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To What Extent Does International Law Matter in the Field of Business and Human Rights?

*Andrea Spagnolo**

1 Introduction

The discourse about the regulation of international business has historically been characterized by a departure from international law. Many authors have perceived the Westphalian system of the international community to be incapable of regulating the conduct of private actors. In light of this, one may argue that ‘global administrative law’ (GAL) offers more suitable legal solutions; or, maybe, legal solutions that make it possible to avoid the constraints of a State-centric law-making system.

It is undeniable that the promise of a GAL is fascinating. Already back in 1909 Reinsch referred to a body of law distinct from international law, aimed at establishing ‘positive norms for universal action’.¹ At the same time, however, it is also difficult to deny that nowadays a large number of international law sources contain rules governing the conduct of corporations. Suffice it to say that the adoption of a binding international treaty on business and human rights is currently under discussion.²

This chapter will be divided into two main parts and a conclusive section. The first part (Sections 2, 3 and 4) will focus on the reasons why a GAL-based approach can be promising in the field of business and human rights, as it seems to offer more answers to the questions left open by international law. The question of the relationship between this (relatively) new approach and international law will then be addressed.

The second part of the chapter (Section 5) will present possible arguments that might undermine the role of international law as compared to GAL. In particular: the participation of non-state (private) actors in the law-making process; the production of non-binding instruments (soft law); and the establishment of quasi-judicial organs for the enforcement of primary rules. Against

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1 Paul S Reinsch, ‘International Administrative Law and National Sovereignty’ (1909) 3 *American Journal of International Law* 1, 5.

2 See Chapter 2 of this volume.

such counterarguments it will be argued that the traditional Westphalian system is not impermeable to the ‘wind of change’ and that, in particular, flexible forms of international law-making and of secondary rules can be addressed to multinational enterprises.

2 The Regulation of Multinational Corporations at the Vanishing Point of International Law

According to Principle 11 of the United Nations Guiding Principles (UNGPS) on Business and Human Rights (B&HR) ‘[b]usiness enterprises should respect human rights’. The commentary to the same principle clarifies that

The responsibility to respect human rights is a global standard of expected conduct for all business enterprises wherever they operate. It exists independently of States’ abilities and/or willingness to fulfil their own human rights obligations, and does not diminish those obligations. And it exists over and above compliance with national laws and regulations protecting human rights.³

The comment of the Special Representative of the Secretary General on one of the most important principles among the UNGPS on B&HR opens two parallel channels for addressing human rights violations committed by business entities: States’ responsibility and the responsibility of private actors, namely multinational corporations. While it appears clear that the former is based on the legal framework offered by international law, the exact origin of the sources of the latter is uncertain.⁴ Notwithstanding this, the regulation of the activity of business entities is nothing new on the international agenda. In fact, in the United Nations (UN), in the 1970’s and up until 1982, States debated the drafting of a Code of Conduct of transnational corporations, aiming at promoting a self-regulation of this kind of entities. Although that draft never gained support, it paved the way for the promotion of a number of initiatives that range

3 HRC, ‘Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises’ (21 March 2011) UN Doc A/HRC/17/31 (UNGPS), 13.

4 See Vincent Chetail, ‘The Legal Personality of Multinational Corporations, State Responsibility and Due Diligence: The Way Forward’ in Dennis Alland, Vincent Chetail, Olivier de Frouville & Jorge E. Vinuales (eds), *Unity and Diversity of International Law. Essays in Honour of Prof. Pierre-Marie Dupuy* (Martinus Nijhoff Publishers 2014) 105,129: ‘A possible rationale would be to define due diligence by reference to international law when it concerns states and to understand it as a term of risks management once applied to corporations’.

from the adoption of guidelines by international organizations to codes of conduct elaborated by the corporations themselves.⁵ Schachter looked at this practice and affirmed that:

Global enterprise and communication networks will continue to produce rules and procedures for transnational activities, many of which, like the *lex mercatoria*, will have only a limited link to national and international law. We can expect a greater mix and overlap of public and private international law with the line between them rather blurred.⁶

It is certainly true that the regulation of multinational corporations is at the vanishing point of international law. It is less certain, however, whether this line has already been crossed; in other words, whether international law is definitely not the most suitable legal environment for regulating business conduct from the perspective of human rights. One possible alternative path is represented by a different conceptual framework: GAL.⁷

3 Framing the Research Question: The Main Features of GAL and its Relationship with International Law in the Field of Business and Human Rights

According to the definition provided in the Encyclopedia of Public International Law, GAL ‘includes the making of general non-treaty rules by administrative bodies (administrative rule-making), decision-making by certain entities that affects identifiable actors or interests, and administrative adjudication of the situation of other actors or the weight to accord to a specific interest.’⁸

5 See generally Jurgen Friedrich, ‘Codes of Conduct’, *Max Planck Encyclopedia of Public International Law* (OUP 2010) <<http://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e1379?prd=OPIL#law-9780199231690-e1379-div2-5>> accessed 18 February 2019. See also Sean D. Murphy, ‘Taking Multinational Corporations Codes of Conduct to the Next Level’ (2005) 43 *Columbia Journal of Transnational Law* 2.

6 Oscar Schachter, ‘The Decline of the Nation-State and its implications for international law’ (1997) 36 *Columbia Journal of Transnational Law* 7, 23.

7 Friedrich (n 5), para 26. See also Gunther Teubner, ‘Self-Constitutionalizing TNCs? On the Linkage of ‘Private’ and ‘Public’ Corporate Codes of Conduct’ (2011) 18 *Indiana Journal of Global Legal Studies* 617.

8 Benedict Kingsbury, Megan Donaldson, ‘Global Administrative Law’, *Max Planck Encyclopedia of Public International Law* (April 2011) <<http://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e948?rskey=eHbDzw&result=1&prd=EPIL>> accessed 18 February 2019, para 13.

Accordingly, the boundaries of GAL appear to extend to all forms of standards-setting that are not strictly ascribed to the traditional list of sources of domestic and international law.⁹ Proponents of this theoretical approach ground their doctrinal efforts on

the vast increase in the reach and forms of transgovernmental regulation and administration designed to address the consequences of globalized interdependence in such fields as security, the conditions on development and financial assistance to developing countries, environmental protection, banking and financial regulation, law enforcement, telecommunications, trade in products and services, intellectual property, labor standards, and cross-border movements of populations, including refugees.¹⁰

Building on these premises, GAL proposes a set of administrative principles that govern the relations among a multitude of actors, ranging from private ones to States, and also including international organizations. It is not possible in this chapter to illustrate the whole intellectual doctrine of GAL. For our purposes here, suffice it to say that such an approach builds on the classical function of administrative law to protect individuals by checking the unauthorized, excessive, arbitrary or unfair exercise of public power and, by so doing, to guide the practices of administrative bodies, particularly in terms of their responsiveness to broader public interests.¹¹ Accordingly, proponents of GAL seek to transpose principles typical of domestic administrative law to the global space.

The need for GAL is justified by the fact that global governance phenomena 'cannot be addressed effectively by isolated national regulatory and administrative measures'.¹² This last sentence clarifies that GAL does not stand in conflict with international law; rather, it seems that part of the latter may be also part of the former, or, again to use the words of the proponents, GAL is 'distinct from the space of inter-state relations governed by international law and the domestic regulatory space governed by domestic administrative law, although encompassing elements of each'.¹³

Notwithstanding this, as GAL goes beyond international law, it is regarded as a normative system able to address some structural deficiencies of the latter

9 Ibid.

10 Benedict Kingsbury, Nico Krisch, Kristen Stewart, 'The Emergence of Global Administrative Law' (2005) 68 *Law and Contemporary Problems* 16, 17.

11 Ibid.

12 Ibid.

13 Ibid 26.

arising from the challenges posed by globalization. For this reason, proponents of GAL have pointed to the rise of new actors and highlighted the need to elaborate conceptual legal frameworks different from that of State-centric international law.¹⁴ The designed (or desired) GAL framework, accordingly, transcends the classical sources of international law, namely, treaties, customs and general principles of law, because it is judged that these sources do not address issues of administrative law.¹⁵ GAL proponents, even more radically, contend that a system of sources that can fit the architecture of administrative principles falls short of catching all the dimensions of global governance, which ‘does not fit easily into the structures of classical, inter-state, consent-based models of international law; too much of it operates outside the traditional binding forms of law’.¹⁶ GAL seems to lie uncomfortably in the narrow cage of legal systems (and their sources) identified by a single rule of recognition shared by all the relevant actors.¹⁷

Similar conclusions can be drawn if one looks at the compliance theory underlying GAL. In fact, GAL proponents foster the idea that the lack of a centralized enforcement mechanism in international law can be better made up for by a system based on ‘non-State dispute settlement structures’, generally regarded as compliance mechanisms.¹⁸ Indeed, the accountability mechanisms foreseen by GAL proponents are not only non-State based, but also non-judicial, being grounded more on the concept of accountability than on the responsibility of the individuals and entities involved. To again use the words of its proponents, GAL seeks to ‘promote or otherwise affect the accountability of global administrative bodies, in particular by ensuring they meet adequate standards of transparency, participation, reasoned decision, and legality, and by providing effective review of the rules and decisions they make’.¹⁹ Similar arguments have been raised, for example, in the debate on the responsibility/accountability of international organizations.²⁰

14 See Nico Krisch, Benedict Kingsbury, ‘Introduction: Global Governance and Global Administrative Law in the International Legal Order’ (2007) 17 *European Journal of International Law* 1, 12.

15 Kirsch, Kingsbury, Stewart (n 10) 29.

16 Kirsch, Kingsbury (n 14) 10.

17 Benedict Kingsbury, ‘The Concept of ‘Law’ in Global Administrative Law’ (2009) 20 *European Journal of International Law* 23, 29–30.

18 Ibid 52. See also and generally Benedict Kingsbury, ‘The Concept of Compliance as a Function of Competing Conceptions of International Law’ (1998) 19 *Michigan Journal of International Law* 345.

19 Kirsch, Kingsbury, Stewart (n 10) 17.

20 See in general on this Pierre Klein, ‘Panels, Médiateurs et Mécanismes Informels de Contrôle des Activités des Organisations Internationales: Entre Accountability et Responsibility’, in *Select Proceedings of the European Society of International Law* (OUP 2010) 227.

Building on these theoretical premises, a GAL-based approach has been advocated to address issues that have not yet been settled in international law, namely, those that are not yet regulated by a source of international law, such as a treaty, or an established custom. Two fitting examples are represented by the emergence of a right to water,²¹ and by the regulation of financial activities.²² Both of them share similar arguments and the same conclusion. As for the arguments, they both rely – among other things – on the need to regulate the conduct of private actors through informal instruments that do not qualify for inclusion among the traditional sources of international law.²³ Moreover, in both cases it is contended that enforcement (or compliance) must be State-centric or judicial in nature.²⁴

4 Reasons for a GAL Approach to Business and Human Rights

Another aspect in which a traditional approach based on international law might be challenged relates to the intrinsic nature of the topic: the relationship between business and human rights. The definition of scope of the rights and duties of multinational corporations is a subject that displays the characteristics of GAL. According to the literature, in fact, there is a direct proportionality between the growing ‘extraterritorial impact of human activity and a deficit in the effectiveness and accountability of national regulation’ and the material expansion of GAL.²⁵ The phenomenon of globalization has undoubtedly contributed to expanding the international (and/or global) agenda, putting on the table new issues that transcend the classical inter-State relations. It is undeniable that the proliferation of multinational enterprises is a direct consequence of globalization. It is also true that when it comes to considering human rights abuses committed by such actors, one of the most critical challenges is the extraterritorial impact of their conducts. Lastly, a debate on this issue is necessary due to the ineffectiveness of the domestic regulations of a majority of

21 Owen McIntyre, ‘The human right to water as a creature of global administrative law’ (2012) 37 *Water International* 654.

22 David Zaring, ‘Informal Procedure, Hard and Soft, in International Administration’ (2005) 5 *Chicago Journal of International Law* 547.

23 See McIntyre (n 21) 660–661; Zaring (n 22) 594.

24 McIntyre (n 21) 659; Zaring (n 22) 580.

25 Lorenzo Casini, ‘The expansion of the material scope of global law’ in Sabino Cassese (ed), *Research Handbook on Global Administrative Law* (Edward Elgar Publishing 2016) 25, 28–29.

States.²⁶ As a result, there has been a call for alternative legal regimes for addressing the human rights impact of multinational corporations, on the ground that the intrinsic extraterritorial nature of their activities ‘undermine the hegemony of the state and its (constitutional and international) human rights law’.²⁷

The same need stems from the structural deficiencies that international law faces when dealing with business and human rights. As is known, the only instruments that directly ‘talk’ to multinational corporations are the already mentioned UNGPs on B&HR, the International Labour Organization (ILO) Tripartite Declaration concerning Multinational Enterprises and Social Policy and the Organisation for Economic Co-operation and Development (OECD) Guidelines for Multinational Enterprises. The former document was prepared by the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises and annexed to his final report to the Human Rights Council, which finally endorsed the UNGPs in its resolution 17/4 of 16 June 2011. The ILO Tripartite Declaration was adopted by the Governing Body of the International Labour Office in 1977 and amended in 2000, 2006 and 2017. The OECD Guidelines are part of the 1976 OECD Declaration on International Investment and Multinational Enterprises first adopted by the governments of OECD member countries on 21 June 1976 and reviewed on several occasions since then (1979, 1984, 1991, 2000 and 2011). There is no doubt that the three documents fall short of being legally binding: suffice it to say that States did not want to characterize them as binding. Rather, they fall under the borderless and undefined category of soft-law instruments.²⁸

Although a binding treaty on business and human rights does not exist, the international community has taken some steps towards one.²⁹ An open-ended

26 For an overview, see Denis G Arnold, ‘Corporations and Human Rights Obligations’ (2016) 1 *Business and Human Rights Journal* 255.

27 Daniel Augenstein, ‘Some preliminaries to Global Law and Human Rights’ in Shavana Musa, Eefje de Volder, *Reflections on Global Law* (Martinus Nijhoff Publishers 2013) 189, 194–195. See also and accordingly H. Wolfgang Reincke, ‘Challenges to the International Legal System Interdependence, Globalization, and Sovereignty: The Role of Non-binding International Legal Accords’ in Dinah Shelton (ed), *Commitment and Compliance: The Role of Non-binding Norms in the International Legal System* (OUP 2003) 88–89.

28 See Section 3.2.

29 See broadly Marco Fasciglione, ‘Another Step on the Road? Remarks on the Zero Draft Treaty on Business and Human Rights’ (2018) 12 *Diritti umani e diritto internazionale* 629. The text of the most updated version of the Zero Draft can be found here <https://www.ohchr.org/Documents/HRBodies/HRCouncil/WGTransCorp/OEIGWG_RevisedDraft_LBI.pdf> accessed 24 April 2019.

intergovernmental working group on transnational corporations and other business enterprises with respect to human rights (OEIGWG) was established and mandated by the Human Rights Council ‘to elaborate an international legally-binding instrument to regulate, in international human rights law, the activities of transnational corporations and other business enterprises’.³⁰ Initially, as per the mandate, the OEIGWG drafted a preparatory document containing ‘Elements for the draft legally binding instrument on transnational corporations and other business enterprises with respect to human rights’, where it also included human rights obligations of business entities.³¹ However, the OEIGWG chose not to include any direct human rights obligations of business entities in the Zero Draft of a possible treaty on business and human rights. Rather, the approach of the Zero Draft focuses on States’ obligations to adopt and implement domestic measures to prevent and punish human rights violations by business entities.³²

Apparently, the current state of the art reveals a certain reluctance of States to elaborate international binding rules that directly impose obligations on private actors, such as business entities. This attitude might be justified by the uncertainty surrounding the legal personality of multinational corporations in international law.³³ At present, therefore, only non-binding instruments – also known as ‘soft-law’ – govern the human rights duties of multinational corporations, despite the fact that there exists a number of international rules that confer rights on the same entities, such as the right to property.³⁴

Against this background, one might argue that a GAL-based approach, as presented in the previous sub-paragraph, could be a viable solution to the absence of an international law-based regulation. In fact, given the impossibility of imposing obligations on business entities through an international treaty,

30 HRC, ‘Resolution 26/9. Elaboration of an internationally legally binding instrument on transnational corporations and other business enterprises with respect to human rights’ (26 June 2014) UN Doc. A/HRC/RES/26/9, para 1.

31 See Chairmanship of the OEIGWG established by HRC Resolution A/HRC/RES/26/9, ‘Elements for the draft legally binding instrument on transnational corporations and other business enterprises with respect to human rights’ (26 September 2017), para 3.2.

32 See critically Fasciglione (n 29) 634–635.

33 Ibid. See in particular Art 5 of the Zero Draft, which reads: ‘State Parties shall regulate effectively the activities of business enterprises within their territory or jurisdiction. For this purpose States shall ensure that their domestic legislation requires all persons conducting business activities, including those of a transnational character, in their territory or jurisdiction, to respect human rights and prevent human rights violations or abuses’.

34 Cf. Andrew Clapham, *Human Rights Obligations of Non-State Actors* (OUP 2006) 80–81; Merja Pentikäinen, ‘Changing International ‘Subjectivity’ and Rights and Obligations under International Law – Status of Corporations’ (2012) 8 *Utrecht Law Review* 145, 148.

thereby securing a treaty-based enforcement mechanism, the main features of GAL can open up a fascinating horizon. In particular, this view is held by authors who believe that such an approach would help to overcome the constraints of international law, especially when it comes to considering the subjectivity of business entities,³⁵ the non-binding nature of the sources addressed to them, and the remedies established for human rights violations arising from their conduct.³⁶ It is undeniable that GAL is promising from this point of view. In particular, avoiding any discourse based on the legal categories of international law, it points to compliance mechanisms rather than on the imposition of international legal duties on multinational corporations.³⁷

Does this mean that an approach based on international law should be abandoned in favor of one based on GAL?

5 To What Extent Does International Law Still Play a Role in the Regulation of Conduct of Business Entities?

In order to establish whether a GAL-based approach should be preferred, one should address the following question: to what extent could international law still play a role in the regulation of the conduct of business entities? This question calls for an inquiry into the challenges posed by the emergence of GAL to the foundations of international law: subjectivity, sources, and enforcement.

5.1 *The Evolving Notion of Subjectivity*

The ability of a classical international law approach to regulate the conduct of multinational enterprises must first be tested through the lens of the doctrine of subjectivity. It is known, in fact, that international law traditionally suffers when new actors emerge and that it takes time to understand whether the boundaries of international subjectivity are permeable to actors other than States. This was the case, by way of example, when the International Court of Justice was asked to give a statement on the subjectivity of international organizations in international law. On those occasions, the ICJ stated that international organizations are subjects of international law, but that, unlike States,

35 Cf. Adefolake O. Adeyeye, *Corporate Social Responsibility of Multinational Corporations in Developing Countries: Perspectives on Anti-Corruption* (CUP 2012) 92–95.

36 See Fabrizio Cafaggi, 'Compliance in Transnational Regulation. A Global Supply Chain Approach' in Diane Stone, Kim Moloney (eds), *The Oxford Handbook of Global Policy and Transnational Administration* (OUP 2019) 599, 602.

37 Ibid.

they do not possess a general competence; accordingly, their subjectivity is functional and limited in scope.³⁸

The traditional view is skeptical as to whether non-State actors other than international organizations may be considered subjects of international law. The position of individuals in international law represents a clear example of the difficulties in accepting new subjects. Back in 1947, Philip C. Jessup, in his famous article on the *Subjects of a Modern Law of Nations*, drew a distinction between subjects and objects as regards the position of individuals: according to him, States are the only subjects of international law, and individuals are subjects within their States; consequently, individuals are 'only' objects in respect of international law.³⁹ In other words, although they are subjects in their domestic legal systems, individuals do not enjoy the same status in international law, mainly because they still fall under the domestic jurisdiction of their respective States.⁴⁰

Since then, however, the evolution of international law has witnessed the creation of international legal norms directly addressed to individuals. One example is human rights treaty rules, whose theoretical conception dates back to the Universal Declaration of Human Rights, which directly conferred to 'human beings' fundamental rights and freedoms. Moreover, some human rights treaties directly allows individuals to seize international courts or monitoring bodies to adjudge violations committed by States. Another classic example that goes in a similar direction is the evolution of international criminal law and international criminal justice. Since the Versailles Treaty and later the Nuremberg Charter of the International Military Tribunal, the institution of the International Criminal Tribunals for the Former Yugoslavia and for Rwanda and, finally, the entry into force of the Rome Statute of the International Criminal Court, a number of legal rules and principles have been established in order to hold individuals criminally liable under international law. The evolution of international human rights law and international criminal law has expanded the boundaries of international subjectivity to also include individuals. Certainly, it might not be a full subjectivity: individuals are not in the same position as States and international organizations in the international legal order, mainly because they do not participate in the lawmaking process.

38 *Reparation for Injuries Suffered in the Service of the United Nations* (Advisory Opinion) 1949 <<https://www.icj-cij.org/files/case-related/4/004-19490411-ADV-01-00-EN.pdf>> accessed 24 April 2019, 179.

39 Philip C Jessup, 'The Subjects of a Modern Law of Nations' (1947) 45 *Michigan Journal of International Law* 383.

40 James Crawford, *Brownlie's Principles of Public International Law* (8th edn OUP 2012) 115 ff.

However, in so far as they are the addressees of international rules, they can be considered as partial or limited subjects of international law.

The discourse on the subjectivity of individuals in international law suggests that there are alternatives to the classical dichotomy between subjects and objects proposed by Philip C. Jessup.⁴¹ A possible alternative is a functional approach to subjectivity, based on the capacity of an actor to be the recipient of international rules to the extent that they apply to functional aspects of its activities. As mentioned before, this is the approach endorsed by the ICJ to define the international legal personality of international organizations. It can also be applied to private actors, such as NGOs, individuals and business entities.⁴² On the basis of these premises, it is possible to argue that multinational corporations can be granted a limited, functional legal personality in international law in view of their undeniable participation in international legal relations and the impact of their activity on human rights.⁴³

More radically, it is possible to challenge the very idea of subjectivity because the evolution of international law regarding the position of individuals demonstrates that participation in the international law-making process is dynamic and thus open to participants and addressees other than States, such as multinational corporations.⁴⁴ Accordingly, there are no compelling reasons that would prevent other entities, including private ones, from becoming subjects of international law. Back in the 1920's Sir Hersch Lauterpacht, in his PhD thesis, affirmed that: 'Gradually a consensus of opinion is evolving to the effect that although it is States which are the normal subjects of international law, there is nothing in international law which is fundamentally opposed to individuals and other legal persons becoming subjects of international rights and duties, i.e., subjects of international law'.⁴⁵ Perhaps, the time is not ripe for discussing a new theory of subjectivity in international law; nonetheless, the

41 Rosalyn Higgins, *Problems and Process: International Law and How We Use It* (OUP 1994) 50.

42 Ruth Wegwood, 'Legal Personality and the Role of Non-Governmental Organizations and Non-State Political Entities in the United Nations System' in Rainer Hofmann (ed), *Non-State Actors as New Subjects of International Law: International Law—From the Traditional State Order Towards the Law of the Global Community* (Duncker & Humblot 1999) 21, 36.

43 See Francesco Francioni, 'Alternative Perspectives on International Responsibility for Human Rights Violations by Multinational Corporations' in Wolfgang Benedek, Koen De Feyter, Fabrizio Marrella (eds), *Economic Globalisation and Human Rights* (CUP 2007) 258.

44 Cf. Clapham (n 34) 59–60. Cf. also Daniel Thürer, 'The Emergence of Non-Governmental Organizations and Transnational Enterprises in International Law and the Changing Role of the State' in Hofmann (n 42) 37–58, at 53.

45 Hersch Lauterpacht, *Private Law Source and Analogies of International Law* (British Library of Political and Economic Science 1927), 79.

historical evolution of the international legal framework proves that there is room for considering other entities participating in international law as norm-recipients or, to some extent, as norm-makers. Against this background, the subjectivity of business entities would simply lose weight in favor of an approach aimed at exploring what the international legal norms applicable to such entities are.⁴⁶ In this regard, suffice it to mention that corporations are already the addressees of specific sets of international law rules, as in the case of bilateral investment treaties (BITs), which confer rights and duties on investors and allow them to rely on dispute resolution mechanisms to protect their rights against the territorial State.⁴⁷ Indeed, the construction of BITs would have not been possible without recognizing a personhood of corporations under international law.⁴⁸

5.2 *On the Soft Nature of Business and Human Rights Sources*

One can put forward the counter-argument that only soft-law instruments enucleate principles and ‘rules’ directly addressed to multinational corporations. This is actually quite a strong argument, as it builds on the current state of evolution of international law regarding the responsibility of business entities for human rights violations. In actual fact, the only instruments that directly ‘speak’ to multinational corporations fall short of being binding: suffice it to say that they are not the product of States’ will. Rather, as seen above,⁴⁹ they fall under the borderless and undefined category of soft-law instruments. The term ‘soft law’ usually indicates a category of acts that cannot be included in the list of the sources of international law. It includes non-binding agreements between States, resolutions of international organizations, final acts of assembly of States parties to a treaty and other instruments that lack binding authority.⁵⁰

46 See Clapham (n 34) 79–81. See also Steven R. Ratner, ‘Corporations and Human Rights: A Theory of Legal Responsibility’ (2001) 111 *Yale Law Journal* 443; Jonathan I. Charney, ‘Transnational Corporations and Developing Public International Law’ (1983) *Duke Law Journal* 748, 762.

47 See broadly on this Marc Jacob, ‘Investments, Bilateral Treaties’, *Max Planck Encyclopedia of International Law* (OUP 2014) <<http://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e1061#law-9780199231690-e1061-div1-4>> accessed 24 April 2019, paras 45–52.

48 See accordingly José E. Alvarez, ‘Are Corporations ‘Subjects’ of International Law?’ (2011) 9 *Santa Clara Journal of International Law* 1, 12.

49 See Section 4.

50 Christine Chinkin, ‘Normative Development in the International Legal System’ in Shelton (n 27) 30; Oscar Schachter, ‘The Twilight Existence of Nonbinding International Agreements’ (1977) 71 *American Journal International Law* 296; Philippe Gautier, ‘Non-binding

States have shown an evolving and increasing appreciation for the adoption of soft-law instruments, as they can more easily reach agreements aimed at strengthening the areas of international cooperation, particularly where customary or treaty norms are not yet established or where the rules are fragmentary.⁵¹ States may be tempted by the adoption of non-binding instruments also because they are not required to comply with the forms laid down by the Vienna Convention on the Law of Treaties; in addition, it should not be forgotten that States do not commit an international offense when they violate provisions of a soft-law act they adopt.⁵²

This does not mean that soft-law instruments are devoid of any normative value. First, in general terms, when States adopt or conclude non-binding instruments, it seems possible to consider that they are committing themselves on a level that is *'purement politique'*.⁵³ Therefore, it cannot be ruled out that non-binding instruments may nevertheless generate expectations among the States that have adopted them in their bilateral relationships by virtue of the principle of good faith.⁵⁴

Furthermore, soft-law instruments might have an impact on the sources of international law. In particular, with reference to customary international law, they may constitute evidence of a consolidated *opinio juris* among States, which leads to the identification of new customary rules. It is known, and has recently been reaffirmed by the International Law Commission and by the ICJ, that the resolutions of the General Assembly can perform similar functions.⁵⁵

agreements', *Max Planck Encyclopedia of Public International Law* (OUP 2006) <<http://opil.ouplaw.com/abstract/10.1093/law:epil/9780199231690/law-9780199231690-e1444?prd=EPIL>> accessed 24 April 2019, para 4.

51 Francesco Francioni, 'International 'Soft Law': A Contemporary Assessment' in Vaughan Lowe, Malgosia Fitzmaurice (eds), *Fifty Years of the International Court of Justice. Essays in Honour of Sir Robert Jennings* (CUP 1996) 167, 174–175.

52 Cf. Schachter, 'The Twilight Existence' (n 50) 299.

53 Michel Virally, 'La distinction entre textes internationaux de portée juridique et textes internationaux dépourvus de portée juridique (à l'exception des textes émanant des organisations internationales)' (Annuaire de l'Institut de Droit International, Tome 1 1983) paras 144 and 230, para 151 <http://www.idi-iiil.org/app/uploads/2018/06/1983_vol_60-I-Session_de_Cambridge.pdf> accessed 24 April 2019.

54 Ibid 229, para 148. See also Robert Kolb, *La bonne foi en droit international public. Contribution à l'étude des principes généraux de droit* (PUF 2000) 83.

55 ILC, 'Report of the International Law Commission on the Work of its Seventieth session' (30 April–1 June 2018 and 2 July–10 August 2018) UN Doc (A/73/10), Conclusion n. 12; *Legality of the Threat or Use of Nuclear Weapons* (Advisory Opinion) [1996] ICJ Rep 226, para 70; *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965* (Advisory Opinion) 2019 <<https://www.icj-cij.org/files/case-related/169/169-20190225-01-00-EN.pdf>> accessed 17 June 2019 [150–152].

In relation to international treaties, soft-law instruments can be conducive to the conclusion of legally binding agreements between States, as in the case of the guidelines of the International Atomic Energy Agency (AEIA), which preceded the adoption of a Convention on the timely notification of a nuclear accident.⁵⁶ Similarly, the 1992 Rio Declaration also contributed to the conclusion of successive international treaties, such as the Framework Convention on Climate Change.⁵⁷

Another function normally associated with such instruments is that of assisting the interpreter in the application and interpretation of binding international treaties that are currently in force. Soft-law might be able to guide the subsequent practice of States in the application of a treaty pursuant to Article 31, par. b), of the VCLT.⁵⁸ The International Court of Justice, for instance, has interpreted the provisions of the UN Charter in light of the resolutions of the General Assembly in its ruling concerning the Military and Paramilitary Activities in Nicaragua.⁵⁹ This function does not lie exclusively with the resolutions of the General Assembly; rather, it can also be associated with other soft-law instruments, provided that they are indicative of a clear will of the States in the sense and in the terms indicated.⁶⁰

There are some scholars who believe that non-binding instruments can fall within the scope of Article 31, par. c) of the VCLT, which includes 'other rules of international law' among the means for interpreting a treaty.⁶¹ The same scholars refer to the practice of the European Court of Human Rights, which has referred to non-binding instruments when defining the scope of application of certain rights under the Convention.⁶² However, a general conclusion can

56 Cf. Alan Boyle, 'Some Reflections on Treaty and Soft Law' (1999) 48 *International Comparative Law Quarterly* 901, 906–907.

57 *Ibid.* 907–908.

58 Gaetano Arangio-Ruiz, *The United Nations Declaration on Friendly Relations and the System of the Sources of International Law* (Sijthoff & Noordhoff 1979) 39; Oliver Dörr, 'Art. 31. General rule of interpretation' in Oliver Dörr, Kirschen Schmalenbach (eds), *Vienna Convention on the Law of Treaties. A commentary* (Springer 2012) 521, 556–559.

59 *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)* (Merits) [1986] ICJ Rep 14, para 188.

60 See again Boyle (n 56) 905.

61 Dörr (n 58) 565; see also Christian Djéffal, *Static and Evolutionary Treaty Interpretation* (CUP 2015) 169. *Contra* Mark E. Villiger, *Commentary on the 1969 Vienna Convention on the Law of Treaties* (Brill 2008) 433.

62 *Demir and Baykara v Turkey* App no 34503/97 (ECtHR, 12 November 2008) paras 85–86.

hardly be drawn from this practice, given the peculiarities of the interpretative methods endorsed by the Court of Strasbourg.⁶³

Finally, a more nuanced approach is warranted when assessing the use of soft-law instruments by domestic judges in the interpretation and application of domestic law in accordance with international law. Some cases seem to demonstrate the tendency of internal courts to resort to non-binding instruments. In the field of refugee protection, for example, the House of Lords⁶⁴ of the United Kingdom and the High Court of Australia⁶⁵ made reference to the *Handbook on Procedures and Criteria for Determining Refugee Status* published by the UNHCR⁶⁶ to interpret their respective States' obligations in the application of the 1951 Refugee Convention. The Supreme Court of Canada⁶⁷ interpreted an internal law on child pornography in the light of a report of the UN Special Rapporteur on the sale of children.⁶⁸ Scholars agree that such practice shows that soft-law instruments can have an interpretive and even a persuasive function.⁶⁹

In consideration of the above examples, it is difficult to contend that the non-binding nature of the instruments adopted to define the human rights obligations of business entities has no significance in international law.

First, non-binding instruments can in any case influence the conduct of actors in international law; as we have seen, soft law can generate legitimate expectations. There are no compelling reasons to exclude multinational corporations from such expectations, especially if we admit that they can have

63 See Cesare Pitea, 'Interpreting the ECHR in the Light of 'Other' International Instruments: Systemic Integration or Fragmentation of Rules on Treaty Interpretation?' in Nerina Boschiero et al. (eds) *International Courts and the Development of International Law. Essays in Honor of Prof. Tullio Treves* (Springer 2013) 545.

64 *R v Secretary of State For The Home Department, Ex Parte Adan R v. Secretary of State For The Home Department Ex Parte Aitseguer* [2000] UKHL 67, [2001] 2 WLR 143, [2001] 1 All ER 593, opinion of Lord Slynn of Hadley.

65 High Court of Australia, *Re Minister for Immigration and Multicultural and Indigenous Affairs; Ex parte Applicants S134/2002*, 4 February 2003, para 20.

66 UNHCR 'Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees' (January 1992) UN Doc HCR/IP/4/Eng/REV.1.

67 Supreme Court of Canada, *R. v Sharpe*, case no. 27376, 26 January 2006, para 179.

68 'Report of the Special Rapporteur on the sale of children, child prostitution and child pornography' (4 August 2010) UN Doc A/65/221.

69 Cf. Wayne Sandholtz, 'How Domestic Courts Use International Law' (2015) 38 *Fordham International Law Journal* 595, 628–630; Dinah Shelton, 'Introduction' in Dinah Shelton (ed) *International Law and Domestic Legal Systems: Incorporation, Transformation, and Persuasion* (OUP 2011) 15.

a limited functional subjectivity.⁷⁰ National implementation of OECD Guidelines and of the 2011 UNGPs through the so-called National Action Plans demonstrate that States can also abide by soft-law instruments.⁷¹

Soft-law instruments might also have an impact on the classical sources of international law, contributing to the evolution or recognition of customary rules or to the conclusion of legally binding international treaties in the business and human rights field. The path towards the conclusion of a binding treaty seems to confirm the view that non-binding instruments such as the UNGPs can serve as a basis for the evolution of binding norms.

Furthermore, we must not underestimate the role of domestic judges in adjudicating human rights abuses by multinational corporations. Recent practice has shown promises and perils. Very recently, the Supreme Court of the United States held the International Finance Corporation (IFC) responsible for inadequate supervision of the environmental and social action plan relating to its US\$450 million loan to construct a coal-fired power plant.⁷² In similar future cases, reference to soft-law instruments might help to define the duties of non-state actors. However, that case is about the responsibility of an international organization. When the liability of multinational corporations is considered, the obstacle of States' jurisdiction still prevents courts from deciding on the merit of the cases, as the Supreme Court affirmed in the famous *Kiobel* and *Jesner* cases.⁷³ Should domestic courts adopt a different approach on admissibility, the conclusion reached by the Supreme Court in the IFC's responsibility case could also apply to private actors.

5.3 *The Enforcement of Non-binding International Rules*

A last argument pertains to the enforcement of human rights obligations (if any) of business entities. A proper enforcement mechanism does not exist. Moreover, engaging States' responsibility seems to be a mirage in the sand, especially if one looks at the practice mentioned at the end of the previous

70 Cf. Juan Carlos Ochoa Sanchez, 'The Roles and Powers of the OECD National Contact Points Regarding Complaints on an Alleged Breach of the OECD Guidelines for Multinational Enterprises by a Transnational Corporation' (2015) 84 *Nordic Journal of International Law* 89, 120–121. See generally Dinah Shelton, 'Introduction: Law, Non-Law and the Problem of "Soft Law" in Shelton (n 27) 10.

71 For an overview of the various National Action Plans see <<https://globalnaps.org/ungp/guiding-principle-10/>> accessed 24 April 2019.

72 Supreme Court of the United States, *Jam et al. v. International Finance Corporation*, No. 17-1011, 27 February 2019.

73 Supreme Court of the United States, *Kiobel v. Royal Dutch Petroleum*, No. 10-1491, 17 April 2013; *Jesner et al. v. Arab Bank, PLC*, No. 16-499, 24 April 2018.

sub-paragraph. In fact, no dedicated court or tribunal exists under international law. Furthermore, any attempt to bring States before human rights courts or monitoring bodies faces the difficult obstacle posed by the prevalent territorial nature of States' jurisdiction. Moreover, the States in whose territory human rights violations occur are often unable or unwilling to prevent them or to offer effective remedies.

However, some 'soft' mechanisms, or, rather, some compliance mechanisms that enable the activity of business entities to be monitored do exist, at least on paper.

The 2011 UNGPs on B&HR, for example, require companies to develop a publicly available policy statement on human rights which is based on appropriate expertise and outlines the responsibilities of employees, partners and other stakeholders.⁷⁴ Moreover, UNGPs from 17 to 21 deal with the human rights due diligence that companies should perform to assess actual or even potential human rights violations arising out of the business enterprise.⁷⁵ Last, but not least, the same instrument establishes that '[w]here business enterprises identify that they have caused or contributed to adverse impacts, they should provide for or cooperate in their remediation through legitimate processes'.⁷⁶ Such a process, according to Guiding Principle 22, should be transparent, accessible and predictable, hence inspired by the principles of GAL as presented in the second paragraph.

However, if one considers other compliance mechanisms established for the purpose of addressing human rights violations committed by multinational corporations, the doors will be open to more nuanced reflections. A particularly interesting example of compliance procedures is the so-called 'specific instances' procedure featured in the OECD Guidelines on B&HR. This procedure is hosted and managed by the National Contact Points (NCPs) established for the implementation of the Guidelines. More in detail, the NCPs host a forum for discussing alleged violations of the Guidelines. Where relevant, the NCPs can 'offer, and with the agreement of the parties involved, facilitate access to consensual and non-adversarial means, such as conciliation or mediation, to assist in dealing with the issues'. Although this is clearly a non-legally binding procedure, and despite that fact that the remedies provided therein are purely internal, it displays some features of dispute settlement that are characteristic of international law. In fact, the 'specific instances' procedure builds on the concept of mediation and conciliation in international law, as

74 See UNGPs, principle 16.

75 Ibid principles 18–21.

76 Ibid principle 22.

the NCPs offer good offices in the dispute between individuals or groups of individuals and corporations.⁷⁷

Moreover, the very idea of providing a forum for redress for victims of human rights abuses committed by multinational corporations seems to be borrowed from the well-established principle that each human rights' victim has the right to a remedy.⁷⁸ As the commentary to the structures and procedures of NCPs puts it, 'NCPs are required to issue final statements upon concluding specific instance processes which may include recommendations to companies. Some NCPs also make determinations, setting out their own views on whether a company observed the OECD Guidelines or not. This is not required by the OECD Guidelines but is a practice of some NCPs'.⁷⁹ The final statement issued by NCPs can be considered like a form of satisfaction, which is normally listed among the remedies for human rights violations as defined by the UN Working Group on the issue of human rights and transnational corporations and other business enterprises in 2013: 'Successful remedies often involved forms of apologies, restitution and guarantees of non-repetition, as well as new opportunities for victims to engage and participate both in the remedy process and more widely in mitigating impacts from a project'.⁸⁰ Satisfaction in international law, and in particular in international human rights law, is a form of reparation owed especially when a conduct also causes immaterial damages.⁸¹ It seems, therefore, that the 'specific instances' procedure under the OECD Guidelines has features that confirm the potential that international law has to influence the establishment of secondary rules for enforcing human rights obligations of multinational corporations at both the international and domestic levels. Indeed, as one author has observed, the notion of legal accountability is broad

77 Cf Giuseppe Palmisano, 'Reflections on the Implementation Procedures of the OECD Guidelines for Multinational Enterprises' in Ennio Triggiani et al. (eds), *Dialoghi con Ugo Villani* (Cacucci editore, 2017) 909.

78 See UNGA, 'The Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law' (16 December 2005) UN Doc. A/res/60/147.

79 OECD, *Structures and Procedures of National Contact Points for the OECD Guidelines for Multinational Enterprises* (2018) <<https://mneguidelines.oecd.org/Structures-and-procedures-of-NCPs-for-the-OECD-guidelines-for-multinational-enterprises.pdf>> accessed 24 April 2019, 33.

80 'Report from an Expert Workshop entitled 'Business Impacts and Non-judicial Access to Remedy: Emerging Global Experience' held in Toronto in 2013' in HRC, 'Report of the Working Group on the issue of human rights and transnational corporations and other business enterprises, Addendum' (28 April 2014) UN Doc. A/hrc/26/25/Add.3, 13.

81 See Cristina Hoss, 'Satisfaction', *Max Planck Encyclopedia of Public International Law* (OUP 2011) <<http://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e1099?rskey=irXaD3&result=1&prd=EPIL>> paras 1–4.

and ‘involves the legal justification of an international actor’s performance *vis-à-vis* others, the assessment or judgment of that performance against international legal standards, and the possible imposition of consequences if the actor fails to live up to applicable legal standards.’⁸²

6 Concluding Remarks

This Chapter has sought to answer a question on the role of international law in directly imposing human rights obligations on business entities. In particular, its purpose was to understand if an approach based on international law should be abandoned in favor of new approaches, such as the one based on GAL.

These brief concluding remarks build on the premises that the original conception of GAL does not exclude international law, but rather includes it in a more complex and comprehensive legal framework. Therefore, the research question was rather a matter of the extent to which international law matters in the field of B&HR.

Accordingly, in section three and in its sub-sections it was demonstrated that, despite the centrifugal forces that seem to push international law to the margin of the global efforts to impose human rights duties on multinational corporations, international law is still the field in which the game is played. This is proven by the role that non-binding rules might play in setting out principles and standards that influence the conduct of business entities and in contributing to the development of legally binding norms. Moreover, primary rules of international law might influence the secondary rules that define the liability of the same entities for human rights violations.

Nonetheless, such remarks are to be read with a pinch of salt. One would have to be blind not to acknowledge that the road toward a full recognition of multinational corporations as limited subjects of international law is a long and winding one and that it represents the elephant in the room in any discussion on the capability of international law to address them with binding rules. However, this simply means that the potential of international law to influence the conduct of multinational corporations, as illustrated in this chapter, should contribute to an evolutive understanding of international law rather than fueling the centrifugal forces that push it to the margin of the debate. In fact, although one might be tempted to exclude all the relatively new challenges posed by the globalization process from the realm of international law, it is

⁸² Jutta Brunnée, ‘International Legal Accountability through the Lens of the Law of State Responsibility’ (2005) 36 *Netherlands Yearbook of International Law* 21, 24.

difficult to deny that the whole spectrum of inter-State relations governed by classical international law does not appear to be limited *ratione materiae*. Moreover, international law is no longer a mere instrument of coordination between States; rather, it serves various ends, ranging from the more classical ones, like maintaining peace, to less obvious aims, such as, for instance, environmental protection and development.⁸³

As one author put it:

In such societal context, public international law is no longer confined to being a neutral instrument of adjustment between sovereign States. It increasingly appears as a vehicle for change for all humanity, be it in the economic, social, environmental or other spheres. International law has evolved from a law of coexistence, founded on the juxtaposition of sovereign entities, towards a law of interdependence, whereby various issues call for a global response that transcends, or even eclipses, the State.⁸⁴

In the end, the extent to which international law plays a role in addressing the business and human rights issue largely depends on the extent to which international law responds and adapts to social changes in the international community.

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84 Chetail (n 4) 130.

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