

**Corporate Social Responsibility**  
**and**  
**International Law**

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## Table of Contents

List of Tables.....	
Introduction.....	5
Chapter 1 Corporate Governance and Corporate Social Responsibility.....	9
1.1 What is Corporate Governance? .....	9
1.2 Corporate Social Responsibility on Focus.....	14
1.3 A Historical Perspective.....	16
1.4 CSR Today .....	19
Chapter 2 The Case Study on Apple-Wintek China.....	22
2.1 Introduction to the Case .....	22
2.2 Facts of the Case.....	23
2.3 Apple's Commitment to CSR.....	24
2.4 Apple Supplier REsponsibility Report 2011 .....	25
2.5 Review of the Case Study.....	27

Chapter 3 Corporate Codes of Conduct .....	31
3.1 Introduction .....	31
3.2 CSR Reporting.....	37
3.3 A Reflexive Regulatory System?.....	39
3.4 Third Party Ranking of Corporate Performance .....	40
Chapter 4 National Laws on Corporate responsibility.....	44
4.1 Introduction .....	44
4.2 Apple Inc under Chinese Law .....	47
Chapter 5 Corporate Responsibility under International Law .....	51
5.1 Sources of International Law.....	51
5.2 International Initiatives .....	57
5.3 Direct Corporate Responsibilities.....	63

Chapter 6 International Enforcement Mechanism .....	74
6.1 The Introduction? .....	74
6.2 Remedies in Home States .....	76
6.3 International Regulatory Mechanism .....	79
The Conclusion.....	85
Bibliography.....	87

## Introduction

Globalisation has assured the presence of corporations in different jurisdictions and cultures and the proponents of globalisation highlight the benefits gained from foreign investment, better employment opportunities, higher wages, economic growth and transfer of technology to the states hosting Multi National Corporations (MNCs).<sup>1</sup> MNCs could operate in different locations and jurisdictions in the form of wholly owned subsidiaries, agents, joint ventures or other partnerships with local companies, supply-chain relationships with contractors and suppliers of goods and services.”<sup>2</sup> The OECD guidelines contemplate on a wide definition of a multinational corporation: *“These usually comprise companies or other entities established in more than one country and so linked that they may co-ordinate their operations in various ways. While one or more of these entities may be able to exercise a significant influence over the activities of others, their degree of autonomy within the enterprise may vary widely from one multinational enterprise to another. Ownership may be private, state or mixed.”*<sup>3</sup> Many of the MNCs may have headquarters in one country, shareholders in another and operations worldwide.<sup>4</sup>

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<sup>1</sup> Mosley and Saiko Uno, *Comparative Political Studies* 2007, p.924.

<sup>2</sup> *McLeay*, NYU School of Law- Global Law Working Paper 01/05 –Symposium, p. 1.

<sup>3</sup> The OECD Guidelines 1.4, available at: <http://www.oecd.org/dataoecd/43/29/48004323.pdf>.

Parallel to the advantageous of globalisation and the rise of MNCs, the latter has gained extensive economic, social and political power, often surpassing those of the governments in weak economies.<sup>5</sup> As a result, Multi National Corporations (MNCs) affect every aspect of modern society including the local and global economies, labour rights, the environment and human rights.<sup>6</sup>

The 2008 global financial crisis depicted a string of corporate crimes involving insider trading, fraudulent audit practice, and corruption, in cases such as Enron, Eurotunnel, Pollypeck, Parmalat and Maxwell<sup>7</sup>. In addition numerous cases have been reported on the destruction of the environment, exploitative labour conditions, inadequate labour standards, destruction of local livelihoods which may well amount to violations of national laws, international law and human rights in particular, with an urgent call for responsibility for MNCs. Recently the Supreme Court of India revived the case, almost after thirty years; the case involving the

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<sup>4</sup> Ratner, Yale Law Journal 2001,P.463

<sup>5</sup> Ratner, Yale Law Journal 2001, P. 458, 461.

<sup>6</sup> Miletello, University of Pittsburgh Journal of Technology Law and Policy 2011, p. 5,6,8

<sup>7</sup> Robert Wearing, p.67- Enron, p.108.Eurotunnel, p.40-Polly Peck, p.95.Parmalat, p.25.Maxwell.

chemical giant, Union Carbide, related to the incident of chemical leak that occurred in Bhopal India, killing and injuring thousands of innocent victims.<sup>8</sup> Thus as far back as 1983, Union Carbide case showed the world the need to hold MNCs liable for human rights violations. As such the right to life and right to health are inalienable conditions of every human life embodied in the International Covenants of Civil and Political Rights (ICCPR) and the International Covenant of Economic, Social and Cultural Rights. (ICESC)

Hence the fight for corporate responsibility continues and to hold MNCs liable for violations of national and international law. CSR is the link between human rights and Enterprises<sup>9</sup>. Thus the spotlight is on MNCs, with a string of questions attached. What do corporations owe to the society? What role could governments play in regulating the activities of corporations, their size, power and the impact on the society? Whether international law could play a role at in this scenario? And how effective could international law be in implementing CSR obligations of these powerful MNCs?

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<sup>8</sup> India Reopens the Bhopal Case: <http://www.guardian.co.uk/environment/2010/aug/31/india-reopens-bhopal-case>.

<sup>9</sup> Lozano and Prandi, International Bar Association Series, Chapter 10, p.184.

This paper starts with an introduction to the two main concepts of Corporate Governance (CG) and Corporate Social Responsibility (CSR), the historical scholarly debate on CSR to the present day application. Chapter Two introduces the case study on the incident of worker poisoning at the Apple Supplier; Wintek in China. Chapter Three identifies the one major source of corporate obligation voluntary corporate codes of conduct and assess the practical relevance against the case study. The rest of the paper is dedicated to exploring the ways and means as to how the Chinese workers could vindicate their human rights against MNCs like Apple. Thus Chapter Four identifies national law remedies and the national regulatory system incorporating international law obligations. Chapter Five examines international law as the main source of corporate responsibility with a study on the status quo of its implementation machinery at corporate, national and international levels followed by a novel and proposal for improvements in the enforcement mechanism in Chapter 6.

All in all this paper is devoted to capture this latest phenomenon of the link between international law and corporate responsibility of MNCs.



## Chapter One

### Corporate Governance and Corporate Social Responsibility

This first section will examine the connection between Corporate Governance and Corporate Social Responsibility.

#### 1.1. Corporate Governance (CG)

The development of CG is a recent global phenomenon and “drawn from a variety of disciplines including, finance, economics, accounting, law, management, and organizational behaviour. <sup>10</sup>The existence of diverse theories of corporate governance corresponds to the diverse CG structures in different countries and at different times.<sup>11</sup> As Christine Mallin observes : *“An aspect of particular importance is whether the company itself operates within a shareholder framework, focusing primarily on the maintenance or enhancement of shareholder value as its main objective, or whether it takes a broader stakeholder approach, emphasizing the interests of diverse groups such as employees, providers of credit, suppliers, customers,*

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<sup>10</sup> Mallin, p.13.

<sup>11</sup> Clerke, p.2.

*and the local community.”*<sup>12</sup>

The stakeholder theory of corporate governance is the most popular<sup>13</sup> and significant one, as far as corporate social responsibility is concerned. The stakeholder theory defines the corporation as a “multilateral agreement” between the company and its internal as well as external stakeholders.<sup>14</sup> Despite the fact that one could not think of an exhaustive and concrete list of stakeholders, the typical stakeholders that one could think of are, employees, consumers, suppliers, the local community, creditors, governments and stockholders.

Corporations not only depend on stakeholders for their existence but also have the capacity to impact their lives. Thus it is important that the management identifies the relevant stakeholders to establish dialogue with them as to their needs and concerns.<sup>15</sup> William. C. Fredrick observes the stakeholder theory as “Kantian in the sense that each stakeholder group has a right to be treated as an end in itself, and

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<sup>12</sup> Mallin, P. 13.

<sup>13</sup>Hess, Journal of Corporation Law 1999, P. 54.

<sup>14</sup> Clerke, p.10.

<sup>15</sup>Hess, Journal of Corporation Law 1999,p. 46.

not to be treated as a means to some end.”<sup>16</sup>

There are two main corporate governance structures in the world.<sup>17</sup> In UK and the US one could witness the one tier system of CG consisting of both executive directors and non-executive directors in the Management Board. Traditionally, shareholder primacy has occupied the central role in such a governance model. <sup>18</sup>

The recent changes to the United Kingdom's Companies Act of 2006 is to the effect of relaxing the shareholder primacy model, whereby a general duty is imposed, so as to endure the success of the company with considerations of other stakeholder interests into decision making process. <sup>19</sup> In recognition of the stakeholders as part of the success of the company, section 172 (1) of the Act, specifically states that the interests of the company's employees, the need to foster the company's business relationships with suppliers, customers, and others, the interests of the community, the environment and the desirability of maintaining reputation have to be given

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<sup>16</sup> Hess, Journal of Corporation Law 1999 P.54, Footnote 109 Citing- William C. Frederick, Values, Nature, and Culture in the American Corporation 217-18 (1995) oxford University Press Aug 1995, p. 213.

<sup>17</sup> Wooldridge, Company Lawyer 2011, p. 190.

<sup>18</sup> Miles, Company Law Newsletter 2011, p.3

<sup>19</sup> Section 172 (2) UK Company's Act.

effect to, while in certain circumstances, the interests of the creditors too would be considered.<sup>20</sup>

In Australia<sup>21</sup>, there has been refusal to pass laws setting out the duties of directors with the explanation that the common law and statutory law are sufficiently broad to enable the directors to incorporate stakeholder interests into decision making “including changes in societal expectations about the role of companies and how they should conduct their affairs.” Therefore it was thought to be a futile exercise to set out non-exhaustive list of interests as directors’ duties or for the government to impose legal obligations on the corporations to take other stakeholder interests into account.<sup>22</sup>

The second system is the two tier system with a management board and supervisory board; as the second tier. In the German two tier system of governance, the employees constitute a significant part of the supervisory board, thereby

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<sup>20</sup> Section 172 (3) UK Company’s Act 2006.

<sup>21</sup> Australia is a common law legal system where CG model is similar to UK model.

<sup>22</sup> Nessen, UCLA Pacific Basin Law Journal 2009. P. 11, section. 5.1.

incorporating the viewpoints of employees and the surrounding economy into the decision making process.<sup>23</sup>

According to paragraph 84.1AktG (German Law on Stock Corporations) the supervisory board appoints the members of the management board and may dismiss the member on reasonable grounds. Moreover in line with paragraph 90 of AktG, the executive board has to make a detailed report to the supervisory board which is essential for the carrying out of the duties of the supervisory board in the supervisory management of the company<sup>24</sup>. Thus it seems that the German model of two tier-system caters more towards accommodating the interests of other stakeholders other than those of shareholders.

The crux of the legal debate on CG and CSR revolves around whether a legal duty be imposed on the directors to take into account not only the interests of shareholders in its decision making process but also the interests of other stakeholders such as employees, customers and the community.<sup>25</sup>

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<sup>23</sup> Para 96 AktG (German Law on Stock Corporations), para.4(1) of the Drittelbeteiligungsgesetz of 2004, Wooldridge, Company Lawyer 2011, p. 191.

<sup>24</sup> Wooldridge, Company Lawyer 2011,p. 191.

<sup>25</sup> Wells, University of Kansas Law Review 2002, p.1.

Now let us turn to the concept of CSR and into a preview of the history of the concept.

## 1.2. Corporate Social responsibility on focus

What is CSR? Is it the corporation's obligation to work for social betterment? What is the nature of this obligation? Who imposes such an obligation on corporations? These are the primary questions that arise in the context of the legal debate surrounding CSR.

Here are some attempts at defining CSR:

“Corporate Social Responsibility is a broad concept describing a business's obligation to interact with society in a socially responsible manner.”<sup>26</sup>

“..Practices that improve the workplace and benefit society in ways that go above

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<sup>26</sup> Barclift, Journal of Civil Rights & Economic Development 2011, p. 464.

and beyond what companies are legally required to do”<sup>27</sup>

CSR means being “responsible and accountable to the member of our global society.”<sup>28</sup>

The first definition speaks of an obligation towards the society, since the corporations is part of that society. The second definition expresses the idea of a legal obligation to benefit the workers and society, while the third obligation stresses not just the mere obligation but accountability towards a wide range of effects that a corporation is bound to bring about on the “ global society”. Thus the question is what is the nature and scope of corporate responsibility? In pursuit of this vital question and what constitutes CSR in the present day, the following section throws some light on the evolution of the concept of CSR.

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<sup>27</sup> Vogel, p. 2.

<sup>28</sup> Visser, Matten, Pohl and Tolhurst, p.11.

### 1.3. A Historical Perspective

The roots of CSR as a concept could be traced back to the legal debate of Adolf A. Berle and E. Merrick Dodd in the 1930s.<sup>29</sup> Dodd argued that directors should take into account diverse interests when making decisions, while Berle argued, based on the shareholder primacy. Berle put forward the idea of a fiduciary duty on the part of directors towards shareholders. He elaborated on his theory by saying that every corporate action must be tested twice. First by the technical rules: by proper exercise of power and secondly by means of equitable power analogous to the judicial duties of a trustee, maneuvered to defend the shareholder against the manager<sup>30</sup> having in the mind the equitable powers of English Courts to tame the unabated exercise of discretion.<sup>31</sup>

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<sup>29</sup> Wells, University of Kansas Law Review 2002, p. 82.

<sup>30</sup> Ibid p. 89.

<sup>31</sup> Ibid.



Dodd argued that if directors have the prime duty to protect the interests of shareholder, in the same way, directors owe a duty to protect the interests of other groups who have a stake in the corporation. So those in control must take responsibilities not only towards owners but also other groups such as employees, consumers and other groups.

It could be contended that Berle's ideology is more akin to shareholder primacy model practiced in UK and US, while Dodd's theory is in line with the German model of two tier governance structure.

The prominent feature of the arguments put forward by the proponents of CSR is the inadequacy of the shareholder primacy model and the need for a broader mandate for the board decision makers to include other stakeholder interests.<sup>32</sup>

Drucker states that a corporation is a representative institution of modern society thus possessing a social, political and economic dimension. He emphasised the social impact thus: "... It is the large corporation...which has emerged as the

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<sup>32</sup> Ibid, p.134.

representative and determining socio-economic institution which sets the pattern and determines the behaviour even of the owner of the corner cigar store who never even owned a share of stock...”<sup>33</sup> Hence expressing the idea that the corporate management is capable of balancing the diverse needs of a wide range of stakeholders both directly connected to the corporation like shareholders and those quite distant in relations to the corporation such as “owner of the cigar store” in his example.

The severest critic of CSR was Milton Friedman called those advocating CSR as “unwitting puppets of the intellectual forces...”<sup>34</sup>In 1970, he made a forceful argument based on economics and morality. Friedman clearly states that the responsibility of the corporation is to “*conduct business in accordance with their desires, which generally will be to make as much money as possible while conforming to the basic rules of the society, both those embodied in law and ethical custom. Of course in some cases his employer may have a different objective*”<sup>35</sup>

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<sup>33</sup> Drucker, p. 8, 130.

<sup>34</sup> Friedman, New York times Magazine of 13.09.1970.

<sup>35</sup> Milton Friedman The Social Responsibility of Business Is to Increase Its profits-New York times Magazine 1970 Pg 51-

## 1.4 CSR Today

Friedman theory has proved to be meaningless in the present day of rapid globalisation<sup>36</sup>, the rise of the power of MNCs and increasing demand for corporate responsibility by consumers<sup>37</sup>, civil rights movement, and international community in the interest of preserving the environment and to guarantee the enjoyment of human rights. This value pluralism has disabled a universally recognised definition of CSR<sup>38</sup>. Thus, the fact that the concept of social responsibility is both open-ended and often imprecise<sup>39</sup> remains even today, because the societal expectations of corporations are evolving from time to time giving rise to unique and vibrant discussion on the contents of CSR and its sources.

Despite the widespread advocacy of CSR on the part of MNCs, supposedly as a response to the societal expectations for corporate responsibility, there's criticism

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<sup>36</sup> Miletello, University of Pittsburgh Journal of Technology Law and Policy 2011, p. 8, section 2.2.

<sup>37</sup> Hess, Journal of Corporation Law- Fall 1999,p. 44.

<sup>38</sup> Ibid p. 46.

<sup>39</sup> Nessen, UCLA Pacific Basin Law Journal 2009, p.2.

that CSR is being used as a form of window dressing, or in other words as a means of strengthening the brand name and reputation and gain competitive advantage. CSR has been described as "green washing" enabling corporations to maintain an environmentally friendly public image.<sup>40</sup>

Today almost every corporation devotes their web pages to depict commitments to CSR and promising good behaviour. Hollender and Green observes thus:

*"Certainly corporate responsibility is more visible than ever before. It delivers good press and even skeptics can see that environmental improvements and energy efficiencies reduce costs. But despite the thousands of corporations that have signed codes of conduct promising good behaviour, the vents that triggered the brutal recession 2008-2009 demonstrate that far too few companies are moving in a truly responsible direction. And so we need a revolution..."<sup>41</sup>*

The authors refer to CSR as "bloodless buzzwords" proved by corporate behaviour that pursued the financial crisis and corporate behaviour in trying to survive the

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<sup>40</sup> Banerjee, p. 5, 6.

<sup>41</sup> Hollender and Green, p. 16.

crisis, which was mostly devoid of any responsibility that they have most faithfully promised to the public. The authors' positive note is unmistakable in anticipating the CSR "revolution" when the term "CSR" will be replaced by "corporate consciousness" or "resource intelligence", "social innovation" to capture the real world experiences.<sup>42</sup> The revolution proposed by Hollender and Green centers upon the vision to make profits with the goal of responding to social and environmental problems is indeed an important one.

All in all it could be observed that the latest development of CSR is the expectation that MNCs comply with international standards relating to labour standards and human rights. As it was mentioned in the introductory part to this paper, CSR is the thread which connects MNCs with human rights and the whole gamut of international law including international labour law relevant to the case study presented in this paper. Many contemporary scholars identify the need for MNCs as duty holders of human rights in today's world, despite the fact that states have been the perennial holders of international obligations. Conventions and treaties on human rights and labour rights are an important segment of international law. Therefore in this part, the terms human rights and international law would be used interchangeably to reflect upon those labour rights and parallel human rights highlighted in the case study which is the focus of the next chapter.

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<sup>42</sup> Ibid p.3.

## Chapter 2

### Case Study

#### 2.1. –Introduction to Apple- Wintek Case

We have discussed that MNCs play an essentially important role in the global economy today, in a context where more and more states encourage foreign direct investment due to the potential economic and social benefits. However one could recall many incidents where MNCs activities have led to violations of the laws of the host state and deprived individuals and communities of the enjoyment of human rights.

Apple- Wintek tragedy is only one example out of many, which bear testimony to the negative impact of MNC activity on labour rights and human rights.

The case presentation that follows focus on the violation of the rights assured under the ICCPR right to life and ICESCR guaranteed right to health, right to work, right to equality at work, right to a safe work environment<sup>43</sup>.

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<sup>43</sup> Ruggie, P.15, para 56, p. 17.

## 2.2 The Facts of Apple- Wintek Case

Apple- the US technology giant hit the news headlines, not just with the launch of the latest piece of innovation: iPad and its profits of \$6bn (£3.7bn) for the fourth quarter of 2010 but more surprisingly with the release of its Supplier Responsibility Progress Report of 2011.

Apple is one of the most innovative and successful MNCs in the world, having its suppliers and manufacturers in different part of the world including China, Singapore, Taiwan, South Korea, Thailand and Philippines, that enable to gain a competitive edge.

Wintek is a Taiwan owned company operating in China as a supplier of Apple. The incident relates to the poisoning of 137 of its workers by exposure to N hexane: a narcotic in used in the manufacture of the glass screens of iPhone. <sup>44</sup>N-hexane has been used since early 2009, upon receiving a large order by Wintek for the iPhone glass panels. N-hexane evaporates quickly hence works as an efficient cleaning agent.

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<sup>44</sup> BARBOZA, The New York Times of 13.02. 2011.

However N-hexane has found to be capable of causing disruptions in the human central nervous system and induces vertigo and muscular atrophy.<sup>45</sup> The affected employees were unaware of the fact that they were suffering from adverse health conditions until they experienced symptoms of nerve damage.<sup>46</sup>

### 2.3 Apple's Commitment to Corporate Responsibility

Apple has asserted its commitments to protect the highest standards of social responsibility "wherever the products are made and assures that its suppliers provide safe working conditions, treat workers with dignity and respect, and use environmentally responsible manufacturing processes"<sup>47</sup> Thus Apple has pledged

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<sup>45</sup> Ibid According to the Occupational Safety and Health Administration Division of the United States Department of Labor.

<sup>46</sup> Ibid

<sup>47</sup> Apple Website : <http://www.apple.com/supplierresponsibility/>



to hold the suppliers responsible under its Supplier Code of Conduct, for non compliance with the Code.<sup>48</sup>

The commitments include labour and human rights such as prevention of underage labour, prevention of occupation injury, prevention of chemical exposure, ensuring occupational safety, environmental protection through management of hazardous waste and ethics such as disclosure of information, whistleblower protection and anonymous complaints.<sup>49</sup>

#### 2.4. Apple Supplier Responsibility Report 2011 Progress Report

Apple's CSR reporting consists of the Supplier Responsibility Report (Report) issued as of December 2010, subsequent to onsite audits conducted at 288 of its facilities including China, Taiwan, Czech Republic, south Korea, Philippines, Thailand, with the aim of monitoring compliance by its suppliers with the voluntary commitments to CSR adopted by Apple.

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<sup>48</sup> Ibid

<sup>49</sup> Apple Supplier Responsibility 2011 Progress Report, p. 3.

The incident of toxic poisoning of 137 workers at Suzhou Facility of Wintek, has been called a “core violation” of its Supplier Code of Conduct.<sup>50</sup> The Report highlights serious violations of its Supplier Code of Conduct as “core violations” which are in total 36 in 2010. In fact the Report reveals several instances of violations of its corporate social responsibility, towards the environment, community and in particular to its employers. Such cases of reported core violations include employment of underage, involuntary labour, falsification of audited material, worker endangerment.<sup>51</sup> The report also reveals the fact that multiple suicides have occurred at Foxconn,<sup>52</sup> one of Apple's major suppliers in China and a marked drop in compliance with the working hour requirements from 46% in 2009 to a shocking 32%. Some Labour Rights Activists have opined that such suicides are results of harsh working conditions in the factory. <sup>53</sup>

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<sup>50</sup> Ibid P. 20.

<sup>51</sup> Apple Supplier Responsibility 2011 Progress Report, P. 16.

<sup>52</sup> Apple Supplier Responsibility 2011 Progress Report, P.18.

<sup>53</sup> DAVID BARBOZA, The New York Times of 23.09.2011.

## 2.5 Review of Apple Scandal in light CSR commitments.

Apple has pledged and asserted its commitment for worker safety by requiring the suppliers to have safety mechanisms in place in handling and disposal of chemicals with proper ventilation systems, risk assessments and to address emergency situations by training and adequate equipment. As mentioned above, according to the Supplier Code of Conduct, all the suppliers are obliged to, as a condition for doing business with Apple, to adhere to safe working conditions, respect the rights of workers and use environmentally friendly manufacturing process, which are drawn from human rights, labour rights and international standard for environmental protection.<sup>54</sup>

The Code compliance is monitored through an onsite factory audit and review program followed by corrective measures, within 90 days of such review.<sup>55</sup>

In response to this incident, Apple lays down the corrective measures in the form of remedies. In that, Wintek has been ordered to stop use of the chemical and obtained proof that the use of N-hexane had been completely removed from the factory

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<sup>54</sup> Apple Website : <http://www.apple.com/supplierresponsibility/>

<sup>55</sup> Apple Supplier Responsibility 2011 Progress Report, p.14.

production lines. Moreover Wintek has been ordered to repair the ventilation system allowing adequate ventilation so that the workers would not be exposed to chemicals and suffer from adverse health effects.

In the report Apple also asserts that it has verified that the affected workers have been treated successfully and pledged to monitor the progress of their health conditions continually. Moreover Apple asserts that according to Chinese Law, the workers have been paid for medical treatment, meals and back wages for sick and recuperating workers.<sup>56</sup>

Contrary to these assertions, the affected workers have aired their grievances during interviews conducted by The New York Times, expressing their predicament that they have never heard from Apple regarding this incident. In fact some of the affected workers are reported to have said that Wintek had pressed them to resign with an upfront cash settlement absolving the company from any future liability and insisted that they work long hours despite their health conditions.<sup>57</sup>

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<sup>56</sup> Apple Supplier Responsibility 2011 Progress Report, P. 20.

<sup>57</sup> David Barboza, The International Herald Tribune of 24.02.2011.

Newspapers carried criticisms on the irresponsible behaviour of Apple with allegations that the technology giant is only concerned in gaining competitive advantage in creating conditions for its suppliers in China to reduce its costs by cutting down safety mechanism for the employees and the environment<sup>58</sup> and that they treat their supply chains "as opportunities for competitive advantage"<sup>59</sup>.

Some of the criticisms are captured below:

The co-author of Network for Business Sustainability,<sup>60</sup> says: "Those companies end up implementing costly and ineffective punitive actions against suppliers after labour issues or supply disruptions have already occurred and in the end, nobody wins."<sup>61</sup>

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<sup>58</sup> Greenwire, Business Vol. 10 No. 9, of 20.01.2011: Ma Jun of the Institute of Public & Environmental Affairs, which published a report on Apple's practices in conjunction with environmental groups.

<sup>59</sup> Gurmukh Singh, Indo-Asian News Service of 29.03.2011.

<sup>60</sup> Gurmukh Singh, Indo-Asian News Service of 29.03.2011: Stephen Brammer of the Warwick Business School is part of an independent research group based at the Richard Ivey School of Business, University of Western Ontario.

<sup>61</sup> Gurmukh Singh, Indo-Asian News Service of 29.03.2011.

"Apple's lack of responsiveness eventually made us quite shocked. It's the whole complacency that it doesn't have to be accountable to the NGOs, to the communities, even to the poisoned workers," <sup>62</sup>

"I regard this report as a means of image-building rather than ensuring compliance with labour rights," Debby Chan, of Hong Kong's Students and Scholars against Corporate Misbehaviour campaign.<sup>63</sup>

Now the task is to explore the effectiveness of those voluntary commitments on CSR undertaken by Apple. Next chapter deals with the trend of voluntary codes of conduct and their implications on CSR in the real world.

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<sup>62</sup> Supra note 58.

<sup>63</sup> Beijing, The Guardian (London) of 16.02.2011.

## Chapter 3

### Voluntary Codes of Conduct

#### 3.1 Introduction

Multi National Corporations (MNCs) have become part of the implementation of laws and norms internationally, through the voluntary commitments they undertake in the fields of labour law, environmental law, and human rights<sup>64</sup> which traditionally belong to the sphere of public law.<sup>65</sup> Such implementation has become necessary and practical with the wide geographical reach of these MNCs combined with a lack of international regulatory authority.<sup>66</sup>

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<sup>64</sup> Ratner, Yale Law Journal, P. 461; Metcalf, Pace Environmental Law Review 2010, p. 146.

<sup>65</sup> Metcalf, Pace Environmental Law Review 2010, p. 150, 151.

<sup>66</sup> Ibid. 146.

In the face of globalisation and consumer demands for corporate accountability, MNCs were driven into self-regulation.<sup>67</sup>

Corporate codes of conduct are commitments voluntarily undertaken by companies which sets out principles that define a set of relationships that a company has with the stakeholders on a range of topics.<sup>68</sup> Codes of conduct for multinational companies are externally generated standards and recommendations agreed by multinationals along with sovereign states, international community and NGOs. Again the voluntary nature of these commitments highlights the lack of legal enforceability.<sup>69</sup> Thus many of the codes in existence are non-binding and are vague<sup>70</sup> Only 52 coeds have provided for independent monitoring out of the 426 Codes covered by the OECD.<sup>71</sup>

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<sup>67</sup> Helen Keller, P. 3.

<sup>68</sup> Ibid. p.5.

<sup>69</sup> Ibid. 54.

<sup>70</sup> Cernic, Denver Journal of International Law and Policy 2011, P. 330.

<sup>71</sup> Keller, p. 55.



“A well drafted and implemented code can be used to bring about real improvements in employee rights, particularly where the host State has little commitment to such rights and where independent civil society and unions are weak or non-existent.”<sup>72</sup>

“The best corporate codes are those that describe the way everybody in the company already behaves and feels. The worst are those where senior executives mandate a list of principles-especially if they fail to “walk the talk” themselves.”<sup>73</sup>

As these two quotes highlight, implementation plays a crucial role in voluntary commitments towards CSR especially in emerging economies like China.

One way to assess the credibility of voluntary commitments is to judge the profitability of CSR projects undertaken by corporations. Metcalf commenting that the profitability of a CSR project is highly debatable introduces three factors vital for determining profitability.<sup>74</sup>

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<sup>72</sup> *McLeay*, NYU School of Law- Global Law Working Paper 2005/1, p. 19,20.

<sup>73</sup> *Doing Well by Doing Good- The Economist* 20<sup>th</sup> 2000 Citing Robert Soloman the University of the Texas.

<sup>74</sup> *Metclaf*, P.155,156.

Firstly, it depends on the preferences of consumers and investors, which could be a point of product differentiation.<sup>75</sup>

Hollender and Breen refer to the Tridos bank as an exemplary case for CSR which in the midst of the financial crisis in 2009, offered investment only in corporations committed to sustainability of the environment.<sup>76</sup>

Consumer boycotts are widely seen in the modern society. In 1995 Shell faced a consumer boycott in Germany over the attempt to dispose the Brent Spar Oil rig in the North Sea followed by a sharp fall in the share prices.<sup>77</sup> Hollender and Green highlight the consumer empowerment in the modern day, due to the internet and their ability to monitor the activities of MNCs in a context where corporations are purpose driven rather than profit driven and that global brands have a social role to play.<sup>78</sup> “Over the long run companies that really are responsible will surpass their profit fixated peers”<sup>79</sup>

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<sup>75</sup> Ibid. 156.

<sup>76</sup> Hollender and Green, p. 1.

<sup>77</sup> Supra note, 73.

<sup>78</sup> Supra Note 76, P. 4,6.

<sup>79</sup> Ibid, p. 4.

Thus Hollender and Green forcefully argue that corporations in the present day, where mere adherence to laws is insufficient because the society acts as the licensor. Accordingly the approval by the community of the business is not only necessary for survival but is the sine qua non for success. According to the study conducted by Michael T. Rock, an interesting observation is made in relation to public responses to disclosure of sweatshop practices of US Multinational Garments, where immediate downfall of stock prices could be seen subsequent to spread of such scandals.<sup>80</sup> Thus it seems that today there's more and more demand from consumers and investors for CSR application.

Secondly, CSR activities could be profitable where the corporations strategically use its CSR projects, to be part of the formulation of regulations in the future, which could minimize future costs and risks.<sup>81</sup> Sustainability and innovation can argue to be solutions in eliminating any cost to its reputation. For example NIKE has evolved

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<sup>80</sup>Original Source: Michael T. Rock, Public Disclosure of the Sweatshop Practices of American Multinational Garment/Shoe Makers/Retailers: Impacts on their Stock Prices, 7 Competition & Change 23, 24 (2003)

A preview of the survey at: <http://www.tandfonline.com/doi/abs/10.1080/1024529032000093352>

<sup>81</sup> Metclaf, P. 157.

exemplary CSR agenda out of harsh lessons learned subsequent to accusations of its sweatshops in China, Vietnam and Indonesia<sup>82</sup>. NIKE website now reveals all its suppliers for independent monitoring by the civil society. This is an innovative and a strategic attempt taken by NIKE in voluntary CSR implementation. <sup>83</sup>

A major criticism leveled against Apple was the lack of transparency reflected on its Report in its dealings with the suppliers. As it was rightly pointed out in one instance: “... there was no way for others to monitor the behaviour of suppliers because Apple would not identify them or even say how many it had...”<sup>84</sup> Had Apple revealed all its suppliers, there would have been more transparency for the civil society to be part of the monitoring process as a global stakeholder, in a country such as China with lax implementation of law especially in relation to worker rights.

One could agree with Hollender and Green’s support for the view that failure to observe CSR commitments would bring about serious risks to the corporations

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<sup>82</sup> Steven Greenhouse, N.Y. Times, Nov. 8, 1997.

<sup>83</sup> NIKE website [http://www.nikebiz.com/responsibility/workers\\_and\\_factories.html](http://www.nikebiz.com/responsibility/workers_and_factories.html)

<sup>84</sup> Greenwire, Business Vol. 10 No. 9, January 20<sup>th</sup> 2011: Debby Chan, of Hong Kong's Students and Scholars Against Corporate Misbehaviour campaign- Ma Jun of the Institute of Public & Environmental Affairs, which published a report on Apple's practices in conjunction with environmental groups.

which compel into responsible behaviour instead of using it as a mere slogan to please the stakeholders. The authors comment that a CSR driven business is “an upside down way to build strategy...”<sup>85</sup>to the “conventional mind” that puts profit before values.

The third criterion is that profitability could be promoted through increased labour performance and productivity. <sup>86</sup> In the instant case Apple’s disrespect towards worker right to health by its failure to provide safe working conditions, has not only injured its global reputation but also caused loss of workers and worker efficiency.

### 3.2 CSR Reporting

This section examines the importance of CSR reporting.

CSR Reporting or Sustainability Reports by the MNCs is a common practice to exhibit their true commitments to CSR. Reporting is essential for understanding the social and environmental impact of business and to bring about positive results

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<sup>85</sup> Hollender and Green, p.2.

<sup>86</sup> Metcalf, p.158.

while minimizing the negative ones.<sup>87</sup>

Cynthia Williams argues that Securities and Exchange Commission could create greater corporate transparency and responsibility by requiring corporations with public reporting with social disclosure of its CSR activities.<sup>88</sup>

According to the KPMG International Survey of Corporate Responsibility Reporting 2008, the 80% of the world's biggest 250 MNCs across diverse sectors, drawn from the Fortune Global 500 List have released their reports on CSR commitments.<sup>89</sup> Most companies have adopted the Sustainability Reporting Guidelines (GRI) released by Global reporting Initiative. Corporate reputation is an important asset in value creation of the firm.<sup>90</sup>

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<sup>87</sup> KPMG International Survey of Corporate Responsibility Reporting 2008, p.13.

<sup>88</sup> Cynthia A. Williams, The Securities and Exchange Commission and Corporate Social Transparency-excerpt at <https://litigationessentials.lexisnexis.com/webcd/app?action=DocumentDisplay&crawlid=1&srctype=smi&srcid=3B15&doctype=cite&docid=112+Harv.+L.+Rev.+1197&key=1c09a7544c33e6c6b0def502d0fcb12a>.

<sup>89</sup> Sura note 87, p.16.

<sup>90</sup> Keller, p.13.

The considerations that drive these companies to report are reputation, ethical, economic considerations, innovation and learning, employee motivation, risk management, strengthened supplier relationship, increased shareholder value, improved market position, good relationships with governments and cost savings. Out of this list the main considerations are those of economics, innovation and learning, employee motivation and ethical considerations.<sup>91</sup>

The following are the trends reported by KPMG: Three-quarters of the G250 companies have incorporated corporate responsibility into their strategy and objectives. While more than half of the G250 companies have publicly disclosed the value of corporate responsibility, 63% of the G250 companies have laid down stakeholder dialogue.<sup>92</sup>

As the Report highlights the challenge is to give information to the relevant stakeholder, at the correct time and in the correct form.<sup>93</sup>

In the light of the above, it seems that CSR reporting is important in enforcing

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<sup>91</sup> Supra notw 89.

<sup>92</sup> Supra note 87, P. 22.

<sup>93</sup> Supra note P.19.

voluntary corporate commitments. However, reporting on CSR violations would be no good, as we saw in Apple's Supplier Responsibility Report 2011. Nevertheless many believe that voluntary enforcement by corporations is better than impositions by law. The next section throws light on the reflexive regulatory system advocated by some scholars.

### 3.3 A Reflexive Regulatory System.

Promoting self regulation of CSR performances by corporations as a reflexive regulatory system has been promoted, in view of the value pluralism inherent in today's society in the event of failures of substantive legal systems<sup>94</sup>. As suggested by David Hess, such an objective indeed requires social legislation. However compliance is non-mandatory, encouraging social conscience of the corporations.<sup>95</sup> The law must require, corporations to internalise the divergent interests of relevant stakeholders into its daily corporate decisions.<sup>96</sup> For this participation of stakeholders is vital to encourage social responsive management.<sup>97</sup> The ultimate objective of which is to encourage MNCs to review their practices on a timely basis and be responsible while adhering to the basic requirements imposed by law.

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<sup>94</sup> Hess, P. 58.

<sup>95</sup> Ibid. P.66.

<sup>96</sup> Hess, P. 61.

<sup>97</sup> Ibid, p. 64.



### 3.4. Third party rankings of corporate CSR performances

The overlap between voluntary CSR commitments, public law and international law seems quite obvious.<sup>98</sup> In this context both public and private actors have tried to make the corporate voluntary commitments more robust and to thereby enforce voluntary commitments.

Monitoring by private parties could act as a form of enforcement of voluntary corporate codes of conduct, based on information available to the public and could be effective in enforcing voluntary commitments than traditional legal enforcement mechanisms.<sup>99</sup>

The Fortune Magazine's "Corporate Social Responsibility" listing assumes importance in this regard.<sup>100</sup> As Metcalf reflects the results of which could be

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<sup>98</sup> Metclaf, P.198, 173.

<sup>99</sup> Metclaf, P.195, 197.

<sup>100</sup> Ibid P.173

interpreted as partially supportive of the positive relationship between the relative rank and the value of the firm. Thus there is an indication that these rankings would compel corporations to observe their CSR commitments. Nevertheless it has to be agreed that such positive findings cannot be generalized “across event windows, years or model specifications addressing the relative ranking effect” that would render “CSR as global public norms.”<sup>101</sup>

It is true that CSR performances could vary over time. For example BP has been “a perennial CSR leader” who ranked second in 2006, first in 2005 and first in 2004<sup>102</sup>. However the recent event of oil spill in the Gulf Coast depicted how poor CSR commitments could bring market pressure on BP and bad reputation worldwide.

Albeit, third party rankings of CSR performance of major global corporations may assume significance today in enforcement of voluntary CSR obligations.

All in all one could clearly see that the emergence of voluntary codes of conduct, independent third party rankings of CSR performances undertaken by the MNCs in

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<sup>101</sup> Metclaf 189, 190.

<sup>102</sup> Ibid, p. 199.

their voluntary codes of conduct and reflexive regulatory approach may well provide evidence, that it is certainly not in the interest of corporations to flout their own commitments. Such commitments often end up as violations of national or international obligations, affecting worker rights and human rights. Despite all these assertions and aspirations, corporate scandals violating voluntary codes of conducts and human rights continue unabated.

The UN Special Representative states that sustainability reporting as implemented by several states, sub national authorities and stock exchanges enables stakeholders to compare rights related performance of corporations,<sup>103</sup> especially the obligation to respect human rights.<sup>104</sup> While there's cause for cheer that voluntary commitments be corporations would be substantially enforced in the near future, one must find other means in holding MNCs responsible for the present violations of international standards.

The next section explores corporate responsibility within the mandate of national laws.

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<sup>103</sup> Ruggie, para 29.

<sup>104</sup> Ruggie, Para 30.

## Chapter 4

### National Laws on corporate responsibility.

#### 4.1 Introduction

A corporation is subject to the laws of the state where it is based or continues operations.<sup>105</sup> According to the United Nations Conference on Trade and Development (UNCTD) Organisation the largest MNC ranked first by the Geographical Spread Index is the US based Citigroup Inc with 601 foreign affiliates and operating in 75 host states<sup>106</sup>. Thus a MNC will be subject to many national laws, where it has business activities.

National laws provide for corporate responsibility on protection of individual and community rights in the diverse laws<sup>107</sup> covering civil law, criminal law, consumer protection, environmental laws, company law, regulations and court decisions.

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<sup>105</sup> Ruggie, Para 14.

<sup>106</sup> UNCTAD website.

<sup>107</sup> Cernic, Denver Journal of International Law and Policy 2011, p.321.

Human rights obligations are mainly enshrined in the national constitutions along with effective remedies.<sup>108</sup>

Moreover it has been argued that human rights obligations derive their authority primarily from the national order<sup>109</sup> since human rights treaty obligations are implemented only upon state discretion.

The issue that one encounters is the lack of uniformity found in diverse national laws in different legal and political systems. Thus MNCs face the problem of conflict of laws and jurisdictions in different locations. This conflict exists despite the attempts at international law to narrow down the gap by international conventions and treaties. The UN special representative comments that states often support and ratify conventions and treaties without the will or inclination to implement those standards within the national system.<sup>110</sup> Policy coherence is needed in balancing diverse and conflicting social ends by nation states<sup>111</sup> in compelling MNCs to comply with the CSR commitments and international obligations under soft law

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<sup>108</sup> Ibid, P.320.

<sup>109</sup> Ibid P.318.

<sup>110</sup> Ruggie, Para 33.

<sup>111</sup> Ibid Para 22.

international instruments such as OECD guidelines, ILO Tripartite Declaration on Labour Rights and UN Global Compact.

Developing states in want of foreign investment and the objective of promoting export often promise lax implementation of national laws in regard to MNCs in bilateral investment treaties.<sup>112</sup> Thus exposing individuals and communities in developing states to labour and human rights violations more than ever at the hands of MNCs, in a context where the latter is reluctant to observe its own voluntary commitments to CSR. As Fiona comments on the human rights situation against the rapidly growing Chinese economy: “China is a key battle-ground in the fight for the promotion, protection and realization of human rights.”<sup>113</sup>

Apple Inc is obliged to obey the laws of its home state as well as those of the host states. In our present case study, Apple is obliged to comply with the host state Chinese laws through its supplier Wintek.

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<sup>112</sup> Ibid para 15.

<sup>113</sup> Ibid, page 12.

## 4.2 Apple under Chinese Law

Chinese legal system is one of civil law coupled with a communist ruling party.<sup>114</sup> No doubt China is the fastest growing economy in the world at present with rapid FDI growth both as a recipient and a source of FDI.<sup>115</sup> However at the same time the country is notorious for its lapses in law enforcement<sup>116</sup> and unethical corporate behaviour. Thus it is true that the law implementation depends on the political, economic, social and cultural setting of a particular country.<sup>117</sup>

However in the recent past there has been much attempt at introducing CSR into the corporate mandate<sup>118</sup>. The introduction of labour laws in 2008 and laws geared to protect the environment, have led to a significant rise of litigation and arbitration of

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<sup>114</sup> A brief Introduction to the Legal System of China available at : <http://faculty.cua.edu/fischer/ComparativeLaw2002/bauer/China-main.htm>

<sup>115</sup> Poncet, Paris School of Economics and CEPII, p.1, available at [http://ces.univ-paris1.fr/membre/Poncet/Person/Chapter\\_FDI\\_PONCET\\_dec2009.pdf](http://ces.univ-paris1.fr/membre/Poncet/Person/Chapter_FDI_PONCET_dec2009.pdf)

<sup>116</sup> Chen, Yuwen Li, Jan Michiel Ottoand, p. 3,4.

<sup>117</sup> Ibid, P. 5

<sup>118</sup> Levine, p.2 available at: [http://www.secure-www.net/files/24063\\_Levine2.pdf](http://www.secure-www.net/files/24063_Levine2.pdf)

labour disputes. Moreover state owned enterprises and listed Companies are encouraged to publish a CSR code and CSR reports. <sup>119</sup>

The Company Law of the Peoples' Republic of China (PRC) 2006 creates rights for workers through union representation, worker representation on corporate supervisory boards and labour laws assuring workers' rights. Nevertheless existence of rights without effective remedies is an illusion. This is so due to three reasons.

Firstly, the Chinese unions are under the control of the ALL China Federation of Trade Union which in turn is closely connected to the Chinese Communist Party which strikes upon the independence of the union representation.<sup>120</sup>

Secondly even though supervisory board consists of one third of worker representatives and has been granted extensive powers in relation to supervision over the exercise of power by the directors, worker supervisors remain passive and weak.<sup>121</sup>

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<sup>119</sup> Ibid; Rebecca Lowe, P. 2; IBA Global Insight- June, 2011- Asia Special.

<sup>120</sup> Miles, Company Law Newsletter 2011, P.3,5.

<sup>121</sup> Ibid P. 5: Articles 52 and 54 of the PRC Company Law 2006:



Lastly as regards labour laws, effective enforcement is a major challenge due to administrative lapses by the local authorities which are “more interested in generating income and which are reluctant to antagonise corporations by forcing them to comply with the law”<sup>122</sup> Moreover Chinese law is drafted in ambiguous and vague language with sweeping discretionary powers vested in the administrative authorities.<sup>123</sup>

Thus one could feel assured only as to the existence of Chinese law geared towards worker right protection, however without satisfactory implementation.<sup>124</sup>

Hence it has been observed that despite myriad of labour laws “the rights of China’s workers are routinely violated and there is almost total failure to enforce either domestic or international law regarding labor rights in China.”<sup>125</sup>

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<sup>122</sup> Ibid citing S. Cooney, “China's Labour Law, Compliance and Flaws in Implementing Institutions” (2007) 49, 5, *Journal of Industrial Relations* 673-686.

<sup>123</sup> Supra note 116. P. 11.

<sup>124</sup> Supra note 119, P. 2.

<sup>125</sup> Fiona, p.12.

Rebecca Lowe comments on the Chinese CSR culture as: “ mere PR exercise, lip service or window dressing”, since they lack third party auditors to monitor the commitments on CSR, marked by lack of strong civic organisation to hold either the authorities or corporations to account, coupled with the absence of an independent judiciary<sup>126</sup> and campaign for legal reform.<sup>127</sup>

It is said that “Chinese courts are far from upholding the rule of law in China” <sup>128</sup> Judiciary is that branch of the government vested with the implementation of rule of law. Therefore judicial independence from the legislative and executive branches of governance is vital for the protection of rights guaranteed to the people.

Compliance with the international obligations by China has not been satisfactory, however there’s hope for improvement:

‘China’s human rights situation is beginning to play a bigger role in companies as

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<sup>126</sup> Supra note 116, p. 6.

<sup>127</sup> Supra note 119, P. 2.

<sup>128</sup> Supra note 116, p. 8.

they consider their future in the country,'<sup>129</sup> Hence there is dire need for MNCs to enter into the human rights debate in China.

Apple has vouched to comply with CSR obligations everywhere it operates. Hence it is not justifiable to deprive the Chinese workers of their rights under both national and international law, based on the lapses in the host state's implementation mechanisms. In this background how could one hold Apple responsible under international law?

## Chapter 5

### International Law on CR

#### 5.1 Sources of International Law on Corporate Responsibility

The preliminary question is whether there are any international treaties or conventions in the area of corporate responsibility?

First let us consider the definition of a treaty.

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<sup>129</sup> Supra note 119, P.3,4: John Kamm, former President of the American Chamber of Commerce in Hong Kong and founder of the human rights Dui Hua Foundation.

The Vienna Convention on the Law of Treaties of 1969 defines a treaty as “an agreement between states in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever their particular designation.”<sup>130</sup>

Article 38 (1) of the Statute of the International Court of Justices 1945, stipulates the basic sources of international law as international conventions, international custom (as evidence of a general practice accepted as law), the general principles of law recognized by civilized nations, judicial decisions and the teachings of the most highly qualified publicists of the various nations.<sup>131</sup>

International conventions and customary law are the major sources of international law.<sup>132</sup>

The conventions adopted by the United Nations (UN) under the Universal Declaration of Human rights (UDHR) are included into this category. <sup>133</sup>The

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<sup>130</sup> Article 2 (1)(a) of the Vienna Convention on the Law of Treaties of 1969

<sup>131</sup> the Statute of the International Court of Justices 1945.

<sup>132</sup> Degan, P. 5.

<sup>133</sup> European Commission for Democracy through Law, 2006, P. 14.

prominent conventions on Human rights are the International Covenant on Civil and Political Rights and the Optional Protocols of 1966, 1989, The International Covenant on Economic, Social and Cultural Rights 1966, the Rights of the Child 1989, Convention against Torture and Other Cruel and Degrading Treatment or Punishment 1984.

In view of these rights guaranteed under the international treaties, it is clear that international law imposes primary obligations only upon state parties to protect human rights/labour rights. Article 1 of the Vienna Convention on the Law of Treaties 1969 (Vienna Convention) restricts the application of the treaty only between states. By virtue of Article 6 of the Vienna Convention only states possess the capacity to conclude treaties; depriving legal status for non state parties such as MNCs. Thus MNCs cannot be direct parties to Conventions.

As a consequence, only states could be held liable under international law. However we have discussed before that international treaties and conventions cannot create automatically binding obligations on states upon their accession. International law requires states to incorporate international human rights obligations into the domestic law upon ratification. <sup>134</sup>

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<sup>134</sup> Sende, P. 34.

In 1970 Milton Friedman observed that “there is one and only one social responsibility of business--to use its resources and engage in activities designed to increase its profits” <sup>135</sup> is universally contradicted in the present stage of globalisation.

Albeit, it is apparent that such a view on corporate responsibility has become outdated in the modern age of rapid globalisation and development, where the actions of each individual, corporation and government counts in the collective effort to protect the environment, diminishing resources protection of human rights and world peace. There’s ample evidence to prove that MNCs are capable of violating the human rights of individuals and communities<sup>136</sup> coupled with no mechanism to hold powerful MNCs accountable under international law. The Apple Scandal highlights the violation of labour as well as parallel human rights of the affected employees.

The international obligations under human rights jurisprudence would include both categories of civil and political as well as social, economic and cultural rights

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<sup>135</sup> Friedman, *The New York Times Magazine*, September 13, 1970.

<sup>136</sup> Cernic, P.316.

embodied in the international conventions. The rights alleged to have been breached by Apple in the instant case are canvassed within the economic, social and cultural right regime. Hence Article 12 of the International covenant on Economic, Social and Cultural Rights (ICESC) recognise the right of everyone to the enjoyment of the highest attainable standard of physical and mental health. Article 7 (b)ICESCR imposes on the state parties the obligation to recognize the right of everyone to the enjoyment of just and favourable conditions of work which ensure, in particular in guaranteeing safe and healthy working conditions.

Moreover in relation to the common discourse on corporate responsibility and corporate liability under international law, it has been suggested that responsibility is a broader concept than liability as it includes not only national liability and accountability under national legal orders (the civil, criminal and administrative liabilities of corporations under national legal orders) but also the international legal responsibility of states and the liability of corporations under investment law and company law".<sup>137</sup>

With dissatisfaction on exercise of state responsibility towards human rights protection under international conventions, the discourse turned to imposition of

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<sup>137</sup> Cernic, Denver Journal of International Law and Policy 2011. P. 309.

obligations on corporations themselves in the form of international agreements.<sup>138</sup>Hence one needs to examine the nature and scope of these obligations under the international initiatives which are often termed as “soft law”<sup>139</sup> due to the fact that they do not enjoy the status of international treaties and convention, imposing no legally binding obligation on corporations.

The debate is more focused on whether such obligations are direct or indirect on MNCs. Prior to pursuing our discussion on the this debate, one must have a look at these international instruments incorporating corporate obligations. In fact corporations have already adopted the principles set out in these international instruments voluntarily into their codes of conduct. The KPMG Report states that companies mostly referred to the UN Global Compact, ILO Core Labor Conventions, the UN Universal Declaration of Human Rights and the OECD Guidelines for Multinational Corporations.<sup>140</sup>

The next section seeks to highlight the key provisions and purpose of these international instruments.

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<sup>138</sup> Ratner, The Yale Law Journal, P.461.

<sup>139</sup> Ibid p. 486.

<sup>140</sup> KPMG Rport, P.29.



## 5.2 International Initiatives

The ILO Tripartite Declaration of Principles concerning Multi National Enterprises and Social Policy 1977 (ILO Declaration)

The declaration consists of a set of guidelines to MNCs, governments, Employers and workers Organisations in the areas of employment, industrial relations, conditions of work and life, reinforced by international labour conventions: the ILO declaration on fundamental principles and rights at work 1988.<sup>141</sup>

Article 34 of the Declaration imposes special obligations for the MNEs operating in developing countries:

“When multinational enterprises operate in developing countries, where comparable employers may not exist, they should provide the best possible wages, benefits and conditions of work, within the framework of government policies. These should be related to the economic position of the enterprise, but should be at

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<sup>141</sup> The ILO Tripartite Declaration of Principles concerning Multi National Enterprises and Social Policy, available at [http://www.ilo.org/empent/Publications/WCMS\\_094386/lang--en/index.htm](http://www.ilo.org/empent/Publications/WCMS_094386/lang--en/index.htm)

least adequate to satisfy basic needs of the workers and their families. Where they provide workers with basic amenities such as housing, medical care or food, these amenities should be of a good standard.”

This provision recognises the importance of corporate obligations in developing countries with weak or no government regulation in accordance with “the economic position” of the particular enterprise. This may indicate that in relation to MNCs, by virtue of wide economic powers wielded, disregarding the fulfillment of the obligations stated in this particular Article would be unjustifiable.

The ILO Declaration expects corporations to work closely with governments in formulating policies relating to fulfillment of worker rights. In fact the Declaration restates the state obligations under international conventions relating to labour rights and impose them on MNCs. <sup>142</sup>Despite the fact there’s no legally binding obligation created on MNCs, the recognition of corporate obligations is a significant step in the right direction.

The OECD's Guidelines for Multinational Enterprises 1976

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<sup>142</sup> Ratner, Yale Law Journal, P.487.

The OECD's Guidelines as amended in 2000, provide principles and standards of good business in the areas of human rights, labour law, the environment and anti-corruption adopted first in 1979. The guidelines apply to 42 governments who account for 85% of the foreign direct investment and thereby encourage the enterprises to adhere to these standards wherever they operate.<sup>143</sup>

The guidelines are recommendations addressed jointly to governments and enterprises therefore not legally enforceable,<sup>144</sup> and apply to all the entities within a multinational corporation including the parent company and the local entities.<sup>145</sup>

Accordingly, the guidelines require MNCs to obey the domestic laws, and to respect the human rights within the sphere of its activities.<sup>146</sup>

The UN Special Representative declares the OECD as the most widely adopted instrument by Corporations, nevertheless the human rights obligations therein lack specificity and corporate voluntary codes fall behind these principles. The only

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<sup>143</sup>OECD Website;

[http://www.oecd.org/document/18/0,3746,en\\_2649\\_34889\\_2397532\\_1\\_1\\_1\\_1,00.html](http://www.oecd.org/document/18/0,3746,en_2649_34889_2397532_1_1_1_1,00.html)

<sup>144</sup> The OECD Guidelines : Para 1.1.

<sup>145</sup> Ibid 1.4.

<sup>146</sup> Ibid, Para 1.2: Ratner, Yale Law Journal, p.487.

remedy suggested to cure this, is to make timely amendment to the OECD guidelines.<sup>147</sup>

### The UN Global Compact

Former United Nations Secretary General Kofi Annan spearheaded the launching of the UN Global Compact enabling the corporations to voluntarily enforce CSR commitments within their “sphere of influence” relating to relevant human rights, labour rights, standards for environmental protection and anti-corruption, so as to ensure sustainable growth and to give “a human face to the global market”<sup>148</sup> By June 2004 “the Global Compact” comprised of ten principles in the areas of human rights, labour standards, environment and anti-corruption.

The UN Global compact website report that the program delisted corporations who were not communicating in the progress of implementing the 10 principles.<sup>149</sup>

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<sup>147</sup> Ruggie, Para 46, p. 13.

<sup>148</sup> Global Compact Website:  
<http://www.ioe-emp.org/en/policy-areas/csr/global-compact/index.html>

<sup>149</sup> Ibid

## The 2003 UN Norms on the Responsibilities of Transnational Corporations and other Business Enterprises with regard to Human Rights (The UN Norms)

The UN Norms imposes the primary responsibility on states to promote, respect and protect human rights recognized in international as well as national law. The preamble refers to “the universality, indivisibility, inter-dependence and interrelatedness of human rights, including the right to development.” The term “human rights” is meant to include the whole range of human rights.<sup>150</sup>

The UN Commission observes that these norms provide guidance to corporations.<sup>151</sup>The Norms reaffirm what has already been agreed, for example under the OECD-guidelines on multinational enterprises and the UN Global Compact Initiative.

Interestingly the UN Norms articulate that in cases where MNCS are confronted with conflicting requirements by diverse state laws, such conflicts are intended to be resolved by cooperation and good faith. Article 9 stipulates that “the use of appropriate international dispute settlement mechanisms, including arbitration, is

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<sup>150</sup> Moder, Background paper on UN-Commission on Human Rights, 25 March 2005.

<sup>151</sup> UN Commission decision regarding the norms 20<sup>th</sup> April 2004-decision 2004/116.

encouraged as a means of facilitating the resolution of legal problems arising between enterprises and host country governments”

These soft law international instruments recognise obligations on the part of MNCs in the form of guidelines and recommendations, with no effective provision for legal enforcement, while the primary obligation is thrust upon states parties. Despite the fact that there are no direct corporate obligations arising from these international agreements, these bear testimony as to the existence of corporate responsibility under international law, which is reinforced by the adoption of principles in corporate Codes of Conduct.

For these reasons there has been no finding of liability of MNCs, from the time of the Bopal disaster in India caused by the chemical giant Union Carbide in 1983. Hence huge corporations are capable of operating their businesses in developing countries with no great fear of apprehension by an international organisation<sup>152</sup>, despite all the positives highlighted in a CSR driven corporate strategy and supranational initiatives discussed above.

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<sup>152</sup> Reserch Series 116 2008 of International Institute for Labour Studies available at: <http://www.ilo.org/public/english/bureau/inst/download/116.pdf>

In this context the challenge that is posed is to impose direct obligations on MNCs within the existing international framework.

### 5.3 Direct Corporate Obligations

As primary holders of human rights, the obligations of state parties consist of three components known as the “tripartite typology”: the obligation to respect, protect and fulfill human rights.<sup>153</sup>

Article 1 of the 2003 UN Norms obliges not only states but also MNCs to respect, protect and fulfill human rights. Every right has three multiple duties. All these three duties must be fulfilled in order to honour a right in full. However it does not follow that the same individual or institution should perform all three kinds of duties. The three duties are as follows: the duty to avoid depriving rights, the duty to protect from deprivation of enjoying rights and the duty to aid the deprived in remedying the rights.<sup>154</sup>

The obligation to respect human rights corresponds to the obligation to refrain from

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<sup>153</sup> Koch, Human Rights Law Review (2005) 5 (1): excerpt.

<sup>154</sup> Shue, P.51,52

interfering with the enjoyment of human rights or violating them.<sup>155</sup>The origin of this rule goes back to the ancient Roman Legal system: embodied in the phrase: *sic utere tuo ut alterum non laedes*, meaning that one's own property should not be used in such a manner injurious to another.<sup>156</sup> This is the most passive form of duty one could expect.<sup>157</sup>The UN Global Compact states that one way in which corporations could support and respect human rights is by providing safe and healthy working conditions.<sup>158</sup> Thus it has to be concluded that Apple failed in its international obligation to respect and support human rights of the workers.

The second obligation is to protect the enjoyment of rights by “employing expertise

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<sup>155</sup> Cernic, Denver Journal of International Law and Policy 2011,P.335

<sup>156</sup> Ibid, p.335 Citing Elizabeth E. Ruddick, Note, The Continuing Constraint of Sovereignty: International Law, International Protection, and the Internally Displaced, 77 B.U. L. Rev. 429, 471 (1997)

<sup>157</sup> Di Henry Shue P.55

<sup>158</sup> The Global Compact Website

<http://www.unglobalcompact.org/AboutTheGC/TheTenPrinciples/principle1.html>



and resources” and enforce the primary duty to respect rights. <sup>159</sup>“The primary institution would normally be the government” <sup>160</sup> Corporations should assist governments in protecting human rights.<sup>161</sup>

Thirdly Corporations owe an obligation to fulfill human rights, where the “corporations take active measures to ensure availability, accessibility and affordability of the right.... in their internal and external activities.<sup>162</sup> This is fairly complicated as Henry observes since use of resources are involved within certain roles or relationships to which this aspect of corporate duty extends.<sup>163</sup>

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<sup>159</sup> Di Henry Shue P.55

<sup>160</sup> Henry P.56.

<sup>161</sup> Cernic, P.340.

<sup>162</sup> Ibid p. 341.

<sup>163</sup> Shue, P.56.

The three duties could assist the governments, MNCs and civil societies to reduce human right violations.<sup>164</sup> However as pointed out by the UN Special Representative MNCs do not own the same responsibility towards human rights as state parties, since corporations are specialized economic organs of the society they cannot be equated to states and given the same responsibilities as states.<sup>165</sup>

However corporate responsibility to respect human rights must be observed with “due diligence”, which is fact based yet, the scope of which more fully described with three considerations.<sup>166</sup> Firstly the corporation has to assess the human rights context and consider and possible human right challenges in the particular location. Secondly consider the potential human rights impact and thirdly, the possibilities in contributing to human rights violations by virtue of relations with the violators such as business partners, suppliers etc and thereby avoid as such.<sup>167</sup>

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<sup>164</sup> Ruggie, Para 17, p. 6.

<sup>165</sup> Ibid, Para 53 p.16.

<sup>166</sup> Ibid Para 57.

<sup>167</sup> Ibid. Para 57.

In this background one must turn to the heated scholarly debate on whether corporations could be held directly liable under international law.<sup>168</sup>

Emily C. Miletello points out two reasons to establish a framework for corporate responsibility under international law. Firstly to establish direct responsibilities for MNCs and secondly due to the persistent violation of human rights by MNCs.

International treaty bodies could be used as a means of enforcing state obligations against corporate activities.<sup>169</sup>

Universal Declaration of Human Rights (UDHR) could be identified as the starting point for responsibility of MNCs under international human rights law; owing to the broad language used despite the fact only states are formally parties to the declaration.

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<sup>168</sup>Cernic, Denver Journal of International Law and Policy 2011, p. 324.

<sup>169</sup> Ruggie, Para 43.

The preamble of UDHR declares:

“as a common standard of achievement for all peoples and all nations, to the end that *every individual and every organ of society*, keeping this Declaration constantly in mind, shall strive by teaching and education to *promote respect for these rights and freedoms* and by progressive measures, national and international, to secure their universal and effective recognition and observance, both among the peoples of Member States themselves and among the peoples of territories under their jurisdiction”

Moreover Article 25 of UDHR: states that everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social services, and the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control.

Article 29 of UDHR says everyone has duties to the community to respect the rights of others, while Article 30 states that a “group or person do not have any rights to engage in any activity or to perform any act aimed at the destruction of any of the rights and freedoms set forth herein.

It is clear that despite the fact that the language of the UDHR imposes obligations on everyone including MNCs. Additionally the states could be held liable for the actions of private parties, due to failure on the part of the state to fulfill its positive obligations under international law.<sup>170</sup> This is described as the “secondary rules of state responsibility’ by Steve Ratner, in line with International Law Commission definition of secondary rules as “the means for a state to be legally responsible for violations of “primary rules of state responsibility”. The primary rules are the substantive obligations under international law.<sup>171</sup>

Ratner considers whether these two sets of state responsibility be transposed to corporations. In its application to primary rules, two obstacles are highlighted. Firstly that all of the rights laid down in ICCPR may not be applicable to corporations, particularly those relating to criminal law. Secondly, due to differences in the nature and scope of states and corporations, all of the state duties cannot be transposed to corporations.<sup>172</sup> Transition of secondary rules may also not be clear for the same reasons as the primary rules of state responsibility.<sup>173</sup>

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<sup>170</sup> Sende, P. 3.

<sup>171</sup> Ratner. P. 490.

<sup>172</sup> Ratner p. 494.

<sup>173</sup> Ibid. p. 495.

Steve Ratner formulates a framework for corporate responsibility expanding on the “the sphere of influence” test introduced by the UN Global compact and followed by the UN Norms, which anticipates concentric circles of stakeholders surrounding corporate activities and the corporate responsibility diminishing with each circle stretching outwards into. <sup>174</sup>Thus corporate responsibility towards employees and suppliers may be greater than to the ones owed to the community, based on the sphere of influence.

Ratner identifies four factors crucial to this test which are: the corporation’s relationship with the government, the connection with the affected population, substantive human rights at issue and the place of individuals violating human rights within the corporate structure.<sup>175</sup>

Accordingly, closer the tie between the state and corporation, greater is the corporate responsibility.<sup>176</sup> In this instance the corporation could be acting as the

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<sup>174</sup> Ruggie. Para 66.

<sup>175</sup> Ratner. P. 497.

<sup>176</sup> Ibid. P. 497

de facto or de jure agent of the state or acting in complicity with the state.<sup>177</sup> If one adopts this criterion to the recent case study it seems that Apple has no apparent link with the state so as to give rise to serious responsibility towards the affected workers. Thus Apple could probably be freed from any responsibility for the violations of right to health and failure to provide safe working condition for Chinese workers at Wintek.

The second criterion relates to the nexus with the affected population which identifies the essential attributes of a state and corporation. Thus while a state is obliged to ensure the protection of the whole gamut of rights to everyone within its territory, the corporation's obligations extend only to those affected.<sup>178</sup> In the present case, Apple's obligations are related to the workers as the population affected by corporate activities.

Once the nexus with the government and affected population has been established, the next step is to draw the substantive rights infringed by corporate activities.<sup>179</sup> A preliminary question in this regard is to determine if a corporation is capable of infringing the rights at issue, if not no issue of corporate responsibility would ever

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<sup>177</sup> Ibid p. 500.

<sup>178</sup> Ibid, P. 506

<sup>179</sup> Ibid P.511.

arise.<sup>180</sup>

The final criterion is to define the connection of the individual violator to the corporation.<sup>181</sup> Accordingly beyond the employees of a corporation, founding corporate liability is a complicated one. <sup>182</sup>Would that mean corporate activities of suppliers such as Wintek would not be sufficiently close so as to attribute corporate responsibility on Apple?

However it has been pointed out that in the absence of a clear sphere of influence, there will be no real responsibility<sup>183</sup> with the ability of MNCs to define its own narrow and diverse interpretations of the “sphere of influence”<sup>184</sup>

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<sup>180</sup> Ibid. P. 511.

<sup>181</sup> Ibid, P. 518.

<sup>182</sup> Ibid, p 519.

<sup>183</sup> Ruggie, Para 77 p. 20.

<sup>184</sup> International Network for Economic, Social & Cultural Rights -Corporate Accountability Working Group- JOINT NGO SUBMISSION- CONSULTATION ON HUMAN RIGHTS AND THE EXTRACTIVE INDUSTRY 2005 : <http://www.earthrights.org/sites/default/files/documents/escr-joint-ngo-submission.pdf> -p.7.



The theory presents a practical solution to the issue of establishing direct corporate responsibility under international law. However this case by case approach may not be the best, as it fails to recognize that fact that MNCs owe the whole gamut of human rights and labour rights applicable to them under international law. The system of pick and choose may not present a coherent and consistent approach in establishing corporate responsibility.

The special representative disagrees with the Ratner theory because the theory is based on specific rights attributable to the corporation depending on specific circumstances, within the sphere of influence. Accordingly it cannot be lawfully justified as to the inclusion of certain rights to the exclusion of others. Thus all the rights need to be given equal importance.

The task is to define specific responsibilities of the MNCs in regard to all the rights instead of certain identified rights.<sup>185</sup> All social actors, states, business and civil society may pursue different but coherent paths leading to the ultimate objective. This is where a common agreement between all the different stakeholder groups becomes fundamental.<sup>186</sup>

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<sup>185</sup> Ruggie, Para 51 p. 15.

<sup>186</sup> Ibid para 6,7,8

## Chapter 6- International Enforcement Mechanism

### 6.1 Introduction

Vázquez argues that in the absence of an enforcement mechanism, there can be no direct obligation for non-state parties under international law.<sup>187</sup> This argument has been countered by Ratner who espoused specific obligation for MNCs and that the nature of an obligation cannot be equated with the way it is implemented.<sup>188</sup> Thus Vázquez's view captures the present status of international law, where legal obligations for MNCs exist without independent means of executing them.

The discussion on direct corporate responsibilities highlighted two main issues. First, the lack of legal personality for corporations under international law and second, lack of enforcement mechanisms in international instruments setting out corporate responsibilities.

It is well known that MNCs as we know them today would belong to several

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<sup>187</sup> CVázquez, Columbia Journal of Transnational Law 2005 P 941

<sup>188</sup> Ratner, P.443.

domestic orders yet be accountable to none. In the first part of this paper, with the case study of Apple, the need to hold MNCs responsible for violations of both national and international standards became obvious. It must also be stated that, despite the failure of the national laws and its implementation mechanism, the international obligations in soft law instruments remain intact.

All the corporate obligations arising from national laws, international law and corporate codes of conduct will be rendered meaningless, in the breakdown of either national implementation of laws or the failures in the international system to provide for effective remedies. This part seeks options to give teeth to the international system so that both International law and national law enforcement mechanism could operate as two autonomous legal orders.

Hence a reliable solution is sought in the form of an international agreement with multi-stakeholder participation backed by credible enforcement mechanism and home state remedies.

## 6.2 Remedies in the Home State

Given the fact that implementation of international obligations fall squarely within the mandate of national laws, in the case of an international dispute such as the one involving US based Apple Corporation partnering with a Taiwanese Company in China, the dispute is bound to give rise to complicated jurisdictional challenges. In this context one needs to consider the option whether Apple could be held liable in its home state for its conduct overseas.

Arguments based on concepts such as state sovereignty or territorial jurisdiction may be hurdles for victims to hold MNCs culpable in their home states for the wrong occurred overseas. The UN Representative observes that there's no agreement as to whether the home state could prevent its corporations from committing human rights violations beyond its territory. This is possible where a recognized basis of jurisdiction exists coupled with a satisfaction of a test of reasonableness.<sup>189</sup>

Since access to legal remedies plays a key role in human rights jurisprudence, effective legal remedies available in the home states of the MNC has been advocated extensively.<sup>190</sup>

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<sup>189</sup> Ruggie, para 19, p.7.

The United States is renowned for its bold steps in assuming jurisdiction based on extraterritorial legislation: most notably Foreign Corrupt Practices Act in 1977 and International Anti-Bribery and Fair Competition Act of 1998. CSR should be identified as requiring similar legislation in holding its MNCs accountable for human rights violations abroad.<sup>191</sup> To this end, isolated extraterritorial legislation by individual states could be of little consequences as opposed to a widely agreed international agreement based on broad consensus from MNCs, governments, stakeholders as to what constitutes corporate responsibilities and more importantly effective remedies such as ones obtainable in home states.

In this context as a first step of the solution suggested by this paper, it is justifiable to allow victims of human rights violations to seek remedies in the home states of the MNCs, where such action would constitute breaches under the laws of the home state. Thus if the same wrongs were to occur within the territory of the home states, legal remedies would be available to victims. This remedy assumes that the primary

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<sup>190</sup> Watson- "Challenging the Future of Corporate Responsibility"- Paper By Programmes Legal Adviser, WWF-UK- And Chair, Corporate Responsibility Coalition- 18 June 2007.

<sup>191</sup> McLoughlin, Ohio Northern University Law Review 2007.

obligations shall remain with the host state, in line with the current international law, however remedies in the home states should be an option available to the victims on defined grounds.<sup>192</sup> These grounds should be defined in an international agreement setting out effective legal remedies against violations caused by MNCs in their home states. Such international agreement has to seek the mandate of all the state parties to avoid jurisdictional conflicts and with multi-stakeholder participation. The primary condition for availability of home state remedies could be the exhaustion of legal remedies in the host state or the failure of the host state to remedy the victims.

Class action and NGO representation could be promoted as a viable solution in assisting the victims to remedy their affected rights.<sup>193</sup> However such representative standing has to have limits, if not it would lead to opening the floodgates for frivolous litigation against MNCs, given the fact that litigation is not the most expeditious and cost-effective remedy. Nevertheless such issues have to be

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<sup>192</sup>Watson, p. 15

<sup>193</sup> Ibid. p. 14.

placed on the agenda as part of consensus building in agreeing on the basic principles governing home state remedies applicable to MNCs.

The UN report highlights certain potential issues such as lack of legal standing under local statute of limitations, forum non conveniens (appropriate forum), independence of the judiciary<sup>194</sup>, arguments based on state sovereignty and territorial jurisdiction, all of which has to be addressed in the agreement, if effective remedies are to be found.

Such consensus building would be a real challenge. However The UN Global Compact is good precedence that would make such an option a reality despite the fact that such an exercise would be time consuming requiring wide deliberation and agreement across many disciplines and interests. Albeit in the context of international corporate responsibility such a remedy is a necessary evil to combat the power of MNCs to empower the powerless and to establish a uniform framework for corporate responsibility on an international scale, without rendering CSR a mere fantasy.

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<sup>194</sup> Ruggie, Para 89 p. 23.

### 6.3. International Regulatory System

Any international agreement would be merely stating soft obligations, without the means to implement those obligations stated in the agreement. The main shortcoming of all the previous efforts at imposing corporate responsibility in observing international standards covering labour rights and human rights was the absence of enforcement. Even though such soft law instruments could be interpreted as evidence for the existence of corporate responsibility in this area, the present agreement under contemplation has to go beyond borders into making such efforts a reality. It ought to be a groundbreaking agreement with an effective enforcement mechanism.

The international agreement created with the participation of MNCs, governments, NGOs, and other wise array of stakeholders should be enforced by the United Nations Security Council for effective and timely enforcement.

Two challenges are clear to arise out of such a proposal expecting the backing of the Security Council as the means of enforcement. Firstly, if the issue of corporate responsibility towards labour rights and human rights fall within the mandate of the



Security Council and the second, in connection with the practicality of such an option in the near future.

The Security Council (SC) is the wing of the United Nations Organisation in charge of maintaining international peace and security. The UN Charter anticipates a collective security system with the Security Council at the helm of the UN system and its enforcement machinery<sup>195</sup>. A collective security system is where “collective measure is taken against a member of a community that has violated community defined values”<sup>196</sup> According to the United Nations Charter the SC possess the power “to determine the existence of a threat to the peace or act of aggression and to recommend what action should be taken”

In this connection one could raise the question as to whether there’s any link between the failure to perform corporate responsibility and international peace and security. On the face of it, it would not be obvious to establish a direct link. However there could be possibilities that violations human rights could lead to a situation of a threat to peace and security.

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<sup>195</sup> The UN Security Council and the Development of collective security Von Danesh Sarooshi Page 5

<sup>196</sup> Sarooshi, P. 5.

The former Secretary General Koffi Anan, convened the High Level Panel on Threats, Challenges and Changes in 2001 with the objective of exploring the ways in which the Security Council could meet the new threats to peace in the 21<sup>st</sup> century in the face of “nuclear terrorism, and State collapse from the witch’s brew of poverty, disease and civil war, environmental degradation,”<sup>197</sup> In this context international cooperation between the developed and the developing world has been highlighted as the key to tackling global issues in the 21<sup>st</sup> century. The concerns over human rights violations by MNCS have been discussed in the previous sections of this paper, which point to the need for effective enforcement at an international level.

The issue of climate change has been advocated as properly within the mandate of the Security Council, despite the absence of direct links to international peace and security.<sup>198</sup>

In the long run “soft threats” could develop into major threats to human life and international peace and security, which is reason enough to act early before it is too

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<sup>197</sup> A more secure world: *Our shared responsibility* 2004

<sup>198</sup> Knight, New York University Law Review 2005.

late. Thus collective security system of the UN Security Council could very well be used in the present discussion and to provide a reliable solution to the challenge of implementing Corporation social responsibility.

Hence it could be well argued for the legitimacy of Security Council intervention as violations of human right be it by the states or individuals or corporations is an issue that needs effective remedies.

In this regard non military measures of sanctions under Article 41 Chapter VII, of the United Nations Charter could well serve the purpose of enforcement. However such sanctions would be against those states who fail to adopt the international obligations in creating legal obligations for MNCs or in the event of failure to punish MNCs violating obligations accepted by them in the areas of human rights, labour rights, the protection of the environment and anti-corruption. <sup>199</sup> Thus it is necessary to take collective action against the powerful MNCs and regulate their behaviour into complying with their obligations already agreed under international law. Thus it could well be argued that such a solution is both legitimate and necessary.

Hence the first question raised at the outset of this section, whether Security Council is the proper forum to enforce corporate obligations agreed by all the stakeholders,

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has to be answered in the positive. Moreover there's support for such a proposition since the agreement is a product from stemming from outside the Security Council, thus avoiding issues such of limited membership.

However the veto power of the permanent members could well be a stumbling block in the implementation process, in a context where reform of the Security Council has been proposed to abolish such veto power and to extend the membership of the Council beyond permanent members. As a remedy to this it is proposed that the Security Council work closely with the membership of the General Council in producing sanctions against the member states in default.

The second challenge as raised at the outset is the viability of the proposals in the face of wide division relating to the involvement of the Security Council in soft threats to peace and security. At present the Security Council is considering its role in green peacekeeping issue on its agenda. This may be a positive step, for pushing Security Council to consider similar threats arising from the failure of the states as well as the corporations in observing the agreed international standards across both developed and developing worlds. However in the current topic of "green peacekeeping", there's deep division in the Security Council itself. The German

Ambassador to the UN: Peter Wittig was heard to say: “It is too early to seriously to think about council action on climate change. This is clearly not on the agenda.”<sup>200</sup>

## The Conclusion

The foregoing discussion highlights the need for MNCs to assume real responsibility in relation to worker rights and human rights under international law. At present there’s much discourse on CSR pointing to MNC failure to observe the standards set by their own codes incorporating both national and international standards. The case study of Apple depicts the human rights violations that could occur in one part of the world due to the actions or omissions in another part of the world. Such are the consequences of globalisation and the power of MNCs. Hence while it was observed that there may be hope for voluntary codes of conduct to be enforced earnestly and sincerely by the big corporations themselves by virtue of CSR reporting and with the support of public and private parties, there’s much to be done to achieve such result.

The present situation is source of worry. Who will stand up for the rights of 137 Chinese workers? Their employment with the world’s most innovative corporation

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<sup>200</sup> UTV 20<sup>th</sup> July 2011 available at: <http://www.u.tv/News/UN-security-council-to-consider-climate-change-peacekeeping/d20a77db-876d-4689-92be-0f4d4b28fd33>

has brought sickness and a life full of suffering. Their government is not too concerned with their grievances. It's not worth to fight for their rights in such a context. Who is responsible for their plight? This is not the first incident of human rights violations by MNCs ever reported in human history. It is one mere recent incident out of many that have already occurred and probably yet more to be seen by the world. Hence it is high time the international community sought answers to this problem.

International agreements with the participation of the world leaders, corporations, civil society and other stakeholders is indeed a good starting point for pushing both states and corporations to assume greater responsibility towards the populace affected by corporate activity so as to deprive the enjoyment of their human rights. In this regard a widely agreed set of direct obligations for MNCs and the right of victim to seek remedies in the home states of culpable MNCs ought to receive the fullest support of the UN system with special assistance by Security Council to achieve effective enforcement. There are many roadblocks indeed, in making such proposal a reality, especially given the wide debates on the propriety of SC handling soft threat to peace and security and the veto power of its permanent members. Nevertheless it is better to create awareness and to arouse discourse as to the viability of such a solution that would lead to early action before it is too late; when the world peace be pushed down the slope of disaster in a world devoid of respect or protection of human rights.

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