GALATASARAY UNIVERSITY
GRADUATE SCHOOL OF SOCIAL SCIENCES
PUBLIC LAW DEPARTMENT

LEGAL GROUNDS FOR HOLDING TRANSNATIONAL CORPORATIONS DIRECTLY RESPONSIBLE FOR HUMAN RIGHTS VIOLATIONS UNDER PUBLIC INTERNATIONAL LAW

Ph.D. THESIS

Elif ORAL

Thesis Advisor: Prof. Dr. Akif Emre ÖKTEM

NOVEMBER 2015

FOREWORD AND ACKNOWLEDGEMENTS

This note of acknowledgment signifies the near-end of a hard and long process full of different sentiments. I decided to conduct research on the responsibility of transnational corporations for human rights violations just after the doctoral proficiency examination I passed in September 2010. Although it has been difficult to cope with the required solitariness of the thesis writing process, now, it is a pleasure to have the opportunity to thank those, who supported me through these years in the furtherance of the thesis.

First of all, I would like to thank my professor and advisor Prof. Dr. Emre Öktem for his guidance, constructive criticisms and insightful comments in each step of my doctoral studies. He has been very patient listening to difficulties I was encountered and provided invaluable intellectual and academic support during the process.

I am also deeply indebted to Prof. Dr. Rona Aybay, who has always been caring, helping and encouraging from the very beginning of my undergraduate studies. His contribution to my professional life and personal development are beyond words.

I find it also as an opportunity to thank Prof. Dr. Hasan Köni, Prof. Dr. Turgut Tarhanlı and Prof. Dr. Sibel Inceoğlu, who have been jury members in my proficiency examination. I will always remember my professor Melike Batur Yamaner with respect. It has been an honour to be her student.

I am especially thankful to Prof. Dr. Hasan Köni and Assoc. Prof. Dr. Vesile Sonay Evik, who -as the members of the Dissertation Committee- have guided me in complex legal matters and done everything to make the process pass smoother for me.

This thesis is the product of a research conducted at the library of University of Amsterdam and the Peace Palace Library. To Prof. Dr. Rosanne van Alebeek and Ms. Jikke Verheij I owe a debt of gratitude for providing me with this research opportunity.

Finally, I would like to thank my family and friends for their moral support, without which I would not manage to finalize my thesis.

Elif Oral

November 2015

Istanbul

CONTENTS

FOREWORD and ACKNOWLEDGEMENTS ……..…. ii

CONTENTS ……. iii

ABBREVIATIONS ……. vii

TABLE OF CASES ……..……... xii

RÉSUMÉ …….. xxiv

ABSTRACT ……..…… xxviii

ÖZET ……..... xxxii

1. RISE OF TRANSNATIONAL CORPORATIONS AS INTERNATIONAL ACTORS …….…… 1

1.1. Privatization and the disappearance of the dichotomy of public law-private law ……... 7

1.2. Co-existence of rights and obligations …….. 11

1.3. Theoretical framework of the thesis ……. 16

1.4. Terminology and definitions …….. 33

1.4.1. Enterprise – Corporation ……... 34

1.4.2. Multinational Corporation – Transnational Corporation 36

1.4.3. Duty – Obligation …… 40

1.4.4. Responsibility – Accountability – Liability ……..…… 43

2. STATE RESPONSIBILITY FOR THE ACTS OF CORPORATIONS ..…... 50

2.1. State Responsibility to Protect Human Rights ……. 51

2.1.1. Traditional Understanding of State Responsibility …… 62

2.1.2. The Doctrine of Horizontal Application of Human Rights ……... 68

2.1.3. The U.S. Experience with the Alien Tort Claims Act ……..... 72

2.2. An Overview of the System of Domestic Regulation ……... 83

2.2.1. Responsibility of Host State ……... 83

2.2.2. Responsibility of Home State ……. 86

2.2.2.1. Nationality of TNCs …… 87

2.2.2.2. Extraterritorial Due Diligence Obligations of Home States ... 89

3. A PATH FROM CORPORATE SOCIAL RESPONSIBILITY TO LEGAL RESPONSIBILITY OR IN BETWEEN? ……... 103

3.1. Corporate Social Responsibility …….. 103

3.2. Various forms of self-regulation and privatization of human rights ... 113

3.3. Web of International Documents: International Soft Regulation …… 123

3.3.1. 1976 OECD Guidelines for Multinational Enterprises (Revised in 2000) (updated in 2011) …… 131

3.3.2. 1977 The ILO Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy (amended in November 2000 and March 2006) ..……. 146

3.3.3. Documents adopted within the United Nations …….. 152

3.3.3.1. 1990 Draft UN Code of Conduct on Transnational Corporations ...…….. 153

3.3.3.2. 2000 UN Global Compact (renewal in December 2007) …… 157

3.3.3.3. 2003 UN Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights ……...165

3.3.3.4. 2011 UN Guiding Principles on Business and Human Rights…….. 176

4. LEGAL RESPONSIBILITY OF TNCS UNDER PUBLIC INTERNATIONAL LAW …… 190

4.1. A Framework for Corporate Human Rights Obligations ……. 197

4.1.1. Respect for Human Dignity as a Basis of Corporate Obligations …….. 200

4.1.2. Status of Corporations under Public International Law …….. 205

4.1.2.1. Legal Personality of Corporations …….. 205

4.1.2.2. Representation and Standing of Corporations before International Bodies ……. 211

4.1.2.3. Rights of Corporations under Human Rights Law ……... 214

4.1.2.4. Rights Come with Responsibilities …….. 225

4.1.3. The Scope of Human Rights Obligations for Corporations …….. 231

4.1.4. Extending Corporate Obligations to the Spheres of Influence …. 234

4.2. Responsibility to Respect and Duties of Corporations towards Society …….. 239

4.3. Responsibility to Protect and Its Implications for Corporations ……. 250

4.3.1. Obligations *erga omnes* and the Jurisprudence of International Courts ……. 255

4.3.2. Possibilities for Horizontal Application of Responsibility to Protect …….. 267

4.4. Responsibility to Act with Due Diligence …… 278

4.4.1. Duty to Regulate: adopt policies and codes of conduct ……. 281

4.4.2. Duty to Prevent and Human Rights Impact Assessments ……. 298

4.4.3. Duty to Monitor Compliance and Fight Impunity …… 304

5. INTERNATIONAL CRIMINAL RESPONSIBILITY AND OBLIGATION NOT TO BE COMPLICIT …….. 313

5.1. International Criminal Responsibility of Corporations: A Contested Issue …… 318

5.2. Trials of the Industrialists before Nuremberg Tribunals ……. 322

5.3. Jurisdiction of the ICC and Responsibility of Legal Persons ……... 328

5.4. Obligation not to be Complicit …… 339

5.5. Degrees of Corporate Complicity …… 351

5.5.1. Direct Corporate Complicity ……... 353

5.5.2. Indirect (beneficial) Corporate Complicity …… 360

5.5.3. Silent Corporate Complicity …… 366

6. IN LIEU OF A CONCLUSION …….. 371

BIBLIOGRAPHY …… 381

CURRICULUM VITAE ……. 423

ABBREVIATIONS

AfCHPR : African Charter on Human and Peoples' Rights
AfCommHPR : African Commission on Human and Peoples' Rights
AfCtHPR : African Court of Human and Peoples' Rights
AHRLJ : African Human Rights Law Journal
AI : Amnesty International
AJIL : American Journal of International Law
Am. U. Int'l L Rev. : American University International Law Review
Ank.Univ. SBF Derg. : Ankara Üniversitesi Siyasal Bilgiler Fakültesi Dergisi
ARIO : Articles on the Responsibility of International Organizations
ARSIWA : Articles on the Responsibility of States for Internationally Wrongful Acts
ASIL : American Society of International Law
ATCA : Alien Tort Claims Act
ATS : Alien Torts Statute
AUHFD : Ankara Üniversitesi Hukuk Fakültesi Dergisi
B.C.J.L. & Soc. Just. : Boston College International and Comparative Law Review
Berkeley J. Int'l L. : Berkeley Journal of International Law
BIT : Bilateral Investment Treaty
BLIHR : Business Leaders Initiative on Human Rights
Brook. J. Int'l Law : Brooklyn Journal of International Law
BLIHR : Business Leaders Initiative on Human Rights
B.U. Int'l L.J : Boston University International Law Journal
Cal. W. Int'l L.J : California Western International Law Journal
Cambridge LJ : Cambridge Law Journal
Cardozo J. Int'l & Comp. L.: Cardozo Journal of International and Comparative Law
CESCR : Committee on Economic, Social and Cultural Rights
Chinese J Int'l Law : Chinese Journal of International Law
Colo J Int'l Envtl'l L & Pol'y : Colorado Journal of International Environmental Law and Policy
Colum. Hum. Rts. L. Rev. : Columbia Human Rights Law Review
Colum. J. Transnat'l L : Columbia Journal of Transnational Law
Cornell L. Rev. : Cornell Law Review
Crim. Just. Ethics : Criminal Justice Ethics
CSR : Corporate Social Responsibility
Cumb. L. Rev. : Cumberland Law Review
CUP : Cambridge University Press
Dealin L. Rev. : Deakin Law Review

DITE **:** Division on Investment, Technology and Enterprise Development
DTCI **:** Division on Transnational Corporations and Investment
Dublin U. L. J. **:** Dublin University Law Journal
ECCHR **:** The European Center for Constitutional and Human Rights
ECHR **:** European Convention for the Protection of Human Rights and Fundamental Freedoms
ECtHR **:** European Court of Human Rights
ECOSOC **:** Economic and Social Council
EJIL **:** European Journal of International Law
EU **:** European Union
Eur JL Ref. **:** European Journal of Law Reform
FDI **:** Foreign Direct Investment
Fla. J Int'l L **:** Florida Journal of International Law
FTA **:** Free Trade Agreement
Ga. J. Int'l & Comp. L. **:** Georgia Journal of International and Comparative Law
Geo. Wash. J. Int'l L. & Econ. **:** George Washington Journal of International Law & Economics
Germ. L. J. : German Law Journal
Germ. YB Int'l L **:** German Yearbook of International Law
Harv. Int'l. L.J. **:** Harvard International Law Journal
Harv. L. Rev. **:** Harvard Law Review
Hastings Int'l & Comp L Rev. : Hastings Journal of International and Comparative Law Review
Hofstra L. Rev. **:** Hofstra Law Review
HR **:** Historical Research
HRC **:** Human Rights Committee
HRLR **:** Human Rights Law Review
HRQ **:** Human Rights Quarterly
HRW **:** Human Rights Watch
IA **:** International Affairs
IAmCHR **:** Inter-American Convention on Human Rights
IAmCommHR **:** Inter-American Commission on Human Rights
IAmCtHR **:** Inter-American Convention on Human Rights
IATA **:** International Air Transport Association
ICAO : International Civil Aviation Organization
ICC **:** International Criminal Court
ICCPR **:** International Covenant on Civil and Political Rights
ICESCR **:** International Covenant on Economic, Social and Cultural Rights
ICJ **:** International Court of Justice
ICLQ : International and Comparative Law Quarterly
Intl'l Community L Rev. **:** International Community Law Review
ICRC **:** International Committee of the Red Cross
ICTR **:** International Criminal Tribunal for Rwanda
ICTY **:** International Criminal Tribunal for the Former Yugoslavia
ICS **:** International Chamber of Shipping

ICSID : International Centre for the Settlement of Investment Disputes
IFA : International Framework Agreements
IFI : International Financial Institutions
IFPMA : International Federation of Pharmaceutical Manufacturers Association
ILC : International Law Commission
FORUM : International Law FORUM du droit international
ILO : International Labour Organisation
ILSA J. Int'L & Comp. L. : International Law Students Association Journal of International and Comparative Law
IMF : International Monetary Fund
IMO : International Maritime Organization
IMT : International Military Tribunal
Ind. L.J. : Indiana Law Journal
Ind. J. Global Legal Stud. : Indiana Journal of Global Legal Studies
IOE : International Organization of Employers
Int'L Rev. Red Cross : International Review of Red Cross
Inter-AmCommHR : Inter-American Commission on Human Rights
IACtHR : Inter-American Court of Human Rights
J Afr L : Journal of African Law
J Crim L & Criminology : Journal of Criminal Law and Criminology
J. Int'l Crim. Just. : Journal of International Criminal Justice
JOP : Journal of Politics
J Leg. Analysis : Journal of Legal Analysis
J Int'l L & Dipl'y : The Journal of International Law and Diplomacy
J Transnat'l Law & Pol'y. : Journal of Transnational Law and Policy
Law Q Rev : Law Quarterly Review
Leiden J Int'l Law : Leiden Journal of International Law
Loy LA Int'l & Comp L. Rev. : Loyola of Los Angeles International and Comparative Law Review
MAI : Multilateral Agreement on Investment
Maltepe Üniv. HFD : Maltepe Üniversitesi Hukuk Fakültesi Dergisi
Melb. J. Int'l L. : Melbourne Journal of International Law
Melb. Univ. L. Rev. : Melbourne University Law Review
Mich. Law Rev. : Michigan Law Review
MLI : Multilateral Lending Institutions
MNC : Multinational Corporation
MNE : Multinational Enterprise
MLR : Modern Law Review
MLR Lim. : Modern Law Review Limited
NAFTA : North American Free Trade Agreement
NCP : National Contact Point
Neb. L. Rev. : Nebraska Law Review
Nordic J. HR : Nordic Journal of Human Rights
Nordic J. Int'l L. : Nordic Journal of International Law
Nw J Int'l HR : Northwestern Journal of International Human Rights
Nethl. QHR : Netherlands Quarterly of Human Rights
NGO : Non-governmental organizations
NIEO : New International Economic Order
NLM : National Liberation Movement

OAS : Organization of American States
OAU : Organization of African Unity
OECD : Organization for Economic Co-operation and Development
OHCHR : Office of the High Commissioner for Human Rights
OSCE : Organization for Security and Co-operation in Europe
OUP : Oxford University Press
Ottowa L. Rev. : Ottowa Law Review
Oxford J Leg. Stud. : Oxford Journal of Legal Studies
Pac. McGeorge Global Bus. & Dev. L.J. : Pacific McGeorge Global Business and Development Law Journal
PCA : Permanent Court of Arbitration
PCIJ : Permanent Court of International Justice
Philippine LJ : Philippine Law Journal
PLO : Palestine Liberation Organization
PMC : Private Military Company
Recueil des Cours : Recueil des Cours de l'académie de droit international de la Haye
Rev. Int'L Stud. : Review of International Studies
RGDIP : Revue générale de droit international public
SATRC : South African Truth and Reconciliation Commission
SAJHR : South African Journal on Human Rights
Santa Clara J Int'l L. : Santa Clara Journal of International Law
St.John's J. Leg. Comm. : St. John's Journal of Legal Commentary
Syracuse J Int'l L & Com. : Syracuse Journal of International Law & Commerce
Tenn L. Rev. :Tennessee Law Review
TNC : Transnational Corporation
Trade L & Dev. : Trade Law and Development
TUAC : Trade Union Advisory Committee to the OECD
TVPA : Torture Victims Protection Act
UDHR : Universal Declaration of Human Rights
UK : United Kingdom of Great Britain and Northern Ireland
UN : United Nations
UNCC : United Nations Compensation Commission
UNCLOS : United Nations Convention on Law of the Sea
UNCTAD : United Nations Conference on Trade and Development
UNCTC : United Nations Centre on Transnational Corporations
UNEP : United Nations Environment Programme
U. Miami Inter-Am. L. Rev. : University of Miami Inter-American Law Review
U. Det. Mercy L. Rev. : University of Detroit Mercy Law Review
U. Pa. L. Rev. : University of Pennsylvania Law Review
U. St Thomas L.J. : University of St Thomas Law Journal
UNTS : United Nations Treaty Series
U.S. : United States of America
Vand. J. Transnat'l L. : Vanderbilt Journal of Transnational Law
VCLT : 1969 Vienna Convention on Law of Treaties
Va. J. Int'l L. : Virginia Journal of International Law
Wash. & Lee L. Rev. : Washington and Lee Law Review
WB : World Bank
WHO : World Health Organization

Whit. L. Rev.	**:** Whittier Law Review
World Competition	**:** World Competition Law and Economic Review
WSOD	**:** World Summit Outcome Document
WTO	**:** World Trade Organization
Yale Hum. Rts & Dev. L.J.	**:** Yale Human Rights & Development Law Journal
Yale J. Int'l L.	**:** Yale Journal of International Law
Yale L.J.	**:** Yale Law Journal
Y.B. Int'l L. Comm'n	**:** Yearbook of International Law Commission

TABLE OF CASES

(in chronological order)

Permanent Court of International Justice

Jurisdiction of the Courts of Danzig (*Pecuniary Claims of Danzig Railway Officials who have passed into the Polish Service, against the Polish Railways Administration*), Advisory Opinion No. 15, 3 March 1928, PCIJ Rep. Series B. No. 15.

Case concerning the Payment of Various Serbian Loans issued in France, Judgment No.14, PCIJ Rep. Series A. Nos.20/21, 1929, p. 41.

Legal Status of Eastern Greenland (Denmark v. Norway), Order of 5 April 1933, PCIJ Ser. A/B no. 53.

International Court of Justice

Reparation for Injuries Suffered in the Service of the United Nations, Advisory Opinion, ICJ Rep. 1949, p. 174.

Corfu Channel Case, Judgment of April 9th, 1949, ICJ Rep. 1949, p.4.

Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, Advisory Opinion, ICJ Rep., 1951, p. 15.

Nottebohm case (Liechtenstein v. Guatemala) (second phase), Judgment, ICJ Rep. 1955, p. 4.

Case concerning the Temple of Preah Vihear (Cambodia v. Thailand), Preliminary objection, 1961 ICJ Rep. 1961, p. 17.

Barcelona Traction, Light and Power Company, Limited, Judgement, ICJ Rep. 1970, p. 3.

Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa), Advisory opinion, ICJ Rep., 1971, p. 16.

Nuclear Test case (New Zealand v. France), ICJ Rep. 1974, p. 457.

Nuclear Tests case (Australia v. France), ICJ Rep. 1974, p. 253

Western Sahara Advisory Opinion, ICJ Rep. 1975, p. 12.

United States Diplomatic and Consular Staff in Tehran (Hostages) (U.S. v. Iran), ICJ Rep. 1980, p. 3.

Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Merits, Judgment, ICJ Rep. 1986, p. 14.

Case concerning East Timor (Portugal v Australia), ICJ Rep. 1995, p. 102.

Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, ICJ Rep. 1996, p. 226.

Gabcikovo-Nagymaros Project (Hungary v. Slovakia), Judgement, ICJ Rep. 1997, p. 7.

Case concerning the Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium), ICJ Rep. 2002, p. 3.

Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, ICJ Rep. 2004, p. 136.

Armed Activities on the Territory of the Congo (New Application 2002) (Democratic Republic of the Congo v. Rwanda), Jurisdiction of the Court and Admissibility of the Application, Judgment, ICJ Rep. 2007, p. 6.

Application of the Convention on the Prevention and Punishment of the Crimes of Genocide (Bosnia and Herzegovina v Serbia and Montenegro), Merits, Judgment, ICJ Rep. 2007, p. 43.

Ahmadou Sadio Diallo (*Guinea v Democratic Republic of the Congo*), Preliminary Objections, ICJ Rep. 2007, p. 582.

Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo), Merits, Judgment ICJ Rep. 2010, p. 639.

Questions relating to the obligation to prosecute or extradite (Belgium v Senegal), Judgement, ICJ Rep. 2012, p. 422.

Arbitral Awards

Trail smelter case (United States v. Canada), 16 April 1938 and 11 March 1941, Vol. III, pp.1905-1982.

Texaco Overseas Petroleum Company and California Asiatic Oil Company v. The Government of the Libyan Arab Republic (Award on the Merits, Sole Arbitrator Dupuy, 1977), 53 ILR 422.

Case concerning the difference between New Zealand and France concerning the interpretation or application of two agreements, concluded on 9 July 1986 between the two States and which related to the problems arising from the Rainbow Warrior Affair, decision of 30 April 1990, Vol. XX, pp. 215-284, p. 251.

Tecnicas Medioambientales Tecmed S.A. v. The United Mexican States, ICSID Case No. ARB(AF)/00/2, 29.05.2003, para.122.

LG&E Energy Corp., LG&E Capital Corp. And LG&E International Inc. V. Argentine, ICDIS Case No. ARB/02/1, 03.10.2006

Occidental Petroleum Corporation, Occidental Exploration and Production Company v. Ecuador, ICSID Case no. ARB/06/11.

Nuremberg Tribunals

Trial of Bruno Tesch and Two Others (Zyklon B Case), Case No. 9, British Military Court, Hamburg, 1-8 March 1946, Law Reports of Trials of War Criminals, Vol. I, London, H.M.S.O., 1947.

Trial of Major War Criminals (Goering et al.), International Military Tribunal (Nuremberg), Judgment and Sentence, 30 September and 1 October 1946, Vol. I, p. 223.

Case No. 48, Trial of Friedrich Flick and Five Others (20th April-22nd December, 1947) on Liability of War Crimes, Crimes against Humanity and Membership of Criminal Organizations of Leading German Industries, Vol. 9 Law Reports of the Trials of War Criminals, p. 28.

Case no. 57, The I.G. Farben Trial, (Trial of Carl Krauch and twenty-two others), U.S. Military Tribunal, Nuremberg, 14 August 1947-29 July 1948, Law Reports of Trials of War Criminals, Vol. VIII, pp. 1-67.

Case No. 58, The Krupp Trial, (Trial of Alfred Felix Alwyn Krupp von Bohlen und Halbach and eleven others), U.S. Military Tribunal, Nuremberg, 17th November, 1947 -30th June, 1948.

Accord United States v Von Weizsaecker ("The Ministries Case") XIV Trials of War Criminals Before the Nuremberg Military Tribunals, 621-22 (1952).

International Criminal Tribunal for Rwanda

Judgment, Prosecutor v Jean Paul Akayesu, ICTR-96-4-T, Trial Chamber, 2 September 1998.

Judgment, Prosecutor v Kayishema and Ruzindana (ICTR-95-1), Trial Chamber, 21 May 1999.

Judgment and sentence, Prosecutor v Alfred Musema, (ICTR-96-13-A), 27 January 2000.

Judgment, Prosecutor v Akayesu (ICTR-96-4), Appeals Chamber, 1 June 2001.

Judgment, Prosecutor v. Alfred Musema, (ICTR-96-13-A), Appeals Chamber, 16 November 2001.

Judgment, Prosecutor v. Bagaragaza, (ICTR-05-86-S) Trials Chamber, 17 November 2009.

International Criminal Tribunal for the Former Yugoslavia

Judgement, Prosecutor v Tadic (IT-94-1), Trial Chamber, 7 May 1997.

Judgement, Prosecutor v Furundžija, (IT-95-17/1-T), ICTY, 10 December1998.

Judgement, Prosecutor v. Tadic, (IT-94-1-A), 15 July 1999.

Judgement, Prosecutor v Kupreskic et al “Lasva Valley”, (IT-95-16), Trial Chamber, 14 January 2000.

Judgment, Prosecutor v Blaskic, (IT-95-14), Trial Chamber, 3 March 2000.

Judgement, Prosecutor v Kvocka et al., IT-98-30/1-T, Trial Chamber, 2 November 2001.

Judgment, Prosecutor v. Delalic et al (Celebici), (IT-96-21-A), Appeals Chamber, 20 February 2001.

Judgement, Prosecutor v. Kunarac, (IT-96-23-T & IT-96-23/1-T), 22 February 2001.

Judgment, Prosecutor v. Tadic, (IT-94-1), Appeals Chamber, 30 July 2002.

Judgement, Prosecutor v Kvocka et al., (IT-98-30/1-A), 28 February 2005.

Human Rights Committee

JRT and the WG Party v. Canada, U.N.Doc. CCPR/C/18/D/104/1981, inadmissibility, 6 April 1983.

HRC, Kindler v. Canada, Comm. no. 470/1991, UN Doc. CCPR/C/48/D/470/1991 (1993), 11 November 1993.

Sharif Mohamed v. Barbados, Comm. No. 502/1992, inadmissibility, 31 March 1994.

SM v Barbados, U.N.Doc. CCPR/C/50/D/502/1992, inadmissibility, 4 April 1994.

Singer v. Canada, U.N.Doc. CCPR/C/51/D/455/1991, 26 July 1994.

Michelle Lamagna v Australia, U.N.Doc. CCPR/C/65/D/737/1997, inadmissibility, 30 April 1999.

Franz Wallmann et al. v Austria, Comm. no. 1002/2001, UN Doc. CCPR/C/80/D/1002/2001, 29 April 2004.

Roger Crochet v France, U.N.Doc. CCPR/C/100/D/1777/2008, 2 November 2010.

Leo Hertzberg et al. v. Finland, Comm.no. 61/1979, U.N. Doc.CCPR/C/OP/1 at 124, 1985.

Inter-American Commission on Human Rights

OEA/Ser.L/V/II.53, doc. 21 rev. 2, 13 October 1981, Report on the Situation of Human Rights in the Republic of Guatemala.

OEA/Ser.L/V/II.54, Doc. 9 rev. 1, 16 October 1981, Annual Report 1980-1981.

OEA/Ser.L/V/II.66, Doc. 10 rev. 1, 5 March 1985, *Yanomami v. Brazil Case*, Res. No. 12/85 Case 7615, in Annual Report of 1985-86.

OAE/Ser.L/V/II.124 Doc. 5, Report No 10/91, Case 10.169, "Banco del Perú", Annual Report 1990-1991.

OEA/Ser.L./II.95 Doc 7 rev. (1996), 11 March 1999, Report No 39/96, Case 11.673 Santiago Marzioni (Argentina).

OEA/Ser. L/V/II.96 Doc. 10 rev.1. (VIII-IV), 24 April 1997, Report on the Situation of Human Rights in Ecuador.

OEA/Ser.L/V/II.98, doc. 6, 16 October 1997, Report 47/97, Annual Report 1997, Tabacalera *Boqueron SA v Paraguay*.

OEA/Ser.L/V/II.102, Doc. 9 rev. 1, 26 February 1999, Third Report on the Human Rights Situation in Colombia.

OEA/Ser.L/V/II.106, Doc. 6 rev., 11 March 1999, Report 39/99, *Mevopal, S.A. v. Argentina*.

OEA/Ser.L/V/II., 27 September 1999, Report No. 106/99, Bendeck-Cohdinsa, Honduras.

OEA/Ser.L/V/II.106 Doc. 3 rev at 468, 13 April 2000, Report No. 36/00, Case 11.101, Annual Report 1999, *"Caloto Massacre" Colombia*.

OEA/Ser.L/V/II.116, Doc. 5 rev. 1 corr., 22 October 2002, Report on Terrorism and Human Rights.

OEA/Ser.L/V/II.118, doc. 4 rev. 2, 29 December 2003, Report on the Situation of Human Rights in Venezuela.

OEA/Ser.L/V/II.118, Doc. 5 rev. 1, 29 December 2003, Justice and Social Inclusion: The Challenges of Democracy in Guatemala.

OEA/Ser.L/II.124 Doc.5 (2005), 24 October 2005, Report on Inadmissibility No 83/05, Carlos Alberto Lopez Urquia, Honduras.

OEA/Ser/L/V/II.123, doc.6, rev. 1., 26 October 2005, ThiHaiti: Failed Justice or the Rule of Law? Challenges Ahead for Haiti and the International Community.

OEA/Ser.L/V/II.131, doc. 36, 2 March 2008, Observations of the Inter-American Commission on Human Rights upon Conclusion of its April 2007 visit to Haiti.

OEA/Ser/L/V/II.135, Doc. 40, 7 August 2009, Follow-up report: Access to Justice and Social Inclusion: The Road towards Strengthening Democracy in Bolivia.

OEA/Ser.L/V/II., Doc. 54, 30 December 2009, Democracy and Human Rights in Venezuela.

OEA/Ser.L/V/II. Doc. 68, 3 June 2010, Preliminary Observations of the Inter-American Commission on Human Rights on Its Visit to Honduras, May 15 to 18, 2010.

Inter-American Court of Human Rights

The Word "Laws" in Article 30 of the American Convention on Human Rights, IAmCtHR Advisory Opinion OC-6/86, Series A No. 6, 9 May 1986.

Velásquez Rodriguez v. Honduras, IAmCtHR, Ser. C, No. 4, 29 July 1988.

Case of the "White Van" (Paniagua-Morales et al v Guatemala), IAmCtHR, Ser. C. No. 37, 8 March 1998.

Case of Loayza Tamayo, IAmCtHR, Ser. C. No. 42, 27 November 1998.

Coard et al v United States, IAmCtHR, Case 10.951, Report No. 109/99, 29 September 1999.

Case of the "Five Pensioners", IAmCtHR, Ser. C No. 98, 28 February 2003.

Case of Juan Humberto Sánchez v. Honduras, IAmCtHR, Ser. C. No. 99, 7 June 2003.

Juridical Status and Rights of Undocumented Migrants, IAmCtHR Advisory Opinion OC-18/03, Ser. A No. 18, 17 September 2003.

Case of the Gómez Paquiyauri Brothers, IAmCtHR, Series C No. 110, 8 July 2004.

Case of the "Mapiripán Massacre" v. Colombia, IAmCtHR, Ser. C No. 134, 15 September 2005.

Case of the Massacre of Pueblo Bello, IAmCtHR, Ser. C, No. 140, 31 January 2006.

Case of Ximenes Lopes v Brazil, IAmCtHR, Ser. C No. 149, 4 July 2006.

Case of González et al. ("Cotton Field") v. Mexico, IAmCtHR, Ser. C No. 205, 16 November 2009.

Case of the "Las Dos Erres" Massacre v Guatemala, IAmCtHR, Ser. C. No. 211, 24 November 2009.

Massacres of El Mozote and Nearby Places v. El Salvador, IAmCtHR, Series C No. 252, 25 October 2012.

Case of Santo Domingo Massacre v. Colombia, IAmCtHR, Ser. C No 259, 30 November 2012.

Suarez Peralta v. Ecuador, IAmCtHR, Series C No. 261, 21 May 2013.

European Court of Human Rights

ECtHR, Sunday Times v. United Kingdom No.1, App.no. 6538/74, 1979.

ECtHR, Case of Airey v. Ireland, App. No. 6289/73, 9 October 1979.

ECtHR, Young, James and Webster v UK, App. nos. 7601/76; 7806/77, 13 August 1981.

ECtHR, James and Others v. the UK, App. no 8793/79, 21 February 1986.

ECtHR, Rees v. the United Kingdom, App. No. 9532/81, 17 October 1986.

ECtHR, Plattform ‘Ärzte für das Leben’ v. Austria, App. no. 10126/82, 21 June 1988.

ECtHR, Soering v. UK, App. no. 14038/88, 7 July 1989.

ECtHR, Mellacher and others v. Austria, App.no. 10522/83, 11011/84, 11070/84, 19 December 1989.

ECtHR, Mrkt. Int'l Verlag GmBH and Klaus Beermann v. Germany, App.no. 10572/83, 20 November 1989.

ECtHR, Autronic AG v. Switzerland, App.no. 12726/87, 22 May 1990.

ECtHR, Groppera Radio AG and Others, App.no. 10890/84, 28 March1990.

ECtHR, Observer & The Guardian v. UK, App.no. 13585/88, 26 November 1991.

ECtHR, Sunday Times v. United Kingdom No. 2, App.no. 13166/1992.

ECtHR, Niemietz v. Germany, App.no.13710/88, 16 December 1992.

ECtHR, Costello-Roberts v UK, App.no. 13134/87, 25 March 1993.

ECtHR, Sibson v UK, App. no. 14327/88, 20 April 1993.

ECtHR, Sigurdur A. Sigurjonsson v Iceland, App. no. 16130/90, 30 June 1993.

ECtHR, Dombo Beheer v. Netherlands, app.no. 14448/88, 27 October 1993.

ECtHR, Durini v Italy, App.no. 19217/91, 12 January 1994.

ECtHR, Stjerna v. Finland, App.no. 18131/91, 25 November 1994.

ECtHR, The Holy Monasteries v. Greece case, App.nos. 13092/87; 13984/88, 9 December 1994.

ECtHR, López Ostra v Spain, App. No.16798/90, 9 December 1994.

ECtHR, Agrotexim and Others v Greece, App. no. 14807/89, 24 October 1995.

ECtHR, Loizidou v. Turkey, App. no. 15318/89, Preliminary Objections, 23 March 1995.

ECtHR, Presos Compania Naveira S.A. v. Belgium, 17849/91, 20 November 1995.

ECtHR, Loizidou v. Turkey, App. no. 15318/89, 18 December 1996.

ECtHR, Gustafsson v Sweden, App. No. 15573/89, 25 April 1996.

ECtHR, Botta v. Italy, App. no 153/1996/772/973, 24 February 1998.

ECtHR, Guerra v Italy, app.no. 116/1996/735/932, 19 February 1998.

ECtHR, Ergi v Turkey, app. No. 23818/94, 28 July 1998.

ECtHR, Yaşa v. Turkey, App. No. 63/1997/847/1054, 2 September 1998.

ECtHR, A v. the United Kingdom, App.no. 100/1997/884/1096, 23 September 1998.

ECtHR, Osman v UK, Apps. No. 87/1997/871/1083, 28 October 1998.

ECtHR, Freedom and Democracy Party (ÖZDEP), App.no. 23885/94, 8 December 1999.

ECtHR, Commingersoll SA v Portugal, App. no. 355382/97, 6 April 2000.

ECtHR, Mahmut Kaya vs Turkey, App.no. 22535/93, 28 March 2000.

ECtHR, Cyprus v. Turkey, App. no. 25781/94, 10 May 2001.

ECtHR, Hatton and Others v UK, App. No 36022/97, 2 October 2001.

ECtHR, Cyprus v. Turkey, App. no. 25781/94, 10 May 2001.

ECtHR, Bankovic et al. v. Belgium and 16 other States, appl. no. 52207/99, Grand Chamber, 12 December 2001, decision of inadmissibility.

ECtHR, Pretty v UK, App.no. 2346/02, 29 April 2002.

ECtHR, Société Colas Est and Others v. France, App. no. 37971/97, 16 April 2002.

ECtHR, Paul and Audrey Edwards v. UK, App.no. 46477/99, 14 June 2002.

ECtHR, E and others v UK, App. no. 33218/96, 26 November 2002 (final 15.01.2003).

ECtHR, Radio France and Others v France, App.no. 53984/00, 23 September 2003 decision of admissibility.

ECtHR, Appleby and Others v United Kingdom, App. No. 44306/98, 6 May 2003.

ECtHR, von Hannover v Germany, App. no. 59320/00, 24 June 2004.

ECtHR, MC v Bulgaria, App.no. 39272/98, 4 March 2004 (final 4.3.2004).

ECtHR, Ilaşcu and others v. Moldova and Russia, App.no. 48787/99, 8 July 2004.

ECtHR, Taskin and Others v Turkey, App. no. 46117/99, 10 November 2004.

ECtHR, Issa and Others v. Turkey, App.no. 31821/96, 16 November 2004.

ECtHR, Öneryıldız v. Turkey, App. no. 48939/99, 20 November 2004.

ECtHR, Bosphorus Hava Yollari Turizm ve Ticaret Anonim Şirketi v. Ireland, App.no. 45036/98, 30 June 2005.

ECtHR, Siliadin v. France, App. no. 73316/01, 26.10.2005.

ECtHR, Terem Ltd Chechetkin and Olius v Ukraine, App.no. 70297/01, 18 October 2005.

ECtHR, Pokis v Latvia, app. no. 528/02, inadmissibility decision 5.10.2006

ECtHR, Österreichischer Rundfunk v Austria, App. no. 358841/02, 7 December 2006.

ECtHR, Case of Islamic Republic of Iran Shipping Lines v Turkey, App.no. 40998/98, 13 December 2007.

ECtHR, Budayeva and Others v. Russia, Apps. nos. 15339/02, 21166/02, 20058/02, 11673/02, 15343/02, 20 March 2008.

ECtHR, Affaire Tatar c. Roumanie, app. no. 67021/01, 27 Janvier 2009.

ECtHR, Opuz v. Turkey, App.no. 33401/02, 9 June 2009.

ECtHR, State Holding Company Luganskvugillya v. Ukraine, app.no.23938/05, 27 January 2009 (inadmissibility).

ECtHR, Van Anraat v Netherlands, App. No. 65389/09, 6 July 2010.

ECtHR, Al-Saadoon v. the UK, App. no. 61498/08, 2 March 2010.

ECtHR, Al-Skeini and Others v. UK, App. no. 55721/07, Grand Chamber, 7 July 2011.

ECtHR, OAO Neftyanaya Kompaniya Yukos v. Russia, App. No. 14902/04, 20 September 2011.

ECtHR, von Hannover v Germany (no. 2), Apps. Nos. 40660/08 and 60641/08, 7 February 2012.

ECtHR, Kolyadenko and Others v. Russia, Apps. no. 17423/05, 20534/05, 20678/05, 23263/05, 24283/05, 35673/05, 28 February 2012.

African Court on Human and People's Rights

AfCommHPR, Civil Liberties Organization v. Nigeria, Comm.no. 101/93, 1995.

AfCommHPR, Free Legal Assistance Group and Others v. Zaire, Comm. Nos. 25/89, 47/90, 56/91, 100/93, 1995.

AfCommHPR, Comm. 105/93, 128/94, 130/94 and 152/96, Media Rights Agenda and Constitutional Rights Project v. Nigeria, 31 October 1998.

AfCommHPR, Constitutional Rights Project, Civil Liberties Organisation and Media Rights Agenda v. Nigeria, Comm. 140/94, 141/94, 145/95, 1999.

AfCommHPR, Comm. No. 155/96 – the Social and Economic Rights Action Center and the Center for Economic and Social Rights/Nigeria, 2001.

AfCommHPR, Zimbabwe Human Rights NGO Forum v Zimbabwe, Comm. No. 245/02, 2006.

AfCommHPR, EX.CL/364 (XI), Annex II, Article 19 v. The State of Eritrea, Comm.no. 275/2003, Decision of 16-30 May 2007.

AfCommHPR, Association of Victims of Post Electoral Violence & INTERIGHTS v. Cameroon, African Commission on Human and Peoples' Rights, Comm. No. 272/03, 2009.

AfCommHPR, Centre on Housing Rights and Evictions v. The Sudan, Comm. Nos. 279/03 & 296/05, 2009.

AfCtHPR, App. No. 00/2011, Tanganyika Law Society and Legal and Human rights Centre v. The United Republic of Tanzania.

United States

Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 427 (1964)

Filártiga v. Peña-Irala, 630 F.2d 876 (2d Cir. 1980)

Tel-Oren v. Libyan Arab Republic, 726 F.2d 774, 517 F. Supp. 542 (D.D.C. 1981)

Filartiga v. Pena-Irala, 630 F.2d 876 (2d Cir.1980).

Filartiga v. Pena-Irala, 577 F. Supp. 860, 861 (E.D.N.Y. 1984)

Forti v. Suarez-Mason 672 F. Supp. 1531, 1539–40 (N.D. Cal. 1987)

Trajano v. Marcos (In re Estate of Ferdinand E. Marcos Human Rights Litigation), 978 F.2d. 493, 503 (9th Cir. 1992).

Abu Zeineh v. Federal Laboratories and Transtechnology Corp., Inc. 975 F.Supp. 774 (1994).

In re Estate of Ferdinand Marcos, Human Rights Litigation, 25 F.3d 1467, 1475 (9th Cir. 1994)

Kadic et al. v. Karadzic, 70 F.3d 232 and 239 (2d Cir. 1995), cert. denied, 116 S.Ct. 2524 (1996).

Wiwa v. Royal Dutch Petroleum Co., 226 F. 3d 88 – Court of Appeals, 2nd circuit, September 14, 2000

Wiwa v. Royal Dutch Petroleum, 2002 WL 319887

Doe I v. Unocal Corp., 395 F. 3d 932- Court of Appeals, 9th Circuit 2002

Presbyterian Church of Sudan et al. v. Talisman Energy Inc., 582 F.3d, docket 07-0016, 2 October 2009.

Sosa v. Alvarez-Machain, 542 U.S. 692, 725 (2004)

In re "Agent Orange" Product Liability Litigation 373 F. Supp. 2d 7, 54 (as to TVPA), 58–59 (as to ATS) (E.D.N.Y. 2005)

Bowoto v. Chevron Corp., No. C99-02506SI, 2007 WL 800940 (N.D. Cal. Mar. 14, 2007).

American Isuzu Motors Inc. v. Lungisile Ntsebeza, 128 S. Ct. 2424 (2008).

In re South African Apartheid Litigation, 617 F. Supp. 2d 228, 255 (2009).

Bowoto v. Chevron Corp. No. 09-15641 D.C. No 3:99-cv-02506-SI, 10 September 2010.

Al Shimari et al v. CACI Premier Technology Inc et al, 4th U.S. Circuit Court of Appeals, No. 13-1937, 30.06.2014.

Cardona et al v. Chiquita Brands International Inc et al, 11th U.S. Circuit Court of Appeals, No. 12-14898, July 2014.

RÉSUMÉ

Les Fondements Juridiques pour engager la responsabilité des Sociétés Transnationales directement des violations des Droits de l'Homme sous l'angle du droit international public

Le discours sur la relation entre le comportement des entreprises et la protection des droits de l'Homme a ses racines historiques dans le monde bipolarisé de la guerre froide. Le mouvement de décolonisation a déclenché l'émergence du droit à l'autodétermination économique et le concept d'un « Nouvel Ordre Economique International » prévoyant le règlement et la surveillance des activités des sociétés transnationales fondées sur les principes de l'égalité souveraine et de la coopération entre tous les États pour le droit à l'autodétermination économique des peuples. Mais, l'adoption de politiques néo-libérales comme le libre-échange, la déréglementation, la privatisation, la réduction des dépenses publiques au détriment des services sociaux, l'abandon de l'intérêt public et la libéralisation du commerce international ont nuis à ce concept. La naissance des sociétés transnationales puissantes et incontrôlées entraine l'émergence de nouveaux acteurs internationaux dans l'ordre international. La répartition inégale des avantages et des coûts de la mondialisation économique a provoqué l'élargissement de l'écart entre les riches et les pauvres, ce qui a constitué une menace pour la prospérité, la sécurité, la stabilité et la protection mondiale des droits de l'Homme.

Le rôle actif joué par les sociétés dans le processus de néo-libéralisation et de mondialisation a également eu des effets sur la sphère juridique, provoquant le relâchement de la séparation traditionnel de droit public - droit privé. Surtout, la privatisation des biens publics et des services publics, qui étaient une partie des fonctions de l'Etat, a augmenté les causes de conflit entre les intérêts publics de la société et les intérêts des entreprises. Par conséquent, afin de diminuer les effets néfastes du néo-libéralisme incontrôlable et de bénéficier des aspects positifs de la mondialisation, aujourd'hui, il devient inévitable de réformer le système international, en particulier en ce qui concerne la réglementation de la conduite des sociétés transnationales et leur violation des droits de l'Homme. Ainsi, les sociétés transnationales seront transformées en outils pour respecter et protéger les droits de l'Homme, et en même temps pour contribuer au développement durable et à la croissance économique. De cette façon, un ordre social et international dans lequel tous les droits et libertés peuvent être pleinement et librement exercées serait construit.

Actuellement, les seuls mécanismes de responsabilité contre les crimes internationaux et les violations des droits de l'Homme perpétrées par les sociétés transnationales existent seulement dans les lois natıonal. La compréhension traditionnelle du droit international suggère que si un acte d'un acteur privé est chargé, dirigé et contrôlé par un Etat, l'acte illicite devient attribuable à cet Etat donnant naissance à sa responsabilité indirecte verticale. En outre, puisque les États ont la principale responsabilité de respecter et de protéger les droits de l'Homme, ils sont dans l'obligation d'agir avec diligence afin de prévenir les violations perpétrées par des acteurs privés et à enquêter, punir et réparer les violations des droits de l'Homme commises sur leur territoire et / ou leur juridiction. En conséquence, les pays d'accueil et les États d'origine auraient la responsabilité internationale pour les actes des sociétés transnationales dans le cadre des principes de territorialité et de la nationalité active. Enfin, le principe d'universalité peut aussi servir comme un outil juridique pour empêcher l'impunité des acteurs privés qui ont violé les droits de l'Homme. Dans ce contexte, le deuxième chapitre examine tout d'abord les règles de la responsabilité de l'Etat et analyse les affaires que les Tribunaux des Etats Unis exécutent dans le cadre des procédures de la Loi de l'Indemnisation des Actes Injustes Commis Contre les Etrangers *(Alien Tort Claims Act)*. Deuxièmement, nous examinerons en détail les obligations extraterritoriales de diligence des États d'origine avec des références à la jurisprudence de la Cour européenne des droits de l'homme.

L'ordre juridique international redéfini avec l'influence notable des acteurs non étatiques prouve que les mesures adoptées par les États, qu'ils soient internationaux ou nationaux, restent inefficaces pour la protection des droits de l'Homme contre les violations perpétrées par les sociétés transnationales puissantes. Dans le troisième chapitre, nous examinerons tout d'abord la notion de responsabilité sociale des entreprises, qui est basée sur l'autoréglementation, l'auto-application et l'auto-surveillance. Ce modèle de règlement néo-classique ou libéral vise à réglementer l'activité économique mondiale au sein des frontières nationales et en se basant sur les marchés mondiaux. En conséquence, nous assistons à une prolifération mondiale des codes de conduite et une tendance à la privatisation de l'établissement de normes, soit adopté individuellement par des sociétés ou mis en œuvre dans le cadre d'une initiative de groupe local, régional ou international, comme les Principes de Sullivan, Table Ronde de Caux et les Principes de Slepak. Cependant, les "*soft sanctions*" ont un effet limité sur le comportement responsable des entreprises. Il ne peut être soutenu avec succès que le régime de l'autoréglementation est un outil efficace de protection des droits de l'Homme.

La mondialisation économique et les conséquences des politiques néo-libérales adoptées par la majorité des Etats dans le monde unipolaire de l'ère de post-guerre froide prouvent que la protection de la dignité humaine est devenue largement tributaire des mesures adoptées par la communauté internationale, où les lois des Etats-nations resteront inefficaces contre les violations des droits de l'Homme commises par les sociétés puissantes. Dans ce contexte, la communauté internationale doit au moins normaliser les exigences minimales obligatoires pour la conduite des entreprises, la mise en surveillance externe et indépendante de la conformité et les sanctions qui doivent être imposées sur les sociétés transnationales en cas de non-conformité. A cet effet, les organisations intergouvernementales, telles que l'Organisation pour la Coopération et le Développement Economique, l'Organisation Internationale du Travail et l'Organisation des Nations Unies qui ont

adopté divers documents juridiques non contraignants sont examinés en détail dans le troisième chapitre. Même si une transformation de la « *soft law* » en droit contraignant ne se réalise pas, ces instruments, reflétant le comportement désiré et attendu pour leurs destinataires, continuent d'affecter le comportement des membres de la communauté internationale.

Cependant, le *realpolitik* mondial démontre que la prévention de la conduite abusive des entreprises et la protection de la dignité humaine par des mesures nationales et des documents juridiques non contraignants restent insuffisantes et inefficaces devant les puissantes sociétés transnationales. En réalité, ces sociétés ont déjà l'obligation de respecter les droits de l'Homme. Le fait qu'il n'y ait aucune institution internationale autorisée à contrôler la conformité des entreprises avec les obligations internationales des droits de l'Homme ne signifie pas que ces sociétés et leurs filiales ne sont pas liées par les droits de l'Homme dans la conduite de leurs activités et de leurs opérations. Par conséquent, dans le quatrième chapitre, après une brève élaboration sur le statut juridique des sociétés en vertu du droit international public, il sera tenté de découvrir l'existence, la nature, la portée et l'étendue des obligations des droits de l'Homme en utilisant les méthodes d'interprétation textuelle et dynamique et en tenant compte de l'évolution des circonstances depuis la Seconde Guerre mondiale.

Les corporations et les organisations non gouvernementales à but lucratif, ont la responsabilité de respecter les droits de l'Homme dans leurs sphères d'influence et d'activité. Ainsi, les sociétés sont soumises à une obligation négative de ne pas interférer avec le libre et le plein exercice des droits de l'Homme, notamment le droit à la vie, le droit à la vie privée, le droit de former et adhérer à des syndicats, le droit de réunion et le droit à l'égalité de rémunération pour un travail. En outre, les sociétés transnationales doivent éviter des activités et des opérations qui portent le danger de saper les efforts internationaux et les tentatives politiques et juridiques nationales pour promouvoir et encourager le respect des droits de l'homme. Tous les dirigeants, travailleurs, entrepreneurs, sous-traitants, fournisseurs, concessionnaires, distributeurs des sociétés transnationales et toutes les autres personnes morales et réelles qui entrent dans une relation contractuelle avec eux sont également dans l'obligation de respecter les normes nationales et internationales des droits de l'homme et d'agir en conformité avec les meilleures pratiques émergentes développées par l'industrie, la société civile et les gouvernements locaux, surtout lorsque la préservation de normes impératives *(jus cogens)* est en risque.

En outre, la responsabilité de protéger doit aussi avoir des implications pour les entreprises, en particulier lorsque les Etats ne parviennent pas à fournir une protection adéquate pour ceux qui sont vulnérables et en situation de risque. La responsabilité de protéger peut être considérée comme une obligation intrinsèque dans la responsabilité de respecter. En tenant compte du caractère de norme impérative de certains droits fondamentaux et des libertés fondamentales et la plupart des normes du droit humanitaire, il s'avère inévitable pour les sociétés d'être également dans l'obligation de protéger les droits et les libertés. Par exemple, les normes impératives telles que la prohibition de la torture, les traitements inhumains et dégradants, l'interdiction de l'esclavage et de la traite des esclaves, l'interdiction du génocide, l'interdiction de la discrimination et le droit à l'autodétermination des peuples créent des obligations directes pour les entreprises.

Les sociétés sont également dans l'obligation d'agir avec diligence afin d'assurer que leurs activités, les opérations, les services et les produits ne violents pas les droits d'autrui. En faisant une analogie des jugements et des décisions des organes de défense des droits de l'Homme internationaux et régionaux ainsi que les tribunaux sur les devoirs des Etats, il peut être conclu que les sociétés doivent également avoir des devoirs en ce qui concerne la réglementation sur la conduite de leurs travailleurs et de leurs filiales via l'adoption des politiques en matière des droits de l'Homme et des codes de conduite. Le but est de prévenir les impacts négatifs réels et potentiels et les violations des droits de l'Homme en faisant une étude d'impact sur les droits de l'Homme objective et efficace, puis de surveiller la conformité de leurs partenaires, leurs entrepreneurs, leurs sous-traitants, leurs fournisseurs, leurs concessionnaires, leurs distributeurs, leurs agents et d'autres personnes liées et les entités avec les normes des droits de l'Homme des sociétés, qui devraient être en ligne avec les normes universelles des droits de l'homme.

Enfin, ces sociétés sont également dans l'obligation de ne pas commettre ou être complices de crimes internationaux perpétrés par d'autres acteurs tels que les Etats ou les groupes armés et paramilitaire. Les procès historiques de Nuremberg démontrent le rôle crucial et l'importance des entreprises dans la commission de crimes internationaux. En outre, il y a un certain nombre d'exemples contemporains où les sociétés transnationales impliquent dans la commission de crimes internationaux de diverses manières et restent impunis. La jurisprudence des tribunaux pénaux internationaux *ad hoc* et la Cour pénale internationale nous offrent des indices juridiques pour tenir les sociétés internationalement responsables par l'application horizontale directe des normes des droits de l'Homme. Par conséquent, une fois que la juridiction de la CPI sur les personnes morales est reconnue par un amendement au Statut de la Cour pénale internationale, il serait possible de tenir les sociétés, si elles constituent les principaux auteurs ou complices dans la perpétration de crimes de guerre, de crimes contre l'humanité et le génocide.

Par conséquent, aujourd'hui, un règlement international contraignant et son exécution effective vis-à-vis des sociétés sont devenu un besoin pressant. Une telle réforme dans le système juridique international peut être réalisé soit en modifiant les documents pertinents existants, soit en créant un nouveau mécanisme de responsabilité compatible avec les modèles opérationnels des sociétés. Une imposition graduelle des responsabilités doit être en mesure d'être reconnue par la communauté internationale et être suivie d'une institutionnalisation graduelle des mécanismes nationaux, régionaux, internationaux et transnationaux d'application complémentaire. Si les sociétés du XXIème siècle réorganisent et fonctionnent comme des réseaux transnationaux, leur réglementation et leur surveillance devraient également être sous la forme d'un réseau transnational de plusieurs documents juridiques et réglementaires, administratives ou autres locaux et les institutions spécialisées sur les problèmes spécifiques des pays où elles opèrent ou sur des secteurs spécifiques qui portent le risque de violations systématiques des droits de l'Homme commises par les sociétés. Une institution internationale supérieure pour superviser et harmoniser le travail de ces structures et pour régler les différends entre les parties peuvent assurer un fonctionnement efficace des institutions formant ce réseau transnational.

ABSTRACT

Legal Grounds for Holding Transnational Corporations Directly Responsible for Human Rights Violations under Public International Law

The discourse on the relationship between corporate conduct and protection of human rights has its historical roots in the bipolarized world of Cold War. The decolonization movement triggered the emergence of the right to economic self-determination and the concept of a New International Economic Order, where the activities of transnational corporations were regulated and controlled based on the principles of sovereign equality and cooperation among all States. Even so, the adoption of neo-liberal policies, such as free trade, deregulation, privatization, reduction of public spending to the detriment of social services, abandonment of the understanding of public interest and liberalization of international trade, resulted in the rise of powerful and uncontrolled transnational corporations as new international actors of the international order. The unevenly shared benefits and unevenly distributed costs of economic globalization caused the widening of the gap between the rich and the poor, which posed a threat to prosperity, security, stability and global protection of human rights.

The active role played by corporations in the process of neo-liberalization and globalization had also effects on the legal sphere causing the loosening of the traditional public law - private law separation. Especially, privatization of public goods and public services, which were a part of State's functions, increased the cases of conflict between the public interests of society and interests of corporations. Consequently, in order to diminish the adverse effects of uncontrollable neo-liberalism and to benefit from the positive aspects of globalization, today, it become inevitable to reform the international system, especially with regard to the regulation of the conduct of transnational corporations and holding them responsible for human rights violations. In this way, transnational corporations will be transformed into tools respecting and protecting human rights, and at the same time contributing to the sustainable development and economic growth. Thus, a social and international order in which all rights and freedoms can be fully and freely exercised would be constructed.

Currently, the only existing legal accountability mechanisms for human rights violations and international crimes perpetrated by transnational corporations are designed domestically. Traditional understanding of international law suggests that if

an act of a private actor is instructed, directed or controlled by the State, the wrongful act becomes attributable to that State giving rise to its indirect vertical responsibility. Furthermore, since States have the primary responsibility to respect and protect human rights, they are under the obligation to act due diligently to prevent violations perpetrated by private actors and to investigate, punish and redress human rights abuses committed within their territory and/or under their jurisdiction. Accordingly, both host states and home states would have international responsibility for the acts of transnational corporations under the principles of territoriality and active nationality. Finally, the principle of universality can also serve as a legal tool for preventing the impunity of private actors who perpetrated human rights abuses. In this context, second chapter firstly focuses on the rules of state responsibility and analyses the case-law of the U.S. courts under the Alien Tort Claims Act procedures. Secondly, the extra-territorial due diligence obligations of home states is examined in detail with references to the jurisprudence of the European Court of Human Rights.

The redefined international legal order shaped with the significant influence of non-state actors proves that the measures adopted by States, whether international or national, remain ineffective for the protection of human rights against violations perpetrated by powerful TNCs. In the third chapter, firstly the concept of corporate social responsibility, which is based on self-regulation, self-enforcement and self-monitoring, is examined. This neo-classic or liberal model of regulation aims to regulate the global economic activity within the national borders and through reliance on global markets. Accordingly, we witness a global proliferation of codes of conduct and a trend of privatization of standard setting, either individually adopted by corporations or implemented in the context of a local, regional or international group initiative, such as the Sullivan Principles, Caux Roundtable and Slepak Principles. However, since the 'soft-sanctions' of this regime have limited effect on responsible corporate behaviour, it cannot be successfully argued that the regime of self-regulation is an effective tool of protecting human rights.

Economic globalization and the consequences of neo-liberal policies adopted by the majority of States in the unipolar world of the post-Cold War era prove that the protection of human dignity has largely become dependent on the measures adopted by international community, where the laws of nation-states remain ineffective against human rights violations perpetrated by powerful corporations. In this context, the international community shall at least standardize the obligatory minimum requirements for corporate conduct, set external and independent monitoring of compliance, and sanctions to be imposed on the TNCs in case of non-compliance. For this purpose, the intergovernmental organizations, such as the Organization for Economic Co-operation and Development, International Labour Organization and the United Nations adopted various soft law documents, which are examined in detail under the third chapter. Even if a transformation of soft law to hard law is not realized, these instruments, reflecting the desired and expected conduct for their addressees, continue to affect the behaviour of the members of international community.

However, the global *realpolitik* demonstrates that preventing abusive corporate conduct and protecting human dignity through national measures and soft law documents remains inadequate and ineffective in the face of powerful transnational corporations. There are already direct human rights obligations and duties imposed on corporations. The fact that there is no international institution authorized to

monitor the compliance of corporations with the international human rights obligations does not mean that corporations and their subsidiaries are not bound by any human rights norms in conducting their activities and operations. Therefore, in the fourth chapter, after a brief elaboration on the legal status of corporations under public international law, it will be attempted to find out the existence, nature, scope and extent of corporate human rights obligations by using the methods of textual and dynamic interpretation and taking into consideration the changing circumstances since the World War II.

Corporations, as organs of society and as for-profit non-governmental organizations, have responsibility to respect human rights in their spheres of influence and activity. Thus, they are under a negative obligation not to interfere with the free and full enjoyment of human rights, *inter alia*, right to life, right to privacy, right to form and join trade unions, right to assembly and right to equal remuneration for work. Furthermore, transnational corporations shall refrain from activities and operations that carry the danger of undermining the international efforts and national political and legal attempts to promote and encourage respect for human rights. All officers, workers, contractors, subcontractors, suppliers, licensees, distributors of transnational corporations and all other legal and real persons that enters into a relationship with them are also under an obligation to observe international and national human rights standards and act in line with the emerging best practices developed by the industry, civil society and the local governments, especially when the preservation of peremptory norms (*jus cogens*) is at risk.

Furthermore, the responsibility to protect shall also have implications for corporations, especially when States fail to provide adequate protection for those who are vulnerable and under risk. Responsibility to protect may be regarded as an obligation intrinsic in the responsibility to respect. Keeping in mind the peremptory norm character of some of the basic rights and fundamental freedoms and most of the norms of humanitarian law, it proves to be inevitable that corporations shall also be under an obligation to protect the rights and freedoms. For example, peremptory norms such as prohibition of torture, inhuman and degrading treatment, prohibition of slavery and slave-trade, prohibition of genocide, prohibition of discrimination and the right to self-determination of peoples create direct obligations for corporations.

Corporations are also under an obligation to act with due diligence in order to ensure that their activities, operations, services and products do not infringe the rights of others. By making an analogy of the judgments and decisions of international and regional human rights bodies and courts on the duties of states, it can be concluded that corporations shall also have duties to regulate the conduct of their workers and subsidiaries via adoption of human rights policies and codes of conduct, to prevent actual and potential adverse impacts and human rights violations by making objective and effective Human Rights Impact Assessments, and to monitor the compliance of their partners, contractors, sub-contractors, suppliers, licensees, distributors, workers and other related persons and entities with the corporate human rights standards, which should be in line with the universal human rights standards.

Lastly, corporations are also under an obligation not to commit or be complicit in the commission of international crimes perpetrated by other actors such as States or armed and para-military groups. The historical Nuremberg trials demonstrate the

crucial role and importance of corporations in the commission of international crimes. Furthermore, there are a number of contemporary examples where the transnational corporations involve in the commission of international crimes in various ways and remain unpunished. The case law of the *ad hoc* international criminal tribunals and the International Criminal Court provides us with legal clues for holding corporations internationally responsible through direct horizontal application of human rights norms. Accordingly, once the jurisdiction of the ICC on legal persons is recognized by an amendment in the Statute of the International Criminal Court, it would be possible to hold corporations, whether they are the principal perpetrators or accomplices in the commission of war crimes, crimes against humanity and genocide.

Consequently, today, an international binding regulation and its effective enforcement on corporations became a pressing need. Such a reform in the international legal system may either made by amending the existing relevant documents or by establishing a new mechanism of responsibility compatible with the operational patterns of corporations. A graded imposition of responsibilities shall be expected to be recognized by the international community and be followed by a graded institutionalization of national, regional, international and transnational implementing mechanisms complementing each other. If the corporations of the 21st century reorganize and function as transnational networks, their regulation and supervision should also be in the form of a transnational network of several local legal, administrative or other regulatory documents and institutions specialized on the specific problems of the countries they operate in or on specific sectors which carry the risk of systematic violations of human rights perpetrated by corporations. A superior international institution supervising and harmonising the work of these structures and settling disputes among the related parties may ensure effective functioning of the institutions forming this transnational network.

ÖZET

Uluslararası Kamu Hukukunda Ulus-aşırı Şirketlerin İnsan Hakları İhlalleri Nedeniyle Doğrudan Sorumlu Tutulmasının Hukuksal Temelleri

Şirket faaliyetleri ve insan haklarının korunması arasındaki ilişki üzerine söylemlerin tarihsel kökeni Soğuk Savaş döneminin iki kutuplu dünyasına dayanmaktadır. Bağımsızlaşma hareketlerinin başlaması da halkların kendi ekonomik geleceklerini belirlemesi hakkının, ve devletlerin egemen eşitliği ve işbirliği ilkelerine dayanan, ulus-aşırı şirket faaliyetlerinin düzenlenmesi ve denetlenmesini öngören "Uluslararası Yeni Ekonomik Düzen" kavramının ortaya çıkmasını tetiklemiştir. Yine de, serbest ticaret, deregülasyon, özelleştirme, sosyal hizmetlere ayrılan bütçede kısıntılara gidilmesi, kamu yararı anlayışının terk edilmesi ve uluslararası ticaretin liberalleşmesi gibi neo-liberal politikaların benimsenmesi, güçlü ve denetlenmeyen ulus-aşırı şirketlerin uluslararası düzenin yeni oyuncuları olarak doğmasına yol açmıştır. Ekonomik küreselleşmenin maliyet ve yararlarının eşit olmayan bir biçimde dağılması refah, güvenlik, istikrar ve insan haklarının korunmasına bir tehdit oluşturarak zengin ve yoksul arasındaki uçurumun derinleşmesine neden olmuştur.

Neo-liberalleşme ve küreselleşme süreçlerinde şirketlerin oynadığı etkin rol, hukuksal zeminde de etkilerini göstererek kamu hukuku ve özel hukuk arasındaki geleneksel ayrımın silikleşmesine yol açmıştır. Özellikle, devlet faaliyetlerinin bir parçası olarak görülen kamu mallarının ve kamu hizmetlerinin özelleştirilmesi, toplumun kamusal yararı ile şirketlerin özel çıkarlarının çatıştığı durumları arttırmıştır. Sonuç olarak, denetlenemeyen neo-liberalizmin olumsuz etkilerini azaltmak ve küreselleşmenin olumlu yönlerinden yararlanmak için, özellikle ulus-aşırı şirket faaliyetlerinin düzenlenmesi ve şirketlerin insan hakları ihlalleri nedeniyle sorumlu tutulabilmesi bağlamında, uluslararası sistemi reforme etmek bugün kaçınılmaz bir gereklilik haline gelmiştir. Böylece ulus-aşırı şirketler sürdürülebilir gelişme ve ekonomik büyümeye katkıda bulunurlarken aynı zamanda insan haklarına saygı gösteren ve bu hakları koruyan birer araca dönüştürülmüş olacaktır.

Günümüzde, ulus-aşırı şirketlerin gerçekleştirdiği insan hakları ihlalleri ve işledikleri uluslararası suçlar nedeniyle hesap vermelerine olanak tanıyan mekanizmalar yalnızca iç hukuk düzenlemelerinde mevcuttur. Geleneksel uluslararası hukuk anlayışı, özel kişilerin devletin emir, yönetim ve denetimi altında işledikleri hukuka aykırı haksız fiillerin devlete atfedilebilir duruma gelerek bu fiillerden devletin dolaylı dikey sorumluluğunun doğacağını öngörmektedir. Ayrıca,

insan haklarına saygı gösterme ve hakları koruma konusunda asli sorumluluk devletlere ait olduğundan, devletler kendi yetki alanlarına giren alanlarda özel kişilerce işlenecek hak ihlallerini önlemek ve ihlal gerçekleştiğinde de sorumluları araştırmak, cezalandırmak ve zararları gidermek konularında gerekli özeni gösterme yükümlülüğü altındadırlar. Dolayısıyla ulus-aşırı şirketlerin gerçekleştirdikleri insan hakları ihlalleri nedeniyle ülkesellik ve faile göre kişisellik ilkeleri gereğince hem ev sahibi devletlerin hem de konuk eden devletlerin uluslararası sorumluluğu olacaktır. Son olarak, evrensellik ilkesi de özel kişilerin işlediği insan hakları ihlallerinde cezasızlığın önlenmesi için bir araç olarak kullanılabilinir. Bu bağlamda ikinci bölümde ilk olarak devletin sorumluluğuna ilişkin kurallar incelenerek Amerika Birleşik Devletleri mahkemelerinin Yabancılara Karşı İşlenen Haksız Fiillerin Tazmini Yasası (*Alien Tort Claims Act*) çerçevesinde yürüttüğü davalar analiz edilecektir. İkinci olarak, İnsan Hakları Avrupa Mahkemesi kararlarından yola çıkılarak ev sahibi devletin ülke-dışı özen gösterme yükümlülükleri detaylı bir biçimde incelenecektir.

Devlet-dışı aktörlerin belirgin etkisiyle yeniden tanımlanan uluslararası hukuk düzeni, devletlerin aldığı ulusal ve uluslararası önlemlerin insan haklarını güçlü ulus-aşırı şirketlerin gerçekleştirdiği ihlallere karşı korumakta etkisiz kaldığını göstermektedir. Üçüncü bölümde öncelikle öz-düzenleme, öz-icra ve öz-denetime dayanan şirketlerin sosyal sorumluluğu kavramı incelenecektir. Bu neo-klasik ya da liberal düzenleme modeli, küresel ekonomik faaliyetleri ulusal sınırlar içinde ve küresel pazara güven çerçevesinde ele almayı amaçlamaktadır. Sonuç olarak, davranış kurallarının yaygınlaşarak çoğaldığına ve şirketlerin tek başlarına ya da Sullivan İlkeleri, Caux Roundtable ve Slepak İlkeleri gibi yerel, bölgesel ya da uluslararası girişimler çerçevesinde grup olarak kabul ettikleri davranış kurallarının yapım sürecinin özelleştiğine tanıklık etmekteyiz. Ancak pazar kurallarıyla şekillenen öz-düzenleme rejiminin 'yumuşak yaptırım'larının şirketlerin işlediği insan hakları ihlallerinden doğan sorumluluk üzerinde çok sınırlı bir etkisi olduğundan, bu rejimin insan haklarının korunmasında etkili bir araç olarak kullanılabileceği başarılı bir biçimde savunulamaz.

Soğuk Savaş sonrasının tek-kutuplu dünyasına egemen ekonomik küreselleşme olgusu ve devletlerin büyük bir bölümü tarafından benimsenen neo-liberal politikalar neticesinde ve ulus-aşırı şirketlerin işledikleri insan hakları ihlallerini önlemekte etkisiz kalan ulusal yasalar dolayısıyla, insan onurunun korunması bugün büyük ölçüde uluslararası toplumun alacağı önlemlere bağımlı hale gelmiştir. Bu bağlamda, uluslararası toplum en azından zorunlu asgari gereklilikleri standartlaştırmalı, standartlara uygunluğun bağımsız denetimini sağlamalı ve ihlal halinde uygulanacak yaptırımları belirlemelidir. Bu amaçla, yine üçüncü bölümde incelendiği üzere, Ekonomik İşbirliği ve Kalkınma Örgütü, Uluslararası Çalışma Örgütü ve Birleşmiş Milletler gibi hükümetler-arası örgütler yumuşak hukuk belgeleri düzenlemişlerdir. Her ne kadar henüz yumuşak hukuktan katı hukuka bir geçiş süreci gerçekleşmemişse de bu belgeler muhataplarından istenen ve beklenen davranışları yansıttıkları için uluslararası toplumun üyelerinin davranışlarını etkilemeye devam etmektedirler.

Küresel *realpolitik*, ulusal önlemler ve yumuşak hukuk belgelerinin güçlü ulus-aşırı şirketlerin işledikleri insan hakları ihlalleri karşısında insan onurunu korumada yetersiz ve etkisiz kaldıklarını göstermektedir. Gerçekte, şirketlerin halihazırda insan haklarına ilişkin doğrudan uluslararası yükümlülük ve görevleri bulunmaktadır.

Şirketlerin bu uluslararası insan hakları yükümlülüklerine uygun davranıp davranmadıklarını denetleyecek bir uluslararası kurumun bulunmayışı, şirketlerin ve bağlı kuruluşlarının faaliyet ve işleyişlerinde insan hakları kurallarıyla bağlı olmadıkları anlamına gelmemektedir. Bu nedenle, dördüncü bölümde, şirketlerin uluslararası kamu hukukundaki konumu hakkında kısa bir değerlendirme yapıldıktan sonra uluslararası insan hakları metinleri, II. Dünya Savaşı'ndan bu yana değişen koşullar da göz önünde tutularak, lafzi ve dinamik yorum yöntemleriyle incelenecek, uluslararası ve bölgesel insan hakları mahkemelerinin de kararları ışığında, şirketlerin uluslararası insan hakları yükümlülüklerinin varlığı, doğası, kapsamı ve boyutu belirlenmeye çalışılacaktır.

Kâr amaçlı hükümet-dışı örgütler olan şirketler, toplumun organları olarak, etki ve faaliyet alanları içinde insan haklarına saygı gösterme yükümlülüğü altındadırlar. Dolayısıyla, şirketler yaşam hakkı, özel yaşamın gizliliği hakkı, sendika kurma ve sendikalara üye olma hakkı, toplantı ve gösteri yürüyüşü hakkı, eşit ücret hakkı gibi insan haklarının tam ve özgürce kullanılmasını engellememek negatif yükümlülüğü altındadırlar. Ulus-aşırı şirketler ayrıca insan haklarına saygının geliştirilmesi ve özendirilmesi yönündeki uluslararası çaba ve ulusal siyasal ve yasal girişimleri zayıflatma tehlikesi taşıyan faaliyet ve işlerden kaçınmalıdırlar. Özellikle uluslararası hukukun emredici kurallarına (*jus cogens*) uyulması söz konusu olduğunda ulus-aşırı şirketlerle iş ilişkisi içine giren çalışanlar, işçiler, sözleşmeciler, alt-sözleşmeciler, tedarikçiler, ruhsat sahipleri, dağıtıcılar ve diğer tüm gerçek ve tüzel kişiler de insan hakları konusunda getirilen tüm uluslararası ve ulusal standartlara ve sektörler, sivil toplum ve yerel yönetimler tarafından geliştirilerek benimsenen 'en iyi uygulamalar'a uygun davranma yükümlülüğü altındadır.

Ayrıca, özellikle devletlerin risk altındaki kırılgan grup ya da bireylere yeterli korumayı sağlayamadığı durumlarda, koruma sorumluluğunun da şirketler bakımından sonuçları olduğu kabul edilmelidir. Koruma sorumluluğu, saygı gösterme sorumluluğunun kapsamına da giren ve ona içkin olarak var olan bir yükümlülük olarak görülebilir. Temel insan hak ve özgürlüklerinin bazılarının ve insancıl hukuk normlarının çoğunun uluslararası kamu hukukunun emredici kuralları kategorisine girdiği düşünüldüğünde, şirketlerin de insan haklarını koruma yükümlülüğü altında oldukları kaçınılmaz olarak kabul edilmelidir. Örneğin, işkence, insanlık dışı ve onur kırıcı davranış yasağı, kölelik ve köle ticareti yasağı, soykırım yasağı, ayrımcılık yasağı ve halkların kendi geleceklerini belirleme hakkı gibi kurallar şirketler için doğrudan yükümlülükler getirmektedir.

Şirketler ayrıca faaliyet, operasyon, hizmet ve ürünlerinin insan haklarını ihlal etmemesini sağlamak için gerekli özeni gösterme yükümlülüğü altındadır. Uluslararası ve bölgesel insan hakları kurum ve mahkemelerinin devletlerin sorumluluğuna ilişkin verdiği kararlar örnekseme yoluyla değerlendirildiğinde, şirketlerin de çalışanlarına ve bağlı kuruluşlarına yönelik olarak insan hakları politikaları ve davranış kuralları kabul ederek düzenleme yapma yükümlülüğü, faaliyetleri hakkında nesnel ve etkili biçimde İnsan Hakları Etki Değerlendirmeleri yaparak faaliyetlerinden doğmuş ve doğacak insan hakkı ihlallerini ve gerçek ve olası olumsuz etkileri önleme yükümlülüğü, ve iş ilişkisi içine girdiği çalışanların, işçilerin, ortakların, sözleşmecilerin, alt-sözleşmecilerin, tedarikçilerin, dağıtıcıların ve diğer tüm ilgili kişilerin de evrensel standartlara uygun insan hakları kurallarıyla uyumlu davranmalarını denetleme yükümlülüğü olduğu kabul edilmelidir.

Son olarak, şirketler uluslararası suç sayılan fiilleri işlememek ve bu fiillerin Devletler ya da silahlı ve yarı-askeri milis gruplar gibi diğer kişilerce işlenmesine iştirak etmemek yükümlülüğü altındadırlar. Tarihi Nürnberg yargılamaları da şirketlerin uluslararası suçların işlenmesindeki önemlerini ve kritik rollerini kanıtlarıyla ortaya çıkarmaktadır. Ayrıca, ulus-aşırı şirketlerin uluslararası suçların işlenmesine iştirak ettikleri ve cezasız kaldıkları birçok güncel örnek de bulunmaktadır. Uluslararası Ceza Mahkemesi'nin ve *ad hoc* uluslararası ceza mahkemelerinin içtihatları da bize insancıl hukuk ve insan hakları kurallarının doğrudan yatay uygulanması yoluyla şirketlerin nasıl uluslararası alanda sorumlu tutulabileceği hakkında hukuksal ipuçları vermektedir. Dolayısıyla, Uluslararası Ceza Mahkemesi'nin tüzel kişiler üzerindeki yargı yetkisi Roma Statüsü'nde yapılacak bir değişiklikle kabul edildiği takdirde, şirketlerin, savaş suçlarının, insanlığa karşı suçların ve soykırım suçunun işlenmesinde asli fail ya da feri fail olarak yargılanmaları olanaklı olacaktır.

Sonuç olarak, bugün, şirketlerin insan haklarına uygun davranmalarını sağlamak için uluslararası bağlayıcılığı olan düzenlemelerin yapılması ve bunların etkili bir biçimde uygulanması zorunlu bir gereksinim haline gelmiştir. Uluslararası hukuk sisteminde böyle bir reform ya ilgili mevcut belgelerde değişiklik ve eklemeler yaparak ya da şirketlerin işleyiş yapılarına uygun yeni bir sorumluluk mekanizması kurarak gerçekleştirilebilir. Uluslararası toplumun şirketlere dereceli bir biçimde sorumluluklar yüklemesi ve bunu da ulusal, bölgesel, uluslararası ve ulus-aşırı faaliyet gösterecek birbirini tamamlayıcı nitelikte yapılarla desteklenecek dereceli bir kurumsallaşmanın izlemesi beklenebilir. 21. yüzyıl şirketleri ulus-aşırı ağlar biçiminde yeniden örgütlenerek faaliyet gösterdiklerinden, bu faaliyetlerin düzenlenmesi ve denetlenmesi de belirli ülkeler ya da sektörlerdeki sorunlar ve sistematik insan hakları ihlalleri işlenmesi konusundaki riskler üzerine uzmanlaşmış yerel hukuksal, idari ve diğer düzenleyici belge ve denetleyici kurumların da ulus-aşırı ağlar biçiminde örgütlenmesini gerektirmektedir. Bu ağları oluşturan yapıların etkili işleyişi de uluslararası bir üst kurumun bu faaliyetleri uyumlulaştırması ve sorun çözücü bir makam olarak çalışmasıyla olanaklı olabilecektir.

1. RISE OF TRANSNATIONAL CORPORATIONS AS INTERNATIONAL ACTORS

The early examples of corporate actors using sovereign powers dates back to the 17th century, when the Dutch East India Company and the British East India Company were responsible for establishing colonies.[1] These companies were empowered to conclude treaties, declare war and peace and to collect taxes.[2] They even had their own administrative departments, armies[3] and flags.[4] They were also involved in 'criminal' activities, such as torturing those who were not willing to pay taxes to the corporate tax collectors,[5] and the commission of the so-called 'Amboina Massacre' of 1623.[6] However, the enormous power exercised by these East India Companies was an exception of the time, and the actual appearance of corporations on the international scene -in the modern sense of political and legal concepts- is a phenomenon of the 20th century.

In general terms, the rights struggle began as a defence of private property by the private property owners, and especially the merchants trading long distances,[7] against the interferences of the autocratic monarchic state.[8] Later, Adam Smith, in

---

[1] Antony Anghie, **Imperialism, Sovereignty and the Making of International Law**, OUP, 2004, p.
[2] Philip C. Jessup, "The Subjects of Modern Law of Nations", **Mich. Law Rev.**, Vol. 45, 1947, p. 389.
[3] Huw V. Bowen, "The East India Company and Military Recruitment in Britain, 1763-71"**, HR**, Vol. 59, issue 139, 1986, pp. 78-90.
[4] Philip J. Stern, **The Company-State: Corporate Sovereignty and the Early Modern Foundations of the British Empire in India**, OUP, 2011, p. 42, fn. 3.
[5] William Dalrymphe, "The East India Company: The original corporate raiders", The Guardian, 04.03.2015, http://www.theguardian.com/world/2015/mar/04/east-india-company-original-corporate-raiders, accessed on 20.03.2015. See also William Dalrymphne, **The Anarchy: How a Corporation Replaced the Mughal Empire, 1756-1803**, upcoming in 2016.
[6] According to the Encyclopaedia Britannica, the Dutch East India Company executed 10 English, 10 Japanese and 1 Portuguese traders. http://global.britannica.com/event/Amboina-Massacre, accessed on 20.03.2015.
[7] Angelo G. Homer, **Multinational Corporate Enterprises: Some Legal and Policy Aspects of a Modern Social-Economic Phenomenon**, Hague Academy of International Law, Vol. 125, 1968, p. 448.
[8] Peter Muchlinski, "Human Rights and Multinationals: Is There A Problem?", IA, 77, 2001, pp. 33. For the history of modern company see Adolf A. Berle and Gardiner C. Means, **The Modern Corporation and Private Property**, Brace and World, 2nd rev. ed., 1967 (1st ed. in 1932).

his masterpiece "The Wealth of Nations" published in 1776, criticized the mercantilist economy and established the principles of classic economic liberalism, such as free market, free trade, free enterprise and free competition.[9] Following the Great Depression of 1930s, John Maynard Keynes developed an interventionist approach arguing that the advancement of capitalism can only be achieved through full employment, which might only be guaranteed by the intervention of the governments and banks.[10] Following the World War II and as a part of the decolonization process, foreign direct investments gained importance with regard to the economic development of the decolonized countries.[11] Furthermore, the decolonization process replaced political imperialism with economic imperialism, which resulted in the transformation of imperial actors from colonial states to corporations.[12] This development in the world politics has also triggered the first international attempts to regulate corporate conduct with the purpose of ensuring the independence of new-born States from the economic powers.[13]

The discourse on the relationship between business and human rights has its historical roots in the bipolarized world of Cold War,[14] when the rise of the countries such as the U.S. and Japan, who were not involved in the colonization movements in the 19th and 20th centuries, has begun.[15] The Group of 77, consisted of the newly independent States, had the support of the socialist Eastern Bloc States, which resulted in obtaining the majority of votes in the UN General Assembly, especially with regard to the issues concerning their economic and social empowerment. Thus, we witnessed the emergence of the right to economic self-determination and the

---

[9] Adam Smith, **An Inquiry into the Nature and Causes of the Wealth of Nations**, Cambridge, 1776.
[10] John Maynard Keynes, **The General Theory of Employment, Interest and Money**, Palgrave Macmillan, 1936.
[11] Peter Muchlinski, "Attempts to Extend the Accountability of Transnational Corporations: The Role of UNCTAD" in Menno T. Kamminga & Saman Zia-Zarifi (eds.), **Liability of Multinational Corporations under International Law**, Studies and Materials on the Settlement of International Disputes Vol. 7, Kluwer Law International, 2000, p. 98.
[12] **ibid.**
[13] 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, p. 246.
[14] Brigitte Hamm, "Business as a New Actor in the Human Rights Regime" in Michael Goodhart & Anja Mihr (eds.), **Human Rights in the 21st Century: Continuity and Change since 9/11**, Palgrave Macmillan, 2011, p. 240.
[15] Paul Lansing & Alex Rosaria, "An Analysis of the United Nations Proposed Code of Conduct for Transnational Corporations", **World Competition**, Vol. 14, 1991, p. 35.

concept of New International Economic Order (NIEO).[16] On May 1st, 1974 the UN General Assembly adopted the Declaration on the Establishment of a New International Economic Order announcing, *inter alia,* that "[r]*egulation and supervision of the activities of transnational corporations by taking measures in the interest of the national economies of the countries where such transnational corporations operate on the basis of the full sovereignty of those countries*" is one of the principles that should be fully respected under the new international economic order.[17]

During the same year, the UN General Assembly also adopted the Charter of Economic Rights and Duties of States stressing that the fundamental purpose of the Charter is to promote the establishment of the new international economic order, based on sovereign equality, interdependence, common interest and cooperation among all States.[18] The Charter underlined that every State has the right to economic self-determination,[19] including the rights to regulate, exercise authority over and supervise the activities of transnational corporations (TNCs) in conformity with the national priorities and economic and social policies. It was also stressed that interference with the internal affairs of host states shall be forbidden. It was concluded that in case of nationalization, expropriation and transfer of ownership of corporate properties, appropriate compensation shall be paid in accordance with the laws and regulations of the host states, unless the parties freely and mutually agreed upon any other convenient means for the peaceful settlement of the dispute.[20]

New *or* neo - liberal policies, replacing the Keynesian interventionist approach of the era of World War II and the post-war period of 1945-1973, have become the dominant principles of the world economy after the capitalism crisis in 1980s.[21] The

---

[16] GA Res. 3201, 9 May 1974, UN GOAR Supp. (No.1) 6th spec. sess.; UN Doc. A/9559 (1974), The Declaration on the Establishment of a New International Economic Order; GA Res. 3202, 16 May 1974, UN GOAR Supp., 6th Spec. Sess., The Programme of Action on the Establishment of a New International Economic Order, ILM, 13, 1974, pp. 715-766; GA Res. 3281 (XXIX) of 15 Jan. 1975, UN GOAR Supp. (No. 31), UN Doc. A/9631 (1975), The Charter of Economic Rights and Duties of States, ILM, 14, 1975, pp. 251-265. For a detailed list of the UN documents on the subject, please see Stephen Tully (ed.). **International Documents on Corporate Responsibility**, Edward Elgar, 2005, pp. 5-6.

[17] 1974 Declaration on the Establishment of a New International Economic Order, 4(g).

[18] 1974 Charter of Economic Rights and Duties of States, Preamble, para. 3.

[19] 1962 Resolution on the Permanent Sovereignty over National Resources.

[20] 1974 Charter of Economic Rights and Duties of States, Article 2.

[21] Mel van Elteren, "Neoliberalization and Transnational Capitalism in the American Mold", **Journal of American Studies**, Vol. 43, Issue: 2, 2009, pp. 177-197. For better understanding the atmosphere of the era and approach concerning transnational corporations see in general Rainer Hellmann,

policies adopted by Margaret Thatcher and Ronald Reagan, who were elected in 1979 and 1981 respectively, have also facilitated the realization of the non-interventionist approach favouring free trade, deregulation, privatization, reduction of public spending to the detriment of social services, abandonment of the concept of public interest and liberalization of international trade.[22] The principal actors of international economy and multilateral lending institutions (MLIs), *i.e.* International Monetary Bank (IMF), World Bank (WB) and World Trade Organization (WTO), have also played an active role in furthering the U.S.-dominated world economy[23] based on crediting and loaning.[24] The economic and political climate change after the end of cold war, clash of interests and ideological controversies between the capital-exporting States and the Group of 77 also resulted in the failure of the NIEO and the attempts to internationally regulate corporate conduct.[25]

Globalization, a process which has been accelerated with the advancements in communication, transportation and information technology[26] signifies, softening, if not disappearance, of national borders allowing free movement of goods, services, capital, technology and knowledge.[27] Globalization is not an all-evil process. There are both positive and negative consequences of globalization. As the Special Rapporteurs on Globalization and its impact on the full enjoyment of all human rights, Mr. Oloko-Onyango and Ms. Deepika Udagama emphasized "*[g]lobalization ... must be understood as both a force of inclusion and exclusion, of expansion and*

Transnational Control of Multinational Corporations, Praeger Special Studies in International Business, Finance and Trade, 1977.

[22] Pierre Dardot & Christian Laval, **Dünyanın Yeni Aklı: Neoliberal toplum üzerine deneme**, (orig. *The New of the World: On Liberal Society*", (transl. Işık Ergüden), İstanbul Bilgi Üniversitesi Yayınları 387, İstanbul, 2012, p. 245 *et seq.*; David P. Forsyth, **Human Rights in International Relations**, CUP, 2nd ed., rep. 2007, pp. 222-227.

[23] The Global 2000 index of the Forbes magazine demonstrates that the economic leaders of 2015 are the U.S. with 579 companies and China with 232 companies. They are followed by Japan and the UK. Banking and financial sectors, oil and gas companies and construction companies also have the biggest shares in the global economy of 2015. Liyan Chen, "The World's Largest Companies 2015", Forbes, 06.05.2015, http://www.forbes.com/sites/liyanchen/2015/05/06/the-worlds-largest-companies/, accessed on 20.07.2015.

[24] van Elteren, **op. cit.**, p. 182.

[25] August Reinisch, "*The Changing International Legal Framework for Dealing with Non-State Actors*" in Philip Alston (ed.), **Non-State Actors and Human Rights**, OUP, 2005, p. 43; Muchlinski, "Attempts to Extend the Accountability …", pp. 101-102.

[26] Philip Sutherland, "Globalization and Corporate Law" in Michael Faure & André van der Walt (eds), **Globalization and Private Law – The Way Forward**, Edward Elgar, 2010, p. 257.

[27] Sukanya Pillay, "And Justice For All? Globalization, Multinational Corporations, and the Need for Legally Enforceable Human Rights Protections", **U. Det. Mercy L. Rev.**, Vol. 81, 2004, p. 492.

contraction, and of human rights promotion, as well as of their marginalization".[28] Globalization is the interconnectivity, interaction and interdependence between regions, peoples, ethnic, social, cultural and commercial interests across the world.[29] It has social, political, cultural and economic dimensions, which add transnational elements to national policies and affect the nature, power and independence of national actors and institutions.[30]

Globalization has its effects also in the legal sphere. Traditional international law emphasizes the dominance of State actors in international relations. Therefore, for a long time, the will of the nation-states played a constitutive role in shaping the rules of international law. As the effects of globalization began to leak in every sector at both national and international levels, their inevitable impact on laws and regulations has become observable. With the emergence of other powerful actors, the nation-states were forced to share their uncontested global power in the new international political system and the monopoly of the State actors has come to an end.[31] Actors of international arena have become diversified, and the effects of policies adopted by the transnational actors and their conducts began to have significant adverse impacts or positive contributions on the treadmills of international interactions.

However, due to the inefficiency of local and global legislations and governance failures, the negative impacts of economic globalization are being felt more by the individuals and the peoples of the world, who are in a vulnerable and unprotected position against the global violations of human rights by powerful actors.[32] As the UN Commission on Human Rights underlined on various occasions,

---

[28] J. Oloko-Onyango & Udagama Deepika, Final report on Globalization and its impact on the full enjoyment of human rights, E/CN.4/Sub.2/2003/14, 25.06.2003, para. 5.
[29] Milena Sterio, "The Evolution of International Law", **B.C.J.L. & Soc. Just.**, Vol. 31, 2008, p. 213.
[30] Larry Catá Backer, "Multinational Corporations, Transnational Law: The United Nations' Norms on the Responsibilities of Transnational Corporations as a Harbinger of Corporate Social Responsibility in International Law", **Colum. Hum. Rts. L. Rev.**, Vol. 37, 2006, p. 309. Reinisch, explaining the effects of globalization on the increasing role of non-state actors, mentions that "[t]*he neoliberal credo of 'Reaganomics' and 'Thatcherism', advocating economic liberalization, deregulation, and privatization, subsequently espoused by the IFIs as Washington consensus, contributed largely to the 'retreat of the state'*." Reinisch, **op.cit.**, p. 77.
[31] Jost Delbrück, "Prospects for a "World (Internal) Law": Developments in a Changing International System", **Ind. J. Global Legal Stud.**, Vol. 9, 2002, p. 410; Philip Alston, "The Myopia of the Handmaidens: International Lawyers and Globalisation", **EJIL**, Vol. 8, 1997, p. 435.
[32] Yasemin Özdek, "Küresel Yoksulluk ve Küresel Şiddet Kıskacında İnsan Hakları," *(Human Rights in the Clamp of Global Poverty and Global Violence)* in Özdek, Yasemin (ed.), **Yoksulluk, Şiddet ve İnsan Hakları** *(Poverty, Violence and Human Rights),* Ankara: TODAIE İnsan Hakları Araştırma ve Derleme Merkezi, 2002, pp. 1-44.

the unevenly shared benefits and unevenly distributed costs of globalization caused the widening of the gap between the rich and the poor and posed a threat to prosperity, security, stability and global protection of human rights.[33]

Furthermore, the power and dominance of corporations began to be felt not only in the national policies and economies, but also in the negotiating processes of bilateral and multilateral treaties.[34] TNCs had also strong influence in litigations and arbitrations brought before the international dispute settlement institutions.[35] On the global scale, economic globalization and the neo-liberal economic system triggered the exploitation of human resources and land resources of the South[36] by the owners of the capital resources in the wealthy nations of the North.[37] In order to diminish the adverse effects of uncontrolled neo-liberalism and benefit from the positive aspects of globalization, we should reform, if not revolt,[38] the international system, especially with regard to the regulation of the conduct of transnational corporations and holding them accountable for human rights violations.

Henkin interprets economic globalization as implying increasing corporate responsibilities to respect human rights, especially when they operate in countries lacking effective enforcement mechanisms for the protection of human rights.[39] As reaffirmed by the former Commission on Human Rights (now Human Rights Council), the right to development is an inalienable human right and it comprises not

---

[33] CHR, E/CN.4/RES/2004/24, 16.04.2004, Globalization and its impact on the full enjoyment of all human rights.

[34] Peter Malanczuk, **Akehurst's Modern Introduction to International Law**, 7th rev. ed., 2010, p. 102.

[35] Jessup gives the examples of international arbitration cases such as American Banana Co. v. United Fruit Co., 213 U.S. 347, 29 S. Ct. 511, (1909) and Lena Goldfields Company Ltd. v. SSCR (1930), Philip C. Jessup, "The Subjects…", p. 400; See Arthur Nussbaum, "Arbitration between the Lena Goldfields Ltd. and the Soviet Government", **Cornell L. Rev.**, Vol. 36, 1950, p. 31; Robert McCorquodale, "The Individual and the International Legal System" in Malcolm Evans (ed.), **International Law**, Oxford, 3rd ed. 2010, p. 297.

[36] See *e.g.* James G. Stewart, **Corporate War Crimes: Prosecuting the Pillage of Natural Resources**, Open Society Foundations, 2010.

[37] Mahmood Monshipouri & Claude E. Welch & Evan T. Kennedy, "Multinational Corporations and the Ethics of Global Responsibilities", **HRQ**, Vol. 25, 2003, p. 967. For an early elaboration on the issue see Peter B. Evans, "National Autonomy and Economic Development: Critical Perspectives on Multinational Corporations in Poor Countries", **International Organizations**, Vol. 25, Issue: 3, 1971, p. 690 *et seq*.

[38] Jordan J. Paust, "The Human Right to Revolution" in Pierre Richard Claude & Burns H. Weston (eds.), **Human Rights in the World Community: Issues and Action**, University of Pennsylvania Press, 3rd ed., 2006, pp. 445-454.

[39] Louis Henkin, "The Universal Declaration at 50 and the Challenge of Global Markets", **Brook. J. Int'l Law**, Vol. 17, April 1999, pp. 22-23.

only economic development, but also social, cultural and political development.[40] Therefore, as de Schutter argues, we may transform the TNCs into tools respecting and ensuring human rights, and at the same time contributing to the world's sustainable development and economic growth.[41] In that way, a social and international order in which all rights and freedoms can be fully and freely exercised would be constructed.[42]

1.1. Privatization and the Disappearance of the Dichotomy of Public Law and Private Law

Steinhardt, in his article dated 1991, argued that the concerns, the actors and the processes of public international law have been privatized in the 20th century leading to the blurring of the lines between public law and private law.[43] He specifically referred to the emergence of the concept of transnational corporate ethic, which pointed out a trend that cannot be reversed, but may only be delayed.[44] As Steinhardt righteously envisaged almost twenty-five years ago, the distinction between state and non-state actors began to disappear today, and non-state actors gradually became the subjects of international laws and regulations[45] in many fields such as human rights, labour law, environment protection, energy, biotechnology, media and the internet, prevention of transnational organized crime, prevention of corruption and fight against terrorism.

The rise of the Western neoliberal economies and the uncontrollable intrusion of the effects of globalization such as increasing mobility of capital and foreign

---

[40] E/CN.4/RES/2004/24, Globalization and its impact on the full enjoyment of all human rights.
[41] Olivier de Schutter, "Transnational Corporations as Instruments of Human Development" in Philip Alston & Mary Robinson (eds.), **Human Rights and Development: Towards Mutual Reinforcement**, OUP, 2005, pp. 404-405.
[42] UNGA Resolution 217a(III), 1948 Universal Declaration of Human Rights, Article 28; UNGA Resolution 41/128, Declaration on the Right to Development, 04.12.1986, Article 2(2) of the Declaration underlines that not only States but also all human beings, whether individually or collectively, have the responsibility to respect human rights and fundamental freedoms and to promote and protect an appropriate political, social and economic order for development.
[43] Ralph G. Steinhardt, "The Privatization of Public International Law", **Geo. Wash. J. Int'l L. & Econ.**, Vol. 25, 1991, p. 544. *See also* Christine Chinkin, "A Critique of the Public/Private Dimension", **EJIL**, Vol.10(2), 1999, pp. 387-395.
[44] Steinhardt, "The Privatization …", p. 548. It is also argued that corporations turned into a kind of public actor, which in certain areas of operation become *de facto* competitor of the state power despite its anti-democratic governance, non-transparent structure and unaccountable character. Backer, "Multinational Corporations, Transnational Law: …, p. 373.
[45] Nils Rosemann, "The Privatization of Human Rights Violations - Business' Impunity or Corporate Responsibility? The Case of Human Rights Abuses and Torture in Iraq", Non-State Actors and International Law, Vol. 5, 2005, p. 96.

investments [46] in the national economies have been followed by waves of privatization of public services, which were previously regarded as purely State functions. The active role played by corporations in the process of neoliberalization and globalization had also effects on the legal sphere causing the loosening of the traditional public-private separation.[47] Especially, privatization of public goods and public services, which were traditionally a part of the State's functions, such as electricity, water, gas, nuclear energy, management of hazardous wastes, health services, education services, social welfare services and even prisons,[48] increased the cases of conflict between the public interests of the society and private interests of corporations.

The under-developed and developing countries lacking the basic infrastructures are in greater need of foreign investment, which makes them more vulnerable in the face of human rights abuses and exploitation of their resources. Peoples of such countries are also fragile and unprotected against exploitations perpetrated by corporations, regardless of their size and sector,[49] to a point that any differentiation between public corporations and private corporations remains artificial and meaningless. In other words, the significance of the public-private divide is perished when the protection of human rights is a concern.[50] For example, working conditions in the purely private and commercial areas of activity and operation, such as the sweatshops of the apparel industry, may have serious consequences in the public sphere implying a pressing need for both national and international regulation of corporate activities.

However, the adverse consequences of privatization can be felt in everyday life of individuals even in the most developed countries. For example, in the U.S., some of the privately run prisons are guaranteed a certain number of beds to be filled by inmates. If the prison quotas are not satisfied, the Government has to compensate for

---

[46] Henry Steiner & Philip Alston & Ryan Goodman, **International Human Rights in Context: Law, Politics, Morals**, OUP, 3rd ed., 2007, p. 1385.
[47] Eric de Brabandere, "Non-State Actors and Human Rights: Corporate Responsibility and the Attempts to Formalize the Role of Corporations as Participants in the International Legal System" in Jean d'Aspremont (ed.), **Participants in the International Legal System: Multiple Perspectives on Non-State Actors in International Law**, Routledge, 2011, p. 274.
[48] **Ibid.**, p. 270.
[49] Emmanuel Roucounas, "Non-state Actors: Areas of International Responsibility in Need of Further Exploration", in Maurizio Ragazzi (ed.), **International Responsibility Today: Essays in Memory of Oscar Schachter**, Martinus Nijhoff Publishers, 2005, p. 404; Steiner & Alston & Goodman, p. 1385.
[50] Henry Steiner, "International Protection of Human Rights" in Malcolm Evans (ed.), **International Law**, Oxford, 3rd ed. 2010, p. 776.

the loss of profit of private prisons (with the money of the taxpayers).[51] Privatization of prison labour, which allows use of inmates for private corporations, may also cause human rights violations especially if the wages paid to inmates remain very low when compared to the profit of corporations gained as a result of this cheap labour.[52] Furthermore, the policy of privatization and outsourcing of military and security services to private contractors[53] has adverse consequences, especially in the armed-conflict zones.[54] For example, *Dyncorp*, who was involved in the sex trafficking of people in Bosnia, was contracted with the U.S. Government for training the Iraqi police forces.[55] The U.S. Government has also been criticized for hiring cooks and truck drivers (*Kellogg, Brown & Root Corp.*) as prison guards in Iraq. They obviously lacked any skill or training for acting in line with international obligations to respect human rights.[56]

---

[51] Chris Kirkham,"Prison Quotas Push Lawmakers To Fill Beds, Derail Reform", Huffington Post, updated 20.09.2013, http://www.huffingtonpost.com/2013/09/19/private-prison-quotas_n_3953483.html, accessed on 15.05.2015.

[52] For example, Article 2(2)(c) of the Forced Labour Convention (No. 29) provides that "*any work or service exacted from any person as a consequence of a conviction in a court of law, provided that the said work or service is carried out under the supervision and control of a public authority and that the said person is not hired to or placed at the disposal of private individuals, companies or associations*" shall not be considered as forced or compulsory labour. Colleen Curry, "Whole Foods, Expensive Cheese, and the Dilemma of Cheap Prison Labor", Vice News, 21 July 2015, https://news.vice.com/article/whole-foods-expensive-cheese-and-the-dilemma-of-cheap-prison-labor, accessed on 20.09.2015.

[53] Philip Alston, "The 'Not-a-Cat' Syndrome: Can the International Human Rights Regime Accommodate Non-State Actors?" in Philip Alston (ed.), **Non-State Actors and Human Rights**, OUP, 2005, pp. 9-11.

[54] Corporate accountability for violating international law under the U.S. legal system will be examined thoroughly in the following section. However, I briefly note here that the private corporations *CACI International Inc.* and *Titan Corp.*, who were contracted by the U.S. government to conduct the interrogation of the prisoners in Abu Ghraib, were sued before the U.S. courts based on the allegations of torture; cruel, inhuman or degrading treatment; war crimes and crimes against humanity. The U.S. Court of Appeals held that the defendant corporations had "government contractor immunity" preventing them to be tried before the courts. On 27 June 2011, the U.S. Supreme Court dismissed the case, which resulted in the impunity of the perpetrators of these heinous crimes.[54] Similarly, in *Al Shimari v. CACI et al.*, the allegations have been dismissed by the District Court due to the 'political question' argument on 18 June 2015, which later has been revived by the U.S. Supreme Court on 30 June 2015 concluding that the U.S. shall not be turned into a safe haven for torturers. "Abu Ghraib Lawsuits against CACI, Titan (now L-3)", http://business-humanrights.org/en/abu-ghraib-lawsuits-against-caci-titan-now-l-3-0; Al-Quraishi v. Nakhla & L-3 Services INC. have been dismissed due to a confidential settlement between the parties. "Will anyone pay for Abu Ghraib?", New York Times, The Opinion pages, 5 Feb, 2015, http://www.nytimes.com/2015/02/05/opinion/will-anyone-pay-for-abu-ghraib.html?_r=0; Al Shimari et al v. CACI Premier Technology Inc et al, 4th U.S. Circuit Court of Appeals, No. 13-1937; Stempel, Jonathan. "Abu Ghraib torture lawsuit revived by U.S. appeals court", 30 June 2015, http://www.reuters.com/article/2014/06/30/us-abughraib-caci-idUSKBN0F51BK20140630, accessed on 30.06.2015.

[55] Rosemann, "The Privatization of Human Rights …", p. 82.

[56] **ibid.**, p. 83.

Consequently, as Kamminga and Zarifi put it, the liberalization movement, which gave birth to the privatization of many public functions, should bring with itself the responsibility that is attached to the characteristics of public functioning.[57] Principles, guidelines and codes adopted by various IGOs concerning the human rights responsibilities of corporations, do not make a distinction between corporations based on their –public or private- ownership, and foresee the equal treatment of state-owned corporations, private corporations and semi-public corporations.[58] For example, the UN Guiding Principles expressly mention that the State's duty to protect human rights against third party violations does not only cover privately owned corporations, but also include the duty to take additional measures regarding the state-owned or controlled corporations, as well as the corporations substantially supported by the state agencies.[59] The UN Guiding Principles emphasize that States should act with due diligence and exercise adequate oversight over the corporations with whom they enter into business relations, or to whom they delegate the provision of certain public services. In doing so, States shall ensure through appropriate tools, such as legislation or insertion of human rights conditions in the commercial contracts that the corporations respect human rights and act consistent with the national and international human rights obligations of the States to protect human rights.[60]

---

[57] Menno T. Kamminga, & Saman Zia-Zarifi, "Liability of Multinational Corporations under International Law: An Introduction" in Kamminga, & Zia-Zarifi, **Liability of Multinational Corporations under International Law**, Studies and Materials on the Settlement of International Disputes Vol. 7, Kluwer Law International, 2000, p. 5.

[58] See *e.g.* below ILO Tripartite Declaration of Principles concerning Multinational Enterprises and the OECD Guidelines for Multinational Enterprises.

[59] In the UN Guiding Principles, support from the agencies formally or informally linked to the State, such as export credit agencies, official investment insurance agencies, guarantee agencies, development agencies and development finance institutions is given as examples of substantial support that may lead to the responsibility of the State. It is stressed that the agencies should carefully consider the potential adverse impacts of the operations of corporations that they support, otherwise they would be at risk of being held responsible for human rights violations committed by the corporations they supported. UN General Assembly, A/HRC/17/31, Ruggie, John. Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, Guiding Principles on Business and Human Rights: Implementing the UN "Protect, Respect, Remedy" Framework, Human rights Council, 17th sess., Agenda item 3, Promotion and Protection of all human rights, civil, political, economic, social and cultural rights, including the right to development, 21 March 2011 (hereinafter 2011 Ruggie Report or Guiding Principles on Business and Human Rights), Annex, I,B.4 and its Commentary.

[60] **ibid.**, Annex, I,B.5 and 6 and their Commentaries.

1.2. Co-existence of rights and obligations

The evolution of international law clearly demonstrates the tendency of a shift from the state-centered approaches in human rights law to an individual-based approach focused on protecting human dignity. By the end of World War II, the classical statist view of international law has been abandoned to a large extent[61] and it has been accepted that individuals as subjects of international law have also rights and duties towards the international community.[62] For example, Article 29 of the Universal Declaration of Human Rights (UDHR) expressly provides that everyone has duties to the community. The concept of duties of individuals is not uncontested as some rightfully argued that individuals shall not be regarded as having converse vertical duties towards the State, and only the States shall have duties towards their nationals. Otherwise, repressive regimes would be permitted to arbitrarily restrict rights and freedoms by invoking the existence of 'duties' of individuals. This argument, as discussed during the drafting and negotiating process of the UDHR,[63] has strong points and has resulted in the second paragraph of Article 29 allowing any limitation of the rights and freedoms only on the condition that it is made by law and "*solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society*."[64]

However, horizontal human rights duties of private persons towards other private persons is a reflection of responsibility to respect human rights, which already finds its ground in positive domestic laws. For example, act of murder is criminalized for protecting the right to life of individuals against both the State and non-state actors. Likewise, right to privacy is protected against the public and private

---

[61] An exception to this paradigm shift in international law is the Chinese concept of international law, which -under the Marxist principles- rejected that an individual may hinder the sovereignty of a nation-state. On the other hand, Soviet approach accepted the individual as a subject of international law only if the said individual is recognized as a person under the laws of a nation-state. William R. Slomanson, **Fundamental Perspectives on International Law**, Thomson, 5th ed., 2007, pp. 192-193.

[62] Antonio Cassese, "Individuals", in M. Bedjaoui (ed.), **International Law: Achievements and Prospects**, Dordrecht: Martinus Nijhoff, 1991, p.115 *et seq*..

[63] John Knox, "The Universal Declaration of Human Rights [and Duties]", Opinio Juris, 06.12.2007, http://opiniojuris.org/2007/11/06/the-universal-declaration-of-human-rights-and-duties/, accessed on 15.06.2015.

[64] A similar provision is also included in Article 18 of the Declaration on Human Rights Defenders, Preambles of the 1966 Twin Covenants, several provisions of the 1948 American Declaration of the Rights and Duties of Man and 1969 American Convention on Human Rights, African Charter on Human and Peoples' Rights and the Asian Charter of Human Rights, which are elaborated on thoroughly in the following chapters.

interferences under both criminal and civil laws. Furthermore, international law, too, imposes direct and indirect horizontal duties on individuals. For example, genocide is an international crime and those who commit, attempt to commit or be complicit in the commission of the crime of genocide shall be held directly responsible before the International Criminal Court (ICC). In addition, even if violation of some of the peremptory norms is not prosecutable or such norms are not directly enforceable on non-state actors by the international courts, it is not contested that they also bind private actors.[65] For example, prohibition of piracy is a *jus cogens* norm, which may be violated by private actors and remain unpunished due to lack of an international accountability mechanism.[66]

Corporations, as legal persons, also have horizontal human rights duties towards individuals, groups and communities. The responsibility to respect human rights of others and the obligation not to be complicit in the commission of human rights violations are the already existing obligations for corporations. I argue that given the enormous economic, social and even political power of some of the 21st century corporations,[67] it shall be possible to hold them accountable before international institutions and bodies in order to prevent impunity. Since the rights of corporations are protected in the international arena, corporations shall also bear responsibilities balancing their unregulated power. For example, they shall have a responsibility to protect the rights and freedoms of those over whom their operations, activities and products cause adverse consequences with regard to their right to a social and international order in which they freely and fully enjoy rights and freedoms.[68] However, as Joseph -referring to the philosophical dilemma in imposing duties via regulations on the non-governmental entities- mentions, the idea of protection of human rights is largely a consequence of the Western liberal theory, and limiting the liberties, commercial rights and other rights of non-state actors

[65] Alexander Orakhelashvili, **Peremptory Norms in International Law**, Oxford, rep. 2012, p. 53.
[66] For a thorough elaboration on piracy see Emre Öktem & Bleda R. Kurtdarcan, **Deniz Haydutluğu ve Korsanlık: Tarihi ve Hukuki Boyutlarıyla** (*Historical and Legal Aspects of Privateering and Piracy*), Denizler Kitabevi, Istanbul, 2011.
[67] As frequently referred to in scholarly articles, the Fortune Global 500 list announced every year, demonstrates the extent of the economic power of the 21st century TNCs reaching far beyond that of the States. For example, the biggest 10 companies by revenue as of 2014 are as follows: "1. Walmart, 2. Sinopec Group, 3. Royal Dutch Shell, 4. China National Petroleum, 5. Exxon Mobil, 6. BP, 7. State Grid, 8. Volkswagen, 9. Toyota Motor, 10. Glencore", http://fortune.com/global500/, accessed on 17.08.2015.
[68] Article 28 of the UDHR.

creates a conflict with the very foundations of human rights law.[69] As a result, if one intends to regulate the conduct of TNCs, the balancing test between the competing interests and rights should be made very carefully in order to prevent any unintended consequence and over-regulation.[70]

An illustrative example for the competing interests of the public and the for-profit NGOs, *i.e.* corporations, is the pharmaceutical companies. The moral and material interests of the authors of scientific, literary or artistic productions are protected under Article 15(1)(c) of the International Covenant on Economic, Social and Cultural Rights (ICESCR). However, the outcomes of the biotechnological revolution and genetic engineering have not always been used for the common good.[71] As affirmed in the World Conference on Human Rights, the development in biomedical and life sciences and information technologies potentially have adverse effects on human rights and the dignity of individuals.[72] The corporations buying the rights related to the scientific inventions and also hiring the researchers from the universities seek to acquire the maximum profit even from the products carrying vital importance such as drugs for the treatment of cancer.[73]

Castells explains that following the discovery of the DNA double helix and the cloning of the first human genome, the researchers working for universities and small companies operating under the auspices of the research centres of the hospitals began to start their own companies in North Carolina, New England, Maryland, Virginia and San Diego.[74] However, the need for capital and the risks involved in the researches caused these small companies to be absorbed by the larger pharmaceutical corporations such as Hoffman, La Roche and Merck.[75] Consequently, in 1988, obtaining a patent right and copyright for a cloned mouse, which is normally owned

---

[69] Sarah Joseph, "An Overview of the Human Rights Accountability of Multinational Enterprises" in Kamminga, & Zia-Zarifi (eds.), **Liability of Multinational Corporations…**, p. 90.
[70] **ibid**., p. 90; Peter Muchlinski, "Multinational Enterprises as Actors in International Law: Creating 'Soft Law' Obligations and 'Hard Law' Rights" in Math Noortmann & Cedric Ryngaert (eds.), **Non-state Actor Dynamics in International Law: From Law-Takers to Law-Makers**, Ashgate, 2010, p. 28 *et seq*.
[71] For an insightful article see Drahos, Peter, "The Right to Food, Health and Intellectual Property in the Era of 'Biogopolies' in Bottomley, Stephen & Kinley, David, (eds.) **Commercial Law and Human Rights**, Ashgate, rep. 2003, pp. 215-234.
[72] 1993 Vienna Declaration and Programme of Action, para. 11.
[73] Manuel Castells, **Enformasyon Çağı: Ekonomi, Toplum, Kültür: I. Cilt Ağ Toplumunun Yükselişi**, (*The Information Age: Economy, Society and Culture: Vol. 1 The Rise of the Network Society*) (transl. Ebru Kılıç) İstanbul Bilgi Üniversitesi Yayınları 97, 2nd ed., 2008, p. 70.
[74] **ibid.**
[75] **ibid.**

by the nature, has become possible.[76] Although, currently it is physically impossible to clone a human being; cells, bones and organs of humans have already been produced in the labs and this process is subject to strict legal regulations and control.[77] Nevertheless, the genetic information acquired through these researches has been made public by the Human Genome Project in order to prevent any claims of private property.[78] Moreover, unauthorized and non-consensual disclosure of any genetic information of a person to any private entity is prohibited with the purpose of protecting private life and preventing any discriminatory practice based on health conditions.[79]

Therefore, responsibility of transnational corporations is based on the international principle of *ex factis jus oritur*,[80] and is a consequence of the pressing need to balance their power and liberties[81] with obligations.[82] The legitimacy of power stems from the accountability of those who have the power.[83] As proven by experience, power without accountability results in intentional or negligent acts and operations, which may lead to serious human rights violations and irreversible damages to human and earth.[84] Especially, if the corporations are collaborating with the State authorities or exercising certain public functions, their degree of accountability shall be higher than that of the corporations conducting purely commercial activities. For example, companies providing public services such as water, gas and telecommunication; private security companies; companies selling

---

[76] **ibid.**, p. 71.
[77] For example, in a recent case filed against the U.S.-based biotech company Myriad Genetics, the high court of Australia unanimously held that a protein called BRCA1, which is linked to breast and ovarian cancers, was a naturally occurring gene and not a "patentable invention". Karen Barlow, "BRCA1, Breast Cancer Gene Cannot be Patented, High Court Finds", Huffington Post, 07.10.2015, http://www.huffingtonpost.com.au/2015/10/07/high-court-breast-cancer-gene_n_8254580.html, accessed on 19.10.2015.
[78] **ibid.**, p. 74.
[79] U.S. Health Insurance Portability and Accountability Act of 1996, The Standards for Privacy of Individually Identifiable Health Information (Privacy Rule). For a summary of the rule see http://www.hhs.gov/ocr/privacy/hipaa/understanding/index.html, accessed on 19.01.2014.
[80] *i.e.* law arises out of the facts. Nehal Bhuta, "The Role of International Actors Other than States can Play in the New World Order" in Antonio Cassese (ed.), **Realizing Utopia: The Future of International Law**, OUP, rep. 2012, p. 70.
[81] S. Popescu, "Le fondement de la responsabilité juridique", 1966, Revue roumaine des sciences juridiques 139 cited in Alain Pellet, "The Definition of Responsibility in International Law" in James Crawford & Alain Pellet & Simon Olleson (eds.), **The Law of International Responsibility**, OUP, 2010, p. 4.
[82] International Council on Human Rights, "Beyond Voluntarism: Human Rights and the developing international legal obligations of companies.", 2002, p. 9.
[83] Rosemann, "The Privatization of Human Rights …", p. 98.
[84] Christopher G. Weeramantry, "Human Rights and the Marketplace", **Brook. J. Int'l Law**, Vol. 25, April 1999, pp. 40-41.

riot control agents; software companies; media companies; apparel companies; and petroleum companies all have different effects over different parts of our daily lives, and the activities of each of these corporations pose a threat to at least one human right if conducted irresponsibly. Therefore, as a consequence of globalization felt in every area of activity and following the developments in world politics, "*the potential for a corporation to violate International Law has also evolved.*"[85]

The UN Norms on the Responsibilities of Transnational Corporations, which will be reviewed thoroughly in the following chapters, also reflect the understanding that the business enterprises are not merely economic actors, but "*quasi-individual self-interested actors with powerful quasi State powers*"[86] *de jure* functioning also in the social, cultural and political spheres.[87] This radical transformation of the functioning of corporations implies their interference with the non-economic spheres that have traditionally been reserved for sovereign powers.[88] Consequently, as one of the international attempts to regulate corporate conduct, the UN Norms treat the transnational business enterprises as 'virtual state actors', which justifies normative regulation of their conduct by international law.[89]

Karp, in his article, interprets the theory of John Rawls on international law concerning 'outlaw states', which lack the willingness to abide by international human rights law and 'societies burdened by adverse conditions' lacking the capacity to do so.[90] Karp making an analogy of the theory with the arguments concerning the responsibility of TNCs, concludes that TNCs may be regarded as both state-like structures and also individual-like entities depending on the circumstances and context of each case.[91] Regarding the latter, he gives the example of the "Grudge Informer"s of the Nazi era, who informed their Jewish neighbours to the SS, who could have chosen not to, without putting their own life in danger.[92] He holds that the Grudge Informer had a 'duty to ignore his legal duties' under the domestic law of the Nazi Germany, just like the corporations are under a duty not to provide practical,

---

[85] Slomanson, **op. cit.**, p. 197.
[86] Kamminga & Zia-Zarifi, "Liability of Multinational Corporations ...", p. 6.
[87] Backer, "Multinational Corporations, Transnational Law: …", p. 371.
[88] **ibid.**
[89] **ibid.**
[90] John Rawls, **The Law of Peoples**, Cambridge, 1999, pp. 89-120.
[91] Karp, David Jason, "Transnational Corporations in 'bad states': Human Rights Duties, Legitimate Authority and The Rule of Law in International Political Theory", **International Theory**, Vol. 1:1, 2009, pp. 98-99.
[92] **ibid.**

material or political assistance or moral support and encouragement to the 'outlaw (or 'bad') states', who are violating internationally protected human rights and freedoms.[93] Regarding the former, Karp refers to the doctrine of responsibility to protect and argues that ideal-sovereigns or closer-to-ideal sovereigns (in our case, state-like corporations who are deemed to be respectful for human rights) shall be permitted and even required to disregard the sovereignty of others (in our case, host states), if they do not have the capacity to protect human rights.[94]

1.3. Theoretical Framework of the Thesis

It is not possible to adopt an all-good or all-evil approach towards transnational corporations. There are both positive contributions and negative consequences of their activities, operations, products and services. For example, it is argued that trade and foreign direct investments in developing countries shall be regarded as engines of prosperity, contributing positively to the economic, social and cultural development[95] of the countries by creating new job opportunities, bettering the living conditions, introducing new technologies and increasing tolerance for diversity.[96] Following the political liberalization of the system, the individuals would inevitably enjoy more civil and political rights. Furthermore, TNCs operating in developing countries may also contribute to the working conditions in the local corporations.[97] TNCs may have a positive effect even on the literacy of the population and the reduction of infant mortality.[98] Thus, giving a low priority to the protection of human rights does not necessarily mean a complete avoidance.[99]

Spar, in her article dated back to 1998, asserted that when a TNC invests in a country abroad, it does not only bring its capital, technology, know-how and management techniques, but also international scrutiny of NGOs and media on the practices of their local sub-contractors. She mentioned that if a TNC is involved in human rights violations in its operations abroad, it becomes the headlines in the

---

[93] **ibid.**
[94] **ibid.**
[95] UN Doc. A/CONF.166/9 (1995), Report of the World Summit for Social Development, Chapter I: An Enabling Environment for Social Development, para. 12(e); E/CN.4/RES/2004/24 Globalization and its impact on the full enjoyment of all human rights.
[96] Monshipouri & Welch & Kennedy, **op. cit.**, p. 967.
[97] Reinisch, **op. cit.**, pp. 63-64.
[98] William H. Meyer, **Human Rights and International Political Economy in Third World Nations: Multinational Corporations, Foreign Aid, and Repression**, Praeger, 1998.
[99] Chris Avery, "Business and Human Rights in a Time of Change" in Kamminga & Zia-Zarifi(eds.), **Liability of Multinational Corporations …**, p. 22.

news, which triggers consumer boycotts and brings bad reputation and embarrassment for the company. This is what Spar named as 'the spotlight phenomenon'. Even though she was sceptical of this fact in her article, she held that as a consequence of the close surveillance of media and NGOs on human rights violations perpetrated by corporations, the TNCs are forced to adopt voluntary codes of conduct or even give an end to their operations abroad in order to recover their public image.[100] Spar argued in her article that despite the examples of bad conduct or even help and support for the dictatorial regimes by the TNCs,[101] the overall impact of foreign investment in developing countries improves the human rights conditions in those countries.[102]

However, the effectiveness of international public pressure depends on the capability of consumer behaviour to affect the profit gain of the company,[103] and as Spar admitted, by the end of 1990s, consumer behaviour was being shaped mostly by brand, price and quality of the products rather than human rights concerns, leaving the revelation and disclosure of bad practices mostly ineffective.[104] Furthermore, as Picciotto criticized in his article, even if the flexibility and adaptability of voluntary codes of conduct make them easier to be adopted, the self-selected and self-defined content and the lack of independent and external implementation, monitoring and enforcement mechanisms prove their inadequacy for protecting human rights.[105]

Today, as a consequence of information revolution, widespread use of social media, internationalization of the civil society and constant flow of direct

---

[100] Spar gives a few examples to famous media scandals such as the Kathie Lee Gifford, Walt Disney, Wal-Mart, Nike, Reebok, The Gap, Starbucks, Levi Strauss and Macy's. For example, Reebok was forced to change its policies and to accept external and independent monitoring, after it was evidenced that its subcontractor in Pakistan was using child labour for manufacturing soccer balls. See Debora L. Spar, "The Spotlight and the Bottom Line: How Multinationals Export Human Rights", **Foreign Affairs**, Volume 77, No. 2, March-April 1998, p. 7.

[101] For example, United Fruit in Guatemala (1954), Elf Aquitaine in Congo (1997) and ITT in Chile (1973). The U.S. corporation The International Telephone and Telegraph (ITT), clearly violating the principle of non-interference with the domestic affairs, has played a crucial role with the other TNCs operating in Chile, in overthrowing the Allende regime with the help of the CIA. Meyer, **Human Rights and International Political Economy…**, p. 177 *et seq*; Reinisch, **op. cit.**,, pp. 63-64; Michael Koebele, **Corporate Responsibility under the Alien Tort Statute: Enforcement of International Law through US Torts Law**, Martinus Nijhoff Publishers, Leiden, 2009, p. 201.

[102] She advocated that 'the old Leninist approach' holding multinationals responsible for human rights abuses is in fact out-dated. Spar, **op. cit.**, p. 7 *et seq*.

[103] David Weissbrodt, "The Beginning of a Sessional Working Group on Transnational Corporations Within the UN Sub-Commission on Prevention of Discrimination and Protection of Minorities" in Kamminga & Zia-Zarifi (eds.), **Liability of Multinational Corporations**…, p. 123.

[104] Spar, **op. cit.**, p. 7.

[105] Sol Picciotto, "Rights, Responsibilities and Regulation of International Business", **Colum. J. Transnat'l L.**, Vol. 42, 2003, pp. 131-152.

information between human rights activists and the public,[106] the public awareness has increased and the TNCs -at least with commercial concerns- are strongly forced to behave more responsibly in their operations abroad.[107] Such non-legal accountability mechanisms are usually based on the principles of market economy and they largely rely on the economic effects of the NGO campaigns, consumer boycotts, works of advocacy networks and negative publicity in the media concerning the corporate behaviour.[108] Reinisch defines such external pressure groups as 'extra-legal enforcers' of human rights norms.[109] Inspection Panels of international financial institutions, such as the World Bank, Asian Development Bank and the Inter-American Bank, may also serve as a tool to contributing to the responsible conduct of the corporations.[110] Additionally, collective action by corporations operating in a given country lessens the competitive disadvantage that might occur in case of adopting certain policies with regard to human rights, labour rights and environment.

Milton Friedman, a Nobel-prize winning economist, argued that the only social responsibility of a business should be towards its shareholders,[111] and therefore, corporations should only seek profit maximization without engaging in deceptive or corrupt practices.[112] Although, it could be defended that corporate social responsibility would also lead to profit-maximization in the long run,[113] it would not be easy to reconcile the interests of the narrow group of shareholders and the wider group of stakeholders, including stockholders, employees, workers, creditors,

---

[106] Reinisch, **op. cit.**, p. 77.

[107] In an example of civil society struggle from 1970s concerning the milk powder sold by Nestlé in the Third World countries, the "Swiss Working Groups for Development Policy", a NGO, was convicted of 'false accusation' in the Swiss courts. For a criticism of the verdict and comments on the Nestlé affair see Cassese, Antonio. "The Human Dimension of International Law: Selected Papers", Oxford, 2008, pp. 387-399.

[108] Ethical investigations may also have influence on corporate ethical conduct. **ibid.**, pp. 41-42, 53, 78.

[109] **ibid.**, p. 53.

[110] For example, the World Bank Inspection Panel is authorized to investigate claims brought by the potential victims of human rights violations caused by the foreign investment credited and supported by the World Bank. McCorquodale, "The Individual …", p. 297.

[111] Origins of the shareholder primacy principle dates back to 1930's and the theories of Adolf Berle. Adolf A. Jr. Berle, "Corporate Powers as Powers in Trust", **Harv. L. Rev.**, Vol. 44, 1931, p. 1049.

[112] Milton Friedman, **Capitalism and Freedom**, 1962, p. 133; Milton Friedman, "The Social Responsibility of Business to Increase its Profits", New York Time Magazine, 13 September 1970; See also Joel Bakan, **Şirket: Kar ve Güç Peşindeki Patolojik Kurum**, (org. "*The Corporation: The Pathological Pursuit of Profit and Power*"), transl. Rahmi G. Öğdül, Ayrıntı, 2007.

[113] Publicity and good corporate reputation would positively affect the consumer behaviour and attract qualified employees. Daniel Aguirre, "Multinational Corporations and the Realisation of Economic, Social and Cultural Rights", **Cal. W. Int'l L.J.**, Vol. 35, 2004, p. 80; Keenan, J. Patrick, "Financial Globalisation and Human Rights", **Colum. J. Transnat'l L.**, Vol. 46, No. 3, 2008, pp. 533-538.

suppliers and all other persons and groups, who might be substantially affected by the corporate activity, such as consumer groups, customers, governments, neighbouring communities, indigenous peoples and communities, NGOs, public and private lending institutions and trade associations.[114]

In such a situation, the following question would be raised: does ethical behaviour and respect for human rights have a market value? If so, the proponents of market regulation argue that 'the invisible hand' will balance the irregularities in the functioning of economic mechanism and the corporations will self-restrict and self-monitor their compliance with the self-imposed codes of conduct and any other relevant tool for corporate social responsibility.[115] Such arguments are also shaped within the context of the concepts such as 'governance', 'corporate citizenship' and 'corporate social responsibility', [116] which are the keywords of neoliberal economy.[117] Even if one assumes that this neoliberal mythology is sound, the profiteers of certain sectors, such as the security sector, which provides military and security products and services, would not be able to maximize their profits if they act in line with the universal human rights standards.[118] Kamatali highlights that even the most zealous supporters of self-regulation such as Alan Greenspan and Richard Falk admit that the argument of self-interest[119] is not sufficient for reining in the corporations to act in line with human rights principles. Therefore, in our view, it cannot be successfully argued that market regulation, voluntary self-regulation and/or soft regulations would be sufficient to prevent adverse consequences of corporate activities. Each of these concepts will be elaborated on thoroughly in the third chapter with their pros and cons.

Another point I shall note is that following the failure of the negotiations on the Organization for Economic Co-operation and Development (OECD) proposal for the

---

[114] Reinisch, **op. cit.**, pp. 51-52; Backer, "Multinational Corporations, Transnational Law…", p. 339; Pillay, **op. cit.**, p. 498.
[115] For a critique of the concept of 'market democracy' see William E. Scheuerman, **Frankfurt School Perspectives on Globalization, Democracy, and the Law**, Routledge, 2008, p. 29 *et seq*.
[116] See *e.g.* Ingo Pies & Peter Koslowski (eds.), **Corporate Citizenship and New Governance – The Political Role of Corporations**, Springer, 2011.
[117] Dardot & Laval, **op. cit.**, pp. 321-323.
[118] Rosemann, "The Privatization of Human Rights…", p. 93, 96.
[119] Jean-Marie Kamatali, "The New Guiding Principles on Business and Human Rights' Contribution in Ending the Divisive Debate over Human Rights Responsibilities of Companies: Is it Time for an ICJ Advisory Opinion?", **Cardozo J. Int'l & Comp. L.**, Vol. 20.2, Winter 2012, p. 450, fn. 63.

Multilateral Agreement on Investment (MAI)[120] due to the famous Seattle protests in 1998,[121] there has been a proliferation of bilateral investment treaties (BITs) and investment provisions in free trade agreements (FTA). Such treaties, on the one hand provide special protection for foreign investors, especially against the changes in laws and regulations and expropriation, and on the other hand impose restrictions and obligations on host states creating an imbalance on the rights and responsibilities of corporations.[122] For example, the agreement between British Petroleum (BP) and the host governments (Azerbaijan, Georgia and Turkey) concerning the consortium for building the Baku-Tblisi-Ceyhan oil pipeline project contained disputed stability clauses.[123] Especially, the *sui generis* agreement concluded between BP and Turkey in 2000 has been harshly criticized, because it suspended the enforcement of all domestic laws and regulations on the pipeline project, including the laws on human rights and environmental protection:[124]

> "*Article 7.2(vi): ...if any domestic or international agreement or treaty; any legislation, promulgation, enactment, decree, accession or allowance; any other form of commitment, policy or pronouncement or permission, has the effect of impairing, conflicting or interfering with the implementation of the Project, or limiting, abridging or adversely affecting the value of the Project or any of the rights, privileges, exemptions, waivers, indemnifications or protections granted or arising under the Agreement or any other Project Agreement it shall be deemed a Change in Law under Article 7.2.(xi).*

---

[120] The MAI, legally guaranteeing the rights of investors, was designed to establish a dispute settlement mechanism resembling to that of ICSID's. Accordingly, TNCs were given the right to bring a case against a host state that allegedly violated their investing rights. However, States were not granted the right to bring a case against a TNC before that dispute settlement institution. Moreover, no provision with regard to the protection of human rights, labour rights and environment was inserted in the Agreement. Thus, the MAI was merely aiming the protection of the rights of TNCs and not that of the humanity and the earth. Alexandra Gatto, **Multinational Enterprises and Human Rights: Obligations under EU Law and International Law**, Edward Elgar Publishing, 2011, pp. 57-58.

[121] Elif Oral, "*Dünya Sosyal Forumu: Bir Küresel Adalet Hareketi*", (*World Social Forum: A Global Justice Movement*) **Maltepe Üniv. HFD**, Kasım 2010, Cilt I, pp. 271-289.

[122] Such agreements include a stabilization clause such as intangibility clauses, consistency clauses, freezing clauses, stability clauses and economic equilibrium clauses. Jeswald Salacuse, **The Three Laws of International Investment: National, Contractual and International Frameworks for Foreign Capital**, Oxford, 2013, pp. 153-155.

[123] de Schutter, "Transnational Corporations …", p. 415.

[124] Celia Wells & Juanita Elias, "Catching the Conscience of the King: Corporate Players on the International Stage" in Philip Alston (ed.), **Non-State Actors and Human Rights,** OUP, 2005, pp. 143-144.

Article 16.1: This Agreement and the rights, obligations and other provisions of this Agreement and any other Project Agreement shall bind and apply to the Parties and: (i) in the case of the State Authorities, shall continue to bind the Government, all State Entities and all Local Authorities notwithstanding any change in the constitution, control, nature or effect of all or any of them and notwithstanding the insolvency, liquidation, reorganization, merger or other change in the viability, ownership or legal existence of the State Authorities (including the partial or total privatization of any State Entity).

Article 21.2: The Parties hereby acknowledge that it is their mutual intention that no Turkish Law now or hereafter existing (including the interpretation and application procedures thereof) that is contrary to the terms of this Agreement or any other Project Agreement shall limit, abridge or affect adversely the rights granted to the MEP Participants or any other Project Participants in this or any other Project Agreement or otherwise amend, repeal or take precedence over the whole or any part of this or any other Project Agreement.

Article 21.3: The Parties hereby acknowledge that (i) this Agreement is not, and shall not be construed as, a special administrative contract granting a concession, (ii) none of the Project Activities conducted by the MEP Participants or any other Project Participant is intended to constitute a public service, (iii) this Agreement and other Project Agreements are intended to constitute instruments to develop, construct, operate and maintain a pipeline system for the transportation of Petroleum and, therefore, the Turkish law relating to any special administrative contract granting a concession is not intended to be applicable to this Agreement and shall have no effect on any of the substantive provisions, commitments, undertakings, rights, guaranties, exemptions, privileges, indemnities, waivers and

standards provided in this Agreement or other Project Agreements; "[125]

Approval of ratification of the agreement by the Turkish Parliament in order to give it equal standing with the domestic laws and to prevent the annulment of its provisions by the Constitutional Court (Article 90 of the Turkish Constitution), caused the debates to become even more heated.[126] However, following all the criticisms and concerns over the potential environmental and human rights damage that the pipeline project would cause, a joint statement ("BTC Human Rights Undertaking") has been signed between the Parties of the consortium on May 16th, 2003 stressing that all undertakings will be conducted in accordance with the EU standards, OECD Guidelines on Multinational Enterprises and the World Bank standards; and that no compensation will be demanded on the ground that the Host State took measures in accordance with its human rights obligations under the international treaties to which it is a party. The choice of dispute settlement mechanism envisaged in those agreements, *i.e.* arbitration, has also been criticized due to lack of transparency where one of the parties is a sovereign power, which shall act with greater openness in democratic societies.[127]

On the other hand, some scholars suggested that international arbitration could serve as a forum for human rights litigation, if (1) it is provided in the arbitration agreement, or (2) human rights treaties or codes of conduct are agreed upon as the applicable law, or (3) the corporation party to the dispute asks the court to apply the code of conduct adopted by either an IGO or the corporation itself.[128] Parker, uses the term meta-regulation for referring to the proliferation of different forms of soft law and hard law regulations, which constitutes a new form of governance encompassing not only enforcement and accountability mechanisms, but also

[125] Host Government Agreement between and Among the Government of the Republic of Turkey and The MEP Participants, Appendix 2 to the Intergovernmental Agreement dated 18 November 1999; at http://www.bp.com/content/dam/bp-country/en_az/pdf/legalagreements/BTC_eng_agmt3_agmt3.pdf, accessed on 15.07.2015.

[126] Zeynep Kıvılcım, "Ulus-Aşırı Şirketler ve İnsan Hakları: Bakü-Tiflis-Ceyhan Boru Hattı Örneği", *(Trans-national Corporations and Human Rights: The Example of Baku-Tblisi-Ceyhan Pipleline)*, **Ank.Üniv. SBF Derg.**, No: 65(3), Temmuz-Eylül 2010, pp. 98-101.

[127] Stiglitz suggests the establishment of an International Commercial Court for settling the disputes arising from the interpretation and/or application of the BITs. Joseph E. Stiglitz, "Multinational Corporations: Balancing Rights and Responsibilities", Ninth Annual Grotius Lecture, American Society of International Law Proceedings 2007, Vol. 101, p. 14, 50, 53-54.

[128] Fabrizio Marrella, "Human Rights, Arbitration, and Corporate Social Responsibility in the Law of International Trade", in Wolfgang Benedek & Koen de Feyter & Fabrizio Marrella(eds.), **Economic Globalisation and Human Rights**, CUP, 2007, at p. 267, 271, 289.

"'collaborations', 'partnerships', 'webs' or 'networks'" of States, businesses, NGOs and the people.[129] In other words, meta-regulation is legally obliging and externally monitoring the compliance of corporations with the tools of self-regulation concerning corporate social responsibility. In fact, today, there is an increasing tendency of including provisions in the multilateral and bilateral investment agreements obliging TNCs to protect human rights in the countries they operate.[130] Marrelle names this concept as the 'contractualization of human rights'.[131] The concept of contractualization or privatization of human rights will also be elaborated on in the third chapter.

Currently, the only existing legal accountability mechanisms for the human rights violations and atrocities perpetrated by transnational corporations are designed domestically. On the international level, States bear the primary responsibility for the horizontal violations of human rights. In other words, the State will be responsible for private violations only if the private acts are attributable to the State or if the State fails to act with due diligence by taking appropriate administrative, legislative and judicial measures to prevent violations and protect human rights. As will be analysed in detail under the second chapter, adopting domestic laws and regulations concerning corporate activities is a right and an obligation for both home states and host states. Furthermore, every State could claim universal jurisdiction over the TNCs, especially when the peremptory norms of international law are under threat. Traditionally, host states have the authority to regulate the corporate conduct operating in their territories. Plus, the TNCs are under an obligation to respect the laws and regulations of that host state. Prohibition of interference with the internal affairs of the host state also creates an obligation for the TNCs. However, strong global competition among developing countries to attract foreign investment into their territories causes them to act reluctant in regulating and/or monitoring corporate conduct to the detriment of protection of human rights. Or, the host states may lack the adequate technical tools, expertise and financial resources to do so.[132]

---

[129] Christine Parker, "Meta-Regulation: Legal Accountability for Corporate Social Responsibility" in Doreen McBarnet, Aurora Voiculescu and Tom Campbell (eds.), **The New Corporate Accountability: Corporate Social Responsibility and the Law**, CUP, 2009, pp. 208-210.
[130] Ralph G. Steinhardt, "Corporate Responsibility and the International Law of Human Rights: The New *Lex Mercatoria*" in Philip Alston (ed.), **Non-State Actors and Human Rights**, OUP, 2005, p. 178.
[131] Marrella, **op. cit.**, p. 305.
[132] Steiner & Alston & Goodman, **op. cit.**, p. 1388.

Home states of TNCs, being developed and industrialized countries, are generally in a better position to regulate and monitor compliance of corporations with the human rights standards.[133] Furthermore, higher level of human rights protection afforded in their territories may contribute to the amelioration of the protection level in developing countries. Adding extra-territorial application of domestic laws would force TNCs to act with greater caution and due diligence in their operations and activities abroad. For example, domestic laws on taxation, corruption and anti-trust are already being applied extra-territorially.[134] However, home states as well, may act reluctant to undertake such a duty and responsibility for not putting their own nationals in a disadvantageous situation compared to TNCs holding the nationality of other developed states. Besides, as Tully draws attention, resorting to civil litigation in the home states of TNCs is slow, expensive for the victims and carry the risk of resulting in unfair solutions due to the inequalities between the powerful corporations and the victims from poor countries.[135]

Therefore, harmonization of domestic regulations at the international and /or supranational level shall be considered as a possibility for legally obliging the TNCs to respect and protect human rights in their conducts, activities, operations and products.[136] However, today, an international binding regulation and its effective enforcement over corporations became a pressing need, since several situations, which will be thoroughly analysed in the following chapters, prove that the gross human rights violations perpetrated or facilitated by corporations remain unpunished and the victims are left without appropriate remedy.

---

[133] Although it is rare, it is not impossible to observe TNCs of underdeveloped home states operating in developed host states. However, in this case, a high level human rights protection would be afforded for the individuals and groups living under the jurisdiction of the developed home state that human rights violations would mostly be related to the overall problems in the domestic legal system. For example, a Malaysian energy company planning to build a natural gas pipeline in the territory of a small aboriginal community living in Canada, was rejected by the peoples of this indigenous community due to the rights granted to indigenous peoples by the judgments of the Supreme Court of Canada on previous occasions. Ian Austen, "Canadian Aboriginal Group Rejects $1 billion Fee for Natural Gas Project", The New York Times, 13 May 2015, http://www.nytimes.com/2015/05/14/business/energy-environment/canadian-aboriginal-group-rejects-1-billion-fee-for-natural-gas-project.html?_r=0, accessed on 19.10.2015. The ban of Monsanto's toxic pesticide Roundup by the Dutch Parliament is another example of developed countries protecting their citizens against corporate human rights violations.

[134] Koebele, **op. cit.**, p. 8.

[135] Stephen Tully, "'Never say never jurisprudence': comparative approaches to corporate responsibility under the law of torts" in Stephen Tully (ed.), **Research Handbook on Corporate Legal Responsibility**, Edward Elgar Publishing, 2005, p. 141.

[136] Backer, specifically refers to the regulations on the areas such as labour law, tax law, prevention of corruption and the status of security forces. Backer, "Multinational Corporations…", pp. 506-507.

For emphasizing this pressing need, Fleur Johns, begins her article on the legal theory concerning the invisibility of TNCs in international law by referring to a Spanish proverb: "*Como telas de aranas son las leyes, que prenden a los moscas y no al milano*".[137] Economic globalization and the consequences of the neo-liberal policies adopted by the majority of States in the unipolar world of the post-Cold War era[138] prove that the protection of human dignity has largely become dependent on the measures adopted by the international community, where the laws of nation-states remain ineffective against the human rights violations perpetrated by powerful corporations.[139] At least, standardizing the obligatory minimum requirements for corporate conduct, external and independent monitoring of compliance, and sanctions to be imposed on the TNCs in case of noncompliance shall be set and guaranteed.[140]

Howen, the former Secretary-General of the International Commission of Jurists, adverts seven reasons for universally adopting a legally binding document, which precisely defines corporate accountability for human rights violations.[141] First, there are many documented cases where the corporations either committed or have been complicit in human rights abuses. Second, regulation by the market rules does not provide adequate and effective protection for human rights since the abuses are sometimes not easily seen and understood by the consumers and public in a way that would trigger a meaningful reaction, which is able to eliminate the competitive advantage of the unethical corporations. Third, despite the benefits of voluntary codes of conduct, 'we must go beyond voluntarism'[142] creating a mix of voluntary codes and legally binding obligations. Fourth, if the right of an individual or group has been violated, it has to be remedied through compensation and restitution.

---

[137] (Laws, like the spider's web, catch the fly and let the hawk go free). Fleur Johns, "The Invisibility of the Transnational Corporation: An Analysis of International Law and Legal Theory", **Melb. Univ. L. Rev.**, Vol. 19, 1994, p. 893.
[138] Francioni, **op.cit.**, p. 247.
[139] Spiro names this new form of international law created in collaboration with all the members of international community as post-national law. Peter J. Spiro, "Globalization, International Law, and the Academy", New York University International Law and Politics, Vol. 32, 2000, pp. 569 *et seq.* *See also* Linda Bosniak, "Multiple Nationality and the Postnational Transformation of Citizenship", **Va. J. Int'l L.**, Vol.42, 2002, pp. 979-1005.
[140] Hamm, **op. cit.**, p. 245.
[141] Nicholas Howen, "Business, Human Rights and Accountability", International Commission of Jurists, speech at the 'Business and Human Rights' Conference Organized by the Danish Section of the ICJ Copenhagen, 21 September 2005, p. 2, http://www.ihrb.org/pdf/Business_Human_Rights_and_Accountability.pdf, accessed on 26.08.2013.
[142] International Council on Human Rights, "Beyond Voluntarism: Human Rights and the developing international legal obligations of companies", 2002.

Charity and philanthropy are not ways of compensating the damage caused by the corporations. If legal rights are violated, then the recovery should be by legal means. Fifth, as widely known, regulation by host states remains ineffective due to the concerns on pulling foreign direct investment in the country. The sixth ground on which Howen bases his argument is that, despite the contribution of consumer law,[143] criminal law and environmental law in the area, only human rights standards can provide a universally accepted normative guide for corporations to adopt in their relations with human beings and the environment. Finally, the arbitrary exercise and abuse of economic and political power of large TNCs may only be prevented by law and legal enforcement.[144]

There are several alternative tools for directly imposing international human rights obligations on corporations and holding them accountable for noncompliance. First option is extending the jurisdiction of the existing international legal and quasi-legal accountability mechanisms to the conducts of corporations.[145] Second option as proposed by Nowak, is establishing a World Court of Human Rights, which is authorized to try both States and non-state actors.[146] Third option is establishing an independent hybrid regional or international court or body specialized in the adverse consequences of corporate activities. Such a court or body may be established either in the international treaty imposing human rights obligations on the corporations or by a separate protocol annexed to the existing human rights treaties, which confers jurisdiction to the existing courts or bodies. New jurisdictional models based on the nationality of the victim or the nationality of the majority of shareholders could also be developed in order to hold the TNCs liable for human rights abuses.[147]

Regarding the first option, de Jonge, in her book, referring to the speech of Dr. Malgoise Fitzmaurice in a Colloquium, elaborated on the possibility of conferring

---

[143] For example, the concept of 'product liability' is developed in order to protect the public interests and to horizontally empower consumers against corporations. Daniel Thürer, "The Emergence of Non-Governmental Organizations and Transnational Enterprises in International Law and the Changing Role of the State" in Rainer Hofmann, **Non-state Actors as New Subjects of International Law: International Law - From the Traditional State Order Towards the Law of the Global Community**, Proceedings of an International Symposium of the Kiel Wlather-Schücking-Institute of International Law, March 25 to 28, 1998, Duncker&Homblot, 1999, p. 49.

[144] Howen, **op. cit.**, p. 2.

[145] For example, an amendment to the Rome Statute of the ICC has already been proposed in order to extend its jurisdiction to legal persons. Even though the draft proposal was not adopted, being one of the most realist and feasible option, possibility of such an amendment will be elaborated on in detail within the concept of criminal liability of corporations under Chapter 5.

[146] Nowak, Manfred. "The Need for a World Court of Human Rights", **HRLR**, Vol.7, 2007, p. 257.

[147] Joseph, "An Overview …", p. 85.

jurisdiction to the ICJ as a global court of appeal concerning all cases brought before decentralized general and special courts and tribunals.[148] She particularly mentioned that the advisory opinion procedures might be extended to TNCs and NGOs enabling them to request the Court to legally clarify any question under Article 65 of the Statute of the ICJ, and in accordance with any contractual limitation clause, if that question have not already been brought before another forum such as the mechanisms of ICSID and ILO. De Jonge added that:

> "*Requests for advisory assistance from the ICJ could also be precluded (using the discretionary power to refuse advisory requests) where the issue under question has given rise to substantive disputes between sovereign states, or when the political opposition to an opinion is likely to be so severe that the opinion will not be accepted by all or most members of the global community, to the detriment of the Court's reputation and the chances of finding an eventual solution to the problem.*"[149]

Even though such a broad option given to the ICJ for rejecting to give an advisory opinion carries the danger of ineffectuating the mechanism, initially it would serve for the international community to accept the jurisdiction of the Court in questions involving transnational corporations.

Only States may be parties to the contentious cases brought before the ICJ, and not the individuals, corporations, NGOs or the IGOs.[150] Lauterpacht, in his book dated 1950,[151] proposed the amendment of Article 34 of the Statute of the ICJ concerning the jurisdiction of the Court so as to include "*disputes between States and private and public bodies or private individuals in cases in which States have*

---

[148] Alice de Jonge, **Transnational Corporations and International Law: Accountability in the Global Business Environment**, Corporations, Globalisation and the Law, Edward Elgar, 2011, pp. 202-205.
[149] **ibid.**, p. 204.
[150] However, Articles 43 and 69 of the Rules of the ICJ has been amended so as to include the requirement for the Registrar to notify the 'public international organizations concerned' in order to enable them to submit their observations to the Court, which is kind of an *amicus curiae* role. As specified under the Rules, the term 'public international organization' denotes an international organization of States. This amendment was made in the Rules on 29 September 2005. Therefore, it is possible that in the near future another amendment could be made so as to include TNCs and NGOs to the category of subjects, who shall be notified for submitting their observations on a case.
[151] Hersch Lauterpacht, **International Law and Human Rights**, Praeger, 1950, p. 58.

consented, in advance or by special agreement".[152] If such an amendment could be made in the Statute of the ICJ, States, whose nationals were harmed as a consequence of corporate activities, might use their right to diplomatic protection against the home state of the corporation or the corporation itself before the ICJ. However, economic concerns of host states, as mentioned above, could again play a hampering role and would cause the impunity of abusive corporations. Alternatively, if there were a breach of an *erga omnes* obligation, than all States would have an interest in bringing the case before the Court.

Regarding the second option, Manfred Nowak, suggested establishing a World Court of Human Rights empowered to deal with allegations of corporate misconduct. Nowak proposed that a Statute of World Court of Human Rights shall be adopted and it shall be open to signature by both States and non-state actors, including IGOs, such as international financial organizations, and NGOs, such as corporations.[153] He continued:

> "*… transnational corporations which adopt voluntary codes of conduct with references to human rights standards in the framework of their corporate social responsibilities (CSR) and which become members of the Global Compact of the United Nations might be invited and encouraged to accept the binding jurisdiction of the World Court in relation to selected human rights in the sphere of their respective influence, such as the prohibition of forced or child labour; the right to form and join trade unions; the right to collective bargaining; and the prohibition of discrimination. The World Court would not only be in a position to decide in a binding judgment whether or not a business corporation subject to its jurisdiction has violated any human right of an employee, a client or any other person affected, but it might also provide proper reparation to the victim concerned. In principle, any non-State actor might be interested, for various reasons including upholding ethical standards, marketing, corporate identity or a genuine interest in*

[152] Stephen M. Schwebel, "Human Rights in the World Court", **Vand. J. Transnat'l L.,** Vol. 24, Number 5, 1991, pp. 947-948.
[153] Nowak, **op. cit.**, p. 256.

> *strengthening human rights, to recognise the jurisdiction of the World Court of Human Rights."*[154]

Third option, establishing a hybrid international or supranational body or court specialized in corporate acts violating human rights law and/or international criminal law shall also be considered as an alternative to prevent impunity. For example, Monshipouri & Welch & Kennedy argued, in their article dated 2003, that an outside governing body to bring accountability for corporations may be an option for restraining the vicious cycle of capitalism.[155] Such a body might be empowered to monitor compliance of corporations with various soft law documents, as well as any legally binding document that the corporations or States are committed to comply with. The decisions of the body may carry a legal or quasi-legal character depending on its constitutive statute.

Weissbrodt and Kruger draw attention to the insufficient efforts of the international codifiers in focusing on the importance of the international responsibility of TNCs and other business enterprises, *i.e.* one of the most powerful non-state actors as the perpetrators of human rights violations.[156] Joseph in her article refers to the proposal of the World Development Movement on holding the TNCs responsible before an international tribunal. She mentions that the proposal was inspired by the Statute of the ICC, even though it was providing for the civil liability of TNCs.[157] Joseph also argues that the international community might well work on a binding behavioural code of conduct for the TNCs. The implementation of such an international code of conduct might be monitored by the existing organs of the UN, such as the UN Human Rights Council, and any violation might result in the international official shaming and condemnation of the corporation.[158] Joseph adds that such sanctions would force TNCs to act in line with their international duties and obligations in order to prevent any negative impact on their products of services.[159]

If the international community agrees on establishing a *sui generis* international court for the human rights violations perpetrated by corporations, then a

---

[154] **ibid.,** pp. 256-257.
[155] Monshipouri & Welch & Kennedy, **op. cit.**, pp. 965-989.
[156] David Weissbrodt & Muria Kruger, "Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises With Regard to Human Rights", **AJIL**, Vol. 97, 2003, p. 901.
[157] Joseph, "An Overview …", p. 87.
[158] **ibid**., p. 87.
[159] **ibid**.

distinction shall be made between the corporate crimes that fall under the jurisdiction of other international courts or tribunals and that are under the exclusive jurisdiction of the new court, in order to prevent double jeopardy for the individuals and violations of the principle of *non bis in idem*. On the other hand, if for any reason, the domestic or international court, which is principally authorized to try legal persons, remains unable or unwilling to try the accused corporate body, then this specialized court shall be capable of bringing those responsible to justice. Such a specialized tribunal would acquire expertise both with regard to specific corporations and characteristic types of human rights violations being frequently perpetrated in a particular country. [160]

Joseph comments that international regulation of the conduct of TNCs would be welcomed both by the 'good' governments of developing countries and the ethical business corporations since such universally enforceable standards would prevent unfair competition in the global market. On the one hand, ethical business would contribute to the economic welfare in a country, which in the end would lead not only to an increase in the demand for products and services provided by the TNCs, but also would augment the full and effective enjoyment of civil, political, economic, social and cultural rights.[161] On the other hand, the corporations themselves would profit from the enforcement of international regulations since such universal standards would raise the performance and self-fulfilment of the workers, which consequently would lead to the overall satisfaction of the consumers and other stakeholders.[162]

In June 2014, the UN Human Rights Council extending the mandate of the Working Group on the issue of human rights and transnational corporations and other business enterprises, requested the Working Group "*to launch an inclusive and transparent consultative process with States in 2015, open to other relevant stakeholders, to explore and facilitate the sharing of legal and practical measures to improve access to remedy, judicial and non-judicial, for victims of business-related abuses, including the benefits and limitations of a legally binding instrument, and to*

[160] Dubinsky, Paul R. ″Human Rights Law Meets Private Law Harmonization: The Coming Conflict", **Yale J. Int'l L.**, Vol. 30, 2005, pp. 309-311.
[161] Peter J. Spiro, "Human Rights and our International Economic Interests", ASIL Proceedings, Vol. 88, 1994, p. 277 cited in Joseph, "An Overview …", pp. 88-89.
[162] Joseph, "An Overview …", pp. 88-89.

prepare a report thereon and to submit it to the Human Rights Council".[163] Therefore, in our thesis I aim to contribute to the work of the UN Human Rights Council. I argue that international regulation of corporate conduct has become a pressing need for the effective protection of human rights. Even though it is established that the corporations already have international responsibilities to respect human rights, I would add that given the increasing political, economic and social power of the TNCs, they should also have responsibility to protect human rights in their spheres of influence.

I agree that an international body or court specialized in abusive corporate conduct shall be established with the approval of the States and open to accession by the corporate actors. However, my thesis aims to add to the scholarly proposals for establishing a specialized international body that such a mechanism shall be supported by an additional structure of transnational networks, which is compatible with the operational pattern of TNCs. If the corporations of the 21st century reorganize and function as transnational networks,[164] their regulation and supervision should also be in the form of a transnational network of several national/local legal, administrative or other regulatory documents and institutions. I argue that creating national sub-units, which work in close cooperation with each other, shall be considered as an option. These sub-units shall be empowered to monitor and report on both States' and corporations' compliance with the human rights treaties. They shall be organically connected to a transnational body, which would have the authority to inquire and investigate allegations of human rights violations perpetrated by corporations. Such allegations may be brought before the superior international body by the national sub-units, victims, NGOs and other corporations operating in the same sector or country. This transnational body may be authorized to function as both a forum for peacefully settling the disputes by non-legal tools and as an international court.

Furthermore, once a decision on compensation or conviction is given, execution of an order such as boycott, embargo, freezing of funds or economic

[163] A/HRC/26/L.1, Human rights and transnational corporations and other business enterprises, para.8.
[164] Cassels, in his article examining the 1984 Bhopal disaster of India, which caused thousands of locals being exposed to toxic chemicals due to a gas leak from the factories of the Union Carbide Corporation (UCC), names TNCs as 'outlaws' since they are subject to neither international law nor laws of the host state or home state. Jamie Cassels, "Outlaws: Multinational Corporations and Catastrophic Law", **Cumb. L. Rev.**, Vol. 31, 2001, pp. 313-314.

resources, prohibition on financial transactions, restrictions on export credits or investment[165] would be easier to be recognized and enforced with the worldwide cooperation of all the States, where a particular corporation operates in. Expertise and continuity would be another advantage of establishing such a tribunal. It may also be argued that an international tribunal established by either the free will of the States or the voluntary contribution of corporations would represent the consensus of the international community purified of political, social or economic biases and concerns of the North. And finally, such a transnational web of monitoring system would be in harmony with the transnational web structure of the corporate activities. In other words, if we have a transnational problem, the solution shall be sought transnationally.

Consequently, I will follow a path capable of demonstrating the evolution of international law on the issue of human rights responsibilities of the TNCs. This introductory first chapter will end up by a clarification on the meanings of the terms resorted in our thesis. The following second chapter will focus on the State responsibility for human rights violations perpetrated by corporate actors. In analysing the state responsibility, first the responsibility of states to protect human rights will be analysed under (1) public international law and human rights law, generally, and (2) the doctrine of horizontal application of human rights. Finally, the third sub-section will examine the experience of the U.S. with its Alien Torts Claims Act, which has been raised as a ground for holding abusive corporations accountable on several occasions. Accordingly, the second chapter will also involve an overview of the system of domestic regulation, with special emphasis on the responsibilities of the home states and host states.

Third chapter examines, in detail, the evolution of international law documents regarding corporate responsibility for human rights violations. First, the concept of corporate social responsibility, its emergence and development is explored. Then, various forms of self-regulation and the concept of privatization of human rights will be researched. Finally, various soft law documents adopted by and /or under the auspicious of the OECD, ILO and the UN will be examined respectively.

---

[165] Steiner & Alston & Goodman, **op.cit**, p. 1160.

Fourth chapter will first attempt to draw an alternative framework for the corporate human rights obligations. The author will argue that respect for human dignity constitutes the basis of corporate human rights obligations. Since the corporations are being represented and even have standing before certain international institutions for claiming their rights, they shall also have international responsibilities and duties towards society, in general, and towards those individuals and peoples, who are affected by their activities, operations, products and services, in particular. Therefore, responsibility to protect shall have an implication for corporations imposing on them a duty to act with due diligence.

Fifth chapter will more precisely focus on the criminal responsibility of corporations for committing or being complicit in the commission of international crimes. In that regard, firstly, the Nuremberg trials of the industrialist will be examined. Secondly, possibilities and attempts for including the legal persons under the jurisdiction of the International Criminal Court will be examined. Finally, degree of corporate complicity in the commission of international crimes will be looked closer. Now, let us begin with clarifying the terminology used in the thesis.

1.4. Terminology and Definitions

The term 'non-state actor' encompasses the broadest category of actors of international law, including individuals, groups, peoples, communities, institutions and non-governmental organizations. Therefore, international law scholars prefer not to limit the content of the term non-state actor, and rather emphasize what is obvious: The term non-state actors include all participants of international law, except the State actors.[166] Accordingly, corporations, too, are considered as a type of non-state actor, in general, and a type of 'for-profit' (or commercial or business) non-governmental organization, in particular.[167]

---

[166] Alston, "The 'Not-a-Cat' Syndrome…", p. 6 *et seq*.

[167] Kemal Başlar, **Uluslararası Hukukta Hükümet Dışı Kuruluşlar: Vestfalya Sonrası Süreçte Küresel Sivil Toplum**, *(Non-governmental Organizations in International Law: Global Civil Society in Post-Westphalian Process),* Nobel, Nisan 2005, pp. 33-44, 191 *et seq. See e.g.* Zimbabwe Human Rights NGO Forum v Zimbabwe, AfCommHPR, 2006, Comm. No. 245/02, para.136; AfCommHPR, Comm. No. 155/96 – the Social and Economic Rights Action Center and the Center for Economic and Social Rights/Nigeria, 2001.

The term 'national legal person' (juridical person or juristic person or artificial person) covers a wide variety of domestic structures such as NGOs, quasi-NGOs,[168] public enterprises, private corporations, political parties, labour unions, universities, associations, foundations, media organizations and religious organizations such as churches. Other institutions such as religious groups may also acquire legal personality depending on the legal regime adopted by a specific country. Accordingly, there are various types of institutions all of which are national legal persons. However, given the political, economic and social influence of corporations on the international order, they step forward among other national legal persons as 'international actors'. For example, in the Max Planck Encyclopaedia of Public International Law concerning legal persons it is concluded that having in mind the legal problems confronted in the international arena, unlike most of the concepts of public international law, a departure from purely domestic law concepts may be required in the area of transnational corporate activities.[169]

In other words, even if the national systems tend to pierce the corporate veil when faced with a problem concerning legal persons, the contemporary international law may require the development of its own standards and procedures for handling the issues in which corporations are involved.[170] Accordingly, a sub-section is reserved for clearing up the confusions on the terminology under public international law. The efforts and attempts for defining such organizations or institutions in legal terms would also help us to frame and limit the scope of the thesis. The terms and concepts of (1) Enterprise – Corporation (2) Multinational Corporation – Transnational Corporation (3) Duty – Obligation (4) Responsibility – Accountability – Liability, will be briefly examined.

1.4.1. Enterprise - Corporation

Regarding any possibility of difference in the meaning of the concepts of 'enterprise' and 'corporation', it is asserted that the latter is usually used for referring to a relatively limited number of entities to which only private law applies.

[168] For example, the International Committee of the Red Cross (ICRC) has international juridical capacity though it is founded in accordance with the Swiss law.
[169] See A.A. Fatouros, "National Legal Persons" in Rudolf Dolzer & E. Robert Hollweg & M. Peter Lawrence & Steven Less & Peter Macalister-Smith (eds), **Max Planck Encyclopedia of Public International Law 10: States, Responsibility of States, International Law and Municipal Law**, Elsevier Science Publishers B.V., 1987, p. 299 et seq.
[170] **ibid.**

Concerning the former, it is understood that the term is so used as to include all entities whether State-owned, privately owned or semi-public. However, due to the disappearance of a rigid line between the scope of application of private law and public law, any legal constraint for making such a distinction between corporations depending on their ownership would be ineffective for responding to the pressing needs of the neo-liberal world order.[171] For example, Rigaux, too, admits that such a distinction would prove to be ineffective and even counterproductive considering the circumstances of current business relationships.[172] However, an important distinction between the public (owned) corporations and public-service corporations could be underlined. As van Kempen puts clearly, the former is owned by the State, but may serve both to public needs or private needs.[173] Public-owned corporations can be considered as a NGO if they do not exercise any governmental powers. The latter, *i.e.* public-service corporation, can be State-owned, privately owned or semi-public, but serves a need of the general public.[174] Therefore, even though a corporation is privately owned, it may be considered as a governmental organization if it exercises governmental power or is serving a public service under governmental regulations.[175]

Another assertion has been that the term 'corporation' is legally preferable to the term 'enterprise', which is commonly used in the business world.[176] According to this view, the legal term 'corporation' implies not only a single enterprise but also a 'group of corporations' consisted of several separate legal entities incorporated under various national legal systems, and at the same time governed under none of these single legal systems.[177] A historical reference to the 'commercial guilds' is also made as the precedents of 'corporations', which were serving as quasi-sovereign entities of the medieval world.[178] The economic, political, social and cultural effects of the activities of some of the biggest modern corporations also demonstrate that

---

[171] Black's Law Dictionary, West Publishing (ed. Bryan Garner), 8th ed., 2nd rep., 2007.
[172] François Rigaux, "Transnational Corporations" in Mohammed Bedjaoui (ed.), **International Law: Achievements and Prospects**, Dordrecht: Martinus Nijhoff, 1991, p. 121.
[173] P.H.P.H.M.C. van Kempen, "Human Rights and Criminal Justice Applied to Legal Persons: Protection and Liability of Private Juristic Entities under the ICCPR, ECHR, ACHR and AfCHPR" in J.H.M. van Erp & L.P.W. van Vliet (eds.), **Netherlands Reports to the Eighteenth International Congress of Comparative Law, Washington 2010**, Intersentia, 2010, p. 513.
[174] **ibid.**
[175] See also Harold H. Koh, "Transnational Legal Process", **Neb. L. Rev.**, Vol. 75, 1996, pp.183-184.
[176] Kamminga & Zia-Zarifi, "Liability of Multinational Corporations …", p. 3.
[177] Rigaux adds that such separate structures may even not have a legal personality under domestic laws of a host state if it is established as a 'branch' or 'agency' or it may be a private individual person, who manages activities across national borders. Rigaux, **op. cit.,** pp. 121-122.
[178] Cary J. Nederman, "Sovereignty, War and the Corporation: Hegel on the Medieval Foundations of the Modern State", **JOP**, Vol. 49, Issue 2, 1987, pp. 500-520.

corporations are still capable of functioning as quasi-governments,[179] and accordingly, they should be liable for both their state-like or state-related activities and private activities.[180] Nevertheless, even if we compel ourselves to make a distinction between the terms enterprise and corporation, it would not change the fact that international documents and legal scholars use these terms interchangeably. Therefore, it would be sufficient for the purposes of our thesis to briefly touch upon the problem of terminology with regard to these two concepts. Unless the language of official documents prefers otherwise, the author will use the term corporation for such entities.

1.4.2. Multinational Corporation / Transnational Corporation

Gatto draws attention to the birth of the adjective 'transnational', which was originally being used for describing the companies that had the ability to operate across national borders, and, which were jointly owned and controlled by several foreign entities from different countries.[181] Accordingly, the term transnational corporation refers mostly to the 'New International Economic Order' of the 1970s and generally has been used by the United Nations and its organs.[182] The rise of economic globalization by the 1980s triggered an augmentation of the items that have been 'transnationalized' by the companies. It was not merely the products or services of the companies that were crossing the national borders, anymore. The business attributes, capital, processes, marketing methods, trade names, skills, technology and management have also become 'transnationalized' as a whole.[183] Rigaux observes that the term 'transnational' is an accepted terminology in international law with the purpose of avoiding any misunderstanding, which the term 'multinational' may cause by giving an impression that the 'nationality status' was implied.[184]

---

[179] Alan Wolfe, "The Modern Corporation: Private Agent or Public Actor?", **Wash. & Lee L. Rev.**, Vol. 50, 1993, p. 1692 cited in Steinhardt, "Corporate Responsibility…", p. 215. See also Işıl Özkan, **Hukukun Küreselleşmesi ve Ulusötesi Hukuk**, *(Globalization of Law and Transnational Law),* Oniki Levha Yay., İstanbul, 2014, p. 219.
[180] Ralph G. Steinhardt, "Soft Law, Hard Markets: Competitive Self-Interest and the Emergence of Human Rights Responsibilities for Multinational Corporations", **Brook. J. Int'l Law**, Vol. 33:3, 2008, p. 945.
[181] Gatto, **op. cit.**, p. 38.
[182] Kamminga & Zia-Zarifi "Liability of Multinational Corporations…", p. 3, fn. 4.
[183] Kamatali, **op. cit.,** p. 460.
[184] Rigaux, **op. cit.,** p. 121.

However, for today, this assertion is not true and both of the terms might be preferred for referring to the same structure. The term 'multinational' has also begun to be frequently used by the business world itself and related international organizations, such as OECD. [185] One of the ways of determining the 'multinationality' of a corporation has been examining the foreign direct investments and subcontracting policies of that company.[186] For example, Crawford defines a 'multinational corporation' as a group of corporations composed of several separate corporate entities, each of which has been established in accordance with various national legal systems in different countries. [187] Olivier de Schutter describes 'multinationals' as "*corporations the economic activities of which develop in different countries, either directly or by the creation of subsidiaries having a distinct legal personality but which are de jure or de facto under the control of the parent corporation*."[188]

Clapham points out that the term 'transnational corporation' is in general used for mentioning a single corporate entity incorporated under the national laws of the home state, and which operates across the national borders of the home state.[189] This is equally true even if the corporation has its local branches having their own separate legal personalities, provided that all these entities operate under a single autonomous corporate system.[190] In other words, once a local enterprise enters into a business relationship with a transnational corporation, it becomes a part of that TNC, constituting one single corporation.[191] Therefore, it could not be argued anymore that the TNC and the local enterprise are separate legal entities, even though they have separate legal personalities.

It is true that, the term 'transnational' refers to the geographical operation and settlement area of corporations,[192] while the term 'multinational' puts an emphasis on

---

[185] Kamminga & Zia-Zarifi, "Liability of Multinational Corporations …", p. 3, fn. 4.
[186] Wells & Elias, **op. cit.,** pp. 149-150.
[187] James Crawford, "The System of International Responsibility" in Crawford & Pellet & Olleson (eds.), **The Law of International Responsibility**, OUP, 2010, p. 19.
[188] Olivier de Schutter, "The Accountability of Multinationals for Human Rights Violations in European Law" in Philip Alston (ed.), **Non-State Actors and Human Rights**, OUP, 2005, p. 227, fn.1.
[189] Therefore, the difference between a local enterprise and a transnational corporation is that the latter operates across the national borders. Clapham, Andrew. *"Human Rights Obligations of Non*-State Actors", OUP, 2006, p. 199.
[190] Andrew Clapham, **Human Rights Obligations of Non-State Actors**, OUP, 2006, p. 199.
[191] Rigaux, **op.cit.**, p. 124.
[192] Clapham, **Human Rights Obligations…**, pp. 200-201.

the status of the nationality and ownership of a corporation. However, as Clapham rightfully mentions, under the circumstances of today's globalized business relationships, an entity generally have the characteristics of both transnationality and at the same time multinationality, and any given name would not affect the international legal status of these corporations.[193] Therefore, the terms 'multinational enterprise', 'multinational corporation', 'transnational enterprise' and 'transnational corporation' are generally used interchangeably.[194] For the purposes of the thesis, the author would adopt a pragmatist approach by using the terms ‘multinational’ and ‘transnational’ interchangeably depending on the context of the subject on elaboration.[195] However, if the official terms used in the international documents do not provide otherwise, priority would be given to the official term used by the UN, *i.e.* transnational corporation.

For example, the ILO Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy does not precisely define the term ‘multinational enterprise’. [196] A similar approach is preserved in the OECD Guidelines for Multinational Enterprises.[197] The reason for not strictly defining the term is to address all multinational enterprises, whether parent company or a subsidiary, regardless of the sector they operate in and regardless of their ownership, *i.e.* State-owned or private or mixed.[198] The only description given by the OECD Guidelines is that "*they 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*

[193] **ibid.** Clapham argues that, the problem of nationality is closely linked with the problem of jurisdiction of States. However, he adds that today, ‘transnationality’ is also an element that is being taken into account when elaborating on the jurisdiction of States over such entities.
[194] Gatto, **op. cit.**, p. 38.
[195] Black's Law Dictionary defines the terms ‘multinational corporation’ and ‘transnational corporation’ as synonyms. Black's Law Dictionary, p. 367.
[196] 1977 (2006) ILO Tripartite Declaration, para. 6: *"... Multinational enterprises include enterprises, whether they are of public, mixed or private ownership, which own or control production, distribution, services or other facilities outside the country in which they are based…. Unless otherwise specified, the term “multinational enterprise” is used in this Declaration to designate the various entities (parent companies or local entities or both or the organization as a whole) according to the distribution of responsibilities among them, in the expectation that they will cooperate and provide assistance to one another as necessary to facilitate observance of the principles laid down in the Declaration".*
[197] OECD Guidelines, Commentary to the General Policies, para. 10 mentions that "*State-owned multinational enterprises are subject to the same recommendations as privately-owned enterprises, but public scrutiny is often magnified when a State is the final owner. The OECD Guidelines on Corporate Governance of State-Owned Enterprises are a useful and specifically tailored guide for these enterprises and the recommendations they offer could significantly improve governance*".
[198] The OECD Guidelines (2011), I. Concepts and Principles, para. 4.

significant influence over the activities of others, their degree of autonomy within the enterprise may vary widely from one multinational enterprise to another". [199] Accordingly, the parent companies and every local entity are expected to co-operate and assist each other properly in observing the guidelines depending on the degree of their responsibilities distributed under the terms of their contract.[200] In determining the degree of influence of an entity over another, several factors, such as nature of the relationship between the parent entity and other entities, the form of ownership and the size, nature and location of the operations conducted by that entity, should be taken into account and a careful analysis should be made.[201] For example, merely owning the majority of shares of an entity or providing knowledge and resources to a company could not be considered by themselves as decisive factors for concluding that an entity has significant influence over another entity.[202]

On the other hand, the UN Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights broadly define the term TNC so as to cover three different concepts without making a clear-cut distinction between the categories of companies: all types of business entities, foreign investment companies and powerful transnational companies.[203] Moreover, the definition of 'other business enterprises' demonstrates that the UN Norms are designed to be applied to every business enterprise, which has any link to a transnational corporation.[204] Accordingly, if the impact of the activities of a national small-business entity extends beyond the national borders of a country, the UN Norms would equally be applied to that enterprise.

---

[199] It is also expressly provided that "*multinational and domestic enterprises are subject to the same expectations in respect of their conduct wherever the Guidelines are relevant to both*". The OECD Guidelines (2011), I. Concepts and Principles, para. 4 and 5.

[200] The same approach is adopted in the (2006) ILO Tripartite Declaration, Preface para. 6.

[201] 1977 ILO Tripartite Declaration, Preface para. 6.

[202] See Gatto, **op. cit.**, pp. 38-39.

[203] The definition given is as follows: "*an economic entity operating in more than one country or a cluster of economic entities operating in two or more countries - whatever their legal form, whether in their home country or country of activity, and whether taken individually or collectively*". The UN Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights, UN Doc. E/CN.4/Sub.2/2003/12/Rev.2 (2003), para. 20. This three-fold categorization mentioned by Backer has its roots in the political history of States where the Western, socialist and third world blocs preferred different definitions for describing the corporations operating cross-border. Today, any significant difference between these terms has disappeared. Backer, Larry Catá. "Multinational Corporations, Transnational Law…", p. 337; Clapham, **Human Rights Obligations…**, p. 200, f.n. 20.

[204] The UN Norms (para. 21) define the 'other business enterprises' as "*any business entity, regardless of the international or domestic nature of its activities, including a transnational corporation, contractor, subcontractor, supplier, licensee or distributor; the corporate, partnership, or other legal form used to establish the business entity; and the nature of the ownership of the entity*".

UN Draft Code of Conduct on Transnational Corporations is one of the most important documents that give a detailed definition for the term 'transnational corporation'. According to this definition, the Code of Conduct would be universally applicable to all enterprises, which comprise both parent and domestic entities located in two or more countries and all of which conduct their operations under a system of decision-making.[205] Inasmuch as these inter-linked entities[206] follow coherent policies and common strategies that have been adopted through one or more decision-making centres, the transnationality of the entities that form the corporation would not be questioned based on their country of origin or ownership, whether private, public or mixed.[207]

Finally, the UN Guiding Principles on Business and Human Rights do not give a precise definition of transnational corporation and frequently prefer the term 'business' for referring to all kinds of enterprises. It is accentuated under the UN Guiding Principles that all enterprises have the responsibility to respect human rights "*regardless of their size, sector, operational context, ownership and structure*".[208] However, adding to what the other international documents have already expressed, special emphasis is given on both these factors and the severity of the adverse human rights impact as tools of assessment in determining the level of responsibility of an enterprise which may cause human rights violations.[209] It is also emphasized that the level of responsibility of enterprises would not only depend on their size, but also on the severity, scale and scope of the adverse impact they cause.[210]

1.4.3. Duty - Obligation

The terms duty and obligation are often used interchangeably. For example, The Oxford Dictionary of Law defines obligation as a 'legal duty'[211], whereas Black's Law Dictionary underlines that an obligation is a legal or moral duty established on a contractual or statutory basis allowing the obligee to force the

---

[205] UN Draft Code of Conduct, para. 1(a), (b), (c) and 2.
[206] This link implies an exercise of significant influence of one or more entities over the other(s), especially by sharing knowledge, resources and more importantly responsibility with these other entities. UN Draft Code of Conduct, para. 1(a).
[207] UN Draft Code of Conduct, para. 1(a).
[208] 2011 UN Guiding Principles on Business and Human Rights: Introduction to Guiding Principles, Annex, II, A.14.
[209] **ibid.**
[210] **ibid.**
[211] Oxford Dictionary of Law, OUP, 7th ed., 2009.

obligor to do or not to do something.[212] Likewise, the term duty is defined as a 'legal obligation' arising from a standard of care, a contractual relationship or a statutory norm, 'for which somebody else has a corresponding right' and the breach of which would give rise to a legal remedy.[213] For example, Lambooy comments that the term 'duty' refers to a legal obligation derived from an international treaty to which the duty-owner is a party.[214]

However, obligation is only one of the various types of 'duties', legally owed to a person due to a right owned by that person. In other words, especially in Roman law, an obligation is a bond of law (*vinculum juris*) implying a right *in personam* for one party and at the same time corresponding to a duty for the other party.[215] As Rosemann puts more clearly, the term 'duty' is used for illuminating a concrete and specific action or omission that is required for complying with a general obligation to respect, protect or fulfil which is provided for under an international human rights treaty.[216] Furthermore, Rosemann draws attention to the language of both of the 1966 UN Covenants, which use the word 'duty' for the acts or omissions of individuals, while the word 'obligation' is preferred in the provisions directed towards the State actors.[217] For example, the Preambles of the twin Covenants provide that "*the individual, having duties to other individuals and to the community to which he belongs, is under a responsibility to strive for the promotion and observance of the rights recognized in the present Covenant*".[218]

Moreover, the term 'obligation' comprises both procedural obligations and substantive obligations.[219] Rosemann asserts that currently there is no procedural obligation, such as the obligation to report, for transnational corporations under international law. However, he adds that substantive obligations such as prohibition

---

[212] *i.e.* positive obligations and negative obligations. Black's Law Dictionary, p. 1104.
[213] "Duty" is also defined as "*any action, performance, task, or observance owed by a person in an official or fiduciary capacity". See* Black's Law Dictionary, pp. 543-545.
[214] Tineke Lambooy, "Corporate Due Diligence as a Tool to Respect Human Rights", **Nethl. QHR**, Vol. 28/3, 2010, p. 431.
[215] John Salmond, "Jurisprudence", Glanville L. Williams (ed.), Sweet & Maxwell, 10th ed., 1947, p. 460 cited in Black's Law Dictionary, p. 1104.
[216] Nils Rosemann, "Business Human Rights Obligations - The 'Norms of the Responsibility of Transnational Corporations and Other Business Enterprises with Regard to Human Rights", **Nordic J. HR**, Vol. 23, Nr. 1, 2005, p. 58.
[217] **ibid.**
[218] **ibid.** See also Article 19(3) of the ICCPR on the limitation grounds of the freedom of expression, which stresses that the exercise of the rights under Article 19 carries with it special duties and responsibiliies.
[219] **ibid.**, pp. 45-46.

of slavery, servitude, and forced or compulsory labour (*e.g.* Article 8 of the ICCPR) do exist also for corporations.[220]

For example, General Comment No. 5 on persons with disabilities provided that Governments have a 'duty' to ensure compliance with their 'obligations' under the ICESCR by taking appropriate measures to temper, complement, compensate for, or override the results produced by the free market forces to the detriment of the persons with disabilities.[221] Therefore, even if the violation of rights of persons with disabilities is caused by the act or omission of a private actor, it is the obligation of the Governments to remedy the social and economic conditions causing or contributing to the horizontal human rights violations.[222]

Another example is the General Comment no. 13 of the Committee on Economic, Social and Cultural Rights (CESCR) concerning the right to education under Article 13 of the ICESCR. In the General Comment, the Committee mentioned that "*[t]he obligation to provide primary education for all is an immediate duty of all States parties*".[223] Therefore, the Committee, here, stressed the specific duty of the States Parties to the ICESCR to provide primary education for all.

In the General Comment no. 14 concerning the right to highest attainable standard of health under Article 12 of the ICESCR, the Committee addressed some of the specific duties of States to fulfil their obligation to protect the right to health.[224] For example, States have the duty to adopt legislation or to take other measures ensuring equal access to health care and health-related services provided by third parties and each State has a duty to take all the steps necessary to ensure that everyone has access to health facilities, goods and services so that they can enjoy, as

---

[220] **ibid.**

[221] CESCR, General Comment No. 5, Persons with disabilities (11th sess., 1994), U.N. Doc E/1995/22 at 19 (1995), rep. in Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, U.N. Doc. HRI/GEN/1/Rev.6 at 24 (2003), para. 12.

[222] Consequently, the primary and ultimate responsibility rests with the States in case of violations of economic, social and cultural rights of persons with disabilities by private actors. See **ibid.,** para. 12. Reference is also made to the World Programme of Action concerning Disabled Persons, para. 3.

[223] CESCR, General Comment No. 13, The right to education (Twenty-first sess., 1999), U.N. Doc. E/C.12/1999/10 (1999), rep. in Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, U.N. Doc. HRI/GEN/1/Rev.6 at 70 (2003), para. 51.

[224] CESCR, General Comment No. 14, The right to the highest attainable standard of health (22nd sess., 2000), U.N. Doc. E/C.12/2000/4 (2000), rep. in Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, U.N. Doc. HRI/GEN/1/Rev.6 at 85 (2003), paras. 35 and 53.

soon as possible, the highest attainable standard of physical and mental health.[225] Accordingly, even if the States delegate their powers to private actors or privatize the provision and supply of certain public services, they shall remain responsible for fulfilling the duties imposed on them under the international human rights documents. For example, as emphasized under the General Comment no. 15 on the right to water, the States "*have a constant and continuing duty under the Covenant to move as expeditiously and effectively as possible towards the full realization of the right to water*",[226] even if the supply of water is privatized.

1.4.4. Responsibility – Accountability - Liability

The terms responsibility, accountability and liability are also concepts that pose questions with regard to their exact legal content and meaning. For example, Gatto notes that the terms 'responsibility' and 'accountability' have almost the same meanings in legal English.[227] On the other hand, Karliner and Bruno stress that even though it is true that the two terms are, in general, mutually supportive of each other, it is very important to acknowledge the nuance between these terms in critical legal assessments, especially when the business and human rights violations are at issue.[228] The term responsibility, when used in the context of corporate conduct, usually implies a semi-legal or moral obligation.[229] Likewise, the term accountability may also have political and moral implications without any legal consequences. However, such a conclusion would be an overgeneralization, since there are also considerable examples of legal responsibilities. To sum up, corporate responsibility may be defined as the status of having moral, political, semi-legal or legal duties and obligations, while corporate accountability is being able to answer political and legal questions coming from the judicial bodies, governmental authorities, or the stakeholders with substantial reasons and convincing explanations and to justify the actions and decisions or the products and services of the corporation.[230]

---

[225] **ibid**.
[226] CESCR, General Comment 15, The right to water (29th sess., 2003), U.N. Doc. E/C.12/2002/11 (2002), rep. in Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, U.N. Doc. HRI/GEN/1/Rev.6 at 105 (2003), para. 18.
[227] Gatto, **op. cit.**, pp. 16-17.
[228] Joshua Karliner & Kenny, Bruno, "USA: Corporate Responsibility vs. Accountability", International Herald Tribune, July 10th, 2002, http://www.corpwatch.org/article.php?id=3110, accessed on 25.02.2012; Rosemann, "Business Human Rights Obligations - The 'Norms…", p. 58.
[229] Lambooy, **op. cit.**, p. 431.
[230] Gatto, **op. cit.**, pp. 16-17; Rosemann, "Business Human Rights Obligations - The 'Norms…", p. 53.

The term liability is also generally used as the synonym of legal responsibility.[231] Slomanson tries to discern a difference with regard to the various uses of the term liability. According to this, liability is, on the one hand, the synonym of 'duty' and opposite of privilege or liberty, and on the other hand, the correlative of power and opposite of immunity.[232] Pellet argues that "*it is ... possible to discern the first outlines of a 'soft' responsibility, which the use of the term 'liability' in English describes more faithfully than does the undifferentiated use of the term 'responsabilité' in French*."[233] In the end, as Anson admits, too, the "[a]*ccurate legal thinking is difficult when the fundamental terms have shifting senses."*[234]

Nollkaemper adverts the re-introduction of the dichotomy of responsibility and liability and puts that "*'[r]esponsibility' focuses on the conduct of the wrongdoer. It allows for a different evaluation, depending on the public or private nature of the interest protected by the obligation. Liability focuses more on the injured entity and its right to reparation, in particular compensation, which does not necessarily depend on the character of the initial obligation"*.[235] In the same direction, Sorel summarizing the view of Zemanek agrees with him that *"... the responsibility is the consequence attached to the breach of an international obligation, whereas liability only correspond to the duty of reparation or of compensation in the absence of a breach of obligation (liability for acts not prohibited by international law)*".[236] Sorel himself mentions that if there is an internationally wrongful act committed, this would give rise to international responsibility; whereas the act or omission amounting to non-compliance with an international obligation without constituting a wrongful act, such as a breach of the obligation of due diligence, would give rise to 'soft responsibility'.[237]

---

[231] Oxford Dictionary of Law defines liability as "1. an amount owed, 2. a legal duty or obligation." Oxford Dictionary of Law, OUP, 7th ed., 2009, p. 325.
[232] William R. Slomanson, "Principles of the Civil Law of Contract", Arthur L. Corbin (ed.), 3rd Am. ed., 1919 cited in Black's Law Dictionary, p. 932.
[233] Pellet, **op. cit.**, p.11.
[234] Slomanson, op. cit., p. 932
[235] André Nollkaemper & Dov Jacobs, "Shared Responsibility in International Law: A Concept Paper", ACIL Research Paper No 2011-07 (SHARES Series), finalized in 2 August 2011, p. 51 *et seq*.; Karavias, Markos, "Shared Responsibility and Multinational Enterprises", 62 **Neth. Int. Law Rev.** 91, 2015, pp. 91-117.
[236] Karl Zemanek, "Causes and Forms of International Liability" in **Contemporary Problems of International Law: Essays in Honour of Georg Schwarzenberger**, London, Stevens and Sons, 1988, p. 319 cited in Jean-Marc Sorel, "The Concept of 'Soft Responsibility" in Crawford & Pellet & Olleson (eds.), **The Law of International Responsibility**, OUP, 2010, p. 166.
[237] **ibid.**, p. 167.

The concept of corporate social responsibility (CSR) is another type of responsibility that should be mentioned when one speaks of human rights responsibilities of corporations.[238] The concept of CSR dates back to the times of Industrial Revolution when the factory owner Robert Owen established 'social villages' with the purpose of ameliorating the working, health and education conditions of his workers and their families.[239] In the 1920s Thorstein Veblen introduced the idea of 'corporate accountability' to the business world.[240] Finally, in 1950s Karl William Kapp, founder of ecological economics, criticized the externalized adverse effects of corporate conduct on social and environmental rights.[241] Later, by the end of 1980s, the neoliberal policies along with the phenomenon of globalization, business corporations have grown and corporations became as powerful as States in terms of economy, expertise, personnel, technology and lobbying powers.[242] On the other hand, information revolution has empowered the civil society, *i.e.* NGOs and other pressure groups, enabling them to force the corporations for the adoption of policies respectful of human rights, environment and labour rights.[243] While corporations were eager to adopt codes of conduct for various reasons, they nevertheless preferred to underline the 'voluntary' character of corporate social responsibility, adding that it is 'over and above compliance with the minimum legal requirements'.[244] NGOs, however, tended to emphasize that the

[238] It should be noted that the concept of CSR has other dimensions related mostly with non-legal perspectives of the problems of corporate behaviour. For example, branches such as business management, marketing, public relations and public administration are also interested in examining the issue of corporate social responsibility. Moreover, concepts such as corporate citizenship, corporate sustainability and ethical corporation are used for referring to the CSR. John Sabapathy, "In the Dark All Cats are Grey: Corporate Responsibility and Legal Responsibility" in Stephen Tully (ed.), **Research Handbook on Corporate Legal Responsibility**, Edward Elgar, 2005, pp. 235-253.

[239] Gregorio de Castro, "Corporate Social Responsibility and restructuring in the EU: A historical overview of recent developments" in **Governance, International Law & Corporate Social Responsibility**, ILO Research Series, 116, ILO Publications, 2008, p. 130. See also Rona Aybay, **Sosyalizmin Öncülerinden Robert Owen: Yaşamı, Eylemi, Öğretisi**, (*Robert Owen as One of the Pioneers of Socialism: Life, Actions and Thoughts*), Alfa yay., İstanbul, 2012.

[240] Thorsten Veblen, "The Engineers and The Price System", Batoche Books, 1921 cited in de Castro, **op.cit.,** p. 130.

[241] Karl William Kapp, **The Social Costs of Private Enterprises**, 2nd rev. ed., 1988 (originally published in 1950); Sebastian Berger, "The Discourse on Social Costs: Kapp's Impossibility Thesis vs. Neoliberalism" in Elsner Wolfram *et al.* (eds.), **Social Costs Today: Institutional Analyses of the Current Crisis**, Routlege, 2012 cited in de Castro, **op.cit.**, p. 130.

[242] Conway W. Henderson, **Understanding International Law**, Wiley-Blackwell, 2010, p. 39.

[243] Mauro Palma, "The Possible Contribution of International Civil Society to the Protection of Human Rights" in Antonio Cassese (ed.), **Realizing Utopia: The Future of International Law**, OUP, rep. 2012, pp. 76-88.

[244] Jennifer Zerk, **Multinationals and Corporate Social Responsibility: Limitations and Opportunities in International Law**, CUP, 2006, pp. 29-30. To note, after examining various Codes on CSR, it has been asserted that these codes may contain rules and principles which may be both mandatory and advisory in nature. See Tony Edwards & Paul Marginson & Anthony Ferner & Olga

corporate social responsibility is the obligation of corporations to behave and operate as 'good corporate citizens' without legal enforcement.[245]

Therefore, the definition of corporate social responsibility is highly controversial. However, I may briefly mention that corporate social responsibility implies the voluntary adoption of ethical policies,[246] principles and behaviours that not only regulate the vertical relations within the corporation among the shareholders, directors, managers and employees, but also aim to preserve the profitability of business conduct and at the same time to be respectful of human rights in its external and horizontal relations with the governments, peoples, local communities, groups, individuals, customers and environment.[247] For example, ISO 26000 defines corporate social responsibility as being responsible "*for the impacts of its decisions and activities on society and the environment, through transparent and ethical behaviour that i. contributes to sustainable development, including health and the welfare of society; ii. takes into account the expectations of stakeholders; iii. is in compliance with applicable law and consistent with international norms of behaviour; iv. is integrated throughout the organization and practices in its relationships.*"[248]

With regard to our study, it could be argued that corporations may have the tendency to foreground corporate social responsibility, in order to go around regulations and laws [249] and avoid any procedure under the accountability

---

Tregaskis, **Corporate Social Responsibility in Multinational Companies: Management initiatives or negotiated agreements?**, International Institute for Labour Studies, International Labour Organization, 2007, pp. 5-6.

[245] Zerk, **op. cit.**, p. 30.

[246] For an early elaboration on the concept *see* Matthew Lippman, "Transnational Corporations and Repressive Regime: The Ethical Dilemma", **Cal. W. Int'l L.J.**, Vol. 15, 1985, pp. 542-551.

[247] Douglas M. Branson, "The Social Responsibility of Large Multinational Corporations", Transnational Law, Vol. 16, 2002, pp. 120-121; Ramon Mullerat, "The Global Responsibility of Business" in Ramon Mullerat (ed.), **Corporate Social Responsibility: The Corporate Governance of the 21st Century**, Kluwer Law International, 2005, p.3 *et seq*; Michael Hopkins, "Criticism of the Corporate Social Responsibility Movement" in Mullerat (ed.), **Corporate Social Responsibility**…, p. 475.

[248] ISO 26000, Terms and Definitions, 2.18. There are seven principles of corporate social responsibility under ISO 26000: 1. accountability, 2. transparency, 3. ethical behaviour, 4. respect for stakeholder interest, 5. respect for rule of law, 6. respect for international norms of behaviour, and 7. respect for human rights.

[249] Dwight W. Justice, "The International Trade Union Movement and the New Codes of Conduct" in R. Jenkins & R. Pearson & G. Seyfang (eds.), **Corporate Responsibility & Labour Rights: Codes of Conduct in the Global Economy**, London, Earthscan, 2002, 90-100, at p. 99.

mechanisms that they would not be able to control.[250] However, the legitimacy of use of political or economic power can only be maintained if it is used within the limits of law.[251] Therefore, the review of legality of use of power by the political or economic actors through judicial or quasi-judicial control mechanisms would guarantee the accountability of these actors for their decisions or acts which violate international norms of human rights.[252] Moreover, tools for the provision of accountability such as transparency, reporting and openness to the public, which facilitate the responses of corporations to the questions by the interested parties, at the same time, are indirect means of ensuring corporate social responsibility.[253] Consequently, the corporate social responsibility and corporate accountability should be considered as tools complementing each other.

Finally, I shall note that the law of international responsibility significantly differs from the law of national systems on responsibility. Unlike the national legal systems, the concept of international responsibility cannot be strictly categorized as civil responsibility and criminal responsibility.[254] An exception to this is, obviously, the international criminal courts and tribunals, which have been authorized to try the individual perpetrators of international crimes.[255] Nevertheless, when the jurisdictional proceedings and legal reasoning adopted by the ICJ is examined, it can be observed that the *sui generis* character of international law of responsibility is reflected even in the case of international crimes.[256]

---

[250] Joshua Karliner & Kenny Bruno, "USA: Corporate Responsibility vs. Accountability", International Herald Tribune, July 10th, 2002, http://www.corpwatch.org/article.php?id=3110, accessed on 25.02.2012.

[251] Slaughter, Ann-Marie. "The Accountability of Government Networks", **Ind. J. Global Legal Stud.**, Vol. 8, 2001, p. 349, 360, 361 and 347-367 cited in Rosemann, "Business Human Rights Obligations - The 'Norms …" p. 53.

[252] Rosemann, Nils. "Business Human Rights Obligations - The 'Norms …", p. 53.

[253] Gatto, **op. cit.**, p. 17.

[254] Hans Kelsen, "Théorie du droit international public", 1953-III, 84 Recueil des cours 1, p. 87 Nevertheless, Ratner prefers to refer to a two-fold categorization of responsibility as civil and criminal. If we adopt the approach differentiating between civil responsibility and criminal responsibility, it may be added that civil responsibility includes state responsibility, group civil responsibility (*e.g.* guerilla movements) and individual civil responsibility. Steven R. Ratner, & S. Jason Abrams, **Accountability for Human Rights Atrocities in International Law: Beyond the Nuremberg Legacy**, 2nd ed., OUP, 2001, p. 15.

[255] Pellet, **op. cit.**, p.12.

[256] Application of the Convention on the Prevention and Punishment of the Crimes of Genocide (Bosnia and Herzegovina v Serbia and Montenegro), Merits, Judgment, ICJ Rep. 2007, paras. 65-66. Crawford, "The System of International Responsibility"…, p. 22.

Therefore, it is hard to make an accurate systematization of international responsibility.[257] Rather, international law has a hybrid system of law of responsibility not only combining the principles of civil law and criminal law but also having *sui generis* principles with regard to responsibility. For example, human rights violations can be subject to both civil proceedings and criminal prosecutions in domestic systems depending on the definitions of 'crime' and 'tort' in each national legal system.[258] Despite having common concepts with domestic laws, such as 'aiding and abetting', international human rights law and humanitarian law have been developed as *sui generis* legal branches differing from the domestic law systems.[259] Moreover, with the exception of the ILC Articles on State Responsibility (ARSIWA), which currently do not have a legally binding effect except for the provisions codifying the customary norms, there is no unique type of responsibility under a general system envisaged by a single international law document. The regime of international responsibility for a certain act or omission is provided for in the special treaty, which specifically regulates that certain behaviour.

Furthermore, unlike the national legal systems, the source of obligation (*e.g.* crime, contract, tort, delict) is not a factor to be considered in determining the type or degree of liability.[260] As affirmed in Article 12 of the ARSIWA, the origin or character of an international obligation does not affect the responsibility of the State. In other words, "*there is no distinction between contractual and tortuous responsibility, so that any violation of a State of any obligation, of whatever origin, gives rise to State responsibility and consequently, to the duty of reparation.*"[261]

An exceptional concept, which may be relevant with regard to human rights violations caused by corporate conduct, is the objective liability of certain actors that operate in certain areas of activity. To be more specific, even if it is an exceptional

[257] Roucounas gives the example of responsibility for pollution at sea and air pollution. For the former, the UNCLOS holds the owner of the ship, a private person, responsible for its polluting activities at sea. In the latter case, however, the State is responsible for the transboundary harm occurred on the territory of another State due to the activities of a private person on the territory of that State. Roucounas, **op. cit.**, p. 400.

[258] *See e.g.* Craig Scott (ed.), **Torture as Tort: Comparative Perspectives on the Development of Transnational Human Rights Litigation**, Oxford, Hart Publishing, 2001; Jane Wright, **Tort Law and Human Rights**, Oxford, Hart Publishing, 2001.

[259] *Doe I v. Unocal Corp*., 395 F. 3d 932- Court of Appeals, 9th Circ. 2002, p. 950.

[260] Crawford, "The System of International Responsibility"…, p. 21.

[261] Case concerning the difference between New Zealand and France concerning the interpretation or application of two agreements, concluded on 9 July 1986 between the two States and which related to the problems arising from the Rainbow Warrior Affair, decision of 30 April 1990, Vol. XX, pp. 215-284, p. 251, para. 75.

type of responsibility, damage and culpability may not be *sine qua non* elements of responsibility.[262] Damage is a factor to be taken into account regarding the obligation to make reparation. This is the reparative aspect of responsibility. However, there is also the preventive aspect of responsibility, which obliges the risk-taker to adopt measures for preventing the occurrence of any damage.[263] Failure of the obligor to adopt necessary measures to prevent a violation may constitute a breach of its international obligations, and such an act or omission attributable to the international actor would be deemed sufficient to hold it internationally responsible.[264] Pellet calls this revolutionary shift of understanding of the concept of responsibility as "objectivization of international law". Pellet explains the concept of objective liability by emphasizing that the source of responsibility is not the act or omission of the international actor (subject), but it is rather the consequence (*i.e.* risk or damage) of the act or omission, which amounted to a breach of an obligation under a treaty, customary law, or principles of international law.[265] Pellet holds that:

> *"The objectivization of responsibility for internationally wrongful acts which results from the excision of damage as a precondition for responsibility is at the origin of a transformation of the function which responsibility is called upon to fulfil in an international society which has less purely inter-state character and is better integrated than formerly. The international law of responsibility has distanced itself from the 'civil law' model which previously characterized it, and no longer solely plays the role of a compensatory mechanism, to which it was for a long time confined. It is now also and perhaps principally, a mechanism having as its function the condemnation of breaches by subjects of international law of their legal obligations and the restoration of international legality, respect for international law being a matter in which the international community as a whole has an interest."*[266]

---

[262] *Cf.* prevention of transboundry damage resulting from hazardous activities and injurious consequences arising out of acts is not prohibited by international law; Pellet, **op. cit.**, p.12.
[263] **ibid.**, p. 12.
[264] **ibid.**, p. 9.
[265] **ibid.**, p. 10.
[266] **ibid.**, p. 15.

2. STATE RESPONSIBILITY FOR THE ACTS OF CORPORATIONS

International human rights law is founded on the principle that States have the primary responsibility for human rights violations. States are under a legal obligation to respect, protect and fulfil human rights. In general terms, the negative duty of the State to respect implies that State actors shall refrain from interfering with the free and full exercise of human rights by the right-holders under their jurisdiction. The duty of the State to protect human rights implies that the State actors are under an obligation to ensure that non-state actors also respect the free and full enjoyment of human rights. As the jurisprudence of the regional human rights courts and the decisions and recommendations of international human rights bodies affirm, States are under a positive obligation to adopt preventive and protective measures including civil, administrative and/or criminal legislation in order to fulfil their convention obligations under human rights law. States shall also adopt any other necessary measure for the creation of a social, economic and political environment, where the individuals, groups and other organs of society fully enjoy the universally recognized rights and fundamental freedoms.[267] However, even though there may be exceptions depending on the circumstances of each case,[268] the State responsibility to protect is an obligation of conduct and not of result. In other words, if the State acts with due diligence in identifying, preventing, mitigating and investigating the actual and potential private interferences with the rights and freedoms, it would not be possible to attribute responsibility on the State.

On the other hand, corporations as the perpetrators of violations bear a secondary responsibility for the consequences of their acts and omissions without an

[267] Article 2(1) of the Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms Adopted by General Assembly resolution 53/144 of 9 December 1998.
[268] CESCR, General Comment No. 3, The nature of States parties obligations (art.2, par.1), 14.12.1990, para. 1.

international legal obligation to implement human rights standards.[269] Therefore, whenever imposition of human rights obligations on TNCs comes into question, a referral to the responsibility of States would also be required.[270] However, the redefined international legal order shaped with the significant influence of non-state actors proves that the measures adopted by States, whether international or national, remain ineffective for the protection of human rights against violations perpetrated by powerful TNCs.[271] Therefore, it becomes inevitable to find ways of legally obliging the TNCs to respect and protect human rights, labour rights and the environment.

One of the tools of holding TNCs accountable for their activities, operations, services or products causing violation of human rights law, is international regulation of corporate conduct. The possibilities of such direct international regulation would be elaborated on thoroughly in the third, fourth and fifth chapters by putting special emphasis on the existing and potential human rights obligations of corporations in the international arena. An analogy of human rights obligations of the State actors would also be used as a pathfinder. However, international regulation of corporate conduct shall always be understood as a complementary tool to domestic regulation, even in situations involving breaches of *erga omnes* obligations.[272] Therefore, the legal context of domestic regulation will be briefly examined in this chapter, in order to demonstrate the existing national tools for holding TNCs responsible for violations of rights and freedoms.

2.1. State Responsibility to Protect Human Rights

As mentioned above, responsibility to protect (RtoP) imposes positive obligations on States to take appropriate and effective measures for preventing and mitigating risks and harms, which may be caused as a consequence of the conduct of third parties.[273] This includes taking administrative, legislative and judicial measures

---

[269] Clapham, **Human Rights Obligations…**, p. 228.
[270] de Schutter, "The Accountability of Multinationals…", p. 233.
[271] Reinisch, **op. cit.**, pp. 74-75.
[272] For a thorough discussion on concurrence of individual and state responsibility see André Nollkaemper, "Concurrence Between Individual Responsibility and State Responsibility in International Law", **ICLQ**, Vol. 52(3), 2003, pp. 615-640, p. 631.
[273] Alastair Mowbray, **The Development of Positive Obligations under the European Convention on Human Rights by the European Court of Human Rights**, Hart Publishing, Oxford, 2004.

as the States may deem appropriate. Enforcing human rights obligations on private actors through regulation and monitoring the compliance of corporations with domestic laws is another aspect of the RtoP. Furthermore, holding the perpetrators of human rights violations accountable, with the imposition of civil or criminal law sanctions and/or providing other appropriate remedies for the victims, also facilitates fighting impunity and contributes to the prevention of foreseeable abusive corporate conduct. Promotion of human rights by encouraging tolerance, raising awareness and building the necessary infrastructures might also be included in the concept of State's RtoP.

The UN Guiding Principles on Business and Human Rights, which will be examined under the third chapter, is a valuable source with regard to the international responsibility of States in cases of human rights abuses perpetrated by private actors. In the "Foundational Principles" section of the Guiding Principles, it is underlined that States should take appropriate and effective preventive or remedial measures to prevent, investigate, punish and redress any human rights violation committed by non-state actors within their territory and/or jurisdiction. These measures may include policy changes, legislative acts, regulations and adjudication.[274] In the Commentary to the UN Guiding Principles, it is underlined that the State's duty to protect is a 'duty of conduct' and not a 'duty of result'. In other words, while the state is responsible for protecting human rights and preventing any violation, it is not *per se* responsible for human rights violations committed by non-state actors that has occurred within its territory and/or jurisdiction. Nevertheless, if a State fails to prevent an act violating human rights or if the act is attributable to the State, it would be internationally responsible for breaching its own human rights obligations.[275] Additionally, the UN Guiding Principles highlight that States should put their policies, legislations, regulations and adjudicative practices so clear that the corporations know that they should respect human rights in the territory and under the jurisdiction of that State.[276]

---

[274] The UN Guiding Principles on Business and Human Rights, Introduction to Guiding Principles, Annex, I,A.1.

[275] In the Commentary it is added that "*States also have the duty to protect and promote the rule of law, including by taking measures to ensure equality before the law, fairness in its application, and by providing for adequate accountability, legal certainty, and procedural and legal transparency.*" UN Guiding Principles on Business and Human Rights, Introduction to Guiding Principles, Annex, I,A.1.

[276] **ibid.**, Annex, I,A.2.

In the "Operational Principles" section of the Ruggie's Framework, it is stressed that States' duty to protect includes the obligation to legislate in a way that ensures respect for human rights by corporations.[277] States should also remove any obstacle in their laws and policies that prevents the corporations from acting in a respectful way in their activities and operations.[278] Furthermore, States should guide the corporations in their operations to ensure that they respect human rights.[279] Finally, corporations should be encouraged to communicate regarding the adverse effects of their operations.[280]

The UN Guiding Principles pay special attention to the responsibility of corporations operating in the conflict-affected areas. With regard to the States' duty to protect in the conflict-affected areas, it is highlighted that States should actively engage in the risk-assessment processes of corporations in the earliest stages of their operations and help them to identify and prevent possible human rights abuses. Additionally, if the corporation at issue has been associated with gross human rights violations, States should refrain from providing public services to that company and should not engage in any activity conducted or controlled by that company.[281] In the Commentary, it is stressed that since in the conflict-affected areas the host state may usually not have an effective control over the territory, the duty to protect human rights lies with the home state and the neighbouring states, as well, to provide additional support for the protection of human rights. Therefore, in order to prevent human rights violations, home states should ensure a close cooperation between their agencies, the corporation, and the agencies of the host state. Furthermore, in case of a failure in cooperation or prevention of human rights abuses, home states should take appropriate and effective measures for forcing the corporation to act in line with the human rights obligations of the State. These measures may include "*denying or withdrawing existing public support or services, or where that is not possible, denying their future provision*." [282]

[277] **ibid.,** Annex, I,B.3, a.
[278] **ibid.,** Annex, I,B.3, b.
[279] **ibid.,** Annex, I,B.3, c.
[280] **ibid.,** Annex, I,B.3, d.
[281] **ibid.**, Annex, I,B.7 and its Commentary.
[282] **ibid.**

Finally, with regard to the State's duty to protect human rights, it is highlighted that both vertical and horizontal coherences in policies of government agencies and State-based institutions are required in order to ensure the protection of human rights.[283] States, as members of international trade and financial organizations, should also contribute to the determination of international policies in a way that would not hinder their duty to protect human rights. Likewise, international policies should encourage corporations to respect human rights in their operations.[284]

To note, second generation rights, which are closely related with and frequently affected by the corporate activities, -by their very nature- already impose duties on States to take affirmative steps to the maximum of their available resources with a view to achieving progressively their full realization.[285] This obligation implies that States "*must demonstrate that every effort has been made to use all resources that are at [*their*] disposition in an effort to satisfy, as a matter of priority, those minimum obligations".*[286] As the CESCR mentioned in its General Comment No.3, despite the relatively soft wording and flexibility of Article 2 of the ICESCR as compared to its equivalent in the ICCPR, it imposes a positive duty on States to take deliberate, concrete and targeted steps towards the full realization of the rights recognized under the Covenant, within a reasonably short period of time and as expeditiously and effectively as possible.[287] 1997 Maastricht Guidelines on Violations of Economic, Social and Cultural Rights also stipulate that the satisfaction of the minimum core obligations, especially for the vulnerable groups and individuals,[288] should be provided for regardless of the scantiness of the resources and situations of severe economic restraints.[289] Furthermore, the CESCR emphasized

---

[283] "*Vertical policy coherence entails States having the necessary policies, laws and processes to implement their international human rights law obligations. Horizontal policy coherence means supporting and equipping departments and agencies, at both the national and subnational levels, that shape business practices – including those responsible for corporate law and securities regulation, investment, export credit and insurance, trade and labour – to be informed of and act in a manner compatible with the Governments' human rights obligations."* **ibid.,** Annex, I,B.8 and its commentary.
[284] **ibid.,** Annex, I,A.10.
[285] ICESCR Article 2(1).
[286] CESCR, General Comment No. 3, The nature of States parties obligations (art.2, par.1), 14.12.1990, para. 10.
[287] **ibid.**, paras.1, 2 and 9.
[288] **ibid.**, para.12.
[289] The Maastricht Guidelines are the product of the workshop organized by the International Commission of Jurists, the Maastricht Centre for Human Rights and the Urban Morgan Institute for Human Rights. They expressly refer to the jurisprudence of the CESCR and 1996 revision of the European Social Charter and its Additional Protocol Providing for a System of Collective Complaints and 1988 San Salvador Protocol to the American Convention on Human Rights in the Area of

that international assistance and cooperation is very important in the full realization of economic, social and cultural rights and highlighted, and the phrase "*to the maximum of its available resources"* includes not only the local resources but also the resources of the international community as a whole.[290] Having said that, the lack of effective international enforcement mechanisms for the protection of second generation rights has led the international judge to interpret the first generation rights in a way to comprise some of the second generation rights. For example, the right to health has been linked to either the right to life or the right to privacy in line with the *effet uttile* principle. Tzevelekos calls this as the 'pseudo-social' application of civil and political rights.[291]

The General Comments of CESCR highlight that while States have the obligation to prevent and punish acts perpetrated by non-state actors that amount to a violation of a right under the ICESCR, the non-state actors as well are under an obligation to act in a way not being detriment to the rights recognized under the Covenant.[292] The obligation of corporations to respect, protect and fulfil the second generation rights is as important as the obligations of State actors in the sense that they are directly linked to the adverse impacts of the activities of corporations. This is especially the case for situations concerning the right to education, right to health, right to adequate food, right to water and illegal evictions,[293] in which corporations potentially play significant roles.[294] In fact, the criticism referring to the vagueness of

---

Economic, Social and Cultural Rights. Possible influence by the adoption of the Optional Protocols to the ICESCR and the Convention on the Elimination of All Forms of Discrimination against Women is also underlined along with the improvements in the structures of national and international NGOs. Maastricht Guidelines on Violations of Economic, Social and Cultural Rights, para. 10.

[290] CESCR, General Comment No. 3, para. 13.

[291] Vassilis P. Tzevelekos, "In Search of Alternative Solutions: Can the State of Origin be Held Internationally Responsible for Investor' Human Rights Abuses that are not Attributable to it?", **Brook. J. Int'l Law**, Vol. 35, 2010, pp. 190-191. Nevertheless, as Tzevelekos points out, the ECtHR on various occasions held that the allocation of funds by the States Parties is a political and not a judicial decision and the margin of discretion "*is even wider when the issues involve an assessment of the priorities as the allocation of limited State resources*". ECtHR, Sentges v. Netherlands, App. No. 27677/02, 8 July 2003, decision on inadmissibility; O'Reilly and Others v. Ireland (decision on partial inadmissibility), App. no. 54725/00, 28 February 2002.

[292] Gatto, **op. cit.**, p. 67.

[293] The Committee in General Comment No. 7 on forced evictions provided that States shall adopt all appropriate legislative and other measures to prevent and punish forced eviction practices by private third parties. General Comment No. 7 (1997) The right to adequate housing (Art.11.1): forced evictions, CESR 20/05/1997, E/1998/22, paras. 8 and 9.

[294] Report of the Sub-Commission on the Promotion and Protection of Human Rights, Report of the UN HCHR, on the Responsibilities of Transnational Corporations and Related Business Enterprises with Regard to Human Rights, UN Document E/CN/4/2005/91 at 12; D. Kinley & R. Chambers, "The UN Human Rights Norms for Corporations: The Private Implications of Public International Law", **HRLR**, Vol. 6:3, 2006, p. 475.

duties of corporations, especially on the protection of economic, social and cultural rights, is not new. Same assertions have been made with regard to the duties of the States Parties to the ICESCR.

For example, the CESCR, in the General Comment No. 14 on Article 12 of the ICESCR, expressly referred to the private business sector stressing that they also do have responsibilities for the realization of the right to health.[295] The States Parties, as the primary obligators, are under an obligation to take appropriate steps for ensuring a favourable climate, where individuals fully enjoy their right to health free from any interference by the other members of society, and especially by the private business sector. [296] Furthermore, the States should *'establish national mechanisms for monitoring the implementation of their national health strategies*' and they should collaborate with the private sector in implementing these strategies.[297]

A similar obligation exists under Article 2 of the ECHR. For example, the ECtHR held that the obligation to take appropriate steps to safeguard the lives of those within their jurisdiction, the States are required "*to make regulations compelling hospitals, whether public or private, to adopt appropriate measures for the protection of their patients' lives."*[298] Additionally, States shall ensure an effective judicial system, capable of investigating the cause of death and the acts that violated the right to life, whether in public or private health institutions, and they shall guarantee that those responsible are made accountable, including through the adoption of criminal law measures, if necessary.[299]

Likewise, the IAmCtHR, examining the State responsibility for human rights violations perpetrated by private health institutions held that, especially when the right to life and right to personal integrity were at issue, the facts of every case should be carefully examined for deciding on whether a State has fulfilled its

[295] General Comment No. 14 (2000) The Right to Highest Attainable Standard of Health, 11/08/2000, E/C.12/2000/4, para. 42. On the right to health see also AfCommHPR, Centre on Housing Rights and Evictions v. The Sudan, Comm. Nos. 279/03 & 296/05, 2009, paras. 119, 209-210.
[296] CESCR General Comment No. 14, paras. 42 and 55; AfCommHPR, Centre on Housing Rights and Evictions v. The Sudan, Comm. Nos. 279/03 & 296/05, 2009, paras. 209-210.
[297] CESCR General Comment No. 14, para. 56.
[298] Calvelli and Ciglio v Italy, Grand Chamber, App. no. 32967/96, 17 January 2002, paras. 48; Vo v France, App. no. 53924/00, 8 July 2004, para. 89.
[299] Calvelli and Ciglio v Italy, paras. 49, 51. The Court also refers to Erikson v. Italy (dec.), no. 37900/97, 26 October 1999; see also Işıltan v. Turkey, no. 20948/92, Comm. Dec. of 22 May 1995, DR 81-B, p. 35.

positive obligations and acted with due diligence to regulate, supervise and control (investigate) in order to guarantee, to prevent from third party intervention and to protect the right at stake, regardless of the public or private nature of the institution providing health services.[300] The Court mentioned that the State should adopt an adequate normative framework of regulation along with setting standards for the health industry in order to fulfil their obligation to guarantee.[301] Moreover, they should establish official supervision mechanisms for ensuring compliance with the domestic regulations of the public and private health institutions.[302] Finally, in case of violation of a right of a person, reasonable, timely, serious and effective criminal and civil investigation and punishment of those responsible and redress for the victim should be guaranteed by the State.[303]

Furthermore, the obligation to respect the right to health requires the States Parties to refrain from entering into bilateral agreements with TNCs that may result in the infringement of the right to health.[304] More importantly, the Committee expressed that the obligation to protect the right to health requires the States Parties "*to ensure that privatization of the health sector does not constitute a threat to the availability, accessibility, acceptability and quality of health facilities, goods and*

[300] *Case of Ximenes Lopes v Brazil*, IAmCtHR, Ser. C No. 149, 4 July 2006, paras. 137-147 and 88; *Suarez Peralta v. Ecuador*, IAmCtHR, Series C No. 261, 21 May 2013, paras. 127, 131, 133, 149, 152; *Case of González et al. ("Cotton Field") v. Mexico,* IAmCtHR, Ser. C No. 205, 16 November 2009, para. 243.

[301] *Suarez Peralta v. Ecuador*, IAmCtHR, Series C No. 261, 21 May 2013, paras. 132, 134-135; See also Separate opinion of Judge Sergio Garcia-Ramirez, para. 6 on IAmCtHR, Case of Albán-Cornejo et al. v. Ecuador, Merits, Reparations, and Costs, Judgment of November 22, 2007, Series C No. 171. The separate opinion of Garcia-Ramirez is significant in highlighting the current affairs of national health systems. According to him, "*These systems comprise multiple agents for the service and the relevant obligations: private and public providers, companies and doctors, health practitioners, supply vendors, and so on. We are thus dealing with a notoriously large network of rights and duties that is to be managed by the modern State, even where the State is no longer in charge of directly providing the service; such network gives rise to specific duties that are becoming increasingly more complex and growing in number, and relate to the obligations to respect and guarantee the basic rights that are modernized in this context: to life and humane treatment*".

[302] *Suarez Peralta v. Ecuador*, IAmCtHR, Series C No. 261, 21 May 2013, paras. 130, 132, 150 citing *Case of Ximenes Lopes v Brazil*, IAmCtHR, Ser. C No. 149, 4 July 2006, paras. 89, 90 and 99; Case of Albán-Cornejo et al. v. Ecuador, paras. 119, 121; Case of Lazar v. Romania, No. 32146/05. Third Section.16 May 2010, para. 66; Case of Z v. Poland, No. 46132/08. Fourth Section. Judgment of 13 November 2012, para. 76; *Case of the Massacre of Pueblo Bello*, IAmCtHR, Ser. C, No. 140, 31 January 2006, paras. 111 and 112; *Case of the "Mapiripán Massacre" v. Colombia*, IAmCtHR, Ser. C No. 134, 15 September 2005, para. 11.

[303] IAmCtHR puts that the provision obliging the States to make adequate reparation (Art. 63(1) of the American Convention) is a norm of customary law and constitutes one of the fundamental principles of international law. *Suarez Peralta v. Ecuador*, IAmCtHR, Series C No. 261, 21 May 2013, paras. 103, 128, 161.

[304] CESCR General Comment No. 14, para. 50. See also Maastricht Guidelines on Violations of Economic, Social and Cultural Rights, para. 15(j).

services; to control the marketing of medical equipment and medicines by third parties; and to ensure that medical practitioners and other health professionals meet appropriate standards of education, skill and ethical codes of conduct."[305] To that end, the Committee concluded that if the States Parties fail to take all necessary measures to prevent violations of the right to health by private parties, they would be in breach of their convention obligations. The Committee exemplified the following situations as possible breaches by the States:

> *"...the failure to regulate the activities of individuals, groups or corporations so as to prevent them from violating the right to health of others; the failure to protect consumers and workers from practices detrimental to health, e.g. by employers and manufacturers of medicines or food; the failure to discourage production, marketing and consumption of tobacco, narcotics and other harmful substances; ...and the failure to enact or enforce laws to prevent the pollution of water, air and soil by extractive and manufacturing industries.*"[306]

The Committee went even further and commented that in order to comply with the obligations under Article 12 of the ICESCR, the States Parties shall "*prevent third parties from violating the right in other countries, if they are able to influence these third parties by way of legal or political means, in accordance with the Charter of the United Nations and applicable international law.*"[307] This obligation translates into the responsibility of home states to regulate the transnational activities of corporations having their nationality. Lastly, the Committee reminded the States Parties, who are members of international financial organizations, such as the IMF and the WB, that they shall keep in mind their obligations under Article 12 when contributing to the decisions taken by these institutions carrying the potential of adversely affecting the right to health of the peoples in various countries.[308]

---

[305] CESCR General Comment No. 14, para. 35.
[306] **ibid.**, para. 51.
[307] **ibid.**, para. 39.
[308] **ibid.**, para. 39.

Similarly, as the Special Rapporteur on the Right to Food Asbjorn Eide underlined, all members of society share a responsibility for the full realization of human rights.[309] The protection of the right to adequate food is especially important with regard to the activities of TNCs. The CESCR explicitly mentioned in its General Comment that corporations, as the members of the society, "have responsibility in the realization of the right to adequate food".[310] The CESCR concluded that corporations, whether local or transnational, should act in accordance with a code of conduct, which ensures respect for the right to adequate food.[311] States, too, shall guarantee that the activities of corporations are in conformity with the requirements of the free and full exercise of the right to adequate food.[312] Particularly, the CESCR advised that the States Parties may consider adoption of a framework law for implementing strategies for the protection of the right to food in collaboration with the private sector, including the establishment of national and international monitoring and recourse mechanisms concerning the activities of corporations.[313]

With regard to the right to water, the CESCR reaffirmed that the States Parties have a responsibility to protect this right against the interferences by third parties, including corporations. States shall adopt necessary and effective measures, '*including particularly the adoption of legislative measures*' for ensuring equal access to adequate water and preventing water pollution caused or contributed to by corporate activities. The Commentary continues by stressing that "*Where water services (such as piped water networks, water tankers, access to rivers and wells) are operated or controlled by third parties, States parties must prevent them from compromising equal, affordable, and physical access to sufficient, safe and acceptable water. To prevent such abuses an effective regulatory system must be established, in conformity with the Covenant and this General Comment, which*

[309] Asbjorn Eide, Final report of the Special Rapporteur on the Right to food, UN Doc. E/CN/.4/Sub.2/1987/23, 7 July 1987, para.65.
[310] UN CESCR, General Comment 12, The Right to Adequate Food (Art. 11), 12 May 1999, UN Doc. E/C.12/1999/5, para. 20.
[311] **ibid.,** para. 20; UN CESCR, General Comment 14, The Right to the Highest Attainable Standard of Health (Art. 12), July 2000, para. 42.
[312] UN CESCR, General Comment 12, The Right to Adequate Food (Art. 11), para. 27.
[313] **ibid.**, para. 29.

includes independent monitoring, genuine public participation and imposition of penalties for non-compliance."[314]

Finally, in its latest General Comment No. 21, the CESCR again stressed that not only the States Parties, but also other members of the society, including the business world, have responsibilities with regard to the effective implementation of the right to take part in cultural life.[315] Accordingly, States should regulate corporate conduct in line with their obligations under the Covenant.[316] States are under a positive obligation to take measures for preventing corporate interferences with the right to take part in cultural life and for protecting its lands, territories and resources from illegal or unjust exploitation by private or transnational enterprises and corporations.[317] This is the consequence of the obligations to respect and protect freedoms, cultural heritage and diversity in the territories of the States Parties.[318]

1997 Maastricht Guidelines on Violations of Economic, Social and Cultural Rights[319] also expressly underline that "*The obligation to protect includes the State's responsibility to ensure that private entities or individuals, including transnational corporations over which they exercise jurisdiction, do not deprive individuals of their economic, social and cultural rights. States are responsible for violations of economic, social and cultural rights that result from their failure to exercise due diligence in controlling the behaviour of such non-state actors.*"[320] Reinisch asserts that this paragraph puts an emphasis on the primary responsibility of States for protecting human rights, and strongly highlights the indirect responsibility of States in cases where they fail to fulfil their obligation to prevent human rights abuses by non-state actors, and especially by corporations.[321] Finally, States should take

---

[314] General Comment No.15 (2003), The right to water, U.N. Doc. E/C.12/2002/11 (2003), paras. 23, 24 and 45.
[315] In the General Comment, there is a special final section called "Obligations of actors other than States". General comment No. 21 (2009), Right of everyone to take part in cultural life (Art. 15, para. 1 (a)), 21/12/2009, UN Doc. E/C.12/GC/21, para. 73.
[316] **ibid.**
[317] **ibid.**, para. 50(c) and 62.
[318] **ibid.**, paras. 48 and 50.
[319] Maastricht Guidelines on Violations of Economic, Social and Cultural Rights, para.I.3.
[320] **ibid.**, para.18.
[321] Reinisch, **op. cit.**, p. 82. Regarding the responsibility of third states for human rights violations see Jochnick, **op. cit.**, pp. 72-76.

effective measures to prevent impunity of the non-state actors, who are directly involved or contributed to the human rights violations, under their jurisdiction.[322]

One of the most important judgments given by the ECtHR on the international consequences of the conduct of non-state actors is the Costello-Roberts v UK case.[323] As Clapham righteously draws attention, even if education may not be considered as a governmental function due to the peculiarities of a given State, such as the structure of the society, history and traditions; the States may nevertheless have positive obligations under human rights treaties, and non-observance of these positive obligations and failure in adopting appropriate measures for the effective enjoyment of this right would lead to the responsibility of the State.[324] In this case, concerning State responsibility for corporal punishment of a child in private school, the Court reiterated that the non-observance of State's obligations under Article 1 to secure the rights and freedoms (in this case, Article 3 and 8) gives rise to the responsibility of State.[325] Due to the facts of the case, the Court also referred to Article 28 of the UN Convention of the Rights of the Child, which obliges States Parties '*to take all appropriate measures to ensure that school discipline is administered in a manner consistent with the child's human dignity and in conformity with the present Convention'*. The Court added that *"State cannot absolve itself from responsibility by delegating its obligations to private bodies or individuals".*[326] Finally, even though the Court did not find violation of Articles 3 and 8[327] due to the specific circumstances of the case, it held that if it were proved to be to the contrary, the acts of a headmaster of a private school in violation of the convention rights might give rise to the responsibility of the State.[328] In sum, the State may delegate some of its public functions to a private entity, but the international responsibility would remain incumbent upon the State.

---

[322] Maastricht Guidelines on Violations of Economic, Social and Cultural Rights, para.27.
[323] Reinisch, **op. cit.**, p. 80.
[324] Clapham, **Human Rights Obligations…**, p. 356.
[325] ECtHR, Costello-Roberts v UK, App.no. 13134/87, 25 March 1993, para. 26.
[326] **ibid.**, para. 27. The Court reached a similar conclusion in *van der Mussele v Belgium* case holding that the delegation of power to the Belgium Bar, for appointing advocates for the free legal assistance of the indigent people, does not relieve the State from responsibility in case of a violation of a right by the Bar. The Court also mentioned that since almost all members of the Council of Europe, including Belgium, which is the respondent state in this case, is party to the ILO Conventions, it will take into account the definition of the term "forced or compulsory labour" under the said Conventions. Van Der Mussele v. Belgium, App. no. 8919/80, Judgment of 23 November 1983, paras. 28-32.
[327] ECtHR, Costello-Roberts v UK, App.no. 13134/87, 25 March 1993, para. 36.
[328] **ibid.**, para. 28.

2.1.1. Traditional Understanding of State Responsibility

The traditional understanding of the law of international responsibility allows States and/or individuals to bring claims against a State if the act or omission that violated a human right is either the act of the State itself or attributable to that State. The former is the direct vertical responsibility of the State while the latter is the indirect vertical responsibility of the State for the acts of TNCs by attribution. The notion of vertical responsibility is a well-established concept under the ILC Draft Articles on State Responsibility for Internationally Wrongful Acts and the jurisprudence of the ICJ.[329] Articles 5 and 8 of the ARSIWA provide that when the act of a non-state actor is instructed, directed or controlled by the State, or when the non-state actor *de facto* exercises governmental authority, the State would be liable for the acts of non-state actors under international law. Even though Articles 9[330] and 11[331] are also related to the attribution of acts of non-state actors to the State, they can hardly be related to the acts of corporations, and therefore, are excluded from the scope of our explanations.[332]

ILC Draft Articles on the Responsibility of States for Internationally Wrongful Acts and the jurisprudence of the ICJ allow us to hold States responsible for the acts of TNCs that violate human rights. It is to be noted here that there is a distinction between (1) the responsibility of State for the acts of non-state actors empowered by internal law to exercise governmental authority as an organ of the State or as a person or entity to whom governmental powers have been delegated by law (Article 5 of ARSIWA); and (2) the responsibility of State for the acts of non-state actors acting under a government's direction, instruction or control (Article 8 of ARSIWA).[333] Clapham highlights that 2001 Draft Articles cover the wrongful acts of privatized state corporations that are empowered with sovereign functions, *i.e.* public or regulatory functions.[334] Bearing in mind the augmentation of the sectors in which

---

[329] For an elaboration on the vertical responsibility see Sir Robert Jennings & Sir Arthur Watts (eds.), **Oppenheim's International Law**, 9th ed., Vol. 1, Part 1, Longman, 1996, p. 550.
[330] *i.e.* the responsibility for the conducts carried out with governmental authority in the absence or default of the official authorities.
[331] *i.e.* conduct acknowledged and adopted by the State as its own.
[332] Obligation of States to respect human rights, *i.e.* to refrain from infringing rights of individuals and corporations, also gives rise to international responsibility due to the vertical application of human rights, which will briefly be touched upon in the following sections.
[333] de Schutter, "The Accountability of Multinationals…", pp. 246-247.
[334]

private corporations operate, having such a responsibility is not surprising but rather inevitable.

Article 5 of ARSIWA envisages that if a person or entity is empowered by the internal law of a State to exercise elements of governmental authority, then the acts, which are exercised in that capacity, would be considered the act of the State. In the Commentary to Article 5 of ARSIWA, it is mentioned that the attribution rule is equally applicable to both the *'parastatal entities [that] exercise elements of governmental authority in place of State organs'* [335] and the *'former State corporations* [that] *have been privatized but retain certain public or regulatory functions*'.[336] The Commentary to Article 5 gives the example of private security firms contracted as prison guards, who are authorized to detain and discipline the prisoners.[337] Another example is the private airlines corporations that are dressed with powers to control illegal immigration or to quarantine to protect public health.[338] The Japanese law empowering the employees of a private railway line to exercise police power raises the direct responsibility of the State for the acts of those private persons.[339] Other examples may concern health and education institutions, universities, private prisons and prison transfers, private security forces, airports, water and electricity services, and postal services. Thus, the only decisive criterion applicable in determining the public or private character of a corporation is its specific empowerment by law to exercise limited or full governmental authority. [340] As the Commentary underlines, the criterion such as the status of a corporation in a given national legal system, or State participation in its capital, or having immunity from administrative controls, do not determine whether an act is attributable to the

[335] Commentary to Article 5 of the ARSIWA, paras. 4-5.
[336] **ibid.**, para. 1.
[337] **ibid.**, para. 2.
[338] The Commentary specifically refers to a case brought before the Iran-U.S. Claims Tribunal, where the Tribunal held that the airlines company in question shall be considered as a public corporation due to the close governmental control. Hyatt International Corporation v. The Government of the Islamic Republic of Iran, Iran-U.S. C.T.R., vol. 9, p. 72, at pp. 88-94.
[339] Ignaz Seidl-Hohenveldern, **Corporations In and Under International Law**, University of Cambridge Research Centre for International Law, Hersch Lauterpacht Memorial Lectures, Cambridge Grotius Publications Ltd., 1987, p. 64.
[340] In the Commentary to Article 5 of the ILC Draft Articles, it is specifically mentioned that if the condition of empowerment by law for exercising public functions is substantiated, then the acts of all corporations whether public, semi-public or private, are attributable to the State, given that the act has occurred as a result of functioning in public capacity. Nevertheless, the authorization should be specific to the acts of corporation. In other words, general authorizations of the community, *e.g.* for self-help and self-defence, under internal law are not covered by the law of responsibility designated under Article 5. Commentary to Article 5 of the ARSIWA, para. 7.

State or not.[341] More importantly, it is highlighted in the Commentary that the attribution of acts of a corporation to the State, and accordingly, holding the State responsible for the acts of that corporation, is only justified when the activity engaged by the corporation is a governmental activity, and not a private or commercial activity.[342] Nevertheless, the Commentary refrains from defining the term 'governmental authority' and leaves it open and dependent on the specificities of the case under consideration, and the characteristics of the society, history and traditions of the parties to that dispute.[343]

Article 8 of the ARSIWA provides that the private acts may be attributed to a State if the acts of a person or group of persons are conducted under the instructions, directions or control of that State.[344] In the Commentary, a reference to the *Nicaragua* case is made where the ICJ held that the high degree of dependence of the *contras* to the U.S. and planning, direction and support given by the U.S. was not sufficient to hold her responsible for the acts of the *contras*, and it should have been proved that the U.S. exercised effective control over the acts of *contras.*[345]

On the other hand, the International Criminal Tribunal for the Former Yugoslavia (ICTY) in the *Tadic* case rejected any pre-determined degree of control in attributing the acts of individuals to a State.[346] Rather the judges declared that each case should be evaluated in its own factual circumstances to determine any responsibility on the side of the State. Therefore, in *Tadic* case, an overall control by the Yugoslavian authorities was regarded sufficient to conclude that the armed conflict was having an international character.[347] However, as it is rightly highlighted

---

[341] **ibid.**, paras. 2 and 3.
[342] The Commentary exemplifies the use of police powers by a railway company as governmental authority while excludes any responsibility of the State for harm occurred as a consequence of the tickets sale, which is a commercial activity. **ibid**., para. 5.
[343] **ibid.**, para. 6: "*... Of particular importance will be not just the content of the powers, but the way they are conferred on an entity, the purposes for which they are to be exercised and the extent to which the entity is accountable to government for their exercise. These are essentially questions of the application of a general standard to varied circumstances*."
[344] *cf.* ARIO Article 7 on the conduct of organs of a State or organs or agents of an international organization placed at the disposal of another international organization, which exercises effective control over that conduct.
[345] Commentary to Article 8 of the ARSIWA, para.4; Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Merits, Judgment, ICJ Rep. 1986, p. 51, 62, 65, paras. 86, 109, 115-116.
[346] Judgement, Prosecutor v. Tadic, (IT-94-1-A), 15 July 1999, para. 117.
[347] "*In order to attribute the acts of a military or paramilitary group to a State, it must be proved that the State wields overall control over the group, not only by equipping and financing the group, but*

in the Commentary, the Nicaragua case concerned the responsibility of the States, while the *Tadic* case concerned the individual criminal responsibility due to the breaches of international humanitarian laws.

The ICJ, in the case concerning the application of the Genocide Convention, elaborated on the possibility of equating the conduct of persons, groups of persons and other entities with the conduct of State organs, due to a 'complete dependence' on the State, which turns them into a mere instrument, *i.e*. acting as a *de facto* organ of the State in the commission of the act. The Court concluded that the acts amounted to genocide at Srebrenica could not be attributed to the FRY, because the perpetrators were not organs of the State, nor were they completely dependent on the FRY, even if they were acting under overall control of the FRY, *i.e.* by the instructions, directions and control of the FRY authorities. The Court held that "*It would merely mean the FRY's international responsibility would be incurred owing to the conduct of those of its own organs which gave the instructions or exercised the control resulting in the commission of acts in breach of its international obligations.*"[348] Additionally, for attributing the conduct of non-state actors to the State under Article 8 of ARSIWA, it should be proved that the State exercised an effective control over the acts perpetrated by the non-state actors. [349]

Additionally, Article 8 of ARSIWA is specific to the responsibility of States for the conducts of State-owned and State-controlled corporations. For explaining the approach of the international judges on the matter, the Commentary to Article 8

---

also by coordinating or helping in the general planning of its military activity. Only then can the State be held internationally accountable for any misconduct of the group. However, it is not necessary that, in addition, the State should also issue, either to the head or to members of the group, instructions for the commission of specific acts contrary to international law." (para.131) "*In the case at issue, given that the Bosnian Serb armed forces constituted a "military organization", the control of the FRY authorities over these armed forces required by international law for considering the armed conflict to be international was overall control going beyond the mere financing and equipping of such forces and involving also participation in the planning and supervision of military operations. By contrast, international rules do not require that such control should extend to the issuance of specific orders or instructions relating to single military actions, whether or not such actions were contrary to international humanitarian law*." Prosecutor v. Duško Tadic, International Tribunal for the Former Yugoslavia, Case IT-94-1-A (1999), ILM, vol. 38, No. 6, November 1999, p. 1518, at p. 1546, para. 145.

[348] Application of the Convention on the Prevention and Punishment of the Crimes of Genocide (Bosnia and Herzegovina v Serbia and Montenegro), Merits, Judgment, ICJ Rep. 2007, para. 397.

[349] **ibid.**, paras. 392-7, and 400-6. For an elaboration on the Genocide case and a critique of the high standards adopted by the ICJ see Alberto Alvarez-Jimenez, "International State Responsibility for Acts of Non-State Actors: The Recent Standards Set by the International Court of Justice in Genocide and Why the WTO Appellate Body Should not Embrace Them", **Syracuse J Int'l L & Com.**, Vol. 35, Fall 2007, pp. 1-25.

refers to the *Barcelona Traction* case. The ICJ, in the *Barcelona Traction* case, held that the principles of national laws on piercing the corporate veil might be justified and equitable in exceptional cases or for certain purposes under international law.[350] For example, in cases of fraud or malfeasance, the corporate veil may be pierced in order to prevent the misuse of the privileges of having a separate legal personality and to protect the interests of third persons (such as shareholders), or to prevent the underestimation of legal requirements or of obligations.[351] Considering the State-owned and State-controlled corporations, the Commentary to Article 8 puts it clear that they have separate legal personalities from that of the State and not all the conducts of such corporations are attributable to the State. Nevertheless, if the corporation were exercising governmental authority, the act would be attributable to the State on the grounds that have been mentioned under Article 5 of the ILC Draft Articles.[352] The Commentary exemplifies that if "*the corporation was exercising public powers, or …the State was using its ownership interest in or control of a corporation specifically in order to achieve a particular result, the conduct in question has been attributed to the State.*"[353]

In order to hold States responsible for the acts of corporations under Article 8 of ARSIWA, it should be established that the State has instructed or directed or controlled the corporation in the commission of the act breaching an international obligation of the State.[354] Additionally, the State would again be responsible for the acts of corporation under Article 8, if the acts were committed under the effective control of the State, even if the agents were acting contrary to the instructions or directions given by the State.[355] Lastly, within the meaning of Article 8, the State

---

[350] Commentary to Article 8, para. 6.
[351] **ibid.** referring to Barcelona Traction, Light and Power Company, Limited, Judgment, ICJ Rep. 1970, p. 3 at p. 39, paras. 56–58. (hereinafter "*Barcelona Traction case*")
[352] Commentary to Article 8, para. 6.
[353] The following cases are among the examples given in the Commentary to Article 8, for illustrating the cases in which the international judges of the Iran-U.S. Claims Tribunal found the acts of corporations attributable to the States: SEDCO, Inc. v National Iranian Oil Company, vol.15, p. 23 (1987);International Technical Products Corporation v The Government of the Islamic Republic of Ira n, vol. 9, p. 206 (1985); Flexi-Van Leasing, Inc. v The Government of the Islamic Republic of Iran, vol. 12, p. 335, at p. 349 (1986); Phillips Petroleum Company Iran v. The Islamic Republic of Iran, vol. 21, at 79 et seq. (1989); Petrolane, Inc. v The Government of the Islamic Republic of Iran, vol. 27, p. 64, at p. 92 (1991); Foremost Tehran, Inc. v The Government of the Islamic Republic of Iran, vol. 10, p. 228 (1986); American Bell International Inc. v The Islamic Republic of Iran, vol. 12, p. 170 (1986).
[354] Commentary to Article 8 of the ARSIWA, para. 7.
[355] **ibid.,** para. 8.

would be responsible for the conducts of group of persons acting collectively, *i.e. de facto* as a legal person, or under an actual legal personality umbrella.[356]

Finally, Article 58 of the ARSIWA stresses that any of the provisions attributing responsibility to the State would not prevent holding the individuals, who [on behalf of a State][357] perpetrated the act that amounted to an international wrongful act, internationally responsible. Even though the individual responsibility referred to under Article 58 is not limited to criminal responsibility, currently there is no positive norm that envisages international civil responsibility of individuals or corporations for violations of human rights.[358] Nevertheless, drawing a clear-cut line between international civil and criminal responsibility would not be an all-consistent and all-valid presumption, especially when the responsibility of corporations is at issue. A future international institution empowered to try corporations for their wrongful acts, may be authorized to decide on not only the criminal responsibility of a defendant corporation, but also on its civil responsibility to compensate and repair damages and even to pay punitive damages.[359] Lastly, I should note that States shall remain responsible for providing reparations to the victims of human rights violations perpetrated by corporate entities.[360] As Rose successfully demonstrates in her article, there is an emerging norm obliging states to provide remedy for the damages caused by the conduct of private actors, such as corporations.[361]

---

[356] **ibid.**, para. 9.

[357] In the Commentary to Article 58, the responsibility of State officials is specifically referred to for highlighting that any official position and assertion of diplomatic immunity would not prevent international prosecutions. Commentary to Article 58 of the ARSIWA, para. 4.

[358] Crawford, "The System of International Responsibility"…, p. 19. A similar provision in the Rome Statute of the International Criminal Court, Article 25(4), provides that any individual criminal responsibility would not affect the international responsibility of the State.

[359] Stephan Wittich, "Punitive Damages" in Crawford & Pellet & Olleson (eds.), **The Law of International Responsibility**, OUP, 2010, pp. 667-675. For the concept of "ersatz" criminal liability, which implies corporate sanctions of administrative nature allowing the corporations escape criminal prosecutions see Beth Stephens, "The Amorality of Profit: Transnational Corporations and Human Rights", **Berkeley J. Int'l L.**, 20, pp. 66-68.

[360] Basic Principles and Guidelines on the Right to a Remedy and Reparation, G.A. Res. 60/147, 15, U.N. Doc. A/RES/60/147, 16 December 2005.

[361] Rose emphasizes that in case of commission of an internationally wrongful act that is attributable to State, there is no hesitation that the State would be responsible for providing remedy. Cecily Rose, "An Emerging Norm: The Duty of States to Provide Reparations for Human Rights Violations by Non-State Actors", **Hastings Int'l & Comp L Rev.**, Vol. 33:2, 2010, p. 308. See *e.g. Velásquez Rodriguez v. Honduras*, IAmCtHR, Ser. C, No. 4, 29 July 1988, para. 174: "*The State has a legal duty … to ensure the victim adequate compensation.*"

2.1.2. The Doctrine of Horizontal Application of Human Rights

The doctrine of horizontal application of human rights has two dimensions. The first dimension is the indirect horizontal application of human rights norms. According to this, individuals may bring claims against States for the acts of a non-state actor, even if these acts are not directly attributable to the State.[362] More precisely, a broad interpretation of State's responsibility to protect human rights includes its international responsibility for failure to demonstrate due diligence, *i.e.* for failure to take appropriate and effective measures capable of preventing human rights abuses by third parties and failure to fight impunity.[363] In fact, it is also successfully argued that the failure of due diligence does create a new sort of rule of attribution, giving rise to State responsibility for failure to protect human rights.[364] In this case, the responsibility of State is that of a standard of conduct, and not of a standard of result, although there may be exceptions to this rule.[365] This implies that States have discretion in choosing the ways to fulfil their duty of diligence through the adoption of legislative, administrative, judicial or any other measures, which they may deem appropriate to prevent human rights violations and to investigate, punish and redress any violation occurred.[366] The indirect horizontal application of human rights norms, both territorially and extraterritorially, will be analysed in the following sub-section in the context of human rights responsibilities of host states and home states.

The concept of indirect horizontal application of human rights is also closely related to the concept of *Drittwirkung*, *i.e.* third party effect, developed under

---

[362] Tzevelekos, **op. cit.**, Vol. 35, 2010, p. 186.
[363] Jan Arno Hessebruegge, "The Historical Development of the Doctrines of Attribution and Due Diligence in International Law", **New York University Journal of International Law and Policy**, Vol. 36, 2003-2004, p. 265; Gatto, **op.cit.**, p. 66, 68, 74.
[364] *Velasquez Rodriguez v. Honduras*, IAmCtHR, Ser C, No. 4, 1988, para. 172. The concept of RtoP and the duty of due diligence will be elaborated on in detail in the following sections. Therefore, in this section, I consider it sufficient to briefly touch upon the concept of 'indirect horizontal application of human rights law'. See also United States Diplomatic and Consular Staff in Tehran (Hostages) (U.S. v. Iran), ICJ Rep. 1980, p. 3, paras. 32-33.
[365] Pierre-Marie Dupuy, "Reviewing the Difficulties of Codification: On Ago's Classification of Obligations of Means and Obligations of Result in Relation to State Responsibility", **EJIL**, Vol. 10, 1999, pp. 378-382.
[366] Human Rights Council, Promotion of All Human Rights, Civil, Political, Economic, Social and Cultural Rights, including the Right to Development, 15 May 2009, A/HRC/11/13/Add.1.

German constitutional law.[367] For the purposes of public international law, it would be sufficient to mention that this doctrine allows and even obliges the national judge to interpret the laws in accordance with the human rights obligations of the State, and thus, indirectly imposes international human rights law on private actors.[368]

The second dimension is the direct horizontal application of human rights norms. This doctrine allows us to oblige non-state actors with the international human rights obligations of the States by horizontally extending the scope of the human rights norms based on the doctrine of effective control or the active personality principle. When applied by the national judge, this doctrine is also called direct third-party application of human rights, or '*unmittelbare Drittwirkung*'.[369] Thus, the national judge imposes a constitutional norm or a provision of an international human rights treaty directly on the private actor. However, as rightly pointed out by the international law scholars, currently, the direct horizontal application of human rights law is not legally possible in the international arena and it should not mislead the reader.[370] The doctrine refers only to a concept adopted

---

[367] Even though it is controversial, the 'state action doctrine' or 'act of state doctrine' under the U.S. law is considered as another aspect of indirect horizontal application of human rights. Ozan Ergül, "Temel Hak ve Özgürlüklerin Yatay Etkisi Karşısında Çalışanın Ücretini Gizli Tutmakla Yükümlü Kılmanın Hukuksal Temelsizliği Üzerine", Prof. Dr. Erdal Onar'a Armağan, Ankara Üniversitesi Yayınları No. 391, Ankara 2013, Cilt 1, p. 457 et seq.; See *e.g. Sosa v. Alvarez-Machain*, 542 U.S. 692, 725 (2004) and *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 427 (1964), where the Court held that it had the authority to develop "federal common law" if a case would have an effect on foreign relations. Gwynne Skinner, "When Customary International Law Violations arise under the Laws of the United States", **Brook. J. Int'l Law**, Vol. 36:1, 2010, pp. 230-231, 235.

[368] de Schutter notes that this technique is also referred to as "*mittelbare Drittwirkung*" in order to differentiate it from the "*unmittelbare Drittwirkung*", which is the direct horizontal application of human rights. Olivier de Schutter, **International Human Rights Law: Cases, Materials, Commentary**, Cambridge, 2010, p. 403.

[369] **ibid.,** p. 401 referring to: H.C. Nipperday, "Allgemeiner Teil des bürgerlichen Rechts", Tübingen, Mohr Siebeck, 1952, vol.1, p. 53 *et seq.*; W. Leisner, Grundrechte und Privaterecht, Munich-Berlin: Ch Beck'sche Verlagsbuchhandlung, 1960, p. 414; K.M. Lewan, "The Significance of Constitutional Rights for Private Law: Theory and Practice in West Germany", **ICLQ**, Vol.17, 1968, p. 571.

[370] D.J. Harris & M. O'Boyle & E.P. Bates & C.M. Buckley, **Harris, O'Boyle, Warbrick Law of the European Convention on Human Rights**, Oxford, 2nd ed., 2009, pp. 20-21. Currently, it is not possible to hold corporations directly responsible in the international arena for the human rights abuses they perpetrated. However, as Harris and O'Boyle mention, States may be held directly responsible for a private act in the international arena, when a violation of a human right is perpetrated by a private actor conducting a privatized State function. They refer to the *Wos v. Poland* case (App. no. 22860/02, 8 June 2006, para.72) and comment that: "*The Court held that the 'exercise of state powers which affects Convention rights and freedoms raises an issue of state responsibility regardless' of the fact that their exercise may have been delegated by the state to a private actor. Consequently, given the need to protect rights effectively, the defendant state was accountable under the Convention for the acts of the foundation. It would be consistent with this reasoning for the state to be directly responsible under the Convention for the acts of private companies and other persons to whom powers that are traditionally state powers have been transferred by privatization, as in the case of private prisons*".

under some of the national systems, such as Germany, Italy, Spain and South Africa, in order to provide effective protection for human rights vis-à-vis third parties.[371]

As it has already been mentioned, the developed home states of corporations are expected to have a higher level of human rights protection afforded to the individuals under their jurisdiction. Therefore, the extraterritorial application of the laws of home states or, if their domestic laws permit, direct imposition of international law might be used as a legal tool for corporate accountability. Such extraterritorial application may be based on the principles of active personality or in some cases on the protective principle of jurisdiction.[372] In fact, it may successfully be argued that this is the extraterritorial effect of due diligence obligations of home states under human rights law. Tzevelekos argues that regulating, investigating and punishing the conduct of corporations based on the principle of active personality by home states is obligatory and is a part of their due diligence obligations. Nevertheless, he adds that the obligation of due diligence is an obligation of means (conduct) and States are free to choose the means. Therefore, home states have a certain margin of appreciation in balancing "*between the protection of dignity-stemming values of humanity on the one hand, and the libertarian margin of discretion for governments to regulate their markets and decide on priorities with regard to investment or, more broadly, to economic policy, on the other hand*".[373] However, if there is a violation of peremptory norm, we shall not be able to argue that the States may exercise a balancing test between human dignity on the one hand and economic freedom on the other hand. For example, prohibition of torture and inhuman or degrading treatment under Article 3 of the European Convention on Human Rights (ECHR) has an absolute character imposing strictly positive obligations on the States to protect and fulfil by taking 'reasonable steps'. Smet

[371] Danwood Mzikenge Chirwa, "In Search of philosophical justifications and suitable models for the horizontal application of human rights", **AHRLJ**, Vol. 8, 2008, p. 308; *see also* John. H. Knox, "Horizontal Human Rights Law", **AJIL**, Vol.102, 2008, pp. 1-47.

[372] Under-developed or developing host states, where the foreign investors and TNCs operate, may exercise jurisdiction over such corporations based on the principles of territoriality or passive personality. In fact, the host states may be the most appropriate forum for trying corporations in case of human rights violations. However, as will be discussed in the following sections, the risk of loosing actual and potential foreign investors, forces the local authorities to stay inactive and reluctant to prosecute the human rights abusers. Furthermore, the weakness of their judicial systems and problems in enforcing the domestic laws on the TNCs may cause any prosecution initiated to be ineffective.

[373] Tzevelekos, **op. cit.**, p. 227-230, 231. See also Robert McCorquodale & Penelope Simons, "Responsibility Beyond Borders: State Responsibility for Extraterritorial Violations by Corporations of International Human Rights Law", **MLR Lim.**, Vol. 70, 2007, pp. 616-625.

argues that as a consequence of this absolute character, the European Court of Human Rights (ECtHR), when considering the cases with the alleged violations of Article 3, does not elaborate on any element of proportionality, nor it exercises a balancing test.[374] Even when the Court's reasoning may seem like a balancing exercise between competing rights or public interest, such as in *Z and others v UK* case, it should be read as *"a recognition that the search for a solution within the family may be worth striving for, but under the condition ... that the abuse is put to an end*.[375]

It should be added that universal jurisdiction could also be considered as the most comprehensive jurisdictional model, which would allow all States to be competent to decide on a case that involves human rights abuses perpetrated by corporations.[376] Universal jurisdiction would especially serve to fight impunity of perpetrators of gross and serious violations of human rights[377] and breaches of peremptory norms of international law. However, adoption of universal jurisdiction is a political choice left to States' discretion, except for treaties obliging the States Parties to adopt universal jurisdiction in their domestic law systems.[378] Furthermore, even if a State adopts universal jurisdiction, trying TNCs based on the principle of universality would again depend on the willingness of the judicial actors to enforce their laws on the nationals of another State for the violations perpetrated in the territories of a foreign State. Also, exercising universal jurisdiction itself may sometimes be violating international law and the principle of state sovereignty,[379] or

---

[374] Stijn Smet, "The 'absolute' prohibition of torture and inhuman or degrading treatment in Article 3 ECHR - Truly a question of scope only?" in Eva Brems & Janneke Gerards (eds.), **Shaping Rights in the ECHR: The Role of the European Court of Human Rights in Determining the Scope of Human Rights**, Cambridge, 2013, pp. 290-293.

[375] **ibid.**

[376] Joseph, "An Overview …" p. 85.

[377] Tzevelekos names such breaches as "*erga omnes* plus" or "*jus cogens* minus". Tzevelekos, **op. cit.**, p. 214, fn. 204.

[378] *e.g.* Article 5(2) of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment: "Each State Party shall likewise take such measures as may be necessary to establish its jurisdiction over such offences in cases where the alleged offender is present in any territory under its jurisdiction and it does not extradite him pursuant to Article 8 to any of the States mentioned in paragraph 1 of this Article". To the contrary, although commission of the international crime of genocide is a violation of peremptory norm, the Genocide Convention does not oblige States Parties to adopt universal jurisdiction for the prosecution of this crime. Tzevelekos, **op. cit.**, p. 95, 218.

[379] Case concerning the Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium), ICJ Rep. 2002, p. 3.

may lead to protectionism or favoritism.[380] Klabbers draws attention to a possible drawback of universal jurisdiction: that is recourse to universal jurisdiction may turn into an exercise of political power by the rich western states over individuals, who does not accept the western standards.[381] On the other hand, when considered from the perspective of holding TNCs liable for violations of international law, it may prove to be an effective tool, since most of the powerful TNCs are nationals of the rich western states and they already adopt the western capitalist standards. Finally, even if the universal jurisdiction stems from criminal cases, civil litigation, as will be examined below, may adopt a universal perspective in providing compensation for the victims of the most heinous crimes of international law.[382] What is said here will be concretized in the analysis of the practice of the U.S. Courts under the Alien Tort Claims Act (ATCA) procedures.[383]

2.1.3. The U.S. Experience with the Alien Tort Claims Act

The Alien Tort Claims Act (a.k.a. the Alien Tort Statute) was first enacted in 1789, most probably with the aim of preventing the acts of piracy and also for the protection of ambassadors from any mistreatment in foreign countries.[384] The Alien Tort Claims Act (ATCA) provides that *"The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States."*[385] Following almost two centuries in abeyance, in the 20th century, the Act was used as a tool for seeking pride by the victims of the dictatorial regimes, whose former heads fled to the USA.[386] The category of norms of law of nations, which may be violated by non-state actors have been gradually expanded so as to include genocide, slave trading,

---

[380] Patrick Macklem, "Corporate Accountability under International Law: the Misguided Quest for Universal Jurisdiction", **FORUM**, Vol. 7, No. 4, December 2005, p. 288.
[381] Jan Klabbbers, **International Law**, Cambridge, rep. 2013, p. 95.
[382] See *e.g.* Draft Convention on jurisdiction and foreign judgment in civil and commercial matters Article 18. Craig Scott (ed.), **Torture as Tort: Comparative Perspectives on the Development of Transnational Human Rights Litigation**, Oxford, Hart Publishing, 2001; Tzevelekos, **op. cit.**, p. 214.
[383] Nissel introduces the coexistent doctrines of state responsibility in his inspiring article: the "spoken" German doctrinalization of state responsibility and the "unspoken" U.S. doctrine of state responsibility and protection of U.S. foreign investment. Alan Nissel, "The Duality of State Responsibility", **Colum. Hum. Rts. L. Rev.**, Vol. 44, 2012-2013, p. 793.
[384] Koebele, **op.cit.**, p. 3.
[385] 28 U.S.C. §1350 (2004); 28 U.S.C. § 1331 (2010): "*The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.*".
[386] Koebele, **op. cit.**, p. 5.

slavery, forced labour and crimes of rape, torture and summary execution if committed in the context of genocide or war crimes.[387] However, except the *Marcos* case, the U.S. cases remained symbolic without any decision of reparation for the victims of the acts violating international law.[388]

The Act now serves as a legal ground for bringing lawsuits against TNCs.[389] The litigations brought against the TNCs in the U.S. system have two functions: 1. The possibility that the corporation might be held liable in the U.S. has a deterrent effect on the conduct of corporations abroad, 2. The victims of crimes perpetrated by the corporations have a forum for seeking justice and claiming compensation. Unfortunately, up to the year 2015 none of the cases have resulted in the civil or criminal conviction of a corporation and most of the cases have been dismissed on pre-trial motions[390] or based on a settlement between the parties.[391]

Filártiga v. Peña-Irala concerns allegations of torture and murder against a Paraguayan former police officer, who moved to the U.S. in the years following the events. The Court of Appeals held that prohibition of torture is a principle of customary international law, and thus, it has been incorporated through the ATCA and is applicable by federal courts even in cases concerning two aliens. Therefore, the Court implicitly affirmed that the U.S. courts are authorized to exercise universal jurisdiction in litigations concerning the allegations of serious breaches of the law of nations.[392] Blum and Steinhardt, after evaluating the *Filartiga* case, concluded that

---

[387] Andrew Clapham, "Extending Criminal Law beyond the Individual to Corporations and Armed Opposition Groups", Corporate Criminal Liability: New Developments in International Criminal Law, **J. Int'l Crim. Just.,** Vol. 6, 2008, pp. 905-907.

[388] *In re Estate of Ferdinand Marcos, Human Rights Litigation*, 25 F.3d 1467, 1475 (9th Cir. 1994) and Trajano v. Marcos (In re Estate of Ferdinand E. Marcos Human Rights Litigation), 978 F.2d. 493, 503 (9th Cir. 1992). In the Marcos litigation, the U.S. courts held that acts that constitute a violation of *jus cogens* norms are actionable under the ATCA. Marcos case was brought against the former Philippine dictator and his daughter. Daughter of Marcos was asked a critical question at her speech at a university, and the student who asked the question was kidnapped and tortured to death by the intelligence service of the Philippines. The claimants also alleged the commission of various crimes perpetrated by the dictatorial regime of Phillipines between 1971 and 1986. Marcos was foundliable of crimes of forced disappearance, summary execution and torture. Further, the Court ordered compensatory and exemplary damages of worth $1,97 billion. Koebele, **op. cit.**, p. 5, 21, 23, 91.

[389] Binda Preet Sahni, **Transnational Corporate Liability: Accountability for Human Injury**, Cameron May, 2006, p. 311 *et seq*.

[390] Steinhardt, "Corporate Responsibility ...", p. 202.

[391] For the legal (im)possibilities of trying the employees of the private security corporations operated in Iraq based on contracts with the U.S. Government and/or CIA *see* Rosemann, "The Privatization of Human Rights …", p. 87 *et seq*.

[392] *Filártiga v. Peña-Irala*, 630 F.2d 876 (2d Cir. 1980); Filartiga v. Pena-Irala, 577 F. Supp. 860, 861 (E.D.N.Y. 1984). Claudia T. Salazar, "Applying International Human Rights Norms in the United

there is a three-part test to be applied in order to determine whether the U.S. courts have jurisdiction under the ATCA: 1. the act must be definable and identifiable as a tort committed by individuals, 2. the norms that are alleged to be violated should be obligatory, 3. the norms should be universal and accordingly non-derogable on the grounds of (political) margin of appreciation.[393] Koebele refers to other cases supporting the arguments of Blum and Steinhardt,[394] however, he underlines that there exists a slight difference between this three-part test and that of in determining customary rules of human rights law.[395] Additionally, *Sosa* test[396] is not restrictive of the three-part test as it was thought to be.[397] Consequently, actionability under the ATCA before the U.S. courts depends on an act that is definable and identifiable as a 'tort' and that violates a norm of international law which is considered as obligatory and universal.[398]

Two cases have particular importance regarding the horizontal application of human rights law in domestic jurisdictions. In *Kadic et al. v. Karadzic* litigation, the former president of the Republic of Srpska, Radovan Karadzic, was sued before the New York federal court on the allegations of commission of crimes against humanity and crime of genocide against the members of the Muslim and Croat citizens of Bosnia-Herzegovina.[399] The case is important because the U.S. Court affirmed that private actors could be held criminally liable for the commission of certain forms of

States: Holding Multinational Corporations Accountable in the United States for International Human Rights Violations under the Alien Tort Claims Act", **St.John's J. Leg. Comm.**, Vol. 19:1, 2004, p.127 *et seq*.

[393] Jeffrey M. Blum & Ralph G. Steinhardt, "Federal Jurisdiction over International Human Rights Claims: The Alien Tort Claims Act after Filartiga v. Pena-Irala", **Harv. Int'l. L.J.**, Vol.22, 1981, pp. 88-89.

[394] *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774, 517 F. Supp. 542 (D.D.C. 1981): concerning massacre committed by the Palestine Liberation Organization (PLO) on bus in Tel Aviv, the allegations were dismissed due to lack of subject matter jurisdiction and being barred by the statute of limitations; *Forti v. Suarez-Mason* 672 F. Supp. 1531, 1539–40 (N.D. Cal. 1987): concerning allegations of torture, murder and arbitrary detention against a former Argentine military general. Koebele, **op. cit.**, p. 21.

[395] In *Filártiga v. Peña-Irala*, the Court held that the judges "*must interpret international law not as it was in 1789, but as it has evolved and exists among the nations of the world today*." (p. 881)

[396] *i.e.* "*courts should require any claim based on the present-day law of nations to rest on a norm of international character accepted by the civilized world and defined with a specificity comparable to the features of the 18th-century paradigms*" that are violation of safe conducts, infringements of the rights of ambassadors, and piracy. *Sosa v Alvarez-Machain et al*. 542 US 692 (2004), pp. 724-725.

[397] Koebele, **op. cit.**, p. 51.

[398] **ibid.,** p. 50.

[399] *Kadic et al. v. Karadzic*, 70 F.3d 232 and 239 (2nd Cir. 1995), cert. denied, 116 S.Ct. 2524 (1996).

conduct in violation of law of nations,[400] even if they are not State officials or acting under the auspices of a State, *i.e.* even if they were not acting under the *'color of law'*.[401] In other words, private persons, who violate *jus cogens* norms of international law, commit a 'tort' under the ATCA and shall pay compensation to the victims of their acts.[402] The Court also noted that the Restatement (Third) of Foreign Relations Law of the United States (1986) proclaims "*Individuals may be held liable for offenses against international law, such as piracy, war crimes, and genocide.*"[403] The Court also, elaborating on the doctrine of *forum non conveniens* (inconvenient forum), held that there was no suitable forum other then the U.S. courts for bringing the litigation and reversed the judgment of the District Court on subject-matter jurisdiction.[404]

---

[400] The allegations involved the commission of brutal acts of rape, forced prostitution, forced impregnation, torture and summary execution carried out as a part of genocidal campaign conducted in the course of the Bosnian civil war.

[401] Corporations may be considered as state organs if they knowingly and willfully participate in the acts of the state or state agents that constitute a crime under the doctrine of "color of law" as adopted by the U.S. courts. Beanal v. Freeport-McMoRan, 969 F. Supp. 362 (E.D. La. 1997). (U.S. District Court for the Eastern District of Louisiana). For example, in *Wiwa v. Royal Dutch Petroleum*, 2002 WL 319887, at 13, the Court held that if a private actor is in joint action with the state officials in a substantial degree of cooperative action, then the act would be considered as a state action. Other criteria used by the Courts are listed by Steinhardt as follows: "*sharing a common, unconstitutional goal, close financial law requirement, symbiotic relationship, close nexus or conspiracy, public, function, state compulsion, and joint action*". In such a case, the doctrine of sovereign immunity or state immunity will come into question, which refers to the doctrine that the court should dismiss a case brought before it if one of the parties is a foreign state or a corporation that could be considered as a state agency or institution due to its incorporation or structure. Only in extremely exceptional situations, if there is a statutory exception to state immunity, the courts may make a judgment. Steinhardt, "Corporate Responsibility…", p. 199 and 201. The question of requirement of state involvement in the commission of international crimes will be elaborated on further in the following sections.

[402] Roland Portmann, **Legal Personality in International Law**, CUP, 2010, p. 163.

[403] Restatement (Third) Section 404 provides that: "*A state has jurisdiction to define and prescribe punishment for certain offenses recognized by the community of nations as of universal concern, such as piracy, slave trade, attacks on or hijacking of aircraft, genocide, war crimes, and perhaps certain acts of terrorism, even where [no other basis of jurisdiction] is present.*"

[404] *Forum non conveniens* refers to a principle of the Anglo-American system that prefers a commercial case to be litigated in the country where the litigation would be the most cost-efficient and to be excluded from the jurisdiction if it has already been brought before a court in another country. In any case, generally when a country is a (parent) corporation's home state, the courts exercise jurisdiction over the disputes. The doctrine has been softened in the UK for allowing the national courts to try TNCs in order to assess their liability for the acts of their subsidiaries abroad. U.S. Courts has also held that a "parent corporation and its subsidiary lose their distinct corporate identities when their conduct demonstrates a virtual abandonment of separateness." *Thomson-CSF*, 64 F.3d at 778 (citing *Carte Blanche*, 2 F.3d at 29); Gatto, **op. cit.**, p. 26, 65; Joseph, "An Overview…", p. 79; Anita Ramasastry, "Corporate Complicity: From Nuremberg to Rangoon, An Examination of Forced Labour Cases and Their Impact on the Liability of Multinational Corporations", **Berkeley J. Int'l L.**, Vol. 20, 2002, p. 98. see also Wiwa v. Royal Dutch Petroleum Co., 226 F. 3d 88 – Court of Appeals, 2nd circuit, September 14, 2000; Francisco Forrest Martin, "The International Human Rights & Ethical Aspects of the *forum non conveniens* Doctrine", **U. Miami Inter-Am. L. Rev.**, Vol. 35, 2003-2004, p. 101; Pascal Grolimund, "Human Rights and Jurisdiction: General Observations and Impact on the Doctrines of *Forum Non Conveniens* and *Forum Conveniens*", **Eur JL Ref.**, Vol. 4, 2002, p. 87.

Following the Kadic litigation, in *Doe I. v. Unocal*, which will be examined in detail under the fifth chapter within the context of corporate complicity, the U.S. Courts reaffirmed that the law of nations may be applied directly on individuals, even if there is no state involvement in the commission of a 'handful of crimes', such as slave trading, and even when the individuals do not act with an official capacity.[405] The Court emphasized that violations of specific, universal and obligatory international norms provide a cause of action under the ATCA.[406] The Court referring to its previous judgments reminded "*torture, murder, and slavery are jus cogens violations and, thus, violations of the law of nations... Rape can be a form of torture… Moreover, forced labor is so widely condemned that it has achieved the status of a jus cogens violation… Accordingly, all torts alleged in the present case are jus cogens violations and, thereby, violations of the law of nations.*" [407] (references omitted)

Later on, several cases have been brought before the U.S. Courts alleging violations of international law by corporations. List of these cases and their subject summaries are as follows:

- *"Caterpillar, for selling bulldozers to the Israeli military, which used them to demolish Palestinian homes (Corrie v. Caterpillar, Inc., 403 F. Supp. 2d 1019 (W.D. Wash. 2005), aff'd on other grounds, 503 F.3d 974 (2007), and petition for reh'g filed, No. 05-36210 (9th Cir. Oct. 9, 2007))*
- *Chiquita, for allegedly paying Colombian paramilitary groups to keep the company's banana plantations "free of labor opposition and social unrest," (Does v. Chiquita Brands Int'l, Inc., No. 07-CV-10300 (S.D.N.Y. Nov. 14, 2007)) (Cardona et al v. Chiquita Brands International Inc et al, 11th U.S. Circuit Court of Appeals, No. 12-14898, July 2014)*

[405] Doe I v. Unocal Corp., 395 F. 3d 932- Court of Appeals, 9th Circuit 2002, p. 945-946.
[406] **ibid.**, p. 944. In the following judgments the U.S. Courts held that *"A Tort that violates customary international law will be recognized if the norm alleged (1) is defined with a specificity comparable to the 18th century paradigms discussed in Sosa, (2) is based upon a norm of international character accepted by the civilized world, and (3) is one that States universally abide by, or accede to, out of a sense of legal obligation and mutual concern*." In re South African Apartheid Litigation, 617 F. Supp. 2d 228, 255 (2009) p. 20.
[407] *Doe I v. Unocal Corp.*, p. 945.

- *Banque Nationale Paris Paribas, for alleged payments to Saddam Hussein's regime in violation of the rules of the United Nations oil-for-food program, (Mastafa v. Australian Wheat Bd., Ltd., No. 07-CIV-7955 (S.D.N.Y. Sept. 11, 2007))*

- *A Boeing subsidiary (Jeppesen Dataplan), for allegedly servicing flights used by the CIA for "extraordinary renditions" of suspected terrorists to other countries where interrogators commonly use torture and other unlawful techniques, (Mohamed v. Jeppesen Dataplan, Inc., No. 5:07-CV-02798 (N.D. Cal. Aug. 1, 2007). See generally also David Weissbrodt & Amy Bergquist, Extraordinary Rendition: A Human Rights Analysis, 19 HARV. HUM. RTS. J. 123 (2006) (discussing extraordinary rendition).)*

- *Yahoo, for providing the Chinese government with internet records leading to the identification and alleged torture of a human rights activist, (Second Amended Complaint at 2, Xiaoning v. Yahoo! Inc., No. 07-CV-2151 (N.D. Cal. July 30, 2007) (case settled))*

- *Drummond mining company, for allegedly paying Colombian paramilitaries who murdered labor activists, (Doe v. Drummond Co., No. 06-CV-61527 (S.D. Fla. Oct. 10, 2006) (case dismissed))*

- *Wal-Mart, for failing to stop suppliers from committing labor abuses, (Doe v. Wal-Mart Stores, Inc., No. 05-CV-7307 (C.D. Cal. Dec. 28, 2005) (case dismissed; appeal pending))*

- *Nestle, for buying cocoa and providing services to cocoa farmers employing child labor, (Doe v. Nestle S.A., No. 05-CV-5133 (C.D.Cal. July 14, 2005))*

...

- *Barclay's Bank and dozens of other major corporations, for doing business with the apartheid regime in South Africa. (Khulumani v. Barclay Nat'l Bank Ltd., 504 F.3d 254 (2d Cir. 2007), aff'd for lack of quorum sub nom American Isuzu Motors Inc. v. Lungisile Ntsebeza, 2008 U.S. LEXIS 3868 (May 12, 2008))"*[408]

[408] Some of these cases are elaborated on in detail in the section regarding corporate complicity. This list have been adopted from Doug Cassel, "Corporate Aiding and Abetting of Human Rights Violations: Confusion in the Courts", **Nw J Int'l HR**, Vol. 6 (2), 2008. Cassel, in his valuable article carefully analysing the judgments of the U.S. Courts, himself refers to the January 2008 petition for certiorari by corporate defendants in the South Africa apartheid litigation for this list. Petition for a

In *Kiobel v. Royal Dutch Petroleum litigation*, the plaintiffs, who are Nigerian nationals residing in the U.S., alleged that the foreign corporations operating in Nigeria have aided and abetted the Nigerian Government in violating human rights and the 'laws of nations'.[409] On April 17, 2013, the U.S. Supreme Court rejected the precedents of the lower courts mentioned above and held that the U.S. courts cannot exercise universal jurisdiction under ATCA, even if the allegations concern the most serious violations of international law (known as *Kiobel II*). This is called the presumption against extraterritoriality: *"when a statute gives no clear indication of an extraterritorial application, it has none*." …"*and reflects the United States law governs domestically but does not rule the world*"[410] (footnotes omitted). Therefore, a wrongful conduct shall 'touch or concern' the U.S. in order to overcome the presumption against extraterritoriality and 'mere corporate presence' is not sufficient to hold that the U.S. courts have jurisdiction under the ATCA[411]. In the concurring opinion of Justices Breyer, Ginsburg, Sotomayor and Kagan, it is stated that:

> *"Unlike the Court, I would not invoke the presumption against extraterritoriality. Rather, guided in part by principles*

Writ of Certiorari at 23, n. 3, American Isuzu Motors Inc. v. Lungisile Ntsebeza, 128 S. Ct. 2424 (2008).

[409] Before the Kiobel case, the Ogonis alleged the complicity of the Royal Dutch Petroleum in the commission of crimes against humanity, apartheid, torture and inhumane treatment in Niger Delta. However, the case was settled out in 2009 when Shell (subsidiary of Royal Dutch Shell in Nigeria) agreed to compensate $15.5 million. Therefore, no conclusion as to the extraterritorial application of ATCA was made. Wiwa v. Royal Dutch Petroleum Co., 226 F.3d 88, 92, 94 (2d Cir. 2000); Jad Mouawad, "Shell to Pay $15.5 million to Settle Nigerian Case", The New York Times, 8 June 2009, http://www.nytimes.com/2009/06/09/business/global/09shell.html?ref=global&_r=0, accessed on 10.07.2013. It shall be noted that in January 2013, the domestic court of the Netherlands, has for the first time ever, decided that the parent company (Royal Dutch Shell) was partially responsible for the environmental damage caused by its subsidiary (Shell Petroleum Development Company Nigeria Ltd.) for negligently violating its duty of care. This is the only case, up-to-2015, that a home state holding its national responsible for extraterritorial violations committed by a subsidiary. The Dutch Court in deciding that Shell shall be responsible, took into consideration the facts that under Nigerian Law it was not possible to hold a company for the damage caused by a sabotage to oil platforms and that the parent company owned 100% of the shares of the local Shell. R Ridderhof, "Shell and Ogoni People: s(oil) pollution in the Niger Delta", 15 February 2015, http://www.peacepalacelibrary.nl/2013/02/shell-and-ogoni-people-soil-pollution-in-the-niger-delta/, accessed on 24.07.2015.

[410] Kiobel (2013), p. 1664.

[411] Kiobel, (2013), 133 S. Ct. p. 1669. In *Daimler AG v. Bauman*, it was alleged that Daimler AG, a German company, collaborated with the security forces of Argentina during the "Dirty War" of 1970's and early 1980's. The Supreme Court again rejecting both the universal and personal jurisdiction, held that Daimler's had not "so continuous and systematic" affiliations with the U.S. "as to render [it] essentially at home in the forum State". Daimler AG v. Bauman et al., 134 S. Ct. 746, 751 (2014), p. 761. See also Cardona et al v. Chiquita Brands International Inc et al, 11th U.S. Circuit Court of Appeals, No. 12-14898, July 2014.

and practices of foreign relations law, I would find jurisdiction under this statute where (1) the alleged tort occurs on American soil, (2) the defendant is an American national, or (3) the defendant's conduct substantially and adversely affects an important American national interest, and that includes a distinct interest in preventing the United States from becoming a safe harbor (free of civil as well as criminal liability) for a torturer or other common enemy of mankind. See Sosa v. Alvarez-Machain, 542 U.S. 692, 732, 124 S.Ct. 2739, 159 L.Ed.2d 718 (2004) ("'[F]or purposes of civil liability, the torturer has become — like the pirate and slave trader before him — hostis humani generis, an enemy of all mankind.'" (quoting Filartiga v. Pena-Irala, 630 F.2d 876, 890 (C.A.2 1980) (alteration in original))). See also 1 Restatement (Third) of Foreign Relations Law of the United States §§ 402, 403, 404 (1986). In this case, however, the parties and relevant conduct lack sufficient ties to the United States for the ATS to provide jurisdiction."[412]

... As I have indicated, we should treat this Nation's interest in not becoming a safe harbor for violators of the most fundamental international norms as an important jurisdiction-related interest justifying application of the ATS in light of the statute's basic purposes — in particular that of compensating those who have suffered harm at the hands of, e.g., torturers or other modern pirates. Nothing in the statute or its history suggests that our courts should turn a blind eye to the plight of victims in that "handful of heinous actions. "Tel-Oren v. Libyan Arab Republic, 726 F.2d 774, 781 (C.A.D.C. 1984) (Edwards, J. concurring). See generally Leval, The Long Arm of International Law: Giving Victims of Human Rights Abuses Their Day in Court, 92 Foreign Affairs 16 (Mar. / Apr. 2013). To the contrary, the statute's language, history, and purposes suggest that the statute was to be a weapon in the "war" against

[412] Kiobel, (2013), p. 1671.

those modern pirates who, by their conduct, have "declar[ed] war against all mankind." 4 Blackstone 71."[413]

Furthermore, regarding corporate liability under ATCA, the Second Circuit held in 2010 (known as *Kiobel I*) that even though under the U.S. domestic law, corporations may be imposed obligations on and be accountable for violations of their obligations, what shall be applied under ATCA procedures is not domestic law, but international law.[414] Moreover, even if the liability of corporations is a norm adopted by "*most or even all "civilized nations",* [it] *does not make that norm a part of customary international law*".[415] The Court concluded that, under customary international law, there is no notion of corporate liability and no international court has ever decided to the contrary.[416] However, the Supreme Court, in its judgment in 2013, did not elaborate on this legal question,[417] which has been interpreted by some scholars and even judges of the Second Circuit as an implicit overturning of the judgment in *Kiobel I*. Steinhardt in his article clarifies what Kiobel case and the concurring opinions of Justices imply for the international scholars: "*All four of the opinions in Kiobel confirm that multiple significant issues remain for future*

[413] Kiobel, (2013), p.1674. Regarding the concurring opinion of Justice Breyer, Ku notes that: "Breyer limited ATS cases to those involving "distinct American interests," even though international law imposes no such requirement and the sources that he cites seem to support a universal jurisdiction approach." For an analysis of Kiobel case from the perspective of the separation of powers doctrine see Julian G. Ku, "Kiobel and the Surprising Death of Universal Jurisdiction under the Alien Tort Statute", Agora: Reflections on Kiobel, **AJIL**, Vol.107, 2013, pp. 835-841. See also Andrew Sanger, "Transnational Human Rights Cases? Not in our Backyard!", **Cambridge LJ**, Vol. 72, Issue 03, November 2013, pp. 487-490.

[414] Kiobel v. Royal Dutch Petroleum, 621 F.3d 111 (2d Cir. 2010), p. 117-118.

[415] Kiobel v. Royal Dutch Petroleum, 621 F.3d 111 (2d Cir. 2010), p.118.

[416] **ibid.**

[417] Kiobel, (2013), p. 1663. There is a similar provision in the Torture Victims Protection Act of 1992 which aimed "*to carry out obligations of the United States under the United Nations Charter and other international agreements pertaining to the protection of human rights by establishing a civil action for recovery of damages for an individual who engages in torture or extrajudicial killing*" (Pub. L. No. 102-256, 106 Stat. 73 (1992) (codified at 28 U.S.C. § 1350) The U.S. Courts affirming that the "*use of the word individual in a statute 'does not necessarily exclude corporations'*" (United States v. Middleton, 231 F.3d 1207, 1210 (9th Cir. 2000), concluded that the use of the word "individual" in the TVPA intends to exclude corporations and to limit liability for acts of torture only to natural persons. Bowoto v. Chevron Corp. No. 09-15641 D.C. No 3:99-cv-02506-SI, 10 September 2010, pp. 13905-13904. *Bowoto v. Chevron Corp.* case concerned allegations against the parent company Chevron US, whose subsidiary Chevron Nigeria Ltd. was accused of being complicit in the commission of crimes (killing of the environmentalist protestors, torture, attacks on the villages, churches and water wells) perpetrated by the Nigerian military personnel, who were hired and provided material assistance by Chevron for the protection of their premises. The case resulted in a verdict in favour of the parent company proving that under the U.S. system it is very difficult to pierce the corporate veil and to hold the parent company liable for the conduct of its subsidiaries in foreign territories. *Bowoto v. Chevron Corp.*, No. C99-02506SI, 2007 WL 800940 (N.D. Cal. Mar. 14, 2007) (the litigation was initially and mistakenly brought against ChevronTexaco in B*owoto v. Chevron Texaco Corp.*, 312 F. Supp. 2d 1229 (N.D. Cal. 2004).

resolution, but it is unrealistic to expect answers on the basis of the Court's decision because what is law in Kiobel isn't clear and what is clear in Kiobel isn't law."[418]

In 2014, the U.S. District Court for the Southern District of New York, in reviving the twelve year-old case *In re South Africa Apartheid Litigation,* interpreted the silence of the Supreme Court on 2010 Kiobel I opinion concerning corporate liability under ATCA as "*sub silentio*" reversing the District Court's judgment.[419] The case concerns allegations against Ford Motor Company, General Motors and International Business Machines Corporation (IBM) for being complicit in violations of international law by manufacturing military vehicles and computers for South African security forces.[420] Justice Scheindlin, summarizing the approaches of the judges in the judgment of the Second Circuit in *Chowdhury v. Worldtel Bangladesh Holding, Ltd.*[421] held that:

> *"In footnote 6 of the majority opinion written by Judge Cabranes, the author of Kiobel I, the court remarked that "[p]laintiff's claims under the ATS . . . encounter a second obstacle [because] the Supreme Court's decision in Kiobel did not disturb the precedent of this [Second] Circuit that corporate liability is not . . . currently actionable under the ATS." But in footnote 2 of the concurring opinion, Judge Rosemary Pooler clarified that footnote 6 "is not pertinent to our decision and thus is dicta." Judge Pooler further noted that "[a]t least one sister circuit has determined that, by not passing on the question*

[418] Steinhardt, Ralph G. "Kiobel and the Weakening of Precedent: A Long Walk for A Short Drink", Agora: Reflections on Kiobel, **AJIL**, Vol.107, 2013, pp.841-845.
[419] In concluding so Justice Scheindlin referred to several pre-Kiobel and post-Kiobel judgments given by the Supreme Court, Second Circuit and other circuits of the Federal Courts, notably: Daimler AG v. Bauman, 134 S. Ct. 746, 751 (2014); Goodyear Dunlop Tires Operations, S.A. v. Brown, 131 S. Ct. 2846, 2851 (2011); Licci ex rel. Licci v. Lebanese Canadian Bank, SAL 732 F.3d 161, 174 (2d Cir. 2013); Chowdhury v. Worldtel Bangladesh Holding, Ltd. No. 09-4483, 2014 WL 503037, at 12 (2d Cir. Feb. 10, 2014); Doe I v. Nestle U.S.A., Inc., 738 F.3d 1048, 1049 (9th Cir. 2013); Sarei v. Rio Tinto, PLC, 671 F.3d 736, 764-65 (9th Cir. 2011); Romero v. Drummond Co., Inc., 552 F.3d 1303, 1315 (11th Cir. 2008); Tymoshenko v. Firtash, No. 11 Civ. 2794, 2013 WL 4564646, at 3 (S.D.N.Y. Aug. 28, 2013); Du Daobin v. Cisco Systems, Inc., No. 11 Civ. 1538, 2014 WL 769095, at 8 (D. Md. Feb. 24, 2014).
[420] *In re: South African Apartheid Litigation*, U.S. District Court, Southern District of New York, No. 02-md-01499, 2014. Koebele gives the examples of IBM who produced the passbook system that was used for identifying the people in controlling the passage to the urban areas; Daimler who supplied cars for the police force; and Shell who supplied oil for the military.
[421] *Chowdhury v. Worldtel Bangladesh Holding, Ltd.,* No. 09-4483, 2014 WL 503037, at 12 (2d Cir. Feb. 10, 2014).

> *of corporate liability and by making reference to 'mere corporate presence' in its opinion, the Supreme Court established definitively the possibility of corporate liability under the ATS."*[422] *(footnotes omitted)*

Justice Scheindlin rationalized her standing by underlining that if there is a presumption against extraterritoriality, which may be overcome by proving the existence of additional factors that link the company and the U.S., then once this presumption is overturned, the U.S. Courts shall have jurisdiction to apply the ATCA, and accordingly, the law of nations, on corporations.[423] Hence, Justice Scheindlin held that "*Kiobel II either implicitly accepts corporate liability under the ATS or, at the very least, undercuts Kiobel I's rationale and reopens the question in this Circuit. For the following reasons, I find that corporations may be held liable for claims brought under the ATS.*"[424]

Furthermore, Justice Scheindlin criticized the finding in *Kiobel I* for missing the difference between existence of a substantive international customary norm, means of enforcing it and subject of the obligation.[425] Scheindlin argued that customary international law establishes a norm of conduct, which may be implemented and enforced through domestic law, such as ATCA.[426] Since the adoption of the ATCA in 1789, corporate tort liability is an established institution under the U.S. law.[427] Furthermore, even if one could assume that Kiobel I rightly argued that "*source of corporate liability must be found in customary international law", Kiobel I* is factually and legally incorrect due to its rejection of existence of corporate liability in international law.[428] Nuremberg trials, and especially *I.G. Farben* trial, prove that corporate liability exists under international law. Scheindlin concludes that: 1. "*There is always a first time for litigation to enforce a norm; there has to be. (Flomo, 643 F.3d at 1017)*", 2. "*International law admits to corporate*

---

[422] *In re: South African Apartheid Litigation*, U.S. District Court, Southern District of New York, No. 02-md-01499, 2014, p. 11.
[423] **ibid**,, p. 14.
[424] **ibid**,, p. 17.
[425] **ibid.**, p. 19.
[426] **ibid.**, p. 21.
[427] **ibid.**, p. 22.
[428] **ibid.**, p. 24.

liability, as does domestic law. (Sarei, 671 F.3d at 761)".[429] Nevertheless, the twelve year-old case has been dismissed on the ground that the conduct of Ford and IBM did not have sufficient touch and concern to displace the presumption against extraterritorial application (*Kiobel II*).[430]

2.2. An Overview of the System of Domestic Regulation

Domestic regulation is one of the measures that may be adopted by the States in the context of their responsibility to protect human rights. International human rights documents leave a margin of appreciation to State authorities in choosing the tools for fulfilling their conventional obligations.[431] In other words, domestic regulation may have administrative, legislative and even a judicial character depending on the policies and political choices of each State. Furthermore, human rights obligations of States may extend beyond their territories. Therefore, States may be held responsible for violations perpetrated by private actors not only in their territories, but also in the foreign territories, provided that the abusive conduct of the private actor is -directly or indirectly- attributable to that State. Lastly, state responsibility to protect shall be understood as the responsibility of both home states and host states under human rights law and the law of international responsibility.[432] As I noted above the indirect horizontal application of human rights law have implications both for host states, based on the principles of territoriality and passive personality, and home states, based on the principle of active personality and also the extraterritorial application of human rights law.

2.2.1. Responsibility of Host State

The traditional way of holding TNCs responsible for human rights violations is on the basis of the laws of host States. No involvement or interference of the home state with the domestic affairs and sovereignty of the host state is legitimate under

---

[429] *In re: South African Apartheid Litigation*, pp. 26-27.
[430] **ibid.**, p. 19. Justice Scheindlin added that "*That these plaintiffs are left without relief in an American court is regrettable. But I am bound to follow Kiobel II and Balintulo, no matter what my personal view of the law may be.*"
[431] *e.g.* ECtHR, Plattform 'Ärzte für das Leben' v. Austria, App. no. 10126/82, 21 June 1988, para. 34; Zimbabwe Human Rights NGO Forum v Zimbabwe, AfCommHPR (2006), Comm. No. 245/02, para. 155.
[432] Clapham, **Human Rights Obligations…**, p. 241 *et seq.*

international law. The traditional understanding results in the irresponsibility of home states for the abusive conduct of its nationals in the foreign territories. This may be considered as an implication of the efforts for establishing the "New International Economic Order" and promoting foreign investments in under-industrialized developing countries.[433] Furthermore, the liberal understanding of international law promotes the protection of the rights of corporations, rather than encouraging the imposition of duties. However, especially when the corporate conduct is in violation of the obligations *erga omnes,* such protection shall not be considered as unlimited. The ICJ, in Barcelona Traction case held that:

> "*When a State admits into its territory foreign investments or foreign nationals, whether natural or juristic persons, it is bound to extend to them the protection of the law and assumes obligations concerning the treatment to be afforded them. These obligations, however, are neither absolute nor unqualified. In particular, an essential distinction should be drawn between the obligations of a State towards the international community as a whole, and those arising vis-à-vis another State in the field of diplomatic protection. By their very nature the former are the concern of all States. In view of the importance of the rights involved, all States can be held to have a legal interest in their protection; they are obligations erga omnes.*
>
> *Such obligations derive, for example, in contemporary international law, from the outlawing of acts of aggression, and of genocide, as also from the principles and rules concerning the basic rights of the human person, including protection from slavery and racial discrimination. Some of the corresponding rights of protection have entered into the body of general international law (Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, Advisory Opinion, I.C.J. Reports 1951, p. 23); others are conferred by*

[433] Rigaux, **op. cit.,** p. 125.

international instruments of a universal or quasi-universal character."[434]

However, as Gatto argues the protection of human rights against corporate abuses by the laws of host states would provide only illusory guarantees, which would remain inadequate and ineffective. The positive obligation to juridically ensure the free and full exercise of rights and freedoms includes the duty to organize the State institutions and tools of public power in a way to guarantee the prevention, investigation and punishment of human rights violations and redressing the damage.[435] However, since the developing states are in a global competition for drawing foreign investment to their countries, they would be very reluctant to regulate corporate behaviour for not pushing the flow of capital backwards.[436] Furthermore, some of the developing countries may lack the technical expertise required to monitor and sanction the corporate behaviour.[437] To add, the economic and political power of the TNCs allows them to control the policy of host states on regulating corporate conduct, and in some developing states, it even leads to a policy of non-enforcement of existing laws.[438] Lowering the tax rates by sacrificing public expenditures and not ameliorating the labour laws are among the policies adopted by developing countries for drawing capital and capitalists to their countries.[439] Besides, the TNCs may have the ability to ineffectuate any sanction imposed on them by the host states, especially when corrupt governments are at the scene.[440]

Moreover, bilateral investment treaties concluded between the host state and the corporation might prevent it from taking measures for the protection of human rights in line with its international obligations under human rights treaties.[441] Accordingly, while the host state would bear the international responsibility for the breach of its international obligations, the corporations would remain

---

[434] *Barcelona Traction*, paras. 33-34.
[435] Tzevelekos, **op. cit.**, p. 183.
[436] Benedek & de Feyter & Marrella, **op. cit.,** pp. 245-265.
[437] Joseph, "An Overview…", p. 78-79.
[438] Evaristus Oshionebo, "The UN Global Compact and Accountability of Transnational Corporations: Separating Myth From Realities", **Fla. J Int'l L**, Vol. 19, No. 1, April 2007, p. 31.
[439] Monshipouri & Welch & Kennedy, **op. cit.**, p. 973.
[440] Joseph, "An Overview …" p. 78-79; Olufemi O. Amao, "Corporate Social Responsibility, Multinational Corporations and the Law in Nigeria: Controlling Multinationals in Host States", **J Afr L**, Vol. 52: 1, 2008, pp. 89-113.
[441] McCorquodale & Simons, "Responsibility Beyond Borders…", pp. 599-600.

unaccountable.[442] This would mean that either the right of the victims to effective remedy would be violated, or the society would be forced to shoulder the economic consequences of the wrongdoings of corporations. Secondly, if the regulation of corporate conduct were left to the political choices of each state, the legal systems on holding the corporations accountable would be very diverse. Such diversity would also undermine the accuracy and effectiveness of holding corporations accountable for violations of human rights. Thirdly, TNCs are generally in a tendency not to obey the laws of the country they operate in. They behave in a way that they would normally refrain from while operating in their home states. Fourthly, the legal system of the host state may be underdeveloped with limited possibilities to provide redress for the victims.[443]

2.2.2. Responsibility of Home State

Home states, generally being industrialised countries, are in a more powerful situation to regulate corporate conduct than the host states.[444] The reasons for this are, firstly, that the home states are in general the economically and politically developed states of the world, and secondly, corporations having the nationality of the home state are subject to the laws of the home state, which supposedly have "*effective control over the transnational network of corporate activities*".[445] Gatto draws attention to the fact that, especially through the taxing system, home states benefit the most from the operations of the TNCs, and thus, they prefer remaining unresponsive to the allegations of human rights violations abroad. Additionally, home states are reluctant to regulate the conduct of their TNCs, which, according to their view, would put them in a disadvantageous position compared to the TNCs of other countries in the competitive world market.[446]

However, as emphasized on various occasions, home states, too, have obligations to respect, protect and fulfil human rights arising under the international conventions. For example, as the Committee on the Rights of the Child stressed, home states have obligations to respect, protect and fulfil the rights of the children in

[442] **ibid.**
[443] Gatto, **op. cit.**, p. 25.
[444] Joseph, "An Overview…", p. 79.
[445] Gatto, **op.cit.**, p. 25.
[446] Joseph, "An Overview…", p. 80.

the context of extraterritorial activities and operations of TNCs, if there exists a reasonable link between the State and the conduct concerned.[447] The Committee explain this 'reasonable link' so as to having the centre of activity in its territory, being registered or domiciled or having its main place of business or substantial business activities in its territory.[448] In any case, home states shall not act in any way contrary to the principles of the UN and general international law.[449] Below, the extraterritorial due diligence obligations of home states will be elaborated on after a brief review of the nationality of TNCs.

2.2.2.1. Nationality of TNCs

The question of nationality of corporations poses a preliminary problem for the international judge in determining the State that is responsible for a wrongful act and also in finding out the State that has the right to diplomatic protection.[450] There is an analogy between the rules determining the nationality of individuals and corporations.[451] Even though it is a well-established rule that the State of incorporation and the place of registration are to be considered as the home state of a corporation, there may be exceptions to this rule.[452] The ICJ, in *Barcelona Traction* case, held that there are a number of systems for conferring nationality to corporations. For example, the place of management or control seat (*siége social réel* or the effective seat test)[453] of the corporation, or the nationality of the majority of shareholders (foreign control test)[454] may be decisive in determining the nationality.[455] As the ICJ concluded, the 'genuine connection' between the

[447] CRC/C/GC/16, General Comment No. 16 (2013) on State obligations regarding the impact of the business sector on children's rights, 17.04.2013, para. 43.
[448] **ibid.**
[449] **ibid.**
[450] Ian Brownlie, **Principles of Public International Law**, OUP, 7th ed., 2008, p. 420.
[451] Barcelona Traction case, para. 70; Ahmadou Sadio Diallo (*Guinea v Democratic Republic of the Congo*), Preliminary Objections, ICJ Rep. 2007, paras. 31, 88.
[452] In this case, the domestic laws of the States would determine whether a corporation has been established duly. The extent of rights and duties of the corporations shall also be determined accordingly. See generally, Ignaz Seidl-Hohenveldern, **Corporations In and Under International Law**, University of Cambridge Research Centre for International Law, Hersch Lauterpacht Memorial Lectures, Cambridge Grotius Publications Ltd., 1987.
[453] Tzevelekos, **op. cit.**, p. 168.
[454] During the Cold War era, the nationality of corporations was considered as an important factor in the determination of the 'enemy property'. Therefore, the control test, *i.e.* the nationality of the shareholders, was frequently being used.
[455] James Crawford, **Brownlie's Principles of Public International Law**, 8th ed., OUP, 2008, pp. 527-530.

corporation and the State would depend on the circumstances of each case and that there is no pre-determined absolute test for finding such a genuine link.[456]

Article 9 of 2006 Draft Articles on Diplomatic Protection foresees, in principle, that the State of nationality is the State where the corporation has been incorporated. However, if the corporation is (1) 'controlled by the nationals of another State or States', and (2) 'has no substantial business activities in the State of incorporation', and (3) 'the seat of management and the financial control of the corporation are both located in another State', then that State would be considered as the State of nationality. It is also expressly provided under Articles 11 and 12 that the State of nationality of shareholders shall not exercise its right to diplomatic protection, unless the corporation (a) 'has ceased to exist', or (b) 'the State of nationality [of the corporation is] alleged to be responsible for causing the injury', or (c) the injury was directly inflicted on the rights of the shareholders.

Article 25(2)(b) of the ICSID Convention defines the term 'national of another Contracting State' as a juridical person who (a) has the nationality of a State other than the State that is party to a dispute, or (b) 'because of foreign control, the parties have agreed [that the juridical person] should be treated as a national of another Contracting State for the purposes of this Convention'. Accordingly, the test of effective foreign control, which is based on an objective criterion, could be applied only if the State parties to a dispute agree thereto.[457]

Clapham suggests that a similar 'effective control' criterion may be used with regard to the international criminal responsibility of corporations.[458] He suggests that any objection as to the jurisdiction of the Court may be avoided by fixing a nationality for the corporation by inserting a complementary formula to the criterion of place of incorporation in the Rome Statute.[459] He refers to the notion of 'enemy

---

[456] Nottebohm case (Liechtenstein v. Guatemala) (second phase), Judgment, ICJ Rep. 1955, p. 23; Barcelona Traction case, para. 70.
[457] Tzevelekos, **op. cit.**, p. 169.
[458] Andrew Clapham, "The Question of Jurisdiction under International Criminal Law Over Legal Persons: Lessons from the Conference on an International Criminal Court" in Kamminga & Zia-Zarifi (eds.), **Liability of Multinational Corporations**…, p. 188.
[459] **ibid.**, pp. 183-184. See also Jo Stigen, **The Relationship between the International Criminal Court and National Jurisdictions: The Principle of Complementarity**, Martinus Nijhoff, Leiden-Boston 2008.

companies in times of war', which originates from the UK law.[460] According to this, the nationality of real persons controlling the company may be a determinant factor for the purposes of proving the criminal intent in the 'controlling mind', which has allegedly used the company as an instrument for committing the crime.[461] To put more precisely, under some circumstances, the place of incorporation or registration or the nationality of directors and shareholders could not be a sufficient factor to conclude that a company is an enemy. Rather, it could be crucial to determine that these real persons were *de facto* controlling the company under the instructions or control of the enemy State with criminal intents.[462]

For example, in the French proposal to the Draft ICC Statute, which will be thoroughly elaborated on in the fifth chapter, it was proposed as a precondition that the individual in a position of 'control' within the corporation under the national law of the State where the juridical person was registered at the time the crime was committed shall be charged and convicted by the Court.[463] Following the conviction of the individual, the corporation would then be tried before the ICC, regardless of its nationality.[464]

2.2.2.2. Extraterritorial Due Diligence Obligations of Home States

The obligation of home states also stems from "*every States' obligation not to allow knowingly its territory to be used for the acts contrary to the rights of other states*" as declared by the ICJ in *Corfu Channel* case.[465] A similar principle with regard to environmental law was also emphasized in the advisory opinion of the ICJ

---

[460] For the UK, enemy company is *"(i) when it owes its legal existence and incorporation to the laws of enemy State; (ii) when wherever incorporated, it has acquired enemy character by reason of the hostile residence or activities of its agents or other persons in de facto control of its activities; (iii) when even though other registered in the United Kingdom, it is carrying on business in enemy territory"*. In 1939 Trading with the Enemy Act, it is provided that enemy is *"(c) any body of persons (whether corporate or unincorporate) carrying on business in any place, if and so long as the body is controlled by a person who, under this section, is an enemy. (d) any body of persons constituted or incorporated in, or under the laws of, a State at war with His Majesty, and (e) as respects any business carried out in enemy territory, any individual or body of persons (whether corporate or unincorporate) carrying on that business*" in Lord McNair and A.D. Watts, **The Legal Effects of War**, 4th ed., 1966, pp. 104 and 236-237 quoted in Clapham, "The Question of Jurisdiction …", pp. 185-186.

[461] Clapham, "The Question of Jurisdiction…", pp. 184-185.

[462] **ibid.**, p. 186.

[463] Working Paper on Article 23, paras. 5 and 6, A/Conf.183/C.1/WGGP/L.5/Rev.2, 3 July 1998.

[464] Clapham, "The Question of Jurisdiction…", p. 179.

[465] Corfu Channel Case, Judgment of April 4th, 1949, ICJ Rep. 1949, p. 22.

on the *Legality of the Threat or Use of Nuclear Weapons* case as follows: *"...The existence of the general obligation of States to ensure that activities within their jurisdiction and control respect the environment of other States or of areas beyond national control is now part of the corpus of international law relating to the environment.*"[466]

De Schutter points out the argument that the responsibility of home state for the acts of its nationals abroad, whether real or artificial, should be considered especially when a violation of peremptory norm is at issue.[467] Such responsibility may stem from the right of the state to diplomatic protection.[468] Nevertheless, it is not disputed that the acts of non-state actors should either directly or indirectly be linked to the act or omission of the home state.[469] De Schutter finally notes that assertions based on the right to diplomatic protection has little standing due to the fact that contemporary positive international law does not allow us to deduce such a consequence.[470] To the contrary, as discussed above, Article 8 of the ILC Draft Articles on State Responsibility expressly requires additional conditions to the nationality condition in order to attribute an act to the State and hold it responsible for the acts of its nationals. On the same account, the ICJ does not consider nationality as a "high degree of dependency" to the State adequate to conclude that the acts of the nationals are attributable to that State. According to the ICJ, effective

---

[466] Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, ICJ Rep., 1996, p. 226, para. 29; This principle has been reaffirmed in Gabcikovo-Nagymaros Project (Hungary v. Slovakia), Judgement, ICJ Rep. 1997, p. 41, para. 53. See also Case concerning the difference between New Zealand and France concerning the interpretation or application of two agreements, concluded on 9 July 1986 between the two States and which related to the problems arising from the Rainbow Warrior Affair, 30 April 1990, Vol. XX pp. 215-284; Trail smelter case (United States v. Canada), 16 April 1938 and 11 March 1941, Vol. III, pp. 1905-1982; McCorquodale & Simons, "Responsibility Beyond Borders…", p. 617.

[467] de Schutter, "The Accountability of Multinationals …", p. 235.

[468] The idea is that if the principle of diplomatic protection belonging to the colonial era facilitating the protection of the nationals of a State, which invested abroad, continues to apply in the post-colonial era; then its counterpart, *i.e.* state responsibility, should also be applicable where any harm occurs as a result of the conduct of its nationals. de Schutter, "The Accountability of Multinationals …", p. 236. To add, Clapham mentions diplomatic protection also as the basis of obligation of host states to exercise due diligence in the treatment of foreign corporations operating in their territory. Clapham, **Human Rights Obligations**…, p. 347.

[469] de Schutter refers to the thesis of Sornarajah who alleges that the responsibility of home state may only be considered in cases where the State *'knowingly permits its nationals to engage in violations of jus cogens principles whilst abroad',* and where *'a State gives active assistance to those who are known to violate or are seen as capable of violating such jus cogens principles*." M. Sornarajah, "Linking State Responsibility for Certain Harms Caused by Corporate Nationals Abroad to Civil Recourse in the Legal Systems of Home States" in Scott (ed.) **Torture as Tort…**p. 504 cited in de Schutter, "The Accountability of Multinationals…", p. 236, fn. 25.

[470] **ibid.,** p. 236.

control of the State over the non-sate actors should be proved to hold the State responsible for their acts that violate human rights.[471] As a consequence, if a TNC is not acting under the instructions, directions or control of the home state, the State may not be held internationally responsible. Therefore, in theory, the only way to invoke the responsibility of the home State may be extending the positive obligation of the home state to protect human rights beyond the national territorial borders of that State without infringing the principles of public international law. In other words, the active personality principle may allow the home state to control the acts of its nationals abroad in order to prevent any human rights violations.[472]

Under the concepts of traditional public international law, even if the jurisdiction of the home state could extend beyond the national borders, it is arguable that it can exercise its sovereign rights over the nationals of another State that enters into commercial relations with its own nationals. For example, could the subsidiaries with their own artificial personalities recognized under the national law system of a host state be forced to act in line with the international human rights obligations of a foreign State? The answer would clearly be negative. However, if the legal theory allows us to consider the main corporation and its subsidiaries as one single entity operating under the control of one central authority, it could be concluded that a TNC should be responsible for the acts of its subsidiaries operating as its organs.[473] For example, Gatto asserts that despite the principle of separation of corporate entity from the personality of its components, the parent corporation should be responsible for the operation of its sub-contractors if it fails to act with due diligence.[474] In this case, the parent corporation may be regarded as culpable or negligent, because of its failure to effectively intervene in the violation of human rights perpetrated within its sphere of influence, which is a concept similar to 'superior liability'[475].[476] This is not only due to the imperatives of justice and need to prevent impunity, but also the

[471] Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Merits, Judgment, ICJ Rep. 1986, para. 115.
[472] de Schutter, "The Accountability of Multinationals…", p. 237.
[473] Rigaux examines the problem by using the term "transnational group of corporations". Rigaux, **op. cit.**, p. 124 *et seq*.
[474] Gatto, **op. cit.,** p. 26.
[475] A similar concept is the vicarious liability, which refers to the liability of employer for the acts of its employee. See for theories on vicarious liability Celia Wells, "Corporate Criminal Responsibility" in Tully, Stephen (ed.), **Research Handbook on Corporate Legal Responsibility**, Edward Elgar Publishing, 2005, p. 150 *et seq.*
[476] Stoitchkova, Desislava. **Towards Corporate Liability in International Criminal Law**, School of Human Rights Research Series Vol. 38, Intersentia, 2010, p. 145.

financial capabilities of the parent corporation to provide remedy for the victims.[477] Accordingly, it can be argued that the home states shall indirectly regulate the conduct of the subsidiaries through the regulation of the conduct of its own nationals.

A critique for the regimes of domestic regulation and civil liability is that they are mostly influenced by the U.S. law, and it is quite rare to find similar regimes in other countries. Nevertheless, it is also important to note that the U.S. is the home to the most of the corporations that operate transnationally and many other developed countries with powerful corporations such as the UK, France, Belgium, the Netherlands and Japan have adopted similar laws in order to hold their corporations liable of the unlawful acts conducted abroad.[478] European Union Regulation on Jurisdiction (Brussels I)[479] provides that an EU member state shall have jurisdiction to try a corporation having its domicile, *i.e.* statutory seat, central administration or principal place of business in an EU member state, and it shall not decline jurisdiction solely on the ground that a non-EU member state would be a more appropriate forum.[480]

For example, UK Courts accepted jurisdiction in the cases against the subsidiaries of the UK corporations abroad, only when substantive justice could not be achieved in the courts of the state of origin of the subsidiary.[481] For example, *David Brian Chandler v. Cape plc.* case concerned the responsibility of the parent company for the damages caused by the subsidiary company to its employee due to unhealthy working conditions, *i.e.* exposition of the employees to the toxic chemical asbestos.[482] Since the subsidiary corporation was not operating anymore, the victims of the unhealthy working conditions remained without remedy. The Court of Appeals

---

[477] **ibid.**, p. 142.
[478] Steinhardt, "Corporate Responsibility…", p. 218.
[479] Article 60 of the Council Regulation (EC) No. 44/2001 of 22 December 2000 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters, 2001, O.J. (L 12).
[480] To add, Rome II Regulation provides that as a principle, the law of the state, where the damage occurred shall be applied in such cases, unless domestic laws of that state "*does not impose civil liability on those whose conduct international law requires states to prohibit and punish –for example, torture- English Courts may apply English law on the basis that the lex causae is manifestly contrary to English public policy"*. Article 4 of the Council Regulation (EC) No. 864/2007 of 11 July 2007 on the Law Applicable to Non-Contractual Obligations, 2007, O.J. (L 199); Andrew Sanger, "Corporations and Transnational Litigation: Comparing *Kiobel* with the Jurisprudence of English Courts", **AJIL Unbound**, 2014, e-25, 27-28.
[481] Wells & Elias, **op. cit.,** p. 153. *See* Peter Muchlinski, "Corporations in International Litigation: Problems of Jurisdiction and the United Kingdom Asbestos Cases", **ICLQ**, Vol. 50, Issue 1, 2001, pp.1-25.
[482] [2011] EWHC 951 (QB); [2012] EXCA Civ 525.

underlined that "*A subsidiary and its company are separate entities. There is no imposition or assumption of responsibility by reason only that a company is the parent company of another company*."[483] Then the Court held that the parent company did have a direct duty of care to the employees, who worked in their subsidiaries, and the Cape Products failed to advise precautionary measures despite the fact that it had superior knowledge about the nature and management of asbestos risk.[484] The legal reasoning in the case concerns the assumption (or attachment) of responsibility due to the proximity of the parent company to the subsidiary:

> *"In summary, this case demonstrates that in appropriate circumstances the law may impose on a parent company responsibility for the health and safety of its subsidiary's employees. Those circumstances include a situation where, as in the present case, (1) the businesses of the parent and subsidiary are in a relevant respect the same; (2) the parent has, or ought to have, superior knowledge on some relevant aspect of health and safety in the particular industry; (3) the subsidiary's system of work is unsafe as the parent company knew, or ought to have known; and (4) the parent knew or ought to have foreseen that the subsidiary or its employees would rely on its using that superior knowledge for the employees' protection. For the purposes of (4) it is not necessary to show that the parent is in the practice of intervening in the health and safety policies of the subsidiary. The court will look at the relationship between the companies more widely. The court may find that element (4) is established where the evidence shows that the parent has a practice of intervening in the trading operations of the subsidiary, for example production and funding issues."*[485]

Nevertheless, it should be underlined that the subsidiaries, as the nationals of the host states, should act in accordance with the national laws, and not that of the home states. Our assertion, here, solely concerns the international responsibility of the home State for the protection of human rights. Currently, the controversies over

[483] [2012] EXCA Civ 525, para. 69.
[484] **ibid.**, paras. 78-79.
[485] **ibid.**, para. 80.

the extraterritorial application of human rights obligations of the home state have not been settled.[486] It is a generally adopted view that the home state is not under a duty to regulate the conduct of its corporate nationals abroad.[487] Nevertheless, they are encouraged to adopt such regulations on the basis of their responsibility to protect.[488]

However, as Seck successfully argued in her article, there is an emerging obligation under the international sustainable mineral development law for the home states "*to regulate and adjudicate transnational mining corporations through the implementation of the three pillars of public participation*", *i.e.* right to access to information, public participation in decision-making, and access to justice in environmental matters.[489] Therefore, it may be expected that international law may evolve so as to require the home states to legislate the extraterritorial conduct of the corporations in other 'risky' areas of operations, conducts and products. Home state liability system requires home states to legislate and impose human rights obligations on the TNCs that are incorporated and seated on their territory, and which operate overseas.[490] Domestic regulations requiring corporations to report the effects of their practices on human rights and to disclose their human rights policies should also be mentioned as a way to tame the conduct of corporations.[491] Despite possible

---

[486] For an elaboration on the future effect of the ruling of the ECJ in *Owusu* case concerning the class action brought before the UK Courts alleging that a British oil trading company caused the poisoning of 12,500 Ivorians by dumped toxic chemicals. *See* Jan Wouters & Leen Chanet, "Corporate Human Rights Responsibility: A European Perspective", **Nw J Int'l HR**, Vol. 6 (2), 2008, pp. 294-299.

[487] Human Rights Council, Promotion of All Human Rights, Civil, Political, Economic, Social and Cultural Rights, including the Right to Development, 15 May 2009, A/HRC/11/13/Add.1, p. 7, para. 15.

[488] **ibid.**. See below General comment No. 19, The Right to social security (art.9), UN Doc. E/C.12/GC/19, 04/02/2008, para. 54. Human Rights Council refers to a Concluding Observation by the Committee on the Elimination of Racial Discrimination concerning the Consideration of Reports submitted by State Parties [the U.S.] under Article 9 of the Convention, mentioning that it encourages the U.S. "*to take appropriate legislative or administrative measures to prevent acts of transnational corporations registered in the State party which negatively impact on the enjoyment of rights of indigenous peoples in territories outside the United States. In particular, the Committee recommends that the State party explore ways to hold transnational corporations registered in the United States accountable. The Committee requests the State party to include in its next periodic report information on the effects of activities of transnational corporations registered in the United States on indigenous peoples abroad and on any measures taken in this regard.*" CERD/C/USA/CO/6, February 2008, para. 30.

[489] Sara L. Seck, "Home State Responsibility and Local Communities: The Case of Global Mining", **Yale Hum. Rts & Dev. L.J.**, Vol.11, 2008, p. 205.

[490] The roots of this system may be found in Articles 2 and 4 of the 1999 OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, according to which the states party to the Convention should punish the offences of bribery even if they are committed abroad by their nationals.

[491] Steinhardt refers to the 2000 UK Pension Act, the French legislation on the issue dated 2002, and the reports of U.S. Commission on International Religious Freedom concerning the practices of corporations in Sudan. Steinhardt, "Corporate Responsibility…", p. 189.

criticisms grounded on the trade liberalization principles, controlling the import and export transactions by the domestic regulations on 'human rights conditionality' may also prove to be an effective tool in preventing human rights abuses.[492]

For example, while the U.S. laws on import control concern only specific labour practices contrary to human rights standards, the laws on export control comprise a broader list of rights, while they geographically or politically limit the area of application in the countries where the most condensed human rights abuses occur.[493] A significant example concerns denying of the export licenses of teargas to Bahrain from the U.S., UK and South Korea[494] due to disproportionate use of teargas against the anti-government demonstrators.[495] Despite the official declarations from the U.S. Government and company representatives, Bahrain Watch had the photos of teargas canisters identical to those manufactured by the Federal Laboratories (US/UK) and NonLethal Technologies (US), which were used against the protestors during the demonstrations.[496]

Likewise, the UN Committee on Economic, Social and Cultural Rights, in the General Comment No. 19 on the right to social security, underlined the positive obligation of the States Parties to adopt a regulatory system along with the necessary and effective measures in order to protect the right to social security from any interference by third parties, including corporations.[497] It is mentioned in the General

---

[492] **ibid.**, p. 190.

[493] Steinhardt underlines that while the products of Sudan and Burma are subject to export control laws, the products of China and Russia are exempted from any control by the U.S. authorities. **ibid.,** p. 193.

[494] Çali, elaborates on the responsibility of the exporting state as a third state obligation under Article 16 of the ILC Draft Articles on State Responsibility, see Başak Çali, "Tears in Our Eyes: Third State Obligation in International Law", 30 July 2015, http://www.ejiltalk.org/tears-in-our-eyes-third-state-obligations-in-international-law/, accessed on 30.07.2015.

[495] "Weaponizing Tear Gas: Bahrain's Unprecedented Use of Toxic Chemical Agents against Civilians", Report of the Physicians for Human Rights, August 2012, https://s3.amazonaws.com/PHR_Reports/Bahrain-TearGas-Aug2012-small.pdf, accessed on 26.07.2013, p. 8 and 35; Ian Black, "Bahrain teargas stockpile faces international opposition", The Guardian, 29 October 2013, http://www.theguardian.com/world/2013/oct/29/bahrain-teargas-stockpile-plan-campaign; Schmas Elwazer & Mohammed Jamjoom & KJ Kwon, "South Korea suspends tear gas exports to Bahrain", 9 January 2014, http://edition.cnn.com/2014/01/09/world/meast/bahrain-south-korea-tear-gas/, accessed on 20.06.2015.

[496] Ahmed Ali, "US and German Tear Gas Continue to be Used to Crackdown on Protestors on Uprising Anniversary", Bahrain Watch, 24 February 2014, https://bahrainwatch.org/blog/2014/02/24/us-and-german-tear-gas-continue-to-be-used-to-crackdown-on-protesters-on-uprising-anniversary/, accessed on 20.06.2015.

[497] General comment No. 19, The Right to social security (art.9), UN Doc. E/C.12/GC/19, 04/02/2008, paras. 45 and 46.

Comment that "*States parties should extraterritorially protect the right to social security by preventing their own citizens and national entities from violating this right in other countries. Where States parties can take steps to influence third parties (non-State actors) within their jurisdiction to respect the right, through legal or political means, such steps should be taken in accordance with the Charter of the United Nations and applicable international law.*"[498] Therefore, on the one hand, home states are under an international obligation of regulating the activities of the TNCs having their nationality. On the other hand, host states are under an obligation to regulate the conduct of third parties and refrain from entering into bilateral agreements with the TNCs that may prejudice the fulfilment of their obligations under the Covenant.[499]

The CESCR in its General Comment No. 14 on the right to health reiterated that States Parties shall "*prevent third parties from violating the right in other countries, if they are able to influence these third parties by way of legal or political means, in accordance with the Charter of the United Nations and applicable international law.*"[500] Finally, the Committee reminded that the States Parties, which are members of international financial organizations, such as the IMF and the WB, should keep in mind their obligations under Article 12 when contributing to the decisions taken by these institutions with the potential of adversely affecting the right to health of the peoples in various countries.[501]

The case law of the ECtHR on extradition of persons[502] might be considered, by analogy, as the preventive extraterritorial effect of the due diligence obligations,

---

[498] **ibid.**, para. 54.
[499] **ibid.**, para. 65.
[500] General Comment No. 14 (2000) The Right to Highest Attainable Standard of Health, 11/08/2000, E/C.12/2000/4, para. 39.
[501] **ibid.**
[502] In cases concerning extradition, where the serious and objectively real threat to life is coming from non-state actors; and the requesting State, where the person will be deported would not be capable of effectively protecting him/her from the threats, the Court holds that deportation of persons would amount to the breach of Article 3 by the deporting State. Accordingly, having regard to the absolute (peremptory norm) character of Article 3, the Convention provides protection against threats posed by private actors located in the country of deportation, if the country of deportation is not capable of or unwilling to provide effective protection for the right at risk. The conclusions of the Court in deportation cases apply *a fortiori* to the threats of violations or violations of Article 3 by private persons in private relationships occurring in the territory, where a Contracting State has jurisdiction. ECHR, Soering v. UK, App. no. 14038/88, 7 July 1989, paras. 86-91; Ahmed v Austria, App.no. 25964/94, 27 November 1996, paras. 44-47; See also HLR v France, app.no. 24573/94, 29 April 1997, paras. 39-41; The X and Y v. the Netherlands, 26 March 1985, paras. 21–27.

especially where there is a (high) risk of (serious) private violation of a peremptory norm in the territory of another State, which is not a party to the Convention.[503] Similarly, the Human Rights Committee, in *Kindler v. Canada*, held that if the extradition of a person poses a real risk of violation of his/her right to life, which is the most essential of the rights under the Covenant, the State Party may be held responsible for that violation that occurred as a foreseeable consequence of the extradition.[504] If the home state fails to legislate on the issue and it fails to successfully prevent or compensate human rights abuses perpetrated by their nationals abroad, then it shall be regarded as being in violation of its own obligations under international law.[505] In other words, home states may be held responsible for the "extraterritorial consequences of their intra-territorial decisions".[506] As McCorquodale and Simons argue, this may especially be the case if the home state has constructive knowledge that the corporate investment and activities abroad carry the risk of violating human rights.[507] Nevertheless, as Joseph warns, such extraterritorial enforcement of the laws of home state should not amount to 'intrusion into the host State's sovereignty'.[508] Home states should refrain from taking protectionist or imperialist measures while reforming their system.[509] Additionally, if

[503] Tzevelekos also argues that the principle of *effet utile* may be applied regarding the other rights under the Convention, if the criterion of *jus cogens* is eliminated or softened. Tzevelekos, **op. cit.**, p. 224.

[504] HRC, Kindler v. Canada, Comm. no. 470/1991, UN Doc. CCPR/C/48/D/470/1991 (1993), 11 November 1993, paras. 13.2, 15.3. However, the Human Rights Commission after examining the specific circumstances of the case and emphasizing the fact that the ICCPR does not prohibit death penalty, concluded that Canada cannot be considered as in violation of Articles 6 and 7.

[505] Joseph, "An Overview…", p. 86.

[506] Sarah Joseph & Jenny Schultz & Melissa Castan, **The International Covenant on Civil and Political Rights: Cases, Commentary and Materials,** Oxford, OUP, 2nd ed, 2004, p. 96 cited in McCorquodale & Simons, "Responsibility Beyond Borders… ", p. 618.

[507] McCorquodale & Simons mention two situations, where the home states may have such constructive knowledge: (1) "*…corporate nationals invest, or intend to invest, in conflict zones, failed states or repressive regimes, and engage in a business relationship with host state governments or a non-state actor party to a civil conflict*", (2) *"...circumstances where the home state could be seen to be facilitating extraterritorial harm perpetrated by a corporate national (through its subsidiaries) – perhaps a form of aiding and assisting*.", such as conducting negotiations of bilateral investment treaties with the host states. McCorquodale & Simons, "Responsibility Beyond Borders… ", p. 598, 620-621.

[508] Eaton, Joshua P. "The Nigerian Tragedy, Environmental Regulation of Transnational Corporations, and The Human Rights to a Healthy Environment", **B.U. Int'l L.J.**, Vol. 15, 1997, p. 280 cited in Joseph, "An Overview…", p. 86.

[509] This is also an implication of the principle of permanent sovereignty over natural resources and economic activities of the States. Rigaux, **op. cit**., p. 125. Joseph gives the Helms-Burton Act as an example to the national legislations designed "to bring human rights and democracy". Under that Act, the U.S. nationals are allowed to sue the "foreign corporations which 'traffic' in property expropriated by Cuba". Joseph highlights that this act was another way of allowing the U.S. to persecute the Cuban government. See Cuban Liberty and Democratic Solidarity (LIBERTAD) Act, Pub, L. No. 104-114, 110 Stat. 785, 1996 and T. Meron and D. Vagts, "Editorial Comment: the Helms-Burton Act:

the adoption of national legislations on the accountability of TNCs is applied universally by all States, then any concern regarding competitive disadvantages in favour of one group of TNCs based in a particular country with more loose laws would be removed.[510]

Finally, regarding the ECtHR jurisprudence on the extraterritorial application of the Convention, home states might be held liable for lack of due diligence in preventing the human rights abuses perpetrated by private actors in foreign territories. In short, it is possible to argue that home states shall be responsible for the private violations of human rights committed abroad, if the private person acted under the direction, control or instructions of a governmental authority (*i.e.* enforcement jurisdiction) or was subject to the regulations by the State outside its national territories (*i.e.* prescriptive jurisdiction).[511]

However, de Schutter, referring to the *Bankovic* case of the ECtHR,[512] interpreted the decision of inadmissibility as follows: when an act violating the rights protected under the ECHR has been committed by a subsidiary, which is under direct control of the parent company, the home State (of the parent company) cannot be held responsible for failure in regulating the corporate conduct.[513] This would be so, even if the home state had the ability to easily regulate the conduct of the parent company, which is subject to its jurisdiction.[514] Accordingly, de Schutter commented that it would not be possible to hold home states responsible for their failure to fulfil the obligation to prevent human rights abuses committed by corporations operating

---

Exercising the Presidential Option", **AJIL**, Vol. 91, 1997, p. 83 cited in Joseph, "An Overview…", p. 86, fn 47.

[510] **ibid.**, p. 87.

[511] de Schutter, "The Accountability of Multinationals...", p. 242.

[512] In *Bankovic* case, the ECtHR held that the Convention, being a constitutional instrument of the European public order for the protection of human rights, could be applied extra-territorially only in exceptional situations, where the (home) States had effective control over the territories by using public powers through military occupation or consent, invitation or acquiescence of the host state. Bankovic et al. v. Belgium and 16 other States, appl. no. 52207/99, ECtHR Grand Chamber, 12 December 2001, decision of inadmissibility, paras. 71 and 80. The Court concluded that: "*...The Convention was not designed to be applied throughout the world, even in respect of the conduct of Contracting States. Accordingly, the desirability of avoiding a gap or vacuum in human rights' protection has so far been relied on by the Court in favour of establishing jurisdiction only when the territory in question was one that, but for the specific circumstances, would normally be covered by the Convention."*

[513] de Schutter, "The Accountability of Multinationals...", p. 245, 249.

[514] **ibid.**, p. 249.

outside of its territories.[515] However, the following jurisprudence of ECtHR shall be examined carefully before coming to a sharp-cut conclusion.[516]

In *Loizidou*, the Court held that since the Turkish army had effective control over the territory of the northern Cyprus due to the 1974 events, her obligation to secure the rights and freedoms shall have continued under Article 1 of the ECHR and the Court had jurisdiction *ratione loci*.[517] The Court concerning the merits concluded that:

> "*…It is not necessary to determine whether ... Turkey actually exercises detailed control over the policies and actions of the authorities of the 'TRNC'. It is obvious from the large number of troops engaged in active duties in northern Cyprus that her army exercises effective overall control over that part of the island. Such control, according to the relevant test and in the circumstances of the case, entails her responsibility for the policies and actions of the 'TRNC'. Those affected by such policies or actions therefore come within the 'jurisdiction' of Turkey for the purposes of Article 1 of the Convention. Her obligation to secure to the applicant the rights and freedoms set out in the Convention therefore extends to the northern part of Cyprus.*"[518]

In Cyprus v. Turkey, the Court held that Turkey, having effective overall control over the territory of northern Cyprus, was responsible for the violations perpetrated by the local administration, which has been supported by Turkey.[519] More importantly, the Court mentioned with regard to the acts of private parties in northern Cyprus that *"...the acquiescence or connivance of the authorities of a Contracting State in the acts of private individuals which violate the Convention rights of other individuals within its jurisdiction may engage that State's*

[515] **ibid.**, p. 247.
[516] In this context only Loizidou v. Turkey, Cyprus v. Turkey and Issa and Others v. Turkey will be touched upon. Please also note ECtHR, Al-Saadoon v. the UK, App. no. 61498/08, 2 March 2010, para. 85 and Al-Skeini and Others v. UK, App. no. 55721/07, Grand Chamber, 7 July 2011, para. 135.
[517] ECtHR, Loizidou v. Turkey, App. no. 15318/89, Preliminary Objections, 23 March 1995, paras. 55, 62-64.
[518] ECtHR, Loizidou v. Turkey, App. no. 15318/89, 18 December 1996, para. 56.
[519] ECtHR, Cyprus v. Turkey, App. no. 25781/94, 10 May 2001, para. 80. See also Andreas Manitaras v. Turkey, App. no. 54591/00, para. 27.

responsibility under the Convention."[520] Nevertheless, the Court regarding the allegations of responsibility of Turkey for the criminal damage given to the Cypriot property by private persons held that *"...the evidence adduced does not establish to the required standard that there is an administrative practice on the part of the "TRNC" authorities of condoning such acts or failing to investigate or prevent them*"[521] nor there is sufficient evidence that "the "TRNC" authorities tolerate, encourage or in any way acquiesce in this form of criminality."[522] Accordingly, there has been no breach of Article 1 of Protocol No.1. Likewise, the Court did not find any violation of Article 13 with regard to the interferences by private persons with the rights enshrined under Article 8 and Article 1 of Protocol 1.[523] The Court also noted concerning the responsibility of Turkey with regard to the alleged violations of Articles 3, 5, 8, 10 and 11 perpetrated by private persons that *"... the evidence does not show to the Court's satisfaction that the "TRNC" authorities have, as a matter of administrative practice, remained totally passive in the face of serious allegations of misconduct or infliction of harm either by State agents or private parties acting with impunity.*"[524]

In *Issa and others*, the Court concluded that:

> *"70. It is not necessary to determine whether a Contracting Party actually exercises detailed control over the policies and actions of the authorities in the area situated outside its national territory, since even overall control of the area may engage the responsibility of the Contracting Party concerned.*
>
> *71. Moreover, a State may also be held accountable for violation of the Convention rights and freedoms of persons who are in the territory of another State but who are found to be under the former State's authority and control through its agents operating – whether lawfully or unlawfully - in the latter State*

[520] The allegations of the applicant Government concerned racial harassment of the Greek Cypriots living in the northern Cyprus by the Turkish residents with the connivance and knowledge of the TRNC authorities. Cyprus v. Turkey, App. no. 25781/94, 10 May 2001, paras. 73 and 81.
[521] **ibid.**, para. 271.
[522] **ibid.**, para. 376.
[523] **ibid.**, para. 324.
[524] **ibid.**, paras. 347-348.

> *(see, mutatis mutandis, M. v. Denmark, application no. 17392/90, Commission decision of 14 October 1992, DR 73, p. 193; Illich Sanchez Ramirez v. France, application no. 28780/95, Commission decision of 24 June 1996, DR 86, p. 155; Coard et al. v. the United States, the Inter-American Commission of Human Rights decision of 29 September 1999, Report No. 109/99, case No. 10.951, §§ 37, 39, 41 and 43; and the views adopted by the Human Rights Committee on 29 July 1981 in the cases of Lopez Burgos v. Uruguay and Celiberti de Casariego v. Uruguay, nos. 52/1979 and 56/1979, at §§ 12.3 and 10.3 respectively). Accountability in such situations stems from the fact that Article 1 of the Convention cannot be interpreted so as to allow a State party to perpetrate violations of the Convention on the territory of another State, which it could not perpetrate on its own territory (ibid.)."*[525]

In a very controversial judgment, *Ilasçu and others v. Moldova and Russia*, the Court concluded that both Moldova and Russia had positive extraterritorial due diligence obligations under the Convention, even if they did not exercise effective control over the territories where the violations occurred. The Court held that *"...even in the absence of effective control ..., Moldova still has a positive obligation under Article 1 of the Convention to take the diplomatic, economic, judicial or other measures that it is in its power to take and are in accordance with international law to secure to the applicants the rights guaranteed by the Convention. [sic.]"*[526] The Court went one step further with regard to Russia and declared that the continuous and uninterrupted link of responsibility between the military, economic, financial and political support of the Russian government and the violations perpetrated proved that the said support had a decisive influence, even if it did not amount to an effective control of the organs of the regime.[527] Therefore, the Court concluded that even in the absence of effective control over a territory or person, if the State is somehow linked to the violation, it is under the burden of proving that it acted with

[525] ECtHR, Issa and Others v. Turkey, App.no. 31821/96, 16 November 2004, para. 70.
[526] ECtHR, Ilaşcu and others v. Moldova and Russia, App.no. 48787/99, 8 July 2004, Grand Chamber, para. 331.
[527] **ibid.**, paras. 392-394.

due diligence by mobilizing any means available for preventing the extra-territorial violations of human rights.[528]

Similarly, the Inter-American Commission on Human Rights in *Coard et al v United States,* held that:

> *"...given that individual rights inhere simply by virtue of a person's humanity, each American State is obliged to uphold the protected rights of any person subject to its jurisdiction. While this most commonly refers to persons within a state's territory, it may, under given circumstances, refer to conduct with an extraterritorial locus where the person concerned is present in the territory of one state, but subject to the control of another state – usually through the acts of the latter's agents abroad. In principle, the inquiry turns not on the presumed victim's nationality or presence within a particular geographic area, but on whether, under the specific circumstances, the State observed the rights of a person subject to its authority and control."*[529]

Consequently, I argue that currently there is no legal barrier to conclude that home state are under a positive obligation to act with due diligence, in order to prevent human rights violations perpetrated by their nationals operating abroad, especially (1) if they know or ought to have known that there is a risk of violation being perpetrated, (2) the corporation operates under the directions, instructions or control of that State, (3) the State acquiesces, tolerates or encourages the human rights violations perpetrated by the corporation, (4) fails to regulate extra-territorial corporate conduct, if there exists an obligation to that end. Finally, in fulfilling its responsibility to protect, the home states shall act in accordance with the principles of public international law and the UN Charter.

---

[528] Tzevelekos, **op. cit.**, p. 226.
[529] *Coard et al v United States*, IAmCtHR, Case 10.951, Report No. 109/99, 29 September 1999, para. 37.

3. A PATH FROM CORPORATE SOCIAL RESPONSIBILITY TO LEGAL RESPONSIBILITY OR IN BETWEEN?

3.1. Corporate Social Responsibility

From the beginning of the 1930s, Adolf Berle and Merrick Dodd have stamped their name on the academic discussions concerning corporate social responsibility.[530] Berle in his article argued that the only duty of corporations shall be the maximization of shareholders' benefit.[531] Dodd, added a 'public obligation theory'[532] to this argument by underlining the social and political functions of corporations as economic institutions contributing to the development of societies and highlighted that they might serve all their constituencies, including not only the shareholders but also the stakeholders.[533] However, by the 1960s, Milton Friedman blocked the evolution of this latter argument and made a sharp return to the Berle's shareholder benefit theory or shareholder primacy principle.[534] Friedman's arguments, advocating the deregulation of the market in order to facilitate the functioning of corporations, have also been adopted by the American and Japanese governments.[535] He drew attention to the fact that corporations are not state actors or governmental units,

---

[530] David. S. Ruder, "Public Obligations of Private Corporations", **U. Pa. L. Rev.**, Vol. 114, 1965, p. 209.

[531] Berle, "Corporate Powers…", p. 1049. His other articles and books include Adolf Berle, "The Organization of the Law of Corporate Finance", **Tenn L. Rev.**, Vol. 9, 1931, pp. 125-145; Adolf A. Berle, & Gardiner C. Means, **The Modern Corporation and Private Property**, Transaction Publishers, 1932; Adolf Berle, **The 20th Century Capitalist Revolution**, Harcourt, Brace and Company, 1954; Adolf Berle, **Power without Property: A New Development in American Political Economy**, Harcourt, 1959; Adolf Berle, **The American Economic Republic**, Harcourt, 1963.

[532] Ruder, **op. cit.**, p. 212.

[533] E. Merrick Dodd, "For Whom are Corporate Managers Trustees?", **Harv. L. Rev.**, Vol. 45, 1932, pp. 1145-1163.

[534] Milton Friedman, **Capitalism and Freedom**, University of Chicago Press, 1962, pp. 133-134.

[535] Steinhardt mentions that the conduct of business activity should aim to enhance the corporate profit and shareholder gain as a consequence of the principle on primacy of shareholder wealth maximization. Nevertheless, he underlines that the corporations are obliged to obey the regulations and legislations of domestic law while they may also act with ethical considerations of responsible conduct and even contribute to the amelioration of public welfare. Steinhardt, "Soft Law, Hard Markets…", p. 934, fn. 1 and 3.

whose directors are democratically elected or who are accountable to the people.[536] The primary responsibility of corporations shall be towards their shareholders and any resource allocation for the social responsibility projects would be a barrier to profit maximization.[537] By the 1980s, the scholars -underlining the social, environmental and political influence of the corporate conduct over governmental decisions and standards of life- put emphasis on the need for the accountability, responsibility and legitimacy of corporations.[538]

Meyer in his article supports the Western originated *'engines of development thesis',*[539] according to which TNCs positively affect the enjoyment of first and second generation rights in developing countries.[540] According to the engines of development thesis, foreign direct investments and TNCs create jobs, capital and technology, and thus, contribute to the economic development of the countries in which they operate. Improvement in the economic conditions of the country contributes to the amelioration of the political, social and cultural environment, which in the end facilitates the free and full enjoyment of human rights and freedoms. Furthermore, Meyer argues -using the data from Freedom House, Commerce Department and Physical Quality of Life Index- that foreign direct investments lead to an increase in the rates of literacy, life expectancy and infant survival.[541]

On the contrary, Smith, Bolyard and Ippolitio -using the data from World Bank, U.S. State Department and Amnesty International- criticize Meyer's arguments and find out that foreign direct investment does not have a statistical correlation implying a positive impact on the enjoyment of rights of a given

---

[536] Milton Friedman, **There's No Such Thing as a Free Lunch**, Open Court Publishing Company, 1977 cited in Backer, "Multinational Corporations, Transnational Law…", p. 300. However, Weissbrodt and Kruger notes that even Friedman excluded fraud and corruption while supported that the only purpose of business could be gaining profit. They add that the same should be true for the crimes such as genocide and slave labour. David Weissbrodt & Muria Kruger, "Human Rights Responsibilities of Business as Non-State Actors" in Alston, Philip (ed.), **Non-State Actors and Human Rights**, OUP, 2005, p. 337.

[537] See Milton Friedman's assertions on the shareholder primacy principle.

[538] See Philip H. Rudolph, "The History, Variations, Impact and Future of Self-Regulation" in Ramon Mullerat (ed.), **Corporate Social Responsibility: The Corporate Governance of the 21st Century**, Kluwer Law International, 2005, pp. 365-384.

[539] UN Doc. A/CONF.166/9 (1995), Report of the World Summit for Social Development, Chapter I: An Enabling Environment for Social Development, para. 12(e).

[540] Meyer, **Human Rights and International Political Economy**…, p. 90 *et seq.*; William H. Meyer, "Confirming, Infirming, and 'Falsifying' Theories of Human Rights: Reflections on Smith, Bolyard, and Ippolito through the Lens of Lakatos", **HRQ**, Vol.21, 1999, p. 221.

[541] **ibid.**

country.[542] To note, in a study conducted by OECD, it was found that an increase in trade and foreign investment might even have negative effects on the improvement of human rights, especially concerning the rights to freedom of association and collective bargaining. For example, it was observed that some governments had the tendency to worsen the conditions protected under the labour laws in order to attract more investment in their countries.[543]

Smith, Bolyard and Ippolitio adopt the *'hymer thesis'*, according to which TNCs do not have any concern for the protection of human rights, unless their goal of profit maximization is not adversely affected.[544] For example, Shell Oil destructed the environment in Ogoniland (Nigeria) and the protests of the Ogoni minority resulted in the killing of the Ogoni leader by the military government in Nigeria, which was supported economically and militarily by Shell.[545] Enforcement of international human rights law on TNCs by States is frequently disregarded due to the concerns on economic growth, as well as the social, economic and political weaknesses of developing countries as compared to the powers of TNCs.[546] Thus, States remain silent in cases of human rights violations and they even do not redress any harm occurred as a result of the violation of State's duty to protect.[547] Furthermore, the policies of international economic institutions, which are not legally accountable for their decisions and activities causing or contributing to the violation

---

[542] Smith, Bolyard and Ippolitio criticize the article of Meyer also because of its limited evaluation on the U.S. corporations with their operations following the end of cold war, and argue that such data may be misleading and deficient in analysing the real effect of the TNCs on the realization of human rights. Jackie Smith & Melissa Bolyard & Anna Ippolito, "Human Rights and the Global Economy: A Response to Meyer", **HRQ**, Vol.21, 1999, pp. 209-211.

[543] OECD, Trade, Employment and Labour Standards: A Study of the Core Workers' Rights and International Trade, COM/DEELSA/TD(96)8/FINAL (1996), p. 42 mentioned in Craig Forcese, **Profiting from Misfortune? The Role of Business Corporations in Promoting and Protecting International Human Rights**, MA Thesis, Norman Paterson School of International Affairs, Carleton University, Ottawa, 1997 referred to in Avery, **op. cit.**, p. 23; D. K. Brown, (2000), "International Trade and Core Labour Standards: A Survey of the Recent Literature", OECD Labour Market and Social Policy Occasional Papers, No. 43, OECD Publishing. http://dx.doi.org/10.1787/677200103808, accessed on 07.07.2014.

[544] Stephen Hymer, "The Multinational Corporation and the Law of Uneven Development" in **Transnational Corporations and World Order: Readings in International Political Economy** 386, 1979; Robert Cohen & Nadine Felton & Morley Nkosi & Jaap van Liere (eds), **The Multinational Corporation: A Radical Approach: Papers by Stephen Hymer**, London: CUP, 1979.

[545] They add the examples of Texaco in Ecuador and practices of Nike in order to demonstrate the negative effects of TNCs on the realization and protection of human rights in developing countries. Smith & Bolyard & Ippolito, **op. cit.**, p. 208.

[546] **ibid.**, p. 211.

[547] **ibid.**

of human rights, also adversely affect the efforts of the international community to protect human rights against violations perpetrated by TNCs.[548]

Corporate social responsibility (CSR), based on self-regulation, self-enforcement and self-monitoring, has a voluntary and enterprise-driven character.[549] Zerk defines CSR as "*responsibility to operate ethically and in accordance with its legal obligations and to strive to minimise any adverse effects of its operations and activities on the environment, society and human health*". [550] The European Commission Green Paper defines social responsibility as "*not only fulfilling legal expectations, but also going beyond compliance and investing 'more' into human capital, the environment and the relations with stakeholders*".[551] In the Green Paper, it is added that any measure taken for CSR shall be complementary to other regulations and legislations concerning social rights and environmental protection with a view to achieving progressive betterment of the local conditions.[552] The Green Paper also underlines that the voluntary codes of conduct shall be supported by binding national and international legal regulations for effectively ensuring the minimum standards for all humans.[553] The definition of CSR has been renewed in 2011 as "*the responsibility of enterprises for their impacts on society*" with an emphasis on human rights due diligence[554] and the renewed strategy of the EU for 2011-2014 has been built upon the OECD Guidelines, ILO Tripartite Declaration, UN Global Compact, UN Guiding Principles on Business and Human Rights and ISO 26000 Guidance on Social Responsibility.[555]

The *'spotlight phenomenon',* a concept of psychology adapted by Spar within the context of corporate responsibility,[556] implies that the surveillance of media and

---

[548] **ibid.**, p. 212, fn. 20.
[549] International Instruments and Corporate Social Responsibility: A Booklet to Accompany Training the Labour Dimension of CSR: from Principles to Practice, 2007, p. 1; For an evaluation of the link between CSR and international law see Jean-Claude Javillier, "Corporate Social Responsibility and law: Synergies are needed for sustainable development" in **Governance, International Law & Corporate Social Responsibility**, ILO Research Studies 116, 2008, pp. 37-62.
[550] Zerk, **op. cit.**, p. 32.
[551] COM (2001)366(final), European Commission Green Paper: Promoting a European framework for Corporate Social Responsibility, DOC/01/9, 18 July 2001, II.2., para. 21.
[552] **ibid.,** para.22.
[553] **ibid.**, para.54. In 2002, a "Communication concerning Corporate Social Responsibility: A Business Contribution to Sustainable Development" has been adopted in order to clarify the principles in the Green Paper, see COM (2002) 347 (final), 02.07.2002.
[554] COM(2011) 681 (final), 25.10.2011, para. 3.1.
[555] **ibid.,** para. 3.2.
[556] Spar, **op. cit.**, p. 7.

NGOs over corporate activities forces TNCs to act respectful of human rights. Considering the growing number and influence of NGOs and the increasing consciousness of consumers on the production and marketing processes of the products and services, protests and boycotts have the potential to have impact on corporate behaviour. In order to acquire a good reputation or at least prevent a bad public image, corporations adopt codes of conduct and seek ways to effectively enforce them.[557] The pressure from NGOs, the civil society and media, along with the corporations' profit concerns due to the responses from the consumers and the investors, push businesses to adopt codes of conduct and to take measures for protecting their reputational capital and to trade and behave ethically in accordance with the underlining principles of corporate social responsibility.

Gatto names this regime as *'informal accountability'* of the corporations.[558] Apart from formal disempowerment mechanisms, such as legal sanctions in the form of fines, disciplinary measures, civil and penal remedies, the public might subject the corporations to informal accountability mechanisms as a consequence of careful auditing of their conduct.[559] However, the 'soft sanctions' of the market-based regime may only have influence over the sales of products that are open to be affected by consumer pressure, such as textile, garment or food markets. Investors may also trigger the socially responsible behaviour through their investment policies.[560] For example, following a campaign by Greenpeace for saving the Arctic, Lego announced that it has ended its business relationship with Shell as of 2014.[561]

---

[557] However, the *'spotlight phenomenon'* is not a good argument for supporting deregulation, since in cases where human rights violations do not draw sufficient attention or are hidden from the public eye, the violations would not cease to exist. Furthermore, as a concept originated from psychology, the spotlight phenomenon actually implies an exaggeration of self-importance by the egocentric individuals, and accordingly, would not be very appropriate to be adapted to the concept of corporate responsibility. Thomas Gilovich & Victoria Husted Medvec & Kenneth Savitsky, "The spotlight effect in social judgment: An egocentric bias in estimates of the salience of one's own actions and appearance", **Journal of Personality and Social Psychology**, Vol, 78(2), Feb. 2000, pp. 211-222. http://dx.doi.org/10.1037/0022-3514.78.2.211, accessed on 17.07.2015.

[558] Gatto, **op. cit.**, p. 18.

[559] Anne Peters & Till Förster & Lucy Koechlin, "Towards non-state actors as effective, legitimate and accountable standard setters" in Anne Peters & Lucy Koechlin & Till Förster & Gretta Fenner Zinkernagel, **Non-State Actors as Standard Setters**, CUP, 2009, p. 529.

[560] For example, EU member states adopt corporate social responsibility as their national public policies in investment. Gatto, **op. cit.**, p. 18; Peters & Förster & Koechlin, **op .cit.**, p. 534; Andrew Fagan, "Buying Right: Consuming Ethically and Human Rights" in Janet Dine & Andrew Fagan (eds.), **Human Rights and Capitalism: A Multidisciplinary Perspective on Globalisation**, Edward Elgar Pub., 2006, pp. 115-144.

[561] Adam Vaughan, "Lego ends Shell partnership following Greenpeace campaign", The Guardian, 09.10.2014, http://www.theguardian.com/environment/2014/oct/09/lego-ends-shell-partnership-following-greenpeace-campaign, accessed on 09.10.2014.

Finally, it should be kept in mind that influential local NGOs capable of holding effective campaigns for putting pressure on the abusive corporations are rare to find in developing countries with bad human rights records.[562]

The neo-classic or liberal model of regulation aims to regulate the global economic activity within the national borders and through reliance on global markets and market liberalization.[563] Self-regulation was favoured by not only the business persons but also by some politicians, and academicians. For example, Alan Greenspan and Richard Falk used to argue that corporations would self-regulate their conduct, if they sought to maximize their self-interests, *i.e.* the interest of the shareholders.[564] The *market-based regime* encourages the competition between corporations through compliance with international human rights standards for the purposes of enhancing consumer satisfaction and drawing investors' attention.[565] Steinhardt names this regime as *'Human Rights Entrepreneurialism'*.[566]

In doing so, the corporations may make use of rights-sensitive product lines and branding or social labels, adopt unilateral codes of conduct, audit social accountability and certify their products or services.[567] *Social disclosure*, most famous of which is the Global Reporting Initiative, is a system allowing the interested groups or persons to monitor the conduct of corporations through various means such as external reporting, disclosure of information to employees, environmental disclosure, use of local value-added statements,[568] and even providing public access to corporate records.[569] Additionally, ethical investment organizations

---

[562] Tom Sorell, "The UN Norms" in Dine & Fagan (eds.), **op. cit.**, p. 289.
[563] Backer, "Multinational Corporations, Transnational Law…", p. 317.
[564] For example, Richard Falk argued that TNCs had neither legal nor moral human rights obligations. Any step taken by corporate entities to respect human rights implies that the shareholders have an interest in doing so in terms of monetary gain as a consequence of betterment of public image of the company. See Alston, "The 'Not-a-Cat' Syndrome…" p. 22 quoting Richard Falk, "Human Rights", Foreign Policy, March-April 2004, p. 18, 20, 21; Kamatali, **op. cit.** , p. 450, fn 63.
[565] Steinhardt, "Soft Law, Hard Markets…", p. 934.
[566] Steinhardt also names the market-based regimes as the 'empirical claim' in another article. Steinhardt, "Soft Law, Hard Markets…", p. 939; Steinhardt, "Corporate Responsibility…", pp. 181-182.
[567] Steinhardt, "Corporate Responsibility…", pp. 181-143. However, corporations while may be willing to certify their products, the costs of such certification are often reflected on the price of the products, and thus, on the consumers' pockets.
[568] *e.g.* statements made by the sub-contractors of TNCs in host countries which give information on the contribution of the TNCs to the economy of the host state may include elaborations on the contribution of TNCs to the human rights conditions in the host state. Gatto underlines that even though there is no EU directive requiring corporations to make such statements, the EU corporations generally prefer to do so. Gatto, **op. cit.**, pp. 21-22.
[569] **ibid.**, p. 20.

and shareholder pressure may help prevent or put an end to human rights abuses.[570] 'Socially responsible investing', *i.e.* ethical investment strategies that prevent TNCs from investing in unethical, unhealthy or environmentally harmful sectors, such as tobacco or arms production, could be mentioned as a tool to prevent human rights violations.[571] Finally, the rise and convergence of NGOs such as the Caux Round Table is also one of the factors that forces corporations to act in line with human rights standards.[572] Consequently, we witness a global proliferation of codes of conduct.

Steinhardt notes that since the corporations that adopt codes of conduct generally have bad human rights records, they may be forced to comply with these codes through non-legal enforcement techniques of the market regime such as a change in the buying behaviour of the consumers and boycotts. Steinhardt, in another article, investigates and favours the market-based regime, suggesting that "*the law protecting the freedom of competition allows companies to compete with one another by implementing human rights policies and by adopting industry-wide statements of best human rights practices*".[573] Thus, Steinhardt argues that imposing human rights obligations on TNCs based on their own voluntary codes of conduct would result in reluctance in adopting such codes, therefore "*preference should be given to the regime of market-induced and market-enforced human rights aspirations*".[574] Steinhardt, finding similarities between the emergence of commercial law and human rights obligations of corporations, points out that the rules of commercial law came to existence as a voluntary custom of merchants (*lex mercatoria*) in the first place.[575] He further comments that it is with the codification movements that the rules became more recognizable and legally enforceable.[576] In other words, the rules

---

[570] Steinhardt, "Corporate Responsibility…", p. 186.

[571] See the first guidelines on international investment adopted by the International Chamber of Commerce (ICC) in 1972. Reinisch, **op. cit.**, p. 68. Steinhardt, too, refers to the socially responsible investing (SRI) funds such as Dreyfus' Third Century Fund and Merill Lynch's Ecological Trust. To add, he gives the examples of pulling out of one of the largest U.S. pension funds from Thailand, the Philippines, Malaysia, and Indonesia on the ground that those countries violated the standards of human rights, especially of prohibition of forced labour, prohibition of discrimination, and the freedom of association. Steinhardt, "Corporate Responsibility…", p. 186.

[572] **ibid.**

[573] Steinhardt, "Soft Law, Hard Markets…", p. 936.

[574] Referring to the intentions of transforming the codes of conduct into legally binding documents for corporations, Steinhardt comments that "no good deed goes unpunished". Steinhardt, "Corporate Responsibility…", p. 219.

[575] Steinhardt, "Soft Law, Hard Markets…", p. 947.

[576] Steinhardt notes that the disputes between merchants were being settled through informal forms of mediation or arbitration, or by the efforts of mercantile councils. If a dispute could not be settled

were already considered as binding, even though there were no mechanisms to control the compliance with these rules.[577] Steinhardt names this process as "gradual crystallization of law" from commercial practices.[578] Keeping in mind the rules of market competition and the market reliability rational, it could also be suggested that the corporations would nevertheless feel forced to adopt codes of conduct in order to compete with other corporations that have a good reputation of human rights in the global market.

Steinhardt's hypothesis is that a new *lex mercatoria* is emerging in the 21st century.[579] He claims that even if currently there is no consensus reached by the business world, human rights advocators and legal scholars on the emergence of such body of laws and regulations, the codes of conduct adopted by non-governmental institutions including corporations, the certification and branding practices along with the domestic laws may lead to the birth of the 'new' *lex mercatoria*.[580] In any event, the practice of international business, *i.e. lex mercatoria*, should be 'taken into account' as evidence of subsequent practice in the interpretation of laws and regulations,[581] by all the parties interested, including domestic and international arbitrary and judiciary organs.[582]

---

through such means, the local courts were giving their decisions based on the law that has been adopted by the merchants for facilitating ethical and uniform trade practices. Steinhardt, "Corporate Responsibility…", p. 179 and 223.

[577] Steinhardt adds that *lex mercatoria* is a body of authority grounded in good faith and it reflects market practices. In the beginning, it was transnational in scope, then has been codified both in national and international law systems. Steinhardt, "Corporate Responsibility…" p. 219 and 224.

[578] He adds that the reason for such crystallization was that the commercants were considering this as a contribution to their self-interest in the long-run. Steinhardt, "Corporate Responsibility…" pp. 179-180. Following the codifications in national laws, the rules of commercial law evolved into the rules of international trade law, which eventually ended with the adoption of the UN Convention on Contracts for the International Sale of Goods. However, Steinhardt also notes that it remains as a question between the scholars that whether *lex mercatoria* existed independent of the national law systems as separate "transnational business order". John Honnold, "The Influence of the Law of International Trade on the Development and Character of English and American Commercial Law, in Clive M. Schmitthoff (ed.), **The Sources of the Law of International Trade**, 1964, p. 70, 76 as referred to by Steinhardt, Ralph G. "Soft Law, Hard Markets…", p. 947.

[579] Steinhardt, "Soft Law, Hard Markets…", p. 947 and 951.

[580] He finalizes his article by referring to Goldschmidt: *'In all great matters relating to commerce, the legislators have copied, not dictated.'* Goldschmidt, Handbuch des Handelsrecht, 378-79 (1891), quoted in Leon E. Trakman, **The Law Merchant: The Evolution of Commercial Law**, Colorado: Fred B. Rothman & Co., 1983, p.10 as referred to by Steinhardt, "Soft Law, Hard Markets…", p. 947 and 951; Steinhardt, "Corporate Responsibility…", p. 225.

[581] 1969 Vienna Convention on Law of Treaties Article 31(3)(b).

[582] Norbert Horn, "Codes of Conduct for MNEs and Transnational Lex Mercatoria: An International Process of Learning and Law Making" in Norbert Horn (ed.), **Legal Problems of Codes of Conduct for Multinational Enterprises**, Studies in Transnational Economic Law Vol. 1, Kluwer, 1980, p. 62.

Despite the voluntary character of the codes of conduct, corporations may comply better with the principles and norms in such codes for the same appealing reasons as of the nations' obeying international law: if the States internalize a norm and consider it as 'fair', then it is more likely that they would comply with that norm.[583] Additionally, a regular reporting system requiring the States to justify their behaviour would increase the rates of compliance with such norms.[584] Similarly, such an understanding of fairness and a reporting system envisaged for corporations would facilitate the gradual amelioration of corporate conduct in accordance with both self-regulatory instruments and other international documents. Through a transnational legal process, which includes (1) dialogue between the transnational actors and the stakeholders, (2) interpretation of the norms in accordance with the interests of all parties, and (3) internalization of the norms in the codes and contracts, might render the norms to become binding in the future interactions between the parties.[585]

For example, Steinhardt puts that even if the codes of conduct and best practices flower up as mere voluntary or aspirational guidelines, it is not rare that they evolve gradually or atomistically.[586] Likewise, the 'comply or explain' directives may turn into more authoritative or even legal obligations for corporations.[587] It is true that compliance with human rights norms would increase the market reliability of a corporation, and therefore, it is in the interest of corporations and their shareholders in the long-run.[588] However, seeing the codes of conduct and the certification processes as mere marketing techniques or public relations exercises

---

[583] Tom R. Tylor, **Why People Obey the Law**, Princeton University Press, 1990 (rep. 2006). Koh referring to Franck's fairness theory and Chayeses' discursive theory, mentions that a transactional approach would help us to better understand why nations do obey international law. According to this approach, voluntary obedience should be preferred to coerced compliance by the nations. Abram Chayes & Antonia Handler Chayes, **The New Sovereignty Compliance with International Regulatory Agreements**, Harvard University Press, 1995; Thomas M. Franck, **Fairness in International Law and Institutions**, Clarendon Press, 1995 referred to in Koh, Harold H. "Why Do Nations Obey International Law", **Yale L.J.**, Vol. 106, 1997, p. 2646.

[584] Chayes & Chayes, **op. cit.**, as referred to in Koh, "Why Do Nations Obey…", p. 2646.

[585] Koh, "Why Do Nations Obey…", p. 2646.

[586] Steinhardt, "Soft Law, Hard Markets…", p. 936.

[587] As Steinhardt explains, the 'comply or explain' principle has widely been adopted by the European institutions for regulating corporate governance. According to this principle, the corporations should comply with the norms or recommendations adopted by the member states or they should make a public explanation of the reasons for their noncompliance with these norms or recommendations. Steinhardt, "Soft Law, Hard Markets…", p. 936.

[588] Steinhardt, "Soft Law, Hard Markets…", p. 943. Steinhardt also refers to the UN High Commission for Human Rights' Presentation for the Annual Meeting of the World Economic Forum, Davos, Jan Switz, **Business and Human Rights: A Progress Report, 2000,** www.ohchr.org/Documents/Publications/BusinessHRen.pdf, accessed on 25.06.2013.

would be misleading in the efforts for understanding the relationship between the global business and human rights.[589]

Moreover, as Gatto adds, even though the codes of conduct are examples of voluntary self-regulations, if they include sufficiently concrete and explicit commitments, they may be used as evidence of facts before the courts.[590] Nevertheless, it is true that the codes of conduct, as self-regulatory instruments, are generally vague in their wordings and they lack any monitoring mechanisms or any tools of remedy for the losses of the victims of human rights abuses. For example, TNCs prefer the use of terms that connotes 'soft law' with regard to their responsibilities and relationships with the stakeholders, such as 'corporate social accountability', 'good governance' and 'responsible citizenship'.[591] Accordingly, Gatto underlines that the codes of conduct are very limited in their effectiveness for ensuring human rights compliance of corporations and a legal ground for corporate international responsibility is still needed.[592]

Dashwood underlines that the voluntary character of CSR does not imply that to act in a certain way is not a duty for the corporation.[593] In other words, the issues handled under the CSR codes should have already been regulated by national and/or international laws to a level of legal obligation for corporations. In any way, the efforts of self-regulation shall be welcomed, since they might trigger the transformation of soft law into hard law.[594] Nevertheless, Kamminga and Zia-Zarifi are sceptical of this approach on the ground that it creates a falsified image of the corporations in the eye of the stakeholders and it constitutes an obstacle for the effective protection of the individuals, groups and the environment through the assertion of the legal liability of TNCs.[595] According to this approach, the codes of

[589] Steinhardt, "Corporate Responsibility…", p. 224; Gatto, **op. cit.**, p. 22.
[590] Horn, **op. cit.**, p. 407.
[591] Kamminga & Zia-Zarifi, **op. cit.**, p. 9.
[592] Gatto, **op. cit.**, pp. 22-23.
[593] Hevina S. Dashwood, "Corporate Social Responsibility and the Evolution of International Norms" in John J. Kirton & Michael J. Trebilcock (eds.), **Hard Choices, Soft Law: Voluntary Standards in Global Trade, Environment and Social Governance**, Global Environmental Governance Series, Ashgate, 2004, p. 191.
[594] H.W. Baade, "The Legal Effects of Codes of Conduct for Multinational Enterprises", in Horn, **op. cit.**, p.3.
[595] Kamminga & Zia-Zarifi, **op. cit.**, p. 9.

conduct are used as tools of public relations and their effectiveness in protecting human rights is realized only in exceptional situations.[596]

3.2. Various forms of self-regulation and privatization of human rights

Non-state actors cannot merely be seen as the law-takers of international law, anymore. They should also be regarded as law-makers, even though what is implied by 'law' and 'law-making' differs from the traditional understanding of norm-setting in international law.[597] Private actors and non-governmental institutions may have legal, economic and social impacts on the traditional understandings of law-making and they may also effect the ways of interpretation and implementation of domestic laws.[598] The sources of such 'new generation laws' may be IGOs, NGOs, governments, private initiatives and finally, corporations.[599] In the latter case, the process is called self-regulation.[600] The law-making patterns of non-state actors reflect a multifaceted learning process focused on not only the problems in international trade law, investment and economic cooperation, but also on the protection of human rights.[601]

Furthermore, the code of conduct movement should be seen as an evolutionary step towards the emergence of legally binding standards for corporations.[602] Peters, Förster and Koechlin argue that standard setting by non-state actors, as a method of 'bottom-up' norm formation, has three functions in relation to hard law. First, it

---

[596] For example, the public pressure along with the code of conduct adopted by Shell following the crisis in the Nigeria which resulted in the execution of activist Ken Saro-Wiwa, lead Shell to minimize its activities in the Niger Delta. Nevertheless, it did not have any contribution to the amelioration of the situation in Niger Delta and to the protection of the Nigerian people. On the contrary, it just decreased the visibility of Shell in the area, and thus, kept it away from the public scrutiny. Kamminga & Zia-Zarifi, **op. cit.**, p. 9.

[597] Muchlinski points out not only the influence of corporations over state policy, state practice and IGO policy formation (*e.g. via* lobbying) as an example of new forms of law-making process, but also their role in the conclusion of international investment agreements, which are in fact internationalized contracts. Muchlinski, Peter. "Multinational Enterprises …", p. 13 *et seq*.

[598] Horn, **op. cit.**, pp. 60-61.

[599] Christopher McCrudden, "Human Rights Codes for Transnational Corporations: What Can the Sullivan and MacBride Principles Tell Us?", **Oxford J Leg. Stud.,** Vol. 19, 1999, pp. 167-201.

[600] Even though for the purposes of this study I will focus only on the codes of conduct regulating corporate behaviour, it shall be noted that the codes of conduct may be adopted not only for businesses but also for international organizations and NGOs. As Reinisch mentions, IGOs, as subjects of international law having (functional) international legal personality, are already bound with international legal norms under general principles of international law, customary law or treaty law. However, whether regulated or unregulated, there are still legal areas, where the international organizations can self-regulate via codes of conduct. Reinisch, **op. cit.**, pp. 43-49.

[601] Horn, **op. cit.**, pp. 45-48

[602] Gatto, **op. cit.**, p. 22.

fulfils a pre-law function by providing guidance on the existing transnational consensus concerning the subject it regulates and precedents the norms of hard law that might be adopted in future international law.[603] Second, it fulfils a para-law function by substituting national and international law, when they are not effective or applicable.[604] Third, it fulfils a complementary function by providing a tool for guidance and interpretation of vague or broad texts of hard law documents.[605]

Codes of conduct are a set of self-declared standards, ethical principles, values and rules that corporations commit themselves to act in conformity with. They shall be regarded as unilateral declarations creating legitimate expectations that the corporation will act in conformity with its provisions.[606] Corporations also oblige their partners, sub-contractors and supply chain to internalize these rules as their own business practices. Furthermore, if the provisions of a code of conduct is incorporated in the private contract between two parties, they would create 'legal' obligations' breach of which could be invoked as a ground for termination if it was "considered essential to determine its consent to be bound".[607]

Sethi, in his book, analyses two different approaches adopted by TNCs in creating their codes of conduct. According to the first approach, *i.e.* group-based approach, corporations in one region or operating in one sector implement a common code of conduct. However, where there is no such common set of rules, or with the purpose of complementing the existing common rules, a corporation may adopt an individual, *i.e.* go-it-alone, approach in order to create its own codes of conduct.[608] When we examine go-it-alone, self-regulatory codes of conduct, we find some common features among them. Firstly, most of the codes, especially in the apparel and oil sectors, are the products of a period of harsh public criticism following the involvement of companies in human rights abuses in a country.[609]

Bernard mentions that a corporation facing allegations of human rights violations, firstly, denies any abuse of human rights; and secondly, if the protests

---

[603] Peters & Förster & Koechlin. **op. cit.**, p. 500.
[604] **ibid.**, p. 501.
[605] **ibid.**
[606] Marrella, **op. cit.**, pp. 301-302.
[607] **ibid.**
[608] S. Prakash Sethi, **Setting Global Standards: Guidelines for Creating Codes of Conduct in Multinational Corporations**, Wiley, 2003, p. 85.
[609] Nevertheless, Avery adds that in the other sectors, the companies prefer to stay silent even if they are subject to criticisms from the public. Avery, **op. cit.**, p. 58.

grow, it blames the local contractors or local governments for their failure to protect human rights. Third step would focus on controlling the damage by both partly denying any involvement in the human rights abuses and by labelling the protestors as political troublemakers. Fourth step would be restoring a good corporate image through the adoption of a corporate conduct. Finally, the fifth step is creating an image of the company that complies with the code of conduct and monitoring its implementation by an independent organ.[610] Consequently, as mentioned above, codes of conduct also serve as a marketing tool for the corporation. Avery argues that due to their voluntary character, companies do not take any measures to effectively implement and enforce the codes, and they wait until the attention of the public on a specific situation disappears.[611] A second common feature is that the codes adopt a minimalist approach and they are designed only to answer the concrete critics from the public. Early examples of the codes of conduct generally focused on the rights of workers and the rights of children[612] with no mention of a general corporate policy to support, promote and protect 'human rights'.[613]

One exceptional example to the general pattern of codes of conduct mentioned above is that of Levi Strauss & Co. Levi's, which is the first TNC to develop a set of standards on labour rights and the environment. It adopted the Global Sourcing and Operating Guidelines and the Country Assessment Guidelines in 1991. The same year, it also launched the 'Project Change' aiming to prevent racial discrimination in the workplace, especially in South Africa.[614] In 1992, the company withdrew from Myanmar (former Burma) on the ground that operating in Myanmar meant that the company directly supported the military government, which had the control since the *coup d'état* in 1962.[615] Additionally, in 1993, Levi's declared that it would end its relationship with the contractors in China due to the gross human rights violations in

---

[610] Elaine Bernard, "Ensuring Monitoring is not Co-opted", New Solutions, Vol.7, No.4, Summer 1997,p.11,http://www.law.harvard.edu/programs/lwp/people/staffPapers/bernard/1997%20Monitoring.pdf, accessed on 26.03.2013.
[611] Avery, **op. cit.**, p. 58.
[612] Gatto, **op. cit.**, p. 19.
[613] Avery, **op. cit.**, p. 58.
[614] In the website of Levi Strauss & Co. it is mentioned that the company's South Africa Policy Group recommended to consider redoing business in the South Africa if the human rights situation is ameliorated after a fair, free and non-racial election. http://www.levistrauss.com/sites/default/files/librarydocument/2010/4/LSCo_Heritage_Timeline.pdf, accessed on 26.03.2013.
[615] This move was followed by several other companies such as Reebok, which developed its own Human Rights Production Standards in 1992. Aaron Freeman, "Sanctioning Burma", Multinational Monitor, June 1996, Vol. 17, Number 6, http://multinationalmonitor.org/hyper/mm0696.03.html, accessed on 07.10.2014.

that country.[616] Nevertheless, these decisions were given as a consequence of a thorough analysis of the potential risks and benefits of operating in the area, and the risk of damage on corporate reputation and brand image was one of the motives behind these moves.[617]

Levi Strauss & Co., in its Citizenship Code of Conduct, provided that it would evaluate the risks of entering into a business relationship in a country based on the Country Assessment Guidelines, and would consider whether the country's health and safety conditions, human rights environment, legal system and political, economic and social environment are consistent with the policies of the company.[618] Additionally, the company would continuously monitor and review the compatibility of the conditions of its sub-contractors -involved in the manufacturing and finishing of products- with the terms of engagement. If a sub-contractor fails to implement the corrective action plan commitment with which it promised to enhance the conditions contrary to the Guidelines of the company, Levi Strauss & Co. would terminate its business relationship with the sub-contractor.[619]

Today, most TNCs have adopted codes of conduct. It is remarkable that, even if it not common, some of those codes refer directly to the UDHR and to the rights contained therein, which at the same time oblige the employees, sub-contractors, suppliers and host governments to obey these provisions.[620] For example, Rio Tinto, a British-Australian TNC on metal and mining, declared that it is committed to support and respect human rights as set out in the UDHR.[621] Likewise, Barclays PLC, a British banking and financial services company, expressly referred to the UDHR and other internationally accepted human rights standards, including the OECD Guidelines and the ILO Core Conventions in its Statement of Human Rights.[622] In only 3% of codes of conduct, the ILO Core Conventions are directly mentioned, while core labour standards such as prohibition of forced labour and

---

[616] Karl Schoenberger, **Levi's Children: Coming to Terms with Human Rights in the Global Marketplace**, Grove Press, 2000, p. 120 *et seq*.
[617] **ibid.**, p. 123.
[618] Levi Strauss & Co., Global Sourcing and Operating Guidelines, http://www.levistrauss.com/sites/default/files/librarydocument/2010/4/CitizenshipCodeOfConduct.pdf accessed on 26.06.2013.
[619] **ibid.**
[620] Gatto, **op. cit.**, p. 19; Avery, **op cit.**, p. 56.
[621] Rio Tinto Commitment, http://www.riotinto.com/ourcommitment/human-rights-4800.aspx, accessed on 19.10.2014.
[622] Barclays Group, Statement on Human Rights, December 2010, 1.0. objectives and rationale.

child labour and prohibition of discrimination or harassment are frequently (approx. 50%) mentioned.[623] The Body Shop launched its Trading Charter and the Statement of Human Rights Principles in 1994.[624] The company also launched a human rights campaign in collaboration with Amnesty International for the 50th anniversary of the adoption of the UDHR and appealed the customers with a slogan: "Make Your Mark for Human Rights".[625]

Regarding the group-based approach on the adoption of codes of conduct, 1977 Sullivan Principles of Corporate Social Responsibility is a notable example. The Sullivan Principles has originally been developed by Leon Sullivan, who was then member of the board of directors of the General Motors, a U.S.-based corporation. Afterwards, the Sullivan Principles were adopted by the other TNCs operating in South Africa in order to resist the effects of the apartheid regime.[626] The Principles were regarded as a corporate civil disobedience movement promoting equal treatment of whites, blacks and other non-whites in the workplace and targeting the empowerment of blacks and other non-whites.[627] In 1984, the seventh principle was inserted in the Sullivan Principles aiming "*to eliminate laws and customs that impede social, economic and political justice*". Independent auditors were monitoring the implementation of the Sullivan Principles by the corporations.[628]

The Sullivan Principles also include provisions on moral responsibility and corporate complicity in the commission of crimes perpetrated by government authorities in South Africa.[629] In the apartheid era, the principle of non-discrimination served as the very fundamental norm that companies should act in line with. The Sullivan Principles played an important role in guiding the (U.S.) corporations in their conducts both at the workplace and in their external relations

---

[623] R. Jenkins, "The political economy of codes of conduct" in R. Jenkins & R. Pearson& G. Seyfang, **Corporate Responsibility and Labour Rights: Codes of Conduct in the Global Economy**, 2002, p. 19.
[624] Its values are being against animal testing, supporting community fair trade, activating self-esteem, defending human rights and protecting the planet.
[625] http://www.thebodyshop.com/content/services/aboutus_history.aspx, accessed on 26.03.2013.
[626] Steinhardt, "Corporate Responsibility …", p. 180.
[627] McCrudden, **op. cit.**, p. 425.
[628] Steinhardt, "Corporate Responsibility …", p. 180.
[629] Irene Khan, **Understanding Corporate Complicity: Extending the Notion Beyond Existing Laws**, London, 8 December 2005, AI Index: POL 34/001/2006, p. 6.

with the sub-contractors and suppliers.[630] Furthermore, the Sullivan Principles were incorporated in the US law through an executive order issued by the then President Ronald Reagan.[631] They also triggered the development of other codes of conduct such as the MacBride Principles adopted in the Northern Ireland[632] and the Valdez Principles concerning the protection of environment.[633]

Even though the adoption of the Sullivan Principles raised global awareness on apartheid and was considered to be the best example of a 'group-based region-wide approach'[634] having positive effects on the business activity,[635] it was proved that they were not sufficiently effective for the prevention of the gross violations of human rights in South Africa. Consequently, the corporations were urged to withdraw completely from the country in order to refrain from any act that would amount to being complicit in such abuses.[636]

In 1999, Leon Sullivan and the UN Secretary General Kofi Annan worked together in order to launch the new Global Sullivan Principles of Corporate Social Responsibility, which is an expanded version of the previous one comprising not only the principle of non-discrimination, but also support for universal human rights, especially for the freedom of association, fair pay, safe and healthy workplace, protection of environment, promotion of sustainable development, promotion of fair competition including the prohibition of bribery, contribution to the improvement of

---

[630] **ibid.**, p. 7.
[631] Executive Order No. 12532, 50 Fed. Reg. 36861, 9 September 1985.
[632] 1984 MacBride Principles were launched by the Irish National Caucus to prevent religious discrimination in the work place and were adopted by the U.S. corporations operating in the Northern Ireland. The MacBride Principles have also been incorporated in the U.S. law by both a presidential order (of Bill Clinton) and legislation in certain States such as Florida, Illinois, Michigan, New York, Texas and Vermont. http://www.irishnationalcaucus.org/the-macbride-principles-the-essence/, accessed on 26.09.2014.
[633] Following the Exxon Valdez oil spill on Bligh Reef in Alaska, 1989 Valdez Principles were adopted by the Coalition for Environmentally Responsible Economies (CERES), which is an international network serving as a forum for environmental NGOs, investment and business groups, governmental agencies and economists worldwide. The Valdez Principles require the signatory corporations to operate in line with the ten principles aiming to protect the environment. The Principles concern the protection of biosphere, sustainable use of natural resources, reduction and recycling of waste, energy conservation, risk reduction, safe services, environmental restoration, informing the public and management commitment. Additionally, the tenth principle requires submission of an annual environmental audit. Moreover, despite the Principles were originally framed to be applied by the private sector, public-sector operations may also be subject to these principles. Steinhardt, "Corporate Responsibility…", p. 181.
[634] Sethi, **op. cit.**, p. 95.
[635] Dinah Shelton, "Compliance with International Human Rights Soft Law", in E. Brown Weiss (ed.), **International Compliance with Nonbinding Accords**, Washington, DC: American Society of International Law, 1997, p. 129.
[636] Steinhardt, "Corporate Responsibility…", p. 181.

educational, cultural, economic and social development of countries they operate in and promotion of the Global Sullivan Principles.

Second notable example of the group-based approach to the adoption of codes of conduct is 1986 Caux Round Table (CRT), which was founded by the senior business leaders from Europe, Japan and Northern America[637] with a vision of "*free, fair and prosperous global society built on the twin pillars of moral capitalism and moral government*".[638] The CRT Principles were adopted in 1994 with the purposes of determining a global standard for ethical and responsible business. It was also designed to serve as a global forum for dialogue and action among corporations and leaders.[639] After the financial crisis in 2009, the CRT Principles have been reformatted, followed by an update in 2010. The underlying motive of the CRT Principles is that the business should act moral and responsible for a sustainable capitalism.[640]

It is highlighted in the CRT Principles that the seven core principles are rooted in three ethical foundational concepts: responsible stewardship; living and working for mutual advantage; and respect and protection of human dignity.[641] The Principles include responsibilities (1) to respect stakeholders, *i.e.* customers, employees, shareholders, suppliers, competitors and communities, (2) to contribute to economic, social and environmental development, (3) to build trust by going beyond the letter of the law, (4) to respect rules and conventions, (5) to support responsible globalization, (6) to respect the environment, and (7) to avoid illicit activities.

Slepak Principles on Human Rights were named after Vladimir Slepak, who was a member of the Helsinki Monitoring Group founded with the purpose of monitoring the compliance of the former Soviet Union and the Baltic States with the

---

[637] For example, the UN Global Compact, the Center for Ethical Business Cultures, Corporate Social Responsibility Europe and International Business Leaders Forum are among the affiliated organizations of the CRT. Steinhardt, "Corporate Responsibility…", p. 186.
[638] http://www.cauxroundtable.org/index.cfm?&menuid=142, accessed on 25.03.2013.
[639] The CRT Principles are consisted of five parts: Principles for Responsible Business, Principles for Governments, Principles for NGOs, Principles for Ownership of Wealth, and finally Principles for Responsible Globalization. For the purposes of this study I would focus on the Principles for Responsible Business.
[640] Introduction to the CRT Principles for Responsible Business, para. 5.
[641] http://www.cauxroundtable.org/index.cfm?&menuid=8, accessed on 25.03.2013.

Helsinki Final Act and to encourage liberalization.[642] Later, the Principles have been enacted by the U.S. Congress to prevent indirect support of U.S. corporations for the human rights abuses perpetrated by the USSR companies with whom they cooperate in joint ventures.[643] The Principles included, *inter alia*, prohibition of assistance to Soviet military, ban on the use of materials made by forced labour and protection of Soviet employees.[644] However, implementation of the Slepak Principles was voluntary for the U.S. nationals.[645]

Similarly, 1991 Maquiladora Standards of Conduct has been drafted by the Coalition for Justice in the *maquiladoras* with the purpose of providing the compliance of the U.S. corporations operating in the U.S.-Mexico border.[646] The Standards, which focus on environmental and labour rights, are derived from the existing national laws of the U.S. and Mexico in order to remind the minimum standards that the corporations are obliged to fulfil.[647]

Reinisch argues that the increased use of codes of conduct could be seen as a new form of privatization of human rights, *i.e.* an area which is regulated by the private actors via voluntary codes of conduct, instead of using public power to prevent human rights abuses by non-state actors.[648] Privatization of human rights includes not only norm setting, but also privatization of the supervision of compliance with the non-binding norms by non-state actors such as NGOs and trade unions.[649] Monitoring of the implementation of the codes of conduct should be independent, on-going, institutional, indigenous, trusted, knowledgeable and transparent.[650] It is asserted that if one of these conditions is absent, then the

---

[642] Carolyn M. Sneider, "The Slepak Principles Act and Soviet Union-United States Joint Ventures: Profits or People", **Loy LA Int'l & Comp L. Rev.**, Vol. 13, 1990, p. 365.
[643] H.R. 2366, 101st Cong., 1st Sess., 16 May 1989; Sneider, **op. cit.**, p. 365.
[644] See in support of the Slepak Principles the article by Carol Rae Hansen, "The Slepak Principles: No Threat to American Traders", **Whit. L. Rev.**, Vol.11, 1989-1990, pp. 459-472.
[645] H.R. 2366, 101st Cong., 1st Sess., 16 May 1989, Section 4.
[646] Maquiladoras are mostly U.S.-owned companies operating in a free trade zone area, located near U.S.-Mexico border.
[647] Meyer, "Human Rights and International Political Economy…", p. 164 *et seq.*
[648] Reinisch, **op. cit.**, p. 42-45. Reinisch, however, underlines that he does not use the term 'privatization' in the sense of *Drittwirkung* or 'third-party effect' as is used so by Clapham. He uses the term in order to mention the increased self-regulation instead of governmental regulation. Accordingly, he also argues that the role of international organizations such as the OECD and ILO in drafting principles for business is diminishing.
[649] **ibid,**, p. 75; Dinah Shelton, "Law, Non-Law and the Problem of 'Soft Law'" in Dinah Shelton (ed.), **Commitment and Compliance…,** p. 11.
[650] The General Principles of Independent Monitoring, Bernard, **op.cit.**, pp. 11-12; Avery, **op. cit.**, p. 61.

monitoring NGOs should not be forced to function as a monitoring body since both the codes of conduct and the monitoring of compliance would be meaningless.[651]

Non-state actors that play a role in the privatization of standard setting include, *inter alia*, International Organization for Standardization (1947),[652] International Accounting Standards Committee (1973) and International Association of Insurance Supervisors (1994).[653] NGOs may also play a role in the process of privatization of human rights[654] by issuing standards, principles and norms. For example, Amnesty International (AI) issued the 1998 Human Rights Principles for Companies, which mainly concern company policies on human rights,[655] security arrangements consistent with the UN instructions,[656] engagements with the local community where they operate,[657] prohibition of discrimination,[658] prohibition of slavery,[659] protection of health and safety,[660] ensuring the freedom of association and the right to collective bargaining,[661] ensuring fair working conditions[662] and establishing mechanisms for monitoring their compliance with international standards.[663] Currently, AI continues to work for the adoption of global standards of corporate conduct and holding the corporations accountable for human rights violations under a strong legal framework inspired by the UN Norms and UN Guiding Principles.[664]

Another example is the Social Accounting 8000 (SA8000), published in 1997. It is a voluntary process of international certification developed by the Council on

---

[651] Bernard, **op. cit.,** pp. 10-12.
[652] See Naomi Roht-Arriza, "'Soft Law' in a 'Hybrid' Organization: The International Organization for Standardization" in Dinah Shelton (ed.), **Commitment and Compliance…**, pp. 263-280.
[653] Dashwood, **op. cit.,** p. 196.
[654] Anton Vedder (ed.), **NGO Involvement in International Governance and Policy**, Martinus Nijhoff Publishers, 2007; Anna-Karin Lindblom, **Non-Governmental Organisations in International Law**, CUP, 2005.
[655] Corporations, as organs of the society, should promote respect for rights and freedoms contained in the UDHR and secure their universal and effective recognition (UDHR Preamble). States have the authority to regulate the operations of corporations in line with the international obligations (The OECD Guidelines).
[656] References to the UDHR Articles 3, 5, and 9; the UN Basic Principles on the Use of Force and Firearms and the UN Code of Conduct for Law Enforcement Officials, Principles Governing Conventional Arms Transfers of the Organization for Security are made.
[657] UDHR Articles 21 and 26(2); ILO Tripartite Declaration introduction.
[658] UDHR Article 2, ILO Convention 100, 111, and 165.
[659] UDHR Article 4, ILO Conventions 29, 105 and 138.
[660] UDHR Article 3, ILO Convention 155.
[661] UDHR Articles 20 and 23; ILO Conventions 87, 98 and 135.
[662] UDHR Articles 23 and 24; ILO Conventions 95, 131, 13, 106, 132.
[663] Human Rights Principles for Companies, January 1998, AI Index: ACT 70/01/98; Avery, **op. cit.**, pp. 37-38.
[664] The AI works on the issue as a part of its "Demand Dignity" campaign; AI web site, http://www.amnesty.org/en/business-and-human-rights, accessed on 16.03.2013.

Economic Priorities Accreditation Agency, currently named as the Social Accountability International (SAI).[665] SA8000 intends to provide a global standard for corporations ensuring their compliance with international human rights obligations, regardless of their sectoral or geographical area of operation.[666] In the certification process, independent auditors supervise the corporate conduct and confirm whether the corporation is acting in line with the international standards regarding nine core areas that derive from the UDHR, ILO conventions and the UN Convention on the Rights of the Child.[667] While Steinhardt mentions that the labelling systems allow corporations to differentiate themselves in the market from their competitors, he admits that in order to be successful, such systems also require well-informed and conscious customers who do not act solely based on the considerations of price.[668]

ISO 26000:2010 Guidance on Social Responsibility is designed to be merely a guide for all type of organizations on the concept of social responsibility. Thus, unlike the other ISO standards, it cannot be certified.[669] In determining the standards and principles, various actors from the governments, business, NGOs and labour organizations cooperated for reaching an international consensus. The sixth of the seven clauses under ISO26000 concerns guidance for social responsibility on seven core subjects, including human rights, labour practices, environment, and consumer issues. Guidance on human rights includes principles on human rights due diligence; human rights risk situations; avoidance of complicity; resolving grievances; principle of non-discrimination and protection of vulnerable groups; respect for civil, political,

---

[665] The Social Accountability International (SAI) is a NGO, which has dedicated itself to the promotion of ethical working conditions, labour rights, corporate social responsibility and social dialogue around the world. It also has developed other procedures for accreditation based on the existing systems such as ISO 9000 on quality control, ISO14000 on environmental management and Forest Stewardship Council (FSC). By 2007, the Social Accountability Accreditation Services (SAAS) began to provide accreditation for not only SAI but also InterAction and the Business for Social Compliance Initiative. http://www.sa-intl.org/index.cfm?fuseaction=Page.ViewPage&pageId=1365, accessed on 18.03.2013.

[666] Steinhardt, "Corporate Responsibility…", p. 178; Steinhardt, "Soft Law, Hard Markets…", p. 941. For an example of sectoral codes see Olga Martin-Ortega & Rebecca M.M Wallace, "The Interaction between corporate codes of conduct and international law: a study of women and children in the textile industry" in Stephen Tully (ed.), **Research Handbook on Corporate Legal Responsibility**, Edward Elgar Publishing, 2005, p. 302.

[667] *i.e.* child labour, forced labour, health and safety, freedom of association, freedom from discrimination, disciplinary practices, work hours, compensation, and management systems to assure compliance. Steinhardt, "Corporate Responsibility…", p. 184.

[668] Steinhardt, "Soft Law, Hard Markets…", p. 941.

[669] http://www.iso.org/iso/home/standards/iso26000.htm, accessed on 18.03.2013.

economic, social and cultural rights; and other fundamental principles and rights at work.

There are many other local, regional and international initiatives focusing on corporate conduct.[670] Initiatives may also be specific to certain sectors or limited geographical areas. For example, Kimberley Process Certification Scheme is a public-private partnership that has been established to separate the conflict (dirty) diamonds from the rough diamonds.[671] This rights-sensitive certification is made for assuring the consumers that the profits from the sale of the diamonds are not going to be used as financial support for the governments or the paramilitary groups that violate the rules of humanitarian and human rights law in the conflict-affected areas.[672] The UN Security Council also welcomed and encouraged such voluntary self-regulatory efforts.[673]

The Coffee and Farmer Equity Practices (C.A.F.E) is a certificate aiming to ensure the consumers that the production and marketing of the coffee they buy do not violate the rights of the workers or the environment.[674] Starbucks uses these 'fair trade' certified coffees for some of its products. Similarly, the Better Banana Project ("BBP") of the Rainforest Alliance has developed the 'Ethical Banana' standard, which is used for certifying the banana farms of Latin America having an auditable social and environmental standard.[675]

3.3. Web of International Documents: International Soft Regulation

Soft law may be defined as a set of rules lacking enforcement provisions. Compliance of the addressees with soft law documents is based on the principle of good faith.[676] Accordingly, soft law documents seek to promote a specific objective

---

[670] For example, see the UK Ethical Trading Initiative, Canada International Centre for Human Rights and Democratic Development, US Interfaith Centre on Corporate Responsibility, UK/Ireland Ecumenical Council for Corporate Responsibility.

[671] World Diamond Council, Kimberley Process Certification Scheme, http://www.kimberleyprocess.com/, accessed on 26.06.2013.

[672] Kamatali, **op. cit.**, p. 445; Steinhardt, Ralph G. "Soft Law, Hard Markets…", p. 939.

[673] S/RES/1446 (2002), 03.12.2002; S/RES/1459 (2003), 27.01.2003.

[674] Steinhardt, "Soft Law, Hard Markets…" , p. 940.

[675] Rainforest Alliance, Profiles in Sustainable Agriculture: Chiquita Reaps a Better Banana (2009), http://www.rainforest-alliance.org/sites/default/files/publication/pdf/chiquita_profile_en_hz_jan09.pdf, accessed on 26.06.2013; Steinhardt, "Soft Law, Hard Markets…", p. 940.

[676] Wade Mansell & Karen Openshaw, **International Law: A Critical Introduction**, Hart Publishing, 2013, p. 27.

rather than to sharply define the rights and obligations of the addressees.[677] Soft law norms can be expressed in a wide range of forms.[678] As a common feature of soft law documents, wordings such as 'take appropriate measures', 'demonstrate best efforts', 'as far as possible', 'with a view to achieving progressively' are frequently used.[679] We also observe that, unlike their ordinary meanings, the UN has the tendency to use *'shall'* for hard law documents, while preferring the use of '*should'* for soft law instruments.[680]

Declarations, resolutions, guidelines, principles, credos and other high level statements made by governments or relevant bodies of international organizations are called as soft law instruments, implying that they are legally non-binding.[681] Soft law instruments should not be categorized as mere political engagements or moral commitments either.[682] Even if some scholars argued that soft law is a form of non-law, which is undesirable and redundant;[683] today, it is generally accepted that it does not completely lack legal significance and is no longer 'soft'.[684] Furthermore, in practice, the clear-cut differences between non-law and law have been blurred.[685] Moreover, non-state participants of the international system, such as NGOs, corporations and experts, are being regarded as indirect contributors to the international norm-setting process through the 'quasi-legal' mediums they develop

---

[677] **ibid.**

[678] For example, even the provisions of a 'hard law' treaty may contain soft obligations, and the form of an instrument is not determinative on its level of hardness or softness. Chinkin, Christine. "Normative Development in the International Legal System" in Shelton, Dinah (ed.). "Commitment and Compliance: The Role of Non-Binding Norms in International Legal Systems", Oxford, 2003, pp. 25-31, 37-39.

[679] Chinkin, **op. cit.**, p.41.

[680] In fact, ordinary meaning of the word 'should' expresses an obligation for the person towards whom the sentence is directed. However, the European Convention on Human Rights, too, prefers the use of the word 'shall'. In any case, as Clapham mentions the meaning of preference of one of these words does not strictly allow us to decide on the legal power of a document. He gives the use of word 'should' in Article 4 of the Optional Protocol to the Convention on the Rights of the Child concerning the involvement of the children in armed conflicts as an example and stresses that the intention of the drafters of this provision was clearly to impose obligations on the States from which no derogation would be possible. However, it should be kept in mind that, Clapham bases his argument on the fact that in that specific provision the 'under any circumstances' template was used. Clapham, **Human Rights Obligations…**, p. 75.

[681] "Soft law" in Black's Law Dictionary.

[682] Gatto, **op. cit.**, p. 75, fn. 68.

[683] Jan Klabbers, "The Redundancy of Soft Law", **Nordic J. Int'l L.**, Vol. 65, 1996, pp. 167-182; Jan Klabbers, "The Undesirability of Soft Law", **Nordic J. Int'l L.**, Vol. 67, 1998, pp. 381-391.

[684] Alan Boyle, "Soft Law in International Law-Making" in Malcolm Evans (ed.), **International Law**, Oxford, 3rd ed. 2010, p. 123.

[685] Bhuta, **op. cit.**, p.68.

concerning both their inner and outer relations with stakeholders and the international community, in general.[686]

The reasons behind the preference of soft law as an alternative to hard law vary depending on the particularities of each area of regulation and norm setting. As a matter of fact, soft law instruments mostly reflect the 'law in development'[687] and have the potential to evolve into legally binding 'hard-law' documents.[688] In other words, soft law documents are used as a declarative preliminary stage before being concretized as hard law rules in the form of human rights treaties.[689] Accordingly, most of the soft law instruments concern newly emerging areas of international law, such as international economic law and international environmental law.[690] Even if a transformation of soft law to hard law is not realized, these instruments, reflecting the desired conduct for their addressees, continue to affect the behaviour of the international community. Especially, soft law documents drafted and adopted by an organ of an IGO would have a significant impact on the conduct of international actors.[691] For example, the UDHR adopted by the General Assembly of the UN and the Helsinki Final Act adopted by the Organization for Security and Co-operation in Europe (OSCE) had considerably affected the legal developments in human rights law and international law.[692] In addition, where the rights and obligations recognized under an international treaty have vague content, the soft law instruments are frequently used by political, quasi-judicial and judicial organs as tools of interpretation for the effective implementation -*effet utile*- of international legal documents.[693]

Alternatively, soft law documents may be used "as such" for expressing the international consensus on a question of continuing international debate.[694] In such cases, as Shelton argues "*secondary soft law may be harder than the primary soft law declaring new standards*" in the sense that it points out to a need for action on a

[686] Emre Öktem, **Uluslararası Teamül Hukuku**, (*International Customary Law*), Beta Basım, İstanbul, 2013, p. 292; Chinkin, **op. cit.,** p. 29.
[687] Rosemann, "Business Human Rights Obligations - The 'Norms…", p. 56.
[688] *cf.* de Brabandere, **op. cit.**, p. 276.
[689] Shelton, "Compliance with …", pp. 140-141.
[690] Malanczuk, **Akehurst's...**, p. 54.
[691] Öktem, **Uluslararası Teamül....**, pp. 162-196.
[692] Weissbrodt & Kruger, "Human Rights Responsibilities of Business …", p. 340.
[693] Gatto exemplifies that the judges may refer to the corporate codes of conduct and soft law documents on corporate responsibility for determining the content of the obligation to act with 'due diligence'. Gatto, **op. cit.**, p. 28.
[694] Shelton, "Compliance with…", pp.140-141.

global concern, which would create a legitimate pressure on the non-consenting states to take affirmative steps in the rights-protecting direction.[695] Neuhold argues that soft law documents might be an alternative to hard law documents due to the lack of speed in the adoption process, clarity of the text, uniformity, wide participation and adaptability to changing circumstances of hard law documents.[696] Furthermore, he argues that contrary to hard law sanctions such as reprisals, which have certain limits and conditions to be followed, soft law sanctions, *i.e.* retorsions, do not have prerequisites, and therefore, could always be resorted to.[697] Soft law (*i.e.* diplomatic) dispute settlement mechanisms may prove to be more effective under certain circumstances, as compared to hard law dispute settlement mechanisms such as arbitration and/or international tribunals, which both require the consent of the parties to a dispute.[698] Finally, Neuhold also giving the example of the legal effect of advisory opinions of the ICJ, holds that States are generally willing to act in line with the findings of the World Court even though these opinions are not legally binding.[699]

Human rights law is one of the areas having a vast number of soft law documents, which cover a wide range of rights and obligations for the addressees.[700] The evolutionary approach welcomes the proliferation of soft law instruments and

---

[695] Shelton names the soft law that sets forth new standards, that reaffirms previously accepted standards, and that further elaborates on the previously accepted vague or general standards as "primary soft law". According to her categorization, recommendations, general comments, interpretative declarations and resolutions of IGOs, the jurisprudence of courts and commissions, decisions of special rapporteurs applying the primary soft law shall be regarded as "secondary soft law". Shelton, "Compliance with…", pp.120-127, 140-141.

[696] Hanspeter Neuhold, "Variations on the Theme of 'Soft International Law'" in Isabelle Buffard & James Crawford & Alain Pellet & Stephan Wittich, **International Law between Universalism and Fragmentation: Festschrift in Honour of Gerhard Hafner**, Martinus Nijhoff Publishers, 2008, pp. 344-351; For the reasons of preference of soft law documents to hard law see also Shelton, "Law, Non-Law…", p.12 *et seq*.

[697] Neuhold, **op. cit.**, p. 351 *et seq*.

[698] He also argues that even if it is true that the judgments of legal bodies are binding for the parties, the lack of effective and centralized enforcement mechanism in the international law system, makes soft law dispute settlement mechanisms no less important. Neuhold, **op. cit.**, p. 353 *et seq*.

[699] Neuhold puts a reservation to his generalization of the situation and draws attention to the fact that sometimes a State, which has been subject of an advisory opinion, may be reluctant to adopt the views declared by the ICJ concerning its critical political standing. He gives the example of the Wall advisory opinion, where the Court concluded that Israel disregarded an obligation *erga omnes*. Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, ICJ Rep. 2004, p. 136; Neuhold, **op. cit.**, p. 355 *et seq*.

[700] It must be noted that the comments, reports and decisions of the monitoring mechanisms established under international human rights treaties fall under the concept of 'soft law'. For example, the views of the UN Human Rights Committee established by the ICCPR upon the complaints submitted by the individuals in accordance with the Optional Protocol to the ICCPR technically constitute 'soft law'. For an analysis of the theory of 'international common law' see Andrew Guzman & Timothy Meyer, "International Soft Law", **J Leg. Analysis**, Vol.2, Number 1, 2010, p. 211 *et seq*.

their contribution to the human rights standards. The progressive development of the concept of human rights obligations of TNCs concerns not only the application area of the human rights documents, but also the categories of human rights obligations enforceable on the private actors.[701] The common feature of international documents related to the human rights obligations of TNCs is that, despite they are directed towards corporations underlining the minimum core human rights obligations for corporate conduct, they begin with stressing the primary responsibility of States. Historically, we observe three steps in the evolution of the international documents on corporate human rights obligations: (1) integration of human rights and labour rights, (2) expansion of territorial application of the provisions, and (3) "progressive strengthening of enforcement/implementation mechanisms".[702]

Baade comments that even if the transformation of codes of conduct into multilateral conventions did not sound feasible in 1980s, their substantive contents can acquire the status of hard law in the course of time.[703] For example, official encouragement of compliance with codes of conduct or soft law documents by host states and/or home states, "*as evidence of a general practice accepted as law*",[704] may give such norms and principles the power of hard law.[705] Likewise, the implementation and transformation of soft law documents into domestic laws would make them enforceable on the corporations at the national level.[706] Accordingly, the legislative, administrative or judicial measures taken by States to the detriment of corporations would be justified and legitimized in the international arena. However, a possible impediment before these arguments is that most soft law documents concerning responsibilities of TNCs expressly provide that they are not legally binding documents, compliance to which are based on voluntary initiatives.[707] To this question, Baade gives a quick answer mentioning that since the rules on the

---

[701] Gatto, **op. cit.**, p. 99.
[702] **ibid.**, p. 91.
[703] However, Baade argues that even if the TNCs could be conferred upon a partial (limited) or *ad hoc* international personality, they lack the power to participate directly in the international norm-creating process. This implies that the self-regulation documents could not be considered as the evidence of *opinio necessitatis iuris* element of an emerging customary rule. Baade, **op. cit.,** pp. 6-8; *cf.* Lindblom, **op. cit.**, p. 106.
[704] Article 38(1)(b) of the ICJ Statute.
[705] Baade, **op. cit.**, p. 11; Öktem, **Uluslararası Teamül**…, p. 290; Brian D. Lepard, **Customary International Law: A New Theory with Practical Applications**, ASIL Studies in International Legal Theory, Cambridge, 2010, p. 187.
[706] Baade, **op. cit.**, p.11.
[707] **ibid.**, pp. 20-21. Baade names this view as the shield theory. *See* de Brabandere, **op. cit.**, p. 276.

sources of international law have themselves came into existence as customary law, it can evolve towards such a change once *opinio necessitatis iuris* is established.[708]

Additionally, the real legal value of soft law documents should also be sought in the unilateral declarations made by the government officials during the negotiation processes and behind the intent of the drafters and voters of such documents.[709] Unilateral declarations made by empowered government officials such as the ministers would be binding for the State on the international level, provided that the statement was made with such an intention.[710] In this case, the declarant states of the general principles of international public policy might also be the contributors to the formation of instant international law.[711] Due to the anti-inconsistency (or non-contradiction) rule and the principle of estoppel, such declarations should be followed in accordance with the principle of good faith.[712] As Sorel argues, soft law is not the absence of law and it gives rise to soft responsibility, which is outside the traditional framework of international responsibility.[713] However, it must also be noted that, unless it is clearly established, states should not be presumed that their intention was to be bound by the document (*in dubio pro libertate*) and any

---

[708] Baade, **op. cit.**, p.12.
[709] **ibid.**, 80, p.16; Shelton, "Law, Non-Law…", p.1.
[710] Baade, **op. cit.**, pp. 10, 13, 16-18 citing Review of the 1976 Declaration and Decisions on International Investment and Multinational Enterprises, Report by the Committee on International Investment and Multinational Enterprises, OECD Doc. 47580, para. 37 at p.14, approved by the Ministers of OECD Member Countries on June 13, 1979; Legal Status of Eastern Greenland (*i.e.* Ihlen Declaration) (Denmark v. Norway), PCIJ Ser. A/B no. 53, Order of 5 April 1933; Nuclear Tests case (Australia v. France), ICJ Rep. 1974, p. 253; Nuclear Test case (New Zealand v. France), ICJ Rep. 1974, p. 267, 272, 472, 477; Case concerning the Temple of Preah Vihear (Cambodia v. Thailand), Preliminary objection, ICJ Rep. 1961, p. 31. However, Brownlie criticizes this assertion for being an over generalization and underlines that in both of the Ihlen Declaration case and the Nuclear Tests case, very specific obligations on very particular situations were at issue. Ian Brownlie, "Legal Effects of Codes of Conduct for MNEs: Commentary" in Horn, **Legal Problems of Codes of Conduct**…, p. 39.
[711] It should be noted that soft law documents do not become instant international law merely by the fact that they are adopted by States. One of the most important determinative elements of instant international law is that it is adopted as such with the intention that it would be legally binding. However, as mentioned earlier, even if the initial intent of States was not to create a legally binding document, the following consistent practice of the host states and home states combined with the *opinio necessitatis iuris* would lead to the transformation of the provisions of soft law documents into hard law. Baade names this view as the "sword theory". He also gives the example of the OECD Guidelines, which is the joint pronouncement of the Ministers of the OECD member states. Accordingly, the OECD Guidelines carry significance in international law legally implying a higher status than a mere act of an international organization or a unilateral act of a state. Additionally, the follow-up procedures provided by the OECD Guidelines require the involvement of the States, which would in the end of the day amount to state practice. In any case, as the *sine qua non* element of the emergence of customary law, this state practice should involve the belief that the state is under a legal obligation to act so. Baade, **op. cit.**, p.28; Boyle, **op. cit.**, pp. 134-137; Lepard, **op. cit.,** p. 190.
[712] Baade, **op. cit.**, pp.17-18, 38.
[713] See the anti-contradiction rule and estoppel as 'soft sanctions'. Sorel, **op. cit.**, pp. 168-169.

interpretation limiting the sovereignty and freedom of action of the states should be made restrictively.[714]

Soft law rules may also blossom up as an offspring of the interaction between the self-regulation documents, soft law rules and the legal instruments. Soft law may become binding on the corporations by the incorporation of soft rules in the business contracts concluded between two corporations or between a corporation and a State or an IGO.[715] Such an internalization would have two consequences if the terms of the contract is violated by the corporation: (1) the other party may end the business relationship with the abuser, (2) when the dispute is brought before a court, the court may assess whether the corporation was in violation of the contract by expressly referring to the soft law rules incorporated in the contract.[716]

A similar and even stronger case would be the incorporation of soft law rules into international treaties by express references. For example, a reference to 'generally accepted international rules and norms' would enable the use of soft law documents by the relevant administrative and judicial organs or political bodies of IGOs.[717] IGOs themselves may create soft law documents that would contribute to the evolution of the concept of human rights obligations of corporations.

It could be observed that while the developed and some of the developing countries and the business sector favour voluntary models, most of the developing countries, as well as the academic community and other international civil and public actors, favour the control model, *i.e.* direct and indirect international regulation of

---

[714] Baade, **op. cit.**, pp. 19-21.

[715] For example, EU may require corporations to comply with the EU standards for allowing them access in the EU market, or to conclude EU public procurement contracts. Gatto, **op. cit.**, p. 28, 76 also referring to Hanley, "The Abuse of Human Rights by European-based Multinational Corporations: Effective Control Mechanisms for the EU", LLM thesis on file at the European University Institute, Florence 2001, p. 33. A similar example is the U.S. Model Business Principles, which have been declared in 1996 as a voluntary set of guidelines to serve as a reference point for the companies in internalizing the universal standards of human rights and adopting their own codes of conduct. Companies are also advised to encourage their partners, suppliers and subcontractors to respect these standards. The principles include, inter alia, safety and health in the workplace, fair employment practices, environmental protection, and compliance with laws promoting good business practices. However, it is also expressly mentioned that the principles does not in any way require the companies to act in violation of the laws of the host state or the U.S. The U.S. Model Business Principles, http://actrav.itcilo.org/actrav-english/telearn/global/ilo/guide/usmodel.htm, accessed on 01.07.2013.

[716] Gatto, **op. cit.**, p. 28.

[717] As examples of the use of such rules of reference Friedrich shows Articles 61(3), 119(1) and 211(2) of the UNCLOS, which refer to 'any generally recommended international standards'. Jürgen Friedrich, "Codes of Conduct", Max Planck Encyclopedia of Public International law, 2010, para. 23.

corporations aimed at diminishing the negative effects of the global economic activities over the vulnerable groups.[718] The reason for the tendency in the international community towards the control model is obviously the increasing awareness of the economic power of TNCs and their dominant position in the world economy, which most of the time has also considerable influence over the social, political and cultural values and assets of a country and may lead to serious human rights abuses.[719] This reasoning obviously has its roots in public law. In other words, since TNCs are the new sources of power production along with States actors, they should also be subject to the principles of transparency, democracy and accountability.[720] Thus, the regulation of TNCs is not only a concern of national corporate laws anymore. Corporate behaviour transforms into an issue of social policy and human rights protection. Accordingly, national regulation should be empowered by international regulation handling the TNCs as hybrid organisms having both private and public characteristics.

National and international regulation of corporations seek to establish a fair balance between benefiting socially and economically from corporate activities on the one hand, and to prevent the adverse consequences of their operations on the protection of human rights on the other hand.[721] This balancing process requires a complete analysis of the rules on investor and private property protection, especially under international investment agreements and opportunities for investor accountability mainly covered in soft law documents.[722] However, the tension between the two is obvious from a -positivist- legal perspective. The implementation and enforcement of legally non-binding documents are dependent on the will of States, as well as of non-state actors. Steinhardt prefers the use of the term 'transnational cartel of values' for referring to the regime of international regulation and quasi-regulation by intergovernmental organizations.[723] Below a thorough analysis of the leading soft law instruments concerning the corporate human rights responsibilities can be found.

---

[718] Backer, "Multinational Corporations, Transnational Law…", p. 319, fn. 126.
[719] **ibid.**, p. 319.
[720] **ibid.**, p. 321, Backer suggests that "*corporate law is now also an object of international law*".
[721] Muchlinski, "Multinational Enterprises…", p. 9.
[722] **ibid.**
[723] Steinhardt, "Corporate Responsibility…", pp. 179-211.

3.3.1. 1976 OECD Guidelines for Multinational Enterprises (Revised in 2000) (updated in 2011)

One of the aims of Organization for Economic Development and Co-operation (OECD) is "*…to promote policies designed ... to contribute to the expansion of world trade on a multilateral, non-discriminatory basis in accordance with international obligations*."[724] In this context, the Governments of OECD member states[725] have adopted the OECD Declaration on International Investment and Multinational Enterprises on 21 June 1976, which has been reviewed five times up to date in 1979, 1984, 1991, 2000 and lastly in 2011. The Declaration has six items, one of which is the Guidelines for Multinational Enterprises.[726]

The OECD Guidelines for Multinational Enterprises were initially adopted with a view to protect the interests of the MNEs and their home states via internationally agreed standards on foreign investment. In other words, the first version of the Guidelines protected the rights of corporations, while the concerns on the protection of human rights and improvement of social and economic conditions in the third world (host) countries were overlooked.[727] It was by the revision of 2000 that the adhering governments expressly included human rights concerns in the Guidelines.[728] In the previous versions of the Preface of the OECD Guidelines, reference was made to the UDHR, ILO Declaration, Rio Declaration on Environment and Development, Agenda 21 and the Copenhagen Declaration for Social Development. However, by the revision of 2011 such direct referrals, except for the UDHR, were deleted, and instead a general reference to the work of the OECD on the development of standards concerning the protection of the environment, the fight

---

[724] Article 1(c) of the OECD Convention.

[725] To note, non-member states can also be a party to the treaties and agreements concluded in the framework of the OECD. Adhering governments to the OECD Declaration as of 2014 are as follows: all 34 OECD member states and the following 10 non-member states: Argentina, Brazil, Colombia, Costa Rica, Egypt, Jordan, Latvia, Lithuania, Morocco, Peru, Romania, and Tunisia.

[726] Other items of the OECD Declaration includes National Treatment, Conflicting Requirements, International Investment Incentives and Disincentives, Consultation Procedures, and Review respectively.

[727] Gatto, **op. cit.**, p. 77.

[728] In 2000, new provisions regarding the abolition of child labour, elimination of all forms of forced or compulsory labour, prohibition of discrimination between workers have also been introduced and a system of environmental management has been established. To add, the scope of application area of the Guidelines has been extended to cover the world-wide activities of the enterprises not only in the territory of the OECD member states but also in the territories of all the adhering governments whether be a member of the OECD or not. Steinhardt, "Corporate Responsibility…", p. 209; Clapham, **Human Rights Obligations…**, p. 201; Gatto, **op. cit.**, p. 78.

against corruption, consumer interests, corporate governance and taxation has been made.[729]

Additionally, the duty of corporations to respect human rights of those affected by their activities has been expressly mentioned in the Guidelines.[730] As stressed in the Commentary to the Guidelines, under this general policy, while the governments remain primarily responsible for the human rights violations caused by the activities of MNEs, the MNEs have the obligation to respect the human rights of all persons, who might be affected by their activities and operations on a foreign territory, including the rights of workers.[731] Furthermore, the Guidelines are complementary to the codes of conduct that define and implement responsible business conduct via private efforts.[732] Chirwa comments that the revision of 2000 could be interpreted as the concrete indication of the evolution of international law towards the acceptance of direct human rights obligations for TNCs.[733] Nevertheless, he admits that the Guidelines did not go further than just incorporating some of the Principles of the ILO Declaration in one single 'human rights clause' and did not trigger an essential shift in the behaviour of corporations.[734]

The OECD Guidelines are merely recommendations addressed to the MNEs that operate either in or from the adhering states.[735] It is a non-binding document to which the MNEs can voluntarily subscribe.[736] Nevertheless, as stated by the OECD Committee on International Investment and Multinational Enterprises, the Guidelines

---

[729] para. 8 of the Preface of the OECD Guidelines. By the update in 2011, each of these issues have been dealt with under separate chapters.
[730] Part II(2) (General Policies) of the OECD Guidelines: Revision 2000.
[731] Commentary on General Policies, para. 4. See also Chapter IV of the Guidelines on Human Rights as updated by 2011. It is significant that the term 'worker' is preferred to the term 'employee' by the update in 2011. ISO26000:2010 defines employee as "*an individual in a relationship recognized as an "employment relationship" in national law or practice*", and notes that "employee is a narrower term than worker". The worker is "*a person who performs work, whether an employee or someone who is self-employed*". ISO26000:2010, definitions 2.5 and 2.27.
[732] para. 7 of the Preface of the OECD Guidelines.
[733] Danwood Mzikenge Chirwa, "The Long March to Binding Obligations of Transnational Corporations in International Human Rights Law", **SAJHR**, Vol. 22, 2006, p. 83.
[734] In the Commentary, it is mentioned that the OECD Guidelines also serve as the promoter of observance of the ILO standards and principles by the MNEs as listed in the 1998 Declaration on Fundamental Principles and Rights at Work. See The Commentary on Chapter V as updated in 2011, para. 48. Chirwa, "The Long March…", p. 84.
[735] See OECD Guidelines, Preface para. 1/1 and Concepts and Principles 1. The Multilateral Agreement on Investment (MAI), a draft agreement negotiated between the years 1995 and 1998 and failed as a consequence of protests, also included the OECD Guidelines for Multinational Enterprises without any change in its essential non-binding nature. See Jan Huner, "The Multinational Agreement on Investment and the Review of the OECD Guidelines for Multinational Enterprises" in Kamminga, Zia-Zarifi (eds.), **Liability of Multinational Corporations**…, pp. 197-199.
[736] Chirwa, "The Long March…", p. 83; and Huner, **op. cit.**, p. 200.

may be regarded as a joint recommendation by the OECD governments to the MNEs, implying an expectation of behaviour by the OECD from the MNEs.[737] More importantly, even though the Guidelines are regarded as purely soft law documents, they are actually annexed to the Declaration on International Investment and Multinational Enterprises made by the governments of OECD member states outside the formal framework of the organization.[738] As Baade argued, this fact implies that if the intention of the adhering States to be bound by the particular provisions of the Guidelines were established, it should be acknowledged that those specific provisions become legally binding in the international sphere for those States.[739] Opponents of this view argued that the provision expressly mentioning the voluntary character of the Guidelines shields any argument attempting to give legal effect to the Guidelines.[740]

In 2011, the sentence in the Preface stating that the Guidelines are "*voluntary principles and standards for responsible business conduct consistent with applicable laws*" has been updated requiring the business conduct to be consistent with not only the applicable laws but also the *internationally recognized standards*.[741] More importantly, it is mentioned that the adhering governments make a binding commitment to implement the Guidelines in accordance with the decisions of the OECD Council.[742] Accordingly, the criticisms mentioned in the above paragraph have been answered with a clear statement.

However, in Article 1 of the Concepts and Principles, it is also expressly stressed that "*Observance of the Guidelines by enterprises is voluntary and not legally enforceable*". Still, it should be noted that by the update in 2011, it is emphasized that the "*enterprises should respect the internationally recognised human rights of those affected by their activities*" and the reference made to the

[737] Review of the 1976 Declaration and Decisions on International Investment and Multinational Enterprises, Report by the Committee on International Investment and Multinational Enterprises, OECD Doc. 47580, para. 37 at p.14, approved by the Ministers of OECD Member Countries on June 13, 1979.
[738] Baade, **op. cit.**, p. 19.
[739] **ibid.**, pp. 19-21.
[740] **ibid.**, pp. 20-21.
[741] Same update has also been made in Article 1, the Concepts and Principles.
[742] OECD Council consists of the representatives of the OECD member states and one representative from the European Commission. It is empowered to make decisions by consensus. In para. 1 of the Preface of the Guidelines it is also added that "the *Guidelines* may also be subject of national law and international commitments."

international obligations and commitments of the host state has been deleted.[743] This could be interpreted as a progress with regard to the obligations of the MNEs, implying that even if the host government is not a party to one of the international conventions for the protection of human rights, the MNE should, in any case, respect the rights contained therein. In other words, the MNEs are generally expected to respect the rights set out in the UDHR, the 1966 UN Covenants,[744] and all other internationally recognized core labour standards.[745] Therefore, the duty to respect human rights exists for the MNEs regardless of the policies, practices, abilities, capacities and willingness of the States that they operate in.[746]

However, it is also underlined in the Commentary that "*In countries where domestic laws and regulations conflict with internationally recognised human rights, enterprises should seek ways to honour them to the fullest extent which does not place them in violation of domestic law, consistent with paragraph 2 of the Chapter on Concepts and Principles.*"[747] Nevertheless, the corporations are encouraged to seek the implementation of the principles and standards in the Guidelines to the fullest extent possible without violating domestic laws.[748] Accordingly, MNEs are expected to conduct their operations in conformity with (1) internationally recognised human rights, (2) international human rights obligations of the host state, and (3) domestic laws and regulations.

A new (fourth) Chapter devoted solely on human rights has been added to the OECD Guidelines, which is in line with the UN Framework for Business and Human Rights.[749] As mentioned in the Commentary, the duty of MNEs to respect human

---

[743] Chapter II, General Policies, A.2.
[744] Chirwa, "The Long March…", p. 82.
[745] This is clearly expressed in the Commentary to the fourth Chapter relating to Human Rights that has been inserted in 2011. (2011) OECD Guidelines, Commentary on Chapter IV on Human Rights, para. 39. More specifically, under the fifth chapter titled "Employment and Industrial Relations", the term 'applicable international labour standards' has been inserted in the OECD Guidelines in 2011 in order to frame the operations of corporations not only with the national laws and practices, but also with the international rules and regulations, especially with the standards of ILO, such as those declared under 1998 Declaration on Fundamental Principles and Rights at Work and 1977 ILO Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy. (2011) OECD Guidelines, Chapter V on Employment and Industrial Relations, and Commentary paras. 47 and 48.
[746] (2011) OECD Guidelines, Commentary on Chapter IV on Human Rights, para. 37.
[747] **ibid.**, paras. 37 and 38.
[748] Concepts and Principles of the (2011) OECD Guidelines, para. 2.
[749] Amnesty International, in its public statement concerning the update in 2011, welcomed the insertion of this new chapter on human rights. Amnesty International, "The 2010-2011 Update of the OECD Guidelines for Multinational Enterprises has come to an end: the OECD must now turn into

rights, which is 'the *chapeau*' of human rights obligations of corporations, is an implication of the effects of the UN Framework for Business and Human Rights and The UN Guiding Principles on the Guidelines.[750] Respect for human rights is the 'global standard' for all enterprises, regardless of their size, sector, operational context, ownership and structure.[751] Accordingly, the fulfilment of the corporate obligation to respect human rights is the legitimate expectation of the international community from the enterprises especially operating on the transnational level. To add, new provisions regarding the 'due diligence' responsibility and supply chain responsibility, including the responsibility for the conduct of subsidiaries, franchises and all business relations with the suppliers, sub-contractors *etc.,* have been introduced. The National Contact Point procedures have also been improved. However, the Guidelines still lack the enforcement mechanisms that would guarantee a faithful compliance.

The duty to respect human rights includes refraining from infringing the rights of individuals and addressing the actual and potential adverse human rights impacts of their activities by identifying, preventing, mitigating and remediating any such impact.[752] This duty also implies an obligation to act with due diligence for the corporations in their decision-making processes and to integrate appropriate policies in their risk management systems.[753] As a General Policy inserted in 2011, the duty to act with due diligence comprises both the actions and omissions perpetrated directly or indirectly by corporations. Accordingly, corporations are expected to act in a way to prevent or mitigate and cease the adverse impacts of the third entity activities that may be triggered by their business relationships, provided that they have the leverage to do so.[754]

---

effective implementation", AI Index: IOR 30/001/2011, 23 May 2011, http://www.amnesty.org/en/library/asset/IOR30/001/2011/en/601f0e2c-a8a3-4fbc-b090-c0abb3c51ab2/ior300012011en.pdf, accessed on 04.01.2013.

[750] (2011) OECD Guidelines, Commentary on Chapter IV on Human Rights, para. 36.

[751] **ibid.**, para. 37.

[752] **ibid.**, para. 41.

[753] **ibid.**, para. 14. See also Commentary on Chapter IV on Human Rights, updated in 2011, para. 45: "… *The process entails assessing actual and potential human rights impacts, integrating and acting upon the findings, tracking responses as well as communicating how impacts are addressed. ... It is an on-going exercise, recognising that human rights risks may change over time as the enterprise"s operations and operating context evolve*."

[754] Leverage is defined as "the ability to effect change in the practices of an entity that cause adverse human rights impacts". **ibid.**, para. 42.

The degree of due diligence that is expected from a corporation may depend on the circumstances of each case, where the size of the enterprise, nature and context of its activities or "*the severity of the risks of adverse human rights impacts*" may be considered as factors to be taken into account.[755] Under the OECD Guidelines, if an actual or potential adverse impact is caused, contributed to[756] or could be directly linked to the operations, products or services of a corporation, then the corporation is expected to take adequate measures for preventing and mitigating the adverse impacts or to use its leverage on the entity with whom it has a business relationship.[757] Corporations shall also cooperate with judicial or State-based non-judicial mechanisms and operational-level grievance mechanisms for providing remedy.[758]

OECD Guidelines Complaints Procedure

OECD complaints procedure is neither a judicial nor quasi-judicial mechanism. Therefore, it does not lead to binding decisions or judgments over corporations.[759] The Amendment of the Decision of the Council on the OECD Guidelines for Multinational Enterprises (hereinafter "The Amendment…") consists of three chapters namely National Contact Points (NCP), the Investment Committee and the Review of the Decision.[760] The OECD complaints (specific instance) procedure allows the NCPs to offer consultation, good offices and other non-adversarial means such as conciliation and mediation, if the parties agree upon.[761] Additionally, the

[755] **ibid.**, para. 45; Chapter II, General policies para.A.10 of the OECD Guidelines, Commentary para. 15.
[756] Chapter II, General policies para.A.11 of the OECD Guidelines. In the Commentary on the General Policies, para.14 it is mentioned that "*For the purposes of this recommendation, 'contributing to' an adverse impact should be interpreted as a substantial contribution, meaning an activity that causes, facilitates or incentivises another entity to cause an adverse impact and does not include minor or trivial contributions."*
[757] The Guidelines define the "business relationships" so as to "*include relationships with business partners, entities in its supply chain, and any other non-State or State entity directly linked to its business operations, products or services*." OECD Guidelines, Commentary on Chapter IV on Human Rights, updated in 2011, para. 43. See also Chapter II, General policies paras. A.11 and A.12 of the OECD Guidelines, which underline that "*This is not intended to shift responsibility from the entity causing an adverse impact to the enterprise with which it has a business relationship.*"
[758] (2011) OECD Guidelines, Commentary on Chapter IV on Human Rights, para. 46.
[759] Clapham, **Human Rights Obligations…,** p. 207.
[760] Amendment of the Decision of the Council on the OECD Guidelines for Multinational Enterprise has been updated in 2000. It includes a Procedural Guidance to the Council Decision as an Annex and a Commentary on Implementation Procedures.
[761] OECD Guidelines, The Amendment…, Procedural Guidance, Chapter 1 on National Contact Points, C. Implementation in Specific Instances, para. 2.

NCPs may refer an issue to the Investment Committee if the interpretation of the Guidelines is needed.[762]

The adhering governments undertake to promote the Guidelines and observe compliance through the NCPs, which usually have a tripartite composition: government, business and labour.[763] Accordingly, establishing the National Contact Points is the only formal obligation imposed on the adhering governments.[764] Moreover, by the update in 2011, it is underlined that human and financial resources of the NCPs should be supplied by the adhering governments in accordance with their internal budget priorities and practices. This means the effective functioning of NCPs and the observance of the Guidelines depends on the political will of the governments. In addition, while the effective functioning of the NCPs is needed mostly in the under-developed or developing countries, the limitedness of their national budgets would prevent the realization of the aim in establishing the NCPs.[765]

The NCPs function as a forum under the specific instances procedure, which resembles the institutions commonly referred to in the mechanisms for the 'pacific settlement of disputes' and whose success depends mostly on the good faith of the parties involved.[766] The NCPs might offer their assistance to or seek advise from the MNEs, NGOs including the worker organizations, experts and all other interests parties. The NCPs should act in accordance with the principles of visibility, accessibility, transparency and accountability in order to guarantee the impartiality,

---

[762] **ibid.** See also Clapham, **Human Rights Obligations…,** p. 207.

[763] Concepts and Principles of the OECD Guidelines, para.11, http://www.oecd.org/investment/investmentpolicy/oecddeclarationanddecisions.htm, accessed on 12.11.2012. In establishing the NCPs, the adhering governments might be supported by the NGOs, such as the organizations of employers and employees and other interested parties. OECD Guidelines, Amendment …, Procedural Guidance, Chapter 1 on National Contact Points, A. Institutional Arrangements.

[764] Huner, **op. cit.**, pp. 197-199.

[765] The aim in establishing the NCPs is furtherance of the effectiveness of the Guidelines "*by undertaking promotional activities, handling enquiries and contributing to the resolution of issues that arise relating to the[ir] implementation...*" OECD Guidelines, Amendment …, Chapter I on National Contact Points, para. 1.

[766] In 2011, the definition of the 'good faith behaviour' has been inserted in the text as follows: "*responding in a timely fashion, maintaining confidentiality where appropriate, refraining from misrepresenting the process and from threatening or taking reprisals against parties involved in the procedure, and genuinely engaging in the procedures with a view to finding a solution to the issues raised in accordance with the Guidelines.*" OECD Guidelines, Commentary on the Implementation Procedures, Implementation on Specific Instances, para.21.

predictability, equitability and compatibility with the Guidelines.[767] These four principles serve for guaranteeing the functional equivalence of the activities of the NCPs.[768] If an NCP decides in its initial assessment that a specific instance merits further consideration,[769] it offers 'good offices' in the resolution of that instance regarding the implementation of the Guidelines.[770] If the parties to an issue give their consent, the NCP can also offer non-adversarial means of resolution of the issue such as conciliation or mediation.[771] However, if the settlement of the issue requires the interpretation of principles or standards in the Guidelines, the NCP should consult the Investment Committee. As a result of the specific instance procedure, the NCP should prepare a report that would be submitted to the Investment Committee.[772]

---

[767] OECD Guidelines, Amendment …, Procedural Guidance, Chapter 1 on National Contact Points, C. Implementation in Specific Instances; OECD Guidelines, Commentary on the Implementation Procedures, paras. 9 and 22.

[768] The principle of visibility implies that the public, and especially the interested parties, should be informed on the existence and availability of the NCPs and the procedures that could be followed for providing the effective implementation of the Guidelines. The principle of accessibility is for guaranteeing easy access to both the NCPs and the information that the NCPs acquired as an output of their activities. The principles of transparency and accountability go hand in hand and they have a big role in acquiring public control and public trust. See OECD Guidelines, Commentary on the Implementation Procedures, Core Criteria for Functional Equivalence in the Activities of NCPs.

[769] In the Commentary on the Implementation Procedures, Initial Assessment, para.25, it is explained that when the NCP evaluates whether a specific instance requires further examination, it should take into account "*the identity of the party concerned and its interest in the matter; whether the issue is material and substantiated; whether there seems to be a link between the enterprise's activities and the issue raised in the specific instance; the relevance of applicable law and procedures, including court rulings; how similar issues have been, or are being, treated in other domestic or international proceedings; whether the consideration of the specific issue would contribute to the purposes and effectiveness of the Guidelines.*"

[770] Otherwise, the NCP submits a statement describing the issue and the reasons for not considering the issue further. OECD Guidelines, Amendment …, Procedural Guidance, Chapter 1 on National Contact Points, C. Implementation in Specific Instances, para. 3. To add, for offering good offices, the NCPs should carefully consider any positive or negative effect to the detriment of either of the parties, especially when there is a parallel international or national proceeding going on concerning the dispute under consideration. Commentary on the Implementation Procedures, Initial Assessment, para. 26. If needed, the NCPs may consult the experts or the relevant NGOs on the specific instance, and they may resort to resolutions of the NCPs in other countries, too. Especially, when an enterprise operating in more than one adhering government, consultation and cooperation between the NCPs may be a key element for reaching an agreement. OECD Guidelines, Amendment …, Procedural Guidance, Chapter 1 on National Contact Points, C. Implementation in Specific Instances, paras. 2 and 24.

[771] If the parties reach an agreement at the end of the specific instance procedure, they may seek the assistance of the NCP for the follow-up of the implementation of the final statement. The provisions of the follow-up mechanism may also be included in the final agreement. OECD Guidelines, Commentary on the Implementation Procedure, Providing Assistance to the Parties, paras. 29 and 34.

[772] The NCP, in its report, should include at minimum: (1) description of the facts; (2) the procedures initiated by the NCP; (3) the date of the agreement or the reasons for not reaching an agreement. In any case, the report should include recommendations for the effective implementation of the Guidelines. OECD Guidelines, Commentary on the Implementation Procedure, Providing Assistance to the Parties, para. 35.

As mentioned in the Procedural Guidance, proceedings before the NCPs will be kept confidential from the very beginning in order to both protect the sensitive information and the interests of the parties and to facilitate the resolution of the issue.[773] However, if the parties involved give their consent, the final report may be made publicly available.[774] The option for making the report public plays an encouraging role for the parties to reach an agreement.[775] On the other hand, if not published, the procedure carries the risk of facilitating secret dealings in-between the parties. Nevertheless, it should be guaranteed that the private and sensitive information of the business and the stakeholders should be protected.[776] Lastly, it should be noted that the enforcement mechanism provided for by the OECD Guidelines still does not provide a possibility for claiming relief or reparation.[777]

By the revision of 2000, in addition to the OECD member states, the non-governmental organizations, including trade unions, have been given the capacity to ask for a consultation and lodge complaints before the National Contact Points.[778] For example, following the revision of 2000, the International Textile, Garment and Leather Workers' Federation gave a letter of complaint dated February 18th, 2002 to the National Contact Point of South Korea concerning the treatment of the Guatemalan workers by a Korean Company.[779] The European Commission has also

[773] In the Commentary, it is mentioned that while transparency is one of the core criteria for the functional equivalence in the activities of NCPs and it is the guarantee of public trust for the work of NCPs, establishing confidentiality and/or keeping the identity of the parties secret may be in the best interests of the effective implementation of the Guidelines during the resolution of specific instances, especially with regard to the 'good offices' function of the NCPs. OECD Guidelines, Commentary on the Implementation Procedures, Core Criteria for Functional Equivalence in the Activities of NCPs and Commentary on the Implementation Procedure, Providing Assistance to the Parties, paras. 30 and 38.

[774] The principle of confidentiality has been softened by the Revision of 2000. OECD Guidelines, Amendment …, Procedural Guidance, Chapter 1 on National Contact Points, C. Implementation in Specific Instances, para. 3.

[775] Clapham suggests that this will also force the TNCs and their subsidiaries to comply with the principles and standards of the Guidelines with the fear of becoming publicly denounced. Clapham, **Human Rights Obligations…,** p. 210.

[776] OECD Guidelines, Amendment…, Procedural Guidance, Chapter 1 on National Contact Points, C. Implementation in Specific Instances, para. 3.

[777] Chirwa, "The Long March…", pp. 84-85.

[778] **ibid.**, p. 85. See also Joris Oldenziel & Wilde-Ramsing & Patricia Feeney, OECD WATCH "10 Years On: Assessing the Contribution of the OECD Guidelines for Multinational Enterprises to responsible business conduct", June 2010, http://oecdwatch.org/publications-en/Publication_3550, accessed on 29.11.2012.

[779] Clapham, **Human Rights Obligations…,** p. 201.

taken an active position in the promotion of the use of the Guidelines by organizing conferences and workshops in order to raise awareness for the OECD Guidelines.[780]

Clapham notes that concrete examples of positive contributions of the NCPs via the specific instance procedures to the protection of human rights are not rare.[781] We can refer to the examples of GSL case by the Australian NCP, Bayer case by the German NCP and Accor Services case by the Argentinean NCP, all of which resulted in the conclusion of an agreement and the improvement of human rights conditions in the activities of these corporations.[782] Additionally, the Dutch NCP was successful in its mediating efforts and reaching an agreement between Adidas and the India Committee of the Netherlands. According to this agreement, Adidas accepted to bring its code of conduct in line with the international standards and to actively monitor its compliance.[783] Moreover, Oxfam Canada, RAID and other interested NGOs filed a complaint against the Canada-based First Quantum Mining Company, which resulted in the conclusion of an agreement on the removal of threat of forcible evictions in the mining zones of Zambia.[784] However, due to the lack of monitoring and follow-up mechanisms of the compliance with the agreements, it came out that the company did not cease breaching the provisions of the Guidelines.

One of the most important examples worth mentioning concerns the exploitation of natural resources in the Democratic Republic of Congo. The UN Panel of Experts on the Illegal Exploitation of Natural Resources and Other Forms of Wealth of the Democratic Republic of Congo (DRC) accused 85 TNCs of violating the OECD Guidelines by continuing mineral trading in a war zone in support of the Congolese army officers and the rebel groups.[785] The Panel noted that home States were morally obliged to ensure the compliance of TNCs with the OECD Guidelines and they would be considered as complicit if they did not take any remedial

---

[780] Council of the European Union, EU Annual Report on Human Rights 2003, Office for Official Publications of the European Community Luxembourg 2003, p. 29.
[781] Clapham, **Human Rights Obligations…,** p. 208; As of June 2012, 104 of 131 cases filed by the NGOs before the NCPs concern violations of Chapter II (General Policies: Human Rights, supply chain) of the Guidelines, where 69 of them concern solely Chapter VI on Environment and only 6 of them is on the allegation of violation of Chapter IV on Human Rights. OECD Watch Quarterly Case Update of OECD Guidelines cases filed by NGOs, Vol. 7, Issue 2, June 2012.
[782] See Oldenziel & Wilde-Ramsing & Feeney, **op. cit..**
[783] **ibid.**
[784] **ibid.**
[785] **ibid.**

measures.[786] All complaints filed before various NCPs by the NGOs, and especially by RAID, have been dismissed. However, following the increasing pressure from the media and the public, members of the British parliament got involved in the process and the UK NCP published a statement declaring that a company -*DAS Air*- had violated the human rights principles stipulated by the Guidelines, and failed to act with due diligence with regard to its supply chain.[787] In 2010, OECD undertook the project 'Due diligence in the mining and minerals sector'.[788]

Another case concerns the involvement of the *Avient Air* in the indiscriminate bombing raids in the Democratic Republic of Congo. The UN Panel of Experts on the Illegal Exploitation of Natural Resources and Other Forms of Wealth of the Democratic Republic of Congo declared that *Avient Air* organised indiscriminate bombing raids and provided military planes, helicopters and crew to the Congolese Army and the Zimbabwean Government for use in the territory of the DRC. Then, the case was referred to the UK NCP, which cleared the allegations accusing the *Avient Air,* and only recommended the company to carefully consider its future conduct without envisaging any follow-up procedure.[789]

Third case on the human rights abuses in the Democratic Republic of Congo concerns accusations against the British company for making payment to the rebel groups (RCD-Goma and FDLR), which were allegedly involved in large scale human rights abuses including the Rwandan genocide, and for buying minerals from the "*mines with harsh, abysmal working conditions and where child and forced labourers were used*".[790] In this case, the UK NCP concluded in its statement that

[786] UN Security Council no S/2002/1146, 16 October 2002, "Final report of the Panel of Experts on the illegal exploitation of natural resources and other forms of wealth of the Democratic Republic of the Congo", paras. 177-178.
[787] For a detailed elaboration on the cases see Larry Catá Backer, "Rights and Accountability in Development ('RAID') v. DAS Air and Afrimex: Small Steps Towards and Autonomous Transnational Legal System for the Regulation of Multinational Corporations", **Melb. J. Int'l L.**, Vol. 10, 2009, pp. 258-307.
[788] OECD Due Diligence Guidance for Responsible Supply Chains of Minerals from Conflict-Affected and High-Risk Areas, http://www.oecd.org/daf/inv/mne/mining.htm, accessed on 18.08.2014.
[789] Oldenziel & Wilde-Ramsing & Feeney, **op.cit.**, p. 32.
[790] **ibid.**, p. 37.

"*Afrimex had failed to ensure that its trading activities did not support armed conflict and forced labour*".[791]

Thus, considering these examples, the OECD Watch confesses that reaching an agreement is not a rule and only an exception,[792] and in most of the cases there is no significant improvement with regard to the implementation and effectiveness of the Guidelines, even if the parties reached an agreement.[793] For example, the Turkish NCP, which is a single government department having an organic link with the General Directorate on Foreign Investment, does not function effectively and up-to-date there has been only three complaints filed before it.[794] As of January 2013, only one of them has been accepted.[795] However, the Turkish NCP closed this case on the grounds that Turkish law does not allow the NCP to function while there were parallel legal proceedings continuing.[796] In that case the Netherlands NCP, which has a mixed structure of independent experts and Government representatives, was involved, too, since the company subjected to the complaint was a Dutch national. However as mentioned in the Trade Union Advisory Committee to the OECD (TUAC) assessment, none of the NCPs played a positive role in resolving the issue,

---

[791] **ibid.** The OECD Watch added that "*The NCP's statement emphasised that because Afrimex failed to practice supply chain due diligence, it had failed to contribute to the abolition of child and forced labour in the mines to take steps to influence the working conditions of the mines.*"

[792] **ibid.,** pp. 21-22. Nevertheless, the specific instance procedure may have indirect positive effects on corporate behaviour, especially when a complaint attracts media attention and raises awareness of the public, or the governments and/or parliaments decide to take the issue at hand. A study suggests that the 'soft sanctioning power' of the specific instance procedure may positively affect the corporate conduct if it manages to hold a consistent attitude towards unwanted corporate behaviour.

[793] **ibid.**, p. 23 *et seq*.

[794] http://www.tuacoecdmneguidelines.org/companydetails3.asp?organisationID=22912, accessed on 05.01.2013. The cases that are still pending before the Turkish NCP both of which concern allegations of violation of the OECD Guidelines IV.1-a: *Unilever Plc v. International Transport Federation*, 24.11.2008, concerning illegal dismissal of workers and the rights to collective bargaining (at the initial assessment stage) and *Compass Group Plc v. International Union of Food Workers*, 02.08.2010, concerning dismissal of trade union activists in order to prevent unionisation by the workforce; intimidation of other workers; violation of right to freedom of association (at the mediation or conciliation stage).

[795] In the *Laurens van der Kroft Textile v. Garment and Leather Workers' Federation* (ITGLWF) case dated 04.12.2006, the complaint was based on the allegations of forced resignation of union members and relocation without consultation with the union members. OECD Guidelines IV.1-a, IV.6.

[796] The term 'parallel legal proceedings' is used by the NCPs for defining: "1) criminal, administrative or civil; 2) alternative dispute settlement proceedings (arbitration, conciliation, mediation); 3) public consultation; or 4) other enquiries such as by the UN." As mentioned in the report of the OECD Watch, this was the most commonly referred justification for refusing the complaints. Oldenziel & Wilde-Ramsing & Feeney, **op.cit.,** p. 46. However, by the update in 2011, it is expressly stressed in the Guidelines that the "NCPs should not decide that issues do not merit further consideration solely because parallel proceedings have been conducted, are under way or are available to the parties concerned." Commentary on the Implementation Procedures, Initial Assessment, para. 26.

while pressure from the customers and campaigns led by the unions and other NGOs contributed to the conclusion of an agreement between the parties to the dispute.[797]

Additionally, there are some other cases that are brought before the NCPs of UK, Italy, France and Belgium which all concerned allegations against BTC oil pipeline in Azerbaijan, Georgia and Turkey.[798] The NCPs of France and Belgium rejected and transferred the cases to the UK NCP, while the Italian NCP declared that it will automatically adopt the decision of the UK NCP.[799] In *Cornerhouse et al. v. BP*, the UK NCP issued its revised final statement that BP failed to investigate alleged human rights abuses perpetrated by the Turkish security forces against the landowners located along the BTC pipeline.[800] Furthermore, BP "*failed to identify specific complaints of intimidation against affected communities by local security forces where the information was received outside of the formal grievance and monitoring channels, and, by not taking adequate steps in response to such complaints, failed to adequately safeguard against the risk of local partners undermining the overall consultation and grievance process*".[801] BP, rejecting that it violated the OECD Guidelines, agreed to comply with the recommendations of the UK NCP, *i.e.* considering and reporting on tools for strengthening the procedures to identify and respond to allegations concerning the abuses perpetrated by the local pipeline security forces.[802]

Amnesty International emphasizes that the improvement of implementation and effectiveness of the OECD Guidelines is strongly dependent on the cooperation of corporations in following the recommendations issued by the NCPs and enforcing the provisions of the agreements they have agreed to sign.[803] Nevertheless, even if the parties do not sign an agreement, the statements of the NCPs on the issue

---

[797] http://www.tuacoecdmneguidelines.org/CaseDescription.asp?id=42, accessed on 05.01.2013.
[798] FoE France v. TotalFinalElf (rejected); Foe US v. Delta Hess (pending); CRBM v. ENI (concluded); FoE US v Unocal (blocked); FoE US v. ConocoPhilips (blocked), all the cases filed in 29 April 2003. Oldenziel & Wilde-Ramsing & Feeney, **op.cit.**, p. 59.
[799] OECD Watch, CRBM v ENI, http://oecdwatch.org/cases/Case_161, accessed on 15.09.2015.
[800] OECD Guidelines for Multinational Enterprises UK National Contact Point –Revised Final Statement, 22 February 2011, Specific Instance: BTC Pipeline, http://www.thecornerhouse.org.uk/sites/thecornerhouse.org.uk/files/11-766-revised-final-statement-ncp-btc.pdf, accessed on 15.09.2015.
[801] **ibid.**
[802] Heather Stewart, "BP failed to act on reports of intimidation along Turkish pipeline", The Guardian, 9 March 2011, http://www.theguardian.com/business/2011/mar/09/bp-intimidation-turkey-btc-pipeline, accessed on 15.09.2015.
[803] Amnesty International: Statement on the Right to an Effective Remedy; Stockholm, November 2009.

acknowledging the legitimacy of the allegations of violation of the principles and standards of the OECD Guidelines and the recommendations for the company under scrutiny contribute to the improvement of the implementation and effectiveness of the Guidelines.[804] The European Center for Constitutional and Human Rights (ECCHR) suggested that if the follow-up procedures of the final statements were mandatory, binding and publicized, then the specific instance procedure would be more effective and the accountability of corporations would increase.[805]

The OECD Investment Committee[806] is responsible for the liberalisation of international economic policies as set out in the 'rules of the game', *i.e.* Codes of Liberalisation. It has the authority to consider the appropriateness of the activities of NCPs on specific instances if requested by an adhering country, an advisory body or the OECD Watch.[807] The NCPs of different countries should be in cooperation regarding the issues relating to their activities and they should meet 'regularly' in order to share their local experiences and to annually submit reports to the Investment Committee concerning their activities in general and in specific instances.[808] The Investment Committee may make recommendations to improve the effectiveness of the NCPs and the implementation of the Guidelines.[809] Additionally, the Committee may make 'clarifications' concerning its considerations on the activities of the NCPs.[810] It is the responsibility of the Investment Committee to make clarifications on the Guidelines and interpret the principles and standards contained therein, if requested concerning a specific instance procedure for the harmonization of the interpretation and implementation of the OECD Guidelines by

[804] The OECD Watch in its report evaluating 10 years of the Guidelines, referred to the statements by the UK NCP in Vedanta and Afrimex cases and by the Norwegian NCP in Aker Kvæmer case as examples. Oldenziel & Wilde-Ramsing & Feeney, **op.cit.,** p. 22.
[805] OECD Watch, Assessment of NCP Performance in the 2013-2014 Implementation Cycle, OECD Watch Submission to the 2014 Annual Meeting of the National Contact Points, Annex I ECCHR Analysis & Update Best Practices in OECD Complaints Procedures The OECD procedures against cotton traders regarding forced child labor Berlin, June 2014 p. 30.
[806] The OECD Investment Committee has been established in April 2004 as a result of the merger of the former Committee on Investment and MNEs (CIME) and the Committee on Capital Movements and Invisible Transactions (CMIT).
[807] OECD Guidelines, Amendment…, Procedural Guidance, Chapter II on Investment Committee, para.2/b.
[808] OECD Guidelines, …, Procedural Guidance, Chapter 1 on National Contact Points, D. Reporting, para. 3.
[809] OECD Guidelines, Amendment …, Procedural Guidance, Chapter II on Investment Committee, para.2/d; OECD Guidelines, Commentary on the Implementation of the Procedures, Commentary on the Procedural Guidance for the Investment Committee, para. 46.
[810] Clapham, **Human Rights Obligations…**, p. 209.

the NCPs.[811] However, since the Guidelines could not be considered as a binding document, the Investment Committee does not have the authority to act as a judicial or even a quasi-judicial body.[812] It cannot reach conclusions on the conduct of a specific corporation,[813] nor reverse the findings of the NCPs.[814] Nevertheless, Huner underlines that even if the name of a corporation was kept confidential, successful requests for clarifications were regarded as *de facto* condemnation of the corporation in the eye of the public, for its activities contrary to the Guidelines.[815]

Additionally, the Investment Committee is empowered to engage with the non-adhering governments for the promotion of the implementation of the Guidelines worldwide. The Committee may cooperate with them especially if they have a special interest in the promotion of the principles and standards in the Guidelines.[816] Furthermore, the Investment Committee may periodically invite or be invited by the 'international partners' in order to co-operate and exchange their views.[817] In 2011, the OECD Watch has been envisaged to be a central communication point for the activities of all interested NGOs concerning the Guidelines[818] and it has been added to the category of 'international partners'.[819]

The Investment Committee also reports to the OECD Council on the implementation of the Guidelines and takes into account the reports submitted by the NCPs, advisory bodies, the OECD Watch (inserted in 2011) and 'other international partners', as well as the views of the non-adhering countries as appropriate.[820] Finally, the Committee shall, in cooperation with the NCPs, promote the effective implementation of the Guidelines and encourage the MNEs to positively contribute

---

[811] OECD Guidelines, Amendment…, Procedural Guidance, Chapter II on Investment Committee, para.1.
[812] OECD Guidelines, Commentary on the Implementation Procedures, Commentary on the Procedural Guidance for the Investment Committee, para. 44.
[813] OECD Guidelines, Amendment…, Chapter II on The Investment Committee, para. 4.
[814] OECD Guidelines, Commentary on the Implementation of the Procedures, Commentary on the Procedural Guidance for the Investment Committee, para. 44.
[815] Huner, **op. cit.**, p. 202.
[816] OECD Guidelines, Amendment …, Chapter II on The Investment Committee, para. 3; OECD Guidelines, Amendment …, Procedural Guidance, Chapter II on Investment Committee, para. 2/f.
[817] The advisory bodies (*i.e.* Business and Industry Advisory Committee to the OECD (BIAC) and the Trade Union Advisory Committee to the OECD (TUAC) are listed among the 'international partners'. OECD Guidelines, Amendment …, Procedural Guidance, Chapter II on Investment Committee, para.2/e.
[818] Clapham, **Human Rights Obligations**..., p. 208.
[819] Accordingly, the reference to "other non-governmental organizations" has been removed from the Guidelines.
[820] OECD Guidelines, Amendment …, Chapter II on The Investment Committee, paras. 5-7.

to the *'economic, environmental and social progress with a view to achieving sustainable development, and to help them identify and respond to risks of adverse impacts associated with particular products, regions, sectors or industries'*[821].

OECD Watch in its Assessment held that, following the update in 2011, which strengthened the provisions on human rights duties of corporations, the number of cases (in total 32) submitted to the NCPs has considerably increased in 2013.[822] However, in 2014 only two cases have been filed until June.[823] One of the reasons for this decline could be the rejection of almost one third of the cases,[824] which, in fact, damages the credibility and legitimacy of the Guidelines.[825] Nevertheless, four of the cases filed between 2013 and 2014 have been resulted in the issuance of a joint statement, while eight others had also positive outcomes.[826] OECD Watch also notes that as a common trend of the final statements made by the NCPs at the end of the specific instance procedures, the complainee corporation is never being declared in violation of the Guidelines even if there were clear evidences to the contrary.[827]

3.3.2. 1977 The ILO Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy (amended in November 2000 and March 2006)

In October-November 1972, ILO hosted a meeting of experts on the "Relationship between multinational corporations and social policy" and this was followed by another meeting in 1976, when the creation of a non-binding declaration of principles regarding the issue was recommended.[828] In June 1976, at the Tripartite

---

[821] (2011) OECD Guidelines, Amendment …, Chapter II on The Investment Committee, para. 8.
[822] There are 12 cases filed in 2003, 21 cases in 2004, 11 cases in 2007, 17 cases in 2010, 22 cases in 2011 and 21 cases in 2012. Among the submissions, the highest number of cases has been filed before the NCP of the UK, even though the highest number of breaches has occurred in New Zealand, Bahrain, Bangladesh and Kazakhstan between 2013 and 2014. Oldenziel & Wilde-Ramsing & Feeney, **op. cit.**, pp. 9-10; OECD Watch, Assessment of NCP Performance in the 2013-2014 Implementation Cycle, OECD Watch Submission to the 2014 Annual Meeting of the National Contact Points, June 2014, p. 8, 10.
[823] **ibid.**, p. 2.
[824] **ibid.**, p. 8, 11.
[825] OECD Watch notes that the best functioning NCP among of all adhering governments is the Norwegian, which follows the four core criteria of visibility, accessibility, transparency and accountability. **ibid.**, pp. 3-4.
[826] **ibid.**, p. 2.
[827] **ibid.**, p. 4.
[828] Kee Beom Kim, "A multilateral contribution to corporate standards of behaviour: the ILO's declaration on multinational enterprises" in Tully (ed.), **Research Handbook…**, pp. 321-322.

World Employment Conference, the Workers' group and the Group of 77, which was composed of the developing countries, suggested the formation of a binding treaty on the subject. However, the employers favoured drafting a voluntary declaration of principles and this approach has been approved by the ILO's Governing Body by consensus in November 1977.[829]

In the revision of 2000, the 1998 ILO Declaration on Fundamental Principles and Rights at Work and its Follow-up has been incorporated in the ILO Tripartite Declaration and it has been underlined that the "*the contribution of multinational enterprises to its implementation can prove an important element in the attainment of its objectives. In this context, the interpretation and application of the Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy should fully take into account the objectives of the ILO Declaration on Fundamental Principles and Rights at Work*".[830] In the revision of 2006, some rights have been added to the Declaration and the follow-up procedures have been strengthened. The list of ILO Conventions and Recommendations referred to in the Declaration can be found in the Annex as amended in 2006.[831] Philip Alston, in his article, argued that the 1998 Fundamental Principles and Rights at Work is the harbinger of a revolutionary transformation.[832] According to the said transformation, the principles of the 1998 Declaration shall be considered as fundamental international norms, and even as *jus cogens* norms, which may be legally binding on the States without any need of the ratification of the relevant conventions.[833] Nevertheless, Alston admits that there is a long way to go in international law for providing an effective protection of labour rights.[834]

---

[829] Chirwa, **op. cit.**, p. 86.
[830] Addendum II as adopted by the Governing Body of the International Labour Office at its 227th Sess.(Geneva, March 2000)
[831] Addendum I to the Tripartite Declaration lists the ILO Conventions and Recommendations which contain provisions relevant to the Declaration.
[832] Philip Alston "'Core Labour Standards' and the Transformation of the International Labour Rights Regime" in Virginia A. Leary & Daniel Warner (eds.), **Social Issues, Globalisation and International Institutions: Labour Rights and the EU, ILO, OECD and WTO**, International Studies in Human Rights, Vol. 84, Martinus Nijhoff Publishers, 2006, p. 2.
[833] Alston refers to a PhD thesis written by Arne Vandaele, where it is argued that the core labour standards shall be enforced as *jus cogens* norms. Vandaele, Arne. "A Critical Analysis on the Use of International Trade Measures as a Means to Enforce Basic Labour Rights" in Alston, "'Core Labour Standards' …", p. 3, f.n. 6.
[834] Alston, "'Core Labour Standards'…", pp. 5-7. See also Alston, Philip (ed.) **Labour Rights as Human Rights**, The Collected Courses of the Academy of European Law, Vol. XIV/1, OUP, 2005.

The ILO Declaration has certain similarities with the OECD Guidelines. First, the principles of the ILO Declaration do concern not only the multinational enterprises but also the national ones.[835] Second, as mentioned before, both the OECD Guidelines and the ILO Declaration refrain from legally defining the term 'multinational enterprise'. However, the ILO Declaration is directed towards a wider group of actors than the OECD Guidelines do.[836] Thirdly, similar to the OECD Guidelines, the ILO Declaration is not a legally binding document and imposes only political and moral obligations on States.[837] In the Declaration, it is expressly stated that all relevant actors, *i.e.* governments, MNEs and the employers' and workers' organizations, are recommended to observe the principles in the Declaration on a voluntary basis.[838] However, the Declaration directly addresses the States, and not the corporations.[839] Therefore, effective implementation of the Declaration essentially depends on its incorporation by the States, willingness of corporations and private enforcement efforts by the NGOs.[840]

It is also stressed that the Declaration does not limit or affect the legal obligations imposed under the ILO Conventions.[841] Nevertheless, the ILO Declaration, as "*an articulation of existing principles*", may be regarded as the authoritative interpretation of the relevant ILO Conventions and Recommendations.[842] Additionally, as Clapham mentions, the ILO Declaration, along with the relevant ILO Conventions and customary law, could be used as one of the tools in determining and specifying the obligations of non-state actors with regard to international labour rights.[843]

---

[835] The Tripartite Declaration, para. 11; OECD Guidelines are to be applied equally to all the enterprises regardless of their national or multinational character. OECD Guidelines, Concepts and Principles para. 5.
[836] Clapham, **Human Rights Obligations…**, p. 212.
[837] Gatto, **op. cit.**, p. 79.
[838] The Tripartite Declaration, paras. 5 and 7.
[839] Oshionebo, **op. cit.**, p. 8.
[840] For such private efforts, Steinhardt especially refers to the work of the NGOs such as Sweatshop Watch, the Campaign for Labor Rights, and the Maquila Solidarity Network. Steinhardt, "Corporate Responsibility…", p. 204.
[841] The Tripartite Declaration, para. 7.
[842] Janelle Diller, Director of the Multinational Enterprises Department, ILO Summary of remarks, Conference on Legal Dimensions of Corporate Responsibility, Royal Institute of International Affairs, 23 November 2001 as referred to in Clapham, **Human Rights Obligations…**, p. 212, fn 73.
[843] **ibid.**, p. 212 and 215. Clapham underlines that the ILO Declaration constitute a material proof for the existence of human rights obligations for multinational and national corporations.

In the Preamble of the Constitution of the International Labour Organization, it is stressed that any failure in the implementation of good labour standards and humane working conditions in one country creates an obstacle to the improvement of labour standards in all the other countries of the world.[844] Having this approach in mind, the aim of the ILO Declaration is determined as encouraging corporations to positively contribute to the economic and social progress of the States they operate in and to prevent the adverse consequences of their operations worldwide. Under the Declaration, reference is made to both the New International Economic Order and also the Global Compact and the Millennium Development Goals, which demonstrates the intention of the drafters to balance the competing interests of the MNEs on the one hand and the public interest on the other hand.[845]

The Tripartite Declaration is composed of four sections on employment[846] (paras. 13-28), training (paras. 29-32), conditions of work and life[847] (paras. 33-40) and the industrial relations[848] (paras. 41-59). Even though the Declaration expressly refers only to 'rights at work', as Steinhardt asserted, the separation between international human rights law and labour rights is artificial and it amounts to an "intellectual apartheid".[849] Therefore, a wide range of categories of human rights, whether individually or collectively enjoyed, should be a concern for the businesses during their commercial activities.[850] Moreover, the persons with vulnerabilities such as the indigenous minorities, migrants, women and children shall be provided with special protection.[851] Finally, while the corporations do have duties vis-à-vis their stakeholders in the broadest sense, respecting and protecting the rights of the MNEs is an obligation for the States.[852]

As mentioned above, despite the fact that most of the MNEs are reluctant to refer to the ILO Conventions in their codes of conduct, Clapham underlines that

---

[844] ILO Constitution Preamble para. 3.
[845] The Tripartite Declaration, para. 2.
[846] The Chapter is composed of three sections: (1) promotion of employment, (2) equality of opportunity and treatment, and (3) security of employment.
[847] This Chapter is composed of three sections: (1) wages, benefits, and conditions of work; (2) minimum wage; and (3) safety and health.
[848] This Chapter is composed of five sections: (1) freedom of association and the right to organize; (2) collective bargaining; (3) consultation; (4) examination of grievances; and (5) settlement of industrial disputes.
[849] Steinhardt, "Corporate Responsibility…", p. 204.
[850] **ibid.**, p. 204.
[851] Gatto, **op. cit.**, p. 79.
[852] Chirwa, "The Long March …", p. 87.

corporations, whether national or transnational, should, at minimum, respect and promote the rights and principles recognized in the International Bill of Rights and the core labour conventions of ILO.[853] In the Declaration, it is underlined that the MNEs should respect and obey not only the national laws but also the local practices, while they should also take into account the relevant international standards. Moreover, the MNEs are required to conduct their activities in harmony with the national social and economic priorities of the country they operate in, and thus they are encouraged to consult continuously with the governments and local employers' and workers' organizations.[854] In addition, Clapham asserts that even though the MNEs are not parties to the ILO Conventions and the obligations under these conventions are primarily addressed to States, corporations also bear both negative and positive obligations concerning labour rights.[855] Nevertheless, inclusion of the provisions of the ILO Declaration in the codes of conduct, contracts with the sub-contractors and collective bargaining agreements would facilitate the enhancement of respect for the rights in the UDHR and the ILO Conventions.[856]

Although compliance with the ILO Declaration is voluntary,[857] two principal follow-up mechanisms have been envisaged.[858] Under the so-called 'periodic survey

[853] Clapham, **Human Rights Obligations**..., p. 215. There are at least 8 ILO Conventions on Fundamental Human Rights that constitute the "core labour Conventions": No. 29 concerning forced or compulsory labour, 1930; No. 87 concerning freedom of association and the right to organize, 1949; No. 98 concerning the application of the principles of the right to organize and bargain collectively, 1949; No. 100 concerning equal remuneration for men and women workers for work of equal value, 195; No. 105 concerning the abolition of forced labour, 1957; No. 111 concerning discrimination in respect of employment and occupation, 1958; No. 138 concerning the minimum age for admission to employment, 1973; No 182 concerning the prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour, 1999. In the Tripartite Declaration para. 9, the Governments are invited to ratify these core labour conventions in addition to the ILO Convention No. 122 on the Employment Policy and apply the Recommendations Nos. 35, 90, 111, 119, 122, 146, 169, 189 and 190. ("Recommendation (No. 35) concerning Indirect Compulsion to Labour; Recommendation (No. 90) concerning Equal Remuneration for Men and Women Workers for Work of Equal Value; Recommendation (No. 111) concerning Discrimination in Respect of Employment and Occupation; Recommendation (No. 119) concerning Termination of Employment at the Initiative of the Employer; Recommendation (No. 122) concerning Employment Policy; Recommendation (No. 146) concerning Minimum Age for Admission to Employment; Recommendation (No. 169) concerning Employment Policy; Recommendation (No. 189) concerning General Conditions to stimulate Job Creation in Small and Medium-Sized Enterprises; Recommendation (No. 190) concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour. ")

[854] The Tripartite Declaration, paras. 8 and 10.

[855] Clapham, **Human Rights Obligations**..., pp. 214-215.

[856] **ibid.**, p. 218.

[857] Leary puts that the term 'compliance' creates an illusory perception of soft law documents as if they are legally binding. She argues that elaborating on the influence and usefulness of such documents would be more appropriate than trying to elaborate on the compliance of the actors addressed in these documents. Virginia Leary, "Nonbinding Accords in the Field of Labor" in E.

mechanism',[859] the Governments, employers' and workers' organizations submit reports to the Sub-Committee on Multinational Enterprises concerning the implementation of the Declaration. The Sub-Committee periodically prepares a detailed follow-up survey based on these reports, which includes examples of good practices and new trends, and submits it to the ILO Governing Body.[860] Evaluating these follow-up surveys, the Governing Body makes recommendations to the parties for the better implementation of the Declaration. Even though this is a welcomed effort for ensuring respect for the core labour standards, the outcomes of the evaluation and analysis of these reports tell so little about the actual abuses of human rights. Moreover the names of the MNEs that are allegedly violating the rights are not revealed to the public.[861] There have been eight surveys up-to-date, the last covering the years 2000-2003.[862]

The second procedure is the interpretation of a provision of the Declaration that caused a disagreement due to its enforcement on an actual situation/concrete dispute occurred between the parties.[863] Following a request made by a member state on behalf of the employers' or workers' organization,[864] the ILO, after consulting the Sub-Committee (Officers of the Committee on Multinational Enterprises), prepares a draft reply, which would be finalized by the Governing Body to be published in the Official Bulletin of the International Labour Office.[865] However, this procedure does not aim the resolution of the dispute, nor it might duplicate or conflict with existing national or ILO procedures.[866] Nor, the requests for interpretation may concern a

---

Brown Weiss(ed.) **International Compliance with Nonbinding Accords,** Washington, DC: American Society of International Law, 1997, p. 248.

[858] There are two other follow-up mechanisms envisaged under the Declaration, details of which will not be examined in our thesis. One is the promotion of the Declaration especially with regard to the ones, who are the most adversely affected by the breaches of the principles mentioned in the Declaration. The other is the establishment of a research program aimed at gathering information on the activities of MNEs and their conformity with the principles in the Declaration. Clapham, **Human Rights Obligations**..., pp. 217-218; Leary, "**Nonbinding Accords**…", p. 252.

[859] Kim, **op. cit.**, p. 323.

[860] Chirwa, "The Long March…", p. 87.

[861] Clapham, **Human Rights Obligations…**, pp. 216-217.

[862] http://www.ilo.org/empent/Informationresources/WCMS_101251/lang--en/index.htm, accessed on 12.03.2013.

[863] The Procedure for the Examination of Disputes Concerning the Application of the Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy by Means of Interpretation of its Provisions (hereinafter "The Procedure…"), para. 1; Clapham, **Human Rights Obligations…**, p. 217.

[864] In case, the Government refuses to make such a request, the employers' and workers' organizations may make the request on their own. See "The Procedure …", Articles 5 and 6.

[865] **ibid.,** Articles 8 and 9. Clapham, **Human Rights Obligations…** p. 217.

[866] **ibid.,** p. 217.

domestic legislation or practice.[867] Consequently, the effectiveness of this procedure is undermined due to the absence of any power of the Sub-Committee on finding a violation and deciding on a redress if a violation is found.[868] Moreover this procedure is related only to the issues that are covered by the ILO Declaration, *i.e.* labour relations. Thus, it lacks any possibility for extending its application to the other areas concerning human rights.[869] Five cases have been subject to the interpretation procedure up to today, which proves that this procedure is ineffective and anachronistic.[870]

3.3.3. Documents adopted within the United Nations

The concept of corporate duties with regard to the protection of human rights has always been on the agenda of the UN's work. Several attempts for internationally regulating corporate conduct have been triggered by international community. Below, each of these attempts will be briefly analysed in order to demonstrate the evolution of the approach adopted by the UN towards human rights abuses perpetrated by corporations.

The first attempts to internationally regulate corporate conduct were followed by the adoption of the UN General Assembly Declaration on the Establishment of a New International Economic Order in 1974.[871] In relation to the economic and political developments of the post-war era, the UN Economic and Social Council entrusted a 'Group of Eminent Persons', who worked on the role, nature and impact of the activities of transnational corporations in the development processes of States.[872] As an outcome of their work and based on the recommendations of the Eminent Persons, the United Nations established the Programme on Transnational

---

[867] Gatto, **op cit.**, p. 80. "The Procedure…", para. 2 reads as follows: "*The above means that questions regarding national law and practice should be considered through appropriate national machinery; that questions regarding international labour Conventions and Recommendations should be examined through the various procedures provided for in articles 19, 22, 24 and 26 of the Constitution of the ILO, or through government requests to the Office for informal interpretation*; *and that questions concerning freedom of association should be considered through the special ILO procedures applicable to that area.*"

[868] Chirwa, "The Long March…", p. 88.

[869] **ibid.**

[870] ILO Doc. GB.229/13/13, 1985; ILO Doc. GB.239/14/24, 1988; ILO Doc. GB.255/10/12, 1993; ILO Doc. GB264/13, 1995; ILO Doc. GB.272/MNE/1, 1998. Kim, **op. cit.**, pp. 324-325.

[871] UNGA, A/RES/S-6/3201(S-VI), 1 May 1974, Declaration on the Establishment of a New International Economic Order,

[872] Official website of the UN Conference on Trade and Development, UNCTC Origins http://unctc.unctad.org/aspx/UNCTCOrigins.aspx, accessed on 14.09.2014.

Corporations, which has been conducted by the UN Centre on Transnational Corporations (UNCTC) between 1974 and 1992.[873] Due to the clash of interests between the capital-exporting States and the Group of 77, an intergovernmental working group was established for working on a draft code of conduct, with the aim of balancing the rights and responsibilities of States and corporations. Accordingly, as it will be mentioned below, the draft UN Code was composed of two parts reflecting these balancing efforts of the clashing interests, one on regulating the activities of TNCs and other on the equal treatment of all corporations.[874]

3.3.3.1. 1990 Draft UN Code of Conduct on Transnational Corporations

The Draft UN Code of Conduct on Transnational Corporations was drafted by the UN Commission on TNCs and the UNCTC with the purpose of regulating corporate conduct in line with the New International Economic Order (NIEO).[875] In this new order, TNCs and foreign direct investments were handled as contributors to world development, mostly with positive impacts on economy and social life. However, due to the ideological controversies, the Draft UN Code of Conduct has never been officially adopted, thus it cannot be considered as a document to be complied with either obligatorily or voluntarily.[876] Nevertheless, for understanding the evolution of UN approach towards TNCs, the provisions of the Draft UN Code will be briefly examined.

The Draft UN Code encourages TNCs to contribute to sustainable economic development of States, and urges States to cooperate in regulating corporate behaviour for minimizing the adverse consequences of corporate activities.[877] Additionally, the participating governments of the Draft UN Code are expected to promote and implement its provisions, and submit their reports to the UN

---

[873] The UNCTC was named at first as the UN Center on Multinational Corporations, then renamed as the UN Commission on Transnational Corporations in 1974; and then finally it has been named as the UN Center on Transnational Corporations until its dissolution in 1992. ECOSOC Res. 1913, UN ESCOR, 57th sess., 5 December 1974, Supp. No. 1, 3, UN Doc. 5570/Add. 1 (1975).
[874] Muchlinski, "Attempts to Extend the Accountability…", p. 100.
[875] Official website of the UNCTAD http://unctc.unctad.org/aspx/UNCTCEvolution.aspx, accessed on 14.09.2014.
[876] In the drafting process of the UN Code of Conduct, the Group of 77 suggested a 'zebra code' structure, which has mandatory provisions for governments and voluntary provisions for corporations. Werner J. Feld, **Multinational Corporations and UN Politics: The Quest for Codes of Conduct**, Pergamon Press, 1980, p. 99. The language of both "*shall*" and "*should*" is used in the Draft Code of Conduct. For a detailed comparison between the UN Norms and the UN Draft Code of Conduct see http://www1.umn.edu/humanrts/ataglance/compdftun.html#reffn4, accessed on 18.03.2013.
[877] Lansing & Rosaria, **op. cit.**, pp. 35-50.

Commission on TNCs concerning the domestic measures they took to that effect.[878] The UN Commission on TNCs shall be responsible for the effective implementation of the Code and would report through Economic and Social Council (ECOSOC) to the UN General Assembly.[879] It has also the authority to provide clarifications on the Code if any dispute on the interpretation and/or application of the Code occurs.[880] Additionally, it may make recommendations to the General Assembly (via ECOSOC) for a review of the provisions of the Code.[881]

The Draft UN Code of Conduct is universally applicable in all States, 'regardless of their political and economic systems'[882] and to every transnational corporation, *i.e.* every enterprise comprising entities in two or more countries, which operate under a system of decision-making.[883] Additionally, if applicable, both the TNCs and local corporations "shall be subject to the same expectations with regard to their conduct".[884] The Draft UN Code of Conduct has five sections, one on the definition and scope of the Code, and the others on the activities of TNCs (paras. 7-48), treatment of TNCs (paras. 47-58), intergovernmental co-operation (paras. 59-65) and implementation of the code of conduct (paras. 66-71), respectively. The Draft UN Code of Conduct has various provisions concerning the activities of TNCs, including respect for human rights and fundamental freedoms, national sovereignty of host states, sovereignty of host states over natural wealth and resources, local cultures and values.[885] TNCs shall respect domestic laws, legislations and regulations of the host State, while the home states should not use the TNCs as a tool for interfering with the internal or external affairs of host States.[886] TNCs shall not interfere with the internal affairs of the host countries and the intergovernmental

[878] Draft UN Code of Conduct para. 66 (c).
[879] **ibid.**, paras. 67-69.
[880] **ibid.,** paras. 69-70.
[881] **ibid.,** para. 71.
[882] **ibid.,** para. 3.
[883] **ibid.,** para. 1(a), 2.
[884] **ibid.,** para. 4.
[885] **ibid.,** paras. 1-14. The Draft Code of Conduct includes provisions on the protection of consumers and protection of the environment, too. Other paragraphs concern among others provisions on balance of payments and financing, transfer pricing, taxation, competition and restrictive business practices and transfer of technology (paras. 37-43).
[886] **ibid.,** paras. 64 and 65. For example, the Draft Code underlines that the principle of exhaustion of domestic remedies shall be respected concerning any dispute involving the TNCs and that the tools that may resorted by home states shall not involve "*any type of coercive measures not consistent with the Charter of the United Nations and the Declaration on Principle of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations".*

relations[887] and home states should also take appropriate measures in order to prevent such interference by the TNCs themselves.[888]

Additionally, TNCs shall not infringe the principle of non-discrimination, and especially, the principles of equal opportunity and equal treatment.[889] However, as Muchlinski suggested in 2000, the Draft Code should be updated in accordance with the changes in the circumstances of contemporary world dynamics.[890] For example, he mentioned that the provision targeting the apartheid regime and prohibiting any cooperation with racist minority regimes, should be replaced with a more general provision obliging corporations to respect human rights and fundamental freedoms.[891] Additionally, the provisions on the treatment of TNCs, which previously blocked the process of adoption of the Draft Code of Conduct, should be re-written in alternative formulations taking into account the new investment policies.[892] Finally, Muchlinski proposed that the Code of Conduct might be drafted with a language that would allow it to be a legally binding document creating a new regime for investments.[893]

The Section on the economic, financial and social activities of TNCs includes a reference to the ILO Tripartite Declaration mentioning that the principles on employment, training, conditions of work and life and industrial relations in the Declaration also apply for the TNCs subject to the UN Code of Conduct.[894] The Draft UN Code of Conduct also requires corporations to regularly disclose clear, full and comprehensible information to the public on both financial and non-financial matters such as their structure, policies, activities and operations.[895] Additionally, in accordance with the ILO Tripartite Declaration and the domestic laws, TNCs are required to disclose information to trade unions and other representatives of the employees on the performance of the local entities or the corporation as a whole, particularly on their current and future development plans that would socially and

[887] **ibid.,** paras. 16-19.
[888] **ibid.,** para. 64.
[889] **ibid.,** para. 14.
[890] Muchlinski, "Attempts to Extend the Accountability…", p. 115.
[891] Draft UN Code of Conduct, para. 15.
[892] Muchlinski admits that there has not been a huge change in the policies. Nevertheless, he asserts that the negotiations might focus on other issues such as reservations or exceptions regarding the controversial provisions on the treatment of TNCs. Muchlinski, "Attempts to Extend the Accountability…", p. 115.
[893] **ibid.**, p. 115-117.
[894] Draft UN Code of Conduct para. 25.
[895] **ibid.,** paras. 44-46.

economically affect the employees. However, it is underlined that the information disclosed under this paragraph of the Draft UN Code of Conduct should be kept confidential.[896]

Second chapter of the Draft Code on the treatment of TNCs begins with underlining that "*States shall fulfil, in good faith, their obligations under international law.*"[897] It is expressly mentioned in the Draft Code that States have the right to regulate the conditions of entry of TNCs to the country and their operations therein, provided that they treat all corporations in a fair and equitable manner, and even under exceptional situations "*no less favourable than that accorded to domestic enterprises in similar circumstances*".[898] Likewise, it is expressly envisaged that States have the right to nationalize or expropriate the assets of TNCs on the condition of paying adequate compensation.[899]

Finally, the Draft UN Code of Conduct includes a paragraph on the dispute settlement mechanism, which provides that TNCs are subject to the jurisdiction of the State they operate in, unless the parties agree upon to the contrary before or after the emergence of the dispute.[900] The Draft UN Code adds that "*Where the exercise of jurisdiction over transnational corporations and their entities by more than one State may lead to conflicts of jurisdiction, States concerned endeavour to avoid or minimize such conflicts, and the problems to which they give rise by following an approach of moderation and restraint, respecting and accommodating the interests of other States.*"[901]

Nevertheless, following the discussions and several revisions of the Draft UN Code of Conduct, the negotiations were suspended in 1992 due to the ideological controversies on the New International Economic Order on the State level to the benefit of the capital-exporting states and the TNCs.[902] This was partly due to the economic and political climate change after the end of cold war, when a 'New Code Environment' has emerged aiming to promote foreign investments in developing countries with the purpose of re-integrating them in the global economic system.

---

[896] **ibid.,** para. 46.
[897] **ibid.,** para. 47.
[898] **ibid.,** paras. 48-54.
[899] **ibid.,** para. 55.
[900] **ibid.,** paras. 56-57.
[901] **ibid.,** para. 58.
[902] Reinisch, **op. cit.**, p. 43; Muchlinski, "Attempts to Extend the Accountability…", pp. 101-102.

This intention also resulted in the disregard for the adverse impacts of the activities of TNC.[903] Following this failure, the UN Commission on TNCs was dissolved in 1992 and the Commission on International Investment and Transnational Corporations was established under the United Nation Conference on Trade and Development (UNCTAD) in 1994[904] for carrying on the implementation of the Programme on Transnational Corporations.[905]

3.3.3.2. 2000 UN Global Compact (renewal in December 2007)

The UN Global Compact is a voluntary initiative formulated to protect human rights, labour rights and environment and to prevent corruption. It is favoured for declaring the universal principles on responsible conduct for the businesses and for having international legitimacy with the potential of being a global forum for advancing the work on the subject.[906] The Global Compact follows the principles acknowledged under the UDHR, ILO Declaration on Fundamental Principles and Rights at Work, The Rio Declaration on Environment and Development and the UN Convention against Corruption, respectively.[907] The idea of an initiative for the Global Compact was triggered by the speech of the then UN Secretary-General, Kofi Annan at the World Economic Forum in 1999, in which he encouraged the business leaders for self-regulating their conduct in the countries they operate.[908] The Global Compact has formally came into existence in 2000 with the principles on the

---

[903] Muchlinski, "Attempts to Extend the Accountability…", pp. 103-104.

[904] **ibid.**, pp. 104-105. In 1992, the UNCTC was renamed as Transnational Corporations Management Division, which functioned as the secretariat of the UN Commission on TNCs. In 1993, the Division has replaced the UN Department of Economic and Social Development in New York to UNCTAD in Geneva. Additionally, the Division on TNCs and Investment (DTCI) was established, which was later renamed as Division on Investment, Technology and Enterprise Development (DITE). DITE could be regarded as a 'high powered think-tank' helping developing countries in attracting good quality investments. Therefore, the work of DITE is not going to be elaborated on further for the purposes of our study. For a list of publications on FDI and TNCs between 1973 and 2003 UNCTAD/ITE/2004/1, http://unctc.unctad.org/Data/PublicationFDIandTNCs_1973-2003Revised.pdf, accessed on 14.09.2014.

[905] ECOSOC Res. 1994/1, Integration of the Commission on TNCs into the institutional machinery of the UN Conference on Trade and Development, 14 July 1994; Reinisch, **op. cit.**, p. 43; Chirwa, "The Long March… ", p. 79.

[906] UN Global Compact Office and the OECD Investment Division, "The UN Global Compact and the OECD Guidelines for Multinational Enterprises: Complementarities and Distinctive Contributions", 26 April 2005, p. 2.

[907] Note on the UN Global Compact and Business and Human Rights, 13 Jan. 2009, www.unglobalcompact.org, accessed on 05.03.2012.

[908] Press Release, Secretary-General Kofi Annan, Secretary-General Proposes Global Compact on Human Rights, Labour, Environment, in Address to World Economic Forum in Davos, UN Press Release SG/SM/6881, 1 February 1999).

protection of human rights, labour rights and environment and on June 24th, 2004, insertion of the tenth principle on the prevention of corruption has been announced.

The legal status of the Global Compact is much more controversial than the other business-related documents in international law, and this controversy weakens its authority and power.[909] The Global Compact is neither a treaty nor an agreement. It is even not a declaration or resolution expressed by an organ or sub-division of an international organization. It is asserted that the Global Compact resembles to a 'contract' or a creative 'partnership' between the UN and the private sector.[910] Moreover, the Global Compact does not envisage a monitoring mechanism and its effectiveness depends merely on the self-enforcement of its provisions by corporations.[911] In any case, the Global Compact elevates the legal status of corporations to a certain degree, especially within the context of the UN.[912] Even though the international law doctrine does not confer legal personality to TNCs, it nevertheless opens the way to indirectly control the conduct of TNCs.[913] This should be considered as an important step in 'reconceptualizing' the transnational corporations as subjects of international law in the near future as a response to the evolving global economic relations where they considerably play a dominant role.[914]

The first two principles of the Global Compact are on human rights and they derive from the UDHR. These two principles may also be considered as international customary law.[915] The first principle vaguely refers to the *'internationally proclaimed human rights'* and requires the business to promote and respect the protection of human rights not only in the workplace but also outside the workplace and in the wider community. The responsibility to respect implies the responsibility not to infringe human rights of others through corporate operations and business

---

[909] Chirwa, "The Long March…", p. 91.
[910] Press Release of Kofi Annan…; Joshua Karliner & Kenny Bruno, "Tangled up in Blue: Corporate partnerships at the United Nations", September 2000, http://s3.amazonaws.com/corpwatch.org/downloads/tangled.pdf, accessed on 06.03.2013; Oshionebo, **op. cit.**, p. 34, fn. 159.
[911] Oshionebo, **op. cit.**, p. 23.
[912] **ibid.,** p. 31.
[913] **ibid.**, p. 34.
[914] **ibid.**, p. 31; Clapham, Andrew, **Human Rights in the Private Sphere**, Oxford, 1996, pp. 89-133. For a comparison between the Global Compact and the OECD Guidelines and their complementarities see UN Global Compact Office and the OECD Investment Division, "The UN Global Compact and the OECD Guidelines for Multinational Enterprises: Complementarities and Distinctive Contributions", 26 April 2005.
[915] http://www.unglobalcompact.org/AboutTheGC/TheTenPrinciples/humanRights.html, accessed on 26.03.2012.

relationships.[916] It also includes human rights due diligence as a way of ensuring and demonstrating that the companies are actually respecting human rights by assessing adverse impacts of their operations on human rights, integrating human rights policy commitments in their internal procedures, taking appropriate action if a violation occurs, tracking performance based on feedback from stakeholders and reporting on the company performance.[917] The responsibility to support or promote human rights can be realized through various ways such as conducting business in line with the UN goals, strategic social investment, public policy engagement, partnership and collective action.[918] The second principle requires the business to act in a way that would not lead to being complicit in human rights abuses.[919] This principle covers all acts and operations that would amount to direct, beneficial or silent complicity in such abuses.[920] It is significant to observe that the Global Compact constitutes the backbone of Ruggie's framework "respect, protect and promote".

The Global Compact has two complementary goals: first the internalization of the principles contained therein by the companies, and second realization of the broader development goals of the UN in general.[921] In achieving these goals, the Global Compact Office works in close cooperation with the Office of the UN High Commissioner for Human Rights, the ILO and the United Nations Environment Programme (UNEP).[922] Other UN agencies, especially the UNDP and the UN Office on Drugs and Crime, may participate in the operations if it is deemed necessary.[923] The Human Rights Working Group advises and helps the Global Compact Office.[924] However, the lack of regulatory governmental and institutional framework of the

---

[916] **ibid.**
[917] **ibid.**
[918] **ibid.** For detailed information see UN Global Compact, "Blueprint for Corporate Sustainability Leadership", p.10.
[919] See also UN Guiding Principles on Business and Human Rights, Principle 17.
[920] Report of the UN High Commissioner for Human Rights to the 56th sess. of the General Assembly, UN Doc. A/56/36/2001, 28 September 2001, paras. 109-111.
[921] Note on the UN Global Compact and Business and Human Rights, 13 Jan. 2009, www.unglobalcompact.org, accessed on 05.03.2012.
[922] These three organizations are sometimes referred to as the 'guardians of the principles'. UN Global Compact Office, "How the Global Compact Works: Mission, Actors and Engagement Mechanisms", 2003, p. 6. To note, the Global Compact Secretariat is composed of the Global Compact office and the six UN agencies.
[923] UN Global Compact Office, "How the Global Compact Works: Mission, Actors and Engagement Mechanisms", 2003, p. 6.
[924] The Human Rights Working Group, established in 2007, has gathered in Istanbul in June 2009, in conjunction with the VII Annual Local Network Forum, for the reports see http://www.unglobalcompact.org/Issues/human_rights/Meetings_and_Workshops.html, accessed on 12.03.2013.

Global Compact Office on the one hand, and its financial dependence on the private sector and voluntary governmental support on the other hand, have given rise to harsh criticisms on the effectiveness of the Office in various occasions.[925] It is also criticized for legitimizing the interaction between the UN and corporations, and a concrete inclusion of the UN General Assembly in the interactions has been proposed in order to protect the reputation of the UN.[926]

The same year, the Secretary-General of the UN issued the Guidelines for Cooperation between the UN and the Business Community with the purpose of creating a framework for facilitating and implementing cooperation between the UN and the for-profit private sector.[927] The Guidelines for Cooperation cover all types of cooperation, including fund-raising, policy dialogue, humanitarian assistance and development.[928] Special reference to the Global Compact is made in the Guidelines and it is highlighted that the UN and its agencies should use the principles of the Global Compact in their relations with their business partners. Moreover, it is stressed that the business partners of the UN, as responsible citizens, should act in accordance with the UN values and principles and other relevant international documents. They should also incorporate the principles of the Global Compact in their self-proclaimed codes of conduct. Finally, it is declared that the corporations that "*are complicit in human rights abuses, tolerate forced or compulsory labour or the use of child labour, are involved in the sale or manufacture of anti-personnel mines or their components, or that otherwise do not meet relevant obligations or responsibilities by the United Nations, are not eligible for partnership.*"[929]

Approximately 10,000 business enterprises and non-business stakeholders have expressed their will to implement the principles enshrined in the UN Global Compact.[930] The adhering companies and stakeholders are expected to integrate the

---

[925] Louis Papa Fall & Mohamed Mounir Zahran, **United Nations Corporate Partnerships: The role and functioning of the Global Compact**, Joint Inspection Unit, Geneva 2010, JIU/REP/2010/9.
[926] **ibid.**
[927] 2000 Guidelines for Cooperation between the UN and the Business Community, paras. 5-8; Clapham, **Human Rights Obligations…"**, pp. 236-237.
[928] The Guidelines for Cooperation between the UN and the Business Community, para. 10.
[929] **ibid.**, para. 12.
[930] It may be noted that such a declaration of policy commitment to the Global Compact should be at the CEO level in support of the board of directors or equivalent of a corporation. According to the statistics given in the Note on the UN Global Compact and Business and Human Rights, 6,400 business participants in over 130 countries and over 2,300 non-business stakeholders, including civil society organizations, labour unions, business associations, foundations, communities and cities, and academic institutions were involved in the UN Global Compact by 2009. Additionally it is noted that

principles in their codes of behaviour, to implement ways for effectively enforcing these principles in their operations, to annually report the progress in internalizing the Compact, and to promote widespread acceptance of the Global Compact.[931] However, it should be kept in mind that the large number of participants from the business is due to the facts that the Global Compact is voluntary, the principles are formulized in vague wordings and effective monitoring mechanisms on compliance is lacking.[932]

These facts also explain the low participation on the part of the non-business stakeholders,[933] despite the support from the Human Rights Watch, Amnesty International and the International Confederation of Free Trade Unions.[934] Even, as an alternative or an opposing document, a 'Citizens Compact' between the UN and civil society has been proposed in order to politically and financially strengthen the UN in its relationship with the private sector.[935] Oshionebo suggests that the participation in the Global Compact should be based on the condition of a minimum social compliance.[936] He also suggests the disaggregation of the industries and creation of industry-specific networks in order to focus on the specific needs of a particular industry, and thus, to develop the best corporate governance practice for the TNCs operating in that sector.[937] This would also be an important step in improving specialized dialogue.

Moreover, it is stressed that the high rates of participation in the Global Compact by the business in a short period of time demonstrate that the Global Compact in fact serves as a concrete tool for corporations to enter into relations with

---

while 40 % of the participants were small and medium-sized enterprises, 162 of the participants were ranked in top 500 of the world's largest businesses by the Financial Times. It is also significant to note that half of the participants originated from developing countries. To add, over 50 % of the participant companies are from the non-OECD countries. Note on the UN Global Compact and Business and Human Rights, 13 Jan. 2009, www.unglobalcompact.org, accessed on 05.03.2012. UN Global Compact Office and the OECD Investment Division, **The UN Global Compact and the OECD Guidelines for Multinational Enterprises: Complementarities and Distinctive Contributions**, 26 April 2005, p. 2.

[931] Chirwa, "The Long March…", p. 89; UN Global Compact Office, **How the Global Compact Works: Mission, Actors and Engagement Mechanisms**, 2003, p. 2.

[932] Clapham, **Human Rights Obligations…**, p. 250; Oshionebo, **op. cit.**, p. 23.

[933] **ibid,**. p. 225: NGOs and scholars criticize the lack of effective monitoring mechanisms and stress the need for codifying legally binding international norms for holding multinational corporations accountable for human rights abuses.

[934] Chirwa, "The Long March…", p. 92.

[935] Karliner & Bruno, "Tangled up in Blue…".

[936] Oshionebo, **op. cit.**, p. 37.

[937] **ibid**.

the UN and gain 'good reputation' in the eye of the stakeholders despite the lack of real efforts in changing their behaviour.[938] Steinhardt mentions that by the way of adhering to the Global Compact, the corporations aim to distinguish themselves from the others in the market via 'human rights entrepreneurialism'.[939] In other words, corporations declaring their commitment to the principles in the Global Compact and incorporating them in their codes of behaviour would be in a more advantageous position than the other corporations in the global competition. As Pace puts it, this phenomenon may shift the objectives of the Global Compact towards an unintended consequence regarding their adoption by corporations.[940] It should always be kept in mind that the corporate culture of profit maximization would prevail any other objective sought by the company and would undermine the efforts in protecting human rights.[941]

Global Compact Follow-Up Mechanisms

The Global Compact is not completely out of any mechanism for follow-up. The Performance Framework developed by the Global Compact focuses on the overall impact of the principles and does not evaluate the compliance performance of a particular corporation.[942] However, the Global Compact "has recently announced measures aimed at 'assuring' its integrity 'at all times'. Under its 'integrity measures' failure to submit a Communication on Progress (COP) until the given deadline leads to the labelling of corporation as a non-communicating participant,[943] and if the non-communicating corporation fails to submit the COP for two consecutive years, it would be labelled as an expelled participant on the Global Compact's web site.[944] This may have 'serious' implications for corporation such as the denial of the privileges on the participation in Global Compact events or the use

[938] Bruno and Karliner criticizes the 'wrong' relationship' between the UN and 'wrong' corporations such as Shell, BP Amoco, Nike, Rio Tinto Plc, Novartis, Aracruz Cellulose, Aventis, Bayer, BASF, DuPont, and DaimlerChrysler. Karliner & Bruno, "Tangled up in Blue…", p. 6; Chirwa, "The Long March…", p. 92.
[939] Steinhardt, "Corporate Responsibility…", p. 206; UN Global Compact Office, "How the Global Compact Works: Mission, Actors and Engagement Mechanisms", 2003, p. 2.
[940] John Pace, "The Global Compact - Fact or Fiction?", **Mediterranean Journal for Human Rights**, Vol. 7, issue 1, 2003, p. 135.
[941] Chirwa, "The Long March…", p. 91.
[942] Oshionebo, **op. cit.**, p. 23.
[943] Previously, the term 'inactive' was being used for such participants. For the non-communicating partcipants see http://www.unglobalcompact.org/COP/analyzing_progress/non_communicating.html, accessed on 24.08.2014.
[944] On August 2014, the total number of participants expelled due to non-communication has reached 4605. **ibid.**.

of the Global Compact name and logo.[945] Expelled participants should reapply in order to join the Global Compact.[946] This is called the shaming strategy.[947] However, as Oshionebo rightfully mentions, the success and impact of this strategy mostly depends on the type of product marketed by the corporation. For example, while the consumption of luxury products may decrease due to a bad human rights record of a corporation, the rate of sale of basic commodities may remain the same.[948] Additionally, concerning the unlabelled products such as the 'conflict diamonds' or the products that are the outcome of a mixture of various other products, the shaming strategy would be ineffective.[949]

Another mechanism is the Communication on Engagement (COE) policy, which requires all stakeholders, *i.e.* the non-business participants such as the civil society, NGOs, cities and universities, to submit reports on their specific activities in support of the Global Compact. These activities may involve various categories of engagement such as dialogue, learning, projects and interactions of local networks.[950] According to the COE mechanism introduced on October 2013, the stakeholders, who fail to submit COEs in two consecutive years, will be expelled from the Global Compact.[951] The inclusion of multiple actors in the efforts for sustainable growth and lasting peace via the Global Compact and forming regionally and nationally nested networks[952] for a better adaptation of the international 'hypernorms' to the local situations through flexible formulations of the principles and soft implementing

---

[945] Oshionebo, **op. cit.**, p. 24.
[946] http://www.unglobalcompact.org/AboutTheGC/IntegrityMeasures/index.html, accessed on 12.03.2013.
[947] Oshionebo, **op. cit.**, pp. 18-19.
[948] **ibid.**
[949] **ibid.**
[950] **ibid.,** pp. 14-15 and 19. Oshionebo explains each of these engagement mechanisms in his article and comments that "*Through these mechanisms, the Global Compact not only provides an avenue for dialogue between business and civil society, it also helps to 'weave a web of values around the global marketplace', foster cooperation between business and civil society, and identify and promote the adoption and dissemination of best practices*". However, he also draws attention to a danger, which may be caused as a result of the emphasis on the learning and dialogue process. He asserts such processes may create an erroneous impression that human rights, which are the peremptory norms of internaitonal law, are "*negotiable commodities between society and business"*. See also Chirwa, "The Long March...", p. 90.
[951] http://www.unglobalcompact.org/COP/COE.html, accessed on 24.08.2014.
[952] The Global Compact might be characterized as a 'Global Action Network' (GAN). Waddell, Steve. "The Global Compact: An organizational innovation to realize UN Principles", November 2011, http://www.unglobalcompact.org/docs/news_events/9.1_news_archives/2011_11_16/UNGC_Organizational_Innovation_Note.pdf, accessed on 12.03.2013.

mechanisms is a welcomed effort for balancing the competing interests of the business and the public.[953]

Additionally, there exists a complaint mechanism for addressing the allegations of systematic or egregious abuses of the principles of the Global Compact.[954] Under this process, the Global Compact communicates the compliant to the corporation and requests written comments for the allegations, unless it finds them *'prima facie frivolous'*.[955] The comments of a participating corporation would be sent to the claimant and the Global Compact would be informed of any remedy that the company offers.[956] If the corporation remains silent for two months, then it is declared and listed as non-communicating participant. However, if the reputation and integrity of the Global Compact is at issue due to the graveness of the claims, then the company may be expelled from the Global Compact. Therefore, it can be argued that the complaint mechanism may help preventing criticisms on the Global Compact for enabling the 'laundering' or 'blue-washing' the public image of a corporation to a certain degree.[957] Nevertheless, it should be highlighted that the Global Compact does not have the authority to decide on the merits of a complaint, and accordingly, it cannot try a corporation or decide on any issue of a legal nature. The sole aim of the Global Compact is promoting the continuous improvement of the adoption of the principles of the Global Compact, and to that end, assisting its participants.[958]

---

[953] Kell, Georg. "The Global Compact: Origins, Operations, Progress, Challenges", JCC 11, Greenleaf Publishing, Autumn 2003, p. 45; Muchlinski, **"Multinational Enterprises…"**, p. 28 *et seq.*

[954] Oshionebo, **op. cit**., p. 24. As examples of such abuses may be listed as follows: "*1. murder, torture, deprivation of liberty, forced labour, the worst forms of child labour and other child exploitation; 2. serious violations of individuals' rights in situations of war or conflict; 3. severe environmental damage; 4. gross corruption; 5. other particularly serious violations of fundamental ethical norms.*"

[955] **ibid.**

[956] As a part of the procedure, the Global Compact at its own discretion may "*Share with the parties information about the specific instance procedures of the OECD Guidelines for Multinational Enterprises and, in the case of matters relating to the labour principles, the interpretation procedure under the ILO Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy*." http://www.unglobalcompact.org/AboutTheGC/IntegrityMeasures/index.html, accessed on 12.03.2013.

[957] Oshionebo, **op. cit.**, p. 25.

[958] http://www.unglobalcompact.org/AboutTheGC/IntegrityMeasures/index.html, accessed on 12.03.2013.

3.3.3.3. 2003 UN Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights

The Working Group on the Working Methods and Activities of Transnational Corporations [the new Working Group on the issue of human rights and transnational corporations and other business enterprises (hereinafter the Working Group)][959] has produced three reports, which in the end gave birth to the UN Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights. The first report concerned the extension of state responsibility to TNCs.[960] Second report, examined the 'New International Regulatory Framework' for corporate governance from the public international law point of view.[961] This framework differentiated from the traditional approaches on the activities of TNCs on two points. Firstly, it transformed the traditional understanding of responsibilities of corporations from wealth maximization of shareholders to the maximization of contribution to economic and social development, protection of human rights, labour rights and environment, and technology transfer of host states.[962] Secondly, it introduced the liability of the parent corporation for the acts of other entities that it has a contractual relationship with.[963] Finally, the third report focused on the reality that the process of globalization supports the increase of the wealth of TNC, which at the same time results in the increased global poverty.[964] Additionally, while TNCs contribute to the global

[959] HRC, A/HRC/RES/17/4 Human rights and transnational corporations and other business enterprises, 6 July 2011.

[960] U.N. Doc. E/CN.4/Sub.2/1995/11 (July 24, 1995), Sub-Commission on Prevention of Discrimination and Protection of Minorities, Background document prepared by the Secretary General on The Relationship Between the Enjoyment of Human Rights, in Particular, International Labour and Trade Union Rights, and the Working Methods and Activities of Transnational Corporations.

[961] U.N. Doc. E/CN.4/Sub.2/1996/12 (July 2, 1996), Report of the Secretary General on The Impact of the Activities and Working Methods of Transnational Corporations on the Full Employment of all Human Rights, in Particular Economic, Social, and Cultural Rights and the Right to Development, Bearing in Mind Existing International Guidelines, Rules and Standards Relating to the Subject Matter.

[962] This transformation also means a change in the understanding of social responsibility of the corporations that is passive, voluntary and permissive in the words of Backer. Backer, "Multinational Corporations, Transnational Law…", p. 322.

[963] **ibid.**, p. 325.

[964] U.N. Doc. E/CN.4/Sub.2/1998/6 (June 10, 1998), Report by El Hadji Guissé, Working Document: The Realization of Economic, Social and Cultural Rights: The Question of Transnational Corporations. In 1998, a Sessional Working Group was established with the purpose of examining the working methods and activities of the TNCs. A 'Forum on Economic, Social and Cultural Rights' (a.k.a. "The Social Forum" within the Sub-Commission) was also envisaged and a Special Rapporteur on economic, social and cultural rights has been appointed in order to co-ordinate the work of the Social Forum. UN Sub-Commission on Prevention of Discrimination and Protection of Minorities Res. E/CN.4/1999/4; E/CN.4/Sub.2/1998/45 (1998); E/CN.4/1999/4 The Relationship between the

economic life, they may constitute an obstacle before the protection and realization of human rights. Thus, the TNC activity should be regulated internationally.[965]

After evaluating and developing the legal production of the Working Group[966] and analysing all proposals, suggestions, observations and recommendations coming from the States, IGOs, NGOs, TNCs and other business enterprises, including all the other interested actors such as unions;[967] the UN Sub-Commission on the Promotion and Protection of Human Rights adopted the text of the UN Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights (hereinafter the UN Norms) unanimously in the form of a resolution.[968] On August 26th, 2003, the Sub-Commission after a final revision of the adopted text and adding an interpretative draft Commentary, submitted the UN Norms[969] to the UN Commission on Human Rights[970] for further consideration and approval.[971]

The first consideration of the UN Norms by the UN Commission on Human Rights was on April 22nd, 2004.[972] The UN Commission on Human Rights in its recommendation to the ECOSOC, requested the Office of the High Commissioner for Human Rights to submit a report on the legal status of all the relevant documents

---

enjoyment of economic, social and cultural rights and the right to development, and the working methods and activities of transnational corporations; UN Commission on Human Rights, Forum on economic, social and cultural rights: the Social Forum, 27.04.1999, E/CN.4/RES/1999/53, available at: http://www.unhcr.org/refworld/docid/3b00f0c218.html, accessed 18.03. 2013.

[965] Backer, "Multinational Corporations, Transnational Law…", p. 326. See also E/CN.4/Sub.2/2002/XX and E/CN.4/Sub.2/2002/WG.2/WP.1 on Human Rights Principles and Responsibilities for Transational Corporations and Other Business Enterprises and its Commentary, which is the precedent of the text of the UN Norms.

[966] HRC, A/HRC/RES/17/4 Human rights and transnational corporations and other business enterprises, 6 July 2011.

[967] Vagts, Detlev F., "The UN Norms for Transnational Corporations", **Leiden J Int'l Law**, Vol. 16, 2003, pp. 795-802; Hillemanns, Carolin F., "UN Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights", **Germ. L. J.**, Vol. 4, No. 10, 2003, pp. 1065-1070.

[968] Sub-Com. Res. 2003/16, Responsibilities of Transnational Corporations and Other Business Enterprises With Regard to Human Rights, 13 August 2003, E/CN.4/Sub.2/RES/2003/16; U.N. Doc. E/CN.4/Sub.2/2003/L.11 at 52 (2003). UN Doc. E/CN.4/Sub.2/2003/12/Rev.2 (2003).

[969] Sub-Com. on the Promotion and Protection of Human Rights, 55th sess. , Commentary on the Norms on the responsibilities of transnational corporations and other business enterprises with regard to human rights, E/CN.4/Sub.2/2003/38/Rev.2 of 26 August 2003.

[970] The UN Commission on Human Rights has ceased to exist and the UN Human Rights Council has been established by a General Assembly Resolution. A/RES/60/251, 3 April 2006.

[971] Backer, "Multinational Corporations, Transnational Law…", p. 330.

[972] David Kinley & Rachel Chambers, "The UN Human Rights Norms for Corporations: The Private Implications of Public International Law", **HRLR**, Vol. 6:3, 2006, p. 457.

and initiatives concerning the responsibility of TNCs for human rights violations.[973] It has been asserted that the driving force of the UN Sub-Commission in drafting the Norms was creating a legally binding and enforceable document on the TNCs.[974] However, one of the then members of the Working Group, David Weissbrodt, in his article with co-author Muria Kruger, summarizes the drafting history of the norms and concludes that the Norms were implemented as soft law because of the belief that international community was not yet ready for legally binding obligations imposed on the TNCs.[975]

This intention clarifies the language of the UN Norms, where the use of '*shall*' reflects the negative duties of corporations, *i.e.* not to violate human rights (to respect) and the use of '*should*' reflects the positive obligations of the States (to protect and fulfil).[976] Furthermore, the most important involvement of the UN Sub-Commission has been underlying and clarifying that the UN Norms, as a draft text, had no legal standing and that the Sub-Commission has no role to play as a monitoring organ in ensuring the implementation of the Norms.[977] As a consequence, the Norms departed from its initially designed legally binding character to a mere list of desires of the international community until the date it will be adopted.[978] Wallace and Martin-Ortega define the UN Norms as "*no more than 'well-intentioned' political rhetoric rather than as a 'hard' legal instrument giving rise to binding obligations*".[979] Nevertheless, Kinley and Chambers describe the Norms as a 'work in

---

[973] Report of the UN Commission on Human Rights, 60th sess., supp. no.3, E/2004/23, E/CN.4/2004/127, 15 March-23 April 2004, at 14 and 332 on Responsibilities of transnational corporations and related business enterprises with regard to human rights; Office of the High Commissioner for Human Rights Decision 2004/116, Responsibilities of Transnational Corporations and Related Business Enterprises With Regard to Human Rights, April 20th, 2004.

[974] Chirwa underlines that the Norms clearly differentiate from the approaches on corporate social responsibility as reflected in the other documents. Chirwa, "The Long March…", p. 96 and 98; Kinley & Chambers, **op. cit.**, pp. 465-466, 484.

[975] Weissbrodt & Kruger, "Human Rights Responsibilities of Business …", p. 324.

[976] Rosemann, "Business Human Rights Obligations - The 'Norms…", pp. 49, 58-59.

[977] Office of the High Commissioner for Human Rights Decision 2004/116, Responsibilities of Transnational Corporations and Related Business Enterprises With Regard to Human Rights, April 20, 2004. Accordingly, the paragraph in the UN Norms that authorized the Sub-Commission to monitor the compliance with the Norms has been removed. It was mentioned in the Commentary para. 16(b) that "*The Sub-Commission on the Promotion and Protection of Human Rights and its relevant working group should also monitor compliance with the Norms and developing best practices by receiving information from non-governmental organizations, unions, individuals and others, and then by allowing transnational corporations or other business enterprises an opportunity to respond."* Clapham, **Human Rights Obligations…",** p. 226.

[978] Backer, "Multinational Corporations, Transnational Law…", **op. cit.**, p. 331.

[979] Rebecca Wallace & Olga Martin-Ortega, "The UN Norms: A First Step to Universal Regulation of Transnational Corporations' Responsibilities for Human Rights?", **Dublin U. L. J.**, Vol. 26, 2004, p. 318.

progress' giving a possibility for its future adoption by the UN.[980] However Backer mentions that by the Spring of 2005 it became certain that the Norms would have no chance to be adopted as a legally binding document and it would not have any strong substantial provisions.[981]

In fact the idea of creating a binding document for corporations was welcomed by the public sector such as NGOs and academicians.[982] However, the business environment, including the International Chamber of Commerce (ICC) and the International Organisation of Employers (IOE) harshly criticised such an international effort. The main argument of the Joint View issued by the ICC and IOE was that the Draft Norms of the Sub-Commission "*will undermine human rights, the business sector of society, and the right to development*".[983] To summarize, the IOE and the ICC underlined in their joint views that the State is the duty-bearer of human rights and not the private actors; that most human rights require balancing decisions and the 'norms' and 'standards' undermine this need for balancing.[984] Moreover, according to the Joint View, the Sub-Commission on Human Rights has misused its authority by privatizing human rights and the vagueness of the UN Norms would cause arbitrariness resulting in the violation of the rights of private actors. States had concerns on the adoption of the UN Norms, as well. While developing states, except for Cuba, declared their overall disapproval for the Norms, the Western states expressly objected to any such attempt based on several grounds.[985]

Rosemann criticizes the wording of the UN Norms and asserts that it should be clearly put whether the Norms concern the procedural responsibilities of States, *i.e.* they codify existing international obligations for the States towards corporate

---

[980] Kinley & Chambers, **op. cit.**, p. 494. For a similar view see Pini Pavel Miretski & Sacha-Dominik Bachmann, "The UN Norms on the Responsibility of Transnational Corporations and Other Business Enterprises with Regard to Human Rights: A Requiem", **Dealin L. Rev.**, Vol. 17, No.1, 2012, pp. 34-35.

[981] Backer, "Multinational Corporations, Transnational Law…", p. 331. For another critique of the UN Norms see Deva, Surya. "UN's Human Rights Norms for Transnational Corporations and other Business Enterprises: An Imperfect Step in the Right Direction?", **ILSA J. Int'L & Comp. L.**, Vol. 10, 2004, pp. 493-523.

[982] Miretski & Bachmann, **op. cit.**, p. 27.

[983] Joint views of the IOE and ICC on the draft "Norms on the responsibilities of transnational corporations and other business enterprises with regard to human rights", p. 1.

[984] In their joint view, IOE and ICC mention that different types of trade-offs are needed for an increase in the enjoyment of human rights: 1. balancing between different categories of right-holders, 2. balancing between different categories of rights, 3. balancing over time, and 4. balancing in the context of some particular real-life situation. **ibid.**, p. 10.

[985] Miretski & Bachmann, **op. cit.**, pp. 30-34.

conduct and leaves regulatory discretion to national authorities, thus give no room for the UN to intervene in except for making recommendations, or they give birth to a new concept in international law, *i.e.* the procedural responsibilities of corporations.[986] For example, Backer argues that the UN Norms transform the status of TNCs from objects of international law to subjects of international law, which implies a shift of the regulatory power from States to non-state actors.[987] Backer argues that the UN Norms by imposing direct obligations on TNCs, transforms their "*character from private enterprises of limited objective to public actors with positive political obligations*" resembling to that of the States. Backer adds that in some areas TNCs become the primary actors and they operate for the attainment of the internationally-derived good. According to this, the Norms instead of taking a position on the superiority of international law over domestic law, and leaving any regulation to the will of the State actors, seek to impose the law from below by effecting the private law contracts, and thus, impose the Norms via the behaviour of corporations, which would in the end limit or at least guide the international and national legislatures. Though Backer does not deny the superiority of national statutes over private law contracts, he highlights that any change in the behaviour of globally large economic entities would create a consistent practice and custom, which would facilitate the effective implementation of the Norms by both State and non-state actors.[988]

The attempt to adopt the UN Norms is also seen as the disempowerment of state sovereignty and authority.[989] Nevertheless, following the adoption of the Norms by the UN Sub-Commission on the Protection and Promotion of Human Rights, the NGOs declared that they are going to use the Norms in their reports regarding the activities of TNCs;[990] and TNCs, as well, announced that they will road-test the Norms as a guide in their activities and use them as an indication of their

[986] Rosemann, "Business Human Rights Obligations - The 'Norms…", p. 59.
[987] This fact equally implies a trend towards transnational law, which blurs the already soft line between public international law and private law. Miretski & Bachmann, **op. cit.**, p. 39.
[988] Backer, "Multinational Corporations, Transnational Law…", pp. 371-377. A critique on the UN Norms concerns the allocation of responsibilities between corporations and States. According to this, since corporations are not democratic institutions established for public good, they cannot be held primarily and directly responsible under international law for human rights violations. Gatto, **op. cit.**, p. 86.
[989] Miretski & Bachmann, **op. cit.**, pp. 38-39.
[990] For example, see the welcoming statements of the Ethical Globalization Initiative and AI.

commitment to human rights.[991] In that sense, it could be commented that the UN Norms are an 'authoritative recommendation' directed towards the corporations and they could be also read as an authoritative interpretation of the UDHR and other documents on human rights.[992] As a consequence of this road-testing by NGOs and TNCs, the UN Norms may become a practice among the actors of international community.[993] As Rosemann concludes: *"On a national level, the Norms provide a lobbying tool in order to request a human rights regulation of the activities of corporations. Business initiatives, institutional investors, pension funds and accounting firms may use the Norms for risk management and ethical investment. Corporations themselves should use the Norms as a solid grounding for their activities and contractual partners. Finally, national legislation should use the Norms while interpreting general terms of national civil, tort and criminal law."*[994]

There are two different approaches on the legal character of the UN Norms. One of the views appraises the UN Norms as the first non-voluntary international document accepted with regard to the responsibilities of corporations at the international level.[995] According to this view, the UN Norms reflect and restate the already existing international legal principles.[996] For example, Rosemann argues that

---

[991] Clapham, **Human Rights Obligations…**, p. 235, 237; Weissbrodt & Kruger, "Human Rights Responsibilities of Business…", pp. 327-328; Kinley & Chambers, **op. cit.**, pp. 461-462, 485. Especially the member corporations of the Business Leaders Initiative on Human Rights (BLIHR), which operate in a wide range of industry sectors, have declared that they were going to road-test the UN Norms in 2004-2006. Moreover, some other companies, such as Vodafone, unilaterally declared that they are going to road-test the Norms.

[992] Karl-Heinz Moder, "Norms on the Responsibilities of Transnational Corporations and other Business Enterprises with regard to Human Rights", Background paper to the Friedrich Ebert Stiftung side event at the 60th sess. of the UN Commission on Human Rights on 25 March 2005, Palais des Nations, Geneva, http://www.fes-globalization.org/geneva/documents/UN_Norms/25March04_UN-Norms_Background.pdf, accessed on 27.02.2013.

[993] Kinley & Chambers, **op. cit.**, p. 485.

[994] Rosemann, "Business Human Rights Obligations - The 'Norms…", p. 62.

[995] Thus, different from the voluntary guidelines of the UN Global Compact, ILO Tripartite Declaration, and the OECD Guidelines, the Norms have a non-voluntary nature. However, opponents of this approach argue that if such a status were accepted, then the Norms should have regulated the conduct of TNCs by imposing new obligations on them, instead of restating the existing ones. Gatto, **op. cit.**, p. 81, 86. Weissbrodt & Kruger, "Human Rights Responsibilities of Business…", p. 318, 339.

[996] For example, Kinley and Chambers argue that currently there is no evidence of instant customary law in favour of imposing obligations on corporations, while some of the paragraphs of the UN Norms restate the already existing international law either as a treaty obligation or a norm of customary law. Such norms (*e.g.* para. 3 of the UN Norms) may be regarded as legally binding on not only States but also on corporations, while the UN Norms would still only have a declaratory effect. Nevertheless, they point out the possibility of UN Norms hardening into customary international law as evidence of a general practice accepted as law within the meaning of Article 38(1)(b) of the Statute of the ICJ. Moreover, a unilateral declaration by States concerning their commitment to the UN Norms may result in the acquisition of a legally binding character of the Norms, as a consequence of the estoppel doctrine, on the part of that State making such a commitment. In any case, Kinley and Chambers admit that the most practical way of effectively enforcing the UN Norms, would be States'

the UN Norms may be defined as a clarification and identification of States' obligations regarding the relationship between business and human rights, while they also imply a need for the creation of direct legal obligations imposed on corporations by the international community.[997] Thus, they do not merely have a political, social, economic and moral standing, but also have a practical binding character and a potential of acquiring independent legal standing.[998] Likewise, Weissbrodt and Kruger stress that the UN Norms embrace and integrate already existing web of international obligations, principles and standards directly or indirectly applicable to corporate conduct in one authoritative document.[999] Thus, although technically the UN Norms are treated as soft law,[1000] they also have their legal authority derived from the positive legal sources of international law in the sense of Article 38 of the Statute of the ICJ.[1001] Adoption of the Norms by the UN as a more authoritative document would increase the possibility of it becoming legally binding in the future.[1002] Chirwa, too, asserts that the UN Norms already include both binding and non-binding standards on the issue of corporate responsibility.[1003] Gatto also agrees that the UN Norms codify the existing human rights obligations for the TNCs.[1004] Gatto argues that the UN Norms do not create an exhaustive list of obligations and they are open to any evolutionary progress in terms of their legal status, content and mechanisms of enforcement.[1005] Clapham mentions that the UN Norms reflect an evolution towards a normative framework of human rights obligations for corporations and they are currently referred to as interpretative tools.[1006] Finally, Steinhardt comments that even though the UN Norms are actually 'overly progressive' of international law and remain as *lex feranda* in the sense that they

---

taking initiative for obliging corporations to act in line with the UN Norms under their domestic law systems. The ATCA could serve as an example for this, even though its implications are still weak due to the corporate lobby's opposition. Kinley & Chambers, **op. cit.**, pp. 482-485, 495-497. See also de Brabandere, **op. cit.**, p. 275.

[997] Rosemann notes that the references in the fourth paragraph of the Preamble of the UN Norms prove that the human rights obligations of corporations generally originate from international law documents as well as the reports, documents and statements of NGOs, such as the consumer initiatives and corporations themselves often through the acceptance of voluntary codes of conduct. Rosemann, "Business Human Rights Obligations - The 'Norms…", pp. 48-49.

[998] **ibid.,** p. 56 and 60. Rosemann comments that the hybrid character of human rights obligations, *i.e.* comprising legal, political and moral imperative, should be recognized.

[999] Weissbrodt & Kruger "Human Rights Responsibilities of Business…", p. 328, 335.

[1000] Kinley & Chambers, **op. cit.**, p. 494.

[1001] Weissbrodt & Kruger, "Human Rights Responsibilities of Business…", p. 340; Chirwa, "The Long March…", p. 94.

[1002] Kinley, & Chambers, **op. cit.**, p. 487.

[1003] Chirwa, "The Long March…", pp. 93-94.

[1004] Gatto, **op. cit.**, p. 82, 86.

[1005] **ibid..**

[1006] Clapham, **Human Rights Obligations…**, p. 237.

oblige TNCs to respect and promote the second generation rights, they demonstrate the evolution of international law in the field.[1007]

It should be noted that the UN Norms differ from the other international documents concerning human rights responsibilities of corporations in various aspects. Firstly, the rights and obligations covered by the UN Norms are broader and more concrete, precise and legally framed than the ones contained in the other documents, because the aim in drafting the UN Norms was to create a comprehensive single document covering all relevant duties and obligations of corporations, including the duties for the protection of first and second generation rights, as well as the right to development and other internationally recognized rights under humanitarian law, refugee law, labour law, environment law, biosafety and other legal issues, such as determining ethical criteria for drug promotion, prevention of bribery and combatting transnational organized crime.[1008] Accordingly, the UN Norms embrace all categories and kinds of human rights, regardless of existence of a universal recognition or level of protection afforded under national and/or international systems. As a consequence, once the UN Norms become legally effective for TNCs, they would be under an obligation to respect all these rights in the territories they operate, even if their home states and/or host states have not ratified a treaty, which recognizes and protects a right at stake. While, the critiques regarding the vagueness and open-endedness of the UN Norms are still valid,[1009] this is much of the same situation of the provisions in other human rights documents and is the consequence of a quest for consensus in the international arena.[1010] Nevertheless, it is obvious that the obligations imposed by the ICESCR on the States Parties are more concrete and onerous than that of the obligations imposed on corporations by the UN Norms concerning the second generation rights.[1011] In any

[1007] Steinhardt, "Corporate Responsibility…", p. 206.
[1008] Chirwa, "The Long March…", p. 96; Rosemann, "Business Human Rights Obligations - The 'Norms…", p. 57.
[1009] Wallace & Martin-Ortega, "The UN Norms…", pp. 310-311.
[1010] It should be noted here that unlike the OECD Guidelines, the UN Norms are the outcome of a broad-based international treaty-making body specialized in human rights and representing many States. Kinley & Chambers, **op. cit.**, p. 466, 484.
[1011] *cf.* the responsibilities of States mentioned under the UN Norms para. 1 and the responsibilities of corporations mentioned under para. 12. The UN Norms underline that corporations have an obligation to respect and contribute to the realization of economic, social and cultural rights, as well as the civil and political rights. The Norms particularly refer to the rights such as the right to development, adequate food and drinking water, the highest attainable standard of physical and mental health, adequate housing, privacy, education, freedom of thought, conscience, and religion and freedom of opinion and expression. Report of the Sub-Commission on the Promotion and Protection of Human

case, the UN Norms could be used as a point of reference in the progressive development of direct human rights obligations for TNCs.[1012]

Secondly, other documents on business conduct expressly refer only to the corporations operating 'transnationally', while the UN Norms cover the activities of 'other business enterprises' operating locally, as well.[1013] Moreover, this catch-all phrase demonstrates that a new type of liability is introduced under the UN Norms, according to which corporations could be held liable for being complicit in serious human rights abuses.[1014] However, it remains problematic if they could still be held liable for the acts of the corporations that they do not have an actual contractual relationship.[1015]

Finally, the UN Norms, unlike the other documents, expressly seek to expand the implementation and enforcement of the human rights obligations on non-state actors.[1016] Human rights documents traditionally focus on the rights, right-holders or various types of rights violations, while the Norms prefer to emphasize the duty-bearer, *i.e.* the duties of corporations to respect and protect particular rights.[1017] The Norms attempt to answer the criticisms concerning the lack of effective implementation mechanisms and envisage a monitoring system referring to both internal self-regulation and external monitoring.[1018]

The UN Norms consist of nine Sections namely: General obligations (1), Right to equal opportunity and non-discriminatory treatment (2), Right to security of

---

Rights, Report of the UN HCHR, on the Responsibilities of Transnational Corporations and Related Business Enterprises with Regard to Human Rights, UN Document E/CN/4/2005/91 at 12; Kinley & Chambers, **op. cit.**, p. 475.

[1012] Gatto, **op. cit.**, p. 88.

[1013] UN Norms para. 21 defines the term 'other business enterprises'. Weissbrodt & Kruger, "Norms on the Responsibilities…", pp. 909-210. However, I should note that other documents also refer to the duties of local enterprises, even though they do not directly express and oblige these domestic structures in every provision, separately and independent of the acts of the parent company. For example see OECD Guidelines, I. Concepts and Principles, para.4; ILO Declaration, paras. 6 and 11; Draft UN Code of Conduct, para. 4.

[1014] UN Norms, para. 3 underlines that TNCs and other business enterprises shall not engage in nor benefit from acts that constitute international crimes.

[1015] Kinley and Chambers give the example of human rights abuses perpetrated by the supplier of a TNC's supplier. In other words, could we hold a TNC liable, not for the acts of its supplier, with which it has a contractual relationship that is in accordance with the UN Norms, but for the acts of the supplier's supplier from another country? This question needs to be answered for a real solution to the global problem of corporate liability. Kinley & Chambers, **op. cit.**, p. 455.

[1016] **ibid.**, pp. 452-454. See paras. 15-19 of the UN Norms.

[1017] **ibid.**, p. 452.

[1018] Participation of the stakeholders is also encouraged with regard to the implementation of the UN Norms. Deva, **op. cit.**, pp. 513-522.

persons (3-4), Rights of workers (5-9), Respect for national sovereignty and human rights (10-12), Obligations with regard to consumer protection (13), Obligations with regard to environmental protection (14), General provisions of implementation (15-19), and Definitions (20-23). Accordingly, corporations have six categories of specific duties along with a general obligation to promote, secure the fulfilment of, respect, ensure respect of and protect the internationally recognized rights.

Implementation Mechanisms under the UN Norms

Backer in his article flashes on the fact that the general provisions on implementation (paras. 15-19) reflect the intent and aim of the UN Norms better than the substantive provisions.[1019] For example, the UN Norms require corporations to periodically report on the implementation of the Norms and to take effective measures in order to improve continually and at least promptly implementing the protections set forth in the Norms. Additionally, TNCs are under a duty to duly inform everyone whose health, safety or environment might be endangered by their activities.[1020] Finally, if any damage occurs as a result of the operations of a corporation, the corporation shall provide prompt, effective and adequate reparation, restitution, compensation and rehabilitation in accordance with the judgments of the international and national courts, which shall apply the UN Norms in determining the damages and the responsibility of the corporation.[1021]

Another mechanism of implementation provided under the UN Norms is the periodic monitoring, which might be conducted as self-assessments or be made by transparent and independent outside national or international consultants and in cooperation with the NGOs, trade unions or governments.[1022] It is also underlined that input from both the stakeholders and the TNC itself shall be taken into account during the monitoring procedure.[1023] This has been interpreted as an attempt to introduce a model of stakeholder primacy, instead of a model based on shareholder primacy.[1024] In addition to that, as Clapham mentions, the UN Norms may provide a

[1019] He defines the situation as "the devil in the small print". Backer, "Multinational Corporations, Transnational Law…", p. 334.
[1020] Commentary para. 15 (e).
[1021] UN Norms, para. 18.
[1022] See also Gatto, **op. cit.**, p. 85.
[1023] para.16 of the UN Norms.
[1024] Backer, "Multinational Corporations, Transnational Law…", p. 358.

common language, which would facilitate the communication between the shareholders and stakeholders.[1025]

Third mechanism envisaged for the implementation of the UN Norms is the impact assessment, which can be made by either the company itself and/or independent experts as to be kept confidential or to be publicly announced. Although environmental impact assessments are well-known, there are many other types of such implementation tools like social impact assessment, human rights impact assessment and political impact assessments.

Finally, international structures may be used as follow-up bodies for a better implementation of the UN Norms. For example, in the Commentary to the UN Norms, creation of additional reporting mechanisms has been mentioned. Furthermore, the UN and its specialized agencies have been called to monitor the compliance of corporations, which they will enter into relationships by way of purchasing their products or services. It is added that the Human Rights Council (former Commission on Human Rights) may also monitor the compliance of corporations with the human rights standards in its country and thematic reports. The Council may also consider establishing a mechanism to receive information on human rights abuses perpetrated by corporations and to take prompt measures triggering the compliance of TNCs with the UN Norms. The UN and its bodies are also invited to develop and adopt additional techniques in collaboration with the NGOs for the effective implementation and follow-up of the compliance of MNCs with the UN Norms.[1026]

Weissbrodt and Kruger add that the UN Norms may be used by other intergovernmental organizations such as ILO, OECD, WTO, NAFTA, EU or Council of Europe.[1027] The organs of these intergovernmental organizations in their resolutions, decisions, recommendations or comments may refer to the UN Norms as a soft law instrument.[1028] For example, the UN Norms may be referred to by the

[1025] Clapham, Andrew. "*Human Rights Obligations of Non-State Actors*", OUP, 2006, p. 237. For example, as mentioned in the Commentary to the UN Norms para. 16(c), trade unions and NGOs are encouraged to use the Norms as a basis of their negotiating agreements conducted with TNCs.
[1026] Commentary to the UN Norms, para 16 (b).
[1027] Weissbrodt & Kruger, "Norms on the Responsibilities…", pp. 918-920.
[1028] Weissbrodt & Kruger, "Human Rights Responsibilities of Business…", p. 345.

OECD in the context of the work of the National Contact Points.[1029] In addition, NGOs have been using the UN Norms and working together with the companies in order to encourage them for the incorporation of the Norms into their codes of conduct.[1030] The UN Norms also have been used as a tool for lobbying governments in search of a way for their implementation and monitoring in domestic law systems.[1031] Legal practitioners, too, have facilitated the use of the UN Norms in the litigation processes.[1032] This wide range use of the Norms in the international forums or by the international treaty bodies may lead them to gain legal authority, or an 'indirectly binding character', in the interpretation of existing obligations under international law.[1033]

3.3.3.4. 2011 UN Guiding Principles on Business and Human Rights

On 2005, the HRC requested the Secretary-General to appoint a special representative on the issue of human rights and transnational corporations and other business enterprises, who shall submit a report to the Council, based on the consultation process with all stakeholders, such as the Global Compact, ILO, UNCTAD, UNEP, OECD, TNCs, NGOs and all other affected parties.[1034] Accordingly, John Gerard Ruggie, who is a professor of Harvard University and one of the drafters of the Global Compact, has been appointed as the special representative of Kofi Annan.[1035] In 2007, the mandate of the Special Representative

---

[1029] Weissbrodt and Kruger add that the UN Norms could be referred to *"as a basis for fact-finding or interpreting the NAFTA standards*" by the two mechanisms of NAFTA, *i.e.* the North American Agreement on Environmental Cooperation and the Agreement on Labour Cooperation. **ibid.**, pp. 345-346.

[1030] Kinley & Chambers, **op. cit.**, pp. 461-462.

[1031] For example, AI has been referring to the UN Norms in its reports on the conduct of corporations. Kinley & Chambers, **op. cit.**, pp. 461-462.

[1032] For detailed information see Thomas McCarthy, "Business and Human Rights: What Do the New UN Norms Mean for the Business Lawyer", International Legal Practitioner, Vol. 28, 2003, p. 73, David Kinley, "Lawyers, Corporations and International Human Rights Law', Company Lawyer, Vol. 25, 2004, pp. 301-302; Halina Ward, "The Interface Between Globalisation, Corporate Responsibility, and the Legal Profession", **U. St Thomas L.J.**, Vol. 1, 2004, p. 813; and Richard Meeran, "Multinational Litigation as a Weapon in Protecting Economic and Social Rights', in Squires & Langford & Thiele (eds), **The Road to A Remedy: Current Issues in Litigation of Economic, Social and Cultural Rights,** Sydney: University of New South Wales Press, 2006, p. 183 all cited in Kinley & Chambers, **op. cit.**, p. 462, f.n. 61.

[1033] Kinley & Chambers, **op. cit.**, p. 485.

[1034] HRC/2005/69, 20.04.2005, Human rights and transnational corporations and other business enterprises.

[1035] Press release, Secretary-General appoints John Ruggie of United States Special Representative on issue of human rights, transnational corporations, other business enterprises, 28.07.2005, http://www.un.org/News/Press/docs/2005/sga934.doc.htm, accessed on 15.09.2014.

has been extended for a year,[1036] which has resulted in the recommendation of Prof. Ruggie to the Human Rights Council for supporting the "Protect, Respect and Remedy Framework". [1037] Human Rights Council, acknowledging Ruggie's recommendation, extended his mandate on the issue of human rights and transnational corporations and other business enterprises for a period of three years.[1038]

In June 2011, the Human Rights Council established a Working Group on the issue of human rights and transnational corporations and other business enterprises for the promotion and effective and comprehensive dissemination and implementation of Ruggie's "Protect, Respect and Remedy Framework".[1039] By the same Resolution, Human Rights Council also established a Forum on Business and Human Rights, which will meet annually for two days in order to promote dialogue and cooperation between the UN bodies, Governments, NGOs, national human rights institutions, TNCs, labour unions, academics and other interested parties.[1040]

On June 16th, 2011, UN Human Rights Council endorsed the UN Guiding Principles on Business and Human Rights (hereinafter the UN Guiding Principles) in order to provide the principles for the implementation of Ruggie's Protect, Respect and Remedy Framework.[1041] The UN Guiding Principles consist of three pillars, which are directed at both States and every company regardless of its size and nature, without limiting or undermining the existing obligations of States to protect, respect and fulfil human rights. It is expressly mentioned in the UN Guiding Principles that

---

[1036] A/HRC/RES/5/1, 18 June 2007, Institution Building of the UN Human Rights Council, App.I.
[1037] A/HRC/8/5, 7 April 2008, Promotion and Protection of All Human Rights, Civil, Political, Economic, Social and Cultural Rights, Including the Right to Development; Protect, Respect and Remedy: a Framework for Business and Human Rights, Report of the Special Representative on the issue of human rights and transnational corporations and other business enterprises.
[1038] A/HRC/RES/8/7, 18/06/2008, Mandate of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises.
[1039] A/HRC/17/4, 06.07.2011, Human rights and transnational corporations and other business enterprises.
[1040] **ibid.** Later on, the HRC, decided to continue to hold the issue under consideration in 2012. A/HRC/RES/21/5, 27/09/2012, Contribution of the UN system as a whole to the advancement of the business and human rights agenda and the dissemination and implementation of the Guiding Principles on Business and Human Rights.
[1041] As Ruggie explained in his book, "*the Framework addresses what should be done; the Guiding Principles how to do it.*" In other words, while the former draws the foundational principles, the latter puts the operational rules on implementation. John G Ruggie, **Just Business: Multinational Corporations and Human Rights**, Norton & Company Inc., New York, 2013, p. 81.

they impose binding obligations neither on States nor on TNCs.[1042] In fact, under Ruggie's framework, States' duty to protect implies a legal obligation, while the corporate responsibility to respect has a semi-legal or moral obligation character.[1043] Ruggie, by the principle-based policy framework, aims to guide the companies in their conducts for respecting human rights and fill the 'governance gaps' emerged as a consequence of economic globalization and neo-liberalization.[1044] In other words, Ruggie, instead of proposing a new international legal tool, encourages governments, business and the civil society to act in cooperation with each other having diverse responsibilities for a common aim: protecting human rights against abuses by corporations.[1045]

Kamatali criticizes the assertion in Ruggie's first interim report dated 2006[1046] that currently there is no international human rights document imposing direct legal obligations on corporations. Kammatali mentions that this statement is not the 'final and most authoritative voice' on the subject and Ruggie's Framework is far from building a meaningful consensus of all stakeholders and setting an authoritative global standard on the relationship between business and human rights.[1047] Jägers, too, reviews the final outcome of the UN Guiding Principles and comments that Ruggie closed the door to the evolution of international law towards the acceptance of direct human rights obligations for corporations and this is a missed opportunity

[1042] Guiding Principles on Business and Human Rights, Introduction to Guiding Principles, General Principles.

[1043] However, positive steps that should be taken by corporations as a part of their responsibility to respect have also been stated under Ruggie's Framework. For example, organizing training programmes for workers in order to prevent discrimination in the work-place is a positive step that may be taken by corporations in order to fulfil their responsibility to respect. Lambooy, **op. cit.**, pp. 431-432.

[1044] **ibid.**, pp. 430-431.

[1045] **ibid.** Lambooy draws attention to the fact that the three pillared framework also reflects a model of 'complementary governance'.

[1046] Interim Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises (hereinafter 2006 Interim Report), UN Doc. E/CN.4/2006/97, 22 February 2006.

[1047] Kamatali, referring to Cassese, Clapham and Tomuschat, mentions that States may create international obligations for non-state actors by becoming party to an international treaty. In addition, horizontal violations of human rights and the responsibility of non-state actors for such violations already exist under international law, provided that non-state actors "*qualify as acceptable parties in national and international society*". Antonio Cassese, "The Status of Rebels Under the 1977 Geneva Protocol on Non-International Armed Conflicts", **ICLQ**, Vol. 30, 1981, pp. 416-439; Clapham, **Human Rights in the Private Sphere**, pp. 89-133; Andrew Clapham, "Human Rights Obligations of Non-State Actors in Conflict Situations", **Int'L Rev. Red Cross**, Vol. 88, No. 863, 2006, p. 503 all referred to by Kamatali, **op. cit.**, pp. 440, 458-459. *See* also 2006 Interim Report of Ruggie.

for determining a set of concrete human rights duties for business.[1048] According to him, even if the approach adopted by Ruggie was a 'principled pragmatism', the Special Representative was nevertheless stayed under the virtual pressure imposed by the fact that international actors -as a consequence of their strong accent on corporate social responsibility- rejected the adoption of the UN Norms.[1049] The notion of 'principled pragmatism' is defined by Ruggie himself in his first interim report as "*an unflinching commitment to the principle of strengthening the promotion and protection of human rights as it relates to business, coupled with a pragmatic attachment to what works best in creating change where it matters most - in the daily lives of people.*"[1050] Ruggie, in his book dated 2013, admitted that by adopting the principled pragmatism approach he wanted to avoid lengthy intergovernmental negotiations over a legal text, which he finds inconclusive and counterproductive, and that he aimed to formulate a politically authoritative document based on policy requirements.[1051]

In an article following his second report of 2008,[1052] Ruggie explained the reasons for his opposition to a legally binding international treaty imposing direct obligations on the corporations.[1053] According to Ruggie, apart from the implementation and enforcement problems, international treaty-making is quite a long process and is inadequate to urgently response to the needs of the global society for preventing human rights abuses perpetrated by corporations.[1054] Additionally, such a process may negatively affect the efforts of bringing the business standards in

---

[1048] Nevertheless, he concludes that the voluntary character of the Guiding Principles may evolve into an obligatory legal framework if the business entities incorporate the Principles into their contracts with the sub-contractors. Nicola Jägers, "UN Guiding Principles on Business and Human Rights: Making Headway towards Real Corporate Accountability?", **NQHR**, Vol. 29/2, 2011, pp. 160-161.
[1049] **ibid.**, p. 160.
[1050] 2006 Interim Report of Ruggie.
[1051] Ruggie, "Just Business…", pp. xlv-xlvi.
[1052] Protect, Respect and Remedy: a Framework for Business and Human Rights Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, A/HRC/8/5, 7 April 2008. (hereinafter 2008 Report – Ruggie Framework)
[1053] John Ruggie, "Treaty road not travelled", Ethical Corporation, 6 May 2008, p. 42, http://www.hks.harvard.edu/m-rcbg/news/ruggie/Pages%20from%20ECM%20May_FINAL_JohnRuggie_may%2010.pdf, accessed on 12.10.2012.
[1054] **ibid.** Ruggie adds that initiating a treaty making process would be inserted as an excuse for not ameliorating the existing national laws by the States. Moreover, should a text of a treaty accepted, this would probably reflect the lowest standards concerning the issue on which all parties could agree upon. Finally, he comments that even if the parties agree upon a text of a multilateral treaty, if it would not be ratified in a short period of time, it would lose legitimacy.

line with the human rights principles.[1055] Instead of concluding a multilateral treaty on business and human rights relations, he suggests that host states should enforce the existing human rights treaties as a part of their duty to protect, and the home states as well for their part take the necessary measures for preventing human rights violations in accordance with the principle of extraterritoriality, without infringing the principle of non-interference in domestic affairs.[1056] Even though it could not be foreseen for the near-future, other possibilities include the establishment of a specialized international court for companies or a special treaty body that would deal with the allegations of human rights violations perpetrated by corporations.[1057]

John Ruggie, in his final report submitted to the then UN Commission of Human Rights, mentioned that initially there was a five-fold categorization of duties in the draft framework: 1. Promote, 2. secure the fulfilment of, 3. respect, 4. ensure respect of, and 5. protect human rights.[1058] Afterwards, Ruggie clarified that the three-fold categorization, *i.e.* protect, respect and remedy, has been accepted by the Human Rights Council as an authoritative focal point, which frames the relationship between human rights and business as recommended by the Special Representative in March 2011.[1059]

In the Guiding Principles, each of these categories of duties is examined based on both foundational and operational principles. Each pillar exists independently of each other, and yet, they should be read as complementary of one another since they reflect *"an inter-related and dynamic system of preventive and remedial measures"*.[1060] The Guiding Principles do not impose new international obligations on States and corporations, rather they restate the existing obligations in a single and coherent international document. The accompanying commentaries of the Principles serve as an important tool for their implementation, while they also highlight the deficiencies and fallacies in the international legal system concerning corporate human rights abuses. Accordingly, they serve as an invaluable tool to be benefitted

[1055] **ibid.**
[1056] **ibid.**
[1057] **ibid.**
[1058] Ruggie, in his report, also referred to the proposals on the imposition of direct duties on TNCs, which were not accepted by the then Commission of Human Rights, due to the reluctance of the Governments and the controversies with regard to the relationship between business and human rights. Guiding Principles on Business and Human Rights, Introduction to Guiding Principles, para. 5.
[1059] **ibid.**, para. 2.
[1060] **ibid.**, para. 6.

from in developing legal rules concerning human rights and business relationships, too.[1061]

Corporate responsibility to respect human rights, which is a reflection of the do-no-harm principle,[1062] includes the duty to refrain from causing or contributing to the infringement of the rights of others on the one hand,[1063] and the duty to address the adverse impacts of their actions or omissions on human rights on the other hand.[1064] Additionally, corporations are responsible for preventing or mitigating such adverse impacts "*that are directly linked to their operations, products or services by their business relationships,*[1065] *even if they have not contributed to those impacts".*[1066] Jägers mentions that scholars welcomed the second pillar of the Framework on the responsibility to respect (RtoR), which covers both the responsibilities of parent companies and of their supply chain, including all the affiliates and subsidiaries. However, due to the principle of separation of legal entities and the principle of limited liability, the applicability of the corporate RtoR would depend on the willingness of each company.[1067] Thus, Jägers comments that the weakness of the second pillar could have been compensated by strengthening the first pillar on the duty of States to protect human rights by a formulation requiring the home state to extraterritorially regulate the operations of their nationals abroad.[1068]

[1061] **ibid.**, paras. 14-15.
[1062] Jägers, **op. cit.**, p. 162.
[1063] For example, corporations should refrain from using unnecessary lethal force against demonstrators. Clapham, **Human Rights Obligations…**, p. 230.
[1064] The Commentary expressly mentions that the word 'activity' includes both actions and omissions of business enterprises. Guiding Principles on Business and Human Rights, Annex,II,A.11 and 13.
[1065] "*Business relationships are understood to include relationships with business partners, entities in its value chain, and any other non-State or State entity directly linked to its business operations, products or services".* **ibid.**, Annex,II,A.13 Commentary.
[1066] 2011 Ruggie Report, Guiding Principles on Business and Human Rights, Annex,II,A.13.
[1067] Jägers, "UN Guiding Principles…"**.**, p. 162.
[1068] **ibid.**, pp. 161-162. Jägers, in his article, criticizes that the Guiding Principles A.1.2 and its Commentary for devaluing the duties of States to protect human rights. He underlines that the obligation of States to protect human rights under ICESCR involves the prevention of infringements by third parties abroad, on the condition that the measures adopted do not amount to a breach of the principle of non-interfernece with the domestic affairs of the host state. Moreover, Jägers criticizes the misleading wordings in the commentary and highlights that the commentary is wrong in the sense that if the State was involved in or in support of the operations of a corporation, than the operation in violation of human rights would be attributable to that States. Accordingly, the State would be legally responsible under international law. In other words, the States should not only encourage corporations to respect human rights, but also they themselves shall act in line with their obligation to respect human rights and not to support or be involved in any activity that have the potential of violating human rights. The Commentary stipulates that "*At present States are not generally required under international human rights law to regulate the extraterritorial activities of businesses domiciled in*

As expressly referred to in the Guiding Principles, the term 'human rights' includes, *at minimum,* the rights and freedoms and the principles recognized in the UDHR, ICCPR, ICESCR and the ILO Declaration on Fundamental Principles and Rights at Work. In other words, corporations shall respect all human rights and freedoms authoritatively listed in the International Bill of Human Rights and the ILO Declaration, and the periodic reviews should include an assessment on each of the rights at stake. Nevertheless, depending on the particular sector or industry of operation of a company, the reports may focus on the specific rights at risk and even involve elaborations on the rights of indigenous peoples, women, minorities, children, persons with disabilities, and migrant workers or the respect for the humanitarian law principles in the conflict-affected areas.[1069]

Moreover, while all business enterprises are fully and equally responsible for respecting human rights regardless of their size, sector, operational context, ownership and structure, the degree of responsibility and the proportionality of the means that they should use to meet that responsibility may vary depending on these factors.[1070] Accordingly, in order to meet its responsibility to respect human rights, each enterprise should adopt a corporate policy,[1071] a human rights due diligence process and a remedy process depending on its own features.[1072]

The principle of human rights due diligence has an important role to play in holding corporations responsible for human rights abuses. This process requires corporations to periodically and continuingly assess, identify, prevent, mitigate, manage and account the actual and potential adverse impacts of their activities from the very beginning of their operations. This is called as the human rights impact assessment (HRIA), which is a different process than the other risk assessment

---

their territory and/or jurisdiction." 2011 Ruggie Report, Guiding Principles on Business and Human Rights, Annex, I,A.2 and its Commentary.

[1069] In the Commentary, it is stressed that the responsibility to respect human rights and the issue of legal liability are two different concepts and the latter is largely dependent on the national laws and policies. Guiding Principles on Business and Human Rights, Annex,II,A.12 and its Commentary.

[1070] Nevertheless, in the Commentary to the Guidelines it is recognized that the scale, scope and irremediable character of the adverse impacts caused by small or medium-sized enterprises may require large-scale measures regardless of the size of the enterprise. Guiding Principles on Business and Human Rights, Annex,II,A.14 and its Commentary.

[1071] In the operational principles, it is mentioned that the statement of policy of an enterprise should be approved at the most senior level and must reflect the responsibilities, commitments and expectations of the corporation including its workers and business partners. The statement should also be available not only to the internal and external workers and partners, but also to the public. Guiding Principles on Business and Human Rights, Annex,II,B.16.

[1072] Guiding Principles on Business and Human Rights, Annex,II,A.15.

processes such as the environmental impact assessment or social impact assessment. Lambooy explains that there are several reasons to hold costly due diligence investigations varying from legal obligations to commercial and practical drives for the companies, such as protecting their reputation.[1073] She argues that human rights impact assessments may be included in the standard corporate due diligence investigations processes.[1074] In doing so, multidisciplinary teams including human rights lawyers and experts may be involved in the assessment procedures concerning both the factual investigation and the desk research.[1075]

Human rights impact assessments should include an elaboration on the adverse impacts of corporate activities and operations on every internationally recognized human right and should especially focus on the rights that are under risk due to the area of operation of that specific company.[1076] Credible and independent human rights experts and relevant internal and external stakeholders, especially the groups that may potentially be adversely affected by the corporate conduct should be consulted with during the process.[1077] Corporations, depending on their size, nature and context of their activities and the severity of actual or potential adverse human rights impacts of their operations, products or services, should take appropriate preventive and remedial measures that are capable of ceasing or preventing the adverse impact that may have been caused or contributed to as a consequence of their business relationships.[1078] Accordingly, corporations may be considered as acting with due diligence by effectively integrating the human rights impact assessments into their operations.

[1073] Lambooy, **op. cit.**, p. 410 et seq.
[1074] **ibid.**, p. 414.
[1075] **ibid.**, pp. 409-410, 415, 442. For example, corruption risk assessment should be included in the due diligence investigations. Additionally, the production process and the relationship with the subcontractors should be carefully examined.
[1076] 2011 Ruggie Report, Guiding Principles on Business and Human Rights, Annex,II,B.18 and its Commentary.
[1077] **ibid.,** Annex,II,B.18,21 and its Commentary. To add, special attention should be paid to the potential and actual risks on the rights of vulnerable groups. Then, the human rights impact assessments should be communicated to all the affected stakeholders without infringing the requirements of commercial confidentiality. As mentioned in the Commentary, the communications may be in different forms such as "*in-person meetings, online dialogues, consultation with affected stakeholders, and formal public reports*". Nevertheless, it is highlighted that the formal reporting procedure is the most required when severe human rights impacts are at issue.
[1078] **ibid.,** Annex,II,B.17,18,19,24 and Commentary. Moreover, if there are more than one adverse human rights impact caused or contributed to by the corporation and it is necessary to prioritize one of them, the priority should be given to the most severe impact for preventing or mitigating it.

Additionally, corporations should refrain from any act or omission that would make them complicit in a potential or actual adverse human rights consequence. In the Commentary, the concept of complicity is examined in two-folds, one as a legal concept, and two as a non-legal concept. Non-legally speaking, complicity is regarded as any benefit acquired by the corporation as a result of human rights violations perpetrated by a third party.[1079] In civil and criminal law terms, complicity means contributing to a harm (or a human rights abuse) by aiding and abetting to the commission of an act (or a crime), *i.e.* 'knowingly providing practical assistance or encouragement that has a substantial effect on the commission of [an act or] a crime'.[1080] Thus, corporations are required to take every reasonable measure to refrain from engaging in activities that may amount to a contribution to the human rights abuses. However, even such a due diligence may not be sufficient to fully preclude liability for causing or being complicit in that human rights abuse.[1081]

Furthermore, the Guiding Principles provide that even if a corporation cannot be considered as contributing to harm, but has 'leverage' over another corporation, which is the principal violator of a right, then that corporation shall be considered as being directly linked to the human rights abuse and not acting with due diligence to take preventive and remedial measures.[1082]

Finally, under the second pillar of the UN Guiding Principles, corporations are required to comply with the national legislations and to respect internationally recognized human rights to the greatest extent possible by paying particular attention to the rights that are most likely to be affected by the corporate activities. Corporations should consider their duty to respect human rights as a matter of legal compliance, especially where gross human rights violations may be at issue.[1083] The corporations and their workers including the board of directors, operating in the conflict-affected areas are under an increased risk of being complicit in human rights abuses; thus, they should act in a more due diligent way in order to preclude any civil or criminal claim that may be brought before the national and/or international judicial organs. Additionally, they should ensure that they are not exacerbating the existing situation in such risky areas. Consultation with the external experts such as

[1079] **ibid.**, Annex,II,B.17.
[1080] **ibid.**
[1081] **ibid.,** and its Commentary.
[1082] **ibid.,** Annex,II,B.19 and its Commentary.
[1083] **ibid.,** Annex,II,B.23 and its Commentary.

the civil society, national human rights institutions and other relevant multi-stakeholder initiatives may be a helpful tool for preventing any adverse human rights impact in these areas.[1084]

Third pillar of the UN Guiding Principles concerns "*access to appropriate and effective judicial and non-judicial remedies*". As previously mentioned, the three pillars in the Guiding Principles should be read as being complementary to each other. In fact, it is intrinsic in the human rights systems that without an effective and accessible remedy for the victims of human rights violations, neither the duty of States to protect, nor the corporate responsibility to respect could be realized. Thus, last pillar of the Guiding Principles focuses on the judicial and non-judicial State-based and non-State-based remedial measures. Additionally, State-based and operational level mechanisms of grievance could be supplemented by enhanced mechanisms of grievance at the international and/or regional level and by collaborative initiatives.[1085]

States are under an obligation to ensure remedy as a part of their duty to protect.[1086] State-based grievance mechanisms may be judicial, administrative, legislative mechanisms or the remedy may be ensured through any other appropriate means that is impartial and independent regardless of the characteristics of the institution that provides the remedy. In other words, whether administered by a State agency or by an independent statutory or constitutional institution, the procedures assessing the remedial measures should be impartial and free from any political or economic influence.[1087] With regard to State-based judicial mechanisms, it is underlined that the States should ensure that access to effective remedy is not barred

[1084] **ibid.**
[1085] **ibid.**, Annex,III,A.25 and its Commentary.
[1086] **ibid.** "*Remedy may include apologies, restitution, rehabilitation, financial or non-financial compensation and punitive sanctions (whether criminal or administrative, such as fines), as well as the prevention of harm through, for example, injunctions or guarantees of non-repetition.*"
[1087] **ibid.** In the commentary, apart from the judicial mechanisms, other institutions such as National Human Rights Institutions, NCPs of the OECD Guidelines, ombudspersons and Government-run compliant offices are given as examples.

by any judicial[1088] or extrajudicial impediments such as corruption or political or economic pressures.[1089]

Additionally, it is stressed that even if the judicial mechanisms are sufficiently effective and accessible, the States should provide State-based non-judicial grievance mechanisms as complementary and supplementary mechanisms to those judicial mechanisms.[1090] Jägers criticizes the emphasis made on the non-judicial mechanisms for the remedy of human rights violations, but he also welcomes the 'effectiveness' criteria put by Ruggie in his report.[1091] In the Commentary, mediation-based, adjudicative or other culturally-appropriate and rights-compatible processes are mentioned as possible grievance mechanisms depending on the potential needs of the parties and special characteristics of the conflict at issue.[1092] In that regard, the importance of national human rights institutions is highlighted.

In order to be considered as effective remedial mechanisms as envisaged under the Guiding Principle 31, all these mechanisms should meet seven criteria depending on the parameters of demands.[1093] These are legitimacy, accessibility, predictability, equitability, transparency, being rights-compatible and being a source of continuous learning. The Guiding Principle brings an additional criterion for the operational-level grievance mechanisms and requires them to be based on engagement and dialogue.[1094]

The UN Guiding Principles equally pay attention to the non-state-based grievance mechanisms that are administered alone by the shareholders (or the business enterprise) or in collaboration with the stakeholders and industry associations. Such mechanisms may be preferred due to their low costs and easy access and remediation. Additionally, they may function not only locally but also

---

[1088] **ibid.** Annex,III,B.26 and its Commentary (operational principles). Examples of legal barriers are given as the provisions of domestic criminal and civil law which avoid corporate accountability, denial of justice in both host and home states, and exclusion of same level of protection for the vulnerable groups in a society.

[1089] **ibid.** Other examples of practical and procedural barriers to accessing effective remedy include unreasonable costs and fees in the judicial process, lack of resources for the payment of fees of lawyers, insufficient resources for the prosecutors to investigate business involved crimes.

[1090] **ibid.,** Annex,III,B.27 and its Commentary.

[1091] Jägers, **"UN Guiding Principles…".**, p. 163.

[1092] 2011 Ruggie Report, Guiding Principles on Business and Human Rights, Annex,III,B.27 and its Commentary.

[1093] **ibid.**, Annex,III,B.29 and its Commentary.

[1094] **ibid.**, Annex,III,B.31.

transnationally. These non-judicial mechanisms may use adjudicative, dialogue-based or other culturally appropriate and rights-compatible processes as declared in the Commentary.[1095] More significantly, non-state-based grievance mechanisms include regional and international human rights bodies, which, in general, deal with failure of States to respect human rights, and occasionally, with the duty to protect human rights against violations perpetrated by non-state actors.[1096]

Corporations should also provide operational-level grievance mechanisms for the individuals and communities that are the most affected by the adverse consequences of their operations.[1097] The operational-level grievance mechanisms are administered by the business enterprise itself, either alone or in collaboration with stakeholders.[1098] It may also be administered by external experts.[1099] In the Commentary, it is highlighted that these operational-level mechanisms have two functions. Firstly, they help business enterprises to identify and analyse the adverse impacts of their activities and to act accordingly in order to prevent unique or systematic human rights abuses. Secondly, such operational-level mechanisms provide an easy and speedy identification of any actual or possible harm, and therefore, allow corporations to address and remedy the adverse impacts of their activities before any serious escalation in situations leading to major human rights abuses.[1100] Despite the benefits of such operational-level mechanisms, the Commentary draws attention to any possible misunderstanding and highlights that such mechanisms could not in anyway substitute any other mechanism providing a wider stakeholder engagement and collective bargaining process.[1101]

Consequently, on May 5th, 2014, the Working Group on the issue of human rights and transnational corporations and other business enterprises submitted its third report to the Human Rights Council on the outcome of its three-year working

[1095] **ibid.**, Annex,III,B.28.
[1096] **ibid.** and its Commentary.
[1097] **ibid.,** Annex,III,B.29 and its Commentary.
[1098] **ibid.,** Annex,III,B.30 and its Commentary. Guiding Principle 30 points out that effectiveness of such grievance mechanisms should also be ensured via codes of conduct, performance standards and international framework agreements (IFA) concluded between trade unions and TNCs.
[1099] **ibid.,** Annex,III,B.29 and its Commentary.
[1100] **ibid**.
[1101] **ibid.** For example, the role of the trade unions in such processes could not be undermined or precluded by inserting any process continuing under judicial or non-judicial mechanism.

period.[1102] The Working Group concluded that the implementation of the UN Guiding Principles by various stakeholders is crucial for the continuance of the legitimacy of this authoritative global framework for business and human rights and the effectiveness of the remedies provided under the Guiding Principles could be achieved through a 'smart mix' of regulatory and policy incentives.[1103] The Working Group also made recommendations for States, corporations and the civil society. For example, States are recommended to include their efforts for implementing the Guiding Principles in the universal periodic reviews.[1104] In addition, support for the process "*envisaged in the OHCHR-commissioned study on corporate liability for gross human rights abuses to initiate a multi-stakeholder process to clarify key issues of policy and principles, and a process to identify best practice at the State level*" is expected from the States.[1105] Corporations should participate in the annual forums and engage in dialogue with the stakeholders, while they should also report and communicate on the efforts for the promotion and the progress in implementing the Guiding Principles.[1106]

In June 2014, the mandate of the Working Group on the issue of human rights and transnational corporations and other business enterprises has been extended for another three years and by the same resolution, an intergovernmental working group has been established, which is mandated to draft an internationally binding document on human rights responsibilities of transnational corporations.[1107] In the same resolution the Human Rights Council requested the Working Group "*to launch an inclusive and transparent consultative process with States in 2015, open to other relevant stakeholders, to explore and facilitate the sharing of legal and practical measures to improve access to remedy, judicial and non-judicial, for victims of business-related abuses, including the benefits and limitations of a legally binding*

[1102] A/HRC/26/25, 5 May 2014, Report of the Working Group on the issue of human rights and transnational corporations and other business enterprises. For the first and second reports see A/HRC/20/29, 10 April 2012; Report of the Working Group on the issue of human rights and transnational corporations and other business enterprises and A/HRC/23/32, 14 March 2013 Report of the Working Group on the issue of human rights and transnational corporations and other business enterprises, respectively.
[1103] A/HRC/26/25, 5 May 2014, Report of the Working Group on the issue of human rights and transnational corporations and other business enterprises, paras. 92-93.
[1104] **ibid.**, para. 94(a).
[1105] **ibid.**, para. 94(e).
[1106] **ibid.**, para. 95(c) and (e).
[1107] A/HRC/26/L.1, Human rights and transnational corporations and other business enterprises.

instrument, and to prepare a report thereon and to submit it to the Human Rights Council".[1108]

Therefore, in the following chapters I will attempt to elaborate on the existing and potential human rights responsibilities of TNCs, which might be included in a potential binding document drafted under the auspices of the UN in the future.

[1108] **ibid.**, para. 8.

4. LEGAL RESPONSIBILITY OF TNCs UNDER PUBLIC INTERNATIONAL LAW

Private initiatives of regulation and most of the soft law documents concerning corporate responsibilities for the protection of human rights are based on the assertion that the realization of rights, in both centralized and decentralized political structures, could well be accomplished in accordance with the rules of market and non-market economies.[1109] However, protection of human rights and especially of economic, social and cultural rights proves to be ineffective and inconsistent with the private interests of the business and the global market mechanism.[1110] Domestic regulations and legislations of home states and host states may impose specific human rights obligations on TNCs and oblige national authorities to take necessary measures for the prevention of human rights violations perpetrated by TNCs. Civil and criminal accountability of the corporate actors, as legal persons, may also be assured through the adoption of domestic laws. However, the global *realpolitik* proves that handling the problems posed by these powerful transnational actors through soft law documents and national measures are not always an effective way to protect human dignity.

As the scholars emphasized on various occasions, in the post-capitalist society, any power that is not balanced by responsibility would result in the tyranny of those who hold the power.[1111] It has been highlighted that given the increasing economic power of TNCs and their involvement in the State functions along with the social and political effects of their activities; corporations, as members of the international

---

[1109] *e.g.* Limburg Principles on the Implementation of the International Covenant on Economic, Social and Cultural Rights, A.6.

[1110] Jochnick, Chris. "Confronting the Impunity of Non-State Actors: New Fields for the Promotion of Human Rights", **HRQ**, Vol.21, 1999, p. 64.

[1111] *See e.g.*, P.F. Drucker, **Post-Capitalist Society**, New York: Harper Business, 1993, p. 97 and 101 quoted in Avery, **op. cit.**, p. 21. See also Noam Chomsky, **Globalization and its Discontents**, Noam Chomsky debates with Washington Post, Washington Post, 16 May 2000, http://www.chomsky.info/debates/20000516.htm, accessed on 01.06.2015.

community, should not be evaluated outside the ambit of international law.[1112] Thus, regulating corporate conduct by international 'binding' instruments and developing a theory that would enable holding TNCs directly liable under international law and before transnational and/or international institutions is not only possible but also necessary and inevitable for preventing human rights violations and protecting human dignity.[1113] Accordingly, as prominent NGOs, such as Human Rights Watch and Amnesty International put it, there is a pressing need to hold corporations accountable for human rights abuses.[1114]

Developments in the last three decades demonstrate the pressing need for handling corporate conduct within an international legal framework. The international system of legal protection of human rights is consisted of two gradual steps: 1. codification of three core obligations of respect, protect and fulfil, and 2. institutionalization.[1115] Current legal structure of protection of human rights against the abusive activities, operations, services and products of TNCs is yet underdeveloped. There is almost no hesitation with regard to the obligation of TNCs to respect human rights, *i.e.* to refrain from infringing the rights and freedoms of others. However, heated debates concerning the existence of corporate obligations to protect human rights from interferences perpetrated by their partners, subsidiaries, contractors, sub-contractors and other related parties such as suppliers, licensees and distributors and to fulfil by taking positive actions in order to facilitate the enjoyment of human rights still continue among scholars, NGOs, States and of course TNCs themselves.[1116]

Currently, the competence of international bodies and tribunals over legal persons is an exceptional situation.[1117] Therefore, institutionalization of human rights protection against corporate violations is yet to develop. However, this fact cannot lead us to conclude that enterprises do not have direct legal obligations and duties towards individuals, societies, international community and the environment.[1118] The fact that there is no international institution authorized to monitor the compliance of

[1112] Kinley & Chambers, **op. cit.**, p. 493.
[1113] Kamminga & Zia-Zarifi, **op. cit.**, p. 24.
[1114] Kamatali, **op. cit.**, p. 440.
[1115] Rosemann, "Business Human Rights Obligations - The 'Norms…", pp. 49-50.
[1116] Gatto, **op. cit.**, p. 94 and 97.
[1117] See the discussions below on legal personality of the corporations.
[1118] Clapham, **Human Rights Obligations…**, p. 31.

corporations with the international human rights obligations does not mean that corporations are not bound by any human rights norms in conducting their activities and operations.[1119]

Weissbrodt and Kruger analysing the international documents that oblige individuals for acts violating human rights, comment that there is no 'conceptual barrier' for obliging non-state actors, and especially corporations, with the existing international human rights documents.[1120] In other words, extension of the State obligations to corporations and applying the international obligations directly and horizontally to private relationships might be possible.[1121] In deriving human rights obligations from the international treaty provisions, methods of textual, historical and dynamic interpretation taking into consideration the changing circumstances since 1950s would be a helpful tool for finding out the existence, nature, scope and extent of corporate human rights obligations.[1122] Furthermore, there are already existing international direct obligations imposed on businesses, which are applied either on the national scale via measures adopted as a consequence of State's duty to protect or on international scale due to the recognized duties of the individuals and the organs of the society.[1123]

Despite strong oppositions on political and economic grounds and certain legal impediments, a gradation of responsibility, *i.e.* a path from responsibility to respect to responsibility to protect and fulfil, shall be expected to be recognized by the international community. Additionally, the nature of the right or freedom at stake, the relationship between the corporation and the perpetrator or the victim, the exercise of governmental authority, knowledge of the circumstances and existence of any fault by the corporation are among the factors that have to be taken into account in determining the degree of responsibility of corporations in accordance with the principle of gradation of responsibility.[1124] Such an evolution would be followed by a

[1119] Lambooy, **op. cit.**,, p. 432.
[1120] Weissbrodt & Kruger, "Human Rights Responsibilities of Business…", pp. 334-335.
[1121] Gatto, **op. cit.**,, p. 65.
[1122] Markos Karavias, **Corporate Obligations under International Law**, Oxford, 2013, p. 21.
[1123] Weissbrodt & Kruger, "Human Rights Responsibilities of Business…", pp. 334-335.
[1124] For example the degree of responsibility may change if the victim is the employee of the company or a group in the community or the community as a whole. Likewise, if the corporation exercises state-like powers due to the nature of services or products it offers or as a consequence of privatization of services or products which previously considered as public functions, the corporation shall have a higher degree of responsibility with regard to the protection of human rights. Gatto, **op.**

gradation of implementing mechanisms.[1125] For example, a transnational or international body that is empowered for authoritatively interpreting a document on the subject or making recommendations to TNCs, may evolve into a quasi-judicial or judicial court qualified for giving binding decisions.

Proponents of market regulation draw attention to the potential danger of undermining or weakening the responsibilities of States with regard to human rights, if direct human rights obligations are internationally imposed on corporations.[1126] However, as Clapham suggests, the problem of dilution could be overcome by accepting that the human rights obligations of non-state actors, and especially those of TNCs are complementary to those of States. Therefore, from the public international law perspective, States shall remain primarily responsible for any horizontal violation of human rights perpetrated under their jurisdiction. In other words, a future international binding document concerning human rights responsibilities of corporations would not replace the State obligations, but would accompany them.[1127]

For example, the Commentaries of the UN Human Rights Committee to the ICCPR on the right to equality between men and women, right to life, right to privacy, freedom of expression, and rights of the child are especially significant in the sense that they oblige States to stop any abuse perpetrated by non-state actors.[1128]

---

cit., p. 94 and 96; Margaret Jungk, "A Practical Guide to Addressing Human Rights Concerns for Companies Operating Abroad" in Michael K. Addo (ed.), **Human Rights Standards and The Responsibility of Transnational Corporation**s, Hague, Kluwer Law International, 1999, p.178; See also Article 5 of the ARSIWA.

[1125] Gatto, **op. cit.**, p. vii.

[1126] Andrew Clapham, "Non-state actors" in Daniel Moeckli & Sangeeta Shah & Sandesh Sivakumaran, **International Human Rights Law**, OUP, 2010, p. 563.

[1127] *e.g.* 1998 Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms adopted by General Assembly 53/144 of 9 December 1998, Preamble para.7, Articles 2 and 3.

[1128] Human Right Committee, General Comment 28, Equity of Rights between Men and Women (Art. 3) 29/03/2000, CCPR/C/21/Rev.1 Add. 10 CCPR; Human Rights Committee, The Right to Life (Art. 6) General Comment 6 (sixteenth sess., 1982, Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, UN Doc. HRI/GEN/1/Rev.1 at 6 (1994); Human Rights Committee, The Right to Respect Family Privacy, Family, Home Correspondence and Protection of honour and reputation (Art. 17), General Comment 16, (twenty-third sess., 1988), Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, UN Doc. HRI/GEN/1/Rev.1 at 21 (1994); Human Rights Committee, General Comment 10, Art.19 (nineteenth sess., 1983) Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, UN Doc. HRI/GEN/1/Rev.6 at 132 (2003); Human Rights Committee, General Comment 17, Art.24 (thirty-fifth sess., 1989) Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, UN Doc. HRI/GEN/1/Rev.6 at 144 (2003); Gatto, **op. cit.**, p. 67.

As an example, this would imply that corporations should be obliged by national regulations to ensure gender equality in the workplace. Similarly, national authorities should regulate corporate conduct in a way capable of preventing the economic exploitation of the child.[1129] For example, the Committee on the Rights of the Child in its General Comment No. 16 on State obligations regarding the impact of the business sector on children's rights, held that "*At this juncture, there is no international legally binding instrument on the business sector's responsibilities vis-à-vis human rights. However, the Committee recognizes that duties and responsibilities to respect the rights of children extend in practice beyond the State and State-controlled services and institutions and apply to private actors and business enterprises. Therefore, all businesses must meet their responsibilities regarding children's rights and States must ensure they do so. In addition, business enterprises should not undermine the States' ability to meet their obligations towards children under the Convention and the Optional Protocols thereto*."[1130]

Therefore, complementary to local laws and regulations, and if they prove to be inadequate or ineffective, or if State authorities are not capable of or are unwilling to enforce the laws and run the national human rights protection mechanisms, an international or transnational judicial or quasi-judicial body should be authorized by an international treaty to prevent impunity and to hold the corporations accountable for human rights violations. Such an institution may also be empowered by a transnational network of local institutions specialized on the specific problems of the countries they operate in or on specific sectors which carry the risk of systematic violations of human rights perpetrated by corporations.

The UN Norms, being the first attempt to impose directly binding human rights obligations on corporate actors, satisfactorily illustrate the complementary nature of such obligations. The Commentary to the UN Norms underlines that the Norms should not be interpreted in a way to diminish, restrict, or adversely affect the obligations and responsibilities of States imposed by more protective standards in either national or international law.[1131] Furthermore, the saving clause providing that

[1129] Article 32 of the Convention on the Rights of the Child.
[1130] CRC/C/GC/16, General Comment No. 16 (2013) on State obligations regarding the impact of the business sector on children's rights, 17.04.2013, para. 8.
[1131] UN Norms, para. 19 and its Commentary.

"*The Norms may not be used by States as an excuse for failing to take action to protect human rights, for example, through the enforcement of existing laws*"[1132] also reaffirms that the States shall remain having the primary responsibility in protecting human rights. In the Commentary to the UN Norms, it is explained that this saving clause is actually based on and connected to the general rule of international law as put in Article 27 of the VCLT that the States may not invoke their internal law as a justification to their non-compliance with an international treaty.

As examined under Chapter Two, the acts of corporations give rise to State responsibility on two occasions: (1) the acts of the corporation is attributable to the State under Articles 5 and 8 of the ARSIWA, *i.e.* the corporation is directed, instructed or controlled by the State or it *de facto* exercises governmental authority, or the State adopts the acts of the corporation as its own. Similarly, the acts of corporations attributable to the State would also give rise to State responsibility under human rights law if (2) the State fails to act with due diligence in identifying, preventing and mitigating actual and potential private interferences with the rights and freedoms, which constitute a breach of its obligation to protect human rights.

As a complementary alternative to holding States responsible for the acts of non-state actors in the international arena, the international community might prefer to directly regulate the activities of non-state actors and oblige them to respect human rights in their conducts and to protect the rights and freedoms of others in their spheres of activity and/or influence. Therefore, human rights obligations might be directly imposed on corporations. For example, corporations could be directly obliged to act in conformity with the right to adequate food, to ensure equal access to adequate, safe and affordable water and to prevent water pollution, to provide available, accessible, acceptable and quality health facilities, goods and services if they operate or establish business relationships in a relevant area of activity. Specific obligations to protect consumers, workers or other vulnerable groups who may be affected by corporate activities, could also be imposed on corporations. Obligations for the protection of environment might also be included in such a binding document. This could be realized upon a consensus among States either to amend the existing international human rights documents in a way to comprise the responsibility of non-

[1132] UN Norms, para.1(b).

state actors or to create a new international treaty envisaging the responsibility of TNCs.[1133] Accordingly, if the rights of an individual, group or people are violated, the non-state actor could be held internationally responsible for the consequences of its acts or omissions. To add, national, regional, international and extraterritorial mechanisms of responsibility should be all regarded as complementary to each other, especially when the complex concept of human rights obligations of TNCs is at issue.[1134] 2011 Draft Articles on the Responsibility of International Organizations is a good example for better understanding the newly emerging concepts of the law of international responsibility.

The principle of complementarity also applies with regard to the individual criminal responsibility of the perpetrators under the Rome Statute of the ICC. The Rome Statute of the International Criminal Court and the case law of *ad hoc* international criminal tribunals provide us with legal clues on holding TNCs internationally responsible through direct horizontal application of human rights norms. Therefore, once the jurisdiction of the ICC on legal persons is recognized, it would be possible to hold corporations accountable before the ICC, whether they are the principal perpetrators or accomplices in the commission of international crimes.

On June 26th, 2014, the UN Human Rights Council adopted a resolution deciding to establish an open-ended intergovernmental working group on a legally binding instrument on transnational corporations and other business enterprises to elaborate on the regulation of the activities of TNCs in human rights law.[1135] The Resolution was highly controversial that 20 countries voted in favour[1136] and 14

[1133] Duncan B. Hollis, "Why State Consent Still Matters - Non-State Actors, Treaties, and the Changing Sources of International Law", **Berkeley J. Int'l L**, Vol. 23, 2005, pp. 137-174; Joseph, "An Overview …", p. 85. We may question if it is possible to establish a direct link between the TNCs and international law resembling to that of the system of liability of the ship-owner irrespective of the relation of the ship with the flag-state or the port-state and the nationality of the ship-owner. Roucounas, **op. cit.**, p. 404.

[1134] Gatto, **op. cit.**, pp. 98-99.

[1135] A/HRC/26/L.22/Rev.1, 26 June 2014, 26/9 Elaboration of an international legally binding instrument on transnational corporations and other business enterprises with respect to human rights. (The resolution was originally ratified in the 2nd Forum on Business and Human Rights in Geneva.) However, there is no time-limit for the working group to come up with a binding instrument and it is envisaged that the members of the group will be meeting for a week, each year. The first meeting has been held in July 2015.

[1136] Algeria, Benin, Burkina Faso, China, Congo, Côte d'Ivoire, Cuba, Ethiopia, India, Indonesia, Kazakhstan, Kenya, Morocco, Namibia, Pakistan, Philippines, Russia, South Africa, Venezuela, Vietnam.

against,[1137] while 13 countries were absent.[1138] On the following day, another resolution has been adopted extending the mandate of the Working Group on the issue of human rights and transnational corporations for a period of three years and requesting the working group to launch a consultative process with the States in 2015 to explore the measures adopted in national law systems in order to provide judicial and non-judicial remedies for the victims of abuses perpetrated by TNCs.[1139] The Working Group has also been requested to work on the benefits and limitations of legally binding instruments on the issue. This second Resolution 26/22, reaffirming the importance of the UN Guiding Principles, was proposed by Norway and adopted unanimously. The difference in the adoption processes of the two Resolutions demonstrates the on-going polarization between those favouring a binding international regulation and those favouring domestic regulation.[1140] Considering the relatively new developments in the business and human rights issue, this chapter will attempt to draw a framework for existing and potential corporate human rights obligations, which may be inserted in a forthcoming draft of an international treaty, binding on corporations.

4.1. A Framework for Corporate Human Rights Obligations

Human rights treaties have an objective and non-contractual nature serving for the common interests of the international community. The parties to human rights treaties undertake to fulfil their obligations for accomplishing the high ideals and serving the common interests of the international community, regardless of any advantage or disadvantage that they may bring to States.[1141] In other words, human rights treaties are not envisaged to create subjective and reciprocal rights and mutual obligations with a perfect balance between rights and duties, but to protect the rights

[1137] Austria, Czech Republic, Estonia, France, Germany, Ireland, Italy, Japan, Montenegro, South Korea, Romania, the Former Yugoslavia, UK, USA.
[1138] Argentina, Botswana, Brazil, Chile, Costa Rica, Gabon, Kuwait, Maldives, Mexico, Peru, Saudi Arabia, Sierra Leone, UAE.
[1139] A/HRC/26/L.1, 27 June 2014, 26/22 Human Rights and Transnational Corporations.
[1140] Nicole R. Tuttle, "Human Rights Council Resolutions 26/9 and 26/22: Towards Corporate Accountability?", American Society of International Law - Insights, Vol. 19, Issue 20, 3 Sept. 2015, http://www.asil.org/insights/volume/19/issue/20/human-rights-council-resolutions-269-and-2622-towards-corporate, accessed on 03.09.2015.
[1141] Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, Advisory Opinion, ICJ Rep., 1951, p. 23.

and freedoms from the infringements of States and third parties, *i.e.* non-state actors, including TNCs.[1142]

Article 60(5) of the VCLT supports these arguments by providing that material breach of a provision relating to the protection of the human person contained in treaties of a humanitarian character does not constitute a legitimate ground for terminating or suspending the operation of such treaty. Article 50 of ARSIWA and Article 53 of ARIO explicitly provide that countermeasures shall not affect obligations for the protection of fundamental human rights, obligations of a humanitarian character prohibiting reprisals and other obligations under peremptory norms of international law. For example, the Commentary to Article 50 of ARSIWA refers to the General Comment No. 8 of the CESCR in order to highlight that economic sanctions adopted by States shall not infringe the rights of individuals.[1143] In the said General Comment, the CESCR underlined that in imposing economic sanctions, "*the party or parties responsible for the imposition, maintenance or implementation of the sanctions, whether it be the international community, an international or regional organization, or a State or group of States*" shall take measures to prevent disproportionate suffering of the vulnerable groups as a consequence of the sanctions imposed.[1144] Particularly, access to food, water, pharmaceuticals and sanitation supplies, provision of basic health and education services and right to work shall not be affected by the economic sanctions imposed on a State.[1145] Accordingly, TNCs shall be regarded as being subjected to an indirect obligation not to act to the detriment of basic needs of persons even if they are obliged to do so by State actors.

[1142] For example, the ECHR seeks to "*establish a common public order of the free democracies of Europe with the object of safeguarding their common heritage of political traditions, ideas, freedom and the rule of law*." ECommHR, *Austria v. Italy* (the 'Pfunders' case), App. no. 788/60, ECHR Y.B., 4 (1961), 116 at 140; *Ireland v UK*, judgment of 18 January 1978, Series A no. 25, p.9 0 para. 239; IAmCtHR, The Effects of Reservations on the Entry into Force of the American Convention on Human Rights (Articles 74 and 75), Advisory Opinion OC-2/82, 24 September 1982, IAmCHR (Series A) No.2, para.29; Human Rights Committee, General Comment No. 24, 1994, Issues Relating to Reservations made upon Ratification or Accession to the Covenant or the Optional Protocols thereto, or in relations to Declarations under Article 41 of the Covenant, para. 17.

[1143] CESCR (1997) General Comment No. 8 on the relationship between economic sanctions and respect for economic, social and cultural rights.

[1144] **ibid.**, para. 11.

[1145] **ibid.**, para. 3.

By analogy, once direct human rights obligations of corporations is acknowledged in the international arena, no ground invoked by TNCs for precluding wrongfulness of their actions or omissions in violation of human rights would be accepted by the competent judicial or quasi-judicial organs, except for situations involving consent,[1146] self-defence,[1147] force majeure, distress and necessity. However, invoking these grounds has strict conditions even for State actors, and it would create specific challenges and require adjustments in case of being invoked as a ground for precluding the wrongfulness of corporate acts or omissions breaching human rights obligations. To add, in case of conducting dangerous activities or similar operations giving rise to objective responsibility, corporations might not invoke even such legitimate grounds. Finally, peremptory norms of international law should not be violated under any circumstances.

Given the general applicable norms on a theory of corporate human rights obligations, the author will now attempt to discover the corporate obligations under positive international law. In the first sub-section the obligation to respect human dignity will be analysed as a basic foundation of corporate human rights obligations. In the second sub-section, current status of corporations under international law with a special focus on corporate rights will be examined. In the third and fourth sub-sections, a line will be drawn regarding both the substantive content of corporate human rights obligations and the extent of possible scope of application of such obligations. This framework will be followed by a research on the existing and potential human rights obligations for corporations to respect and to protect, respectively. Within this context, the responsibility of corporations to act with due diligence will also be examined with a special focus on the duties to regulate, prevent and monitor.

[1146] As underlined in para. 10 of the Commentary to the Article 20 of the ARSIWA "*The rights conferred by international human rights treaties cannot be waived by their beneficiaries, but the individual's free consent may be relevant to their application*" such as is in Articles 7, 9 (3), 14(3)(g) and 23(3) of the ICCPR.

[1147] Even though, the self-defence argument is not easy to adjust in cases involving TNCs, especially for the TNCs operating in security sector shall not violate peremptory norms, non-derogable human rights provisions and other obligations under international humanitarian law even in situations of self-defence.

4.1.1. Respect for Human Dignity as a Basis of Corporate Obligations

Philosophical and legal foundation of principles and norms on human rights protection lies within the recognition of inherent and inviolable dignity of each person and in the thought of natural rights.[1148] Especially following the World War II, the ideal of protecting human dignity has significantly contributed to the development of customary and non-conventional human rights norms, some of which became legally binding despite the absence of explicit or tacit state consent.[1149] Henkin points out that such peremptory norms allowed a "radical derogation from the axiom of 'sovereignty'", which is one of the fundamental principles of public international law.[1150] Therefore, obliging state and non-state actors regardless of their consent to be bound by an international legal obligation has a legitimate ground and legal justification in human rights law.[1151]

All rights and freedoms stem from the very concept of human dignity**,** which at the same time constitutes the fundamental value to be respected and protected under the Charter of the UN, the UDHR and the 1966 Twin Covenants. As Clapham rightfully pointed out, apart from the procedural rules of the state-centred monitoring mechanisms provided under the international human rights treaties, which preclude complaints against non-state actors, the substantive norms of these treaties, general principles of international law and rules of customary international law are easier to be adopted and applied to the conducts of non-state actors.[1152]

The Preamble of the UDHR recognizes that the foundation of freedom, justice and peace in the world rests with the inherent dignity of human beings.[1153] It also reaffirms the faith in the dignity and worth of the human person, which shall be constantly kept in mind by every individual and every organ of the society.[1154] Article 1 of the UDHR recognizes that all human beings are equal in dignity and

---

[1148] Clapham, "Non-state actors"…, p. 564.
[1149] Louis Henkin, "Sibley Lecture, March 1994: Human Rights and State "Sovereignty", **Ga. J. Int'l & Comp. L.**, Vol. 25, 1994, p. 38.
[1150] **ibid.**
[1151] Jochnick, **op. cit.**, pp. 60-61.
[1152] Clapham points out to the language of the UDHR, where the word 'state' is used so rare that it allows us to interpret the duties under the Declaration so as to cover not only States, but also non-state actors. Clapham, "Non-state actors" …, p. 564. For an elaboration of the terms used in the UDHR see the sub-section below on the Responsibility to Respect.
[1153] Preamble of the UDHR, para. 1.
[1154] **ibid.**, para. 5.

rights. Articles 22 and 23(3) of the UDHR underline that every person is entitled to the realization of economic, social and cultural rights indispensable of his/her dignity and to just and favourable remuneration ensuring an existence worthy of human dignity. The Preamble of the Charter of the UN emphasizes the faith of the peoples of the UN in the dignity and worth of the human person. The Preambles of both of 1966 Covenants refer to the principles of the UN Charter and recognize that the rights and freedoms of the human person derives from his/her inherent dignity.

In addition, Article 11 of the Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms stipulates that everyone, who has the ability to affect human dignity and the enjoyment of human rights, shall respect human rights and act in line with the national and international occupational and professional standards of conduct or ethics.[1155] The Declaration on the Rights and Responsibilities is also a resolution adopted by the UN General Assembly, which has no legally binding force 'as such', except for its provisions that are declaratory of the rules of customary law. However, as Clapham righteously pointed out in his book, soft law instruments generally precede the legally binding international instruments and they serve as authoritative guidance for states and non-state actors regarding the interpretation and implementation of the human rights obligations. Accordingly, the comments on the legally binding and non-binding character of soft law documents on human rights remains merely "academic", since in history it is very rare that a State has ever rejected responsibility on the ground that a principle or standard contained in a legally non-binding document may not be enforced against States.[1156] Thus, I argue that the Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote, Protect Universally Recognized Human Rights and Fundamental Freedoms shall be read bearing in mind that this understanding should be equally valid for non-state actors.

The Preamble of the American Declaration of the Rights and Duties of Man also acknowledges the dignity of individual and emphasizes that:

[1155] Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms, adopted by General Assembly 53/144 of 9 December 1998.
[1156] Clapham, **Human Rights Obligations…,** pp. 99-100.

> "*The fulfilment of duty by each individual is prerequisite to the rights of all. Rights and duties are interrelated in every social and political activity of man. While rights exalt individual liberty, duties express the dignity of that liberty."*

Accordingly, the Declaration approaches the concept of dignity from a different standing point and underlines that the duties of individuals also blossom up as an expression and implication of the dignity of having rights and liberties. The American Convention on Human Rights stresses that the prohibition of torture or cruel, inhuman or degrading treatment (Article 5) and the prohibition of slavery or involuntary servitude (Article 6) aim to protect the inherent dignity of the human person. In addition, Article 11 provides that everyone has the right to have his/her dignity recognized. For example, the IAmCtHR underlined in the Velásquez-Rodriguez case that the use of public power is restricted by the protection of human dignity, which is inherent in the obligation to respect human rights and freedoms.[1157]

Article 5 of the African Charter on Human and Peoples' Rights specifically recognizes the right to respect of the dignity inherent in a human being. The provision continues with an emphasis on the right to recognition of legal status and the prohibition of slavery, slave trade, torture, cruel, inhuman or degrading punishment and treatment, which implies a strong relation between these rights and human dignity.

Preamble of Protocol 13 to the ECHR emphasizes that "*the abolition of death penalty is essential ... for the full recognition of the inherent dignity of all human beings*".[1158] Both the European Commission on Human Rights and ECtHR have referred to the concept of human dignity on various occasions, especially when considering the violations of Article 3 of the Convention. In *Pretty v UK*, the ECtHR emphasized that "*the very essence of the Convention is respect for human dignity*

[1157] *Velásquez Rodriguez v. Honduras*, IAmCtHR, Ser. C, No. 4, 29 July 1988, para. 165. The Court refers also to its advisory opinion on the subject: *The Word "Laws" in Article 30 of the American Convention on Human Rights*, IAmCtHR Advisory Opinion OC-6/86, Series A No. 6, 9 May 1986, para. 21.

[1158] Protocol No. 13 to the Convention for the Protection of Human Rights and Fundamental Freedoms concerning the abolition of the death penalty in all circumstances, Vilnius 3.V.2002.

and human freedom".[1159] Preamble and Article 1 of the Convention on Human Rights and Biomedicine also emphasize the importance of respect and protection of human dignity.[1160] Preamble and Article 26 of the European Social Charter recognize the right to dignity at work, obliging the States to undertake the prevention of negative and offensive actions directed against individual workers in the workplace or in relation to work.[1161]

1990 Cairo Declaration on Human Rights in Islam mentions in its Preamble that safeguarding the rights and freedoms is both an individual responsibility of every person and collective responsibility of the entire Ummah, *i.e.* the Muslim community. Article 1(3) of 2004 Arab Charter on Human Rights provides that the aim of the Charter is "*to prepare future generations in the Arab States to live free and responsible lives in a civil society united by a balance between consciousness of rights and respect for obligations, and governed by principles of equality, tolerance and moderation.*"[1162]

Vienna Declaration and Programme of Action also recognized that human dignity is inherent in biomedical ethics (Article 11), prohibition of gender-based violence and harassment (Article 18), treatment of indigenous peoples (Article 20), abolition of extreme poverty (Article 25) and prohibition of torture (Article 55).[1163] Right to education,[1164] right to health,[1165] rights of indigenous cultures[1166] and protection of human dignity in cases of biomedical experimentation[1167] shall also be mentioned due to their potential relation with the activities of TNCs.

[1159] ECtHR, Pretty v UK, App.no. 2346/02, 29 April 2002, para. 65.
[1160] ETS No. 164 (1997), Convention for the Protection of Human Rights and Dignity of the Human Being with regard to the Application of Biology and Medicine: Convention on Human Rights and Biomedicine.
[1161] ETS No. 163 (1996), European Social Chater (revised).
[1162] The Arab Charter has entered into force in 2008.
[1163] Vienna Declaration and Programme of Action, World Conference on Human Rights, Vienna, 14-25 June 1993, UN Doc. A/CONF157/24.
[1164] Articles 37 and 40 of the Convention on the Rights of the Child, Article 28 of the Convention on the Rights of Persons with Disabilities.
[1165] Article 25 of the Convention on the Rights of Persons with Disabilities.
[1166] Article 2 of 1957 Convention on Indigenous and Tribal Populations Convention; Articles 15 and 43 of the 2007 UN Declaration on the Rights of Indigenous Peoples.
[1167] Preamble and Articles 1, 2, 6, 10, 11, 12, 15, 21 and 24 of 1997 UNESCO Universal Declaration on the Human Genome and Human Rights, UNGA Res. AIRES/53/152, 9 December 1998.

Finally, Common Article 3 of the Geneva Conventions prohibits "*outrages upon personal dignity, in particular humiliating and degrading treatment*".[1168] A similar provision (Article 75) is also included in the Additional Protocol I to the Geneva Conventions relating to the protection of victims of international armed conflicts.[1169] Furthermore, Article 85 of the Protocol stipulates that apartheid and other inhuman and degrading practices involving outrages upon personal dignity, based on racial discrimination shall be regarded as grave breaches of the Protocol. Article 4 of the Additional Protocol II to the Geneva Conventions relating to the Protection of the Victims of Non-International Armed Conflicts also prohibits "*outrages upon personal dignity, in particular humiliating and degrading treatment, rape, enforced prostitution and any form of indecent assault*".[1170] The Statutes of the international criminal tribunals also include similar provisions prohibiting outrages upon personal dignity.[1171]

Consequently, the language of the international human rights law and humanitarian law documents allow us to comment that the protection of human dignity shall be regarded as a duty of all members of the international community, including corporations. Since human dignity constitutes the basis of all rights and freedoms, each member of the international community shall have obligations to respect and even to protect the rights and freedoms of individuals, groups and peoples. The content and degree of responsibility of each obligor shall be determined depending on various factors, such as their proximity to the victim and/or perpetrator, area of activity, sphere of influence and leverage. Keeping in mind the peremptory norm character of some of the basic rights and fundamental freedoms and most of the norms of humanitarian law, it proves to be inevitable that non-state actors shall also be under an obligation to protect the rights and freedoms serving the

[1168] Convention (III) relative to the Treatment of Prisoners of War, Geneva, 12 August 1949.
[1169] Protocol Additional to the Geneva Conventions of Aug 12th 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (protocol II), June 8th, 1977.
[1170] Additional Protocol II to the Geneva Conventions relating to the Protection of the Victims of Non-International Armed Conflicts, 8 June 1977.
[1171] See e.g. Article 3 of the 2002 Agreement for and Statute of the Special Court for Sierra Leone, Article 4 of the 1994 Statute of the International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan citizens responsible for genocide and other such violations committed in the territory of neighbouring States, Article 8 of the Rome Statute of the ICC.

community interests and derogation from which are prevented due to their non-bilateralizable character.[1172]

4.1.2. Status of Corporations under Public International Law

In this sub-section, I will attempt to define the status of corporations under public international law. In doing so, firstly, I will investigate the concept of legal personality and assess whether corporations can be considered as having legal personality under public international law. Secondly, I will examine the international forums, where corporations are being represented and are granted standing to claim their rights. Thirdly, the rights and status of corporations in international human rights law will be examined in light of the positive law documents and the jurisprudence of international and regional human rights bodies. Finally, I will conclude that TNCs, which benefit from the rights and other positive aspects of international law, should equally be responsible for respecting and protecting human rights of those who are affected by their activities, operations, services and products.

4.1.2.1. Legal Personality of Corporations

International legal personality and the concept of subjects of international law are the terms used for signifying the same meaning.[1173] International actors may have different capacities depending on their powers and/or functions.[1174] However, these are two different concepts, each of which may overlap or evolve on different levels. International legal personality is the legal capacity to directly acquire rights and obligations in the international arena and to be a party to a legal dispute at the international level.[1175] ICJ defines international legal personality as being capable of

---

[1172] Orakhelasvili explains in his book that the category of *jus cogens* norms shall not be restricted with the category of non-derogable human rights. For example, he argues that the rights to due process and fair trial are *jus cogens* norms. Furthermore, rights such as freedom of expression and right to freedom of religion might also be regarded as *jus cogens* norms, since their core cannot be derogated from and they cannot be restricted by bilateral treaties or contracts. Orakhelashvili, **op. cit.**, pp. 59-60.

[1173] Gatto, **op. cit.**, p. 48, fn. 3.

[1174] It is not realistic to expect that different structures such as States, international organizations, individuals and corporations all should have the same capacities in the international arena. Rather, it would be reasonable to expect that each actor has the capacity to act in a way enabling its effective functioning. Therefore, even if an actor has more limited capacity than a State, it could equally be accepted as a subject of international law. Daniel O'Connell, **International Law**, Vol 1, London, Stevens and Sons, 2nd ed. 1970, p. 82 cited in Clapham, **Human Rights Obligations…**, p. 71.

[1175] **ibid.**

possessing international rights and duties and having the capacity to maintain these rights by bringing international claims, too.[1176] Moreover, the legal capacity of an entity to conduct only certain acts or to acquire certain rights and obligations does not prevent it from being considered as having legal personality. In other words, entities, which do not have the exact legal capacity as States, could nevertheless be considered as having a legal personality. For example, concerning the question on the legal personality of the UN, the ICJ held that such a capacity would either be expressly declared or implied under the constitutive document of an international organization and be developed in practice. If one can conclude that the capacity to act or do something is indispensable for the effective functioning of an organization to fulfil its constituting purpose, then it should have been implicitly endowed with the capacity to act/do something in that way.[1177] This is called functional legal personality.[1178]

Orthodox positivist doctrine follows the traditionalist approach concerning international legal personality and the subjects of international law. According to this doctrine, States are the only subjects of international law, and corporations do not possess international legal personality.[1179] Therefore, TNCs are the 'objects' of international law and they are recognized as legal persons only under domestic laws.[1180] However, as international law is not static, but under constant evolution, so is the concept of legal personality.[1181] In the early 20th century, even the individuals

[1176] Reparation for Injuries Suffered in the Service of the UN, Advisory Opinion, ICJ Rep. 1949, p. 179.
[1177] **ibid.,** 180. Kamatali comments that the attribution of international personality requires a determination on the purposes and functions of an entity as specified or implied in its constitutive document and consistent practice. He underlines that the ICJ did not overthrow the possiblity of the non-state actors being regarded as subjects of international law depending on the specificities of a given situation. Kamatali, **op. cit.**, p. 460. Accordingly, legal personality is a fluid concept, which can be granted as a result of a functional process. Muchlinski, "Multinational Enterprises…", pp. 9-40.
[1178] In the same direction, Article 2(a) of the 2011 ARIO defines international organization as an entity possessing its own international legal personality.
[1179] As Feldman mentions neither socialist nor Western approaches were willing to regard corporations as international actors. David Feldman, "International Personality", ***Recuil des Cours***, Vol. 191, 1985, pp. 359-360. See also Ian Brownlie, **Principles of Public International Law**, p. 66.
[1180] Accordingly, their rights and obligations may only be claimed and invoked before national courts. A. Claire Cutler, "Critical Reflections on the Westphalian Assumptions of International Law and Organization: A Crisis of Legitimacy", **Rev. Int'L Stud.,** Vol. 27, 2001, p. 138. However, as Lauterpacht, asserted to the contrary that even if the right-holder cannot invoke his/her right by his/her own before the international tribunals and is in need of diplomatic protection by the State of which (s)he is a national, this would not signify that (s)he is not a subject of the law. Hersch Lauterpacht, "The Subjects of the Law of Nations", **Law Q Rev.**, Vol. 68, 1947, p. 438.
[1181] Gatto, **op. cit.**, p. 52.

were not regarded as subjects of international law.[1182] However, it was not contested that States could agree upon imposing direct rights and obligations for individuals, which would then be enforceable by national courts in accordance with national laws.[1183]

Moreover, there is no authoritative body, which determines and/or limits the list of subjects of international law. In that regard, even the decisions of international courts and tribunals on international legal personality are not constitutive, but merely declarative of any existing *ad hoc* status.[1184] Consequently, there is no *numerus clausus* for the subjects of international law.[1185] For example, the ICJ in the *Reparations case*, declared the functional legal personality of the UN, while refrained from generalizing the existence or non-existence of legal personality for other international organizations. Tzevelekos commenting on the following paragraph excerpted from the *Reparations case*, argued that the Court opted-out of the classical voluntarist approach in favour of the objectivist approach, which prioritizes the international social necessity:[1186]

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

[1182] For a detailed historical analysis of the concept, see Janne Elisabeth Nijman, **The Concept of International Legal Personality: An Inquiry into the History and Theory of International Law**, TMC Asser Press, 2004.
[1183] PCIJ, Jurisdiction of the Courts of Danzig (Pecuniary Claims of Danzig Railway Officials who have passed into the Polish Service, against the Polish Railways Administration), Advisory Opinion No. 15, 3 March 1928, Series B. No. 15, at pp. 17-18: "*It may be readily admitted that, according to a well established principle of international law, the Beamtenabkommen, being an international agreement, cannot, as such, create direct rights and obligations for private individuals. But it cannot be disputed that the very object of an international agreement, according to the intention of the contracting Parties, may be the adoption by the Parties of some definite rules creating individual rights and obligations and enforceable by the national courts.*" See Hersch Lauterpacht, "The Subjects of International Law" in E. Lauterpacht (ed.), **International Law. Being the Collected Papers of Hersch Lauterpacht, Volume I: The General Works**, Cambridge: CUP, 1970, p. 137.
[1184] Clapham, **Human Rights Obligations…**, p. 71.
[1185] Karsten Nowrot, "Reconceptualising International Legal Personality of Influential Non-state Actors: Towards a Rebuttable Presumption of Normative Responsibilities", **Philippine LJ**, Vol. 80, No.4, 2006, p. 566.
[1186] Tzevelekos, **op. cit.**, p. 162.

> *plane by certain entities which are not States. ... But to achieve these ends the attribution of international personality is indispensable*." [1187]

Lauterpacht agreed that the list of subjects of international law could be modified in accordance with the requirements of international recourse.[1188] He added that, even before the conclusion of international treaties on the relevant subjects, individuals already had international duties under customary international law.[1189] Without hesitation, this implied that States, as the primary subjects of international law, could confer legal personality to the objects of international law and could create direct rights and duties for the individuals,[1190] which then would be enforced by both national and international courts and tribunals.[1191]

Following the Second World War, the traditional understanding of international law on legal personality has been abandoned, not only for international organizations, but also for individuals.[1192] Due to the gross human rights violations along with the breaches of norms of humanitarian law perpetrated by the Nazi regime, the individual became a subject of international law acquiring not only substantial and procedural rights, but also obligations and duties under international law. Moreover, and maybe more importantly, the individual acquired the capacity to claim his/her rights before international tribunals. Secondly, the individual was in the scene also as the duty-bearer. The individual acquired the capacity to be held internationally accountable and be prosecuted by the international judge if (s)he violates an international obligation attributable to his/her conduct or omission. In addition, the possibility of granting international legal personality to corporations became an issue under consideration.[1193] Accordingly, in the early 21st century, iy

---

[1187] Reparation for Injuries Suffered in the Service of the United Nations, Advisory Opinion, ICJ Rep., 1949, p. 178.
[1188] **ibid.**
[1189] e.g. prohibition of piracy and especially the laws of war. **ibid.**, p. 141.
[1190] Philip Jessup, **A Modern Law of Nations: An Introduction**, New York, Macmillan, 1949, pp. 17-18.
[1191] Lauterpacht, "The Subjects of International Law" …, pp. 142-143.
[1192] Philosophical foundation of the idea was first purported by Léon Duguit, in 1901. Duguit and his followers asserted that only individuals could be the subjects of international law, and not the States. Duguit, Léon. "Etudes de droit public, Vol. I: L'Etat, le droit objectif et la loi positive (Paris, 1901); Vol. II: L'Etat, les gouvernants et les agents (Paris, 1903) cited in Marek St. Korowicz, "The Problem of the International Personality of Individuals", **AJIL**, Vol. 50, 1956, p. 539.
[1193] For example, in *Texaco/Calasiatic v. Libya*, even though the decision of the sole arbitrator René-Jean Dupuy did not reflect the dominant view of the scholars of the time and has been strongly

may be asserted that we are witnessing a similar path of evolution of international law with regard to the recognition of enforceable duties and obligations for corporations.

For example, assertions on the fact that States were also 'corporate persons', and that the Holy See[1194] and the Order of Malta were regarded as having legal personality as 'organizations' have been strong points of the arguments favouring corporate international personality.[1195] Philip Jessup, in his article dated 1947, asserted that "[s]*o long as national law creates these juristic persons, international law must deal with them as individuals. Accordingly, under this hypothesis, corporations or partnerships may also be subjects of international law.*"[1196] Later, in his book dated 1956, he reaffirmed that corporate bodies are also subject of international law.[1197] In any case, I should emphasize that possessing international legal personality does not imply any equality between different international actors.[1198] Likewise, although there may exist common responsibilities such as respecting the peremptory norms of international law, the rights and duties possessed by those actors differ both in their content and extent.[1199]

By the end of Cold War, the effects of economic globalization, unrestrained neo-liberal policies and *laissez-faire* democracy have significantly contributed to the growth of TNCs, while equally causing a considerable weakening in the protection

---

opposed, it was declared that *"...stating that a contract between a State and a private person falls within the international legal order means that for the purposes of interpretation and performance of the contract, it should be recognized that a private contracting party has specific international capacities. But, unlike a State, the private person has only a limited capacity and his quality as a subject of international law does enable him only to invoke, in the field of international law, the rights which he derives from the contract*." Texaco Overseas Petroleum Company and California Asiatic Oil Company v. The Government of the Libyan Arab Republic (Award on the Merits, Sole Arbitrator Dupuy, 1977), 53 ILR 422, p. 457, para. 46. However, this arbitral award has not been considered as a precedent in the following international arbitrations.

[1194] Holy See, without being a State, was capable of concluding treaties and entering into diplomatic relationships until its annexation by Italy in 1870. Hersch Lauterpacht, "The Subjects of the Law of Nations", **Law Q Rev.**, Vol. 63, October 1947, p. 445.

[1195] Hans Aufricht, "Personality in International Law", **American Political Science Review**, Vol. 37, 1943, pp. 219-220; Jennings & Watts (eds.), **Oppenheim's International Law**…, pp. 17-18, 848; Malcolm Shaw, **International Law**, 6th ed. CUP, 2008, p. 243.

[1196] Philip C. Jessup, "The Subjects of Modern Law of Nations", **Mich. Law Rev.**, Vol. 45, 1947, p. 387.

[1197] Philip C Jessup, **Transnational Law**, Yale University Press, 1956, p. 3.

[1198] Jessup, "The Subjects of Modern Law …", pp. 393-394.

[1199] Fergus Green, "Fragmentation in Two Dimensions: The ICJ's Flawed Approach to Non-State Actors and International Legal Personality", **Melb. J. Int'l L.**, Vol. 9, 2008, p. 71.

of human rights, workers' rights and the environment.[1200] In this new post-statist international order, non-sovereign actors have also acquired legal and moral significance in the international plane.[1201] *De jure* objects of international law, *i.e.* corporations, were now operating as *de facto* subjects of international law.[1202] However, this was an impaired subjectivity favouring corporations and allowing them to be represented in the international arena and claiming their rights before international judicial or quasi-judicial organs without any possibility for imposing direct obligations and holding them responsible for their operations in violation of the norms of international law.[1203] Therefore, theories of limited legal personality (*ad hoc* legal personality) have been blossomed up to make corporations internationally recognized as *quasi*-subjects[1204] or (derivative) subjects[1205] of international law.[1206] On the other hand, leaving behind the theoretical discussions on the "subjectivity", the theorists preferred to concentrate on capacity, which would, in the end, may signify possession of a limited *ad hoc* legal personality.[1207]

[1200] See generally, Steiner & Alston & Goodman, **op. cit.**, pp. 512-516.

[1201] Christopher Harding, "Statist Assumptions, normative individualism and new forms of personality: evolving a philosophy of international law for the twenty-first century" in Malgosia Fitzmaurice & Peter Muchlinski & Milena Szuniewicz (eds.), **Non-State Actors and International Law,** Vol. 1, No. 2, Kluwer Law International, 2001, pp. 119-120.

[1202] Cutler, **op. cit.**, p. 137. Nevertheless, it is important to be cautious when referring to the corporations as 'subjects'. For example, the preference of Nowrot to use the term '*de facto* participants' may be more proper. Nowrot, 'Reconceptualising…", p. 566.

[1203] For example, Kinley and Chambers, evaluating the legal implications of the UN Norms, underline that the corporations have some sort of limited international legal personality, which allows us to shift the responsibility of protection and promotion of human rights onto the corporations without diminishing the primary responsibility of States as stressed under the UN Norms para. 19. Kinley & Chambers, **op. cit.**, p. 451, 479 and 481.

[1204] However, the term quasi-subject has been used for NGOs, while TNCs continued to be treated as 'objects' of international law. Rigaux, **op. cit.**, p. 129; Russell A. Miller, "Paradoxes of Personality: Transnational Corporations, Non-Governmental Organizations and Human Rights in International Law", in Miller & Bratspies (eds.), **Progress in International Law**, Koninklijk Brill NV., 2008, pp. 387-388.

[1205] The existence and functioning of derivative subjects depend on a decision or recognition by the originary subjects of international law. Originary subjects *de facto* exist independent of the approval of any other subject. States, insurgents and peoples are examples of originary subjects, while the 'personality' of individuals and corporations derive from the will of the sovereigns. Cassese, "Individuals" …, pp. 119-120.

[1206] See also Patrick Dumberry & Erik Labelle-Eastaugh, "Non-state actors in international investment law: The legal personality of corporations and NGOs in the context of investor-state arbitration" in Jean d'Aspremont, (ed.) **Participants in the International Legal System: Multiple Perspectives on Non-State Actors in International Law**, Routledge, 2011, pp. 362-365.

[1207] O'Brien also agrees that the TNCs do not have full international personality. John O'Brien, **International Law**, Cavendish, 2001, p. 155; Clapham, **Human Rights Obligations…,** p. 78.

4.1.2.2. Representation and Standing of Corporations before International Bodies

Corporations have already become international actors and are being represented in the international arena. For example, business is represented in the negotiations conducted under the auspices of ILO and has direct voting rights. International Telecommunication Union (ITU)[1208] has also a significant importance with regard to direct corporate participation in law making.[1209] Private sector entities, including corporations, may become 'Sector Members' of ITU and participate in the decision-making processes.[1210] In other international organizations, such as OECD, corporations may be formally consulted if needed for the development of its regulations.[1211] Additionally, corporations do have a considerable influence in and contribution to international standard setting and rule making, especially concerning the rules on trade, investment, antitrust, intellectual property and telecommunications.[1212] Furthermore, certain special agencies of the UN, such as the World Health Organization (WHO), International Maritime Organization (IMO) and International Civil Aviation Organization (ICAO) have close ties, but not membership, and collaboration with the global private business associations such as the International Federation of Pharmaceutical Manufacturers Association (IFPMA), International Chamber of Shipping (ICS) and International Air Transport Association (IATA), respectively.[1213]

Corporations also have legal standing before certain dispute settlement mechanisms. Some of the scholars argue that standing may imply the recognition of a limited legal personality.[1214] However, I should point out that, as Sellers rightfully

---

[1208] ITU is a specialized agency of the UN founded on the principle of international cooperation between governments and the private sector. http://www.itu.int/en/about/Pages/default.aspx, accessed on 02.12.2013.
[1209] J. Dunoff & S. Ratner, & D. Wippman, **International Law: Norms, Actors, Process: A Problem-Oriented Approach**, Aspen Law & Business, 2002, p. 214.
[1210] For example, the role of Motorola, as expert, in shaping the work of International Telecommunication Union is significant. Currently, over 750 private-sector entities (Sector Members, associates and academia) are members of the ITU. **ibid.**, p. 206 and 215.
[1211] Cutler, **op. cit.**, p. 143, fn.59.
[1212] Dunoff & Ratner & Wippman, **op. cit.**, p. 206.
[1213] Karsten Ronit, "Transnational Corporations and Regulation of Business at the Global Level" in Bob Reinalda, **The Ashgate Research Companion to Non-State Actors**, Ashgate, 2011, pp. 85-86.
[1214] Malanczuk, Peter. "Multinational Enterprises and Treaty-Making: A Contribution to the Discussion on Non-State Actors and the 'Subject of International Law'" in V. Gowlland-Debbas (ed)

demonstrated, the chains between standing and personality may be broken.[1215] He deconstructed these two notions and highlighted that the absence of standing does imply neither the absence of a right nor the absence of personality.[1216] He concluded that even if the individuals or corporations do not have standing (*jus standi*) before the international tribunals, they have rights and duties under international law.[1217] For example, the ICJ in various cases emphasized that it acknowledges the existence of rights and liabilities of companies distinct from their shareholders.[1218] The Court made a clear distinction between the right to property of companies on the one hand and of the shareholders (*associées*) on the other hand.[1219] Moreover, since they have international rights and duties, they also have international legal personality, even if they have no standing before international tribunals. If the international community recognizes rights and duties for corporations, it also recognizes the legal personality of corporations; because personality means the recognition of identity and morality.[1220]

Nevertheless, corporations have already standing before some of the international judicial and quasi-judicial organs, especially when their right to property is at issue. For example, the World Bank's International Centre for the Settlement of Investment Disputes (ICSID) is a conciliation and arbitration institution with full international legal personality serving the settlement of private international investment disputes between States and corporations, who are not nationals of the State party to the dispute.[1221] Therefore, the ICSID mechanism aims

---

Multilateral Treaty-Making: the Current Status of Challenges to and Reforms needed in the International Legislative Process, The Hague: Martinus Nijhoff, 2000, p. 62.

[1215] M.N.S. Sellers, "International Legal Personality", **Ius Gentium**, Legal Personality, Vol. 11, Spring 2005, pp. 73-74.

[1216] **ibid.**

[1217] **ibid.**

[1218] See Sandy Ghandhi, "Human Rights and the International Court of Justice The Ahmadou Sadio Diallo Case", **HRLR**, Vol. 11:3, 2011, pp. 527-555. See *e.g. Barcelona Traction* case, paras. 44, 46. For a historical perspective see also Shiv R.S. Bedi, **The Development of Human Rights Law by the Judges of the International Court of Justice**, Oxford, Hart Publishing, 2007.

[1219] ICJ, for the first time, -basing its reasoning on a human rights document- held that the Democratic Republic of Congo breached its obligations under the ICCPR and the African Charter on Human and People's Rights. Accordingly, it could be commented that the function of diplomatic protection has been evolved so as to include human rights protection at the World Court. In that case, Mr. Diallo was the sole shareholder (*associée*) of two private limited liability companies and the ICJ held that the companies having separate legal personalities had rights and liabilities distinct from that of their shareholders. Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo), Merits, Judgment ICJ Rep. 2010, p. 639, paras. 155-159.

[1220] Sellers, **op. cit.**, pp.73-74.

[1221] The ICSID has been established by 1965 World Bank Convention on Settlement of Investment Disputes between States and Nationals of Other States. Articles 18 and 25 of the ICSID Convention.

to realize the effective exercise and protection of the investors' rights without a need for the diplomatic protection of the home state.[1222] More recently, the ICSID, in *Tecmed* arbitration, considered the proportionality of the measure of refusal of renewing the licence based on public interests and held that "*There must be a reasonable relationship of proportionality between the charge or weight imposed to the foreign investor and the aim sought to be realized by any expropriatory measure.*"[1223] ICSID also referred to several judgments of the ECtHR concerning the restrictions on the right to property,[1224] but found out that Mexico violated its BIT obligations. It shall be noted that such decisions are only exceptionally given by the Centre, and they are not sufficient to protect human rights against violations perpetrated by the investors.

Another example for such dispute settlement mechanisms is the Iran-United States Claims Tribunal, which has jurisdiction over the disputes between one of these two States and the nationals of the other state.[1225] Both of these international tribunals are established for protecting the rights of the investors and foreign corporations against the regulations of host states, such as unequal treatment, expropriation and disputes on the terms of the contracts.[1226] The Court of Justice of the European Union is also empowered to hear cases involving TNCs, provided that they are subject to EU regulations.[1227]

To add, the United Nations Convention on Law of the Sea (UNCLOS) Articles 187 and 291(2) concerning the jurisdiction of the Seabed Disputes Chamber of the Law of the Sea Tribunal envisages that the dispute settlement procedures, as a rule,

---

Article 18 of the Convention expressly provides that the Centre has full international legal personality including the capacities to contract, acquire and dispose of movable and immovable property and to institute legal proceedings.

[1222] Article 27 of the ICSID Convention.

[1223] Tecnicas Medioambientales Tecmed S.A. v. The United Mexican States, ICSID Case No. ARB(AF)/00/2, 29.05.2003, para. 122. See also LG&E Energy Corp., LG&E Capital Corp. And LG&E International Inc. V. Argentine, ICDIS Case No. ARB/02/1, 03.10.2006, para. 195; Occidental Petroleum Corporation , Occidental Exploration and Production Company v. Ecuador, ICSID Case no. ARB/06/11, paras. 404-409. For an elaboration of the issue see Ernst-Ulrich Petersmann, "Human Rights, International Economic Law and 'Constitutional Justice'", **EJIL**, Vol. 19, No. 4, 2008, p. 795.

[1224] Tecnicas Medioambientales Tecmed S.A. v. The United Mexican States, ICSID Case No. ARB(AF)/00/2, 29.05.2003, para. 122.

[1225] Due to the hostages crisis in November 1979, the Iran-United States Claims Tribunal was established by the Algeria Declaration for settling the disputes filed until 19 January 1982 and other disputes concerning the interpretation and performance of the Algiers Declarations. http://www.iusct.net/, accessed on 15.05.2015.

[1226] Cutler, **op. cit.**, p. 143.

[1227] Henderson, **op. cit.**, pp. 41-42.

are only open to States Parties, and exceptionally also to the non-state actors, including corporations, if explicitly provided so in the Convention.[1228] The Permanent Court of Arbitration serves as an international tribunal for settling the disputes between states, state entities, intergovernmental organizations and private parties concerning matters such as investment protection and environmental protection.[1229] Finally, corporations also have standing before the regional human rights courts, examples of which will be examined in detail in the following sub-chapters of this thesis.[1230] These are the examples of 'active' legal personality that the corporations enjoy in the international scene. However, legal personality shall also have a 'passive' component, and that is the capacity to be held accountable for violations of international law.[1231]

4.1.2.3. Rights of Corporations under Human Rights Law

The language of human rights documents suggests that not only human beings but also legal entities including corporations do have rights under international law.[1232] The use of the words 'everyone', 'no one', 'individual' and 'persons' allows us to conclude that corporations, like real persons, possess rights to the extent such a right is applicable and enjoyable by an artificial person. For example, the UDHR prefers to use the term 'everyone' and 'no one' in almost all of its provisions, except for the right to marry. In general, the twin covenants also use a similar language. Even if such wordings might create an impression to the contrary, corporations may be the subjects of human rights documents, where appropriate. For example, the intention of the drafters of the text of the UDHR was to include the protection of the rights of corporations, especially with regard to their scientific, literary and artistic

---

[1228] Article 187 of the UNCLOS reads as follows: "*(c) disputes between parties to a contract, being States Parties, the Authority or the Enterprise, state enterprises and natural or juridical persons referred to in article 153, paragraph 2(b), concerning: (i) the interpretation or application of a relevant contract or a plan of work; or (ii) acts or omissions of a party to the contract relating to activities in the Area and directed to the other party or directly affecting its legitimate interests…*"

[1229] See detailed information and documents at http://www.pca-cpa.org, accessed on 15.05.2015. See also procedures in the context of The North America Free Trade Agreement (NAFTA) and The Canada-United States Free Trade Agreement (FTA).

[1230] The decisions of the UN Security Council to freeze funds, other financial assets and economic resources of the corporations, who allegedly finance terrorism, will also be elaborated on in the following sections.

[1231] Alain Pellet, "The Definition of Responsibility in International Law" in Crawford & Pellet & Olleson (eds.), **The Law of International Responsibility**, OUP, 2010, pp. 7-8.

[1232] See for a relatively early elaboration on the subject Daniel Freidman & Daphne Barak-Erez (eds.), **Human Rights in Private Law**, Hart, 2001, p. 2-3, 9.

productions.[1233] Article 15(1)(c) of the ICESCR also recognizes that everyone has the right "*to benefit from the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author*". In this provision, the use of the pronoun 'he' does not aim to exclude the right of corporations.[1234]

However, legal persons do not have standing before the UN treaty bodies for claiming their rights under the twin covenants.[1235] Accordingly, the Human Rights Committee declares cases inadmissible *ratione personae*, where the authors of communications claimed violation of corporate rights.[1236] Nevertheless, as expressly mentioned by the Human Rights Committee, real persons are entitled to submit communications if their rights have been violated as a direct or indirect consequence of the acts or omissions of legal persons:

> *"The beneficiaries of the rights recognized by the Covenant are individuals. Although, with the exception of article 1, the Covenant does not mention the rights of legal persons or similar entities or collectivities, many of the rights recognized by the Covenant, such as the freedom to manifest one's religion or belief (article 18), the freedom of association (article 22) or the rights of members of minorities (article 27), may be enjoyed in community with others. The fact that the competence of the Committee to receive and consider communications is restricted to those submitted by or on behalf of individuals (article 1 of the Optional Protocol) does not prevent such individuals from*

[1233] Lucien J. Dhooge, "Human Rights for Transnational Corporations", **J Transnat'l Law & Pol'y**, Vol. 16:2, Spring 2007, p. 212.
[1234] In other words, just like the use of "he" does not exclude "her" from such a right, the corporation as an "it" would not be excluded from benefitting the interests of its products.
[1235] Similarly, the Committee on Elimination of Discrimination against Women (CEDAW), Committee against Torture (CAT), Committee on the Elimination of Racial Discrimination (CERD), Committee on the Rights of Persons with Disabilities (CRPD), Committee on Enforced Disappearances (CED) may consider only individual communications. Sarah Joseph, "Scope of Application" in Moeckli & Shah & Sivakumaran (eds.), **International Human Rights Law**, OUP, 2010, pp. 153-154.
[1236] HRC view of 14 July 1989 A newspaper publishing company v. Trinidad and Tobago, Comm. 360/1989, para. 3.2; JRT and the WG Party v. Canada, CCPR/C/18/D/104/1981, inadmissibility, 6 April 1983, para. 6.4; Sharif Mohamed v. Barbados, Comm. No. 502/1992, inadmissibility, 31 March 1994; SM v Barbados, CCPR/C/50/D/502/1992, inadmissibility, 4 April 1994, para. 6.3; Michelle Lamagna v Australia, CCPR/C/65/D/737/1997, inadmissibility, 30 April 1999, para. 6.2; Roger Crochet v France, CCPR/C/100/D/1777/2008, 2 November 2010, para. 6.2.

> *claiming that actions or omissions that concern legal persons and similar entities amount to a violation of their own rights."* [1237]

For example, the HRC in its decision on Singer v. Canada held that:

> "*The Committee notes that the Covenant rights which are at issue in the present communication, and in particular the right of freedom of expression, are by their nature inalienably linked to the person. The author has the freedom to impart information concerning his business in the language of his choice. The Committee therefore considers that the author himself, and not only his company, has been personally affected by the contested provisions of Bills Nos. 101 and 178.*"[1238]

Clapham, agreeing with Lauterpacht underlines that possessing a right does not always come with a remedy that allows for its effective protection. Therefore, even if real or legal persons do not have an international procedural remedy to claim their rights before an international institution, it is accepted that they nevertheless possess that right. Accordingly, as it is assessed below, corporations have rights under the international and regional human rights treaties, even if the venue for claiming such rights is currently limited to the European protection system. However, having an international procedural remedy only provides for the effective protection of the already existing (recognized) rights.[1239] As a consequence, even if having international procedural remedies is a strong evidence of possessing international legal personality, absence of such remedies does not by itself allows us to conclude that a non-state actor does not have an international status.[1240] Furthermore, as van Kempen concludes, even if we were to assume that legal persons are not right-

[1237] See e.g. *Singer v. Canada*, U.N. Doc. CCPR/C/51/D/455/1991, 26 July 1994, para.11.2. However, Joseph comments that the Human Rights Committee came to this conclusion by considering the fact that the company was a small family-company and accordingly any prohibition on the use of language of its own choice has directly affected the right of the members of the family. Joseph, "Scope of Application" …, p. 153; *cf. Franz Wallmann et al. v Austria*, Comm. no. 1002/2001, UN Doc. CCPR/C/80/D/1002/2001, 29 April 2004.

[1238] Human Rights Committee, General Comment 31, Nature of the General Legal Obligation on State Parties to the Covenant, U.N. Doc. CCPR/C/21/Rev.1/Add.13 (2004), para. 9.

[1239] Clapham refers to Lauterpacht, E. (ed.) "Lauterpacht, H. Collected Papers", Vol. 1, Cambridge, CUP, 1970, pp. 286-287, see Clapham, **Human Rights Obligations…**, p. 74.

[1240] **ibid.**

holders under the human rights instruments and that they cannot be considered as victims before the international human rights protection mechanisms, an indirect protection is nevertheless afforded for them through the protection of natural persons affiliated with that legal person.[1241]

The American Declaration of the Rights and Duties of Man uses 'every person' as to include legal persons, where applicable. For example, the right to association (Article 22) and the right to property (Article 23) are among the rights that corporations are entitled to enjoy. Contrary to the American Declaration and despite the use of the words such as 'everyone', 'anyone' and 'no one', Article 1(2) of the American Convention on Human Rights explicitly defines 'person' as 'human beings', *i.e.* real persons.[1242] Accordingly, the Inter-American Commission on Human Rights made a distinction between competence to lodge petitions to the Commission and the capacity to be a victim of an alleged human rights violation.

The Commission declared the cases concerning rights of corporations inadmissible *ratione personae*, where the victim of a violation was a legal entity, and especially if the alleged violation concerned an activity of commercial nature, which did not violate human rights.[1243] For example, the Commission, in its annual report concerning Peru, expressly held that "*In this case the Commission recognized its competence to protect the rights of an individual whose property is expropriated, but not to protect "the rights of corporations, "such as companies or... banking institutions".*[1244] In *Mevopal SA v Argentina*, the Commission held that private juridical persons could be considered as 'NGOs' within the context of the American Convention, hence they could lodge petitions in accordance with Article 44.[1245] However, the Commission, in line with the well-established case-law of the Court, noted that neither the shareholders, nor any other physical person were a victim of

[1241] van Kempen, **op. cit.**, pp. 516-517.
[1242] However, Dhooge argues that the freedom from *ex post facto* laws, right to privacy, right to reply, right to judicial protection, and right to property (Articles 9, 11, 14, 21 and 25 of the American Convention) could be interpreted in a way to include the TNCs, as well. Dhooge, **op. cit.**, p. 214.
[1243] *e.g.* OEA/Ser.L/V/II.98, doc. 6, 16 October 1997, Report 47/97, Annual Report 1997, Tabacalera Boqueron SA v Paraguay, paras. 29 and 35. In *Tabacalera Boqueron* case, the Commission declared the submission inadmissible on the ground that the conflict was a matter of private international law, international commercial transactions and trademark law and not of human rights law.
[1244] OAE/Ser.L/V/II.124 Doc. 5, Report No 10/91, Case 10.169, "Banco del Perú", Annual Report 1990-1991, p. 452.
[1245] OEA/Ser.L/V/II.106, Doc. 6 rev., 11 March 1999, Report 39/99, *Mevopal, S.A. v. Argentina*, para. 12.

any violation, and concluded that it did not have competence to hear the case.[1246] In *Bendeck-Cohdinsa v Honduras*, the Commission reaffirmed that as a 'legal fiction', legal (artificial) persons are not provided with the protection of the Inter-American Convention.[1247] In a recent case, the IACommHR concluded that the petitioner, as a real person, had standing before the Commission because being the sole proprietor Carlos Lopez Urquia had no partner and the corporation he owned did not have a separate legal personality under Honduras law.[1248]

The African (Banjul) Charter on Human and People's Rights, except for in the Preamble and Articles 4 and 13,[1249] prefers to use the term 'individual'. Thus, in theory, there is no express ground not to conclude that the Banjul Charter protects the rights and freedoms of both real persons and legal persons, where applicable.[1250] Viljoen draws attention to the fact that communications before the African Commission on Human and Peoples' Rights can only be brought against States, and not non-state actors.[1251] However, if a State Party does not take the necessary steps to effectively protect the rights and to duly impose the duties envisaged under the Charter, inter-state (Articles 47-54) and non-state (Articles 55-57) communications may also be brought before the Commission.[1252] Furthermore, legal persons certainly can submit applications on behalf of real persons or group of real persons to the AfCommHPR.[1253] Moreover, unlike the other regional human rights protection systems, complaints *actio popularis*[1254] are also admissible before the AfCommHPR.

[1246] **ibid.**, paras. 16-20.

[1247] The Commission held that "…*the essential rights of man 'are based upon attributes of the human personality'...*". OEA/Ser.L/V/II., 27 September 1999, Report No. 106/99, Bendeck-Cohdinsa, Honduras, para. 17; See also OEA/Ser.L./II.95 Doc 7 rev. (1996), 11 March 1999, Report No 39/96, Case 11.673 Santiago Marzioni (Argentina), para. 20.

[1248] OEA/Ser.L/II.124 Doc.5 (2005), 24 October 2005, Report on Inadmissibility No 83/05, Carlos Alberto Lopez Urquia, Honduras, para. 42. See also Marius Emberland, "The Corporate Veil in the Jurisprudence of the Human Rights Committee and the Inter-American Court and Commission of Human Rights", **HRLR**, Volume 4, Number 2, 2004.

[1249] In the Preamble of the African Charter on Human and People's Rights, it is stated that 'human rights stem from the attributes of human beings' and in Article 4 it is expressly mentioned that 'human beings' have right to life. Article 13 of the Charter also refers to 'every citizen' as right-holders, even though the term 'citizen' potentially includes corporations.

[1250] For example, Article 2 of the Charter stipulates that "*Every individual shall be entitled to the enjoyment of the rights and freedoms recognized and guaranteed in the ... Charter without distinction of any kind such as ... national ... origin*".

[1251] Frans Viljoen, "Communications under the African Charter: Procedure and Admissibility" in M. Evans & R. Murray (eds.), **The African Charter on Human and Peoples' Rights: The System in Practice 1986-2006**, Cambridge, CUP, 2nd ed., 2008, p. 102.

[1252] **ibid.,** p. 102; Anselm Chidi Odinkalu, "Implementing Economic, Social and Cultural Rights" in Evans & Murray (eds.), **The African Charter**… p. 206, 215.

[1253] Article 35 of the AfCHPR.

[1254] *i.e.* submissions without a particular victim but that aim the protection of public interest.

However, whether the complainants can allege a violation of their own rights is not that certain. For example, van Kampen comments, in a case concerning the ban of private newspapers,[1255] while the AfCommHPR reported that this ban amounted to a violation of the right to freedom of expression, it did not specify the victim of the violation, *i.e.* whether the victim was the newspaper as a legal person, or the journalists of the newspaper as real persons, or the readers, or even the society as a whole.[1256]

The ECHR expressly recognizes that the legal persons have both substantive and procedural rights and freedoms under the Convention.[1257] Article 34 of the ECHR provides that "*any person, non-governmental organizations or group of individuals*" have the capacity to submit applications before the Court. The ECtHR considers corporations as 'NGOs' within the meaning of Article 34 of the Convention and declares applications brought by corporations *ratione personae* admissible.[1258] For example, the Court in Autronic AG v Switzerland case held that "*In the Court's view, neither Autronic AG's legal status as a limited company nor the fact that its activities were commercial nor the intrinsic nature of freedom of expression can deprive Autronic AG of the protection of Article 10. The Article applies to "everyone", whether natural or legal persons.*"[1259]

However, it should be noted that the Court, when attributing a non-governmental character to an organization within the meaning of Article 34,

---

[1255] AfCommHPR, EX.CL/364 (XI), Annex II, Article 19 v. The State of Eritrea, Comm.no. 275/2003, Decision of 16-30 May 2007.

[1256] Similarly see AfCommHPR, *Civil Liberties Organization v. Nigeria, Comm.no.* 101/93, 1995, para. 17. The AfCommHPR held that the right to freedom of association of the Nigerian Bar Association was violated. In another case, the AfCommHPR again held that the right to property was violated by the sealing up of the buildings of newspapers, but it did not specify whether the right-holder was the corporation, or the owner of the building or both. See AfCommHPR, *Constitutional Rights Project, Civil Liberties Organisation and Media Rights Agenda v. Nigeria*, Comm. nos. 140/94, 141/94, 145/95, 31 October 1998, para. 54. Concerning the press, church, universities and schools see also AfCommHPR, Free Legal Assistance Group and Others v. Zaire, Comm.nos. 25/89, 47/90, 56/91, 100/93, 1995, paras. 2, 3, 4, 45, 46, 48. See van Kempen, **op. cit.**, p. 514.

[1257] Marius Emberland, **The Human Rights of Companies: Exploring the Structure of ECHR Protection**, OUP, 2006.

[1258] Harris & O'Boyle & Bates & Buckley, **op. cit.**, p. 787.

[1259] ECtHR, Autronic AG v. Switzerland, App.no. 12726/87, 22 May 1990, para. 47. The Court in the same paragraph also referred to its case law concerning the application of Article 10 on freedom of expression in ECtHR, Sunday Times v. United Kingdom No.1, App.no. 6538/74, 1979; ECtHR, Sunday Times v. United Kingdom No. 2, App.no. 13166/1992; ECtHR, Mrkt. Int'l Verlag GmBH and Klaus Beermann v. Germany, App.no. 10572/83, 20 November 1989; ECtHR, Groppera Radio AG and Others, App.no. 10890/84, 28 March1990; ECtHR, Observer & The Guardian v. UK, App.no. 13585/88, 26 November 1991.

carefully draws a line between public and private corporations.[1260] For example, in a case concerning an Austrian broadcasting corporation, the Court held that the said corporation had an editorial independence and institutional autonomy qualifying it as a non-governmental organization.[1261] Similarly, in Radio France case, the Court held that "*...the category of "governmental organisation" includes legal entities which participate in the exercise of governmental powers or run a public service under government control. In order to determine whether any given legal person other than a territorial authority falls within that category, account must be taken of its legal status and, where appropriate, the rights that status gives it, the nature of the activity it carries out and the context in which it is carried out, and the degree of its independence from the political authorities.*"[1262] Furthermore, the Court explained that the reason for barring the public corporations from submitting applications before the Court is to prevent the States Parties to act both as an applicant and respondent in a case.[1263]

The ECtHR concluded on several occasions that corporations, as legal persons, can claim being victims of human rights violations.[1264] It is also the established case-law of the Court that shareholders cannot bring an application before the Court alleging violation of the rights of the corporation, unless it is proved that it turned out impossible for the company to bring such a claim through its competent representatives, organs or liquidators.[1265] For example, a corporation's right to

[1260] Clapham, **Human Rights Obligations**..., p. 82.
[1261] Österreichischer Rundfunk v Austria, App. no. 358841/02, 7 December 2006, paras. 53-54. Note that, the Human Rights Committee in a communication brought before it, pointed out that the State would be responsible for actions of the broadcasting company, whose 90% of stakes were owned by the State and which was under effective governmental control. *Leo Hertzberg et al. v. Finland*, Comm.no. 61/1979, U.N. Doc.CCPR/C/OP/1 at 124, 1985, para. 9.1.
[1262] Radio France and Others v France, App.no. 53984/00, 23 September 2003 decision of admissibility, para. 26. The Court also referred to the Holy Monasteries v. Greece case, App.nos. 13092/87; 13984/88, 9 December 1994, para. 49, where it concluded that the monasteries do not exercise governmental powers and are not under the supervision of the State. Therefore, the applicant monasteries shall be considered as NGOs within the meaning of Article 34 of the Convention.
[1263] Case of Islamic Republic of Iran Shipping Lines v Turkey, App. No. 40998/98, 13 December 2007, paras. 79-81 (admissibility); State Holding Company Luganskvugillya v. Ukraine, App. No.23938/05, 27 January 2009 (inadmissibility).
[1264] For an elaboration on the proposals in *travaux préparatoires* see Emberland, **The Human Rights of Companies**…, p. 35. See, *inter alia*, OAO Neftyanaya Kompaniya Yukos v. Russia, App. No. 14902/04, 20 September 2011; Bosphorus Hava Yollari Turizm ve Ticaret Anonim Şirketi v. Ireland, App. no. 45036/98, 30 June 2005.
[1265] Pokis v Latvia, app.No. 528/02, inadmissibility decision 5.10.2006: shareholders of a limited-liability company cannot apply concerning a dispute on the capital belonging to the company as a legal entity; Terem Ltd Chechetkin and Olius v Ukraine, App.no. 70297/01, 18 October 2005, para. 28: "… *The Court recalls further that the shareholders of a company, including the majority shareholders, cannot claim to be victims of an alleged violation of the company's rights under the*

property, right to protection of home and correspondence, right to freedom of expression, rights to freedom of association and freedom of assembly, right to be free of discrimination, right to fair trial may be violated.[1266] Furthermore, a commercial company may even suffer non-pecuniary damage depending on the circumstances of each case.[1267] The Court, in *Österreichischer Rundfunk v Austria* case, noted that political declarations of the Member States against the Resolutions of the Committee of Ministers and judicial practice of various States Parties demonstrate that commercial corporations as juristic persons may also be awarded compensation for non-pecuniary damages.[1268] The Court concluded that:

> *"In the light of its own case-law and that practice, the Court cannot therefore exclude the possibility that a commercial company may be awarded pecuniary compensation for non-pecuniary damage.*
>
> *The Court reiterates that the Convention must be interpreted and applied in such a way as to guarantee rights that are practical and effective. Accordingly, since the principal*

Convention ..."; *Agrotexim and Others v Greece*, App. no. 14807/89, 24 October 1995, paras. 59-72, para. 66: "*...the Court considers that the piercing of the "corporate veil" or the disregarding of a company's legal personality will be justified only in exceptional circumstances, in particular where it is clearly established that it is impossible for the company to apply to the Convention institutions through the organs set up under its articles of incorporation or - in the event of liquidation - through its liquidators. The Supreme Courts of certain member States of the Council of Europe have taken the same line. This principle has also been confirmed with regard to the diplomatic protection of companies by the International Court of Justice (Barcelona Traction, Light and Power Company Limited, judgment of 5 February 1970, Reports of judgments, advisory opinions and orders 1970, pp. 39 and 41, paras. 56-58 and 66)*"; Vesela and Loyka v Slovakia, App. no. 54811/00, inadmissibility decision; F. Santos Lda and Fachadas v Portugal, App. no. 49020/99, inadmissibility decision; CDI Holding Aktiengesellschaft and others v Slovakia, App.no. 37398/97, 18 October 2001, inadmissibility; Camberrow MM5 AD v Bulgaria, App.no. 50537/99,1 April 2004; Credit and Industrial Bank v Czech Republic, App.no. 29010/95, 21 October 2003, para. 52: "*The Court accordingly finds that, having regard to the particular nature of the complaints made, there were exceptional circumstances which entitled Mr Moravec, as the former President of the bank's Board of Directors and its majority shareholder, to lodge a valid application on the bank's behalf."*

[1266] For example, cases concerning right to fair trail of corporations includes, *inter alia*, ECtHR, Presos Compania Naveira S.A. v. Belgium, 17849/91, 20 November 1995 and ECtHR, Dombo Beheer v. Netherlands, app.no. 14448/88, 27 October 1993. For a good illustration of Court's approach regarding violation of rights of corporations in tax audits see OAO Neftyanaya Kompaniya YUKOS v Russia, App. no. 14902/04, 20 September 2011. Also see Vastberga Taxi Aktiebolag and Vulic v Sweden, App.no. 36985/97, 23 July 2002; Bernh Larsen Holding As and Others v Norway, App. no. 24117/08, 14 March 2013.

[1267] Commingersoll SA v Portugal, App. no. 355382/97, 6 April 2000, paras. 32-37; Vereinigung Demokratischer Soldaten Österreichs and Gubi v. Austria, App. no. 15153/89, 19 December 1994, para. 62; Freedom and Democracy Party (ÖZDEP), App.no. 23885/94, 8 December 1999, para. 57.

[1268] Österreichischer Rundfunk v Austria, App. no. 358841/02, 7 December 2006, paras. 34.

form of redress which the Court may order is pecuniary compensation, it must necessarily be empowered, if the right guaranteed by Article 6 of the Convention is to be effective, to award pecuniary compensation for non-pecuniary damage to commercial companies, too. Non-pecuniary damage suffered by such companies may include heads of claim that are to a greater or lesser extent "objective" or "subjective". Among these, account should be taken of the company's reputation, uncertainty in decision-planning, disruption in the management of the company (for which there is no precise method of calculating the consequences) and lastly, albeit to a lesser degree, the anxiety and inconvenience caused to the members of the management team."[1269]

Furthermore, the Court reaffirmed in *Société Colas Est and others v France* that:

"...the Convention is a living instrument which must be interpreted in the light of present-day conditions (see, mutatis mutandis, Cossey v. the United Kingdom, judgment of 27 September 1990, Series A no. 184, p. 14, § 35 in fine). As regards the rights secured to companies by the Convention, it should be pointed out that the Court has already recognised a company's right under Article 41 to compensation for non-pecuniary damage sustained as a result of a violation of Article 6 § 1 of the Convention (see Comingersoll v. Portugal [GC], no. 35382/97, §§ 33-35, ECHR 2000-IV). Building on its dynamic interpretation of the Convention, the Court considers that the time has come to hold that in certain circumstances the rights guaranteed by Article 8 of the Convention may be construed as including the right to respect for a company's registered office, branches or other business premises (see, mutatis mutandis, Niemietz, cited above, p. 34, § 30)."[1270]

[1269] Commingersoll SA v Portugal, App. no. 355382/97, 6 April 2000, para. 35.
[1270] ECtHR, Société Colas Est and Others v. France, App. no. 37971/97, 16 April 2002, para. 41. The case concerned the search without warrant of the office of a French construction company on

It is commented that this paragraph demonstrates that even though the protection afforded by the Convention would remain dependent on the wording and object and purpose of the text,[1271] the ECtHR gradually extends the scope of the rights so as to include the rights of corporations on a case-by-case basis.[1272] Winfried and Rezai commented that "[t]*his steady evolution of the Court's case law apparently signifies a dynamic process of gradual humanization of corporations*".[1273] They asserted that the Court's dynamic interpretation of the Convention might even result in the recognition of the right to life for corporations in the future.[1274]

However, it should be kept in mind that corporations cannot be considered equal with human beings and the 'humanization' of corporations shall be kept limited to the particularities of their existence.[1275] Furthermore, when affording a right to a corporation the logic and reason behind granting that right to human beings shall also be kept in mind.[1276] So, the rights of TNCs under international human rights law shall be narrower than that of the real persons and even of the other legal entities serving public good, such as labour unions, ideological organizations, or charitable organizations.[1277] For example, as Dhooge mentions, environmental

---

suspicion of engagement in anti-corruption activities. The applicant corporation alleged that the workplace constitutes "home" within the meaning of Article 8.

[1271] Clapham, **Human Rights Obligations**…, p. 407.

[1272] Winfried H.A.Ö. van den Muijsenbergh & Sam Rezai, "Corporations and the European Convention on Human Rights", **Pac. McGeorge Global Bus. & Dev. L.J.**, Vol. 25, 2012, p. 59.

[1273] **ibid.**

[1274] **ibid.** Winfried and Rezai point out that in *Comingersoll v Portugal* case, Judges Rozakis, Bratza, Caflisch and Vajic in their concurring opinion argued that the corporations are "*independent living organisms… whose rights also receive autonomous protection under the* [ECHR]".

[1275] Humanization of corporations has been harshly criticized by the civil society, even triggering mass protests such as the Occupy Wall Street movement. 'Probably', as a consequence of these protests and especially, regarding the corporate actors financing the political parties and candidates for the elections in the U.S., the New York City Council adopted a symbolic 'anti-corporate personhood' Resolution (1172) on 4 January 2012 for opposing the Supreme Court decision (Citizens United vs. Federal Election Commission, 558 U.S._(2010); Docket no. 08-205), which held that corporations, just like the real persons, have first amendment rights. The Resolution also called for a constitutional amendment "*to provide that corporations are not entitled to the entirety of protections or 'rights' of natural persons, specifically so that the expenditure of corporate money to influence the electoral process is no longer a form of constitutionally protected speech."* Walker, Hunter, City Council Passes Anti-Corporate Personhood Resolution, http://observer.com/2012/01/city-council-passes-anti-corporate-personhood-resolution/#ixzz3hUsfLln7, accessed on 17.08.2015; Interview with Edward Radzivilovskiy on "After Thirty Years of Class War" in Noam Chomsky, **Occupy: Reflections on Class War, Rebellion and Repression**, Occupied Media Pamphlet Series/Zucotti Park Press, Brooklyn 2012, pp. 53-54.

[1276] Dhooge, **op. cit.**, pp. 200, 228, 232. Please see the "Universal Declaration of the Rights of Transnational Corporations and Other Business Enterprises" annexed to Dhooge's article.

[1277] Dhooge argues that corporations are "self-concerned" persons aiming to maximize their profits, therefore, they should be afforded the lowest degree of human rights protection. On the other hand, if

regulations, zoning and building codes and eminent domain could be used as grounds for restricting the property rights of corporations.[1278] Intellectual property rights, on the other hand, require protection against the violations by private persons.

Moreover, as van Kempen rightfully warns, human rights protection afforded to corporations carry the risk of being abused by powerful TNCs, especially by those operating in developing countries.[1279] van Kempen argues that where it becomes difficult for national authorities to maintain law and order and to protect the rights of the individuals against violations perpetrated by such powerful TNCs, the prohibition of abuse of rights as provided under Article 30 of the UDHR, Article 5 of the ICCPR, Article 17 of the ECHR, Article 29 of the IACHR and Article 27 of the AfCHPR, shall be applied in order to withhold the human rights from that legal person.[1280]

Even though it may be suggested that in some cases the Convention obligations bind private parties, applications lodged against private persons before the ECtHR are inadmissible *ratione personae.*[1281] Nevertheless, this does not bar the national judges from applying the ECHR provisions to the disputes between private parties,[1282] provided that the incorporating legislation allows them to do so by imposing duties on individuals or requiring or prohibiting certain conduct of private persons.[1283] Furthermore, it may be argued that the ECHR is being indirectly enforced on corporations in situations where the State is found to be in violation of its positive obligations for either not preventing the interferences by the non-state

---

a right is granted to a corporation under national or international law, that right should be equally enjoyed by all corporations, whether publicly traded, privately held, state-owned, domestic, foreign, alien, national or transnational. However, with regard to the freedom of expression on political issues and the right to take part in the government, Dhooge mentions that a distinction is required between the national and transnational corporations. Anyway, under the international documents, TNCs are already prohibited from engaging in activities that may amount to an interference with the domestic affairs of the host country. Dhooge, **op. cit.**, pp. 230-231, 233-234.

[1278] **ibid.,** p. 237.

[1279] van Kempen, **op. cit.**, p. 548.

[1280] **ibid.**, p. 548.

[1281] See inadmissibility decisions by the Commission in app. nos. 172/56; Yearbook 1, pp. 211, 215 and 1599/62, Yearbook 6, pp. 348, 356; X v UK No 6956/75, 8 DR 103, 1976; Durini v Italy No. 19217/91, 12 January 1994.

[1282] Clapham, **Human Rights Obligations**…, p. 350.

[1283] Ovey, Clare & White, Robin C. A., **Jacobs & White, The European Convention on Human Rights**, OUP, 4th ed., 2006, p. 52.

actors or failing to provide effective remedy for the victims of such interferences or both.[1284]

4.1.2.4. Rights Come with Responsibilities[1285]

In line with the concept of international legal personality, I argue that TNCs, which benefit from the rights and other positive aspects of international law, should equally bear the negative consequences of being an international participant.[1286] Today, it cannot be argued that international human rights norms only address States. Non-state actors are also bearers of duties under the modern concepts of international human rights law.[1287] Considering the phenomena of economic globalization and neo-liberalism, the changing circumstances of world politics and the fragmentation of actors influencing the international policies, it is inevitable to accept that TNCs do also have at least an obligation to respect human rights for the purposes of *sustainable co-existence.*[1288] Going one step further, if States agree to adopt an international document expressly and directly imposing human rights obligations on corporate actors, the discussions on international legal personality would to some extent become moderate.[1289]

Clapham argues that if the international community is able to impose duties and obligations on individuals, it should equally be able to impose such duties and obligations on TNCs, irrespective of the discussions on the legal personality or subjectivity in public international law.[1290] What should be taken into account is the effectiveness principle for the protection of human rights.[1291] In other words, if it serves the protection of human rights, the international community should be able to prohibit the abusive acts, conducts or operations of corporations. Moreover,

---

[1284] Clapham, **Human Rights Obligations**…, p. 409.
[1285] This well-known idiom is borrowed from Roger M. Michalski, "Rights Come with Responsibilities: Personal Jurisdiction in the Age of Corporate Personhood", San Diego Law Review, Vol. 50, 2013, pp.125-190.
[1286] Gatto, **op. cit.**, p. 62.
[1287] Reinisch, **op. cit.**, p. 72.
[1288] The term sustainable co-existence is generally used for the co-existence of mankind and nature. Even though the relationship of TNCs with the international community includes concerns on the protection of environment, for the purposes of this study, I use the term so as to imply the co-existence of humans and corporations.
[1289] Reinisch, **op. cit.,** p. 72.
[1290] Clapham, **Human Rights Obligations**…,, p. 79.
[1291] **ibid.**, p. 80.

corporations should be held internationally liable, irrespective of their status as a legal person under international law.[1292] In the end, TNCs, as international actors, should be under an obligation to respect human rights, regardless of the inadequacies in domestic legislations and enforcement mechanisms.

As discussed above, it could be alleged that TNCs have limited legal personality that allows them to enjoy rights and bear duties, which are recognized under international conventions and customary international law, especially on international humanitarian law and international human rights law. Additionally, 'internationalized contracts', which (1) expressly refer to general principles of international law, (2) provide international arbitration as a mechanism for the settlement of disputes, (3) constitute an 'economic development agreement', are considered as tools for granting limited international personality to corporations.[1293] This limited legal personality should also include the capacity to be prosecuted and held accountable for the crimes they perpetrate.[1294] In any case, lack of a system of legal responsibility does not allow us to conclude that corporations lack international legal personality.[1295]

Gatto agrees that even though currently there is no consensus on the international legal personality of corporations, it cannot be contravened that they do participate in the international web of legal interactions either as addressees and beneficiaries or holders of rights and duties.[1296] As examined above, corporations also acquired access to international courts and tribunals. Even though this access is currently only for the protection of their own rights, international law should evolve in a way to cover the duties and obligations of corporations. Historical analysis on

---

[1292] The legal status of an entity shall be determined by the domestic law of the State, where it is established or registered. For further elaboration see the discussion on nationality of corporations.

[1293] Fleur purports that if a corporation breaches its obligations under such an internationalized contract, the act or omission of the corporation could be considered as violating international law. Fleur Johns, "The Invisibility of the Transnational Corporation: An Analysis of International Law and Legal Theory", **Melb. Univ. L. Rev.**, Vol. 19, 1994, p. 905-906; Backer, "Multinational Corporations, Transnational Law…", p. 377. See also Pierre-Marie Dupuy, "L'unité de l'ordre juridique internationale: Cours général de droit international public", Vol. 297, RCADI, Leiden, Martinus Nijhoff, 2002, p. 105 ("with specific reference to *Texaco v Libya* 53 ILR [1977] 389) and at p. 117 cited in Clapham, **Human Rights Obligations…"**, p. 77.

[1294] Clapham, "The Question of Jurisdiction…", p. 190.

[1295] Pellet gives the example of constitutional systems, *"in which the only consequence of the violation of their rules is a purely political sanction"*. Pellet, "The Definition of Responsibility…", p. 4.

[1296] Gatto, **op. cit.**, p. 61.

the development of international law proves that no other 'subject', such as individuals, organizations, insurgents and national liberation movements have acquired solely rights,[1297] and the acquisition of rights has been immediately followed by the acquisition of international duties and obligations.[1298] Finally, corporations also participate in the international law-making process by affecting the policies of other international actors through intentional lobbying activities or interactions with the other international actors affecting their behaviours and policies.[1299] International arbitral decisions, too, may occasionally reflect the interests of the corporations, contributing to the formation of norms of international law.[1300]

To add, one pragmatic approach on the problem of legal personality has also been theorized, which presumed the existence of legal personality unless evidence found to the contrary.[1301] Nowrot, in his comprehensive article, elaborates on the "rebuttable presumption of normative responsibilities of *de facto* powerful actors".[1302] He argues that the aim of international law is 'positive peace'. This notion implies, on the one hand, the preservation of order and peace in international relations and the promotion of peaceful settlement of disputes. On the other hand, protection of human rights, labour rights and environment also contribute to the maintenance of 'positive peace' and social justice.[1303] The transformation of international law from a web of rules regulating inter-state relations[1304] to a

---

[1297] **ibid.**, p. 53.
[1298] **ibid.**, p. 51.
[1299] **ibid.**, p. 62.
[1300] Muthucumaraswamy Sornarajah, "Economic Neo-Liberalism and the International Law on Foreign Investment" in Anghie, Antony & Chimni, Bhupinder & Mickelson, Karin & Okafor, Obiora. **The Third World and International Order: Law, Politics and Globalization**, Developments in International Law, Vol. 45, Martinus Nijhoff Publishers, 2003, pp. 173-190.
[1301] Jan Klabbers, **An Introduction to International Institutional Law**, Cambridge: CUP, 2005, p. 55. In the Reparations case, implications in support of this approach could also be detected: *"... the Court's opinion is that fifty States, representing the vast majority of the members of the international community, had the power, in conformity with international law, to bring into being an entity possessing objective international personality, and not merely personality recognized by them alone, together with capacity to bring international claims.*" Reparation for Injuries Suffered in the Service of the United Nations, Advisory Opinion, ICJ Rep. 1949, p. 185.
[1302] Nowrot, "Reconceptualising…", p. 573 *et seq.*
[1303] **ibid.**, p. 569.
[1304] Emer de Vattel, "Le Droit des Gens, ou Principes de la Loi Naturelle, appliqués á la Conduite aux Affaires des Nations et des Souverains" in James Brown Scott (ed.), **The Classics of International Law**, The Carnegie Institute of Washington, 1916, originally published in 1758, Préliminaires, para. 3 (p.1) cited in Portmann, **op. cit.**, pp. 35-38.

'constitutionalized'[1305] legal system that promotes global public goods and protect community interests shall also have its implications in the concept of 'legal personality'.[1306]

International law, as a realistic legal system, should evolve in line with the changing circumstances and orientate itself with the sociological facts of the international order shaped by the practices of the members of the international community.[1307] The 'subjects doctrine' of international law has become out-dated and insufficient for the sustainability of international rule of law.[1308] Therefore, normative obligations and responsibilities of *de facto* powerful and effective non-state actors, and especially of TNCs, should be acknowledged especially when the global public good and positive peace is under a risk of disturbance.[1309] Consequently, Nowrot suggests a reconceptionalization of the 'subjects doctrine' in a way to cover TNCs for the imposition of normative responsibilities, which would contribute to the preservation of positive peace and protection of global public interests, such as human rights, labour rights and the environment.[1310] He argues that, considering the primary aims of international law and the sociological facts of the evolving conditions and relations of the international community, a realist approach would admit that, currently, there is already a presumption that TNCs are under an international legal obligation to promote the community interests. Yet, this presumption has not been rebutted by the members of the international community.[1311]

Klabbers argues that the legal scholars habitually discuss the concept of personality when corporations are at issue. This in turn, as Klabbers suggests, harms

---

[1305] Jan Klabbers & Anne Peters & Geir Ulfstein, **The Constitutionalization of International Law**, OUP, 2009; Jürgen Habermas, "The Constitutionalization of International Law and the Legitimation Problems of a Constitution for World Society", **Constellations**, Volume 15, Issue 4, December 2008, pp. 444–455.

[1306] Nowrot, "Reconceptualising…", pp. 569-570.

[1307] **ibid.,** p. 571 and 583: The new 'subjects doctrine' relies on the power of *de facto* influential non-state actors and is to a great extent influenced by the sociological school of international law. However, it also adds a normative element and requires that no objection has been made by the States, international organizations or the other members of the international community.

[1308] Sir Arthur Watts, "The International Rule of Law", **Germ. YB Int'l L**, Vol. 36, 1993, p. 15; Thürer, **op. cit.**, p. 58.

[1309] Nowrot, "Reconceptualising…", p. 571.

[1310] **ibid.**, p. 573 *et seq.*

[1311] **ibid.**, pp. 574-575. Nowrot asserts that for rebutting this presumption, 'a respective normative expression of the international community as a whole, or at least a sufficiently uniform practice of states and international organizations' is required.

the real purpose of the acquisition of personality, *i.e.* being recognized as a person.[1312] Therefore, Klabbers asserts that the concepts of legal personality and subjectivity are purely academic and descriptive notions.[1313] Clapham agrees with Klabbers and suggests that analysing the rights, obligations, privileges, powers and immunities of corporations would be more meaningful than concentrating on the elements of personality in determining their legal status and international legal personality.[1314] Granting personality or subjectivity would not by itself amount to the recognition of rights and obligations for an individual or corporation. Likewise, non-recognition would not bar the enjoyment of rights or the imposition of duties on non-state and non-subject actors. Nevertheless, Klabbers, in another article, gives the devil his due and posits that personality, on one hand, may serve as legitimizing the existence of rights of a group, and on the other hand, may prevent any interference on the enjoyment of these rights by governmental authorities or third-parties.[1315] For the purposes of our study, it should also have an implication that the 'person' has direct duties and obligations that are claimable and enforceable in the international arena.

Besides all that has been said above, there are other criticisms directed at the efforts of granting international legal personality to corporations. These efforts are generally due to the assertion of the Special Rapporteur Gaja that legal personality is a precondition for imposing secondary obligations based on the breach of a primary obligation under international law.[1316] However, as Nollkaemper and Jacobs explain,

---

[1312] Jan Klabbers, "The Concept of Legal Personality", **Ius Gentium**, Legal Personality, Volume 11, Spring 2005, p. 61.
[1313] Klabbers, "An Introduction…", p. 43 and 57.
[1314] Clapham, **Human Rights Obligations**..., p. 83.
[1315] Klabbers, "The Concept of Legal Personality"…, p. 65. For a critic on the 'subjects doctrine' with special references to the international politics after 9/11 see Jan Klabbers, "(I Can't Get No) Recognition: Subjects Doctrine and the Emergence of Non-State Actors" in Jarna Petman & Jan Klabbers (eds), **Nordic Cosmopolitanism. Essays in International Law for Martti Koskenniemi**, LeidenBoston: Martinus Nijhoff, 2003, pp. 351-369.
[1316] First Report on ILC Draft Articles on the Responsibility of International Organizations by Special Rapporteur Giorgio Gaja, UN Doc A/CN.4/532, 26 March 2003, paras. 15-20. See also Roucounas, **op. cit.**, pp. 398-399. The distinction between primary and secondary rules of international law is based on the dichotomy used by the International Law Commission. According to this, the norms creating obligations for States are the primary rules (or obligations of conduct), and the norms regarding the responsibility of States for violating the primary rules and the consequences of such breaches are secondary rules (or rules of enforcement). Nollkaemper & Jacobs, "Shared Responsibility…", pp. 45-50.

the artificial distinction between primary and secondary rules of international is not always clear-cut, nor it is pragmatic.[1317]

Moreover, Alvarez adds that the dichotomy between 'subject' and 'object' of international law causes confusion more than any enlightenment.[1318] Likewise, Mogami endorses that an artificial segregation is created between States and non-state actors on the ground that the latter could not be a party to international treaties despite the fact that they possess rights and obligations on the international sphere, have standing before judicial and quasi-judicial proceedings, and are able to participate in the international law-making processes, especially of customary law.[1319] According to Mogami, this could be called a "'normative detention' of non-state actors in the state-centric paradigm".[1320] As Higgins deduced, in her famous book dated 1994, the discussion on the legal personality of non-state actors and 'subjectivity' create a feeling of circularity and an intellectual prison with no functional purpose.[1321] Accordingly, she proposed the use of the term 'participants' for referring to all the actors taking place in the international legal process.[1322]

In fact, scholars' intention is to construct a legal reasoning for imposing direct human rights obligations on non-state actors. However, as Reinisch rightfully puts it, in trying to do so, they rely on the international law documents that already take non-state actors as direct addressees of human rights obligations.[1323] Gatto, underlines that States, international organizations, non-governmental organizations, national liberation movement, individuals and companies have already become subjects of international law to the extent they participate in the international legal interactions.[1324] Therefore, as Klabbers puts it in a reconciling terminology, once an

---

[1317] **ibid.,** p. 47. See also Eric David, "Primary and Secondary Rules", in Crawford & Pellet & Olleson (eds.), **The Law of International Responsibility**, OUP, 2010, p. 29 *et seq*.
[1318] José E. Alvarez, "Are Corporations 'Subjects' of International Law?", **Santa Clara J Int'l L.**, Vol. 9, 2011, p. 9.
[1319] Toshiki Mogami, "Non-state Actors and International Law: A Tentative Theorization on the Conversion of the Principle of the Legal Order", **J Int'l L & Dipl'y**, Vol. 108, No. 2, August 2009, p. 309.
[1320] **ibid.**
[1321] Rosalyn Higgins, **Problems and Process: International Law and How We Use It**, OUP, 1994 (rep.2010), p. 49.
[1322] **ibid.**
[1323] Reinisch, **op. cit.**, p. 72. For a philosophical approach of the matter see, Janne E. Nijman, "Paul Ricoeur and International Law: Beyond "The End of the Subject" - Towards a Reconceptualization of International Legal Personality", **Leiden J Int'l Law***,* Vol. 20, 2007, pp. 25-64.
[1324] Gatto, **op. cit.**, p. 49.

actor participates in the international legal relations, it shall be presumed that it has 'a degree of international legal personality'.[1325]

4.1.3. The Scope of Human Rights Obligations for Corporations

The term 'human rights' includes a wide range of categories of rights, each of which has specific characteristics with regard to its nature, addressees and enforceability. Therefore, the amount, degree, intensity and nature of the obligation that might be imposed directly on corporations would depend on the particularities of a given right under the specific circumstances of a given case.[1326] While some of the rights, such as the right to asylum, right to nationality, right to fair trial, prohibition of arbitrary arrest, could not be a source of obligation for individuals or corporations, some other rights such as the right to family or right to education, if reformulated, could create obligations for TNCs.

For example, Clapham argues that all rights and freedoms protected under the ECHR may have an area of application in the private sphere, including even the right to marry in the context of the obligation not to discriminate in the workplace based on marital status.[1327] Even in cases concerning violations of rights that can only be breached by State actors, 'purely private' corporations would be under an obligation not to be complicit in, *i.e.* not to encourage or facilitate, the acts perpetrated by the governmental authorities.[1328] In that case, the TNC could be considered as being in violation of its obligation not to be complicit in human rights violations and even to protect human rights from third party interferences.[1329]

On the other hand, peremptory norms, such as the right to life, prohibition of torture, inhuman and degrading treatment, prohibition of slavery, prohibition of apartheid, prohibition of racial discrimination, crimes against humanity and fundamental principles of law of armed conflict, do create direct obligations for

---

[1325] Klabbers, "An Introduction…", p. 58.
[1326] Gatto, **op. cit.**, p. 96.
[1327] Clapham, **Human Rights Obligations**…, p. 418.
[1328] Gatto, **op. cit.**, p. 95.
[1329] David Kinley & Junko Tadaki, "From Talk to Walk: the Emergence of Human Rights Responsibilities for Corporations at International Law", **Va. J. Int'l L.**, Vol. 44, 2004, pp. 962-993.

TNCs, as such, *i.e.* without a need for reformulation.[1330] For example, as the ICTY affirmed in Furundzija case, the prohibition of torture operates 'both at the interstate level and at the level of individuals', leaving no legal loopholes.[1331] This fact also constitutes the legal ground for universal jurisdiction concerning violations of the prohibition of torture.[1332] Furthermore, today, it is not disputed that TNCs are under an obligation to respect human rights. For example, corporate obligation to respect human rights under the UN Guiding Principles include, *at minimum,* respect for the rights and freedoms and the principles recognized in the International Bill of Human Rights and the ILO Declaration on Fundamental Principles and Rights at Work.

The UN Norms define the term 'human rights' in a broader sense so as to include *"civil, cultural, economic, political and social rights, as set forth in the International Bill of Human Rights and other human rights treaties, as well as the right to development and rights recognized by international humanitarian law, international refugee law, international labour law, and other relevant instruments adopted within the United Nations system."*[1333] Furthermore, the Preamble of the UN Norms specifically underlines that TNCs, their officers and persons working for TNCs are obliged to respect the generally recognized responsibilities under the following non-exhaustive list of international treaties, as well as soft law documents:

• Convention on the Prevention and Punishment of the Crime of Genocide;

• Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment;

• Slavery Convention and the Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery

• International Convention on the Elimination of All Forms of Racial Discrimination;

• Convention on the Elimination of All Forms of Discrimination against Women;

• International Covenant on Economic, Social and Cultural Rights;

[1330] An exemplary list of peremptory norms is given in the Commentary to ARSIWA Article 26 (para. 5) and Article 40 (paras. 3-5) and also in the General Comment no. 29 of the UN Human Rights Committee.
[1331] Judgement, Prosecutor v Furundžija, (IT-95-17/1-T), ICTY, 10 December1998, para. 146.
[1332] **ibid.**, para. 156.
[1333] UN Norms, para. 23.

• International Covenant on Civil and Political Rights;

• Convention on the Rights of the Child;

• International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families;

• Geneva Conventions of 12 August 1949 and two Additional Protocols thereto for the protection of victims of war;

• Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms;

• Rome Statute of the International Criminal Court;

• United Nations Convention against Transnational Organized Crime;

• Convention on Biological Diversity;

• International Convention on Civil Liability for Oil Pollution Damage;

• Convention on Civil Liability for Damage Resulting from Activities Dangerous to the Environment;

• Declaration on the Right to Development;

• Rio Declaration on the Environment and Development;

• Plan of Implementation of the World Summit on Sustainable Development;

• United Nations Millennium Declaration;

• Universal Declaration on the Human Genome and Human Rights;

• International Code of Marketing of Breast-milk Substitutes adopted by the World Health Assembly;

• Ethical Criteria for Medical Drug Promotion and the "Health for All in the Twenty-First Century" policy of the World Health Organization;

• Convention against Discrimination in Education of the United Nations Educational, Scientific, and Cultural Organization;

• Conventions and recommendations of the International Labour Organization;

• Convention and Protocol relating to the Status of Refugees;

• African Charter on Human and Peoples' Rights;

• American Convention on Human Rights;

• European Convention for the Protection of Human Rights and Fundamental Freedoms;

• Charter of Fundamental Rights of the European Union;

• Convention on Combating Bribery of Foreign Public Officials in International Business Transactions of the Organisation for Economic Cooperation and Development.

It shall be underlined that, the international documents referred to above and the rights contained therein signify merely the rights that may be directly affected or interfered with as a consequence of corporate activities. Furthermore, as Kinley and Chambers prove, each of these rights are directly or indirectly interconnected and linked to each other that violation of one of the rights might at the same time amount to the violation of another right.[1334] For example, as Kinley and Chambers mention failure in consumer protection may result in the infringement of the right to physical integrity, or business corruption in a country may amount to the denial of the right to self-determination.[1335]

Therefore, the indivisibility, interdependency and interrelatedness of all human rights should always be kept in mind without giving priority to any certain of one of the rights, which also prevents us from making an exhaustive list of obligations for corporations.[1336] Consequently, it would neither be practical nor meaningful to make a list of rights to be respected and/or protected by corporations.

4.1.4. Extending Corporate Obligations to Spheres of Influence

The term 'sphere of influence' has been used for the first time in the UN Norms and it implies a potential of existing duties for corporations not only in their actual operation areas, but also in the territories where the community feels the effects of their operations.[1337] Accordingly, the UN Norms seek to impose obligations on companies in their spheres of activity and influence, and they apply

[1334] Kinley & Chambers, **op. cit.**, p. 471 *et seq*.
[1335] Similarly, the right to a healthy environment is integral part of Article 12 of ICESCR (right to health) and the right to development is an inalienable human right in the sense of UDHR Articles 22 and 29, ICCPR and ICESCR common article 1. See also Rio Declaration on Environment and Development Principle 1 and Declaration on the Right to Development Article 1, Vienna Declaration and Programme of Action Part I para.10, UN's Millennium Development Goals. Kinley & Chambers, **op. cit.**, p. 471 *et seq*.
[1336] Gatto, **op. cit.**, p. 98.
[1337] Kinley & Chambers, **op. cit.**, p. 452.

complementary to the national laws of host and home states.[1338] Thus, the UN Norms aim to hold corporations responsible for human rights abuses even if the host state fails to implement human rights obligations or the host state itself violates the human rights of those under its jurisdiction, while the corporation knowingly becomes complicit in such abuses.[1339] In other words, the UN Norms link the theory of corporate responsibility to the 'influence'[1340] and 'benefit'[1341] of the company, instead of its 'control'.[1342] The term 'sphere of activity' is also used in Principle 1 of the UN Global Compact, however, no definition has been given.[1343] Likewise, the OECD Guidelines, while not using the same wordings, imply such responsibility and refer to the human rights of those affected by the activities of TNCs.[1344]

Gatto, emphasizes that a certain degree of political, contractual, economic or geographic proximity should be required in deciding whether an individual or group is within the sphere of influence of a corporation.[1345] Jochnick, too, argues that, the responsibility of TNCs for human rights violations could be drawn upon the criteria used by the ICJ in Nicaragua case, by analogy.[1346] The ICJ in Nicaragua case held that "…*the United States authorities largely financed, trained, equipped, armed and organized the FDN… What the Court has to determine at this point is whether or not the relationship of the contras to the United States Government was so much one of dependence on the one side and control on the other that it would be right to equate the contras, for legal purposes, with an organ of the United States Government, or as acting on behalf of that Govemment.… Yet despite the heavy subsidies and other support provided to them by the United States, there is no clear evidence of the United States having actually exercised such a degree of control in al1 fields as to*

[1338] As suggested by Kinley and Chambers, given the lack of an international treaty directly obliging parent companies for the conduct of their subsidiaries through the piercing of corporate veil, shared (joint) responsibility of home State, host State and the TNC with respect to their spheres of activity and influence may apply in such situations. As a legal ground to their argument they underline especially Article 5 of the 2001 ARSIWA. Kinley & Chambers, **op. cit.,** p. 466.
[1339] **ibid.**, p. 468. See *Doe I v. Unocal Corp*., 395 F. 3d 932 (9th Cir. 18 September 2002).
[1340] UN Norms, para. 1.
[1341] UN Norms, para. 3.
[1342] Steinhardt, "Corporate Responsibility…", p. 205.
[1343] UN Global Compact, Principle 1: "Business is asked to support and respect the protection of international human rights within their sphere of influence'"
[1344] The OECD Guidelines, II. General Policies, A.2: (Enterprises should) "Respect the internationally recognised human rights of those affected by their activities."
[1345] Gatto highlights that para. 22 of the Norms adopt a very broad definition of the term "stakeholder", and to prevent such a broad application the criteria of proximity should be added. Gatto, **op. cit.**, p. 84.
[1346] Jochnick, **op. cit.**, p. 78.

justify treating the contras as acting on its behalf."[1347] According to this, the proximity to and the degree of influence of TNCs on a particular human rights violation by a subsidiary should play an important role in determining the legal, criminal and administrative responsibility of TNCs.[1348]

The term 'influence' has been used by the ICJ in the context of State's obligation to prevent genocide. The Court held that States are "*…under an obligation to prevent, so far as within their power, commission of genocide by persons over whom they have a certain influence…*"[1349] Furthermore, the ICJ added that one of the parameters in concluding whether the State failed to fulfil her due diligence obligations to prevent genocide is her "*capacity to influence effectively the action of persons likely to commit, or already committing, genocide. This capacity itself depends, among other things, on the geographical distance of the State concerned from the scene of the events, and on the strength of the political links, as well as links of all other kinds, between the authorities of that State and the main actors in the events. The State's capacity to influence must also be assessed by legal criteria, since it is clear that every State may only act within the limits permitted by international law; seen thus, a State's capacity to influence may vary depending on its particular legal position vis-à-vis the situations and persons facing the danger, or the reality, of genocide."*[1350] Consequently, the Court held that despite having an undeniable influence and information on the commission of crimes and the means to prevent the Srebrenica genocide, Serbia failed to fulfil its obligation to prevent it.[1351]

Sphere of influence of corporations may be described by way of using concentric rings. In such case, corporations might most likely be held legally responsible at the innermost circles, and less likely to be held responsible at the outermost circles. For example, the Global Compact used the following order to demonstrate the relationship of corporations with the outer world on different levels:

[1347] Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Merits, Judgment, ICJ Rep. 1986,paras. 108-109.
[1348] Jochnick, **op. cit.**, p. 78.
[1349] Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro), Judgment, ICJ Rep. 2007, para. 166 and see also paras. 410, 434, 435, 461.
[1350] **ibid.**, para. 430.
[1351] **ibid.**, para. 438.

1. workplace;
2. supply chain;
3. marketplace;
4. community;
5. government. [1352]

First of all, this model demonstrates that a corporation shall be responsible for all violations directly or indirectly perpetrated at the workplace. Secondly, the model clearly implies that corporations are not only responsible for their conducts in the workplace, but also of all their conducts and business relationships with their supply chains, within the marketplace and the community. Finally, corporations may also be held at least morally responsible for their relations with the Governments, which potentially violate or support or encourage the violation of human rights. Accordingly, corporations are expected to adopt codes of conduct and policies fully aware of their responsibilities towards all stakeholders. For example, Barclays commits itself that regardless of weakness of state jurisdiction or ineffectiveness of local legislation, it will seek to raise awareness of human rights, provide an example of good practice through its business conduct with the employees, customers, suppliers, sub-contractors, joint venture partners and communities and uphold the principles declared in its code of conduct to respect and promote human rights within its spheres of influence.[1353] Furthermore, it notes that Barclays seeks to support human rights through its supply chain by adopting the Supplier Code of Conduct and People Screening standards.[1354]

Ruggie criticizes the use of the broad and ambiguous term ‘sphere of influence’ and mentions that it may mislead us in finding out the real relationships between various business entities and the actual impact of the corporate activity that

[1352] A/HRC/8/16, Promotion and Protection of All Human Rights, Civil, Political, Economic, Social and Cultural Rights, including the Right to Development: Clarifying the Concepts of "Sphere of Influence" and "Complicity", Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, 15 May 20008, para. 8.

[1353] Barclay’s Statement on Human Rights, March 2015, http://www.barclays.com/content/dam/barclayspublic/docs/Citizenship/Policy-Positions/barclays-statement-human-rights.pdf, accessed on 10.04.2015.

[1354] Section 3.4. of Barclay’s Statement on Human Rights, March 2015, http://www.barclays.com/content/dam/barclayspublic/docs/Citizenship/Policy-Positions/barclays-statement-human-rights.pdf, accessed on 10.04.2015.

may extend beyond its sphere of influence.[1355] Kinley and Chambers share the assertion of Prof. Ruggie and underline that even though it is essential for holding corporations liable for human rights abuses, none of the documents concerning corporate responsibility legally defines the term *'sphere of activity and influence'*.[1356] Therefore, it is necessary to provide a definition for this term either in domestic law or in international legal documents or both.[1357] They mention that it is reasonable to assume that the term 'sphere of activity' refers to various groups such as workers, consumers, nationals of the host state, and also the environment.[1358] The term 'influence', refers to violations of rights where corporations do not actually operate in but their activities have an influence over [1359]

Ruggie prefers to use the word ‘leverage’ instead of ‘influence’. The Guiding Principles define 'leverage' as the 'ability to effect changes in the wrongful practices of an entity that causes a harm'.[1360] The assessment on the leverage of a corporation is important. When a corporation could not be considered as contributing to an adverse human rights impact, but nevertheless, has leverage over the operations, products and services of another corporation due to its business relationship, then it can be concluded that that corporation is directly linked to the harm caused and accordingly has not acted with due diligence.[1361] In other words, if a corporation has leverage over an entity, it has the duty to take appropriate steps to prevent or mitigate the adverse impacts cause by that entity. If it does not have sufficient leverage over that entity, then it should seek ways to increase its leverage such as offering capacity building. In the worst case, taking into account the severity of the abuse, it should also consider terminating its business relationship with that entity, provided that this

---

[1355] A/HRC/8/16, Promotion and Protection of All Human Rights, Civil, Political, Economic, Social and Cultural Rights, including the Right to Development: Clarifying the Concepts of "Sphere of Influence" and "Complicity", Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, 15 May 20008, paras. 5-25.
[1356] Kinley & Chambers, **op. cit.**, p. 471.
[1357] **ibid.**
[1358] **ibid.**, p. 469.
[1359] **ibid.**
[1360] 2011 Ruggie Report, Guiding Principles on Business and Human Rights, Annex,II,B.19 and its Commentary.
[1361] The Commentary holds that “*Among the factors that will enter into the determination of the appropriate action in such situations are the enterprise’s leverage over the entity concerned, how crucial the relationship is to the enterprise, the severity of the abuse, and whether terminating the relationship with the entity itself would have adverse human rights consequences*" 2011 Ruggie Report, Guiding Principles on Business and Human Rights, Annex,II,B.19 and its Commentary.

relationship is not crucial to the corporation for continuing its operations.[1362] Finally, it has to be noted that the corporation should constantly take appropriate measures to prevent and mitigate any continuing adverse impact caused by the entity that it has relationship with. Otherwise, the corporation may be legally and financially held liable and this may also have reputational consequences.[1363]

4.2. Responsibility to Respect and Duties of Corporations towards Society

The responsibility to respect or the 'do-no-harm principle' refers to a negative obligation for corporations, *i.e.* a duty not to engage in activities that may amount to an interference with the enjoyment of human rights.[1364] This minimum standard of human rights obligations for corporations has its legal grounds either explicitly or implicitly in various international and regional documents. Below, the relevant provisions of the International Bill of Human Rights, The Declaration on the Rights and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms (or The Declaration on the Rights of Human Rights Defenders), American Declaration of the Rights and Duties of Man, American Convention on Human Rights, the African (Banjul) Charter on Human and Peoples' Rights, Asian Charter of Human Rights, Vienna Declaration and Programme of Action and the Draft Guiding Principles on Extreme Poverty and Human Rights will be listed and briefly explained.

To begin with, apart from the specific soft law documents analysed in the previous chapter, other more general soft law documents also underline that non-state actors have responsibility to respect human rights. For example, 1993 Vienna Declaration and Programme of Action adopted by the General Assembly following the World Conference on Human Rights emphasizes that respect for human rights is a fundamental rule of international human rights law and urges all groups,

---

[1362] According to Prof. Ruggie, "*A relationship could be deemed as crucial if it provides a product or service that is essential to the enterprise's business, and for which no reasonable alternative source exists.*" 2011 Ruggie Report, Guiding Principles on Business and Human Rights, Annex,II,B.19 and its Commentary.

[1363] 2011 Ruggie Report, Guiding Principles on Business and Human Rights, Annex,II,B.19 and its Commentary.

[1364] Gatto, **op. cit.**, p. 97.

institutions, NGOs and individuals to cooperate against racism, racial discrimination, xenophobia and related intolerance.[1365]

In the Draft Guiding Principles on Extreme Poverty and Human Rights - The Rights of the Poor, it is provided that:

> *"States, the international community, intergovernmental organizations, national and transnational enterprises and non-governmental organizations, inter alia, have a responsibility to take into account and fully respect human rights, in particular the principles set out in the present document. Infringements of these rights, whether arising from negligence or from a deliberate decision, should be regarded as violations of human rights, for which their perpetrators should be held responsible and should bear the corresponding legal consequences."*[1366]

The Preamble of the UDHR proclaims that the Declaration serves as a common standard for all nations and all peoples to be constantly kept in mind and to be respected by every individual and every organ of the society, including non-state actors such as corporations. As Henkin in his article underlined "[e]*very individual includes juridical persons. Every individual and every organ of society excludes no one, no company, no market, no cyberspace. The Universal Declaration applies to them all.*"[1367] Corporations, shall also be considered as organs of the society as they have social, economic, political and even cultural functions within the society.[1368] Article 29 of the UDHR provides that everyone has duties towards the community, implying that non-state actors as well have a direct obligation to respect and protect human rights along with the obligation to contribute to the fulfilment of human rights within their area of activity and influence.[1369]

[1365] 1993 Vienna Declaration and Programme of Action, para. 15.
[1366] A/HRC/Sub.1/58/16, 23 June 2006, Implementation of existing human rights norms and standards in the context of the fight against extreme poverty, final report submitted by José Bengoa, Annex Draft Guiding Principles on Extreme Poverty and Human Rights: The Rights of the Poor, para.6.
[1367] Henkin, "The Universal Declaration at 50…", p. 25.
[1368] Gatto, **op. cit.**, p. 73, fn. 53.
[1369] Rosemann, "Business Human Rights Obligations - The 'Norms…", p. 51.

A similar language is used in Article 18 of the Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms:[1370]

> "*1. Everyone has duties towards and within the community, in which alone the free and full development of his or her personality is possible.*
>
> *2. Individuals, groups, institutions and non-governmental organizations have an important role to play and a responsibility in safeguarding democracy, promoting human rights and fundamental freedoms and contributing to the promotion and advancement of democratic societies, institutions and processes.*
>
> *3. Individuals, groups, institutions and non-governmental organizations also have an important role and a responsibility in contributing, as appropriate, to the promotion of the right of everyone to a social and international order in which the rights and freedoms set forth in the Universal Declaration of Human Rights and other human rights instruments can be fully realized.*"

Since the above provision is directed towards 'everyone', non-state actors could be held responsible for human rights violations that they have directly perpetrated or contributed to their commission via acts or omissions.[1371] More specifically, corporations, as for-profit non-governmental organizations also have duties and responsibilities towards and within the community. Furthermore, as mentioned in the Commentary to the Declaration, all non-state actors including the media and companies shall refrain from taking measures, which impede or create legal, political or social obstacles for the human rights defenders in exercising their rights.[1372] Non-state actors shall promote the Declaration in order to prevent the violation of the rights of human rights defenders.[1373] Finally, corporations are expected to show due

---

[1370] A/RES/53/144, 8 March 1999, 53/144 Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms adopted by General Assembly.
[1371] Articles 10, 11, 12(3), 19 of the Declaration on the Rights and Responsibility of Individuals…
[1372] A/65/223, para. 22, Commentary to the Declaration on the Rights and Responsibility of Individuals…
[1373] **ibid.**

diligence and ensure that their activities and operations do not infringe the rights of others, and especially of the human rights defenders.[1374]

In the Preambles of the 1966 UN Covenants, it is mentioned that individuals have duties towards other individuals and to the community. According to the Preambles of the twin Covenants, individuals have the responsibility to promote and observe the rights recognized under the Covenants.[1375] Specifically, Article 19 of the ICCPR on the right to freedom of expression underlines the special duties and responsibilities accompanying the use of this right.[1376] Thus, the responsibility of non-state actors is not an extrinsic concept of human rights law. Nevertheless, the UN Human Rights Committee in General Comment No. 31 expressly mentioned that the ICCPR does not have a direct horizontal effect, *i.e.* the provisions of the Convention cannot be directly imposed on non-state actors.[1377]

The Preamble of the 1948 American Declaration of the Rights and Duties of Man[1378] considers the rights and duties as a whole and declares that they are complementary to each other. It underlines that the rights and duties are interrelated in all and every social and political activity of humankind, and the fulfilment of the duties is a prerequisite for the full realization of the rights and freedoms recognized under the Declaration.[1379] The duties of individuals may have moral and/or legal character. As asserted in the Preamble, the duties with a legal nature presuppose the existence of moral duties, which constitutes their basis. Furthermore, Article 1 of the American Declaration provides that each person shall enjoy rights and freedoms and fulfil their duties, without distinction of any kind. The rights of others, security of all, the just demands of the general welfare and the advancement of democracy are the

[1374] Margaret Sekaggya, UN Special Rapporteur on the situation of human rights defenders, "Commentary to the Declaration on the Rights and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms", July 2011, pp. 11-12.
[1375] Preamble, para. 6 of the ICCPR and the ICESCR.
[1376] Even though not directly linked with our scope of study, the ICCPR also refers to the responsibilities of non-state actors, such as spouses in a marriage, and the ICESCR mentions the responsibility of the family to care and educate their children.
[1377] General Comment No. 31 [80] Nature of the General Legal Obligation Imposed on States Parties to the Covenant: 26/05/2004, CCPR/C/21/Rev.1/Add.13. (adopted on 29 March 2004), para. 8.
[1378] Adopted by the Ninth International Conference of American States, Bogotá, Colombia, 1948.
[1379] The Preamble of the American Declaration of the Rights and Duties of Man, para. 2.

legitimate grounds, which may be used as the basis of restrictions on the enjoyment of the rights and freedoms of individuals and corporations under the Declaration.[1380]

Chapter Two (Articles 29-38) of the Declaration is reserved for the duties of 'every person' towards society and towards other members of the society. For example, Article 29 imposes on individuals the duty to conduct in relation to others in a way that each and every one may fully form and develop his personality. This may translate into the duty of corporations to refrain from conducts that impair the formation and development of personality of persons with whom they enter into contractual relations or directly or indirectly interact as a consequence of their operations. Article 33 of the Declaration should also be read as obliging corporations to obey the laws and other legitimate commands of authorities in both home and host states. They shall also be regarded as being under the obligation *"to cooperate with the State and the community with respect to social security and welfare, in accordance with* [their] *ability and with existing circumstances*" (Article 35). Likewise, the duty to pay taxes under Article 37 is also applicable for corporations. Lastly, corporations are under a duty to refrain from taking part in political activities where they operate as foreign corporations (Article 38).

1969 American Convention on Human Rights[1381] Article 32 also recognizes that every person has responsibilities to his community and mankind, and that the enjoyment of rights may be subject to restrictions, if they are in violation of the rights of others, security of all, the just demands of the general welfare, in a democratic society.[1382] However, for the purposes of our study, it is necessary to restate that Article 1(2) of the American Convention on Human Rights expressly

---

[1380] Article 28 of the American Declaration.
[1381] Adopted at the Inter-American Specialized Conference on Human Rights, San José, Costa Rica, 22 November 1969.
[1382] *See* also Article 29 of the American Convention on the interpretation of the Convention, which is as follows:
" No provision of this Convention shall be interpreted as:
a. permitting any State Party, group, or person to suppress the enjoyment or exercise of the rights and freedoms recognized in this Convention or to restrict them to a greater extent than is provided for herein;
b. restricting the enjoyment or exercise of any right or freedom recognized by virtue of the laws of any State Party or by virtue of another convention to which one of the said states is a party;
c. precluding other rights or guarantees that are inherent in the human personality or derived from representative democracy as a form of government; or
d. excluding or limiting the effect that the American Declaration of the Rights and Duties of Man and other international acts of the same nature may have."

defines 'person' as a 'human being', therefore, excludes legal persons. Nevertheless, as the Inter-American Commission on Human Rights noted in its various country reports, even if there is no international responsibility of a State for the illegal acts perpetrated by private individuals, which are not attributable to it; a failure of the State to reasonably prevent[1383] these acts by not taking necessary and timely[1384] positive measures,[1385] or reluctance in identifying,[1386] investigating, prosecuting and adequately punishing the perpetrators,[1387] or any other support, tolerance, or acquiescence by the State for the commission of these acts would incur its responsibility in the international arena.[1388] The Commission also underlined that States are under an obligation to prevent all incidents of violence and they are the only responsible actors for maintaining law and order, and combating crime regardless of the source of threat, or political motivation of the abusive acts.[1389]

[1383] OEA/Ser.L/V/II.106 Doc. 3 rev at 468, 13 April 2000, Report No. 36/00, Case 11.101, Annual Report 1999, "Caloto Massacre" Colombia, para. 63 citing *Velásquez Rodriguez v. Honduras*, IAmCtHR, Ser. C, No. 4, 29 July 1988, para. 174.

[1384] OEA/Ser.L/V/II.66, Doc. 10 rev. 1, 5 March 1985, *Yanomami v. Brazil Case*, Res. No. 12/85 Case 7615, in Annual Report of 1985-86, para. 1; Gatto, **op. cit.**, pp. 70-71; Clapham, **Human Rights Obligations**..., p. 427.

[1385] OEA/Ser. L/V/II.96 Doc. 10 rev.1. (VIII-IV), IAmCommHR, Report on the Situation of Human Rights in Ecuador, 24 April 1997,.

[1386] OEA/Ser.L/V/II.106 Doc. 3 rev at 468, 13 April 2000, Report No. 36/00, Case 11.101, Annual Report 1999, "Caloto Massacre" Colombia, para. 53.

[1387] OEA/Ser.L/V/II.102, Doc. 9 rev. 1, 26 February 1999, Third Report on the Human Rights Situation in Colombia, Chapter IV on Violence, and Violations of International Human Rights and Humanitarian Law, para.4; *Velásquez Rodriguez v. Honduras*, IAmCtHR, Ser. C, No. 4, 29 July 1988, para. 166; OEA/Ser.L/V/II.118, doc. 4 rev. 2, 29 December 2003, Report on the Situation of Human Rights in Venezuela, para. 323.

[1388] OEA/Ser.L/V/II.116, Doc. 5 rev. 1 corr. 22 October 2002, IAmCommHR, Report on Terrorism and Human Rights, para. 47; OEA/Ser.L/V/II.102, Doc. 9 rev. 1, 26 February 1999, Third Report on the Human Rights Situation in Colombia, Chapter I on Context for the Analysis of the Human Rights Situation in Colombia, para. 4; See also *Massacres of El Mozote and Nearby Places v. El Salvador*, IAmCtHR, Series C No. 252, 25 October 2012, paras. 144, 149; *Case of Juan Humberto Sánchez v. Honduras*, IAmCtHR, Ser. C. No. 99, 7 June 2003, para. 110; *Velásquez Rodriguez v. Honduras*, IAmCtHR, Ser. C, No. 4, 29 July 1988, para. 175.

[1389] *See* also OEA/Ser/L/V/II.123, doc.6, rev. 1., 26 October 2005, Haiti: Failed Justice or the Rule of Law? Challenges Ahead for Haiti and the International Community, para. 82 citing IAmCommHR, Annual Report 1980-1981, Ch. V: "General Situation of Human Rights in the Member States of the OAS and areas in which further steps are needed to give effect to the Human Rights set forth in the American Declaration of the Rights and Duties of Man and the American Convention on Human Rights"; OEA/Ser. L/V/II.116, Doc. 5 rev. 1 corr., 22 October 2002, IAmCommHR, Report on Terrorism and Human Rights, Introduction, para. 3; OEA/Ser/L/V/II.135, Doc. 40, 7 August 2009, Follow-up report: Access to Justice and Social Inclusion: The Road towards Strengthening Democracy in Bolivia, para. 102 citing, *inter alia*, *Case of the Massacre of Pueblo Bello*, IAmCtHR, Ser. C, No. 140, 31 January 2006. *See* also the Report on the Situation of Human Rights in the Republic of Guatemala, concerning the responsibility of the Government of Guatemala for the violence against the trade union activist, including acts of murder, threat, intimidation, assault perpetrated by the private security forces hired by the Coca Cola Bottling Company. OEA/Ser.L/V/II.53, doc. 21 rev. 2, 13 October 1981, IAmCtHR, Report on the Situation of Human Rights in the Republic of Guatemala, Chapter VIII on Right to Assembly and Freedom of Association, Trade Union Rights; OEA/Ser.L/V/II.54, Doc. 9 rev. 1, 16 October 1981, Annual Report of the IAmCommHR 1980-1981. Similarly, in Santo Domingo Massacre case it was alleged that the

While violent (non-state) actors in a country are not the focus of the Commission's scrutiny,[1390] their acts may be relevant and be considered in determining the level of responsibility of State actors.[1391] If the acts of private individuals or groups are attributable to the State, either because they acted as State agents, or the State has acquiesced in, tolerated or condoned the commission of the acts violating the rights guaranteed under the American Declaration or the American Convention, then the Commission would have jurisdiction to investigate and hear these cases.[1392] The Commission held that:

> "*As noted in its two previous country reports on Colombia, OAS* [Organization of American States] *member States opted deliberately not to give the Commission jurisdiction to investigate or hear individual complaints concerning illicit acts of private persons or groups for which the State is not internationally responsible. If it were to act on such complaints, the Commission would be in flagrant breach of its mandate, and, by according these persons or groups the same treatment and status that a State receives as a party to a complaint, it would infringe the sovereign rights and prerogatives of the State concerned.*"[1393]

However, the Commission also emphasized that its lack of competence with regard to individual complaints does not mean a complete disregard of the illegal private conducts. The Commission especially noted that terrorist acts, blackmailing, extortion, kidnapping, torture and assassination perpetrated by private armed groups

---

private security agents were acting as State agents, and even if they were not, the State was collaborating with the security agents by providing financial and arms assistance in order to protect the property of the multinational corporation called OXY. *Case of Santo Domingo Massacre v. Colombia*, IAmCtHR, Ser. C No 259, 30 November 2012, para. 135.

[1390] OEA/Ser.L/V/II.102, Doc. 9 rev. 1, 26 February 1999, Third Report on the Human Rights Situation in Colombia, Chapter IV on Violence, and Violations of International Human Rights and Humanitarian Law, para. 3.

[1391] **ibid.**, para. 5.

[1392] **ibid.**, para. 3. See also OEA/Ser.L/V/II.116, Doc. 5 rev. 1 corr. 22 October 2002, IAmCommHR, Report on Terrorism and Human Rights, para. 147: *"...the Commission's mandate is to promote the observance and protection of human rights by states and their agents rather than non-state actors."*

[1393] OEA/Ser.L/V/II.102, Doc. 9 rev. 1, 26 February 1999, Third Report on the Human Rights Situation in Colombia, Chapter IV on Violence, and Violations of International Human Rights and Humanitarian Law, para. 5.

shall be condemned by the Commission.[1394] In particular, the IAmCommHR receives information concerning human rights violations perpetrated by corporations, and evaluates them for determining the concrete conventional obligations of the States Parties.[1395] The mining, lumber and petroleum industries require special attention in that regard, where violation of the right to health is a major concern.[1396] The rights of indigenous peoples living in the operation areas of corporations are also under threat. Accordingly, effective protection and preservation of their rights is also an obligation for the member states of the OAS.[1397] The measures adopted by States for the environmental protection and the prevention of exploitation of natural resources by private actors are also under close scrutiny of the Commission.[1398]

African (Banjul) Charter on Human and Peoples' Rights[1399] is the first human rights convention, which gives particular attention to the concept of 'duties of the individual'. The Preamble of the African Charter highlights that everyone, who possesses rights and freedoms, also bears implied duties towards the society, the State and other legally recognized communities, and the international community as a whole.[1400] Article 1 of the African Charter obliges the States Parties to recognize and give effect in their national systems to both the rights and the duties enshrined under the Charter.[1401] This principle is reaffirmed in Article 25 of the Charter which

[1394] The Commission refers to its press release with regard to the condemnation of the Revolutionary Armed Forces of Colombia (FARC) for kidnapping civilians in the roadblock and called the FARC to release those who deprived of their liberty. OEA/Ser.L/V/II.102, Doc. 9 rev. 1, 26 February 1999, Third Report on the Human Rights Situation in Colombia, Chapter IV on Violence, and Violations of International Human Rights and Humanitarian Law, paras. 6-7; IACHR, Press Release No. 5/98, April 1, 1998; IAmCtHR, OEA/Ser.L/V/II.53, doc. 21 rev. 2, 13 October 1981, Report on the Situation of Human Rights in the Republic of Guatemala, Chapter II on right to life, para. 10.

[1395] Such information has also been frequently referred to in the press releases, communications with the governments and reports. OEA/Ser.L/V/II.116, Doc. 5 rev. 1 corr. 22 October 2002, IAmCommHR, Report on Terrorism and Human Rights, para. 48.

[1396] OEA/Ser/L/V/II.135, Doc. 40, 7 August 2009, Follow-up report: Access to Justice and Social Inclusion: The Road towards Strengthening Democracy in Bolivia, para. 158.

[1397] See the thematic report of the IAmCommHR on the Human Rights Situation of the Indigenous People in the America, OEA/Ser.L/V/II.108, Doc. 62, 20 October 2000; OEA/Ser. L/V/II.96 Doc. 10 rev.1. (VIII-IV), 24 April 1997, IAmCommHR, Report on the Situation of Human Rights in Ecuador.

[1398] OEA/Ser/L/V/II.135, Doc. 40, 7 August 2009, Follow-up report: Access to Justice and Social Inclusion: The Road towards Strengthening Democracy in Bolivia, para. 158 citing Observatory on Human Rights and Social Policy, Working Paper. Human Rights in Bolivia in 2007, 1st ed., La Paz, Bolivia, January 2008, p. 57.

[1399] Adopted 27 June 1981, OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982), entered into force 21 October 1986.

[1400] AfCHPR, Preamble para. 7: "*Considering* that the enjoyment of rights and freedoms also implies the performance of duties on the part of everyone".

[1401] Even though the relevant provisions of the African Charter is formulated with a weaker language than that of other international human rights documents, the AfCommHPR has in several occasions mentioned that the State obligations are no weaker than those provided in other regional and

reads as follows: "*States parties to the present Charter shall have the duty to promote and ensure through teaching, education and publication, the respect of the rights and freedoms contained in the present Charter and to see to it that these freedoms and rights as well as corresponding obligations and duties are understood.*"

Chapter Two (Articles 27-29) of the African Charter is reserved for the duties of 'every individual' and underlines that the individuals shall pay due regard to the rights of others, collective security, morality and common interest (Article 27).[1402] This is an indirect duty imposed on individuals, which at the same time implies the limits of the exercise of the rights under the Charter.[1403] Additionally, individuals are under the duty to respect and consider each other without discrimination (Article 2) with a view to maintain their relations based on mutual respect and tolerance (Article 28). Other direct duties of the individual include, *inter alia*, "not to compromise the security of the State whose national or resident he is", "to preserve and strengthen social and national solidarity", "to preserve and strengthen the national independence and the territorial integrity of his country", and "to pay taxes imposed by law in the interest of the society" (Article 29).

The States Parties to the African Charter are under the positive obligation to recognize and to give effect through adopting legislative and any other appropriate measures for the implementation of not only the rights, but also the duties of individuals as imposed under the Charter (Article 1). Heyns asserts that unlike the traditional understanding of the law of treaties, the African Charter explicitly

---

international documents. Bronwen Manby, "Civil and Political Rights in the African Charter on Human and Peoples' Rights: Articles 1-7" in M. Evans & R. Murray, (eds.), **The African Charter…**, p. 172.

[1402] This provision has also been interpreted by the AfCommHPR as a general limitation clause regarding the enjoyment of rights and freedoms by the individuals. Nevertheless, the Commission underlined that any limitation on the rights imposed by the State authorities should have legitimate foundations, be strictly proportionate to the legitimate aim pursued and be absolutely necessary to achieve that legitimate aim. Finally, the restriction shall not cause the right to become illusory. AfCommHPR, Comm. 105/93, 128/94, 130/94 and 152/96, Media Rights Agenda and Constitutional Rights Project v. Nigeria, 31 October 1998, paras. 68, 69 and 70. Manby, **op. cit.**, p.176. The Court agreed with the Commission in its judgments. See *e.g.* AfCtHPR, App. No. 00/2011, Tanganyika Law Society and Legal and Human rights Centre v. The United Republic of Tanzania, para. 107-108.

[1403] Mutua, Makau. "Human Rights and the African Fingerprint" in Mutua, Human Rights: A political and Cultural Critique, 2002, p. 71 cited in Steiner & Alston & Goodman, **International Human Rights in Context**…, p. 509.

imposes duties also on individuals and applies on horizontal relations.[1404] Heyns names such duties as 'secondary duties', since they are dependent on the 'primary duty' of the States to adopt a measure that will oblige the individuals to act in line with the provisions of the Charter.[1405]

However, given the vagueness and the broad spectrum of the duties mentioned under the Charter, the binding nature and enforceability of the duties of individuals remain questionable.[1406] For example, contrary to Heyn's argument, Pityana categorizes such duties of individuals as moral obligations rather than legal obligations.[1407] Accordingly, the enforcement of these moral duties would depend on the conscience of and acceptance by individuals.[1408] Viljoen, too admits that the function of these duties enshrined in the African Charter is to guide the States Parties in fulfilling their general obligations under Article 1 of the Charter.[1409] Either way, in the end, if a State fulfils its positive obligations under Article 1 of the Convention and obliges individuals with direct duties under positive law, these moral duties would transform into legal ones.

The concern over the domination of corporations on the economic and social policies of States is reflected in 1998 Asian Human Rights Charter.[1410] The Asian Charter of Human Rights explicitly draws attention to the increasing influence of business corporations over the policies of States and mentions that it is necessary to adopt a regime where corporations may be held liable for the violations of rights, especially of the vulnerable groups such as workers, women and indigenous peoples.[1411] Therefore, the only international human rights protection document expressly stressing the duties of corporations is the Asian Charter. The Charter, after

---

[1404] C. Heyns, "Civil and Political Rights in the African Charter" in M.D. Evans & R. Murray (eds.) **The African Charter on Human and Peoples' Rights: The System in Practice 1986-2000**, Cambridge, CUP, 2002, p. 140, 146.
[1405] **ibid.**, p. 140.
[1406] Steiner & Alston & Goodman, **International Human Rights in Context**…, p. 506.
[1407] N.B. Pityana, "The Challenge of Culture for Human Rights in Africa: the African Charter in a Comparative Context", in M.D. Evans & R. Murray (eds.) **The African Charter on Human and Peoples' Rights: The System in Practice 1986-2000,** Cambridge, CUP, 2002, p. 230.
[1408] **ibid.**
[1409] Viljoen, "Communications…", p. 102.
[1410] 1998 Asian Human Rights Charter, para. 2.8. See also ASEAN Human Rights Declaration, para. 6: "*The enjoyment of human rights and fundamental freedoms must be balanced with the performance of corresponding duties as every person has responsibilities to all other indviduals, the community and the society where one lives. It is ultimately the primary responsibility of all ASEAN Member States to promote and protect all human rights and fundamental freedoms.*"
[1411] **ibid.**

emphasizing the increasing need for action to restrain the negative impacts of globalization, calls for a strengthened regime of protection of human rights against violations perpetrated by corporations by holding them liable for their operations.[1412] The Charter especially stresses that the rights of workers to form trade unions and to collective bargaining, right to fair and adequate wage, and right to healthy and safe working conditions should be guaranteed.[1413] The Asian Charter puts special emphasis on the horizontal violations of human rights perpetrated by corporations and asserts that TNCs should be dressed with self-awareness of the negative consequences of their acts over the disadvantaged and oppressed groups of people.[1414]

The Asian Charter also recognizes the role of NGOs, and especially of the professions such as lawyers and doctors, in raising public awareness against human rights abuses and for guarding human rights. According to this, NGOs play a powerful role in the political and legal protection system of human rights.[1415] In order to prevent any abuse, which may occur as a result of the exploitative practices of corporations, States are under a duty to effectively protect the rights of workers, consumers and the public in general.[1416] Finally, in the Charter, it is recommended that a regional human rights protection mechanism should be established in order to deal with the particularities and endemic human rights problems of the continent Asia. The jurisdiction of a specialized regional court that would be established should specifically include the protection of rights against abuses by corporations.[1417]

Consequently, all these universal and regional human rights documents impose direct or indirect duties and obligations on non-state actors.[1418] Corporations, whether national or transnational, have the responsibility to respect human rights regardless of the badly designed local laws in force where they operate. Furthermore, TNCs shall refrain from activities and operations that carry the danger of undermining the international efforts and national political and legal attempts to promote and encourage respect for human rights. All officers, workers, contractors,

---

[1412] **ibid.**
[1413] **ibid.**, para. 12.1.
[1414] **ibid.** para. 15.2a.
[1415] **ibid.**, para. 15.2b.
[1416] **ibid.**, para. 15.2g.
[1417] **ibid.**, para. 16.2.
[1418] Gatto, **op. cit.**, pp. 73-74.

subcontractors, suppliers, licensees, distributors of TNCs and all other legal and real persons that enters into a contractual relationship with them are also under an obligation to observe international and national human rights standards and act in line with the emerging best practices developed by the industry, civil society and the local governments, especially when the preservation of peremptory norms is at risk.[1419]

Nevertheless, as Clapham rightfully concludes, it is obvious that the extent of the positive obligations of States is greater than that of non-state actors. For example, he agrees that private persons are not expected to protect (or rescue) the lives of other individuals, except for the health care workers or security personnel.[1420] However, he questions whether we could come to the same conclusion, when pharmaceutical corporations were at issue. He exemplifies that corporations, which produce life-saving drugs, may be under a positive obligation, for example, to continue producing these drugs even if they are so high cost or low profit drugs.[1421] Furthermore, as I will argue below, under certain circumstances, corporations may have a responsibility to protect the rights of individuals, groups, peoples or communities, if their business relationships causes or contributes to a risk of violation or breach of a human rights obligation having *erga omnes* character.

4.3. Responsibility to Protect and Its Implications for Corporations

Responsibility to protect (RtoP or R2P) has been defined under three pillars in the 2005 UN World Summit Outcome Document (WSOD)[1422] and the Report of the Secretary General on Implementing the Responsibility to Protect.[1423] According to this approach, (1) States bear the primary responsibility to protect the population from mass atrocities; (2) the international community has the responsibility to encourage and assist States in fulfilling their RtoP, and (3) international community has the responsibility to protect the population via diplomatic, humanitarian and

[1419] Commentary to the UN Norms, para. 4.
[1420] Clapham, **Human Rights Obligations**…, p. 372.
[1421] **ibid.**, p. 370. See on the same direction concerning the pricing policies of HIV/AIDS drugs Gunther Teubner, "The Anonymous Matrix: Human Rights Violations by 'Private' Transnational Actors", **MLR,** 69 (3), pp. 327-346.
[1422] A/RES/60/1, GA Resolution, 2005 World Summit Outcome, 24 October 2005, paras. 138-140.
[1423] A/63/677, 12 January 2009, Secretary-General's 2009 Report on Implementing the Responsibility to Protect.

other means, if the State manifestly fails to do so. It shall be kept in mind that, the notion of RtoP presupposes that the States themselves do not commit mass atrocities against their own populations. In other words, the RtoP is a political attempt to establish the legal grounds of humanitarian intervention and it does not encompass the responsibility of the State not to commit mass atrocities against its own population.[1424]

The second (preventive) pillar concerning the encouragement and assistance of State by the international community has particular importance with regard to the international responsibilities of non-state actors. For a meaningful elaboration on the RtoP, the term 'international community' shall be precisely defined in order to draw the limits of the responsibility of non-state actors to encourage and assist. The term international community has been used in various documents, *inter alia*, the Rome Statute of the ICC, International Convention for the Suppression of Terrorist Bombings, International Convention for the Suppression of the Financing of Terrorism and International Convention against the Taking of Hostages. Moreover, Article 48(1)(b) of the ARSIWA refers to the obligations owed to the international community as *erga omnes* obligations.[1425] In the WSOD, non-governmental organizations, civil society and the private sector have been mentioned among the actors of "international community", who positively contribute to the promotion and implementation of development and human rights programmes.[1426]

In July 2014, the Secretary-General identified various actors in order to provide guidance for the international community in assisting the States for fulfilling the RtoP in accordance with the second pillar.[1427] The report expressly mentioned that "*In some cases, international companies operating in a State under stress can also assist in protecting the population by ensuring that their products, services or*

[1424] Raphael van Steenberghe, "Non-State actors" in Gentian Zyberi (ed.), **An Institutional Approach to the Responsibility to Protect**, Cambridge, June 2013, pp. 54-55.
[1425] Article 33 of ARIO recognizes that the international organizations have *erga omnes* obligations, too.
[1426] A/RES/60/1, GA Resolution, 2005 World Summit Outcome, 24 October 2005, para. 22(e), 155(a), 172-175.
[1427] A/68/947-S/2014/449, 11 July 2014, Secretary-General's report: "Fulfilling our collective responsibility: International assistance and the responsibility to protect".

technologies are not directly or indirectly contributing to systematic violence or serious human rights violations."[1428] The report added:

> *"Private sector actors can contribute to building resilience by strengthening local economies and employing a workforce inclusive of all social groups. In some cases, private sector expertise can be mobilized through public-private partnerships to enhance the impact of national measures aimed at atrocity prevention. On the other hand, experience shows that businesses can both indirectly contribute to the commission of atrocity crimes through their operations and business practices, particularly in extractive industries, and directly enable those engaged in such acts through their products and services. Private sector actors can reduce this risk by complying with the 2011 United Nations Guiding Principles on Business and Human Rights and ensuring that their commercial activities do not exacerbate social cleavages. They could also consider developing risk management tools that explicitly incorporate atrocity crime risks."*[1429]

van Steenberghe, elaborating on the possibilities for imposing responsibilities on NGOs to protect, mentions that even if it can be asserted that such a responsibility exists, it should be accepted that it does have a political or moral character rather than a legal nature.[1430] By analogy, it could have beenclaimed that TNCs, as members of the international community, do also have at least political and moral RtoP in the sense that they shall assist States and international organizations in fulfilling their duties in the framework of the RtoP. While it is true that there is a fundamental difference between NGOs and TNCs -unlike NGOs, TNCs' reason of existence is making profit to the maximum extent possible-, a good reputation for the business would ultimately be to the benefit of the corporation and its shareholders. Accordingly, the profit motive, too, may trigger corporate behaviour to be reshaped in a way contributing to the States' RtoP. One exception would be the corporations

[1428] **ibid.,** para. 60.
[1429] **ibid.,** para. 26.
[1430] van Steenberghe, **op. cit.**, pp. 48-50.

producing military equipment for armed conflicts and other tools for riot control and law enforcement, all of which directly profit from the mass atrocities and human rights violations.[1431] In this case, corporations shall have a responsibility to avoid complicity in violations by States.[1432]

Regarding the third (response) pillar, concerning the RtoP of the international community if a State fails to do so, it is observed that the most frequent reaction from the international community towards the abusive governments is the imposition of economic sanctions on such States. As the Secretary General in his report on the RtoP held, the role of the private sector in shaping the international response to mass atrocities should not be underestimated.[1433] For example, even if the Security Council fails to impose an embargo on a State, where gross human rights violations are being perpetrated, the foreign investors may at their own initiatives refrain from investing in such territories.[1434] Even though it is a very controversial idea, it is even suggested the business may choose to support the resisting groups and counter forces of the abusive States in order to give an end to the commission of mass atrocities.[1435]

Telecommunication companies may also play a significant role with regard to the third pillar. They may disable their services for the state authorities or refuse to give information on the users of its communication channels. For example, during the Arab Spring, social media played a crucial role in the dissemination of information all around the world and maybe even in overturning the existing governments.[1436] More recently, Facebook announced that it would notify the social media users if they detect that an account is being targeted by "*an attacker suspected of working on behalf of a nation-state.*" The notification added that "*we decided to show this additional warning if we have a strong suspicion that an attack could be government-sponsored. We do this because these types of attacks tend to be more advanced and dangerous than others, and we strongly encourage affected people to*

[1431] Conor D. Seyle, **Business Participation in the Responsibility to Protect**, One Earth Future Foundation, 2013, p. 9.
[1432] **ibid.**, pp. 13-14.
[1433] A/63/677, 12.01.2009, SG's 2009 Report on Implementing the Responsibility to Protect, para. 59.
[1434] **ibid.,** para. 59.
[1435] Seyle gives the experiences in Libya and Cote d'Ivoire as examples. Seyle, **op. cit.**, pp. 20-23.
[1436] Peter Beaumont, "The Truth about Twitter, Facebook and the uprising in the Arab world", The Guardian, 25 February 2011.

take the actions necessary to secure all of their online accounts."[1437] On the other hand, AT&T, a telecommunication company, has been criticized for being "highly collaborative" having an "extreme willingness to help" the U.S. government and National Security Agency (NSA) by providing technical assistance in wiretapping phone calls and accessing e-mails.[1438] Likewise, Hacking Team, an Italian cybersecurity company, has been allegedly providing software and spying tools to the suppressive regimes such as Sudan, Nigeria, Ethiopia, Azerbaijan, Uzbekistan, Russia, Turkey and Bahrain for interception of communication.[1439]

Hence, protection of human rights and fundamental freedoms constitute a legitimate concern for the international community.[1440] This is especially so for the TNCs, whose conduct has the potential to influence the protection of human rights both positively and negatively. Therefore, it could be argued that TNCs shall on the one hand refrain from infringing the rights of others by their own conduct; and on the other hand, they shall prevent human rights abuses perpetrated not only by their subsidiaries, subcontractors and entities they have a business relationship with, but also by the States or other non-state actors, whose acts may be linked to the corporation. In doing so, they shall act with due diligence by adopting policies and standards. Secondly, they shall diligently assess the adverse impacts of their operations, activities, products and business relationships on environment and human rights, as well as on the social, political and economic well-being of the countries they operate. Thirdly, they shall monitor the compliance of their subsidiaries and other entities and persons they are in a business relationship with, with the human rights standards of the corporation. Responsibility to protect would gain importance especially if there is a threat of violation of the peremptory norms of international law, which are a form of customary international law, binding on all individuals, including legal persons such as corporations.[1441] Since all *jus cogens* norms impose

---

[1437] Alex Stamos (Chief Security Officer at Facebook), "Notification for Targeted Attacks", 17 October 2015, https://www.facebook.com/notes/facebook-security/notifications-for-targeted-attacks/10153092994615766 accessed on 17.10.2015.
[1438] Julia Angwin, Charlie Savage, Jeff Larson, Henrik Moltke, Laura Poitras, James Risen, "AT&T Helped U.S. Spy on Internet on a Vast Scale", The New York Times, 15 August 2015, http://www.nytimes.com/2015/08/16/us/politics/att-helped-nsa-spy-on-an-array-of-internet-traffic.html?_r=0, accessed on 01.09.2015.
[1439] Lauren Walker, "Cybersecurity Company Supplies Repressive Regimes with Spyware, Recent Hack Claims", Newsweek, 07.06.2015, http://www.newsweek.com/cybersecurity-firm-supplies-repressive-regimes-spyware-recent-hack-claims-350501, accessed on 01.09.2015.
[1440] 1993 Vienna Declaration and Programme of Action, part 1. para. 4.
[1441] Gatto, **op. cit.**, p.91.

obligations *erga omnes* -but not *vice versa*-,[1442] I argue that corporations, too, have obligations to protect all individuals, communities and peoples affected by their operations, activities and products from any damage, loss or injury that might be caused as a consequence of violation of peremptory norms by others.

4.3.1. Obligations *erga omnes* and the Jurisprudence of International Courts

By the end of 1980s, the phenomenon of globalization began to have it effects also in the field of justice as observed in the jurisprudence of national and international courts. The protection of human rights based on the values enshrined under the UDHR triggered a trend of cross-referencing in the decisions and judgments of various quasi-judicial and judicial bodies, which has contributed to the "building of a transnational *jus commune* of human rights".[1443] James Crawford, in his report, put that human rights treaties are designed to protect the common good, and depending on the universality and significance of a specific human right protected under a treaty provision, the responsibility to protect that right might be regarded as an obligation *erga omnes*.[1444]

Below, I will examine some of the decisions and judgments of international and regional bodies and courts in order to elaborate on the possibility of imposing direct responsibilities on TNCs to protect human rights. In doing so, I should carefully underline that it is neither politically nor legally possible to hold states and non-state actors equally responsible in the international plane. However, certain obligations may be imposed on TNCs by altering the content and context of these human rights obligations. Furthermore, as Gatto righteously points out, despite the similarities of real persons and legal persons, they differentiate in character and nature under certain circumstances. Thus, applying the international rules directed towards individuals equally to both the real persons and legal persons may mislead us and result in awkward legal consequences. Accordingly, it shall be kept in mind

---

[1442] For example, prohibition of massive pollution of environment has not yet been considered as a *jus cogens* norm. Malanczuk, **Akehurst's**…, p. 60.
[1443] de Schutter, **International Human Rights Law**…, p. 31 *et seq*.
[1444] James Crawford, ILC Special Rapporteur, Third Report on State Responsibility, UN Doc. /CN.4/507 and Add.1-4, 2000, paras. 86-89, 92.

that legal persons have different capacities and behavioural attitudes than the real persons, and they may violate human rights in different ways.[1445]

The most cited landmark judgment of the IAmCtHR on state responsibility for the acts of non-state actors is *Velasquez Rodriguez v. Honduras* case, dated 1989.[1446] The case concerned the kidnapping and forced disappearance of a university student. The IAmCtHR, in its judgment, examined the conditions under which an act of a private person would be imputable to a State.[1447] Particularly, the Court analysed the obligations *erga omnes* of the State to respect, guarantee and ensure the effectiveness of the rights by adopting the necessary and adequate measures (Articles 1(1) and 2).[1448] According to the Court, even if an act was initially not attributable to a State under the law of State responsibility,[1449] the lack of due diligence to prevent, investigate and punish such an act, and/or the existence of support, tolerance, or acquiescence of the State in the commission of the act, and/or failure in adequately redressing the damage occurred would lead to the international responsibility of the State.[1450]

In other words, the act or omission of public authorities in taking reasonable preventive and remedial measures, which results in the violation of human rights by third parties, becomes a fact attributable to the State within the meaning of law of

---

[1445] For example, Gatto mentions that the prohibitions and unlawful conducts of real persons are listed *numerus clauses* under the conventions concerning international criminal law and humanitarian law. However, we may face situations where a legal person does not violate any of these rules, yet it can still be responsible under international law for its conduct. Gatto gives the example of the apartheid regime in South Africa where human rights violations were perpetrated as a result of the state policy, lack of legal protection and inefficiency of the judiciary system. The corporations benefitted from these abuses. Should it assumed to the contrary, the protection provided by human rights law would be ineffective in protecting rights and freedoms. It is also possible that legal persons may be responsible for human rights violations, in situations where no individual responsibility have occurred. Gatto, **op. cit.**, pp. 91-92.

[1446] *Velásquez Rodriguez v. Honduras*, IAmCtHR, Ser. C, No. 4, 29 July 1988.

[1447] **ibid.**, para. 160.

[1448] **ibid.**, paras. 165-166; *Case of Santo Domingo Massacre v. Colombia*, IAmCtHR, Ser. C No 259, 30 November 2012, paras. 166-167, 188; *Case of the "Mapiripán Massacre" v. Colombia*, IAmCtHR, Ser. C No. 134, 15 September 2005, para. 111; *Case of Ximenes Lopes v Brazil*, IAmCtHR, Ser. C No. 149, 4 July 2006, paras. 85-86; *Juridical Status and Rights of Undocumented Migrants*, IAmCtHR Advisory Opinion OC-18/03, Ser. A No. 18, 17 September 2003, para. 140; *Suarez Peralta v. Ecuador*, IAmCtHR, Series C No. 261, 21 May 2013, para. 127. See also Jochnick, **op.cit.**, p. 66.

[1449] As the IAmCtHR reaffirmed, under the general rules of state responsibility, the State would be held internationally responsible for breaches by its officials, agents or any other person acting in that capacity with a public power even when the person's act exceeded the limits of his/her authority. *Velásquez Rodriguez v. Honduras*, IAmCtHR, Ser. C, No. 4, 29 July 1988, paras. 170-172.

[1450] **ibid.,** paras. 172-173.

international responsibility.[1451] Accordingly, the effects of the responsibility of States extend beyond inter-state relations in a way to comprise the protection of human rights from horizontal violations that may occur in inter-individual relations.[1452] This is called the "vertical dimension of the American Convention" implying its character *erga omnes lato sensu, i.e.* binding on all States and non-state actors whether they are parties to a treaty or not.[1453] Nevertheless, the attribution of private acts, omissions or incidents (deeds) is not automatic and the responsibility of the State is not unlimited.[1454] Circumstances of each case shall be analysed by the Court for deciding on whether the State authorities have failed to fulfil the treaty-based *erga omnes* obligation to effectively guarantee human rights on that specific case.[1455] A finding that no reasonable act capable of preventing the violation could have been expected from the State authorities, shall absolve the State from responsibility of due diligence.[1456] On the other hand, if a State does not demonstrate its 'best efforts' to prevent a violation, then it will be responsible for the damage occurred as a result of the violation.[1457]

Erga omnes obligations find their written legal ground in Article 48(1)(b) of the ARSIWA, which clarifies that any State other than the injured State is entitled to invoke the responsibility of the wrongdoer State, if "*the obligation breached is owed*

[1451] *Case of the Massacre of Pueblo Bello*, IAmCtHR, Ser. C, No. 140, 31 January 2006, para. 111 citing also *Cf. Case of the "Mapiripán Massacre" v. Colombia*, IAmCtHR, Ser. C No. 134, 15 September 2005, para. 108; *Case of the Gómez Paquiyauri Brothers*, IAmCtHR, Series C No. 110, 8 July 2004, para. 72; *Case of the "Five Pensioners"*, IAmCtHR, Ser. C No. 98, 28 February 2003, para. 63; See also United States Diplomatic and Consular Staff in Tehran (Hostages) (U.S. v. Iran), ICJ Rep. 1980, p. 3, paras. 32-33.

[1452] *Case of the Massacre of Pueblo Bello*, IAmCtHR, Ser. C, No. 140, 31 January 2006, para. 113.

[1453] *e.g.* see below, Separate opinion of Judge A.A. Cançado Trindade in *Case of the "Mapiripán Massacre" v. Colombia*, IAmCtHR, Ser. C No. 134, 15 September 2005.

[1454] *"…while it is the duty of the Contracting States to take reasonable and appropriate measures to enable lawful demonstrations to proceed peacefully, they cannot guarantee this absolutely and they have a wide discretion in the choice of the means to be used*" in ECtHR, Plattform 'Ärzte für das Leben' v. Austria, App. no. 10126/82, 21 June 1988, para. 34: *Case of the Massacre of Pueblo Bello*, IAmCtHR, Ser. C, No. 140, 31 January 2006, para. 123; *Case of González et al. ("Cotton Field") v. Mexico,* IAmCtHR, Ser. C No. 205, 16 November 2009, para. 280.

[1455] *Suarez Peralta v. Ecuador*, IAmCtHR, Series C No. 261, 21 May 2013, para. 129. See also as cited by the Court in the same paragraph: *Case of the "Mapiripán Massacre" v. Colombia*, IAmCtHR, Ser. C No. 134, 15 September 2005, para. 111, and *Case of Ximenes Lopes v Brazil*, IAmCtHR, Ser. C No. 149, 4 July 2006, paras. 85 and 86; *Juridical Status and Rights of Undocumented Migrants*, IAmCtHR Advisory Opinion OC-18/03, Ser. A No. 18, 17 September 2003, para. 140; *Cf. Case of the Massacre of Pueblo Bello*, IAmCtHR, Ser. C, No. 140, 31 January 2006, para. 123, and *Case of González et al. ("Cotton Field") v. Mexico,* IAmCtHR, Ser. C No. 205, 16 November 2009, para. 280.

[1456] AfCommHPR, Zimbabwe Human Rights NGO Forum v Zimbabwe, Comm. No. 245/02, 2006, para. 156.

[1457] Dupuy, "Reviewing the Difficulties of Codification…", p. 379.

to the international community as a whole". In ARSIWA Article 48(1)(a), it is also provided that one of the States belonging to a group of States may also invoke the responsibility of a wrongdoer State, if an international obligation towards the group has been breached to the detriment of the group's collective interest.[1458] Such obligations are called "*obligations erga omnes partes*", which implies the "horizontal dimension of international conventions".[1459] Examples include regional conventions for the protection of the environment and treaties establishing the regional human rights protection systems.[1460] Article 33 of ARIO acknowledges that international organizations owe an obligation to the international community as a whole, too. Olivier de Schutter argues that while negative obligations envisaged under international human rights law documents could be in principle imposed *erga omnes*, positive obligations to protect human rights requires a specific duty-bearer to be identified.[1461] Such obligations include, *inter alia*, prohibition of act of aggression, prohibition of genocide,[1462] protection from slavery and racial discrimination,[1463] the right to self-determination of peoples[1464] and most of the rules of international humanitarian law.[1465]

For example, although the IAmCtHR admitted in *Mapiripran* case that it had no jurisdiction to attribute international responsibility on the States Parties based on the violation of the rules of international humanitarian law, and especially of Common Article 3 of the Geneva Conventions, it held that such provisions may be used as tools of interpretation (Article 29(b)) when establishing state responsibility under the American Convention. The Court especially relied on the fact that

[1458] *Barcelona Traction* case, para. 33, which defines the obligations e*rga omnes partes* as the obligations compliance to which are to the legal interest of all the States parties to a convention.
[1459] The vertical and horizontal dimensions of *erga omnes* obligation are complementary to each other and exist concurrently. *e.g.* see below, Separate opinion of Judge A.A. Cançado Trindade in *Case of the "Mapiripán Massacre" v. Colombia*, IAmCtHR, Ser. C No. 134, 15 September 2005.
[1460] Commentary to Article 48 of the ARSIWA, paras. 6-7; see also Questions relating to the obligation to prosecute or extradite (Belgium v Senegal), Judgement, ICJ Rep. 2012, para. 69.
[1461] de Schutter, **International Human Rights Law**…", p. 411.
[1462] Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, Advisory Opinion, ICJ Rep., 1951, p. 15; Armed Activities on the Territory of the Congo (New Application 2002) (Democratic Republic of the Congo v. Rwanda), Jurisdiction of the Court and Admissibility of the Application, Judgment, ICJ Rep. 2007, para. 64.
[1463] *Barcelona Traction* case, para. 34.
[1464] Case concerning East Timor (Portugal v Australia), ICJ Rep. 1995, p. 102, para. 29; Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa), Advisory opinion, ICJ Rep. 1971, pp. 31-32, paras 52-53; Western Sahara Advisory Opinion, ICJ Rep. 1975, pp. 31-33, paras. 54-59; Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, ICJ Rep., 2004, p. 199, para. 155-157.
[1465] Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, ICJ Rep. 1996, p. 226, para. 79.

Colombia was a party to the Geneva Conventions at that time, and more importantly, that in domestic law, the Constitutional Court of Colombia has declared that such norms were to be considered as *jus cogens* norms and that they should be binding on both the State and non-state actors. Accordingly, in the *Mapiripran* Case, the IAmCtHR concluded that the armed forces of the Colombian State and the paramilitary forces committed the massacre, directly or indirectly in cooperation and in a coordinated, parallel or linked manner that the State was responsible for the commission of these crimes. Moreover, even if the State was not involved in the commission of the crimes, due to its failure in effectively protecting the victims and investigating the perpetrators, it is internationally responsible for failing "to fulfil its *erga omnes* treaty obligations to ensure effective exercise of human rights" in inter-individual relations.[1466]

The Advisory Opinion of the IAmCtHR on the Juridical Status and Rights of Undocumented Migrants is very important for understanding the approach of the IAmCtHR on *erga omnes* obligations and *jus cogens* norms of human rights.[1467] In the said opinion, the Court held that the principle of equality before the law and the prohibition of discrimination have the nature of *erga omnes* obligations, since they "*derive[…] directly from the oneness of the human family and [are] linked to the essential dignity of the individual*".[1468] The Court continued its reasoning by asserting that, in fact, these principles should be considered also as having the nature of *jus cogens* norms, since the legal structure of national and international public order is based on these principles, which are accepted to be binding on not only States Parties to a certain human rights treaty, but also all members of the international community.[1469] In particular, they give rise to effects with regard to individuals, implying that States should ensure that individuals under their jurisdiction comply with these principles and that their acts or omissions in violation of the principles are not supported, tolerated, or acquiesced by governmental authorities.[1470]

[1466] *Case of the "Mapiripán Massacre" v. Colombia*, IAmCtHR, Ser. C No. 134, 15 September 2005, paras. 115 and 123.
[1467] IAmCtHR, Juridical Condition and Rights of the Undocumented Migrants, Advisory Opinion OC-18/03, September 17, 2003, Series A No. 18.
[1468] **ibid.,** para. 100.
[1469] **ibid.**, paras. 100-101.
[1470] **ibid.**, paras. 100, 152.

The Court added that States should take every measure to prevent *de jure* or *de facto* situations, which contradict these principles, even if it is not directly or indirectly involved in the acts violating these principles. Therefore, such peremptory norms have effects vis-à-vis third parties, if their discriminative acts are not based on an objective and reasonable ground.[1471] The Court, in its Advisory Opinion held that *"In an employment relationship regulated by private law, the obligation to respect human rights between individuals should be taken into consideration. That is, the positive obligation of the State to ensure the effectiveness of the protected human rights gives rise to effects in relation to third parties (erga omnes). This obligation has been developed in legal writings, and particularly by the Drittwirkung theory, according to which fundamental rights must be respected by both the public authorities and by individuals with regard to other individuals."*[1472]

Judge Ramirez, in his concurring opinion welcomed the judgment of the Court and underlined that not only States, but individuals too have the obligation to respect human rights in their inter-individual private relationships. As the Judge emphasized the principle of free will under private law cannot be a ground for violating human rights, which have binding effectiveness *erga omnes.*[1473] Judge Trindade in several judgments of the IAmCtHR wrote his opinion to emphasize that the fulfilment of the Convention obligations of protection requires the acknowledgement of the effects of the American Convention vis-à-vis third parties (*Drittwirkung*).[1474] Judge Trindade in one of his separate opinions referred to his speech at the Cracow meeting, where he stressed that grave breaches of *erga omnes* obligations are breaches of fundamental values of the international community. Such gross violations may be perpetrated both by State and non-state actors, such as clandestine or paramilitary groups, other groups, individuals, or corporations. Consequently, protection of the fundamental values against private breaches has also been a necessity for the

[1471] **ibid.**, para. 110.
[1472] **ibid.,** para. 140.
[1473] Judge Sergio Garcia Ramirez, Reasoned concurring opinion paras. 17-18 in relation to Juridical Condition and Rights of the Undocumented Migrants, Advisory Opinion OC-18/03, September 17, 2003, Series A No. 18.
[1474] Separate Opinion of A.A. Cançado Trindade, paras. 6-8, in *Case of the Massacre of Pueblo Bello*, IAmCtHR, Ser. C, No. 140, 31 January 2006, citing his other opinions in Peace Community of San José de Apartadó v. Colombia, 18 June 2002 and Urso Branco Prison v. Brazil, 7 July 2004; also see Concurring Opinion in the case of the Communities of the Jiguamiandó and the Curbaradó, Order of 06.03.2003, paras. 2-3; Concurring Opinion in Advisory Opinion No. 18 of the IAmCtHR on The Juridical Status and Rights of Undocumented Migrants, 17.09.2003.

international community. Judge Trindade concluded his views in the separate opinion in *Mapiripán Massacre* case as follows:

> *"25. Here, once again, the obligation of the State to ensure protection and due diligence shows the broad scope of the general duty of protection under Article 1(1). In this connection, regarding the broad scope of the erga omnes obligation of protection, in my Concurring Opinion in Advisory Opinion No. 18 of the InterAmerican Court on The Juridical Status and Rights of Undocumented Migrants (of 17.09.2003), I noted that said erga omnes obligations, characterized by jus cogens (from which they derive),[1475] being necessarily objective in nature, therefore encompass all the addressees of the legal provisions (omnes), both members of the bodies of the public State authorities and private individuals (para. 76). And I added:*
>
> *"In my view, we can consider such erga omnes obligations from two dimensions, one horizontal and the other vertical, which complement each other. Thus, the erga omnes obligations of protection, in a horizontal dimension, are obligations pertaining to the protection of human beings that pertain to the international community as a whole.[1476] In the framework of international treaty law, they bind all the States Parties to human rights treaties (obligations erga omnes partes), and, in the ambit of general international law, they bind all the States that constitute the organized international community, whether or not they are Parties to those treaties (obligations erga omnes lato sensu). In a vertical dimension, the erga omnes obligations of protection bind both the bodies and agents of (State) public*

[1475] Footnote 8 in the original text: "*In this same Opinion, I noted that "By definition, all the norms of jus cogens necessarily generate obligations erga omnes. While jus cogens is a concept of material law, the erga omnes obligations refer to the structure of their performance on the part of all the entities and all the individuals bound by them. In turn, not all erga omnes obligations necessarily refer to norms of jus cogens." (para. 80)*"

[1476] Footnote 8 in the original text: (ACtHR, Blake versus Guatemala case (Merits), 24.01.1998, Separate Opinion of Judge A.A. Cançado Trindade, para. 26, and see paras. 27-30.)

power, and the individuals themselves (in inter-individual relations).

The advent and evolution of International Human Rights Law have decisively contributed to development of this vertical dimension. But it is surprising that, until now, these horizontal and vertical dimensions of the erga omnes obligations of protection have gone entirely unnoticed by contemporary legal doctrine. Nevertheless, I see them clearly take shape in the legal system of the American Convention on Human Rights itself. Thus, for example, as to the vertical dimension, the general obligation, set forth in Article 1(1) of the American Convention, to respect and to ensure respect for the free exercise of the rights protected by it, generates erga omnes effects, encompassing relations of the individual both with the public (State) authorities as well as with other individuals (particuliers).[1477] *"*

26. Actually, contemporary legal doctrine, addressing erga omnes obligations, has focused almost exclusively on the horizontal dimension, without establishing a distinction with regard to the other, vertical dimension, and without addressing the latter at all. The facts in the instant case of the Mapiripán Massacre have shown the urgent need to pay greater attention to what I call the vertical dimension of the erga omnes obligations to provide protection."[1478]

Currently, no international judicial organ has jurisdiction to try legal persons for human rights abuses, even if they amount to breaches of obligations *erga omnes.* However, such obligations exist regardless of the ability of the international community to invoke responsibility of TNCs for breaches of obligations *erga omnes*. Same assertions shall be made regarding the peremptory norms of international law. Article 26 of both ARSIWA and ARIO provide that both the States and the international organizations shall act in conformity with their obligations arising

[1477] Footnote 10 in the original text: (paras. 77-78).
[1478] Separate opinion of Judge A.A. Cançado Trindade in *Case of the "Mapiripán Massacre" v. Colombia*, IAmCtHR, Ser. C No. 134, 15 September 2005, paras. 25-26.

under peremptory norms of general international law.[1479] The principles and rules of the law of State responsibility are equally applicable for the responsibility of international organizations. Thus, they may be applied, *mutatis mutandis*, to the activities of TNCs. For example, a private contract should be declared, partially or wholly, null and void or be disregarded if a court decides that it is contrary to the values protected by peremptory norms (VCLT Article 53).[1480] Clapham asserts that, even if one or all of the parties to a treaty are private persons having no state functions, the prohibition of concluding treaties contrary to the peremptory norms still applies and any violation shall result in the international responsibility and/or international individual criminal responsibility of the parties, if it constitutes an international crime.[1481]

Corporations cannot claim that they are not bound by the peremptory norms of international law due to the lack of an international body competent to try legal persons. The ICJ confirmed this assertion as follows:

> *"147. ... It has no power to rule on alleged breaches of other obligations under international law, not amounting to genocide, particularly those protecting human rights in armed conflict. That is so even if the alleged breaches are of obligations under peremptory norms, or of obligations which protect essential humanitarian values, and which may be owed erga omnes.*
>
> *148. As it has in other cases, the Court recalls the fundamental distinction between the existence and binding force of obligations arising under international law and the existence of a court or tribunal with jurisdiction to resolve disputes about compliance with those obligations. The fact that there is not such a court or tribunal does not mean that the obligations do not exist. They retain their validity and legal force. States are required to fulfil their obligations under international law,*

[1479] Articles 41-42 of both ARSIWA and ARIO concerns the responsibility of States and international organizations for serious (gross and systematic) breaches of peremptory norms.
[1480] Clapham, **Human Rights Obligations**..., p. 90.
[1481] **ibid.,** p. 90.

> *including international humanitarian law, and they remain responsible for acts contrary to international law which are attributable to them (e.g. case concerning Armed Activities on the Territory of the Congo (New Application: 2002) (Democratic Republic of the Congo v. Rwanda), Jurisdiction of the Court and Admissibility of the Application, Judgment, I.C.J. Reports 2006, pp. 52-53, para. 127).''*[1482]

Finally, I should remind that TNCs shall be tried before domestic courts for violations of peremptory norms regardless of the choice of law that is applicable in that case. For example, in *Doe I. v. Unocal* litigation, the U.S. Court held that although the law of the State where the crimes were committed, *i.e.* Myanmar, shall be applied in the case at hand, the allegations concerned the breach of peremptory norms. That is to say, the law of the state where the crimes were committed shall either be identical to the peremptory norms or be invalid.[1483]

Slave trade, slavery, forced labour and child labour are among the peremptory norms, which are more likely to be perpetrated by non-state actors alone, without any need of material or psychological support or involvement of the State officials.[1484] The corporations may also become complicit in human rights violations if they either directly or through their sub-contractors, encourage, facilitate or benefit from forced labour, child labour or undocumented migrant workers. Article 5(3) of 1926 Convention to Suppress the Slave Trade and Slavery underlines that in any situation involving compulsory or forced labour, the responsibility would rest with the State authorities. Similarly, Article 4 of 1930 ILO Convention (No. 29) concerning Forced or Compulsory Labour obliges States Parties not to "*impose or permit the imposition of forced or compulsory labour for the benefit of private individuals, companies or associations*". Article 5 of the Convention also prohibits granting any concession to private persons for products or processes of production, which would result in forced or compulsory labour. Therefore, currently, States remain the sole responsible actor

---

[1482] Application of the Convention on the Prevention and Punishment of the Crimes of Genocide (Bosnia and Herzegovina v Serbia and Montenegro), Merits, Judgment, ICJ Rep. 2007, p. 65, paras.147-148.
[1483] *Doe I v. Unocal Corp*., 395 F. 3d 932- Court of Appeals, 9th Circuit 2002, p. 948. The case will be elaborated on in detail, in the context of complicity below.
[1484] Ratner and Abrams, **op. cit.**, p. 116. *See* also Reinisch, **op. cit.**, p. 87.

for preventing, investigating and punishing acts of slavery, forced labour and child labour.

Ratner and Abrams suggest that this fact may make it easier for the domestic prosecutors to bring cases against the perpetrators of such crimes, if the prosecutors are not barred by the economic or political power of the perpetrators.[1485] Thus, any person, whether natural or legal, would be criminally liable for the acts mentioned in the Convention. However, speaking of international individual criminal liability of those who engage in employment relationships that amount to slavery or forced labour, especially at the sweatshops or in agricultural or coffee farm sectors, seems to be a far-away possibility under current international law norms.[1486] Nevertheless, it should be recognized that TNCs have an obligation to protect human rights and they shall take appropriate measures in order to prevent their subsidiaries to recourse to slavery, forced labour and child labour. In the context of supply chain responsibility, they shall also ensure that the raw materials or certain parts of their products are not derived from the use of slavery or forced labour.

Prohibition of torture is also a *jus cogens* norm and has an absolute and non-derogable character.[1487] The Committee against Torture in its General Comment no. 2 on the implementation of Article 2 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment held that "*State's obligation to prevent torture also applies to all persons who act, de jure or de facto, in the name of, in conjunction with, or at the behest of the State party.*"[1488] States are under the positive obligation to adopt effective measures for investigating and punishing direct perpetrators and other officials in the chain of command, and for preventing future acts of torture and ill-treatment.[1489] States are also internationally responsible for the acts and omissions of their officials, agents, private contractors, persons acting under an official capacity or acting under the direction or control of the State, or otherwise under colour of law.[1490] The UN Human Rights Committee, too, emphasized that the States Parties shall adopt any legislative and other measures as

[1485] Ratner and Abrams, **op. cit.**, p. 116.
[1486] **ibid.**
[1487] Committee against Torture, General Comment No.2, Implementation of Article 2 by State parties, CAT/C/GC/2, 24.01.2008, para. 1.
[1488] **ibid.**, para. 7.
[1489] **ibid.**, para. 15.
[1490] **ibid.**

may be necessary in order to protect everyone from torture, cruel, inhuman or degrading treatment or punishment as prohibited under Article 7 of the ICCPR.[1491] Similarly, the ECHR in evaluating the complaints concerning the alleged violations of Article 3 and Article 4 underlined that the States shall ensure that the absolute prohibition of torture, inhuman or degrading or any other ill-treatment and slavery, servitude and forced or compulsory labour are not being violated by private persons.[1492]

The Committee against Torture exemplified that the State would be responsible for the acts of torture or ill-treatment perpetrated in the privately-owned or run detention centres on two-fold: (a) for the acts of the personnel who act in an official capacity while performing a State function, and (b) for failure to monitor and take effective measures for the prevention of the acts of torture and ill-treatment.[1493] In the latter case, lack of due diligence and indifference or inaction to prevent, investigate, prosecute and punish the non-state actors, who have engaged in the acts of torture or ill-treatment, resulting in the impunity of these perpetrators,[1494] would amount to encouragement and/or *de facto* permission of these acts by the State actors, provided that they knew or had reasonable grounds to believe that the acts of torture or ill-treatment were being committed by private actors.[1495] The Committee expressly stressed that the Convention against Torture does not impose obligations on individuals, reserving that it also does not limit any potential international responsibility of individuals that would arise as a consequence of the commission of an act of torture or ill-treatment which constitute a violation of customary law or any other international treaty.[1496] Moreover, State responsibility extends to any territory, where the State exercises, directly or indirectly, *de jure* or *de facto*, factual or

[1491] General Comment No.20 on Article 7 of the ICCPR, Compilation of General Comments and General Recommendations adopted by Human Rights Treaty Bodies, U.N. Doc. HRI/GEN/1/Rev.1 at 30 (1994).
[1492] ECtHR, A v. the United Kingdom, App.no. 100/1997/884/1096, 23 September 1998, para. 22; E and others v UK, App. no. 33218/96, 26 November 2002 (final 15.01.2003), para. 88; ECtHR, MC v Bulgaria, App.no. 39272/98, 4 March 2004 (final 4.3.2004), para. 149; Siliadin v. France, App. no. 73316/01, 26.10.2005, paras. 116-149.
[1493] Committee against Torture, General Comment no.2, implementation of article 2 by State parties, CAT/C/GC/2, 24.01.2008, para. 17.
[1494] See also Committee against Torture, General Comment no.3, implementation of article 14 by State parties, CAT/C/GC/3, 13.12.2012, para. 42.
[1495] Committee against Torture, General Comment no.2, implementation of article 2 by State parties, CAT/C/GC/2, 24.01.2008, para. 18; Committee against Torture, General Comment no.3, implementation of article 14 by State parties, CAT/C/GC/3, 13.12.2012, para. 7.
[1496] Committee against Torture, General Comment no.2, implementation of article 2 by State parties, CAT/C/GC/2, 24.01.2008, para.15.

effective control.[1497] In any case, if torture has been committed within the context of international crimes described under the Statutes of international tribunals would allow the international judge to try the private actor before an international judicial organ.[1498]

4.3.2. Possibilities for Horizontal Application of Responsibility to Protect

One of the purposes of the UN is the promotion of universal respect for, and observance of human rights.[1499] Member States are under an obligation to cooperate with the UN for facilitating the achievement of this purpose.[1500] It has been stressed in various documents of international organizations such as OECD, EC, NAFTA, and WTO that the States have the primary responsibility to promote, secure the fulfilment of, respect, ensure respect of and protect human rights.[1501] Obligation to protect requires States not to remain passive and to take all reasonable and appropriate measures to prevent, investigate, punish and redress potential and actual adverse impacts that may emanate from the activities of non-state actors.[1502] In other words, States are under an obligation to protect the right-holders from any political, social and economic interference that may come from non-state actors and to create and preserve a peaceful living atmosphere, where individuals freely and fully enjoy their rights and freedoms.[1503] Therefore, the obligation to protect is a prophylactic duty[1504] and it goes hand-in-hand with the obligation to promote and fulfil, which implies a requirement to advance the actual and full realization and enjoyment of all human rights by mobilizing all available and affordable tools at the disposal of the State.[1505]

[1497] **ibid.**, para. 16.
[1498] John Cerone, "The Vanishing Relevance of State Affiliation in International Criminal Law: Private Security Contractors and Other Non-State Actors" in Bartram S. Brown, (ed.), **Research Handbook on International Criminal Law**, Edward Elgar Publishing, 2011, p. 26.
[1499] UN Charter, Articles 1(3) and 55(c).
[1500] UN Charter, Article 56.
[1501] Kamminga and Zarifi comments that this fact demonstrate the trend towards protecting the rights of TNCs against States, rather than imposing human rights obligations on them. Kamminga & Zia-Zarifi, **op. cit.**, p. 5.
[1502] General Comment No. 31 [80] Nature of the General Legal Obligation Imposed on States Parties to the Covenant: 26/05/2004, CCPR/C/21/Rev.1/Add.13. (adopted on 29 March 2004), para. 8.
[1503] AfCommHPR, Comm. No. 155/96 – the Social and Economic Rights Action Center and the Center for Economic and Social Rights/Nigeria, 2001, paras. 46-47.
[1504] Odinkalu, **op. cit.**, p. 197.
[1505] Heyns, **op. cit.**, p. 139.

For example, 1998 Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms, firstly stresses that the primary responsibility and duty to promote, protect and implement human rights lie with the States, and secondly underlines that individuals, groups and associations are also responsible for the promotion and protection of human rights and fundamental freedoms both at the national and international levels.[1506] Furthermore, Article 10 of the Declaration prohibits any active or passive participation in acts or omissions that violate human rights. It is also provided that individuals, NGOs and other institutions have an important role to play in raising public awareness concerning the problems related to human rights issues. In doing so, they may engage in different levels of activities of educating, training and researching depending on the specifications of the country they operate in.[1507] Similarly, Article 16 underlines the role of individuals, NGOs and other relevant institutions in raising public awareness on the protection of human rights.

In the famous landmark *Ogoni* case, the African Commission dealt with the allegations of environmental degradation in the Niger Delta region (Ogoniland) and the health problems caused on the local communities (the *Ogoni* people) due to the oil production activities conducted by the State oil company in a consortium with the transnational Shell Petroleum Development Corporation.[1508] The African Commission examined the allegations on the violation of Article 21 on the right to free disposal of wealth and natural resources,[1509] which is a right that would potentially be in danger due to the operations of transnational corporations in developing countries, especially in the African continent.[1510] The Commission also examined Article 24 of the African Charter on the right to a "*general satisfactory environment favorable to ... development*". Other allegations concerning the protection of environment included the contamination of water, soil and air by toxic

[1506] Preamble para. 7 and Articles 2 and 3 of the Declaration on the Right and Responsibility of Individuals...
[1507] Article 16 of the Declaration on the Rights and Responsibility of Individuals...
[1508] AfCommHPR, Comm. No. 155/96 – the Social and Economic Rights Action Center and the Center for Economic and Social Rights/Nigeria, 2001.
[1509] **ibid.**, para. 55.
[1510] **ibid.**, paras. 56 and 68.

wastes, poisoning of fishing and farming sources and killing of the animals as direct consequences of the exploitation of oil reserves.[1511]

Furthermore, the Commission, while acknowledging the potentially positive contributions of corporations in the development of the African continent, drew attention to the failure of the military government in fulfilling its positive duty to protect human rights against the public and private abuses.[1512] Furthermore, the Commission underlined that the State has facilitated the abusive practice of private corporations by providing its military and security forces at their disposal, which perpetrated wide spread killings and terrorized the Ogonis.[1513] The Commission, therefore, discussed the indirect horizontal dimension of the rights under the Convention.[1514] The Commission concluded that the Nigerian Government has not controlled or monitored the compliance of these corporations with the international and national standards of oil activities and failed to protect the rights of the Ogonis.[1515] Finally, Nigeria did not request any report from the corporations and forbid the private initiatives to make research on the adverse effects of the operations, and accordingly, also failed to adopt preventive measures to assess the negative impacts of private activities and to minimize them.[1516]

As an example of the cross-fertilization between the regional bodies over the extension of State's positive obligations to prevent human rights violations perpetrated by non-state actors,[1517] the African Commission, referring to *Velasquez*

[1511] **ibid.**, 1, 2, 9, 67.
[1512] **ibid.**, para. 69.
[1513] **ibid.,** para. 67. See also Commission Nationale des Droits de l'Homme et des Libertés v Chad, AfCommHPR, Comm. 74/92, 1995, paras. 18-22, which among other allegation against the State authorities (*i.e.* of vertical violations of human rights), also concerned the harassment of journalists by undercover security service agents of the Government and the killing of Bisso Mamadou by armed individuals who were not brought to justice by the Government.
[1514] Complicity in the commission of crimes against humanity, torture and inhumane treatment committed against the Ogonis have also been alleged before the U.S. courts in the litigation Wiwa v. Royal Dutch Petroleum Co., 226 F.3d 88, 92, 94, 2nd Cir., 2000. The plaintiffs alleged that Shell called for the help of the Nigerian government to suppress the protests and even paid the soldiers. However, the case was settled out in 2009 when Shell agreed to compensate $15.5 million. Jad Mouawad, "Shell to Pay $15.5 million to Settle Nigerian Case",. The New York Times, 8 June 2009, http://www.nytimes.com/2009/06/09/business/global/09shell.html?ref=global&_r=0, accessed on 10.07.2013.
[1515] AfCommHPR, Comm. No. 155/96 – the Social and Economic Rights Action Center and the Center for Economic and Social Rights/Nigeria, 2001, paras. 4, 55.
[1516] **ibid.**, para. 5; Clive Baldwin & Cynthia Morel, "Group Rights" in Evans & Murray (eds.), **The African Charter … 1986-2006**, …, p. 286.
[1517] Thomas Buergenthal, "Lawmaking by the ICJ and Other International Courts", **American Society of International Law Proceedings**, Vol. 103, 2009, p. 405.

Rodriguez case of the IAmCtHR, the case of *X. and Y. v. Netherlands* of the ECtHR, and its own decision in *Union des Jeunes Avocats v. Chad* held that:

> "*…in the present case, despite its obligation to protect persons against interferences in the enjoyment of their rights, the Government of Nigeria facilitated the destruction of the Ogoniland. Contrary to its Charter obligations and despite such internationally established principles, the Nigerian Government has given the green light to private actors, and the oil Companies in particular, to devastatingly affect the well-being of the Ogonis. By any measure of standards, its practice falls short of the minimum conduct expected of governments, and therefore, is in violation of Article 21 of the African Charter*."[1518]

The Commission also interpreted Articles 14, 16 and 18(1) in combination and concluded that the African Charter also protects the right to housing, which has been violated by the Nigerian Government as a consequence of its operations in the *Ogoni* villages.[1519] Moreover, with regard to the right to food, the African Commission concluded in the *Ogoni* case that:

> *"The right to food is inseparably linked to the dignity of human beings and is therefore essential for the enjoyment and fulfilment of such other rights as health, education, work and political participation. The African Charter and international law require and bind Nigeria to protect and improve existing food sources and to ensure access to adequate food for all citizens. Without touching on the duty to improve food production and to guarantee access, the minimum core of the right to food requires that the Nigerian Government should not destroy or contaminate food sources. It should not allow private*

[1518] AfCommHPR, Comm. No. 155/96 – the Social and Economic Rights Action Center and the Center for Economic and Social Rights/Nigeria, 2001, para. 58.
[1519] **ibid.,** paras. 60-62.

> *parties to destroy or contaminate food sources, and prevent peoples' efforts to feed themselves."*[1520]

Consequently, the Commission held that Nigeria violated the right of the Ogoni people to food under the African Charter by allowing the private oil companies to destroy the food sources of the Ogonis and by not preventing its own security forces and state oil company to destroy the food sources.[1521] Finally, the Government also has been found in violation of the Charter due to lack of effective investigation and prosecution of those responsible for the crimes committed in the Ogoniland, and inadequate compensation provided for the victims of human rights violations. The African Commission held that the Nigerian Government was under an obligation to take effective measures, including legislation, to protect the rights enshrined in the African Charter from any political, economic and social interference.[1522]

Thus, the African Commission has also adopted the method of progressive interpretation in determining the positive obligations of States for fulfilling their responsibilities under the Charter.[1523] Furthermore, the Commission ordered the State to ensure the preparation of appropriate environmental and social impact assessments for future oil development and independent and effective monitoring of safe operation of the companies. Additionally, the rights of the local communities should also be protected by providing them with the information on the health and environmental risks of any future oil production activity and their access to decision-making bodies should be ensured. In addition, the efforts of NGOs in the decision-making process of the Commission should also be appreciated, which undoubtedly contributed to this precedent-setting decision.[1524]

The RtoP encompasses a duty to regulate, prevent and monitor requiring the State to take all possible appropriate measures in order to prevent potential and actual violations by third parties that it knows or ought to have known. States are

---

[1520] **ibid.**, para. 65.
[1521] **ibid.**, paras. 66-67.
[1522] **ibid.**, para. 46.
[1523] Gatto, **op. cit.**, p. 71.
[1524] Nobuntu Mbelle, "The Role of Non-governmental Organizations and National Human Rights Institutions at the African Commission" in Evans & Murray (eds.), **The African Charter… 1986-2006,** …, pp. 309-310.

expected to take all reasonably available steps in order to prevent abusive acts that amount to ill-treatment, especially against vulnerable persons, when the authorities had or ought to have had knowledge of these acts.[1525] The ECtHR, concerning the 'knowledge' test that shall apply under Article 3 held in *E and others v. UK* that *"[a] failure to take reasonably available measures which could have had a real prospect of altering the outcome or mitigating the harm is sufficient to engage the responsibility of the State."*[1526] For example, in *Opuz v. Turkey*, the Court reiterated that Article 1 of the ECHR obliges the State Parties to take measures ensuring that individuals, especially those who are vulnerable such as women and children, are protected against serious breaches of their personal integrity and that they are not being subjected to torture, inhuman or degrading treatment by other private individuals.[1527] The Court held that, in some cases, the States should be regarded as having sufficient knowledge of the threat of a violation even if there is no official complaint made[1528] or the complaint is withdrawn or there is a general pattern of violations.[1529] Accordingly, the Court required a higher degree of diligence under certain fragile circumstances such as domestic violence.[1530] The Court concluded that failure of the State to take protective measures having deterrent effects on the potential private violators, *i.e.* the husband, constitutes a breach of State due diligence obligations under the ECHR.[1531]

As a general rule, the responsibility to protect is an obligation of diligence (means or conduct), and not of result.[1532] Therefore, violation of a human right by a third party would not lead to holding the State responsible for the harm occurred provided that it took all the necessary and appropriate measures, which could

[1525] *E and others v UK*, App. no. 33218/96, 26 November 2002 (final 15.01.2003), para. 88.
[1526] **ibid.**, paras. 99-100.
[1527] Opuz v. Turkey, App.no. 33401/02, 9 June 2009, para.159; see also ECtHR, A v. the United Kingdom, App.no. 100/1997/884/1096, 23 September 1998, para. 22; E and others v UK, App. no. 33218/96, 26 November 2002 (final 15.01.2003), para.88; MC v Bulgaria, App. no. 39272/98), 4 March 2004 (final 4.3.2004), para. 149.
[1528] 97 Members of the Gldani Congregation of Jehovah's Witnesses and 4 other vs Georgia, 3 May 2007, App.no. 71156/01, para. 97.
[1529] ECtHR, Mahmut Kaya vs Turkey, App.no. 22535/93, 28 March 2000, para. 127.
[1530] Lambooy, **op. cit.**, p. 424.
[1531] Opuz v. Turkey, App.no. 33401/02, 9 June 2009, para. 176.
[1532] For example, the ECtHR expressly mentioned that even though the States are under an obligation to take all reasonable and appropriate measures to ensure the enjoyment of the right to peaceful demonstrations, it cannot be absolutely guaranteed that any third party interference may impair such an enjoyment. Accordingly, States have a "*wide discretion in the choice of the means to be used"* and that the Convention obligations under Article 11 are "*obligations as to measures to be taken and not as to results to be achieved.*" ECtHR, Plattform 'Ärzte für das Leben' v. Austria, App. no. 10126/82, 21 June 1988.

reasonably be expected from her. For example, omission of the legislative organ to enact protective laws, or failure of the executive organ to effectively enforce the laws and prosecute the acts, or inadequacy of a judicial organ in providing reparation for the harm suffered by the victim would give rise to the responsibility of the State.[1533] Unpredictability of human conduct,[1534] existence of emergency situations[1535] and availability of national budgetary resources constitute the legitimate limits of the conduct of the State. In other words, the obligation of due diligence cannot be interpreted as imposing impossible or disproportionate burden on the state authorities.[1536] To add, States shall also carefully apply the balancing test between the conflicting human rights when taking the measures that they deem necessary. Finally, contractual freedom of individuals and the autonomy of individual, who waives his/her rights by contractual or non-contractual relations shall also be respected, both of which constitute the limits of the obligation of States to protect human rights.[1537]

However, the context of RtoP would evolve by time and space, depending on the circumstances of each case. For example, the African Commission held that the compelling nature of human rights law obliges States to effectively protect and guarantee the enjoyment of human rights, which, at the same time, implies the imposition of obligations of result on the States for giving effect to the provisions of international human rights instruments.[1538] In the mentioned case, the Commission concluded that even if we were to assume that Cameroon fulfilled its obligation of diligence, the measures it took were not sufficient to prevent the foreseeable post electoral events. Consequently, Cameroon failed to fulfil its obligation of result and

[1533] de Schutter, "The Accountability of Multinationals…", p. 246.
[1534] For example in Osman v UK, the ECtHR noted that given the unpredictability of human conduct in modern societies, the measures that may be reasonably expected from the State authorities shall not extend beyond the availability of resources and priorities of a State. ECtHR, Osman v UK, Apps. No. 87/1997/871/1083, 28 October 1998., para. 116; *cf.* Kiliç v. Turkey, App. No. 22492/93, 28 March 2000, paras. 62 and 63; Opuz v. Turkey, App.no. 33401/02, 9 June 2009, para.129; AfCommHPR, Zimbabwe Human Rights NGO Forum v Zimbabwe, Comm. No. 245/02, 2006, para. 157.
[1535] Budayeva and Others v. Russia, Apps. nos. 15339/02, 21166/02, 20058/02, 11673/02, 15343/02, 20 March 2008, paras. 134-135.
[1536] ECtHR, Appleby and Others v United Kingdom, App. No. 44306/98, 6 May 2003, paras. 39-40, see, inter alia, ECtHR, Rees v. the United Kingdom, App. No. 9532/81, 17 October 1986, para. 37, and ECtHR, Osman v UK, Apps. No. 87/1997/871/1083, 28 October 1998, para. 116.
[1537] de Schutter, International Human Rights Law…", p. 366.
[1538] AfCommHPR, Association of Victims of Post Electoral Violence & INTERIGHTS v. Cameroon, African Commission on Human and Peoples' Rights, Comm. No. 272/03, 2009, paras. 111-112.

should redress the damage suffered by the victims.[1539] Nevertheless, the Commission too underlined that States have a wide margin of appreciation in determining the tools to be used for preventing and protecting human rights, and that the State could preclude responsibility by providing evidence that it took all necessary measures for preventing the violation.[1540] Finally, the degree of diligence required of States would be much higher if a violation of peremptory norm is at stake.

Isaak v. Turkey[1541] and *Solomou v. Turkey*[1542] cases both include allegations of killings of the demonstrators by counter-demonstrators and other private individuals in front of the police, who passively watched the events or even participated in the beatings. The Court in *Isaak* case held that Article 2(1) obliges States not only to refrain from violating the right to life, but also to take appropriate and effective steps, including taking preventive operational measures to safeguard the persons under their jurisdiction from the criminal acts that may be perpetrated by other private persons.[1543] The Court concluded that "*...Isaak was killed by, and/or with the tacit agreement of, agents of the respondent State…*" and that Article 2(2) of the Convention has been breached by Turkey. [1544]

The Court in *Solomou* judgment, given on the same day with *Isaak* judgment, reiterated its previous findings and held that:

> *"In addition, the acquiescence or connivance of the authorities of a Contracting State in the acts of private individuals which violate the Convention rights of other individuals within its jurisdiction may engage that State's responsibility under the Convention. Any different conclusion would be at variance with the obligation contained in Article 1 of the Convention (see Cyprus v. Turkey [GC], no. 25781/94, § 81, ECHR 2001-IV). This is particularly true in the case of recognition by the State in question of the acts of self-*

[1539] **ibid**., paras. 119-121.
[1540] See *e.g.* AfCommHPR, Association of Victims of Post Electoral Violence & INTERIGHTS v. Cameroon, African Commission on Human and Peoples' Rights, Comm. No. 272/03, 2009, para. 98.
[1541] Isaak and Others v. Turkey, App. 44587/98, 24 June 2008, para. 111.
[1542] Solomou and Others v. Turkey, App. No. 36832/97, 24 June 2008.
[1543] Isaak and Others v. Turkey, App. 44587/98, 24 June 2008, para. 106.
[1544] **ibid.**, para. 120.

> *proclaimed authorities which are not recognised by the international community (see Ilaşcu and Others, cited above, § 318)."*[1545]

In a similar occasion, in which the Court evaluated the protection of the right to assembly, it held that:

> "*A demonstration may annoy or give offence to persons opposed to the ideas or claims that it is seeking to promote. The participants must, however, be able to hold the demonstration without having to fear that they will be subjected to physical violence by their opponents; such a fear would be liable to deter associations or other groups supporting common ideas or interests from openly expressing their opinions on highly controversial issues affecting the community. In a democracy the right to counter-demonstrate cannot extend to inhibiting the exercise of the right to demonstrate.*
>
> *Genuine, effective freedom of peaceful assembly cannot, therefore, be reduced to a mere duty on the part of the State not to interfere: a purely negative conception would not be compatible with the object and purpose of Article 11. Like Article 8, Article 11 sometimes requires positive measures to be taken, even in the sphere of relations between individuals, if need be (see, mutatis mutandis, the X and Y v. the Netherlands judgment of 26 March 1985, Series A no. 91, p. 11, § 23)*."[1546]

Likewise, in Gustafsson v Sweden, the Court added to its findings that *"national authorities may, in certain circumstances, be obliged to intervene in the relationships between private individuals by taking reasonable and appropriate*

[1545] Solomou and Others v. Turkey, App. No. 36832/97, 24 June 2008, para. 46.
[1546] ECtHR, Plattform 'Ärzte für das Leben' v. Austria, App. no. 10126/82, 21 June 1988, para.32.

measures to secure the effective enjoyment of the negative right to freedom of association".[1547]

Finally, *Fadeyava v. Russia* case concerns the allegation that the right of the applicant to health and well-being under Article 8 of the ECHR has been violated due to the industrial pollution caused by the operation of the Severstal steel plant owned by the Ministry of Black Metallurgy of the Soviet Russia. Later, the plant was privatized by the Russian Federation. The Court, firstly, noted that not all the environmental damages cause a breach of the Convention and that there is no right to the preservation of nature, as such.[1548] For the Court to conclude that there has been a breach of the Convention, a certain minimum level of adverse effects of the environmental pollution depending on its general context, density, duration and severity shall have caused a direct and actual interference with the applicant's right to private life and home.[1549] The Court, analysing the data on pollution and other facts in the area after Russia became a party to the ECHR, held that even if the exceeding safe levels of pollution did not cause a special or extraordinary damage for the applicant, it is strongly possible that her health has been deteriorated due to prolonged exposure to the pollution or at least became more vulnerable to the illnesses.[1550] The Court examining the conditions for attribution of the breach to the Russian Federation held that the plant's activities has been under the supervision of the Government authorities, even after it was privatized in 1993. The pollution caused by the plant was continuous and so well-known that there was no hesitation as to the nexus between the pollution and failure of the State to take reasonable and appropriate measures, *i.e.* to regulate private industry, for fulfilling its positive obligations under Article 8.[1551]

The Court then examined whether a fair balance between the competing interests and rights of the individual applicant and the community as a whole was

[1547] ECtHR, Gustafsson v Sweden, App. No. 15573/89, 25 April 1996, para.45. The case concerned the allegation the boycott and blockade by the union to the detriment of the applicant's business was a violation of his right to negative freedom of association, which the Court rejected by referring to the rights of the employers under the ECHR and other international covenants.
[1548] Fadeyava v Russia, App. no. 55723/00, 9 June 2005, para. 68
[1549] **ibid.**, paras. 69-70.
[1550] **ibid.**, paras. 87-88.
[1551] **ibid.**, para. 89.

struck.[1552] In doing so, failure of the State to regulate private industry has been considered as one of the factors that should be taken into account in concluding whether the State was responsible for the violations. The Court held that even if the Government argued that the authorities supervised and controlled the plant on various occasions and imposed administrative penalties on the company if breach of domestic law has been found, no evidence as to the effective imposition of these penalties has been submitted. Nor, the types of breaches by the company have been clarified. Accordingly, even if the States have a wide margin of appreciation in determining the appropriate measures to be taken for ensuring effective enjoyment of the right to family and home, "*there is no indication that the State designed or applied effective measures which would take into account the interests of the local population, affected by the pollution, and which would be capable of reducing the industrial pollution to acceptable levels*".[1553]

It is not disputed that States are the primary duty-bearers for protecting human rights. However, could we argue that the RtoP extends to non-state actors, and especially to TNCs? In other words, could it be asserted that the duties, *mutatis mutandis*, to regulate, to act with due diligence and to fight impunity (or redress) to protect human rights may be imposed on TNCs and that they may be held secondarily (and complementarily) responsible for protecting human rights against violations? I would give an affirmative answer to these questions, especially when the peremptory norms of international law are under threat. The horizontal application of human rights instruments to private relations has neither been forbidden nor foreseen by the drafters.[1554] Moreover, even if Ruggie, in his report, underlined that the RtoP is a duty for States, and that corporations have only a responsibility to respect human rights, *i.e.* to do-no-harm, the fulfilment of the obligation to respect also requires TNCs to act with due diligence, which depending on the circumstances of each case, may correspond to a RtoP for TNCs.[1555] For example, it may also be argued that TNCs have an obligation to use their power of

[1552] **ibid.**, para. 93. Another balancing test applies for the competing right of the individual under Art.8 on the one hand and of the company under Art.1 of Protocol 1 on the other. However, the Court underlined that given the wide margin of appreciation enjoyed by the States in environmental protection policies, the Court plays a subsidiary role and "*only in exceptional circumstances may it go beyond this line and revise the material conclusions of the domestic authorities*". (para.105)
[1553] **ibid.**, para. 133.
[1554] Karavias, "Corporate Obligations…", p. 22.
[1555] de Schutter, **International Human Rights Law**…, pp. 398-399.

influence in entering into contractual relationships with business partners in various countries in order to protect human rights against violations that may be perpetrated by such actors.[1556] Furthermore, Ruggie himself in his Report on the Guiding Principles on Business and Human Rights already set that corporations have a duty to address the adverse impacts of their actions and omissions and that they are under an obligation to prevent or mitigate such adverse impacts "*that are directly linked to their operations, products or services by their business relationships,*[1557] *even if they have not contributed to those impacts"*.[1558] For example, the UN Norms affirm that TNCs shall use their influence in order to help promote and ensure respect for human rights.[1559] The private sector in supporting prevention, cessation and recovery from the violations of human rights and humanitarian law may facilitate early warning tools and systems and directly support the State for enhancing its capacity to prevent violations.[1560]

4.4. Responsibility to Act with Due Diligence

The legal foundation of the duty of corporations to act with due diligence may be found in the Preamble of the UDHR, which stipulates that every individual and every organ of the society shall secure the universal and effective recognition and observance of all rights and freedoms by adopting progressive measures. TNCs, as one of the organs of the society, shall act with due diligence not to commit and contribute directly or indirectly to the human rights violations perpetrated by not only the persons and entities they have business relationships with, but also by third parties. Therefore, corporate human rights due diligence is an obligation for the fulfilment of both the responsibility to respect and the responsibility to protect. Furthermore, corporations shall act with due diligence for not directly or indirectly benefitting from human rights abuses, provided that they knew or ought to have known that there has been a violation of human rights.

[1556] Clapham, **Human Rights Obligations**... *",* pp. 230-231.

[1557] "*Business relationships are understood to include relationships with business partners, entities in its value chain, and any other non-State or State entity directly linked to its business operations, products or services."* Guiding Principles on Business and Human Rights, Annex,II,A.13 Commentary.

[1558] **ibid.**

[1559] Commentary to the UN Norms para.1(b).

[1560] Seyle gives the example of *Safaricom*, a telecommunication company in Kenya, which filtered the text messages calling for violence in the streets and sent counter messages to the protestors for calming down the tension raised after the elections in 2007. Seyle, Conor D. "Business Participation in the Responsibility to Protect", One Earth Future Foundation, 2013, p. 16, 19.

Human rights due diligence principle requires the corporations to take positive (affirmative) action in order to identify, prevent, mitigate and account for actual and potential adverse impacts of their activities, products, operations or services on the rights of affected individuals, peoples and communities.[1561] In other words, parent corporations shall ensure that their sub-contractors, subsidiaries and other entities in the supply chain respect human rights in their activities, operations, services and products.[1562] Furthermore, corporations shall also analyse the risks of contributing to human rights abuses perpetrated by the authorities of host states. Lambooy, in her article, examines the three factors that have to be considered in the context of due diligence investigation: (1) the particularities and the political context of the (host) country should be assessed with due diligence before entering into business relations and corporations shall adopt a proactive corporate human rights policy in order to prevent any substantial contribution to human rights abuses perpetrated by the failed states, (2) the potential and actual human rights impacts of the activities on the communities, consumers and employees should be evaluated with due diligence, (3) the risk of contribution (*i.e.* complicity) to the abuse perpetrated by sub-contractors, joint venture partners, agents, suppliers and local authorities shall be analysed with due diligence.[1563]

The extent of due diligence that could be expected from non-state actors and the concrete duties that may be imposed on corporations would depend on each substantive right that is protected under human right documents.[1564] A review of the fulfilment of the duty of due diligence requires an assessment of the remoteness and foreseeability[1565] of any risk of harm[1566] and the appropriateness and proportionality

---

[1561] See *e.g.* Ruggie, **Just Business…**, p. 113.

[1562] In general, the sub-contractors, subsidiaries and other entities have separate legal personalities and nationalities than the parent company, but the international judge may investigate the existence of a relationship (or genuine link) between a State and a company. Jennings, Sir Robert & Watts, Sir Arthur (eds.), **Oppenheim's International Law**, 9th ed., Vol. 1, Parts 2 to 4, Longman, 1992, p. 862.

[1563] Lambooy, **op. cit.**, p. 434.

[1564] Tzevelekos, **op. cit.**, p. 197.

[1565] The ECtHR prefers to the "real and immediate risk" criterion in its judgments. See *e.g* ECtHR, Osman v UK, Apps. No. 87/1997/871/1083, 28 October 1998, para. 116; Mahmut Kaya v Turkey, App. no. 22535/93, 28 March 2000, para. 101.

[1566] For example, as it is touched upon in the previous sub-section, the AfCommHPR concluded in one of its decisions that, even if we assumed the Government of Cameroon fulfilled its obligation of diligence, the measures it took were not sufficient to prevent the foreseeable post electoral events, which resulted in the violation of rights of persons. Accordingly, Cameroon failed to fulfil its obligation of result and should redress the damage suffered by the victims. AfCommHPR, Association

of any legislative, administrative or other measure(s) taken to prevent such harm.[1567] Some of the human rights treaties expressly require States Parties to regulate private conduct and to adopt measures that are capable of preventing any abuse by private third parties. Furthermore, general rules of law of international responsibility obliges States to protect human rights if they have effective control on a territory. By analogy, the corporations shall act with due diligence in order to prevent any predictable risk to the detriment of human rights caused or contributed to by their sub-contractors or the third parties over which they have leverage, and in the areas under their sphere of influence. Nature, content and size of the businesses are also important factors for determining the degree of due diligence that may be expected from corporations.

As observed in the jurisprudence of international courts and tribunals, the standard of knowledge applied in determining the degree of responsibility of State to act with due diligence is the "*have or ought to have known*" standard.[1568] Regarding the due diligence obligations of corporations, a similar standard shall be applied. For example, Ruggie in his report proposed the use of "*have or should have known*" standard implying the degree of knowledge that could be reasonably expected from the corporation to have under the specific circumstances of a case or situation.[1569] Consequently, corporations shall also be under an obligation to adequately investigate the data and facts of each case within the context of the duty to act with due diligence in order to be aware of the risks and potential harms that may be caused or contributed to as a consequence of their operations, activities, services and products.[1570]

In this chapter, I will argue that corporations shall fulfil their human rights obligations by (1) regulating the conduct of their subsidiaries, (2) preventing the potential risks by conducting Human Rights Impact Assessments, and (3) monitoring

---

of Victims of Post Electoral Violence & INTERIGHTS v. Cameroon, African Commission on Human and Peoples' Rights, Comm. No. 272/03, 2009, para. 90.

[1567] Shaw, **op. cit.**, pp. 791, 855.

[1568] See also AfCommHPR, Association of Victims of Post Electoral Violence & INTERIGHTS v. Cameroon, African Commission on Human and Peoples' Rights, Comm. No. 272/03, 2009, para. 90; Mahmut Kaya v Turkey, App. no. 22535/93, 28 March 2000, para. 101; ECtHR, Paul and Audrey Edwards v. UK, App.no. 46477/99, 14 June 2002, para. 56; *Case of the Massacre of Pueblo Bello*, IAmCtHR, Ser. C, No. 140, 31 January 2006, para. 124 citing ECtHR, Osman v UK, Apps. No. 87/1997/871/1083, 28 October 1998, paras. 115 and 116.

[1569] Ruggie report 2008, para. 79.

[1570] Lambooy, **op. cit.**, p. 433.

the compliance of their subsidiaries and other affiliated entities with the corporate policies and the codes of conduct, which set the minimum human rights standards to be implemented.

4.4.1. Duty to Regulate: adopt policies and codes of conduct

Traditional understanding of international law limits the regulatory autonomy to sovereign powers. In the traditional strict legal meaning of the word 'legislation', one cannot argue that any actor other than States and international organizations has the power or authority to adopt rules that may be legally imposed on third parties. For example, the PCIJ held in 1929 that *"[a]ny contract which is not a contract between States in their capacity as subjects of international law is based on the municipal law of some country*".[1571] This is especially so for criminal legislations. However, developments of a few decades prove that there has been a paradigm shift in the concepts, subject and objects of international law, where the argument that States are the sole regulatory powers in international law has begun to become out-dated.[1572]

[1571] Case concerning the Payment of Various Serbian Loans issued in France, Judgment No.14, PCIJ, Series A. Nos.20/21, 1929, p. 41.

[1572] See, *inter alia*, Cathrine Tinker, "The Role of Non-State Actors in International Law-Making During the UN Decade of International Law", **ASIL Proceedings**, Vol. 89, 1995, pp.177-180; Susan D. Daggett, "NGOs as Lawmakers, Watchdogs, Whistle-blowers, and Private Attorneys General", **Colo J Int'l Envtl'l L & Pol'y**, Vol.13:1, 2002, pp. 99-113; Stephen Tully, **Corporations and International Lawmaking**, BRILL, 2007; Katz Jacob Cogan, "The Regulatory Turn in International Law", **Harv. Int'l. L.J.**, Vol. 52, Number 2, Summer 2011, pp. 321-372; Stephan Hobe, "The Role of Non-State Actors, in Particular of NGOs, in Non-Contractual Law-Making and the Development of Customary International Law" in Rüdiger Wolfrum & Volker Röben, (eds.) **Developments of International Law in Treaty Making**, Springer, 2005, pp. 319-329; Math Noortmann & Cedric Ryngaert (eds.), **Non-state Actor Dynamics in International Law: From Law-Takers to Law-Makers**, Ashgate, 2010; Peter T. Muchlinski, "'Global Bukowina' Examined: Viewing the Multinational Enterprise as a Transnational Law-making Community" in Gunther Teubner, (ed.) **Global Law without a State**, Studies in Modern Law and Policy, Ashgate, rep. 2003, pp. 79-108; Brian Bercusson, "Globalizing Labour Law: Transnational Private Regulation and Countervailing Actors in European Labour Law" in Gunther Teubner (ed.), **Global Law** …, pp. 133-178; Martin Herberg, "Private Authority, Global governance, and the Law: The Case of Environmental Self-regulation in Multinational Enterprises" in Gerd Winter, (ed.) **Multilevel Governance of Global Environmental Change: Perspectives from Science, Sociology and the Law**, CUP, 2006, pp. 149-178; Dewi Williams, "Private Regulation of Private Military Companies: A Potentially Private Solution to a Commercial Problem?" in Quénivet, Noëlle & Shah-Davis, Shilan (eds.) **International Law and Armed Conflict: Challenges in the 21st Century**, TMC Asser Press, 2010, pp. 227-240; Backer, Larry Catá. "Multinational Corporations as Objects and Sources of Transnational Regulation", **ILSA J Int'l & Comp. L.**, Vol. 14:2, 2008, pp. 499-523; Dan Danielsen, "How Corporations Govern: Taking Corporate Power Seriously in Transnational Regulation and Governance", **Harv. Int'l. L.J.**, Vol. 46, No. 2, Summer 2005, pp. 411-425.

The emergence of international financial institutions and the rise of transnational corporations have accelerated the trend towards the adoption of new law-making models in a new international order with multi-actors. The evolution of the international system and international law based on a (neo)liberal global economy has brought with it certain contradictions and significant concerns with regard to the protection of human dignity and human rights. The scholars have long been continuing their debates concerning the legal nature of bilateral investment treaties and the legal effects of regulations and directives adopted by the IFIs from a perspective of international economic law and international trade law. Furthermore, the judgments and decisions of international commercial arbitration bodies and other dispute settlement mechanisms have become principal venues for the settlement of disputes involving corporations.

Having said that, the legal lacunae with regard to the international accountability of corporations for human rights violations and commission of international crimes is increasingly becoming a major concern especially for the vulnerable members of the international community, who are put up with the adverse consequences of profit maximization of corporations. Bearing in mind the specificities of the activities of corporations, protection of the rights of vulnerable persons such as the women, children, workers, consumers, indigenous peoples, minorities, persons with disabilities, migrants and the protection of the environment would have important implications on corporate responsibilities. Considering the state-like functioning of some TNCs, especially in cases of privatization of public services,[1573] and the growing economic, social and political power acquired by companies, it has become inevitable that corporations shall have certain human rights obligations, violations of which would give rise to international accountability. For example, protection of public health, especially of the right to adequate food and water, would require corporations to act with due diligence.[1574] Therefore, in this section, the possibilities for imposing a duty to regulate on corporations would be

[1573] As the CESCR mentioned in its General Comment, privatization measures shall not contravene with the positive obligations of States Parties under the ICESCR to protect the right to work. General comment No. 18, The right to work (Article 6), E/C.12/GC/18, 06/02/2006, para. 25 and 35. See also General Comment No. 16, The equal right of men and women to the enjoyment of all economic, social and cultural rights (art. 3 of the International Covenant on Economic, Social and Cultural Rights), E./C.12/2005/4, 11/08/2005, para. 20.

[1574] *e.g.* General Comment No. 14 (2000) The Right to Highest Attainable Standard of Health, 11/08/2000, E/C.12/2000/4, para. 51.

argued. In doing so, the international human rights treaties and relevant jurisprudence on States' RtoP and the soft law documents briefly analysed in the previous chapter would be the pathfinder.

As emphasized on several occasions, States have the primary responsibility to protect human rights against violations by private parties.[1575] They shall adopt all appropriate legislative, administrative, judicial and any other measure necessary for effectively protecting human rights and implement appropriate policies, services and programmes to train potential perpetrators and victims of human rights violations and for raising the public awareness in general. Accordingly, State authorities enjoy a wide margin of appreciation in choosing the tools for fulfilling their conventional human rights obligations. Even so, the development and evolution of law and practice and contemporary standards for the protection of human rights shall be taken into account in deciding the appropriate measures to be adopted for providing adequate protection.[1576]

Furthermore, certain human rights treaties may contain provisions expressly obliging States to legislate, and even criminalize certain acts, especially when the protection of peremptory norms is at issue. For example, the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD) Articles 2(1)(d) and 5 oblige the States Parties to prohibit and bring to an end racial discrimination by any person, group or organization and to take adequate measures for the protection of racial groups. Furthermore, the ICCPR requires legislative authorities to take positive steps for effectively preventing any violation of the right to life (Article 6) and to prohibit slavery, slave-trade in all their forms[1577] (Article 8)

[1575] General Comment No. 31 [80] Nature of the General Legal Obligation Imposed on States Parties to the Covenant: 26/05/2004, CCPR/C/21/Rev.1/Add.13, adopted on 29 March 2004, para. 8.
[1576] ECtHR, MC v Bulgaria, App.no. 39272/98, 4 March 2004 (final 4.3.2004), paras. 154-166.
[1577] 1926 Convention to Suppress the Slave Trade and Slavery obliges States Parties to prevent and suppress slave trade, to abolish all forms of slavery, progressively and as soon as possible. 1956 Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery Article 6 also requires that any act of enslavement, attempting to it, or being accessory thereto, or being a party to a conspiracy to accomplish any such acts should be criminalized and punished. Same obligation exists with regard to the inducement of a person to place himself into the servile status as mentioned in Article 6(2). Article 25 of 1930 Convention concerning Forced or Compulsory Labour (ILO Convention No.29) also obliges the States parties to criminalize forced and compulsory labour and to strictly impose adequate penalties on the perpetrators of such crimes. No obligation or duty is imposed on non-state actors under the ILO Convention No. 29. Consequently, even if the crimes of slavery and forced labour might be perpetrated by private actors, primary responsibility concerning the prevention of such human rights abuses and crimes lies with the

and hate speech (Article 20(2)). The right to privacy (Article 17) and right to equality before law (Article 26) should also be protected by domestic laws.[1578] In particular, the Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography Article 3(4) expressly requires the State Parties to adopt national legislation enabling to hold legal persons liable of the offences defined in the Protocol. The choice of type of liability, *i.e.* civil, criminal or administrative, is left to the State Parties depending on the particularities of national legal principles.[1579]

Convention on Elimination of All Forms of Discrimination against Women (CEDAW) also oblige States Parties to legislate for suppressing all forms of traffic in women, exploitation and prostitution of women (Article 6) and to eliminate discrimination against women in employment (Article 11). For example, the UN Committee on the Elimination of Discrimination against Women recommended that that States should take all the measures "*to overcome all forms of gender-based violence, whether public or private act*".[1580] In a following Recommendation, the Committee also highlighted that "*States parties should report on how public and private health care providers meet their duties to respect women's rights to have access to health care*" and that the States parties should "*take action to prevent and impose sanctions for violations of rights by private persons and organizations".*[1581] Further, it is stressed that:

> "*States parties cannot absolve themselves of responsibility in these areas by delegating or transferring these powers to private sector agencies. States parties should therefore report on what they have done to organize governmental processes and all structures through which public power is exercised to*

State. To add, as the CESCR mentioned in its General Comment, States' responsibility to protect includes the obligation to prohibit forced and compulsory labour that may be practiced by TNCs. General Comment No. 18, The right to work (Article 6), E/C.12/GC/18, 06/02/2006, para. 25 and 35.

[1578] General Comment No. 31 [80] Nature of the General Legal Obligation Imposed on States Parties to the Covenant: 26/05/2004, CCPR/C/21/Rev.1/Add.13., adopted on 29 March 2004, para. 8.

[1579] Article 7 of the Protocol mentions some of the measures that could be taken by the States such as the seizure and confiscation of goods used to commit or facilitate the offence and the proceeds derived from the offence, temporary or permanent closure of premises used in committing the offence.

[1580] UN Committee on the Elimination of Discrimination against Women, General Recommendation 19, 'Violence against Women', 30 January 1992, UN Doc. A/47/38, para. 24(a).

[1581] UN Committee on the Elimination of Discrimination against Women, General Recommendation 24, 'Women and Health", Art.12, 20th sess., UN Doc. A/54/38 at 5 (1999), paras.14-15.

> *promote and protect women's health. They should include information on positive measures taken to curb violations of women's rights by third parties, to protect their health and the measures they have taken to ensure the provision of such services."*[1582]

Additionally, it is inherent in some of the provisions of the ICCPR that the States Parties are under a positive obligation to enact for the protection of the rights of individuals. Therefore, it can be deduced from the General Comment that not only complicity in torture, but also complicity in other cruel, inhuman and degrading treatment, commission of acts of unconsented medical or scientific experimentation (Article 7) by private persons shall be prohibited by law.[1583] Consequently, States have the responsibility to hold the perpetrators of acts violating peremptory norms accountable under their domestic laws in order to prevent, punish and redress human rights violations committed by corporations.[1584] In other words, States are under a positive obligation to prevent violations that may emanate from the acts and conducts of TNCs.[1585] Civil and criminal accountability of legal persons and the question of piercing the corporate veil, then would remain a matter of domestic law system.

Moreover, self-executing provisions of human rights treaties might be applied directly by national judges in order to effectively protect the rights at stake. For example, the Committee on the Economic, Social and Cultural Rights mentioned in its General Comment No. 3 that principle of equality (Article 3), right to fair wage and equal remuneration for work of equal value without distinction (Article 7/a,i), right to form trade unions and join trade unions of his choice (Article 8), protection of children and young persons from economic and social exploitation and prohibition of child labour (Article 10/3), right to compulsory and available free primary education to all (Article 13/2,a), liberty of parents to choose their children schools (Article 13/3), liberty of individuals and bodies to establish and direct educational institutions (Article 13/4), and right to freedom indispensable for scientific research

---

[1582] **ibid.**, para. 17.
[1583] **ibid.**, paras. 8 and 13.
[1584] Kamatali, **op. cit.**, p. 442.
[1585] Clapham, **Human Rights Obligations**…, p. 348.

and creative activity (Article 15) are all self-executing in the national systems capable of immediate application by the national authorities.[1586]

Furthermore, other conventions such as the Convention against Torture (Article 4) envisage criminalization of acts of torture, attempts to commit torture, complicity and participation in torture by 'any person'. To add, as ICTY emphasized in Furundzija case, States are required to eliminate any legislation contrary to the prohibition of torture.[1587] The Court continued:

> *"At the inter-state level, [*prohibition of torture*] serves to internationally de-legitimise any legislative, administrative or judicial act authorising torture. It would be senseless to argue, on the one hand, that on account of the jus cogens value of the prohibition against torture, treaties or customary rules providing for torture would be null and void ab initio, and then be unmindful of a State say, taking national measures authorising or condoning torture or absolving its perpetrators through an amnesty law. If such a situation were to arise, the national measures, violating the general principle and any relevant treaty provision, would produce the legal effects discussed above and in addition would not be accorded international legal recognition. Proceedings could be initiated by potential victims if they had locus standi before a competent international or national judicial body with a view to asking it to hold the national measure to be internationally unlawful; or the victim could bring a civil suit for damage in a foreign court, which would therefore be asked inter alia to disregard the legal value of the national authorising act. What is even more important is that perpetrators of torture acting upon or benefiting from those national measures may nevertheless be held criminally responsible for torture, whether in a foreign State, or in their own State under a subsequent regime. In short,*

[1586] CESCR, General Comment No. 3, The nature of States parties obligations (art.2, par.1), 14.12.1990, para. 5.
[1587] Judgement, Prosecutor v Furundžija, (IT-95-17/1-T), ICTY, 10 December1998, para. 150.

> *in spite of possible national authorisation by legislative or judicial bodies to violate the principle banning torture, individuals remain bound to comply with that principle. As the International Military Tribunal at Nuremberg put it: "individuals have international duties which transcend the national obligations of obedience imposed by the individual State (IMT, Vol. 1, p.233)"*[1588] (footnotes omitted)

States also have an obligation to criminalize the acts amounting to crimes under international treaties, even if such acts have not yet become 'international crimes'. For example, activities related to an organized criminal group should be criminalized in the domestic systems of the States Parties to the UN Convention against Transnational Organized Crime (Article 10). Likewise, crimes such as trafficking in persons, smuggling of migrants, illicit manufacturing of and trafficking in firearms are not 'international crimes' in the technical sense. However, they should be criminalized at the national level if a state becomes a party to an international treaty that criminalizes such acts.

Article 1(2) of Protocol 12 to the ECHR on the general prohibition of discrimination provides that "*No one shall be discriminated against by any public authority on any ground as those mentioned in paragraph 1*". The Explanatory Report on the Protocol underlines that express referral to the acts of public authorities is not meant to exclude the positive obligations of States to prevent discriminative conduct in private relationships.[1589] Even though the Explanatory Report is not an authoritative interpretation of the Convention, the case-law of the Court, too, supports that the States have positive obligations to give indirect horizontal effect to the provisions of the Convention. However, the Report also underlines that the extent of the positive obligations is not unlimited:

> "*These considerations indicate that any positive obligation in the area of relations between private persons would concern, at the most, relations in the public sphere normally regulated by*

[1588] **ibid.**, para.155.
[1589] Explanatory Report on Protocol No.12 to the Convention for the Protection of Human Rights and Fundamental Freedoms, para. 24.

> *law, for which the state has a certain responsibility (for example, arbitrary denial of access to work, access to restaurants, or to services which private persons may make available to the public such as medical care or utilities such as water and electricity, etc). The precise form of the response which the state should take will vary according to the circumstances. It is understood that purely private matters would not be affected. Regulation of such matters would also be likely to interfere with the individual's right to respect for his private and family life, his home and his correspondence, as guaranteed by Article 8 of the Convention."*[1590]

Even if the international human rights documents do not generally oblige States to adopt criminal law measures in order to prevent human rights violations, depending on the circumstances of each case, the international judge might find imposition of criminal sanctions necessary for the effective deterrence and repression of violation of certain rights.[1591] The necessity to establish an effective law-enforcement machinery capable of preventing, suppressing, investigating and penalising crimes committed against the right to life has been stressed by the international judge on various occasions.[1592] In any case, currently, there is no specific requirement for States to criminalize corporate activities. Accordingly, punishment of legal entities is dependent on the criminal law system of each State. Provided that the national legal system of a State allows the criminalization of

---

[1590] **ibid.**, para. 28. See also AfCommHPR, Centre on Housing Rights and Evictions v. The Sudan, Comm. Nos. 279/03 & 296/05, 2009, para. 211; *Free Legal Assistance Group and Others v. Zaire*, AfCommHPR, Comm.s 25/89, 47/90, 56/91 and 100/93.

[1591] IAmCtHR Bamaca Velasquez v. Guatemala, Order of 27 January 2009, paras. 26, 28 (violation of prohibition of forced disappearance, jus cogens); Goiburu v. Paraguay, 22 September 2006, para. 84 (violation of prohibition of forced disappearance, jus cogens); Perozo v. Venezuela, 28 January 2009, paras. 64, 118-120, 141, 300 (if proportionate, criminal proceedings should be resorted); Matter of 'Globovision', Television Station v. Venezuela, Order of 4 September 2004, paras. 11 and 22; See also AfCommHPR, Zimbabwe Human Rights NGO Forum /Zimbabwe, Report of 11-25 May 2006, Comm. 245/2002, paras. 143, 146, 153, 160, 204-215.

[1592] AfCommHPR, Centre on Housing Rights and Evictions v. The Sudan, Comm. Nos. 279/03 & 296/05, 2009, paras. 147-148. See also AfCommHPR Comm.No. 275/2003; ECHR judgments in McCann v. United Kingdom, 21 EHRR 97, 1995 and Tanrikulu v. Turkey, 30 EHRR 950, 1999; ECtHR, Osman v UK, Apps. No. 87/1997/871/1083, 28 October 1998, para. 115; See also on the positive obligations of State to protect women against violence Opuz v. Turkey, App.no. 33401/02, 9 June 2009, para.128 *et seq*.

corporate acts, then the international judge would examine the cases brought before it without making a distinction between public and private corporations.[1593]

Article 1 of the ECHR on the general obligation to respect human rights imposes both negative and positive obligations on the Contracting States. These obligations may either be derived directly from the text of the Convention or may have been established through the interpretation of the Court.[1594] For example, as underlined in the jurisprudence of the ECtHR, the mere existence of availability of alternative solutions does not rule out a need for reform in the legislation provided that it would constitute a reasonable and appropriate measure for striking a fair balance between competing interests of the community and the individual in order to achieve the legitimate aim pursued.[1595] In addition, any legislation presented by the Contracting Parties shall be regarded as one of the relevant factors that should be elaborated on in deciding whether the State acted with due diligence in preventing human rights violations by third parties.[1596] Consequently, the ECtHR is not in a position to decide "*whether the legislation represented the best solution for dealing with the problem or whether the legislative discretion should have been exercised in another way.*"[1597]

The Grand Chamber judgment of *Hatton and Others v UK* concerns the noise disturbances caused by the private aircraft operators in airports of Gatwick and Heathrow.[1598] The Grand Chamber noted that *"...the State's responsibility in*

[1593] **ibid.** pp. 542-543.

[1594] For example, Articles 2(1) and 3 of the ECHR read in conjunction with the general obligation under Article 1, oblige States to secure the protection of the right to life and human dignity. The positive obligations under Articles 6 and 8 have also been developed by the case law. Harris & O'Boyle & Bates & Buckley, **op. cit.**, p. 19; Jacobs & Ovey, **op. cit.**, p.100.

[1595] ECtHR, James and Others v. the UK, App. no 8793/79, 21 February 1986, para. 51; See also ECtHR, Botta v. Italy, App. no 153/1996/772/973, 24 February 1998, paras. 31-35 (the applicant's claim that he had the right to access to the beaches under Art.8 of the Convention has been rejected by the Court); and, *mutatis mutandis*, ECtHR, Mellacher and others v. Austria, App.no. 10522/83, 11011/84, 11070/84, 19 December 1989, para. 53.

[1596] **ibid.**

[1597] **ibid.**

[1598] The Third Section in its judgment on Hatton's claims concluded that the UK violated Article 8 by not striking a fair balance between the competing interests and that "*The Court would, however, underline that in striking the required balance, States must have regard to the whole range of material considerations. Further, in the particularly sensitive field of environmental protection, mere reference to the economic well-being of the country is not sufficient to outweigh the rights of others. The Court recalls that in the above-mentioned Lopez Ostra v. Spain case, and notwithstanding the undoubted economic interest for the national economy of the tanneries concerned, the Court looked in considerable detail at "whether the national authorities took the measures necessary for protecting the applicant's right to respect for her home and for her private and family life ..." (judgment of 9*

environmental cases may also arise from a failure to regulate private industry in a manner securing proper respect for the rights enshrined in Article 8 of the Convention".[1599] The Court then questioned whether a fair balance was struck between the rights of the individuals neighbouring the airports and the interest of community as a whole due to the policy of the Government on night flights.[1600] What differentiates the Hatton case from the other cases concerning environmental pollution is that unlike the other cases where the Court also found a violation of domestic laws by the local authorities,[1601] in the Hatton case, the conduct of the actors was fully compatible with the domestic regulations.[1602] Therefore, the Court evaluated all the circumstances of the case to find out whether the government authorities had struck a fair balance between the competing interests of the individuals and the community as whole. In doing so, contribution to general economy, availability of measures to mitigate the effects of night noise, public participation in the decision-making process, conduct of appropriate investigations and studies have been considered as factors to be examined for adopting environmental and economic policies.[1603] Consequently, the Court concluded that the Government authorities having a certain margin of appreciation did not fail to strike

---

December 1994, p. 55, para. 55). It considers that States are required to minimise, as far as possible, the interference with these rights, by trying to find alternative solutions and by generally seeking to achieve their aims in the least onerous way as regards human rights. In order to do that, a proper and complete investigation and study with the aim of finding the best possible solution which will, in reality, strike the right balance should precede the relevant project." ECtHR, Hatton and Others v UK, Chamber Third Section, App. No 36022/97, 2 October 2001, para. 97; See also ECtHR, von Hannover v Germany, App. No. 59320/00, 24 June 2004, paras. 56-60, 72-75 ECtHR, von Hannover v Germany (no. 2), Apps. Nos. 40660/08 and 60641/08, 7 February 2012, paras. 123-126. In *López Ostra v. Spain*, the Court found violation of Article 8 by Spain due to its failure to fulfil positive obligations under the Convention to take reasonable and appropriate measures to secure the rights of individuals and held that "*the State did not succeed in striking a fair balance between the interest of the town's economic well-being - that of having a waste-treatment plant - and the applicant's effective enjoyment of her right to respect for her home and her private and family life*". ECtHR, López Ostra v Spain, App. No.16798/90, 9 December 1994, paras. 51-58.

[1599] Hatton and Others v UK, Grand Chamber, App. No 36022/97, 8 July 2003, para. 119.

[1600] See also Powell and Rayner v UK, App. no. 9310/81, 21 February 1990, paras. 39-46. In Powell and Rayner v UK, the Court held that even if neither the airport nor the aircrafts were owned, controlled or operated by public authorities, the States have a positive duty to ensure the enjoyment of Convention rights free from any interference by private actors, given that a fair balance is struck between the competing interests of the individuals and the community as a whole. Heathrow Airport has significant importance for the business, economic well-being of the country and the international trade. The Government has introduced various regulatory measures and adopted international standards to control, abate and compensate the noise caused by the aircrafts, jets and helicopters. Therefore, it is the Court's opinion that the Government without exceeding its margin of appreciation has struck a fair balance between the competing interests and has fulfilled its positive duties under the Article 8.

[1601] ECtHR, López Ostra v Spain, App. No.16798/90, 9 December 1994, paras.46-47; Guerra v Italy, Apps. No. 116/1996/735/932, 19 February 1998, para. 25-27.

[1602] Hatton and Others v UK, Grand Chamber, App. No 36022/97, 8 July 2003, para. 120.

[1603] **ibid.**, paras. 126-128.

a fair balance and did not violate the rights of the individuals to private life and home under Article 8.

In some cases, lack of legislation may give rise to state responsibility under the ECHR.[1604] For example, in *X and Y v. the Netherlands*, a case concerning the rape of a mentally handicapped person, the Court held that lack of practical and effective criminal legislation capable of deterring the commission of such crimes gives rise to the violation of positive obligations of the State to protect human rights of individuals from the interferences of other private individuals.[1605] Similarly and specific to corporate activities, in *Young, James and Webster v UK*, the Court examined whether any violation perpetrated by the British Rail could be attributed to the UK in relation to its legislation functions.[1606] In other words, if it was found that there was a violation of the right to join trade unions, could it be concluded that this violation was a direct consequence of the Trade Union and Labour Act and the Amendment Act of the UK?[1607] The Court held that even if the proximate cause of the dismissals from employment of the workers from the British Rail was the closed shop agreement, the State was responsible for allowing such a treatment of the employers in its legal system. Therefore, failure of the State to enact effective preventive or protective domestic legislation would give rise to its international responsibility due to non-observance of its obligation to secure a given right under Article 1 of the ECHR.[1608]

[1604] ECtHR, Botta v. Italy, App. no 153/1996/772/973, 24 February 1998, paras. 31-35; The X and Y v. the Netherlands, 26 March 1985, paras. 21–27; A v UK (1999) 27 EHRR 611, 624, para. 22, and the Stjerna v. Finland, App.no. 18131/91, 25 November 1994, para. 38. See *mutatis mutandis*, ECtHR, Niemietz v. Germany, App.no. 13710/88, 16 December 1992, para. 29; Case of Airey v. Ireland, App.No. 6289/73, 9 October 1979, para. 32.

[1605] X and Y v Netherlands, 26 March 1985, 8 ECHR 235 Series A, No. 91, at. 11, paras. 23, 24, 27; see also MC v Bulgaria, App. No. 39272/98, 4 March 2004, para. 150; August v. the United Kingdom (dec.), no. 36505/02, 21 January 2003.

[1606] The case concerns the application of three former employees of the British Rail alleging that, *inter alia*, their right to join trade unions (Article 11 of the ECHR) was violated. The applicants were dismissed from the company on the ground that they did not become a member of one of the three trade unions, which have concluded a 'closed shop' agreement with the company in order to put the employees under an obligation to join one of these specified trade unions.

[1607] ECtHR, Young, James and Webster v UK, App. nos. 7601/76; 7806/77, 13 August 1981, para. 48.

[1608] Additionally, since Article 11 covers the employment relationships both in the public and private sector, the Court considered it unnecessary to examine whether the company could be regarded as an organ of the State or the State had control over the company. In conclusion, the Court held that since the right to freedom of association, including the right to form and to join trade unions of one's choice, has both positive and negative aspects, and it also implies the negative right to not to join trade unions, the State was in violation of Article 11 of the ECHR by not ensuring the full and effective exercise of this right. ECtHR, Young, James and Webster v UK, App. nos. 7601/76; 7806/77, 13 August 1981, para. 49, 51-52, 55. cp. ECtHR, Costello-Roberts v UK, App.no. 13134/87, 25 March 1993, para. 26; ECtHR, Sibson v UK, App. no. 14327/88, 20 April 1993, paras. 28-30. (no violation

Likewise, in a report on Ecuador, the IAmCommHR stressed that especially in cases of severe environmental pollution, failure of the State to take reasonable measures to prevent the risk, or adequate measures for redressing the harm suffered by the victims may amount to a violation of the right to health and right to life under the IACHR.[1609] The Report included evaluations on the infringement of the rights of the indigenous group in Ecuador -the Huaoranis- caused by the oil plants of Shell in the Ecuadorian Amazon. In addition, the gold mining activities adversely affected and posed threat to the right to health and right to life of these indigenous groups living in the territory due to the toxic wastes and chemicals emitted by the water resources and the soil. The Commission -in its analysis with regard to the exploitation of natural resources- held that:

> *"The Commission recognizes that the right to development implies that each state has the freedom to exploit its natural resources, including through the granting of concessions and acceptance of international investment. However, the Commission considers that the absence of regulation, inappropriate regulation, or a lack of supervision in the application of extant norms may create serious problems with respect to the environment which translate into violations of human rights protected by the American Convention.*
>
> *The Government stated in its observations on the present report that the environment had been damaged by deforestation, erosion, the over-exploitation of resources, and high levels of contamination from oil exploitation and mining. As has been recognized by the Government of Ecuador and numerous international observers, it is clear that the activities of the state-run oil company and the acts and omissions of licensee*

---

of Article 11); ECtHR, Sigurdur A. Sigurjonsson v Iceland, App. no. 16130/90, 30 June 1993, paras. 36-37 (violation of Art.11).

[1609] OEA/Ser. L/V/II.96 Doc. 10 rev.1, 24 April 1997, IAmCommHR, Report on the Situation of Human Rights in Ecuador, Chapter VIII on the Human Rights Situation of the Inhabitants of the Interior of Ecuador affected by Development Activities.

companies have resulted in severe environmental pollution…"[1610]

1997 Maastricht Guidelines on Violations of Economic, Social and Cultural Rights involves a guidance on the responsibility of states, non-state entities and international organizations for violations of the economic, social and cultural rights. The Maastricht Guidelines mention that "*the failure to reform or repeal legislation which is manifestly inconsistent with an obligation of the Covenant", "the failure to enforce legislation or put into effect policies designed to implement provisions of the Covenant", "the failure to regulate activities of individuals or groups so as to prevent them from violating economic, social and cultural rights", "formal removal or suspension of legislation necessary for the continued enjoyment of an economic, social and cultural right that is currently enjoyed*" and "*the active support for measures adopted by third parties which are inconsistent with economic, social and cultural rights"* are examples of violations of economic, social and cultural rights through the direct action of States or other entities insufficiently regulated by States.[1611]

Responsibility to protect may be regarded as an obligation intrinsic in the responsibility to respect. Sottiaux argues that since there is no hierarchy between various rights and freedoms, it would not be explicable to create a hierarchy between the (positive) obligation to protect and the (negative) obligation to respect.[1612] By analogy, it can be argued that corporations have a duty to regulate, too. Corporations too, to the extent of their resources and capabilities shall frame policies and programmes to promote human rights and provide education and training programmes for the stakeholders in order to diminish the adverse effects of their operations and activities on human rights.

[1610] **ibid.**

[1611] Maastricht Guidelines …, para. 14 (a), (b) and (c).

[1612] Stefan Sottiaux, **Terrorism and the Limitations of Rights, The European Convention on Human Rights and the United States Constitution**, Oxford, Hart publishing, 2008, pp. 8-9. However, it should be underlined that Sottiaux's argument is related to the human rights obligations of State actors. Furthermore, the jurisprudence of the ECtHR gives priority to the obligation of respect and regards the obligation to protect as a secondary obligation, which leaves a wider room for the State authorities to fulfil their Convention obligations. de Schutter, **International Human Rights Law**, pp. 446-447.

Since such an obligation would be an obligation of conduct, corporations shall have discretion in choosing the tools for performing the duty to regulate for preventing, mitigating, managing, accounting for and redressing the adverse human rights impacts and human rights violations. For example, adopting human rights policies and/or environmental policies and integrating them into their codes of conduct might be one of the options. They may adopt and implement codes of conduct and internal rules of operation, which incorporate the relevant provisions of human rights documents. TNCs shall also ensure that their partners, contractors, sub-contractors, suppliers, licensees, distributors, workers and other related persons and entities are also respecting the rights of all stakeholders in their conducts linked to their business relationship with the parent corporation. Accordingly, corporations may also adopt explicit policy commitments on the highest management level providing that they expect their partners, contractors, sub-contractors, workers and other persons who may engage in risky relationships with the stakeholders to act in accordance with the national and international human rights standards.[1613]

For example, 1995 Beijing Declaration and Platform for Actions of the UN Fourth World Conference on Women provides that the Governments should ensure that all corporations, including transnational corporations, act in line with the national and international regulations and standards.[1614] Afterwards, the Declaration adds that the private sector, *i.e.* corporations, should adopt policies for non-discriminatory practices regarding women and should obey the laws on labour, health and safety, environment protection and consumer protection.[1615]

Furthermore, TNCs shall also ensure that other non-state actors and State actors that they enter into relationships do not violate peremptory norms, such as prohibition of racial discrimination, prohibition of slavery, prohibition of torture, cruel, inhuman and degrading treatment. Accordingly, TNCs may be expected to adopt codes of conduct and human rights policies prohibiting the commission of and complicity in acts amounting to violations of peremptory norms. If an internationally

[1613] Ruggie emphasizes that such a policy commitment shall be communicated to all the relevant parties including the internal and external stakeholders. Ruggie, **Just Business**…, p. 113.
[1614] Beijing Declaration and Platform for Actions of the UN Fourth World Conference on Women, UN Doc. A/CONF.177/20 (1995) para. 165(l). Weissbrodt, "The Beginning of a Sessional Working Group…", p. 124.
[1615] Beijing Declaration … para. 177.

binding treaty imposing direct duties on corporations would be adopted, it can oblige the TNCs to adopt such documents, and even may specify some of its substantive norms protecting, *inter alia*, right to life, right to privacy, right to form and join trade unions, right to assembly and right to equal remuneration for work. This would imply that self-regulation would become an international obligation for TNCs, substantive content of which is determined beforehand. Then, it could be commented that the degree of protection afforded for other rights not mentioned under an international treaty, would depend on the discretionary policies adopted by a corporation and the domestic laws of the country they operate in.

Once a duty to regulate is recognized for corporations, absence of regulation, inappropriate regulation or lack of supervision shall be considered as a failure in fulfilling their responsibility to protect. Corporations may be required to take appropriate measures, such as auditing the acts of sub-contractors by internal and external controls or to adopt transactional due diligence policies such as inserting special provisions for the protection of human rights in the BITs and other contracts. For example, TNCs (parent company) shall insert clauses for the protection of human rights into the business contracts they conclude with contractors, subcontractors, suppliers, licensees and distributors. Likewise, it would be expected that TNCs enter into or continue business relationships only with enterprises complying with the universal human rights standards. For example, Philips, Nike and Wal-Mart have introduced human rights clauses in the contracts they concluded with the suppliers, which envisaged termination of the business relationship in case of a breach.[1616] Target, refuses to use Uzbek cotton and any product containing Uzbek cotton on the ground that it practices state-organized forced and child labour.[1617] In addition to that, Crate&Barrel bans use of sandblasting on textile.[1618] Banks such as Dutch RABO[1619] and British Barclays Bank[1620] have also adopted codes of conduct

[1616] Tineke Lambooy & M-E. Rancourt, 'Private Regulation: Indispensable for Responsible Conduct in a Globalizing World?' in **Law and Globalisation,** Bocconi School of Law, Milan and VDM Publishing, Saarbrücken, 2009, pp. 108–110.

[1617] Purchase and sell of the conflict minerals, being used to finance the armed groups in the Democratic Republic of Congo, is also forbidden. Labour and Human Rights Policies of Target, https://corporate.target.com/corporate-responsibility/responsible-sourcing/social-compliance/labor-and-human-rights, accessed on 18.04.2015.

[1618] Crate&Barrel Social and Environmental Guidelines, Section 3 of Vendor Operations Guide 2015.

[1619] Rabobank Group Human Rights Policy, https://www.rabobank.com/en/images/Human%20Rights%20Policy.pdf, accessed on 10.04.2015.

and introduced the condition of respect for dignity, human rights and planet in the loan agreements, breach of which would lead to withdrawal of the loan. For example, Barclays Bank declared that "*When assessing customers' financial propositions generally, and providing financial advice, relationship management should consider any material human rights aspects as part of their due diligence. In particular, it is important that all substantial loans to finance public or private sector projects, corporations or governments are reviewed for potential human rights impacts as part of the assessment/sanctioning process. The undertaking of appropriate human rights due diligence is important in demonstrating adherence to the UN Guiding Principles on business and human rights, and the OECD Guidelines for Multinational Enterprises*."[1621]

For example, the UN Draft Norms para. 15 obliges corporations to adopt, disseminate and implement the Norms in their codes of conduct[1622] and internalize them in their contracts with private third parties such as contractors, subcontractors, suppliers, licensees, distributors, or natural or other legal persons that enter into any agreement with them. In the Commentary, it is mentioned that the codes of conduct shall be communicated to the workers, unions, and other entities that enter into business relationship with the corporation.[1623] Informing the public, and especially the stakeholders, of such codes of conduct shall be regarded as another aspect of the duty to regulate for corporations. Especially, informing NGOs such as trade unions, or associations specialized in the protection of consumers or the environment, which scrutinize the activities, operations and products of the business, would facilitate the implementation and follow-up of such rules by local business enterprises. The

---

[1620] Barclay's Statement on Human Rights, March 2015, http://www.barclays.com/content/dam/barclayspublic/docs/Citizenship/Policy-Positions/barclays-statement-human-rights.pdf, accessed on 10.04.2015.

[1621] 3.3.1. of Barclay's Statement on Human Rights, March 2015,

[1622] Commentary para. 19 (b) provides that "*Transnational corporations and other business enterprises are encouraged to express their own commitment to respecting, ensuring respect for, preventing abuses of, and promoting internationally recognized human rights by adopting their own internal human rights rules of operation which are even more conducive to the promotion and protection of human rights than those contained in these Norms.*" See for example the Business Leaders Initiative on Human Rights that was consisted of several different companies from different sectors such as the Coca Cola Company, Nova Novartis, Barclays and Hewlett Packard, that aimed to road-test the UN Norms between the years 2003-2009. Weissbrodt, D. & Kruger, M. "Human Rights Responsibilities of Business…", p. 342.

[1623] Commentary para. 15 (a).

information on the codes of conduct shall be made available with the official local language(s) of the States where the TNCs operate in.[1624]

Accordingly, corporations will facilitate the referral of the domestic courts and arbitral tribunals to the UN Norms in cases concerning human rights violations perpetrated by themselves or their subsidiaries.[1625] Backer comments that the UN Norms "*reflect a clever idea: assert the autonomy and supremacy of international law over domestic law by imposing international law standards through private law, thereby making state acceptance of those standards less relevant to implementation. ... The Norms seek to do this with the long term view of putting forward the Norms-grounded private and contractually binding behaviour of TNCs as the basis for the recognition of new (and binding) customary international law*."[1626]

Backer draws attention to a possible problem that would occur if U.S. corporations adopt the Norms in their private law contracts. According to this, the primacy of stakeholder model, which requires mandatory insertion of the UN Norms in the private law contracts, violates the 'public policy' of freedom of contract that is inherent in the corporate law systems of most of States, and especially of the U.S. Thus, such an amendment (incorporation) in the contracts (*'constituency statute'*) would first of all require the necessary amendments in the corporate law documents by the public law authorities. In other words, the board of directors or the shareholders are not authorized to make such an amendment, which would alter the relationship between themselves that is envisaged by domestic public law. Contracts concluded to the contrary would be either void or construed narrowly in accordance with the shareholder wealth maximization model that has been prescribed by the domestic law of that State. Backer argues that, in order to avoid such a consequence, the UN Norms themselves should be incorporated into the federal law of the U.S.[1627]

[1624] See *e.g.* Commentary to the UN Norms para.15 (a).
[1625] Clapham, **Human Rights Obligations** ..., p. 237.
[1626] Backer, "Multinational Corporations, Transnational Law…", p. 357 and 360-367.
[1627] **ibid.**

4.4.2. Duty to Prevent and Human Rights Impact Assessments

The first application of the due diligence principle dates back to 1872[1628] and the fundamental concepts of public international law find their roots in private law, and especially in law of obligations.[1629] Therefore, a reference to the concept of 'due diligence' as a notion of commercial law would help us to better understand its content with regard to the responsibility of corporations to respect and protect human rights. For example, Lambooy, in her article, contends that the use of the term 'due diligence' in the Guiding Principles has established a link between corporate law and human rights law. She exemplifies the legal proceedings such as merger, acquisition, management buy-out, investment, setting up joint venture, disinvestment, privatization, exploration or exploitation agreements, management agreements turn-key projects (*e.g.* building a power plant), transports contracts and infrastructural contracts, which all require a due diligence investigation process to be conducted with sufficient diligence and be disclosed to the stakeholders and all the interested parties.[1630]

After examining the history and practice of the term in corporate law, she argues that the duty of due diligence, which has also traditionally been used for referring to the positive obligations of States to protect human rights against abuses perpetrated by private actors, could be penetrated into the concept of corporate human rights responsibilities by using the human rights impact assessments as a tool.[1631] State responsibility to act with due diligence have implications for the corporate conduct also in other areas of public international law, such as international environmental law.[1632] Human rights impact assessments, as well as environmental, social and political impact assessments, would facilitate developing and adopting policies to identify, prevent, mitigate, manage, account for and remedy

---

[1628] Tzevelekos, **op. cit.**, p. 177, fn. 71.
[1629] For example, Oxford Dictionary of Law defines the duty of care as the "legal obligation to take responsible care to avoid causing damage." Oxford Dictionary of Law, pp. 187-188. Black's Law Dictionary, refers to the U.S. courts' jurisprudence and underlines that "*there is a 'general duty' to 'exercise reasonable care', to avoid subjecting others to 'an unreasonable risk to harm', or to comply with the 'legal standard of duty, these formulations merely give the expression to the point that negligence is the standard of liability'*." Restatement (Third) of Torts, section 6 cmt. a (discussion draft 1999).
[1630] Lambooy, **op. cit.**, pp. 405-413.
[1631] **ibid.**, pp. 404-448.
[1632] Robert Barnidge, "The Due Diligence Principle under International Law", **Intl'l Community L Rev.**, Vol. 8, 2006, p. 91.

the actual and potential adverse human rights impacts not to cause or contribute to directly or indirectly adverse human rights impacts. Accordingly, depending on the outcomes of the impact assessments, corporations shall effectively integrate the HRIAs into their policies and practices, codes of conduct, BITs and contracts with the other entities in the supply chain. In addition to that, they shall take appropriate preventive and/or remedial measures in order to prevent or cease the harm they caused or contributed to as a consequence of their activities, operations, services or products.

Impact assessments have been envisaged as one of the implementation tools of the UN Norms. Either the company itself and/or independent experts can work on the HRIAs. Under the UN Norms, corporations are also required to periodically report on the implementation of the Norms and to take effective measures in order to improve continually and at least for promptly implementing the protections set forth in the Norms. It is underlined that reports shall include relevant, regular and reliable information on the activities of the corporation.[1633] Ruggie framework recommends that an effective human rights impact assessment should cover four elements: policies, impact assessments, integration, tracking and reporting performance.[1634]

Furthermore, risks on each and every human right that may be adversely affected shall be examined in detail with a special focus on the area and sector of activity of the corporation.[1635] Size, nature and context of corporate activities, operations, services and products may also be relevant in effectively assessing the risks of a business relationship.[1636] Since the human rights risks may change over time, the due diligence required of corporations shall be conducted periodically and continuously so as to cover the duration of the operations and conducts of a particular corporation on a particular project or territory.[1637] Finally, Kinley and Chambers comment that a reasonable margin of discretion should be left to corporations in exercising a balancing test between the competing rights, *e.g.*

[1633] Commentary para. 15.
[1634] Ruggie Report, 2008 paras 60-63 and Ruggie Report, 2010, paras. 85, 59.
[1635] 2011 Ruggie Report, Guiding Principles on Business and Human Rights, Annex,II,B.18 and its Commentary.
[1636] **ibid.**, Annex,II,B.17,18,19 and Commentary.
[1637] Ruggie, **Just Business**…, p. 99.

economic development versus environmental or social consequences of an activity.[1638]

The local communities and all relevant internal and external stakeholders, including credible and independent human rights experts, should be provided with the opportunity to participate in the impact assessment and decision-making processes.[1639] For example, Rabobank in its Human Rights Policy expressly recognizes that a meaningful engagement with the internal and external stakeholders, such as NGOs and unions, through on-going dialogue is important for effectively protecting human rights by way of on-going learning and improvement.[1640] Local news should also be included in the assessments, if they contain any allegation of human rights violations. Stakeholder questionnaires may be valuable sources in a due diligent inspection, too.[1641] For example, the IAmCommHR in its country report on Venezuela concerning the exploitation of natural resources and the rights of indigenous people, noted that States have the obligation to ensure that the mining corporations shall not engage in legal or illegal mining activities without consulting with and the participation of the local communities in the decision-making process that would adversely affect their territories.[1642]

For example, the IAmCommHR in another report concerning the human rights situation in Ecuador held that the Government shall take measures to prevent any harm, which may occur as a consequence of the conduct of private actors, and protect human rights against horizontal violations.[1643] More interestingly, evaluating the harm occurred as a consequence of gold mining activities, the Commission concluded that both the State and the companies conducting oil exploitation activities

---

[1638] UN Norms, para. 14, Kinley & Chambers, **op. cit.**, p. 476.
[1639] Also see AfCommHPR, Comm. No. 155/96 – the Social and Economic Rights Action Center and the Center for Economic and Social Rights/Nigeria, 2001; Baldwin & Morel, "Group Rights"…, p. 286.
[1640] Rabobank Group Human Rights Policy, https://www.rabobank.com/en/images/Human%20Rights%20Policy.pdf, accessed on 10.04.2015.
[1641] For some of the examples of famous HRIAs see the Danish Institute for Human Rights (Human Rights Compliance Assessment) and the Global Reporting Initiative (G3 Sustainability Reporting Guidelines). Lambooy, **op. cit.**, pp. 409-410, 415, 442.
[1642] OEA/Ser.L/V/II., Doc. 54, 30 December 2009, Democracy and Human Rights in Venezuela, para. 1062 citing IAmCtHR, 119th Period of Sess., Hearing on the effects of Mining in Venezuela., 4 March 2004.
[1643] OEA/Ser. L/V/II.96 Doc. 10 rev.1. (VIII-IV), 24 April 1997, IAmCommHR, Report on the Situation of Human Rights in Ecuador, citing OEA/Ser.L/V/II.66, Doc. 10 rev. 1, 5 March 1985, *Yanomami v. Brazil Case*, Res. No. 12/85 Case 7615, in Annual Report of 1985-86.

were responsible for the anomalies caused by such activities, and both should be responsible for correcting them through decontamination.[1644] Furthermore, as the Commission underlined, it is the duty of the State to ensure that the human rights of individuals are protected and the right to a healthy environment and ecosystem is preserved through a careful and responsible management.[1645] Accordingly, the Commission recommended the Ecuadorian government to take necessary preventive and remedial measures in order to prevent future oil and oil-related contamination and remedy the injury suffered by the communities.[1646]

Additionally, the communities should be informed on the potential dangers of the private activity.[1647] Especially, the vulnerable groups shall be given information on the actual and potential risks and dangers they may face as a consequence of corporate activities. The information may be provided in various forms such as "*in-person meetings, online dialogues, consultation with affected stakeholders and formal public reports*", and the latter shall be made compulsory if serious risks to human rights are at issue.[1648] Such information should be timely disclosed and must be relevant and reliable in the sense that it does not become ineffective for protecting human rights.[1649] For example, in *Guerra and others v. Italy*, concerning the release of poisonous gas and toxic substances from a private factory as an output of the production of fertilisers, which was listed as a high-risk activity, the ECtHR held that "*...although the object of Article 8 is essentially that of protecting the individual against arbitrary interference by the public authorities, it does not merely compel the State to abstain from such interference: in addition to this primarily negative undertaking, there may be positive obligations inherent in effective respect for private or family life.*"[1650] Thus, the failure of the national authorities to provide the essential information to the public on the high-risk activities of the factory and to

---

[1644] OEA/Ser. L/V/II.96 Doc. 10 rev.1, 24 April 1997, IAmCommHR, Report on the Situation of Human Rights in Ecuador, Chapter VIII on the Human Rights Situation of the Inhabitants of the Interior of Ecuador affected by Development Activities.
[1645] **ibid.**
[1646] **ibid.** See also Gatto, **op. cit.**, p. 68; Nicola Jägers, **Corporate Human Rights Obligations: In Search of Accountability**, Antwerp, Intersentia, 2002, pp. 155-156.
[1647] See AfCommHPR, Comm. No. 155/96 – the Social and Economic Rights Action Center and the Center for Economic and Social Rights/Nigeria, 2001, Baldwin & Morel, "Group Rights"…, p. 286.
[1648] 2011 Ruggie Report, Guiding Principles on Business and Human Rights, Annex,II,B.18,21 and its Commentary.
[1649] See *e.g.* UN Norms, para. 15.
[1650] Guerra v Italy, Apps. No. 116/1996/735/932, 19 February 1998, para. 58.

ensure the effective protection of the rights of the residents living in the area near the factory constitute breaches of the obligations under Article 8 of the Convention.[1651]

Similarly, in *Öneryıldız v. Turkey*, concerning the death of persons due to methane explosion in a municipal rubbish, the Court reaffirmed that the public has the right to information especially on the potential and actual consequences of dangerous activities posing a threat to the right to life.[1652] In *Kolyadenko and Others v. Russia,* the Court emphasized the obligation of State authorities to establish an emergency warning system especially when there is a dangerous activity being conducted putting the lives of people at high risk.[1653] Therefore, corporations conducting dangerous activities shall cooperate with the State authorities in establishing such warning systems or they may be required to establish and operate such systems themselves by elaborating all the risks involved in their business activities.

In *Vilnes and Others v. Norway*, the applicants alleged that their diving operations in the North Sea during the oil exploration activities of a partially State-owned company "Norwegian Underwater Intervention Ltd." (NUI/NUTEC) caused the breach of their rights under Articles 2 and 8. The Court without considering "the degree of involvement of the State in the hazardous activity in question, since the Convention obligation applies to 'any activity, whether public or not'"[1654] held that the public's right to information creates a positive obligation on the States to ensure that essential information is given to the workers and the public, even if the hazardous or dangerous (risky) activities at issue are conducts of private persons.[1655]

An example in the jurisprudence of the ECtHR concerning impact assessments and the right of public to participate in the decision-making process concerns the gold mining activities operated by a corporation despite a national court judgment to

[1651] **ibid.,** para. 60.
[1652] The Court added that States authorities must carefully govern the licensing, setting up, operation, security and supervision of the dangerous activities, by taking due care of the technical specificities of each activity for identifying the potential risks and shortcomings. Öneryıldız v. Turkey, App. no. 48939/99, 20 November 2004, paras. 89-90; See also Budayeva and Others v. Russia, Apps. nos. 15339/02, 21166/02, 20058/02, 11673/02, 15343/02, 20 March 2008, para. 132.
[1653] Kolyadenko and Others v. Russia, Apps. no. 17423/05, 20534/05, 20678/05, 23263/05, 24283/05, 35673/05, 28 February 2012, para. 158.
[1654] Vilnes and Others v. Norway, Apps. no. 52806/09 and 22703/10, 5 December 2013, para.223.
[1655] **ibid.,** paras. 235, 244.

annul the permit given by the administrative authorities. In *Taskin and Others v Turkey*, the applicants alleged that the operating permit issued for Normandy Madencilik AŞ. to use cyanide in extracting gold from a mine in Ovacık (Bergama) resulted in the violation of their rights under Articles 2 and 8 due to the environmental damage on the ecosystem, human health and safety caused by the company.[1656] The Court examining the allegation of the breach of Article 8 on both substantive and procedural aspects, held that even though in cases concerning environmental issues the Contracting States have a wide margin of appreciation, the decision of the national court to annul the permit issued, based on the environmental impact assessment report and the national legislation due to lack of public interest, clearly demonstrate the limits of the margin for this case on the substantive merits.[1657] On the procedural aspect, the Court held that:

> *"Where a State must determine complex issues of environmental and economic policy, the decision-making process must firstly involve appropriate investigations and studies in order to allow them to predict and evaluate in advance the effects of those activities which might damage the environment and infringe individuals' rights and to enable them to strike a fair balance between the various conflicting interests at stake (see Hatton and Others, cited above, para. 128). The importance of public access to the conclusions of such studies and to information which would enable members of the public to assess the danger to which they are exposed is beyond question (see, mutatis mutandis, Guerra and Others v. Italy, judgment of 19 February 1998, Reports 1998-I, p. 228, para. 60, and McGinley and Egan v. the United Kingdom, judgment of 9 June 1998, Reports 1998-III, p. 1362, para. 97). Lastly, the individuals concerned must also be able to appeal to the courts against any decision, act or omission where they consider that their interests or their comments have not been given sufficient*

[1656] The applicants also claimed that their right to effective judicial protection under Articles 6(1) and 13 of the Convention has been violated.
[1657] Taskin and Others v Turkey, App.no. 46117/99, 10 November 2004, paras. 116-117.

weight in the decision-making process (see, mutatis mutandis, Hatton and Others, cited above, para. 127)."[1658]

The Court concluded that the continuing the production at the gold mine by the decision of the Council of Ministers despite the judicial decision of annulment of the permit and the deficiencies in the decision-making process constitute violations of Article 8 on the procedural aspects.[1659] In a similar case, *Tatar v. Romania*, the Court again noting that States had a duty to ensure the protection of the rights under Article 8 to private life and home, held that corporate activities operating in high risk sectors for the health of persons and the environment shall be regulated and monitored.[1660] Moreover, public access to the results of investigations and other documents concerning the decision-making process, such as environmental impact assessments, shall be ensured. [1661]

4.4.3. Duty to Monitor Compliance and Fight Impunity

Duty to monitor the implementation of corporate policies and codes of conduct is also an important element of the corporate human rights due diligence. As mentioned in the previous sub-section, human rights impact assessments are one of the tools for ensuring that both the parent corporation and its contractors or sub-contractors are complying with the universal human rights standards. However, an effective monitoring system is also required for guaranteeing that corporations are acting in line with the minimum standards set forth under the national and international human rights norms. The outcomes obtained at the end of the monitoring process would also facilitate specifying and adopting the appropriate and adequate preventive and/or remedial measures regarding the activities, operations, services or products of the corporation.

In general, monitoring mechanisms implemented by corporations shall be periodic, continuous, transparent and preferably independent of any political, social

---

[1658] **ibid.,** para. 119.
[1659] **ibid.,** para. 125.
[1660] The Court also referred to the Romanian Constitution, which recognized the right to enjoy a healthy and protected environment, and the precautionary principle that applies in environmental issues. Affaire Tatar v Roumanie, App.no. 67021/01, 27 January 2009, para. 109.
[1661] **ibid.**, para. 88.

and economic constraints. Self-assessments made by TNCs are also valuable tools in the sense that they both encourage the persons having a hierarchical or horizontal relationship with the corporation to act in line with the human rights standards and that the TNC itself feels eager to endeavour for progressive development of its human rights protection policies and commitments. Ideally, specialized NGOs such as trade unions or consumer associations shall be involved in the monitoring process and data input from all stakeholders such as the stockholders, other owners, workers and their representatives, as well as any other individual or group that is directly or indirectly affected by the activities of transnational corporations or other business enterprises, consumer groups, customers, Governments, neighbouring communities, indigenous peoples, public and private lending institutions, suppliers, trade associations shall be taken into due account.[1662] The monitoring process may either be confidential or public. Keeping the reports confidential may encourage the companies to disclose more information regarding their compliance with the human rights standards.[1663] However, if the results are revealed publicly, it will be to the benefit of the public good and deterrent for both the corporation itself and other corporations operating in the same industries or in the same countries.

Duty to monitor compliance goes hand-in-hand with the duty to fight impunity. In other words, if the corporation finds out or ought have found out that there is a non-compliance with the human rights obligations of one of its contractors or sub-contractors including the employees, it should take all appropriate measures to cease the non-compliance and to provide remedy if harm occurred. The duty of the State to fight impunity might be used, by analogy, in determining the potential duties of corporations in that regard. However, given the dominant public characteristic of the duty to fight impunity, we shall refrain from over-generalizing the sub-duties and extending them to corporate actors. Rather, the duty of corporations to cooperate with State authorities in their fight against impunity should be emphasized.

Both the IAmCommHR and the IAmCtHR define 'impunity' as "*the lack of investigation, pursuit, arrest, prosecution, and conviction of those responsible for*

[1662] See *e.g.* UN Norms, para. 22.
[1663] Weissbrodt and Kruger add that if the assessment is to be made public, then the standardized reporting system of the Global Reporting Initiative could be used. Weissbrod & Kruger, "Human Rights Responsibilities of …", p. 343.

human rights violations".[1664] Accordingly, all elements of the duty to fight impunity implicate the necessity of use of public power in fulfilling this duty. So, one more time, it should be stressed that States are primarily responsible for fighting impunity when corporations or their contractors and sub-contractors perpetrate human rights violations. States should take all necessary legal, political, administrative and cultural measures "*to promote the protection of human rights and ensure that any violations are considered and treated as illegal acts*" [1665] and organize their governmental apparatuses by allocating sufficient resources[1666] in order to prevent chronic recidivism of human rights violations and fulfil their obligations to respect and ensure free and full enjoyment of the rights and to promote their protection[1667] as recognized under the American Convention (Article 1).[1668]

For example, the African Commission, in a case concerning the responsibility of Zimbabwe for the violations perpetrated by the Zimbabwe Liberation War Veterans Association, commented that it could apply the authoritative interpretation of the IAmCtHR on the State's duty of due diligence.[1669] Hence, a purely private conduct, not imputable to a governmental authority, could be transformed into a constructive act of the State on the basis of the duty of State to exercise due diligence

[1664] OEA/Ser.L/V/II. Doc. 68, 3 June 2010, Preliminary Observations of the Inter-AmCommHR on Its Visit to Honduras, May 15 to 18, 2010, para. 98; *Case of the "Las Dos Erres" Massacre v Guatemala*, IAmCtHR, Ser. C. No. 211, 24 November 2009, para. 234.

[1665] *Velásquez Rodriguez v. Honduras*, IAmCtHR, Ser. C, No. 4, 29 July 1988, para. 175; OEA/Ser.L/V/II.106 Doc. 3 rev at 468, 13 April 2000, Report No. 36/00, Case 11.101, Annual Report 1999, "Caloto Massacre" Colombia, para. 63; See also *Massacres of El Mozote and Nearby Places v. El Salvador*, IAmCtHR, Series C No. 252, 25 October 2012, para. 146.

[1666] OEA/Ser.L/V/II.131, doc. 36, 2 March 2008, Observations of the Inter-AmCommHR upon Conclusion of its April 2007 visit to Haiti, para. 15; *Velásquez Rodriguez v. Honduras*, IAmCtHR, Ser. C, No. 4, 29 July 1988, para. 166; similarly, see Zimbabwe Human Rights NGO Forum v Zimbabwe, AfCommHPR (2006), Comm. No. 245/02, para. 147.

[1667] OEA/Ser.L/V/II.118, doc. 4 rev. 2, 29 December 2003, Report on the Situation of Human Rights in Venezuela, para. 325; *Case of Santo Domingo Massacre v. Colombia*, IAmCtHR, Ser. C No 259, 30 November 2012, para. 189 citing *Cf. Velásquez Rodriguez v. Honduras*, IAmCtHR, Ser. C, No. 4, 29 July 1988, para. 166, and *Massacres of El Mozote and Nearby Places v. El Salvador*, IAmCtHR, Series C No. 252, 25 October 2012, para. 144.

[1668] OEA/Ser.L/V/II. Doc. 68, 3 June 2010, Preliminary Observations of the Inter-American Commission on Human Rights on Its Visit to Honduras, May 15 to 18, 2010, paras. 98-99; *Case of Loayza Tamayo*, IAmCtHR, Ser. C. No. 42, 27 November 1998, para. 170, citing *Case of the "White Van" (Paniagua-Morales et al v Guatemala),* IAmCtHR, Ser. C. No. 37, 8 March 1998, para. 173; Castillo Páez Case. November 3, 1997. Series C, No. 34, para. 90; OEA/Ser.L/V/II.106 Doc. 3 rev at 468, 13 April 2000, Report No. 36/00, Case 11.101, Annual Report 1999, "Caloto Massacre" Colombia, para. 57; *Velásquez Rodriguez v. Honduras*, IAmCtHR, Ser. C, No. 4, 29 July 1988, paras. 166, 176.

[1669] Zimbabwe Human Rights NGO Forum v Zimbabwe, AfCommHPR (2006), Comm. No. 245/02, para. 144.

for the prevention of human rights abuses perpetrated by non-state actors.[1670] However, the Commission applied "*much-higher-than-usual standards of evidence*"[1671] and held that "[a] *single violation of human rights or just one investigation with an ineffective result does not establish a lack of due diligence by a State. Rather, the test is whether the State undertakes its duties seriously.*"[1672] If the impunity of perpetrators of human rights violations becomes structural and widespread, it would encourage the continuance and repetition of the commission of such violations, which may even amount to being complicit in the commission of crimes.[1673] Therefore, the obligation to guarantee requires States to adopt all sufficient and effective measures for preventing impunity and ensuring accountability, which would in the end contribute to the building of confidence and trust for the judicial system and the promotion of the rule of law and democracy.[1674]

However, as underlined by the IAmCtHR in Velasquez Rodriguez case, the necessary and adequate measures that the States should adopt within the context of obligation to prevent human rights violations may vary depending on the particularities and conditions of each State and each instance.[1675] The Court put that even if the occurrence of one single violation does not necessarily mean that the

---

[1670] **ibid.**

[1671] Manby notes that the campaign of the Zimbabwean Government against the work of the African Commission affected the decision-making process and caused the Commission to apply a higher standard of evidence. Manby, **op. cit.**, p. 175.

[1672] Zimbabwe Human Rights NGO Forum v Zimbabwe, AfCommHPR (2006), Comm. No. 245/02, para. 158; Commission on Human Rights, Fifty-second sess., February 1996, Report of the Special Rapporteur on violence against women, its causes and consequences, "Further Promotion and Encouragement of Human Rights and Fundamental Freedoms, Including the Question of the Programme and Methods of Work of the Commission Alternative Approaches and Ways and Means within the United Nations System for Improving the Effective Enjoyment of Human Rights and Fundamental Freedoms", submitted in accordance with Commission on Human Rights Resolution 1995/85.

[1673] For example, see the report on Guatemala concerning the obstacles on preventing the crimes such as lynching, corruption and organized crime due to the consistent patterns of impunity and denial of justice, which also undermine the principle of rule of law and democracy. OEA/Ser.L/V/II.118, Doc. 5 rev. 1, 29 December 2003, Justice and Social Inclusion: The Challenges of Democracy in Guatemala, paras. 21, 30; Inclusion: The Road towards Strengthening Democracy in Bolivia, para. 102; Zimbabwe Human Rights NGO Forum v Zimbabwe, AfCommHPR (2006), Comm. No. 245/02, paras. 160, 208-211.

[1674] OEA/Ser/L/V/II.123, doc.6 rev 1, 26 October 2005, Haiti: Failed Justice or the Rule of Law? Challenges Ahead for Haiti and the International Community, para. 229; OEA/Ser.L/V/II.118, doc. 4 rev. 2, 29 December 2003, Report on the Situation of Human Rights in Venezuela, para. 327; OEA/Ser.L/V/II.118, Doc. 5 rev. 1, 29 December 2003, Justice and Social Inclusion: The Challenges of Democracy in Guatemala, para. 21 citing IACHR, OEA/Ser.L/V/II.106, Doc. 59 rev, June 2, 20, Second Report on the Status of Human Rights in Peru, Chapter II. See also IACHR, Third Report on the Status of Human Rights in Paraguay, OEA/Ser./L/VII.110, Doc. 52, March 9, 2001, Chapter III.

[1675] *Velásquez Rodriguez v. Honduras*, IAmCtHR, Ser. C, No. 4, 29 July 1988, para. 175; *also* Zimbabwe Human Rights NGO Forum v Zimbabwe, AfCommHPR (2006), Comm. No. 245/02, para. 158.

State has violated its obligation to respect and ensure under Article 1(1) and 2 of the American Convention, "*subjecting a person to official, repressive bodies that practice torture and assassination with impunity is itself a breach of the duty to prevent violations of the rights to life and physical integrity of the person, even if that particular person is not tortured or assassinated, or if those facts cannot be proven in a concrete case."*[1676] Therefore, the case system adopted by the Court also plays an important role in preventing and serving an early-warning function for systematic and gross violations of human rights.[1677]

As the Human Rights Committee also emphasized in General Comment No. 31, impunity may trigger the commission of widespread and systematic violations, which may even amount to an international crime prosecutable under the Rome Statute of the ICC.[1678] This implies that if the States Parties fail to prosecute the crimes committed by TNCs or act reluctant in bringing those responsible for human rights violations to justice,[1679] they will be in breach of convention obligations, which have the character of *erga omnes* obligations.[1680]

Obligation to prevent and obligation to investigate are obligations of means, and not of result.[1681] However, any investigation conducted by State authorities should be made *ex officio* and in a serious, genuine, impartial, objective manner with the purpose of obtaining an effective result for determining the truth, identifying the perpetrator, capturing, prosecuting and imposing pertinent punishments on the perpetrator(s) within a reasonable time.[1682] As the Court frequently reiterated,

---

[1676] *Velásquez Rodriguez v. Honduras*, IAmCtHR, Ser. C, No. 4, 29 July 1988, para. 175.
[1677] Claudio Grossman, "Strengthening the Inter-American Human Rights System: The Current Debate", **American Society of International Law Proceedings**, Vol. 92, 1998, p. 188.
[1678] General Comment No. 31 [80] Nature of the General Legal Obligation Imposed on States Parties to the Covenant: 26/05/2004, CCPR/C/21/Rev.1/Add.13, adopted on 29 March 2004, para. 18.
[1679] Kamatali, **op. cit.**, p. 442.
[1680] HRC General Comment No. 31, para. 2.
[1681] *Velásquez Rodriguez v. Honduras*, IAmCtHR, Ser. C, No. 4, 29 July 1988, para. 177; *Case of González et al. ("Cotton Field") v. Mexico,* IAmCtHR, Ser. C No. 205, 16 November 2009, para. 251, 279.
[1682] *Velásquez Rodriguez v. Honduras*, IAmCtHR, Ser. C, No. 4, 29 July 1988, paras. 174-177; *Case of Juan Humberto Sánchez v. Honduras*, IAmCtHR, Ser. C. No. 99, 7 June 2003, paras. 143-144; Bámaca Velásquez Case. November 25, 2000. Series C No. 70, para. 64, 211, 212; "Street Children" Case (Villagrán Morales et al.), November 19, 1999. Series C No. 63, para. 226; Godínez Cruz Case, January 20, 1989, Series C No. 5, para. 188; *Case of the Massacre of Pueblo Bello*, IAmCtHR, Ser. C, No. 140, 31 January 2006, para. 143; *Case of the "Mapiripán Massacre" v. Colombia*, IAmCtHR, Ser. C No. 134, 15 September 2005, paras. 219 and 223; Case of the Moiwana Community, paras. 145, 146; *Case of the Gómez Paquiyauri Brothers*, IAmCtHR, Series C No. 110, 8 July 2004, para. 131; *Case of Santo Domingo Massacre v. Colombia*, IAmCtHR, Ser. C No 259, 30 November 2012,

"[w]*here the acts of private parties that violate the Convention are not seriously investigated, those parties are aided in a sense by the government, thereby making the State responsible on the international plane"*.[1683] Victims of an act in violation of the Convention should be provided with compensation for damages, and if possible the right violated should be restored, as soon as possible.[1684] Consequently, if the private person who violated the right of an individual goes unpunished with impunity and the damage of the victim is not redressed, the State would be in violation of its duty to respect and ensure full and free exercise of the rights recognized under the Convention.[1685]

In addition, psychological factors (culpability or intention) attached to the perpetrator of the act does not affect the duty of the State to respect, protect and fulfil human rights. Thus, even if the perpetrator of an act could not be identified, the State would be responsible if it failed to act with due diligence.[1686] The IAmCtHR concluded in *Paniagua-Morales v. Guatemala* case that since the State is under an obligation to ensure free and full enjoyment of the rights under the Convention, it is irrelevant to allege that the acts were not committed as part of a State policy for precluding the international responsibility of the State.[1687] Furthermore, as the IAmCtHR reiterated in its Report on Terrorism and Human Rights, neither culpability (guilt) nor intent of the perpetrators would have an effect on the obligations of the States derived form the duty to respect and ensure exercise of human rights.[1688] Consequently, the criminal responsibility of the individual under

---

para. 157; *Cf.*, *Massacres of El Mozote and Nearby Places v. El Salvador*, IAmCtHR, Series C No. 252, 25 October 2012, para. 144.

[1683] *Velásquez Rodriguez v. Honduras*, IAmCtHR, Ser. C, No. 4, 29 July 1988, para. 177.

[1684] OEA/Ser.L/V/II.106 Doc. 3 rev at 468, 13 April 2000, Report No. 36/00, Case 11.101, Annual Report 1999, "Caloto Massacre" Colombia, para. 53; *Velásquez Rodriguez v. Honduras*, IAmCtHR, Ser. C, No. 4, 29 July 1988, para. 166; IAmCommHR, Report on the Situation of Human Rights in Mexico, 1998, para. 675.

[1685] *Velásquez Rodriguez v. Honduras*, IAmCtHR, Ser. C, No. 4, 29 July 1988, para. 176.

[1686] *Case of the "White Van" (Paniagua-Morales et al v Guatemala),* IAmCtHR, Ser. C. No. 37, 8 March 1998, para. 91.

[1687] **ibid.**, para. 95.

[1688] *See* also OEA/Ser.L/V/II.116, Doc. 5 rev. 1 corr. 22 October 2002, Report on Terrorism and Human Rights, para. 147; *Case of Santo Domingo Massacre v. Colombia*, IAmCtHR, Ser. C No 259, 30 November 2012, para. 162; *Case of the "Mapiripán Massacre" v. Colombia*, IAmCtHR, Ser. C No. 134, 15 September 2005, para. 110.

domestic law and the international responsibility of the State for acts perpetrated by private persons are two different concepts of law of responsibility.[1689]

Similarly, corporations shall have a secondary duty to investigate the allegations of human rights violations perpetrated within their spheres of influence and by the persons with whom they have a business relationship. The investigation conducted by the corporation shall too be serious, genuine and impartial, capable of revealing the truth about the allegations and identifying the perpetrator. Following the investigation, the corporation shall adopt measures to prevent future violations and to remedy any damage caused by the act in violation of the human rights norms, regardless of a successful identification of the actual perpetrator.[1690] Obviously, existence of a corporate human rights policy shall not prevent holding the corporation responsible for its failure to act with due diligence. In other words, as an intrinsic part of the duty of corporations to act with due diligence, corporations shall also be held responsible for their failure to adequately investigate acts and/or omissions and to identify and "punish" those responsible for human rights violations. Finally, imposing disciplinary sanctions on the perpetrators or adopting other appropriate remedies concerning the acts in violation of human rights standards shall also be considered by taking into account the seriousness and effects of the damage given to the victims.

By analogy, corporations are also required to act with scrutiny in monitoring and continuing their business relationships with the contractors and sub-contractors, especially if the human rights record of a business partner is being severely criticized by the stakeholders and the public. This would equally be valid even if there has not been any concrete human rights violations up-to-that date. Furthermore, if the parent company enters into business relationship with a partner, who is known to be practicing abusive acts and operations in its previous conducts, it would be under a

---

[1689] *Case of the Massacre of Pueblo Bello*, IAmCtHR, Ser. C, No. 140, 31 January 2006, para. 113, 118; See also IAmCommHR, Maria da Penha vs Brazil, Case 12.051, Report No. 54/01, OEA/Ser./L/V/II.111, doc. 20 rev., at 704 (2000), 16 April 2001, paras. 5, 20, 54, 56 and 58.

[1690] For example, the ECtHR in Ergi v Turkey held that the State was responsible for the death of the villager Ergi, even if the actual perpetrator could not be identified due to the chaos during the crossfire shootings between PKK and the Turkish Army. Ergi v Turkey, app. No. 23818/94, 28 July 1998, paras. 79-81. See, *inter alia*, Cyprus v. Turkey, App. no. 25781/94, 10 May 2001, para. 131; Yaşa v. Turkey, App. No. 63/1997/847/1054, 2 September 1998, para. 100.

heavier burden of proof that it acted with due diligence to prevent human rights violations.

Specifically, the security personnel of corporations shall be under close scrutiny in order to prevent any human rights violation that may be perpetrated as a consequence of aggressive use of force. For example, Commentary to the UN Norms envisages the adoption of policies "*to prohibit the hiring of individuals, private militias and paramilitary groups, or working with units of State security forces or contract security firms that are known to have been responsible for human rights or humanitarian law violations. Transnational corporations and other business enterprises shall engage with due diligence in investigations of potential security guards or other security providers before they are hired and ensure that guards in their employ are adequately trained, guided by and follow relevant international limitations with regard, for example, to the use of force and firearms. If a transnational corporation or other business enterprise contracts with a State security force or a private security firm, the relevant provisions of these Norms (paragraphs 3 and 4 as well as the related commentary) shall be incorporated into the contract and at least those provisions should be made available upon request to stakeholders in order to ensure compliance."*[1691]

For example, *Abtan et al. v. Prince* and *Albazzaz et al. v. Prince* are two cases brought before the U.S. courts under ATCA procedures against the private military contractor Blackwater (XE Services) on account of committing war crimes, due to the fire opened on Iraqi civilians at Nisoor Square in 2007. The company was contracted for providing security services to the government officials visiting Baghdad. It was alleged, *inter alia*, that the company created a culture of impunity within the corporate structure and encouraged its employees to use excessive force. The lack of due diligence in hiring its personnel, who had a bad record of human rights abuses and who were acting under the influence of chemical substances, has also been stressed in the opinion of the U.S. District Court for Virginia.[1692] The company argued that it is an employee of the U.S. Government; therefore, the Government should be the defendant in this case. On January 6th, 2010, the case was

[1691] Commentary to the UN Norms, para. 4(d).
[1692] In re: XE Services Alien Tort Litigation, 21 October 2009, p. 7.

dismissed due to a settlement between the parties.[1693] However, six months after the settlement, the U.S. District Court for North Carolina dismissed the case in *Brady et al v. XE Services et al.* concerning the same events and allegations on the grounds that: (1) the plaintiffs lack standing to sue in the U.S. courts, because there is neither a specific statutory scheme nor they reside in the U.S., *i.e.* they have no contact with the U.S., (2) the District Court lacks subject-matter jurisdiction, hence the case shall be remanded to the state court, where it was originated.[1694]

The security personnel of Blackwater is also bound by the rules of international criminal law and they could be held responsible before the international criminal courts/tribunals.[1695] However, Rosemann noted that since the U.S. is not a party to the Statute of the ICC and is lobbying for concluding treaties exempting the U.S. citizens from extradition and from the jurisdiction of the Court, trying the security personnel of Blackwater before the ICC was hard enough.[1696] Adding to that, the UN Security Council Resolution 1422/2002, 1487/2003 and 1483/2004 requested the ICC not to investigate or prosecute those individuals who participated in or authorized the UN Peacekeeping Operations if they are from the non-State parties to the Rome Statute.[1697] Cerone, too, affirms that, even if the conduct of the security personnel was attributable to the U.S., there had been doubts on the international criminal responsibility of the personnel, who were not "*incorporated into the US armed forces or otherwise engaged into combatant functions"*.[1698]

[1693] In re: XE Services Alien Tort Litigation, 6 January 2010.
[1694] Brady et al. V. XE Services LLC et al., No. 5:09-CV-449-BO, (E.D.N.C. 6 July 2010).
[1695] Cerone, **op. cit.**, pp. 31-33.
[1696] Rosemann, "The Privatization of Human Rights…," p. 92.
[1697] **ibid.**
[1698] Cerone, **op. cit.**, pp. 31-33; See also Montreux Document on Pertinent International Legal Obligations and Good Practices for States related to Operations of Private Military and Security Companies during Armed Conflict, UN Doc. A/63/467-S/2008/636, 6 October 2008; Dan Kuwali, "Grey War Zone? The Question of Contractual Control of the Privatization of Warfare and Civilianization of the Military" in Carsten Stahn & Larissa van den Herik, (eds.) **Future Perspective on International Criminal Justice**, TMC Asser Press, 2010, pp. 369-394; Chrispin Materneau, "Holding Private Military Corporations Accountable for their Crimes: The Applicability of the Commander/Superior Responsibility Doctrine to Crimes of PMCs" in Carsten &van den Herik (eds.), **op. cit.**, pp. 395-421; White, Nigel, D. "Due Diligence Obligations of Conduct: Developing a Responsibility Regime for PMSCs", **Crim. Just. Ethics**, Vol. 31 (3), December 2012, pp. 233-261.

5. INTERNATIONAL CRIMINAL RESPONSIBILITY and OBLIGATION NOT TO BE COMPLICIT

International Criminal Court has jurisdiction to try individuals who allegedly perpetrated the most serious crimes of concern to the international community as a whole. These crimes include genocide, crimes against humanity, war crimes and the crime of aggression. Except for the crime of aggression, involvement of a State is not a requirement for trying individuals before the ICC, although such crimes are usually perpetrated by explicit or tacit approval, tolerance, acquiescence or complicity of State authorities.[1699] Having said that, any connection with an 'organized power structure' would be sufficient to try individual perpetrators of international crimes.[1700] This may be a hint for us to comment that there is a constant evolution broadening the application area of international criminal law, which implies a shift from strict requirements of state involvement in the commission of international crimes to a more realistic requirement of a 'power' involvement in the actions amounting to breaches of international laws.[1701]

Furthermore, the existence of an international or internal armed conflict is not a precondition for the commission of international crimes, except for the war crimes.[1702] As Cerone rightfully points out the requirement for a contextual element, *i.e.* a nexus between the act and a broader context concerning the commission of crimes, has been loosened.[1703] Accordingly, once the jurisdiction of the ICC on legal

---

[1699] Antonio Cassese, **International Criminal Law**, p.106.
[1700] Cerone, **op. cit.**, p. 31.
[1701] For a critique of this approach see William Schabas, "State Policy as an Element of International Crimes", **J Crim L & Criminology**, Vol. 29 (3), Spring 2008, pp. 953-982.
[1702] For example, Protocol Additional to the Geneva Conventions of 12 August 1949 and relating to the Protection of Victims of Non-International Armed Conflicts of 8 June 1977 applies not only in the context of an international or internationalized armed conflict but also in a civil war, or internal strife, in which the peoples are giving a fight against colonial domination, alien occupation or racist regimes in the exercise of their right to self-determination. Volker Nerlich, "Core Crimes and Transnational Business Corporations", **J. Int'l Crim. Just.**, Vol. 8, 2010, pp. 902-903.
[1703] Cerone, **op. cit.**, p. 31.

persons is recognized, there will be no such prerequisite in order to hold TNCs criminally responsible for commission of war crimes, crimes against humanity and genocide. In addition, it would also be possible to hold them criminally responsible for being complicit in the commission of all these core crimes.

In this chapter, below, a general overview on each of the international crimes will be given. Then, in the first sub-section, the concept of corporate criminal liability under international law will be analysed. Secondly, the historical examples from the Nuremberg trials of businesspersons will be examined. Thirdly, the possibilities of including legal persons under the jurisdiction of the ICC will be discussed. Finally, the obligation of corporations not to be complicit in the commission of human rights violations and international crimes will be assessed.

War Crimes: The International Criminal Tribunal for Rwanda (ICTR) confirmed that war crimes could be committed by non-state actors.[1704] As Cassese draws attention, crimes committed by civilians against other civilians may amount to war crimes, provided that those crimes are committed in the context of an international or internal armed conflict.[1705] Accordingly, once this contextual element exists, there will be no requirement of involvement of a State actor in the commission of the war crime.[1706] For example, procurement of raw materials by means of grave human rights abuses may amount to a war crime, if committed in the context of an armed conflict.[1707]

Crimes against humanity: Likewise, crimes against humanity as defined under Article 7 of the ICC Statute could be committed by both state and non-state actors and in times of war or peace, as part of a widespread or systematic attack against any civilian population. That is to say there is no requirement of the contextual element (armed conflict) to exist for prosecuting the crimes against humanity. Nor, state involvement in the commission of crimes against humanity is required.[1708] However,

---

[1704] Judgment, Prosecutor v Akayesu (ICTR-96-4), Appeals Chamber, 1 June 2001, paras. 630-634, 640.
[1705] Cassese, **International Criminal Law**…, p. 49.
[1706] Nerlich, **op. cit.**, pp. 903-904.
[1707] Julia Graff, "Corporate War Criminals and the International Criminal Court: Blood and Profits in the Democratic Republic of Congo", **Human Rights Brief,** Vol. 11, no. 2, 2004, pp. 23-26.
[1708] Cassese, **International Criminal Law**…, pp. 83-85; *cf.* the historic Nuremberg trials Judgment, Kupreskic et al "Lasva Valley" (IT-95-16), Trial Chamber, 14 January 2000, para. 555: "*While crimes*

Article 7(2)(a) defines "attack directed against any civilian population" as the commission of acts "pursuant to or in furtherance of a State or organizational policy to commit such attacks". Nerlich answers the question whether TNCs could be considered as an 'organization' within the meaning of Article 7, affirmatively. He concludes that the conduct of TNCs may amount to a crime against humanity without the need of a link of that conduct with a State policy.[1709] Nerlich gives the example of the promotions made by milk companies, which are alleged to cause the death of babies in developing countries.[1710]

Genocide: The crime of genocide may be perpetrated both in times of war and peace. Article 4 of the Convention on the Prevention and Punishment of the Crime of Genocide expressly mentions that private individuals shall also be held responsible for committing, conspiring, inciting, attempting to and being complicit in the commission of the crime of genocide. As the ICJ affirmed in its Advisory Opinion on the Reservations to the Genocide Convention, the legal obligations under the Convention has become customary international law obliging every individual and every State, whether it is a party to the convention or not, and the obligations therein bind all individuals and all States regardless of the place of the commission of the crime of genocide.[1711] Given the seriousness and the magnitude of this heinous crime, which can only be committed by a special intent, the *ad hoc* tribunals stressed

---

against humanity are normally perpetrated by State organs, i.e. individuals acting in an official capacity such as military commanders, servicemen, etc., there may be cases where the authors of such crimes are individuals having neither official status nor acting on behalf of a governmental authority. The available case-law seems to indicate that in these cases some sort of explicit or implicit approval or endorsement by State or governmental authorities is required, or else that it is necessary for the offence to be clearly encouraged by a general governmental policy or to clearly fit within such a policy. In addition to many decisions concerning crimes against humanity perpetrated by individuals acting on a private capacity, the Weller case may prove to be of some relevance to this issue. This case gave rise to six different judgements by German courts after World War II and involved the ill-treatment of Jewish civilians by two persons under the command of Weller, a member of the SS, who was at the time not in uniform and was acting on his own initiative. After the injured parties reported to the Jewish community, which in turn complained to the local Gestapo, the head of the Gestapo informed the wronged Jews that Weller's actions were an isolated event which would in no way be approved. Thereafter Weller was summoned by the Gestapo and strongly taken to task by the district leader of the Nazi party. On appeal to the Supreme Court for the British zone, it was held that the offence did indeed constitute a crime against humanity, on the grounds that it was sufficient for the attack on human dignity to be connected to the national-socialist system of power and hegemony." (footnotes omitted) See also Judgment, Prosecutor v Blaskic, (IT-95-14), Trial Chamber, 3 March 200, paras. 205-207.

[1709] Nerlich, **op. cit.**, p. 904.

[1710] **ibid.,** p. 904, fn. 38.

[1711] Clapham, **Human Rights Obligations**..., p. 29, fn. 16. and Report of the Secretary General pursuant to paragraph 2 of Security Council Resolution 808(1993) S/25704, 3 May 1993, (on the establishment of the ICTY), para. 45.

the need for the direct or indirect involvement of a State or State-like entity.[1712] However, as the ICTY underlined the existence of a state policy was only a requirement during the WWII era.[1713] Today, international law has evolved in a way to hold individuals criminally liable, even if there is no state policy applied in the commission of an international crime.[1714] Therefore, once the ICC had jurisdiction over the TNCs, they could be held liable for both perpetrating and aiding and abetting, or otherwise assisting in the commission of the crime of genocide.

Crime of aggression: Apart from these three international crimes, the responsibility of TNCs should be examined with regard to the crime of aggression, which is traditionally described as a 'leadership crime'.[1715] Article 8*bis* inserted in the text of the Statute of the ICC defines the crime of aggression as "*the planning, preparation, initiation or execution, by a person in a position effectively to exercise control over or to direct the political or military action of a State, of an act of aggression which, by its character, gravity and scale, constitutes a manifest violation of the Charter of the United Nations.*"[1716] Therefore, international criminal law leaves the crime of aggression as a 'leadership crime' and does not allow us to hold TNCs responsible for the crime of aggression. For example, possibility of waging terrorist attacks against a State by non-state actors or threatening a State's sovereignty, territorial integrity or political independence by way of serious and massive economic coercion has not been included in the text of the amendment.[1717] Furthermore, by inserting Article 25 (3 *bis*), the drafters included the requirement of leadership not only for the principal perpetrator, but also for all the other modes of

[1712] For example, the ICTR held that *"…although a specific plan to destroy does not constitute an element of genocide, it would appear that it is not easy to carry out a genocide without such a plan, or organization. Morris and Scharf note that 'it is virtually impossible for the crime of genocide to be committed without some direct or indirect involvement on the part of the State given the magnitude of this crime.' They suggested that "it is unnecessary for an individual to have knowledge of all details of the genocidal plan or policy." The Chamber concurs with this view.*" Kayishema and Ruzindana (ICTR-95-1), Trial Chamber, 21 May 1999, para. 94. (The ICTR cited Virginia Morris & Michae Scharf, **The International Criminal Tribunal for Rwanda**, 1998, p. 168.)

[1713] The ICTY added that even for the crime of genocide, the Nuremberg Tribunal held that in case of a lack of state policy in the commission of crime of genocide, the perpetrators would be responsible for their acts, which amount to crimes against humanity. Tadic (IT-94-1), Trial Chamber, 7 May 1997, paras. 654-655.

[1714] **ibid.**, para. 655.

[1715] 1996 Draft Code of Crimes against the Peace and Security of Mankind, II Y.B. Int'l L. Comm'n (1996), Article 2; ICC Statute Article 8(bis); Cerone, **op. cit.**, p. 26.

[1716] Res. RC/Res.6, 11 June 2010, The Crime of Aggression, Annex I Amendments to the Rome Statute of the ICC on the crime of aggression. However, the ICC will not have jurisdiction over crimes of aggression until 1 January 2017 and with the condition that at least 30 States Parties have ratified and accepted the amendments.

[1717] Cassese, **International Criminal La…,** p. 114.

participation: "*In respect of the crime of aggression, the provisions of this article shall apply only to persons in a position effectively to exercise control over or to direct the political or military action of a State.*"[1718] However, as mentioned in the Report of the Special Working Group on the Crime of Aggression, one of the views expresses that the wording of Article 25 (3 *bis*) is broad enough to include the responsibility of persons who are complicit in the commission of the crime of aggression and who have "*effective control over the political or military action of a State but who are not formally part of the relevant government, such as industrialists.*"[1719]

The Rome Statute, likewise, does not confer jurisdiction on the ICC for trying legal persons. Nevertheless, lack of international accountability does not amount to lack of international human rights obligations for legal persons.[1720] The increasing number of the international documents concerning the regulation of corporate behaviour clearly precludes any absolute assumption rejecting the international liability of corporations under public international law.[1721] Finally, it is important to note that, even though currently the ICC has no jurisdiction *rationae personae* to try legal persons, it may pierce the corporate veil and try the individuals who are criminally responsible for the crimes perpetrated by and through the corporation.[1722] For example, a communication to the ICC has been submitted requesting the prosecution of Chevron officials for committing crimes against humanity.[1723] It has been alleged by the plaintiffs that, the conduct of Chevron in Ecuador caused the destruction of rainforests by deliberately dumping more than 18 billion gallons of toxic waste-water into the Lago Agrio region, which in the end amount to an 'attack

[1718] Res./Res.6, 11 June 2010, The Crime of Aggression, Annex I Amendments to the Rome Statute of the ICC on the crime of aggression.
[1719] See Annex I to the Report of the Special Working Group on the Crime of Aggression, ICC-ASP/7/SWGCA/2, 20 February 2009, para. 25.
[1720] Gatto, **op. cit.**, p. 93.
[1721] Clapham, **Human Rights Obligations…**, p. 251.
[1722] Ilias Bantekas, "Corruption as an International Crime and Crime against Humanity: An Outline of Supplementary Criminal Justice Policies", **J. Int'l Crim. Just.**, Vol. 4, 2006, p. 475.
[1723] The conduct of Chevron has been subject to a judgment in Ecuador, in which the national court awarded the indigenous peoples of Ecuador to $9 billion. However, the award has never been up-to-date, and the plaintifs started a legal process for the recognition of the judgment of the Ecuadorian court in Canada. Liam McHugh-Russell, "Whispers of Transnational Corproate Responsibility", Critical Legal Thinking, 09.09.2015, http://criticallegalthinking.com/2015/09/09/whispers-of-transnational-corporate-responsibility-chevron/, accessed on 17.10.2015; see also the decision of Supreme Court of Canada Chevron Corp. *v.* Yaiguaje, 2015 SCC 42, 04.09.2015, docket 35682.

on a civilian population' and forcible transfer of the population.[1724] However, as Heller analysed in his article, there are various reasons why the Office of the Prosecutor would not file a case before the ICC, including the difficulties in extending the concept of 'aid and abet' to such a situation.[1725]

5.1. International Criminal Responsibility of Corporations: A Contested Issue

Individual criminal responsibility, originated from national criminal law systems, is a well-established institution under international criminal law. Legal concepts of domestic criminal law, such as conspiracy, complicity, participation, cooperation, attempt, direct and public incitement to commit a crime, facilitating, aiding and abetting, encouraging the commission of a crime, and command responsibility have also been adopted under various international criminal law documents.[1726] Thus, it can be concluded that, while fundamentals, basic notions and institutions of public international law have their origins in civil law concepts of national legal systems, inspirations for the concepts of international criminal law also come from national criminal law systems. Hence, the concept of corporate criminality under national law systems[1727] and the pros and cons related to the punishment of corporations as legal entities would also be relevant with regard to international criminal responsibility of corporations.[1728] Lastly, a discussion with

---

[1724] Kevin Jon Heller, "The ICC, Continuing Crimes, and Lago Agrio", http://opiniojuris.org/2014/10/28/icc-prosecute-chevron-officials-damage-lagio-agrio/?utm_source=feedburner&utm_medium=email&utm_campaign=Feed%3A+opiniojurisfeed+%28Opinio+Juris%29, accessed on 01.06.2015.

[1725] **ibid.**

[1726] See, *inter alia*, ICC Statute, 1926 Convention to Suppress the Slave Trade and Slavery, 1974 International Convention on the Suppression and Punishment of the Crime of Apartheid.

[1727] Historically, corporations were not accepted as entities having an independent will or a criminal mind, which prevented the conviction of legal persons under domestic law systems. See the maxim "*societas delinqere non-potest", i.e.* associations cannot commit crimes. Similarly, the famous saying of the Lord Chancellor of England, Edward, First Baron Thurlow reflects the understanding with regard to corporate criminality in a time of ecclesiastical courts: "*Did you ever expect a corporation to have a conscience, when it has no soul to be damned, and no body to be kicked?*" see in C. Jr. Coffee, "'No Soul to Damn, No Body to Kick': An Unscandalized Inquiry into the Problem of Corporate Punishment", **Mich. Law Rev.**, Vol. 79, 1981, p. 386. However, today, the legal systems are evolving as to encompass corporations as subjects of criminal law. For example, Australia, Belgium, Canada, China, France, India, Japan, the Netherlands, Norway, South Africa, Switzerland, UK and the U.S. are among the states where the corporations can be held criminally liable for their acts and/or omissions. On the other hand, there is still a considerable number of States, which accepts criminal responsibility only for real persons.

[1728] For example, prohibition of mass punishments and the individuality of punishments shall be carefully taken into consideration when holding that a corporation is 'criminal' as a legal entity. Nazi Conspiracy and Aggression, Opinion and Judgment, US Government Printing Office, Washington,

regard to the legal character of the sanctions imposed on corporations would be meaningless, since there is no distinction between the sanctions of administrative law and criminal law in international law.[1729]

Individuals have international criminal responsibility for the acts that amount to an international crime defined under the Statute of the ICC. Therefore, as it is emphasized above, war crimes, crimes of genocide and crimes against humanity can be committed by non-state actors. The only exception is the crime of aggression, which can solely be perpetrated by State actors. Moreover, human rights violations, such as murder, rape, forced prostitution, torture[1730] and arbitrary detention of civilians, which are committed as a part of the crimes of genocide or war crimes are regarded as violations of international humanitarian law if they are committed within

---

1947, p. 85-86. Kamatali mentions that the arguments on the philosophy of responsibility such as individualism, deterrence and retribution, which used to be asserted for limiting criminal responsibility with individuals, could be used to justify criminal responsibility of legal persons as well. Kamatali, **op. cit.** p. 448. Furthermore, Ramasastry argues that even if the individual, who is responsible for the commission of a crime has been punished and expelled from the corporation, the corporation may continue its existence and its wrongful conduct. To add, the deterrent effect of individual responsibility may not deter the corporation from future misconduct. Ramasastry, Anita. **op. cit.**, p. 96.

[1729] Larissa van den Herik, "Corporations as Future subjects of International Criminal Court: An Exploration of the Counterarguments and Consequences" in Stahn & van den Herik (eds.), **Future Perspective**…, p. 366.

[1730] It should be noted that the definition of torture in human rights law is different than that of the humanitarian law. Article 1 of 1984 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment defines the crime of torture as "*any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions. 2. This article is without prejudice to any international instrument or national legislation which does or may contain provisions of wider application."* International humanitarian law does not require any State action or presence of any state official in commission of the crime of torture for punishing those responsible for the criminal conduct. The ICTY in Furundzija case held that: "*the elements of the offence of torture in an armed conflict require that torture: (i) consists of the infliction, by act or omission, of severe pain or suffering, whether physical or mental; in addition (ii) this act or omission must be intentional; (iii) it must aim at obtaining information or a confession, or at punishing, intimidating, humiliating or coercing the victim or a third person, or at discriminating, on any ground, against the victim or a third person; (iv) it must be linked to an armed conflict; (v) at least one of the persons involved in the torture process must be a public official or must at any rate act in a non-private capacity, e.g. as a de facto organ of a State or any other authority-wielding entity*." Judgement, Prosecutor v Furundžija, (IT-95-17/1-T), ICTY, 10 December1998, para. 162. See also Kadic v. Karadzic 1993 WL 385757 (S.D.N.Y. Sep. 24, 1993) (No. 93 CIV. 1163 (PKL), 93 CIV. 0878 (PKL)) and Filártiga v. Peña-Irala 630 F.2d 876 (2d Cir.1980).

the context of an armed conflict.[1731] Accordingly, no state involvement is required for holding individuals criminally responsible for such crimes.

Clapham underlines that even though it would be regarded as more appropriate to impose civil law remedies on TNCs, criminal law should still be considered as a complementary tool for preventing human rights violations and for ameliorating the international peace and justice, especially when international crimes are concerned.[1732] In this way, both States and other TNCs or local companies may become reluctant to enter into business relationships with a corporation, which supposedly engages in criminal activities that may be subject to a national or international prosecution in the future. Such a criminalization would also have a deterrent effect and it would push legal persons to act with greater caution, fully considering the effects of their decisions in their area of operation.[1733] Furthermore, consequences of a criminal conviction on the ground of commission of an international crime and a civil court decision merely on reparation would affect the public opinion and consumer behaviour differently.[1734] Finally, in cases where the real person is out of financial resources for compensating the victim of the international crime, holding the legal person liable of the criminal act would allow us to obtain a fast and effective relief for the harm suffered by the victim.[1735]

However, existence of 'group/organizational criminal responsibility' under international criminal law is a contested issue. For example, Articles 9 and 10 of the Charter of the International Military Tribunal were authorizing the International Military Tribunal for Nuremberg (IMT) to try both individuals and groups or organizations for committing the international crimes listed under the Charter.[1736]

[1731] Koebele, **op. cit.**, p. 251.

[1732] Clapham, especially inquires into the question of responsibility of corporations that construct mass graves, the Rwandan radio station which urged the killing of Tutsis, and the coffee companies that stored arms and other equipment used in the commission of the crime of genocide in Rwanda. Clapham, "The Question of Jurisdiction…", p. 139, 147, 148.

[1733] **ibid**.

[1734] **ibid**., p. 140. Clapham adds that by holding corporations criminally responsible before an international court, the victim(s) of an international crime perpetrated by a powerful TNC would not be left alone before a civil court and with the burden of proof put on their shoulders.

[1735] **ibid**., p. 147.

[1736] The Nuremberg Trials of the Major War Criminals were held before the IMT, which was composed of the judges of the Allied Forces (*i.e.* the U.S., China, Russia and France). The following trials were proceeded before the U.S. Nuremberg Military Tribunals (NMT), which was established in accordance with the Control Council Law No. 10 empowering each "occupying authority" to try

Thus, the IMT had the power to declare an organization 'criminal' (Article 9) and such a decision was not questionable by any other international, national or military court (Article 10).[1737] However, this example does not allow us to conclude that the criminal responsibility of legal persons is recognized under international law. Despite the express reference to 'criminal organizations', the Nuremberg Tribunal did not have jurisdiction over legal persons.[1738] As the IMT affirmed, the term 'criminal organization' has been used analogous to 'criminal conspiracy', which implies cooperation between persons having a criminal and common purpose.[1739]

As Nerlich concludes in his article that the issue of international criminal liability of TNCs is *de lege ferenda* and not *de lege lata*.[1740] However, he also underlines that the jurisdiction of international courts over legal persons is one question and the existence of substantive norms of international law penalizing TNCs for core crimes is quite another.[1741] According to this, a norm "*would lie dormant, but it could be activated, without breach of the nullum crimen principle, through the establishment of a court or tribunal vested with jurisdiction over transnational business corporations.*"[1742] This argument is in line with the evolution of international law, which demonstrates a tendency to broaden its scope of application.[1743] However, there is no express substantive norm, whether conventional or customary international law, criminalizing or penalizing the conducts of TNCs.[1744]

---

suspects of war criminals in the occupied territories. Twelve trials were brought before the U.S. Nuremberg Military Tribunal, which was composed of only U.S. judges and prosecutors.

[1737] See also Control Council Law No 10, Punishment of Persons Guilty of War Crimes, Crimes against Peace and Against Humanity, 20 December 1945, 3 Official Gazette Control Council for Germany 50-55 (1946).

[1738] Gatto, **op. cit.**, p. 74; Nerlich, **op. cit.**, p. 898.

[1739] Nazi Conspiracy and Aggression, Opinion and Judgment, US Government Printing Office, Washington, 1947, p. 86.

[1740] Nerlich, **op. cit.**, p. 898.

[1741] Nerlich mentions that a norm of criminal law consists of two sub-norms: 1. prohibition of an act, 2. penalization of this act. Nerlich, **ibid.,** p. 898.

[1742] **Ibid**. 1968 Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity Article 1(b) supports this argument, which reads: "*"No statutory limitation shall apply to the following crimes, irrespective of the date of their commission ... (b) Crimes against humanity whether committed in time of war or in time of peace ...".* Cerone, **op. cit.**, p. 25.

[1743] Nerlich, **op. cit.**, p. 899.

[1744] However, Article 2 of the 1999 UN Convention on the Suppression of the Financing of Terrorism and the UN Security Council Resolution 1373(2001) obliges states to criminalize financing of terrorism and to adopt measures to that effect against not only the natural persons but also the legal persons in their territories. To add, international treaties concerning environmental protection, prevention of corruption and transnational organized crimes may also be relevant. Boister, names such crimes regulated under separate treaties as 'transnational crimes', which is a different concept than 'international crimes'. Boister, Neil. "Transnational Criminal Law", **EJIL**, Vol. 14, No.5, pp. 953-976.

Nevertheless, according to Nerlich, the post-World War II cases imply a prohibition of conducts constituting core crimes and violations of peremptory norms.[1745] For example, prohibition of slavery is a binding international norm on corporations even if it is currently not possible to try such a conduct before an international court.[1746]

5.2. Trials of the Industrialists before the Nuremberg Tribunals

During the Nuremberg trials, it was confirmed that international law is binding upon private individuals regardless of existence of any public authority or official status of the individual, who committed an international crime.[1747] The Nuremberg trials are important in the sense that they reflect customary international law, since at the time of the proceedings, there was no treaty provision empowering the international judge to try the individuals who were responsible for the commission of international crimes. The IMT expressly underlined the legal fact that "*international law imposes duties and liabilities upon individuals as well as upon States has long been recognised*"[1748] and "*criminal sanctions of international law are applicable to private individuals.*"[1749] Therefore, becoming and remaining members to a criminal organization with the knowledge that that organization was being used for the commission of crimes would give rise to international criminal responsibility, except for cases in which the individual did not actually commit any international crime and had no other choice but to join the organization due to State pressure.[1750] Therefore, a mere membership to a criminal organization would not be sufficient to hold an individual criminally responsible for the crimes committed within the group's or

---

[1745] Nerlich, **op. cit.**, p. 898-901.
[1746] **ibid.**, p. 899.
[1747] Transcript of Proceedings, Nuremberg Tribunal, 41 **Am. J. Int'l. L. Supp.** 172 (1947); Principles of International Law Recognized in the Charter of the Nuremberg Tribunal and in the Judgment of the Tribunal, adopted 2 August 1950, principle 1, UN Doc.A/1316, rep. in 2 **Y.B. Int'l L. Comm'n** 374 (1950); Affirmation of the Principles of International Law Recognized by the Charter of the Nuremberg Tribunal, UN GOAR, GA Res. 95(1), UN Doc. A/64/Add.1. at 188; Case No. 48, Trial of Friedrich Flick and Five Others, 20th April-22nd December, 1947, on Liability of War Crimes, Crimes against Humanity and Membership of Criminal Organizations of Leading German Industries, Vol. VI, pp. 1191-1192.
[1748] *Trial of Major War Criminals (Goering et al.)*, IMT (Nuremberg), Judgment and Sentence, 30 September and 1 October 1946, Vol. I, p. 223; See also Case No. 48, Trial of Friedrich Flick and Five Others (20th April-22nd December, 1947) on Liability of War Crimes, Crimes against Humanity and Membership of Criminal Organizations of Leading German Industries, Vol. 9 Law Reports of the Trials of War Criminals, p. 1125. The Tribunal referred to a judgment by the U.S. Supreme Court as an evidence of this customary law rule, where the Court held that the law of war imposes duties on enemy nations and enemy individuals: *Ex Parte Quirin (1942, 317 U.S. I, 63 S.Ct. 2, 87 L. Ed. 3).*
[1749] Case no 57, I.G. Farben case, p. 1191.
[1750] Trial of Friedrich Flick and Five Others, p. 28.

organization's context.[1751] Having said that, the conclusions of the Nuremberg Tribunals is not so clear-cut when it comes to the responsibility of criminal organizations in general, and of corporations in particular. The trials of the industrialists of the Nazi era are significant in finding out the approach of the Nuremberg Tribunals regarding corporate criminal responsibility.[1752]

The Nuremberg Tribunals did not declare any organization criminal as a whole in a way that would result in the collective responsibility of the members of the organization for merely being 'members'.[1753] Instead, it held only certain groups of persons within an accused organization responsible for either being directly involved in the commission of the criminal activities (Article 6 of the Nuremberg Charter) or solidarizing the commission of the criminal activities by becoming and continuing to be members of the organization.[1754] For example, in *Nazi Conspiracy and Aggression* case, the IMT concluded that *Das Corps der politischen Leiter der Nationalsozialistischen Deutchen Arbeiterpertei* (the Leadership Corps of the Nazi Party), *Die Schutzstaffeln der Nationalsozialistischen Deutschen Arbeiterpartei*, including *Die Sicherheitsdienst* (the SS and the SD), and *Die Geheime Staatspolizei* (Secret State Police, *i.e*. the Gestapo) had certain 'criminal groups' within them. In the end, no real person was found guilty of merely being a member to the groups declared criminal by the Tribunal. The IMT added that the members of these criminal groups were guilty if they became or remained members of the organization *"with knowledge that it was being used for the commission of the acts declared criminal by Article 6 of the Charter"* or *"were personally implicated as members of the organisation in the commission of such crimes."*[1755]

[1751] Nazi Conspiracy and Aggression, Opinion and Judgment, US Government Printing Office, Washington, 1947, p. 86. *cf.* Control Council Law No.10, Article II,(1)(d) explicitly mentioned that "*Membership in categories of a criminal group or organization declared criminal by the International Military Tribunal*" is a crime.

[1752] See below, Flick, I.G. Farben and Krupp cases.

[1753] Report by J. Spiropoulos, Special Rapporteur, on Draft Code of Offences against the Peace and Security of Mankind, Doc. A/CN.4/25 in UN **Y.B. Int'l L. Comm'n,** Vol. II, 1950, A/CN.4/SER.A/1950/Add.1, p. 260, para. 50.

[1754] **ibid.**

[1755] *Nazi Conspiracy and Aggression, Opinion and Judgment. United States Government Printing Office, Washington, 1947, p. 85-86, 102-104.* See also "The Charter and the Judgment of the Nürnberg Tribunal – History and Analysis", Memorandum submitted by the Secretary General, A/CN.4/5, 1949.

The case of Friedrich Flick and Five others illustrates the approach adopted by the U.S. Military Tribunal concerning the responsibility of corporations. Friedrich Flick was the dominant active head of a chain of industrial enterprises involved in production and manufacturing of coal, iron and steel.[1756] During World War II, the Flick enterprises, with the support of the Government, gained power and dominated the military economy. Flick was also a member of the official body responsible for regulating the mine industry. He and other five defendants were accused of slavery and forced labour. Exploitation of public and private properties in the occupied territories was another accusation directed at Flick. Additionally, committing crimes against humanity by economically pressuring the Jewish industries and providing financial support to the S.S. were among other allegations. The Tribunal dismissed the allegations on the commission of crimes against humanity. However, the case resulted in the conviction of Friedrich Flick for employment of slave labour and providing financial support to the S.S. with the knowledge of their criminal activities, which amounted to war crimes.[1757] The Tribunal found *"that knowledge of these criminal activities was sufficiently general to justify declaring that the S.S. was a criminal organisation ...* ".[1758] The Nuremberg Tribunal concluded that it lacked jurisdiction to try a corporation, even if an organization may be held criminally responsible.[1759] As de Schutter comments, even if the Tribunal had the legal tool for holding the corporation 'as such' criminally responsible for international crimes and declare it a 'criminal organization', it preferred to underline that the crimes could only be committed by real persons, and not by abstract entities.[1760] Thus, The

---

[1756] Other defendants were also the highest ranked officials of various enterprises operating in the chain.

[1757] Case No. 48, Trial of Friedrich Flick and Five Others, p. 7, 9, 10, 28. The Tribunal concerning the deployment of Russian prisoners of war rejected the arguments of state of necessity and held that "*the steps taken in this instance were initiated not in Government circles, but in the plant management. Moreover, the evidence showed that these steps were taken not as a result of compulsion or fear, but admittedly for the purpose of keeping the plant as near capacity production as possible.*" However, regarding four of the defendants, the Tribunal accepted the defence of necessity and the fear of loss of life as a legitimate ground for precluding responsibility in accepting slave labour. The Tribunal concluded that "*It was known that any act that could be construed as tending to hinder or retard the war economy programmes of the Reich would be construed as sabotage and would be treated with summary and severe penalties, sometimes resulting in the imposition of death sentences.*" The judgment continued by stressing that no active steps were taken by the four defendants for the employment of slave labour.

[1758] **ibid.**.

[1759] Charter of the International Military Tribunal Articles 9 and 10. Gatto, **op. cit.**, p. 92.

[1760] de Schutter adds that not only the IMT of Nuremberg, but also the other Allied Tribunals established under the Control Council Law No.10 did not hold the corporations responsible, despite finding the officers of the corporation criminally responsible for international crimes. de Schutter, "The Accountability of Multinationals…", pp. 231-232. See *Trial of Major War Criminals (Goering et al.)* and I.G. Farben case.

Tribunal concluded that the international judge could enforce international law only by punishing the individuals who have committed such crimes.[1761]

The I.G. Farben case (Carl Krausch and 20 others) involved I.G. Farben and its subsidiary Degesch, which manufactured Zyklon B gas and provided tools such as coal to Germany for waging war.[1762] The indictment also included allegations of use of the inmates and civilians as slave workers at the plant they constructed near Auschwitz, crimes of terrorisation, torture, killings, plunder and spoliation of invaded countries, production and supply of drugs and poison gas (Zyklon B) for experimental and extermination purposes amounting to war crimes and crimes against humanity. In the judgment, it is mentioned that: "*While the Farben organisation, as a corporation, is not charged under the indictment with committing a crime and is not the subject of prosecution in this case, it is the theory of the prosecution that the defendants individually and collectively used the Farben organisation as an instrument by and through which they committed the crime enumerated in the indictment. All the members of the Vorstand or governing body of Farben who were such at the time of the collapse of Germany were indicted and brought to trial.*"[1763]

The Tribunal held that: "*It is appropriate here to mention that the corporate defendant, Farben, is not before the bar of this Tribunal and cannot be subjected to criminal penalties in these proceedings. We have used the term 'Farben' as descriptive of the instrumentality of cohesion in the name of which the enumerated acts of spoliation were committed. But corporations act through individuals and, under the conception of personal individual guilt to which previous reference has been made, the prosecution, to discharge the burden imposed upon it in this case, must establish by competent proof beyond a reasonable doubt that an individual defendant was either a participant in the illegal act or that, being aware thereof, he authorized or approved it.*"[1764]

[1761] *Trial of Major War Criminals (Goering et al.)*, p. 223.
[1762] Case no. 57, The I.G. Farben Trial, (Trial of Carl Krauch and twenty-two others), U.S. Military Tribunal, Nuremberg, 14 Aug. 1947-29 July 1948, Law Reports of Trials of War Criminals, Vol. VIII, pp. 1-67.
[1763] **ibid.,** p. 1108.
[1764] **ibid.,** p. 52.

In this context, it should also be underlined that the motive of the company, *i.e.* maximization of profit, and its unjust enrichment constituted parts of the crime and violated the right to private property protected under the Laws and Customs of War and the Hague Regulations.[1765] The Tribunal held that *"Commercial transactions entered into by private individuals which might be entirely permissible and legal in time of peace or nonbelligerent occupation may assume an entirely different aspect during belligerent occupation and should be closely scrutinized where acquisitions of property are involved, to determine whether or not the rights of property, protected by the Hague Regulations, have been adhered to. Application of these principles will become important in considering the responsibility of members of the Vorstand of Farben, who are sought to be charged under the indictment, and who did not personally participate in the negotiations or other action leading to the alleged act of spoliation except by virtue of such Vorstand membership."*[1766] In the end, thirteen of the accused were sentenced to imprisonment. Clapham comments that the judgment of the U.S. Military Tribunal in the *Farben* case could be interpreted as a conviction of *Farben* as a company (organization or group).[1767] Thus, corporations shall be regarded as capable of violating the laws of war and the Hague Regulations. Consequently, the individuals, who knowingly participated in the violation of the Hague Regulations,[1768] were convicted under the Control Council Law No. 10, Article II(2)(e) for being members of the organization *'Farben'*, a company connected with the commission of war crimes.[1769]

Krupp trial concerns allegations of providing arms to the German military troops, actively planning, participating in the preparations of, initiating and waging aggressive war and crimes against peace, using slave labour in the Krupp Holding, participating in the crimes against humanity including murder, extermination, enslavement, deportation, imprisonment and torture of civilians.[1770] The Tribunal, referring to an 'authoritative' American scholarly text, held that the principle of

[1765] Int'l L. Rep. (1948) at p. 676; Trials of War Criminals, Vol. VIII, **op.cit**. n. 53 at p. 1140. See also Clapham, "The Question of Jurisdiction…", p. 169.
[1766] "Vorstand" is the managing body of the corporation. I.G. Farben case, p. 1136.
[1767] Clapham, "The Question of Jurisdiction…", pp. 167, 170-171. On the same point, *see* Ramasastry, **op. cit.**, p.107.
[1768] *i.e.* acquisition of permanent property interests by plundering and spoliation in connection with the proceedings conducted by Farben.
[1769] Clapham, "The Question of Jurisdiction…", p. 170.
[1770] Case No. 58, The Krupp Trial, Trial of Alfred Felix Alwyn Krupp von Bohlen und Halbach and eleven others, U.S. Military Tribunal, Nuremberg, 17th November 1947 -30th June 1948.

individual criminal responsibility of officers, directors or agents of a corporation participating in the violation of laws of war shall apply in the case of Krupp, too. That is to say, even if they could not be held liable for the criminal acts of other persons related to the corporate activities, the individuals who actually and personally participated, directed or permitted the commission of crimes with the guilty knowledge or criminal intent shall be convicted.[1771] As Ramasastry mentions, while the S.S. offered the inmates held in the concentration camps to the armaments industry, the industrialist (*i.e.* Krupp firm) by knowingly and intentionally submitting their requests for free labour have been complicit in the commission of international crimes.[1772]

The U.S. Military Tribunal held that "*...it was not a matter of refusing to accept an allocation. It was up to the enterprises to put in requests. Many armament firms refused. The Krupp firm sought concentration camp labor because of the scarcity of manpower then prevailing in Germany.*"[1773] Finally, the Tribunal concluded that "*… the confiscation of the Austin plant based upon German-inspired anti-Jewish laws and its subsequent detention by the Krupp firm constitute a violation of Article 48 of the Hague Regulations which requires that the laws in force in an occupied country be respected; that it was also a violation of Article 46 of the Hague Regulations which provides that private property must be respected; that the Krupp firm, through defendants Krupp, Loeser, Houdremeont Mueller, Janssen and Eberhardt, voluntarily and without duress participated in these violations… and that there was no justification for such action*."[1774]

Special Rapporteur Spiropoulos in his Report on Draft Code of Offences against the Peace and Security of Mankind elaborated on the theoretical discussions on holding organizations, including corporations, criminally responsible in the

---

[1771] Krupp trial, p. 150. "*When the corporation itself is forbidden to do an act, the prohibition extends to the board of directors and to each director, separately and individually*". Corpus Juris Secondum, Vo.19, p. 363, American Law Book Co., (1940), Brooklyn, N.Y. (cited in the original text)

[1772] Put it differently, the Krupp firm "planned, desired, and sought forced labor or engaged in plunder and pillage" and became indirectly complicit in the commission of slavery and forced labour. Ramasastry, **op. cit.**, p.112.

[1773] Krupp trial, para. 1412. Furthermore, the Tribunal refused the defence of necessity, which was based on the fear that if the industrialists refused the free labour offer, the S.S. would confiscate their factories and properties, on the ground that fear of loss of property was not a legitimate ground for precluding responsibility. Ramasastry, **op. cit.**, p. 112, 117.

[1774] Krupp Trial, paras. 1351-1352.

international arena.[1775] He drew attention to the fact that while the Nuremberg Charter authorized the IMT to declare an organization criminal, it did not envisage any penal sanctions.[1776] The only consequence of such a declaration under the Charter was holding the individual responsible for membership to the criminal organization and of its criminal activity.[1777] Consequently, Spiropoulos, in his report dated 1950, concluded that since at that time neither the Nuremberg Tribunal nor the national courts, except for rare cases, recognized criminal responsibility of legal persons, the organizations could not be regarded as subjects of international law for the purposes of imposing international sanctions and punishment for the international crimes they committed.[1778] Nevertheless, the concepts of conspiracy and complicity would fill the legal gap that may rise from the lack of criminal responsibility of organizations.[1779]

5.3. Jurisdiction of the ICC and Responsibility of Legal Persons

Debates concerning the criminal responsibility of organizations and jurisdiction of international courts over legal persons date back to the drafting process of the Convention on The Establishment of an International Penal Tribunal for the Suppression and Punishment of the Crime of Apartheid and Other International Crimes. Although the Draft Convention was never adopted, the crime of apartheid has been included in the Statute of the ICC as a form of crime against humanity. Article 1(2) of 1974 International Convention on the Suppression and Punishment of the Crime of Apartheid requires States Parties to declare that the organizations, institutions and individuals committing the crime of apartheid are criminals.[1780] Article 3 holds that individuals, members of organizations and institutions and representatives of States shall have international criminal responsibility for the acts of apartheid they commit, participate in, directly incite, conspire, directly abet, encourage or cooperate in the commission of the crime.

[1775] Report by J. Spiropoulos, Doc. A/CN.4/25 in UN Y.B. Int'l L. Comm'n Vol. II, 1950, A/CN.4/SER.A/1950/Add.1, p. 260, paras. 47-52.
[1776] **ibid.**, para. 48.
[1777] Art. 10 of the Nuremberg Charter; Report by J. Spiropoulos, Special Rapporteur, on Draft Code of Offences against the Peace and Security of Mankind, Doc. A/CN.4/25 in UN Y.B. Int'l L. Comm'n Vol. II, 1950, A/CN.4/SER.A/1950/Add.1, p. 260, para. 49.
[1778] Report by J. Spiropoulos, Doc. A/CN.4/25 in UN Y.B. Int'l L. Comm'n Vol. II, 1950, A/CN.4/SER.A/1950/Add.1, p. 260, para. 51.
[1779] **ibid.**, para. 52.
[1780] G.A. res. 3068 (XXVIII)), 28 U.N. GAOR Supp. (No. 30) at 75, U.N. Doc. A/9030 (1974), 1015 U.N.T.S. 243, entered into force July 18, 1976.

Article 4 of the Draft Convention on The Establishment of an International Penal Tribunal for the Suppression and Punishment of the Crime of Apartheid and Other International Crimes provided that "[t]*he Tribunal shall have universal jurisdiction with respect to the investigation, prosecution, adjudication and punishment of persons and legal entities accused or found guilty of those crimes which are within its jurisdiction*".[1781] Article 5 of the Draft Convention expressly conferred jurisdiction to the Tribunal to try any legal entity accused or guilty of the crime of apartheid and any other international crime, which may be provided for by a Supplemental Agreement. The jurisdiction of the Tribunal over legal entities has been confirmed under Article 6, which stipulated that "[t]*he Tribunal shall exercise its jurisdiction over natural persons and legal entities as defined in Article XX*".[1782] Article 20(5) defined the term entity so as to include groups, organs of state, states or groups of states. To add, fines and injunctions restricting legal persons from engaging in certain conduct or activities have been adopted as sanctions under Article 7. Finally, Article 21(4) of the Draft Convention recognized collective responsibility and provided that:

> *"a. A group or organization other than a state or an organ of a state is collectively responsible for its acts, irrespective of the responsibility of its members.*
>
> *b. A person is responsible for crimes committed by a group or organization, if he knew of or could reasonably foresee the commission of such crime and remained a member thereof."*

Bassiouni and Derby comments that the responsibility of corporate entities and States shall be deemed as 'quasi-criminal' "for which fines and punitive damages are the appropriate remedies".[1783] The Final Report also noted that:

[1781] Cherif Bassiouni & Daniel H. Derby, "Final Report on The Establishment of an International Criminal Court for the Implementation of the Apartheid Convention and Other Relevant International Instruments", **Hofstra L Rev.**, Vol. 9, 1980-1981, p. 547 *et seq*.

[1782] Article 20(4) underlined that the words "group" and "organization" are used interchangeably as to refer to a group consisting of "more than one person, acting in concert with respect to the performance of a particular act".

[1783] Article 24(3) of the Draft Convention provides that "*a. Penalties for crimes for which groups are collectively responsible under Article XXI, Para. 4 shall consist of fines or other sanctions established in accordance with the principle of proportionality set forth in Paragraph 1 of this Article and as promulgated by the Rules of the Court. b. Fines shall be collectively levied against the assets of group*

> *"Surprisingly, perhaps, one of the most promising areas for deterring apartheid may be in connection with transnational corporations (TNCs). Because TNCs may have property in the territory of States Parties to the Draft Convention and Protocol, the threat of fines to be levied against such property may be a very real and effective deterrent. In the face of such a threat, TNCs could be forced to choose between dealing with States with a policy of apartheid and States-Parties to the Draft Convention and Protocol.*
>
> *One major qualification must be stated, however. Further elaboration is required before any process against TNCs could be attempted to distinguish between corporate policy that in fact aids apartheid and employees who may or may not be part of that decision-making process, and corporate policy that in fact defeats apartheid."*[1784]

As mentioned above, the Draft Convention on The Establishment of an International Penal Tribunal for the Suppression and Punishment of the Crime of Apartheid and Other International Crimes was never adopted. Accordingly, currently, there is no international court or tribunal that has criminal jurisdiction over legal persons. Article 25 of the Rome Statute expressly provides that the ICC has jurisdiction only over natural persons, excluding any possibility for trying legal persons. However, the discussions and arguments brought during the drafting process of the Rome Statute proves that there is a high potential of recognition of international criminal responsibility for legal persons by the international community.[1785] In the Draft Statute of the ICC, it was proposed to insert a paragraph in Article 25 (Article 23 in the draft), allowing the Court to try 'legal persons, with the exception of States, if the crimes were committed on behalf of such legal persons

---

and individual participants and enforced by the States-Parties wherein such assets may be found." M. Bassiouni & Derby, **op. cit.**, p. 540.

[1784] **ibid.,** p. 543.

[1785] Reinisch, **op. cit.**, p. 87.

or by their agents or representatives'.[1786] However, the proposals were rejected on the ground that the time was very limited to comprehensively discuss such a complex technical issue, where there was a deep divergence of views.[1787]

For example, the ICRC proposed the following sub-paragraphs to be inserted in the draft text of the ICC Statute:

> ***ICC Draft Statue Article 23(5):*** *The Court shall have jurisdiction over legal persons, with the exception of States, when the crimes committed were committed on behalf of such legal persons or by their agencies or representatives.*
>
> ***ICC Draft Statute Article 23(6):*** *The criminal responsibility of legal persons shall not exclude the criminal responsibility of natural persons who are perpetrators or accomplices in the same crimes.*
>
> ***ICC Draft Statute Article 76:*** *Penalties applicable to legal persons*
>
> *A legal person shall incur one or more of the following penalties:*
>
> *(i) Fines;*
>
> *[(ii) Dissolution;]*
>
> *[(iii) Prohibition, for such period as determined by the Court, of the exercise of activities of any kind;]*

[1786] UN Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, Rome, Italy, 15 June - 17 July 1998, Report of the Preparatory Committee on the Establishment of an International Criminal Court, UN Doc. A/CONF.183/2/Add.1, 14 April 1998, p. 31 proposal for Art 25(5). See also 1995 Report of the Ad Hoc Committee on the Establishment of an International Criminal Court, U.N.Doc. A/50/22, at 58.

[1787] While Rwanda, France, Italy, Portugal, Solomon Islands, Egypt, Tanzania, and Libya supported the proposal on the inclusion of criminal responsibility of legal persons; Belgium, Colombia, Venezuela, Sweden, Switzerland, Austria, Japan, Finland and Norway objected. Also as Clapham mentions states such as Thailand, UK and South Africa showed genuine attempts to discuss the issue during the negotiating process. Clapham, "The Question of Jurisdiction…", p. 158; UN Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, Rome, 15 June-17 July 1998, Official Records, Vol. III, A/CONF.183/13(Vol. Ill), Reports and Other Documents, 2002, Report of the Preparatory Committee on the Establishment of an International Criminal Court, p. 31, fn. 71.

[(iv) Closure, for such a period as determined by the Court, of the premises used in the commission of the crime;]

[(v) Forfeiture of [instrumentalities of crime and] proceeds, property and assets obtained by criminal conduct;] [and]

[(vi) Appropriate forms of reparation.][1788]

*[**Article 99** Enforcement of fines and forfeiture measures*

1. States Parties shall [in accordance with their national law,] enforce fines and forfeiture measures [and measures relating to compensation or [restitution] [reparation]] as fines and forfeiture measures [and measures relating to compensation or [restitution] [reparation]] rendered by their national authorities.

[For the purpose of enforcement of fines, the [Court] [Presidency] may order the forced sale of any property of the person sentenced which is on the territory of a State Party. For the same purposes, the [Court] [Presidency] may order the forfeiture of proceeds, property and assets and instrumentalities of crimes belonging to the person sentenced.]

[Decisions by the Presidency are implemented by States Parties in conformity with their domestic laws. [The provisions of this article shall apply to legal persons.]]

2. Property, including the proceeds of the sale thereof, which is obtained by a State Party as a result of its enforcement of a judgement of the Court shall be handed over to the [Court] [Presidency] [which will dispose of that property in accordance with the provisions of article 79 [paragraph 5 of article 54].][1789]

France also proposed the recognition of jurisdiction of the ICC on legal persons. The initial proposal of France to insert two sub-paragraphs in the text of

[1788] **ibid.**, p. 63.
[1789] **ibid.,** p. 77, (footnotes omitted).

draft Article 23 resembled very much Articles 9 and 10 of the Charter of Nuremberg Tribunal and was inspired by the French criminal law:[1790]

> ***ICC Draft Statue Article 23(5):*** *When the crime was committed by a natural person on behalf or with the assent of a group or organization of every kind, the Court may declare that this group or organization is a criminal organization.*
>
> ***ICC Draft Statue Article 23(6):*** *In the cases where a group or organization is declared criminal by the Court, this group or organization shall incur the penalties referred to in article 76, and the relevant provision of articles 73 and 79 are applicable.*
>
> *In any such case, the criminal nature of the group or organization is considered proved and shall not be questioned, and the competent national authorities of any State party shall take the necessary measures to ensure that the judgement of the Court shall have binding force and to implement it.*
>
> *[**ICC Draft Statue Article 76** Penalties applicable to criminal organizations*
>
> *A criminal organization shall incur one or more of the following penalties.*
>
> *(i) Fines;*
>
> *(ii) (Deleted)*
>
> *(iii) (Deleted)*
>
> *(iv) (Deleted)*
>
> *(v) Forfeiture of [instrumentalities of crime and] proceeds, property and assets obtained by criminal conduct;] [and]*
>
> *[(vi) Appropriate forms of reparation].]*

[1790] France: Proposal regarding Article 23, Individual criminal responsibility, legal persons, A/Conf.183/C.1/L.3, 16 June 1998.

Later, France developed another detailed proposal for the inclusion of legal persons in the provision concerning the jurisdiction of the Court. This latter proposal for holding legal persons criminally responsible resembled very much the concept of commander (superior) liability,[1791] since it required that the natural person, who committed the crime, was in a position of control within the juridical person and (s)he acted (1) on behalf of, and (2) with the explicit consent of the corporation, and (3) in the course of its activities.[1792] In other words, if a corporation were in a position of effective control on the acts and omissions of its employees, who were acting in relation to corporation's daily course of commercial activities or 'on behalf of' and 'in control of' the corporation, then the corporation should have prevented the crime, which it had knowledge of,[1793] by taking reasonable measures.[1794] Clapham explains the rationale of this requirement by pointing out that if the crime was committed without the consent of the corporation, out of the course of its activities, and for the sole benefit of the real person himself/herself, then the corporation should not be considered as the perpetrator of the crime but the victim of it.[1795]

Finally, for holding corporations criminally responsible for a crime, the actual perpetrator of the crime should be convicted. According to Clapham, although this prerequisite is not parallel with most of the national legislations,[1796] it resembles very much the text of Article 18 of the Council of Europe's Criminal Convention on Corruption, which requires the conviction of the natural person in a *leading position* and who has the power of *representation*, or *authority to take decisions*, or authority to exercise *control* or where there has been *lack of supervision* by that person

---

[1791] Clapham, "The Question of Jurisdiction…", pp. 152-153.

[1792] **ibid.,** p. 154.

[1793] Or, if the corporations explicitly or implicitly consented, accepted or acquiesced, authorized or approved the act or omission of its employee.

[1794] See the trials of business leaders *e.g.* Prosecutor v. Alfred Musema, Judgment and Sentence, (ICTR-96-13-T), 27 January 2000, para. 880 (see also ICTR-96-13-A Appeals Chamber, 16 November 2001); Judgment, Prosecutor v. Bagaragaza, (ICTR-05-86-S) Trials Chamber, 17 November 2009.

[1795] Clapham also refers to a U.S. case, where the court held that it must be beyond reasonable doubt that the acts of the employer, whether high ranked or low ranked, could be considered as the acts of the corporation. In reaching such a decision three factors should be evaluated: "(*1) the agent was acting within the course and scope of his or her employment, having the authority to act for the corporation with respect to the particular corporate business which was conducted criminally; (2) the agent was acting, at least in part, in furtherance of the corporation's business interests, and (3) the criminal acts were authorized, tolerated, or ratified by corporate management*." (Clapham refers to to State v. Christy Pontica-GMC Inc, 345 Nw. 2d 17 (Minn. S.C. 1984), per Simonett J. in Wells, Celia. "Corporations and Criminal Responsibility (1993), p. 118).

[1796] Clapham, "Extending Criminal Law…", p. 915.

(emphasis by Clapham).[1797] In other words, contrary to the notion of 'corporate crimes', in case of war crimes, crimes against humanity and genocide, the French delegation proposed that the criminal responsibility of the corporation would be an issue to be considered before the Court only if the individual is convicted by the ICC. This implies that after clearly establishing that the *mens rea* of the crime exists for the natural person, then the Court would assess whether the corporation was an 'accessory' to the individual's commission of the crime, *i.e.* whether the corporation has an 'accessorial liability' in the commission of the war crime, the crime against humanity or genocide.[1798]

The text of the French proposal is as follows:

> ***ICC Draft Statue Article 23(5)****: Without prejudice to any individual criminal responsibility of natural persons under this Statute, the Court may also have jurisdiction over a juridical person for a crime under this Statute.*
>
> *Charges may be filed by the Prosecutor against a juridical person, and the Court may render a judgement over a juridical person for the crime charged, if:*
>
> *a. The charges filed by the Prosecutor against the natural person and the juridical person allege the matters referred to in subparagraphs (b) and (c); and*
>
> *b. The natural person charged was in a position of control within the juridical person under the national law of the State where the juridical person was registered at the time the crime was committed; and*

[1797] Clapham adds that the element of "having the authority to act for the corporation with respect to the particular corporate business" does not require an authorization strictly given for that act, but only implies the necessity for the existence of a general authority that one could easily conclude that the employee was acting within the scope of his/her employment relationship. Accordingly, Clapham underlines that it is not an issue to be considered whether the individual agent was acting "*ultra vires* or unauthorized or contrary to corporate policy or to specific instructions given to the agent". Likewise, the national courts do not consider the mental state (intention) of the agent as a *sine qua non* element to be taken into account when deciding on the criminal responsibility of the corporation. Clapham, "The Question of Jurisdiction…", p. 153, fn 26; p. 155, fn. 33.

[1798] Nerlich, **op. cit.**, pp. 896-897, fn. 5; Clapham, "The Question of Jurisdiction…", p. 139 *et seq*., pp. 152-153.

c. The crime was committed by the natural person acting on behalf of and with the explicit consent of that juridical person and in the course of its activities; and

d. The natural person has been convicted of the crime charged.

For the purpose of this Statute, ''juridical person'' means a corporation whose concrete, real or dominant objective is seeking private profit or benefit, and not a State or other public body in the exercise of State authority, a public international body or an organization registered, and acting under the national law of a State as a nonprofit organization.

***ICC Draft Statue Article 23(6)**: The proceedings with respect to a juridical person under this article shall be in accordance with this Statute and the relevant Rules of Procedure and Evidence. The Prosecutor may file charges against the natural and juridical persons jointly or separately.*

The natural person and the juridical person may be jointly tried. If convicted, the juridical person may incur the penalties referred to in article 76. These penalties shall be enforced in accordance with the provisions of article 99.[1799]

***ICC Draft Statute Article 76**: Penalties applicable to juridical persons*

A juridical person shall incur one or more of the following penalties:

(a) Fines;

[1799] Working Paper on Article 23, paras. 5 and 6, A/Conf.183/C.1/WGGP/L.5/Rev.2, 3 July 1998. (footnotes omitted) Accordingly, even in case of recognizing the jurisdiction of ICC over legal persons, IGOs and NGOs are excluded form any trial before the ICC. Clapham, "The Question of Jurisdiction…", p. 156.

(b) Forfeiture of proceeds, property and assets derived directly or indirectly from that crime, without prejudice to the rights of bona fide third parties[1800]

In the Final Draft of the Rome Statute, none of the proposals were inserted in the text and the jurisdiction of the ICC over legal persons was outlawed.[1801] The finalized text of the Statute of ICC, as authenticated by the delegates, expressly recognized the jurisdiction of the ICC for only natural persons and excluded legal persons. Gatto comments that the efforts for the inclusion of legal persons under the jurisdiction of International Criminal Court came to a dead end due to legal problems on the definition of legal persons and the issue of collective responsibility.[1802]

Clapham, in his article dated 2000, argued the possibility for the amendment of the ICC Statute.[1803] Article 122 allows for proposing 'exclusively institutional' amendments in the Statute to be made any time. However, non-institutional amendments, such as insertion of criminal responsibility of legal persons in the text of Article 25, could only be considered at the Review Conference, which was going to be held after seven years of the entry into force of the Statute under Article 121. The Review Conference was held in 31 May-11 June 2010, in Kampala, Uganda; but no amendment proposal was made with regard to Article 25.[1804] Nevertheless, it is now possible to propose any amendment at any time under Article 123(2) of the ICC Statute.[1805] An amendment may be adopted by consensus, and if a consensus cannot be reached, two thirds of the majority of States Parties will be required. However, as Clapham rightfully mentioned, for making such an amendment, the political will of the States should evolve in that direction.[1806] Such an evolution could be achieved if the States and the international community acquire the perception that lack of

---

[1800] DOC.A/CONF.183/C.1/WGP/L.12, 2 July 1998. This proposal regarding Article 76 was supported by the following States: Belgium, Benin, Brazil, Burundi, Dominican Republic, Egypt, France, Oman, Portugal, Republic of Korea, Romania, Samoa, Slovenia, South Africa, Thailand, Togo, United Kingdom and Northern Ireland and United Republic of Tanzania.

[1801] William Schabas, **The International Criminal Court: A Commentary on the Rome Statute**, Oxford Commentaries on International Law, Oxford, 2010, pp. 425-427.

[1802] Gatto, **op. cit.**, p. 23, f.n. 71.

[1803] Clapham, "The Question of Jurisdiction…", p. 159.

[1804] Two important amendments were made by the Resolution adopted in the Conference, Article 8 was amended, and Article 8 and Articles 15 *bis* and Article 15 *ter* were inserted in the Rome Statute.

[1805] After the first period of seven years, if a State Party requests so, and the Secretary General of the UN approves this request, the Review Conference may be convened by a majority vote of the State Parties for considering any amendment.

[1806] Article 123(2) of the ICC Statute.

jurisdiction of international courts and tribunals over legal persons cause a manifest injustice. Nevertheless, as Clapham argued, corporations are already bound with the rules of international criminal law, even if they cannot be tried before the ICC.[1807]

Therefore, if the agents of a corporation intentionally commit each essential element of an international crime to the benefit of the corporation, the corporation shall be held criminally responsible for the commission of that crime.[1808] Clapham put that corporate crimes, such as corporate corruption, are already subject to rules of international law. Accordingly, there is no legal impossibility for legislating and criminalizing corporate crimes under international law. Clapham strengthened his point by arguing that the lack of ICC jurisdiction over corporations for crime of corruption does not devalue the force of international law of corruption for corporations. Likewise, even if the ICC is not empowered to try legal persons for international crimes, this does not allow us to conclude that corporations are not legally bound by the norms of international humanitarian law and international human rights law.[1809] Nevertheless, Clapham argued that "*the concept of criminalizing the individual participation in a crime committed by a collective entity is ... present and operative"* under Article 25(3)(d) of Rome Statute.[1810]

Alternatively, the concept of commander (superior) responsibility (ICC Statute Article 28) may be used as a tool for holding parent corporations for the crimes perpetrated by their employees, agents, sub-contractors and subsidiaries,[1811] who are under the effective command or authority and control of the corporation.[1812] If the corporation knew, or -owing to the circumstances at the time- should have known, or have consciously disregarded information that its employees or agents were committing or about to commit crimes, then the mental element of the crime should be regarded as present.[1813] In that case, the corporation would be liable for its failure to exercise proper control over its employees or to take all necessary and reasonable measures within its power to prevent or suppress the commission of the crime or to

---

[1807] Clapham, "The Question of Jurisdiction…", pp. 160-161.
[1808] Kenneth Scott & Laura Rhodes, "Corporate Social Responsibility and The Responsibility to Protect: Corporate Liability for International Crimes", Research Report, One Earth Future Project, p. 10.
[1809] Clapham, "The Question of Jurisdiction…", p. 178.
[1810] **ibid.**, p. 145.
[1811] Wells & Elias, **op. cit.**, p. 166.
[1812] *cf.* ICC Statute Article 28(a) and (b).
[1813] *cf.* ICC Statute Article 28(a)(i) and (b)(i).

submit the violations to the competent authorities for investigation and prosecution.[1814] Accordingly, commander responsibility is the responsibility for omission, *i.e.* failure to perform a certain duty in order to prevent or repress a crime committed by the persons under his/her effective command and control, or effective authority and control.[1815] However, it should be kept in mind that what the ICC Statute refers to is the responsibility of a "military commander" or "person effectively acting as a military commander". In case of the responsibility of TNCs, a "civil commander" would be at issue.

5.4. Obligation not to be Complicit

As analysed above, corporations are under an obligation not to directly violate human rights. Corporations are also under a secondary (indirect or derivative) obligation[1816] not to be complicit in the breaches of primary obligations and human rights violations perpetrated by Governments, public or private security forces and other armed or para-military groups. For example, 2011 Draft Articles on the Responsibility of International Organizations Article 11, which is similar to Article 16 of the ARSIWA, provides that international organizations shall be responsible for aiding or assisting the commission of internationally wrongful acts committed by either States or other international organizations, if: "*(a) the organization does so with knowledge of the circumstances of the internationally wrongful act; and (b) the act would be internationally wrongful if committed by that organization.*" A parallel provision may be envisaged for corporations, which aid and assist the commission of internationally wrongful acts or international crimes committed by other entities of international law.

Accordingly, the corporate due diligence process, examined under the fourth chapter, shall also encompass the accurate assessments for the potential or actual risks of being complicit in human rights abuses perpetrated by other parties.[1817] Corporations shall take every reasonable and appropriate measure to avoid complicity in human rights violations, for example, by effectively integrating

---

[1814] *cf.* ICC Statute Art. 28(a)(ii) and (a)(iii).
[1815] Cassese, **International Criminal Law**…, p. 205.
[1816] Clapham, **Human Rights Obligations**..., p. 232.
[1817] *e.g.* 2011 Ruggie Report, Guiding Principles on Business and Human Rights, Annex,II,B.17.

policies in the due diligence process[1818] and establishing a monitoring system to ensure compliance, even though such due diligence may not 'automatically and fully' absolve the corporation from responsibility.[1819]

The concept of corporate criminal complicity, having both legal and non-legal meanings, is a concept as vague as the criminal responsibility of corporations.[1820] Complicity is defined as indirect involvement in the human rights abuses by knowingly contributing to the commission of acts or omissions by third parties. However, the degree of involvement is a contested issue. For example, one of the soft law documents examined under the third chapter, the UN Guiding Principles legally exclude any benefit acquired by the corporation as a result of human rights abuses perpetrated by third party and categorizes such involvement as non-legal complicity.[1821] On the other hand, the UN Norms emphasize that corporations should act with *"...due diligence in ensuring that their activities do not contribute directly or indirectly to human rights abuses, and that they do not directly or indirectly benefit from the abuses of which they were aware or ought to have been aware*."[1822] Kofi Annan in his speech, which has triggered the Global Compact, suggested that TNCs could make sure that they are not complicit in human rights abuses and this suggestion became the second principle of the Global Compact.[1823] Involvement by a company in the commission of human rights abuses referred to in the Global Compact embrace all categories of complicity: *i.e.* direct, indirect and silent complicity.[1824]

[1818] A/HRC/8/16, Promotion and Protection of All Human Rights, Civil, Political, Economic, Social and Cultural Rights, including the Right to Development: Clarifying the Concepts of "Sphere of Influence" and "Complicity", Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, 15 May 20008, paras. 32, 59.

[1819] 2011 Ruggie Report, Guiding Principles on Business and Human Rights, Annex,II,B.17 and its Commentary.

[1820] Reinisch, **op. cit.**, p. 66.

[1821] 2011 Ruggie Report, Guiding Principles on Business and Human Rights, Annex,II,B.17.

[1822] Commentary to para.1 of the UN Norms on the Responsibilities of Transnational Corporations and Other business Enterprises with Regard to Human Rights.

[1823] Press Release, Secretary-General Kofi Annan, Secretary-General Proposes Global Compact on Human Rights, Labour, Environment, in Address to World Economic Forum in Davos, UN Press Release SG/SM/6881, 1 February 1999.

[1824] Commentary on Principle 2 of the Global Compact; Report of the UN High Commissioner for Human Rights to the 56th Session of the General Assembly, UN Doc. A/56/36/2001, 28 September 2001, paras. 109-111.

For the purposes of international criminal law, the person, who actually commits the crime by perpetrating every required act or omission under the law, is called the principal perpetrator of the crime. Legally, all other modes of participation amount to being complicit in the commission of the crime, and the person is called the accomplice. Article 25(3) of the ICC Statute, Article 7(1) of the ICTY Statute, Article 6(1) of the ICTR Statute and Article 6(1) of the Statute of the Special Court for Sierra Leone provides that planning, ordering, committing, aiding and abetting, instigating[1825] or assisting in any other way are various modes of participation in the commission of a crime. Article 2(3) of the 1996 Draft Code of Crimes against Peace and Security of Mankind adds that directly participating in planning or conspiring, and inciting to commit a crime are also other modes of participation.

All modes of participation require a direct and substantial contribution to the crime (*actus reus – guilty act*) with the intent to facilitate or encourage the commission of the crime or with the knowledge of the circumstances and consequences of the acts or omissions (*mens rea – guilty mind*) that would lead to an international crime. As confirmed in the jurisprudence of the international tribunals, the accomplice would be responsible for complicity in the commission or attempt of commission of a crime even if the principal perpetrator cannot be identified or is not found guilty.[1826] Furthermore, once the accomplice knowingly acted in a way that facilitates the commission of the crime, it would not be an important factor to be taken into account whether (s)he actually wished the commission of a crime: "*an indifference to the result of the crime does not of itself negate abetting. If one man deliberately sells to another a gun to be used for murdering a third, he may be indifferent about whether the third lives or dies and interested only the cash profit to be made out of the sale, but he can still be an aider and abettor.*"[1827] Similarly, the U.S. Courts underlined that under customary international law, "*there is no difference between amorality and immorality. One who substantially assists a violator of the law of nations is equally liable if he or she desires the crime to occur*

[1825] Instigation means urging or encouraging the perpetrator for the commission of the crime. In the ICC Statute Article 25, instead of the terms instigating, the terms of soliciting and inducing are used.
[1826] Judgment, Prosecutor v Jean Paul Akayesu (ICTR-96-4-T), Trials Chamber, 2 September 1998, para. 531. Andrew Clapham & Scott Jerbi, "Categories of Corporate Complicity in Human Rights Abuses", **Hastings Int'l & Comp L Rev.**, Vol. 24, 2001, p. 342.
[1827] Prosecutor v Jean Paul Akayesu (ICTR-96-4-T), Trials Chamber, Judgment, 2 September 1998, paras. 538-539 quoting the case of National Coal Board v. Gamble, (1959) 1 QB 11.

or if he or she knows it will occur and simply does not care."[1828] For example, building crematoria ovens in the concentration camps knowingly that they were going to be used for incinerating corpses of the victims murdered by the Nazis amounts to complicity of *J.A. Topf and Sons*, a German engineering company, in the commission of the crime of genocide.[1829]

Finally, there is also a slight difference between aiding and abetting on the one hand, and the joint criminal enterprise on the other hand. In a joint criminal enterprise, all participants in the commission of the crime act with a common purpose and the same ('joint') criminal intent for furthering the common design of the crime.[1830] Accordingly, even though the criminal responsibility of each participant is derivative, they are treated as the principal perpetrator of the crime or co-perpetrators.[1831] To add, a significant (not substantial) contribution to the commission of the crime would be sufficient and the act does not need to be criminal in itself.[1832] Farrel gives the example where a corporation discusses with the government authorities and helps to shape a plan for the removal of people from an area, or provides the means and equipment sharing the common purpose (a higher degree of *mens rea* requirement) of forcible transfer of people.[1833] However, for co-

[1828] *In Re South African Apartheid Litigation,* 617 F. Supp. 2d 228, (2009), p. 262.
[1829] Alex Alvarez, **Governments, Citizens and Genocide: A Comparative and Interdisciplinary Approach**, Indiana University Press, 2001, pp. 103-104.
[1830] Celia Wells & Juanita Elias, "Catching the Conscience of the King: Corporate Players on the International Stage" in Philip Alston (ed.), **Non-State Actors and Human Rights**, OUP, 2005, p. 165.
[1831] In fact, there is an inconsistency of interpretation and application of the elements of modes of participation by the international ad hoc tribunals and the ICC. Nor, national legal systems do have a common understanding of these concepts. In certain legal systems, conspiracy to commit a crime may be considered within the context of joint criminal enterprise. Judgement, Prosecutor v Furundžija, (IT-95-17/1-T), ICTY, 10 December1998, para. 249. For a thorough elaboration on different legal systems concerning complicty see Evik, Vesile S. **Suça İştirakte Yardım Edenin Ceza Sorumluluğu**, *Criminal Responsibility of Aider and Abettor in Joint Criminal Enterprise*, Oniki Levha yay., İstanbul, October 2011, pp. 41-79.
[1832] Norman Farrell, "Attributing Criminal Liability to Corporate Actors – Some Lessons from the International Tribunals", **J. Int'l Crim. Just.**, Vol. 8, 2010, pp. 878-879. Krajisnik, (IT-00-39-A), Appeals Chamber, 17 March 2009, paras. 215-218.
[1833] Farrell, **op. cit.**, p. 879. Deputy Prosecutor of the ICTY, Mr. Farrell, noting that the interpretation of the concept of joint criminal enterprise is different in the limited jurisprudence of each international criminal tribunal, exemplifies the difference between joint criminal enterprise and aiding and abetting as follows: "*The more links in the supply chain, the more difficult it may be to establish the necessary mens rea. Take the example of a foreign company selling arms to a government, which in turn distributes those arms to a militia, which uses the weapons to carry out crimes. In such circumstances, the corporate actor may not in fact share an objective to commit those crimes with members of the government or the militia, and may not have the direct intent to commit those crimes. Even if they do, it may be difficult to establish this as a matter of evidence. Although physical or structural remoteness is not a per se obstacle to prosecuting corporate actors under this mode of liability, the common purpose and high mens rea standard may limit the applicability of joint criminal*

perpetration, Article 25(3)(a) of the Statute of the ICC requires a higher standard of *actus reus* of a 'joint control', according to which each component act shall be capable of stopping the commission of crime.[1834] On the other hand, Article 25(3)(d) sets lower standards of 'common purpose' and 'intentional contribution' with the aim of furthering the crime would be a wider application area when corporate complicity is at issue.[1835]

The second 'systemic' form of joint criminal enterprise is defined by the ICTY as "*the existence of an organized criminal system, in particular in the case of concentration or detention camps*", which requires "*personal knowledge of the organized system and intent to further the criminal purpose of that system*".[1836] The third form of joint criminal enterprise requires that (1) the co-perpetrator has the intention to participate in and contribute to the common criminal purpose, and (2) "*in order to be held responsible for crimes which were not part of the common criminal purpose, but which were nevertheless a natural and foreseeable consequence of it, the accused must also know that such a crime might be perpetrated by a member of the group, and willingly take the risk that the crime might occur by joining or continuing to participate in the enterprise.*"[1837] Therefore, under the joint enterprise doctrine of 'common-purpose', it is accepted that if there is an agreed plan on the commission of a crime, all parties to that joint enterprise would be liable for the unintended consequences occurred as a result of the intended but natural and foreseeable consequences of their acts. For example, if there is an agreed plan on giving bodily harm to a person with acts capable of also resulting in the death of that person, then all parties to the agreement would be liable for murder if death occurs.[1838]

However, in aiding and abetting to the commission of the crime, the accomplice has the intent of facilitating or encouraging the acts or omissions with the knowledge that a particular crime is being committed by the principal. Aiding and abetting to the commission of a crime may include any practical assistance,

---

enter- prise in the corporate context."
[1834] **ibid.**, p. 880.
[1835] **ibid.,** pp. 880-881.
[1836] Judgement, Prosecutor v Kvocka et al., (IT-98-30/1-A), 28 February 2005, paras. 81-82.
[1837] **ibid.**, para. 83.
[1838] Wells & Elias, **op. cit.**, p. 165.

encouragement and moral support, which have a direct and substantial effect for facilitating the commission of the crime.[1839] However, the question whether the corporation needs to share the intention of the perpetrator in order to be held complicit in the commission of a crime is still an open-ended question.[1840] A similar provision to that of the responsibility of international organizations (Article 11 of ARIO) may be adopted providing that corporations shall be legally responsible for aiding or assisting the commission of internationally wrongful acts committed by third parties, if (a) the corporation does so with knowledge of the circumstances of the internationally wrongful act; and (b) the act would be internationally wrongful if committed by that corporation. However, a different standard, such as requirement of intention, may be adopted concerning the criminal responsibility of corporations.

For example, the ICTY held that knowledge of the accomplice that his/her acts assist or facilitate the commission of the crime is sufficient for holding him/her responsible as aider and abettor.[1841] The ICJ held that in order to hold an accomplice criminally responsible for an act furnishing aid or assistance to the commission of the crime of genocide, it must be proven that the accomplice at least was aware of the specific genocidal intent (*dolus specialis*) of the principal perpetrator.[1842] The ICTY, in Akayesu case, affirmed that knowledge of special intent of the principal

---

[1839] Aiding and abetting may be both an act or omission and can be provided in any stage of the commission of the crime. Judgment, Prosecutor v. Delalic et al (Celebici), (IT-96-21-A), Appeals Chamber, 20 February 2001, para. 352; Judgment, Prosecutor v. Tadic, (IT-94-1), Appeals Chamber, 30 July 2002, ("Tadic Appeal Judgment"), para. 229; Judgement, Prosecutor v Furundžija, (IT-95-17/1-T), ICTY, 10 December1998, paras. 232, 235.

[1840] Clapham, "Extending Criminal Law…", p. 912. For example in *Presbyterian Church of Sudan et al. v. Talisman Energy Inc.*, a Canadian based oil company, the plaintiffs alleged Talisman was complicit in the commission of crime of genocide due to its support for the ethnic cleansing perpetrated by the Sudanese government against the non-Muslim African Sudanese group living in the area of Talisman's oil concession. The U.S. Court held that corporations are not immune from tort liability under customary international law. However, both the lower court and the Court of Appeals dismissed the case due to lack of evidence. The Supreme Court also rejected to hear the case. In this case, the Court of Appeals controversially affirmed the judgment of the lower court holding that complicity in human rights abuses shall be purposeful in order to be held liable for: "*We hold that under the principles articulated by the United States Supreme Court in Sosa v. Alvarez-Machain, 542 U.S. 692 (2004), the standard for imposing accessorial liability under the ATS must be drawn from international law; and that under international law, a claimant must show that the defendant provided substantial assistance with the purpose of facilitating the alleged offenses. Applying that standard, we affirm the district court's grant of summary judgment in favor of Talisman, because plaintiffs presented no evidence that the company acted with the purpose of harming civilians living in southern Sudan.*" *Presbyterian Church of Sudan et al. v. Talisman Energy Inc.*, 582 F.3d, docket 07-0016, 2 October 2009.

[1841] Prosecutor v Kvocka et al., IT-98-30/1-T, Trial Chamber, 2 November 2001, para. 253.

[1842] Application of the Convention on the Prevention and Punishment of the Crimes of Genocide (Bosnia and Herzegovina v Serbia and Montenegro), Merits, Judgment, ICJ Rep. 2007, p. 218, para. 421; Akayesu, para. 485.

perpetrator is sufficient to hold the accomplice responsible for aiding and abetting the commission of crime of genocide.[1843] Article 25 (3) (c) of the Statute of the ICC provides that the individual shall aid and abet with the 'purpose' of facilitating the commission of a crime, implying that the aider and abettor must have an (secondary) intention similar to that of the principal perpetrator, even though, as the U.S. Court stressed, it is still possible for the ICC to interpret this provision in line with the existing customary international law.[1844]

In *Kvocka et al*., the ICTY held that:

> "*There is no requirement that the aider or abettor have a causal effect on the act of the principal.* (Furundzija, para. 233*) But the aider or abettor must have intended to assist or facilitate, or at least have accepted that such a commission of a crime would be a possible and foreseeable consequence of his conduct.* (Tadic, Trial Chamber, para. 674, … Aleksovski, para. 61*) Further, it is not necessary that the aider or abettor know the precise crime that was intended or which was actually committed. If he is aware that one of a number of crimes will probably be committed, and one of those crimes is in fact committed, he has intended to assist or facilitate the commission of that crime and is guilty as an aider or abettor. (*Furundzija, para. 246*) In the Aleksovski case, the Appeals Chamber stated that, in order to have the necessary mens rea, the aider and abettor must be aware of the essential elements of the crime ultimately committed by the principal. (*Aleksovski, para. 162*)*"[1845]

Regarding the *actus reus* element, in Furundzija case, the ICTY reaffirmed that "[t]*he position under customary international law seems therefore to be best reflected in the proposition that the assistance must have a substantial effect on the commission of the crime… the actus reus of aiding and abetting in international*

[1843] Akayesu, p. 545.
[1844] *In Re South African Apartheid Litigation,* 617 F. Supp. 2d 228, (2009), p. 261.
[1845] Prosecutor v Kvocka et al., IT-98-30/1-T, Trial Chamber, 2 November 2001, para. 255.

criminal law requires practical assistance, encouragement, or moral support which has a substantial effect on the perpetration of the crime."[1846] However, the concept of 'substantial contribution' is not very clear in international law theory and practice. For example, the ICTY in *Tadic* case held that if one can conclude that a crime would have not been committed in the exact way that it has been committed in the absence of an act or omission, than that act or omission would be considered as having a substantial effect in the commission of that crime.[1847] I should note that contrary to the Statutes of the *ad hoc* tribunals, the Statute of the ICC refrained from stressing the element of substantial contribution to the commission of a crime as the *actus reus* of complicity by aiding and abetting. Ruggie asserts that it is not necessary to prove that the crime would not be committed in the absence of the contribution provided by the accomplice.[1848] However, it is questionable whether the ICC would interpret aiding and abetting in the broader sense without requiring any substantial contribution to the crime.[1849]

Khan, the former Secretary General of Amnesty International, gives examples of the situations in which the international community is most likely to face corporate complicity in human rights violations.[1850] Situations of armed conflict create one of the most chaotic environments that catalyze human rights abuses. Corporations, operating in such territories, might become complicit in war crimes by providing financial or technical assistance or help through their products and services.[1851] For example, Khan questions the corporate liability and complicity of oil companies that provide fuel to the aviation of air forces, which take part in the bombing of villages.[1852] He also stresses the possibility of being complicit in human rights abuses through allowing the abusive or oppressive governments to use the

---

[1846] Judgement, Prosecutor v Furundžija, (IT-95-17/1-T), ICTY, 10 December1998, paras. 234-235.
[1847] Judgement, Prosecutor v Tadic (IT-94-1), Trial Chamber, 7 May 1997, para. 688.
[1848] A/HRC/8/16, Promotion and Protection of All Human Rights, Civil, Political, Economic, Social and Cultural Rights, including the Right to Development: Clarifying the Concepts of "Sphere of Influence" and "Complicity", Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, 15 May 20008, para. 37.
[1849] William Schabas, "Enforcing International Humanitarian Law: Catching the Accomplices", **Int'l Rev Red Cross**, 2001, Vol.83, no. 842, p. 448.
[1850] Irene Khan, "Understanding Corporate Complicity: Extending the Notion Beyond Existing Laws", London, 8 December 2005, AI Index: POL 34/001/2006, p. 4.
[1851] **ibid.** For example, the Kimberly Process certification was born as a result of the trade in rough (conflict) diamonds by the rebel movements, which were contributing to the funding of weapons in Africa.
[1852] **ibid.**

technologies that are produced or provided by them. This is the case for not only the corporations that export military products, but also for the IT corporations that prevent access to information on the request by the governments[1853] or allow invasion of private lives by the State authorities.[1854]

The UN Norms is also significant concerning the concept of complicity. The Norms provide that "[t]*ransnational corporations and other business enterprises shall not engage in nor benefit from war crimes, crimes against humanity, genocide, torture, forced disappearance, forced or compulsory labour, hostage-taking, extrajudicial, summary or arbitrary executions, other violations of humanitarian law and other international crimes against the human person as defined by international law, in particular human rights and humanitarian law."*[1855] It is added that security measures adopted by transnational corporations and other business enterprises shall observe both the national and international human rights standards.[1856] Accordingly, it prohibits direct or indirect (beneficial) contribution to violations of human rights law and humanitarian law. This provision is especially directed towards TNCs that "*produce and/or supply military, security, or police products/services*" and that "*produce or sell weapon*"s.[1857]

Accordingly, sale of products such as tear gas and water cannons and provision of infrastructure and public services such as the oil pipelines, railways, electricity, water and IT services normally provided in the course of business activities might also contribute to the maintenance and furtherance of illegitimate and repressive State practices. For example, providing Zyklon B gas for the concentration camps or importing tear gas for the riot police, which has a bad record of unlawful recourse to violence during demonstrations, would clearly contribute to the furtherance of human rights violations perpetrated by State authorities.

The case of *Tesch and two others* (*Zyklon B)* concerned the accusation of Dr. Tesch and two others of selling Zyklon B gas and gassing equipment to the

---

[1853] Human Rights Watch: "'Race to the Bottom': Corporate Complicity in Chinese Internet Censorship", 10 August 2006, HRW Index No. C1808, http://www.hrw.org/reports/2006/china0806/index.htm, accessed on 26.08.2013.
[1854] Khan, **op. cit.**, p. 6.
[1855] UN Norms, para. 3.
[1856] UN Norms, para. 4.
[1857] Commentary to para. 3(a) of the UN Norms.

concentration camps in Auschwitz, knowingly that the gas was to be used in the murder of people.[1858] Dr. Tesch, the sole owner of the firm, and the two others, as the persons fully empowered to act in the absence of Dr. Tesch, were convicted of war crimes for the violation of Article 46 of the Hague Regulations,[1859] as they knowingly supplied Zyklon B gas, which was used by the Nazis to exterminate 4,5 million people.[1860] The British Military Tribunal did not question whether the accused persons actually had the intention to exterminate people by selling the Zyklon B gas.

Years later, allegations of complicity against the American manufacturer of the CS gas used by Israel against Palestinians have been subject of a litigation in the U.S.. In *Abu Zeineh v. Federal Laboratories and Transtechnology Corp. Inc.*, the plaintiffs alleged that exposure to excessive CS gas, which is a form of tear gas manufactured and negligently sold by the Federal Laboratories Inc. and used by the Israeli army in the occupied territories of the West Bank and Gaza Strip, caused the wrongful death of the Palestinians who were the citizens of Palestine and Jordan. However, the U.S. District Court for Western District of Pennsylvania dismissed the case for the lack of subject-matter jurisdiction, because Palestine is not a recognized State by the U.S. and the plaintiffs were not Jordan citizens at the time of the events.[1861]

A similar case brought before the U.S. domestic courts concerned the liability of corporations for providing Agent Orange to the U.S. military during the Vietnam War. The class-action lawsuit was initiated by the Vietnam Association for Victims of Agent Orange/Dioxin against several U.S. companies such as Dow Chemical Company, Monsanto Company, Ultramar Diamond Shamrock, Uniroyal, Thompson Chemicals, Hercules on the allegation that these companies, which develop and produce Agent Orange, should be liable for being complicit in causing personal

---

[1858] *Trial of Bruno Tesch and Two Others (Zyklon B Case)*, Case No. 9, British Military Court, Hamburg, 1-8 March 1946, Law Reports of Trials of War Criminals, Vol. I, London, H.M.S.O., 1947, p. 93.

[1859] Hague Convention IV respecting the Laws and Customs of War on Land and its Annex: Regulations concerning the Laws and Customs of War on Land, The Hague, 18 October 1907, Section III: Military authority over the territory of the hostile state, Regulations Article 46 provides that 'Family honour and rights, the lives of persons, and private property, as well as religious convictions and practice, must be respected. Private property cannot be confiscated.'

[1860] They were sentenced to death penalty by hanging. See also Nerlich, **op. cit.**, p. 901.

[1861] Abu Zeineh v. Federal Laboratories and Transtechnology Corp., Inc. 975 F.Supp. 774 (1994).

injuries (*inter alia*, miscarriages, birth defects, breast cancer, ovarian tumours, lung cancer, Hodgkin's disease and prostate tumours) as a consequence of the use of the gas by the U.S. military in Vietnam. The plaintiffs also argued that the defendants were responsible for war crimes, genocide, crimes against humanity and torture. However, the U.S. District Court for the Eastern District of New York rejected the claims on the ground that the use of Agent Orange was not prohibited under international law, and that there was no rule prohibiting the U.S. from using herbicides against human beings at that time.[1862] More importantly, the Court concluded that even though "*corporations could be liable in a civil case brought under the ATS for violation of international law, and that a claim for aiding and abetting liability was cognizable under the statute*", a company could not be held liable for the out of purpose use of a product.[1863] Second Circuit Court of Appeals of Manhattan dismissed the case in 2008 holding that the poisoning of human beings were not intended by the use of herbicides during the Vietnam War,[1864] thus the act could not be considered as a violation of international law.[1865]

van Anraat case is also important for its potential implications on the responsibility of corporations for human rights abuses. The applicant, who was a businessperson, supplied the Iraqi Government with mustard gas, which he bought from several companies located in the U.S. and Japan. Saddam Hussein and Chemical Ali[1866] used the mustard gas against both the Iranian armed forces and civilians during the Iran-Iraq War, and later against the Kurdish civil population in Halabja.[1867] van Anraat has been tried before the Dutch courts for aiding and abetting

---

[1862] *In re "Agent Orange" Product Liability Litigation* 373 F. Supp. 2d 7, 54 (as to TVPA), 58–59 (as to ATS) (E.D.N.Y. 2005); Koebele, **op. cit.**, pp. 205-209.

[1863] The Court specifically noted that the context of use of Agent Orange was different than the use of Zyklon B gas in the concentration camps during World War II. Agent Orange was not used as a means of directly attacking enemy troops. (p. 94). *In re "Agent Orange" Product Liability Litigation*, pp. 52-59.

[1864] Agent Orange was used from 1961 to 1972 in the Operation Ranch Hand for destroying the jungle, where the Vietnamese troops and guerrilla were using to hide. "History: Agent Orange/Dioxin in Vietnam", http://www.aspeninstitute.org/policy-work/agent-orange/history, accessed on 20.06.2015.

[1865] *Vietnam Association for Victims of Agent Orange/Dioxin v. Dow Chemical Co.*, 05-1953-cv, U.S. Court of Appeals for the Second Circuit, 22 February 2008.

[1866] Chemical Ali is the nickname of Ali Hassn Abd al-Majid al Tikriti, who has been tried by the Special Iraqi Criminal Tribunal and was found guilty of the Halabja gas attack. Later, he was hanged to death.

[1867] A campaign for a similar case was conducted for the prosecution of Lima Holding B.V., a Dutch company, of war crimes for renting and providing the equipment for the construction of the wall between Israel and Palestine in West Bank. However, the Dutch authorities rejected the commencement of such a prosecution. "Dutch won't charge company in West Bank separation fence

genocide and violations of laws and customs of war committed by Saddam Hussein and Chemical Ali and he has been sentenced to seventeen years of imprisonment for complicity in war crimes.[1868] The Dutch court held that van Anraat and his corporation was a monopoly in the supply of the mustard gas and he knew and was aware of the fact that the gas was being converted into a chemical weapon to be used on the civilians. In holding so, the Dutch Court underlined that "…*in fixing the appropriate punishment, the Court has taken into account the general prevention aspect. People or companies that conduct (international) trade, for example in weapons or raw materials used for their production, should be warned that – if they do not exercise increased vigilance – they can become involved in most serious criminal offences*".[1869]

Afterwards, van Anraat lodged an application before the ECtHR, alleging that the Dutch courts violated his rights under Articles 6 and 7 of the ECHR. The ECtHR, examining both the Dutch law and the various documents of international law, held that at the time of the commission of the said crimes, there has already been a norm of customary international law prohibiting the use of mustard gas in international armed conflicts and also against civilian populations within the own territories of the States.[1870] The Court concluded that the rules prohibiting the use of mustard gas were sufficiently clear and the "*applicant could therefore reasonably have been expected to be aware of the state of the law and if need be to take appropriate advice"* as a professional doing business in this area.[1871] Accordingly, the application was declared inadmissible.

Lastly, any form of trading is also prohibited under the UN Norms if it causes violations of human rights or humanitarian law.[1872] According to this view, any

---

case", 14 May 2013, http://www.haaretz.com/news/diplomacy-defense/dutch-won-t-charge-company-in-west-bank-separation-fence-case-1.524061, accessed on 26.07.2013.

[1868] van der Wilt comments that if the corporation established and directed by van Anraat was to be prosecuted under the Dutch law, the Dutch courts would definitely convict the corporation for knowingly selling the mustard gas and acquiring huge profits as a result of this commerce. van der Wilt, Harmen. "Corporate Criminal Responsibility for International Crimes: Exploring the Possibilities", **Chinese J Int'l Law**, Vol. 12, 2013, pp. 62-63. For the approach of Dutch courts on corporate complicity in the commmission of international crimes see Wim Huisman & Elies van Sliedregt, "Rogue Traders – Dutch Businessmen, International Crimes and Corporate Complicity", **J. Int'l Crim. Just.**, Vol. 8, 2010, pp. 803-828.

[1869] Official translation, International Law in Domestic Courts (ILDC) 753 (NL 2007) para. 11.16.

[1870] Van Anraat v Netherlands, App. No. 65389/09, Decision of 6 July 2010, paras. 92 and 94.

[1871] **ibid.**, para. 96.

[1872] Commentary to para. 3(b) of the UN Norms.

entity conducting business in a State, which tolerates or perpetrates human rights violations, could be regarded as indirectly profiting from such violations and thus could be held responsible for silent complicity. For example, the mere existence of corporations in apartheid zones may be considered as a (silent) complicity in the crimes committed by the Government. As Gatto comments, the drafters of the UN Norms, in fact, took into consideration the historical lessons learned from the apartheid regime, in which the corporations were merely operating in South Africa, and were held responsible for human rights violations despite the absence of a clear causal link between their operations and violations. The corporations were held liable on the ground that they indirectly took advantage of the violations by commercially operating in that country.[1873] It is not unusual to observe that the mere presence of some corporations operating in under-developed or developing countries actually helps the maintenance and encourages the continuance of repressive policies of the governments.[1874]

5.5. Degrees of Corporate Complicity

There are various factors to be examined in establishing the degree of complicity of corporations in human rights violations. Firstly, the proximity of the corporation to the principal perpetrator and/or the victim of the crime and their degree of relationship are important elements to be taken into account in determining the degree of involvement of a corporation in the commission of human rights abuse.[1875] However, physical proximity to the place of commission of the crime is not required.[1876] For example, existence of a trade relationship or joint venture or a contract of subsidiary would be an evidence of complicity in the crime. Likewise, the employment relationship between the company and the victim, or being resident near the plants of the company should be considered as relationships that affect the degree of responsibility of a corporation.

[1873] Gatto refers to the Report of the SATRC, Ch. 1 n. 35. Gatto, **op. cit.**, p. 85.

[1874] Craig Forcese, **Putting Conscience into Commerce: Strategies for making human rights business as usual**, International Centre for Human Rights and Democratic Development, Montreal, 1997, p. 18.

[1875] For an elaboration on the examples of direct and indirect complicity in the commission of hostilities by the employees of private military companies see Ahmet Hamdi Topal, "Uluslararası Hukuk Açısından Özel Askeri Şirketler ve Şirket Çalışanlarının Statüsü" (*The Status of the Private Military Companies and Their Employees in International Law*), **AUHFD**, 60(4), 2011, pp. 1008-1015.

[1876] Farrell, **op. cit.**, p. 877.

Secondly, knowledge and awareness of the company of the human rights violations is another element in determining the degree of complicity. In international criminal law, the mental element (*mens rea*) of an international crime is defined as the intent and knowledge of the material elements of a crime. Article 30(3) of the ICC Statute defines knowledge as "*awareness that a circumstance exists or a consequence will occur in the ordinary course of events. "Know" and "knowingly" shall be construed accordingly."*[1877] In principle, the elements of intent to assist or encourage a criminal act and/or knowledge or awareness of the commission of a crime are required in order to hold both individuals and juridical persons liable for their acts.[1878] Contrary to the wording of Articles 25 and 30 of the Statute of the ICC, Clapham argues that the knowledge-based intention, *i.e.* knowledge of the circumstances of the wrongful act, is required and sufficient for holding corporations accountable.[1879] For example, it was alleged that Nike was not aware of the working conditions in its subsidiaries abroad until the human rights groups drew attention to the abuses. Nike, after a reputational damage, started a control mechanism on the conduct of its sub-contractors.[1880] In other words, a purpose-based intention shall not be a requirement for holding corporations responsible. Thus, the prosecutor does not need to prove the 'intention' of the TNC, which is actually a very difficult task.[1881]

Thirdly, any benefit that the corporation acquired as a result of the violations is important in determining any complicity on the part of the corporation. For example, benefitting from the eviction of people from a certain territory by the government, or operating in a country, where the establishment of trade unions is banned with the

---

[1877] see *e.g. Flick* case who is convicted of knowingly supplying poison gas to the Nazis; and the IBM Corp., who facilitated the commission of crimes in the concentration camps by providing punch cards (a passbook system) to the Nazis.

[1878] Wells & Elias, **op. cit.**, p. 163, 165. Intent is defined under Article 30(2) as follows: "*For the purposes of this article, a person has intent where:*
In relation to conduct, that person means to engage in the conduct;
In relation to a consequence, that person means to cause that consequence or is aware that a circumstance exists or a consequence will occur in the ordinary course of events."

[1879] For example, Articles 14 and 15 of the Draft Articles on the Responsibility of International Organizations require the knowledge of the circumstances for holding IGOs responsible for internationally wrongful acts.

[1880] On the same grounds, as Khan mentions, the financial support of World Bank to the abusive governments has also been under scrutiny by NGOs. Khan, **op. cit.** p. 9.

[1881] Andrew Clapham, "On Complicity", in M. Henzelin and R. Roth (eds.), **Le Droit penal a l'epreuve de l'internationalization**, 2000, p. 260.

purpose of attracting foreign investment, constitute examples of beneficiary complicity in human rights abuses.[1882] Recourse to brutal armed or police forces of a State for the protection of corporate premises or supporting the arrest of labour leaders or environmental activists may also be given as examples of corporate conduct weakening the protection of human rights.[1883]

Below, the concepts of direct, indirect (beneficial) and silent corporate complicity in the commission of international crimes (and human rights abuses) will be examined in detail.

5.5.1. Direct Corporate Complicity

If a corporation knowingly and actively aids and assists in or provides means for or in any other way intentionally contributes to the commission of a crime by a State or non-state actor, including its business partners or sub-contractors, then it would be directly complicit in the violation.[1884] ICTR interprets the rules on complicity by aiding and abetting so as to require a positive action, which, in principle excludes failure to act or omission.[1885]

For example Article 25(3) (b), (c) and (d) of the ICC Statute provide that:

> "*(b) Orders*[1886]*, solicits or induces the commission of such a crime which in fact occurs or is attempted*
>
> *(c) For the purpose of facilitating the commission of such a crime, aids, abets or otherwise assists in its commission or its attempted commission, including providing the means for its commission;*

[1882] Khan, **op. cit.**, p. 10.
[1883] Weissbrodt, "The Beginning of a Sessional Working Group…", p. 123.
[1884] A.P. Ewing, "Understanding the Global Compact Human Rights Principles" in UN Global Compact Office & OHCHR, **Embedding Human Rights in Business Practice I**, UN Global Compact Office, New York, 2004, p. 39.
[1885] Prosecutor v. Bagaragaza, Judgment Trials Chamber, ICTR-05-86-S, 17 November 2009, para. 22.
[1886] Inclusion of the act of 'ordering' in the provision on complicity has been criticized on the ground that, ordering the commission of a crime is not being complicit in the commission of the crime, but directly perpetrating it. Moreover, the act of inducing a crime is an umbrella term and a distinction between the acts of soliciting and inducing is quite difficult to make. Wells & Elias, **op. cit.**, pp. 166-167.

> *(d) In any other way contributes to the commission or attempted commission of such a crime by a group of persons acting with a common purpose. Such contribution shall be intentional and shall either:*
>
> *(i) Be made with the aim of furthering the criminal activity or criminal purpose of the group, where such activity or purpose involves the commission of a crime within the jurisdiction of the Court; or*
>
> *(ii) Be made in the knowledge of the intention of the group to commit the crime;"*

The South African Truth and Reconciliation Commission (SATRC) mentioned that if a corporation knowingly assists a State in perpetrating international crimes or violating human rights, it could be considered as being directly complicit in the commission of such crimes or violations of human rights. Especially, corporations that assist the continuance of apartheid policies with their involvement in the governmental conduct in violation of international rules should be mentioned in that regard.[1887] In fact, the report of the SATRC explains very well the potential ways of contribution of both public and private corporations to the commission of human rights abuses and/or crimes. The report analyses the degrees of involvement on three-folds, two of which correspond to direct corporate complicity.[1888] The Report notes on the first order involvement that:

> *"23. To the extent that business played a central role in helping to design and implement apartheid policies, it must be held accountable… Direct involvement with the state in the formulation of oppressive policies or practices that resulted in low labour costs (or otherwise boosted profits) can be described as first-order involvement... Businesses that were involved in this way must be held responsible and accountable for the suffering that resulted. Furthermore, to the extent that subsequent capital accumulation was boosted beyond that which*

[1887] Also see the Sullivan Principles mentioned above.
[1888] The third degree (order) of involvement shall be considered as indirect (or beneficial) corporate complicity, which will be examined below.

would have occurred in the absence of such policies, the moral basis of such wealth must be questioned – a matter that is dealt with in the recommendations."[1889]

The Report further analyses the second order involvement of corporations in the commission of apartheid as follows:

"26. However, a distinction needs to be made between those businesses that made their money by engaging directly in activities that promoted state repression and those whose business dealings could not have been reasonably expected to contribute directly or subsequently to repression. Businesses that provided armoured vehicles to the police during the mid-1980s would fall into the former category – so-called second-order involvement – whereas those building houses for state employees would need to be viewed differently.

27. As is the case with first-order involvement, those who made their money through second-order involvement clearly have more to answer for than did those who made their money in other business activities. The argument is that, as entrepreneurs, they could have chosen not to engage in such business – allocating their capital and energies elsewhere.

28. Second-order involvement hinges to some extent on people knowing that their products or services would be used for morally unacceptable purposes. Consider the example provided by Major Williamson – that banks provided the police with covert credit cards. A bank that provides a covert credit card to the police to help them with, say, investigations into white-collar fraud, is in a different position to one which knowingly provides covert credit cards to death squads to help them lure their victims. Some covert activities are more acceptable than are others. Covert credit cards and other banking facilities are, no doubt, still provided by banks to the

[1889] SATRC Report, Vol. 4, Ch.2 on Business and Labour, para. 23.

police to help with their investigations of white-collar crime."[1890]

The U.S. District Court in *In Re South African Apartheid Litigation*[1891] based on the ATS concerning the allegations of complicity (aiding and abetting) of the corporations[1892] (via their agents and alter-egos)[1893] operating in South Africa in violation of the norms of customary international law held as follows:

In *Ntsebeza v. Daimler A.G.* litigation it is alleged that the mentioned TNCs both directly[1894] and indirectly violated law of nations between 1948 and 1994. The first action was *Ntsebeza v. Daimler A.G.* alleging discriminatory practices, employment retaliation for political beliefs, geographic segregation, arbitrary arrest and detention, torture, forced exile, arbitrary denationalization, and the extrajudicial killing of family members:

- Automotive defendants (Daimler, Ford, GM) aided and abetted apartheid, torture, extrajudicial killing and cruel, inhuman and degrading treatment by knowingly providing information on anti-apartheid activists to the South African security forces, facilitating arrests and even participating in the interrogations, producing and selling specialized military equipment such as trucks, armoured personnel carriers knowing that these vehicles were used for carrying out attacks on the civilians.

[1890] **ibid.**, paras. 26-28.
[1891] *In Re South African Apartheid Litigation*, 617 F. Supp. 2d 228, (2009).
[1892] The list of other defendants include UBS AG; Citigroup, Inc.; Minnesota Mining and Manufacturing Co.; General Electric Co.; Bristol-Myers Squibb Co.; Commerzbank AG; Dresdner Bank AG; E.I. DuPont de Nemours; Shell Oil Co.; Xerox Corp.; IBM Corp.; General Motors; Honeywell International, Inc.; ExxonMobil Corp.; Deutsche Bank AG; Colgate-Palmolive Co.; National Westminster Bank Plc; Bank of America, N.A.; Dow Chemical Co.; Ford Motor Co.; Barclays Bank Plc.; Coca-Cola Co.; J.P. Morgan Chase & Co.; DaimlerChrysler Corp.; EMS Chemie (North America), Inc.; ChevronTexaco Corp.; ChevronTexaco Global Energy; American Isuzu Motors, Inc.; Nestle USA, Inc.; Holcim (US) Inc.; Fujitsu Ltd.; Credit Suisse Group; and BP Plc." Koebele, **op. cit.**, p. 72, fn. 113.
[1893] The Court mentioned that even though under the ATCA procedures applicable law is customary international law, "*whenever possible, it is necessary to rely on federal common law in limited instances in order to fill gaps*" (para. 270). The Court noted that although the concept of command responsibility is relevant for the case, international law has not yet developed precise standards applicable with a reasonable certainty. Accordingly, the Court decided to apply the principles of federal common law concerning the responsibility of corporations for the acts of their agents.
[1894] Allegations of direct tort liability for apartheid committed by private persons has been denied on the ground that "international legal system has not thus far definitively established liability for non-state actors who follow or even further state-sponsored racial oppression." *In Re South African Apartheid Litigation,* 617 F. Supp. 2d 228, (2009), para. 252.

- International Business Corporation (IBM) allegedly aided and abetted denationalization of black South Africans through the provision of computers, software, training and technical support specifically designed to produce identity cards and documents and effectuate denationalization. However, the Court dismissed the allegations stating that computers were not an essential element of the crimes committed.

- Barclays Bank PLC has been accused of aiding and abetting apartheid regime by its employment policies and hiring patterns, such as systemic denial of job opportunities on the basis of race, but the Court dismissed the allegations mentioning that "*The employment practices were more akin to acquiescence to –rather than the provision of essential support for- apartheid.*"[1895]

Second action was *Khulumani v. Barclays National Bank Ltd.* alleging extrajudicial killing, torture, detention and cruel treatment. In *Khulumani v. Barclays National Bank Ltd.* litigation it is alleged that the agents or alter-egos of the mentioned TNCs both directly and indirectly aided and abetted the commission of extrajudicial killings, torture, unlawful detention cruel, inhuman and degrading treatment by South African security forces, and accordingly, violated law of nations between 1960 and 1994:

- Automotive Defendants: Allegations against Daimler included supply of military vehicles, parts and other equipment used for the maintenance of the state-sponsored apartheid by the internal security forces. It is also alleged that "*Daimler knew the vehicles and components it exported fell within the United Nations Security Council's ban on the export of military equipment to South Africa.*"[1896] The Court held that, these allegations satisfied both the *mens rea* and *actus reus* requirements for extrajudicial killing and apartheid. However, it dismissed the claims that the sale of vehicles amounted to aiding and abetting to the commission of crimes of torture and prolonged unlawful detentions. General Motors and Ford were also acquitted for

[1895] *In re South African Apartheid Litigation*, 617 F. Supp. 2d 228, (2009), p. 266.
[1896] **ibid.,** p. 268.

sale of ordinary (commercial and passenger) vehicles such as cars and small trucks.[1897]

• Technology Defendants: IBM and Fujitsu were accused of supplying computer equipment specifically designed to track and monitor racial classification and movement for security purposes, which had an essential use for the implementation and enforcement of the racial pass laws, which facilitated racial segregation and discrimination. It is also alleged that IBM knew that its products were to be used in the furtherance of the apartheid regime since it used a front corporation in South Africa and declared that *"It's not really our policy to tell our customers how to conduct themselves"*. [1898] The Court concluded that *"[t]hat level of willful blindness in the face of crimes in violation of the law of nations cannot defeat an otherwise clear showing of knowledge that the assistance IBM provided would directly and substantially support apartheid. Therefore, plaintiffs have adequately pled that IBM and Fujitsu aided and abetted the commission of apartheid by the Government of South Africa*." (footnotes omitted)

However, the Court continued, *"the sale of equipment used to enhance the logistics capabilities of an arms manufacturer is not the same thing as selling arms used to carry out extrajudicial killing; it is merely doing business with a bad actor. Although more closely related to the violations of the law of nations at issue, even the sale of computers to the South African Defense Forces does not constitute aiding and abetting any and all violations of customary international law that the military committed, as computers are not the means by which those violations were carried out. Most broadly, "sustaining the apartheid regime" does not render the technology defendants liable for aiding and abetting all violations of the law of nations committed in apartheid-era South Africa. Therefore, the Khulumani plaintiffs' claims that the technology defendants aided and abetted extrajudicial killing, torture, prolonged unlawful detention, and CIDT are dismissed.*"[1899] (footnotes omitted)

[1897] **ibid.**
[1898] **ibid.**
[1899] **ibid.**, p. 269.

- Banking defendants: The Court dismissed the allegations against Barclays and Union Bank of Switzerland for being complicit in the commission of crimes by providing loans and purchasing South African defence force bonds.[1900]

A recent example is the inquiry started against Toyota Motor Corp., whose vehicles are being used by the ISIS terrorists in Syria and Iraq. Toyota's spokesperson, in his statement declared that "*Toyota has a strict policy to not sell vehicles to potential purchasers who may use or modify them for paramilitary or terrorist activities. ...However, it is impossible for any automaker to control indirect or illegal channels through which our vehicles could be misappropriated, stolen or resold by independent third parties.*"[1901] In fact, there have been claims that the ISIS terrorists captured these vehicles from the 'Free Syrian Army', to whom the U.S. sent non-lethal aid, including the Toyota trucks currently being used by the terrorists.[1902]

Finally, the trial of Bagaragaza before the ICTR for complicity in genocide is a remarkable example concerning responsibility of business for violations of humanitarian law. The accused, who was in control of 11 tea factories as a government officer,[1903] pleaded guilty and has been convicted because of his substantial contribution to in the killing of Tutsi ethnic group by authorizing vehicles and fuels to be transported the attackers, allowing its personnel to participate in the commission of genocide, providing the attackers with heavy weapons and finally knowingly supplying money for alcoholic beverages to the attackers for motivating them to continue killings.[1904]

[1900] **ibid.** For the rejections of appeals see In re: South African Apartheid Litigation, U.S. District Court, Southern District of New York, No. 02-md-01499, 28.08.2014 and In re: South African Apartheid Litigation, 2nd U.S. Circuit Court of Appeals, No. 14-4104, 27.07.2015.

[1901] Yoko Kubota, "Toyota to Support U.S. Probe After Terrorists are Seen on Its Pickups", The Wall Street Journal, 09.09.2015, http://blogs.wsj.com/japanrealtime/2015/10/09/toyota-to-support-u-s-probe-after-terrorists-are-seen-on-its-pickups/, accessed on 19.09.2015.

[1902] Tony Cartalucci, The Mystery of ISIS' Toyota Army Solved", Ron Paul Institute for Peace and Prosperity, 09.09.2015, http://www.ronpaulinstitute.org/archives/featured-articles/2015/october/09/the-mystery-of-isis-toyota-army-solved/, accessed on 19.10.2015.

[1903] Prosecutor v. Bagaragaza, Judgment Trials Chamber, ICTR-05-86-S, 17 November 2009, para. 17.

[1904] **ibid.**, paras. 24-27.

5.5.2. Indirect (beneficial) Corporate Complicity

Indirect complicity implies any supporting activity that amount to a financial, material or commercial contribution to the continuance of the State, government or regime that is in violation of human rights.[1905] In indirect complicity, corporations do not violate international law themselves, but knowingly benefit from the violations perpetrated by third parties, such as States.[1906] In fact, as Ramasastry admits the parameters for determining which acts constitute direct complicity and/or indirect complicity are not clear under human rights law, and therefore, a case-by-case basis analysis is required for finding out the acts potentially contributing to the commission of international crimes.[1907]

Financial complicity is financially and mostly monetarily supporting the government agents, state institutions, military or other security forces that violate human rights. The conduct of corporations in Nazi Germany that amounted to slavery and forced labour is an example of indirect (beneficiary) complicity. For example, Karl Rasche, who was the chairman of a private commercial bank characterized as the bank of the Third Reich, was accused of facilitating the use of slave labour by the mere act of providing money and credit to the entities using slave labour. [1908] Even though the accusations of complicity of Rasche in slave labour was rejected by the U.S. Military Tribunal, Ramasastry draws attention to a possibility of holding corporations responsible for knowingly or intentionally providing financial support to the perpetrators of international crimes.[1909]

For example, the crimes of financing terrorist activities and money laundering perpetrated by corporations lead to criminal liability in domestic law systems.[1910] 1999 UN Convention on the Suppression of the Financing of Terrorism provides that 'any person' may commit the acts that constitute offences mentioned in the Convention.[1911] Furthermore, the UN Security Council in its Resolution 1373(2001)

[1905] Wells & Elias, **op. cit.**, p. 163.
[1906] Ramasastry, **op. cit,** p. 130.
[1907] Ramasastry, **op. cit,** p.141.
[1908] *Accord United States v Von Weizsaecker* ("The Ministries Case") XIV Trials of War Criminals Before the Nuremberg Military Tribunals, 621-22 (1952).
[1909] Ramasastry, **op. cit.**, pp. 112-113.
[1910] **ibid.**, p. 113.
[1911] Article 2 of the UN Convention on the Suppression of the Financing of Terrorism.

obliged the States to prohibit and criminalize financing of terrorism and to adopt measures to that effect against not only natural persons but also legal persons in their territories.[1912] The Security Council also decided that the States shall freeze funds, other financial assets and economic resources of entities owned or controlled directly or indirectly by persons who commit, attempt to commit, participate in or facilitate the commission of terrorist acts.[1913] Accordingly, a similar approach may be adopted with regard to the financial corporations and banks if they provide financial aid to States or other non-state actors, which are violating human rights law and/or humanitarian law.

Material complicity implies any support other than financial contribution that facilitates abusive governmental conduct. For example, providing infrastructure or other services and products, which facilitate the continuance of the repressive regimes or commission of mass atrocities shall be regarded as material complicity in the perpetration of the crimes. Another example may be the covert government shipment of arms to a terrorist organization, armed rebel groups, paramilitaries or civil militia operating in and against another State, by way of air cargo planes of an airway company.[1914] Incitement complicity is entering into a relationship with the State institutions that may, on some occasions, amount to inciting the commission of a crime.[1915] In this type of complicity, the corporation does not actively assist or cause a human rights violation, but benefits from the consequences of human rights violations perpetrated by repressive and abusive regimes and practices.[1916]

Especially in times of conflict, corporations may tend to benefit from the consequences of the conflict and to practice slave or forced labour by exploiting those who are most vulnerable to violations. In such cases, international community

---

[1912] UN Security Council, S/RES/1373 (2001), 28 September 2011.
[1913] The Security Council added that the States shall prohibit entities within their territories from "*making any funds, financial assets or economic resources or financial or other related services available, directly or indirectly, for the benefit of persons who commit or attempt to commit or facilitate or participate in the commission of terrorist acts, of entities owned or controlled, directly or indirectly, by such persons and of persons and entities acting on behalf of or at the direction of such persons*". UN Security Council, S/RES/1373 (2001), 28 September 2011.
[1914] Craig Forcese, "Deterring Militarized Commerce", **Ottowa L Rev.**, Vol. 31, 1999, p. 171.
[1915] **Ibid.** *e.g.* calling the Nigerian army, which has a bad human rights record, to protect the premises of a company against environmentalists. For a detailed elaboration on the responsibility of Canadian companies that retain local military services for the protection of their premises abroad see the article of Forcese mentioned in the previous footnote, who examines the possibilities of holding corporations operating internationally under Canadian Criminal Law and Civil Law.
[1916] Gatto, **op. cit.**, p. 12.

shall be capable of holding corporations accountable of complicity in the commission of international crimes, especially if the acts also amount to the breaches of peremptory norms of international law, such as the prohibition of slavery.[1917] Ruggie underlines that even if beneficial complicity may not lead to legal liability, it would attract the attention of social actors, such as NGOs and trade unions.[1918] Thus, corporations would at least be non-legally forced not to be complicit in human rights abuses. Ramasastry comments that the degree of complicity may rise from indirect complicity to direct complicity if (1) there is a strong and interdependent relationship between the abusive government and the corporation and (2) the TNC continues to provide assistance, knowing that it is used for the furtherance of criminal activities.[1919]

For example, *Doe I. v. Unocal* case is significant for demonstrating the approach of the U.S. courts on both the concept of indirect complicity and the extraterritorial application of ATCA. Total, a French company, collaborated with the Burmese (Myanmar) Government and its state-owned corporation (Myanmar Oil)[1920] in a joint venture for producing, transporting and selling natural gas from Yadana Field. Later, Unocal Corp. acquired 28% interest from Total in this project. The Myanmar Military provided security and other services for the project. The plaintiffs, who were the villagers of Yadana, alleged before the U.S. courts that Unocal knowingly (or should have reasonably known[1921]) benefitted from forced labour and child labour for building the Yadana Pipeline in Burma (Myanmar).[1922] Furthermore, the Burmese security forces of the military dictatorship (State Law and Order Restoration Council - SLORC) committed crimes such as murder, torture, and rape of the villagers and displacement of villages during its operations conducted for

---

[1917] "*Examples of beneficial complicity could also include a company that receives financial incentives in an Export Processing Zone where the government prohibits unions; a company that purchases materials from a supplier that is committing gross human rights violations; and a company that tolerates working conditions detrimental to worker health in its supply chain*." Ewing, **op. cit.**, p. 39.

[1918] A/HRC/8/16, Promotion and Protection of All Human Rights, Civil, Political, Economic, Social and Cultural Rights, including the Right to Development: Clarifying the Concepts of "Sphere of Influence" and "Complicity", Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, 15 May 20008, para.70.

[1919] Ramasastry, **op. cit.**, p.103.

[1920] The claims against the Myanmar Oil were dismissed on the ground of state immunity. *Doe I v. Unocal Corp*., 395 F. 3d 932- Court of Appeals, 9th Circuit 2002, p. 956-958.

[1921] **ibid.**, p. 953.

[1922] **ibid.**, pp. 939-941, 948.

protecting the pipeline project, which upon completion would serve the Burma dictatorship. Accordingly, it has also been alleged that even if Unocal did not itself participate in the commission of crimes mentioned above, it has benefitted from the consequences of such crimes.[1923]

The U.S. Court noted that Unocal provided practical assistance to the Myanmar Military by hiring them for providing security and by using photos, surveys and maps in daily meetings to show the military forces where to provide security. The Court held that this assistance had a substantial effect on the commission of the crimes that, in the absence of such assistance, the crimes "most probably would not [have] occurred in the same way".[1924] However, the District Court held that Unocal could not be liable under the ATCA for forced labour because Unocal's conduct did not rise to the level of "active participation" in the forced labour, and Unocal did not actually controlled the military units. The Court of Appeals, overturning the judgment of the District Court, held that 'active participation' in the commission of the crimes is not a requirement for holding corporations liable.[1925] The Court of Appeals concluded that knowingly providing practical assistance to the military or encouragement that has a substantial effect on the alleged perpetration of the crimes would be sufficient to hold Unocal liable for complicity.[1926] In the end, Unocal agreed to compensate the plaintiffs and the case was settled out in March 2005, with a compensation amount of approximately $30 million.[1927]

The Dabhol Power Corp., a subsidiary of Enron, General Electric and Bechtel in India, has been accused of benefitting (directly) from an official policy of abusive

---

[1923] **ibid.** The U.S. District Court held that Unocal could not be held liable, because it was not controlling the Burmese military.
[1924] **ibid.**, p. 953.
[1925] **ibid.,** p. 948. The Court of Appeals commented that the District Court misapplied the active participation requirement, which was an element examined by the Nuremberg Tribunals (Krupp trial) in the context of analysis of the "necessity" defence. In the Unocal case, no such defence was made and actually could not be made due to the power and influence the corporation had over the Government.
[1926] **ibid.,** p. 948; See also Dennis v. Spraks, 449 U.S., 27 1980 and the Furundzija judgment in the same direction. See Tawny Aine Bridgeford, "Imputing Human Rights Obligations on Multinational Corporations: The Ninth Circuit Strikes again in Judicial Activism", **Am. U. Int'l L Rev.**, Vol. 18, 2003, pp. 1009-1057.
[1927] However, the terms of the agreement are kept confidential. John Doe I. v Unocal Corp. Court of Appeals, 403F.3d 708, 9th Circ., 13 April 2005. Koebele, **op. cit.**, p. 7; EarthRights International, "Historic Advance for Universal Human Rights: Unocal to Compensate Burmese Villages", 02.04.2005, http://www.earthrights.org/legal/historic-advance-universal-human-rights-unocal-compensate-burmese-villagers, accessed on 01.06.2015.

practices and impunity of the state security forces protecting the company.[1928] According to the report of Human Rights Watch, the Dabhol Power Corp. paid and provided material and financial support to the state forces and benefitted from the state tolerance of criminal violence recoursed by the Indian forces during the peaceful demonstrations against the power plant established by Enron.[1929] Dabhol, on its part was employing and paying the Indian forces (in accordance with Indian law) and situating them near the power plant for suppressing the peaceful protests. HRW also commented that the U.S. Government and the U.S. Ex-Im Bank, both of which financially supported Enron for its investment in India, were also accountable for not effectively investigating the allegations of human rights violations.[1930]

For example, the Panel of Experts on the Illegal Exploitation of Natural Resources and Other Forms of Wealth of the Democratic Republic of the Congo has listed the corporations violating the OECD Guidelines, and also compiled another list of corporations, which "by contributing to the revenues of the elite networks, directly or indirectly, …contribute to the on-going conflict and to human rights abuses."[1931] Consequently, the Panel recommended the Security Council to consider imposing restrictions such as barring them from accessing banking facilities and other financial institutions and from receiving funding or establishing a partnership or other commercial relations with the IFIs.[1932]

Likewise, the conclusion of agreements between the Colombian Defence Ministry, having one of the worst reputations on human rights protection in the Western world, and the oil companies such as the British Petroleum (BP) and Occidental Petroleum for the protection of companies' operations shall be regarded

---

[1928] Human Rights Watch, "The Enron Corporation: Corporate Complicity in Human Rights Violations", New York, 1999, http://www.hrw.org/reports/1999/enron/enron7-0.htm, accessed on 20.05.2014. Ramasastry interpret this report as the collapse of the distinction between direct and indirect complicity. Ramasastry, **op. cit.**, p. 103.

[1929] HRW, "The Enron Corporation…" report.

[1930] Press release on the report of the HRW see http://www.hrw.org/de/news/1999/01/24/us-corporation-complicit-abuses-india, accessed on 18.09.2013.

[1931] Final Report of the Panel of Experts on the Illegal Exploitation of Natural Resources and Other Forms of Wealth of the Democratic Republic of the Congo, S/2002/1146, 16 October 2002, paras. 175-178. Elite networks are consisted of a small core of political and military elites and business people operating both in the occupied areas and the Government-held area. The elite networks derive financial benefit from the criminal activities and monopolize production, commerce and fiscal functions (para. 21).

[1932] **ibid.**, para. 176.

as an example of beneficial corporate complicity.[1933] During the 90s, the Colombian army was accused of incidents of kidnapping, torture and murder of the protesters.[1934] Furthermore, the oil companies operating in a region of violent conflict were harshly criticized by NGOs such as Christian Aid, Oxfam and Save the Children Fund UK, because they were operating in a conflict zone, where numerous trade unionists, environmentalists and activists (*i.e.* anyone possibly having sympathy for the guerrilla) has been killed by the right-wing paramilitaries.[1935] Later on, BP also contracted with a private military company for providing training to the Colombian police, which allegedly provided arms and intelligence services to the police.[1936]

Conspiring for overthrowing the democratically elected governments should also be mentioned as an example of conduct that has to be prevented and sanctioned.[1937] For example, the Truth and Reconciliation Commission of South Africa, while defining the third order involvement as indirectly benefitting (silent complicity) from human rights abuses, noted that:

> *"…Condemning such businesses suggests that all who prospered under apartheid have something to answer for, in that they took advantage of a situation which depressed the earnings of black South Africans, whilst boosting their own. Taken to its logical conclusion, this argument would need to extend also to those businesses that bankrolled opposition parties and funded resistance movements against apartheid. Clearly not all businesses can be tarred with the same brush."* [1938]

[1933] Payment of war tax by the corporation to the State may also be regarded as another dimension of financial complicity. Human Rights Watch, "Colombia: Human Rights Concerns Raised by the Security Arrangements of Transnational Oil Companies", 1 April 1998.
[1934] Forcese, "Deterring Militarized Commerce"…, p. 177.
[1935] Greg Muttitt & James Mariott, "Some Common Concerns", Chapter 11 on "Line of Fire: BP and Human Rights Abuses in Colombia", October 2002, http://www.carbonweb.org/documents/chapter11.pdf, accessed on 20.05.2014.
[1936] Forcese, "Deterring Militarized Commerce" …, p. 177.
[1937] Amnesty International, Human Rights Principles for Companies, AI Index ACT 70/01/98 (1998).
[1938] SATRC Report, Vol. 4, Ch.2 on Business and Labour, para. 32.

5.5.3. Silent Corporate Complicity

Silent complicity (or inappropriate corporate presence) is a form of complicity, where the corporation remains inactive in the face of systematic and continuous human rights violations without directly benefitting from it.[1939] In such cases, mere presence in a country may turn into a tacit approval of what is being done in violation of human rights.[1940] As Avery underlines, in silent complicity, silence and inaction are no longer an acceptable option regarding human rights violations perpetrated by governments.[1941] He especially refers to the Royal Dutch Shell's attitude towards the practice of the Nigerian government regarding the trial and execution of the members of the Ogoni ethnic group in 1994.[1942] For example, Saro Wiwa, a member of the Ogoni people and an environmental activist, was hung by the military government as a response to his protests against Shell's project in the Ogoniland.[1943] As some argue, Shell was in a position to speak out loud against this execution, but it remained silent.[1944] Apart from the human rights violations directly committed by Shell as examined above concerning the *Ogoni* case, the mere presence of such a powerful company in a country where there is constant abusive State practice, may imply that it seeks to benefit from the poor human rights laws of that State without being effectively monitored by national and/or international authorities.[1945]

In other words, in situations of repressive regimes committing massive human rights abuses, corporations are not only under an obligation not to assist or benefit from the abusive practices of governmental authorities, but they are also expected to use their leverage in order to support and promote the protection of human rights.[1946] In that case, it may be argued that corporations are 'indirectly' benefitting from the

---

[1939] https://www.unglobalcompact.org/aboutthegc/thetenprinciples/Principle2.html, accessed on 27.05.2015.
[1940] Ramasastry, **op. cit.**, p. 104.
[1941] Avery, **op. cit.**, p. 29.
[1942] **ibid.**, p. 29. See also Neil Forbes, "Multinational Enterprise, 'Corporate Responsibility' and the Nazi Dictatorship: The Case of Unilever and Germany in the 1930s", **Contemporary European History**, Vol. 16: 2, 2007, pp. 149-167.
[1943] Koebele, **op. cit.**, p. 69.
[1944] Florian Wettstein, "Silence as Complicity: elements of a corporate duty to speak out against the violation of human rights" in Cragg Wesley (ed.), **Business and Human Rights**, Edward Elgar Publishing, 2012, pp. 122-123.
[1945] Wiwa v. Royal Dutch Shell Petroleum (*Shell),* U.S. District Court for the Southern District of New York, 28 February 2002, para. 39.
[1946] de Schutter, "Transnational Corporations…, p. 427.

human rights abuses perpetrated by States in the course of regular corporate activities. For example, corporations, which indirectly benefit from the discriminative employment laws would be silently complicit in the continuance of human rights abuses being perpetrated by the State.[1947] In other words, if the silence of the corporation has a significant effect on the commission of crimes and the corporation knows that such systematic and continuous crimes are being committed, then it may be held accountable for silent complicity, if the consequences of the silence (assistance or encouragement) are reasonably foreseeable.

Silent complicity is the most controversial type of complicity and there is almost no possibility to hold corporations legally and/or criminally responsible for their inaction and silence in the face of human rights violations. Mere presence and/or engagement in investment activities cannot be interpreted as active support for oppressive governments, even though it may be argued that corporations have a moral obligation to criticize the abusive laws and practices of the host states.[1948] Ruggie also rightfully mentions in his report that legal liability for mere presence in a country where various atrocities are being committed is very unlikely, unless it is proved without doubt that the silence of the corporation amounted to a substantial contribution to the commission of the crimes.[1949] For example, in the Furundzija judgment, the ICTY stressed that "presence, when combined with authority, can constitute assistance in the form of moral support, that is the *actus reus* of the offence."[1950] The ICTY continued "accused's presence and continued interrogation of [the victim] encouraged [the actual perpetrator] and substantially contributed" to the

[1947] A/HRC/8/16, Promotion and Protection of All Human Rights, Civil, Political, Economic, Social and Cultural Rights, including the Right to Development: Clarifying the Concepts of "Sphere of Influence" and "Complicity", Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, 15 May 20008, paras.58

[1948] Ramasastry, **op. cit.**, p.104; Clapham, "Extending Criminal Law…, p. 921.

[1949] As Ruggie points out there are cases in which the international tribunals held that the silent presence having a legitimizing or encouraging effect for the commission of the crime would give rise to the legal responsibility of that person. However, in such cases the accomplice had a superior status than the actual perpetrator. A/HRC/8/16, Promotion and Protection of All Human Rights, Civil, Political, Economic, Social and Cultural Rights, including the Right to Development: Clarifying the Concepts of "Sphere of Influence" and "Complicity", Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, 15 May 20008, paras. 39-40.

[1950] The judgment concerns rape and other abuses of a person during an interrogation in the presence of the accused. Judgement, Prosecutor v Furundžija, (IT-95-17/1-T), ICTY, 10 December1998, para. 274.

war crimes.[1951] It shall be noted that a German court decided in the *Synagogue* case that a Nazi Party member and local leader of SA shall be convicted of crimes against humanity, who did not participate, design, plan or order the destruction of the Syangogue but was present during the destruction, which provided moral support and psychological encouragement to the perpetrators.[1952]

ICTY, in *Kvocka et al.* also referring to its case law held that: "*Presence alone at the scene of the crime is not conclusive of aiding or abetting, unless it is shown to have a significant legitimizing or encouraging effect on the principal. (*Kunarac et al, Trial Chamber, Judgement, para. 393; see also Tadic, Trial Chamber Judgement, para. 689; Aleksovski Trial Chamber, Judgement, para. 64) *Presence, particularly when coupled with a position of authority, is therefore a probative, but not determinative, indication that an accused encouraged or supported the perpetrators of the crime.* (Aleksovski Trial Chamber, Judgement, para. 65; Akayesu Trial Chamber, Judgement, para. 693)"[1953]

Furthermore, the ICTY noted that, in Tadic case, "*the presence of the accused when crimes were committed by a group was sufficient to entail his responsibility if he had previously played an active role in similar acts committed by the same group and had not expressly spoken against the conduct of the group.* (Tadic, Trial Chamber, para. 690) *This holding is particularly notable because the defendant was a low level actor, a person without any official authority who entered camps, including Omarska, to beat and otherwise abuse detainees.*"[1954]

However, the U.S. Court, in *In Re: South African Apartheid Litigation* examined the meaning of 'substantial contribution' in international law for determining the standards of secondary liability with 'reasonable certainty' by making an analysis of *actus reus* and *mens rea* of aiding and abetting in international law.[1955] The U.S. Court held that:

[1951] **ibid.**, paras. 232, 235.
[1952] *Entscheidungen des Obersten Gerichtshofes fuer die Britische Zone,* I Entscheidungen inStrafsachen 53 (1949), paras. 55-56 as referred to in Koebele, **op. cit.**, pp. 272-273.
[1953] Prosecutor v Kvocka et al., IT-98-30/1-T, Trial Chamber, 2 November 2001, para. 257.
[1954] **ibid.**, para. 259.
[1955] The U.S. Court noted that in tort cases brought under the ATCA, standards on the secondary liability of corporations, like the standards of direct liability, shall be determined based on customary norms of international law. The Court underlining that the ATCA procedures provide an alternative

> *"It is (or should be) undisputed that simply doing business with a state or individual who violates the law of nations is insufficient to create liability under customary international law. International law does not impose liability for declining to boycott a pariah state or to shun a war criminal. Aiding a criminal "is not the same thing as aiding and abetting [his or her] alleged human rights abuses." [Mastafa, 2008 U.S. Dist. LEXIS 73305, 2008 WL 4378443, at 4.] On the other hand, assistance having a substantial effect "need not constitute an indispensable element, that is, a conditio sine qua non for the acts of the principal." [Furundzija p. 209. Accord Mastafa, 2008 U.S. Dist. LEXIS 73305, 2008 WL 4378443, at 3] An accessory may be found liable even if the crimes could have been carried out through different means or with the assistance of another. [Prosecutor v. Tadic, Case No. IT-94-1-T, Trial Chamber Judgment ("Tadic I") p. 688 (May 7, 1997); Blagovjevic v. Jokic, Case No. IT-02- 60-A, Appeal Judgement pp. 127, 134 (May 9, 2007)]"*[1956]

The U.S. Court referring to two judgments of the IMT, *i.e.* (1) the Ministries case, where the IMT held that Karl Rasche, who, as a banker, knowingly and with an express intent to further the crimes of S.S. facilitated large loans to be given to Himmler was not guilty of aiding and abetting crimes against humanity, (2) the Zyklon B case, where the IMT held that Brune Tesch, who, as the owner of a gas firm, provided Zyklon B gas to the S.S. and trained those who were going to use the gas in the gas chambers, guilty of aiding and abetting crimes against humanity, commented that "[t]*he provision of goods specifically designed to kill, to inflict pain, or to cause other injuries resulting from violations of customary international law bear a closer causal connection to the principal crime than the sale of raw materials or the provision of loans.*"[1957] Finally, the U.S. District Court dismissed the

civil remedy for violations of customary international law, which are traditionally categorized as crimes. *In Re South African Apartheid Litigation,* 617 F. Supp. 2d 228, (2009), p. 255, 258.

[1956] **ibid.**, pp. 258-259.

[1957] *In Re South African Apartheid Litigation,* 617 F. Supp. 2d 228, (2009), pp. 258-259; *Trial of Bruno Tesch and Two Others (Zyklon B Case)*, Case No. 9, British Military Court, Hamburg, 1-8

allegations against the corporate defendants who were accused of aiding and abetting the commission of apartheid by merely 'doing business' with the apartheid Government of South Africa.[1958]

Consequently, even if a powerful transnational corporation does not in any way contribute to the violations of human rights, its mere presence would contribute to the furtherance of economic development of that State and would trigger a falsified public image of the abusive Government. However, the mere existence of a corporation should not be considered as legal complicity, even though it may be argued that corporations would have a moral obligation to refrain from engaging in business activities in suspicious situations that may give rise to their legal or non-legal accountability.

One exception to that argument is the sanctions imposed by the UN Security Council concerning certain activities being conducted with(in) certain States. For example, the Security Council in its Resolution concerning the situation in Southern Rhodesia decided that all States shall prevent their nationals to engage in any activities of import of any commodities and products originated from Southern Rhodesia and export to there, and that they shall prevent sale and supply of any material, except those which are strictly for medical purposes, educational equipment, and food for humanitarian purposes.[1959] Furthermore, provision of any commercial, industrial or public utility undertaking, including tourist enterprises, in Southern Rhodesia any funds for investment or any other resources shall be prevented. Finally, all airline companies of Member States shall be prevented to operate to and from Southern Rhodesia. Even though these obligations are imposed on the Member States of the UN, they indirectly create international obligations for the corporations not to engage in commercial activities with Southern Rhodesia within the context of the UN Security Council Resolution.

March 1946, Law Reports of Trials of War Criminals, Vol. I, London, H.M.S.O., 1947, 93-103; *Accord United States v Von Weizsaecker* ("The Ministries Case") XIV Trials of War Criminals Before the Nuremberg Military Tribunals, 621-22 (1952).

[1958] **ibid.**, p. 134, 257-258.

[1959] UN Security Council, Resolution 253 (1968), 29 May 1968, S/RES/253 (1968).

6. IN LIEU OF A CONCLUSION

Transnational law, which is a complex and hybrid branch of law, comprises elements and characteristics from both municipal and international law, and applies to both public and private relations.[1960] Jessup, in his book published in 1956, referring to the monist theory of Scell "*un Droit intersocial unifié*", declared that he would prefer to use the term "transnational" instead of "international".[1961] Today, international law is increasingly becoming a complex branch of law comprising a fragmented set of rules governing not only relations between States but also imposing duties and obligations on non-state actors. Although holding transnational corporations internationally responsible is still controversial, imposition of duties and obligations on non-state actors as part of a customary norm or international treaty is not new. Especially, most of the norms of humanitarian law are binding on not only state actors, but also non-state actors.[1962] Furthermore, certain subject-specific treaties and resolutions and decisions adopted by the IGOs refer to non-state actors as addressees. Soft law documents and self-regulatory codes also take place in this complicated web of documents. Non-state actors themselves, either separately or collectively, adopt codes of conduct and even integrate such codes in the private contracts they conclude with other public or private actors. Such private initiatives transform non-state actors into lawmakers of international law. This fact also implies the transformation of international law from a body of legal rules adopted by sovereigns into a web of international norms and/or transnational documents adopted

[1960] Peters & Förster & Koechlin, **op. cit.**, p. 550.
[1961] Philip C. Jessup, **Transnational Law**, Yale University Press, 1956, p. 3. Prof. Ökçün, preferred the term trans-municipal. Gündüz A. Ökçün, **Trans-Municipal Law: A Critical Analysis of Private International Law**, Capital Markets Board, 2nd ed., November 1998.
[1962] See e.g. Common Article 3 of the Geneva Conventions. Emre Öktem, **Terörizm, İnsancıl Hukuk ve İnsan Hakları**, (*Terrorism, Humanitarian Law and Human Rights*), Derin Yayınları, İstanbul, 2007, pp. 87-88.

by various actors participating in international relations.[1963] These norms exist concurrently and they complement each other.

It is important to emphasize that the international, regional, national and extraterritorial responsibilities imposed on non-state actors complement each other.[1964] For example, the Global Compact Office considers the UN Norms and the Global Compact as complementary to each other and rejects any assertion on their contradiction or duplication.[1965] The UN Guiding Principles also serve as a tool for interpreting the principles declared under the Global Compact.[1966] Likewise, all the other international documents on the subject have a mutually reinforcing complementary character as emphasized on various occasions.[1967] The principle of complementarity is equally valid for binding, non-binding and mixed sanctions, as well as the administrative and judicial ones.[1968] However, with regard to peremptory norms, superiority of the international and/or transnational bodies and their decisions shall be recognized. For example, the ICTY concerning the prohibition of torture held that:

> *"Where there exist international bodies charged with impartially monitoring compliance with treaty provisions on torture, these bodies enjoy priority over individual States in establishing whether a certain State has taken all the necessary measures to prevent and punish torture and, if they have not, in calling upon that State to fulfil its international obligations. The existence of such international mechanisms makes it possible for*

[1963] Sterio gives the example of the 'effects doctrine' of the U.S., which allows extraterritorial jurisdiction by way of enforcing the Sherman Act on the conducts occurred abroad but that have an effect in the domestic markets of the U.S.. Sterio, **op. cit.**, p. 214, 218, 224.
[1964] Gatto, **op. cit.**, p. 28.
[1965] AI, 'The UN Human Rights Norms for Business: Towards Legal Accountability', IOR 42/002/2004, 18 January 2004 at 14-15.
[1966] Joint Note by the Global Compact and the OHCHR, The UN Guiding Principles on Business and Human Rights: Relationship to UN Global Compact Commitments, July 2011 (updated June 2014) http://www.unglobalcompact.org/docs/issues_doc/human_rights/Resources/GPs_GC%20note.pdf, accessed on 28.10.2014.
[1967] Note on the UN Global Compact and Business and Human Rights, 13 Jan. 2009, www.unglobalcompact.org, accessed on 05.03.2012; UN Global Compact Office, "How the Global Compact Works: Mission, Actors and Engagement Mechanisms", 2003, pp. 6-7.
[1968] Gatto, **op. cit.**, pp. 98-99.

> *compliance with international law to be ensured in a neutral and impartial manner"*[1969]

The web of international documents can also be read as a consequence of developing transnational networks, *i.e.* a web of interactions between different actors in different legal structures such as governments, organizations, peoples and individuals. More importantly, the transformation of international law covers not only the regulations of commercial relations in the global market, but also finds its reflections in the area of international human rights law.[1970] The diversification and multiplication of the demands of the individual in the post-industrial society expanded the content of minimum requirements for guaranteeing the respect for human dignity.

Private corporations have gradually acquired rights in the international scene and they increased their economic and political powers to the extent that, in certain cases, they became equal with or even more advantageous than States.[1971] From a historical perspective, it could be observed that the gradual acquisition of rights, such as the right to conclude international contracts, right to property, right to be free from discriminatory treatment, is followed by gradual acquisition of moral and even legal duties through various soft law documents adopted as a consequence of the initiatives triggered by IGOs such as the UN, ILO and OECD.[1972] The development of compliance procedures also demonstrates a gradual pattern. For example, follow-up procedures, state-reporting system, individual complaint mechanisms,[1973] legal enforcement mechanisms and judicial control mechanisms have been gradually developed by the international community in a way allowing the adoption of a wide range of measures for the prevention of human rights violations.[1974]

Since State actors and TNCs are different in their capacities, roles, structures, organization and legal status, the obligations imposed on them shall also differ.

[1969] Prosecutor v Furundzija, Case IT-95-17/1-T, Judgment, 10 December 1998, para. 152.
[1970] Steinhardt, Ralph G. "Corporate Responsibility…", p. 178.
[1971] Jessup, "The Subjects…", p. 400.
[1972] Gatto, **op. cit.**, pp. 54-55, 99.
[1973] For example the follow-up procedures of the ILO Declaration and the OECD Guidelines provide the monitoring of the implementation of the Guidelines by the participants. Clapham, **Human Rights Obligations** ..., pp. 202-203.
[1974] Reinisch, **op. cit.**, p. 41.

TNCs are legal persons enjoying rights and freedoms and as the organs of society with a significant impact on inter-individual and inter-state relations, they shall have obligations and duties towards the society in terms of both respecting and protecting human rights. Responsibility to respect obliges States and non-state actors equally, imposing negative duties not to interfere with the rights of others. On the other hand, the extent and content of responsibility to protect, *i.e.* duty to take positive steps in order to prevent third party interferences, depends on the power, capability to influence the perpetrator of the violation and spheres of influence of each corporation. Today, as Joseph highlights, it is frequently mentioned that corporations are accountable towards their stakeholders including those who are being adversely affected by the corporate activities, even if this accountability rarely has a legal character and when it does, it is hard to assume that such accountability leads to governmental-type responsibilities for corporations.[1975]

As Kamatali asserted in his article, an ICJ advisory opinion triggered by the UN General Assembly or the UN Human Rights Council may also lighten the way to holding corporations liable on the international level and such an attempt would constitute an additional or alternative legal solution in that regard.[1976] An advisory opinion given by the ICJ on the subject would be so invaluable that it would not only clarify the legal standing of the ICJ on the issue, but also would unify different views among the legal scholars.[1977] Kamatali lists the reasons for justifying the necessity of an ICJ advisory opinion as follows: 1. an accountability mechanism is required to remedy the human rights violations committed by corporations, 2. legal gaps exist in holding the corporations legally accountable in national and international law, especially when the host states and home states are unwilling or unable to impose human rights responsibilities on TNCs[1978], 3. there is continuing discussion on the binding character of international human rights treaties for the corporations, 4. these questions could be answered by an international court, and that is the ICJ. Kamatali argues that if the ICJ interprets the existing international human rights documents in

[1975] Joseph, "An Overview…", p. 90.
[1976] Kamatali asserts that the UN General Assembly would be the best organ to initiate such a procedure due to the historical experience. However, he adds that, submission of such a request by the UN Human Rights Council would be more appropriate due to its technical equipment on the subject and its mission on promoting and protecting human rights. Nevertheless, under Article 96 of the UN Charter, the UN Human Rights Council should be authorized by the General Assembly to make such a request before the ICJ. Kamatali, **op. cit.**, p. 453, 462.
[1977] **ibid.**, p. 463.
[1978] **ibid.**, p. 454.

a way allowing them to create binding obligations for corporations, then such discussions would come to an end. If it decides to the contrary, then attempts to create new international documents on the responsibility of corporations would gain speed.[1979]

As I argued in my thesis, there is actually a pressing need for institutionalizing international hard accountability of corporations. Reforming the existing institutions shall be considered as one of the options. For example, the system of ICSID might be reformed by authorizing the Centre to interpret the treaties in conformity with the human rights obligations of host states. The rules of international economic law shall be justified, interpreted, designed and developed "in conformity with the principles of justice and international law", including "human rights and fundamental freedoms for all", as stipulated in the Preamble of the VCLT.[1980] Inclusion of codes of conduct or human rights clauses in the BITs, *i.e.* privatization of human rights, might also open the way to ICSID and other arbitral mechanisms for interpreting corporate obligations in line with the human rights obligations. Finally, the competence of the existing courts or bodies of human rights protection might be extended to corporations, either by amending the international or regional human rights documents or by adding a protocol built on a new consensus. Furthermore, the ICJ and/or the ICC might be empowered to directly try legal persons, if necessary amendments are made in their constitutive statutes.

Creating a new institution specialized on corporate human rights abuses and empowered to recommend and decide on the disputes and/or allegations concerning corporate conduct is another option for preventing impunity of corporations. For realizing this alternative, either an inter-state treaty may be concluded or an international agreement codifying the international obligations of TNCs under human rights law and humanitarian law -and to which transnational corporations can accede- may be considered as an option. In the former alternative, except for the peremptory norms and customary laws, the incorporation of the international document will depend mostly on the will of nation-states, leaving them a margin of appreciation for the tools they will resort to for ensuring the compliance of

[1979] **ibid.**, p. 460.
[1980] Ernst-Ulrich Petersmann, "Human Rights and International Economic Law", **Trade L & Dev**, Vol. 4, 2012, pp. 283-314.

corporations with human rights norms. Therefore, the policies and measures adopted by each nation-state would vary, depending on the preferences of the Governments.[1981] The doctrine of margin of appreciation and subsidiary character of international law reflect the respect for local preferences against the values of the international community. However, in order to ensure a fair and adequate reparation for the victims of corporate abuses, establishment of a global 'corporate victims fund' through the taxation of TNCs on the ratio of their profits may be considered as an option. This way, corporations may act more willing to comply with human rights norms, and they may even monitor the compliance of other corporations with human rights norms, especially if they are operating in the same countries or sectors.

In any case, if the international community hopes to effectively deal with transnational actors such as corporations, transnationally or internationally harmonized regulations would be inevitable.[1982] As affirmed by various legal scholars, direct international regulation of TNCs has many advantages. First, international human rights duties of TNCs would be interpreted by a single authoritative body. Second, TNCs would be forced to act more respectful of the cultural and economic differences in the developing host states. Third, international regulation would prevent abusive acts encouraged by the slack legislation in the home states of TNCs. Finally, from a broader point of view, as Joseph pointed out, international regulation would signify a paradigm shift in the classical state-oriented understanding of international law.[1983]

My proposal is that, in line with the "Rise of the Network Society", international regulation of corporate conduct shall accompany an enforcement mechanism in the form of a transnational network.[1984] A network has two main characteristics: strength of internal links (loops & nodes) and consistency.[1985] Therefore, the difference between the former international and the latter transnational systems would be the interdependency of national authorities in regulating the

---

[1981] See Jenia Iontcheva Turner, "Transnational Networks and the International Public Order", in Miller & Bratspies (eds.), **Progress in International Law**, Koninklijke Brill NV., 2008, p. 422 *et seq.*
[1982] **ibid.**
[1983] Joseph, "An Overview…", p. 88.
[1984] Castells envisages that while the concept of sovereignty will be trivialized, the nation-states will transform into a multilateral network of interchangeable commitments, responsibilities, alliances and interdependencies. Castells, **op. cit**, p. 510.
[1985] **ibid.** p. 237, 622.

corporate conduct, leaving a minimum margin of appreciation in order to prevent any advantageous situation for the investor to prefer one State over another when human rights would be at risk due to the corporate activity. In the former case, dialogue, interaction and cooperation between the local points (or the nation-states) in the network would affect each other in a way to harmonize their regulations concerning the corporate conduct. My suggestion on the establishment of transnational networks for the protection of human rights resembles the system of OECD, which envisages the establishment of national contact points. However, there shall be fundamental differences between the two, the most important one being the legal effect of their regulations and decisions. Two developments can be read as implications of such evolution on the regulation and supervision of corporate conduct, which also signify a broadening in the legal framework: "*A. The more frequent and increasingly diverse use of codes of conduct addressed directly to non-state actors and, B. The increased use of extraterritorial regulation by States of the behaviour of non-state actors*".[1986]

On the other hand, Castells argues that while the interaction between the global and local institutions continues to exist, the transnational character of the networks is becoming more and more internationalized. Slaughter in her book draws attention to the paradox of globalization: we need more 'government' both in the global and regional scale, but at the same time fear from centralization of decision-making power by a coercive authority.[1987] Accordingly, organized transnational networks may be an effective method for global governance.[1988] International law may also evolve in a way allowing corporations to become parties to international treaties as for-profit 'non-governmental organizations'. [1989] Moreover, recognition of international legal personality of transnational corporations and holding them criminally responsible before international courts or tribunals may also be reconsidered as a solution to *de facto* dominant state-like influence of corporations on global human rights problems.

[1986] Reinisch puts that the change in the legal framework on the substantive norms of human rights law and the procedural norms and institutions envisaged for the protection of human rights proves that human rights is not exclusively a sub-branch of public international law anymore. Rather, all branches of national law are now more or less intrinsically related to the protection of human rights. Reinisch, **op. cit.**, p. 42.

[1987] Anne-Marie Slaughter, **A New World Order**, Princeton University Press, 2004, p. 8.

[1988] Turner, "Transnational Networks…", p. 421.

[1989] For example, while the international corporations and capital become global, the workers and the labour remain local. Castells, **op. cit.**, p. 314, 628.

This implies the creation of local and national subunits designed to monitor the implementation of the international norms by TNCs. Accordingly, these subunits would acquire technical expertise and knowledge on both particular problems concerning specific sectors of TNC activity and also on specific types of violations systematically perpetrated by an individual TNC. The close relations and cooperation between the subunits would allow the superior unit, *i.e.* the international body, to observe the worldwide problems related to both specific sectors, such as the petroleum industry or the apparel sector, and to specific corporations, such as the ones operating in conflict-affected zones. Furthermore, if the local laws allow, the subunits may serve as arbitral structures and a forum for negotiation, mediation and conciliation between the victims and TNCs. They may be authorized to give binding remedial decisions for fair and adequate reparations, including restitution, financial and non-financial compensations, rehabilitation, criminal or administrative punitive sanctions and apologies; or preventive decisions such as guarantee of non-repetition.

For example, the Council of Europe in its Recommendation No. 88 (18), recommended that enterprises should be able to be held liable for the crimes they committed in the course of their activities, even if the activity concerned was not related to the constitutive purpose of the enterprise, and the real person who perpetrated the act could not be identified.[1990] However, if the corporation took all the necessary measures to prevent the commission of a crime, the liability of the corporation shall be precluded for that act. The Recommendation included various types of sanctions and measures that could be imposed on enterprises, which may be taken separately or in combination with the purpose of preventing the furtherance of the consequences of the crime and providing reparation for the victims: *"warning, reprimand, recognisance; a decision declaratory of responsibility, but no sanction; fine or other pecuniary sanction; confiscation of property which was used in the commission of the offence or represents the gains derived from the illegal activity; prohibition of certain activities, in particular exclusion from doing business with public authorities; exclusion from fiscal advantages and subsidies; prohibition upon advertising goods or services; annulment of licences; removal of managers; appointment of a provisional caretaker management by the judicial authority;*

[1990] Recommendation No. R(88) 18 of the Committee of Ministers to Member States concerning Liability of Enterprises having Legal Personality for Offences Committed in the Exercise of Their Activities, 20 October 1988.

closure of the enterprise; winding-up of the enterprise; compensation and/or restitution to the victim; restoration of the former state; publication of the decision imposing a sanction or measure"[1991] However, it is important to note that the Recommendation underlined that proportionate and dissuasive legal and administrative measures, which are capable of effectively serving the same purpose, are also welcomed and that the States are not explicitly obliged to adopt criminal measures for legal persons.[1992]

Miller came across to Habermas's theory of discursive democracy while researching on the indigenous peoples' right to self-determination, and he realized that the theory could also be applied to the relationships between NGOs, TNCs and States.[1993] According to this, mistrust and violence occur as a result of distortion of communication between individuals. Therefore, it is not very surprising to face gross human rights violations when communication between groups is distorted systematically. [1994] Moreover, with regard to international cooperation and coordination, the significance of the effect of interpersonal contacts between both high-level and low-level government officials and diplomats should not be underestimated.[1995] Miller concluded that the discourse principle of Habermas would facilitate the realization of global democracy through the participation of TNCs and NGOs in opinion and will-formation processes.[1996] On the same ground, the democratic and legitimate law-making process on the global level would be encouraged. Finally, as Miller mentioned, granting personality to TNCs would also strengthen the international normative regime that would have been built as an outcome of such a process.[1997]

[1991] **ibid.**

[1992] For example, non-criminal fines, exclusion from entitlement to public benefits or aid; temporary or permanent disqualification from participation in public procurement or from the practice of other commercial activities; placing under judicial supervision; a judicial winding-up order; establishment of public records on legal persons; and exchange of information contained in these records with the competent authorities are among the other sanctions that may be imposed on legal persons. The Commentary to the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, para. 24; Article 10 of the UN Convention against Transnational Organized Crime, GA Res. 55/25, UN GAOR, 55th Sess., 62nd plenary meeting, UN Doc. A/Res/55/25 (2001).

[1993] Russell A. Miller, "Paradoxes of Personality: Transnational Corporations, Non-Governmental Organizations and Human Rights in International Law", in Miller & Bratspies (eds.), **Progress in International Law**, Koninklijk Brill NV., 2008, p. 398.

[1994] **ibid.**, p. 400.

[1995] Turner, "Transnational Networks…, p. 408.

[1996] Miller, "Paradoxes of Personality…", p. 402 quoting Jurgen Habermas, **Between Facts and Norms,** William Rehg transl., 1996, p. 123.

[1997] **ibid.**

Consequently, creation of transnational networks would promote the development and enforcement of international norms by providing technical assistance and invaluable information on the experiences of domestic systems with the implementation of international norms.[1998] For example, transnational sub-units may be authorized to establish public records disclosing bad corporate practices and serious allegations of human rights violations. Furthermore, such records may be exchanged between the other transnational sub-units in order to detect repetitive patterns of abusive conduct among the subsidiaries of a certain TNC. The transnational subunits would also facilitate the transnational engagement, dialogue and close cooperation between Governments, NGOs, IGOs and the TNCs. Additionally, soft-law mechanisms such as guidelines, codes of 'best practices', standards, or memoranda of understandings may come to existence as a result of the interactions in the framework of informal transnational networks.[1999] The flexibility and lack of strict bureaucratic processes would also allow transnational networks to serve as a forum for the discussion of politically 'sensitive' problems.[2000]

[1998] Turner mentions that the UN serves as a successful forum by the regular meetings it holds for exchanging technical information on the potential problems of domestic compliance with the rules of international environmental law. NAFTA also plays an important role in promoting compliance with environmental law by creating working groups and dispute resolution mechanisms under its auspices. Turner, "Transnational Networks…, pp. 413-414.

[1999] Turner gives the example of the code of best practices adopted by the Basel Committee on Banking Supervision and the International Organization of Securities Commissioners for combating money laundering. Turner, "Transnational Networks…, p. 413, 415.

[2000] **ibid.**, p. 415.

BIBLIOGRAPHY

Addo, Michael K. (ed), **Human Rights Standards and the Responsibility of Transnational Corporations**, Hague, Kluwer Law International, 1999.

Aguirre, Daniel, "Multinational Corporations and the Realisation of Economic, Social and Cultural Rights", **California Western International Law Journal**, Vol. 35, 2004, pp. 53-82.

Alston, Philip, "The 'Not-a-Cat' Syndrome: Can the International Human Rights Regime Accommodate Non-State Actors?" in Alston, Philip (ed.), **Non-State Actors and Human Rights**, Oxford University Press, 2005, pp. 3-36.

Alston, Philip, "'Core Labour Standards' and the Transformation of the International Labour Rights Regime" in Leary, Virginia A. & Warner, Daniel (eds.), **Social Issues, Globalisation and International Institutions: Labour Rights and the EU, ILO, OECD and WTO**, International Studies in Human Rights, Vol. 84, Martinus Nijhoff Publishers, 2006, pp.1-88.

Alston, Philip (ed.), **Labour Rights as Human Rights**, The Collected Courses of the Academy of European Law, Vol. XIV/1, Oxford University Press, 2005.

Alston, Philip (ed.), **Non-State Actors and Human Rights**, Oxford University Press, 2005.

Alston, Philip. "The Myopia of the Handmaidens: International Lawyers and Globalisation", **European Journal of International Law**, Vol. 8, 1997, p. 435.

Alston, Philip & Robinson, Mary (eds.), **Human Rights and Development: Towards Mutual Reinforcement**, Oxford University Press, 2005.

Alvarez, Alex, **Governments, Citizens and Genocide: A Comparative and Interdisciplinary Approach**, Indiana University Press, 2001.

Alvarez-Jimenez, Alberto, "International State Responsibility for Acts of Non-State Actors: The Recent Standards Set by the International Court of Justice in Genocide and Why the WTO Appellate Body Should not Embrace Them", **Syracuse Journal of International Law & Commerce**, Vol. 35, Fall 2007, pp.1-25.

Alvarez, José E., "Are Corporations 'Subjects' of International Law?", **Santa Clara Journal of International Law,** Vol. 9, 2011, pp.1-36.

Amao, Olufemi O., "Corporate Social Responsibility, Multinational Corporations and the Law in Nigeria: Controlling Multinationals in Host States", **Journal of African Law**, Vol. 52: 1, 2008, pp. 89-113.

Angelo, Homer G., **Multinational Corporate Enterprises: Some Legal and Policy Aspects of a Modern Social-Economic Phenomenon**, Hague Academy of International Law, Vol. 125, 1968.

Anghie, Antony, **Imperialism, Sovereignty and the Making of International Law**, Cambridge, 2004.

Aufricht, Hans, "Personality in International Law", **American Political Science Review**, Vol. 37, 1943, pp. 217-243.

Avery, Chris, "Business and Human Rights in a Time of Change" in Kamminga, Menno T. & Zia-Zarifi, Saman. (eds.), **Liability of Multinational Corporations under International Law**, Studies and Materials on the Settlement of International Disputes Vol. 7, Kluwer Law International, 2000, pp. 17-74.

Aybay, Rona, **Sosyalizmin Öncülerinden Robert Owen: Yaşamı, Eylemi, Öğretisi**, (*Robert Owen as One of the Pioneers of Socialism: Life, Actions and Thoughts*), Alfa yayınları, İstanbul, 2012.

Baade, Hans W., "The Legal Effects of Codes of Conduct for Multinational Enterprises", in Norbert Horn (ed.), **Legal Problems of Codes of Conduct for Multinational Enterprises**, Studies in Transnational Economic Law Vol. 1, Kluwer, 1980, pp. 3-38.

Backer, Larry Catá, "Multinational Corporations as Objects and Sources of Transnational Regulation", **ILSA Journal of International & Comparative Law**, Vol. 14:2, 2008, pp. 499-523.

Backer, Larry Catá, "Multinational Corporations, Transnational Law: The United Nations' Norms on the Responsibilities of Transnational Corporations as a Harbinger of Corporate Social Responsibility in International Law", **Columbia Human Rights Law Review**, Vol. 37, 2006, pp. 287-389.

Backer, Larry Catá, "Rights and Accountability in Development ('RAID') v. DAS Air and Afrimex: Small Steps Towards and Autonomous Transnational Legal System for the Regulation of Multinational Corporations", **Melbourne Journal of International Law**, Vol. 10, 2009, pp. 258-307.

Bakan, Joel, **Şirket: Kar ve Güç Peşindeki Patolojik Kurum**, (org. "The Corporation: The Pathological Pursuit of Profit and Power"), transl. Rahmi G. Öğdül, Ayrıntı, 2007.

Baldwin, Clive & Morel, Cynthia. "Group Rights" in Evans, M. and Murray, R. (eds.), **The African Charter on Human and Peoples' Rights: The System in Practice 1986-2006**, Cambridge, Cambridge University Press, 2nd ed., 2008, pp. 244-288.

Bantekas, Ilias, "Corruption as an International Crime and Crime against Humanity: An Outline of Supplementary Criminal Justice Policies", **Journal of International Criminal Justice**, Vol. 4, 2006, pp. 466-484.

Barker, Craig J. "International Law and International Relations: International Relations for the 21st century", Contiuum, rep. 2004.

Barnidge, Robert, "The Due Diligence Principle under International Law", **International Community Law Review**, Vol. 8, 2006, pp. 81-121.

Bercusson, Brian, "Globalizing Labour Law: Transnational Private Regulation and Countervailing Actors in European Labour Law" in Teubner, Gunther (ed.), **Global Law without a State**, Studies in Modern Law and Policy, Ashgate, rep. 2003, pp. 133-178.

Bassiouni, M. Cherif & Derby, Daniel H., "Final Report on The Establishment of an International Criminal Court for the Implementation of the Apartheid Convention and Other Relevant International Instruments", **Hofstra Law Review**, Vol. 9, 1980-1981, pp. 523.

Başlar, Kemal, **Uluslararası Hukukta Hükümet Dışı Kuruluşlar: Vestfalya Sonrası Süreçte Küresel Sivil Toplum** *(Non-governmental Organizations in International Law: Global Civil Society in Post-Westphalian Process)*, Nobel, April 2005.

Bedi, Shiv R.S., **The Development of Human Rights Law by the Judges of the International Court of Justice**, Oxford, Hart Publishing, 2007.

Bedjaoui, Mohammed (ed.), **International Law: Achievements and Prospects**, Dordrecht: Martinus Nijhoff, 1991.

Benedek, Wolfgang & de Feyter, Koen & Marrella, Fabrizio (eds.), **Economic Globalisation and Human Rights**, Cambridge University Press, 2007.

Berle, Adolf A. & Means, Gardiner C., **The Modern Corporation and Private Property**, Brace and World, 2nd rev. ed., 1967.

Berle, Adolf A. Jr., "Corporate Powers as Powers in Trust", **Harvard Law Review**, Vol. 44, 1931, pp. 1049-1074.

Berle, Adolf, "The Organization of the Law of Corporate Finance", **Tennessee Law Review**, Vol.9, 1931, pp. 125-145.

Berle, Adolf, **The 20th Century Capitalist Revolution**, Harcourt, Brace and Company, 1954.

Berle, Adolf, **Power without Property: A New Development in American Political Economy**, Harcourt, 1959.

Berle, Adolf, **The American Economic Republic**, Harcourt, 1963.

Berman, Schiff Paul. "The Globalization of International Law", The International Library of Essays on Globalization and Law", Ashgate, 2005.

Bernard, Elaine, "Ensuring Monitoring is not Co-opted", **New Solutions**, Vol. 7, No. 4, Summer 1997, pp. 10-12.

Beveridge, Fiona. (ed.) "Globalization and International Investment", International Library of Essays on Globalization and Law, Ashgate, 2005.

Bhuta, Nehal, "The Role of International Actors Other than States can Play in the New World Order" in Cassese, Antonio (ed.), **Realizing Utopia: The Future of International Law**, Oxford University Press, rep. 2012, pp. 61-75.

Bianchi, Andrea. (ed.) "Non-State Actors and International Law", The Library of Essays in International Law, Ashgate, 2009.

Bignami, Francesca. Transnational Networks vs. Democracy, 26 **Mich. J. Int'l L**. 807, 845 (2005)

Black's Law Dictionary, West Publishing (ed. Bryan Garner), 8th ed., 2nd rep., 2007.

Blum, Jeffrey M. & Steinhardt, Ralph G., "Federal Jurisdiction over International Human Rights Claims: The Alien Tort Claims Act after Filartiga v. Pena-Irala", **Harvard International Law Journal**, Vol.22, 1981, pp. 53-113.

Boister, Neil. "Transnational Criminal Law", **European Journal of International Law**, Vol. 14, No.5, pp. 953-976.

Bosniak, Linda, "Multiple Nationality and the Postnational Transformation of Citizenship", **Virginia Journal of International Law**, Vol.42, 2002, pp. 979-1005.

Bowen, Huw V., "The East India Company and Military Recruitment in Britain, 1763-71**", Historical Research**, Vol. 59, issue 139, 1986, pp. 78-90.

Boyle, Alan, "Soft Law in International Law-Making" in Evans Malcolm (ed.), **International Law**, Oxford, 3rd ed. 2010, pp. 122-140.

Branson, Douglas M., "The Social Responsibility of Large Multinational Corporations", **Transnational Law**, Vol. 16, 2002, pp. 121-139.

Brems, Eva (Ed.), **Conflicts between Fundamental Rights**, Antwerp-Oxford-Portland: Intersentia-Hart, 2008.

Brems, Eva & Gerards, Janneke (eds.), **Shaping Rights in the ECHR: The Role of the European Court of Human Rights in Determining the Scope of Human Rights**, Cambridge, 2013.

Bridgeford, Tawny Aine, "Imputing Human Rights Obligations on Multinational Corporations: The Ninth Circuit Strikes again in Judicial Activism", **American University International Law Review**, Vol. 18, 2003, pp. 1009-1057.

Brown, Bartram S. (ed.), **Research Handbook on International Criminal Law**, Edward Elgar Publishing, 2011.

Brownlie, Ian, **Principles of Public International Law**, Oxford University Press, 7th ed., 2008.

Brownlie, Ian, "Legal Effects of Codes of Conduct for MNEs: Commentary" in Horn, Norbert (ed.), **Legal Problems of Codes of Conduct for Multinational Enterprises**, Studies in Transnational Economic Law Vol. 1, Kluwer, 1980, pp..

Buergenthal, Thomas, "Lawmaking by the ICJ and Other International Courts", **American Society of International Law Proceedings**, Vol. 103, 2009, pp. 403-406.

Buffard, Isabelle & Crawford, James & Pellet, Alain & Wittich, Stephan, **International Law between Universalism and Fragmentation: Festschrift in Honour of Gerhard Hafner**, Martinus Nijhoff Publishers, 2008.

Cassel, Doug, "Corporate Aiding and Abetting of Human Rights Violations: Confusion in the Courts", **Northwestern Journal of International Human Rights**, Vol.6, Issue 2, 2008, pp. 304-326.

Cassels, Jamie, "Outlaws: Multinational Corporations and Catastrophic Law", **Cumberland Law Review**, Vol. 31, 2001, pp. 311-335.

Cassese, Antonio, "Individuals", in Bedjaoui, M. (ed.), **International Law: Achievements and Prospects**, Dordrecht: Martinus Nijhoff, 1991, pp. 113-120.

Cassese, Antonio, **International Criminal Law**, Oxford University Press, 2003.

Cassese, Antonio (ed.), **Realizing Utopia: The Future of International Law**, Oxford University Press, rep. 2012.

Cassese, Antonio, **The Human Dimension of International Law: Selected Papers**, Oxford, 2008.

Cassese, Antonio, **The Status of Rebels Under the 1977 Geneva Protocol on Non-International Armed Conflicts**, International and Comparative Law Quarterly, Vol. 30, 1981, pp. 416-439.

Castells, Manuel, **Enformasyon Çağı: Ekonomi, Toplum, Kültür: I. Cilt Ağ Toplumunun Yükselişi**, (*The Information Age: Economy, Society and Culture: Vol. 1 The Rise of the Network Society*) (transl. Ebru Kılıç) İstanbul Bilgi Üniversitesi Yayınları 97, 2nd ed., 2008.

Cerone, John, "The Vanishing Relevance of State Affiliation in International Criminal Law: Private Security Contractors and Other Non-State Actors" in Brown, Bartram S. (ed.) **Research Handbook on International Criminal Law**, Edward Elgar Publishing, 2011, pp. 17-33.

Chayes, Abram & Chayes, Antonia Handler, **The New Sovereignty Compliance with International Regulatory Agreements**, Harvard University Press, 1995.

Chinkin, Christine, “A Critique of the Public/Private Dimension”, **European Journal of International Law**, Vol.10(2), 1999, pp. 387-395.

Chirwa, Danwood Mzikenge, "The Long March to Binding Obligations of Transnational Corporations in International Human Rights Law", **South African Journal on Human Rights**, Vol. 22, 2006, pp. 76-98.

Chirwa, Danwood Mzikenge, “In Search of philosophical justifications and suitable models for the horizontal application of human rights”, **African Human Rights Law Journal**, Vol. 8, 2008, pp. 294-311.

Chrispin, Materneau, “Holding Private Military Corporations Accountable for their Crimes: The Applicability of the Commander/Superior Responsibility Doctrine to Crimes of PMCs” in Stahn, Carsten & van den Herik, Larissa. (eds.) **Future Perspective on International Criminal Justice**, TMC Asser Press, 2010, pp. 395-421.

Chomsky, Noam **Occupy: Reflections on Class War, Rebellion and Repression**, Occupied Media Pamphlet Series/Zucotti Park Press, Brooklyn 2012.

Chomsky, Noam, **Globalization and its Discontents**, Noam Chomsky debates with Washington Post, Washington Post, May 16, 2000, http://www.chomsky.info/debates/20000516.htm, accessed on 01.06.2015.

Clapham, Andrew, “Extending Criminal Law beyond the Individual to Corporations and Armed Opposition Groups”, Corporate Criminal Liability: New Developments in International Criminal Law, **Journal of International Criminal Justice**, Vol. 6, 2008, pp. 899-926.

Clapham, Andrew, **Human Rights in the Private Sphere**, Oxford, 1996.

Clapham, Andrew, **Human Rights Obligations of Non-State Actors**, Oxford University Press, 2006.

Clapham, Andrew, “Human Rights Obligations of Non-State Actors in Conflict Situations”, International Review of Red Cross, Vol. 88, No 863, 2006, pp. 491-523.

Clapham, Andrew, "Non-state actors" in Moeckli, Daniel & Shah, Sangeeta & Sivakumaran, Sandesh (eds.), **International Human Rights Law**, Oxford University Press, 2010, pp. 561-582.

Clapham, Andrew, "On Complicity", in Henzelin M. and Roth R. (eds.) Le Droit penal a l'epreuve de l'internationalization, 2000, pp. 241-274.

Clapham, Andrew, "The Question of Jurisdiction under International Criminal Law Over Legal Persons: Lessons from the Conference on an International Criminal Court" in Kamminga, Menno T. & Zia-Zarifi, Saman. (eds.), **Liability of Multinational Corporations under International Law**, Studies and Materials on the Settlement of International Disputes Vol. 7, Kluwer Law International, 2000, pp. 139-195.

Clapham, Andrew & Jerbi, Scott, "Categories of Corporate Complicity in Human Rights Abuses", **Hastings International and Comparative Law Review**, Vol. 24, 2001, pp. 339-349.

Claude, Pierre Richard & Weston, Burns H. (eds.), **Human Rights in the World Community: Issues and Action**, University of Pennsylvania Press, 3rd ed., 2006.

Coffee C. Jr., "'No Soul to Damn, No Body to Kick': An Unscandalized Inquiry into the Problem of Corporate Punishment", **Michigan Law Review**, Vol. 79, 1981, pp. 386-459.

Cogan, Katz Jacob. "The Regulatory Turn in International Law", **Harvard International Law Journal**, Vol. 52, Number 2, Summer 2011, pp. 321-372.

Cohen, Robert & Felton, Nadine & Nkosi, Morley & van Liere, Jaap (eds), **The Multinational Corporation: A Radical Approach: Papers by Stephen Hymer**, London: Cambridge University Press, 1979.

Cooter, Robert & Ulen, Thomas. "Law & Economics", 4th ed., Pearson, 2004.

Cutler, A. Claire, "Critical Reflections on the Westphalian Assumptions of International Law and Organization: A Crisis of Legitimacy", **Review of International Studies,** Vol. 27, 2001, pp. 133-150.

Crawford, James, **Brownlie's Principles of Public International Law**, 8th ed., Oxford University Press, 2008.

Crawford, James & Pellet, Alain & Olleson, Simon (eds.), **The Law of International Responsibility**, Oxford University Press, 2010.

Crawford, James, "The System of International Responsibility" in Crawford, J. & Pellet, A. & Olleson, S. (eds.), **The Law of International Responsibility**, Oxford University Press, 2010, pp. 17-25.

Çali, Başak, "Tears in Our Eyes: Third State Obligation in International Law", 30 July 2015, http://www.ejiltalk.org/tears-in-our-eyes-third-state-obligations-in-international-law/, accessed on 30.07.2015.

Daggett, Susan D. "NGOs as Lawmakers, Watchdogs, Whistle-blowers, and Private Attorneys General", **Colorado Journal of International Environmental Law and Policy**, Vol.13:1, 2002, pp. 99-113.

Danielsen, Dan. "How Corporations Govern: Taking Corporate Power Seriously in Transnational Regulation and Governance", **Harvard International Law Journal**, Vol. 46, No. 2, Summer 2005, pp. 411-425.

Dankwa, Victor & Flinterman, Cees & Leckie, Scott. "Commentary on the Maastricht Guidelines on Violations of Economic, Social and Cultural Rights", SIM Special 20, pp. 13-34, http://www.uu.nl/faculty/leg/NL/organisatie/departementen/departementrechtsgeleer

dheid/organisatie/onderdelen/studieeninformatiecentrummensenrechten/publicaties/simspecials/20/Documents/20-02.pdf, accessed on 13.03.2013.

Dardot, Pierre & Laval, Christian, **Dünyanın Yeni Aklı: Neoliberal toplum üzerine deneme**, (orig. *The New of the World: On Liberal Society*", (transl. Işık Ergüden), İstanbul Bilgi Üniversitesi Yayınları 387, İstanbul, 2012.

d'Aspremont, Jean(ed.), **Participants in the International Legal System: Multiple Perspectives on Non-State Actors in International Law**, Routledge, 2011.

Dashwood, Hevina S., "Corporate Social Responsibility and the Evolution of International Norms" in Kirton, John J. & Trebilcock, Michael J. (eds.), **Hard Choices, Soft Law: Voluntary Standards in Global Trade, Environment and Social Governance**, Global Environmental Governance Series, Ashgate, 2004, p. 191.

David, Eric. "Primary and Secondary Rules", in Crawford, J. & Pellet, A. & Olleson, S. (eds.), **The Law of International Responsibility**, Oxford University Press, 2010, pp. 27-36.

de Brabandere, Eric, "Non-State Actors and Human Rights: Corporate Responsibility and the Attempts to Formalize the Role of Corporations as Participants in the International Legal System" in d'Aspremont, Jean (ed.), **Participants in the International Legal System: Multiple Perspectives on Non-State Actors in International Law**, Routledge, 2011, pp. 268-283.

de Castro, Gregorio, "Corporate Social Responsibility and restructuring in the EU: A historical overview of recent developments" in **Governance, International Law & Corporate Social Responsibility**, International Labour Organization, Research Series, 116, ILO Publications, 2008, pp. 129-154.

de Jonge, Alice, **Transnational Corporations and International Law: Accountability in the Global Business Environment**, Corporations, Globalisation and the Law, Edward Elgar, 2011.

de Schutter, Olivier. **International Human Rights Law: Cases, Materials, Commentary**, Cambridge, 2010.

de Schutter, Olivier, "The Accountability of Multinationals for Human Rights Violations in European Law" in Alston, Philip (ed.), **Non-State Actors and Human Rights**, Oxford University Press, 2005, pp. 227-314.

de Schutter, Olivier., "Transnational Corporations as Instruments of Human Development" in Alston, Philip & Robinson, Mary (eds.), **Human Rights and Development: Towards Mutual Reinforcement**, Oxford University Press, 2005, pp. 403-444.

Delbrück, Jost, "Prospects for a "World (Internal) Law": Developments in a Changing International System", Indiana Journal of Global Legal Studies, Vol.9, 2002, pp. 401-431.

Deva, Surya. "UN's Human Rights Norms for Transnational Corporations and other Business Enterprises: An Imperfect Step in the Right Direction?", ILSA Journal of International and Comparative Law, Vol. 10, 2004, pp. 493-523.

Dhooge, Lucien J., "Human Rights for Transnational Corporations", **Journal of Transnational Law and Policy**, Vol. 16:2, Spring 2007, pp. 197-249.

Dine, Janet & Fagan, Andrew (eds.), **Human Rights and Capitalism: A Multidisciplinary Perspective on Globalisation**, Edward Elgar Pub., 2006.

Dodd, E. Merrick, "For Whom are Corporate Managers Trustees?", **Harvard Law Review**, Vol. 45, 1932, pp. 1145-1163.

Dolzer, Rudolf & Hollweg, E. Robert & Lawrence, M. Peter & Less, Steven & Macalister-Smith, Peter. (eds) "Max Planck Encyclopedia of Public International Law 10: States, Responsibility of States, International Law and Municipal Law", Elsevier Science Publishers B.V., 1987.

Drahos, Peter, "The Right to Food, Health and Intellectual Property in the Era of 'Biogopolies' in Bottomley, Stephen & Kinley, David, (eds.) **Commercial Law and Human Rights**, Ashgate, rep. 2003, pp. 215-234.

Dubinsky, Paul R., ″Human Rights Law Meets Private Law Harmonization: The Coming Conflict", **Yale Journal of International Law**, Vol. 30, 2005, pp. 211-317.

Dumberry, Patrick & Labelle-Eastaugh, Erik, "Non-state actors in international investment law: The legal personality of corporations and NGOs in the context of investor-state arbitration" in d'Aspremont, Jean (ed.), **Participants in the International Legal System: Multiple Perspectives on Non-State Actors in International Law**, Routledge, 2011, pp. 360-371.

Duncan B., Hollis, "Why State Consent Still Matters - Non-State Actors, Treaties, and the Changing Sources of International Law", **Berkeley Journal of International Law**, Vol. 23, 2005, pp. 137-174.

Dunoff, J. & Ratner, S. & Wippman, D., **International Law: Norms, Actors, Process: A Problem-Oriented Approach**, Aspen Law & Business, 2002.

Dupuy, Pierre-Marie, "Reviewing the Difficulties of Codification: On Ago's Classification of Obligations of Means and Obligations of Result in Relation to State Responsibility", **European Journal of International Law**, Vol. 10, 1999, p. 371.

Dwight W., Justice. "The International Trade Union Movement and the New Codes of Conduct" in Jenkins R. & Pearson R. & Seyfang G. (eds.), **Corporate Responsibility & Labour Rights: Codes of Conduct in the Global Economy**, London, Earthscan, 2002, pp. 90-100.

Eaton, Joshua P., "The Nigerian Tragedy, Environmental Regulation of Transnational Corporations, and The Human Rights to a Healthy Environment", Boston University International Law Journal, Vol. 15, 1997, pp. 261-307.

Edwards, Tony &, Marginson, Paul & Ferner, Anthony & Tregaskis, Olga, **Corporate Social Responsibility in Multinational Companies: Management initiatives or negotiated agreements?**, International Institute for Labour Studies, International Labour Organization, 2007.

Emberland, Marius, "The Corporate Veil in the Jurisprudence of the Human Rights Committee and the Inter-American Court and Commission of Human Rights", **Human Rights Law Review**, Volume 4, Number 2, 2004.

Emberland, Marius, **The Human Rights of Companies: Exploring the Structure of ECHR Protection**, Oxford University Press, 2006.

Ergül, Ozan, "Temel Hak ve Özgürlüklerin Yatay Etkisi Karşısında Çalışanı Ücretini Gizli Tutmakla Yükümlü Kılmanın Hukuksal Temelsizliği Üzerine", Prof. Dr. Erdal Onar'a Armağan, Ankara Üniversitesi Yayınları No. 391, Ankara 2013, Cilt 1, pp. 433-488.

Evans, Malcolm (ed.), **International Law**, Oxford, 3rd ed. 2010.

Evans, M. & Murray, R. (eds.), **The African Charter on Human and Peoples' Rights: The System in Practice 1986-2000**, Cambridge, Cambridge University Press, 2002.

Evans, M. & Murray, R. (eds.), **The African Charter on Human and Peoples' Rights: The System in Practice 1986-2006**, Cambridge, Cambridge University Press, 2nd ed., 2008.

Evans, Peter B., "National Autonomy and Economic Development: Critical Perspectives on Multinational Corporations in Poor Countries", **International Organizations**, Vol. 25, Issue: 3, 1971, pp. 675-692.

Evik, Vesile S. **Suça İştirakte Yardım Edenin Ceza Sorumluluğu**, *Criminal Responsibility of Aider and Abettor in Joint Criminal Enterprise*, Oniki Levha yay., İstanbul, Ekim 2011.

Ewing, A.P., "Understanding the Global Compact Human Rights Principles" in UN Global Compact Office & OHCHR, **Embedding Human Rights in Business Practice I**, UN Global Compact Office: New York, 2004, pp. 29-42.

Fagan, Andrew, "Buying Right: Consuming Ethically and Human Rights" in Dine, Janet & Fagan, Andrew (eds.), **Human Rights and Capitalism: A Multidisciplinary Perspective on Globalisation**, Edward Elgar Pub., 2006, pp. 115-144.

Falk, Richard. "Human Rights", **Foreign Policy**, March-April 2004, pp. 18-26.

Farrell, Norman, "Attributing Criminal Liability to Corporate Actors – Some Lessons from the International Tribunals", **Journal of International Criminal Justice**, Vol. 8, 2010, pp. 873-894.

Farrior, Stephanie. “State Responsibility for Human Rights Abuses by Non-State Actors” in **American Society of International Law**, “Proceedings of the 92nd Annual Meeting”, April 1-4 1998, Washington DC, [92 ASIL PROC. 214 (1998), p. 299.

Fatouros, A.A., "National Legal Persons" in Dolzer, Rudolf & Hollweg, E. Robert & Lawrence, M. Peter & Less, Steven & Macalister-Smith, Peter (eds), **Max Planck Encyclopedia of Public International Law 10: States, Responsibility of States, International Law and Municipal Law**, Elsevier Science Publishers B.V., 1987, pp. 299-306.

Faure, Michael & van der Walt, André (eds.), **Globalization and Private Law – The Way Forward**, Edward Elgar, 2010.

Feld, Werner J., **Multinational Corporations and UN Politics: The Quest for Codes of Conduct**, Pergamon Press, 1980.

Feldman, David, “International Personality", ***Recuil des Cours de l'Académie de Droit International***, Vol. 191, 1985, pp. 345-41.

Fitzmaurice, Malgosia & Muchlinski, Peter & Szuniewicz, Milena (eds.), **Non-State Actors and International Law**, Volume 1, No. 2, Kluwer Law International, 2001.

Forbes, Neil, "Multinational Enterprise, 'Corporate Responsibility' and the Nazi Dictatorship: The Case of Unilever and Germany in the 1930s", **Contemporary European History**, Vol. 16: 2, 2007, pp. 149-167.

Forcese, Craig. "Deterring Militarized Commerce", **Ottowa Law Review**, Vol. 31, 1999, p. 171-211.

Forcese, Craig, **Putting Conscience into Commerce: Strategies for making human rights business as usual**, International Centre for Human Rights and Democratic Development, Montreal, 1997.

Forsyth, David P., **Human Rights in International Relations**, Cambridge University Press, 2nd ed., rep. 2007.

Francioni, Francesco, "Alternative Perspectives on International Responsibility for Human Rights Violations by Multinational Corporations" in Benedek, Wolfgang & de Feyter, Koen & Marrella, Fabrizio (eds.), **Economic Globalisation and Human Rights**, Cambridge University Press, 2007, pp. 245-265.

Freidman, Daniel & Barak-Erez, Daphne (eds.), **Human Rights in Private Law**, Hart, 2001.

Friedman, Milton, **Capitalism and Freedom**, University of Chicago Press, 1962.

Friedman, Milton, "The Social Responsibility of Business to Increase its Profits", New York Time Magazine, 13 September 1970.

Friedman, Milton. **There's No Such Thing as a Free Lunch**, Open Court Publishing Company, 1977.

Freeman, Aaron, "Sanctioning Burma", Multinational Monitor, June 1996, Vol. 17, Number 6, http://multinationalmonitor.org/hyper/mm0696.03.html, accessed on 07.10.2014.

Frynas, Jedrzej George & Pegg, Scott. (eds.), "Transnational Corporations and Human Rights", Palgrave Macmillan, 2003.

Gatto, Alexandra, **Multinational Enterprises and Human Rights: Obligations under EU Law and International Law**, Edward Elgar Publishing, 2011.

Ghandhi, Sandy, "Human Rights and the International Court of Justice The Ahmadou Sadio Diallo Case", **Human Rights Law Review**, Vol. 11:3, 2011, pp. 527-555.

Gianviti, François. "Economic, Social, and Cultural Human Rights and the International Monetary Fund" in Alston, Philip (ed.) "*Non-State Actors and Human Rights*", Oxford University Press, 2005, pp. 113-138.

Gilovich, Thomas & Medvec, Victoria Husted & Savitsky, Kenneth, "The spotlight effect in social judgment: An egocentric bias in estimates of the salience of one's own actions and appearance", **Journal of Personality and Social Psychology**, Vol. 78(2), Feb. 2000, pp. 211-222. http://dx.doi.org/10.1037/0022-3514.78.2.211, accessed on 17.07.2015.

Graff, Julia, "Corporate War Criminals and the International Criminal Court: Blood and Profits in the Democratic Republic of Congo", **Human Rights Brief** , Vol. 11, no. 2 (2004), pp. 23-26.

Green, Fergus, "Fragmentation in Two Dimensions: The ICJ's Flawed Approach to Non-State Actors and International Legal Personality", **Melbourne Journal of International Law**, Vol. 9, 2008, pp. 47-77.

Grolimund. Pascal, "Human Rights and Jurisdiction: General Observations and Impact on the Doctrines of *Forum Non Conveniens* and *Forum Conveniens*", **European Journal of Law Reform**, Vol. 4, 2002, pp. 87-118.

Grossman, Claudio, "Strengthening the Inter-American human Rights system: The Current Debate", **American Society of International Law Proceedings**, Vol. 92, 1998, pp. 186-191.

Guzman, Andrew & Meyer, Timothy, "International Soft Law", **Journal of Legal Analysis**, Vol.2, Number 1, 2010, pp. 171-225.

Habermas, Jürgen, "The Constitutionalization of International Law and the Legitimation Problems of a Constitution for World Society", **Constellations**, Volume 15, Issue 4, December 2008, pp. 444–455.

Hamm, Brigitte. "Business as a New Actor in the Human Rights Regime" in Goodhart, Michael & Mihr, Anja (eds.), **Human Rights in the 21st Century: Continuity and Change since 9/11**, Palgrave Macmillan, 2011, pp. 237-255.

Hansen, Carol Rae, "The Slepak Principles: No Threat to American Traders", **Whittier Law Review,** Vol.11, 1989-1990, pp. 459-472.

Harding, Christopher, "Statist Assumptions, normative individualism and new forms of personality: evolving a philosophy of international law for the twenty-first century" in Fitzmaurice, Malgosia & Muchlinski, Peter & Szuniewicz, Milena (eds.), **Non-State Actors and International Law**, Volume 1, No. 2, Kluwer Law International, 2001, pp. 107-125.

Harris, D.J. & O'Boyle, M. & Bates E.P. & Buckley, C.M, **Harris, O'Boyle, Warbrick Law of the European Convention on Human Rights**, Oxford, 2nd ed., 2009.

Hellmann, Rainer, **Transnational Control of Multinational Corporations**, Praeger Special Studies in International Business, Finance and Trade, 1977.

Henderson, Conway W., **Understanding International Law**, Wiley-Blackwell, 2010.

Henkin, Louis. "That 'S' Word: Sovereignty, and Globalization, and Human Rights, Et Cetera", 68 **Fordham L. Rev.** 1, 1999, pp.1-14.

Henkin, Louis, "Sibley Lecture, March 1994: Human Rights and State "Sovereignty", **Georgia Journal of International and Comparative Law**, Vol. 25, 1994, pp. 31-

Henkin, Louis, "The Universal Declaration at 50 and the Challenge of Global Markets", **Brooklyn Journal of International Law**, Vol. 17, April 1999, pp. 17-25

Herberg, Martin, "Private Authority, Global governance, and the Law: The Case of Environmental Self-regulation in Multinational Enterprises" in Winter, Gerd. (ed.) **Multilevel Governance of Global Environmental Change: Perspectives from Science, Sociology and the Law**, Cambridge University Press, 2006, pp. 149-178.

Hessebruegge, Jan Arno, "The Historical Development of the Doctrines of Attribution and Due Diligence in International Law", **New York University Journal of International Law and Policy**, Vol. 36, 2003-2004, p.265-306.

Heyns, C., "Civil and Political Rights in the African Charter" in M.D. Evans & R. Murray (eds.), **The African Charter on Human and Peoples' Rights: The System in Practice 1986-2000**, Cambridge, Cambridge University Press, 2002, pp.

Higgins, Rosalyn, **Problems and Process: International law and how we use it**, Oxford University Press, 1994 (rep. 2010).

Hillemanns, Carolin F., "UN Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights", **German Law Journal**, Vol.4, No.10, 2003, pp. 1065- 1080.

Hobe, Stephan, "The Role of Non-State Actors, in Particular of NGOs, in Non-Contractual Law-Making and the Development of Customary International Law" in Wolfrum, Rüdiger & Röben, Volker (eds.), **Developments of International Law in Treaty Making**, Springer, 2005, pp. 319-329.

Hofmann Rainer (ed.), **Non-state Actors as New Subjects of International Law: International Law - From the Traditional State Order Towards the Law of the Global Community**, Proceedings of an International Symposium of the Kiel Wlather-Schücking-Institute of International Law, March 25 to 28, 1998, Duncker&Homblot, 1999.

Hopkins, Michael, "Criticism of the Corporate Social Responsibility Movement" in Mullerat, Ramon (ed.), **Corporate Social Responsibility: The Corporate Governance of the 21st Century**, Kluwer Law International, 2005, p. 475.

Horn, Norbert (ed.), **Legal Problems of Codes of Conduct for Multinational Enterprises**, Studies in Transnational Economic Law Vol. 1, Kluwer, 1980.

Horn, Norbert, "Codes of Conduct for MNEs and Transnational Lex Mercatoria: An International Process of Learning and Law Making" in Norbert Horn (ed.), **Legal Problems of Codes of Conduct for Multinational Enterprises**, Studies in Transnational Economic Law Vol. 1, Kluwer, 1980, pp.

Howen, Nicholas. "Business, Human Rights and Accountability", International Commission of Jurists, speech at the 'Business and Human Rights' Conference Organized by the Danish Section of the ICJ Copenhagen, 21 September 2005, http://www.ihrb.org/pdf/Business_Human_Rights_and_Accountability.pdf, accessed on 26.08.2013.

Hughes, Edel. Schabas, William A. & Thakur, Ramesh. (eds.) "Atrocities and International Accountability: Beyond Transitional Justice", United Nations University Press, 2007, pp. 246-274.

Huisman, Wim & van Sliedregt, Elies, "Rogue Traders – Dutch Businessmen, International Crimes and Corporate Complicity", **Journal of International Criminal Justice**, Vol. 8, 2010, pp. 803-828.

Huner, Jan, "The Multinational Agreement on Investment and the Review of the OECD Guidelines for Multinational Enterprises" in Kamminga, Menno T. & Zia-Zarifi, Saman (eds.), **Liability of Multinational Corporations under International Law**, Studies and Materials on the Settlement of International Disputes Vol. 7, Kluwer Law International, 2000, pp. 197-205.

Hymer, Stephen. "The Multinational Corporation and the Law of Uneven Development" in Transnational Corporations and World Order: Readings in International Political Economy 386, 1979.

Jägers, Nicola, "UN Guiding Principles on Business and Human Rights: Making Headway towards Real Corporate Accountability?", **Netherlands Quarterly of Human Rights**, Vol. 29/2, 2011, pp. 159-163.

Jägers, Nicola, **Corporate Human Rights Obligations: In Search of Accountability**, Antwerp, Intersentia, 2002.

Javillier, Jean-Claude, "Corporate Social Responsibility and law: Synergies are needed for sustainable development" in **Governance, International Law & Corporate Social Responsibility**, ILO Research Studies 116, 2008, pp. 37-62.

Jenkins, R., "The political economy of codes of conduct" in Jenkins, R., Pearson R. and Seyfang G. (eds.), **Corporate Responsibility and Labour Rights: Codes of Conduct in the Global Economy**, 2002, pp. 13-30.

Jenkins R. & Pearson R. & Seyfang G. (eds.), **Corporate Responsibility & Labour Rights: Codes of Conduct in the Global Economy**, London, Earthscan, 2002.

Jennings, Sir Robert & Watts, Sir Arthur (eds.), **Oppenheim's International Law**, 9th ed., Vol. 1, Longman, 1996.

Jennings, Sir Robert & Watts, Sir Arthur (eds.), **Oppenheim's International Law**, 9th ed., Vol. 1, Parts 2 to 4, Longman, 1992.

Jessup, Philip C., **A Modern Law of Nations: An Introduction**, New York, Macmillan, 1949.

Jessup, Philip C., "The Subjects of Modern Law of Nations", **Michigan Law Review**, Vol. 45, 1947, pp. 383-408.

Jessup, Philip C., **Transnational Law**, Yale University Press, 1956.

Jochnick, Chris, "Confronting the Impunity of Non-State Actors: New Fields for the Promotion of Human Rights", **Human Rights Quarterly**, Vol.21, 1999, pp. 56-79.

Johns, Fleur. (ed.) "International Legal Personality", The Library of Essays in International Law, Ashgate, 2010.

Johns, Fleur, "The Invisibility of the Transnational Corporation: An Analysis of International Law and Legal Theory", **Melbourne University Law Review**, Vol. 19, 1994, pp. 893-.

Joseph, Sarah, "Scope of Application", in Moeckli, Daniel & Shah, Sangeeta & Sivakumaran, Sandesh (eds.), **International Human Rights Law**, Oxford University Press, 2010, pp. 150-170.

Joseph, Sarah., "An Overview of the Human Rights Accountability of Multinational Enterprises" in Kamminga, Menno T. & Zia-Zarifi, Saman. (eds.), **Liability of Multinational Corporations under International Law**, Studies and Materials on the Settlement of International Disputes Vol. 7, Kluwer Law International, 2000, pp. 75-96.

Joseph, Sarah & Schultz, Jenny & Castan, Melissa, **The International Covenant on Civil and Political Rights: Cases, Commentary and Materials,** Oxford, OUP, 2nd ed., 2004.

Jungk, Margaret, "A Practical Guide to Addressing Human Rights Concerns for Companies Operating Abroad" in Addo, Michael K. (ed), **Human Rights Standards and the Responsibility of Transnational Corporations**, Hague, Kluwer Law International, 1999, pp. 171-186.

Kamatali, Jean-Marie, "The New Guiding Principles on Business and Human Rights' Contribution in Ending the Divisive Debate over Human Rights Responsibilities of Companies: Is it Time for an ICJ Advisory Opinion?", **Cardozo Journal of International and Comparative Law**, Vol. 20.2, Winter 2012, pp. 437-463.

Kamminga, Menno T. "The Evolving Status of NGOs under International Law: A Threat to the Inter-State System?" in Alston, Philip (ed.) "*Non-State Actors and Human Rights*", Oxford University Press, 2005, pp. 93-111.

Kamminga, Menno T. & Zia-Zarifi, Saman, "Liability of Multinational Corporations under International Law: An Introduction" in Kamminga, Menno T. & Zia-Zarifi, Saman (eds.) **Liability of Multinational Corporations under International Law**, Studies and Materials on the Settlement of International Disputes Vol. 7, Kluwer Law International, 2000, pp. 1-15.

Kamminga, Menno T. & Zia-Zarifi, Saman, **Liability of Multinational Corporations under International Law**, Studies and Materials on the Settlement of International Disputes Vol. 7, Kluwer Law International, 2000.

Karavias, Markos, **Corporate Obligations under International Law**, Oxford, 2013.

Karavias, Markos. "Shared Responsibility and Multinational Enterprises", 62 **Neth. Int. Law Rev.** 91, 2015, pp. 91-117.

Karp, David Jason, "Transnational Corporations in 'bad states': Human Rights Duties, Legitimate Authority and The Rule of Law in International Political Theory", **International Theory**, Vol. 1:1, 2009, pp. 87-118.

Keenan, J. Patrick, "Financial Globalisation and Human Rights", **Columbia Journal of Transnational Law**, Vol. 46, No. 3, 2008, pp. 509-562.

Keohane, Robert & Nye, Joseph. *Transgovernmental Relations and International Organizations*, 27 **World Pol.** 39, 44 (1974).

Keynes, John Maynard, **The General Theory of Employment, Interest and Money**, Palgrave Macmillan, 1936.

Kıvılcım, Zeynep, "Ulus-Aşırı Şirketler ve İnsan Hakları: Bakü-Tiflis-Ceyhan Boru Hattı Örneği", *(Trans-national Corporations and Human Rights: The Example of Baku-Tblisi-Ceyhan Pipleline)*, **Ankara Üniversitesi SBF Dergisi**, No: 65(3), Temmuz-Eylül 2010, pp.87-122.

Kim, Kee Beom, "A multilateral contribution to corporate standards of behaviour: the ILO's declaration on multinational enterprises" in Tully, Stephen (ed.), **Research Handbook on Corporate Legal Responsibility**, Edward Elgar Publishing, 2005, pp. 319-333.

Kinley, David (ed.), **Human Rights and Corporations**, International Library of Essays, Ashgate, 2009.

Kinley, David & Chambers, Rachel, "The UN Human Rights Norms for Corporations: The Private Implications of Public International Law", **Human Rights Law Review**, Vol. 6:3, 2006, pp. 447-497.

Kinley, David & Tadaki, Junko, "From Talk to Walk: the Emergence of Human Rights Responsibilities for Corporations at International Law", **Virginia Journal of International Law**, Vol. 44, 2004, pp. 931-1022.

Kirton, John J. & Trebilcock, Michael J. (eds.), **Hard Choices, Soft Law: Voluntary Standards in Global Trade, Environment and Social Governance**, Global Environmental Governance Series, Ashgate, 2004.

Klabbers, Jan, "(I Can't Get No) Recognition: Subjects Doctrine and the Emergence of Non-State Actors", in Petman, Jarna & Klabbers, Jan (eds), **Nordic Cosmopolitanism. Essays in International Law for Martti Koskenniemi**, LeidenBoston: Martinus Nijhoff, 2003, pp. 351-369.

Klabbers, Jan, "The Concept of Legal Personality", **Ius Gentium**, Legal Personality, Volume 11, Spring 2005, pp. 35-66.

Klabbers, Jan, **An Introduction to International Institutional Law**, Cambridge University Press, 2005.

Klabbbers, Jan, **International Law**, Cambridge, rep. 2013.

Klabbers, Jan, "The Redundancy of Soft Law", **Nordic Journal of International Law**, Vol. 65, 1996, pp. 167-182.

Klabbers, Jan, "The Undesirability of Soft Law", **Nordic Journal of International Law**, Vol. 67, 1998, pp. 381-391.

Klabbers, Jan & Peters, Anne & Ulfstein, Geir, **The Constitutionalization of International Law**, Oxford University Press, 2009.

Knox, John. H., "Horizontal Human Rights Law", **American Journal of International Law**, Vol.102, 2008, pp. 1-47.

Knox, John H., "The Universal Declaration of Human Rights [and Duties]", Opinio Juris, 06.11.2007, http://opiniojuris.org/2007/11/06/the-universal-declaration-of-human-rights-and-duties/, accessed on 15.06.2015.

Koebele, Michael, **Corporate Responsibility under the Alien Tort Statute: Enforcement of International Law through US Torts Law**, Martinus Nijhoff Publishers, Leiden, 2009.

Koh, Harold H., "Transnational Legal Process", **Nebraska Law Review**, Vol. 75, 1996, pp.181-207.

Koh, Harold H., "Why Do Nations Obey International Law", **Yale Law Journal**, Vol. 106, 1997, pp. 2599-2659.

Korowicz, Marek St., "The Problem of the International Personality of Individuals", **American Journal of International Law**, Vol. 50, 1956, pp. 533-542.

Ku, Julian G., "Kiobel and the Surprising Death of Universal Jurisdiction under the Alien Tort Statute", Agora: Reflections on Kiobel, **American Journal of International Law**, Vol.107, 2013, pp. 835-841.

Kuwali, Dan, "Grey War Zone? The Question of Contractual Control of the Privatization of Warfare and Civilianization of the Military" in Stahn, Carsten & van den Herik, Larissa (eds.), **Future Perspective on International Criminal Justice**, TMC Asser Press, 2010, pp. 369-394.

Lambooy, Tineke, "Corporate Due Diligence as a Tool to Respect Human Rights", **Netherlands Quarterly of Human Rights**, Vol. 28/3, 2010, pp. 404-448.

Lambooy, Tineke & Rancourt, M-È., "Private Regulation: Indispensable for Responsible Conduct in a Globalizing World?", in **Law and Globalisation**, Bocconi School of Law, Milan and VDM Publishing, Saarbrücken, 2009, pp. 90–133.

Lansing, Paul & Rosaria, Alex, "An Analysis of the United Nations Proposed Code of Conduct for Transnational Corporations", **World Competition Law and Economic Review,** Vol. 14, 1991, pp. 35-50.

Lauterpacht, Hersch, **International Law and Human Rights**, Praeger, 1950.

Lauterpacht, Hersch, "The Subjects of International Law" in Lauterpacht E. (ed.), **International Law. Being the Collected Papers of Hersch Lauterpacht, Volume I: The General Works***,* Cambridge: Cambridge University Press, 1970, pp. 136-50.

Lauterpacht, Hersch, "The Subjects of the Law of Nations", **Law Quarterly Review**, Vol. 63, October 1947, pp. 438-460.

Lauterpacht, Hersch, "The Subjects of the Law of Nations", **Law Quarterly Review**, Vol. 68, 1947, p. 438.

Leary, Virginia A. & Warner, Daniel (eds.), **Social Issues, Globalisation and International Institutions: Labour Rights and the EU, ILO, OECD and WTO**, International Studies in Human Rights, Vol. 84, Martinus Nijhoff Publishers, 2006.

Leary, Virginia, "Nonbinding Accords in the Field of Labor", in E. Brown Weiss (ed.) **International Compliance with Nonbinding Accords**, Washington, DC: American Society of International Law, 1997, pp. 247-264.

Lepard, Brian D., **Customary International Law: A New Theory with Practical Applications**, ASIL Studies in International Legal Theory, Cambridge, 2010.

Lindblom, Anna-Karin, **Non-Governmental Organisations in International Law**, Cambridge University Press, 2005.

Lippman, Matthew, "Transnational Corporations and Repressive Regime: The Ethical Dilemma", **California Western International Law Journal**, Vol. 15, 1985, pp. 542-551.

Lowe, Vaughan. "International Law", Clarendon Law Series, Oxford University Press, reprinted 2011.

Macklem, Patrick, "Corporate Accountability under International Law: the Misguided Quest for Universal Jurisdiction", **International Law FORUM du droit international**, Vol. 7, No. 4, December 2005, pp. 281-289.

Malanczuk, Peter, **Akehurst's Modern Introduction to International Law**, 7th rev. ed., 2010.

Malanczuk, Peter, "Multinational Enterprises and Treaty-Making: A Contribution to the Discussion on Non-State Actors and the 'Subject of International Law'" in V. Gowlland-Debbas (ed), **Multilateral Treaty-Making: the Current Status of Challenges to and Reforms needed in the International Legislative Process**, The Hague: Martinus Nijhoff, 2000, pp. 45-72.

Manby, Bronwen, "Civil and Political Rights in the African Charter on Human and Peoples' Rights: Articles 1-7" in Evans, M. & Murray, R. (eds.), **The African Charter on Human and Peoples' Rights: The System in Practice 1986-2006**, Cambridge, Cambridge University Press, 2nd ed., 2008, pp. 171-212.

Mansell, Wade & Openshaw, Karen, **International Law: A Critical Introduction**, Hart Publishing, 2013.

Marrella, Fabrizio, "Human Rights, Arbitration, and Corporate Social Responsibility in the Law of International Trade", in Benedek, Wolfgang & de Feyter, Koen & Marrella, Fabrizio (eds.), **Economic Globalisation and Human Rights**, Cambridge University Press, 2007, pp. 266-310.

Martin, Francisco Forrest, "The International Human Rights & Ethical Aspects of the *forum non conveniens* Doctrine", **University of Miami Inter-American Law Review**, Vol. 35, 2003-2004, pp. 101-121.

Martin-Ortega, Olga & Wallace, Rebecca M.M., "The Interaction between corporate codes of conduct and international law: a study of women and children in the textile industry" in Tully, Stephen (ed.), **Research Handbook on Corporate Legal Responsibility**, Edward Elgar Publishing, 2005, pp. 302-318.

Mbelle, Nobuntu, "The Role of Non-governmental Organizations and National Human Rights Institutions at the African Commission" in Evans, M. & Murray, R. (eds.), **The African Charter on Human and Peoples' Rights: The System in Practice 1986-2006**, Cambridge, Cambridge University Press, 2nd ed., 2008, pp. 289-315.

McBarnet, Doreen & Voiculescu, Aurora & Campbell, Tom (eds.), **The New Corporate Accountability: Corporate Social Responsibility and the Law**, Cambridge University Press, 2009.

McCorquodale, Robert, "The Individual and the International Legal System" in Malcolm Evans (ed.), **International Law**, Oxford, 3rd ed. 2010, p. 297.

McCorquodale, Robert. "Overlegalizing Silences: Human Rights and Non-State Actors", **ASIL Proceedings**, Vol. 96, 2002, pp. 384-388.

McCorquodale, Robert & Simons, Penelope, "Responsibility Beyond Borders: State Responsibility for Extraterritorial Violations by Corporations of International Human Rights Law", **Modern Law Review Limited**, Vol. 70, 2007, pp. 598-625.

McCrudden, Christopher, "Human Rights Codes for Transnational Corporations: What Can the Sullivan and MacBride Principles Tell Us?", **Oxford Journal of Legal Studies**, Vol. 19, 1999, pp. 167-201.

Meyer, William H., "Confirming, Infirming, and 'Falsifying' Theories of Human Rights: Reflections on Smith, Bolyard, and Ippolito through the Lens of Lakatos", **Human Rights Quarterly**, Vol.21, 1999, pp. 220-228.

Meyer, William H., **Human Rights and International Political Economy in Third World Nations: Multinational Corporations, Foreign Aid, and Repression**, Praeger, 1998.

Michalski, Roger M., "Rights Come with Responsibilities: Personal Jurisdiction in the Age of Corporate Personhood", San Diego Law Review, Vol. 50, 2013, pp.125-190.

Mieville, China, **Between Equal Rights: A Marxist Theory of International Law**, Historical materialism book series, Vol. 6, Brill 2005.

Miller, David. Principles of Social Justice, Cambridge, Harvard University Press, 1999.

Miller & Bratspies (eds.), **Progress in International Law**, Koninklijk Brill NV., 2008.

Miller, Russell A., "Paradoxes of Personality: Transnational Corporations, Non-Governmental Organizations and Human Rights in International Law", in Miller & Bratspies (eds.), **Progress in International Law**, Koninklijk Brill NV., 2008, pp. 381-406.

Miretski, Pini Pavel & Bachmann, Sacha-Dominik, "The UN Norms on the Responsibility of Transnational Corporations and Other Business Enterprises with Regard to Human Rights: A Requiem", **Deakin Law Review**, Vol. 17, No.1, 2012, pp. 5-41.

Moder, Karl-Heinz, "Norms on the Responsibilities of Transnational Corporations and other Business Enterprises with regard to Human Rights", Background paper to the Friedrich Ebert Stiftung side event at the 60th session of the UN Commission on Human Rights on 25 March 2005, Palais des Nations, Geneva, http://www.fes-globalization.org/geneva/documents/UN_Norms/25March04_UN-Norms_Background.pdf, accessed on 27.02.2013.

Moeckli, Daniel & Shah, Sangeeta & Sivakumaran, Sandesh (eds.), **International Human Rights Law**, Oxford University Press, 2010.

Mogami, Toshiki. "Non-state Actors and International Law: A Tentative Theorization on the Conversion of the Principle of the Legal Order", **The Journal of International Law and Diplomacy**, Vol. 108, No. 2, August 2009, pp. 309-310.

Monshipouri, Mahmood & Welch, Claude E. & Kennedy, Evan T., "Multinational Corporations and the Ethics of Global Responsibilities", **Human Rights Quarterly**, Vol. 25, 2003, pp. 965-989.

Mowbray, Alastair. "Cases and Materials on the European Convention on Human Rights", Oxford, 2007.

Mowbray, Alastair, **The Development of Positive Obligations under the European Convention on Human Rights by the European Court of Human Rights**, Hart Publishing, Oxford, 2004.

Muchlinski, Peter T., "Attempts to Extend the Accountability of Transnational Corporations: The Role of UNCTAD" in Kamminga, Menno T. & Zia-Zarifi, Saman (eds.), **Liability of Multinational Corporations under International Law**, Studies and Materials on the Settlement of International Disputes, Vol. 7, Kluwer Law International, 2000, pp. 97-118.

Muchlinski, Peter, "Corporations in International Litigation: Problems of Jurisdiction and the United Kingdom Asbestos Cases", **International and Comparative Law Quarterly**, Vol. 50, Issue 1, Jan. 2001, pp. 1-25.

Muchlinski, Peter. "Multinational Enterprises as Actors in International Law: Creating 'Soft Law' Obligations and 'Hard Law' Rights" in Noortmann, Math & Ryngaert, Cedric (eds.), **Non-state Actor Dynamics in International Law: From Law-Takers to Law-Makers**, Ashgate, 2010, pp. 9-40.

Muchlinski, Peter T., "'Global Bukowina' Examined: Viewing the Multinational Enterprise as a Transnational Law-making Community" in Teubner, Gunther. (ed.) **Global Law without a State**, Studies in Modern Law and Policy, Ashgate, rep. 2003, pp. 79-108.

Muchlinski, Peter, “Human Rights and Multinationals: Is There A Problem?”, International Affairs, 77, 2001, pp. 31-47.

Muchlinski, Peter T., "Corporations in International Litigation: Problems of Jurisdiction and the United Kingdom Asbestos Cases", **International and Comparative Law Quarterly**, Vol. 50, Issue 1, 2001, pp.1-25.

Mullerat, Ramon (ed.), **Corporate Social Responsibility: The Corporate Governance of the 21st Century**, Kluwer Law International, 2005.

Mullerat, Ramon. "The Global Responsibility of Business" in Mullerat, Ramon. (ed.) **Corporate Social Responsibility: The Corporate Governance of the 21st Century**, Kluwer Law International, 2005, pp. 3-30.

Nederman, Cary J., "Sovereignty, War and the Corporation: Hegel on the Medieval Foundations of the Modern State", **Journal of Politics**, Vol. 49, Issue 2, 1987, pp. 500-520.

Nerlich, Volker, "Core Crimes and Transnational Business Corporations", **Journal of International Criminal Justice**, Vol. 8, 2010, pp. 895-908.

Neuhold, Hanspeter, "Variations on the Theme of 'Soft International Law'" in Buffard, Isabelle & Crawford, James & Pellet, Alain & Wittich, Stephan, **International Law between Universalism and Fragmentation: Festschrift in Honour of Gerhard Hafner**, Martinus Nijhoff Publishers, 2008, pp. 343-360.

Nijman, Janne E, “Paul Ricoeur and International Law: Beyond "The End of the Subject" - Towards a Reconceptualization of International Legal Personality”, **Leiden Journal of International Law**, Vol. 20, 2007, pp. 25-64.

Nijman, Janne Elisabeth, **The Concept of International Legal Personality: An Inquiry into the History and Theory of International Law**, TMC Asser Press, 2004.

Nissel, Alan. "The Duality of State Responsibility", **Columbia Human Rights Law Review**, Vol. 44, 2012-2013, pp. 793-858.

Nollkaemper, André & Jacobs, Dov, "Shared Responsibility in International Law: A Concept Paper", ACIL Research Paper No 2011-07 (SHARES Series), finalized in 2 August 2011.

Nollkaemper, André, "Concurrence Between Individual Responsibility and State Responsibility in International Law", **International and Comparative Law Quarterly**, Vol. 52(3), 2003, pp. 615-640.

Noortmann, Math & Ryngaert, Cedric (eds.), **Non-state Actor Dynamics in International Law: From Law-Takers to Law-Makers**, Ashgate, 2010.

Noussia, Kyriaki. “Confidentiality in International Commercial Arbitration: A Comparative Analysis of the Position under English, US, German and French Law”, Springer, 2010.

Nowak, Manfred, "The Need for a World Court of Human Rights", **Human Rights Law Review**, Vol. 7, 2007, pp. 251-259.

Nowrot, Karsten. "New Approaches to the International Legal Personality of Multinational Corporations Towards a Rebuttable Presumption of Normative Responsibilities", ESIL web publications, 2005 Geneva Research Forum, How Does International Law Accommodate Private Actors?, http://www.esil-sedi.eu/fichiers/en/Nowrot_513.pdf, accessed on 08.12.2011.

Nowrot, Karsten, "Reconceptualising International Legal Personality of Influential Non-state Actors: Towards a Rebuttable Presumption of Normative Responsibilities", **Philippine Law Journal**, Vol. 80, No.4, 2006, pp. 563-586.

Nussbaum, Arthur, "Arbitration between the Lena Goldfields Ltd. and the Soviet Government", **Cornell Law Review**, Vol. 36, 1950, pp. 31-53.

O'Brien, John, **International Law**, Cavendish, 2001.

O'Connell, Daniel, **International Law**, Vol 1, London, Stevens and Sons, 2nd ed., 1970.

Odinkalu, Anselm Chidi, "Implementing Economic, Social and Cultural Rights" in Evans, M. and Murray, R. (eds.), **The African Charter on Human and Peoples' Rights: The System in Practice 1986-2006**, Cambridge, Cambridge University Press, 2002, pp.178-218.

Oldenziel Joris & Wilde-Ramsing, Joseph & Feeney, Patricia, "OECD WATCH 10 Years On: Assessing the Contribution of the OECD Guidelines for Multinational Enterprises to responsible business conduct", June 2010, http://oecdwatch.org/publications-en/Publication_3550, accessed on 29.11.2012.

Orakhelashvili, Alexander, **Peremptory Norms in International Law**, Oxford, rep. 2012.

Oral, Elif, "*Dünya Sosyal Forumu: Bir Küresel Adalet Hareketi*" (*World Social Forum: A Global Justice Movement*), **Maltepe Üniversitesi Hukuk Fakültesi Dergisi**, Kasım 2010, Cilt I, pp. 271-289.

Oxford Dictionary of Law, Oxford University Press, 7th ed., 2009.

Ökçün, Gündüz A., **Trans-Municipal Law: A Critical Analysis of Private International Law**, Capital Markets Board, 2nd ed., November 1998.

Öktem, Emre & Kurtdarcan, Bleda R., **Deniz Haydutluğu ve Korsanlık: Tarihi ve Hukuki Boyutlarıyla**, (*Historical and Legal Aspects of Privateering and Piracy*) Denizler Kitabevi, Istanbul, 2011.

Öktem, Emre, **Terörizm, İnsancıl Hukuk ve İnsan Hakları**, (*Terrorism, Humanitarian Law and Human Rights*), Derin Yayınları, İstanbul, 2007.

Öktem, Emre, **Uluslararası Teamül Hukuku**, (*International Customary Law*), Beta Basım, İstanbul, 2013.

Özkan, Işıl. **Hukukun Küreselleşmesi ve Ulusötesi Hukuk**, *(Globalization of Law and Transnational Law),* Oniki Levha Yayıncılık, İstanbul, 2014.

Oshionebo, Evaristus, "The UN Global Compact and Accountability of Transnational Corporations: Separating Myth From Realities", **Florida Journal of International Law**, Vol. 19, No. 1, April 2007, pp. 1-38.

Özdek, Yasemin, "Küresel Yoksulluk ve Küresel Şiddet Kıskacında İnsan Hakları," *(Human Rights in the Clamp of Global Poverty and Global Violence)* in Özdek, Yasemin (ed.), **Yoksulluk, Şiddet ve İnsan Hakları** *(Poverty, Violence and Human Rights),* Ankara: TODAIE İnsan Hakları Araştırma ve Derleme Merkezi, 2002, pp. 1-44.

Ovey, Clare & White, Robin C. A., **Jacobs & White, The European Convention on Human Rights**, Oxford University Press, 4th ed., 2006.

Ovey, Clare & White, Robin C. A., **Jacobs & White, The European Convention on Human Rights**, Oxford University Press, 5th ed., 2010.

Pace, John, "The Global Compact - Fact or Fiction?", **Mediterranean Journal for Human Rights,** Vol. 7, issue 1, 2003, pp. 127-

Palma, Mauro, "The Possible Contribution of International Civil Society to the Protection of Human Rights" in Cassese, Antonio (ed.), **Realizing Utopia: The Future of International Law**, Oxford University Press, rep. 2012, pp. 76-88.

Parker, Christine, "Meta-Regulation: Legal Accountability for Corporate Social Responsibility" in McBarnet, Doreen & Voiculescu, Aurora & Campbell, Tom (eds.), **The New Corporate Accountability: Corporate Social Responsibility and the Law**, Cambridge University Press, 2009, pp. 207-237.

Paust, Jordan J., "The Human Right to Revolution" in Claude, Pierre Richard & Weston, Burns H. (eds.), **Human Rights in the World Community: Issues and Action**, University of Pennsylvania Press, 3rd ed., 2006, pp. 445-454.

Pellet, Alain, "The Definition of Responsibility in International Law" in Crawford, James & Pellet, Alain & Olleson, Simon (eds.), **The Law of International Responsibility**, Oxford University Press, 2010, pp.1-16.

Peters, Anne & Koechlin, Lucy & Förster, Till & Fenner Zinkernagel, Gretta, **Non-State Actors as Standard Setters**, Cambridge University Press, 2009.

Peters, Anne & Förster, Till & Koechlin, Lucy, "Towards non-state actors as effective, legitimate and accountable standard setters" in Peters, Anne & Koechlin, Lucy & Förster, Till & Fenner Zinkernagel, Gretta, **Non-State Actors as Standard Setters**, Cambridge University Press, 2009, pp. 492-562.

Petersmann, Ernst-Ulrich, "Human Rights, International Economic Law and 'Constitutional Justice'", **European Journal of International Law**, Vol. 19, no. 4, 2008, pp. 769-798.

Petersmann, Ernst-Ulrich, "Human Rights and International Economic Law", **Trade Law and Development**, Vol. 4, 2012, pp. 283-314.

Picciotto, Sol, "Rights, Responsibilities and Regulation of International Business", **Columbia Journal of Transnational Law**, Vol. 42, 2003, pp.131-152.

Pies, Ingo & Koslowski, Peter (eds.), **Corporate Citizenship and New Governance – The Political Role of Corporations**, Springer, 2011.

Pillay, Sukanya, "And Justice For All? Globalization, Multinational Corporations, and the Need for Legally Enforceable Human Rights Protections", **University of Detroit Mercy Law Review**, Vol. 81, 2004, pp. 489-523.

Pityana, N.B., "The Challenge of Culture for Human Rights in Africa: the African Charter in a Comparative Context", in M.D. Evans & R. Murray (eds.) **The African Charter on Human and Peoples' Rights: The System in Practice 1986-2000,** Cambridge, Cambridge University Press, 2002, pp. 219-245.

Portmann, Roland, **Legal Personality in International Law**, Cambridge University Press, 2010.

Ragazzi, Maurizio (ed.), **International Responsibility Today: Essays in Memory of Oscar Schachter**, Leiden and Boston: Martinus Nijhoff Publishers, 2005.

Ramasastry, Anita, "Corporate Complicity: From Nuremberg to Rangoon, An Examination of Forced Labour Cases and Their Impact on the Liability of Multinational Corporations", **Berkeley Journal of International Law**, Vol. 20, 2002, pp. 91-159.

Ratner, Steven R. & Abrams, S. Jason, **Accountability for Human Rights Atrocities in International Law: Beyond the Nuremberg Legacy**, 2nd ed., Oxford University Press, 2001.

Rawls, John, **The Law of Peoples**, Cambridge, 1999.

Reinalda, Bob. "Non-state actors in the International System of States" in Reinalda, Bob. "The Ashgate Research Companion to Non-State Actors", Ashgate, 2011, pp. 3-18.

Reinalda, Bob, **The Ashgate Research Companion to Non-State Actors**, Ashgate, 2011.

Reinisch, August, "*The Changing International Legal Framework for Dealing with Non-State Actors*" in Alston, Philip (ed.), **Non-State Actors and Human Rights**, Oxford University Press, 2005, pp. 37-89.

Rigaux, François, "Transnational Corporations" in Bedjaoui, Mohammed (ed.), **International Law: Achievements and Prospects**, Dordrecht: Martinus Nijhoff, 1991, pp. 121-132.

Roht-Arriza, Naomi, "'Soft Law' in a 'Hybrid' Organization: The International Organization for Standardization" in Shelton, Dinah (ed.), **Commitment and Compliance: The Role of Non-Binding Norms in International Legal Systems**, Oxford, 2003, pp. 263-280

Ronit, Karsten, "Transnational Corporations and Regulation of Business at the Global Level" in Reinalda, Bob, **The Ashgate Research Companion to Non-State Actors**, Ashgate, 2011, pp. 75-88.

Rose, Cecily. "The Application of Human Rights Law to Private Sector Complicity in Governmental Corruption", **Leiden Journal of International Law**, Vol. 24, 2011, pp. 715-740.

Rosemann, Nils, "Business Human Rights Obligations - The 'Norms of the Responsibility of Transnational Corporations and Other Business Enterprises with Regard to Human Rights", **Nordic Journal of Human Rights**, Vol. 23, Nr. 1, 2005, pp. 47-62.

Rosemann, Nils, "The Privatization of Human Rights Violations - Business' Impunity or Corporate Responsibility? The Case of Human Rights Abuses and Torture in Iraq", **Non-State Actors and International Law**, Vol.5, 2005, pp. 77-100.

Roucounas, Emmanuel, "Non-state Actors: Areas of International Responsibility in Need of Further Exploration", in Ragazzi, Maurizio (ed.), **International Responsibility Today: Essays in Memory of Oscar Schachter**, Martinus Nijhoff Publishers, 2005, pp. 392-404.

Ruder, David. S., "Public Obligations of Private Corporations", **University of Pennsylvania Law Review**, Vol. 114, 1965, pp. 209-229.

Rudolph, Philip H., "The History, Variations, Impact and Future of Self-Regulation" in Mullerat, Ramon (ed.), **Corporate Social Responsibility: The Corporate Governance of the 21st Century**, Kluwer Law International, 2005, pp. 365-384.

Ruggie, John G., **Just Business: Multinational Corporations and Human Rights**, Norton & Company Inc., New York, 2013.

Ruggie, John G., "Treaty road not travelled", Ethical Corporation, May 6th, 2008, pp. 42-43, http://www.hks.harvard.edu/m-rcbg/news/ruggie/Pages%20from%20ECM%20May_FINAL_JohnRuggie_may%2010.pdf, accessed on 12.10.2012.

Ryngaert, Cedric. "Imposing International Duties on Non-State Actors and the Legitimacy of International Law" in in Noortmann, Math & Ryngaert, Cedric. (eds.) **Non-state Actor Dynamics in International Law: From Law-Takers to Law-Makers**, Ashgate, 2010, pp.69-91.

Sabapathy, John, “In the Dark All Cats are Grey: Corporate Responsibility and Legal Responsibility” in Tully, Stephen (ed.), **Research Handbook on Corporate Legal Responsibility**, Edward Elgar Publishing, 2005, pp. 235-253.

Sahni, Binda Preet, **Transnational Corporate Liability: Accountability for Human Injury**, Cameron May, 2006.

Salacuse, Jeswald, **The Three Laws of International Investment: National, Contractual and International Frameworks for Foreign Capital**, Oxford, 2013.

Salazar, Claudia T., "Applying International Human Rights Norms in the United States: Holding Multinational Corporations Accountable in the United States for International Human Rights Violations under the Alien Tort Claims Act", **St. John's Journal of Legal Commentary,** Vol. 19:1, 2004, pp. 111-157.

Sanger, Andrew. “Corporations and Transnational Litigation: Comparing *Kiobel* with the Jurisprudence of English Courts”, **American Journal Of International Law Unbound**, 2014, e-pp. 23-30.

Sanger, Andrew. “Transnational Human Rights Cases? Not in our Backyard!”, **The Cambridge Law Journal**, Vol. 72, Issue 03, November 2013, pp. 487-490.

Schabas, William, “Enforcing International Humanitarian Law: Catching the Accomplices”, **International Review of the Red Cross,** 2001, Vol.83, No. 842, pp. 439-460.

Schabas, William, “State Policy as an Element of International Crimes”, **Journal of Criminal Law and Criminology**, Vol. 29, Issue 3, Spring 2008, pp. 953-982.

Schabas, William, **The International Criminal Court: A Commentary on the Rome Statute**, Oxford Commentaries on International Law, Oxford, 2010.

Scharf, Michael F. "Trading justice for peace: The contemporary law and policy debate" in Hughes, Edel. Schabas, William A. & Thakur, Ramesh. (eds.) "Atrocities and International Accountability: Beyond Transitional Justice", United Nations University Press, 2007, pp. 246-274.

Scheuerman, William E., **Frankfurt School Perspectives on Globalization, Democracy, and the Law**, Routledge, 2008.

Schoenberger, Karl, **Levi's Children: Coming to Terms with Human Rights in the Global Marketplace**, Grove Press, 2000.

Schwebel, Stephen M., "Human Rights in the World Court", **Vanderbilt Journal of Transnational Law**, Vol. 24, Number 5, 1991, pp. 945-970.

Scott, Craig (ed.), **Torture as Tort: Comparative Perspectives on the Development of Transnational Human Rights Litigation**, Oxford, Hart Publishing, 2001.

Seck, Sara L., “Home State Responsibility and Local Communities: The Case of Global Mining”, **Yale Human Rights & Development Law Journal**, Vol.11, 2008, pp. 177-185.

Seidl-Hohenveldern, Ignaz, **Corporations In and Under International Law**, University of Cambridge Research Centre for International Law, Hersch Lauterpacht Memorial Lectures, Cambridge Grotius Publications Ltd., 1987.

Sellers, M.N.S., "International Legal Personality", **Ius Gentium**, Legal Personality, Volume 11, Spring 2005, pp.67-78.

Sethi, Prakash S., **Setting Global Standards: Guidelines for Creating Codes of Conduct in Multinational Corporations**, Wiley, 2003.

Seyle, Conor D., **Business Participation in the Responsibility to Protect**, One Earth Future Foundation, 2013.

Shaw, Malcolm N., **International Law**, 6th ed. Cambridge University Press, 2008.

Shelton, Dinah (ed.), **Commitment and Compliance: The Role of Non-Binding Norms in International Legal Systems**, Oxford, 2003.

Shelton, Dinah, "Compliance with International Human Rights Soft Law", in E. Brown Weiss (ed.), **International Compliance with Nonbinding Accords**, Washington, DC: American Society of International Law, 1997, pp.119-145.

Shelton, Dinah, "Law, Non-Law and the Problem of 'Soft Law'" in Shelton, Dinah (ed.), **Commitment and Compliance: The Role of Non-Binding Norms in International Legal Systems**, Oxford, 2003, p.11.

Skinner, Gwynne, "When Customary International Law Violations arise under the Laws of the United States", **Brooklyn Journal of International Law**, Vol. 36:1, 2010, pp. 205-240.

Slaughter, Anne-Marie, **A New World Order**, Princeton University Press, 2004.

Slomanson, William R., **Fundamental Perspectives on International Law**, Thomson, 5th ed., 2007.

Smet, Stijn, "The 'absolute' prohibition of torture and inhuman or degrading treatment in Article 3 ECHR - Truly a question of scope only?" in Brems, Eva & Gerards, Janneke. (eds.) **Shaping Rights in the ECHR: The Role of the European Court of Human Rights in Determining the Scope of Human Rights**, Cambridge, 2013, pp.273-293.

Smith, Adam, **An Inquiry into the Nature and Causes of the Wealth of Nations**, Cambridge, 1776.

Smith, Jackie & Bolyard, Melissa & Ippolito, Anna, "Human Rights and the Global Economy: A Response to Meyer", **Human Rights Quarterly**, Vol.21, 1999, pp. 207-219.

Sneider, Carolyn M., “The Slepak Principles Act and Soviet Union-United States Joint Ventures: Profits or People”, **Loyola of Los Angeles International and Comparative Law Review**, Vol. 13, 1990, pp. 365-392.

Sorel, Jean-Marc, "The Concept of 'Soft Responsibility" in Crawford, J. & Pellet, A. & Olleson, S. (eds.), **The Law of International Responsibility**, Oxford University Press, 2010, pp. 165-171.

Sorell, Tom. "The UN Norms" in Dine, Janet & Fagan, Andrew (eds.), **Human Rights and Capitalism: A Multidisciplinary Perspective on Globalisation**, Edward Elgar Pub., 2006, pp. 284-299.

Sornarajah, Muthucumaraswamy, "Economic Neo-Liberalism and the International Law on Foreign Investment" in Anghie, Antony & Chimni, Bhupinder & Mickelson, Karin & Okafor, Obiora. **The Third World and International Order: Law, Politics and Globalization**, Developments in International Law, Vol. 45, Martinus Nijhoff Publishers, 2003, pp. 173-190.

Sottiaux, Stefan, **Terrorism and the Limitations of Rights, The European Convention on Human Rights and the United States Constitution**, Oxford, Hart publishing, 2008.

Spar, Debora L., "The Spotlight and the Bottom Line: How Multinationals Export Human Rights", **Foreign Affairs**, Volume 77, No. 2, March-April 1998, pp. 7-12.

Spiro, Peter J., "Globalization, International Law, and the Academy", **New York University International Law and Politics**, Vol. 32, 2000, pp. 567-590.

Spiro, Peter J., “Human Rights and our International Economic Interests", **ASIL Proceedings**, Vol. 88, 1994, p. 274.

Stahn, Carsten &van den Herik, Larissa. (eds.) “Future Perspective on International Criminal Justice”, TMC Asser Press, 2010.

Steiner, Henry & Alston, Philip & Goodman, Ryan, **International Human Rights in Context: Law, Politics, Morals**, Oxford University Press, 3rd ed., 2007.

Steiner, Henry, “International Protection of Human Rights” in Malcolm Evans (ed.), **International Law**, Oxford, 3rd ed. 2010, pp. 757-789.

Steinhardt, Ralph G., "Corporate Responsibility and the International Law of Human Rights: The New *Lex Mercatoria*" in Alston, Philip (ed.), **Non-State Actors and Human Rights**, Oxford University Press, 2005, pp. 177-226.

Steinhardt, Ralph G., “Kiobel and the Weakening of Precedent: A Long Walk for A Short Drink”, Agora: Reflections on Kiobel, **American Journal of International Law**, Vol.107, 2013, pp. 841-845.

Steinhardt, Ralph G., "The Privatization of Public International Law", **George Washington Journal of International Law & Economics**, Vol. 25, 1991, pp. 523-553.

Steinhardt, Ralph G., "Soft Law, Hard Markets: Competitive Self-Interest and the Emergence of Human Rights Responsibilities for Multinational Corporations", **Brooklyn Journal of International Law**, Vol. 33:3, 2008, pp. 933-953.

Stephens, Beth. "The Amorality of Profit: Transnational Corporations and Human Rights", **Berkeley Journal of International Law**, 20, pp. 45-90.

Sterio, Milena, "The Evolution of International Law", **Boston College International and Comparative Law Review**, Vol. 31, 2008, pp. 213-256.

Stern, Philip J. **The Company-State: Corporate Sovereignty and the Early Modern Foundations of the British Empire in India**, Oxford University Press, 2011.

Stewart, James G., **Corporate War Crimes: Prosecuting the Pillage of Natural Resources**, Open Society Foundations, 2010.

Stigen, Jo, **The Relationship between the International Criminal Court and National Jurisdictions: The Principle of Complementarity**, Martinus Nijhoff, Leiden-Boston 2008.

Stiglitz, Joseph E., "Multinational Corporations: Balancing Rights and Responsibilities", Ninth Annual Grotius Lecture, **American Society of International Law Proceedings,** 2007, Vol. 101, pp. 3-60.

Stoitchkova, Desislava. **Towards Corporate Liability in International Criminal Law**, School of Human Rights Research Series Vol. 38, Intersentia, 2010.

Sutherland, Philip, "Globalization and Corporate Law" in Faure, Michael. & van der Walt, André (eds), **Globalization and Private Law – The Way Forward**, Edward Elgar, 2010, p.255-342.

Teubner, Gunther. (ed.) **Global Law without a State**, Studies in Modern Law and Policy, Ashgate, rep. 2003.

Teubner, Gunther, "The Anonymous Matrix: Human Rights Violations by 'Private' Transnational Actors", **Modern Law Review**, 69 (3), pp. 327-346.

Tinker, Cathrine, "The Role of Non-State Actors in International Law-Making During the UN Decade of International Law", **American Society of International Law Proceedings**, Vol. 89, 1995, pp.177-180.

Thürer, Daniel, "The Emergence of Non-Governmental Organizations and Transnational Enterprises in International Law and the Changing Role of the State" in Hofmann, Rainer, **Non-state Actors as New Subjects of International Law: International Law - From the Traditional State Order Towards the Law of the Global Community**, Proceedings of an International Symposium of the Kiel Wlather-Schücking-Institute of International Law, March 25 to 28, 1998, Duncker&Homblot, 1999, pp. 37-58.

Topal, Ahmet Hamdi, "Uluslararası Hukuk Açısından Özel Askeri Şirketler ve Şirket Çalışanlarının Statüsü" (*The Status of the Private Military Companies and Their Employees in International Law*), **AUHFD**, 60 (4), 2011, pp. 963-1021.

Tully, Stephen, **Corporations and International Lawmaking**, BRILL, 2007.

Tully, Stephen (ed.), **International Documents on Corporate Responsibility**, Edward Elgar, 2005.

Tully, Stephen, "'Never say never jurisprudence': comparative approaches to corporate responsibility under the law of torts" in Tully, Stephen (ed.), **Research Handbook on Corporate Legal Responsibility**, Edward Elgar Publishing, 2005, pp. 125-146.

Tully, Stephen (ed.), **Research Handbook on Corporate Legal Responsibility**, Edward Elgar Publishing, 2005.

Turner, Jenia Iontcheva. Transgovernmental Networks in International Criminal Justice, 105 Mich. L. Rev. 985 (2007).

Turner, Jenia Iontcheva, "Transnational Networks and the International Public Order", in Miller & Bratspies (eds.), **Progress in International Law**, Koninklijke Brill NV., 2008, pp. 407-430.

Tuttle, Nicole R., "Human Rights Council Resolutions 26/9 and 26/22: Towards Corporate Accountability?", American Society of International Law - Insights, Vol. 19, Issue 20, 3 Sept. 2015, http://www.asil.org/insights/volume/19/issue/20/human-rights-council-resolutions-269-and-2622-towards-corporate, accessed on 03.09.2015.

Tylor, Tom R., **Why People Obey the Law**, Princeton University Press, 1990 (rep. 2006).

Tzevelekos, Vassilis P., "In Search of Alternative Solutions: Can the State of Origin be Held Internationally Responsible for Investor's Human Rights Abuses that are not Attributable to it?", **Brooklyn Journal of International Law**, Vol. 35, 2010, pp. 155-231.

Watts, Sir Arthur, "The International Rule of Law", **German Yearbook of International Law**, Vol. 36, 1993, pp. 15-45.

Vagts, Detley. "The Multinational Enterprise: A New Challenge for Transnational Law" (1970) 83 **Harvard Law Review** 739.

Vagts, Detlev F., "The UN Norms for Transnational Corporations", Leiden Journal of International Law, Vol. 16, 2003, pp. 795-802.

van den Herik, Larissa, "Corporations as Future subjects of International Criminal Court: An Exploration of the Counterarguments and Consequences" in Stahn, Carsten & van den Herik, Larissa (eds.), **Future Perspective on International Criminal Justice**, TMC Asser Press, 2010, pp. 350-369.

van den Muijsenbergh, Winfried H.A.Ö. & Rezai, Sam. "Corporations and the European Convention on Human Rights", **Pacific McGeorge Global Business and Development Law Journal**, Vol. 25, 2012, pp. 43-68.

van Elteren, Mel, "Neoliberalization and Transnational Capitalism in the American Mold", **Journal of American Studies**, Vol. 43, Issue: 2, 2009, pp. 177-197.

van Kempen, P.H.P.H.M.C, "Human Rights and Criminal Justice Applied to Legal Persons: Protection and Liability of Private Juristic Entities under the ICCPR, ECHR, ACHR and AfChHPR" in van Erp, J.H.M. & van Vliet, L.P.W. (eds.), **Netherlands Reports to the Eighteenth International Congress of Comparative Law, Washington 2010**, Intersentia, 2010, pp. 509-551.

van Steenberghe, Raphael, "Non-state actors" in Gentian Zyberi (ed.), **An Institutional Approach to the Responsibility to Protect**, Cambridge, June 2013, pp. 33-57.

van der Wilt, Harmen, "Corporate Criminal Responsibility for International Crimes: Exploring the Possibilities", **Chinese Journal of International Law**, Vol. 12, 2013, pp. 43-77.

Vedder, Anton (ed.), **NGO Involvement in International Governance and Policy**, Martinus Nijhoff Publishers, 2007.

Vicuna, Francisco Orrego. "Individuals and Non-state Entities before International Courts and Tribunals", **Max Planck Yearbook of United Nations Law**, Vol. 5, 2001, pp.53-66.

Viljoen, Frans. "Admissibility under the African Charter", in M.D. Evans and R. Murray (eds.) *The African Charter on Human and Peoples' Rights: The System in Practice 1986-2000*, Cambridge, Cambridge University Press, 2002, pp. 61-99.

Viljoen, Frans, "Communications under the African Charter: Procedure and Admissibility" in Evans, M. and Murray, R. (eds.), **The African Charter on Human and Peoples' Rights: The System in Practice 1986-2006**, Cambridge, Cambridge University Press, 2nd ed., 2008, pp. 76-138.

Wallace, Rebecca & Martin-Ortega, Olga, "The UN Norms: A First Step to Universal Regulation of Transnational Corporations' Responsibilities for Human Rights?", **Dublin University Law Journal**, Vol. 26, 2004, pp. 304-319.

Weeramantry, Christopher G., "Human Rights and the Marketplace", **Brooklyn Journal of International Law**, Vol.25, April 1999, p. 27.

Weiss, E. Brown (ed.), **International Compliance with Nonbinding Accords**, Washington, DC: American Society of International Law, 1997.

Weissbrodt, David, "The Beginning of a Sessional Working Group on Transnational Corporations Within the UN Sub-Commission on Prevention of Discrimination and Protection of Minorities" in Kamminga, Menno T. & Zia-Zarifi, Saman. (eds.), "Liability of Multinational Corporations under International Law", Studies and

Materials on the Settlement of International Disputes Vol. 7, Kluwer Law International, 2000, pp. 119-138.

Weissbrodt, David & Kruger, Muria, "Human Rights Responsibilities of Business as Non-State Actors" in Alston, Philip (ed.), **Non-State Actors and Human Rights**, Oxford University Press, 2005, pp. 315-350.

Weissbrodt, David & Kruger, Muria, "Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with regard to Human Rights", **The American Journal of International Law**, Vol. 97, 2003, pp. 901-922.

Wells, Celia, "Corporate Criminal Responsibility" in Tully, Stephen (ed.), **Research Handbook on Corporate Legal Responsibility**, Edward Elgar Publishing, 2005, pp. 147-158.

Wells, Celia & Elias, Juanita, "Catching the Conscience of the King: Corporate Players on the International Stage" in Alston, Philip (ed.), **Non-State Actors and Human Rights**, Oxford University Press, 2005, pp. 141-175.

Wesley, Cragg (ed.), **Business and Human Rights**, Edward Elgar Publishing, 2012.

Wettstein, Florian, "Silence as Complicity: elements of a corporate duty to speak out against the violation of human rights" in Wesley, Cragg (ed.), **Business and Human Rights**, Edward Elgar Publishing, 2012, p. 122-123.

White, Nigel, D. "Due Diligence Obligations of Conduct: Developing a Responsibility Regime for PMSCs", **Crim. Just. Ethics**, Vol. 31, No. 3, December 2012, pp. 233-261.

Williams, Dewi, "Private Regulation of Private Military Companies: A Potentially Private Solution to a Commercial Problem?" in Quénivet, Noëlle & Shah-Davis, Shilan (eds.), **International Law and Armed Conflict: Challenges in the 21st Century**, TMC Asser Press, 2010, pp. 227-240.

Wittich, Stephan, "Punitive Damages" in Crawford & Pellet & Olleson (eds.), **The Law of International Responsibility**, Oxford University Press, 2010, pp. 667-675.

Wright, Jane, **Tort Law and Human Rights**, Oxford, Hart Publishing, 2001.

Wouters, Jan & Chanet, Leen, "Corporate Human Rights Responsibility: A European Perspective", **Northwestern Journal of International Human Rights**, Vol. 6, Issue 2, 2008, pp. 262-303.

Zerk, Jennifer, **Multinationals and Corporate Social Responsibility: Limitations and Opportunities in International Law**, Cambridge University Press, 2006.

Zyberi, Gentian (ed.), **An Institutional Approach to the Responsibility to Protect**, Cambridge, June 2013.

SELECTED REPORTS

Amnesty International, 'The UN Human Rights Norms for Business: Towards Legal Accountability', IOR 42/002/2004, 18 January 2004.

Brown, D.K., "International Trade and Core Labour Standards: A Survey of the Recent Literature", OECD Labour Market and Social Policy Occasional Papers, No. 43, OECD Publishing., 2000, http://dx.doi.org/10.1787/677200103808, accessed on 07.07.2014.

Fall, Louis Papa & Zahran, Mohamed Mounir, "United Nations Corporate Partnerships: The role and functioning of the Global Compact", Joint Inspection Unit, Geneva 2010, JIU/REP/2010/9.

Human Rights Watch: "'Race to the Bottom': Corporate Complicity in Chinese Internet Censorship", 10 August 2006, HRW Index No. C1808, http://www.hrw.org/reports/2006/china0806/index.htm, accessed on 26.08.2013.

Human Rights Watch, "The Enron Corporation: Corporate Complicity in Human Rights Violations", New York, 1999, http://www.hrw.org/reports/1999/enron/enron7-0.htm, accessed on 20.05.2014.

Human Rights Watch, "Colombia: Human Rights Concerns Raised by the Security Arrangements of Transnational Oil Companies", 1 April 1998.

International Council on Human Rights, "Beyond Voluntarism: Human Rights and the developing international legal obligations of companies", 2002.

International Instruments and Corporate Social Responsibility: A Booklet to Accompany Training the Labour Dimension of CSR: from Principles to Practice, 2007.

Kell, Georg, **The Global Compact: Origins, Operations, Progress, Challenges**, JCC 11, Greenleaf Publishing, Autumn 2003, pp. 35-49.

Khan, Irene, **Understanding Corporate Complicity: Extending the Notion Beyond Existing Laws**, London, 8 December 2005, Amnesty International Index: POL 34/001/2006.

OECD Watch, Assessment of NCP Performance in the 2013-2014 Implementation Cycle, OECD Watch Submission to the 2014 Annual Meeting of the National Contact Points, June 2014.

Scott, Kenneth & Rhodes, Laura. "Corporate Social Responsibility and The Responsibility to Protect: Corporate Liability for International Crimes", Research Report, One Earth Future Project.

Switz, Jan, **Business and Human Rights: A Progress Report, 2000,** www.ohchr.org/Documents/Publications/BusinessHRen.pdf, accessed on 25.06.2013.

Weaponizing Tear Gas: Bahrain's Unprecedented Use of Toxic Chemical Agents against Civilians", Report of the Physicians for Human Rights, August 2012, https://s3.amazonaws.com/PHR_Reports/Bahrain-TearGas-Aug2012-small.pdf, accessed on 26.07.2013.

SELECTED DOCUMENTS

(in chronological order)

UN Doc. A/CN.4/25, 1950, Spiropoulos, J., Special Rapporteur, on Draft Code of Offences against the Peace and Security of Mankind, in UN Yearbook of the International Law Commission Vol. II, 1950, A/CN.4/SER.A/1950/Add.1, p. 260.

UN Doc. HRI/GEN/1/Rev.6 at 132 (2003), HRC, General Comment 10, Art.19 (nineteenth session, 1983) Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies.

UN Doc. E/CN/.4/Sub.2/1987/23, Eide, Asbjorn, Final report of the Special Rapporteur on the Right to food, 7 July 1987.

UN Doc. HRI/GEN/1/Rev.1, (twenty-third session, 1988), HRC, General Comment 16, The Right to Respect Family Privacy, Family, Home Correspondence and Protection of honour and reputation (Art. 17), Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, at 21 (1994).

UN Doc. HRI/GEN/1/Rev.6 at 144 (2003), Human Rights Committee, General Comment 17, Art.24 (thirty-fifth session, 1989) Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies.

E/1991/23, 14.12.1990, CESCR, General Comment No. 3, The nature of States parties obligations (art.2, par.1).

UN Doc. E/1992/23, 13.12.1991, General Comment NO 4: The right to adequate housing.

U.N. Doc. HRI/GEN/1/Rev.1, 29 July 1994, General Comment No. 20 on Art. 7 of the ICCPR.

U.N. Doc E/1995/22, (11th sess., 1994), CESCR, General Comment No. 5, Persons with disabilities.

UN Doc. HRI/GEN/1/Rev.1, (1994), HRC, General Comment 6, The Right to Life (Art. 6).

UN Doc. A/CONF.166/9, 1995, Report of the World Summit for Social Development.

U.N. Doc. E/CN.4/Sub.2/1995/11, 24 July 1995, Sub-Commission on Prevention of Discrimination and Protection of Minorities, Background document prepared by the Secretary General on The Relationship Between the Enjoyment of Human Rights, in Particular, International Labour and Trade Union Rights, and the Working Methods and Activities of Transnational Corporations.

U.N. Doc. E/CN.4/Sub.2/1996/12 (July 2, 1996), Report of the Secretary General on The Impact of the Activities and Working Methods of Transnational Corporations on the Full Employment of all Human Rights, in Particular Economic, Social, and Cultural Rights and the Right to Development, Bearing in Mind Existing International Guidelines, Rules and Standards Relating to the Subject Matter.

UN Doc. CESR 20/05/1997, E/1998/22, General Comment No. 7 (1997) The right to adequate housing (Art.11.1).

E/C.12/1997/8, 12 December 1997, CESCR, General Comment No. 8 on the relationship between economic sanctions and respect for economic, social and cultural rights.

U.N. Doc. E/CN.4/Sub.2/1998/6, Guissé, El Hadji, Working Document: The Realization of Economic, Social and Cultural Rights: The Question of Transnational Corporations, 10 June 1998.

UN Doc. E/C.12/1999/5, 12.05.1999, CESCR, General Comment 12, The Right to Adequate Food (Art. 11).

U.N. Doc. E/C.12/1999/10, 08.12.1999, CESCR, General Comment 13, The right to education.

UN Doc./CN.4/507 and Add.1-4, 2000, Crawford, James, ILC Special Rapporteur, Third Report on State Responsibility, II (I) ILC YB 3.

UN Doc. E/C.12/2000/4, 11.08.2000, General Comment No. 14 (2000) The Right to Highest Attainable Standard of Health.

UN Doc. CCPR/C/21/Rev.1 Add. 10, 29.03.2000, HRC, General Comment 28, Equity of Rights between Men and Women (Art. 3).

UN Doc. A/56/10 (2001), Draft Articles on Responsibility of States for Internationally Wrongful Acts, Report of the ILC on the Work of its 53rd sess., II (2) ILC YB 26.

UN Doc. A/56/36/2001, Report of the UN High Commissioner for Human Rights to the 56th Session of the General Assembly, 28 September 2001.

UN Doc. S/2002/1146, 16 October 2002, Final Report of the Panel of Experts on the Illegal Exploitation of Natural Resources and Other Forms of Wealth of the Democratic Republic of the Congo.

UN Global Compact Office, How the Global Compact Works: Mission, Actors and Engagement Mechanisms, January 2003.

U.N. Doc. E/C.12/2002/11, 20.01.2003, General Comment No.15, The right to water.

UN Doc. E/CN.4/Sub.2/2003/14, 25.06.2003, Oloko-Onyango J. & Deepika, Udagama, Final report on Globalization and its impact on the full enjoyment of human rights.

UN Doc. /CN.4/Sub.2/2003/38/Rev.2, 26.08.2003, UN Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights.

UN Doc. CCPR/C/21/Rev.1/Add.13, 26.05.2004, General Comment No. 31: The Nature of the General Legal Obligation Imposed on States Parties to the Covenant.

UN Doc. E/C.12/GC/18, 24.11.2005, General Comment No. 18: The Right to work.

UN Global Compact Office and the OECD Investment Division, "The UN Global Compact and the OECD Guidelines for Multinational Enterprises: Complementarities and Distinctive Contributions", 26 April 2005.

UN Doc. E/CN/4/2005/91, Report of the Sub-Commission on the Promotion and Protection of Human Rights, Report of the United Nations High Commissioner on Human Rights, on the Responsibilities of Transnational Corporations and Related Business Enterprises with Regard to Human Rights.

UN Doc. E/CN.4/2006/97, 22.02.2006, Interim Report of the Special Representative of the Secretary-General on the Issues of Human Rights and Transnational Corporations and Other Business Enterprises.

A/HRC/Sub.1/58/16, 23 June 2006, Implementation of existing human rights norms and standards in the context of the fight against extreme poverty, final report submitted by José Bengoa, Annex Draft Guiding Principles on Extreme Poverty and Human Rights: The Rights of the Poor.

UN Doc. A/HRC/8/5, 07.04.2008, Protect, Respect and Remedy: A Framework for Business and Human Rights.

Un Doc. A/HRC/11/13, 22.04.2009, Business and Human Rights: Towards Operationalizing the “Protect, Respect and Remedy Framework”.

UN Doc. E/C.12/GC/21, 21/12/2009, General Comment No. 21, Right of everyone to take part in cultural life (art. 15, para. 1 (a)).

UN Global Compact Office, Guidance on Responsible Business in Conflict-Affected and High-Risk Areas: A Resource for Companies and Investors, A Joint UN Global Compact-PRI publication, 2010.

UN Doc. A/66/10, 2011, Draft Articles on the Responsibility of International Organizations as included in the Report of the ILC on the Work of its 63rd sess..

A/HRC/17/31, 21 March 2011, UN General Assembly, Ruggie, John. Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect, Remedy" Framework, Human rights Council, 17th session, Agenda item 3, Promotion and Protection of all human rights, civil, political, economic, social and cultural rights, including the right to development.

A/HRC/20/29, 10 April 2012, Report of the Working Group on the issue of human rights and transnational corporations and other business enterprises

A/HRC/23/32, 14 March 2013 Report of the Working Group on the issue of human rights and transnational corporations and other business enterprises respectively.

A/HRC/25/55, 23 December 2013, Sekaggya, Margaret. UN Special Rapporteur on the situation of human rights defenders, "Commentary to the Declaration on the Rights and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms".

A/HRC/26/25, 5 May 2014, Report of the Working Group on the issue of human rights and transnational corporations and other business enterprises.

NEWS

(in chronological order)

Karliner, Joshua & Bruno, Kenny. "Tangled up in Blue: Corporate partnerships at the United Nations", September 2000, http://s3.amazonaws.com/corpwatch.org/downloads/tangled.pdf, accessed on 06.03.2013.

Karliner, Joshua & Bruno, Kenny, "USA: Corporate Responsibility vs. Accountability", International Herald Tribune, July 10th, 2002, http://www.corpwatch.org/article.php?id=3110, accessed on 25.02.2012.

EarthRights International, “Historic Advance for Universal Human Rights: Unocal to Compensate Burmese Villiages”, 02.04.2005, http://www.earthrights.org/legal/historic-advance-universal-human-rights-unocal-compensate-burmese-villagers, accessed on 01.06.2015.

Mouawad, Jad, "Shell to Pay $15.5 million to Settle Nigerian Case", The NY Times, 08.06. 2009, http://www.nytimes.com/2009/06/09/business/global/09shell.html?ref=global&_r=0, accessed on 10.07.2013.

Beaumont, Peter. "The Truth about Twitter, Facebook and the uprising in the Arab world", The Guardian, 25 February 2011.

Stewart, Heather, "BP failed to act on reports of intimidation along Turkish pipeline", The Guardian, 9 March 2011, http://www.theguardian.com/business/2011/mar/09/bp-intimidation-turkey-btc-pipeline, accessed on 15.09.2015.

"The Long Arm of the State: Where's the Party?" The Economist, Jan 28th, 2012, http://www.economist.com/node/21543575?fsrc=scn/fb/wl/ar/wherestheparty, accessed on 28.01.2012.

Walker, Hunter, City Council Passes Anti-Corporate Personhood Resolution, http://observer.com/2012/01/city-council-passes-anti-corporate-personhood-resolution/#ixzz3hUsfLln7 , accessed on 17.08.2015.

Dutch won't charge company in West Bank separation fence case", 14 May 2013, http://www.haaretz.com/news/diplomacy-defense/dutch-won-t-charge-company-in-west-bank-separation-fence-case-1.524061, accessed on 26.07.2013.

Kirkham, Chris, "Prison Quotas Push Lawmakers To Fill Beds, Derail Reform", Huffington Post, updated 20.09.2013, http://www.huffingtonpost.com/2013/09/19/private-prison-quotas_n_3953483.html, accessed on 15.05.2015.

Black, Ian, "Bahrain teargas stockpile faces international opposition", The Guardian, 29 October 2013, http://www.theguardian.com/world/2013/oct/29/bahrain-teargas-stockpile-plan-campaign; accessed on 20.06.2015.

Elwazer, Schmas & Jamjoom, Mohammed & Kwon, KJ. "South Korea suspends tear gas exports to Bahrain", 9 January 2014, http://edition.cnn.com/2014/01/09/world/meast/bahrain-south-korea-tear-gas/, accessed on 20.06.2015.

Ali, Ahmed, "US and German Tear Gas Continue to be Used to Crackdown on Protestors on Uprising Anniversary", Bahrain Watch, 24.02.2014, https://bahrainwatch.org/blog/2014/02/24/us-and-german-tear-gas-continue-to-be-used-to-crackdown-on-protesters-on-uprising-anniversary/, accessed on 20.06.2015.

Vaughan, Adam. "Lego ends Shell partnership following Greenpeace campaign", The Guardian, 09.10.2014, http://www.theguardian.com/environment/2014/oct/09/lego-ends-shell-partnership-following-greenpeace-campaign , accessed on 09.10.2014.

Al-Quraishi v. Nakhla & L-3 Services INC. have been dismissed due to a confidential settlement between the parties. "Will anyone pay for Abu Ghraib?", New York Times, The Opinion pages, 5 Feb, 2015, http://www.nytimes.com/2015/02/05/opinion/will-anyone-pay-for-abu-ghraib.html?_r=0, accessed on 30.06.2015.

Dalrymphe, William. "The East India Company: The original corporate raiders", The Guardian, 04.03.2015, http://www.theguardian.com/world/2015/mar/04/east-india-company-original-corporate-raiders, accessed on 20.03.2015.

Chen, Liyan. "The World's Largest Companies 2015", Forbes, 06.05.2015, http://www.forbes.com/sites/liyanchen/2015/05/06/the-worlds-largest-companies/, accessed on 20.07.2015.

Ridderhof, R., "Shell and Ogoni People: s(oil) pollution in the Niger Delta", 15 February 2015, http://www.peacepalacelibrary.nl/2013/02/shell-and-ogoni-people-soil-pollution-in-the-niger-delta/, accessed on 24.07.2015.

Austen, Ian, "Canadian Aboriginal Group Rejects $1 billion Fee for Natural Gas Project", The New York Times, 13.05.2015, http://www.nytimes.com/2015/05/14/business/energy-environment/canadian-aboriginal-group-rejects-1-billion-fee-for-natural-gas-project.html?_r=0, accessed on 19.10.2015.

Walker, Lauren, "Cybersecurity Company Supplies REpressive REgimes with Spyware, Recent Hack Claims", Newsweek, 07.06.2015, http://www.newsweek.com/cybersecurity-firm-supplies-repressive-regimes-spyware-recent-hack-claims-350501, accessed on 01.09.2015.

Angwin, Julia & Savage, Charlie & Larson, Jeff & Moltke, Henrik & Poitras, Laura & Risen, James, "AT&T Helped U.S. Spy on Internet on a Vast Scale", The New York Times, 15.08.2015, http://www.nytimes.com/2015/08/16/us/politics/att-helped-nsa-spy-on-an-array-of-internet-traffic.html?_r=0, accessed on 01.09.2015.

Cartalucci, Tony, The Mystery of ISIS' Toyota Army Solved", Ron Paul Institute for Peace and Prosperity, 09.09.2015, http://www.ronpaulinstitute.org/archives/featured-articles/2015/october/09/the-mystery-of-isis-toyota-army-solved/, accessed on 19.10.2015.

Kubota, Yoko, "Toyota to Support U.S. Probe After Terrorists are Seen on Its Pickups", The Wall Street Journal, 09.09.2015, http://blogs.wsj.com/japanrealtime/2015/10/09/toyota-to-support-u-s-probe-after-terrorists-are-seen-on-its-pickups/, accessed on 19.09.2015.

Barlow, Karen, "BRCA1, Breast Cancer Gene Cannot be Patented, High Court Finds", Huffington Post, 07.10.2015, http://www.huffingtonpost.com.au/2015/10/07/high-court-breast-cancer-gene_n_8254580.html, accessed on 19.10.2015.

Curry, Colleen, "Whole Foods, Expensive Cheese, and the Dilemma of Cheap Prison Labor", Vice News, 21.07.2015, https://news.vice.com/article/whole-foods-expensive-cheese-and-the-dilemma-of-cheap-prison-labor, accessed on 20.09.2015.

Stempel, Jonathan. "Abu Ghraib torture lawsuit revived by U.S. appeals court", 30 June 2015, http://www.reuters.com/article/2014/06/30/us-abughraib-caci-idUSKBN0F51BK20140630, accessed on 30.06.2015.

Heller, Kevin Jon. "The ICC, Continuing Crimes, and Lago Agrio", http://opiniojuris.org/2014/10/28/icc-prosecute-chevron-officials-damage-lagio-agrio/?utm_source=feedburner&utm_medium=email&utm_campaign=Feed%3A+opiniojurisfeed+%28Opinio+Juris%29, accessed on 01.06.2015.

"Abu Ghraib Lawsuits against CACI, Titan (now L-3)", http://business-humanrights.org/en/abu-ghraib-lawsuits-against-caci-titan-now-l-3-0, accessed on 30.06.2015.

ELECTRONIC BIBLIOGRAPHY

Amnesty International, The 2010-2011 Update of the OECD s for Multinational Enterprises has come to an end: the OECD must now turn into effective implementation", AI Index: IOR 30/001/2011, 23 May 2011, http://www.amnesty.org/en/library/asset/IOR30/001/2011/en/601f0e2c-a8a3-4fbc-b090-c0abb3c51ab2/ior300012011en.pdf, accessed on 04.01.2013.

Barclay's Statement on Human Rights, March 2015, http://www.barclays.com/content/dam/barclayspublic/docs/Citizenship/Policy-Positions/barclays-statement-human-rights.pdf, accessed on 10.04.2015.

Caux Round Table, official website, http://www.cauxroundtable.org/index.cfm?&menuid=8, accessed on 25.03.2013.

History: Agent Orange/Dioxin in Vietnam, http://www.aspeninstitute.org/policy-work/agent-orange/history, accessed on 20.06.2015.

Labour and Human Rights Policies of Target, https://corporate.target.com/corporate-responsibility/responsible-sourcing/social-compliance/labor-and-human-rights, accessed on 18.04.2015.

Levi Strauss & Co., Global Sourcing and Operating Guidelines, http://www.levistrauss.com/sites/default/files/librarydocument/2010/4/CitizenshipCodeOfConduct.pdf, accessed on 26.06.2013.

Muttitt, Greg & Mariott, James, "Some Common Concerns", Chapter 11 on "Line of Fire: BP and Human Rights Abuses in Colombia", October 2002, http://www.carbonweb.org/documents/chapter11.pdf, accessed on 20.05.2014.

OECD Due Diligence Guidance for Responsible Supply Chains of Minerals from Conflict-Affected and High-Risk Areas, http://www.oecd.org/daf/inv/mne/mining.htm, accessed on 18.08.2014.

Rabobank Group Human Rights Policy, https://www.rabobank.com/en/images/Human%20Rights%20Policy.pdf, accessed on 10.04.2015.

Rainforest Alliance, Profiles in Sustainable Agriculture: Chiquita Reaps a Better Banana (2009), http://www.rainforest-

alliance.org/sites/default/files/publication/pdf/chiquita_profile_en_hz_jan09.pdf, accessed on 26.06.2013.

Rio Tinto Commitment, http://www.riotinto.com/ourcommitment/human-rights-4800.aspx, accessed on 19.10.2014.

The AI works on the issue as a part of its "Demand Dignity" campaign; AI web site, http://www.amnesty.org/en/business-and-human-rights, accessed on 16.03.2013.

The Body Shop, official website, http://www.thebodyshop.com/content/services/aboutus_history.aspx, accessed on 26.03.2013.

The MacBride Principles, http://www.irishnationalcaucus.org/the-macbride-principles-the-essence/, accessed on 26.09.2014.

The U.S. Model Business Principles, http://actrav.itcilo.org/actrav-english/telearn/global/ilo/guide/usmodel.htm, accessed on 01.07.2013.

United Nations Conference on Trade and Development, Official website, UNCTC Origins http://unctc.unctad.org/aspx/UNCTCOrigins.aspx, accessed on 14.09.2014.

UNCTAD, Official website, http://unctc.unctad.org/aspx/UNCTCEvolution.aspx, accessed on 14.09.2014.

World Diamond Council, Kimberley Process Certification Scheme, http://www.kimberleyprocess.com/, accessed on 26.06.2013.

Waddell, Steve. "The Global Compact: An organizational innovation to realize UN Principles", November 2011, http://www.unglobalcompact.org/docs/news_events/9.1_news_archives/2011_11_16/UNGC_Organizational_Innovation_Note.pdf, accessed on 12.03.2013.

ÖZGEÇMİŞ

Tezin yazarı 1981 yılında Ankara'da doğmuştur. Orta öğrenimini Denizli Anadolu Lisesi'nde, lise öğrenimini ise TED Ankara Koleji'nde tamamlamıştır. Burslu olarak girdiği İstanbul Bilgi Üniversitesi Hukuk Fakültesi'nden onur derecesiyle mezun olmuştur. 2005 yılında Uluslararası Hukuk ve Avrupa Hukuku alanında Yüksek Lisans yapmak üzere Hollanda hükümetince verilen *Matra Training for European Cooperation* (MTEC) bursuyla Amsterdam Üniversitesi Hukuk Fakültesi'nde eğitimine başlamış ve "İnsan Hakları Avrupa Sözleşmesi'ne göre Ulusal Güvenlik Gerekçesiyle İfade Özgürlüğünün Sınırlandırılması: Türkiye'de İfade Özgürlüğünün Sınırlandırılmasını Düzenleyen Yasaların Evrimi" konulu tezini tamamlayarak *cum laude* derecesi ile mezun olmuştur. Bir süre Maltepe Üniversitesi'nde araştırma görevlisi olarak çalışan ve Montpellier'de Fransızca dil eğitimini sürdüren yazar, 2009 yılında Galatasaray Üniversitesi Sosyal Bilimler Enstitüsü Kamu Hukuku Doktora programına başlamış, tez çalışmalarını Amsterdam Üniversitesi Kütüphanesi ve Lahey Uluslararası Adalet Divanı Kütüphanesi'nde yürütmüştür. Halen TOBB Ekonomi ve Teknoloji Üniversitesi'nde Uluslararası Kamu Hukuku alanında araştırma görevlisi olarak çalışmaktadır. Yayınları arasında "Bir İnsan Hakları Sorunu Olarak Yolsuzluk", "Dünya Sosyal Forumu: Bir Küresel Adalet Hareketi", "Lübnan Özel Mahkemesi", "General Assessment on the Effect of the System of the European Convention on Human Rights in National Legal Orders", "A Concept in Evolution: jus cogens", "Reservations to Treaties under the 1969 Vienna Convention on the Law of Treaties and the Work of the International Law Commission" gibi makaleler bulunmaktadır.

TEZ ONAY SAYFASI

Üniversite	Galatasaray Üniversitesi
Enstitü	Sosyal Bilimler Enstitüsü
Adı Soyadı	Elif ORAL
Tez Başlığı	Legal Grounds for Holding Transnational Corporations Directly Responsible for Human Rights Violations under Public International Law
Savunma Tarihi	18.12.2015
Danışmanı	Prof. Dr. Akif Emre ÖKTEM

JÜRİ ÜYELERİ

Ünvanı, Adı, Soyadı	İmza
Prof. Dr. Akif Emre ÖKTEM	
Prof. Dr. Rona AYBAY	
Prof. Dr. Hasan KÖNİ	
Doç. Dr. Vesile Sonay EVİK	
Yrd. Doç. Dr. Mehmet KARLI	

Enstitü Müdürü

Prof. Dr. M. Yaman ÖZTEK