fa0238025668700518ca4/169143c3c1009015c1256e830058c441/\\$FILE/G0413976.pdf](http://www.unhchr.ch/huridocda/huridoca.nsf/e06a5300f90fa0238025668700518ca4/169143c3c1009015c1256e830058c441/$FILE/G0413976.pdf)>; see also Karl-Heinz Moder, "Norms on the Responsibilities of Transnational Corporations and other Business Enterprises with regard to Human Rights" *Friedrich-Ebert-Stiftung Background Paper* (25 March 2004), at 3, online: <[http://www.fes-globalization.org/geneva/documents/UN\\_Norms/25March04\\_UN-Norms\\_Background.pdf](http://www.fes-globalization.org/geneva/documents/UN_Norms/25March04_UN-Norms_Background.pdf)>.

<sup>524</sup> Private actors' direct committal, and aiding and abetting, of crimes against humanity, war crimes and genocide is a violation of customary international law. See *Affirmation of the Principles of International Law Recognized by the Charter of the Nürnberg Tribunal*, *supra* note 344; see also *Principles of International Law Recognized in the Charter of the Nürnberg Tribunal and in the Judgment of the Tribunal*, *supra* note 344 at Principles 6-7; See also *Convention on the Prevention and Punishment of the Crime of Genocide*, *supra* note 74 at Art. 3. I am equating the treaty language on "complicity" with an obligation not to aid and abet. While I believe this is a defensible equation, further discussion of this point is beyond the scope of this thesis.

<sup>525</sup> See *Affirmation of the Principles of International Law Recognized by the Charter of the Nürnberg Tribunal*, *ibid.*; see also *Principles of International Law Recognized in the Charter of the Nürnberg*

Slavery, the slave trade or forced labour is similarly not permitted.<sup>526</sup> No aiding and abetting of state torture or other *jus cogens* state abuses is permissible either.<sup>527</sup>

Regardless of whether an MNE can practically get away with breaching these or other international law duties, the MNE is in violation of international law. No new treaty is needed to declare these legal duties, and public pressure, or practical enforcement as political will permits, will encourage MNEs to adhere to these legal duties.

A third positive prospect for the governance gap which is presented by MNE personality relates to how home and host states have international law obligations concerning MNE oversight and conduct. For instance, states are obliged under international human rights law to protect human rights through effective regulation of MNEs.<sup>528</sup> Also, states are obliged themselves not to violate human rights whether acting alone or in conjunction with MNEs.<sup>529</sup> When state and MNE conduct is interwoven, the issue of complicity arises.<sup>530</sup> Initiatives to ameliorate the governance gap which clarify

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*Tribunal and in the Judgment of the Tribunal, ibid.*; See also *Convention on the Prevention and Punishment of the Crime of Genocide, ibid.*

<sup>526</sup> *Slavery Convention, supra* note 353; *The United Nations 1956 Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery, supra* note 367.

<sup>527</sup> Note the customary status of the prohibition against torture. See e.g. *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, supra* note 465. The *Restatement on Foreign Relations of the United States* lists *jus cogens* norms as including prohibitions against slavery and the slave trade, systemic racial discrimination, genocide, the murder or disappearance of individuals, torture or other cruel, inhuman, or degrading treatment or punishment, prolonged arbitrary detention and the use of force contrary to the principles of the United Nations Charter. See American Law Institute, *Restatement of the Law (3d) Restatement of Foreign Relations Law of the United States, supra* note 335 at § 702, cmts. h, k, n.

<sup>528</sup> See generally, McCorquodale & Simons, *supra* note 304. See also: D. M. Chirwa, “The Doctrine of State Responsibility as a Potential Means of Holding Private Actors Accountable for Human Rights” (2004) 5:1 *Melbourne Journal of International Law* 1; Rebecca J. Cook, “State Responsibility for Violations of Women's Human Rights” (1994) 7 *Harv. Hum. Rts. J.* 125.

<sup>529</sup> See generally, Mark Gibney, Katerina Tomasevski, & Jens Vedsted-Hansen, “Transnational State Responsibility for Violations of Human Rights” (1999) 12 *Harv. Hum. Rts. J.* 267; Robert McCorquodale, “Spreading Weeds beyond their Garden: Extraterritorial Responsibility of States for Violations of Human Rights by Corporate Nationals” (2006) 100 *American Society of International Law: Proceedings of the Annual Meeting* 95.

<sup>530</sup> Human Rights Council, *Clarifying the Concepts of “Sphere of influence” and “Complicity: Report of the Special Representative of the Secretary-General on the issue of Human Rights and Transnational Corporations and other Business Enterprises, John Ruggie*, UN HRCOR, 2008, UN Doc. A/HRC/8/16 (15 April 2008), online: <<http://www.reports-and-materials.org/Ruggie-companion-report-15-May-2008.pdf>>. Underscoring the importance of this topic, de Schutter writes, “Offering a typology of the situations where a corporation may be said to be complicit in human rights violation committed by its business partners or by the host government in the country where it operates certainly is the most urgent task facing legal doctrine today in this field”. Olivier de Schutter, “The Challenge of Imposing Human Rights Norms on Corporate Actors” in de Schutter, *Transnational Corporations and Human Rights, supra* note 300, 1 at 13 [emphasis

and build upon state obligations are hindered in part, however, by states' ability to obfuscate the issue of their international responsibilities *vis-à-vis* MNEs by pointing to a purported lack of existence of MNEs in international law.<sup>531</sup> Acknowledgement of the MNE as a legal person with a unique form within the international system, namely as a business enterprise with extra-territorial operations but also having a "home state", will permit successive developments to occur within public international law which renders more detailed the respective responsibilities of home states, MNEs, and host states.

Briefly put, the legal personality of MNEs under international law removes a hurdle to developments in international law which relate to state responsibility concerning MNE oversight. States need to coordinate with one another to address the governance gap and acknowledgement of the existence of MNEs is a valuable first step.

#### *4.2.2 MNE Personality: Implications for Domestic Level Approaches to the Governance Gap*

As is the case at international law, MNE personality is helpful to the amelioration of the governance gap via domestic measures because it encourages the existence of MNEs to be acknowledged within the legal systems tasked with ensuring MNE accountability.

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added]. He holds furthermore that, "Neither the draft Norms, nor, indeed, any other mechanism for improving the accountability of multinational corporations for human rights obligations, will be workable unless these notions are adequately clarified." *Ibid.*

<sup>531</sup> Canada's pronounced hesitation to react to reports of Canadian mining companies' complicity in human rights violation abroad relates to a non-acknowledgement of the existence of Canadian-based transnational actors. Through non-acknowledgement of the MNE as holistic actor, focussing instead on an exaggerated distinction between parent and subsidiary corporate components of Canadian MNEs, Canada has eschewed applying any concrete, binding regulatory measures to Canadian based MNEs which might reduce the governance gap with regard to Canadian companies abroad. This narrow conception of MNE personality operates in conjunction with Canada's demonstrated aversion to extraterritorial regulatory jurisdiction to limit Canadian legal responses to Canadian mining companies' alleged misconduct abroad. On corporate personality in this context see e.g. Sarah Seck, "Exploding the Myths: Why Home States are Reluctant to Regulate" (Keynote Address at MiningWatch Canada Conference: Regulating Canadian Mining Companies Operating Internationally, 20 October 2005) at 9-11, online:

<[http://www.miningwatch.ca/updir/Keynote\\_SSSeck.pdf](http://www.miningwatch.ca/updir/Keynote_SSSeck.pdf)>. On limited Canadian legal responses to mining companies' alleged misconduct abroad, see Department of Foreign Affairs and International Trade, *Building the Canadian Advantage: A Corporate Social Responsibility (CSR) Strategy for the Canadian International Extractive Sector* (Ottawa: DFAIT, March 2009) at 14-15, online:

<<http://www.international.gc.ca/trade-agreements-accords-commerciaux/assets/pdfs/CSR-March2009.pdf>>. See also Liisa North, Timothy David Clark, & Viviana Patroni, eds., *Community Rights and Corporate Responsibility: Canadian Mining and Oil Companies in Latin America*, (Toronto: Between the Lines Press, 2006).

For a decrease in the governance gap to occur, MNEs need to be brought more completely within the domestic legal orders that they operate in. As Nijman and Nollkaemper note:

Private actors may have formed their own private international order that has little to do with national law, international law or any ‘relationship’ between them. For instance multinational corporations escape the national legal order, but are hardly integrated in the international legal order.<sup>532</sup>

On the domestic level MNE personality will encourage states to take steps to bring MNEs more effectively within their domestic legal systems. Established MNE personality on the international law level will help to break the negative feedback loop which exists whereby domestic state processes do not adequately take into account the existence of MNEs in part because the mainstream precedent set at the international law level erroneously encourages them not to do so. State courts and other elements of the domestic administration of the rule of law do not adequately respond to the reality of MNE operations because they use a schema for understanding the existence of MNEs which unduly stresses their components rather than their whole, a model which is sanctioned by inaccurate discourse within mainstream public international law. A conception of MNE legal personality under public international law which more closely matches the economic reality of MNEs will provide states with an updated way of conceptualizing MNEs in their own regulatory and adjudication efforts.

For instance, an updated conception of MNEs may lead states to improve domestic approaches to adjudicating claims against MNEs, to ensure the maximum accountability possible. Holistic MNE personality at international law may signal domestic courts to take a broadened view of their role in ensuring MNE accountability. Such a broadened view may be concretized in various ways, such as a decreased aversion to extraterritorial assumption of jurisdiction<sup>533</sup>, where appropriate, or through increased international

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<sup>532</sup> Janne Nijman and André Nollkaemper, “Beyond the Divide” in Nijman & Nollkaemper, *supra* note 316, 341 at 348 [internal footnotes excluded, emphasis added]. (316)

<sup>533</sup> See e.g. Olivier de Schutter, “Extraterritorial Jurisdiction as a tool for improving the Human Rights Accountability of Transnational Corporations” (Background Paper prepared for seminar organized in collaboration with the Office of the UN High Commissioner for Human Rights, 3-4 November 2006),

judicial cooperation.<sup>534</sup> In cases where plaintiff claims are launched in a common law home state of an MNE, *forum non conveniens* should be applied only with great caution, since it may translate on a practical level to a denial of justice.<sup>535</sup>

In sum, practical grappling with MNEs' operation as economic wholes needs to be done at the domestic policy and legal level as well as the international level. As long as international law presents an outdated legal notion of what an MNE is and how it operates, national legal systems will be encouraged to follow suit. Innovations in national regulation are needed to cope with the modern reality of MNEs in the global economy and such innovations are encouraged by an international law conception of the MNE which notes its unified economic activities and otherwise presents a model for national regimes to draw from.

#### 4.3 Conclusion

On a final note, and the governance gap aside, MNE personality is of benefit to public international law as a discipline because it allows the field to become current with 21<sup>st</sup> century global affairs. The MNE being such an influential and important type of global economic actor, a discipline which fails to take MNEs into account in a meaningful way renders itself vulnerable to self-referential irrelevance.

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online: <<http://www.reports-and-materials.org/Olivier-de-Schutter-report-for-SRSG-re-extraterritorial-jurisdiction-Dec-2006.pdf>>.

<sup>534</sup> The European Judicial Network is an interesting example of a framework for judicial cooperation. See European Commission, *European Judicial Network in Civil and Commercial Matters*, online: <[http://ec.europa.eu/civiljustice/index\\_en.htm](http://ec.europa.eu/civiljustice/index_en.htm)>.

<sup>535</sup> See the access to justice considerations articulated in the UK *Lubbe* case in relation to *forum non conveniens*. *Lubbe and Others v. Cape Plc.*, *supra* note 302. Within the EU, the Brussels Convention, and subsequent directives, means that MNEs may be sued in their home state without access to a claim dismissal on *forum non conveniens* grounds. *Brussels Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters* 1968, 27 September 1968, 1262 UNTS 1653, at Art. 2, online: <<http://www.jus.uio.no/lm/brussels.jurisdiction.and.enforcement.of.judgments.in.civil.and.commercial.matters.convention.1968/doc.html#157Brussels.convention>>. The convention was replaced in 2002 by EC Regulation 44/2001, see EC, *Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters*, [2001] O.J. L 12, at 1. In Canada, the most famous foreign investment related *forum non conveniens* case is *R. v. Cambior* which saw the plaintiffs' claim dismissed. *Recherches Internationales Quebec v. Cambior*, [1998] Q.J. No. 2554 (Qc. Sup. Ct.).

With increased global mobility (for those who can afford it) the role of MNEs within societies around the globe becomes more and more evident to the casual observer. The same MNE logos are visible around the world, and legal protection of such trademarks is in fact extended nearly worldwide via the WTO's *Agreement on Trade-Related Aspects of Intellectual Property Rights* and its referenced conventions.<sup>536</sup> Despite this, MNEs appear to be permitted to remain largely beyond public international law's reach. The reoccurring logos seen in hundreds of the world's cities represent a phenomenon of enormous significance, one driven by transnational actors that international law itself can no longer afford to ignore. Unless mainstream public international law awakens to the reality of MNEs as transnational actors, this discipline will drift into conclusive status as a quaint antique, of curious interest perhaps, but of little useful contemporary importance.

That MNEs are important in global affairs, and in the global economy, can be demonstrated on a quantitative level by the figures presented in Chapter 1 of this thesis.<sup>537</sup> On a qualitative level, the importance of MNEs can be understood as their ability to influence and shape national economies, both on a production and consumption level. States largely hold the power of military force in the world, while MNEs hold the power of MNEs' tangible and intangible property, in such forms as capital, protected knowledge and international logistics systems. As Susan Strange wrote:

It is only when you think of power in terms the ability to create or destroy, not order but wealth, and to influence the elements of justice and freedom as part of the value-composition of the whole system, that it becomes obvious that big business plays a central, not a peripheral role [in international relations].<sup>538</sup>

The current global economic recession (of 2008-2009) is a crisis spawned at least in part by the irresponsible practices of under-regulated financial services giants<sup>539</sup> making the influential role of MNEs in world affairs crystal clear.

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<sup>536</sup> *Agreement on Trade-Related Aspects of Intellectual Property Rights*, 15 March 1994, 1869 UNTS 299, online: <[http://www.wto.org/english/docs\\_e/legal\\_e/27-trips.pdf](http://www.wto.org/english/docs_e/legal_e/27-trips.pdf)> (entered into force 1 January 1995).

<sup>537</sup> For instance, MNEs are responsible for 2/3rds of world trade. Debra Johnson & Colin Turner, *supra*, note 117.

<sup>538</sup> Susan Strange, "Big Business and the State" in Lorraine Eden & Evan H. Potter, eds., *Multinationals in the Global Political Economy* (New York: St. Martin's Press, Inc., 1993) 101 at 102.

<sup>539</sup> Debt from the US sub-prime mortgage industry was transferred into dubious investment assets which in turn polluted and weakened the global financial system. A wide assortment of companies, including ratings

Ultimately, however, I have not fixed my attention primarily on either the future relevance of international law to world affairs, or on the qualitative and quantitative significance of MNEs within the global economy. Rather, I have focused upon the behaviour of states in their granting of rights to MNE investors, as well as customary international law's allocation of duties to MNEs as corporate persons. By examining such elements of international law, I have observed states' implicit intention that MNEs hold the capacity for rights and obligations under international law, as legal persons.

What type of personality has been created for MNEs in international law? Consistently with the *Anglo-Iranian Oil* case, I do not argue that MNEs are legal persons with the ability to create international law themselves, such as via treaty. MNE legal personality does not mean that MNEs can enter into treaties or have their practice count for purposes of identifying custom. MNEs are not states. Rather, the rights and duties of the MNE under international law today reveals them to be a sort of "super individual" as a private actor with an international presence, particularly in the case of the top 500 elite MNEs.

Quite simply, MNEs exist within this legal system and may be properly held to perform their legal duties. They exist as legal persons in public international law because states have created them as legal persons with international law rights and duties within the system.

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firms, mortgage and investment banks, and insurance companies have been implicated in this exacerbation of the financial crisis. See generally Thomas James Fitzpatrick IV & Chris Sagers, "Faith-Based Financial Regulation: A Primer on Oversight of Credit Rating Organizations" *Cleveland-Marshall Legal Studies Paper No. 09-171* (April 8, 2009), online: <[http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1375034](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1375034)>; Michele U. Fratianni & Francesco Marchionne, "The Role of Banks in the Subprime Financial Crisis" (April 10, 2009) [unpublished], at 20-24, online: <SSRN: <http://ssrn.com/abstract=1383473>>; Martin F. Hellwig, "Systemic Risk in the Financial Sector: An Analysis of the Subprime-Mortgage Financial Crisis" *Max Planck Institute Collective Goods Preprint No. 2008/43* (2008), online: <<http://ssrn.com/abstract=1309442>>.

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