

**HUMAN RIGHTS AND TRANSNATIONAL CORPORATIONS
IN THE 21ST CENTURY:
OVERVIEW AND OUTLOOK**

MARTINA CARONI *

RAMONA PEDRETTI **

* Professor of Public International Law, University of Lucerne, Switzerland.

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Summary: I. Introduction. II. Examples of Corporate Behavior Violating Human Rights. III. Challenges and Unresolved Questions in Respect of Human Rights. Obligations of Business Enterprises. IV. Existing Instruments and Initiatives on Corporate Social Responsibility with a Focus on Human Rights. VI. Litigation in Domestic Courts. VII. Voluntary Initiatives. VIII. Certification Schemes. IX. Mainstream Financial Indices. X. Are Business Enterprises Bound By Human Rights?. XI. Which Type of Human Rights Obligations for Business Enterprises?. XII. Which Human Rights do Business Enterprises Have to Respect?. XIII. Conclusion: How could the Responsibility to Respect Human Rights be Established?

I. Introduction

The question of human rights observance by business enterprises is not a new one. As early as in 44 B.C. Cicero criticized the immoral and unprincipled business practices¹. In the 19th century British abolitionists launched boycott campaigns against sugar produced by slave labor² and the War Crimes Tribunals after the Second World War addressed the support of business enterprises for repressive regimes and rendered guilty verdicts against CEOs of companies that had provided the cyanide used in concentration camps³.

In recent years, however, the question of human rights responsibility of business enterprises in general and multinational or transnational corporations (MNCs or TNCs)⁴ in particular has become more and more important and pressing. Rightfully, TNCs have been dubbed both engines of development and tools of exploitation⁵. Corporate behavior has a direct bearing on human rights adherence as well as human rights implementation and business enterprises can act both as promoters or violators of human rights. In addition, changes to the

¹ *Marcus Tullius Cicero*, *De Officiis*, Book III.

² See *Mike Kaye*, *The Development of Anti-Slavery Movement After 1807*, 26 *Parliamentary History* 238 (2007) at p. 239.

³ See *Florian Jessberger*, *On the Origins of Individual Criminal Responsibility under International Law for Business Activity*, *IG Farben on Trial*, 8 *J. Int'l Crim. Just.* 783 (2010) at p. 783 and p. 791; *Steven R. Ratner*, *Corporations and Human Rights: A Theory of Legal Responsibility*, 111 *Yale L.J.* 443 (2001-2002) at p. 477; *Kendra Magraw*, *Universally Liable? Corporate-Complicity Liability Under the Principle of Universal Jurisdiction*, 18 *Minn. J. Int'l. L.* 458 (2009) at p. 470-71 and p. 475-76.

⁴ The legal concept of a multinational or a transnational corporation is vague. Commonly MNCs and TNCs are viewed as enterprises that consist of numerous corporations integrated into a multinational firm. See on the notion of TNCs *Gralf-Peter Calliess*, *Transnational Corporations Revisited*, 18 *Ind. J. Global Legal Stud.* 601 (2011).

⁵ See *Bjørn Letnes*, *Transnational Corporations and Human Rights: Silencing the Ontological Controversy*, 4 *Public Organization Review: A Global Journal* 259 (2004).

international economic system have led to business enterprises becoming important non-state players in the field of human rights. Whilst the structure of the international economic system remains state-centered, globalization of markets has led to a largely diminished state authority. The vacuum was filled by non-state actors that were able to accumulate vast sums of resources and power, often in excess of the states' resources and power. Thus, in a number of countries business enterprises have gained the power and ability to undermine domestic policies. This power imbalance between governments and TNCs has been further fostered by enforcement mechanisms of international trade or investment organizations as in certain circumstances business enterprises have the ability to challenge state policies that they deem unfavorable through international quasi-judicial mechanisms. Thus, e.g., the jurisdiction of the International Center for the Settlement of Investment Disputes (ICSID), established by the Convention on the Settlement of Investment Disputes between States and Nationals of Other States⁶, extends according to Art. 25 para. 1 "to any legal dispute arising directly out of an investment, between a Contracting State (...) and a national of another Contracting State". Art. 25 para. 2 goes on to specify that national of another contracting state means both natural and juridical person which has the nationality of a contracting state.

As power and resources increasingly shift from state control to private non-state actors, the role of the latter must be scrutinized under the aspect of human rights because their potential to either promote or harm the realization of human rights and escape liability for doing so has exponentially increased. It will be one of the challenges for the international community in the 21st century to answer the pressing question of human rights responsibilities of business enterprises.

II. Examples of Corporate Behavior Violating Human Rights

There are –sadly– numerous cases of corporate behavior that violate human rights. Among these are, inter alia, the following cases:

(1) In the 1960s Rio Tinto, a British-Australian mining and resources group with headquarters in London and Melbourne, sought to build an open mine on the island of Bougainville in Papua New Guinea, the Panguna Mine. In order to obtain the assistance of the government of Papua New Guinea for this project, Rio Tinto offered 19.1 percent of the mine's profits to the government. As Papua New Guinea depends heavily on mining production for its earnings, the government agreed. Mining operations started in 1972 and each day approximately 300'000 tons of ore and waste rock were blasted, excavated and removed from the mine. Annually, 180,000 tons of copper concentrate and 400,000 ounces of gold were produced. The mining operations resulted in devastating environmental degradation and undermined the physical and mental health of Bougainville's

⁶ Convention on the Settlement of Investment Disputes between States and Nationals of Other States, 18 March 1965, 575 UNTS 160.

HUMAN RIGHTS AND TRANSNATIONAL CORPORATIONS

residents. Furthermore, Rio Tinto's conditions of employment discriminated the islanders, all of whom were black. They were paid significantly lower wages than the white workers recruited off the island and lived in slave-like conditions. In 1988, Bougainvilleans engaged in acts of sabotages against the mine and forced it to be closed. Thereupon, Rio Tinto sought the assistance of the Papua New Guinea government to quell the protests against the destructive mining policies and to reopen the mine. On February 14, 1990 the Papua New Guinea Army attacked the islands and killed numerous civilians. In response, Bougainvilleans called for secession and 10 years of civil war with around 20'000 deaths on the island ensued. Allegedly at the behest of Rio Tinto, the government forces committed atrocious human rights abuses and war crimes, including aerial bombardment of civilian targets, burning of villages, rape and pillage. A group of Bougainvilleans filed suit in a US federal district court under the Alien Tort Claims Act⁷, seeking damages from Rio Tinto. Whereas in 2002 the District Court dismissed the claims as non-justiciable political questions⁸, in August 2006 the United States Circuit Court of Appeals for the Ninth Circuit reversed in part⁹. After numerous judgments of different courts the case is still pending. On 25 October 2011 the Court of Appeals reversed the lower court's dismissal on the genocide and war crimes claims and sent the case back to the district court for further proceedings¹⁰.

(2) In the summer of 2006 the Probo Koala, a tanker chartered by the Dutch-Swiss company Trafigura Beheer BV, was carrying a load of 500 tons of toxic waste consisting of fuel, caustic soda and hydrogen sulfide. In order to cut costs, Trafigura choose not to discharge the load in the port of Amsterdam – the disposal charge in Amsterdam amounted to 1000 € per cubic meter; rather, the load was cleared in the port of Abidjan in the Ivory Coast, where a local contractor dumped the waste at twelve sites in and around Abidjan. The gas caused by the chemicals killed more than a dozen people, injured over 30,000 people with injuries ranging from mild headache to severe burns of skin and lungs and caused more than 100,000 people to seek medical treatment. In 2007 Trafigura paid the Ivorian government \$ 189 million for cleanup, without admitting any wrongdoing. In 2008 approximately 30,000 claimants filed a civil lawsuit against Trafigura in the United Kingdom. This lawsuit was settled in September 2009 when Trafigura agreed to pay each of the claimants an amount of approximately \$ 1,500. Finally, on July 23, 2010 a Dutch court found Trafigura guilty of illegally exporting toxic waste as well as concealing the nature of the

⁷ See *infra* 4.2.2.

⁸ *Sarei v Rio Tinto, PLC*, 221 F. Supp. 2d 1116 (C.D. Cal. 2002).

⁹ *Sarei v Rio Tinto, PLC*, 456 F. 3d 1069 (9th Cir. 2006).

¹⁰ *Sarei v. Rio Tinto, PLC*, No. 02-56256 (9th Cir., Oct 25, 2011).

cargo and was imposed a fine of € 1 million¹¹. On appeal, the judgment was upheld by the Appeals Court on 23 December 2011¹².

(3) Another well-publicized incident concerns the Ogoni region of the Niger delta. Since the late 1950s numerous multinational oil companies and especially Royal Dutch Shell PLC had been drilling for crude oil in Ogoniland, the homeland of the Ogoni people, an ethnic minority in Nigeria. Decades of drilling activities and indiscriminate dumping of petroleum waste led to severe environmental damages. In the early 1990s residents began to protest against the environmental degradation and the harm to local communities attributed to the extraction of oil in the Niger delta. The Nigerian government used violent means to quell the protests, resulting in the death, injury and arrest of several activists, including Ken Saro-Wiwa, the President of the Movement for the Survival of the Ogoni People. Ken Saro-Wiwa was tried by a military tribunal and hanged in 1995 by the Abacha Regime. The family of Ken Saro-Wiwa and other residents of the Ogoni region brought a series of cases under the Alien Tort Claims Act¹³ against Royal Dutch Shell PLC. The lawsuits claim that Royal Dutch Shell PLC acted in concert with the Nigerian government and is therefore accountable for human rights violations in Nigeria, including summary executions, crimes against humanity, torture as well as arbitrary arrest and detention. Just days before the trial was to begin in 2009, Royal Dutch Shell PLC agreed in an out-of-court settlement to pay \$ 15,5 millions to the victims' families, while denying any liability for the human rights violations and stating that the payment was made as part of a reconciliation process.

(4) Finally, the last example concerns a lawsuit against the Coca-Cola Company for events in Colombia. The lawsuit, filed under the Alien Tort Claims Act¹⁴ in 2001 in a Federal Court in Florida, was brought by the Colombian trade union Sinaltrainal and five individuals. In the lawsuit the plaintiffs claimed that the Coca-Cola Company and two of its Latin American bottlers (Bebidas y Alimentos and Panamerican Beverages, Inc.) hired, contracted with or otherwise directed paramilitary security forces that systematically intimidated, detained, tortured and murdered the leaders of Sinaltrainal. In August 2009 the United States Court of Appeals for the Eleventh Circuit¹⁵ affirmed the dismissal of the action against the defendants for lack of subject matter by the United States District Court for the Southern District of Florida¹⁶.

¹¹ In re *Trafigura Beheer B.V.*, District Court of Amsterdam of 23 July 2010, case no. 13/846003-06, LJN BN2149, published in: *Milieu & Recht* 2010/86.

¹² In re *Trafigura Beheer B.V.*, Appeals Court of Amsterdam, 23 December 2011, case no. 23-003334-10, LJN BU9237.

¹³ See *infra* 4.2.2.

¹⁴ See *infra* 4.2.2.

¹⁵ *Sinaltrainal v. The Coca-Cola Company et al.*, 578 F.3d 1252 (11th Cir. 2009)

¹⁶ *Sinaltrainal v. The Coca-Cola Company et al.*, 256 F.Supp. 2d 1345 (Dist. Court, S.D. Florida 2003).

III. Challenges and Unresolved Questions in Respect of Human Rights. Obligations of Business Enterprises

While previously control and regulation of business activity was possible based on domestic regulation as business enterprises were usually acting within one country, today business enterprises are too dynamic to be effectively regulated by domestic law. Besides that, in numerous countries business enterprises and TNCs have a great impact on domestic policies. Finally, globalization has led since the 1980s financial organizations such as the International Monetary Fund or the World Bank to require structural adjustments favoring business activities from member states as prerequisite for receiving funds. All these factors have led to constraints on the state's ability to fulfill some of its human rights obligations. Therefore, there are an increasing number of voices that call on international law to impose legally binding human rights obligations directly on TNCs.

However, there are serious queries and issues that have to be solved before international law can impose legally binding human rights obligations on business enterprises and TNCs. These include, inter alia:

(1) First and foremost the fact that business enterprises and TNCs as yet are not subjects of international law. This raises the question whether and how international law could at all impose duties on these entities. Are business enterprises duty bearers of human rights obligations?

(2) In addition, there is the query which type of human rights obligations should and could be imposed on business enterprises and TNCs. Do the possible human rights obligations take the same form as states' obligations?

(3) Furthermore, it is still unresolved which human rights should be respected by business enterprises and TNCs. Only those human rights that relate to work and employment? Or those that might be affected by the business activity? Or all human rights?

(4) Finally there's the matter how human rights responsibilities of business enterprises and TNCs could and should be established.

After an overview of existing initiatives on corporate social responsibility (chapter 4) some preliminary answers to these queries shall be proposed (chapters 5 and 6).

IV. Existing Instruments and Initiatives on Corporate Social Responsibility with a Focus on Human Rights

There is a plethora of different instruments and initiatives that focus on corporate social responsibility including human rights issues. These approaches

differ widely in respect of their source, their objective, the existence of a monitoring mechanism, their voluntariness etc.

1. International Instruments

It is not unheard of in international law to impose legally binding obligations on business enterprises through treaty-based agreements. Thus, even if they are not subjects of international law, business enterprises that violate environmental standards are liable for civil damages under several treaties, e.g. in the field of nuclear damage or oil pollution:

- In respect of nuclear energy the Paris Convention on Third Party Liability in the Field of Nuclear Energy¹⁷ imposes a strict liability on operators of nuclear installations. Similar obligations are imposed also by the Brussels Convention on the Liability of Operators of Nuclear Ships¹⁸ and the Vienna Convention on Civil Liability for Nuclear Damages¹⁹.
- According to the International Convention on Civil Liability for Oil Pollution Damage²⁰ the owner of a ship is liable for any pollution damage caused by oil escaped or discharged from the ship²¹.

The mentioned treaties embrace the polluter pays-principle, i.e. the principle that the polluter has to pay for the damage done to the natural environment. Thus, polluters – be they state authorities or private corporations – are responsible and liable for damages.

In the field of human rights several international organizations have attempted to move beyond the restricted discourse of individual criminal liability for human rights violations by articulating human rights obligations of business enterprises and TNCs. However, none of these instruments imposes binding obligations on TNCs, rather they either rest on voluntary adherence or call on the states to regulate corporate social responsibility.

¹⁷ Adopted 1960 under the auspices of the OECD Nuclear Energy Agency the Convention has been amended three times by protocols. It is in force for 16 European states and open for ratification to any OECD country as of right and to any non-member with the consent of the other contracting parties.

¹⁸ Adopted in 1962 at a diplomatic conference convened by the International Atomic Agency and the International Maritime Committee.

¹⁹ Adopted in 1963 and amended in 1997 by a Protocol; 38 state parties.

²⁰ Adopted in 1969 and amended in 1976, 1984 and 1992; 36 state parties.

²¹ See Article III of the International Convention on Civil Liability for Oil Pollution Damage.

2. OECD Guidelines for Multinational Enterprises

In 1976 the Organization for Economic Cooperation and Development (OECD) adopted Guidelines for Multinational Enterprises²². These Guidelines are recommendations by governments to multinational enterprises and provide voluntary principles and standards for responsible business conduct. Repeatedly revised, the Guidelines aim at improving the investment climate, encouraging the positive contribution multinational enterprises can make to economic and social progress and minimize as well as resolve difficulties that may arise from their operations. They cover a broad field of business ethics, including human rights, environmental and employment issues. All 34 OECD member states (including from the Americas Canada, Chile, Mexico and the United States) and 8 non-OECD countries (including from the Americas Argentina, Brazil and Peru) have adhered to the Guidelines.

Implementation and observance of the Guidelines rests on a threefold institutional setup: First, adhering states are required to set up a National Contact Point (NCP). NCPs are a government office that is responsible for encouraging observance of the Guidelines in the national context and for ensuring that the Guidelines are well known and understood by the national business community and by other interested parties. Furthermore, when issues arise relating to the implementation of the Guidelines, a trade union or other parties can bring the case – called specific instance – to the attention of the NCP. The NCP is then expected to help resolve the case.²³ Secondly, the Guidelines establish the OECD Committee on International Investment and Multinational Enterprises (CIME) as the OECD body responsible for the implementation and development of the Guidelines. Finally, the Business and Industry Advisory Committee of the OECD (BIAC)²⁴, the Trade Union Advisory Committee to the OECD (TUAC)²⁵ and

²² Available at <http://www.oecd.org/dataoecd/43/29/48004323.pdf> (last visited 7 February 2012); for a recent analysis of the Guidelines see *Matthew H. Kita*, *It's Not You, It's Me: An Analysis of the United States' Failure to Uphold its Commitment to OECD Guidelines for Multinational Enterprises in Spite of No Other Reliable Alternatives*, 29 *Penn St. Int'l L. Rev.* 359 (2010).

²³ For instance, in March 2009 the International Union of Foodworkers made a submission to the NCP in the United Kingdom in a case relating to the rights of precarious workers at a Unilever/Lipton tea factory in Pakistan. The UK NCP engaged an external mediator who finally successfully negotiated a settlement between Unilever and the International Union of Foodworkers. The settlement led to the creation of 200 permanent jobs for casual workers at the tea factory in Pakistan.

²⁴ BIAC is an independent business association founded in 1962 and devoted to advising policymakers at the OECD on business related issues. BIAC may bring concerns relating to the implementation of the Guidelines to the attention of CIME and is consulted regularly by CIME on Guidelines issues.

²⁵ TUAC, founded in 1948, is an international trade union organization having consultative status with the OECD and its committees. In the context of the OECD Guidelines TUAC may bring concerns relating to the implementation of the Guidelines to the attention of CIME and is consulted regularly by CIME on Guidelines issues.

OECD Watch²⁶ as well as NCPs may bring a case to the attention of the OECD Investment Committee and ask it to consider an amendment to the Guidelines or issue a clarification of a particular clause of the Guidelines.

Though being a non-binding document and therefore not legally enforceable, the Guidelines are an important tool for corporate social responsibility, as they target in their language both the adhering states as well as business enterprises. Thus, chapter II on general policies uses wording addressed directly at enterprises and puts, *inter alia*, a focus on human rights:

«Enterprises should take fully into account established policies in the countries in which they operate, and consider the views of other stakeholders. In this regards, enterprises should:

« (...)

2. Respect the internationally recognised human rights of those affected by their activities.

(...))»

As the landscape for international investment and multinational enterprises has changed dramatically since the last review of the Guidelines in 2000, the 42 adhering states agreed in 2010 on Terms of Reference for carrying out an update of the Guidelines. According to the Terms of Reference for the 2010 review in respect of human rights «the update should develop more elaborated guidance on the application of the Guidelines to human rights. (...) Such additional guidance should be developed with the aim of helping multinational enterprises identify, prevent and remedy negative human rights impacts which may result from their operations. This guidance should cover situations of supposed conflicting requirements between internationally-recognized standards on human rights and host country policies, including situations where the host country has not ratified a specific human rights instrument»²⁷.

On 25 May 2011 the updated Guidelines were adopted by the adhering Governments. The major innovation, in line with the Terms of Reference for the review, is the inclusion of a new chapter on human rights. Chapter IV on human rights states:

«States have the duty to protect human rights. Enterprises should, within the framework of internationally recognised human rights, the international human

²⁶ OECD Watch is an international network of civil society organizations. OECD Watch may bring concerns relating to the implementation of the Guidelines to the attention of CIME and is consulted regularly by CIME on Guidelines issues.

²⁷ Available at www.oecd.org/dataoecd/61/41/45124171.pdf (last visited 7 February 2012), at p. 3-4.

HUMAN RIGHTS AND TRANSNATIONAL CORPORATIONS

rights obligations of the countries in which they operate as well as relevant domestic laws and regulations:

1. Respect human rights, which means they should avoid infringing on the human rights of others and should address adverse human rights impacts with which they are involved.
2. Within the context of their own activities, avoid causing or contributing to adverse human rights impacts and address such impacts when they occur.
3. Seek ways to prevent or mitigate adverse human rights impacts that are directly linked to their business operations, products or services by a business relationship, even if they do not contribute to those impacts.
4. Have a policy commitment to respect human rights.
5. Carry out human rights due diligence as appropriate to their size, the nature and context of operations and the severity of the risks of adverse human rights impacts.
6. Provide for or co-operate through legitimate processes in the remediation of adverse human rights impacts where they identify that they have caused or contributed to these impacts.»

The new human rights chapter is thus consistent with the Guiding Principles on Business and Human Rights²⁸.

3. ILO Tripartite Declaration on Principles Concerning Multinational Enterprises and Social Policy

In 1977 the Governing Body of the International Labour Organization (ILO) adopted the Tripartite Declaration on Principles Concerning Multinational Enterprises and Social Policy (ILO Declaration)²⁹. The principles set forth in the ILO Declaration aim at encouraging the positive contribution that multinational enterprises can make to economic and social progress by providing guidance to multinational enterprises, governments, workers' and employers' organizations in areas such as employment, conditions of work and life, training and industrial relations. Similar to the OECD Guidelines, the ILO Declaration is not binding. However, as a tripartite declaration, its words are directly addressed not only at states but also at multinational businesses as well as labour organizations and employers' associations. Thus, para. 7 of the ILO Declaration states:

²⁸ See *infra* 4.1.6.

²⁹ Available at http://www.ilo.org/wcmsp5/groups/public/---ed_emp/---emp_ent/---multi/documents/publication/wcms_094386.pdf (last visited 7 February 2012).

«This Declaration sets out principles in the fields of employment, training, conditions of work and life and industrial relations which governments, employers' and workers' organizations and multinational enterprises are recommended to observe on a voluntary basis».

The ILO Declaration incorporates, according to para. 8, all the rights listed in the Universal Declaration of Human Rights and the two UN Covenants:

«All the parties concerned by this Declaration should respect the sovereign rights of States, obey the national laws and regulations, give due consideration to local practices and respect relevant international standards. They should respect the Universal Declaration of Human Rights and the corresponding International Covenants adopted by the General Assembly of the United Nations (...).»

Implementation and observance of the ILO Declaration rests on two arrangements. First, even if the ILO Declaration is a voluntary instrument, the ILO Governing Body created and approved a procedure for the submission of requests for interpretation in cases of dispute on the meaning and application of the provisions. Thus, the ILO Office may receive requests for interpretation of the ILO Declaration arising in an actual situation from governments of ILO member states as well as national or international organizations of employers or workers. If the request is receivable, the ILO Governing Body issues a clarification³⁰. Secondly, the ILO periodically makes a survey on the effect given to the ILO Declaration by governments and employers' as well as workers' organizations.

4. UN Global Compact

Launched in 2000 by UN Secretary General Kofi Annan, the UN Global Compact³¹ is a strategic policy initiative addressed to businesses. It rests on the premises that (1) business enterprises as the primary agents driving globalization can help ensure that markets, commerce, technology and finance advance in ways that benefit economies and societies everywhere and (2) that the private sector must be actively involved in corporate social responsibility programs if these shall be successful. Thus, the UN Global Compact is addressed solely at business enterprises and aims at aligning their operations and strategies with ten principles dealing with human rights, labour, environment and anti-corruption. Participation in the UN Global Compact is voluntary and the initiative does not offer any monitoring mechanism. Rather, the UN Global Compact relies on public accountability, transparency and self-interest of companies for implementation and observance. As the UN Global Compact is directed solely at business enterprises its approach in spelling out enterprises' obligations is different.

³⁰ To date, five cases – two submitted by governments and three by international workers' organizations – have been decided by the ILO Governing Body.

³¹ See <http://www.unglobalcompact.org/AboutTheGC/TheTenPrinciples/index.html> (last visited 7 February 2012).

HUMAN RIGHTS AND TRANSNATIONAL CORPORATIONS

Instead of addressing only work-related rights it links the obligations to the spheres of influence of a corporation, encompassing thus not only workers, but also communities outside the work place and the broader good.

The first two principles of the UN Global Compact deal with human rights and spell out two types of obligations:

«Principle 1

Businesses should support and respect the protection of internationally proclaimed human rights.

Principle 2

Businesses should make sure that they are not complicit in human rights abuses.»

Thus, business enterprises shall neither instigate violations of human rights nor be complicit in such violations.

To date, more than 8000 enterprises and other stakeholders from more than 135 countries participate in the Global Compact. Participants are offered a wide array of specialized work streams, management tools and resources designed to help advance sustainable business models and markets in order to contribute to the overarching objective of the initiative, i.e. helping to build a more sustainable and inclusive global economy.

5. Draft UN Norms on the Responsibility of Transnational Corporations and Other Business Enterprises with Regard to Human Rights

In August 2003 the UN Sub-Commission on the Promotion and Protection of Human Rights sought to formulate a comprehensive answer to the question of human rights obligations and responsibilities of multinational enterprises and adopted the draft UN Norms on the Responsibility of Transnational Corporations and Other Business Enterprises with Regard to Human Rights³². These draft norms constitute the first attempt to impose legally binding obligations on TNCs and constitute the first set of comprehensive international human rights proclamations specifically aimed at and applying to business enterprises. They set forth the responsibilities of business enterprises with regard to human rights and labour rights and provide guidelines for companies in conflict zones. In addition, they prohibit bribery and contain obligations in respect the protection of consumers and the environment. Finally, enforcement mechanisms include self-reporting and external verification procedures as well as an obligation to provide reparations for failure to comply with the provisions. However, the draft norms remain illustrative as the Commission on Human Rights did not adopt them.

³² UN Doc. E/CN.4/Sub.2/2003/12/Rev.2. See further the Commentary on the Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights, U.N. Doc. E/CN.4/Sub.2/2003/38/Rev.2.

Nevertheless, the draft norms constitute an important step forward for human rights obligations of TNCs as they have overturned two paradigms that have to date dominated the discourse: that initiatives on corporate social responsibility should be voluntary and that there is not one model that fits all business enterprises³³. According to para. 1 of the draft norms adherence to them is not voluntary for TNCs and other business enterprises:

«States have the primary responsibility to promote, secure the fulfillment of, respect, ensure respect of and protect human rights recognized in international as well as national law, including ensuring that transnational corporations and other business enterprises respect human rights. Within their respective spheres of activity and influence, transnational corporations and other business enterprises have the obligation to promote, secure the fulfillment of, respect, ensure respect of and protect human rights recognized in international as well as national law, including the rights and interests of indigenous peoples and other vulnerable groups.»

By requiring business enterprises to promote, secure the fulfillment of, respect, ensure respect of and protect human rights the draft norms impose both negative and positive obligations on them. Furthermore, the draft norms adopt the “spheres of influence” concept of the Global Compact extending the reach of obligations and responsibilities beyond direct employees and other persons traditionally associated with business enterprises.

In respect of observance and implementation, the draft norms embark on a new track as TNCs and other business enterprises not only shall be subject to periodic monitoring by international bodies but shall also incorporate the draft norms “in their contracts or other arrangements and dealings with contractors, subcontractors, suppliers, licensees, distributors, or natural or other legal persons that enter into any agreement with the transnational corporation or business enterprise”³⁴.

5.1. The UN “Protect, Respect and Remedy” Framework

As the Draft Norms were vehemently contested, the Commission on Human rights declined to adopt them. Instead, the Commission requested the UN Secretary-General to appoint a Special Representative for Business and Human Rights³⁵. In 2005, Kofi Annan appointed John Ruggie as his Special Representative for Business and Human Rights. The mandate of the Special Representative encompassed the following tasks:

³³ See *Carolin F. Hillmanns*, UN Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with regard to Human Rights, 4 *German Law Journal* 1065 (2003), at p. 1068.

³⁴ UN Doc. E/CN.4/Sub.2/2003/12/Rev.2 at para. 15.

³⁵ UN Doc. E/CN.4/RES/2005/69.

HUMAN RIGHTS AND TRANSNATIONAL CORPORATIONS

«(a) To identify and clarify standards of corporate responsibility and accountability for transnational corporations and other business enterprises with regard to human rights;

(b) To elaborate on the role of States in effectively regulating and adjudicating the role of transnational corporations and other business enterprises with regard to human rights, including through international cooperation;

(c) To research and clarify the implications for transnational corporations and other business enterprises of concepts such as “complicity” and “sphere of influence”;

(d) To develop materials and methodologies for undertaking human rights impact assessments of the activities of transnational corporations and other business enterprises;

(e) To compile a compendium of best practices of States and transnational corporations and other business enterprises.»³⁶

After three years of research, in June 2008, the Special Representative presented the “Protect, Respect and Remedy” Framework to the Human Rights Council³⁷. Realizing that one of the reasons for failing to achieve progress in respect of corporate social responsibility was the lack of a clear framework that clarified the different actors’ responsibilities and thus a lack of a foundation on which, over time, thinking and action could be built, Ruggie outlined the “Protect, Respect and Remedy” Framework. It rests on three pillars: (1) the state duty to *protect* against human rights abuses by third parties, (2) the corporate social responsibility to *respect* human rights and (3) the need for greater access to *remedy* for victims of business-related abuse. By framing the corporate obligation as responsibility and not duty, the wording reflects that international human rights law does currently not impose directly on business enterprises but can at least express a standard of expectations in respect of corporate behavior.

The Human Rights Council unanimously welcomed this Framework and extended the mandate of the Special Representative for Business and Human Rights until 2011 with the mandate to operationalizing and promoting the framework.³⁸

³⁶ UN Doc. E/CN.4/RES/2005/69 at para. 1.

³⁷ UN Doc. A/HRC/8/5. See further *John Ruggie*, Business and Human Rights: The Evolving International Agenda, 101 *Am. J. Int’l L.* 819 (2007); *Larry Catá Backer*, On the Evolution of the United Nations’ “Protect-Respect-Remedy” Project: The State, the Corporation and Human Rights in a Global Governance Context, 9 *Santa Clara J. Int’l L.* 37 (2011); *Ursula A. Wymhoven*, The Protect-Respect-Remedy Framework and the United Nations Global Compact, 9 *Santa Clara J. Int’l L.* 81 (2011).

³⁸ UN Doc. A/HRC/RES/8/7 at para. 4.

5.2. Guiding Principles on Business and Human Rights: Implementing the United Nations “Protect, Respect and Remedy” Framework

In March 2011 John Ruggie, the Special Representative of the Secretary-General for Business and Human Rights, presented his final report and the Guiding Principles on Business and Human Rights: Implementing the United Nations “Protect, Respect and Remedy” Framework.³⁹ The Guiding Principles, which were formally endorsed in June 2011 by the UN Human Rights Council⁴⁰, rest on the “Protect, Respect and Remedy”-Framework and seek to provide an authoritative global standard for preventing and addressing human rights questions in the context of business activity without creating new international law obligations. They delineate foundational and operational principles for each of the three pillars of the Framework, i.e. the state duty to protect human rights, the corporate responsibility to respect human rights and the access to remedy. In respect of the corporate responsibility to respect human rights they state, inter alia:

«11. Business enterprises should respect human rights. This means that they should avoid infringing on the human rights of others and should address adverse human rights impacts with which they are involved.

(...)

13. The responsibility to respect human rights requires that business enterprises:

(a) Avoid causing or contributing to adverse human rights impacts through their own activities, and address such impacts when they occur;

(b) Seek to prevent or mitigate adverse human rights impacts that are directly linked to their operations, products or services by their business relationships, even if they have not contributed to those impacts.

14. The responsibility of business enterprises to respect human rights applies to all enterprises regardless of their size, sector, operational context, ownership and structure. Nevertheless, the scale and complexity of the means through which enterprises meet that responsibility may vary according to these factors and with the severity of the enterprise’s adverse human rights impact.»

The responsibility of business enterprises to respect human rights is not linked to the spheres of influence; rather, the Guiding Principles extend the responsibility to all internationally recognized human rights. Accordingly, Principle 12 states:

³⁹ UN Doc. A/HRC/17/31.

⁴⁰ UN Doc. A/HRC/Res/17/4.

HUMAN RIGHTS AND TRANSNATIONAL CORPORATIONS

«The responsibility of business enterprises to respect human rights refers to internationally recognized human rights – understood, at minimum, as those expressed in the International Bill of Human Rights and the principles concerning fundamental rights set out in the International Labour Organization’s Declaration on Fundamental Principles and Rights at Work.»

Moreover, responsibility to respect human rights is not a voluntary decision by business enterprises. Responsibility to respect, in point of fact, describes a “global standard of expected conduct for all business enterprises wherever they operate”⁴¹.

6. Working Group on Human Rights and Transnational Corporations and Other Business Enterprises and Forum on Business and Human Rights

In the same resolution in which the Human Rights Council formally endorsed the Guiding Principles on Business and Human Rights it also decided to establish a Working Group on Human Rights and Transnational Corporations and Other Business Enterprises⁴². This Working Group, appointed by the Council in November 2011 and consisting of five experts, shall, inter alia, promote the Guiding Principles, make recommendations on the implementation of the Guiding Principles, conduct country visits and explore options for enhancing access to effective remedies for victims.

At the same time the Human Rights Council also established a Forum on Business and Human Rights which shall discuss trends and challenges in the implementation of the Guiding Principles. The Forum shall be open to a broad participation of States, UN mechanisms, bodies, specialized agencies and funds, TNCs, business associations, labour unions, etc.

7. Domestic Instruments and Initiatives

Down to the present day and presumably also in the future, the principal bulk of legislative and judicial activity in respect of human rights respect by business enterprises remains at the domestic level. Undisputedly, the primary obligation to respect and enforce human rights lies with the states. Thus, as a matter of principle, it would be up to the states to introduce provisions requiring business enterprises to respect human rights into their domestic legal system. However, such efforts are rarely tackled and have until now not proven to be successful. In addition, as no international human rights body or tribunal is competent to hear

⁴¹ See the Commentary to the Guiding Principles, UN Doc. A/HRC/17/31 at p. 13.

⁴² UN Doc. A/HRC/Res/17/4 at para. 6.

cases against TNCs, litigation against TNCs for human rights violations occurs almost exclusively in domestic jurisdictions⁴³.

8. Domestic Legal Standards

It is undisputed that business enterprises are subjected to the laws of their home state. Thus, the relevant domestic laws are applicable to TNCs. Furthermore, in the past several countries have attempted to enact specific corporate conduct laws that would have imposed extraterritorial liability for breaches of human rights and environmental standards on TNCs. However, all these initiatives met stiff opposition and did not pass. Thus, e.g., the Australian Corporate Code of Conduct Bill 2000⁴⁴ aimed at imposing “environmental, employment, health and safety and human rights standards on the conduct of Australian corporations or related corporations”, requiring “such corporations to report on their compliance with the standards imposed by this Act” and providing “for the enforcement of those standards”⁴⁵. It would have applied to companies established in Australia as well as holding companies, subsidiaries or subsidiaries of holding companies established in Australia provided they employ the services of more than 100 persons abroad⁴⁶. As the Parliamentary Joint Statutory Committee on Corporations and Securities found the Bill to be impracticable, unworkable, unnecessary and unwarranted⁴⁷, it was not even put before Parliament. Sharing the same fate as its Australian counterpart, the United States Corporate Code of Conduct Act⁴⁸ sought to oblige US nationals employing more

⁴³ See art. 25 para. 1 of the Rome Statute which restricts the personal jurisdiction of the ICC to natural persons; similarly art. 6 of the Statute of the ICTY and art. 5 of the Statute of the ICTR; *Kiobel v. Royal Dutch Petroleum Co.*, 621 F. 3d 111 (2nd Cir. 2010) at 120; *Olivier De Schutter*, The Accountability of Multinationals for Human Rights Violations in European Law, in: Philip Alston (Ed.), *Non-State Actors and Human Rights*, Oxford 2005, at p. 232.

⁴⁴ Act to impose standards on the conduct of Australian corporations which undertake business activities in other countries, and for related purposes (Corporate Code of Conduct Bill 2000), C2004B01333, available at <http://www.comlaw.gov.au/Details/C2004B01333> (last visited 7 February 2012). See on the Bill *Surya Deva*, *Corporate Code of Conduct Bill 2000: Overcoming Hurdles in Enforcing Human Rights Obligations Against Overseas Corporate Hands of Local Corporations*, 8 New LR 87 (2004). In general on domestic extraterritorial regulation see *Christen Broecker*, “Better the Devil You Know”: Home State Approaches to Transnational Corporate Accountability, 41 N.Y.U. J. Int’l L. & Pol. 159 (2008).

⁴⁵ Sec. 3(1) Corporate Code of Conduct Bill.

⁴⁶ Sec. 4 Corporate Code of Conduct Bill.

⁴⁷ Report of the Parliamentary Joint Statutory Committee on Corporations and Securities, Report on the Corporate Code of Conduct Bill 2000, June 2000, available at http://www.aph.gov.au/senate/committee/corporations_ctte/completed_inquiries/1999-02/corp_code/report/report.pdf (last visited 7 February 2012).

⁴⁸ H.R. 5377 [109th Cong.], Corporate Code of Conduct Act, introduced on May 11, 2006, available at http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=109_cong_bills&docid=f:h5377ih.txt.pdf (last visited 7 February

than 20 persons abroad to take all necessary measures to, *inter alia*, comply with internationally recognised environmental and human rights standards⁴⁹. Finally, also in the United Kingdom the Corporate Responsibility Bill 2003⁵⁰ fell through at the parliamentary stage.

VI. Litigation in Domestic Courts

To date, litigation against business enterprises for human rights violations does occur – if at all – almost exclusively at the domestic level. The main focus lies, as, e.g., the already mentioned *Trafigura* case shows, on criminal or civil jurisdiction.

In recent years, however, due to the Alien Tort Claims Act (ATCA)⁵¹ the primary forum for claims against business enterprises have become US Courts. According to the ATCA

“the district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States”.

The Alien Tort Claims Act, adopted in 1789, lay practically dormant until in 1980 the Second Circuit decided the case of *Filartiga v. Pena-Irala*⁵². Since then, the ATCA has evolved into the primary tool for seeking redress for human rights violations that have occurred outside the United States⁵³. The ruling in *Filartiga* paved also the way for holding business enterprises liable under the ATCA. The first ATCA claim brought against a corporation was brought by Myanmar villagers against Unocal Corp. The plaintiffs alleged that Unocal Corp. had, in complicity with the Myanmar military, resorted to forced labor and committed murders, rapes and torture while constructing a natural gas pipeline⁵⁴. Later cases

2012). See as well the previous attempts: H.R. 2782 [107th Cong.] and H.R. 4596 [106th Cong.].

⁴⁹ Sec. 3(b) Corporate Code of Conduct Act.

⁵⁰ Corporate Responsibility Bill 2003, Bill 129/2003, available at: <http://www.publications.parliament.uk/pa/cm200203/cmbills/129/2003129.pdf> (last visited 7 February 2012).

⁵¹ 28 U.S.C. § 1350.

⁵² *Filartiga v. Pena-Irala*, 630 F.2d 876 (2nd Cir. 1980). The case concerns a suit filed by the family of a deceased Paraguayan man against a Paraguayan police officer for alleged torture to death. The US Court of Appeals of the Second Circuit concluded, at 884-885, that acts of official torture were in breach of the law of nations since “international law confers fundamental rights [including the right to be free from torture] upon all people vis-à-vis their own governments”.

⁵³ See e.g. *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774 (D.C. Cir. 1984); *Kadic v. Karadzic*, 70 F.3d 232 (2d Cir. 1995); *Abebe-Jira v. Negewo*, 72 F.3d 844 (11th Cir. 1996).

⁵⁴ See *Doe v. Unocal Corp.*, 963 F. Supp. 880 (C.D.Cal. 1997), *aff'd in part* 395 F. 3d 932 (9th Cir. 2002).

concern Pfizer for having tested an experimental antibiotic drug on 200 children in Nigeria without their informed consent and causing death and serious injuries to these children⁵⁵; ExxonMobil for its alleged implication in human rights violations committed by Indonesian military forces against Indonesian villagers to protect gas extraction facilities and pipelines⁵⁶; Rio Tinto for health problems of the islanders of Bougainville in Papua New Guinea caused by mining operations and its involvement in the civil war in which war crimes and crimes against humanity were committed⁵⁷; and Royal Dutch Petroleum PLC for being accomplice in the commission of human rights violations such as torture and extrajudicial killings of members of the Ogoni ethnic group by Nigerian military forces⁵⁸.

For the ATCA to apply, three requirements have to be met: (1) the plaintiff must be an alien, (2) the claim has to be filed for a tort and (3) the tort must be in violation of the law of nations. As a matter of principle under ATCA only state actors can violate the law of nations. Thus, in suits filed against business enterprises the plaintiffs must prove a nexus between the defendant corporation and the foreign government in order to establish a violation of the law of nations and thus establish the subject-matter jurisdiction of the court. In *Doe v. Unocal Corp.* the Ninth Circuit brought forward two theories for subject-matter jurisdiction in suits against business enterprises. Accordingly, corporate responsibility is engaged if the business enterprise aids and abets the state in the commission of human rights abuses⁵⁹. Furthermore, business enterprises incur responsibility for acts that give rise to individual responsibility under international law, such as genocide, war crimes as well as slavery and forced labor⁶⁰. Other violations of human rights law are merely proscribed under international law when perpetrated by state actors or in sufficient connection to the state⁶¹. In addition, according to later judgments, corporations incur responsibility in cases where violations of human rights are committed “in concert with” the state (i.e.

⁵⁵ *Abdullahi v. Pfizer, Inc.*, 562 F. 3d 163 (2nd Cir. 2009).

⁵⁶ *Doe VIII v. ExxonMobil Corp.*, United States Court of Appeals of the District of Columbia, No. 09-7125 of 8 July 2011.

⁵⁷ See *supra* 2.

⁵⁸ *Wiwa v. Royal Dutch Petroleum Co.*, 226 F. 3d 88 (2nd Cir. 2000); *Kiobel v. Royal Dutch Petroleum Co.*, 456 F. Supp. 2d 457 (S.D.N.Y. 2006), *aff'd in part* 621 F. 3d 111 (2nd Cir. 2010); see *supra* 2.

⁵⁹ *Doe I v. Unocal Corp.*, 395 F. 3d 932 (9th Cir. 2002) at 953 and 956. See also *Presbyterian Church of Sudan v. Talisman Energy*, 582 F. 3d 244 (2nd Cir. 2009) at 259; *Khulumani v. Barclay Nat. Bank Ltd.*, 504 F. 3d 254 (2nd Cir. 2007) at 260.

⁶⁰ *Doe I v. Unocal Corp.*, 395 F. 3d 932 (9th Cir. 2002) at 945-946. See also *Sinaltrainal v. Coca-Cola Co.*, 578 F. 3d 1252 (11th Cir. 2009) at 1266-1267; *Doe I v. Unocal Corp.*, 395 F. 3d 932 (9th Cir. 2002) at 945-946; *Kadic v. Karadzic*, 70 F. 3d 232 (2nd Cir. 1995) at 241-243.

⁶¹ *Doe I v. Unocal Corp.*, 395 F. 3d 932 (9th Cir. 2002) at 946 retaining, however, that “crimes like rape, torture, and summary execution, which by themselves require state action for ATCA liability to attach, do *not* require state action when committed in furtherance of other crimes like slave trading, genocide or war crimes”.

HUMAN RIGHTS AND TRANSNATIONAL CORPORATIONS

“under the color of law”) so that the misbehavior of the corporation may be regarded as that of the state itself⁶².

However, in *Kiobel v. Royal Dutch Petroleum*⁶³ the Second Circuit held in September 2010 that business enterprises cannot be held liable for violations of customary international law as “customary international law has steadfastly rejected the notion of corporate liability for international crimes”⁶⁴. Therefore, “insofar as plaintiffs bring claims under the ATS against corporations, plaintiffs fail to allege violations of the law of nations, and plaintiffs’ claims fall outside the limited jurisdiction provided by the ATS”⁶⁵. The United States Supreme Court will rule in its 2011-2012 term on the appeal.

VII. Voluntary Initiatives

In recent years TNCs themselves have adopted a large number of voluntary initiatives aiming at promoting and guaranteeing compliance with human rights and environmental standards. Such efforts mostly have their origin in concerted NGO and consumer campaign activities pressuring TNCs into modifying their behavior when doing business. Consumer mobilization campaigns, e.g. the “Clean Cloth Campaign”⁶⁶, aim at denouncing work conditions and environmental issues and seek to coerce manufacturers into adapting their practices. Such corporate accountability campaigns by NGOs heavily influence consumer behavior and thus force business enterprises to openly confront the dangers of infringing upon human rights. As a response to such campaigns and activities a large number of business enterprises have adopted voluntary corporate ethics codes.

Thus, for instance, the Nike, Inc. Code of Conduct⁶⁷ stresses that, e.g., employment by its contractors must be voluntary, employees are at least age 16 or over, there shall be no discrimination and freedom of association as well as the right to collective bargaining must be respected.

In addition to codes of conduct of individual enterprises, there are efforts of self-regulation within specific industries. Examples of such voluntary codes of

⁶² See *Abdullahi v. Pfizer, Inc.*, 562 F. 3d 163 (2nd Cir. 2009) at 188; *Kadic v. Karadžić*, 70 F. 3d 232 (2nd Cir. 1995) at 245; *Beth Stephens*, Corporate Liability: Enforcing Human Rights Through Domestic Litigation, 24 *Hastings Int’l & Comp. L. Rev.* 401 (2000-2001) at p. 407.

⁶³ *Kiobel v. Royal Dutch Petroleum Co.*, 621 F. 3d 111 (2nd Cir. 2010).

⁶⁴ *Kiobel v. Royal Dutch Petroleum Co.*, 621 F. 3d 111 (2nd Cir. 2010) at 120.

⁶⁵ *Kiobel v. Royal Dutch Petroleum Co.*, 621 F. 3d 111 (2nd Cir. 2010) at 120.

⁶⁶ See Clean Clothes Campaign, www.cleanclothes.org (last visited 7 February 2012); the campaign seeks to strengthen the rights and improve the working conditions of employees in the garment and sportswear sector.

⁶⁷ See

http://nikeinc.com/system/assets/2806/Nike_Code_of_Conduct_original.pdf?1317156854 (last visited 7 February 2012).

conduct for specific branches are the Global Sullivan Principles on Social Responsibility⁶⁸ and the Caux Roundtable Principles for Business⁶⁹. The *Global Sullivan Principles on Social Responsibility*, initially established as a voluntary code of conduct for business enterprises doing business in Apartheid South Africa, commit participating companies to endorse specific principles and goals in respect of human rights, social justice, environmental protection and equal opportunities for all employees. Endorsers have to comply with an annual reporting process. The *Caux Roundtable Principles for Businesses* were designed in 1994 by a network of business leaders and aim to express a standard to measure business behavior through the identification of shared values. The principles focus on the responsibility of businesses to respect human rights and democratic institutions.

However welcome and important such voluntary codes of conduct by business corporations are, their implementation and enforcement remains the weak point. There is no legally binding mechanism of implementation and enforcement. Rather, the business enterprises are the sole monitor of their own compliance.

VIII. Certification Schemes

Certification schemes are attempts to overcome some of the weaknesses of voluntary initiatives. They constitute programs run by an organization, group or network and require participating companies to adhere to a set of principles set forth by the program. In contrast to voluntary codes of conduct, compliance with the rules and principles of a certification scheme is monitored independently by the respective organization, group or network. Thus, for instance, the *Worldwide Responsible Apparel Production Certification Program* run by the Worldwide Responsible Accredited Production (WRAP)⁷⁰, an independent, non-profit organization, requires participating manufacturers to comply with 12 principles (the WRAP-Principles)⁷¹ ranging from the prohibition of forced labor, the prohibition of child labor, the prohibition of discrimination to the guarantee of a healthy and safe workplace, freedom of association and rules on the working hours as well as on compensation and benefits. Interested companies demonstrating the willingness and ability to implement the WRAP-Principles are certified by the WRAP and included on the list of certified facilities⁷². A

⁶⁸ See <http://lhsfound.accountsupport.com/sample-page/global-sullivan-principles> (last visited 7 February 2012).

⁶⁹ See http://www.cauxroundtable.org/view_file.cfm?fileid=143 (last visited 7 February 2012).

⁷⁰ See www.wrapcompliance.org (last visited 7 February 2012).

⁷¹ See <http://www.wrapcompliance.org/en/wrap-12-principles-certification?format=pdf> (last visited 7 February 2010).

⁷² See <http://www.wrapcompliance.org/en/certified-facility-list> (last visited 7 February 2012).

comparable certification scheme, the *SA8000 Standard*⁷³, is run by Social Accountability International⁷⁴.

A further certification scheme is the *Kimberly Process Certification Scheme* run by the Kimberly Process⁷⁵, an initiative established in 2002 by governments, the industry and the civil society aiming at preventing the trade of blood diamonds. The certification scheme attaches extensive requirements to the issuance of a certificate in order to secure that ‘conflict diamonds’ are banned from legitimate trade.

IX. Mainstream Financial Indices

Mainstream financial indices aim at changing the conduct of business enterprises through the activity of investors and markets by creating sets of social and environmental indices based on objective criteria against which companies are monitored. The FTSE Group⁷⁶, for example, is an independent company which develops and manages indices and associated data services to measure the performance of companies in respect of globally recognized corporate responsibility standards. Thus, the FTSE4Good IBEX Index⁷⁷ reviews companies devoted to maintain and promote universal human rights, environmental sustainability and which are trying to entertain positive relationships with stakeholders. It facilitates the identification of environmentally and socially responsible business enterprises in which interested groups can invest.

1. Imposing Human Rights Obligations on Business Enterprises – Possible Solutions

It is undisputed that business enterprises and TNCs should act in a responsible manner as their activity and behavior can have both beneficial and adverse effects on human rights and environmental standards. However, down to the present day neither at the domestic nor at the international level do directly binding obligations on business enterprises exist. Thus, even if there are numerous instruments and initiatives in respect of business enterprises and human rights, there remain a number of yet unanswered questions as to the nature and the scope of human rights responsibilities of business enterprises. Furthermore, the issue of implementation and monitoring is equally unsettled.

⁷³ See http://www.sa-intl.org/_data/n_0001/resources/live/2008StdEnglishFinal.pdf (last visited 7 February 2012).

⁷⁴ See <http://www.sa-intl.org/> (last visited 7 February 2012).

⁷⁵ See <http://www.kimberlyprocess.com> (last visited 7 February 2012).

⁷⁶ See <http://www.ftse.com/> (last visited 7 February 2012).

⁷⁷ See for the inclusion criteria http://www.ftse.com/Indices/FTSE4Good_IBEX_Index/Downloads/FTSE4Good_IBEX_Inclusion_Criteria.pdf (last visited 7 February 2012).

X. Are Business Enterprises Bound By Human Rights?

Similar to fundamental rights laid down in domestic constitutions, human rights are conceived as guarantees of the individual against the state. Human rights are a counterpoise to the state monopoly to use force. Thus, the primary duty bearer of human rights obligations is the state⁷⁸. In contrast, individuals whose acts cannot be attributed to the state are, as a matter of principle, not directly bound by international human rights provisions. Direct obligations on private individuals are imposed solely by international criminal law in respect of genocide, crimes against humanity and war crimes⁷⁹. Apart from that, private individuals can only be held responsible for human rights violations if a state enacts into its domestic law relevant provisions.

Having said that, it remains to be determined whether business enterprises can be equated with private individuals. As already exposed, in the last decades TNCs have gained such economic and financial power that they in certain cases easily surpass the state⁸⁰. Thus, there are strong and convincing grounds to claim that business enterprises should be considered as duty bearers of human rights obligations. Though, the extent of these obligations remains to be seen.

XI. Which Type of Human Rights Obligations for Business Enterprises?

The human rights obligations of states as primary duty bearers are threefold: states have the obligation (1) to *respect*, (2) to *protect* and (3) to *fulfil* human rights. The duty to respect human rights requires from states not to interfere with the guaranteed rights whereas the duty to protect imposes on states the obligation to effectively ensure the enjoyment of human rights by protecting the individual from interferences by private actors. Finally, the duty to fulfil requires from states to make available the conditions necessary for realizing and enjoying human rights⁸¹.

Again, due to the different role and objectives of business enterprises and states, a simple translation of states' obligations, i.e. the triad of the duty to respect, to protect and to fulfil, on business enterprises is not appropriate. The question of business enterprises obligations has been one of the crucial issues of all the international initiatives. The UN Global Compact frames it as expectation

⁷⁸ *Walter Kälin/Jörg Künzli*, *The Law of International Human Rights Protection*, Oxford/New York 2009 at p. 80.

⁷⁹ See art. 5 of the Rome Statute; arts. 1-5 of the Statute of the ICTY; arts. 1-4 of the Statute of the ICTR; *Robert Cryer/Håkan Friman/Darryl Robinson/Elizabeth Wilmshurst*, *An Introduction to International Criminal Law and Procedure*, 2nd edition 2010, at p. 4-5.

⁸⁰ See *supra* 1.

⁸¹ *Walter Kälin/Jörg Künzli*, *The Law of International Human Rights Protection*, Oxford/New York 2009 at p. 98-112.

HUMAN RIGHTS AND TRANSNATIONAL CORPORATIONS

to respect, to support and not be an accomplice of human rights violation⁸², the UN Draft Norms circumscribe the corporate obligation as “obligation to promote, secure the fulfilment of, respect, ensure respect of and protect human rights”⁸³. Finally, the “Protect, Respect and Remedy”-Framework of the Guiding Principles on Business and Human Rights contrasts the state duty to protect to the corporate responsibility to respect human rights⁸⁴.

In view of the different roles of states and business enterprises, the approach chosen by the Guiding Principles is the most convincing. Thus, business enterprises even if not directly bound by international human rights law have the responsibility not to interfere with human rights. This of course leaves ample room for further debates, inter alia, whether the core interest of business enterprises – to make profits – could alter the responsibility to respect human rights. There are voices which contend that profit interests of business enterprises have to be taken into account in terms of a balancing between the contradicting positions:

«Human rights law is generally based in a balancing between the interests of the state and the rights of the individual (...). The ICCPR (...) identifies these interests – national security (...), public order, public health or morals, and the right to freedoms of others – although it also recognizes that some rights cannot be suspended under any circumstances. Business enterprises, however, have different goals and interests that fundamentally rest on the need to maintain a profitable income stream. To talk about duties of business entities vis-à-vis individuals necessitates taking into account not only the rights of the individuals, but also these interests. Indeed (...) business themselves have some human rights, including privacy and association rights that, when exercised, inevitably have an impact upon individuals with whom they interact.

Consequently, the company's responsibility must, as an initial matter, turn on a balancing of the individual right at issue with the enterprise's interests and on the nexus between its action and the preservation of its interests.»⁸⁵

Thus, according to this view, interferences with individuals' human rights through the activity of business enterprises do not necessarily amount to a violation of the human rights concerned. Rather, such interferences should be accepted and justified provided that the pursuit of business interests is proportionate to the interference with individuals' rights. Only where the

⁸² See *supra* 4.1.3.

⁸³ See *supra* 4.1.4.

⁸⁴ See *supra* 4.1.6.

⁸⁵ *Steven R. Ratner, Corporations and Human Rights: A Theory of Legal Responsibility*, 111 Yale L.J. 443 (2001-2002) at p. 513 (citation omitted).

interference is not proportionate or where non-derogable rights are at stake a violation of human rights by TNCs and business enterprises could be affirmed⁸⁶.

Even though it undisputed that business enterprises and states have very different goals and interests past experiences teach us that noncommercial interest, i.e. human rights or environmental interest, hardly ever prevail when their realization is placed under the reservation of being economically viable or proportionate. While maybe not profitable from a short-term perspective, on the long run business enterprises will gain both financially as well as morally if they respect human rights unconditionally. Thus, business enterprises should have the responsibility to respect human rights without being able to claim profit interests for reducing their obligation.

The responsibility to respect human rights encompasses, as convincingly shown by the Guiding Principles on Business and Human Rights⁸⁷, not just abstaining from actively interfering with rights but entails some positive obligations. In order to assess these obligations, the TNC's role and functions as well as its relationship to the state are the decisive elements to be taken into account. Generally speaking, the greater the power and resources of TNCs in a particular state or field the broader the set of positive obligations.⁸⁸ Two indicators, the overall power imbalance on the one hand and the particular branch of the TNC on the other hand, offer pivotal guidance. When the power of business enterprises and that of the host state diverge widely, which occurs in politically and economically weak states, the obligation to take affirmative steps should increase significantly. The same mechanism ought to be applied in subject-specific areas where business enterprises act as social service and public utility provider or in cases where the activity of business enterprises consists in the exploitation of public resources. These specific areas or types of services justify imposing positive obligations. In India, for instance, Coca-Cola skimmed water from public sources for the purpose of realizing profit by means of a water contract. This activity allegedly led to drinking water scarcity and environmental problems in the affected region.⁸⁹ The positive obligation of business enterprises

⁸⁶ See *Steven R. Ratner*, *Corporations and Human Rights: A Theory of Legal Responsibility*, 111 *Yale L.J.* 443 (2001-2002) at p. 513-515; *Olivier De Schutter*, *The Accountability of Multinationals for Human Rights Violations in European Law*, in Philip Alston (Ed.), *Non-State Actors and Human Rights*, Oxford 2005, at p. 312.

⁸⁷ See *supra* 4.1.6.

⁸⁸ See *David Kinley/Junko Tadaki*, *From Talk to Walk: The Emergence of Human Rights Responsibilities for Corporations at International Law*, 44 *Va. J. Int'l L.* 931 (2003-2004) at p. 963-966.

⁸⁹ See *Beth Gardiner*, *Beverage Industry Works to Cap Its Water Use*, *The New York Times*, 21 March 2011, available at <http://www.nytimes.com/2011/03/22/business/energy-environment/22iht-rbog-beverage-22.html?pagewanted=all> (last visited 7 February 2012); *Paul Brown*, *Coca-Cola in India accused of leaving farms parched and land poisoned*, *The Guardian*, 25 July 2003, available at <http://www.guardian.co.uk/environment/2003/jul/25/water.india> (last visited 7 February 2012).

would consist in guaranteeing to the local population sufficient drinking water by either refraining from drawing it all or by actively placing it at their disposal.

XII. Which Human Rights do Business Enterprises Have to Respect?

Another issue that remains into the air is the question about which human rights business enterprises have to respect. The evolution that has taken place in this respect can clearly be seen in the wording of the different international instruments and initiatives. While the earlier instruments called for TNCs to respect primarily work-related human rights, the UN Global Compact was the first international instrument to introduce the sphere of influence-model. The Guiding Principles on Business and Human Rights, finally, state in Principle 12:

«The responsibility of business enterprises to respect human rights refers to internationally recognized human rights – understood, at a minimum, as those expressed in the International Bill of Human Rights and the principles concerning fundamental rights set out in the International Labour Organization’s Declaration on Fundamental Principles and Rights at Work.»

The Guiding Principles thus have dropped the limitation to the spheres of influence and extend business enterprises responsibility to respect human rights to the full spectrum of rights⁹⁰. However, it is clear that the risk of business enterprises violating human rights is less likely in those areas and contexts which are close to the exercise of state authority. Thus, it is hard to imagine how, e.g., defendants’ rights such as the right to an impartial and independent court, the presumption of innocence, the principle of non-retroactivity or the right to access to court could be infringed by business enterprises⁹¹. The same holds true in respect of rights relating to the individuals’ nationality or residence such as the freedom of domicile, the protection against expulsion, the right to seek asylum and some political rights (e.g. secret ballot, right to take part in government).

XIII. Conclusion: How could the Responsibility to Respect Human Rights be Established?

Having concluded that business enterprises have the responsibility to respect human rights, the crucial question remains how this responsibility should be established, implemented and monitored. As previously noted, the primary obligation to respect, protect and fulfil human rights rests on the states. Thus,

⁹⁰ See in this respect the 2008 Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and other Business Enterprises, UN Doc. A/HRC/8/16, paras. 5-18.

⁹¹ See *David Kinley/Junko Tadaki*, From Talk to Walk: The Emergence of Human Rights Responsibilities for Corporations at International Law, 44 Va. J. Int’l L. 931 (2003-2004) at p. 967; *Steven R. Ratner*, Corporations and Human Rights: A Theory of Legal Responsibility, 111 Yale L.J. 443 (2001-2002) at p. 492-493.

based on the states' duty to protect it is primarily incumbent on the states to guarantee human rights respect by business enterprises. However, where the state for whatever reason (political unwillingness, lack of institutional capacities and resources, fear of losing investments, complicity of the business enterprise in violations committed by the authorities) is unwilling or unable to fulfil its obligations, the spectre of impunity appears. Unfortunately, this holds true for most states where business enterprises do violate human rights. In contrast, the states of origin of the enterprises would in most cases be in a position to hold business enterprises liable. They are, however, reluctant to enact extraterritorial regulations and assume jurisdiction for human rights violations that have occurred abroad (of course with the notable exception of the ATCA in the United States).

At the international level the situation is not much better. So far the efforts to create binding international legal obligations for TNCs proved not to be successful. Rather, all existing international instruments and initiatives are based on voluntariness. They might over time contribute to the formation of an international custom but are currently lacking the effectiveness required for safeguarding human rights.

Having said that, the course adopted by the Special Representative for Business and Human Rights, John Ruggie, might provide a roadmap for a way out of the current impasse. The Guiding Principles on Business and Human Rights are a non-binding document. However, it can be hoped that over time they become the benchmark for assessing human rights performance of business enterprises and will move one day from soft law to customary international law.