

Who Is Responsible for Corporate Human Rights Violations?

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Abbreviations

ATCA	Alien Tort Claims Act
ECHR	European Convention for the Protection of Human Rights and Fundamental Freedoms
ECtHR	European Court of Human Rights
FDI	Foreign direct investment
IACHR	Inter-American Court of Human Rights
ICC	International Criminal Court
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
ICTY	International Criminal Tribunal for the Former Yugoslavia
ILO	International Labour Organization
MNC	Multinational corporation
NGO	Non-governmental organization
NIEO	New International Economic Order
OECD	Organization for Economic Co-operation and Development
UDHR	Universal Declaration of Human Rights
UN	United Nations
US	United States of America
WTO	World Trade Organization

1 Introduction

Multinational corporation (MNC) human rights practices have in recent years been a topic of much concern. Major violations of human rights resulting from company activities have been brought to public attention through individual, non-governmental, and intergovernmental actions. To come to terms with such incidents a wide array of initiatives have been adopted. Their common aim is to improve corporate compliance with international human rights standards. As a consequence of this development the traditional notion that only states and state agents can be held accountable for human rights violations is being challenged. Nevertheless, it can safely be concluded already at this introductory stage, that the mechanisms for attributing human rights responsibilities to non-state actors are still very much in the making. As a consequence the question of responsibility for corporate human rights violations remain uncertain. This report undertakes to focus on that uncertainty and discuss who can be responsible for such human rights. The structure of the report is threefold. Focus will be on state, corporate, and individual responsibility, each considered in turn in order to explore their relationship to corporate violations.

Approaches to enhance MNC human rights responsibility emphasize both legal and “soft” methods. Apart from strictly legal liability, concepts such as stakeholder responsibility, good corporate governance, ethical and social responsibility of corporations and good or global citizenship, have perhaps become the most common attributes of the responsible corporation. This responsibility is measured e.g. through environmental sustainability, respect for human rights and workers rights, accountability and transparency.¹ This development is highly interesting, especially if it lays the ground for legal arrangements. While some remarks on the character of “soft” approaches will be made, main interest will however be on assessing the applicability and usefulness of a legal framework for holding states, corporations, or individuals accountable. Given that the responsibility question is raised on these different levels, this framework will not only entail human

¹ On the concepts, see e.g. Addo, “Human Rights and Transnational Corporations”, in Michael K. Addo (ed.), *Human Rights Standards and the Responsibility of Transnational Corporations*, 1999, Kluwer Law International, 3-37, esp. at 12-14, and United Nations Conference on Trade and Development, *World Investment Report 1999: Foreign Direct Investment and the Challenge of Development*, 1999, United Nations.

rights law itself, but also take e.g. criminal law and domestic approaches into consideration.

1.1 Identifying the Multinational Corporation

There are several labels in use for describing the entity that is here denoted "multinational corporation". The vocabulary preferred by the UN has been "transnational", whereas "multinational" is widely used by the business community and academics. "Corporation" on its part is often substituted with "business", "enterprise", or "company". Distinctions between these can be made. However, in a simplified definition (sufficient for present purposes) a company falls within all of these "... if it has a certain minimum size, if it controls production or service plants outside its home state and if it incorporates these plants into a unified corporation strategy".² The MNC is distinguished from a uninal company by its capacity to locate production across national borders, trade across frontiers, exploit foreign markets, and organize managerial structures in a way that affects the international allocation of resources.³ The MNC can be further characterized by its legal status and profit motive. These aspects can be useful in distinguishing the corporation from other multinational groups, such as profiteering criminal organizations and international political movements or non-governmental organizations (NGOs).⁴ The question of the legal status of MNCs is often identified as a threshold for settling responsibility issues. This follows from a presumption that entities only owe responsibilities to the international community when they are considered subjects of law. As will be explained later, in the nexus between the two concepts, the legal

² Wildhaber, "Some Aspects of the Transnational Corporation in International Law", 27 *Netherlands International Law Review* (1980), 79-88, at 80. The notion "multinational" is in this paper used as a contrast to "uninal". "Corporation" on its part is not used to restrict interest to certain entities alone. On defining the terms, see e.g. Peter Muchlinski, *Multinational Enterprises and the Law*, 1995, Blackwell Publishers, at 12-13, and Ignaz Seidl-Hohenveldern, *International Economic Law*, 1992, Martinus Nijhoff Publishers, at 13-20.

³ Muchlinski (1995), *ibid*, at 15.

⁴ Kamminga and Zia-Zarifi, "Liability of Multinational Corporations Under International Law: An Introduction", in Menno T. Kamminga and Saman Zia-Zarifi (eds), *Liability of Multinational Corporations under International Law*, 2000, Kluwer Law International, 1-15, at 3-4.

personality must however be settled by the character of corporate rights and duties.⁵ Thus, an insight into the responsibility question will at the same time shed some light on the legal status of MNCs in the international context.

The MNC is a complex entity. E.g. the OECD Guidelines for Multinational Enterprises does not undertake any precise legal definition, and it may well be argued that any such attempts will be somewhat arbitrary. Nevertheless, the Guidelines do point out that a MNC: "... usually comprise companies or other entities whose ownership is private, state or mixed, ... The degrees of autonomy of each entity in relation to the others varies widely ...".⁶ A distinction to take into account in subsequent discussions is the one between public and private ownership. Although some remarks will be made regarding public corporations, primary focus will be on private entities. The definition of the Guidelines also shows that the MNC structure entails both parent companies and local entities, included in a single "corporate identity". The relationship between the parent and the subsidiary (e.g. their degree of autonomy) is dependent on the individual corporation. In all the MNC structure often creates what has been termed a "corporate veil". The notion indicates that the corporate structure conceals a variety of relationships, most notably between legal persons, but also including natural persons (e.g. directors).⁷ This "veil" can work to the detriment of determining legal liability questions. As to the corporate identity, it should be kept in mind that MNCs are by definition business oriented. This presumably affects their very definition of ethical behaviour, just as that same definition by human rights organizations is influenced by the primary desire to secure human rights. Subsequently questions such as whether it would be a violation of the right to life to price (e.g. HIV/AIDS) medicines too high, are bound to be highly contentious.⁸ The fact that MNCs, in the end, consist of individuals (including both employees and managers), turns interest to individual responsibility. That question in

⁵ Jägers, "The Legal Status of the Multinational Corporation Under International Law", in Addo, *supra* note 1, 259-270, at 263-267.

⁶ OECD Guidelines for Multinational Enterprises, 15 ILM (1976), at 967, introduction. The guidelines as amended in 1979, 1984 and 1991 can be found at <www.oecd.org/daf/investment/guidelines/mnetext.htm> (15 January 2002), (hereinafter *OECD Guidelines*). See also Muchlinski (1995), *supra* note 2, at 14.

⁷ See Meeran, "The Unveiling of Transnational Corporations: A Direct Approach", in Addo, *supra* note 1, 161-170.

⁸ This "hard case" is mentioned by Joseph, "An Overview of the Human Rights Accountability of Multinational Enterprises", in Kamminga and Zia-Zarifi, *supra* note 4, 75-93, at 91-92.

itself has received much recent attention through developments in international criminal law.

1.2 Multinational Corporations in the Global Context

The brief definition of MNCs presented above does not fully answer the question why MNC have become of increasing interest, i.e. why the responsibility question for MNC activities is focused on in the first place. In this context it becomes necessary to introduce another central concept for describing contemporary societal events – globalization. This concept commonly refers to developments in the political, economic and cultural spheres, all of which are connected.⁹

Economic globalization is of main interest in explaining the increased focus on MNCs. It is in a most general sense about removal of barriers to trade and investment and the movement of capital across national boundaries. Economic globalization can be identified through features such as: growing shares of spending on goods and services are devoted to imports (i.e. international trade), growth in foreign direct investment (FDI), and increased capital market flows.¹⁰ Through the collapse of the United Nations (UN) New International Economic Order (NIEO) paradigm, there was a retreat of a regulatory approach towards companies on both the national and international levels. One consequence of this was a regained strength of MNCs.¹¹ Aside from global finance, the growing influence of MNCs is the most common image of the economic aspect of globalization. In fact, measured in volume of world trade, the operations of MNCs are central to the phenomenon.¹²

⁹ For a general overview see e.g. David Held *et al.*, *Global Transformations*, 1999, Stanford University Press, at 67, and Raimo Väyrynen, *Globalisaatio: Uhka vai Mahdollisuus?*, 1998, Atena, at 69.

¹⁰ Economic globalization as defined by the World Bank. See World Bank Briefing Papers Series, *Globalization*, April 2000, <www.worldbank.org/html/extdr/pb/globalization/> (15 January 2002).

¹¹ Wälde, "A Requiem for the 'New International Economic Order' – The Rise and Fall of Paradigms in International Economic Law", in Najeeb Al-Nauimi and Richard Meese (eds), *International Legal Issues Arising under the United Nations Decade of International Law*, 1995, Kluwer Law International, 1301-1338, at 1327-1328.

¹² Held *et al.*, *supra* note 9, at 236.

The increased role of MNCs also has to do with the tremendous growth, especially since the 1980s, of foreign direct investment. FDI can be defined as a long-term relationship of investment in a company resident in an economy other than that of the investor.¹³ The growth in FDI on its part is closely related to corporate size. In all, MNCs account (as of 1995) for around two-thirds of international transactions, with a third of these being intrafirm trade. This means that a large share of international transactions no longer take place between independent agents, but is organized under corporate governance.¹⁴ Another aspect of the increased role of MNCs is the exponential rise in number of corporations, as well as the ambition of MNCs to become ever more international.¹⁵ This last aspect - the internationalization of production - means that production and distribution networks stretch corporate activity across the world in a search for cost-efficiency, taking into account e.g. labour costs, environmental regulations and political stability. This is made increasingly easier through deregulation of barriers to trade, and a decrease in transport and communication costs. Unlike other companies, MNCs can serve the markets from any production location that suits their objectives.¹⁶

The search for comparative advantages can come with negative repercussions. Such consequences of "outsourcing" are captured e.g. in the criticism of the "race to the bottom" phenomenon, i.e. use of low-cost services provided through poor environmental standards, low wages, or poor working conditions. In a worst-case scenario this leads to competition between states with social and environmental standards in order to attract companies. As a consequence large MNCs can escape national regulatory control through relocating their production to countries offering more favourable terms. The negative features of globalization, combined with the circumvention of regulatory powers of states, have brought about

¹³ Definition used by the United Nations Conference on Trade and Development. See *World Investment Report 2000: Cross-border Mergers and Acquisitions and Development*, 2000, United Nations, at 267.

¹⁴ United Nations Conference on Trade and Development, *World Investment Report 1995: Transnational Corporations and Competitiveness*, 1995, United Nations, at 39.

¹⁵ World Investment Report 2000, *supra* note 13, at 8, and table I.4, at 11-14, indicates the existence of around 63.000 parent firms. Notably the definition on transnational corporations used by the World Investment Report excludes financial organizations.

¹⁶ See United Nations Conference on Trade and Development, *World Investment Report 1997: Transnational Corporations, Market Structure and Competition Policy*, 1997, United Nations, at 163-154. For a general overview of MNCs and global production, see Held *et al.*, *supra* note 9, at 236-282. For an argument that the role of MNCs is emphasized disproportionately, see Robert J. Holton, *Globalization and the Nation-State*, 1998, Macmillan Press, at 62 *et seq.*

a change in the balance between power and global reach on the one hand, and responsibility on the other. This has generated what the UN Secretary-General termed a “backlash” against globalization.¹⁷ One aspect of this “backlash” is exploring avenues for asserting responsibility for MNC human rights abuse. The complex character of MNCs makes the responsibility question in this context additionally challenging.¹⁸

1.3 The Human Rights System

In asserting responsibility for human rights violations, a fundamental question is posed by the applicability of the human rights standards themselves. In the corporate context, the question of which human rights standards can be applied to and by companies not only reveals the direct applicability of the law, but has an impact e.g. on how to determine complicity in human rights abuse. The question is also a central theme in the context of individual responsibilities. As the character and applicability of human rights principles hereby qualifies the subject matter of this study, it would be premature to rush into any definitions on the relationship of international human rights standards to MNCs at this stage. However, it might be useful to recollect some general characteristics of international human rights law.

The central human rights documents are traditionally captured under the notion The International Bill of Human Rights. This comprises the 1948 Universal Declaration of Human Rights (UDHR), the 1966 International Covenant on Civil and Political Rights (ICCPR), and the 1966 International Covenant on Economic, Social

¹⁷ See Millennium Report of the UN Secretary-General to the General Assembly, *We, the Peoples: The Role of the United Nations in the 21st Century* (UN Doc. A/54/2000), 2000, United Nations Department of Public Information, <www.un.org/millennium/sg/report/full.htm> (15 January 2002), Malanczuk, “Globalization and the Future Role of the Sovereign State”, in Friedl Weiss, Erik Denters and Paul de Waart (eds), *International Economic Law with a Human Face*, 1998, Kluwer Law International, 45-65, at 56, and Held *et al.*, *supra* note 9, at 276.

¹⁸ Nevertheless, the question of responsibility of domestic (uninational) corporations is no less important. In fact, as many of the obstacles for development and equality are political and internal to developing countries, a sustainable globalization can perhaps not be reached by targeting the economic elite only. See Raimo Väyrynen, *Globalisaatiokritiikki ja kansalaisliikkeit*, 2001, Gaudeamus, at 105-106.

and Cultural Rights (ICESCR).¹⁹ In addition there are numerous UN, ILO, and regional Conventions, in all constituting the body of international human rights law. Within these, a common categorization is often made between core rights, participation rights, and “other” rights. Core rights are those rights without which mental or physical human life would be impossible, whereas participation rights serve to ensure full enjoyment of the core rights. Legally speaking the concept of core rights is however uncertain. As with an attempt to characterize which human rights are of a peremptory character, no unanimity on such a definition exists.²⁰ Similar uncertainty attach to any attempts at defining which human rights are most relevant for MNCs.

At least in principle it seems that all human rights are susceptible to private interference. However, as will be seen, there are some human rights which are closer to the immediate functions of the corporation. These need not necessarily coincide with a definition on “core” rights. The fact that human rights treaties are geared towards states and focus on the government-citizen relationship is reflected conceptually. A person beaten by the police suffers a human rights violation, while an identical beating by a thief is an ordinary crime. Similarly, torture can be argued to paradigmatically involve official acts as it otherwise would become indistinguishable from assault or battery. This is of some concern for the applicability of human rights law. The indication is that human rights may not always be suitable for direct regulation of private relations.²¹ This distinction, which will be further discussed in due course, should also be borne in mind when reflecting on the usefulness of national regulatory approaches.

¹⁹ Universal Declaration of Human Rights, UN Doc. A/810 (1948), International Covenant on Civil and Political Rights (1966), 999 UNTS 171, International Covenant on Economic, Social and Cultural Rights (1966), 993 UNTS 3.

²⁰ In general, see The Dutch Branches of Amnesty International and Pax Christi International, *Multinational Enterprises and Human Rights*, Utrecht, November 1998, chapter III, <www.paxchristi.nl/mne.html> (15 January 2002). Although any complete set of peremptory human rights has not been agreed upon, discussions frequently mention: genocide, crimes against humanity, piracy, torture, slavery, and war crimes. See e.g. Bassiouni, “The Sources and Content of International Criminal Law: A Theoretical Framework”, in M. Cherif Bassiouni, *International Criminal Law* (2 ed.), vol. I, 3-125, at 41, and Ian Seiderman, *Hierarchy in International Law: The Human Rights Dimension*, 2001, Intersentia – Hart, at 66-121.

²¹ Klabbers, “Doing the Right Thing? Foreign Tort Law and Human Rights”, in Craig Scott (ed.), *Torture as Tort: Comparative Perspectives on the Development of Transnational Human Rights Litigation*, 2001, Hart Publishing, 553-566, at 558, and Donnelly, “The Social Construction of International Human Rights”, in Tim Dunne and Nicholas J. Wheeler (eds), *Human Rights in Global Politics*, 1999, Cambridge University Press, 71-102, at 85-88.

1.4 *The Responsibility Concept*

To fully conceptualize a responsibility it must be made clear who is responsible and to what degree, where that responsibility arises from, towards who such responsibility exists, and how such responsibility is asserted.²² Outlining the applicable legal avenues, i.e. answering the first questions, cannot be done without even taking into consideration the last two. The aspects necessarily become intertwined in an overall assessment on the merits and flaws with different avenues of asserting responsibility. This is not to say that international law could not exist without effective sanctions, but rather to stress that as a question of legal processes, e.g. the question of availability and effectivity cannot be ignored. A similar approach must be chosen for analyzing the nexus between the MNC and the responsible entity (state, corporation, or individual). Thus, in the context of states, the task is not only to identify the responsibilities, but also to reflect on whether and under what conditions states can be responsible for violations by private actors. For individuals, the crucial question is not only the existence of responsibilities, but also whether the individual can (or should) be responsible for corporate wrongs.

In all of its aspects the question of responsibility must also be related to the element of breach. It seems clear that a corporation can be guilty of violating different obligations, against different parties, within different legal orders, presumably also raising different modes of responsibility.²³ The MNC acts in both a home and host state relationship (determined by the nationality of the corporation). Within these relationships corporate misbehaviour is not necessarily restricted to action affecting its own employees. The victims might as well be human beings external to the corporation (cf. denial of freedom of association of workers, criminal use of force by company security forces, and forcible displacement of individuals for realizing constructions). Further complexity can be added through asking whether

²² See Dutch Branches of Amnesty International and Pax Christi International, *supra* note 20, chapter IV.1.

²³ On different degrees of company responsibility, Frey, "The Legal and Ethical Responsibilities of Transnational Corporations in the Protection of International Human Rights", in 6 *Minnesota Journal of Global Trade* (1997), 153-188, at 180-187.

the parent company is responsible for its subsidiaries, or business partners, and how complicity with abusive governments affects the responsibility question.

As the main purpose is not to reflect on consequences of asserting responsibilities, but on the applicability of the concept itself, "responsibility" is not used so as to make any *prima facie* distinction to "liability" (instead they are used synonymously). Indeed any differences attached to the concepts have to be derived from the specific context.²⁴ Thus, while e.g. state responsibility as codified by the International Law Commission (ILC), and international criminal law as applied by tribunals attach particular consequences to breaches of obligations, social responsibility concepts are considerably more vague.

²⁴ A common distinction is often made between "responsibility" as denoting a breach of a legal duty, and "liability" as meaning the obligation to pay compensation, or as referring to obligations arising from harmful consequences of hazardous activities (requiring compensation). However, the usage of the concepts by the ICJ and the ILC is controversial. See Peter Malanczuk, *Akehurst's Modern Introduction to International Law*, 1997, Routledge, at 254-256, and Göran Lysén, *State Responsibility and International Liability of States for Lawful Acts: A Discussion of Principles*, 1997, Iustus Förlag, at 46-52, and esp. note 78.

2 State Responsibility

To begin a discussion of responsibility for MNC human rights abuse by focusing on states is natural, given that states are the prime bearers of rights and duties under international law. It is also states that international human rights law is primarily directed to. A commonly heard contention claims that globalization is a process whereby capital overtakes or escapes the state. Although a shift in the relationship between power and responsibility can be identified, a suggestion that the state would be vanishing is misleading. There might be some “diffusion of political authority”, meaning that rule over territory has been affected (as the balance between national, regional and international legal frameworks has changed), and a change in state autonomy (i.e. the capacity to articulate and achieve policies independently) as costs and benefits on the global level of pursuing certain policies have turned decisive. These effects can be recognized e.g. through a limited possibility for exercising unilateral macroeconomic policies.²⁵ However, the position of states as primary actors in international relations and international law remains unthreatened. States still perform central functions such as proposing and disposing agreements. Perhaps most importantly, MNCs themselves owe their powerful role to the (non) regulatory approach pursued by states. It is thus governmental policies that enable globalization in the first place.²⁶

These remarks are of some importance, as they emphasizes that appeals to corporate responsibility should not serve as an excuse for states not to fulfil their duty to protect human rights. Business misconduct should not be exaggerated. It has been suggested that in most of the major cases of reported corporate human rights abuse, the host state has been involved. In other words, would governments fully live up to their responsibilities, then “the role of business would simply be business, and

²⁵ On globalization and the state, see e.g. Held *et al.*, *supra* note 9, at 62 *et seq.*, and Scholte, “Global Capitalism and the State”, in 73 *International Affairs* (1997), no. 3 (July), 427-452, at 443-444.

²⁶ In general, see Devetak and Higgot, “Justice Unbound? Globalization, states and the transformation of the social bond”, in 75 *International Affairs* (1999), no. 3 (July), 483-498, at 491-495, Malanczuk (1998), *supra* note 17, at 64-65, and Panitch, “Rethinking the Role of the State”, in James H. Mittelman (ed.), *Globalization: Critical Reflections*, 1996, Lynne Rienner Publishers, 83-113, at 84-85.

corporate citizenship would be reduced to complying with laws”.²⁷ This is not to deny that MNC activities can result in the violation human rights, but to recognize that (at least some) states could act to prevent such abuse.

2.1 Obligations of States Under International Human Rights Law

”State responsibility” in general terms denotes a situation which occurs following a breach by a state of its legal obligations. Such obligations can be negative or positive, and can give rise to direct and indirect responsibilities. Direct responsibility follows when the state itself is the agent of harm, whereas the nexus otherwise is indirect.²⁸ There are some obligations undertaken through human rights instruments that are of special interest in this respect. Article 28 of the UDHR, and Article 2(1) of the ICCPR and ICESCR all relate to, and define, the obligations of state parties. The ICCPR provision proclaims a duty of states to: ”... respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant”.²⁹ A first aspect of the quote indicates that it is up to states, and states only, to carry out the obligations established by the Convention.³⁰ More interestingly, the two aspects defining the obligation (to respect and to ensure), indicate slightly different things. The obligation to respect is a negative obligation, asserting a direct prohibition on state violation of human rights. However, the obligation to ensure goes further, indicating that state parties must take positive steps to give effect to the ICCPR rights.³¹ This implies an obligation to adopt the necessary ”legislative and other measures” (Article 2(2) ICCPR) to provide effective

²⁷ Muchlinski, ”Human Rights and Multinationals: Is there a problem?”, in 77 *International Affairs* (2001), no. 1 (January), 31-47, at 44-46, and George Kell, *Corporate Citizenship: Defining the New Responsibilities*, 24 October 2000, Chatham House, London, <www.unglobalcompact.org> (15 January 2002).

²⁸ See Scott, ”Translating Torture into Transnational Tort: Conceptual Divides in the Debate on Corporate Accountability for Human Rights Harms”, in Scott, *supra* note 21, 45-63, at 47-48.

²⁹ ICCPR, *supra* note 19, Article 2(1).

³⁰ Klein, ”The Duty to Protect and to Ensure Human Rights Under the International Covenant on Civil and Political Rights”, in Eckart Klein (ed.), *The Duty to Protect and to Ensure Human Rights* (Colloquium, Potsdam, 1-3 July 1999), 2000, Berlin Verlag, 295-318, at 296-297.

³¹ See Human Rights Committee, General Comment 3, Article 2, Implementation at the National Level, Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, UN Doc. HR\GEN\1\Rev.1 at 4 (1994).

remedy to victims and establish institutional safeguards (procedural and legislative). The notion also implies an obligation to protect individuals against interferences with their civil and political rights by other private individuals, groups or entities. As, at least in theory, all human rights are susceptible to private interference, this duty covers all human rights. However, the "horizontal effect" attached to any particular right, i.e. the extent and character of the indirect obligation, depend on the particular circumstances.³²

Reference has in this respect even been made directly to corporations. The Human Rights Committee has defined e.g. the right to privacy as protecting people from "all such interferences and attacks whether they emanate from State authorities or from natural or legal persons".³³ According to the UN Committee on Economic, Social and Cultural Rights states should take steps to ensure that "activities of the private business sector and civil society are in conformity with the right to food".³⁴ The Maastricht Guidelines on Violations of Economic, Social and Cultural Rights conclude that "The obligation to protect includes the States' 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", and thus "..., the failure to ensure that private employers comply with basic labour standards may amount to a violation of the right to work or the right to just and favourable conditions of work".³⁵ The UN Convention on the Elimination of All Forms of Discrimination against Women requires states "to take all appropriate measures to eliminate discrimination against women by any person, organization or enterprise".³⁶ Similarly the UN Convention on the Elimination of All Forms of Racial

³² Nowak, "The International Covenant on Civil and Political Rights", in Raija Hanski and Markku Suksi (eds), *An Introduction to the International Protection of Human Rights*, 1999, Institute for Human Rights, Åbo Akademi University, 79-100, at 87-88, and Klein, *supra* note 30, at 302. On the ECHR, Ress, "The Duty to Protect and to Ensure Human Rights Under the European Convention on Human Rights", in Klein *supra* note 30, 165-205, at 191-196.

³³ Human Rights Committee, General Comment 16, Article 17, Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, UN Doc. HRI/GEN/1/Rev.1 at 21 (1994).

³⁴ Committee on Economic, Social and Cultural Rights, General Comment 12, Article 11, Right to adequate food, UN Doc. E/C.12/1999/5 (1999), para. 27.

³⁵ Maastricht Guidelines on Violations of Economic, Social and Cultural Rights, Maastricht, January 22-26, 1997, paras 6 and 18.

³⁶ Convention on the Elimination of All Forms of Discrimination against Women (1979), 19 ILM 33 (1980), Article 2(e).

Discrimination obliges states to "prohibit and bring to an end ... racial discrimination by any persons, group, or organization".³⁷

As to case-law before international courts, the Inter-American Court of Human Rights (IACHR) and the European Court of Human Rights (ECtHR) have both stressed the legal duty of states to prevent human rights violations (under the American Convention on Human Rights and European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) respectively). In fact, it is in the practice of these courts that the principle is most clearly established.³⁸ Positive obligations are also inherent in many ILO Conventions. E.g. the ILO Convention No. 182 against Worst Forms of Child Labour, signed by and directed towards states, obliges state-parties to take effective measures to "secure the prohibition and elimination" of child labour.³⁹

2.2 The International Rules on State Responsibility

Besides obligations arising out of international human rights law, interest can also be turned to the "law of state responsibility". In this respect the ILC Draft Articles on State Responsibility can be utilized as an indication of established and developing customary law. The second reading of the Draft Articles on International State Responsibility was concluded in 2001. The Draft Articles give at hand that there is an

³⁷ Convention on the Elimination of All Forms of Racial Discrimination (1966), 5 ILM 352 (1966), Article 2(1)(d). See also International Council on Human Rights Policy, *Business Wrongs and Rights: Human rights and the developing international legal obligations of companies*, draft report, January 2001, 15-19.

³⁸ *Velásquez Rodríguez v. Honduras*, Inter-American Court of Human Rights, (21 July 1989), 28 ILM 291 (1989), and e.g. *Osman v. United Kingdom*, European Court of Human Rights, (29 October 1998), Reports of Judgements and Decisions, 1998-VIII. See also Clapham, "Revisiting *Human Rights in the Private Sphere*: Using the European Convention on Human Rights to Protect the Right of Access to the Civil Courts", in Scott, *supra* note 21, 513-535, and Lawson, "Out of Control. State Responsibility and Human Rights: Will the ILC's Definition of the 'Act of State' Meet the Challenges of the 21st Century?", in Monique Castermans-Holleman, Fried van Hoof, and Jacqueline Smith (eds), *The Role of the Nation-State in the 21st Century: Human rights, international organisations and foreign policy: essays in honour of Peter Baehr*, 1998, Kluwer Law International, 91-116, at 104 *et seq.*

³⁹ Convention Concerning the Prohibition and Immediate Elimination of the Worst Forms of Child Labour (1999) (ILO No. C 182), 38 ILM 1207 (1999). See also Cook, "State Responsibility for Violations of Women's Human Rights", in 7 *Harvard Human Rights Journal* (1994), (spring), 125-175.

internationally wrongful act of a state when conduct consisting of an action or omission:

- (a) Is attributable to the State under international law; and
- (b) Constitutes a breach of an international obligation of the State.⁴⁰

Although in theory the conduct of all human beings, corporations and collectives can be linked to the state by nationality, residence, or incorporation, the international law approach is different. The "law on state responsibility" stresses the connection to government. The Draft Articles cover (among others) acts of state organs or entities exercising elements of governmental authority, acts carried out under the direction or control of the state, and acts acknowledged by a state as its own.⁴¹ If a corporation is in such a relationship with the state, or has such a status under national law (Article 4 ILC), the state can consequently be held responsible for the wrongful act of the MNC.

As a corollary to this approach, the acts of private persons are not as a general rule attributable to the state.⁴² However, state responsibility does cover e.g. situations where former state corporations have been privatized but retain certain public or regulatory functions (Article 5 ILC). This would be the case e.g. where private security forces are responsible for guarding prisons. Also acts by private individuals who are employed as auxiliaries or "volunteers" assert state responsibility. These are in themselves difficult characterizations to be made. It seems clear that establishing the governmental connection, a question involving difficult considerations of distinguishing the public and the private spheres, will always entail an amount of discretion. E.g. the fact that the state established a corporation has not (in the Iran-US Claims Tribunal) sufficed to attribute its consequent conduct to the state.⁴³

While the Draft Articles primarily focus on state responsibility for the conduct of governmental organs and officials, the situation is also accounted for where acts

⁴⁰ For the text of the Articles, with commentary, see Report of the International Law Commission (Fifty-Third Session (23 April-1 June and 2 July-10 August 2001)), Official Records of the General Assembly, Fifty-sixth Session, Supplement No. 10, UN Doc. A/56/10 (2001), chapter IV, Article 2, (hereinafter *ILC Draft Articles*).

⁴¹ See chapter 2 of the ILC Draft Articles, *ibid*. On public enterprises, see Muchlinski (1995), *supra* note 2, at 75-76.

⁴² See ILC Draft Articles, *ibid*, at 80-81, and note 97 for further references.

⁴³ ILC Draft Articles, *ibid*, at 92 and 104-107.

of private persons can give rise to state responsibility. Article 12 of the ILC Draft states that there is a breach of an international obligation when the act in question is not in conformity with an obligation, “regardless of its character”. This means e.g. that it is not only the character of legislation that is considered. Existence of a breach of obligation will also depend on whether and how that legislation is given effect. Thus, inaction by state organs, not preventing an injurious act, may provide the necessary link for making a violation attributable to the state.⁴⁴

2.3 The Relationship between Human Rights Law and Rules on State Responsibility

Despite the seeming correlation between international human rights law and international rules on state responsibility, the question has arisen whether the ILC Draft Articles make sense in the human rights context.⁴⁵ On the other hand a desire for elevating an international human rights law violation to become an “authentic” breach of international law has been expressed. One mechanism in this respect could be for human rights law to invoke the principles of state responsibility.⁴⁶ In fact, ECtHR case-law has been interpreted so as to be consistent with the principles articulated by the ILC (without expressly referring to them), at least as far as the duty of states to “secure” the rights and freedoms of the ECHR in domestic law, or to take “reasonable and appropriate protection” are concerned. This would indicate that there is no conflict between ILC and ECHR principles.⁴⁷ The fact that ECtHR practice

⁴⁴ ILC Draft Articles, *ibid*, at 81 and esp. 130-133 with case-law references. See also Lawson, *supra* note 38, at 96-97.

⁴⁵ For a contention in the ECHR context that the extension of state responsibility so as to cover acts of individuals unconnected with the state is inappropriate, see Andrew Clapham, *Human Rights in the Private Sphere*, 1993, Clarendon Press. The argument is that the ECHR: “... does not primarily operate at the inter-state level, as it grants remedies to individuals; effective protection demands that the Convention control private actors; the Convention takes effect in the national order of the Contracting Parties and constitutes a kind of *ordre public*; a public/private dichotomy is arbitrary, unreasonably discriminatory, and perpetrates the exclusion of certain kinds of violations of rights ...”, at 188.

⁴⁶ Meron, “State Responsibility for Violations of Human Rights”, in *American Society of International Law / Proceedings of the 83rd Annual Meeting (Chicago, Illinois, April 5-8, 1989)*, 372-385, at 377.

⁴⁷ For counter-arguments to Clapham and references to ECtHR case-law, see Lawson, *supra* note 38, at 100 *et seq.*

does treat e.g. failure to legislate as possibly giving rise to state responsibility, is also reflected in the ILC Draft.⁴⁸

The Commentary to the Draft Articles give at hand that they do not define the contents of obligations ("primary rules") giving rise to responsibility. Rather, they constitute the general ("secondary") rules of international law.⁴⁹ This is an important distinction, as it indicates that the rules on state responsibility do not aim to substitute any other obligations. In this sense any critique against state responsibility provisions for being insufficient for protecting human rights is falsely targeted. A critique of the extent of obligations should rather be directed at the "primary" rules, i.e. human rights conventions.⁵⁰ Exploring the relationship between these two sets of principles also reveals that the ILC Draft Articles shall apply to the whole field of international obligations of states, irrespective of whether that obligation is owed to states, to an individual, a group, or the international community as a whole. Especially Part I of the Draft (defining the internationally wrongful act of a state) is intended to apply also to human rights violations. Thus, it does not only cover international obligations owed to other states, but all obligations of the state.⁵¹ Although the element of reciprocity is dissimilar in human rights law and the law of state responsibility (human rights conventions e.g. not containing any right to take countermeasures), the ILC Draft takes this into account by recognizing that the latter parts of the Draft Articles (on legal consequences and implementation) are not entirely applicable in the case of human rights obligations. This way the ILC Draft avoids a situation where human rights obligations could be suspended as a response to another state's breach of international law.⁵² As to grounds precluding wrongfulness (consent, self-defense, countermeasures, force majeure, distress, necessity), peremptory norms are naturally treated as absolute. Self-defence cannot serve to preclude wrongfulness of violation of non-derogable human rights. Further,

⁴⁸ See e.g. *Costello-Roberts v. the UK*, (12 March 1993), Publications of the European Court of Human Rights, Series A, vol. 247-C, and Lawson, *supra* note 38, at 104-106.

⁴⁹ ILC Draft Articles, *supra* note 40, at 59.

⁵⁰ Lawson, *supra* note 38, at 104 and 116.

⁵¹ ILC Draft Articles, *supra* note 40, at 59-62 and 214. The Commentary also states that whereas the responsibility for a human rights treaty violation may exist towards all other parties, reparation should benefit the individual, at 234.

⁵² See ILC Draft Articles, *supra* note 40, Article 50(1)(b).

the rights conferred by human rights conventions cannot be waived.⁵³ Thus, at least a very core of human rights are treated as absolute. This also reflects the ICCPR approach. Whereas the convention allows derogation from its provisions in times of public emergency, the right to life, the prohibition against torture and cruel, inhuman or degrading treatment or punishment, against slavery and servitude, against detention for debt, the principle of legality in the field of criminal law, the right to recognition of legal personality, and freedom of thought, conscience and religion, are characterized as non-derogable.⁵⁴

2.4 Asserting State Responsibility for MNC Acts

2.4.1 Home / Host State Responsibility

While the aim in this context is not to sort out the discussion on the compatibility of human rights law and the rules on state responsibility, the discussion above does indicate that the ILC recognition of omissions of state organs as a ground for invoking responsibility for private acts, corresponds to the duty imposed by human rights instruments upon states to ensure these rights. Both sets of principles suggest that state responsibility may be invoked, for a breach initially not imputable to the state, on the grounds of lack of due diligence to prevent a violation.⁵⁵

As a consequence of the "multinational" character of MNCs, the question arises whether liability in this situation would arise for the home or the host state. The ICCPR entails an obligation for states to ensure human rights "... to all

⁵³ Although consent may be relevant to their application, see e.g. Article 7 ICCPR, *supra* note 19. In general see chapter V of the ILC Draft Articles commentary, *supra* note 40, at 169 *et seq.*

⁵⁴ Article 4, ICCPR, *supra* note 19, and Human Rights Committee, General Comment 29, Article 4, States of Emergency, UN Doc. CCPR/C/21/Rev.1/Add.11 (31 August 2001).

⁵⁵ The due diligence test was first articulated in the *Velásquez Rodríguez Case*, *supra* note 38, para. 172. See also the UN Declaration of the Elimination of Violence against Women, UN Doc. A/48/49 (1993), Article 4(c), and UN Committee on the Elimination of Discrimination against Women, General Recommendation 19, Violence against Women, Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, UN Doc. HR\GEN\1\Rev. 1 at 84 (1994), para. 9.

individuals within its territory and subject to its jurisdiction...”.⁵⁶ Stressing the territorial connection, the “classic” due diligence rule of state responsibility can be seen to emphasize the obligations of the host state (and especially protection of foreign nationals).⁵⁷ Corporations are presumably subject to the national law under which they operate. Thus, when a company violates human rights, the first reaction would be to look at the regulatory failure of the jurisdiction within which the violation takes place. In this case the host state would be liable if it fails to protect individuals (or corporations) against acts of corporations (e.g. due to inadequate legislative measures). As the state is not in this case the immediate agent of harm, the character of the responsibility is indirect. Direct host state responsibility would only occur if the violation would in fact amount to an “act of state”.

As to the responsibilities of the home state, it has been argued that an approach has (re)emerged which requires the home state not only to protect a citizen or corporation, but to prevent him (or it), from engaging in injurious conduct abroad. In the *Nicaragua* case the ICJ indicated responsibility of states for acts of persons unconnected with the state if there was control over these persons.⁵⁸ There are even some codified examples of such responsibility, especially in the environmental sphere. E.g. the Basel Convention controlling the transport of hazardous waste impose an obligation not to permit citizens and corporations to export such waste to other countries.⁵⁹ The Human Rights Committee on its part has found that the ICCPR notion: “... to all individuals within its territory and subject to its jurisdiction ...”, “...does not imply that the State party concerned cannot be held accountable for violations of rights under the Covenant which its agents commit upon the territory of another State, whether with the acquiescence of the Government of that State or in opposition to it”.⁶⁰ Further, if interest is turned to national law, e.g.

⁵⁶ Article 2, ICCPR, *supra* note 19.

⁵⁷ See Sornarajah, “Linking State Responsibility for Certain Harms Cause by Corporate Nationals Abroad to Civil Recourse in the Legal Systems of Home States”, in Scott, *supra* note 21, 491-512, at 500, and Theodore Meron, *Human Rights and Humanitarian Norms as Customary Law*, Clarendon Press, 1989, at 159.

⁵⁸ *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, Merits, Judgment, ICJ Reports 1986, at 14. For further case references, see Sornarajah, *supra* note 57, at 501, note 41.

⁵⁹ See Basel Convention on the Control of Transboundary Movement of Hazardous Wastes and Their Disposal (1989), 28 ILM (1989), at 657 (hereinafter *Basel Convention*).

⁶⁰ *Lilian Celiberti de Casariego v. Uruguay*, (Human Rights Committee, Session 13), Communication No. 56/1979 (29 July 1981), UN Doc. CCPR/C/OP/1 at 92 (1984), para. 10.3.

Canada and Australia have made it a criminal offence for their nationals to have "sex" with children anywhere in the world, thus in effect creating jurisdiction over their nationals abroad. Whether this is an expression of a "duty" to ensure human rights is uncertain. An argument can nevertheless be made that a home state duty *can* be constructed. The case of home state responsibility would be similar to host state responsibility in the sense that it is indirect, asserted as a result of failure of human rights protection. The benefits of this approach would build on the fact that home states of the largest MNCs, most of which are located in developed countries, have better resources to ensure that corporations respect human rights. Home states are also the prime beneficiaries of MNC operations, which could add a moral duty for controlling how that wealth is gained. However, while states are permitted to regulate their nationals, there might yet not be any general obligation in this respect.⁶¹

2.4.2 Due Diligence

The task for establishing state responsibility (whether on the home or the host state level) for MNC human rights violations is qualified by the due diligence concept. This notion determines whether a duty to ensure human rights is violated. Its contents are in essence "right-specific". The outcome depends on the specific circumstances of the case and the rights violated, and cannot thus be stated in the abstract. This follows from that, in choosing how to provide effective protection of human rights, there are different means at a state's disposal.⁶² In general terms, the Human Rights Committee has held e.g. that the existence of legal rules does not suffice to fulfil a condition of reasonable measures. The rules must also be implemented and applied

⁶¹ See Sornarajah, *supra* note 57, at 510, and Scott, *supra* note 28, at 54-56.

⁶² See e.g. *Plattform 'Ärzte für das Leben' v. Austria*, (21 June 1988), Publications of the European Court of Human Rights, Series A, vol. 139, para. 34: "...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". See also van Dijk, "Positive Obligations' Implied in the European Convention on Human Rights: Are the States Still the 'Masters' of the Convention?", in Castermans-Holleman, van Hoof and Smith, *supra* note 38, 17-33.

(entailing e.g. investigations and judicial proceedings) and victims must have effective remedy (again, the contents of which depend on the specific case).⁶³

An analysis of the feasibility of effective state action must also be undertaken.⁶⁴ A finding that no reasonable diligence could have prevented the event has contributed to denials of responsibility. Foreseeability is a related factor. Arguably it is impossible for a state, unconnected with the MNC, to know beforehand how it is going to act abroad. However, once an allegation of such abuse has arisen the situation is different.⁶⁵ A disputed element is also whether questions of diligence should be assessed in light of the capabilities of the particular state, or whether this determination should be left to an international standard. The ICJ has analyzed due diligence in terms of "means at the disposal" of the state.⁶⁶ Nevertheless, this need not be inconsistent with maintaining some minimum requirements.⁶⁷ It could well be assumed that for non-derogable human rights the positive obligations of states would go further than in other areas.⁶⁸

2.5 Assessing State Responsibility

Bringing states to account for corporate human rights violations could force them to put pressure on companies. This could be a driving force for advocating state responsibility. As a question of human rights law the state concerned must be bound by the legal obligation in order to be held responsible for human rights violations. When this is established (either by custom or convention), the most clear-cut case of state responsibility for MNC abuse occurs if there is a link between the violating corporation and the state (the company in fact exercising governmental authority).

⁶³ Klein, *supra* note 30, at 313-316.

⁶⁴ For case-law references as to these aspects, see Brian Smith, *State Responsibility and the Marine Environment; The Rules of Decision*, Oxford University Press, 1988, at 32.

⁶⁵ Sornarajah, *supra* note 57, at 508.

⁶⁶ *Case Concerning United States Diplomatic and Consular Staff in Tehran (US v. Iran)*, Judgment, ICJ Reports 1980.

⁶⁷ Smith, *supra* note 64, at 40.

⁶⁸ See Ress, *supra* note 32, at 204, and Bernhardt, "The Duty to Protect and to Ensure Human Rights Under the European Convention on Human Rights – Comment on the paper by George Ress", in Klein, *supra* note 30, 207-210, at 209.

This determination can of course be difficult to make, especially if the "corporate veil" serves to conceal the corporate structure. Further, while state responsibility has been asserted in situations where a company has exercised governmental powers, or the state has used its ownership to achieve a particular result (in the Iran-US Claims Tribunal), this possibility only covers a limited number of MNCs.⁶⁹ The "veil" can also create problems for asserting the nationality of the corporation to begin with (a problem that affects many aspects of the responsibility question), this way even rendering the entire home / host division uncertain.⁷⁰

Host state responsibility arises from obligations undertaken through legal instruments to "ensure" (ICCPR) and "secure" (ECHR) human rights. A failure to fulfil these obligations also lie at the heart of the ILC definition of a breach of an obligation. This would indicate that a state cannot absolve itself of its human rights responsibilities through reference to private entities.⁷¹ The most extensive case-law in this respect is to be found within the ECtHR context.⁷² A few cases of corporate human rights violations, e.g. the activities of Shell in Nigeria, have been briefly noted before international human rights bodies. In the corporate context, this tool for asserting state responsibility is nevertheless poorly utilized. No direct cases targeting a government for failure to regulate business have arisen.⁷³ A host state approach can seem unattractive for practical reasons. Host state responsibility suffers from the fact that MNCs may often be more powerful than the state in which they operate. This is especially apparent considering that most problems arise in developing countries (and are thus outside possibilities of asserting host state responsibility e.g. through the ECHR mechanism). By threatening to relocate, MNCs can resist any domestic sanctions. Some states may also lack the practical machinery (and willingness) for monitoring and regulating corporate activities.

⁶⁹ See references in the Commentary of the ILC Draft Articles, *supra* note 40, at 108, notes 173-175.

⁷⁰ See ILC Draft Articles, *supra* note 40, at 107-108, and Johns, "The Invisibility of the Transnational Corporation: An Analysis of International Law and Legal Theory", in 19 *Melbourne University Law Review* (1994), 893-923, at 896.

⁷¹ Muchlinski (2001), *supra* note 27, at 42.

⁷² See Ress, *supra* note 32. In fact, that duty has even been called the "hallmark" of the ECHR, distinguishing it from other human rights conventions, see Starmer, "Positive Obligations under the Convention", in Jeffrey Jowell and Jonathan Cooper (eds), *Understanding Human Rights Principles*, 2001, Hart Publishing, 139-159, at 159.

⁷³ See Committee on Economic Social and Cultural Rights, Concluding Observations: Nigeria 13/05/1998, UN Doc. E/C.12/1/Add. 23 (1998), para. 29, and Joseph, *supra* note 8, at 78.

A proposed solution to this problem could be home state accountability. This would entail stretching the responsibility for "ensuring" human rights beyond the traditionally territorial scope of the obligation. Although such a regulatory approach has been argued to be legally possible, it seems safe to conclude that human rights law itself has not yet evolved this far. Rather, states would have to choose to regulate their corporate nationals. Such regulation could put (home state) corporations at a comparative disadvantage, and would thus certainly meet with opposition from the business sector.⁷⁴ Nevertheless, in this scenario (most MNCs being nationals of developed states), the corporate bargaining advantage would perhaps not be as obvious as in the host state approach.

The obligation to adopt "necessary legislative and other measures" (Article 2(2) ICCPR) which is the correlate legislative duty of home state responsibility, may also be somewhat problematic when extended beyond the host state, as it raises concerns of extraterritorial jurisdiction. This is not to say that home states would be without means for regulating their corporate nationals. The United States (US) Alien Tort Claims Act is probably the best example of a mechanism creating a legislative exception to the presumption of territorial application of law. Although this mechanism has had some success in raising lawsuits against corporations, the exercise of jurisdiction has also met with accusations of being selective and only applied when advantageous to national interests. In addition, the perhaps most famous example involving a MNC – the UNOCAL Case – was in fact jurisdictionally based on universality and not on nationality.⁷⁵ This mechanism will however be discussed further in the corporate responsibility context. Interestingly, the problems inherent in state responsibility, and (paradoxically perhaps) especially the problems with state commitment in the human rights sphere, has been one driving force for exploring the direct responsibility of corporations.⁷⁶

⁷⁴ Joseph, *supra* note 8, at 80.

⁷⁵ Sornarajah, *supra* note 57, at 506. The American company UNOCAL was charged with acquiescence in human rights violations of the Burmese military. *John Doe I v. Unocal corp.*, 963 F.Supp. 880 (C.D.Cal. 1997).

⁷⁶ Another side of the problem with state responsibility for corporate human rights violations is hereby also the general criticism of inadequacy that can be directed towards the international human rights mechanisms themselves. Despite the increased procedures of human rights protection, the scale or intensity of violation has not been significantly reduced. For a critical overview of tensions within human rights, see Chinkin, "International Law and Human Rights", in Tony Evans (ed.), *Human Rights Fifty Years On: A reappraisal*, 1998, Manchester University Press, 105-129.

3 *Corporate Responsibility*

The question of corporate responsibility is in one sense the flip-side of the question of state responsibility for MNC human rights abuse as, if state responsibility is advocated, this entails an obligation of states to regulate. The question of corporate responsibility is also raised in the context of direct international obligations. Each of these will be considered in turn. It might however first be useful to make some general remarks on how to qualify the responsibilities of corporations.

Firstly, state complicity in corporate human rights violations must be taken into account. Apart from raising the issue of more direct state responsibility for human rights violations, such complicity also means that corporate responsibility can arise in different contexts. A company can be actively involved in violating human rights, giving rise to "primary responsibility". The company can also be passively involved, meaning that it e.g. does not take action for protecting the rights of its employees, even if it is not itself the immediate violator. The responsibility discussion can even be stretched to situations of "pervasive violations", in which a corporation is aware that violations are occurring in the country in which it operates, although unrelated to the MNC operations. Apparently the duties of a company (whether national or international) are strongest in cases of primary responsibility. In the other end of the spectrum, any degree of responsibility is presumably lower. In this latter situation the issue could be one e.g. on whether a MNC can be required to undertake positive action to enhance the human rights situation in a country of operation. Such a contributing aspect (to a more enabling environment for the realization of human rights) is often included in "soft" approaches for asserting responsibility.⁷⁷ This serves to show that any determination of when responsibilities arise is not likely to be completely unambiguous.

The extension of human rights responsibilities to companies often also raises the question of legal personality. As was mentioned when characterizing the MNC, a lack of legal personality has been perceived as an obstacle for imposing

⁷⁷ This is based on Frey, *supra* note 23, at 180-187. See also Jägers, *supra* note 5, at 260-261, and The Dutch Branches of Amnesty International and Pax Christi International, *supra* note 20, chapter IV.

responsibilities upon corporations. However, merely recognizing (or denying) legal personality does not say anything about whether or which obligations companies might have. Instead it can plausibly be argued that the ascertainment of legal personality depends on whether the corporation in fact possesses (and can enforce) rights and duties under international law.⁷⁸ In fact it has even been contended that the question of legal personality is rendered uninteresting altogether, as MNCs are in fact important participants in the evolution of international law, whereas the law itself can be slow to respond to this reality. With this in mind, a suggestion that responsibilities cannot be attached to a MNC because of lack of personality cannot be withheld. Even if the personality concept is maintained (which can be doubted in its own right), it is rather the imposition of duties to observe human rights upon MNCs that indicates a legal status.⁷⁹

3.1 Direct International Responsibilities

3.1.1 The Selection of Human Rights Principles

In identifying direct obligations of companies, it could be useful to return to the discussion on applicability of human rights provisions that was touched upon in the introductory chapter. If some kind of "core" set of MNC human rights are to be found, interest can be turned to instruments which directly target companies. One of the most recent innovations for enhancing corporate responsibility, the UN Global Compact, although referring to the Universal Declaration of Human Rights at large, also conducts a selection within the document. This selection basically ends up with equalizing core human rights for the workplace with the ILO Declaration on Fundamental Principles and Rights at Work (safe and healthy working conditions, freedom of association, non-discrimination in personnel practices, no forced or child

⁷⁸ As to MNCs in particular, see Jägers, *supra* note 5, at 263-267.

⁷⁹ On the usefulness of the personality concept, see Rosalyn Higgins, *Problems and Process: International Law and How We Use It*, 1993, Oxford University Press, at 49-50. See also Jägers, *supra* note 5, at 266-267, and Muchlinski (2001), *supra* note 27, at 41.

labour, and right to basic health, education and housing).⁸⁰ This enumeration is also largely reflected in the recent draft on Principles Related to the Human Rights Conduct of Companies by the UN Sub-Commission on the Promotion and Protection of Human Rights.⁸¹ Outside the workplace the Global Compact holds that existing international guidelines and standards for the use of force should be respected. In the wider community companies are to prevent the forcible displacement of individuals, groups or communities, protect the economic livelihood of local communities, and contribute to public debate.⁸²

Although this indicates a rather focused selection of human rights, it is unlikely that a company would deny e.g. the fundamental character of right to life or freedom from slavery and apartheid. Notably some rights, such as the right to nationality, to leave any country, to seek asylum, to marry and found a family, and to education, require positive action on the behalf of states. MNCs can promote e.g. the right to education if reformulated as a prohibition against child labour. Many human rights principles are also interconnected. The prohibition against forced labour corresponds to the right to freedom from slavery. This way rights “within the sphere of company influence” could come to protect other fundamental rights. As e.g. to the right to nationality any reformulation seems more difficult.⁸³ Although it can be argued that

⁸⁰ ILO Declaration on Fundamental Principles and Rights at Work, 37 ILM (1998), at 1233.

⁸¹ UN Sub-Commission on the Promotion and Protection of Human Rights, *Principles Relating to the Human Rights Conduct of Companies*, working paper prepared by Mr. David Weissbrodt, UN Doc. E/CN.4/Sub.2/2000/WG.2/WP.1/Add.1 (2000). The working paper further adds: war crimes and crimes against humanity, respect for national sovereignty and right to self-determination, fair and equal remuneration, hours of work, consumer protection, and environmental protection (hereinafter *Sub-Commission Draft Code*).

⁸² See <www.unglobalcompact.org> (15 January 2002). A recent study on codes of conduct by the OECD, surveying 246 different codes, gives at hand that environmental stewardship and labour relations are the areas most frequently addressed. “Reasonable working environment” is the most common quality of labour contents (76%). “Environmentally friendly products and services” in the environmental field (38%), and discrimination (60%), child (43%) and forced labour (38%) are also among the most frequent attributes. A closer look into extractive industry codes show that nearly all address environmental and labour issues. Textile industry codes clearly emphasize the labour principles of the ILO Declaration. See the OECD Report, *Codes of Conduct – An Expanded Review of their Contents*, TD/TC/WP(99)56/FINAL, June 2000, <[applied.oecd.org/olis/1999doc.nsf/LinkTo/td-tc-wp\(99\)56-final](http://applied.oecd.org/olis/1999doc.nsf/LinkTo/td-tc-wp(99)56-final)> (15 January 2002). See also the ILO Report *Overview of Global Developments and Office Activities Concerning Codes of Conduct, Social Labelling and other Private Sector Initiatives Addressing Labour Issues*, Governing Body, GB.273/WP/SDL/1, November 1998, <www.ilo.org/public/english/standards/relm/gb/docs/gb273/sdl-1.htm> (15 January 2002).

⁸³ In general, Dubin, “The Direct Application of Human Rights Standards to, and by, Transnational Corporations”, in *The Review* (1999), no. 61 (Globalization, Human Rights and the Rule of Law), 35-66, at 41. This emphasizes a public-private distinction, and the fact that there still are essential differences between the roles of these societal spheres. Non-state actors can not ensure an arena in which everyone has access to common institutions and equal protection of law. Nor can they

MNCs are bound by the most basic human rights at any rate by way of their normative status, even their applicability must be qualified. Out of the common non-derogable human rights, e.g. any connection to the prohibition against retroactive criminal liability might be difficult to visualize.⁸⁴

3.1.2 The Applicability of Human Rights Instruments

Most human rights instruments deal primarily with the obligations of states. However, some human rights standards could be constructed so as to concern even non-state actors. The UDHR preamble states that the Declaration is:

... a common standard of achievement for all peoples and all nations, to the end that *every individual and every organ of society*, keeping this Declaration constantly in mind, shall strive by teaching and education to promote respect for these rights and freedoms and by progressive measures, national and international, to secure their universal and effective recognition and observance,
....⁸⁵

The last article of the UDHR further states that "Nothing in this Declaration may be interpreted as implying for *any State, group or person* any right to engage in any activity or to perform any act aimed at the destruction of any of the rights and freedoms set forth herein".⁸⁶ The ICCPR and ICESCR echo these articles to some extent.⁸⁷ These provisions can be interpreted as establishing a duty to respect the rights of others. The essence of such a duty is that, for an effective protection of

legitimize ethical values through democratic dialogue or sustain them through public action. See e.g. Schachter, "The Decline of the Nation State", in 35 *Colombia Journal of Transnational Law* (1997), 7-23, at 22-23, Stern, "How to Regulate Globalization?" in Michael Byers (ed.), *The Role of Law in International Politics: Essays in international relations and international law*, 2000, Oxford University Press, 247-268, at 267, Muchlinski (2001), *supra* note 27, at 35-36, and Anthony Giddens, *The Third Way and Its Critics*, 2000, Polity Press, at 164-165.

⁸⁴ On non-derogable human rights, see *supra* chapter 2.3.

⁸⁵ Preamble, UDHR, *supra* note 19, (emphasis added).

⁸⁶ UDHR, *supra* note 19, Article 30 (emphasis added).

⁸⁷ ICCPR and ICESCR, *supra* note 19, Article 5(1). See also Weissbrodt, "Non-State Entities and Human Rights within the Context of the Nation-State in the 21st Century", in Castermans-Holleman, van Hoof and Smith, *supra* note 38, 175-195, and International Council on Human Rights Policy, *supra* note 37, at 32-38.

human rights, anyone who has the power to affect the rights of others must do so without violating or undermining them. In this sense e.g. the right to life could mean for a company that the working environment is safe and that the products do not threaten individuals or society at large. The specific contents would however be determined by the circumstances.⁸⁸

Although such a general duty could be inferred, human rights instruments do not directly impose obligations upon corporations to protect human rights. Despite the focus and discussions on the role of MNCs in the global context, the fact still remains that the primary (and only direct) duty-bearer in international human rights law is the state.⁸⁹ Thus, a direct application to corporations would only be possible if the private body performs public functions (and thus is in fact an extension of governmental authority). It would seem logical that the provisions (esp. of the UDHR) referring to responsibilities of non-state entities, in order to be meaningful, should as a minimum include peremptory norms. Indeed, as evidenced by the UNOCAL case in US law, peremptory norms can be used (through universal jurisdiction) to invoke responsibilities of companies. Nevertheless, the mechanism in this case works via the state. Nor can a corporation be a defendant before human rights treaty bodies. Thus, any direct responsibilities arising out of the human rights instruments would lie in the political or moral sphere.

In the ECHR context, the *drittwirkung* (or third-party-effect) of the Convention has been argued to have rendered the Convention applicable in the private sphere. The *drittwirkung* concept itself is undefined (and its desirability disputed). In general terms it entails the idea that human rights provisions also apply in relations between private parties (and not only in the public - private relationship).⁹⁰ This is sometimes equalized with the horizontal duty of states to "ensure" human rights ("indirect *drittwirkung*"). In a more extensive setting *drittwirkung* can be defined as a possibility for an individual to enforce his rights against other individuals. However, the ECHR does not provide for the possibility to lodge complaints against other individuals. Apart from the possibility of directly invoking the ECHR before national courts that

⁸⁸ Addo, *supra* note 1, at 27-31.

⁸⁹ Frey, *supra* note 23, at 163.

⁹⁰ For a general overview in the ECHR context, see Pieter van Dijk and Fried van Hoof, *Theory and Practice of the European Convention on Human Rights*, 1998, Kluwer Law International, at 22-26.

this extensive *drittwirkung* opens up, the mechanism on the international (ECtHR) level then still works through state obligations.⁹¹

3.1.3 Corporations and International Crimes

Although the UN human rights treaty bodies do not currently have institutional authority to exercise direct review over companies, such a role could evolve implicitly or through treaty.⁹² Another prospect in this respect could be international criminal responsibility. Historical precedents exist. In the aftermath of world war II, the United States Military Tribunal at Nuremberg in the *I.G. Farben Trial* treated the corporate defendant, Farben, as a legal entity, capable of violating the laws of war.⁹³ While the jurisdiction of the Criminal Tribunals for the former Yugoslavia and Rwanda is restricted to natural persons, the Rome Conference on the International Criminal Court (ICC) did not challenge the assumption that corporations are bound by international criminal law. The fact that the draft provisions directed at legal persons were omitted from the final ICC article on jurisdiction was due to disagreements e.g. on questions of how indictments are to be served, who is to represent the interests of the legal person, how intention is to be proved, how to ensure that natural persons do not hide behind group responsibility, and the fact that all states have not criminalized corporate crimes in their national penal codes.⁹⁴

On the international level there are some treaties, such as the already mentioned Basel Convention on Hazardous Wastes, which defines illegal traffic of

⁹¹ van Dijk and van Hoof, *ibid*, at 23-24, and van Hoof, "International Human Rights Obligations for Companies and Domestic Courts: An Unlikely Combination?", in Castermans-Holleman, van Hoof and Smith, *supra* note 38, 47-59, at 54-57.

⁹² See Scott, *supra* note 28, at 56-57.

⁹³ The I.G. Farben Trial, US Military Tribunal, Nuremberg, 14 August 1947-29 July 1948, (Case no. 57) at 1132-1133, referred to in Clapham, "The Question of Jurisdiction Under International Criminal Law Over Legal Persons: Lessons from the Rome Conference on an International Criminal Court", in Kamminga and Zia-Zarifi, *supra* note 4, 139-195, at 167.

⁹⁴ On the drafting process, see e.g. Clapham (2000), *ibid*, at 141-160. The fact that only some states have criminalized corporate crimes would have made the preference that the ICC provides for national criminal procedure unworkable. See Rome Statute of the International Criminal Court (1998), 37 ILM 999 (1998), Article 17 (hereinafter *ICC Statute*), and Ambos, "Article 25: Individual Criminal Responsibility", in Otto Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court: Observers' Notes, Article by Article*, 1999, Nomos Verlagsgesellschaft, 475-492, at 478.

waste as "criminal" (Article 4(3)), and more importantly, expressly addresses corporate entities by defining the person violating the provisions of the Convention as "any natural or legal person" (Article 2(14)).⁹⁵ The same pattern is followed in Council of Europe and OECD conventions against corruption, and by the UN Convention Against Transnational Organized Crime.⁹⁶ This development recognizes that corporations can commit crimes (and provides for regimes to deal with them). Such criminalization of corporate behaviour could bear the conclusion that, despite lack of ICC jurisdiction, there are no theoretical barriers to applying laws of war, humanitarian law, and international human rights law, to corporations.⁹⁷

3.2 National Approaches

In all, the conclusion on the international regulation of MNCs must be that the mechanism for asserting responsibility for human rights abuse is better sought on the national level. International obligations, as asserted upon corporations, still works through the agency of the state. Jurisdictionally this poses no problem. National legal jurisdiction is the cornerstone of the interstate system. All persons must act in compliance with national laws and policies, and indeed, national legal systems are increasingly recognizing corporate criminal liability.⁹⁸

There are two major theories of corporate criminal liability in use in domestic legal systems; identification and imputation. The basis for liability under the identification theory is that acts of certain natural persons are actually the acts of the corporation. The scope of liability is restricted to those who represent the corporation. Under the imputation theory the corporation can be held responsible for

⁹⁵ See Basel Convention, *supra* note 59, and Clapham (2000), *supra* note 93, at 173-174.

⁹⁶ See Convention Against Transnational Organized Crime (2000), UN Doc. A/45/49 (Vol. I) (2001).

⁹⁷ Clapham (2000), *supra* note 93, at 175-178. However, e.g. the Genocide Convention imposes responsibility only on individuals (and possibly on states). See Convention on the Prevention and Punishment of the Crime of Genocide (1948), 28 ILM 754 (1989), and Steven R. Ratner and Jason S. Abrams, *Accountability for Human Rights Atrocities in International Law: Beyond the Nuremberg Legacy*, 1997, Clarendon Press, at 15.

⁹⁸ See Celia Wells, *Corporations and Criminal Responsibility*, 2001, Oxford University Press, at 183-140.

the acts of all its agents. In fact, in national legal systems, individual and corporate responsibilities are usually cumulative. This builds on the idea that the acts of employees or directors, when not performed in their "individual capacity", can be linked to the corporation.⁹⁹

Some national legal systems also recognize that corporations can commit torts and are thus subject to civil liability.¹⁰⁰ If regarded as a question of unilateral v. multilateral regulation, advantages with a national approach are that international regulation, if available at all, is often perceived as cumbersome and weak. On the other hand, as a disadvantage, domestic regulatory approaches can entail a pursuit of national interests only, thus leading to a lack of unified policies.¹⁰¹ Complexities also arise out of the home/host state division. While some of these were already touched upon, it can be useful to still focus on the national responsibility of MNCs to some extent. The complexities of national responsibility not only affect the human rights liability of corporations, but also (as was seen) can have an impact on the question of state responsibility for corporate human rights abuse.

Host state responsibility is well grounded jurisdictionally in the principle of territoriality. The fact that every state has jurisdiction over crimes committed in its own territory is a universally accepted maxime. A duty for host states to regulate MNCs operating within their territory may even, at least in theory, be deduced from the obligation to ensure human rights. The flaws which nevertheless can serve to make host state regulation ineffective arise both from the power and character of MNCs, as well as from the lack of capabilities, resources and willingness of states. In asserting MNC host state responsibility, whereas the formal contents of host state laws is the starting point for the relationship between the state and the MNC, the actual application can come to depend e.g. on relative bargaining power. States are driven by desires to secure economic and social benefits, while also creating a favourable company environment. Although establishing a distinction between the

⁹⁹ On theories of corporate criminal responsibility, see Nina Jørgensen, *The Responsibility of States for International Crimes*, Oxford University Press, 2000, at 77 (with further references). See also Wells, *ibid.*, e.g. chapter 7, at 127 *et seq.*

¹⁰⁰ In fact the dominant development in the US has been the disappearance of any clearly definable line between civil and criminal law. An important distinguishing feature of criminal law as a tool for moral education and socialization nevertheless remain. See Jaatinen, "Corporate Criminal Liability and Neo-Classical Criminal Policy", in 1 *Turku Law Journal* (1999), no. 1, 103-108, at 104.

¹⁰¹ Muchlinski (1995), *supra* note 2, at 108.

public and private spheres is a matter of political preference, there are however some fundamental tensions which can affect the fulfilment of these goals. Basically - companies are business orientated (although social responsibility has penetrated the agenda), while states have the primary social responsibility (nevertheless requiring resources and being subject to privatization).¹⁰² This is not to say that relative bargaining strength will always be dependent upon these fundamentals. Nor does it mean that the interests of companies and states never could coincide, or that all governments would take their social responsibility seriously to begin with. It rather serves to illustrate that the relationship might, especially for developing states, turn into (unhealthy) dependence on corporations in order to realize the social tasks.

Home state responsibility on its part could build on several jurisdictional grounds. Nationality is generally recognized as a basis for jurisdiction over extraterritorial acts, and could thus provide states the authority to prosecute its MNC nationals for crimes committed abroad. E.g. the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment provides that state parties are to "take such measures as may be necessary to establish its jurisdiction ... when the alleged offender is a national of that State".¹⁰³ This is not completely unproblematic if applied to corporations, as jurisdiction in such a case would be based on the nationality of the parent company, thus disregarding the nationality of the subsidiary. This approach can also run into difficulties with lifting the "corporate veil" in order to settle the nationality in the first place. Alternatives to the territorial principle could be the protective (accepting jurisdiction over activities abroad which affect the vital interests of the regulating state), and objective territorial jurisdiction (accepting jurisdiction when an offence is commenced in one state and completed in another).¹⁰⁴

Universality on its part provides every state with jurisdiction over offences which are generally considered to be of a sufficiently serious character. It is thus

¹⁰² For a general overview on the public-private concept, see e.g. Chinkin, "A Critique of the Public/Private Dimension", 10 *European Journal of International Law* (1999), no. 2, 387-395. See also *supra* note 83.

¹⁰³ Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (1984), 23 ILM 1027 (1984), Article 5(1)(b).

¹⁰⁴ As to jurisdictional principles in general, see McConville, "Taking Jurisdiction in Transnational Human Rights Tort Litigation: Universality Jurisdiction's Relationship to *Ex Juris Service*, *Forum Non Convenience*, and the Presumption of Territoriality", in Scott, *supra* note 21, 157-196, and in relation to MNCs in particular, Muchlinski (1995), *supra* note 2, at 123-126.

detached from any territorial or nationality considerations. It is this presumption that the national mechanism having received most attention in recent years, the US Alien Tort Claims Act (ATCA), builds upon. The ATCA permits aliens to sue US and foreign corporations for gross violations of human rights committed either within the US or abroad. The US stands practically alone in permitting such lawsuits.¹⁰⁵ In order to decide a case, US courts require subject matter and personal jurisdiction. Personal jurisdiction is asserted through showing a connection to one of the 50 states (the corporation is "doing business in it"). In practice the presence of an agent or an office has proved sufficient. However, there is no automatic attribution of all activities of subsidiaries to the parent company. As to subject matter jurisdiction, the ATCA makes a claim to universality. The tort must violate a "law of nations" or a treaty of the US. "Law of nations" has in fact been (and naturally so, in order to enact universal jurisdiction) interpreted restrictively, only including the most fundamental civil and political rights, and humanitarian law.¹⁰⁶

There is a potential with exercising ATCA-like jurisdiction in that it may influence MNC behaviour. The fear of costly lawsuits can push companies to consider their human rights policies. It can also affect host state behaviour (especially if the corporation considers divestment), this way acting as an indirect sanction on governments participating in human rights violations.¹⁰⁷ Civil proceedings can have certain advantages over criminal law in overcoming reluctance of governments to instigate criminal proceedings for political reasons. On the other hand, extraterritorial application of law is a problem even with tort remedies. It can be seen as an attempt to impose policies upon others, and thus as an infringement of (home or host) state sovereignty. This could result in that the mechanism is only used when there is no risk of embarrassing state relations. It also lies close at hand to assume that absence of a unified multilateral approach can result in selective and divergent application, mainly favouring the policies of the state allowing such proceedings. Variation could also arise from individual judges' knowledge of international law. Such considerations, if proving to be determining, could in fact

¹⁰⁵ In general, see *Corporate Liability for Violations of International Human Rights Law*, under Developments in the Law, International Criminal Law, in 114 Harvard Law Review (2001) (May), 2025-2048.

¹⁰⁶ See Stephens, "Corporate Accountability: International Human Rights Litigation Against Corporations in US Courts", in Kamminga and Zia-Zarifi, *supra* note 4, 209-229, at 221-222.

¹⁰⁷ Harvard Law Review, *supra* note 105, at 2041.

undermine the usefulness of universal jurisdiction itself.¹⁰⁸ Furthermore, any expansion of the application of such unilateral mechanisms may not be desirable. An interpretation of the "law of nations" that enters into politically and culturally controversial principles is likely to meet with accusations of legal (and cultural) imperialism. It should also be considered that "weaker" states are not necessarily sufficiently powerful to use such mechanisms to begin with.¹⁰⁹

3.3 Non-Legal Responsibilities

Although direct legal responsibilities on MNCs are scarce on the international level, there are nevertheless "soft" mechanisms aspiring to this effect. Such initiatives have arisen from many different sources. Corporations, international organizations, and NGOs have all been active in introducing codes of conduct, guidelines, certification, verification and monitoring procedures, and network constructions, all promoting sustainable development (and human rights as a part thereof).

On the intergovernmental level, the historical roots of this development go back to the New International Economic Order, one aspect of which was the work that began on formulating a Code of Conduct for MNCs.¹¹⁰ However, with the collapse of the NIEO, this approach was abandoned. Ever since, UN initiatives targeting corporations have been non-binding. The two most notable government-initiated international instruments directed at MNCs, the OECD Guidelines for Multilateral Enterprises and the ILO Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy, both explicitly state that they are non-binding on states or the private sector.¹¹¹ A current Draft Code of Conduct for

¹⁰⁸ Many proceedings under the ATCA against individuals, although based upon universal jurisdiction, have in fact dealt with regimes or individuals no longer in official positions. See Klabbers, *supra* note 21, at 562.

¹⁰⁹ See Harvard Law Review, *supra* note 105, at 2045, and Muchlinski (1995), *supra* note 2, at 109-110.

¹¹⁰ See Muchlinski, "Attempts to Extend the Accountability of Transnational Corporations: The Role of UNCTAD", in Kamminga and Zia-Zarifi, *supra* note 4, 97-117, at 98-102, and Wälde, *supra* note 11, at 1304.

¹¹¹ OECD Guidelines, *supra* note 6, Introduction, and ILO Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy, 17 ILM (1978), at 422, Preamble (para. 7).

Companies by the UN Sub-Commission on the Promotion and Protection of Human Rights, does not address the question of bindingness at all.¹¹² The UN Global Compact provides a rather pragmatic answer to why a non-binding approach has been chosen; no probability is seen for reaching consensus between states on the issue any time soon; the task of monitoring global companies is regarded as a logistical and financial nightmare; and business opposition to a code of conduct could have generated a more uniform anti-code coalition.¹¹³ Difficulties with monitoring compliance, verifying, and reporting, are well-perceived problems.¹¹⁴

Several factors have been put forward to explain the driving force behind compliance with voluntary initiatives. These include: long-term interactive relationships, reputation, social consensus on the underlying norms, need to maximize welfare and minimize transaction costs, threat of sanctions (or e.g. legally binding norms), and institutional structures which encourage transparency and accountability.¹¹⁵ From a welfare perspective, some studies indicate improved financial performance as a result of social responsibility. There are also success stories, such as the Body Shop, that have succeeded in making ethics an important and profitable part of business.¹¹⁶ As to reputation, a role as a “niche player” may have a positive effect.¹¹⁷ This builds on the idea that social quality is valuable as a competitive asset. Another important aspect is the influence of “stakeholders”. Action by civil society can put pressure on companies by undermining their moral reputation.¹¹⁸ The impact of such “shaming” strategies is not necessarily direct. As far

¹¹² See Sub-Commission Draft Code, *supra* at 81. See also Commission of the European Communities, Green Paper, *Promoting a European Framework for Corporate Social Responsibility*, Brussels, 18 July 2001, COM(2001) 366 final, suggesting that proposals to strengthen corporate responsibility should build on a voluntary nature.

¹¹³ John Ruggie, *The Global Compact as Learning Network*, <www.unglobalcompact.org> (15 January 2002).

¹¹⁴ See e.g. Sub-Commission Draft Code, *supra* note 81, para. 24.

¹¹⁵ Weiss, “Conclusions: Understanding Compliance with Soft Law”, in Dinah Shelton (ed.), *Commitment and Compliance: The Role of Non-Binding Norms in the International Legal System*, 2000, Oxford University Press, 535-553, at 539-546.

¹¹⁶ See Business for Social Responsibility website, “Introduction to Corporate Social Responsibility” <www.bsr.org/BSRLibrary/TOdetail.cfm?DocumentID=138>, for references (15 January 2002). Case studies of successful socially responsible action is even available on the Global Compact website, <www.unglobalcompact.org> (15 January 2002). As for company codes of conduct, e.g. the Sullivan Principles have been described as a success, see McCrudden, “Human Rights Codes for Transnational Corporations: The Sullivan and MacBride Principles”, in Shelton, *ibid*, 418-449.

¹¹⁷ See Zadek and Forstater, “Making Civil Regulation Work”, in Addo, *supra* note 1, 69-75, at 74.

¹¹⁸ E.g. Corpwatch has launched a series of investigative articles on whether corporations participating in the Global Compact are living up to the commitment, see <www.corpwatch.org>.

as share prices or dividends are concerned it has been indicated that all high profile campaigns against companies have not had any immediate financial effect. Corporate social responsibility is in this light perhaps best seen as a combination of demonstrating ability and following the demands of society.¹¹⁹

Given the limited capacity to regulate effectively, self-regulation is an attractive and low-cost way to try to affect corporate strategies, restrain the backlash against globalization and maintain an open economical system.¹²⁰ Expected benefits include flexibility, openness to all parties, low transaction costs, and the possibility that such initiatives may serve as a path to legal arrangements.¹²¹ In most general terms the effect of voluntary approaches is to create an expectation of behaviour. Codes and initiatives create a climate where it can be expected that companies make a conscious assessment on the impact of their activities. Subsequently these initiatives can also be used as a benchmark against which to compare corporate behaviour. E.g. for the Global Compact, hopes are also that use of non-binding accords can strengthen a co-operative global governance through creating credibility and trust and accommodating differing views on regulating business.¹²²

Although a voluntary and soft-law approach *can* be useful, it does not escape criticism. The actual impact comes to depend upon the interests of the participants and the incentives for compliance. In fact the focus on compliance in itself entails a paradox as the non-binding form often has been chosen precisely in order to avoid any obligation to comply.¹²³ A "voluntarist" and co-operative perspective has even been said to move "beyond" compliance altogether.¹²⁴ This is reflected in an all too

¹¹⁹ Zadek and Forstater, *supra* note 117, at 69-75.

¹²⁰ Haufler, *International Business Self-Regulation: A Contribution to Public Policy?*, Carnegie Endowment for International Peace, 1999, <www.ceip.org/files/events/selfregulation.asp?p=7> (15 January 2002).

¹²¹ See Reinicke and Witte, "Interdependence, Globalization, and Sovereignty: The Role of Non-binding International Legal Accords", in Shelton, *supra* note 115, 26-55, e.g. at 51.

¹²² In general, see Chinkin, "Normative Development in the International Legal System", in Shelton, *supra* note 115, 21-42, at 41-42.

¹²³ *Ibid*, at 25.

¹²⁴ See Mickelson, "Carrots, Sticks, or Stepping-Stones: Differing Perspectives on Compliance with International Law", in Thomas J. Schoenbaum, Junji Nakagawa and Linda C. Reif (eds), *Trilateral Perspectives on International Legal Issues: From Theory to Practice*, 1998, Transnational Publishers, 35-48, at 39-40 and 46-48.

frequent absence of any proper mechanism for verification and accountability, rendering also the question of corporate responsibility somewhat uncertain.¹²⁵

3.4 Assessing Corporate Responsibility

International human rights instruments are not designed for holding corporations responsible. While this does not release a company from the obligation to respect international human rights standards, the mechanism for asserting responsibility is only indirect and works via the state. The most comprehensive practice on national proceedings against corporations exists within US law. Tort claims under the ATCA may seem as the only truly effective path for remedy of corporate human rights abuse. Nevertheless, use of this approach (although jurisdictionally based on universality) has raised some concern of politization, cultural and judicial expansion, and legal competition. Neither does it seem plausible that the ATCA alone, in the long run, can represent an effective means for deterring and punishing massive human rights violations.¹²⁶

The reluctance of states to implicate nationals of other states (whether legal or natural persons), although perhaps slowly being relaxed, is still a major obstacle for criminal proceedings. This problem can perhaps be overcome to some extent through civil process. However, it must also be noted that civil process is basically a mechanism of providing compensation for victims, and not so much one of enforcement. While its value may (as e.g. with war-crimes trials) be symbolic, it will not serve as a similar statement of moral values as criminal law. Use of tort law can also be criticized for having a deteriorating effect upon the very social relations which

¹²⁵ See e.g. Huner, "The Multilateral Agreement on Investment and the Review of the OECD Guidelines for Multinational Enterprises", in Kamminga and Zia-Zarifi, *supra* note 4, 197-205, at 204-205, and Viljam Engström, *Realizing the Global Compact*, Forum Iuris, (forthcoming 2002).

¹²⁶ See e.g. Slaughter and Bosco, "Alternative Justice", <<http://www.globalpolicy.org/intljustice/atca/2001/altjust.htm>> (15 January 2002), and Glaberson, "U.S. Courts Become Arbiters of Global Rights and Wrongs", in *The New York Times*, 21 June 2001, <<http://college3.nytimes.com/guests/articles/2001/06/21/852996.xml>> (15 January 2002).

human rights serve to safeguard.¹²⁷ Criminal prosecution on its part could potentially bring with it public censure, threat of punitive damages, and a more proper sense of justice (instead of "crimes for sale"). It could even change the rationale of other initiatives (codes of conduct, policy networks, certification procedures, etc.), from public relations exercises, into preventive procedures.¹²⁸

Given the many problems inherent in national regulatory approaches, direct responsibility on the international level has been advocated. This can be argued to be theoretically possible and preferable. An international approach could lead to more uniform practices for corporate responsibility. It could also take cultural and economic differences into account. The positive effects of an international approach would however be dependent on the context in which such a mechanism is established. Whereas trade organizations have the strongest enforcement procedures, e.g. the WTO is accused of regarding human rights as restraints on free trade and using such standards to impose conditionality. One underlying problem (as far as it is one), is also that such an approach entails a shift away from the state-centered focus of international law (as it suggests a legal personality of MNCs), a development that can be argued to already be under way.¹²⁹

The current direct international responsibilities on MNCs are however of a non-legal character. They can subsequently be criticized with arguments familiar from the soft-law debate. The basic fact still remains that companies are business oriented. Thus, there is in principle nothing to prevent setting a self-regulatory initiative aside if the cost-benefit analysis does not appear satisfying. To survive the initiative has to appear rewarding and be backed by public pressure. A connected challenge for self-regulatory initiatives is that they only address participants in the

¹²⁷ See Terry, "Taking *Filártiga* on the Road: Why Courts Outside the United States Should Accept Jurisdiction Over Actions Involving Torture Committed Abroad", in Scott, *supra* note 21, 109-133, at 112-113, and Klabbers, *supra* note 21, at 558.

¹²⁸ Clapham (2000), *supra* note 93, at 195. On the deterrent effect of civil and criminal approaches, see also Brent Fisse and John Braithwaite, *Corporations, Crime and Accountability*, 1993, Cambridge University Press, e.g. at 81-88.

¹²⁹ In general, Joseph, *supra* note 8, at 87-88. As to the changing role of the state, see e.g. Held *et al.*, *supra* note 9, at 62 *et seq.* For an argument that what is at stake at most is nevertheless "only" a rethinking and reorganizing of states, see e.g. Panitch, Leo, "Rethinking the Role of the State", in James H. Mittelman (ed.), *Globalization: Critical Reflections*, 1996, Lynne Rienner Publishers, 83-113. For the WTO critique, see UN Sub-Commission on the Promotion and Protection of Human Rights, *The Realization of Economic, Social and Cultural Rights: Globalization and its impact on the full enjoyment of human rights*, preliminary report submitted by J. Oloka-Onyango, and Deepika Udagama, UN Doc. E/CN.4/Sub.2/2000/13 (2000).

particular initiative. Unethical trading may seemingly give competitors market advantages. Decisive inclusiveness to avoid this problem can perhaps only be reached through a regulatory approach on an intergovernmental level. This could even serve as an incentive for business to support binding international regulation.¹³⁰ Non-binding initiatives could in a worst case scenario serve as an excuse to refrain from engaging in efforts to work towards a legal framework. In such cases the soft approach itself becomes a smoke screen for hiding from demands of compliance.¹³¹ This negative impact could also affect human rights principles themselves if in fact leading to a relativization of them. Such a threat exists if the lack of strict requirements for compliance leads to a practice of tolerating abusive practices. In all it would seem then that a purely self-regulatory approach can not be relied upon if the goal is to *ensure* corporate responsibility. For that purpose self-regulation must fall within a stricter framework.¹³²

¹³⁰ Joseph, *supra* note 8, at 88-89.

¹³¹ In pulling out from the Multistaker Review of Voluntary Initiatives of the UN Commission on Sustainable Development, the International Chamber of Commerce referred e.g. to engagement in the Global Compact. Critics see the reason for the withdrawal to be that the Review would have revealed dubious practices of Chamber members. See Corporate Europe Observatory, *High Time for UN to Break 'Partnership' with the ICC*, 25 July 2001, <www.xs4all.nl/~ceo/un/icc.html> (15 January 2002).

¹³² See Chinkin (2000), *supra* note 122, at 42, Joseph, *supra* note 8, at 83, and Skogly, "Economic and Social Human Rights, Private Actors and International Obligations", in Addo, *supra* note 1, 239-258, at 250-251.

4 *Individual Responsibility*

Individual criminal responsibility is a general principle of law both under national and international criminal law.¹³³ It is a necessary addition to the state-oriented human rights mechanism, as it works so as not to let perpetrators escape personal responsibility under the disguise of the abstract "state" notion.¹³⁴ On the national level, most domestic legal systems have criminalized serious violations of human rights.

Through the uprise of criminal tribunals, establishment of the ICC, and the criminalization of certain action through conventions, individual criminal responsibility has become a topic of concern on the international level. The ongoing institutionalization of international criminal law is both a process of defining the sources of criminal law, and establishing enforcement mechanisms. Apart from the Statutes of the Rwanda and Yugoslavia tribunals and the ICC, the contents are derived from international and regional human rights law, norms on inter-state cooperation in penal matters, emerging international criminological and penological considerations, and general principles of law.¹³⁵ Individual criminal responsibility for human rights violations is through developments in these areas claimed to be firmly grounded in international law. The question is rather under what circumstances the individual can be held responsible.¹³⁶

¹³³ See e.g. Ambos, "Individual Criminal Responsibility in International Criminal Law: A Jurisprudential Analysis – From Nuremberg to the Hague", in Gabrielle Kirk McDonald and Olivia Swaak-Goldman (eds), *Substantive and Procedural Aspects of International Criminal Law*, vol. I, 1-31, at 6.

¹³⁴ Reisman and Levit, "Reflections on the Problem of Individual Responsibility for Violations of Human Rights", in Pedro Nikken and Antônio A. Cançado Trindade (eds), *The Modern World of Human Rights: Essays in honour of Thomas Buergenthal*, Inter-American Institute of Human Rights, 1996, 419-436, at 420-422.

¹³⁵ See Bassiouni, *supra* note 20, at 14-17.

¹³⁶ See Reisman and Levit, *supra* note 134, at 426.

4.1 Human Rights Duties of Individuals

In the ICCPR and ICESCR, direct duties are placed upon individuals through a prohibition against destructing any of the recognized rights and freedoms of the conventions.¹³⁷ Broad obligations (even in regional human rights instruments) also include duties to the community and the state (e.g. obey the law, civic duties), and to oneself (e.g. work and education).¹³⁸ Although such general duties can be inferred from the human rights instruments, any obligations of individuals are not expressly addressed. Thus, individual responsibility can only occur when a violation is also an international crime.¹³⁹ Such criminalization is inherent e.g. in conventions on genocide, crimes against humanity (most notably slavery, torture, racial discrimination and apartheid), and war crimes. Many of these crimes can safely be concluded to have entered the realm of customary law, and are covered by universal jurisdiction.¹⁴⁰

In defining the law applicable before international courts, interest is turned historically all the way to the Nuremberg trials. International crimes are also enumerated in the Statutes and case-law of the Rwanda and Yugoslavia tribunals.¹⁴¹ The Rome Statute of the ICC, as a reflection of current international criminal law, asserts jurisdiction with respect to the crime of genocide, crimes against humanity (murder, extermination, enslavement, deportation or forcible transfer, deprivation of physical liberty, torture, rape and other sexual violence, enforced disappearances, apartheid, and other inhumane acts), war crimes, and the crime of aggression.¹⁴² In

¹³⁷ See Article 5(1) ICCPR and Article 5(1) ICESCR, *supra* note 19.

¹³⁸ See Beddard, "Duties of Individuals under International and Regional Human Rights Instruments", in 21 *Human Rights Quarterly* (1999), no. 1 (February), 30-47.

¹³⁹ Reisman and Levit, *supra* note 134, at 430-431. See also Rosas and Scheinin, "Categories and Beneficiaries of Human Rights", in Hanski and Suksi, *supra* note 32, 49-62, at 60.

¹⁴⁰ For a general overview of instruments and status, see Ratner and Abrams, *supra* note 97, part I (at 1-130).

¹⁴¹ See the Statute of the International Criminal Tribunal for Rwanda (1994), 33 ILM 1598 (1994), and the Statute of the International Criminal Tribunal for the Former Yugoslavia (1993), 32 ILM 1203 (1993).

¹⁴² ICC Statute, *supra* note 94, Article 5. For the closer definitions of these categories see Articles 6-8.

these articles the ICC Statute encompasses the "most serious crimes of concern to the international community as a whole".¹⁴³

4.2 Enforcing Individual Responsibilities

In implementing international criminal law, it is primarily on the national level where adequate means can be found for effective enforcement. This is the essence of the criminalization e.g. in the conventions on genocide, slavery, torture, and apartheid, which all require states to penalize such offences under national law. The general theories justifying national action were already touched upon in discussing corporate responsibility. Thus; crimes committed within the territory of the state, crimes committed by a national of the state, crimes threatening the national interests of the state, crimes injuring the national of the state, and universal jurisdiction, may all be invoked to claim criminal jurisdiction. Out of these, the most frequently invoked principles - territoriality and nationality - are locally defined, rather than according to any universal sense of wrong. States have also undertaken to enforce international norms without reliance on treaty or custom, prosecuted offenders for crimes defined in national laws, and thus envisaged general extraterritorial application for crimes (cf. the prohibition to have "sex" with children abroad).¹⁴⁴

Applying the universality principle on its part restricts the scope of matters which would fall under the domestic jurisdiction of a state. The universality principle thus adds to the scope and international character of criminal law, by addressing e.g. situations where a national legal system does not criminalize violations of human rights, or when national regulation is not effective. It is of special interest as it permits exercise of jurisdiction regardless of nexus of the prosecuting state to the victim, offender, or offence. Clearly, was the offence to violate a peremptory norm, the

¹⁴³ ICC Statute, *supra* note 94, Article 5 (1). In general, see Wise, "Perspectives and Approaches", in Bassiouni, *supra* note 20, 283-310, at 284-285. See also Reisman and Levit, *supra* note 134, at 426-430 with further references.

¹⁴⁴ In general see Ratner and Abrams, *supra* note 97, at 139-146, and Lyal S. Sunga, *The Emerging System of International Criminal Law: Developments in Codification and Implementation*, 1997, Kluwer Law International, at 249 *et seq.*

universality presumption would be even stronger. Although there are some examples from e.g. Israel, France, and Canada for prosecuting war criminals, universal jurisdiction as a tool for instigating criminal proceedings is however poorly utilized. A change may have occurred with the *Pinochet* case towards (re)confirming the legitimacy of implementing universal criminal jurisdiction on the national level. The additional importance of this modern precedent derives from that it is not concerned with war crimes.¹⁴⁵

The most frequently used national mechanism is tort proceedings in US law (although even other countries provide similar avenues). The ATCA and the Torture Victims Protection Act (extending the protection of the ATCA to include US citizens) have been at the centre of this development.¹⁴⁶ While many treaties lay down an obligation to prosecute or extradite offenders (an obligation that itself is poorly observed), there is in international law no customary requirement for states to utilize universal jurisdiction for prosecution. In fact, it can safely be assumed that states are not easily persuaded to take criminal action for violations occurring in other countries. As was concluded in the corporate responsibility discussion, such impediments to the full use of criminal proceedings (e.g. not jeopardizing the international relations of a state) could be used as an argument in favour of tort law. In civil action the decision of prosecution lies with the plaintiff. The state would thus avoid difficult political considerations. Tort action (under US law) also has more lenient procedural and evidentiary requirements, and the defendant need not be present for the trial. This way difficult problems of collecting evidence, proving guilt beyond reasonable doubt, and detaining the defendant, could be avoided.¹⁴⁷

As to a question of whether national or international mechanisms should be preferred, the ICC Statute does provide a partial answer in that it gives preference to national court proceedings when conducted in a bona fide way.¹⁴⁸ While the legitimacy of the process of prosecuting international crimes will be further strengthened, the Court will in this way also place emphasis on national action.

¹⁴⁵ For references and examples, see Bianchi, "Immunity versus Human Rights: The *Pinochet* Case", in 10 *European Journal of International Law* (1999), no. 2, 237-27, chapter 3.

¹⁴⁶ See *Filártiga v. Peña-Irala*, 630 F.2d 876 (CA, 2d Cir. 1980), which broke the ground in this respect.

¹⁴⁷ Terry, *supra* note 127, at 115-118.

¹⁴⁸ See ICC Statute, *supra* note 94, Article 17.

Given the general reluctance of states to submit disputes to settlement outside the diplomatic channels, the effect, and perhaps one of the most notable results of the establishment of the ICC, could be that barriers for national criminal prosecution is lowered.¹⁴⁹ It should nevertheless be kept in mind that the ICC itself is not yet operational. The international case-law on individual criminal responsibility is thus restricted to proceedings in the aftermath of world war II and the more recent Rwanda and Yugoslavia tribunals. While crimes committed in armed conflict are of no less importance, the ICC will enlarge the jurisdictional scope of enforcement by institutionalizing an avenue for criminal responsibility even outside such situations.¹⁵⁰

4.3 Holding an Individual Responsible for Corporate Action

An important aspect of advocating individual criminal responsibility is the relationship of individual liability to the corporate entity. Although individuals can be criminally responsible for certain human rights violations, the question arises how the status as company employee or director relates to that responsibility.

As was mentioned, the traditional setting for the international criminal law discussion is that individual responsibility exists alongside state responsibility, thus making it impossible for individuals to escape responsibility under the state abstraction. A similar reasoning could be applied to the relationship between the corporation and the individual. Whereas an individual should not be able to escape responsibility through hiding behind the corporate entity, neither should the corporation be able to hide behind individual responsibility. Through increasingly recognizing corporations as subjects of (national) criminal systems, a trend has emerged of regarding corporate acts as bureaucratically constructed, and not as merely single employee activities. This approach can have some merit, as merely

¹⁴⁹ See Charney, "International Criminal Law and the Role of Domestic Courts", 95 *American Journal of International Law* (2001), no. 1 (January), 120-124, at 122-123.

¹⁵⁰ The ICC does not require armed conflict as a prerequisite for enforcing e.g. crimes against humanity. In general see Boot, Dixon and Hall, "Article 7: Crimes Against Humanity", in Triffterer, *supra* note 94, 117-172, at 122-123. The applicability irrespective of whether there is an armed conflict is also a basic aspect of conventions addressing crimes against humanity, as also of the Genocide Convention. See Genocide Convention, *supra* note 97, Article 1.

focusing upon individual action can fail to capture the corporate aspect of the violation, and thus fail to address corporate operations and policies. Individual liability can nevertheless be involved additionally.¹⁵¹

Individual liability in a company context can be imposed both upon the manager(s) and the employee "pulling the trigger". In the latter case there can be a risk of lower-level employees being used as scapegoats. This can perhaps only be addressed through corporate or managerial responsibility. At the same time, individual responsibility should not be supplanted by neither corporate nor managerial responsibility. In this respect the dividing line is bound to be tight as to when the individual employee is to blame, and when the corporation is liable (e.g. due to a corporate system failure). One qualifying aspect in the employee-director relationship is the well-established principle that superior orders cannot be invoked as justification for violation of fundamental human rights.¹⁵² As to directors, if only corporate liability is imposed, this could provide higher management a chance to hide behind the corporate entity. Apparently managerial liability would remove that possibility. Even more importantly, holding managers responsible could also have a more farreaching effect on corporate human rights policies. The use of individual managerial responsibility to pierce the corporate "veil" has attracted interest e.g. in the US and England. It has been imposed e.g. on grounds of recklessness or failure of using a possibility to prevent the act, on the grounds of having given guidance, or authorized, a forbidden act, or when an offence has been committed with the "consent or connivance" of the director.¹⁵³ The criteria applied are of course subject to the practices of the national legal system.¹⁵⁴

On the international level it could be useful to recollect that directors of the I.G. Farben corporation were convicted by the US Military Tribunal for war crimes committed under the auspices of the company. The acts of Farben and its

¹⁵¹ Wells, *supra* note 98, at 160-161, Fisse and Braithwaite, *supra* note 128, at 57.

¹⁵² See e.g. Convention against Torture, *supra* note 103, Article 2(3), and ICC Statute, *supra* note 94, Article 33.

¹⁵³ See e.g. *US v Park*, 421 US 658 (1975). As to England, see Wells, *supra* note 98, at 161-163. On the Dutch approach, see de Doelder and Hartmann, "Criminal Liability of Private and Public Corporations. A Dutch Perspective", in 1 *Turku Law Journal* 1999, no. 1, 75-92.

¹⁵⁴ In general see Wells, *supra* note 98, at 162. On command responsibility and the *respondeat superior* doctrine in US law, see Valerie Oosterveld and Alejandra C. Flah, "Holding Leaders Liable for Torture by Others: Command Responsibility and *Respondeat Superior* as Frameworks for Derivative Civil Liability", in Scott, *supra* note 21, 441-464, at 450-451.

representatives were found to be no different from that of officers, soldiers, or officials of the German Reich. The Tribunal lacked jurisdiction over the corporate entity itself. However, as the acts of Farben violated the Hague Regulations on laws of war, the participating individuals were held criminally responsible. Thus, the directors of Farben were convicted for knowingly participating in crimes through belonging to an "organization or group" connected with the commission of the crime.¹⁵⁵

Whereas the ICC Statute does not know of such a crime, its provisions on individual responsibility could impose managerial liability (in that capacity) if a director "Orders, solicits or induces the commission of such a crime ...".¹⁵⁶ Also, Article 28 on "command responsibility" can be interpreted as including business leaders within the definition of a "superior". "Superior responsibility" presupposes that the superior has knowledge of the violation. There must also be *de jure* or *de facto* authority, and ability, to control the action of subordinates. The standards for establishing such responsibility would be stricter than e.g. for military commanders. In lack of substantial disciplinary powers, the duty of business directors would be to submit the matter to competent authorities.¹⁵⁷

4.4 Assessing Individual Responsibility

In order to assert individual responsibility at the international level, interest must be turned to international criminal law. Although the constitutive elements of this law are not completely unambiguous, it is held that individuals can be criminally responsible for certain violations "of concern to the international community as a whole". Hopes

¹⁵⁵ See Control Council Law no. 10, Punishment of Persons Guilty of War Crimes, Crimes Against Peace and Against Humanity, 20 December 1945, Article II(2)(e), <<http://www.yale.edu/lawweb/avalon/imt/imt10.htm>> (15 January 2002), and Trials of War Criminals before the Nuremberg Military Tribunals, vol. VIII, referred to and quoted in Clapham (2000), *supra* note 93, at 166-171.

¹⁵⁶ ICC Statute, *supra* note 94, Article 25(3)(b).

¹⁵⁷ Command or superior responsibility is well established both through conventions and custom. This approach is also inherent in Article 7(3) of the ICTY Statute and has been upheld in ICTY case-law. See Fenrick, "Article 28: Responsibility of Commanders and Other Superiors", in Triffterer, *supra* note 94, 515-522, at 520-522.

are that procedures in this respect will be enhanced once the ICC is operational. Until that time, individual responsibility can be asserted, in the Rwanda and Yugoslavia tribunals (the jurisdiction of which are restricted both temporally and territorially) or through establishing new ad-hoc tribunals, but primarily, on the national level.

On the national level individual criminal responsibility can be asserted both domestically and extraterritorially. The jurisdictional possibilities provided by international law for addressing human rights violations have however been restrictively used. In this respect civil liability has presented itself as an attractive alternative.¹⁵⁸ This way political implication of the prosecuting government can be avoided. However, even in this context difficult questions remain. Most notably, the utilization of this avenue becomes dependent upon the private international law of a state (and questions e.g. about choice of law, jurisdictional rules, *forum non conveniense* interpretations, what level of corporate involvement is actionable, etc.).¹⁵⁹ Neither does civil procedure do away with the criticism for extraterritorial application of law, but, as was seen in assessing corporate responsibility, in fact can add some concern about the usefulness of tort law in the human rights context. Focusing on the ICC in this connection seems warranted as it provides a possibility for enhancing the use (and legitimacy) of both international and national criminal process.

It should be borne in mind that the ICC Statute defines crimes against humanity as violations of a large-scale and systematic character. By omitting isolated instances of such violations, the jurisdiction of the court will be limited.¹⁶⁰ The case-law of US Courts against corporations includes lawsuits e.g. for cultural genocide, and large-scale and involuntary servitude.¹⁶¹ Such violations could be brought before the ICC if extended to managerial responsibility. The historical precedent for convicting managers does exist through the *Farben* trial. Eventually it should not be

¹⁵⁸ Notably also the ICC Statute provides for reparation for victims, see Article 75, *supra* note 94.

¹⁵⁹ As to the UNOCAL proceedings, the US Federal District Court in Los Angeles dismissed the case, as the plaintiff did not succeed in showing that UNOCAL participated in or played a direct and active role in the commission of the human rights violations. *John Doe I v. Unocal Corp.*, 110 F.Supp.2d 1294 (C.D. Cal. 2000). The decision has been appealed to the US Court of Appeals (Ninth Cir.).

¹⁶⁰ See ICC Statute, *supra* note 94, Article 7. Further restrictions for ICC jurisdiction can arise e.g. from its provisions restricting jurisdiction to state parties. See Article 12(2).

¹⁶¹ For a brief overview on US cases see Green and Hoffman, "US Litigation Update", in Kamminga and Zia-Zarifi, *supra* note 4, 231-240.

overlooked that individual criminal responsibility, even with an operational international court, is still only concerned with the very core of the human rights concept. International criminal law does not address e.g. labour rights, whereas it presumably is within this category that more frequent instances of abuse can be found. While international criminal law (and individual responsibility) could serve to safeguard the most fundamental human rights, the protection this offers is radically different e.g. from the ambitions of voluntary initiatives.

5 Concluding Remarks

The aim of this research report has been to provide an overview and assessment of legal means for asserting responsibility for human rights violations arising out of MNC activities. Focus has been on state, corporate and individual responsibilities. Out of these, states have positive obligations to ensure human rights. The obligation is well established in international human rights law (most notably within ECtHR case-law). In fact some human rights instruments (and bodies) have explicitly enumerated this obligation with respect to corporate violations. Such a duty is also identified in the ILC rules on state responsibility. Nevertheless, usage of this mechanism in situations of (non-state connected) corporate violations is still virtually non-existent. Pragmatic arguments for why a corresponding duty to regulate MNCs is ineffective would focus on the powerful role of corporations, and a related (or unrelated) unwillingness or inability of states to enact such regulation. These considerations attach to both home and host state responsibility. It can be argued that home states (most of which are developed countries) would be better equipped to enact such a duty. Nevertheless, it seems that no general obligation has yet evolved within human rights law in this respect. A home state approach would also raise concern about the extraterritorial application of law. The multinational character of MNCs (and esp. the corporate "veil") can in fact create problems for the home / host state division itself.

The corporate responsibility question can be approached both nationally and internationally. Direct international initiatives targeting corporations are of a non-binding character. A move towards increased use of self-regulation can be perceived as a threat to the normative development of the international legal order. On the other hand, such approaches manage to take wider concerns into account, thus enlarging the realm of corporate responsibilities both substantially (by including more programmatic principles) and as a matter of complicity (by not only focusing on the corporation as an active violator). A more strict regulatory approach is better sought at the national level. Although international criminalization of certain conduct could point to the theoretical possibility of direct international corporate responsibility,

human rights law itself does not address corporations (and neither does the ICC). Corporate responsibility is thus mainly addressed through the agency of the state. In the national context the home / host state division, with the connected concerns e.g. of establishing the nationality of the corporation, extraterritoriality, and willingness/capacity re-enters the discussion. As there is no general duty under international human rights law for states to regulate corporations, asserting responsibility will thus be dependent on a choice by states. The only current mechanism under which lawsuits have successfully been raised – the US ATCA – is itself a civil procedure. Although it can this way perhaps avoid some (political and practical) obstacles of extraterritorial criminal proceedings, it is nevertheless far from unproblematic. Above all, this mechanism cannot alone be an effective remedy against human rights violations.

Individual criminal responsibility, arising out of conventions, custom, and statutes, relies mainly upon national legal systems. An emerging use of universal jurisdiction, by states, for asserting criminal responsibility even outside situations of armed conflict can perhaps be discerned. It would as of yet, nevertheless, be premature to speak of any institutionalized practice in this respect. The question must also be asked whether individual responsibility is a useful tool in the corporate context. This raises a delicate criminological debate on the relationship between corporate, employee and managerial liability, only an oversimplification of which has been presented in this context. The discussion served to indicate that corporate criminal responsibility is increasingly entering domestic criminal codes, and that managerial responsibility has been used for penetrating the corporate veil. Managerial responsibility could also potentially come to arise before the ICC. Its jurisdiction will however be restricted to the most serious and large scale violations of human rights only. For a truly effective and comprehensive criminal law protection, hopes must then rather be turned to strengthened national incentives for criminal prosecution. This presumption also inheres in the ICC Statute itself.

It should be stressed that the singular form of the title of this report should not imply a choice of either state, corporate, or individual responsibility. All avenues must be utilized for an effective protection of human rights. This way the undesirable implications arising out of preferring one over the other can be avoided. E.g. stressing corporate and individual responsibility should not elude focus from the

primary obligation of states to fulfil their human rights obligations. On the other hand, focusing only on individual and state responsibility should not turn interest away from corporations as powerful independent actors, whose human rights policies do have a fundamental impact on the well-being of individuals and communities. The fact that individuals act as company agents and managers, and that corporations may act in (different degrees of) complicity with states, creates further interconnections which, rather than separating these questions, suggests an additional one – the proper sharing of responsibility.

The discussion on different ways to assert responsibility for human rights abuse arising out of MNC activities suggests that there are avenues, either directly or indirectly targeting companies, that could be utilized for improving MNC human rights practices. For although focus has been on states, corporations and individuals, this is what eventually is at stake – the conduct of MNCs. Despite the weaknesses that have been pointed out on all levels of asserting responsibility, the basic framework exists within which to pursue improvement. In general terms, through focusing on state human rights obligations, national mechanisms for corporate responsibility can be enhanced. Managerial accountability can also have a deterrent effect upon MNC activities. Nevertheless, it might be that binding international regulation, directly aimed at corporations, will prove necessary to overcome the shortcomings identified. This way e.g. the inadequacies of national regulatory attempts, the problem of state complicity (and accountability), and the limitations of criminal responsibility could be addressed. The conclusion is also supported by the soft-law discussion, as other than regulatory approaches can be set aside if the cost-benefit analysis does not seem rewarding.¹⁶²

It should be remembered that the process of addressing non-state actors through human rights law is still in the making. The uncertainty attached to corporate human rights responsibilities is perhaps reflected in a cautiousness, e.g. of human rights bodies. While a duty for non-state actors to respect human rights can be

¹⁶² On the relationship between regulation, co-regulation, and self-regulation, see e.g. Judith Richter, *Holding Corporations Accountable: Corporate Conduct, International Codes, and Citizen Action*, 2001, Zed Books, chapter 2, at 28 *et seq.* The fact that binding regulation still stands at the top of the hierarchy is also recognized e.g. by the UN Global Compact. The question is rather, "what works under what circumstances for what purpose". See George Kell, *Dilemmas in Competitiveness, Community and Citizenship*, Business and Human Rights Seminar: "Towards Universal Business

inferred from both human rights and criminal law contexts, it is nevertheless in a strictly conceptual sense still not completely uncontroversial to speak of MNCs as human rights violators to begin with. Put differently, although MNC exercise of power can analogically be compared with that of public power, this does not automatically render human rights law suitable for such a regulatory purpose.¹⁶³ Indeed, as this report has indicated, key questions go beyond merely asserting a mandatory character into issues as: which human rights are applicable to MNCs, who sets the rules, and how the rules are to be implemented. Even the question of the legal status of corporations is affected. Until such questions are settled, and a definition of MNC human rights responsibilities materializes, hopes must be placed on the framework outlined above, and in an extension and combination of the international and domestic approaches discussed.

Principles", the London School of Economics and Political Science, 22 May 2001, <www.unglobalcompact.org> (15 January 2002).

¹⁶³ See Klabbers, *supra* note 21, at 558.

Bibliography

Books and Articles

- Addo, Michael, "Human Rights and Transnational Corporations", in Michael K. Addo (ed.), *Human Rights Standards and the Responsibility of Transnational Corporations*, 1999, Kluwer Law International, 3-37.
- Ambos, Kai, "Individual Criminal Responsibility in International Criminal Law: A Jurisprudential Analysis – From Nuremberg to the Hague", in Gabrielle Kirk McDonald and Olivia Swaak-Goldman (eds), *Substantive and Procedural Aspects of International Criminal Law*, vol. I, 2000, Kluwer Law International, 1-31.
- Ambos, Kai, "Article 25: Individual Criminal Responsibility", in Otto Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court: Observers' Notes, Article by Article*, 1999, Nomos Verlagsgesellschaft, 475-492.
- Bassiouni, Cherif, "The Sources and Content of International Criminal Law: A Theoretical Framework", in M. Cherif Bassiouni (ed.), *International Criminal Law* (2 ed.), vol. I, 1999, Transnational Publishers, 3-125.
- Beddard, Ralph, "Duties of Individuals under International and Regional Human Rights Instruments", in 21 *Human Rights Quarterly* (1999), no. 1 (February), 30-47.
- Bernhardt, Rudolf, "The Duty to Protect and to Ensure Human Rights Under the European Convention on Human Rights – Comment on the paper by George Ress", in Eckart Klein (ed.), *The Duty to Protect and to Ensure Human Rights* (Colloquium, Potsdam, 1-3 July 1999), 2000, Berlin Verlag, 207-210.
- Bianchi, Andrea, "Immunity versus Human Rights: The *Pinochet* Case", in 10 *European Journal of International Law* (1999), no. 2, 237-278.
- Boot, Machtheld, Dixon, Rodney, and Hall, Christopher K., "Article 7: Crimes Against Humanity (paras. 2 a-i)", in Otto Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court: Observers' Notes, Article by Article*, 1999, Nomos Verlagsgesellschaft, 117-172.
- Charney, Jonathan, "International Criminal Law and the Role of Domestic Courts", 95 *American Journal of International Law* (2001), No. 1 (January), 120-124.

- Chinkin, Christine, "Normative Development in the International Legal System", in Dinah Shelton (ed.), *Commitment and Compliance: The Role of Non-Binding Norms in the International Legal System*, 2000, Oxford University Press, 21-42.
- Chinkin, Christine, "A Critique of the Public/Private Dimension", 10 *European Journal of International Law* (1999), no. 2, 387-395.
- Chinkin, Christine, "International Law and Human Rights", in Tony Evans (ed.), *Human Rights Fifty Years On: A reappraisal*, 1998, Manchester University Press, 105-129.
- Clapham, Andrew, "The Question of Jurisdiction Under International Criminal Law Over Legal Persons: Lessons from the Rome Conference on an International Criminal Court", in Menno T. Kamminga and Saman Zia-Zarifi (eds), *Liability of Multinational Corporations under International Law*, 2000, Kluwer Law International, 139-195.
- Clapham, Andrew, "Revisiting *Human Rights in the Private Sphere*: Using the European Convention on Human Rights to Protect the Right of Access to the Civil Courts", in Craig Scott (ed.), *Torture as Tort: Comparative Perspectives on the Development of Transnational Human Rights Litigation*, 2001, Hart Publishing, 513-535.
- Clapham, Andrew, *Human Rights in the Private Sphere*, 1993, Clarendon Press.
- Cook, Rebecca, "State Responsibility for Violations of Women's Human Rights", in 7 *Harvard Human Rights Journal* (1994), (spring), 125-175.
- Corporate Europe Observatory, *High Time for UN to Break 'Partnership' with the ICC*, 25 July 2001, <www.xs4all.nl/~ceo/un/icc.html> (15 January 2002).
- Devetak, Richard and Higgot, Richard, "Justice Unbound? Globalization, states and the transformation of the social bond", in 75 *International Affairs* (1999), no. 3 (July), 483-498.
- van Dijk, Pieter, "'Positive Obligations' Implied in the European Convention on Human Rights: Are the States Still the 'Masters' of the Convention?", in Monique Castermans-Holleman, Fried van Hoof, and Jacqueline Smith (eds), *The Role of the Nation-State in the 21st Century: Human rights, international organisations and foreign policy: essays in honour of Peter Baehr*, 1998, Kluwer Law International, 17-33.
- van Dijk, Pieter, and van Hoof, Fried, *Theory and Practice of the European Convention on Human Rights*, 1998, Kluwer Law International.

- de Doelder, Hans, and Hartmann, Arthur R., "Criminal Liability of Private and Public Corporations. A Dutch Perspective", in 1 *Turku Law Journal* (1999), no. 1, 75-92.
- Donnelly, Jack, "The Social Construction of International Human Rights", in Tim Dunne and Nicholas J. Wheeler (eds), *Human Rights in Global Politics*, 1999, Cambridge University Press, 71-102.
- Dubin, Laurence, "The Direct Application of Human Rights Standards to, and by, Transnational Corporations", in *The Review* (1999), no. 61 (Globalization, Human Rights and the Rule of Law), 35-66.
- Dutch Branches of Amnesty International and Pax Christi International, *Multinational Enterprises and Human Rights*, Utrecht, November 1998, <www.paxchristi.nl/mne.html> (15 January 2002).
- Engström, Viljam, *Realizing the Global Compact*, Forum Iuris, (forthcoming 2002).
- Fenrick, William J., "Article 28: Responsibility of Commanders and Other Superiors", in Otto Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court: Observers' Notes, Article by Article*, 1999, Nomos Verlagsgesellschaft, 515-522.
- Fisse, Brent and Braithwaite, John, *Corporations, Crime and Accountability*, 1993, Cambridge University Press.
- Frey, Barbara, "The Legal and Ethical Responsibilities of Transnational Corporations in the Protection of International Human Rights", in 6 *Minnesota Journal of Global Trade* (1997), 153-188.
- Giddens, Anthony, *The Third Way and Its Critics*, 2000, Polity Press.
- Glaberson, William, "U.S. Courts Become Arbiters of Global Rights and Wrongs", in *The New York Times*, 21 June 2001, <<http://college3.nytimes.com/guests/articles/2001/06/21/852996.xml>> (15 January 2002).
- Green, Jennifer and Hoffman, Paul, "US Litigation Update", in Menno T. Kamminga and Saman Zia-Zarifi (eds), *Liability of Multinational Corporations under International Law*, 2000, Kluwer Law International, 231-240.
- Harvard Law Review, Developments in the Law, International Criminal Law, "Corporate Liability for Violations of International Human Rights Law", vol. 114, 2001 (May), 2025-2048.
- Haufler, Virginia, *International Business Self-Regulation: A Contribution to Public Policy?*, Carnegie Endowment for International Peace, 1999, <www.ceip.org/files/events/selfregulation.asp?p=7> (15 January 2002).

- Held, David, McGrew, Anthony, Goldblatt, David, and Perraton, Jonathan, *Global Transformations*, 1999, Stanford University Press.
- Higgins, Rosalyn, *Problems and Process: International Law and How We Use It*, 1993, Oxford University Press.
- Holton, Robert J., *Globalization and the Nation-State*, 1998, Macmillan Press.
- van Hoof, Fried, "International Human Rights Obligations for Companies and Domestic Courts: An Unlikely Combination?", in Monique Castermans-Holleman, Fried van Hoof, and Jacqueline Smith (eds), *The Role of the Nation-State in the 21st Century: Human rights, international organisations and foreign policy: essays in honour of Peter Baehr*, 1998, Kluwer Law International, 47-59.
- Huner, Jan, "The Multilateral Agreement on Investment and the Review of the OECD Guidelines for Multinational Enterprises", in Menno T. Kamminga and Saman Zia-Zarifi (eds), *Liability of Multinational Corporations under International Law*, 2000, Kluwer Law International, 197-205.
- International Council on Human Rights Policy, *Business Wrongs and Rights: Human rights and the developing international legal obligations of companies*, draft report, January 2001, 15-19.
- Jaatinen, Heikki, "Corporate Criminal Liability and Neo-Classical Criminal Policy", in 1 *Turku Law Journal* (1999), no. 1, 103-108.
- Johns, Fleur, "The Invisibility of the Transnational Corporation: An Analysis of International Law and Legal Theory", in 19 *Melbourne University Law Review* (1994), 893-923.
- Joseph, Sarah, "An Overview of the Human Rights Accountability of Multinational Enterprises", in Menno T. Kamminga and Saman Zia-Zarifi (eds), *Liability of Multinational Corporations under International Law*, 2000, Kluwer Law International, 75-93.
- Jägers, Nicola, "The Legal Status of the Multinational Corporation Under International Law", in Michael K. Addo (ed.), *Human Rights Standards and the Responsibility of Transnational Corporations*, 1999, Kluwer Law International, 259-270.
- Jørgensen, Nina, *The Responsibility of States for International Crimes*, Oxford University Press, 2000.
- Kamminga, Menno and Zia-Zarifi, Saman, "Liability of Multinational Corporations Under International Law: An Introduction", in Menno T. Kamminga and Saman Zia-

- Zarifi (eds), *Liability of Multinational Corporations under International Law*, 2000, Kluwer Law International, 1-15.
- Kell, George, *Dilemmas in Competitiveness, Community and Citizenship*, Business and Human Rights Seminar: "Towards Universal Business Principles", the London School of Economics and Political Science, 22 May 2001, <www.unglobalcompact.org> (15 January 2002).
- Kell, George, *Corporate Citizenship: Defining the New Responsibilities*, 24 October 2000, Chatham House, London, <www.unglobalcompact.org> (15 January 2002).
- Klabbers, Jan, "Doing the Right Thing? Foreign Tort Law and Human Rights", in Craig Scott (ed.), *Torture as Tort: Comparative Perspectives on the Development of Transnational Human Rights Litigation*, 2001, Hart Publishing, 553-566.
- Klein, Eckart, "The Duty to Protect and to Ensure Human Rights Under the International Covenant on Civil and Political Rights", in Eckart Klein (ed.), *The Duty to Protect and to Ensure Human Rights* (Colloquium, Potsdam, 1-3 July 1999), 2000, Berlin Verlag, 295-318.
- Lawson, Rick, "Out of Control. State Responsibility and Human Rights: Will the ILC's Definition of the 'Act of State' Meet the Challenges of the 21st Century?", in Monique Castermans-Holleman, Fried van Hoof, and Jacqueline Smith (eds), *The Role of the Nation-State in the 21st Century: Human rights, international organisations and foreign policy: essays in honour of Peter Baehr*, 1998, Kluwer Law International, 91-116.
- Lysén, Göran, *State Responsibility and International Liability of States for Lawful Acts: A Discussion of Principles*, 1997, Iustus Förlag.
- Malanczuk, Peter, "Globalization and the Future Role of the Sovereign State", in Friedl Weiss, Erik Denters and Paul de Waart (eds), *International Economic Law with a Human Face*, 1998, Kluwer Law International, 45-65.
- Malanczuk, Peter, *Akehurst's Modern Introduction to International Law*, 1997, Routledge.
- McConville, Anne C., "Taking Jurisdiction in Transnational Human Rights Tort Litigation: Universality Jurisdiction's Relationship to *Ex Juris Service*, *Forum Non Convenience*, and the Presumption of Territoriality", in Craig Scott (ed.), *Torture as Tort: Comparative Perspectives on the Development of Transnational Human Rights Litigation*, 2001, Hart Publishing, 157-196.

- McCrudden, Christopher, "Human Rights Codes for Transnational Corporations: The Sullivan and MacBride Principles", in Dinah Shelton (ed.), *Commitment and Compliance: The Role of Non-Binding Norms in the International Legal System*, 2000, Oxford University Press, 418-449.
- Meeran, Richard, "The Unveiling of Transnational Corporations: A Direct Approach", in Michael K. Addo (ed.), *Human Rights Standards and the Responsibility of Transnational Corporations*, 1999, Kluwer Law International, 161-170.
- Meron, Theodore, "State Responsibility for Violations of Human Rights", in *American Society of International Law / Proceedings of the 83rd Annual Meeting (Chicago, Illinois, April 5-8, 1989)*, 372-385.
- Meron, Theodore, *Human Rights and Humanitarian Norms as Customary Law*, 1989, Clarendon Press.
- Mickelson, Karin, "Carrots, Sticks, or Stepping-Stones: Differing Perspectives on Compliance with International Law", in Thomas J. Schoenbaum, Junji Nakagawa and Linda C. Reif (eds), *Trilateral Perspectives on International Legal Issues: From Theory to Practice*, 1998, Transnational Publishers, 35-48.
- Muchlinski, Peter, "Human Rights and Multinationals: Is there a problem?", in 77 *International Affairs* (2001), no. 1 (January), 31-47.
- Muchlinski, Peter, "Attempts to Extend the Accountability of Transnational Corporations: The Role of UNCTAD", in Menno T. Kamminga and Saman Zia-Zarifi (eds), *Liability of Multinational Corporations under International Law*, 2000, Kluwer Law International, 97-117.
- Muchlinski, Peter, *Multinational Enterprises and the Law*, 1995, Blackwell Publishers
- Nowak, Manfred, "The International Covenant on Civil and Political Rights", in Raija Hanski and Markku Suksi (eds), *An Introduction to the International Protection of Human Rights*, 1999, Institute for Human Rights, Åbo Akademi University, 79-100.
- Oosterveld, Valerie and Flah, Alejandra C., "Holding Leaders Liable for Torture by Others: Command Responsibility and *Respondeat Superior* as Frameworks for Derivative Civil Liability", in Craig Scott (ed.), *Torture as Tort: Comparative Perspectives on the Development of Transnational Human Rights Litigation*, 2001, Hart Publishing, 441-464.
- Panitch, Leo, "Rethinking the Role of the State", in James H. Mittelman (ed.), *Globalization: Critical Reflections*, 1996, Lynne Rienner Publishers, 83-113.

- Ratner, Steven R. and Abrams, Jason S., *Accountability for Human Rights Atrocities in International Law: Beyond the Nuremberg Legacy*, 1997, Clarendon Press.
- Reinicke, Wolfgang H. and Witte, Jan Martin, "Interdependence, Globalization, and Sovereignty: The Role of Non-binding International Legal Accords", in Dinah Shelton (ed.), *Commitment and Compliance: The Role of Non-Binding Norms in the International Legal System*, 2000, Oxford University Press, 26-55.
- Reisman, Michael, and Levit, Janet Koven, "Reflections on the Problem of Individual Responsibility for Violations of Human Rights", in Pedro Nikken and Antônio A. Cançado Trindade (eds), *The Modern World of Human Rights: Essays in honour of Thomas Buergenthal*, 1996, Inter-American Institute of Human Rights, 419-436.
- Ress, Georg, "The Duty to Protect and to Ensure Human Rights Under the European Convention on Human Rights", in Eckart Klein (ed.), *The Duty to Protect and to Ensure Human Rights* (Colloquium, Potsdam, 1-3 July 1999), 2000, Berlin Verlag, 165-205.
- Richter, Judith, *Holding Corporations Accountable: Corporate Conduct, International Codes, and Citizen Action*, 2001, Zed Books.
- Rosas, Allan and Scheinin, Martin, "Categories and Beneficiaries of Human Rights", in Raija Hanski and Markku Suksi (eds), *An Introduction to the International Protection of Human Rights*, 1999, Institute for Human Rights, Åbo Akademi University, 49-62.
- Ruggie, John, *The Global Compact as Learning Network*, <www.unglobalcompact.org> (15 January 2002).
- Schachter, Oscar, "The Decline of the Nation State", in 35 *Columbia Journal of Transnational Law* (1997), 7-23.
- Scholte, Jan Aart, "Global Capitalism and the State", in 73 *International Affairs* (1997), no. 3 (July), 427-452.
- Scott, Craig, "Translating Torture into Transnational Tort: Conceptual Divides in the Debate on Corporate Accountability for Human Rights Harms", in Craig Scott (ed.), *Torture as Tort: Comparative Perspectives on the Development of Transnational Human Rights Litigation*, 2001, Hart Publishing, 45-63.
- Seiderman, Ian, *Hierarchy in International Law: The Human Rights Dimension*, 2001, Intersentia – Hart.
- Seidl-Hohenveldern, Ignaz, *International Economic Law*, 1992, Martinus Nijhoff Publishers.

- Skogly, Sigrun I., "Economic and Social Human Rights, Private Actors and International Obligations", in Michael K. Addo (ed.), *Human Rights Standards and the Responsibility of Transnational Corporations*, 1999, Kluwer Law International, 239-258.
- Slaughter, Anne-Marie and Bosco, David L., "Alternative Justice", <<http://www.globalpolicy.org/intljustice/atca/2001/altjust.htm>> (15 January 2002).
- Smith, Brian, *State Responsibility and the Marine Environment; The Rules of Decision*, Oxford University Press, 1988.
- Sornarajah, Muthucumaraswamy, "Linking State Responsibility for Certain Harms Cause by Corporate Nationals Abroad to Civil Recourse in the Legal Systems of Home States", in Craig Scott (ed.), *Torture as Tort: Comparative Perspectives on the Development of Transnational Human Rights Litigation*, 2001, Hart Publishing, 491-512.
- Starmer, Keir, "Positive Obligations under the Convention", in Jeffrey Jowell and Jonathan Cooper (eds), *Understanding Human Rights Principles*, 2001, Hart Publishing, 139-159.
- Stephens, Beth, "Corporate Accountability: International Human Rights Litigation Against Corporations in US Courts", in Menno T. Kamminga and Saman Zia-Zarifi (eds), *Liability of Multinational Corporations under International Law*, 2000, Kluwer Law International, 209-229.
- Stern, Brigitte, "How to Regulate Globalization?" in Michael Byers (ed.), *The Role of Law in International Politics: Essays in international relations and international law*, 2000, Oxford University Press, 247-268.
- Sunga, Lyal S., *The Emerging System of International Criminal Law: Developments in Codification and Implementation*, 1997, Kluwer Law International.
- Terry, John, "Taking *Filártiga* on the Road: Why Courts Outside the United States Should Accept Jurisdiction Over Actions Involving Torture Committed Abroad", in Craig Scott (ed.), *Torture as Tort: Comparative Perspectives on the Development of Transnational Human Rights Litigation*, 2001, Hart Publishing, 109-133.
- Väyrynen, Raimo, *Globalisaatiokritiikki ja kansalaisliikkeet*, 2001, Gaudeamus.
- Väyrynen, Raimo, *Globalisaatio: Uhka vai Mahdollisuus?*, 1998.
- Weiss, Edith Brown, "Conclusions: Understanding Compliance with Soft Law", in Dinah Shelton (ed.), *Commitment and Compliance: The Role of Non-Binding Norms in the International Legal System*, 2000, Oxford University Press, 535-553.

- Weissbrodt, David, "Non-State Entities and Human Rights within the Context of the Nation-State in the 21st Century", in Monique Castermans-Holleman, Fried van Hoof, and Jacqueline Smith (eds), *The Role of the Nation-State in the 21st Century: Human rights, international organisations and foreign policy: essays in honour of Peter Baehr*, 1998, Kluwer Law International. 175-195.
- Wells, Celia, *Corporations and Criminal Responsibility*, 2001, Oxford University Press.
- Wildhaber, Luzius, "Some Aspects of the Transnational Corporation in International Law", *27 Netherlands International Law Review* (1980), 79-88.
- Wise, Edward, "Perspectives and Approaches", in M. Cherif Bassiouni (ed.), *International Criminal Law* (2 ed.), vol. I, 1999, Transnational Publishers, 283-310.
- World Bank Briefing Papers Series, *Globalization*, April 2000, <www.worldbank.org/html/extdr/pb/globalization/> (15 January 2002).
- Wälde, Thomas, "A Requiem for the 'New International Economic Order' – The Rise and Fall of Paradigms in International Economic Law", in Najeeb Al-Nauimi and Richard Meese (eds), *International Legal Issues Arising under the United Nations Decade of International Law*, 1995, Kluwer Law International, 1301-1338.
- Zadek, Simon and Forstater, Maya, "Making Civil Regulation Work", in Michael K. Addo (ed.), *Human Rights Standards and the Responsibility of Transnational Corporations*, 1999, Kluwer Law International, 69-75.

Conventions and Statutes

- 1948 Convention on the Prevention and Punishment of the Crime of Genocide, 28 ILM 754 (1989).
- 1965 Convention on the Elimination of All Forms of Racial Discrimination, 5 ILM 352 (1966).
- 1966 International Covenant on Civil and Political Rights, 999 UNTS 171.
- 1966 International Covenant on Economic, Social and Cultural Rights, 993 UNTS 3.
- 1979 Convention on the Elimination of All Forms of Discrimination against Women, 19 ILM 33 (1980).

- 1984 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, (UN General Assembly Res. 39/46 (10 December 1984)), 23 ILM 1027 (1984).
- 1989 Basel Convention on the Control of Transboundary Movement of Hazardous Wastes and Their Disposal, 28 ILM 657 (1989).
- 1993 Statute of the International Criminal Tribunal for the Former Yugoslavia, 32 ILM 1203 (1993).
- 1994 Statute of the International Criminal Tribunal for Rwanda, 33 ILM 1598 (1994).
- 1998 Rome Statute of the International Criminal Court, 37 ILM 999 (1998).
- 1999 Convention Concerning the Prohibition and Immediate Elimination of the Worst Forms of Child Labour (ILO No. C 182), 38 ILM 1207 (1999).
- 2000 Convention Against Transnational Organized Crime, UN Doc A/45/49 (2001) (Vol. I).

Cases

European Court of Human Rights

- Plattform 'Ärzte für das Leben' v. Austria*, (21 June 1988), Publications of the European Court of Human Rights, Series A, vol. 139.
- Costello-Roberts v. the UK*, (12 March 1993), Publications of the European Court of Human Rights, Series A, vol. 247-C.
- Osman v. United Kingdom*, European Court of Human Rights, (29 October 1998), Reports of Judgements and Decisions, 1998-VIII.

Inter-American Court of Human Rights

- Velásquez Rodríguez v. Honduras*, Inter-American Court of Human Rights, (21 July 1989), 28 ILM 291 (1989).

International Court of Justice

- Case Concerning United States Diplomatic and Consular Staff in Tehran (US v. Iran)*, Judgment, ICJ Reports 1980.
- Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, Judgment, ICJ Reports 1986.

United Nations Human Rights Committee

Lilian Celiberti de Casariego v. Uruguay, (Human Rights Committee, Session 13),
Communication No. 56/1979 (29 July 1981), UN Doc. CCPR/C/OP/1 (1984).

United States

US v. Park, 421 US 658 (1975).

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

John Doe I v. Unocal corp., 963 F.Supp. 880 (C.D.Cal. 1997).

John Doe I v. Unocal corp., 110 F.Supp.2d 1294 (C.D. Cal. 2000).

Legislation and Declarations

Control Council Law no. 10, Punishment of Persons Guilty of War Crimes, Crimes
Against Peace and Against Humanity, 20 December 1945, <[http://www.yale.edu/
lawweb/avalon/imt/imt10.htm](http://www.yale.edu/lawweb/avalon/imt/imt10.htm)> (15 January 2002).

United Nations, Universal Declaration of Human Rights, UN Doc. A/810 (1948).

United Nations, Declaration of the Elimination of Violence against Women, UN Doc.
A/48/49 (1993).

Guidelines, Recommendations, Reports etc.

Commission of the European Communities, Green Paper, *Promoting a European
Framework for Corporate Social Responsibility*, Brussels, 18 July 2001,
COM(2001) 366 final.

International Labour Organization, Declaration on Fundamental Principles and
Rights at Work, 37 ILM (1998), at 1233.

International Labour Organization, Overview of Global Developments and Office
Activities Concerning Codes of Conduct, Social Labelling and other Private Sector
Initiatives Addressing Labour Issues, Governing Body, GB.273/WP/SDL/1,
November 1998, <[www.ilo.org/public/english/standards/relm/gb/docs/gb273/sdl-
1.htm](http://www.ilo.org/public/english/standards/relm/gb/docs/gb273/sdl-1.htm)> (15 January 2002).

International Labour Organization, Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy, 17 ILM (1978), at 422.

Maastricht Guidelines on Violations of Economic, Social and Cultural Rights, Maastricht, January 22-26, 1997.

Organization for Economic Co-operation and Development, *Codes of Conduct – An Expanded Review of their Contents*, TD/TC/WP(99)56/FINAL, June 2000, <[apli1.oecd.org/olis/1999doc.nsf/LinkTo/td-tc-wp\(99\)56-final](http://apli1.oecd.org/olis/1999doc.nsf/LinkTo/td-tc-wp(99)56-final)> (15 January 2002).

Organization for Economic Co-operation and Development, Guidelines for Multinational Enterprises, 15 ILM (1976), at 967 (as amended in 1979, 1984 and 1991 at <www.oecd.org/daf/investment/guidelines/mnetext.htm> (15 January 2002).

United Nations, Committee on the Elimination of Discrimination against Women, General Recommendation 19, Violence against Women, eleventh session, 1992 UN Doc. HRI\GEN\1\Rev. 1 (1994).

United Nations, Committee on Economic Social and Cultural Rights, Concluding Observations: Nigeria 13/05/1998, UN Doc. E/C.12/1/Add 23 (1998).

United Nations, Committee on Economic, Social and Cultural Rights, General Comment 12, Article 11, Right to adequate food, UN Doc. E/C.12/1999/5 (1999).

United Nations, Human Rights Committee, General Comment 29, Article 4, States of Emergency, UN Doc. CCPR/C/21/Rev.1/Add.11 (31 August 2001).

United Nations, Human Rights Committee, General Comment 3, Article 2, Implementation at the national level, Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, UN Doc. HRI\GEN\1\Rev.1 (1994).

United Nations, Human Rights Committee, General Comment 16, Article 17, Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, UN Doc. HRI\GEN\1\Rev.1 (1994).

United Nations, Millennium Report of the UN Secretary-General to the General Assembly, *We, the Peoples: The Role of the United Nations in the 21st Century* (UN Doc. A/54/2000), 2000, United Nations Department of Public Information, <www.un.org/millennium/sg/report/full.htm> (15 January 2002).

United Nations, Report of the International Law Commission (Fifty-Third Session (23 April - 1 June and 2 July - 10 August 2001)), Official Records of the General Assembly, Fifty-sixth Session, Supplement No. 10, UN Doc. A/56/10 (2001).

United Nations, Sub-Commission on the Promotion and Protection of Human Rights, *Principles Relating to the Human Rights Conduct of Companies*, working paper prepared by Mr. David Weissbrodt, UN Doc. E/CN.4/Sub.2/2000/WG.2/WP.1/Add.1 (2000).

United Nations, Sub-Commission on the Promotion and Protection of Human Rights, *The Realization of Economic, Social and Cultural Rights: Globalization and its impact on the full enjoyment of human rights*, preliminary report submitted by J. Oloka-Onyango, and Deepika Udagama, UN Doc. E/CN.4/Sub.2/2000/13 (2000).

United Nations Conference on Trade and Development, *World Investment Report 2000: Cross-border Mergers and Acquisitions and Development*, 2000, United Nations.

United Nations Conference on Trade and Development, *World Investment Report 1999: Foreign Direct Investment and the Challenge of Development*, 1999, United Nations.

United Nations Conference on Trade and Development, *World Investment Report 1997: Transnational Corporations, Market Structure and Competition Policy*, 1997, United Nations

United Nations Conference on Trade and Development, *World Investment Report 1995: Transnational Corporations and Competitiveness*, 1995, United Nations.