LIABILITY OF MULTINATIONAL CORPORATIONS UNDER INTERNATIONAL LAW

Studies and Materials on the Settlement of International Disputes

Volume 7

Series Editor
Professor Peter Malanczuk, *Chair of International Law, Erasmus University Rotterdam*

Liability of Multinational Corporations under International Law

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Note by the Series Editor

The present series *Studies and Materials on the Settlement of International Disputes* (SMSID) started as a contribution to the United Nations Decade of International Law (the programme announced by the UN General Assembly for the period 1990-1999) which attached particular importance to the issue of dispute settlement. The series intends to address the issue of international dispute settlement and prevention from an interdisciplinary perspective – law, economics, history and politics – with the primary objective, however, to search for answers to the question of how to strengthen the rule of law in international relations. For practical purposes, this objective requires a broad perspective and must cover not only the analysis of the peaceful settlement of international disputes, but also the role of the use of force and its legitimacy. Furthermore, while the traditional focus of studies in this area has been limited to interaction between states, the series encourages the analysis also of international dispute settlement involving international organizations and non-state actors, including individuals, minorities, indigenous people, non-governmental organizations, and transnational companies. Finally, the series will also assist in exploring more in depth the linkages between dispute settlement in 'public international law' and 'international commercial arbitration' and their significance for enhancing the international rule of law.

The first volume of the series was published in 1996 by Dr. Mojtaba Kazazi on the topic *Burden of Proof and Related Issues*, an excellent study on evidence before international tribunals. The second volume, which also appeared in 1996, was written by Professor Karel Wellens and undertook a functional and well-researched analysis of the hitherto widely unknown field of *Economic Conflicts before the World Court (1922-1995)*. The third volume of the series, published in 1998, by Professor Juliane Kokott continued research into the area explored by Dr. Kazazi and addressed *The Burden of Proof in Comparative and International Human Rights Law* comparing civil law and common law approaches in an in-depth study with a

focus on the American and German legal systems. The fourth volume *International Law in Post-Colonial Africa*, written by Professor Tiyanjana Maluwa, appeared in 1999 and contains an illuminating and scholarly written analysis, including a number of case studies, of the contribution of African States to the development of international law in a variety of areas, including dispute settlement. The fifth volume *Exclusion from Participation in International Organisations: The Law and Practice behind Member States' Expulsion and Suspension of Membership*, a thorough study on dispute settlement between member states and international organizations and their organs, was prepared by Professor Konstantinos D. Magliveras and also published in 1999. The sixth volume *Judicial Review, the International Court of Justice and Judicial Review: A Study of the Court's Powers with Respect to Judgements of the ILO and UN Administrative Tribunals*, written by Dr. Kaiyan Homi Kaikobad, was printed in 2000.

The present seventh volume *Liability of Multinational Corporations Under International Law*, co-edited by Menno Kamminga and Saman Zia-Zarifi, enters new and important ground in the general discussion on the role of multinational companies.[1] It is part of a larger research project that has been conducted for several years at the Department of International Law and the GLODIS-Institute of the Law Faculty of Erasmus University Rotterdam (see *www.eur.nl/glodis* and the special website *www.multinationals.law.eur.nl*). This project culminated in a colloquium held in Rotterdam on 29 and 30 April 1999. The colloquium assembled a unique group of international legal academics and practitioners to discuss the current legal status of transnational companies under international law and, especially, the possible role of international law in controlling and limiting the abuse of human rights by the global operations of such private entities. The book is highly innovative in the approach it takes as well as in the insights it produces. It is certainly a major contribution to the newly evolving debate and emerging international practice concerning the development of adequate international standards that may apply to the transnational activities of multinational companies.

Professor Menno T. Kamminga holds the Chair of Public International Law at Maastricht University (since 2000). He is also Co-Director of the

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1 See P. Malanczuk, 'Multinational Enterprises and Treaty-Making – A Contribution to the Discussion on Non-State Actors and the "Subjects" of International Law', in: Vera Gowland-Debbas (ed.), *Multilateral Treaty-making: The Current Status of Challenges to and Reforms Needed in the Legislative Process*, Proceedings of The American Society of International Law/Graduate Institute of International Studies, Forum Geneva, May 16, 1998, Geneva, Switzerland. Kluwer Law International: The Hague / London / Boston: 2000, pp. 35-62.

Maastricht Centre for Human Rights. Previously, he was Associate Professor at the Department of International Law and member of the GLODIS-Institute (of which he is now an External Academic Fellow) at Erasmus University. He is a former Legal Advisor and Representative at the United Nations of Amnesty International (1978-86). Professor Kamminga is also a former member of the International Executive Committee of Amnesty International (1994-99). Furthermore, he is member of the Board of Editors of the *Netherlands International Law Review*, and rapporteur for the International Law Association (ILA) Committee on International Human Rights Law and Practice on the Exercise of Universal Jurisdiction in Respect of Gross Human Rights Offences. His degrees include an LL.M. from Groningen University (1973), an MA from the Fletcher School of Law and Diplomacy (1974) and a Ph.D. from Leiden University (1990). Among his other publications in various areas of international law is his well-known book *Inter-State Accountability for Violations of Human Rights* (1992). Professor Kamminga was the initiator and project-leader of the research on the international responsibility of multinational companies in Rotterdam.

Saman Zia-Zarifi is currently a Senior Research Fellow at the Department of International Law and the GLODIS-Institute of Erasmus University Law School. He was specially engaged to work on the multinationals project, including convening the colloquium that led to this volume and editing the results. As part of his project, he served as a consultant to the European Parliament, the European Trade Union Technical Bureau, and several NGOs including Amnesty International, the International Union for the Conservation of Nature, and Oxfam. He has written extensively on the impact of multinational corporations and economic globalization on human rights. He is an Iranian national with permanent residence in the United States. He obtained a Bachelor of Arts from Cornell University (1990), his Juris Doctor from Cornell Law School (1993) and an LL.M. from New York University School of Law (1997). He practiced for several years as a corporate litigator in California. At the time of writing, he is preparing to take up new responsibilities with Human Rights Watch in New York as Director of the Academic Freedom program.

I am very pleased to include this stimulating book in the Series and am confident that it will attract much attention. This it fully deserves.

Peter Malanczuk, Series Editor
Director of the GLODIS-Institute
Chair of International Law, Erasmus University Rotterdam
Honorary Professor, Peking University

The Hague, July 2000

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We would like to thank the Board of Erasmus University for their confidence in us and their generous funding of this research project and the Colloquium which led to this book. We would also like to extend our gratitude to the faculty and staff of the Erasmus University Law School, and especially the Department of Public International Law, for providing a unique environment in which to conduct our research.

We are particularly thankful of the excellent research assistance provided by Serge Bronkhorst, who helped begin this project, and Tania van Dijk, who was especially helpful in the organization of the Colloquium and the editing of this book. The compilation of material from widely disparate sources in a relatively new field of law requires a great deal of patience and creativity, and fortunately for us both researchers exhibited these traits in abundance. We would like to acknowledge Erik Eldor Koudijs, who provided to us his excellent taste and eye for detail in transforming this collection of manuscripts into a book.

Finally, we would like to thank our respective families for their unstinting support.

MTK & SZ

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Section III: Domestic Approaches

List of Abbreviations

A. 2d	Atlantic Reporter (US, State Courts)
AC	Appeal Cases (Law Reports, UK)
AI	Amnesty International
AJIL	*American Journal of International Law*
Alb. L. Rev.	*Albany Law Review*
All ER	All England Law Reports
Am. U. J. Int'l L. & Pol'y	*American University Journal of International Law and Policy*
Am. U. L. Rev.	*American University Law Review*
ANZSIL	Australian and New Zealand Society of International Law
Ariz. Ct. App.	Arizona Court of Appeal
Ariz. J. Int'l & Comp. L.	*Arizona Journal of International and Comparative Law*
Asian Y.B. Int'l L.	*Asian Yearbook of International Law*
ATCA	Alien Tort Claims Act (US)
B.C. Int'l & Comp. L. Rev.	*Boston College International and Comparative Law Review*
B.C. Third World L.J.	*Boston College Third World Law Journal*
BITs	Bilateral Investment Treaties
Brit. Y.B. Int'l L.	*British Yearbook of International Law*
Brook. J. Int'l L.	*Brooklyn Journal of International Law*
B.U. Int'l L. J.	*Boston University International Law Journal*
Bus. & Soc'y Rev.	*Business and Society Review*
CA	Court of Appeal (UK)
Cal. W. Int'l L.J.	*California Western International Law Journal*

Can. Y.B. Int'l L.	*Canadian Yearbook of International Law*
Cardozo L. Rev.	*Cardozo Law Review*
Ch.	Chancery Division (Law Reports, UK) [Note: when not referring to chapter]
CCR	Center for Constitutional Rights
C.D. Cal.	District Court for Central District of California (US, Federal)
CEO	Chief Executive Officer
CERD-Communication	Communication of the Committee for the Elimination of Racial Discrimination
CIME	Committee on Investment and Multinational Enterprises (of the OECD)
Cir.	Circuit Court of Appeals (US, Federal)
Colo. J. Int'l Envtl L. & Pol'y	*Colorado Journal of International Environmental Law and Policy*
Colum. J. Transnat'l L.	*Columbia Journal of Transnational Law*
Colum. J. World Bus.	*Columbia Journal of World Business*
Common Mkt. L. Rev.	*Common Market Law Review*
Comp. Lab. L.	*Comparative Labour Law*
Conn. J. Int'l L.	*Connecticut Journal of International Law*
Cornell L. Rev.	*Cornell Law Review*
Crim. App. Rep.	Criminal Appeal Reports (UK)
D.C. Cir.	Court of Appeals for District of Columbia (US, Federal)
D.D.C.	District Court for District of Columbia (US, Federal)
Denv. J. Int'l L. & Pol'y	*Denver Journal of International Law and Policy*
DITE	Division on Investment Technology and Enterprise Development (of UNCTAD)
D. Mass.	District Court for District of Massachusetts (US, Federal)
D.N.J.	District Court for District of New Jersey (US, Federal)
DTCI	Division on Transnational Corporations and Investment (predecessor of DITE)
Duke J. Comp. & Int'l L.	*Duke Journal of Comparative and International Law*
Duke L.J.	*Duke Law Journal*

ECHR	European Convention on Human Rights (Convention for the Protection of Human Rights and Fundamental Freedoms)
ECJ	European Court of Justice
ECOSOC	Economic and Social Council (UN)
ECR	European Court Reports
E.D. La.	District Court for Eastern District of Louisiana (US, Federal)
E.D.N.Y.	District Court for Eastern District of New York (US, Federal)
EEC	European Economic Community
EJIL	*European Journal of International Law*
ELNI-Newsletter	Environmental Law Network International - Newsletter
Envtl. L.	*Environmental Law*
ESCOR	Economic and Social Council Official Records (UN)
EU	European Union
Eur. Ct. H.R.	European Court of Human Rights
Eur. L. Rev.	*European Law Review*
Eur. Rev. Private L.	*European Review of Private Law*
F.2d	Federal Reporter (second series) (US, Courts of Appeals)
F.3d	Federal Reporter (third series) (US, Courts of Appeals)
FDI	Foreign Direct Investment
Fed. L. Rev.	*Federal Law Review*
Fordham Int'l L. J.	*Fordham International Law Journal*
Fordham L. Rev.	*Fordham Law Review*
Foreign Aff.	*Foreign Affairs*
Foreign Pol'y	*Foreign Policy*
F.R.D.	Federal Rules Decisions (US)
FSIA	Foreign Sovereign Immunities Act (US)
F. Supp.	Federal Supplement (US, Federal District Courts)
GA	General Assembly (UN)
Ga. J. Int'l & Comp. L.	*Georgia Journal of International and Comparative Law*
Ga. L. Rev.	*Georgia Law Review*
GAOR	General Assembly Official Records (UN)

GATT	General Agreement on Tariffs and Trade
German Y.B. Int'l L.	*German Yearbook of International Law*
Green Globe Y.B.	Green Globe Yearbook
Harv. Bus. Rev.	*Harvard Business Review*
Harv. L. Rev.	*Harvard Law Review*
Hastings Int'l & Comp. L. Rev.	*Hastings International and Comparative Law Review*
Hofstra L.& Pol'y Symp	*Hofstra Law and Policy Symposium*
HR	Hoge Raad (NL)
Hum. Rts. Q.	*Human Rights Quarterly*
ICC	International Criminal Court
ICCPR	International Covenant on Civil and Political Rights
ICCR	Interfaith Center on Corporate Responsibility
ICERD	International Convention on the Elimination of Racial Discrimination
ICESCR	International Covenant on Economic, Social and Cultural Rights
ICFTU	International Confederation of Free Trade Unions
ICHRDD	International Centre for Human Rights and Democratic Development
ICRC	International Committee of the Red Cross
ICSID	International Centre for the Settlement of Investment Disputes
ICSID Rev.	*ICSID Review-Foreign Investment Law Journal*
ILM	*International Legal Materials*
ILO	International Labour Organization
Inter-Am. Ct. H.R.	Inter-American Court of Human Rights
Int'l & Comp. L.Q.	*International and Comparative Law Quarterly*
Int'l Envtl. L. Rep.	*International Environmental Law Reports*
Int'l Hum. Rts. Rep.	*International Human Rights Reports*
Int'l L. Rep.	*International Law Reports*
Int'l Law.	*International Lawyer*
Int'l Rel.	*International Relations*
IMGES	Independent Monitoring Group of El Salvador

J. Bus. Ethics	*Journal of Business Ethics*
J. Int'l Bus.	*Journal of International Business*
J. Int'l Econ. L.	*Journal of International Economic Law*
J. L.& Inequality	*Journal of Law and Inequality*
J. Pol.	*Journal of Politics*
J. Transnat'l L. & Pol'y	*Journal of Transnational Law and Policy*
J. World Trade L.	*Journal of World Trade Law*
KG	Kort Geding (NL)
LBR-Bulletin	*Landelijk Buro Racismebestrijding-Bulletin*
Leiden J. Int'l L.	*Leiden Journal of International Law*
Lloyd's Rep.	Lloyd's Law Reports (UK)
L.Q. Rev.	*Law Quarterly Review*
MAI	Multilateral Agreement on Investment
Melb. U. L. Rev	*Melbourne University Law Review.*
MEP	Member of European Parliament
Mich. J. Int'l L.	*Michigan Journal of International Law*
Minn. J. Global Trade	*Minnesota Journal of Global Trade*
Minn. S.C.	Minnesota Supreme Court
MNCs	Multinational Corporations
MNEs	Multinational Enterprises
N.C. J. Int'l L. & Com. Reg.	*North Carolina Journal of International Law and Commercial Regulation*
N.D. Cal.	District Court for Northern District of California (US, Federal)
N.D. Ga.	District Court for Northern District of Georgia (US, Federal)
Neth. Int'l L. Rev.	*Netherlands International Law Review*
Neth. Q. Hum. Rts.	*Netherlands Quarterly of Human Rights*
Neth. Y.B. Int'l L.	*Netherlands Yearbook of International Law*
New. L.J.	*New Law Journal*
New Zealand L. Rep.	New Zealand Law Reports
NGOs	Non-Governmental Organizations
NIEO	New International Economic Order
NJ	*Nederlandse Jurisprudentie* (NL)
NJCM-Bulletin	*Netherlands Juristen Comité voor de Mensenrechten – Bulletin*
NL	Netherlands
NTI	National Treatment Instrument

Nw. 2d	North Western Reporter (US, State Courts)
Nw. J. Int'l L. & Bus.	*Northwestern Journal of International Law and Business*
OAS	Organization of American States
OAU	Organization of African Unity
OECD	Organisation for Economic Cooperation and Development
O.J.	*Official Journal of the European Communities*
Oxford J. Legal Stud.	*Oxford Journal of Legal Studies*
Oxford U. J. Envtl. L.	*Oxford University Journal of Environmental Law*
P. 2d	Pacific Reporter (US, State Courts)
Pa. S.C.	Pennsylvania Supreme Court
Rb.	Rechtbank (NL)
Rev. Eur. Community & Int'l Envtl. L.	*Review of European Community and Environmental Law*
S.C. Vic.	Supreme Court Victoria (Australia)
S.D. Fla.	District Court for Southern District of Florida (US, Federal)
S.D. Ind.	District Court for the Southern District of Indiana (US, Federal)
S.D.N.Y.	District Court for Southern District of New York (US, Federal)
SI	Statutory Instrument (UK)
Stan. Envtl. L.J.	*Stanford Environmental Law Journal*
St. Mary's L.J.	*St. Mary's Law Journal*
Suffolk Transnat'l L. Rev.	*Suffolk Transnational Law Review*
Sup. Ct. Rep.	Supreme Court Reporter (India)
Temp. Int'l & Comp. L.J.	*Temple International and Comparative Law Journal*
Tex. L. Rev.	*Texas Law Review*
Third World Legal Stud.	*Third World Legal Studies*
Third World Q.	*Third World Quarterly*
Tilburg Foreign L. Rev.	*Tilburg Foreign Law Review*

TK	*Verslag der Handelingen van de Tweede Kamer der Staten-Generaal* (NL)
TLR	Times Law Reports (UK)
TMA	*Tijdschrift voor Milieuaansprakelijkheid*
TNCs	Transnational Corporations
Transnat'l Corp.	*Transnational Corporations*
Transnat'l Law.	*Transnational Lawyer*
TVPA	Torture Victim Protection Act (US)
TVVS	*Tijdschrift Voor Vennootschappen, Verenigingen en Stichtingen*
U.C. Davis L. Rev.	*University of California at Davis Law Review*
UCLA J. Int'l L. & Foreign Aff.	*UCLA Journal of International Law and Foreign Aff.*
UDHR	Universal Declaration of Human Rights
UK	United Kingdom
U. Miami Inter-Am. L. Rev.	*University of Miami Inter-American Law Review*
UN	United Nations
UNCTAD	United Nations Conference on Trade and Development
UNCTC	United Nations Commission on Transnational Corporations
UNHCHR	United Nations High Commissioner on Human Rights
U.N.T.S.	United Nations Treaty Series
U. Pa. J. Int'l Econ. L.	*University of Pennsylvania Journal of International Economic Law*
U. Rich. L. Rev.	*University of Richmond Law Review*
US	United States
U.S.	United States Supreme Court Reports
U.S.T.	United States Treaties
Va. J. Int'l L.	*Virginia Journal of International Law*
Val. U. L. Rev.	*Valparaiso University Law Review*
Vand. J. Transnat'l L.	*Vanderbilt Journal of Transnational Law*
V.R.	Victorian Reports
Wash. & Lee L. Rev.	*Washington and Lee Law Review*
W.D. Appeal Docket	Westlaw Electronic Library Court of Appeals Rulings (US)

W.D. Washington	District Court for the Western District of Washington (US)
WHA	World Health Assembly
WHO	World Health Organization
WIR	World Investment Report
WLR	Weekly Law Reports (UK)
WTO	World Trade Organization
Yale J. Int'l L.	*Yale Journal of International Law*
Y.B. Int'l Humt. L.	*Yearbook of International Humanitarian Law*
ZaöRV	*Zeitschrift für ausländisches öffentliches Recht und Völkerrecht*

SECTION I

Introduction and Overview

INTRODUCTION

Liability of Multinational Corporations Under International Law: An Introduction

MENNO T. KAMMINGA AND SAMAN ZIA-ZARIFI*

What is the liability of multinational corporations ('MNCs') for violating international legal standards? When we began the research project that culminates with this book, the stock answer to this question was that MNCs incurred few, if any, liabilities for violating international standards of conduct.[1] But after three years of research, an important part of which was the Colloquium that inspired the present collection, we found that our early response was incorrect, or at least incomplete. The existing international legal system does place obligations on private actors such as MNCs, and the shirking of these obligations can lead to liability. This assertion is not to deny the unsatisfactory state of international law regarding the status of MNCs and their impact – positive or negative – on our society and the environment. Rather, this assertion encapsulates the conclusion of our research, and of the contributions to this volume, that while MNCs still lack international legal responsibility commensurate with their role and influence in international and domestic affairs, the rapid growth of MNC activity and the desire and need to protect their economic activities has now placed MNCs within the ambit of international law, and that this placement is secure and likely to increase. In short, we are now confident that liability of MNCs under international law is necessary, is possible, and is inevitable.

* Menno T. Kamminga is Professor of Public International Law at Maastricht University. He was a member of the International Executive Committee of Amnesty International. Saman Zia-Zarifi is Senior Research Fellow at the Department of Public International Law, Erasmus University Rotterdam, where he conducts the research project on multinational corporations under international law. He was a corporate litigator in California.

1 But even 30 years ago, Prof. Vagts could point to the fact that 'as the literature about the MNE [Multinational Enterprise] grows exponentially, the question arises whether the legal profession should not be developing responses to it. As yet it has not; statutory or case law reaction is virtually nonexistent and the secondary coverage is thin'. D.F. Vagts, 'The Multinational Enterprise: A New Challenge for Transnational Law', 83 *Harv. L. Rev.* (1970), p. 739 at p. 739.

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Our research began with the observation that some multinational corporations, in their search for profits around the world, were committing abuses in their host countries either directly through their activities or indirectly by colluding with abusive governments that were unable or unwilling to address such violations, especially in the developing world. With foreign direct investment replacing intergovernmental aid as the most important means of transferring capital and technical know-how from the developed to the developing world, governments in developing countries are tempted to – and in some cases feel compelled to – attract investors by minimizing the potential costs facing investing MNCs. This desire, compounded in many instances by the relative weakness of host States compared to the larger and more experienced MNCs, means that injured citizens of these host States are left without any legal recourse unless they leave the boundaries of their own States, either to seek justice in the MNCs' home States or at some international or regional forum – thus implicating an international legal system that seemingly did not recognize, much less address, the real source of their damages. The problem with this state of affairs, aside from the obvious and intolerable injustice, was that it made a mockery of a system that claimed to embody international law but did not cover the behaviour of actors whose role in international transactions – commercial, cultural, social – already rivalled that of States.

For international law to deal with the problems and promises of MNC activity, it must face a number of complexities peculiar to the nature of multinational corporations and their transboundary activity. Here, we will briefly outline our own research on this discussion within the framework of explaining the terms we have used for the title of this book.

'Multinational Corporation'

The type of entity we have labelled a multinational corporation is also described in different combinations of the terms multinational, transnational, corporation, business and enterprise. Accordingly, we allowed the different contributors to this book to use the term they preferred. But there is little disagreement about the core concept: A business is called an MNC (or TNC or MNE) '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] Our selection of the term 'multinatio-

2 L. Wildhaber, 'Some Aspects of the Transnational Corporation in International Law', 27 *Neth. Int'l L. Rev.* (1980), p. 79 at p. 80.

nal' as opposed to 'transnational' simply reflects the latter term's close correspondence with the now discredited New International Economic Order movement of the 1970s[3] and our desire to use the former in order to reflect the terminology most frequently used by the MNCs themselves.[4] Regardless of the terms used, it is the ability of MNCs to operate across national borders and outside the effective supervision of domestic and international law that makes them important actors ripe for greater investigation under international law.

An initial consideration was whether to focus on multinational corporations or on all corporations including those that only operate within one country. We chose the former approach, although it is clear that many of the important legal considerations applicable to multinational corporations apply equally to those with domestic operations. For instance, the duty to promote and protect human rights under the language of the Preamble to the Universal Declaration of Human Rights applies to all corporations, as important 'organs of society', regardless of the range of their operations. Similarly, multilateral environmental standards and labour regulations should apply to corporations without consideration of their domestic or multinational nature. Nevertheless, we focused on corporations with multinational operations because their amorphous structure renders them immune to the control of any single State and requires regulation and protection at the international level.

MNCs may be characterized by the twin criteria of having legal status and profit motive, and our selection of the term 'corporation', as opposed to the broader term 'enterprise', simply reflects the terminology commonly used in the commercial world to refer to particular profitseeking operators. Legally, a corporation refers to a for-profit organization with a legal standing apart from its shareholders and with the ability of transacting business – hence providing such synonyms for 'corporation' as 'legal person', 'legal entity' or '*personne juridique*'. Under this fiction, the law creates a 'corporate' entity and then vests it with certain powers and responsibilities, or rather, rights and duties. In the case of multinational corporations, this

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3 T. Wäelde, 'A Requiem for the "New International Economic Order"', in: G. Hafner et al. (eds.), *Liber Amicorum Ignaz Seidl-Hohenveldern in honour of his 80th Birthday* (1998), p. 771.

4 The term 'transnational' is accordingly still used mostly by the United Nations and its related organs, while the term 'multinational' appears more frequently in institutions more closely associated with the business community itself, for instance the Organisation for Economic Cooperation and Development and the International Chamber of Commerce.

corporate entity is highly peculiar, since no single law creates the MNC and thus no single law delineates the limits of its proper activity. To deal with this peculiarity, the term 'corporation' signifies a unified entity that can be held liable, as opposed to the liability of an MNCs' officers or shareholders as individuals under international law (established since the Nuremberg trials of German industrialists) or the liability of individual business subsidiaries in different States. In this context, it is useful to remember that the term 'corporation' has a significant historical antecedent in describing the commercial guilds that served as quasi-sovereign entities in the medieval world and serves to remind us that the State's exclusive role in international law over the past century is neither inevitable nor permanent, and that corporate entities can and very likely will exist as subjects of international law.[5]

One of the complexities of addressing MNCs is distinguishing them from other multinational groups and organizations. Profiteering criminal organizations could have significant impact on international trade or human rights, but they exist by definition outside the law. On the other hand, legally recognized political groups, such as political parties, may operate across national borders and affect international and domestic affairs, but their avowed aim is not the accumulation of profits. While corporations, *per se*, are the main focus of our research and this volume, most of the conclusions and analyses presented here could just as well apply to other legal commercial forms that are not strictly private corporations, such as banks and partnerships. Finally, and perhaps of most practical significance, the extension of international law to cover MNCs must also address corporations with significant State components – either joint ventures with host States, or, less explicitly but more common, 'national champion' MNCs whose interests are so closely linked with those of their home States as to significantly implicate these States in their operations. While these complexities deserve serious future study, it is important to note here that the basic MNC is fairly easy to identify as the international aggregation of fictional commercial entities with legal status. In the absence of adequate domestic regulation of these entities, it is necessary to create an international regime that can guide their behaviour.

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5 For a development of the philosophical history of this notion, see C.J. Nederman, 'Sovereignty, War and the Corporation: Hegel on the Medieval Foundations of the Modern State', 49 *J. Pol.* (1987), p. 500.

'International Law'

If we can now realistically discuss the possibility of holding MNCs liable under international law it is because international law has already learned to address MNCs in terms of protecting their interests. The existing legal framework for MNCs has developed to facilitate the increasing economic interaction of European States and the US amongst each other and with the developing world. The prevailing legal standard has been the doctrine of State responsibility for injuries to aliens and their property, both as customary international law and as institutionalized in a number of instruments such as the regime under the World Trade Organization, the European Community, the North American Free Trade Agreement, the Organisation for Economic Cooperation and Development, and bilateral investment treaties between those States home to MNCs and those States hosting them. These legal instruments show that the drive for greater international liberalization has not really been towards decreasing the laws applicable to MNCs, but rather increasing the laws protecting MNCs *vis-à-vis* States. The demand by MNCs for deregulation and the departure of the State from many economic and social fields in essence privatized the functions of States; it logically follows that the entities that took over these functions should also assume the ensuing obligations. This concept is familiar in domestic law, where private parties that conduct themselves in a manner resembling a State or pursuant to State authorization are subject to the same constitutional standards as public officials.[6]

The aforementioned international legal instruments, essentially the core of international economic law, clearly show two conceptualizations of MNCs under international law: On the one hand, MNCs are juridical individuals, composed of separate enterprises each (potentially) responsible to domestic legislation in different sovereign States; on the other hand, MNCs are unified entities with common strategy and resources beyond the control of any single State. What is interesting about these two conceptual approaches is that they can be used by proponents of facilitating MNC activity, as well as those advocating regulation of such activity.[7] Not surprisingly, MNCs

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6 M.T. Kamminga, 'Holding Multinational Corporations Accountable for Human Rights Abuses: A Challenge for the EC', in: P. Alston (ed.), *The EU and Human Rights* (1999), p. 554.

7 See, for instance, the seminal article by G. Ball, 'Cosmocorp: The Importance of Being Stateless', 2 *Colum. J. World Bus.* (1967), p. 25, arguing that the lack of adequate international regulations deprives MNCs of their ability to 'pursue the true logic of the global economy'.

emphasize the former view when seeking protection from States, and the latter view when trying to minimize their obligations. While MNCs may be able to exploit in the short term this gap between their international rights and duties, it seems more probable – indeed, inevitable – that the need for greater protection of MNC activity in some areas will entail a corresponding growth in their responsibility in some areas of activity. Perhaps the clearest example of this tension between greater MNC rights and duties was the negotiations surrounding the failed OECD Multilateral Agreement on Investment, which sought to give MNCs standing to bring international legal action against States violating the treaty's provisions. MNCs abandoned the process once it became obvious that the treaty's lopsided pro business stance could have been balanced by some sort of binding standard of behaviour (no matter how weak). Recent public pressure on international economic institutions such as the World Trade Organization, the International Monetary Fund and the World Bank indicates growing demand to balance the rights and duties of MNCs as quasi individual self-interested actors with powerful quasi State powers.

Through this synthesis of the legal thinking about the rights and duties of States and individuals (both of which are well-studied subjects of international law), we can finally discuss MNCs as bearers of both rights and duties under international law without necessarily having to threaten the existing predominance of State sovereignty as the focus of public international law. That is, international law is not a zero-sum system, in which conferring legal subjecthood on one entity denies it to all others; in the particular instance of MNCs, the partaking of private profit-seeking entities of some of the rights and obligations previously granted only to States (and in some instances, individuals) does not deny these rights and obligations to the States (or the individuals). In this view, international legal personality of MNCs points toward growth of a complementary system of law that fills the penumbra of existing State-centred international law and facilitates, as well as regulates, activity undertaken by, through, and with sovereign States and their citizens.

This development obviates the primary objection expressed by States against some degree of international subjecthood for MNCs. The relative absence of MNCs from formal international law discourse in the past reflected common interests on the parts of States and MNCs, since the former were loathe to weaken their monopoly on international status, while the latter were (and remain) reluctant to assume any international legal obligations. Furthermore, the overwhelming majority of MNCs are based in the powerful States that continue to dominate international lawmaking, and these

powerful States have been and continue to be able to regulate their own MNCs domestically, when the need has arisen, while benefiting from the revenue and influence garnered by their MNCs in the absence of any international regulations. Nevertheless, even the most powerful States, and their MNCs, have increasingly turned to international law to facilitate their wealth-generating activities, for instance through international liberalization efforts (the WTO, NAFTA) and multilateral attempts against anti-competitive activity (the OECD anti-corruption convention). Conversely, weaker States, or those historically not benefiting from MNC activity on their territory (or on the territory of their competitors) have not always supported international laws regarding MNCs because these laws, when they have existed, have been to the disadvantage of these States (anti-expropriation laws, protectionist barriers, anti-development measures). But these States too now find international law a useful conduit for their aspirations, via international development rules on technology transfer, trade liberalization measures facilitating their exports and efforts to curb the negative impact of MNCs. An overview of the shifting perceptions of international law and MNCs toward international legal regulation of MNCs appears in the following chapters in the first section of this book.

While there is no question that international law still has a long way to go before it provides clear guidelines for MNC behaviour, it is clear – logically and empirically – that providing clear rules for MNCs operating throughout the world and fostering a uniform competitive field for commercial activity only brings together the process already under way in the fields of private international law, international economic law, international environmental law, international criminal law and international human rights law, and will be of mutual benefit to MNCs, the States in which they operate, and most important, the citizens of these States. As set out in the following chapters, international law can now expand its reach to facilitate the beneficial results of MNC activity while holding MNCs liable for deviating from international norms of conduct.

'Liability'

In contrast to their great enthusiasm for binding international rules that protect and facilitate their activity, MNCs have argued vociferously against any sort of international rules that would hold them accountable for any damages they cause. MNCs claim that such a development would hamper

their commercial activities.[8] But there is no question that corporations thrive most in the highly regulated, highly litigious environments of North America and Western Europe.[9] Furthermore, corporations were (and remain) very active in promulgating internationally binding standards for the protection of their investments and competitiveness, now securely in place through the WTO system, the macroeconomic regulations of the International Monetary Fund, and the nearly 2,000 bilateral investment treaties in existence.[10] When facing the problem of international bribery, long a bane (and accepted cost) of multinational business operators, corporations were instrumental in the creation and passage of a multilateral convention that makes bribery of public officials by private MNCs illegal, and indeed demands criminal sanctions for such activity. If the unethical and antidemocratic practice of bribery is considered proper for international regulation, it seems disingenuous to argue that other, even less ethical practices, such as profiteering from environmental and human rights abuse, should not be subject to international law in order to maintain a phantom commercial advantage. It now seems possible, indeed highly probable, that a regime of international legal liability for MNCs can and will be developed.

Not all international law can or should be transferred wholesale to cover MNC activity, but it is clear that some international legal standards already apply directly to MNCs while others should serve as guideposts for corporate behaviour. There is now a growing consensus that MNCs are bound by those few rules applicable to all international actors, plus a continuum of obligations that refer specifically to a corporation's activity and influence. Under the category of generally applicable international rules, MNCs must respect the national sovereignty of the States in which they operate to the extent consistent with their international obligations; MNCs are prohibited from engaging directly or indirectly in violations of *jus cogens* principles (such as the prohibition of slavery and forced labour, genocide, torture, extrajudicial murder, piracy, crimes against humanity, and apartheid); MNCs must promote and protect certain human rights and labour principles pertaining to their area of activity (such as the right of their employ-

8 M. Baker, 'Private Codes of Conduct: Should the Fox Guard the Henhouse?', 24 *U. Miami Inter-Am. L. Rev.* (1993), p. 399.

9 UNCTAD, *World Investment Report: Foreign Direct Investment and the Challenge of Development* (1999); OECD, *Trade, Employment and Labour Standards: A Study of Core Workers' Rights and International Trade* (1996).

10 For development of this idea, see K.P. Sauvant and V. Aranda, 'The International Legal Framework for Transnational Corporations', in: A.A. Fatourous (ed.), *Transnational Corporations: The International Legal Framework* (United Nations Library on Transnational Corporations, Vol. 20) (1994), p. 83.

ees to free association and a decent pay, the prohibition of child labour and racial and sexual discrimination in the work place, and the maintenance of a safe work environment); MNCs must observe the principles of sustainable development; and MNCs must not engage in bribery or corruption of government officials. The second category of rules applicable to MNCs is obviously more specific to any given corporation's particular activity and requires a factual analysis of the corporation's influence on the local situation; the greater an MNC's real influence, the greater its obligations to observe international legal standards. This short list is neither exhaustive nor comprehensive. What it does reflect is growing sophistication about the role of MNCs in international affairs and thus under international law, and so it is likely that this list will grow in range and detail.

Beyond the question of the identity of the norms applicable to MNCs, and of greater immediate concern to us, is the development of mechanisms whereby any international legal obligations could be meaningfully enforced on MNCs. It is now fashionable, and strongly encouraged by MNCs themselves, to discuss the responsibilities of corporations in terms of social accountability, good governance, responsible citizenship, or other such formulations, in lieu of international legal obligations. This approach has some value in terms of creating 'soft law' that could gel into 'hard law' regulating the activity of MNCs and the States in which they operate.[11] But through the course of our research, we grew increasingly sceptical about the effectiveness of this approach, which centres on making corporations seem more responsive to their shareholders, or stakeholders, or society in general. While such responsiveness is important, our focus was on protecting the rights of individuals hurt by the activity of multinationals and the assertion of these rights against MNCs – that is, the question of the liability of multinationals. Our research indicated that voluntary codes of conduct are seldom useful in ameliorating the problems caused by MNCs.[12] By

11 The classic development of this idea appears in H.W. Baade, 'The Legal Effects of Codes of Conduct for Multinational Enterprises', in: R.N. Horn (ed.), *Legal Problems of Codes of Conduct for Multinational Enterprises* (1980), p. 3.

12 A clear example comes from the activity of the Royal Dutch Shell Company. Shell adopted a Code of Conduct widely regarded as pathbreaking in the business community in response to massive public disapproval in the wake of the Brent Spar environmental disaster and the Nigerian crisis highlighted by the execution of activist Ken Saro-Wiwa. Pursuant to this Code, and mindful of public presure, Shell minimized its activity in the Niger delta and transferred much of its operations to competitors, subcontractors and smaller operators. While doing so decreased Shell's visibility and thus vulnerability to public pressure, it did nothing for the people of the Niger delta, who are now subject to the same, and possibly worse, abuses instigated by some of Shell's successors.

focusing on liability, we addressed codes of conduct to the extent that they had solidified or formed semi-legal obligations – obligations that could be applied to MNCs even against their will, obligations that created potential liabilities for MNCs violating them.

The solidifcation of MNC obligations now finds support from a number of recent developments, generally set out in the second part of this book. Although the UN system still seems interested in voluntary codes of conduct, as demonstrated by Secretary General Kofi Annan's Global Compact between MNCs and civil society (launched appropriately during the 1999 annual gathering of capitalists and heads of State at Davos, Switzerland), other UN organs are tentatively discussing the possibility of a more serious approach. For instance, the UN High Commissioner for Human Rights, which has launched a website dedicated exclusively to the impact of corporations on human rights, suggests that corporations agree to independent verification and public reporting procedures.[13] The ILO, which has initiated a reporting procedure for member States under its Declaration on Fundamental Principles and Workers' Rights, points out that labour groups can submit their own comments on the national reports and expect some sort of State response (however in typical fashion the ILO points out that this does not constitute an official complaint procedure).[14] Even the World Bank, at times lambasted (unfairly) as handmaiden to MNC expansionism, is now using its Inspection Panels and the threat of withdrawing loans to force MNCs to comply with the Bank's guidelines on environmental and human rights issues. These developments, while not yet at the level of international liability for MNCs, show the evolution of international regulatory systems towards the creation of norms enforceable on MNCs.

More concrete, and therefore more intriguing, examples come from the use of domestic courts to enforce international norms on MNCs. The advantage of enforcing international law in domestic courts is that they have relatively well-developed systems for addressing corporate entities and levying penalties against them. The disadvantage, of course, is that multinational corporations are set up precisely to avoid domestic jurisdiction over their activities abroad. As set out in this book's final section, this approach is most

13 UN High Commissioner for Human Rights, Business and Human Rights: A Progress Report, (Jan. 2000), <http://www.unhchr.ch/business.htm>, accessed on 6 February 2000, at p. 18.

14 International Labour Organization, Review of Annual Reports Under the Follow-Up to the ILO Declaration on Fundamental Principles and Rights at Work, (March 2000), <www.ilo.org>, accessed on 10 March 2000, p. 13, para. 56.

developed in the United States under the Alien Tort Claims Act. This 200-year-old statute, which was resuscitated to prosecute tyrants like Ferdinand Marcos and Radovan Karadzic, has now been adapted to seek redress from corporate entities that violate customary international law.[15] The effort to bring to justice another infamous dictator, Augusto Pinochet, now raises the possibility of a similar development in other major homes for MNCs, most significantly the UK and member States of the European Union. Since the time of our Colloquium, we have learned of other attempts at using domestic courts to seek redress from MNCs, primarily in Canada and Australia.[16] The extensive legal resources of the home States can thus serve alongside international regulation as a parallel means of addressing the activity of corporate citizens with far-flung operations. At any rate, it seems to us that it is possible to extend the reach of international law to cover the activity of MNCs through a combination of international and domestic regulatory measures.

The Rotterdam Colloquium

Our aim in convening the group of experts that gathered at the Rotterdam Colloquium and contributed to this book was to bring together a group of academicians, practitioners, activists and policy makers who could begin and continue the two-pronged process of creating international standards and supervisory procedures applicable to MNCs as well as juridical precedents useful for establishing the liability of MNCs violating such standards. At this time, developments indicate some early success in our aim as several further meetings on the subject have taken place with various participants of the Rotterdam Colloquium at their nuclei. Even more encouraging are indications that the notion of holding MNCs subject to binding international legal standards is gathering momentum at various fora: The United Nations, through the Sub-Commission on the Promotion and Protection of Human Rights, is (again) discussing the need for creating global standards

15 S. Zia-Zarifi, 'Suing Multinational Corporations in U.S. Courts for Violating International Law', 4 *UCLA J. Int'l L. & For. Aff.* (1999) p. 81.

16 In Canada, an NGO unsuccesfully sued a Quebecois mining MNC, Gambior, for a massive cyanide spill in Guayana. *Recherches Internationales du Quebec* v. *Gambior Inc.* [1998] *Q.J.* No. 2554 (Q.L.). In Autralia, plaintiffs from Papua New Guinea sued mining giant Broken Hill Properties for polluting their land. BHP settled when the Australian judge ruled he had jurisdiction over the case. *Dagi* v. *Broken Hill Properties* (No. 2), [1997] 1V.R. 428 (S.C.Vic.). For more information, see S. Seck, 'Environmental Harm in Developing Countries Caused by Subsidiaries of Canadian Mining Corporations: The Interface of Public and Private International Law', 37 *Can. Y.B. Int'l L.* (1999) (forthcoming).

of conduct for MNCs; the European Union is continuing with its efforts to establish some sort of oversight over European MNCs; the World Bank is examining the impact of its Guidelines on controlling MNCs conducting the Bank's projects; and several large NGOs, such as Amnesty International, Human Rights Watch, Friends of the Earth and Oxfam, are coming to grips with the impact of multinational corporations. More concretely, groups in Europe, Africa and South America are now considering ways of marshalling evidence and resources in order to bring legal actions in the home States of MNCs violating basic international standards or at international and regional fora. To the extent that our Colloquium and the contents of this book help this development, we may judge them to be successful.

In choosing the participants at the Rotterdam Colloquium, we tried to bring together people who could take part in one, or both, of the avenues we had judged important for the development of international liability for MNCs: the identification of international standards through international and domestic institutions and the application of these norms to MNCs. During April 29 and 30, 1999, the participants discussed and analyzed the current status of MNCs under international law, especially as pertaining to the protection of human rights and the environment, and the possibility of using international law to regulate some of the abusive practices of MNCs. Our goal was not to produce particular conclusions at this meeting, but rather to create a network of experts who could aid the process of understanding the proper role of MNCs in international affairs. Each participant was invited because we believed they were best equipped in their field to answer the particular questions posed by the activity of MNCs.

Chris Avery, a US-trained lawyer and formerly Legal Adviser at Amnesty International, has been examining the impact of MNCs closely since 1997. During that time, he has spent considerable time talking with business people about their views about their own role, especially in terms of the ability of businesses to have a positive impact on the societies in which they exist and operate. His initial questions regarding the legal basis for placing positive obligations on MNCs was an important early impetus in creating the research project that led to the Colloquium and this book.

Sarah Joseph, a Senior Lecturer at Australia's Monash University, came to our attention through a very strong article on the status of MNCs under public international law she submitted to the Netherlands International Law Review. This article captured precisely the problems associated with MNCs as international actors, while also pointing out the difficulties likely to arise in the process of subjecting these entities to international law.

Prof. Peter Muchlinski, of Queen Mary & Westfield College of the University of London, is undoubtedly one of the most frequently cited authors in the field of MNCs. His seminal work, *Multinational Enterprises and the Law* (1995), remains the most thorough discussion of the legal issues surrounding MNC activity. Furthermore, Prof. Muchlinski is closely involved with the new work of UNCTAD in helping developing countries deal with international trade liberalization and MNCs.

Prof. David Weissbrodt is a longstanding authority on international law and human rights at the University of Minnesota, as well as a member of the UN Sub-Commission on the Promotion and Protection of Human Rights. In that capacity, Prof. Weissbrodt has been very active in examining the positive and negative impact of MNCs on human rights, and in the possibility of drafting an international set of guidelines for businesses and human rights.

Prof. Andrew Clapham is one of the foremost experts on the role of non State actors under international law, as set out in his authoritative survey of this subject, *Human Rights in the Private Sphere* (1993). Prof. Clapham was particularly well-suited to the discussion of the specific issue of MNCs because of his close involvement in the drafting of a provision of the Statute of the International Criminal Court addressing the Court's jurisdiction over legal persons, including corporations.

Perhaps none of our participants have been as closely involved with the international lawmaking role of MNCs as Mr. Jan Huner of the Dutch Ministry of Economic Affairs, and secretary of the drafting committee of the Multinational Agreement on Investment ('MAI'). Mr. Huner has also been active in the process of revising the OECD's Guidelines on Multinational Enterprises. His extensive understanding of the background of the need to facilitate MNC activity and the pressures faced by governments were invaluable in discussions.

Prof. Beth Stephens, of Rutgers University/Camden, was also invaluable in discussing her years of experience at the New York-based Center for Constitutional Rights, which pioneered the use of the Alien Tort Claims Act ('ATCA') and its application to MNCs. Prof. Stephens, along with her colleagues Jennifer Green, a leading litigator at the Center for Constitutional Rights, and Paul Hoffman, a premier human rights litigator and former Chair of Amnesty International USA, were instrumental in reviving the ATCA and continue their groundbreaking work in applying the statute on behalf of victims of MNC excesses.

Prof. Michael Byers, now of Duke University, was a member of the British Branch of the International Law Association's Committee dedicated to examining how UK courts could replicate the successes of the ATCA. Prof. Byers was also a key player in the effort to bring Gen. Augusto Pinochet to justice, and could offer his insights into the difficulties and advantages of using UK courts as a potential forum for victims of atrocities committed outside the UK.

Similarly, Richard Meeran, of the UK law firm of Leigh, Day & Co., offered his hard won experiences as one of the leading British practitioners involved in bringing lawsuits against UK-based corporations for injuries inflicted outside the UK. These lawsuits remain at the forefront of efforts to hold international businesses accountable for their transboundary activities.

Prof. Andre Nollkaemper of the University of Amsterdam and Gerrit Betlem of Exeter University examined the possibility of using similar litigation tactics in the Netherlands – and by extension, other continental European jurisdictions. Prof. Nollkaemper, an expert on environmental and marine law, has been examining the use of public international law in domestic jurisdictions. Betlem brought to bear his experience in the newest developments in the field of private international law and the specialized European system of recognizing jurisdiction.

Along with the authors whose work appears in this volume, we also hosted several other speakers whose contributions enriched the Colloquium.

Richard Howitt, Member of the European Parliament from England, was author of the Parliament's recent Resolution on the Creation of a European Code of Conduct for European MNCs Operating Abroad. Howitt, whose work focused on the sometimes unsavoury nature of activity undertaken by European companies, is now involved in the process of possibly creating a European level body to monitor MNC activity.

Prof. Anita Ramasastry of the University of Washington has analyzed the use of lawsuits by victims of the Nazi Holocaust against MNCs that used them as slave labourers or banks who financed these MNCs.

Richard Dicker, who heads the campaign on MNCs at Human Rights Watch, discussed the organization's efforts to address the responsibility of businesses in protecting and promoting human rights, as well as the shift in the strategy of NGOs as they adapt to an international system no longer completely dominated by States.

It is also appropriate here to address some omissions in the roster of the Colloquium's participants. Despite our efforts, the ILO decided not to send a representative to the Colloquium. While there is no question that labour rights are a key component of any international system of regulating MNCs, the ILO has not to date exhibited its interest in a broader discussion of the role of MNCs under international law. We hope that the prominence of the ILO's recent Declaration of Fundamental Principles and Rights at Work will encourage the organization to embrace a wider section of civil society in its future work.

Also unfortunately, we could not convince any lawyers representing major MNCs (either in house or from outside law firms) to attend the Colloquium. While we appreciate the busy schedule of practitioners serving the corporate world, we had hoped that at least Dutch MNCs would welcome the opportunity to learn about new legal developments. However, our invitations were answered by public relations departments, indicating that lawyers in the business world still do not take the international legal obligations of MNCs very seriously.

Since the Colloquium – and in large part because of it – we have learned of many more experts who can contribute to the international legal discussion regarding MNCs. Unfortunately we could not include every relevant development, given the constraints of producing a book. In preparing this volume we tried to provide the most recent information possible, and we checked the sources and materials in December 1999 and February 2000. Nevertheless, recent events have undoubtedly superseded some of the information presented here. We gladly accept this inevitable shortcoming in our work and look forward to the day that more concrete legal results will render obsolete our early discussions on the liability of multinational corporations under international law.

CHAPTER 1

Business and Human Rights in a Time of Change

CHRIS AVERY*

INTRODUCTION

Globalization and the shift to a knowledge-based economy are raising basic questions about society and its values.[1] As multinational corporations expand their operations world-wide, the business community's relation to human rights is coming under the spotlight, and the questioning of values is well underway. This article looks at some of the changes taking place in that domain, and their implications. It is important for companies – and for human rights advocates dealing with companies – to recognize these fundamental changes and to adapt to the new world.

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* Chris Avery served as Legal Advisor and Deputy Head of Research to Amnesty International. Since 1997 he has been conducting independent research on the interaction between business and human rights. This article is adapted from a longer version which is available on the 'Multinational Corporations & Human Rights' website of the Multinationals Project, Department of Public International Law, Erasmus University Rotterdam: <http://www.multinationals.law.eur.nl>.

1 On the subject of transformation to a knowledge-based society, see P. Drucker, *Post-Capitalist Society* (1993), and L. Thurow, *The Future of Capitalism: How Today's Economic Forces Shape Tomorrow's World* (1996). Recent books/articles raising questions or concerns about the effects of globalization include: W. Allmand/International Centre for Human Rights and Democratic Development, *Trading in Human Rights: The Need for Human Rights Sensitivity at the World Trade Organization* (Mar. 1999); S. Anderson, et al., *Field Guide to the Global Economy* (2000); S. Beder, *Global Spin: The Corporate Assault on Environmentalism* (1998); C. Caufield, *Masters of Illusion: The World Bank and the Poverty of Nations* (1997); M. Chossudovsky, *The Globalisation of Poverty: Impacts of IMF and World Bank Reforms* (1997); Christian Aid/M. Lockwood and P. Madden, 'Closer Together, Further Apart: A discussion paper on globalisation' (Sept. 1997), <http://www.christian-aid.org.uk/f_reports.htm>, accessed on 28 July 1999; Christian Aid/A. Wood and M. Lockwood, *The Perestroika of Aid? New Perspectives on Conditionality* (Mar. 1999), <http://www.christian-aid.org.uk/f_reports.htm>, accessed on 28 July 1999; J. Fox and L. Brown (eds.), *The Struggle for Accountability: The World Bank, NGOs and Grassroots Movements* (1998); T. Friedman, *The Lexus and the Olive Tree: Un-*

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Sections 1 and 2 identify trends which have a bearing on business and human rights. Sections 3 and 4 look at how companies are responding to these trends. This article covers only some of the recent developments and initiatives relating to business and human rights; the footnotes refer to publications which provide a fuller picture.

The term 'human rights' is used in this article to refer to the full range of rights in the Universal Declaration of Human Rights[2]: civil and political rights, as well as economic, social and cultural rights. These rights are recognized as being universal, indivisible, interdependent and interrelated.[3] 'Sustainable development' denotes an approach to development which 'meets the needs of the present without compromising the ability of future generations to meet their own needs'.[4]

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derstanding Globalization (1999); J. Gray, *False Dawn: The Delusions of Global Capitalism* (1998); W. Greider, *One World, Ready or Not: The Manic Logic of Global Capitalism* (1997); Harvard Law School Human Rights Program, *Business and Human Rights: An Interdisciplinary Discussion Held at Harvard Law School in December 1997* (1999); C. Jochnick, *The Human Rights Challenge to Global Poverty* (Feb. 1999), Center for Economic and Social Rights website ('publications'), <http://www.cesr. org/>, accessed on 11 Aug. 1999; J. Karliner, *The Corporate Planet: Ecology and Politics in the Age of Globalization* (1997); D. Korten, *When Corporations Rule the World* (1997); E. Lee, *The Asian Financial Crisis: The challenge for social policy* (International Labour Office, 1998); C. LeQuesne, *Reforming World Trade: The Social and Environmental Priorities* (1996); J. Madeley, *Big Business, Poor Peoples: The Impact of Transnational Corporations on the World's Poor* (1999); J. Mander and E. Goldsmith (eds.), *The Case against the Global Economy: And for a Turn Toward the Local* (1996); Oxfam Policy Department, *A Case for Reform: Fifty Years of the IMF and World Bank* (1995); R. Papini, et al. (eds.), *Living in the Global Society* (1997); D. Rodrik, *Has Globalization Gone Too Far?* (Institute for International Economics, 1997); D. Rodrik, *The New Global Economy and Developing Countries: Making Openness Work* (Overseas Development Council, 1999); S. Sassen, *Globalization and Its Discontents: Essays on the New Mobility of People and Money* (1999); G. Soros (ed.), *The Crisis of Global Capitalism: Open Society Endangered* (1998); A. Taylor and C. Thomas (eds.), *Global Trade and Global Social Issues* (1999); L. Thurow, *The Future of Capitalism: How Today's Economic Forces Shape Tomorrow's World* (1996); K. Watkins, *Economic Growth with Equity: Lessons from East Asia* (Oxfam, 1998); J. Wiseman (ed.), *Alternatives to Globalisation: An Asia-Pacific Perspective* (Community Aid Abroad, 1997).

2 UN, *Universal Declaration of Human Rights*, GA Res. 217 A (III), UN Doc. A/180 (1948), available at <http://www.unhchr.ch/udhr/index.htm>, accessed on 30 July 1999.

3 UN, World Conference on Human Rights, *The Vienna Declaration and Programme of Action*, 25 June 1993, Art. 5, UN Doc. A/CONF.157/23 (1993), available at <http://www.unhchr.ch/html/menu5/d/vienna.html>, accessed on 23 May 1999.

4 World Commission on Environment and Development, *Our Common Future* (1987).

1 CHANGES IN BUSINESS THINKING

1.1 Re-Examining the Fundamental Purposes of Business

In 1970 Milton Friedman wrote that 'the one and only social responsibility of business' is to increase its profits.[5] While there are still remnants of that thinking around, a growing number of business leaders see the equation as more complex: they consider that making money for shareholders is necessary, but not sufficient. For example:

i) Jack Welch, Chairman and Chief Executive Officer (CEO), General Electric Company: 'I've always believed that the greatest contribution a business could make to society was its own success, which is a fountainhead of jobs, taxes, and spending in the community. I still believe that - but I don't think that is enough anymore. And I don't believe that even generous financial philanthropy on top of that prosperity is enough. ...[T]hese times...will not allow companies to remain aloof and prosperous while the surrounding communities decline and decay'.[6]

ii) The late J.R.D. Tata, Chairman of Tata Sons from 1938 to 1991: 'We in the Tatas, have long recognized that the responsibilities and obligations of our industrial enterprise transcend the normal ones to its owners, its employees, and to the customers of its products and services, and that they should encompass the welfare of, and service to, the local community and society as a whole...'.[7]

iii) Sir John Browne, Chief Executive, BP Amoco: 'We're part of society and we have some responsibility to contribute to its positive development. That covers issues such as human rights...'.[8]

iv) George Soros, President of Soros Fund Management, Chief Investment Advisor to Quantum Fund, Founder of Open Society Institute: 'The doctrine of *laissez-faire* capitalism holds that the common good is best served by the uninhibited pursuit of self-interest. Unless it is tempered by the recognition of a common interest..., [our democratic open society] is liable to break down'.[9]

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5 M. Friedman, 'The Social Responsibility of Business Is to Increase Its Profits', *New York Times Magazine* (13 Sept. 1970).

6 J. Welch, Jr., 'A CEO Forum: What Corporate Social Responsibility Means to Me; Wanted: Teachers and Leaders', *Bus. & Soc'y Rev.* No. 81 (Spring 1992), p. 88.

7 J.R.D. Tata, Letter inviting Justice Mr S P Kotwal to head the Social Audit Committee of Tata Steel, 1979, quoted in Tata Community Initiatives, 'Social accounting and auditing: Why social accounting?' (undated).

8 'Green light for partnership', *The Shield Magazine: The international magazine of the BP Group*, Issue One (1998), p. 33 at p. 34.

9 G. Soros, 'The Capitalist Threat', *The Atlantic Monthly*, Vol. 279, No. 2 (Feb. 1997), <http://www.theatlantic.com/issues/97feb/capital/capital.htm>, accessed on 1 Nov. 1998.

Two of the world's leading business schools, Harvard and INSEAD, now have introductory courses on the purpose of business, including coverage of social issues such as human rights.[10] The Asian Institute of Management (Manila) has made 'development management' one of its full-fledged business degrees.[11]

In France the *Centre des Jeunes Dirigeants d'entreprise* (Centre of Young CEOs) published a 150-page report which says companies should be judged on their contribution to the well-being of society.[12]

Royal Dutch Shell's Statement of General Business Principles says Shell companies recognize five areas of responsibility 'seen as inseparable': to shareholders; to customers; to employees; to those with whom they do business; and to society.[13] Shell's 1999 social report says: 'We must take economic, environmental and social considerations into account in everything we do....This will mean that some business decisions will be made differently and some may have different outcomes from the past'.[14]

The change in thinking about the purposes of business is not limited to a few companies. It is becoming mainstream to talk about the responsibilities companies have to stakeholders and communities. A May 1999 *Business Week* special advertising section included contributions about social and environmental issues by the CEOs of AT&T, BP Amoco (on 31 December 1998 BP and Amoco merged), Intel, General Motors, DuPont, Storebrand ASA, Mitsubishi Electric, Weyerhauser, ITT Fluid Technology, and Siemens Westinghouse Power.[15]

The fact that the *Business Week* initiative took the form of an advertising section begs the question: Is there a real change of thinking in the corporate world which affects day-to-day decision-making, or is it more of a public relations exercize aimed at creating the perception of a more socially-engaged private sector? The answer is probably a mix of the two, with some companies giving higher priority than others to implementing real change in their operations. In any event, more and more company executives are going on record with a commitment to address social issues, and their com-

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10 C. Marsden, Warwick Business School Corporate Citizenship Unit, 'Human rights teaching in Business schools', *Human rights & Business matters* (Amnesty International UK Business Group Newsletter) (spring 1999), p. 4.

11 Asian Institute of Management, *Center for Development Management* (undated).

12 I. Alexander, *The Civilized Market: Corporations, Conviction and the Real Business of Capitalism* (1997), p. 220.

13 Royal Dutch Shell, 'Statement of General Business Principles' (1997), <http://www.-shell.com/principles/general_a.html>, accessed on 24 May 1999.

14 Royal Dutch Shell, *The Shell Report 1999: People, planet & profits: An act of commitment* (1999), <http://www.shellreport.com>, accessed on 28 Apr. 1999.

15 'The Next Bottom Line', *Business Week* special advertising section (3 May 1999).

pany's social performance can now be measured against that commitment as well as against other standards.

Too often companies presume that shareholders have no interest other than short-term profit. In fact, most shareholders are long-term investors who want to invest in responsible companies with the sort of reputation which helps to ensure a long-term record of success. Dayton Hudson, a large, successful retail company in the United States, for 53 years has been committed to donating five percent of its pre-tax profits to community programmes, including to 'social action programs that assist people in reaching economic independence'.[16] Few if any large companies in the US donate a higher percentage. In 1982-83 Dayton Hudson commissioned a survey of its stockholders to see how they felt about the company's very high level of community giving. Of the 561 shareholders surveyed, 31 percent supported increasing the level of giving, 42 percent supported continuing at the same level, and five percent supported a cutback.[17]

John Elkington, Chairman of SustainAbility (a London-based consultancy) urges companies to integrate into their thinking a 'triple bottom line' to which they are already being held to account: economic prosperity, environmental quality, and social justice.[18]

Peter Drucker, a leading authority on international business and management, says the private sector greed we saw in the 1980s where 'maximize shareholder value' was the mantra will not work anymore. His view is that just focusing on this year's bottom line forces a corporation to be managed for the shortest term, which leads to a decline in the long-term wealth-producing capacity of business. 'Long-term results cannot be achieved by piling short-term results on short-term results'.[19] Drucker recognizes that economic performance is the first responsibility of business, but he says it is not the only responsibility. 'Power must always be balanced by responsibility; otherwise it becomes tyranny. Without responsibility, power...always degenerates into non-performance'.[20] Drucker concludes that political and social theory since Plato and Aristotle focused on power, but in post-capitalist society the focus will be on responsibility.[21]

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16 'The Dayton Hudson Foundation' and '50+ Years of Giving', <http://www.dhc.com/dhf/index.htm>, accessed on 31 May 1999.

17 Human Resources Network, *An Evaluation of the Dayton Hudson Giving Program* (21 Mar. 1983).

18 J. Elkington, *Cannibals with forks: The triple bottom line of 21st century business* (1997).

19 Drucker, op. cit. n. 1, at p. 80.

20 Ibid., p. 101.

21 Ibid., p. 97.

1.2 Challenging Traditional Business Thinking About Human Rights

Much of the business community has traditionally argued that human rights do not need to be a priority for developing countries (and that companies operating or investing in countries with repressive governments should not be challenged). The substantive merits of this argument are showing strain. For example:

(i) Many in the business sector traditionally argued that it is acceptable for governments of developing countries to give a low priority to civil and political rights while focusing on economic development. Their theory: respect for civil and political rights will naturally follow later, after trade and investment create a middle class and induce political liberalization.

That argument ignores the internationally-recognized principle, affirmed in the UN Declaration on the Right to Development, that economic rights and civil/political rights are universal, interdependent and indivisible.[22] It ignores The Vienna Declaration, adopted by consensus by the 171 governments at the 1993 UN World Conference on Human Rights, which states: 'While development facilitates the enjoyment of all human rights, the lack of development may not be invoked to justify the abridgement of internationally recognized human rights'.[23] Nevertheless in the past business people regularly made that argument (often in relation to Asia), and authoritarian governments welcomed the support.

Given recent events in Indonesia and other Asian countries, that argument is heard less often these days. Kim Dae Jung, democratically-elected President of South Korea, certainly sees things differently: 'I think Asia's economic crisis stems mainly from a lack of democracy....If we develop both democracy and a market economy, we can expect successful results in the near future'.[24]

A study of 123 countries for the period 1985 to 1994 suggested that there is no meaningful statistical correlation between increases in foreign direct investment and improvements in a country's human rights performance.[25]

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22 UN General Assembly, *Declaration on the Right to Development*, 4 Dec. 1986, Art. 6(2), GA Res. 41/128, Annex, 41 UN GAOR Supp. (No. 53) at 186, UN Doc. A/41/53, available at <http://www.unhchr.ch/html/menu3/b/74.htm>, accessed on 22 May 1999.

23 *The Vienna Declaration and Programme of Action*, Art. 10, loc. cit. n. 3.

24 'A Government by the People: Kim Dae Jung on what he wants for his country', *Time (Asia Edition)*, Vol. 151, No. 8 (2 Mar. 1998), <http://cgi.pathfinder.com/time/asia/magazine/1998/980302/qa.html>, accessed on 10 Apr. 1998.

25 C. Forcese, *Profiting From Misfortune? The Role of Business Corporations in Promoting and Protecting International Human Rights*, MA Thesis, Norman Paterson School of

Another study, by the Organisation for Economic Co-operation and Development ('OECD'), found no convincing causal connection between trade liberalization and respect for freedom of association rights.[26] In fact the OECD study found that a country's desire to increase trade and direct foreign investment could lead to a deterioration rather than an improvement in human rights: '[T]here [was] evidence that some governments felt that restricting certain core labour standards would help attract inward FDI [foreign direct investment]'.[27] In some countries foreign direct investment has been seen as a factor in reinforcing a government and insulating it from calls for democratisation.[28]

An article in the *Northwestern Journal of International Law & Business* argued that unless a process of economic liberalisation incorporates human rights considerations from the beginning, it will lead to 'a race to the bottom' and exacerbate human rights abuses. The authors point out that 'a global chase for the cheapest labor markets' drives down wage levels as developing countries compete for foreign investment. 'In this setting, it has become increasingly difficult to persuade governments of developing countries to respect internationally recognized labor rights....Against this background, it is increasingly difficult to assume that investment in and of itself will promote expansion of a middle class, thereby enlarging the number of citizens who enjoy economic and social rights and simultaneously making it more likely that citizens will insist upon personal and political freedoms'.[29]

Amnesty International said in a 1996 publication about China: 'The government says the right to subsistence and development is paramount for the Chinese people. But the need to feed the hungry can never justify tor-

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International Affairs, Carleton University, Ottawa (1997), referred to in C. Forcese, *Putting Conscience into Commerce: Strategies for making human rights business as usual* (Montreal, International Centre for Human Rights and Democratic Development, 1997), p. 18.

26 OECD, *Trade, Employment and Labour Standards: A Study of the Core Workers' Rights and International Trade*, COM/DEELSA/TD(96)8/FINAL (1996), p. 42; referred to in Forcese, *Putting Conscience into Commerce*, op. cit. n. 25, p. 18. The OECD study examined 38 emerging markets and found that 15 countries made improvements in free association after making trade reforms; 9 countries made such improvements before making trade reforms; 8 countries made such improvements at the same time as making trade reforms; 6 countries made no such improvements before, during or after trade reforms.

27 Ibid., referred to in Forcese, *Putting Conscience into Commerce*, op. cit. n. 25, at p. 18.

28 Forcese, *Putting Conscience into Commerce*, op. cit. n. 25, at p. 19.

29 D. Orentlicher and T. Gelatt, 'Public Law, Private Actors: The Impact of Human Rights on Business Investors in China', 14 *Nw. J. Int'l L. & Bus.* (1993), p. 98 at pp. 100-101, referred to in Forcese, *Putting Conscience into Commerce*, op. cit. n. 25, pp. 19-20.

ture, and there is no evidence that denying people such a fundamental right as freedom of speech improves their economic well-being'.[30]

(ii) Another argument often put forward by business is that investment and trade with a repressive government should be encouraged because withdrawal or sanctions hurt the people and deprive the country of the liberalizing influence of engagement with the outside world.

While business people and others continue to make this case, their persuasiveness is strained when people with the moral authority of Nobel laureates Archbishop Desmond Tutu and Aung San Suu Kyi argue just the opposite.

Desmond Tutu stated during South Africa's apartheid era:

> I have no hope of real change from this government unless they are forced. We face a catastrophe in this land, and only the action of the international community can save us....I call upon the international community to apply punitive sanctions against this government to help us establish a new South Africa – non-racial, democratic, participatory and just. This is a non-violent strategy to help us do so....
>
> You hear so many extraordinary arguments. Sanctions don't work. Sanctions hurt those most of all whom you want to help. That is interesting. I haven't heard similar arguments brought forward in the United States when sanctions are applied at the drop of a hat against Panama, Nicaragua, Libya, Poland. I have to say that I find this new upsurge of altruism from those who suddenly discover they feel sorry for blacks very touching, though it's strange coming from those who have benefited from cheap black labor for many years. Spare us your crocodile tears, for your massive profits have been gained on the basis of black suffering and misery.[31]

Aung San Suu Kyi made the following statements in recent years:

> If material betterment...is sought in ways that wound the human spirit, it can in the long run only lead to greater human suffering. The vast possibilities that a market economy can open up to developing countries can be realized only if economic reforms are undertaken within a framework that recognizes human needs.[32]

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30 Amnesty International, *China: No one is safe – An Amnesty International Briefing* (AI Index ASA 17/02/96, Mar. 1996).

31 J. Allen, *The Essential Desmond Tutu* (1997), pp. 39-40.

32 A.S. Suu Kyi, 'Empowerment for a Culture of Peace and Development' (address delivered on her behalf at a Nov. 1994 meeting of UNESCO's World Commission on Culture and Development and at a Dec. 1994 forum for Democratic Leaders in the Asia-Pacific), in A.S. Suu Kyi, *Freedom from Fear and other writings* (1995), p. 267.

> There are those who claim that the people of Burma are suffering as a consequence of sanctions, but that is not true. We want investment to be at the right time – when the benefits will go to the people of Burma, not just to a small, select elite connected to the government.[33]

Burton Levin, a former US Ambassador to Burma, agreed with Aung San Suu Kyi's conclusion about sanctions: 'Foreign investment in most countries acts as a catalyst to promote change, but the Burmese regime is so single-minded that whatever [income] they might obtain from foreign sources they pour straight into the army while the rest of the country is collapsing'.[34]

Craig Forcese, a Canadian law professor and expert on business and human rights, cites four ways in which a company's activities, rather than inducing political liberalization, 'may bolster the repressive capacity and the staying power of a regime which systematically violates human rights':

1) The firm can produce products used by the regime that increase its repressive capacity.
2) The firm can be a major source of revenue that increases a regime's repressive capacity.
3) The firm provides infrastructure in the form of roads, railways, power stations, oil refineries or the like that increases a regime's repressive capacity.
4) The firm in the country may provide international credibility to an otherwise discredited regime.[35]

1.3 Corporate Reputation: A Valuable Asset

Charles Fombrun, Professor of Management at the Stern School of Business (New York University), says in his book *Reputation: Realizing Value from the Corporate Image* that each company's reputation is 'a fragile, intangible asset' which 'complements – and sometimes surpasses – the value of the more tangible material and financial assets that managers routinely worry about'.[36] He notes:

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33 'Burma's Suu Kyi: Take your investments elsewhere, please', *Business Week* (30 Mar. 1998).

34 Canadian Friends of Burma (CFOB), *Dirty Clothes-Dirty System* (Ottawa, CFOB, 1996), p. 51, referred to in Forcese, *Putting Conscience into Commerce*, op. cit. n. 25, at p. 18.

35 Forcese, *Putting Conscience into Commerce*, op. cit. n. 25, at pp. 22-24.

36 C. Fombrun, *Reputation: Realizing Value from the Corporate Image* (Boston, Harvard Business School Press, 1996), pp. 10, 32.

> In recent years, many prominent companies...found their reputations sullied, and so called attention to the importance of protecting and defending reputational capital....This book shows that better-regarded companies...initiate policies that...consider the joint welfare of investors, customers, and employees; that invoke concern for the development of local communities; and that ensure the quality and environmental soundness of their technologies, products, and services.[37]

Sir Geoffrey Chandler, formerly a senior manager at Royal Dutch Shell, is now Chairperson of Amnesty International's United Kingdom Section Business Group. He emphasizes that 'the reputation of companies – crucial to their acceptability and success in a critical world – will be increasingly influenced by their willingness to recognize their role' in respect of human rights.[38] He says companies have a clear choice: 'to use what influence they have, or to do nothing....If they speak out they may incur the anger of government. If silent, the certain price is reputation – which is, of course, everything'.[39]

1.4 Human Rights Are Good for Business

During the period of military rule in Nigeria, Shell Nigeria's general manager reportedly stated: 'For a commercial company trying to make investments, you need a stable environment. Dictatorships can give you that'.[40] Fortunately such views are heard less often these days from business people, though no doubt they have not disappeared entirely.

Thomas d'Aquino, CEO of Canada's Business Council on National Issues, articulates a different point of view about business and human rights:

> Whether at the World Trade Organization, or at the OECD, or at the United Nations, an irrefutable case can be made that a universal acceptance of the rule of law, the outlawing of corrupt practices, respect for workers' rights, high health and safety standards, sensitivity to the environment, support for education and the protection and nurturing of children are not only justifiable against the criteria of morality and justice. The simple truth is that these are good for business and most business people recognize this.[41]

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37 Ibid., at pp. 5-6, 8-9.

38 G. Chandler, 'Human rights have everything to do with business', *The Observer* (UK) (19 May 1996).

39 G. Chandler, 'People and profits', *The Guardian* (14 Nov. 1996).

40 Elkington, op. cit. n. 18, at p. 110.

41 Forcese, *Putting Conscience into Commerce*, op. cit. n. 25, p. 12.

Former Canadian Prime Minister Joe Clark rejects the notion that the defence of human rights will mean losing trade. He noted that many Canadian Ministers and diplomats have raised human rights issues with their trading partners without in any sense jeopardizing those relationships. He said Canada's reputation for human rights is actually an asset for business.[42]

Reebok's 'Human Rights Production Standards' say: 'Reebok's experience is that the incorporation of internationally recognized human rights standards into its business practice improves worker morale and results in a higher quality working environment and higher quality products'.[43]

Sophon Suphaphong, President of Bangchak Petroleum (a leading Thai oil company), observed: 'The world's markets just won't buy products that are cheap and good quality if they are manufactured by countries that exploit child labour; that are dictatorial; and that destroy the environment. Eventually, business people will have no choice but to take part in the process of resolving our social problems'.[44]

Kleinwort Benson Investment Management's Paul Sheehan explains why his firm launched an investment fund focused on UK companies which take a stringent stakeholder approach to their businesses: 'It makes sense. The companies that have clear values, invest more in training employees and put money back into the communities actually buying their products will have more success over the long term than those still caught up in a bottom-line-only culture'.[45]

Peter Sutherland, the former Director-General of the World Trade Organization who is now Chairman of Goldman Sachs International and Co-Chairman of BP Amoco, said:

> Business finds itself having to deal in a practical way with human rights issues. This is not a matter of choice but a reality in this global environment. And getting it right is not only a matter of ethical behaviour and moral choice. Enlightened business people have realized that good business is good business.

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42 International Centre for Human Rights and Democratic Development (ICHRDD), *Globalisation, Trade and Human Rights: The Canadian Business Perspective*, Summary report, Conference held on 22 Feb. 1996, in Toronto, Canada, <http://www.ichrdd.ca/PublicationsE/reposum.html>, accessed on 18 Mar. 1999.

43 Reebok, *Reebok Human Rights Production Standards*, <http://www.reebok.com/human_rights.html>, accessed on 23 May 1999.

44 'From austerity to prosperity: Profile, Bangchak Petroleum managing director Sophon Suphaphong', *Bangkok Post* (11 Dec. 1996), 'Outlook' section, p. 1.

45 Elkington, op. cit. n. 18, at pp. 151-52.

> Good business is sustainable, is part of global society not at odds with it, and reflects values which are shared across the world.[46]

Sir John Browne, Chief Executive of BP Amoco, when defining the interests of international business, said that one of the conditions for best pursuing business is operating in an open society. He acknowledged that this runs 'directly contrary, of course, to the common belief that companies find it easier to deal with the apparent stability of repressive regimes than to manage the uncertainties of democracy. In fact, stability built on repression is always false. Sooner or later the waters break the dam'.[47]

Amnesty International has noted that 'the building blocks of human rights protections – the rule of law, government accountability, independence of the judiciary – are the key elements in creating a stable climate for business, as evidenced by the recent economic crisis in Asia'.[48]

1.5 The Employee Factor

Companies are increasingly recognizing that only if they have a good reputation and social record will they be able to attract and retain the best and brightest employees.

Peter Drucker notes that managing a business exclusively for shareholders alienates the new class of knowledge workers; they 'will not be motivated to work to make a speculator rich'.[49] He says companies and mission statements 'that express the purpose of the enterprise in financial terms fail inevitably, to create the cohesion, the dedication, the vision of the people who have to do the work so as to realize the enterprise's goal'.[50]

A 1995 study in the US found that 84 percent of employees felt that a company's image in the community is important; 54 percent said it is very important.[51]

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46 P. Sutherland, address to Amnesty International event, Dublin (26 Sep. 1997), pp. 2-3, <http://www.bpamoco.com/speeches/sp_9709.htm>, accessed on 27 May 1999.

47 J. Browne, *Corporate Responsibility in an International Context*, address to Council on Foreign Relations, New York, 17 Nov. 1997, p. 6, <http://www.bpamoco.com/_nav/pressoffice/speech.htm>, accessed on 18 Apr. 1999.

48 Amnesty International, 'ASEM: A human rights agenda for ASEM II (Asia-Europe Meeting), 3-4 April 1998, London' (AI Index 01/03/98, Feb. 1998), p. 4.

49 Drucker, op. cit. n. 1, p. 80.

50 P. Drucker and I. Nakauchi, *Drucker on Asia: A dialogue between Peter Drucker and Isao Nakauchi* (1997), p. 128.

51 'Center Study Shows Good Image Boosts Employee Loyalty', *Corporate Community Relations Letter*, Vol. 10, No. 2 (Oct. 1995), pp. 1, 3.

Recently several multinational oil company managers mentioned to the author in informal conversations that many of the most promising university graduate engineers are now asking questions during their job interview about the company's policy on the environment and human rights, questions which did not arise often in the past.

2 SOCIETY CALLS ON BUSINESS TO ACT

2.1 Silence and Inaction: No Longer Tenable Options

Royal Dutch Shell has come under fire for its environmental and human rights record in Nigeria over the years, both for what it has done and for what it has failed to do.[52] Shell's world-wide reputation is still paying the price. Shell sought to distance itself from events in Nigeria when Ken Saro-Wiwa and his Ogoni colleagues (who had campaigned against environmental damage by oil companies and for increased autonomy for the Ogoni ethnic group) were arrested in 1994, detained illegally for at least eight months, held incommunicado in military custody under harsh conditions, tried in 1995 (before a special court established by the military government) under procedures which clearly violated international fair trial standards, convicted of murder, and executed.[53] Shell says of the case: 'We did not seek to influence his trial, but after the verdict the Chairman of the Group's Committee of Managing Directors sent a letter to the Nigerian head of State urging him to grant clemency for all those sentenced'.[54] One of Shell's general managers reportedly made the following statement after the execution:

> I am afraid I cannot comment on the issue of the Ogoni 9, the tribunal and the hanging. This country has certain rules and regulations on how trials can take place. Those are the rules of Nigeria. Nigeria makes its rules and it is not for private companies like us [Shell] to comment on such processes in the country.

That statement ignores the most basic concepts of human rights: governments are prohibited from violating internationally-recognized fundamental

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52 See, for example, Human Rights Watch, *The Price of Oil: Corporate Responsibility and Human Rights Violations in Nigeria's Oil Producing Communities* (1999), <http://-www.hrw.org/hrw/reports/1999/nigeria/index.htm>, accessed on 27 May 1999.

53 Information about the arrest, detention, trial and execution from Amnesty International, *Amnesty International Report 1996* (London, Amnesty International Publications, 1996), pp. 237-238.

54 Royal Dutch Shell, *Profits and Principles – does there have to be a choice?* (1998), p. 16.

human rights, and human rights violations are a matter of international concern because human rights transcend national boundaries. While the statement came from Shell, the philosophy of 'human rights is not a matter for business to get involved with' has been shared by too many companies. Indeed most other multinational companies operating in Nigeria also remained silent about human rights violations.

Sir Geoffrey Chandler says the days when companies could remain silent about human rights issues are over: 'Silence or inaction will be seen to provide comfort to oppression and may be adjudged complicity....Silence is not neutrality. To do nothing is not an option'.

2.2 A More Sceptical and Demanding Public

Companies are realizing that their credibility with the public has been strained in recent years, and that in a dispute with a human rights organization or an environmental organization they cannot depend on public opinion to give them the benefit of the doubt...in fact, just the reverse.

In the aftermath of the Brent Spar affair a MORI-conducted poll reflecting public opinion in seven West European countries showed the following levels of confidence in statements about the environment: 27 percent confidence in statements by the oil industry (in Spain and Germany the level was closer to 10 percent), 29 percent confidence in government statements, 63 percent confidence in statements by environmental groups, and 65 percent confidence in statements by academics.[55]

Royal Dutch Shell, in its 1998 social report, noted:

> Multinationals have been criticized as being overly concerned with profit and failing to take their broader responsibilities seriously: to defend human rights, to protect the environment, to be good corporate citizens. [This debate] is taking place in a fast-changing world, characterized by global communications and diminishing respect for established authority....[P]eople are withdrawing their trust in traditional institutions unless it can be demonstrated that such faith is warranted – what has been called a move from a 'trust me' to a 'show me' world.[56]

Some people are extremely sceptical about the entire notion of the business community getting serious about human rights; they see companies as part of the human rights problem internationally, rather than part of the sol-

55 E&P Forum (The Oil Industry International Exploration & Production Forum, London), MORI-conducted opinion poll (1995).

56 Royal Dutch Shell, op. cit. n. 54, at p. 2.

ution. Many others see business capable of both harm and good in the human rights sphere. Twenty years ago most of these people probably would have given business the benefit of the doubt in a human rights controversy. But that is no longer the case. In the past two decades they have been disappointed too many times by disclosures about the human rights record of particular companies. While they welcome the news when a company adopts a human rights policy, they now withhold judgement to see whether the company follows through with action, and whether the results are verified by an organization truly independent of the company and without any motive to sugar-coat the findings. Too often they have seen companies only address human rights issues when forced to do so by public exposure. They have seen too many companies respond with approaches which are superficial, minimalist, and short-term, looking more like a slick public relations exercize than a genuine commitment to improving the human rights situation. They have heard too many companies say they believe in constructive engagement and 'quiet diplomacy' with governments on human rights issues, in situations where there is little or no evidence that such engagement or diplomacy is actually taking place.

2.3 The Informed Consumer

A garment industry consultant writing in the *Wall Street Journal* acknowledged that consumers are increasingly taking human rights issues into account:

> What's changed is that for the first time human rights concerns could become a major marketing issue and tool for manufacturers. In an era when companies must work harder than ever to sell their products, anything that turns the consumer off has to be avoided at all costs....I am not speaking as a do-gooder....I am a garment industry consultant who has spent 30 years in Asia showing companies how to produce and buy better garments for less money. And I know for a fact that no social adjustments take place in the world of business unless the cost-accountants prove that change is necessary. But I am here to tell you that the tapping noise you hear on your door is your CPA [certified public accountant] coming to announce that something is indeed happening out there, and that if you want to survive, now would be a good time to develop a social conscience....
>
> [T]ake Burma, where orders for exported garments produced by Burmese factories have fallen by two-thirds over the past year. Companies like Eddie Bauer, Liz Claiborne and Federated Department Stores, which in the past found some of their best bargains in Burma, are now discovering that in today's socially conscious marketplace these products are less competitive. You

may ask, 'What does Aung San Suu Kyi have to do with fashion?' The latest answer is, 'A lot'.[57]

2.4 Intergovernmental Organizations

UN Secretary-General Kofi Annan, speaking at the Davos World Economic Forum in January 1999, called on multinational companies to promote universal values in their dealings, and to 'uphold human rights and decent labour and environmental standards directly, by your own conduct of your own business'.[58] He has proposed a 'Global Compact', challenging business leaders to abide by nine principles derived from internationally-recognized standards:

Human rights

1) Business should support and respect the protection of internationally proclaimed human rights within their sphere of influence; and
2) make sure they are not complicit in human rights abuses.

Labour

3) Businesses should uphold the freedom of association and the effective recognition of the right to collective bargaining;
4) the elimination of all forms of forced and compulsory labour;
5) the effective abolition of child labour; and
6) eliminate discrimination in respect of employment and occupation.

Environment

7) Businesses should support a precautionary approach to environmental challenges;
8) undertake initiatives to promote greater environmental responsibility; and
9) encourage the development and diffusion of environmentally friendly technologies.[59]

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57 D. Birnbaum, 'Forget MFN, the Consumers Are Coming!', *Wall Street Journal* (9 Apr. 1996).

58 International Labour Office, Governing Body, Working Party on the Social Dimensions of the Liberalization of International Trade, *Further examination of questions concerning private initiatives, including codes of conduct*, Doc. GB.274/WP/SDL/1 (Mar. 1999), para. 8, <http://www.ilo.org/public/english/20gb/docs/gb274/sdl-1.htm>, accessed on 19 May 1999.

59 UN, *The Global Compact*, <http://www.un.org/partners/business/fs1.htm>, accessed on 30 July 1999.

The UN fact sheet explaining the Global Compact with business notes: 'Although governments have primary responsibility for implementing internationally accepted values, corporations acting on their own can do a great deal to actualize these principles within their spheres of influence'.[60] The UN says that supporting the nine principles of the Global Compact is the right thing to do and is also good for business: 'A clear demonstration that basic and broadly popular social values are being advanced as part and parcel of the globalisation process will help ensure that markets remain open, and will truly bring the people of the world closer together'.[61] On 5 July 1999, Secretary-General Annan and the President of the International Chamber of Commerce (and other business leaders representing the ICC) issued a joint statement stating that 'business leaders welcomed the United Nations Secretary-General's call for a Global Compact between the United Nations and the private sector to promote human rights, improve labour conditions and protect the environment'.[62]

Mary Robinson, UN High Commissioner for Human Rights, in June 1999 delivered a speech on the subject of business and human rights in which she noted that 'civil society is scrutinizing corporate conduct much as it has watched the behavior of Governments in the past'. She welcomed the fact that a number of business people were recognizing 'that the long term viability of their corporate activities and the future protection of shareholder value will be enhanced if the countries they are involved with respect human rights'. She added: 'The rights in the Universal Declaration [of Human Rights] contribute, both directly and indirectly, to the social and political conditions conducive to business'. She encouraged companies to integrate human rights concerns into every aspect of their business in a meaningful way: 'Human rights are not an "add on", they should be central to companies' approach to investment and doing business'. Finally, the High Commissioner said that her office and other UN agencies would be happy 'to assist the private sector in incorporating the agreed values and principles into mission statements and corporate practices'.[63]

When the UN General Assembly adopted the Declaration on the Right to Development in 1986, it made clear that the responsibility to promote

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60 Ibid.

61 Ibid.

62 UN, *Business leaders advocate a stronger United Nations and take up challenge of Secretary-General's Global Compact* (5 July 1999), <http://www.un.org/partners/business/iccun1.htm>, accessed on 30 July 1999.

63 UN, *Statement by Mary Robinson, United Nations High Commissioner for Human Rights: Giving a Human Face to the Global Market – The Business Case for Human Rights* (WinConference '99, Interlaken, 10 June 1999), <http://www.un.org/partners/business/hchrstat.htm>, accessed on 30 July 1999.

development does not apply only to governments: 'All human beings have a responsibility for development, individually and collectively, taking into account the need for full respect for their human rights and fundamental freedoms as well as their duties to the community, which alone can ensure the free and complete fulfilment of the human being, and they should therefore promote and protect an appropriate political, social and economic order for development'.[64]

In 1998 the UN Sub-Commission on Prevention of Discrimination and Protection of Minorities decided to form a working group for a three-year period to examine the activities of transnational corporations from a human rights perspective.[65]

At the 1995 UN World Summit for Social Development (Copenhagen), governments reached consensus on the principle that respect for human rights is necessary for sustainable development.[66] The World Summit agreed that the private sector should be one of the actors involved in taking steps to address social development issues.[67]

The 1977 International Labour Organization (ILO) Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy states that all concerned parties (governments, employers and workers) 'should respect the Universal Declaration of Human Rights and the corresponding International Covenants adopted by the General Assembly of the United Nations as well as the Constitution of the International Labour Organization and its principles according to which freedom of expression and association are essential to sustained progress'.[68]

The OECD Guidelines for Multinational Enterprises state: 'The common aim of Member countries is to encourage the positive contributions which multinational enterprises can make to economic and social progress and to minimize and resolve the difficulties to which their various operations may give rise ...with a view to improving the welfare and living standards of all people'.[69] A May 1995 OECD Development Assistance Committee policy

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64 UN General Assembly, op. cit. n. 22, Art. 2(2).

65 UN Sub-Commission on Prevention of Discrimination and Protection of Minorities, Resolution 1998/8, UN Doc. E/CN.4/1999/4, E/CN.4/Sub.2/1998/45 (1998), p. 30.

66 UN, *Report of the World Summit for Social Development*, UN Doc. A/CONF.166/9 (1995), Annex I (Copenhagen Declaration on Social Development).

67 Ibid., Annex II (Programme of Action of the World Summit for Social Development), para. 83(d).

68 ILO, *Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy*, para. 8, 61 *Official Bulletin ILO* (1978) Series A, No. 1; reproduced in 17 *ILM* (1978) p. 422; also available at <http://www.ilo.org/public/english/85multi/tridecl/index.htm>, accessed on 23 May 1999. See Annex 1 to this volume.

69 OECD, *OECD Guidelines for Multinational Enterprises*, <http://www.oecd.org/daf/cmis/cime/mnetext.htm>, accessed on 11 May 1999. See Annex 3 to this volume.

statement says that a key element to the success of sustainable development is: 'Good governance and public management, democratic accountability, the protection of human rights and the rule of law'.[70]

The World Bank in 1997-98 helped to launch Business Partners for Development (BPD), 'an informal global network of business, government and civil society, with the World Bank Group as an equal partner, that aims to produce solid evidence of the positive impact of tri-sector partnerships – both the developmental impact and the business impact'.[71] The World Bank explains the thinking behind BPD:

> Our starting point is the premise that there is growing pressure on companies to deliver, and demonstrate that they are delivering, value both to their shareholders and to the communities in which they operate. Corporate social responsibility is no longer an addition to the bottom line, but integral to it. New forms of partnerships are emerging that maximize the long term interest of the business sector along with the social and human development interests of the civil society and the state.[72]

The European Parliament in January 1999 passed a resolution, 'Code of conduct for European enterprises operating in developing countries', which, *inter alia*:

i) encourages company codes of conduct 'with effective and independent monitoring and verification, and stakeholder participation in the development, implementation and monitoring of these codes';
ii) recommends that a model Code of Conduct for European businesses should be adopted, which guarantees minimum internationally-recognized standards on the environment, health and safety conditions in the workplace, and respect for basic human rights; and
iii) requests the European Commission to establish an independent body of experts to monitor and verify implementation of the Code of Conduct, identify best practices, and receive complaints about corporate conduct from interested parties.[73]

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70 OECD, *Development Partnerships in the New Global Context*, <http://www.oecd.org/-dac/htm/dpngc.htm>, accessed on 20 May 1999.

71 World Bank, *About BPD: What is Business Partners for Development (BPD)?*, <http://-www.worldbank.org/bpd/about.htm>, accessed on 20 May 1999.

72 World Bank, *About BPD: Why do we need BPD?*, [http://www.worldbank.org/bpd/a-bout.htm>, accessed on 20 May 1999.

73 European Parliament resolution A4-0508/98 on EU Standards for European Enterprises operating in developing countries towards and European Code of Conduct, *O.J.* (1999) C 104/180, also available at <http://www.multinationals.law.eur.nl/documents/cmp/coc99.html>, accessed on 27 May 1999. See Appendix 4 to this volume.

Richard Howitt, the MEP (Member of European Parliament) who introduced the resolution, said:

> What I want to emphasize is that our proposal is not to draw up a different set of standards just for Europe. Our purpose is to adopt a series of minimum applicable international standards which have been agreed already within bodies such as the United Nations and the International Labour Organization, and to use the European Union to promote their implementation and to monitor those standards....[M]any people from developing countries, as well as trade unionists, have said that when new codes of business practice are drawn up, they often involve dilution of standards which have been negotiated over many years within international institutions. This proposal is intended to avoid such dilution.[74]

2.5 Governments

In the UK, both the Foreign & Commonwealth Office and the Department for International Development have established units to promote and support socially responsible business.[75]

The Government of the Netherlands recently emphasized (in an explanatory memorandum to the 1998 budget of the Netherlands Ministry of Foreign Affairs) that it is important for multinational corporations to remain alert to the human rights situation in countries where they operate and to ensure that their activities do not contribute to a continuation of human rights violations. The memorandum also says corporations should contribute to the creation of an enabling environment for the realisation of human rights.[76]

In the US, the White House announced in May 1995 the 'Model Business Principles', a one-page voluntary code of human rights principles for US companies operating abroad.[77] These principles have been criticized for

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74 'Peter Frankental, project manager of the Business Group of Amnesty International UK, asks Richard Howitt MEP about the significance of the European Parliament's resolution', *Human rights & Business matters* (Amnesty International UK Business Group Newsletter) (Spring 1999), p. 2.

75 'Government action on responsible business', *Human rights & Business matters* (Amnesty International UK Business Group Newsletter) (spring 1999), p. 3; Department for International Development (DFID), *Partnerships with Business*, p. 1.

76 The Netherlands Ministry of Foreign Affairs, Explanatory Statement on the 1998 Budget, Second Chamber of the States General, 1997-1998, no. 25 600, Chapter V, no. 2, referred to in The Dutch Sections of Amnesty International and Pax Christi International, *Multinational Enterprises and Human Rights* (1998), pp. 19-20.

77 US Government, *Model Business Principles* (May 1995).

being too vague, incomplete in terms of the substantive rights included, and lacking a framework for effective implementation.[78] In 1996 President Clinton appointed the Apparel Industry Partnership (see section 3.4, below).

The Canadian Government convened a meeting in May 1999 of Canadian retailers, manufacturers and non-governmental organizations (NGOs) to discuss how to ensure that consumer products sold in Canada are made under humane working conditions. The participants agreed to form a joint working group to develop a Canadian basic code of labour practice.[79]

South African President Nelson Mandela has called on the business community to contribute to social development: 'There are many ways in which the special skills and know-how of the business community can help the government achieve its development objectives';[80] 'Development can no longer be regarded as the responsibility of government alone. It requires a partnership of government with its social partners: private sector, labor and non-governmental organisations'.[81]

2.6 Non-Governmental Organizations

Amnesty International's *Human Rights Principles for Companies* (and accompanying *Introductory Checklist*)[82] contain standards on the following subjects:

i) Personnel practices and policies;
ii) Security arrangements;
iii) Responsibility for promoting and upholding human rights standards;
iv) Implementation and monitoring;

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78 C. Chandler, 'Code of Conduct: Draft Assailed: Rights Groups Criticize Administration's Rules for US Firms Abroad', *New York Times* (28 Mar. 1995), p. D4; C. Forcese, *Commerce with conscience? Human Rights and Corporate Codes of Conduct* (Montréal, International Centre for Human Rights and Democratic Development, 1997), p. 60, endnote 1.

79 *Government responds to call for federal task force on sweatshops*, Press release issued by NGOs following 11 May 1999 meeting to discuss sweatshop issues (11 May 1999).

80 Excerpt from remarks by President Nelson Mandela at launch of National Business Initiative (March 1995), in *National Business Initiative*, 'Enhancing the Business Contribution to Make our Society Work for All' (undated).

81 Excerpt from remarks by President Nelson Mandela to the World Economic Forum Southern Africa Economic Summit, referred to in *World Economic Forum*, 'Presidents Mugabe and Mandela appeal for efforts to globalize sub-saharan Africa at the World Economic Forum's international business summit in Harare, Zimbabwe' (21 May 1997), <http://www.weforum.org/publications/press_releases/zaes97_globalize210597.asp>, accessed on 1 June 1999; e-mail from L. Stott, Prince of Wales Business Leaders Forum, 31 Mar. 1998.

82 Amnesty International, *Human Rights Principles for Companies* (AI Index ACT 70/01/98).

v) Company policy on human rights;
vi) Community engagement;
vii) Prohibition of forced labour, bonded child labour, or coerced prison labour;
viii) Health and safety;
ix) Freedom of association and the right to collective bargaining; and
x) Fair working conditions.

Amnesty International, in spite of having a more limited mandate than most other human rights organizations, is increasingly addressing business issues. For example, in 1996 the organization published a report on Nigeria which includes a section entitled 'Transnational companies'.[83] During the organization's 1996 campaign on China it issued a special set of papers for business people, entitled 'Human rights are everybody's business'.[84]

Sir Geoffrey Chandler, Chairperson of Amnesty International's UK Section Business Group, emphasizes that the Universal Declaration of Human Rights 'not only legitimizes a company's right to speak out on such matters; it imposes an obligation to do so'.[85] He recently commented, in a *Time* magazine guest editorial distributed to participants in the 1999 Davos World Economic Forum, that corporations must change their perception 'about the frontiers of their responsibility'. They must recognize that 'they bear responsibility for the total impact of their operations – for the manner in which they treat their employees, for their security arrangements, for their effect on the social, physical and political environment in which they operate'.[86]

Human Rights Watch, in its 'Working Guidelines on Business and Human Rights',[87] explains that its research and advocacy is focused on three issues where companies have been complicit in human rights abuses or have gained advantage from human rights abuses: direct corporate complicity; corporate advantage from the failure of government enforcement; and inappropriate corporate presence.

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83 Amnesty International, *Nigeria: Time to end contempt for human rights* (AI Index AFR 44/14/96, 6 Nov. 1996), p. 25.

84 Amnesty International, *Human rights are everybody's business* (AI Index ASA 17/18/96, Jan. 1996).

85 Chandler, 'Oil Companies and Human Rights', *Oxford Energy Forum* (Nov. 1997), p. 4.

86 G. Chandler, 'The New Corporate Challenge: Globalization requires companies to do more than seek higher profits', *Time* (1 Feb. 1999), p. 68, <http://cgi.pathfinder.com/time/reports/davos/corp_challenge.html>, accessed on 3 Apr. 1999.

87 Human Rights Watch, *Working Guidelines on Business and Human Rights* (June 1997).

The Human Rights Watch guidelines include a section on 'Proactive Measures', which says:

> Human Rights Watch urges corporations to be a force for improving respect for human rights through a broad range of actions, including:
> - emphasizing commitment to the rule of law which underlies respect of human rights;
> - protesting restrictions on civil and political rights, for example freedom of expression, association or assembly;
> - using influence with governments to raise concerns about human rights violations;
> - respecting and protecting the basic human rights, including labor rights, of their employees.

The Human Rights Watch guidelines conclude with the following statement:

> In countries characterized by severe human rights violations, corporations often justify their presence by arguing that their operations will enhance respect for rights but then adopt no substantive measures to achieve that end. Corporations doing business in these states take on a special obligation to implement proactive steps to promote respect for rights and to ensure that they do not become complicit in rights violations. Where a corporation uses 'constructive engagement' to justify its presence in such a country, we will examine whether it has taken any of the acts listed above.

Human Rights Watch has also been giving more attention to the human rights-related record of corporations in its country reports. In 1996 it published *Mexico – No Guarantees: Sex Discrimination in Mexico's Maquiladora Sector* which examined discrimination against and mistreatment of women workers in export-processing factories owned by multinationals.[88] That report was updated in a 1998 report: *Mexico – A Job or Your Rights: Continued Sex Discrimination in Mexico's Maquiladora Sector.*[89] In 1998 Human Rights Watch published *Colombia: Human rights concerns raised by the secur-*

88 Human Rights Watch, *Mexico – No Guarantees: Sex Discrimination in Mexico's Maquiladora Sector* (Aug. 1996), <http://www.hrw.org/hrw/summaries/s.mexico968.html>, accessed on 27 May 1999.

89 Human Rights Watch, *Mexico – A Job or Your Rights: Continued Sex Discrimination in Mexico's Maquiladora Sector* (Dec. 1998), http://www.hrw.org/hrw/reports98/women2/, accessed on 27 May 1999.

ity arrangements of transnational oil companies.[90] That report includes recommendations to oil companies aimed at preventing further human rights violations by military forces protecting company interests in Colombia, and letters from Human Rights Watch to BP and to Occidental Petroleum.

In January 1999 Human Rights Watch published two books which examine in great detail the human rights-related record of corporations:

i) *The Enron Corporation: Corporate Complicity in Human Rights Violations*[91] focuses on the Dabhol Power Corporation (DPC), an Indian subsidiary of Houston-based Enron Corporation. The report examines the complex history of the Dabhol Power project in India from its inception in 1992, particularly the local opposition which arose from environmental activists and villagers' organizations, and human rights violations including suppression of freedom of expression and peaceful assembly, arbitrary detention, and excessive use of force by the police. The report states that DPC was complicit in these violations because it:

a) paid the police security forces located adjacent to the project site;
b) did not adequately investigate complaints that DPC contractors committed abuses; and
c) did not speak out about human rights violations.

The report identifies the interconnected responsibility of all the actors in this project for the human rights violations which occurred: the Government of India, the State Government of Maharashtra, Enron, the US Government, and public and private financial institutions that financed the project.

ii) *The Price of Oil: Corporate Responsibility and Human Rights Violations in Nigeria's Oil Producing Communities*[92] examines in considerable detail the connection between international oil companies and human rights violations in the oil-producing region of Nigeria. It includes recommendations to the Nigerian Government, the international oil companies operating in Nigeria, and the international community.

The Interfaith Center on Corporate Responsibility (US), The Ecumenical Council for Corporate Responsibility (UK/Ireland) and The Taskforce on

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90 Human Rights Watch, *Colombia: Human rights concerns raised by the security arrangements of transnational oil companies* (Apr. 1998), < http://www.hrw.org/hrw/advocacy/corporations/colombia/index.htm >, accessed on 27 May 1999.

91 Human Rights Watch, *The Enron Corporation: Corporate Complicity in Human Rights Violations* (1999), < http://www.hrw.org/hrw/reports/1999/enron/ >, accessed on 26 May 1999.

92 Human Rights Watch, loc. cit. n. 52.

the Churches and Corporate Responsibility (Canada) together developed *Principles for Global Corporate Responsibility: Bench Marks for Measuring Business Performance.*[93] These principles, adopted in 1995 and revised in 1998, include the following:

> The company is fully committed to respecting internationally recognized human rights standards, including the Universal Declaration of Human Rights....
>
> In instances where legislation or the actual practices of any public institution violate fundamental human rights, the company does everything in its power to maintain respect for those fundamental rights in its own operations. The company also seeks to exercise its corporate influence to contribute to the establishment of such fundamental rights.
>
> The company has a policy that it will withdraw from a country in instances where there are gross and systematic violations of human rights and when there is a recognized movement from within the country calling for withdrawal.[94]

The Ethical Trading Initiative in the UK is 'an alliance of companies, non-governmental organizations (NGOs) and trade union organizations committed to working together to identify and promote good practice in the implementation of codes of labour practice, including the monitoring and independent verification of the observance of code provisions'.[95]

New York-based Council on Economic Priorities (CEP) in 1997 launched SA8000, a social accountability code providing global standards in the areas of workers' rights including trade union rights, child labour, forced labour, and health and safety.[96] CEP's research team tracks hundreds of corporations internationally, rating their performance on issues including the environment, women's advancement, minority advancement, charitable giving, community outreach, family benefits, workplace issues, disclosure of information, military contracts, and animal testing.

The International Centre for Human Rights and Democratic Development (ICHRDD) in Canada has given much attention to the subject of business and human rights in its publications and conferences. Ed Broad-

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93 The Interfaith Center on Corporate Responsibility, The Ecumenical Council for Corporate Responsibility, The Taskforce on the Churches and Corporate Responsibility, *Principles for Global Corporate Responsibility: Bench Marks for Measuring Business Performance* (29 May 1998).

94 Ibid.

95 *Ethical Trading Initiative*, <http://www.ethicaltrade.org>, accessed on 25 May 1999.

96 Council on Economic Priorities, *Social Accountability 8000* (undated).

bent, when he was the organization's president in 1996, identified three practical steps that companies can take to address human rights:

a) adopt codes of conduct aimed at ensuring that business operations respect international human rights principles;
b) integrate information about human rights as part of strategic research prior to business trips and use whatever opportunities are available to inquire about such matters with local authorities; and
c) establish a charitable fund for human rights groups with a percentage of corporate profits.[97]

Development organizations such as Oxfam, Christian Aid, Save the Children and ACTIONAID during the 1990s have given increasing attention to the links between civil/political rights and economic/social/cultural rights. Oxfam emphasized at the 1993 UN World Conference on Human Rights 'the view, based on experience of working with poor people throughout the developing world, that poverty tends to be characterized not only by material insufficiency but also by denial of rights....Political participation and economic empowerment, it believes, can be shown to be essential elements in all successful development programmes'.[98]

Development agencies are giving increasing attention to encouraging business to contribute positively to sustainable development and human rights. They urge companies:

a) to avoid harm to the well-being of local communities;
b) to use their influence with governmental authorities to press for funds (for example, fees paid by the company for joint ventures or exploration rights) to be used in ways which promote sustainable development for local communities and for others in need;
c) to work in partnership with local communities and NGOs to contribute positively to sustainable development, poverty alleviation, education, health care, and other social needs.

ACTIONAID, for example, works closely with companies on development projects aimed at eradicating poverty. In India ACTIONAID supports Partners in Change, an organization which helps companies develop a social development policy, identify NGO partners, sensitize and train company staff on social development issues, and monitor the progress of social development programmes.[99]

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97 International Centre for Human Rights and Democratic Development (ICHRDD), loc. cit. n. 42.

98 P. Feeney, 'New development agenda', in: R. Reoch (ed.), *Human Rights: The New Consensus* (1994), p. 32 at p. 35.

99 Partners in Change/ACTIONAID, *Corporate Partnership: Making Social Responsibility Work* (brochure describing the work of Partners in Change).

Accountable Aid, an Oxfam study of major development programs in Brazil, India and Uganda, sets forth six principles for accountable development derived from internationally recognized human rights standards which Oxfam says should be respected by companies, governments, international financial institutions and NGOs.[100]

2.7 Selective Purchasing Laws

A number of selective purchasing laws have been enacted in the US by state and city governments. Most prevent those state and city governments from dealing with companies doing business in Burma (Myanmar) because of the human rights situation in that country. Several localities in Australia recently joined the list.[101] And Burma is not the only target: Berkeley, Oakland and Alameda County adopted selective purchasing laws on Nigeria during the period of military rule in that country, and Berkeley also targets companies doing business in Tibet if their operations have been criticized by the Tibetan government-in-exile.[102]

In April 1998 the National Foreign Trade Council (NFTC) brought a lawsuit in US federal court alleging that the Massachusetts selective purchasing law on Burma was unconstitutional because it infringed on the federal government's exclusive foreign affairs power. The NFTC is a coalition of 580 US multinational corporations; the organization says its members account for 70 percent of all US non-agricultural exports.[103] The NFTC secured a protective order so that it did not have to reveal (except to the judge) the names of the individual companies which were alleging they were harmed by the Massachusetts law; those corporations feared that if they were publicly named they would be subjected to consumer boycotts.[104]

Simon Billenness of Trillium Asset Management (a Boston-based socially responsible investment advisor) criticizes the NFTC's case:

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100 P. Feeney, *Accountable Aid: Local Participation in Major Projects* (Oxford, Oxfam Publications, 1998), pp. 146-49.

101 *Localities with Burma Selective Purchasing Laws*, <http://www.soros.org/burma/city-list.html>, accessed on 2 Apr. 1999.

102 S. Billenness, *Companies Take to the Courts: Case Against Burma Law Now Likely* (15 Apr. 1998), <http://soros.org/burma/le41598.html>, accessed on 2 Apr. 1999.

103 'Advocates vow boycott of companies in Myanmar', *Journal of Commerce* (9 Nov. 1998), <http://www.joc.com/>, accessed on 2 Apr. 1999.

104 Telephone interview with S. Billenness, Trillium Asset Management, 20 Apr. 1999; 'Burma government follows ruling on Massachusetts boycott law', *Boston Globe* (6 Nov. 1998), <http://shweinc.com/news/19981106-3.shtml>, accessed on 2 Apr. 1999.

> [T]he NFTC and its allies fail to explain adequately why only cities and states should be barred from incorporating moral concerns into their choices in the marketplace. After all, consumers are free to boycott companies that violate their moral concerns. Even corporate members of the NFTC, such as Levi Strauss & Co. and Liz Claiborne, are on the record as ending their contracts to buy from Burmese factories because of the military regime's pervasive abuse of human rights.[105]

Those filing *amicus curiae* briefs on the side of the NFTC included the European Union, the US Chamber of Commerce, the National Association of Manufacturers, and the American Petroleum Institute.[106]

The State of Massachusetts argues that its selective purchasing law is constitutional, in part because the US Congress had implicitly permitted the state's law when Congress in 1996 – months after enactment of the Massachusetts Burma Law and similar local laws – imposed economic sanctions on Burma but took no action to pre-empt state and local laws. Massachusetts also argues that it is simply exercising its right to spend its own money as it sees fit in a free market, and that the 'market participant doctrine' (an exception to the Commerce Clause of the US Constitution) grants cities and states considerable leeway when they participate in the marketplace.[107]

An *amicus curiae* brief filed by human rights organizations supporting the State of Massachusetts says: 'International human rights law establishes a recognized standard of public morality endorsed by the federal government and reserved, in large part, for implementation by the states'. The brief says that when the US federal government ratified the UN Charter and human rights treaties, it delegated to the states the necessary authority to implement those treaties, and therefore the Massachusetts Burma law is a legitimate response to the human rights record of Burma's military rulers.[108]

In November 1998 the federal district court struck down the Massachusetts law as unconstitutional, on the grounds that it violates the federal government's power to regulate foreign affairs.[109] The Attorney General of Massachusetts appealed the ruling, and on 22 June 1999 the US Court of

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105 S. Billenness, 'Burma Law on Trial: Case Threatens Anti-Apartheid Legacy', *Investing for a Better World*, Vol. 12, No. 4 (Apr. 1999), p. 1.

106 USA*Engage, *Amicus Briefs Filed in Support of the National Foreign Trade Council*, <http://www.usaengage.org/background/lawsuit/ProAmicusBriefs.html> accessed on 2 Apr. 1999; 'EU files brief with US District Court in Massachusetts', *The European Union Press Releases*, No. 65/98 (8 July 1998), <http://www.eurunion.org/news/press/1998-3/pr65-98.htm>, accessed on 2 Apr. 1999.

107 Billenness, loc. cit. n. 105, at p. 1.

108 Ibid., at p. 5.

109 Ibid., at p. 4

Appeals upheld the lower court's ruling, finding that the Massachusetts law was unconstitutional on three counts: it interferes with the federal government's foreign policy powers, it impinges upon Congress' powers to regulate foreign trade, and it was pre-empted by the federal sanctions on Burma.[110] The Massachusetts Attorney General is asking the US Supreme Court to review the case.[111] If the court's decision is not overturned by the Supreme Court, selective purchasing laws in states and cities across the US could be affected. Billenness notes that there is much at stake:

> At risk is the rich legacy of state and city action that rose to prominence in the campaign against apartheid in South Africa. The NFTC and its corporate backers clearly see the case as an opportunity to obliterate this method of activism. The result would be to dramatically reduce the tools available for American citizens to hold multinational corporations accountable for their actions abroad.[112]

Meanwhile, human rights advocates are threatening consumer boycotts of certain large corporations (including those on the NFTC board) if they are denied recourse to selective purchasing laws.[113] If selective purchasing laws are no longer an option, more attention will be given by states, cities and universities to divestment of their investments in any companies doing business in Burma. Indeed a Burma divestment bill reportedly was pending before the Massachusetts State legislature in July 1999.[114]

2.8 Petitions to Revoke Corporate Charters

On 10 September 1998, thirty citizens' organizations and individuals filed a 127-page petition calling on the California Attorney General to revoke the charter of Unocal oil company. The petition said Unocal had a record of

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110 Public Citizen/Global Trade Watch, *Federal Appeals Court Rules Against MA Burma Law* (23 June 1999), <http://www.citizen.org/pctrade/burma/update2.htm>, accessed on 30 July 1999; *National Foreign Trade Council* v. *Natsios*, 181 F.3d 38 (1st Cir. 1999).

111 E. Iritani, 'Ruling on Myanmar Ban to Go to High Court', *Los Angeles Times* (13 July 1999), p. C-4, <http://www.latimes.com/>, accessed on 30 July 1999; B. Geman, 'Supreme challenge', *The Boston Phoenix* (15-22 July 1999), <http://www.boston-phoenix.com/alt1/index.html/archive/features/99/07/15/POLITICS.html>, accessed on 30 July 1999; R. Holding, 'Winds May Be Shifting for S.F.'s Foreign Policy', *San Francisco Chronicle* (11 July 1999), <http://www.sfgate.com/cgi-bin/article.cgi?file=/chronicle/archive/1999/07/11/SC100286.DTL>, accessed on 30 July 1999.

112 Billenness, loc. cit. n. 105, at p. 5.

113 'Advocates vow boycott of companies in Myanmar', loc. cit. n. 103.

114 Telephone interview with S. Billenness, Trillium Asset Management, 30 July 1999.

being a 'repeat offender' of environmental, labour and deceptive practices laws, and that through its operations in Burma and Afghanistan (and its links with those governments) it had been complicit in human rights violations. California law allows the Attorney General to go to court to dissolve a corporation for wrongdoing and to sell its assets to others who will operate in the public interest.[115]

Law professor Robert Benson, lead attorney for the petition against Unocal, said 'there has to be a point at which corporate repeat offenders are permanently prevented from doing further harm.... The State permanently revokes the licenses of hundreds of doctors, lawyers, accountants and others every year - why not corporations?'[116] Richard Grossman, co-founder of the Program on Corporations, Law and Democracy, said that the courts have 'always held that corporations are artificial entities, "mere creatures of the state", and must be summoned to answer to the people for usurpations of power and violations of the public trust such as those repeatedly committed by the Union Oil Company of California [Unocal]'.[117]

On 15 September 1998, three business days after the petition against Unocal had been filed, California's Attorney General declined to institute legal proceedings against Unocal.[118] He did not explain the reason for his decision. In April 1999, after a new state Attorney General had been elected, a coalition of nearly 130 groups and individuals (including 50 law professors) filed a similar petition against Unocal; in May the new Attorney General declined to take action against Unocal without explaining his reasons for doing so.[119]

Moves to revoke corporate charters have been rare in the past, but a few have been successful. In 1976 California's Attorney General asked a court to dissolve a private water company for allegedly delivering impure water to its customers; in that case the company settled the case, agreeing to sell its assets to a public water company and go out of business. In 1998 New York's Attorney General dissolved the corporate charter of the Council for

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115 M. Hood and N. Penniman, *Environmental, Human Rights and Women's Groups Petition California Attorney General To Revoke UNOCAL's Charter* (10 Sep. 1998), <http://www.igc.org/igc/en/hg/unocal.html>, accessed on 15 Apr. 1999.

116 R. Benson, 'Soft on Crime?' *The Recorder* (San Francisco) (14 Oct. 1998), reproduced as *Charter Revocation Article Appears in Nationwide Legal Press* (Update #8, 22 Nov. 1998), <http://www.heed.net/updates.html>, accessed on 15 Apr. 1999.

117 Hood and Penniman, loc. cit. n. 117.

118 *Bar Group Blasts Attorney General's Refusal to Act on Unocal Petition* (Update #2, 17 Sep. 1998), <http://www.heed.net/updates.html>, accessed on 15 Apr. 1999.

119 *Petition Re-filed with Attorney General Lockyer and Governor Davis* (Update #11, 14 Apr. 1999), <http://www.heed.net/update11.html>, accessed on 21 Apr. 1999; *Action Alert: Attorney General Lockyer turns his back on Unocal petition* (Update #13, 23 June 1999), <http://www.heed.net/update13.html>, accessed on 28 July 1999.

Tobacco Research (which had been an advocate for the interests of the tobacco industry) after the Council agreed to go out of existence as part of a settlement of litigation against the tobacco industry in other states. New York's newly elected Attorney General, Mark Spitzer, pledged during his campaign to be aggressive in revoking corporate charters when it is warranted.[120]

Corporate charter revocation laws in the US codify the English common law writ of *quo warranto*, and therefore charter revocation may be a potential remedy available in other countries as well.[121]

2.9 Lawsuits Against Companies

A number of groundbreaking lawsuits have been brought against companies for alleged misconduct relating to human rights. For example, in the United States lawsuits have been filed against Unocal for abuses in Burma, Shell and Chevron for abuses in Nigeria, Gap and 17 other clothing retailers for abuses in Saipan (a US territory in the Pacific), and Texaco for abuses in Ecuador.[122]

Another lawsuit accused Nike of violating California's consumer protection laws. A more detailed discussion of Nike's human rights record is included in the longer, original version of this article, as explained at the beginning. In April 1998 a civil lawsuit was filed against Nike in the San Francisco, California, Superior Court, alleging that Nike had violated state law by misleading customers about the working conditions in its Asian factories. This was a 'private attorney general action' for 'unlawful and unfair business practices' that violate California's Business and Professions

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120 Benson, loc. cit. n. 116; *Petition Re-filed with Attorney General Lockyer and Governor Davis*, loc. cit. n. 119.

121 Telephone interview with Professor R. Benson, 22 Apr. 1999; Benson, loc. cit. n. 116.

122 'Shell faces Saro-Wiwa legal action', *Independent on Sunday* (United Kingdom) (23 May 1999), <http://www.globalarchive.ft.com/search/FTJSPController.htm>, accessed on 30 July 1999; G. Malkani, 'US groups come under spotlight over human rights abroad: An energy company faces the possibility of being held liable for abuses by the Burmese army: Gautam Malkani reports', *Financial Times* (5 July 1999), <http://www.globalarchive.ft.com/search/FTJSPController.htm>, accessed on 30 July 1999; E. Press, 'Texaco on Trial', *The Nation* (31 May 1999), <http://www.thenation.com/>, accessed on 11 Aug. 1999; 'Aguinda v. Texaco; Jota v. Texaco', <http://www.texacorainforest.org>, accessed on 11 Aug. 1999; *Aguinda* v. *Texaco, Inc.*, 850 F. Supp. 282 (S.D.N.Y. 1994), dismissed on other grounds, 945 F. Supp. 625 (S.D.N.Y.) 1996, vacated subnom, *Jota* v. *Texaco, Inc.*, 157 F. 3d 153 (2d Cir. 1998)]; Order granting in part and denying in part defendant Unocal's motion to dismiss in case of *Doe* v. *Unocal Corp.*, 963 F. Supp. 880 (C.D. Cal. 1997), <http://diana.law.yale.edu/diana/db/31198-1.html>, accessed on 30 July 1999.

Code. Such cases can be brought in California state courts more easily than elsewhere in the US because under California's broad consumer protection laws the plaintiff does not need to show that he or she personally suffered injury; it is enough to show that there was a likelihood of deception. The lead attorney said at the time of lodging the complaint, 'Nike has failed to tell Californians the truth about their business practices. They misrepresented the conditions in their factories and the wages they paid to protect their profits, and that's illegal'.[123] The press statement issued the day the complaint was filed said:

> The most damning evidence against the company is contained in a 1997 Ernst & Young internal audit. Despite Nike's claims in a January 1996 letter that its Memorandum of Understanding certifies compliance with 'applicable government regulations regarding occupational health and safety [and] environmental regulations', Ernst & Young's inspection of a Vietnamese Nike shoe plant found evidence of widespread health and safety violations.[124]

The purpose of the complaint was stated to be to get Nike 'to correct the discrepancy between its public rhetoric and its actual labor practices overseas....to force the company to bring its labor practices up to the level of its claims'.[125]

The complaint says that Nike misrepresented the truth when the company made claims including:

i) that Nike workers were not subjected to punishment or sexual abuse;
ii) that Nike products are made in accordance with laws governing wages and hours;
iii) that health and safety regulations are followed at Nike factories;
iv) that Nike pays average line-workers double the minimum wage in Southeast Asia;
v) that Nike workers receive free meals and health care;
vi) that the Andrew Young (Goodworks International) report proves that Nike is doing a good job and 'operating morally'; and
vii) that Nike guarantees a 'living wage' for its workers.[126]

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123 *USA: Nike sued over sweatshop conditions* (20 Apr. 1998), <http://diana.law.yale.edu/diana/db/5798-3.html>, accessed on 19 Apr. 1999. For more detail on the legal basis and range of these lawsuits, see the contributions by B. Stephens, and J. Green and P. Hoffman, to this volume.

124 Ibid.

125 Ibid.

126 Complaint in the case of *Mark Kasky* (on behalf of the general public of the State of California) v. *Nike, Inc.*, San Francisco Superior Court (20 Apr. 1998), <http://www.corpwatch.org/trac/nike/lawsuit.html>, accessed on 26 Apr. 1999.

The complaint refers to extensive documentation contradicting Nike's claims, including the above-mentioned Ernst & Young report. The complaint accuses Nike of violations of California law including negligent misrepresentation, fraud and deceit. It asks for Nike to turn over any profit made through unfair business practices and to undertake a corrective advertising campaign to explain how its products were produced.

The complaint was pending when Nike announced some changes to its policies in May 1998. The case was never argued on its facts; instead Nike moved for the complaint to be dismissed saying that even if the facts argued against it were true (which Nike did not accept) there would be no basis under law for finding Nike liable. Nike argued that its claims were made not in paid advertisements but in the context of statements to shareholders, over the internet, and to reporters, which Nike considered to be non-commercial speech protected by the First Amendment of the US Constitution.[127] The Superior Court judge in February 1999 ruled in favour of Nike and dismissed the case, finding no legal basis for it to proceed.[128] The judge did not explain his precise reasons for dismissing the case; this is not required when a motion to dismiss is granted.[129] The case is being appealed by the plaintiffs, who argue in their appellate brief that Nike's statements about its labour practices were commercial speech intended to induce consumers to buy its products and that the lower court erred because the First Amendment does not protect commercial speech that is false, deceptive or misleading. The brief also argues that even if Nike's statements were non-commercial speech the action must be allowed to proceed because the First Amendment does not bar the action.[130]

2.10 A Need for More Attention to the Private Sector's Responsibility to Promote Human Rights

Much of the focus of those monitoring business and human rights has been on alleged acts of irresponsibility, often by companies in the oil, mining or apparel industries. It is right that acts of irresponsibility by business should always be a top priority for human rights monitors.

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127 Defendants Nike...reply memorandum in support of demurrer to plaintiff's first amended complaint in the case of *Mark Kasky* (on behalf of the general public of the State of California) v. *Nike, Inc.*, San Francisco Superior Court (23 Oct. 1998).

128 'Nike Wins Dismissal of Suit Alleging It Runs Asian Sweatshops', *International Herald Tribune* (8 Feb. 1999).

129 Ibid.; Telephone interview with law firm of Bushnell, Caplan & Fielding (attorneys for plaintiff), 19 Apr. 1999.

130 Appellant's opening brief, *Kasky* v. *Nike, Inc.*, Case No. A086142 San Francisco Superior Court.

But human rights and development advocates, and the business community itself, also need to give increased attention to articulating and monitoring the positive responsibilities of all companies to promote human rights and sustainable development. This is particularly important now because a new league of multinational companies, the 'knowledge-based companies',[131] are becoming larger and more powerful. Their work focuses on technology, computer networks, software, semiconductors, telecommunications, the internet and biotechnology. Their names include Microsoft, Intel, Cisco, Lucent, AOL, Yahoo and Amgen.

If anyone doubts the astounding growth and economic power of these companies, the market capitalization (commonly referred to as 'market cap': the total market value of all outstanding shares, computed by multiplying the number of shares times the market price, in US dollars) of Microsoft on 10 April 1999 ($475.7 billion) was larger than the market cap of all the following oil companies put together (all figures reflect 10 April 1999)[132]: Exxon ($181.6 billion), Mobil ($73.4 billion), Chevron ($61.4 billion), Texaco ($31.0 billion), Total ($29.8 billion), Atlantic Richfield ($25.1 billion), Enron ($21.2 billion), CONOCO ($15.0 billion), Phillips Petroleum ($12.2 billion), Unocal ($8.8 billion), and Occidental Petroleum ($6.4 billion). If Exxon and Mobil are deleted from that list, Intel ($217.5 billion) had a market cap greater than the other nine oil companies combined. Cisco ($188.7 billion), Lucent ($168.2 billion) and America Online ($163.7) each had a greater market cap than eight of those oil companies put together (excluding Exxon, Mobil and Chevron). Even Yahoo ($41.5 billion) had a market cap almost equal to four oil companies combined: CONOCO, Phillips, Unocal, and Occidental. On 22 April 1999 the market capitalisation of Royal Dutch Shell was $187 billion; BP Amoco was $171.2 billion.[133] In December 1997 the market cap of General Electric was roughly $241 billion, then greater than the combined value of the stock markets of Malaysia, Indonesia, Thailand, the Philippines and Korea.[134] Today Microsoft's market cap is larger than that of General Electric. There are many more technology companies than oil companies or apparel companies, they are growing at a much faster rate, and most of them are already international players.

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131 Drucker, op. cit. n. 1.

132 Figures on market capitalisation from three INTERNET sites on 10 Apr. 1999: Yahoo!FinanceQuotes/Profile, <http://quote.yahoo.com/>; Quicken.comQuotes, <http://www.quicken.com/investments/snapshot/>; AOLPersonalFinancequotes center.

133 *Forbes Global Business & Finance* (17 May 1999), p. 52.

134 A. Abelson, *Rx for Asia*, Barron's Online (15 Dec. 1997), <http://interactive.wsj.com/pages/barrons.htm>, accessed on 17 Dec. 1997.

The new technology companies are much less likely than some traditional companies to be displacing people, having contacts with a country's security forces, causing major environmental damage, operating sweatshops, using forced labour or using child labour. Their success is not based primarily on extracting resources from the earth or physical labour from people; it is based mainly on mobilizing knowledge from employees' brains and skills from a highly-trained workforce.

What responsibilities do these huge technology companies have to use their tremendous resources, skills and influence to contribute positively to the societies which supply them with markets, workers and customers? How should they be contributing to sustainable development and to civil society? What role should they play in improving education, reducing poverty, protecting the environment, and promoting human rights and the rule of law?

The human rights guidelines for companies articulated by human rights organizations, development agencies, business people and others (referred to elsewhere in this article) help to answer these questions. But more work needs to be done by human rights and development advocates to explain the positive responsibilities of business, to challenge companies to act, and to engage directly with the 'knowledge companies' which so far have tended to be on the sidelines of human rights debates.

3 STEPS TOWARD CHANGE

3.1 Business Groups Putting Human Rights on Their Agenda

The Caux Round Table Principles for Business, adopted by a group of US, Japanese and European business leaders in 1994, state that business has certain responsibilities, including: 'We believe that as global corporate citizens, we can contribute to such forces of reform and human rights as are at work in the communities in which we operate. We therefore have a responsibility in those communities to...respect human rights and democratic institutions, and promote them wherever practicable'.[135]

In 1997, 14 Canadian companies announced an 'International Code of Ethics for Canadian Business'.[136] Signatory companies pledge that they

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135 *The Caux Round Table Principles for Business: An international ethics statement for business* (1994), section 3, <http://www.cauxroundtable.org/ENGLISH.HTM>, accessed on 25 May 1999.

136 *The International Code of Ethics for Canadian Business*, <http://www.uottawa.ca/hrrec/busethics/codeint.html>, accessed on 28 Mar. 1999.

will 'support and promote the protection of international human rights within our sphere of influence' and will 'not be complicit in human rights abuses'.

In April 1998 the Confederation of Danish Industry published *Industry and Human Rights*, a guide to help companies come to grips with human rights issues. This guide was developed in co-operation with the Danish Center for Human Rights.[137]

In the US, Business for Social Responsibility (BSR) is an alliance of over 1400 member companies and affiliated companies.[138] Its Business and Human Rights Program helps companies:

i) develop company human rights policies and systems for independent monitoring;
ii) engage in dialogue with human rights organizations, labour unions and governments; and
iii) address issues arising through sourcing and manufacturing in developing countries, such as worker health and safety, child labor, forced labour, working conditions, and environmental standards.[139]

The BSR website provides extensive information about human rights designed to help companies develop their policies and practices.[140]

These initiatives provide important recognition by the business community that support for, and promotion of, human rights are not outside the scope of the private sector's responsibilities. As for voluntary codes of conduct, they are significant but not sufficient. Maurice Williams, President of the Society for International Development, has drawn attention to the fact that these codes are no substitute for enforced standards of public policy:

> While these declarations of intentions are praiseworthy, they are entirely voluntary and hortatory. Systematic reporting on their application is largely lacking. Most private firms place the efficiency of their operations well to the fore of social concerns, as is the accepted business ethos. In fact, competition in the market-place is such that few firms are likely to take human rights standards seriously outside the framework of enforced public policy in favor

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137 J. Schierbeck/Confederation of Danish Industries (Dansk Industri), *Industry and Human Rights* (Apr. 1998).

138 Business for Social Responsibility, *Frequently Asked Questions*, <http://www.bsr.org/>, accessed on 5 June 1999.

139 Business for Social Responsibility, *Human Rights*, <http://www.bsr.org/resourcecenter/>, accessed on 5 June 1999; J. Nelson/The Prince of Wales Business Leaders Forum, *Business as Partners in Development: Creating wealth for countries, companies and communities* (London, The Prince of Wales Business Leaders Forum, 1996), p. 267.

140 Business for Social Responsibility, loc. cit. n. 139.

of uniform application of social and environmental standards. Public spirited firms seek to cooperate with governments in the setting of such standards.

3.2 Companies Adopting Human Rights Principles

The changes in business thinking discussed in section 1, and the various pressures on the private sector discussed in section 2, have spurred some companies to adopt human rights policies. Companies are starting to realize that in the 21st century it will be very difficult to be a world-class company if they have a second-class human rights record.

Amnesty International's guidelines call on companies to adopt human rights policies which:

i) explicitly support the Universal Declaration of Human Rights;
ii) set forth procedures to ensure all operations are examined for their potential impact on human rights;
iii) provide safeguards to ensure that company staff are never complicit in human rights abuses;
iv) enable issues about human rights and the rule of law to be raised with government authorities;
v) provide for human rights training of all employees within the company;
vi) commit the company to promote respect for international human rights.[141]

The International Confederation of Free Trade Unions, and the International Trade Secretariats, together adopted in 1997 a 'Basic Code of Conduct covering Labour Practices', a minimum list of standards which they consider should be included in all company codes of conduct covering labour practices.[142]

Until the late 1990s only a few companies had adopted policies which seriously addressed international human rights issues. Those in the forefront included Levi Strauss, Reebok and The Body Shop.

The Levi Strauss 'Global Sourcing & Operating Guidelines', adopted in 1991, say that the company will only do business with partners which adopt certain employment, health and safety standards. These guidelines also include the following provision: 'We will favor business partners who share our commitment to contribute to improving community conditions'.[143]

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141 Amnesty International, loc. cit. n. 84.

142 ICFTU, *The ICFTU/ITS Basic Code of Labour Practice*, <http://www.icftu.org/english/tncs/tncscode98.html>, accessed on 28 Mar. 1999.

143 Levi Strauss & Co., *Global Sourcing and Operating Guidelines: Business Partner Terms of Engagement*, <http://www.levistrauss.com/about/code.html>, accessed on 27 May 1999.

Levi Strauss says that if it determines any business partner is in violation of these standards, 'the company may withdraw production from that factory or require that a contractor implement a corrective action plan within a specified time period. If a contractor fails to meet the corrective action plan commitment, Levi Strauss & Co. will terminate the business relationship'.[144] The Levi Strauss 'Country Assessment Guidelines' say: 'The diverse cultural, social, political and economic circumstances of the various countries where Levi Strauss & Co. has existing or future business interests raise issues that could subject our corporate reputation and therefore, our business success, to potential harm. The Country Assessment Guidelines are intended to help us assess these issues'.[145] The guidelines say one of the factors the company assesses is 'whether the...[h]uman rights environment would prevent us from conducting business activities in a manner that is consistent with the Global Sourcing Guidelines and other company policies'.[146] Levi Strauss, applying its Country Assessment Guidelines, decided to withdraw operations from Burma (Myanmar) in 1992, stating: 'Under current circumstances, it is not possible to do business in Myanmar without directly supporting the military government and its pervasive violations of human rights'.[147]

Reebok's 'Human Rights Production Standards', adopted in 1992, say that the company's 'devotion to human rights worldwide is a hallmark of our corporate culture'.[148] The standards cover non-discrimination, working hours/overtime, forced or compulsory labour, wages, child labour, freedom of association, and workplace safety/health. Reebok says it applies these standards in its selection of business partners: 'To assure proper implementation of this policy, Reebok will seek business partners that allow Reebok full knowledge of the production facilities used and will undertake affirmative measures, such as on-site inspection of production facilities, to implement and monitor those standards'.[149] Reebok annually recognizes four young human rights advocates with its Reebok Human Rights Award

144 Levi Strauss & Co, *Global Sourcing and Operating Guidelines: Evaluation & Compliance*, <http://www.levistrauss.com/about/code.html>, accessed on 27 May 1999.

145 Levi Strauss & Co., *Country Assessment Guidelines*, <http://www.irrc.org/labor/levis.htm>, accessed on 23 May 1999.

146 Ibid.

147 T. Smith, 'Transnational influence: The power of business', in: R. Reoch (ed.), op. cit. n. 98, p. 149 at p. 151.

148 Reebok, loc. cit. n. 43.

149 Ibid.

(a grant of $25,000 to a human rights organization designated by each recipient).[150]

The Body Shop's 'Trading Charter', adopted in 1994, includes the following statements:

> We aim to ensure that human and civil rights, as set out in the Universal Declaration of Human Rights, are respected throughout our business activities. We will establish a framework based on this declaration to include criteria for workers' rights embracing a safe, healthy working environment, fair wages, no discrimination on the basis of race, creed, gender or sexual orientation, or physical coercion of any kind. We will support long term, sustainable relationships with communities in need. We will pay special attention to those minority groups, women and disadvantaged peoples who are socially and economically marginalized....We will institute appropriate monitoring, auditing and disclosure mechanisms to ensure our accountability and demonstrate our compliance with these principles.[151]

The Body Shop also has adopted a 'Statement of Human Rights Principles', which includes the following assertions:

> While we respect cultural differences, and are aware of the economic disparities that exist within and between countries, we believe that the civil, political, economic, social and cultural rights outlined in the Universal Declaration of Human Rights (UDHR) are universal, indivisible, interdependent and interrelated. Our goal is to encourage the creation of working and living conditions where people can fulfil their potential, where their human rights are respected without prejudice, and where they can determine their own destiny. We will seek business partners who share this commitment.[152]

The Body Shop's principles include one of the strongest statements of any company about its responsibility to promote human rights in the societies where it operates: 'Raising awareness of human rights at every level will empower individuals and communities. We aim to educate ourselves on human rights issues and to use our influence and our trading relationships to promote respect for human rights. We will campaign passionately for

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150 Reebok, *About the Reebok Human Rights Award*, <http://www.reebok.com/human-rights/about.html>, accessed on 23 May 1999.

151 The Body Shop, *Trading Charter*, <http://www.the-body-shop.com/aboutus/body-charter.html>, accessed on 23 May 1999.

152 The Body Shop, *Our Agenda* (1996), p. 6.

human rights where we believe our involvement will contribute to positive change'.[153]

Today many more companies, including Royal Dutch Shell, BP Amoco, Nokia, Statoil, Norsk Hydro, Rio Tinto, and BT (British Telecommunications PLC) have adopted human rights policies. The policies of several of these companies explicitly state that the company supports the Universal Declaration of Human Rights. For example, BP in 1998 incorporated the following statement into its business policies:

> We will pursue our business with integrity, respecting the different cultures and the dignity and rights of individuals in all the countries in which we operate. We support the principles set forth in the UN Universal Declaration of Human Rights, recognising the role and enforcement responsibilities of governments.[154]

BP noted in its 1997 Social Report that under its self-certification process, each year about 10,000 employees in positions of responsibility world-wide must certify that they understand the business policies, that they have brought the policies to the attention of their staff and any third parties acting on BP's behalf, and that they are to the best of their knowledge in compliance with the policies. They are instructed to bring forward any concerns they might have about implementation of the policies.[155]

Another example of a recently-adopted human rights policy is that of Royal Dutch Shell. Its Statement of General Business Principles now includes provisions recognising the responsibility of Shell companies to 'respect the human rights of their employees' and...'[t]o conduct business as responsible corporate members of society, to observe the laws of the countries in which they operate, to express support for fundamental human rights in line with the legitimate role of business and to give proper regard to health, safety and the environment consistent with their commitment to contribute to sustainable development'.[156]

In 1998 Royal Dutch Shell published its first social report, entitled *Profits and Principles – does there have to be a choice?*[157] The introduction speaks

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153 Ibid., p. 7.

154 BP, 'BP's Policy Commitment to Ethical Conduct', *What we stand for...: Our Business Policies* (1998), p. 7; same language in BP Amoco, 'BP Amoco's Policy Commitment to Ethical Conduct', *What we stand for...Our Business Policies* (1999), p. 5.; *BP Amoco's Policy Commitment to Ethical Conduct*, <http://www.bpamoco.com/about/policies/ethic.htm>, accessed on 23 May 1999.

155 BP, *BP Social Report 1997* (1998), p. 8.

156 Royal Dutch Shell, loc. cit. n. 13.

157 Royal Dutch Shell, op. cit. n. 54.

of a thorough and far-reaching review Shell has been carrying out, and says: 'We had looked in the mirror and we neither recognized nor liked some of what we saw'.[158] Shell's report says it supports the Universal Declaration of Human Rights, and 'to ensure we act in the best possible way when confronted with human rights issues' the company will 'speak out in defence of human rights when we feel it is justified' and 'engage in discussion on human rights issues when making business decisions'.[159] Shell's 1999 social report explains that the company's letter of assurance process (each Country Chairman is required to write an annual letter to the Group Managing Director explaining how the company's General Business Principles are being applied) includes specific reference to human rights.[160]

BT's board of directors reportedly approved a new statement of business practices in March 1999 which includes a section on human rights. Amnesty International's UK Business Group commented: 'This is a significant step for a company which has not been targeted by NGOs and therefore does not have a pressing need to improve its image and appease its critics'.[161] Jan Walsh of BT said:

> Our commitment to addressing the human rights context of our operations reflects our aspirations as a global company to minimize the risk of transgressing international law and of violating widely held norms of acceptable behaviour. The Universal Declaration of Human Rights is an appropriate framework for us to use because of its international legitimacy and because it will facilitate our future efforts to develop human rights benchmarks... .[162]

Human rights and development advocates are watching to see how each new policy will be implemented and monitored, recognising that if a company adopts policies without also training staff, introducing accountability and providing for independent monitoring, there may be little change in corporate culture and conduct. What ultimately matters is what a company does in practice about human rights, not what it declares in its company code.

Looking at corporate codes referring to human rights issues which have been adopted so far, shortcomings are evident:

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158 Ibid., at p. 2.
159 Ibid., at p. 33.
160 Royal Dutch Shell, loc. cit. n. 14, at pp. 4-5, 28.
161 'BT calls on Universal Declaration of Human Rights', Human rights & Business matters (Amnesty International UK Business Group Newsletter) (Spring 1999), p. 1.
162 Ibid.

i) Most human rights policies have been adopted by companies only after they or their industry have come under attack in connection with human rights abuses. Most codes with a human rights component are found at apparel companies and oil companies. It is very disappointing that companies in other industries are usually silent on the subject.
ii) Of those corporate codes which do include human rights issues, most take a minimalist approach, referring only to issues for which their industry has been criticized. For example, the codes of many apparel companies have provisions about working conditions and child labour/ forced labour. While those commitments are welcome, there is seldom any reference at all to the company's responsibility to support and promote fundamental human rights in the wider society where it operates...indeed in apparel codes there is seldom any mention of the term 'human rights' at all.
iii) Some companies which adopt a code as a defensive measure in response to pressure do not give priority to implementing their code after the pressure abates. The Canadian Government drew attention to this problem in a 1998 Industry Canada report:

> [W]hile codes are voluntary – firms are not legislatively required to develop or adhere to them – the term 'voluntary' is something of a misnomer. Voluntary codes are usually a response to the real or perceived threat of a new law, regulation or trade sanctions, competitive pressures or opportunities, or consumer and other market or public pressures...[O]nce the code is in place, the initial pressure that led to its creation may dissipate, which could cause compliance among adherents to taper off.[163]

3.3 Human Rights Training for Employees

Amnesty International states that companies can improve their ability to promote human rights by 'providing effective training for their managers and their staff in international human rights standards, preferably with input and assistance from non-governmental organisations'.[164] To be effective, 'a corporate human rights policy must become an integral part of the company's culture'.[165]

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163 Government of Canada, Voluntary Codes: A guide for their development and use (Mar. 1998), pp. 8-9, quoted in C. Forcese, 'Human Rights Mean Business: Broadening the Canadian Approach to Business and Human Rights', Feb. 1999 (forthcoming, Proceedings-University of Toronto Human Rights Conference), p. 27.

164 Amnesty International, loc. cit. n. 84.

165 Dutch Sections of Amnesty International and Pax Christi International, op. cit. n. 76, at p. 59.

Too many companies which have adopted fine-sounding human rights principles have made little or no effort to train their managers and staff in the practical application of those policies, and have no system for assessing whether those principles are being implemented.

A recent report by the ILO about codes of conduct noted: 'Not infrequently, codes launched with much publicity in an import country are unknown, unavailable or untranslated at producing facilities; even where available, workers may have no way of reading the code or reporting non-compliance without disciplinary treatment or dismissal'.[166]

Royal Dutch Shell is one company which has taken some first steps in developing a training process. Shell's new training guide for managers, 'Business and Human Rights: A Management Primer',[167] was written with the help of independent experts. Its foreword says that the handbook was prepared 'to facilitate a better understanding of human rights, its history, vocabulary and dilemmas, and to help Shell companies identify and understand their role and responsibilities in supporting human rights'.[168]

One of the questions posed in the handbook is: 'How should a company be expected to express its support for international human rights standards in countries that don't fully observe them?'[169] The handbook admits that Shell needs to undertake more discussion of this dilemma, but notes it is vital for all employees to be aware of the company's societal responsibility 'to express support for fundamental human rights in line with the legitimate role of business'.[170] It goes on to say that Shell companies...

> can develop human rights goals appropriate to their own situations, and commit to entering into dialogue with policymakers about the need to remove constraints on their ability to achieve them. How this dialogue is conducted – whether publicly or privately, for example – depends upon a company's assessment of the situation. While this may include an external communica-

166 International Labour Office, Governing Body, Working Party on the Social Dimensions of the Liberalization of Interrnational Trade, Overview of global developments and Office activities concerning codes of conduct, social labelling and other private sector initiatives addressing labour issues, Doc. GB.273/WP/SDL/1 (Rev.1) (Nov. 1998), para. 60, <http://www.ilo.org/public/english/20gb/docs/gb273/sdl-1.htm>, accessed on 19 May 1999.

167 Royal Dutch Shell, Business and Human Rights: A Management Primer (1998), available at <http://www.shell.com/download/3359/index.htm>, accessed on 28 Apr. 1999.

168 Ibid., at p. 5.

169 Ibid., at p. 20.

170 Ibid.

> tions strategy, the focus should remain on achievement of concrete human rights goals rather than 'playing to the gallery', either at home or abroad.[171]

Shell's 1999 social report refers to training of the company's security personnel.[172]

It will be important for all companies to ensure that human rights training:

i) explains in plain language international standards on civil, political, economic, social and cultural rights – and how those rights are relevant to the company's operations internationally and locally;
ii) includes among the trainers people from human rights NGOs and people who have practical experience addressing human rights issues in the particular country and locality;
iii) focuses not just on managers at headquarters, but is effectively delivered to all staff and managers at all the company's operations world-wide;
iv) is pragmatic and specific rather than academic and vague;
v) addresses local issues and difficult fact situations which may arize in the particular country;
vi) is delivered in local languages whenever necessary to ensure full understanding by all staff;
vii) explains to employees how company procedures will ensure each staff member is individually accountable for applying the company's human rights policy, and how the overall policy will be implemented and independently monitored; and
viii) makes clear to employees how they can report non-compliance with the company's human rights principles without any risk of retaliation.

3.4 Independent Monitoring

Elaine Bernard, Executive Director of the Harvard Trade Union Program, has put forward 'general overall principles of independent monitoring' which she says are necessary 'to breathe life into the promise of any "code of conduct" or indeed, any claims of "good employer" practices':[173]

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171 Ibid., at pp. 20-21.

172 Royal Dutch Shell, loc. cit. n. 14, at p. 17.

173 E. Bernard, 'Ensuring Monitoring is not Coopted', New Solutions, Vol. 7, No. 4 (Summer 1997), pp. 10-12; also available at <http://www.tiac.net/users/htup/eb/monitor.html>, accessed on 12 May 1999.

i) Independent: 'Monitoring must be independent of business and the government'.
ii) Ongoing: 'Monitoring must be ongoing, not ad hoc, nor simply a publicity, celebrity visit....[W]orkers must be able to talk with monitors in complete confidentiality and with no reprisals'.
iii) Institutional: 'Monitoring needs to be institutional and to have independent authority beyond a "great man" or "great woman"'. The monitoring agency needs sufficient resources.
iv) Indigenous: 'Monitoring must have an indigenous component. That is, it must be on the ground, with local people, who speak the language, who live in the country where workplaces are being monitored'.
v) Trusted: 'Monitoring groups must be trusted by the workers and with a track record within the country'.
vi) Knowledgeable: '[F]or monitoring to be truly effective, the monitors need to have people who have knowledge about the work process under review and an appreciation of what is common practice and what is not'.
vii) Transparent: 'The work of the monitoring group must be as open as possible. Transparency needs to be written into any monitoring agreement so that the monitors have the right to communicate information without corporate pre-screening or control'.[174]

Elaine Bernard says that if the above conditions cannot be met, NGOs 'should not be dragged into monitoring....For example, if rights are so consistently denied that there is no "trusted" indigenous human rights or workers group to partner with, we should state openly that "independent monitoring" is not possible in this environment – and furthermore, that any code of conduct under such circumstances is meaningless'.[175]

Amnesty International calls on companies to take the following steps to monitor their human rights performance:

> All companies should establish mechanisms to monitor effectively all their operations' compliance with codes of conduct and international human rights standards. Such mechanisms must be credible and all reports must periodically be independently verifiable in a similar way to the auditing of accounts or the quality of products and services. Other stakeholders such as members of local communities in which the company operates and voluntary organizations should have an opportunity to contribute in order to ensure transparency and credibility.[176]

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174 Ibid.
175 Ibid.
176 Amnesty International, loc. cit. n. 84.

The Dutch Sections of Amnesty International and Pax Christi International note that a company should extend such a monitoring system to its suppliers, sub-contractors and joint ventures. They stress the importance of involving local organizations in the monitoring process: 'Accuracy and credibility is enhanced if the monitoring programme involves local labour, human rights, religious or other institutions who have the trust of workers and knowledge of local conditions. Monitors rooted in local communities will be best qualified to detect essential, but not easily quantifiable, facts which relate to human rights, like non-discrimination, harassment, the right to organize, etc'.[177]

Richard Howitt, the Member of the European Parliament who introduced the recently-adopted European Parliament resolution concerning codes of conduct for European transnational corporations (described in section 2.4), has urged that more attention be given to implementation and monitoring of company codes:

> I believe that voluntary codes of conduct on their own are inadequate. In the two years of preparation for this parliamentary report, I have observed that many companies and business associations express their codes in glossy documents with fine words. When I ask the question *how are these to be implemented?'*, or *'how have these voluntary standards changed business practice?'* or *'have they led to compensation for a complainant?'*, there is a deafening silence. This is not to say that these voluntary codes are drawn up in bad faith, which I don't believe to be the case. However, if these codes are to be worth the paper they are written on, companies and industry-wide associations who are responsible for them must place far greater emphasis on implementation, including independent monitoring, complaints mechanisms and redress. My resolution in the European Parliament was designed to encourage voluntary codes which are accompanied by such measures....No company can have a credible code of conduct, unless within that code is a system of monitoring and implementation.[178]

The US Department of Labor, in a 1996 study of corporate codes dealing with child labour, noted that 'a credible system of monitoring –to verify that a code is indeed being followed in practice– is essential'. The study found that 'most of the codes...do not contain detailed provisions for moni-

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177 Dutch Sections of Amnesty International and Pax Christi International, op. cit. n. 76, at p. 59.

178 'Peter Frankental, project manager of the Business Group of Amnesty International UK, asks Richard Howitt MEP about the significance of the European Parliament's resolution', loc. cit. n. 74, at p. 2.

toring and implementation', 'many of the companies do not have a reliable monitoring system in place', and where monitoring was undertaken 'there seems to be relatively little interaction between, on the one hand, monitors, and on the other hand, workers and the local community'. The study noted with concern: 'It also appears that monitors have a technical background in production and quality control and are relatively untrained with regard to implementation of labor standards'.[179]

Sir John Browne, BP Amoco's Chief Executive, speaking to the New York-based Council on Foreign Relations in 1997, recognized that social and human rights principles alone are not enough: 'Companies need to win and retain public trust....[W]e have to be open to dialogue with local communities and non-governmental organizations and open to scrutiny even when it is uncomfortable....[W]e have to develop the means of verification, an independent auditing process to underpin the company's own assurance'.[180] BP's 1997 social report states: 'Assurances of good behaviour are insufficient without independent verification'.[181]

A recent *Economist* article noted: 'The best codes now tend to be monitored by outside auditors. Companies realize that merely making promises risks adding hypocrisy to the list of charges against them'.[182]

The New Economics Foundation, a London-based organization which is working with companies to develop techniques for social auditing, emphasizes that the integrity of a social audit is dependent on meaningful involvement of stakeholders in the process:

> If the process is to be credible, then the dialogue with stakeholders must be meaningful and, most importantly, the key indicators which result from the accounting process must be developed by the stakeholders themselves, in line with international human rights instruments. So the paradox of how to measure human rights can perhaps be resolved if the assessment of the expression of rights involves the people affected.[183]

Few companies have commissioned independent social audits, and even fewer have made them public. In India, The Tata Iron and Steel Company in 1979 was one of the first in the world to commission a social audit,

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179 US Department of Labor, *The Apparel Industry and Codes of Conduct: A solution to the international child labor problem?* (1996).

180 Browne, loc. cit. n. 47, at p. 9.

181 BP, op. cit. n. 155, at p. 5.

182 'Sweatshop wars', The Economist (27 Feb. 1999), p. 76 at p. 79.

183 A. Henriques/New Economics Foundation, 'Are human rights made to measure?', Human rights and Business matters (Amnesty International UK Business Group Newsletter) (spring 1999), p. 3.

carried out by a three-person committee (a judge and two professors). The audit was made public.[184]

The Body Shop in January 1996 published a statement of its social performance, which was independently verified by the New Economics Foundation. The Body Shop's auditing process involved participation by a committee of stakeholders. The company also commissioned Kirk Hanson, a professor of business ethics at Stanford University Graduate School of Business, to evaluate the company's social record. The Body Shop's founders, Anita and Gordon Roddick, wrote about the social audit process in the company's *Social Statement 1995*:

> We went into the social audit with a sense of 'damned if we do, damned if we don't'. We are pleased with the result. It has been a long and detailed process, which we now feel we can recommend to others. We are already finding that it is helping us run our business better and we are delighted to see that different parts of the business recognize the improvement points necessary to maintain the support of their stakeholders. We now have a list of strategic targets and priorities for action described as 'next steps' goals for each stakeholder group which will drive us on towards the millennium with greater confidence about those human relationships which are integral to our success.[185]

The Roddicks, publicly recognizing both the positive and negative findings of Kirk Hanson's social evaluation, said: 'The integrity of the business shines through amidst some ineptitude, some lack of attention, some good old fashioned neglect....We have much to improve'.[186]

Kirk Hanson said of The Body Shop's social auditing process: 'To my knowledge, no other company has permitted such an extensive and public evaluation of its social record by an outside individual'.[187] He predicted that social auditing would become a more common practice: 'Social performance today has profound importance for commercial performance...the social audit will eventually be done much as the financial audit is now done'.[188]

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184 The Tata Iron and Steel Company Limited, Social Audit Committee: Report (Bombay, Tata Press Limited, 1980).

185 The Body Shop, 'Founders' Statement', The Body Shop Social Statement 95 (1996), p. 3.

186 G. Roddick and A. Roddick, 'Foreword', in K. Hanson, Social Evaluation: The Body Shop International – 1995 (1996).

187 Hanson, ibid., at p. 3.

188 The Times (London) (19 Sep. 1996).

In 1997 The Body Shop published its second Values Report, which included a social audit independently verified by the New Economics Foundation.[189]

A precedent-setting 1996 independent monitoring agreement was the key to resolving a dispute which arose when a garment manufacturer in El Salvador supplying Gap was accused of abuses including child labour, forced overtime, unsafe working conditions, and threats to prevent workers from organising.[190] Gap had adopted a code of conduct before the allegations came to light, but according to the executive director of the US National Labor Committee in Support of Democracy and Human Rights in El Salvador, no worker at the factory in El Salvador had ever seen the code, and it had not even been translated into Spanish.[191] Gap and the Salvadorian supplier agreed to a system of periodic on-site visits to the factory by independent monitors. The Independent Monitoring Group is composed of the Human Rights Institute of the University of Central America, the Human Rights Office of the Archdiocese of San Salvador, and the Labor Studies Center (CENTRA). Labour groups had insisted that independent monitoring was necessary to make Gap's 'Sourcing Principles & Guidelines' work in practice. They believed that only independent monitors could ensure that the process would be thorough and objective, and ensure that workers would be able to speak freely without fear of harassment or loss of employment.[192]

On 9 August 1999 four major US retailers (Nordstrom, Gymboree, Cutter & Buck, and J. Crew) agreed to an independent monitoring scheme for the factories they use in the Northern Marianas Islands (a US commonwealth in the Pacific; Saipan is the largest island). The agreement was part of a settlement by those companies of a class action lawsuit brought against 18 retailers for allegedly conspiring with Marianas factory owners to deprive apparel workers of labour rights. The monitoring reportedly will be organized by Verite, an independent monitoring organization based in Massachusetts, and will include unannounced factory visits and investigation of complaints by workers.[193]

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189 The Body Shop, The Body Shop Values Report 1997, <http:www.the-body-shop.-com/aboutus/values.html>, accessed on 27 May 1999.

190 Resolution Declaration (22 Mar. 1996), *Statement of Resolution* (15 Dec. 1995); see also P. DeSimone, 'Retailer Bridges the Gap on Supplier Standards', *IRRC Corporate Social Issues Reporter* (Mar. 1996), pp. 13-16.

191 B. Jeffcott and L. Yanz, 'Exposing the Labour Behind the Label', Our Times (Feb. 1997), <http://www.web.net/~msn/3gap1.htm>, accessed on 17 Apr. 1999.

192 DeSimone, loc. cit. n. 190, at p. 13.

193 S. Greenhouse, '4 Companies Gain Accord in Labor Suit', New York Times (10 Aug. 1999), <http://archives.nytimes.com/archives/>, accessed on 15 Aug. 1999.

US President Clinton in 1996 appointed the Apparel Industry Partnership, a panel of representatives of apparel companies and NGOs, to address the issue of sweatshops in the apparel industry. The Partnership released its 'preliminary agreement' in November 1998, including a 'Workplace Code of Conduct' and 'Principles of Monitoring', to be administered by a new 'Fair Labor Association'. An amended agreement was issued in June 1999.[194] Several of the NGOs which had been part of the Partnership (the Interfaith Center on Corporate Responsibility [ICCR]; the AFL-CIO; the Retail, Wholesale and Department Store Union; and UNITE, the nation's leading apparel union) rejected the agreement on the grounds that it was not strong enough.[195]

There is increasing pressure on companies to move toward 'social audits' which are accorded the same priority and conducted with the same rigor as financial audits. This does not mean that such audits should be the exclusive preserve of the same accounting firms which carry out financial audits. Accounting firms may be able to play a useful role in social audits, particularly in terms of ensuring that the process is correct and thorough, and that standards are applied uniformly. However, they do not have a level of expertise and experience in social issues which would enable them to be the primary assessor in the monitoring of human rights issues. Moreover they may not be perceived by the public, by workers and by local stakeholders as being sufficiently independent of the company, particularly if they have an ongoing contractual relationship with the company. The Nike case demonstrates the limitations of using a traditional auditing firm for social audits. When allegations of abuses in Nike's Asian factories first arose in 1996, Nike denied the allegations and said: 'Every Nike subcontractor is subject to systematic, unannounced evaluation carried out by Ernst & Young'.[196] If that was indeed the case, the Ernst & Young oversight of labour issues apparently was not as effective as it should have been; it has since been recognized that there were a number of serious shortcomings at Nike's Asian factories in 1996. Human rights advocates who conducted a 1996 fact-finding mission examining Nike's factories in Indonesia concluded:

> The Ernst & Young audits are thoroughly inadequate, mainly because the company is unknown to workers and hence not trusted. Workers are well

194 Apparel Industry Partnership, Charter Document: Fair Labor Associaton, Amended Agreement (June 1999), <http://www.lchr.org/sweatshop/amendedFLA.htm>, accessed on 30 July 1999.

195 Sweatshop Watch, White House Apparel Industry Partnership Issues Proposal with serious shortcomings in living wages and the right to organize, <http://www.igc.org-/swatch/headlines/1998/aip_nov98.html>, accessed on 13 May 1999.

196 Nike responds to Sweatshop Allegations, Nike press release (6 June 1996).

> aware that revealing the truth (let alone active dissent) often leads to reprisals....Through interviews with workers last week, the delegation discovered that the Ernst & Young monitoring teams are concerned primarily with product quality and whether production quotas are being met. Groups of workers at three separate factories were unanimous in claiming that monitors 'never ask questions about the workers or conditions in the factories'. At least two Nike-producing facilities weren't even audited in the last year.[197]

The Independent Monitoring Group of El Salvador (IMGES), established to monitor the Gap code of conduct in El Salvador as discussed above, argues that 'for monitoring to function properly, monitors must be trusted by the workers. And – given the harsh and bitter experience that many [workers] face – representatives of local, respected civil society organisations will always be more trusted than outside auditing firms'.[198]

An International Labour Office report recently noted: 'Some evidence indicates that traditional financial accounting firms may be less independent due to inexperience in the detection of workplace violations and pre-existing contractual relationships with enterprise management'.[199]

The Interfaith Center on Corporate Responsibility has been closely involved with monitoring issues, including the monitoring agreement for Gap in El Salvador. The organization says:

> We believe local NGOs must play a central role in monitoring the workplace standards because local NGOs have skills that auditing, accounting and public relations firms do not....Monitors hired by companies to do social audits are trained to look at pages of figures, analyze [data] and check for quantifiable code violations. The skills required to detect violations of worker rights are different. Serious violations of freedom of association and various forms of harassment of workers often go undetected by auditors who come into an area, visit a plant, then leave. Independent monitors made up of local NGOs, rooted in local communities and having the trust of employees, are better qualified to detect the essential, but less quantifiable, elements in the workplace which

197 Global Exchange, An Open Letter to Nike Shareholders, Workers, and Consumers from the Global Exchange Fact-Finding Mission to Indonesia' (16 Sep. 1996).

198 IMGES, Eliminating Sweatshop Practices (San Salvador: IMGES, 1997), quoted in Forcese, *Putting Conscience into Commerce*, op. cit. n. 25, at p. 27.

199 International Labour Office, Governing Body, Working Party on the Social Dimensions of the Liberalization of International Trade, loc. cit. n. 166, para. 65.

> relate to human respect, nondiscrimination, right to freely associate and to work in [a] safe environment free from fear.[200]

Many multinational companies which have recently adopted human rights principles have tended to be slow in adopting a system for independent monitoring or auditing. Some of them seem to be stalled at the point of discussing a range of alternative complex procedures for auditing and trying to decide how stakeholders should be consulted and who should be involved in carrying out the audit. While it is important to ensure an effective process for an independent social audit, there is a danger that companies may spend too much time discussing procedure at company headquarters and delay for too long the day when there is some practical focus on substance by genuinely independent monitors where it matters at the site of their operations. Social auditing should not be looked at as an all-or-nothing proposition. Even if a company decides it needs some more time to finalize plans for a comprehensive independent social audit, that should not prevent some form of pragmatic independent human rights monitoring from going ahead in the meantime.

Many companies, even some of those which endorse the notion of independent monitoring, seem to be finding it difficult in practice to take the step of agreeing to have their operations inspected by genuinely independent monitors. This is not surprising; companies are accustomed to having total control over their operations, and to being very careful in how they project the company's image to the outside world. But attempts by company managers to control the monitoring process by assigning the task to an auditing firm or organization which is too closely associated with the company will be seen by many as more of a public relations exercise than a meaningful form of verification. Those with ultimate responsibility for monitoring must be knowledgeable about the local human rights situation, trusted by workers and stakeholders, and genuinely independent – not under the company's control or influence at all, and not in an ongoing business relationship with the company. There must be no good reason for any reasonable person to question the absolute impartiality of the monitors.

Some companies also resist independent monitoring and particularly the idea of publishing the results because they believe public criticism of the company is based on misperceptions, and they do not welcome the idea of engendering further public discussion of the company's perceived short-

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200 Interfaith Center on Corporate Responsibility, A Step Towards Eliminating Sweatshops: The White House Apparel Industry Partnership Report, <http://www.sweatshopwatch.org/swatch/what/iccr_report.html>, accessed on 28 Mar. 1999.

comings. As Gordon and Anita Roddick commented when the 1995 independent social evaluation of The Body Shop was released:

> One of the difficult lessons we have learned and perhaps are still learning is that although perception and our view of reality are often poles apart, it does not matter a damn. We must deal with perception as if it were reality, otherwise nothing changes. Our legendary grouchiness under criticism has sometimes stemmed from this perception/reality gap combined with a sense of unfairness, but we have promised to do better. This report has been a major step along the way.[201]

When The Body Shop commissioned and later published the independent audit, and when it accepted that along with the company's significant social achievements there were some shortcomings which needed attention, the public tended to welcome what it saw as signs of corporate humility, openness and integrity.

The irony is that in this new era companies which insist that their social record is irreproachable and resist independent monitoring are inviting the very criticism they seek to avoid.

4 A SLOW RESPONSE TO THE NEW REALITIES

The trends discussed above in section 2 mean that companies will increasingly find human rights issues coming onto their agenda, whether they like it or not.

But in the new millennium most companies have still not come to terms with the new reality that they are to be held accountable for their human rights-related record. Most have not yet seriously addressed international human rights issues in their company policies and practices. As Chandler notes:

> Shell and BP have led the way in explicitly spelling out new human rights principles for their companies and a commitment to their implementation. Rio Tinto has followed these major players on the world scene. But the absentees – the American, German, French and Italian transnationals – remain in the majority, treating human rights violations as external to their responsibilities, regarding any adverse impact as a public relations problem rather than one that

201 Roddick and Roddick, op. cit. n. 186.

> lies in the heart of the boardroom....[202] Concern for human rights appears to require corporate disaster or attritional external pressure to bring change, as did the slow corporate acceptance of protection of the environment.[203]

Looking back at the criticism Royal Dutch Shell faced after the execution of Ken Saro-Wiwa and the Brent Spar incident, Shell's Senior Managing Director Cor Herkstroter acknowledged that Shell had 'become inward looking, isolated',[204] and had been guilty of 'technological arrogance'[205] and insensitivity to the view of society.

Chandler has noted that...

> it is perhaps unsurprising that companies should fail so significantly in understanding the world in which they work. Technical and commercial success, the insulating carapace of high salaries, company transport, and corporate palaces shield senior executives from a world where non-governmental organisations (NGOs) and single-issue pressure groups, rather than politicians, now reflect the values of society and attract popular allegiance.[206] ... From this viewpoint, the corporate instinct is to rebut, to look to public relations as a defence, not to change.[207]

An intelligent company response to allegations of involvement in human rights abuses would be:

i) to state that any such abuses would be contrary to the company's policies (companies with explicit human rights policies can do this more persuasively);
ii) to promise a prompt, thorough and impartial investigation to see whether any of the allegations are true;
iii) to pledge that if any abuses are found, the company will take prompt action to remedy the situation and to prevent further abuses.

But most companies have started out by denying the allegations and attacking the critics; were these companies (whether or not they believed the allegations to be true) so out of touch with societal attitudes toward human rights issues that they thought blanket denials and attacks on human rights advocates would stop the pressure? It tended to have the opposite effect. The next step often has been grudging recognition by the company that

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202 Chandler, loc. cit. n. 86, at p. 68.
203 G. Chandler, 'The wages of oppression', Financial Times (10 Dec. 1998).
204 'Shell to consult pressure groups', Financial Times (17 Mar. 1997).
205 Chandler, 'Oil Companies and Human Rights', loc. cit. n. 85, at p. 5.
206 Ibid.
207 G. Chandler, 'Do the Right Thing', Green Futures (Mar./Apr. 1999), p. 22 at 23.

something needed to be done, but too often they would try to get by with minimalist steps such as a half-hearted internal review which looked like a public relations exercise. This just prolonged the controversy and further damaged the company's business and reputation. When the company finally (often years later) admitted that mistakes had been made, agreed to take remedial action, and adopted human rights policies, shareholders should have asked why the company had damaged itself by not taking these steps sooner, why the company's management allowed itself to be consumed for years by a human rights controversy which could have been avoided. If positive steps had been taken at the outset they would have been seen as acts of corporate leadership (and more importantly they could have stopped human rights abuses sooner); after so much delay they appear to be defensive moves, an exercise in damage control. As Chandler recently wrote:

> Why [do] the boundaries of accepted responsibility have to be pushed forward by disaster and external pressure, rather than forethought and internal leadership? Is there an inherent incompatibility between corporate purpose and the valid expectations of society? ...Why...do the transnational companies – some of the most sophisticated of organisations – require damage to reputation or a long attritional battle to force change?[208]

The Economist Intelligence Unit's *Business Asia* (a 'fortnightly report to managers of Asia operations') in 1997 issued a report entitled 'Just don't', warning other companies to avoid the mistakes Nike had made:

> Hindsight is of course 20:20 and Nike would doubtless prefer to have caught these problems before they became headline news....In today's marketplace, consumers demand that brand leaders embody the virtues of social responsibility. Nike...would have done better to focus more resources and money on the early steps in the manufacturing of its products. Humanitarian issues aside, it is clear that one bout of bad publicity can undo hundreds of millions of dollars worth of marketing. Indeed a joyless marketing manager might point out it would have cost less to pay plant workers properly than to rebuild customers' good will.[209]

No doubt Shell has learned many lessons from its mistakes, and Nike has learned many lessons from its mistakes, and as the Economist Intelligence

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208 Ibid., at pp. 22-23.

209 The Economist Intelligence Unit, 'Just don't', Business Asia: Fortnightly Report to Managers of Asia Operations (28 July 1997), pp. 1-2.

Unit says, 'they are better off for the lessons learned'.[210] But why had Shell not learned more from earlier mistakes by Freeport-McMoRan and Rio Tinto so that it could have avoided similar problems, and why had Nike not learned more from the Shell experience? If the management and directors of other companies are not now learning from what happened to Shell and Nike and acting on those lessons by proactively adopting and implementing human rights policies and reviewing their human rights practices, they are not doing their job on behalf of shareholders, and not fulfilling their responsibility to promote respect for human rights. As Sir Geoffrey Chandler notes, 'It was the absence of appropriate policies and practices which moved Shell and BP from the financial columns of the media to front page headlines for their actions in Nigeria and Colombia respectively'.[211]

As globalization accelerates, the human rights performance of companies will be more closely scrutinized, evaluated and compared. Each company must now decide whether it will face up to human rights challenges with wisdom and leadership, or will defensively resist the attention being focused on its social record. Companies can no longer sit on the sidelines of the debate; inertia and inaction will be deemed irresponsibility. Superficial public relations gestures and codes of conduct which are not implemented or independently monitored will be seen for what they are. Companies will be expected to treat human rights issues with the same seriousness they give to traditional business issues, not as an afterthought or a damage-control exercise. A human rights component must be integrated into the company's decision-making at all levels – it must be on the agenda, for example, when deciding: whether to invest or locate in a country, where to locate in a country and the impact that may have on existing communities, issues to raise with a host government, how to approach environmental/health/safety measures, how to deal with workers' organizations and to ensure they are allowed to operate in full freedom, recruitment/training/compensation/promotion/working hours of managers and staff, how to deal with allegations of discrimination or sexual harassment, how to deal with strikes or demonstrations against the company, security arrangements, and what community projects should be supported by charitable giving. Companies which pay serious attention to respecting and promoting human rights will see their reputations enhanced. Those which do not will see their reputations suffer.

It is not just the reputations of individual companies which are at stake for the private sector. A backlash against globalization and the market sys-

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210 Ibid., at p. 1.

211 Chandler, loc. cit. n. 86, at p. 68.

tem is growing, largely because of dislocations and inequities caused by the new world economy, but also due to irresponsible behavior by some multinational corporations, and a perception that too many multinational corporations address social, human rights and environmental concerns only if forced to do so and then only minimally. In December 1997 the Workplace Editor of *Business Week* magazine referred to 'a growing backlash against globalisation around the world'.[212]

In June 1999, Kofi Annan, speaking to the Chamber of Commerce of the US, said: 'As you know, globalisation is under intense pressure. And business is in the line of fire, seen by many as not doing enough in the areas of environment, labour standards and human rights'.[213] The fact sheet on the Secretary-General's proposed 'Global Compact' notes that the 'backlash against liberalisation' could lead to a 'return to market protectionism and unnecessary barriers against technical and commercial innovation'. The document concludes: 'To be sustainable, globalisation must be accompanied by the effective promotion and protection of human rights, labour standards and the environment'.[214]

Lester Thurow, a professor of economics and former dean of the Sloan School of Management at MIT, concludes in *The Future of Capitalism* that the private sector and the capitalist system must find a way to address social needs in a meaningful way if they are to survive and succeed:

> If capitalism is to work in the long run, it must make investments that are not in any particular individual's immediate self-interest but are in the human community's long-run self-interest. How does a doctrine of radical short-run individualism emphasize long-run communal interests? How can capitalism promote the values that it needs to sustain itself when it denies that it needs to promote any particular set of values at all? Put simply, who represents the interests of the future to the present?[215]

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212 Harvard Law School Human Rights Program, comment by Aaron Bernstein (workplace editor of Business Week magazine), *Business and Human Rights: An Interdisciplinary Discussion Held at Harvard Law School in December 1997* (Cambridge, Massachusetts, Harvard Law School Human Rights Program, 1999), p. 24

213 UN, Address by Mr. Kofi Annan to the Chamber of Commerce of the United States of America, Washington, D.C., 8 June 1999, <http://www.un.org/partners/business/sgstat1.htm>, accessed on 30 July 1999.

214 UN, loc. cit. n. 59.

215 L. Thurow, *The Future of Capitalism* (1996), pp. 308-309.

CHAPTER 2

An Overview of the Human Rights Accountability of Multinational Enterprises

SARAH JOSEPH*

INTRODUCTION

In traditional international law, the essential actors, the entities with rights and duties, are States. Unlike traditional international law, the actors in international human rights law are not only States, as the prime beneficiaries of international human rights law are individuals. However, the primary duty-bearer in international human rights law remains the State, which reflects the continued State-centric focus of international law.

This status quo accurately reflects the fact that the State may pose a grave danger to one's enjoyment of human rights. One only has to consider the all-too-regular phenomenon of abuse of police or military power. However, it is clear that non-government entities also threaten the enjoyment of human rights – consider the human rights impacts of secessionist groups, terrorists, organized crime, and abusive spouses. Of course, artificial persons like corporations may also commit human rights abuses. This paper focuses on the application and relevance of international human rights law to a particularly powerful type of non-government body, multinational enterprises ('MNEs').[1]

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1 MNEs may be defined as 'a cluster of corporations or unincorporated bodies of diverse nationality joined together by ties of common ownership and responsive to a common management strategy'. This definition has been adapted from D. Vagts, 'The Multinational Enterprise: A New Challenge for Transnational Law', 83 *Harv. L. Rev.* (1970) p. 739 at p. 740; R.Vernon, 'Economic Sovereignty at Bay', 47 *Foreign Aff.* (1968) p. 110 at p. 114. It is conceded that numerous definitions for MNEs, or alternatively, 'Multinational' or 'Transnational' Corporations (the latter terms do not however cover unincorporated entities), have been put forward by economists and international organizations; see gen-

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MNEs can and do perpetrate human rights abuses. For example, MNEs can breach labour rights by mistreating and exploiting their workforce (e.g., Nike has faced criticism for substandard conditions in Asian supplier factories). They can cause extensive environmental damage (e.g., oil extractions by Royal Dutch Shell and British Petroleum have caused egregious environmental damage in, respectively, the Ogoni homelands in Nigeria, and Colombia), which can impact on the rights to health, life, minority rights, and the right of self-determination. They can have lax rules regarding worker safety, which threatens workers' rights to health and at worst, their right to life. Lax safety regulations can threaten the lives and bodily integrity of people in the vicinity of manufacturing plants, as was evinced horribly in 1984 in Bhopal, India when a toxic gas leak from a Union Carbide plant killed 2,000 people and injured over 200,000. In recent years, there have been allegations of severe human rights abuse, including tortures and killings, by security forces hired to guard MNE installations, or to clear land to facilitate MNE operations. Aggressive marketing policies can hide the dangers of dangerous products and pose an unacceptable threat to the life and health of consumers; relevant products might include new untested drugs like thalidomide in the 1960s, automobiles with minimal safety features, and cigarettes. MNEs may illegitimately influence the political processes within a State, undermining democratic rights. A most dramatic example of this was the overthrow of the democratically elected government of Salvador Allende in 1972 in Chile, which was allegedly engineered in large part by ITT, an American MNE.[2] Less spectacular, but nevertheless anti-democratic, is the use of bribery to influence governments. Indeed, difficult questions may perhaps be raised about the dangers to democracy posed by the sheer lobbying power of MNEs. Finally, collusion with repressive governments may help prop up those governments and perpetuate their abuses.

These examples show how MNEs can abuse human rights. A key issue therefore is: How, currently, are MNEs held accountable for the human rights abuses that they perpetrate? A second issue, discussed in Part 2 of this paper, is: What human rights obligations should be attributed to MNEs?

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erally P. Muchlinski, *Multinational Enterprises and the Law* (1995) at pp. 12-15. It is contended that the definition given accords generally with the most common definitions.

2 See 53 UN ESCOR (1822nd mtg) 19, 22, UN Doc. E/SR, 1822 (1972).

1 MNE ACCOUNTABILITY FOR HUMAN RIGHTS ABUSE

1.1 Human Rights and Private Bodies

International human rights law has made some progress towards imposing human rights duties in the non-government sphere. Human rights duties are recognized as having a tripartite character: States are required to respect, protect and ensure the enjoyment of human rights by persons within their jurisdiction. In order to properly fulfil their duties to protect and ensure enjoyment of human rights, States must control private entities. This is known as the duty to horizontally apply human rights. These duties are made express in the international single-issue conventions, such as the International Convention on the Elimination of Racial Discrimination 1966 ('ICERD').[3] This duty can also be inferred from general obligatory provisions of the International Human Rights Covenants,[4] as well as the 'obligation to *secure* Convention rights' in Article 1 of the European Convention on Human Rights (hereafter 'ECHR').[5] Finally, the horizontal application of international human rights has been confirmed in international human rights jurisprudence.[6]

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3 GA Res. 2106 (XX), Annex, 20 UN GAOR Supp. (No. 14) at 47, UN Doc. A/6014, 660 U.N.T.S. 195, entered into force 4 Jan. 1969, also available at <http://untreaty.un.org>; see, e.g., ICERD, article 2(d).

4 Article 2(1) of the International Covenant on Civil and Political Rights ('ICCPR'), GA Res. 2200A (XXI), 21 UN GAOR Supp. (No. 16) at 52, UN Doc. A/6316, 999 UNTS 171, entered into force 23 Mar. 1976, also available at <http://untreaty.un.org>, requires States to 'ensure' ICCPR rights, implying a positive duty to prevent human rights abuse by private bodies; see M. Nowak, *UN Covenant on Civil and Political Rights* (1993), pp. 36-38. See, with respect to the International Covenant on Economic Social and Cultural Rights ('ICESCR'), GA Res. 2200 A (XXI), 21 UN GAOR Supp. (No. 16) at 49, UN Doc. A/6316, 993 U.N.T.S. 3, entered into force 3 Jan. 1976, the 'Maastricht Guidelines on Violations of Economic, Social And Cultural Rights', 20 *Hum. Rts Q.* (1998) p. 691, paras. 6, 15(j) and 18.

5 *Convention for the Protection of Human Rights and Fundamental Freedoms*, 213 U.N.T.S. 222, entered into force 3 Sept. 1953.

6 See generally A. Clapham, *Human Rights in the Private Sphere* (1993), Ch. 4. Relevant case law includes *Velásquez-Rodriguez* v. *Honduras*, Inter. Am. Ct. H.R. (Series C) No. 4 [1988], 28 *ILM* (1989) p. 291; *Yilmaz-Dogan* v. *Netherlands*, CERD Communication No. 1 [1988], reproduced in 2 *Int'l Hum. Rts. Rep.* 348 (1995); *L.K.* v. *Netherlands*, CERD Communication No. 4 [1991], reproduced in 1 *Int'l Hum. Rts. Rep.* 32 (1994); and *A* v. *the United Kingdom*, Eur. Ct. H.R., 1998-VI, No. 90 [1998] p. 2692. The Human Rights Committee's General Comments on the various ICCPR rights have tended to confirm duties to control private individuals with respect to all enumerated rights.

1.1.1 Regulation by Host States

International human rights law has therefore evolved so as to protect persons to some extent from non-governmental human rights abuse. Human rights duties are not imposed directly on non-government actors, but are imposed indirectly, through the agency of the State in which they operate, the 'host State'. For example, a host State has a duty under Article 22 of the International Covenant on Civil and Political Rights ('ICCPR') and Article 11 ECHR to prevent MNEs from refusing to allow employees to join trade unions. Indeed, the existence of 'host State liability' should be exploited more in human rights forums; it is presently an under-utilized tool for imposing human rights accountability on MNEs.[7] However, specific problems arise with host States being required to control MNEs because the latter are uniquely international, uniquely mobile, and, most importantly, uniquely powerful.

MNEs are often more powerful than developing States in which they operate. The economic muscle of MNEs may allow them to resist domestic sanctions. For example, they may terminate business dealings in the sanctioning State and establish themselves in a more corporate-friendly State.[8] They may even be able to discourage sanctions by *threatening* to disengage from a State, many of which perceive that they need MNE investment to boost economic development. Thus, their economic power may be abused to dissuade corruptible or vulnerable governments from establishing regulatory regimes to enforce human rights against corporations. Given the potential for MNEs to translate their economic power into potentially huge *de facto* political power, it is perhaps unrealistic to expect MNE human rights accountability to emanate exclusively from host States.

Furthermore, some host States lack the technical expertise to monitor and regulate corporate activities to, for example, decide whether a corporation's environmental practices or its safety precautions at manufacturing plants are satisfactory.[9] Certain States may also lack the legal machinery, such as resources to undergo complex discovery of documents, to unravel the cor-

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7 Few instances of MNE impunity have been brought before international human rights bodies. Information about Shell's activities in Nigeria was brought before the Committee on Economic Social and Cultural Rights, which monitors the ICESCR, during the Committee's examination of Nigeria's report in May 1998. In its Concluding Comments on that Report (UN doc. E/C.12/1/Add. 23), the Committee specifically drew attention to the 'devastation that oil exploration has done to the environment and quality of life in the areas such as Ogoniland where oil has been discovered and extracted without due regard to the health and well-being of the people and their environment' (paragraph 29).

8 See M. Lippman, 'Transnational Corporations and Repressive Regimes: The Ethical Dilemma', 15 *Cal. W. Int'l L. J.* (1985) p. 542 at p. 545.

9 Ibid.

porate veil which may shield an asset-rich parent company behind an asset-poor local subsidiary.

1.1.2 Regulation by Home States

Given the problems entailed in requiring host States to regulate MNEs, perhaps greater regulation of MNEs should come from their home States. An MNE's home State, usually defined as the State of incorporation,[10] is normally a developed nation. Developed home States are generally more able to match MNE power than developing host States.

For example, greater accountability could arise from home States adopting lenient tests to allow litigation regarding human rights abuses against MNEs within their own jurisdictions, by for example adopting lenient rather than strict doctrines of *forum non conveniens* ('FNC'). This is the doctrine applied in Anglo-American jurisdictions to exclude the hearing of cases when another jurisdiction is deemed to be a more appropriate forum. It is a doctrine that is used, and arguably abused, by parent companies to avoid liability in their home jurisdictions. For example, the FNC doctrine was applied very strictly to deny relief to Indian plaintiffs in US courts against Union Carbide after the Bhopal disaster despite ample evidence that Indian law did not provide an adequate remedy.[11]

In recent years, British courts have applied the FNC doctrine in a more lenient way so as to allow negligence claims to be brought against United Kingdom parent corporations for the adoption of slack worker safety practices in Southern African subsidiaries; these slack practices have resulted in workers contracting diseases such as mercury poisoning and asbestosis. The cases have been allowed to proceed in situations where justice would clearly not be served in the local jurisdictions.[12]

Another recent instance of home State regulation of MNEs comes from the United States. In the decision of *Doe I* v. *Unocal Corp.*,[13] plaintiffs have been allowed for the first time to proceed against MNEs under the Alien

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10 See *Case Concerning the Barcelona Traction Light and Power Co Ltd. (Belgium* v. *Spain)* ICJ Rep. [1970] p. 3, para. 70.

11 In re *Union Carbide Corp. Gas Plant Disaster (Bhopal Case),* 809 F. 2d 195 (2d Cir. 1987). See R. Kapur, 'From Human Tragedy to Human Rights: The Accountability of Multinational Corporations for Human Rights Violations', 10 *B. C. Third World L. J.* (1990) p. 1 at p. 3, stating that, in light of the Bhopal case, the doctrine of *forum non conveniens* had 'ceased to be [an] instrument of justice'.

12 See *Lubbe* v. *Cape plc,* [1999] Int'l Litigation Procedure 113, CA and *Connelly* v. *RTZ Corporation plc* [1997] 3 WLR 376. For more information on these cases, see R. Meeran's contribution to this volume.

13 963 F. Supp. 880 (C.D. Cal. 1997).

Tort Claims Act in US courts for alleged extraterritorial breaches of customary human rights.[14]

Home State extraterritorial regulation of their MNEs certainly boosts actual MNE accountability for their human rights abuses. However, it seems likely that international human rights law has not evolved so as to hold States responsible for the actions of their non-government citizens, including corporate citizens, abroad.[15] Home States would have to choose to regulate their MNEs if they are not presently compelled to do so by international human rights law. Home States are however reluctant to do so, as they perceive that such regulation puts their corporations at a competitive disadvantage with other countries' corporations.[16]

1.2 Informal Monitoring of MNEs

I now move to discuss alternative extant mechanisms for imposing human rights accountability on MNEs. Firstly, informal mechanisms will be discussed,[17] followed by a discussion of existing direct international regulation.

1.2.1 NGO Pressure

Non-governmental organizations ('NGOs') have become highly adept at mobilizing public opinion against unethical corporations.[18] Numerous high

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14 28 US Code section 1350 (1994). For more information, see B. Stephens' contribution to this volume.

15 See F. Johns, 'The Invisibility of the Transnational Corporation: An Analysis of International Law and Legal Theory', 19 *Melb. U. L. Rev.* (1994) p. 893 at pp. 895-896. This author however knows of no attempt to extend the horizontal application of human rights to home States, so the door may remain open for such arguments. See text below at n. 42.

16 See D. Cassel, 'International Security in the Post Cold-War Era: Can International Law Truly Effect Global Political and Economic Stability? - Corporate Initiatives: A Second Human Rights Revolution?', 19 *Fordham Int'l L.J.* (1996) p. 1963 at p. 1975. Indeed, note the following comment from *The New York Times* (27 March 1995) D1, quoted in H. Steiner and P. Alston, *International Human Rights in Context* (1996) p. 883, on President Clinton's proposal for a *voluntary* code of human rights principles for American companies operating abroad: 'The chief problem is that America's allies, who are its chief economic competitors, have no such codes, and companies in those nations stand to sweep on business that the United States passes by'.

17 More information on NGO campaigns against corporations, and corporate codes of conduct, is contained in C. Avery's contribution to this volume.

18 See P.J. Spiro, 'The Decline of the Nation State and its Effect on Constitutional and International Economic Law - New Global Potentates: Nongovernmental Organizations and the 'Unregulated' Marketplace', 18 *Cardozo L. Rev.* (1996) p. 957 at pp. 959-960.

profile corporations have suffered the wrath of negative NGO campaigns, including Nestlé, Royal Dutch Shell, British Petroleum and Nike. The oil and apparel industries have been especially targeted in the 1990s. Non-governmental activism can also exist at a level short of confrontation and campaigns against corporate bad behaviour. Instances of NGO/corporate dialogue in the arena of ethics and human rights are increasingly common.[19] NGO/corporate engagement is important, as businesspeople are unlikely to be human rights experts,[20] so they need assistance in addressing and even recognizing human rights issues.

Negative publicity about a corporation's ethics can lead to consumer boycotts, as well as difficulties in attracting or retaining quality staff. Furthermore, consumer outrage can inspire regulatory action by governments[21] or shareholder revolts.[22]

Non-governmental activism has had tangible positive results in making MNEs change their behaviour. For example, on 12 May 1998, the CEO of Nike, in response to extensive negative publicity, announced several labour initiatives to be implemented in Nike's Asian factories, including raising the minimum age of workers, increasing the standard of air quality within shops, allowing greater access for NGOs and external audits of Nike factories, expansion of education programs for workers at factories, and the funding of university research into issues related to global manufacturing and responsible business practices.[23] Nike is one in a long line of MNEs which have vowed to redress exploitative work practices amongst suppliers after harsh NGO criticism.[24] Furthermore, NGO pressure has encouraged many MNEs to disengage from States which commit gross and pervasive violations of human rights.[25] Finally, grassroots criticism has encouraged

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19 For example, Amnesty International has recently issued Guidelines to assist corporations to make decisions in ways which conform with human rights standards; see Amnesty International, *Human Rights Guidelines for Corporations* (1998).

20 A.M. Mayer, 'Law and Ethics in Emerging Markets: An Introduction', 18 *U. Pa. J. Int'l Econ. L.* (1997) p. 1153 at p. 1159.

21 See, e.g., Mass. Cen. Law. Ann. Ch. 130 (West 1996), a Massachusetts law prohibiting the state from contracting with companies that do business with Burma, cited in Spiro, loc. cit. n. 18, at p. 960, n. 9.

22 Spiro, loc. cit n. 18, at p. 960.

23 This information was obtained from <http://www.nikebiz.com/social/labor/>, accessed on 10 June 1998.

24 See generally, 'Human Rights: Ethical Shopping', *The Economist* (3 June 1995), p. 56.

25 See Spiro, loc. cit. n. 18, at p. 959; 'The Fun of Being a Multinational', *The Economist*, (20 July 1996), p. 51.

many corporations to adopt internal codes of conduct, an increasingly common form of self-regulation which is discussed below.[26]

Grassroots activism may currently be one of the better mechanisms for encouraging MNE respect for human rights. However, there are limits to the effectiveness of NGO campaigns. For example, there is no clear evidence that the share price of delinquent companies drops as a result of negative publicity.[27] Indeed, one could note that despite the long-standing consumer boycott of Nestlé, due to allegations of its continued improper marketing of baby milk formula in developing countries, that corporation continues to reap enormous world-wide profits.[28] Consumers are probably aware that the enforcement of duties against MNEs may have the knock-on effect of imposing greater burdens on themselves in the form of more expensive products, or product inaccessibility. There must be a limit to the amount of altruistic diminution of lifestyle that consumers will accept in order to improve the lot of others.[29] It cannot be left up to consumers to decide that the people who make a product are more important than the product itself.[30]

1.2.2 Self-Regulation

There has been a trend in the 1990s of corporations adopting their own voluntary codes of conduct, which prescribe certain standards of behaviour in relation to numerous issues, including respect for human rights. For example, these codes can set minimum standards for the company's own behaviour, as well as standards for the types of countries the company will be willing to invest in, and standards for the behaviour of acceptable business partners.[31]

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26 S. Webley , 'The Nature and Value of Internal Codes of Ethics', in: M.K. Addo (ed.), *Human Rights Standards and the Responsibility of Transnational Corporations* (1999), pp. 107-113.

27 S. Zadek and M. Forstater, 'Making Civil Regulation Work', in: M.K. Addo, op. cit. n. 26, at pp. 69-75.

28 The use of baby milk formula, aggressively marketed by Western corporations, increased infant mortality in developing nations, and led to the adoption by the World Health Organization of an International Code of Marketing of Breast-Milk Substitutes in 1981, WHO Res. 34.22, UN WHO, 34th Sess. UN Doc. (1981); see Muchlinski, op. cit. n. 1, at p. 7, n. 19. The International Baby Food Action Network has reported that Nestlé continues to breach the WHO Code, <http://www.oneworld.org/ni/>, accessed on 27 Oct. 1998.

29 See Lippman, loc. cit. n. 8, at p. 551.

30 A. Hughes, 'Is Business Everybody's Business?', 20(2) *Alternative L. J.* (1995) p. 71 at p. 73.

31 See B.M. Landay, 'One Corporation's Attempt to Define and Play a Role in the Global Environment: Some Observations on the Standards for Social Responsibility of the Timberland Company', 88 *ASIL Proceedings* (1994) p. 282, for a description of

Numerous codes have been adopted in the wake of consumer criticism of relevant corporations.[32] For example, a survey in 1997 of 500 of the largest UK companies by the Institute of Business Ethics revealed that 57 percent had adopted codes of conduct, up from 18 percent in 1987 and 47 percent in 1995.[33] This may constitute evidence that corporations, including MNEs, are beginning to take issues of human rights and other ethical matters seriously.

It may be too early to assess the real impact of corporate codes of conduct on corporate behaviour.[34] However, there are reasons for reservations about their efficacy. Internal codes only bind those corporations that implement them, which are by no means all corporations. Moreover, there are worries that the adoption or publicizing of internal codes is often a public relations exercise. Codes will not be effective unless there is vigorous enforcement and independent monitoring. It is doubtful that all codes are policed to a satisfactory extent. Furthermore, it may seem too easy to flout the requirements of one's own code when serious profits are at stake.[35] It is therefore contended that self-regulation cannot currently be relied upon as a primary means of ensuring respect for human rights by MNEs.

1.3 International Regulation of MNEs

The final method of controlling MNEs is to impose direct obligations on them in international law.

Moves towards a form of international regulation of MNEs occurred in the 70s, 80s and early 90s, as part of the international impetus for a 'New International Economic Order'.[36] Draft codes of conduct, drawn up under the auspices of the United Nations Commission on Transnational Corpor-

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Timberland's code. See also D. Orentlicher and T. Gelatt, 'Public Law, Private Actors: The Impact of Human Rights on Business Investors in China', 14 *Nw. J. Int'l L. & Bus.* (1993) p. 66, Appendices at pp. 125-128, printing the internal codes of Levi-Strauss, Reebok International Ltd., and Phillips-van Heusen. See J. Johnson, 'Public-Private-Public Convergence: How the Private Actor can Shape Public International Labor Standards', 24 *Brook. J. Int'l L.* (1998) p. 291 at pp. 299-302, on the Apparel Industry Partnership Initiative in the United States.

32 Webley, loc. cit. n. 26.

33 Institute of Business Ethics, *Report on Business Ethics Codes 1998* (1998).

34 S. Livingstone, 'Economic Strategies for the Enforcement of Human Rights', in: A. Hegarty and S. Leonard (eds.), *A Human Rights Agenda for the Twenty-First Century* (1999).

35 S.I. Skogly, 'Economic and Social Human Rights, Private Actors, and International Obligations', in: M.K. Addo (ed.), op. cit. n. 26, p. 239 at p. 247.

36 See GA Res 3201-2, 29 UN GAOR, Supp. (No.1), S-VI, UN Doc A/9556 (1974); 13 *ILM* (1974) p. 714.

ations, spelt out guidelines for ethical MNE behavior.[37] For example, draft provisions required MNEs to respect fundamental human rights and to refrain from interfering in a State's political affairs. These codes, had they ever been adopted, had fairly weak enforcement provisions. In particular, no provision for actual finger-pointing at delinquent MNEs was ever proposed.

The last draft code appeared in 1990 and it was last discussed by the UN General Assembly in 1992. In 1992, the code concept was abandoned due to its apparent ambitiousness and irreconcilable North/South differences.[38] Indeed, in 1992 the Australian Delegate to the UN Commission on Transnational Corporations described the code movement as a relic of a bygone era.[39] Those comments accurately reflect the abandonment of moves towards a New International Economic Order in favour of moves towards a global free market.[40]

Whereas the world-wide UN approach failed to produce a code, non-binding codes have been produced by the International Labour Organization (hereafter 'ILO'), in the area of labour regulation, and the Organisation for Economic Cooperation and Development ('OECD'), which has a voluntary code relating only to operations in OECD States. These codes are currently the most authoritative internationally agreed standards for corporate conduct.[41]

However, these codes unfortunately suffer from the obvious problem of being non-binding. Neither code provides a method for publicly denouncing delinquent corporations. The OECD code has the additional problem of only relating to operations within 32 of the wealthiest nations, when the most acute problems arize in developing nations. Finally, both Codes envisage the primacy of national laws, which is problematic when host State regulation is deficient. Therefore, despite their value as 'soft law' guidelines

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37 See *Draft United Nations Code of Conduct on Transnational Corporations*, Annex to UN doc E/1990/94, for the latest Draft Code.

38 J. Braithwaite, 'Regulation of Transnational Corporations: Towards a Code of Conduct for Australian Businesses Operating Offshore', Discussion Paper for the International Commission of Jurists (Victorian Branch), January 1997, p. 21.

39 Allan Asher, Australian Delegate, UN Commission on Transnational Corporations, *Report on the 18th Session*, New York, April 1992, 16, cited in Braithwaite, loc. cit. n. 38, at p. 22.

40 See also Muchlinski, op. cit. n. 1, at pp. 10-11. See however, P. Muchlinski's contribution to this volume on how the code movement may be revived in a different context through the agency of UNCTAD.

41 European Parliament Resolution A4-0508/98 on EU Standards for European Enterprises operating in developing countries towards a European Code of Conduct, preamble, *O.J.* (1999) C 104/180. See Appendices 1, 3, and 4 to this volume.

for 'good' MNE behaviour, these codes do not act as adequate deterrents to MNE abuses of human rights.

1.4 Reform Options

In light of the above analysis, it seems that current accountability mechanisms do not adequately ensure actual MNE accountability in the human rights arena. Further reform is needed to tighten up the framework of MNE accountability. Two reform options are canvassed below.

1.4.1 Extension of Horizontal Obligations of Home States

As noted above, home States are generally not currently liable in international human rights law for the delinquencies of their MNEs. Therefore, one reform option is to extend the scope of the horizontal effects of existing human rights treaties so as to hold home States liable for the offshore activities of their MNEs which detrimentally affect human rights.

This may only entail an interpretive extension of the jurisdictional limits of existing human rights treaties.[42] However, extension of liability to cover the extraterritorial actions of non-State actors is a radical step which would probably necessitate relevant treaty amendments, or the adoption of appropriate optional protocols. Indeed, negotiation of new treaty norms in this respect may be needed to adequately address complex issues such as the extension of home State jurisdiction to all parts of an MNE's business empire,[43] and the actual definition of MNE human rights duties.[44]

It is worth mentioning that more comprehensive jurisdictional models could be proposed in any new treaty regime aimed at reining in MNEs. Jurisdiction over MNE human rights abuse could perhaps be established according to the nationality of the victim or the State containing the largest percentage of shareholders. Obviously the most comprehensive model would be for treaty norms to confer compulsory universal jurisdiction on States with regard to MNE human rights abuse. However, this paper will

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42 For example, article 2(1) ICCPR holds a State party responsible for implementing the ICCPR within its territory and jurisdiction. The United Nations Human Rights Committee, the monitoring body established under the ICCPR, has interpreted article 2(1) to extend a State's responsibility beyond its own territory where the impugned actions are committed by the State's own agents. See, e.g., *López Burgos* v. *Uruguay*, Communication no. 52/1979, reported in *Selected Decisions of the Human Rights Committee*, Vol. 1 (United Nations, 1985) p. 88.

43 States have very different municipal rules regarding the exercise of jurisdiction over their corporations' foreign subsidiaries; see generally, Muchlinski, op. cit. n. 1, at pp. 126-171.

44 See the discussion in part 3 of this paper.

focus on the less ambitious jurisdictional bases of nationality (home State) and territory (host State).

Under a system of 'home State liability', home States would be required to enact and enforce legislation to impose human rights duties on their MNEs with regard to their overseas activities.[45] A home State's failure to fulfil such a responsibility would amount to a breach of its international human rights obligations.

A possible danger with home State liability is that extraterritorial enforcement may on occasion constitute an unacceptable intrusion into the host State's sovereignty.[46] Extraterritorial MNE regulation could result in the imposition of protectionist or imperialist measures disguised as human rights enforcement.[47] However, the dangers of protectionism or cultural imperialism exist whether home State liability for human rights abuse is imposed or not. The imposition of compulsory extraterritorial duties does not alter a State's municipal powers to unilaterally abuse its extraterritorial power. The present reform proposal is to require all home States to impose a standard minimum human rights regime on their MNEs. These human rights requirements should fall short of protectionist or imperialist measures.

Indeed, the OECD Bribery Convention, which came into force in February 1999, provides an important precedent in this regard. OECD members are required to make bribery abroad by their nationals an offence.[48] Bribery is a practice which can severely undermine democratic rights. Bribery is also politically sensitive as it inherently involves foreign government officials. If home State liability can be negotiated in such a sensitive area, it

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45 It is beyond the scope of this article, and possibly premature, to discuss the ideal modalities of such legislation, such as types of remedies and rules of standing.

46 Braithwaite, loc. cit. n. 38, at p. 19; J.P. Eaton, 'The Nigerian Tragedy, Environmental Regulation of Transnational Corporations, and the Human Right to a Healthy Environment', 15 *B.U. Int'l L. J.* (1997) p. 261 at p. 280.

47 Note the controversy over the *Cuban Liberty and Democratic Solidarity (LIBERTAD) Act*, Pub. L. No. 104-114, 110 Stat. 785 (1996) in the United States (often known as the 'Helms-Burton' Act), which permits lawsuits by US nationals against foreign corporations which 'traffic' in property expropriated by Cuba. While this statute is arguably designed to promote human rights and democracy in Cuba, it is highly likely that the statute is simply another in the long line of US politically motivated acts aimed at persecuting the Cuban communist government; see generally, T. Meron and D. Vagts, 'Editorial Comment: The Helms-Burton Act: Exercising the Presidential Option', 91 *AJIL* (1997) p. 83.

48 See Convention on Combating Bribery of Foreign Public Officials in International Business Transactions ('OECD Bribery Convention'), 17 Dec. 1997 (text available at <http://www.oecd.org>, accessed on Sept. 1, 1999), articles 2 and 4. The OECD Bribery Convention entered into force on 15 Feb. 1999. For more on the OECD's efforts, see J. Huner's contribution to this volume.

should be possible to negotiate home State liability in other areas of human rights.

The imposition of home State liability would prompt many home States to adopt legislation to absolve themselves of such liability. The fear of competitive disadvantage, cited above as a reason for a failure by home States to regulate their MNEs, disappears if uniform international levels are prescribed as a matter of obligation. Furthermore, accountability would generally be imposed via more powerful channels than is presently provided by host States. Home state liability therefore significantly augments current guarantees of MNE accountability for human rights abuse.

On the other hand, certain home States might prove as corruptible or as vulnerable as certain host States. Indeed, an MNE's choice of its state of incorporation may be a simple matter of convenience so perhaps this decision should not have lasting international legal significance.[49] Indeed, greater regulation could encourage dissolution and subsequent re-incorporation in a more corporate-friendly State.

1.4.2 Binding Direct International Regulation

An alternative reform is for a system of binding direct international regulation of MNEs to be devised.

The World Development Movement has put forward a proposal whereby States, home and host, could ratify a treaty giving power to an international tribunal to regulate MNEs. This proposal mirrors the model recently agreed for the formation of an International Criminal Court,[50] though an MNE could have civil rather than criminal liability.[51] Alternatively, a binding behavioural code for MNEs could be devised. Existing bodies such as the UN Commission on Human Rights or the Sub-Commission for the Promotion and Protection of Human Rights could then be given powers to investigate MNEs and publicly condemn delinquent MNEs. The official international shaming of MNEs could radically change MNE behaviour, as it could have disastrous consequences for product attractiveness – more so than the current accusations of NGOs.

Direct international regulation of MNEs has a number of advantages. It would provide for more uniform interpretation of human rights duties for MNEs. International regulatory bodies would also presumably be, or at least

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49 Johns, loc. cit. n. 15, at p. 894.

50 See Rome Statute of the International Criminal Court, adopted 17 July 1998, UN doc. A/CONF.183/C.1/L.76, article 12. See A. Clapham's contribution to this volume for a discussion of the obligations of corporations in international criminal law, and on the omission of MNE accountability from the Rome Statute.

51 The type of liability might vary according to the human rights abuse at issue.

appear, more sensitive to legitimate cultural and economic differences, and therefore may be more palatable to developing nations. Direct regulation would also pose a greater deterrent to abusive MNEs with weak or corrupt home States. Finally, direct international regulation of MNEs would constitute a welcome paradigmatic shift away from the State-centric focus of international law. The nation State has lost the monopoly on global power which justified that exclusive focus.[52] Indeed, MNEs are some of the major usurpers of that power. International law, including international human rights law, must change to accommodate the reality of non-State agenda-setters, or it may lose its relevance in the true conduct of international affairs.[53]

The second reform proposal is more radical than the first, and would entail the creation of an entirely new system of international human rights law. In that respect, it is perhaps less of a short-term possibility than the first reform, that of home State liability. Ultimately, the optimum reform measure may entail a combination of the two proposals.

1.4.3 Political Will for Reform

Of course, such reforms may be politically whimsical – why would States and MNEs support reform?

There are practical reasons for States and even some MNEs to support the introduction of more international regulation. For example, there are good reasons, besides moral ones, for MNEs to want to behave ethically. Ethical business raises staff morale, contributes to staff stability and efficiency, and lessens worker and consumer rebellion. Indeed, corporations like The Body Shop have shown that ethical business can be very profitable. Furthermore, it may improve economic conditions in poorer countries, helping to increase world-wide demand for products.[54] Greater economic prosperity tends to increase enjoyment of civil and political rights in society, creating a more stable environment for MNEs to trade and invest.[55]

Despite all of these reasons for MNEs to behave ethically, worries persist that unethical trading and investment may give a delinquent corporation a market advantage over an ethical corporation. Alternatively, it may be felt

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52 See, eg, P. Alston, 'The Myopia of the Handmaidens: International Lawyers and Globalisation', 8 *EJIL* (1997) p. 435; Spiro, loc. cit. n. 18.

53 Alston, loc. cit. n. 52, at pp. 440-448.

54 Johnson, loc. cit. n. 31, at pp. 336-337, citing R. Nurkse, 'Some International Aspects of the Problem of Economic Development, in: R. Kanth (ed.), *Paradigms in Economic Development* (1994) at pp. 47-50.

55 J. Spero, 'Human Rights and our International Economic Interests', 88 *ASIL Proceedings* (1994) p. 274 at p. 277; Orentlicher and Gelatt, loc. cit. n. 31, at p. 97

that the benefits of ethical trading will not accrue unless all players engage in such ethical trading. Therefore, it may be that a substantial number of 'ethical' MNEs and 'good' governments would welcome international regulation to introduce universally enforceable minimum standards to ensure that ethical corporations do not suffer market disadvantage.

2 CHARACTERIZATION OF MNE HUMAN RIGHTS ABUSE

The second part of this paper focuses on the characterization of certain MNE activities as human rights abuses. That is, assuming that MNEs should be accountable for human rights abuses, what sort of human rights obligations should be imposed on them?

Much literature in this regard has concentrated on the imposition of labour and environmental duties, as these address the rights most obviously abused by MNEs.[56] Imposition of duties in these areas would however be controversial. Such duties would probably have the greatest impact in developing States, who may perceive such measures as 'backdoor' protectionism, depriving them of legitimate market advantages. Another common criticism of MNEs has related to their willingness to engage with repressive regimes.[57] Imposition of duties to withdraw from such States would effectively link a State's trading rights with its human rights record. Again, this is controversial, as is witnessed by the international community's general reluctance to impose trade sanctions against rogue abusive governments.[58] A further difficulty in attributing human rights duties to MNEs is that MNEs are occasionally 'required' by oppressive host State laws (e.g., laws banning trade unions, laws banning the employment of women) to breach human rights standards. It would again be very contentious to impose duties on MNEs to essentially disobey local laws.

This paper will not however address the above matters in any detail. They have been briefly raised to flag these matters to readers. The remainder of this paper will instead focus on some of the theoretical difficulties entailed in imposing human rights duties on MNEs.

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56 See, e.g., Eaton, loc. cit. n. 46, Johnson, loc. cit. n. 31.

57 See B.A. Frey, 'The Legal and Ethical Responsibilities of Transnational Corporations in the Protection of International Human Rights', (1997) 6 *Minn. J. Global Trade* (1997) p. 153 at pp. 180-187; Cassel, loc. cit. n. 16, at pp. 1980-1984.

58 See Orentlicher and Gelatt, loc. cit. n. 31, at pp. 98-99, on the arguments in favour of constructive engagement (i.e., the argument that foreign business will promote liberal democratic values and other beneficial changes in rogue States), and pp. 99-102 for counter-arguments.

It cannot be simply assumed that the human rights obligations that should be imposed on MNEs are the same as those currently imposed on States. States and MNEs have different capacities and different roles. For example, it is doubtful that the same moral rectitude can be required of MNEs, who perceive their prime duties as maximizing profits for shareholders,[59] and governments, whose duties are to all of the people that they represent.[60] More recent discourse holds that corporations are truly accountable, if not often legally accountable, to stakeholders. Stakeholders are all persons with interests affected by the corporation, including consumers, investors, and the communities in which the corporations operate.[61] Nevertheless, it is still difficult to postulate that corporations should have 'governmental'-type responsibilities.

Furthermore, international human rights law is largely influenced by Western liberal theory.[62] This is evinced by the exclusive imposition of duties on States and the usual emphasis on the individual as the beneficiary of those duties. Imposition of human rights duties on non-governmental entities poses a fundamental liberal dilemma, as the imposition of duties limits the liberties of those non-governmental entities. Regulation could easily evolve into over-regulation. These theoretical considerations do not arise in attributing human rights duties to governments.

Delineation of MNE human rights duties is therefore problematic in liberal theory, as such delineation requires a careful balance between the commercial and even human rights of the MNE, and the rights of others. In certain cases, the balance would seem to intuitively fall against preservation of MNE rights. For example, it is submitted that an individual's freedom from bodily harm outweighs a corporation's right to trade at ultra-competitive levels; profit margins should never justify slack worker safety regimes or compromize consumer well being. However, numerous 'hard cases' exist, where an MNE engages in actions which seem detrimental to human rights, but civil libertarians could possibly balk at regulating the action in question.

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59 See the seminal article by M. Friedman, 'The Social Responsibility of Business is to Increase Profits', *The New York Times Magazine* (13 Sept. 1970).

60 See T. Donaldson, *The Ethics of International Business* (1989) at p. 84; and M.J. Whincrop and M.E. Keyes, 'Corporation, Contract, Community: An Analysis of Governance in the Privatisation of Public Enterprise and the Publicisation of Private Corporate Law', 25 *Fed. L. Rev.* (1997) p. 51 at p. 71.

61 S. Webley lists stakeholders as consisting of six 'constituencies': employees, shareholders and other investors, suppliers, customers, the community, and competitors in Webley, loc. cit. n. 26.

62 Steiner and Alston, op. cit. n. 16, at p. 187 and material at pp. 166-187.

For example, the American Management Association reports that two thirds of its members regularly conduct electronic surveillance of their employees.[63] The increasing advent of random drug testing by private employers represents another invasion of employee privacy and could, in certain circumstances, constitute degrading treatment. Nevertheless, US courts have tended to uphold the private employer's right to monitor employee activities, upholding private enterprise rights to ensure business efficiency over the countervailing privacy rights.[64] In contrast, the US Constitution protects employees from arbitrary invasions of their privacy by government employers.[65] Liberal theory certainly holds that corporations and other private bodies are entitled to more room than governments to pursue their perceived self-interests. However, one might question whether, in the US context, there is a relevant difference between private and public employers beyond adherence to the theoretical purity of the public/private divide, given the dominance of the private sector as a provider of employment in the US.

A second example involves the extent to which the content of privately owned media should be regulated, to ensure representation of a plurality of views in accordance with free speech principles. To what extent, for example, should the private media, often owned by MNEs, be compelled to publish certain views, or to disclose commercial interests which may influence their editorial line? It may be that the human rights duties of an MNE should vary according to the amount of power they have in a given situation. For example, media monopolies should perhaps have more onerous human rights duties than smaller operations. Perhaps human rights should be specifically protected from monopolistic positions, much like consumer and competition rights are protected from monopolistic positions by anti-trust law.[66]

A final example of a 'hard case' arises with regard to the availability of medicines to the poor. In 1998, controversy arose in the UK over whether the anti-impotence drug Viagra should be made available on the National

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63 S. E. Wilborn, 'Revisiting the Public/Private Distinction: Employee Monitoring in the Workplace' 32 *Ga. L. Rev.* (1998) p. 825 at pp. 825-826.

64 Ibid., at pp. 836-837. See, e.g., *Hart* v. *Seven Resorts Inc*, 947 P.2d 846 (Az. Ct. App. 1997), and *Rebel* v. *Unemployment Compensation Board of Review*, No. 76 W.D. Appeal Docket 1997, 723 A.2d 156 (Pa. S.C. 1997), on the permissibility of 'private' random drug testing. It is conceded that there may be extraordinary circumstances or jobs where random drug testing, by private or public employers, might be reasonable. See *Skinner* v. *Railway Labor Executives' Association*, 489 US 602 (1989), on the permissibility of drug testing government train drivers who had been involved in accidents.

65 Wilborn, loc. cit. n. 63, at p. 839.

66 Cf., G. Amato, *Antitrust and the Bounds of Power* (1997) at pp. 1-4, 109-112.

Health Service (hereafter 'NHS'). The UK government felt that the demand for the costly drug would overburden the NHS. If Viagra threatened to overstretch the NHS, one can only imagine the effect of the cost of and demand for any future cure or vaccine for HIV/AIDS. The intellectual property in such a drug will almost certainly be owned by an MNE. The price of this medicine will probably be enormous, considering the cost of preceding research and development, and the natural and even reasonable inclination of corporations to make a profit. Would it be a breach of human rights, such as the right to health or the right to life, to price an HIV cure/vaccine so highly as to burst the seams of the NHS? More pertinently, would it be a breach of human rights to price such a drug out of the reach of the most affected patients in Africa? Though the poverty of most African States denies their people access to many effective Western medicines, this HIV scenario would starkly raise the issue of whether profit-seeking can legitimately outweigh human life.

International human rights law, imbued with a libertarian ethic, is not well equipped to combat many of the excesses of private power, even with the advent of either proposed reform. The formulation of an appropriate set of comprehensive human rights duties for MNEs is not an easy task. Given the complexity of the characterisation issue, the above comments are meant as a prompt for future discussion.

CONCLUSION

MNEs are very powerful international agents, capable of inflicting serious human rights abuse. Present methods of imposing accountability on MNEs for such abuse are deficient. There is therefore a need for reform of the international human rights regime to counter *de facto* MNE impunity. Efforts to impose human rights duties on MNEs must however be accompanied by efforts to clarify the content of those duties.

The globalization of economics has facilitated the growth of the *de facto* power of MNEs.[67] Their power is augmented by international trade law, which gives MNEs more rights and no enforceable duties. The proposed Multilateral Agreement on Investment ('MAI') was designed to confer even greater rights on foreign investors. There is a need to introduce some reciprocity and impose responsibilities and duties in return for these broad-ranging rights.

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67 Livingstone, loc. cit. n. 34.

Indeed, the time may be ripe for the successful advocacy of reform to enhance MNE human rights accountability. The ongoing negotiation of a new MAI may offer a tantalizing carrot with which to entice MNEs into accepting more regulation. Moreover, in light of the recent catastrophic collapse of free market economies in South East Asia and Russia, calls for greater regulation of the global economy have emerged from many quarters, including the meeting of the Group of Seven major industrialized Democracies (G-7) in October 1998. Human rights advocates should take advantage of a potential 'pro-regulation' environment to push the case for greater human rights regulation of MNEs. In any case, human rights advocates must ensure the inclusion of human rights values in any reworking of the international agenda, lest human rights become an anachronistic value in the age of the global free market.[68]

68 Alston, loc. cit. n. 52, especially at pp. 442 and 447.

SECTION II

International Approaches

CHAPTER 3

Attempts to Extend the Accountability of Transnational Corporations: The Role of UNCTAD

PETER T. MUCHLINSKI*

INTRODUCTION

This article aims to trace the history of United Nations involvement in the issue of establishing a regime for the accountability of transnational corporations ('TNCs'). Much of this story is well known, especially as regards the negotiating history of the draft UN Code of Conduct for TNCs. However, a fresh look at this history is in order in the light of recent developments in the programme of the Division on Investment Technology and Enterprise Development ('DITE') of the United Nations Conference on Trade and Development ('UNCTAD'), the body currently responsible for TNC issues within the UN, and as a result of the recent failure of negotiations of a Multilateral Investment Agreement ('MAI') under the auspices of the OECD.

As will be shown the UNCTAD-DITE programme is significantly different from that followed by the UN in the days of the Draft Code, the days of the UN Commission and Centre on TNCs. Those differences broadly express a shift in priorities in the regulation of foreign direct investment ('FDI') from control to protection and promotion and towards helping to recognize the contribution to development that FDI can make. Thus the current policy shows an awareness that many of the problems of development and social justice that lay at the heart of the earlier programme on TNCs remain with us to this day. The crucial issue is how to pursue those

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objectives in a manner that is both sensitive to, and feasible within, the contemporary world order. That, in essence, is the task facing UNCTAD.

The paper is divided into the following sections: First, it begins with a brief recap of the original UN policy on TNCs, centred on the draft Code of Conduct. Second, the paper traces the demise of this policy, and its attendant institutional changes leading to the current institutional arrangements in UNCTAD. Third, this paper describes and assesses the current UNCTAD programme in light of the issue of TNC accountability.

1 THE EVOLVING UN POLICY ON TNCS: 1972-1992

1.1 The original UN policy on TNCs: 1972-1992

The original UN policy on TNCs has its origins in the decolonization process after World War II. This had a number of relevant political and economic effects. First, although the political sphere of influence of the old metropolitan powers diminished, their economic influence upon the newly independent States continued. This was interpreted by many of these States as evidence of continuing economic imperialism conducted not by colonial administrators but by private firms. Secondly, the newly independent States gained a voting majority in the UN, where they became an important pressure group, the so-called 'Group of 77'. That group, supported by the then socialist Eastern Bloc States, ensured that the UN would place the interests of the newly independent states at the head of its economic and social agenda. This resulted in the development of the concept of a New International Economic Order ('NIEO'),[1] and of the 'right to economic self-determination' which demanded the attainment of economic independence as a necessary aspect of political independence.[2] These developments may be seen as the main sources of the original UN policy concerning TNCs.[3] This

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1 The principal UN General Assembly Resolutions on the New International Economic Order are: GA Res. 3201 of 9 May 1974, UN GAOR Supp. (No. 1) 6th Special Sess., UN Doc. A/9559 (1974), *The Declaration on the Establishment of a New International Economic Order*; GA Res. 3202 of 16 May 1974, UN GAOR Supp., 6th Special Sess., *The Programme of Action on the Establishment of a New International Economic Order*, both reproduced in 13 *ILM* (1974) pp. 715-766. These were followed by GA Res. 3281 (XXIX) of 15 Jan. 1975, UN GAOR Supp. (No. 31), UN Doc. A/9631 (1975), *The Charter of Economic Rights and Duties of States*, reproduced in 14 *ILM* (1975) pp. 251-265.

2 See further P. Muchlinski, 'The Right to Economic Self-Determination', in: J.N. Adams (ed.), *Essays for Clive Schmitthoff* (1983) p. 73.

3 See further J. Robinson, *Multinationals and Political Control* (1983) pp. 163-166; F.I. Nixson, 'Controlling the Transnationals? Political Economy and the United Nations

would include *inter alia* the legal reaffirmation of the right of a State to control the activities of TNCs operating within its borders.

In 1972 the Economic and Social Council of the UN requested the Secretary General of the UN to establish a group of eminent persons to study the impact of multinational corporations ('MNCs') on world development and international relations. The Group reported on 24 May 1974.[4] The Group's report helped to lay down not only immediate UN policy in the field of MNCs, but also what could be described as the 'conventional framework' of issues generated by MNCs in their relations with developing countries. As regards the former, the Group recommended the setting up of a UN Commission on Multinational Corporations and a UN Centre on Multinational Corporations to oversee and develop UN policy in this area. These bodies were soon renamed the UN Commission on Transnational Corporations and UN Centre on Transnational Corporations ('UNCTC'), taking account of UN terminological changes in this field.

The Group further recommended that the Commission should set about the task of formulating a Code of Conduct for TNCs. This was made a priority objective of the Commission at its first session in March 1975.[5] At its second session, the Commission decided to establish an Intergovernmental Working Group which would prepare a draft text of the Code on the basis of proposals or views put to it by states.[6]

In relation to the principal substantive issues, the Group adopted a philosophy that was not opposed to investment by TNCs in developing countries, but which required their regulation so that they could become instruments of development. The vision was one of a co-operative, rather than an adverse, relationship, coupled, however, with a recognition that powerful foreign firms could act in an abusive manner towards a developing host State. To that extent they had to be controlled. In particular, the Group accepted that the global organization, size and technological superiority of TNCs could threaten the sovereignty of the host State through the ability of the TNC to evade national regulation and taxation, to abuse its compet-

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Code of Conduct', 11 *Int'l J .Soc. L.* (1983) p. 83; W.J. Field, *Multinational Corporations and UN Politics: The Quest for Codes of Conduct* (1980).

4 UN Doc. E/5500/Add 1 (Part 1) 24 May 1974. The Report is reproduced in 13 *ILM* (1974) p. 800.

5 See UN Commission on Transnational Corporations, *Report on the First Session*, 17-28 Mar. 1975 (E/5655; E/C.10/6 Economic and Social Council Official Records 59th Session Supplement No. 12.) para. 9 at p. 2.

6 See UN Commission on Transnational Corporations, *Report on the Second Session*, 1-12 March 1976 (Economic and Social Council Official Records 61st Session Supp. No. 5, May 1976) paras. 10-17 and 47-51; reproduced in 15 *ILM* (1976) p. 779 at pp. 782-783 and p. 790.

itive power by distorting market conditions, and to exploit the lack of technological know-how of the host where the latter needed modern technology to ensure the growth of its economy. Furthermore, certain undesirable non-economic abuses were singled out for control. These included subversive political intervention in the host State,[7] the introduction of alien cultural values and lifestyles and the generation of intergovernmental confrontations between home and host States. All these abuses were to be controlled through national regulation backed up by international controls, based on the contents of an internationally agreed code of conduct. This would lay down clearly what TNCs could and could not do, and also the principles upon which the host country should formulate its policy towards TNCs. The key concept from the beginning was balance – a balance between the rights and responsibilities of countries and firms.

From the outset, however, it was clear that major disagreements existed as to the nature and contents of the draft Code. The capital-exporting States were concerned to use the Code primarily as a means of protecting TNCs against discriminatory treatment contrary to the international minimum standards accepted by these States. The countries belonging to the Group of 77, supported by the then socialist countries, were concerned to use the Code as a means of subjecting the activities of TNCs to greater regulation, in line with the contents of the UN Charter of Economic Rights and Duties of States, so as to avoid the adverse effects of TNC activities on national economic objectives and political independence.

The Intergovernmental Working Group began work on a draft text of the Code in January 1977. An early disagreement occurred over whether the Code should be addressed only to TNCs, as desired by the Group of 77, or whether it should also extend to the treatment of TNCs by host governments, as desired by the major capital-exporting countries.[8] Ultimately the capital-exporting countries succeeded. Thus the Economic and Social Council, by Resolution 1980/60 of 24 July 1980, affirmed in paragraph 6(g) that the Code should, 'include provisions relating to the treatment of transnational corporations, jurisdiction and other related matters'.[9] Thereafter the draft Code would consist of two main parts: the first on the activities of TNCs, the second on the treatment of TNCs.

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7 This may be seen as a response to the interference of ITT in Chile which led to the downfall of Salvador Allende's government in 1973.

8 See S.K.B. Asante, 'United Nations: International Regulation of Transnational Corporations', 13 *J. World Trade L.* (1979) p. 55 at pp. 57-58. This article contains a useful summary of the issues surrounding the draft Code at its inception.

9 See UN Commission on Transnational Corporations, *Information Paper on the Negotiations to Complete the Code of Conduct on Transnational Corporations*, UN Doc E/C.10/-1983/S/2 of 4 Jan. 1983, para. 13, reproduced 22 *ILM* (1983) p. 177 at p.181.

The Intergovernmental Working Group presented its report to the Commission at its eighth session in 1982.[10] Although the report had annexed to it a draft Code, this was still a rather incomplete document. No drafting had been done on the 'Preamble and Objectives', and major differences existed between States in the drafting of the substantive provisions, especially those dealing with the treatment of TNCs. Accordingly, on the recommendation of the Commission, the Economic and Social Council, in its resolution 1982/68 of 27 October 1982, decided that the Commission on Transnational Corporations should hold a special session, open to all States, early in 1983 for the purpose of concluding the Code.[11]

Since 1983, meetings of the special session were held on numerous occasions,[12] supplemented throughout the period by informal consultations. These meetings resulted in a number of revized drafts of the Code, culminating in the proposed text of 31 May 1990, submitted by the Chairman of the reconvened special session of the Commission to the Economic and Social Council.[13] This represents the last version of the draft Code. Despite continued efforts at revisions of the draft Code, negotiations were in effective deadlock for many years, reflecting deep-rooted disagreements between the developed capital-exporting States and capital-importing members of the Group of 77 over fundamental issues as to the content, legal status and relationship with general international law of the Code. Finally, in July 1992, negotiations over the Code were suspended.[14]

The period of negotiations was marked by a shift away from a strongly regulatory approach towards TNCs and its gradual replacement in success-

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10 See UN Doc. E/C.10/1982/6 of 5 June 1982.

11 See UN Commission on Transnational Corporations, loc. cit. n. 9 above para. 15 at p. 182.

12 Meetings of the special session were held on 7-18 Mar. 1983, 9-21 May 1983, 11-29 June 1984, 9-13 Nov. 1984, 17-21 June 1985, 20-31 Jan. 1986, 14 Apr. 1986, 6 Apr. 1987 and 24 May 1990.

13 The 1990 proposed text can be found in UN Doc. E/1990/94 of 12 June 1990 or in Annex IV of the UNCTC Publication, *Transnational Corporations, Services and the Uruguay Round*, UN Doc. ST/CTC/103 (1990). This text supersedes the 1988 text which can be found in UN Doc. E/1988/39/Add.1. of 1 Feb. 1988. The text of the Code as it stood in the Summer of 1986 can be found in Annex I to UNCTC Publication, *The United Nations Code of Conduct on Transnational Corporations*, UNCTC Current Studies (Series A) No. 4, UN Doc. ST/CTC/SER.A/4 (1986). Earlier formulations of the draft Code can be found in UN Doc. E/C.10/1984/S/5 of 29 May 1984, reproduced in 23 *ILM* (1984) p. 602 at pp. 626-640 and UN Doc. E/C.10/1983/S/2, loc. cit. n. 9, at pp. 192-206. This reproduces the first draft Code submitted by the Intergovernmental Working Group in 1982.

14 International Chamber of Commerce, *Annual Report 1992* (1992) p. 24.

ive drafts of the Code with formulations closer to those favoured by the capital exporting countries.[15]

It was generally agreed that States had the right to control the entry and establishment of TNCs within their territory, including the determination of the role that such corporations could play in economic and social development and the prohibition or limitation of their presence in specific sectors.[16] Equally, there was considerable agreement over the contents of the section entitled 'Activities of Transnational Corporations' which laid down the duties of TNCs towards host States.[17] The major disagreements arose in relation to the treatment of TNCs after they had been admitted into a host country. These centred around whether a reference to international law should be included in the Code, whether and to what extent national treatment should be protected and as to the precise extent of the right of expropriation and the levels of compensation payable in the event.

The history of the draft Code represents a growing compromise by those States advocating TNC control of their original objectives. It also reflects certain fundamental changes in the environment for FDI which were to render a blow not only to the draft Code but also to influence the re-organization of the institutional machinery set up by the UN to deal with TNC issues.

1.2 The Shift Away from TNC Control Towards Investment Promotion and Protection: 1990-93

By the early 1990s the UNCTC itself was beginning to have doubts about the initial calls for a universal code laying down obligations for TNCs. In its view the economic and political conditions which gave rise to those calls had changed.[18] Developing countries were now faced with an acute shortfall of investment by comparison to the days of the early 1970s. While investment by TNCs in developed countries had increased, it had stagnated

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15 See, e.g., the Preamble to the draft Code and UNCTC, *The United Nations Code of Conduct on Transnational Corporations,* op. cit. n. 13, at pp. 2-3.

16 1990 Draft Code para. 48; UNCTC 1990 loc. cit. n. 13, at p. 180.

17 Ibid. This section is divided into three parts. The first deals with general obligations of TNCs (paras. 7-20). The second part deals with economic, financial and social obligations of TNCs (paras. 21-46). The third deals with disclosure (paras. 47-58).

18 See UNCTC, *The New Code Environment* (1990); summarized in UN Doc. E/C.10/1990/5 of 29 Jan. 1990. See also Report of the Secretary-General, *Transnational Corporations in the New World Economy: Issues and Policy Implications*, UN Doc.E/C.10/1992/5, 5 Feb. 1992; Report of the Secretary-General, *International Arrangements and Agreements Relating to Transnational Corporations*, UN Doc. E/C.10/1992/8, 18 Feb. 1992. This paragraph and the next are adapted from Muchlinski, op. cit. n. 2, at pp. 596-597.

in developing countries.[19] According to the UNCTC, this raised new policy questions, leading to what it called a 'New Code Environment', an environment in which a code of conduct that reflected those questions would be more relevant than ever. No longer was the control of the potentially negative impacts of TNCs the major issue; rather it was how best to re-integrate developing countries into the global economy in a manner that ensured inflows of new investment capital. Given that TNCs were a primary vehicle for such integration, any future Code should be geared to the realisation of this goal.[20]

Furthermore, certain fundamental disagreements were becoming increasingly irrelevant given the logic of the 'New Code Environment'. Thus the debates over nationalization and a reference to international law or obligations assumed equity ownership structures that were now less frequently used, being increasingly replaced by reduced equity and non-equity forms of investment structures by firms.[21] Moreover, local ownership as evidence of control had also diminished as an objective for host States. They, 'may aim instead at capturing a larger share of the economic benefits that derive from a transnational corporation's non-equity competitive advantages'.[22]

These changes in attitude can be attributed to changes in the economic and political climate during the 1980s and to increased knowledge about TNC operations.[23] On an economic level, the 1980s marked a slowing down of growth in the world economy, especially in the manufacturing sector, combined with an increased scarcity of financial capital, especially for developing countries, in the wake of the 'debt crisis' of the early 1980s. This led to greater competition between States for FDI. On a political and ideological level a number of States, notably the US and UK, underwent changes in government resulting in influential administrations that were sympathetic to neo-classical political economy and its liberal approach to FDI. A similar development could be traced in the European Commission with the coming of the European Single Market programme. In addition, the formerly socialist States of the Eastern Bloc abandoned command economy structures and began moving towards free-market economies. Moreover, in developing countries, external economic forces caused a rethinking of earlier political commitments to nationalistic and State-led economic policies. Increasingly, the problem of economic efficiency challenged governments to work out new approaches. As a consequence many States

19 E/C.10/1990/5, paras. 16-20 at p. 8.
20 Ibid., paras. 39-41.
21 Ibid., para. 45.
22 Ibid., para. 47.
23 See Muchlinski, op. cit. n. 2, at pp. 10-11.

attempted the privatisation of State-owned companies, some of which were previously foreign-owned, and the introduction of more competition into the economy.

In the international arena, the fears generated by calls for a NIEO on the part of developing countries, led to a reaction by developed countries. They were moved to use their leverage with the weaker developing countries not only to limit the scope of the proposed UN Code of Conduct but also to bring about a new regime of bilateral investment protection treaties coupled with action aiming to establish new international institutional structures for investor protection through the World Bank and, more recently, through the Uruguay Round negotiations under the General Agreement on Tariffs and Trade ('GATT') which resulted in the first multilateral disciplines concerning FDI in the fields of services, intellectual property and performance requirements, to be administered by the World Trade Organization ('WTO').

In light of these changes in environment and perception, and as a result of the restructuring of the UN administrative bureaucracy under the former UN Secretary-General Boutros Boutros-Ghali, in 1992, the UNCTC was reorganized and renamed as the Transnational Corporations Management Division ('TCMD'), one of eight divisions of the United Nations Department of Economic and Social Development. Its task was to act as the secretariat to the UN Commission on TNCs. In 1993 the UN programme on TNCs was transferred from the UN Department of Economic and Social Development in New York to UNCTAD in Geneva. This relocation is significant, not only as it places responsibility for TNC issues in the hands of that part of the UN system directly responsible for economic development issues, but also as Geneva is the home of the WTO.

A new Division on Transnational Corporations and Investment ('DTCI') was established. This has since been re-named the Division on Investment, Technology and Enterprise Development ('DITE'). In the meantime, the UN Commission on TNCs was wound up and replaced by the Commission on Investment Technology and Related Financial Issues (the 'Commission') which reports to the Trade and Investment Board of UNCTAD as the body supervising the development of the UN TNCs programme. The Board is ultimately responsible to the UNCTAD Conference itself.

According to the UNCTAD *World Investment Report 1995*, 'DTCI seeks to further the understanding of the nature of transnational corporations and their contribution to development and to create an enabling environment for international investment and enterprise development. The work of the Division is carried out through intergovernmental deliberations, policy analysis and research, technical assistance activities, seminars, workshops and

conferences'.[24] Thus DITE can be seen as a high powered 'think tank' with the aim of helping developing countries to get good quality FDI that will assist in economic development. In this regard the current institutional aims are not very different to those envisaged by the original Group of Experts in 1974. Nonetheless an important policy-making function has been taken away. No longer are negotiations over a code of conduct or other normative instruments within the remit of the current intergovernmental machinery. This is significant in view of more recent developments in relation to the future of a MAI, which include calls for negotiations to be resumed in the UN system. Finally, it is important to distinguish clearly between the Commission and the Secretariat, which is embodied in DITE. The Commission consists of representatives of the governments that comprize the membership of UNCTAD. Thus it reflects the majority opinion of those representatives. By contrast the Secretariat has to serve all members and is therefore always more likely to take a more 'centrist' view of investment issues.

2 CONTEMPORARY UN POLICY: FDI PROMOTION AND PROTECTION AND 'FLEXIBILITY FOR DEVELOPMENT'

The process of change described above has resulted in a new policy orientation at the UN. This is to be found in the mandate given to UNCTAD at the Ninth Session of the Conference held in Midrand, South Africa, in 1996.[25] Its principal features can be summarized as being: first, a stronger emphasis on factual and policy analysis and wider policy discussion; secondly, technical assistance to developing countries in response to a growing demand for inward investment; thirdly, and, for the purposes of this paper, most importantly, the development of a programme concerning a possible multilateral framework on investment ('PMFI'), which will be considered in detail in the next section of the paper.

The 'think tank' function of DITE is perhaps best exemplified by the annual World Investment Reports ('WIRs') produced by TCMD, DTCI and DITE since 1991. Each Report contains an annual update on FDI trends

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24 UNCTAD, *World Investment Report 1995* (1995). In the *World Investment Report 1996* the reference to policy analysis and research was dropped and the reference to DTCI was replaced by a reference to UNCTAD, thereby emphasizing the actual source of the UN TNCs programme as the Conference itself.

25 See the Midrand Declaration of 11 May 1996 adopted by the 9th Session of UNCTAD. para. 89 (a)-(g), <http://www.unctad.org/en/special/u9midra.htm>, accessed on Sept. 20, 1999. See further UNCTAD, *Report of the Proceedings of the United Nations Conference on Trade and Development Ninth Session Midrand, South Africa, 27 April - 11 May 1996* (Geneva: UN, Sales No.E.97.II.D.4).

both globally and by region, and a section analyzing a topical issue in FDI regulation. Each report is compiled by members of the DITE Secretariat working with a global network of scholars and practitioners specializing in FDI issues. Among the pages of the WIRs, issues relevant to corporate liability have been addressed including *inter alia*: employment and the workplace and corporate social responsibility in 1994, the problems relating to a multilateral agreement on investment in 1996, competition regulation of FDI in 1997 and double taxation agreements and impacts on FDI of international investment agreements in 1998. These Reports, though not immune from criticism, have become an authoritative source of data and of balanced debate on FDI related issues.[26]

As regards technical assistance, the Midrand mandate specifies a number of policies which can enhance the capacity of developing countries and countries in transition to benefit from FDI. These include: investment policy reviews with member countries aimed at familiarizing other governments and the private sector with that country's investment environments and policies; enhancing the overall investment climate, obtaining information and formulating policies to attract, and benefit from, FDI; assistance in the area of accounting standards and accounting education and related activities; exchanging experiences on investment promotion and the benefits of FDI among host countries; promoting investment among developing countries; and investigation of how to mobilize the private sector in order to encourage investment flows into the least developed countries.[27]

3 THE POSSIBLE MULTILATERAL FRAMEWORK ON INVESTMENT

The Midrand mandate in this area requires UNCTAD to identify and analyze the implications for development of issues relevant to a PMFI, 'begin-

26 For reviews of the WIRs see: on the 1998 *WIR*: B. Sutcliffe 'Development: Capitalism sans frontiers?', *South-North Development Monitor* (1998) no. 4321; on the 1997 *WIR*: R. Vernon, 'World Investment Report 1997: Transnational Corporations, Market Structure and Competition Policy', 47 *Economic Development and Cultural Change* (1999) no. 2; on the 1996 *WIR*: E. Safarian, 'Wold Investment Report 1996: Investment, Trade and International Policy Arrangements', 5 *Transnat'l Corp.* (1996) p. 163; on the 1995 *WIR*: L. Eden, 'World Investment Report 1995: Transnational Corporations and Competitiveness?', 5 *Transnat'l Corp.* (1996) p. 145; on *WIR 1994*: P.J. Buckley, 'World Investment Report 1994: Transnational Corporations, Employment and the Workplace', 3 *Transnat'l Corp.*, (1994) p. 91; on *WIR 1993*: J. Behrman, 'World Investment Report 1993: Transnational Corporations and Integrated International Production', 2 *Transnat'l Corp.* (1993) p. 149.

27 UNCTAD, *Midrand Declaration*, op. cit. n. 25.

ning with an examination and review of existing agreements, taking into account the interests of developing countries and bearing in mind the work undertaken by other organizations'.[28] The PMFI has been interpreted as encompassing all international investment agreements ('IIAs'), be this at the bilateral, regional or multilateral levels. Furthermore, the mandate to deal with 'existing' agreements can be seen as a compromize act to deal with the MAI which was under negotiation then. According to UNCTAD, its prime objective in this area, 'is to help developing countries and economies in transition participate as effectively as possible in international discussions on investment rule-making, be it at the bilateral, regional, plurilateral or multilateral level. This reflects the need for greater information, transparency and proper economic and legal analysis'.[29]

Thus the approach focuses on international developments in rule-making. As such the resulting programme has been criticized by NGOs, from both developing and developed countries, for having been set not so much by the needs of developing countries but by the structure and content of the MAI negotiations and the investment promotion and protection agenda upon which these were based.[30] Indeed, UNCTAD has been perceived as being in favour of a MAI, an impression said to have been reinforced in the *WIR 1996*, which contains a section seemingly advocating the conclusion of a multilateral framework for investment as a development friendly policy.[31]

At the outset it should be stressed that UNCTAD was never in favour of the OECD's MAI. That was an OECD initiative upon which UNCTAD had no official position. UNCTAD has, rather, concentrated on the more general issue of a multilateral framework for investment. However, even in this wider context, as a close reading of the *WIR 1996* shows, UNCTAD has never advocated the adoption of a multilateral framework for investment as a cure-all for developing country economic development. Indeed the stress is on proceeding with bilateral and regional arrangements and on the importance of the development dimension, which requires *inter alia* safeguards for developing countries by way of transitional periods, advancement through special measures to be taken by developing countries to increase benefits from FDI and home country support for development friendly FDI.[32]

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28 See UNCTAD, 'UNCTAD's work programme on a possible multilateral framework on investment: an update', *UNCTAD Issues Note* (18 Feb. 1999).

29 Ibid., at p.1.

30 See especially the views of the Third World Network summarized in 'No MAI, but MFI with GATS approach, says Fortin', *South-North Development Monitor* (Geneva, 17 June 1998).

31 UNCTAD, *World Investment Report 1996* (1996), ch. VI.

32 Ibid., at pp. 195-196.

Furthermore, UNCTAD has always included in the agenda issues that go beyond the narrow investor protection agenda pursued in the MAI negotiations.[33] These points are reinforced by the way in which the PMFI policy has evolved, especially as regards the range and scope of the IIA Issues Papers discussed below. UNCTAD's work in this area involves a 'two-track' process: first, substantive support is given to the intergovernmental debate in various intergovernmental bodies, especially the Commission, and its expert meetings on the subject and, secondly, the secretariat's work.[34]

3.1 Substantive Support to the Intergovernmental Debate

The Commission is one of the three subsidiary bodies of UNCTAD's Trade and Development Board. It holds annual meetings that draw on the findings of expert meetings whose task is to exchange experiences and to debate existing investment agreements and their implications for development. The most recent of these meetings was held between 24 and 26 March 1999 and dealt with the issue of flexibility for development in international investment agreements. This followed on from two earlier meetings in May 1997 on bilateral investment agreements ('BITs') and on regional and multilateral IIAs and their development dimension.[35]

The discussions at the most recent expert meeting have made more explicit the need for development needs to direct the formulation and implementation of IIAs. Discussion was based on a Secretariat Note entitled 'International Investment Agreements: Concepts Allowing for a Certain Flexibility in the Interest of Promoting Growth and Development'.[36] The Note stresses that IIAs need to be flexible in the interests of developing countries. This is especially important in view of the fact that while the parties to an IIA may be formally equal, resulting in 'legal symmetry', they may be at different levels of economic development, resulting in 'economic asymmetry'.[37] The Note suggests that a degree of flexibility in IIAs, as they

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33 These include restrictive business practices, transfer pricing, technology transfer, employment, environment and illicit payments. Ibid., at pp. 184-189. See further the discussion of the Issues Papers on International Investment Agreements *infra* Section 3.2.1.

34 *UNCTAD Issues Note*, loc. cit. n. 28, at p. 1.

35 See *Report of the Expert Meeting on Existing Agreements on Investment and Their Development Dimensions* (Geneva 28-30 May 1997) UNCTAD Doc.TD/B/COM.2/5 TD/B/COM.2/EM.1/3, 18 June 1997. The discussions of the expert meeting on BITs are reflected in the final version of the *UNCTAD Publication Bilateral Investment Treaties in the Mid-1990s* (1998) (UN Sales No.E.98.II.D.8).

36 UNCTAD Doc.TD/B/COM.2/EM.5/2, 5 Feb. 1999.

37 Ibid., at para. 11, p. 6.

apply to participating developing countries, can be achieved through the following techniques:

(i) Objectives: typically, the preamble of an agreement is the repository of its aims and purposes. It can spell out specific objectives that elaborate on general development themes or it can introduce development concerns for the first time in an agreement;
(ii) Substantive provisions: development concerns can serve to determine which issues are included in an IIA and which are not, as well as the manner in which the issues included are dealt with;
(iii) Modalities of implementation and technical assistance: these relate to the ways in which agreements operate to further development objectives. This can include technical assistance, not only as regards the implementation of agreements but also beyond. Development-oriented considerations can, furthermore, be the basis for exceptions and derogations as well as transitional periods for compliance by developing countries;
(iv) Overall structure: here it is the very design of an agreement, not merely its substantive content, that can further development.[38]

Thus, the Note suggests that the outcome of negotiations for an IIA, regardless of whether it is bilateral, regional or multilateral, can take account of the special concerns of developing countries thereby ensuring that they are not exposed to the risk of radical liberalisation and/or obligations to protect foreign investors where they may not be in an economic position to deal with them.

This approach should not be misread as a means of 'massaging' developing countries into regimes that are beneficial to foreign investors only. The failure of the MAI negotiations shows that the conclusion of IIAs is a very complex process in which full consensus, even among developed countries, is hard to achieve. As the Secretary-General of UNCTAD, Rubens Ricupero, has stressed on a number of occasions, the failure of the MAI is not a 'North versus South' issue. It shows difficulties that all countries will have with unconditional and unqualified liberalisation of investment regimes. However, it also shows that, to be useful, IIAs must be sensitive to the real needs and interests of the various types of countries that participate in them. Thus the stress on 'flexibility for development' is an important way in which the debate on a useful approach to IIAs can evolve.

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38 Ibid., at para. 12, p. 6. Recently, at the request of a group of delegates from both developed and developing countries, the WTO has asked UNCTAD to submit this paper to the WTO Working Group on the Relationship Between Trade and Investment.

Perhaps the one area that is missing from UNCTADs deliberations in this field, is an express acknowledgement that, at its heart, the debate on flexibility is a debate about the permissible limits of host country discretion at the local level, the level where the 'real world' of FDI takes place. The linkage of the structures and contents of IIAs with the operational priorities of host developing countries must be further examined in this context. This may require more detailed consideration than has occurred to date of the relationship between investor protection rights and investor responsibilities in host countries. In this regard the old UN policy centred on the draft Code of Conduct was perhaps closer to these vital concerns, though it suffered from being identified with what can be termed as 'Cold War' agendas of competition between pro- and anti-capitalist ideologies. In the contemporary environment, however, the link between rights and responsibilities of investors should not be perceived as so threatening as to be omitted from the agenda. In a sense this is, to use current British political jargon, a 'Third Way' issue that has a clear acceptability to both business, government and civil society.[39] UNCTAD is in a very good position to further develop these concerns as part of the 'flexibility' agenda to which a 'social responsibility' agenda may be added.

This has particular significance in the light of the fact that, following the 1996 Ministerial Conference of the WTO in Singapore, UNCTAD has been given special observer status in the WTO working group on the relationship between trade and investment and in the WTO working group on the interaction between trade and competition policy. Though neither working group is charged with the preparation of a WTO based multilateral framework for investment these bodies have a significant role to play in the evolution of WTO competence in the investment field. In turn UNCTAD has a significant role to play in ensuring that the development dimension is introduced into the work of these groups. It may also have a similar role to play if, at some future time, negotiations on a multilateral framework for investment begin at the WTO.[40] Such an involvement would render any WTO based initiative quite distinct from the failed MAI, which tended too far towards a narrow investor promotion and protection agenda.

UNCTAD has contributed to the discussions of the working group on the relationship between trade and investment. The official reports of the Commission relating to IIAs and their development dimension are made available to the group on a regular basis. At the group's March 1998 meet-

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39 On the 'Third Way', see A. Giddens, *The Third Way: The Renewal of Social Democracy* (1998).

40 See M. Shahin, 'Multilateral investment and competition rules in the World Trade Organization: An Assessment', 6 *Transnat'l Corp.* (1997) p. 171 at pp. 175-176.

ing, UNCTAD summarized the main results of its recent work on existing investment agreements. At the June 1998 meeting UNCTAD explained its ongoing work, briefly described above, on the development dimension of IIAs. At the third meeting in September 1998, at the group's request, UNCTAD submitted a paper comparing the OECD Guidelines on Multinational Enterprises and the draft UN Code of Conduct on TNCs.[41] This suggests that the relationship between the rights and responsibilities of investors is being taken seriously at the WTO. It is notable also that although the Draft Code of Conduct was never adopted, it remains a source of examples and ideas as to how the responsibilities of investors should be approached in an IIA. The continuing influence of the Code negotiations should not be lightly dismissed, as they provide a starting point of experience which can inform many contemporary problems involved in the drafting of provisions in IIAs. Indeed, UNCTAD was asked by the working group to add to its comparison between the Draft UN Code and the OECD Guidelines the text of the Draft UN Code as well as the UNCTAD draft Code on the Transfer of Technology and the only adopted UNCTAD Code, the set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices of 1980.[42]

3.2 Secretariat Work

The work of the Secretariat on the PMFI programme consists of the following elements: the preparation and dissemination of a series of 'International Investment Agreements Issues Papers', the organization of capacity building seminars, regional symposia and training courses, responding to *ad hoc* technical assistance requests, the organization and facilitation of public private sector dialogue and research and policy analysis.[43]

3.2.1 The 'Issues Papers' Series

This aims to discuss the key concepts in IIAs and to present them as a series of issue specific 'handbooks' which may be used by non-specialist end users to understand the technical aspects of the issue in question. Each paper seeks to identify the principal questions raised by the issue under examination, to

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41 *UNCTAD Issues Note,* loc. cit. n. 28, at p. 2. The deliberations of the group involving UNCTAD's presentations are summarized in the *1998 Report of the Working Group on the Relationship Between Trade and Investment to the General Council,* WTO Doc.WT/WGTI/2 (8 Dec. 1998) especially at pp. 51-62, paras. 191-225.

42 Ibid., para. 225, at p. 62. On the draft Technology Transfer Code see Muchlinski, op. cit. n. 1, at ch. 12; on the set of Multilaterally Agreed Principles on Restrictive Business Practices see Muchlinski, ibid., ch. 11.

43 *UNCTAD Issues Note,* loc. cit. n. 28, at pp. 2-5.

provide a stocktaking of the way in which existing agreements have dealt with the issue, identifying, where possible, different models of provisions which relate to that issue, how the issue interacts with other key issues in IIAs and, by way of conclusion, what are the principal economic and development implications of the issue and, in the light of identified models of provisions, what options are open to countries as regards dealing with the issue in an IIA.

The aim of the series is not to prescribe how negotiators of IIAs should act, only to offer a better understanding of the available alternatives by pointing out those alternatives and by providing references to where they exist through precedents. It would be beyond the mandate given to UNCTAD at Midrand for this body to instruct countries as to the proper policy to pursue. In any case this would be futile as the member countries of UNCTAD are sovereign. Thus it is up to each country to decide for itself whether it wishes to follow a more or less restrictive policy on the treatment of foreign investors. The Issues Papers are no more than an aid to this process.

The issues to be covered in the series follow the most common clauses found in IIAs.[44] These include (in alphabetical order): admission and establishment,[45] dispute settlement (investor-State), dispute settlement (State-State), fair and equitable treatment, funds transfer, most-favoured-nation treatment,[46] national treatment, scope and definition,[47] taking of property, and transparency. However, the UNCTAD agenda is wider than this. The Issues Papers therefore also deal with matters not often found in traditional investor protection oriented BITs or other IIAs. These involve, first, certain commercial/industrial issues including competition, home country measures, host country operational measures, illicit payments, incentives, investment related trade measures ('IRTMs'),[48] taxation, transfer of technology, and transfer pricing;[49] secondly, social issues such as employment, environment and corporate social responsibility. In addition certain titles consider wider background issues which will impact on the negotiation and conclusion of IIAs. These include the economic question of foreign direct investment and development,[50] modalities and implementation issues, and

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44 See UNCTAD, *Report on the Launching of UNCTAD Issues Papers on International Investment Agreements* (Geneva 16 and 18 Feb. 1999) UNCTAD/ITD/Misc.12, 16 Mar. 1999, at pp. 11-12.

45 Already published UN Sales No.E.99.II.D.10.

46 Already published UN Sales No.E.99.II.D.11.

47 Already published UN Sales No.E.99.II.D.9.

48 Already published UN Sales No.E.99.II.D.12.

49 Already published UN Sales No.E.99.II.D.8.

50 Already published UN Sales No.E.98.II.D.15.

an overview of present international arrangements for foreign direct investment. A further title will consider lessons from the Uruguay Round negotiations.

The Issues Papers have been made available not only to the general public, but in particular to the member States of UNCTAD and WTO, both through their Permanent Missions and through the training events that form part of the project.

3.2.2 Capacity Building Seminars, Regional Symposia and Training Courses

A number of regional symposia for decision-makers in the field of FDI regulation have taken place in developing countries. The first was in Fez, Morocco, for African countries in June 1997. Since then three further symposia have been organized in New Delhi, India, in July 1998, for Asian countries, in Kingston, Jamaica, in September 1998, for Caribbean countries, in Lima, Peru, in November 1998, for Andean Group countries and in Cairo, Egypt, in May 1999, for Arab countries. Future symposia are in preparation, as well as an inter-regional symposium in China scheduled for September 1999. The delegates to these symposia include not only government officials and UNCTAD specialist faculty but also representatives of civil society and specialist academics from the region. In this connection, a significant development arose in the context of the Regional Symposium in New Delhi. The Indian based Consumer Unity and Trust Society (CUTS) co-organized with UNCTAD a round table for NGOs for the day after the symposium. This event can be seen as a response by UNCTAD to criticisms against its policy on IIAs already mentioned above. Since the Delhi meeting it is now become a part of UNCTAD practice to organize similar meetings with local representatives of civil society, in addition to their participation in the symposium itself. Such a meeting took place after the Peruvian and Egyptian symposia.

As to the capacity building seminars, these have taken place in co-operation with the WTO and involve delegates from the Permanent Missions to the two organizations, specialist UNCTAD faculty and representatives from NGOs trade unions and business. Three such seminars have taken place: two for anglophone countries in February and June 1998 and one for francophone countries in April 1999.

Finally, training courses for negotiators from developing countries are currently in preparation. These will involve both a familiarisation of the main issues, using the Issues Papers as part of the training package, and simulation exercises. These will be useful not only for a PMFI, but also for the considerable treaty-making activity already taking place at the bilateral and regional levels.

3.2.3 Ad Hoc Technical Assistance

This is offered in response to requests by member countries. A recent example involved a request by the Group of 15 for a forum to negotiate BITs among the G-15 countries. The forum was held from 7-14 January 1999 and resulted in the negotiation of eight BITs. UNCTAD organized the event and provided the resource persons and background documentation.[51]

3.2.4 Facilitation of Public/Private Sector Dialogue

UNCTAD has hosted a number of round table events to promote dialogue on IIAs between Geneva based ambassadors with interested groups from civil society and the private sector. The first such dialogue was organized with the co-operation of the European Round Table of Industrialists in December 1997. This was followed by a dialogue with ambassadors and NGOs in June 1998 which was held just prior to the annual UNCTAD-NGO consultations. A similar event took place with the International Confederation of Free Trade Unions in December 1998.

3.2.5 Research and policy analysis

This aspect of the PMFI programme is part of the wider research activities of UNCTAD already mentioned above.

The PMFI programme is evaluated by independent evaluators who attend all events and critically assess their utility to members. To date evaluations have been positive. The programme is also monitored by the principal funding countries and bodies which include: Australia, Brazil, Canada, the Netherlands, Norway, Switzerland, the United Kingdom and the European Union. Periodic meetings are held with UNCTAD to discuss progress.

CONCLUSIONS

This paper has sought to trace the development of UN policy in the field of TNC regulation from its inception in the early 1970s to the present. The abiding theme has been the shift from a negotiating process aimed primarily at the conclusion of a Code of Conduct addressed to TNCs and governments, to a more detached and analytical approach aimed at ensuring further and better knowledge concerning the activities of TNCs and their effects on the development process, and on ensuring that developing countries are themselves better aware of, and able to deal to their benefit with,

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51 *UNCTAD Issues Note*, loc. cit. n. 28, at p. 4; UNCTAD, *Bilateral Investment Treaties Among the G-15: Bilateral Negotiations Final Report*, UNCTAD/ITE/Misc.7/Rev.1 (15 Mar. 1999).

the principal issues arising out of a possible emerging global framework of investment rules.

It is possible to describe this shift as one towards a new 'consensus' in international investment policy, one which may view TNCs in a less hostile manner than before and which places investor protection alongside development concerns. However, that is to assume that the original UN position was different. The Group of Experts vision in the 1970s was precisely that of consensus around the basic assumption that FDI by TNCs is good for development but that it may need a degree of regulation to ensure that this is the case. The contemporary version of this vision stresses 'balance' and 'flexibility' for development in the way that possible future IIAs are drawn up.

Against this general conclusion, certain more specific points may be made. First, the draft UN Code of Conduct, as shown above, may still have some role to play in this process. Indeed, its contents appear far less controversial now than they did in the more politically polarized days of the 1970s and 80s. The question arizes what role can the Draft Code actually perform? Despite its age, it is sufficiently broad in its subject matter to encompass many of the issues that the contemporary agenda has placed at the heart of discussion including, for example, disclosure, taxation, competition and environmental protection, not to mention respect for human rights and for the internal cultures and political systems of host countries. On the other hand, the Draft Code cannot be used as a means of avoiding new negotiations concerning the scope and content of a new, balanced, regime of rights and responsibilities for investors. First, certain provisions of the Draft Code, notably those concerning non-collaboration by TNCs with racist minority regimes on Southern Africa are a product of their time. They should be replaced by an expanded provision on respect for human rights and fundamental freedoms. Secondly, the provisions on the treatment of TNCs, which led to the non-conclusion of the Code, will need to be re-examined in the light of contemporary investment patterns and policies. Here the problems encountered by the negotiators of the Draft Code have not disappeared, and the alternative formulations at which the negotiating process ended still display the basic starting points of debate. However, they do not encompass the debate as it might evolve now. For example, in the controversial area of national treatment, no mention is made in the Draft Code of exceptions or reservations. In any future multilateral regime on FDI, such issues will inevitably be included. Thirdly, the Draft Code was intended to be a non-binding instrument. A future regime of rights and responsibilities for investors is likely to be legally binding. Thus greater detail and precision will be required of its provisions. The Draft Code did not need to offer such a degree of drafting sophistication. So, while it may point the way to

the general content and approach to a new regime for investment regulation, the Draft Code cannot, by itself, offer that regime.

This point leads to a second concern, the widening of the agenda of IIAs, and how to deal with it. The paper has shown that UNCTAD is in the process of responding to this challenge, both as regards the range of substantive issues covered and through the diversity of the dialogues with governments, business and civil society that it has, and continues to, engage in. However, there is room for more detailed consideration of certain issues. Corporate responsibilities were highlighted above as an example. This in turn demands further understanding of the linkages between issues.[52] This may require a more fully institutionalized structure of consultation not only with business and civil society but also with other UN agencies and outside bodies responsible. The linkage with the WTO on training issues is one example of what may become a wider series of contacts that go beyond informal interactions. Indeed, following the pattern of the seminars for delegates, a series of joint UNCTAD and WTO seminars is being launched for NGOs.

In addition, as noted above, the 'top-down' approach of the UNCTAD agenda must be supplemented with further research and discussion of the local effects of FDI regulation. The 'bottom-up' aspects of this process have not been as fully developed as they should be. If they are not, UNCTAD may well be perceived as being out of touch with real issues and concerns. Thus issues such as the interaction of national, regional and multilateral regulatory regimes should be more fully investigated, as should local systems for the attraction and control of FDI.[53]

Thirdly, should a negotiating process for a multilateral framework for investment commence in the near future, UNCTAD may have a role to play as part of the secretariat for such a process. Much has been said of the WTO as a possible future forum for negotiations. Critics have argued that this would place too great an emphasis on liberalisation and investor protection, given the WTO mandate. On the other hand the WTO is the only body which already has experience of negotiating and operating an emerging multilateral framework for investment through the GATS, TRIMS and TRIPS agreements, and the financial services and telecommunications protocols. What is needed is a balancing of these priorities with the wider priorities connected with the existing UNCTAD programme. Perhaps the best

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52 On which see further S. Picciotto, 'Linkages in International Investment Regulation: The Antimonies of the Draft Multilateral Investment Agreement', 19 *U. Pa. J. Int'l Econ. L.* (1998) p. 731.

53 On which see UNCTAD, *World Investment Report 1992* (1992), which considered FDI and development; the *World Investment Report 1999* will address that issue again.

approach would be to create an arms-length relationship with the WTO and UNCTAD by establishing a negotiating machinery that would access the skills and services of both WTO and UNCTAD, but remain outside both bodies. A not dissimilar approach was, after all, taken in the process of negotiating GATS itself, resulting in a separate Council on Services in the WTO, and in the OECD during the negotiations for the MAI, where the OECD provided the negotiating services but where the negotiations occurred outside the usual OECD structures. Therefore, UNCTAD and the WTO may have a role to play in the creation of a truly forward looking multilateral framework for investment though the establishment of an independent negotiating machinery that could benefit from the skills and experience of the secretariats of both organizations while at the same time being able to provide the wider agenda required of the complex contemporary economic and social environment for transnational business.

CHAPTER 4

The Beginning of a Sessional Working Group on Transnational Corporations Within the UN Sub-Commission on Prevention of Discrimination and Protection of Minorities

DAVID WEISSBRODT*

INTRODUCTION

When the United Nations Sub-Commission on Prevention of Discrimination and Protection of Minorities (the 'Sub-Commission') met in Geneva, Switzerland, from August 3rd through August 28th, 1998 for its 50th session,[1] it decided to form a sessional working group, for a three-year period beginning in August 1999, to examine the working methods and activities of transnational corporations.[2]

The idea for a sessional working group arose from Sub-Commission Resolution 1997/11,[3] which had asked Mr. El-Hadji Guissé (expert from Senegal) to present a working document to the Sub-Commission at its 50th session on the issue of human rights and transnational corporations. Transnational corporations ('TNCs'), it was noted, have been implicated in a variety of human rights abuses, which may at times jeopardize the well-

* University of Minnesota School of Law. The author wishes to thank Professor Menno Kamminga of Maastricht University and Mr. Saman Zia-Zarifi of the Faculty of Law of Erasmus University, Rotterdam as well as the other participants in the Erasmus University Colloquium on the Liability of Multinational Corporations Under International Law, 29-30 Apr. 1999; Dr. Sharon Ladin and Dr. Steven Suppan of the Institute for Agriculture and Trade Policy; Mr. Chris Jochnick and Ms. Maria Green of the Centro de Derechos Economicos y Sociales, as well as Professor Morton Winston, Ms. Mayra Gómez, Mr. Bret Thiele, Ms. Alya Kayal, Ms. Joanne O'Donnell, Ms. Nicole Ankeny, Professor Barbara Frey, and Ms. Shinobu Garrigues for their assistance in preparing this comment.

1 See also D. Weissbrodt, et al., 'Brief Summary of the 50th Session of the United Nations Sub-Commission on Prevention of Discrimination and Protection of Minorities', 16 *Neth. Q. Hum. Rts.* (1998) p. 553. Since the drafting of this paper, the Sub-Commission has changed its title to the Sub-Commission on the Protection and Promotion of Human Rights.

2 Sub-Commission [hereafter S.C.] Res. 1998/8, UN Doc. E/CN.4/1999/4, E/CN.4/Sub.2/1998/45 (1998) p. 30.

3 See S.C. Res. 1997/11, UN Doc. E/CN.4/1998/2, E/CN.4/Sub.2/1997/50 (1997) p. 34.

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being of individuals and entire communities. TNCs have been known to adopt policies which perpetuate child labour practices, hazardous working conditions, exploitation of workers, and which may at times interfere with the work of trade unions. The Guissé document briefly addressed the impact of transnational economic actors on income inequality both nationally and internationally.[4] Mr. Guissé also raised concerns about the far-reaching impact of TNC policies and practices – for example, the threat to environmental sustainability posed by TNCs.[5]

The Sub-Commission had also previously requested in its Resolution 1994/37 that the Secretary-General prepare a background paper 'examining the relationship between the enjoyment of human rights, in particular, international labour and trade union rights, and the working methods and activities of transnational corporations' and in its Resolution 1995/31 that the Secretary-General ask governments, intergovernmental organizations and non-governmental organizations to submit information on this subject; the Secretary-General collected that information in its comprehensive and useful background documents[6] E/CN.4/Sub.2/1995/11 and E/CN.4/Sub.2/1996/12 and Corr.1.

The Sub-Commission had, in addition, undertaken several studies and adopted a number of resolutions relevant to this subject matter. For example, the Sub-Commission gathered a list of banks, transnational corporations, and other organizations assisting the racist regime of South Africa. The Sub-Commission also studied the realisation of economic, social and cultural rights; human rights and the environment; the right to food; human rights and income distribution; impunity as to economic, social, and cultural rights; human rights and extreme poverty; protection of the heritage of indigenous people; scientific and technological developments and human rights; etc. Further, the Sub-Commission had adopted resolutions on such related subjects as economic, social and cultural rights.[7]

4 See Working document on the impact of the activities of transnational corporations on the realisation of economic, social and cultural rights, UN Doc. E/CN.4/Sub.2/1998/6 (1998) p. 2. 'The globalisation of the economy may lead to the creation of even more wealthy transnational corporations but also even greater numbers of poor people, particularly in countries whose economy is weak. It will be necessary to consider how we are going to manage the development and proliferation of transnational corporations to the benefit of all. They can and must participate, while abiding by the rules, in the economic development of the States where they are located and in whose economies they operate'. Ibid., para. 8.

5 Ibid, at p. 5.

6 UN Doc. E/CN.4/Sub.2/1995/11 (1995); E/CN.4/Sub.2/1996/12 and Corr.1 (1996).

7 UN S.C. Res. 1989/20, 1989/21, 1990/16, 1991/27, 1992/29, 1993/36, 1993/40, 1994/40, 1994/41, 1994/48, and 1996/31. In addition, at its 1997 session the Chairperson of the Working Group on Indigenous Populations indicated that at its 1998 session, the

This paper discusses the need for the new Sub-Commission working group on human rights and the activities of transnational corporations, several relevant general human rights standards, human rights standards and implementation procedures in regard to transnational corporations, developing further approaches to implementation as to human rights and transnational corporations, and other activities of the Commission on Human Rights and the Sub-Commission which coincide with or potentially inhibit the new working group.

1 NEED FOR THE WORKING GROUP ON HUMAN RIGHTS AND THE ACTIVITIES OF TRANSNATIONAL CORPORATIONS

Since the beginning of the United Nations and the modern effort to protect human rights, there has been a considerable change in the principal actors on the international stage. As the Commission on Global Governance has observed,

> When the United Nations system was created, nation-states, some of them imperial powers, were dominant. Faith in the ability of governments to protect citizens and improve their lives was strong. Moreover the state had few rivals. The world economy was not as closely integrated as it is today. The vast array of global firms and corporate alliances that has emerged was just beginning to develop. The huge global capital market, which today dwarfs even the largest national capital markets, was not foreseen.[8]

Transnational corporations[9] and other businesses[10] now play a significant

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Working Group would consider possible guidelines or codes of conduct for private-sector mining and energy concerns carrying out activities on indigenous lands.

8 Commission on Global Governance, *Our Global Neighborhood* (1995) p. 3.

9 The term transnational corporation ('TNC') generally refers to a corporation with affiliated business establishments in more than one country. B.A. Frey, 'The Legal and Ethical Responsibilities of Transnational Corporations in the Protection of International Human Rights', 6 *Minn. J. Global Trade* (1997) p. 153, citing J. Charney, 'Transnational Corporations and Developing Public International Law', 1983 *Duke L.J.* (1983) p. 748 at p. 749, n. 1; W. Feld, *Nongovernmental Forces and World Politics: A Study of Business, Labor and Political Groups* (1972) pp. 20-23; P. Bailey, et al. (eds.), *Multinationals and Employment: The Global Economy of the 1990s* (1993). The term multinational company (MNC) also is used in this context. See, e.g., W. H. Meyer, 'Human Rights and MNCs: Theory Versus Quantitative Analysis', 18 *Hum. Rts. Q.* (1996) p. 369.

10 Businesses that are not TNCs may also benefit from international trade and may have a substantial impact upon human rights, for example, a pharmaceutical company which exports expired or outmoded medicines abroad can cause considerable harm. Nonethe-

role in the international arena.[11] Of the 100 largest economies in the world, 51 are now global corporations; only 49 are countries. Mitsubishi has sales greater than the gross domestic product of Indonesia; Ford is bigger than South Africa; Royal Dutch Shell is bigger than Norway.[12] As Theo van Boven has noted, 'The extensive movement in favour of market-oriented economies has made TNCs mobilizers of capital, generators of technology and international actors with considerable impact on so-called global governance'.[13] TNCs are often active in some of the most dynamic sectors of national economies, such as telecommunications, transport, banking and finance, insurance and securities trading, etc.[14] Due to their focus on profit-making, their economic and political power, their ability to obtain the assistance of their home governments and industry associations, as well as their ability to straddle national frontiers, TNCs are often insufficiently aware of, or ignore, the impact of their activities on society. While their increasing rate of activity has positively resulted in the creation of jobs, availability of capital and transfers of technology, TNCs are also responsible for abuses such as employment of child labourers, discrimination against certain groups of employees, failure to provide safe and healthy working conditions as well as just and favourable conditions of work,[15] attempts to repress independent trade unions, discouraging the right to bargain collec-

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less, TNCs have the unique flexibility to straddle national borders and thus possibly evade national regulation of their conduct.

11 For a detailed analysis of TNCs and human rights, see Frey, op. cit. n. 9, at pp. 153-88; see also 'The Impact of Multinational Corporations on Development and on International Relations', UN Doc. E/5500/Rev.1, ST/ESA/6 (1974) p. 14; J. LaPapalombara and S. Blank, *Multinational Corporations and Developing Countries* (1979); J.H. Cavanaugh & F.F. Clairmonte, *The Transnational Economy* (1982); Activities of the United Nations Centre on Transnational Corporations and of the joint units established with the regional commissions, UN Doc. E/C.10/1992/9 (1992).

12 S. Anderson and J.H. Cavanagh, *The Top 200: The Rise of Global Corporate Power* (1996) (These figures were calculated by comparing total sales with gross domestic product based on data from the World Bank, *World Development Report 1996* (1996) and Forbes Magazine for the years 1994 and 1995.)

13 T.C. van Boven, 'Non-State Actors: Introductory Comments', in: T.C. van Boven, et al. (eds.), *The Legitimacy of the United Nations: Towards an Enhanced Legal Status of Non-State Actors* (1997) pp. 1, 5.

14 The Realisation of Economic, Social and Cultural Rights: The relationship between the enjoyment of human rights, in particular, international labour and trade union rights, and the working methods and activities of transnational corporations, UN Doc. E/CN.4/Sub.2/1995/11 (1995) para. 22.

15 See, e.g., L. Kochan, *The Maquiladoras and Toxics* (1989); The Realization of Economic, Social and Cultural Rights: The relationship between the enjoyment of human rights, in particular, international labour and trade union rights, and the working methods and activities of transnational corporations, loc. cit. n. 14, paras. 58-67 (TNC activities in export processing zones).

tively, limiting the broad dissemination of appropriate technology and intellectual property, dumping toxic wastes, etc.[16] Some of these abuses disproportionately affect women who work in unsafe and poorly paid production jobs.

The TNC desire for greater profit has also frequently resulted in direct or indirect support of State practices violating human rights. These negative effects are exacerbated by the transboundary nature of TNC activity, which allows TNCs to operate outside the reach of most State regulations, and by the tremendous economic power of TNCs, which sometimes impels States to turn a blind eye to abuses by TNCs and to weaken standards or enforcement measures that would limit the way TNCs operate. Some businesses actually encourage State violations of human rights, for example when they advocate the arrest of labour leaders, foster corruption, or utilize security forces to use deadly force in protecting their installations and personnel.[17] Because of their economic power and political influence, however, TNCs can also have a positive influence in fostering economic prosperity and encouraging governments to comply with their international human rights obligations.[18]

As discussed in greater detail below, TNCs may be increasingly aware of existing international standards and willing to co-operate in the development of those standards, because they are more concerned about public criticisms regarding their labour and other human rights practices. TNCs may be susceptible to international pressure because they are profit-driven. While the effectiveness of this pressure may vary, depending on how closely their profits are associated with their public image, TNCs may be motivated to change their human rights practices when there is an effect on their profits.

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16 See D. Weissbrodt and M. Hoffman, 'The Global Economy and Human Rights: A Selective Bibliography', 6 *Minn. J. Global Trade* (1997) p. 189.

17 See Amnesty International, *Human Rights Principles for Companies*, AI Index ACT 70/01/98 (1998). There have also been cases in which TNCs have conspired to overthrow democratically elected governments. See W.H. Meyer, *Human Rights and International Political Economy in Third World Nations: Multinational Corporations, Foreign Aid and Repression* (1998) ch. 5.

18 See D.L. Spar, 'The Spotlight and the Bottom Line: How Multinationals Export Human Rights', 77 *Foreign Aff.* (1998) pp. 7-12. Foreign investment is often viewed as an engine of development which leads to better jobs and a higher standard of living for the people in a developing country. Many TNCs now have their own codes of business practice which, in some cases, set a standard for labour and environmental protections that is higher than the local laws. Not only do the employees of such companies benefit from such practices, but increasingly these higher standards are being required of the business partners, suppliers, and subcontractors of the TNCs. For more on this topic, see C. Avery's contribution to this volume.

2 SEVERAL RELEVANT GENERAL HUMAN RIGHTS STANDARDS

Most human rights instruments deal primarily with the obligations of States, but are applicable to all actors. Some general human rights standards could be construed to apply to transnational corporations. For example, the Universal Declaration of Human Rights was declared as

> a common standard of achievement for all peoples and all nations, to the end that *every individual and every organ of society*, keeping this Declaration constantly in mind, shall strive by teaching and education to promote respect for these rights and freedoms and by progressive measures, national and international, to secure their universal and effective recognition and observance, both among the peoples of the Member States themselves and among the peoples of territories under their jurisdiction.[19]

Article 28 of the Universal Declaration asserts that '[e]veryone is entitled to a social and international order in which the rights and freedoms set forth in this Declaration can be fully realized'.[20] Article 30 further states, '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'.[21] The International Covenant on Economic, Social and Cultural Rights[22] and the International Covenant on Civil and Political Rights[23] contain similar provisions.

In addition, both the ICCPR and the ICESCR provide in their common Article 1 that:

> 1. All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.

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19 *Universal Declaration of Human Rights*, GA Res. 217A (III), UN Doc. A/180 (1948) p. 71 [hereinafter 'Universal Declaration'] (emphasis added).

20 Ibid.

21 Ibid.

22 *International Covenant on Economic, Social and Cultural Rights*, GA Res. 2200A (XXI), 21 UN GAOR Supp. (No. 16) at 49, UN Doc. A/6316, 993 U.N.T.S. 3 (1966), entered into force 3 Jan. 1976.

23 *International Covenant on Civil and Political Rights*, GA Res. 2200A (XXI), 21 UN GAOR Supp. (No. 16) at 52, UN Doc. A/6316, 999 U.N.T.S. 171 (1966), entered into force 23 Mar. 1976.

2. All peoples may, for their own ends, freely dispose of their natural wealth and resources without prejudice to any obligations arising out of international economic co-operation, based upon the principle of mutual benefit, and international law. In no case may a people be deprived of its own means of subsistence.

The Declaration on the Right to Development[24] defines development as a multidimensional and global process, which should promote 'a new international economic order based on sovereign equality, interdependence, mutual interest and cooperation among all States as well as to encourage the observance and realisation of human rights' (Art. 3 (3)).

Since its founding in 1919, the International Labour Organization ('ILO') has promulgated 181 conventions and 188 recommendations establishing labour standards on such issues as forced labour, workplace safety and health, discrimination, hours of work and rest periods, minimum age for workers, protection of workers with family responsibilities, minimum wages, night work and hours of work, collective bargaining, freedom of association, workers compensation, unemployment compensation, and social security. Because of its tripartite structure, the ILO's standards have been developed by governments, workers, and employers. The ILO has also promulgated the Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy.[25]

The Vienna Declaration and Programme of Action provides,

> To strengthen the enjoyment of economic, social and cultural rights, additional approaches should be examined, such as a system of indicators to measure progress in the realisation of the rights set forth in the International Covenant on Economic, Social and Cultural Rights. There must be a concerted effort to

24 *Declaration on the Right to Development*, GA Res. 41/128, Annex, 41 UN GAOR Supp. (No. 53) at 186, UN Doc. A/41/53 (1986); see also *Charter of Economic Rights and Duties of States*, GA Res. 3281 (XXIX), 29 UN GAOR, Supp. (No. 31) 50, UN Doc. A/9631 (1974); *Declaration on the Establishment of a New International Economic Order*, GA Res. 3201, UN GAOR Supp. (No. 1) 6th Special Sess., UN Doc. A/9559 (1974); *Permanent Sovereignty over Natural Resources*, GA Res. 1803 (XVII), 17 UN GAOR Supp. (1962).

25 International Labour Organization, 'Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy (1977)', 61 *Official Bulletin ILO* (1978) Series A, No. 1; 17 *ILM* (1978) p. 422,; see V. Leary, 'Workers' Rights and International Trade: The Social Clause', in: J. Bhagwati and R.E. Hudec (eds.), *Fair Trade and Harmonization: Prerequisites for Free Trade?* (1996) p. 177.

ensure recognition of economic, social and cultural rights at the national, regional and international levels.[26]

The Beijing Declaration and Platform for Action of the UN Fourth World Conference on Women identified among the actions to be taken by Governments that they should 'Ensure that all corporations, including transnational corporations, comply with national laws and codes, social security regulations, applicable international agreements, instruments and conventions, including those related to the environment, and other relevant laws ...'.[27]

3 DEVELOPING FURTHER HUMAN RIGHTS STANDARDS AND IMPLEMENTATION PROCEDURES IN REGARD TO TNCS

Previous efforts of the UN[28] and the Organisation for Economic Co-operation and Development ('OECD')[29] to develop particular human rights and other international standards for TNCs have not been very successful: the UN Code of Conduct was never adopted and the OECD Code of Conduct

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26 *World Conference on Human Rights: Vienna Declaration and Programme of Action*, UN Doc. A/CONF.157/23 (1993) para. 98.

27 *Beijing Declaration and Platform for Action of the UN Fourth World Conference on Women*, UN Doc. A/CONF.177/20 (1995) para. 165(l). The World Summit for Social Development also concluded that 'Making economic growth and the interaction of market forces more conducive to social development requires the following actions: ... Encouraging transnational and national corporations to operate in a framework of respect for the environment while complying with national laws and legislation, and in accordance with international agreements and conventions, and with proper consideration for the social and cultural impact of their activities ..'. *Report of the World Summit for Social Development*, UN Doc. A/CONF.166/9 (1995) para. 12(e).

28 'United Nations Draft International Code of Conduct on Transnational Corporations', 23 *ILM* (1984) p. 626. For more on the UN Code of Conduct, see P. Muchlinski's contribution to this volume.

29 Organisation for Economic Co-Operation and Development, 'Guidelines for Multinational Enterprises (1976)', 15 *ILM* (1976) p. 967; see N. Horn, 'International Rules for Multinational Enterprises: The ICC, OECD, and ILO Initiatives', 30 *Am. U. L. Rev.* (1981) p. 923; N. Horn (ed.), *Legal Problems of Codes of Conduct for Multinational Enterprises* (1980). The Council of Europe, European Union, and the Organization of American States have also sought to regulate TNC activities, but not generally on human rights issues. See Frey, loc. cit. n. 4, at p. 165. In addition, the World Bank and the World Trade Organization have sought to regulate the trade and investment activities of TNCs.

does not focus much on human rights.[30] These difficulties may have been the result of opposition by TNCs to such specific binding standards.

TNCs may now be somewhat more willing to co-operate in the development of international standards, because they are more concerned about public criticisms regarding their labour and other human rights practices.[31] A number of TNCs and other businesses have begun to consider the human rights implications of their activities,[32] for example, (1) by carefully assessing the context in which they are investing or doing business; (2) planning and implementing internal corporate policies; and (3) establishing workplace codes of conduct as to overseas offices, subsidiaries, suppliers, and contractors. These workplace codes deal with such issues as compliance with national and local laws, non-discrimination, adequate wage levels, workplace safety and health, working hours and overtime, freedom of association and the right to organize trade unions, prohibitions on child and forced labour,

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30 In earlier decades, there were efforts in the UN to draw up a code of conduct for TNCs in order to contain and possibly control their powers, but with the change of the international climate in favour of the mechanism of the free market these efforts lost most of their political support and were discontinued. The UN Commission on Transnational Corporations was established in 1975 to create an International Code of conduct for TNCs. E.S.C. Res. 1913, UN ESCOR, 57th Sess., Supp. No. 1A, UN Doc. 5570/Add.1 (1975); E.S.C. Res. 1908, UN ESCOR, 57th Sess., Supp. No. 1, UN Doc. E/5570 (1974) p. 13. The Commission recommended that TNCs: respect human rights; abstain from involvement in, and subversion of, domestic politics in host nations; practice nondiscrimination; respect host government priorities on employment, the environment, and socioeconomic policy; and cease collaboration with racist politicians in South Africa. Development and International Economic Co-Operation: Transnational Corporations, UN Doc. E/1990/94 (1990); Meyer, op. cit. n. 4 at p. 369 (citations omitted). ECOSOC eventually abandoned the draft, because it appeared impossible to reach a compromize. See also S.J. Rubin, 'Transnational Corporations and International Codes of Conduct: A Study of the Relationship Between International Legal Cooperation and Economic Development', 10 *Am. U. J. Int'l L. & Pol'y* (1995) p. 1275. The recent report of the Commission on Global Governance considers the time ripe for a global framework of rules to regulate competition and for that purpose a Global Competition Office should be established to provide oversight of enforcement efforts. T. van Boven, op. cit. n. 13, at pp. 5-6 (citing Report of the Commission on Global Governance, *Our Global Neighbourhood* (1995), pp. 342-43). Professor van Boven further states, 'In a review of the new challenges for the World Bank and the International Monetary Fund (IMF), it was aptly observed that the growing influence of TNCs and other Non-State Actors affects international organizations, which cannot effectively perform their functions without the support and participation of these Non-State Actors. In fact, as the authors commented, these organizations cannot expect to effectively implement their mandates simply by reaching agreements with their member states'. T. van Boven, loc. cit. n. 13 at p. 6 (citation omitted).

31 See D. Cassel, 'International Security in the Post-Cold War Era: Can International Law Truly Effect Global Political and Economic Stability? – Corporate Initiatives: A Second Human Rights Revolution?', 10 *Fordham Int'l L. J.* (1996) p. 1963.

32 B.A. Frey, *Ethical Issues for International Business* (1998).

environmental protection, dissemination of company policies, implementation of company policies by supervisors, and protection for employees who complain about breaches of company policies.[33] Not only have several dozen companies developed their own ethical codes,[34] but some associations of TNCs – for example, in the apparel, rug, and sports industries – have begun to develop joint standards.[35]

An even more widely accepted human rights code for TNCs might help protect human rights and give corporations some degree of predictability and consistency about their responsibilities for protecting human rights.[36] To ensure such broad acceptance, it is advisable to involve corporate leadership in formulating human rights standards applicable to the conduct of TNCs. In this regard, the Sub-Commission's new working group should seek information from TNCs as to their own ethical codes, procedures for independent monitoring of these codes, and the need for more broadly applicable standards and mechanisms for implementation.[37] The Sub-Commission's working group should also seek information from NGOs that monitor the effective implementation of such codes and standards.

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33 Ibid.; see also M. Baker, 'Private Codes of Corporate Conduct: Should the Fox Guard the Henhouse?', 24 *U. Miami Inter-Am. L. Rev.* (1992-93) p. 399; T. Donaldson, *The Ethics of International Business* (1989).

34 Among the corporations which have adopted voluntary codes of conduct for the human rights impact of their own purchases, investments, or other operations are: 3M, Body Shop, Cargill, Carlson Companies, Gap, Levi Strauss, Medtronic, Nokia, Reebok International, and Starbucks Coffee. For further examples, see C. Avery's contribution to this volume.

35 See, e.g., Caux Round Table Principles for Business, <http://www.cauxroundtable.org/>, accessed on 27 May 1999; D. Cassel, loc. cit. n. 31, at p. 1973; J. Perez-Lopez, 'Promoting International Respect for Worker Rights through Business Codes of Conduct', 17 *Fordham Int'l L. J.* (1993) p. 1; T. Donaldson, *Corporations & Morality* (1982); P.A. French, *Collective and Corporate Responsibility* (1984); R. Manning, 'Corporate Responsibility and Corporate Personhood', 3 *J. Bus. Ethics* (1984) p. 77; J. Ladd, 'Corporate Mythology and Individual Responsibility', 2 *Int'l J. Applied Phil.* (1984) p. 1; E. Wolgast, *Ethics of an Artificial Person: Lost Responsibility in Professions and Organizations* (1992).

36 Compare 'European Parliament Resolution A4-0508/98 on EU standards for European Enterprises operating in developing countries: towards an European Code of Conduct', *O.J.* (1999) C 104/180 (see Appendix 4 to this volume); the 'Sullivan Statement of Principles' (4th Amplification), Nov. 8, 1984, 24 *ILM* (1985) p. 1464; cf. D. Weissbrodt and G. Mahoney, 'International Legal Action Against *Apartheid*', 4 *J. L. & Inequality* (1986) p. 485; and Irish National Caucus, *The MacBride Principles* (1984).

37 *The African Charter for Popular Participation in Development*, UN Doc. E/ECA/CM.-116/11 (1990); see C. Grossman and D. Bradlow, 'Are We Being Propelled Towards a People-Centered Transnational Legal Order?', 9 *Am. U. Int'l L. & Pol'y J.* (1993-94) p. 1 at pp. 21-22.

While few would deny that TNCs are a powerful, perhaps the most powerful, category of economic and political agents, the sectoral and structural diversity of TNCs constitutes one difficulty in developing appropriate human rights standards and fashioning implementation procedures.[38] The United Nations Conference on Trade and Development's *World Investment Report 1997: Transnational Corporations, Market Structure and Competition Policy*,[39] indicates this diversity. One challenge in selecting which class of activities and working methods to analyse in developing standards and procedures is how to distort as little as possible the diversity of TNCs while maintaining an analytic focus concerning the characteristic activities and working methods that unite them. This analytic challenge has been underlined by the United Nations Secretary-General in announcing a long-range plan of co-operation with TNC representatives[40] and by the desire of many countries to attract TNC investments in order to exercize effectively the right to development. If meetings towards the realisation of this plan, such as an UNCTAD meeting in Lyon in October 1998 on a 'partnership for development', are to contribute to an effective implementation of human rights, then understanding the effect of TNC operations and working methods on human rights will be a prerequisite for any standard-setting and later implementation.

In view of the historical absence of information from TNCs themselves concerning their impact on human rights, and in view of the incipient 'partnership for development' proposed in the Secretary-General's new engagement with TNC representatives, the Sub-Commission should consider the subject matter within a framework common to both TNC practices and to the means for implementing the 'partnership for development'.

4 DEVELOPING FURTHER APPROACHES TO IMPLEMENTATION THROUGH THE WORKING GROUP

Because of the changing landscape of modern global financial relations, and because of the degree of influence that TNCs now have over domestic economies, the Sub-Commission in its Resolution 1998/8 of 20 August 1998, decided:

38 See R. Vernon, *Sovereignty at Bay: The Multinational Spread of US Enterprises* (1971); R.J. Barnet and R.E. Muller, *Global Reach: The Power of the Multinational Corporations* (1974); E. Kolodner, *TNCs: Impediments or Catalysts of Social Development?* (1994).

39 UNCTAD, *World Investment Report 1997: Transnational Corporations, Market Structure and Competition Policy* (1997) pp. 28-40.

40 'First-Ever Joint Statement of S-G and Corporate Leaders Reflects New Phase of Shared Interests, Growing Cooperation', 9 *Int'l Doc. Rev.* (16 Feb. 1998) pp. 1-2.

> [T]o establish, for a three-year period, a sessional working group of the Sub-Commission, composed of five of its members, taking into account the principle of equitable geographic distribution, to examine the working methods and activities of transnational corporations.[41]

This sessional working group will constitute a step towards establishing an effective mechanism for the gathering of information relating to the human rights implications of TNCs. Several questions remain unanswered and could benefit from further study. For example, how the profit-driven nature of TNCs can offer incentives toward bringing TNCs into compliance with international human rights standards remains a potential avenue of inquiry. In addressing these questions, the sessional working group could help make significant gains toward establishing universal standards of conduct for TNCs, and may also help to suggest other strategies which ultimately ensure compliance from TNCs themselves.

In regard to the application of existing general norms and more specific standards to TNCs, monitoring of compliance and other mechanisms for implementation are necessary. Means should be sought to encourage TNCs to conform to internationally agreed principles. Existing or new standards should reinforce the capacity of governments to protect the rights of their residents, because governments should provide the most effective means for implementation and have the greatest responsibility for doing so. For example, the Committee on Economic, Social and Cultural Rights might

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41 S.C. Res. 1998/8, loc. cit. n. 2, at p. 30 (1998). The mandate of this sessional working group is to (1) identify and examine the effects of the working methods and activities of transnational corporations on the enjoyment of economic, social, and cultural rights and the right to development, as well as civil and political rights; (2) examine, receive and gather information, including any working paper prepared by a member of the Sub-Commission, on the effects of the working methods and activities of transnational corporations on the enjoyment of economic, social, and cultural rights and the right to development, as well as of civil and political rights; (3) analyze the compatibility of the various international human rights instruments with the various investment agreements, regional as well as international, including, in particular, the Multilateral Agreement on Investment; (4) make recommendations and proposals relating to the methods of work and activities of transnational corporations in order to ensure that such methods and activities are in keeping with the economic and social objectives of the countries in which they operate, and to promote the enjoyment of economic, social, and cultural rights and the right to development, as well as of civil and political rights; (5) prepare each year a list of countries and transnational corporations, indicating, in United States dollars, their gross national product or financial turnover, respectively; and (6) consider the scope of the obligation of States to regulate the activities of transnational corporations, where their activities have or are likely to have a significant impact on the enjoyment of economic, social, and cultural rights and the right to development, as well as of civil and political rights of all persons within their jurisdiction.

adopt a general comment which requests information from governments in their States' reports as to how TNCs and other businesses are affecting relevant human rights. The Committee would then also encourage nongovernmental organizations to submit relevant information on TNCs. Similarly, the Human Rights Committee might focus on how TNCs affect civil and political rights. Other treaty bodies may adopt a similar approach.

The Sub-Commission has never initiated a thorough study on human rights and transnational corporations, which would ordinarily have been the precursor for the intra-sessional working group on transnational corporations it has already established. The working group or a parallel Sub-Commission study may recommend more specific content for proposed general comments by the Human Rights Committee, the Committee on Economic, Social and Cultural Rights, or other human rights treaty bodies. After reviewing all existing standards and the evolution of standards as well as possible techniques for implementing those standards, the working group may well recommend concrete steps for further monitoring and implementation procedures as to the human rights implications of TNCs.

While the growth of TNCs and armed opposition groups challenge the power of the State, national governments remain the principal guarantors against abuses of human rights norms by TNCs and other non-State entities.[42] International human rights standards can be applied to the conduct of both governments and non-State entities. Some members of the Sub-Commission may encourage the new sessional working group to focus on situations in which transnational corporations are abusing human rights or on governments which have failed to protect the human rights of residents against abuses by transnational corporations. Other members of the Sub-Commission and possibly the Commission on Human Rights may at least initially resist such concrete applications of the working group's efforts.

In any case, international human rights standards should be used to assist governments in respecting human rights themselves and in ensuring respect for and implementation of human rights by non-State entities.[43] The working group could propose additional standards to address both the home States of TNCs and receiving States. After all, TNCs function by virtue of their establishment as corporations pursuant to statutory authority or gov-

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42 Cf. N. Rodley, 'Can Armed Opposition Groups Violate Human Rights?', in: K.E. Mahoney and P. Mahoney (eds.), *Human Rights in the Twenty-first Century: A Global Challenge* (1993) pp. 297-318; P. Baehr, 'Amnesty International and Its Self-Imposed Limited Mandate', 12 *Neth. Q. Hum. Rts.* (1994) p. 5 at p. 16.

43 For a discussion of the feasibility of rights, i.e., whether and when it is reasonable to expect governments successfully to bear and fulfil the duties required by a right, see J.W. Nickel, 'How Human Rights Generate Duties to Protect and Provide', 15 *Hum. Rts. Q.* (1993) p. 77.

ernmental license. To fulfil their international human rights obligations, governments should afford adequate human rights protection against abuses by TNCs, armed opposition groups, perpetrators of ethnic violence, perpetrators of domestic violence, and other non-State entities. While international human rights law and procedures have been used in the past to strengthen the capacity of international institutions *vis-à-vis* governmental violations, they should also be used to strengthen the resolve of governments to ensure protection of individuals from human rights abuses by TNCs and other non-State entities.[44]

The sessional working group is scheduled to meet during the 51st session of the Sub-Commission in 1999, however, it remains unclear how this meeting will relate to several other initiatives of the Sub-Commission, including its embattled proposal for a Social Forum and its preliminary study of trade, investment, and financial policy as well as the overall situation of the Sub-Commission.

5 THE PROPOSED SOCIAL FORUM

During the same session that the Sub-Commission decided to authorize the working group on transnational corporations, it also adopted Resolution 1998/14 of 20 August 1998 endorsing the recommendation in the final report prepared by Mr. José Bengoa (expert from Chile) entitled: 'The Relationship Between the Enjoyment of Human Rights, in Particular Economic, Social, and Cultural Rights, and Income Distribution'[45] and its *addendum* entitled: 'Poverty, Income Distribution, and Globalization: A Challenge for Human Rights'[46] for the establishment of a 'Forum on Economic, Social and Cultural Rights, hereinafter called the Social Forum'[47] within the Sub-Commission.[48] If fully implemented, the Social Forum would have a significant impact on the work of the Sub-Commission. The Social Forum was expected to meet during the Sub-Commission's annual

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44 See *Velásquez Rodriguez* v. *Honduras*, Inter-Am. Ct. H.R. (Series. C.) No. 4 [1988], 28 *IL M* (1989) p. 294. In that case, Honduran armed forces had detained Angel Manfredo Velásquez Rodriguez, after which time he never reappeared. The Court found that the Government had an obligation to protect its residents from disappearances and was ordered to pay compensation to the family.

45 See S.C. Res. 1998/14, UN Doc. E/CN.4/1999/4, E/CN.4/Sub.2/1998/45 (1998) p. 42.

46 See UN Doc. E/CN.4/Sub.2/1998/8 (1998).

47 Ibid., at para. 94.

48 See S.C. Res. 1998/14, loc. cit. n. 45, at p. 42.

sessions to analyze violations of economic, social, and cultural rights.[49] Resolution 1998/14 also seeks authorisation from the Commission to appoint a Sub-Commission expert as Special Rapporteur on economic, social, and cultural rights to co-ordinate the work of the Social Forum.[50]

When the proposal for the Social Forum was presented, it remained unclear how it would relate to the working group on transnational corporations. At minimum, a timing issue would no doubt need to be resolved, as both of these important, and related, discussions were scheduled to occur in an already overly crowded session. That procedural concern may at least partially have motivated the Commission on Human Rights to adopt its Resolution 1999/53 of 27 April 1999 in which it asked the Sub-Commission to 'further review [its proposal for the Social Forum], in the light of the ongoing discussions by the Commission on its working methods'.

If eventually implemented, the Social Forum would be an innovative step for UN human rights bodies in general, and for the Sub-Commission in particular. In addition to input from non-governmental organizations and governments, the proposed Social Forum would break new ground by inviting the participation of international organizations including:

> the United Nations Development Programme and the United Nations Children's Fund, specialized agencies, in particular the World Bank; the International Monetary Fund; the International Labour Organization; the United Nations Educational, Scientific, and Cultural Organization; and the United Nations Industrial Development Organization; and other bodies concerned with the promotion and protection of economic, social, and cultural rights.[51]

The main objectives of the Social Forum would be (1) the '[e]xchange of information on the enjoyment of economic, social and cultural rights and its relationship with the processes of globalisation';[52] (2) the '[f]ollow-up on the relationship between income distribution and human rights, at both the international and national levels';[53] (3) the '[f]ollow-up on situations of poverty and destitution in the world, bearing in mind that this amounts to complete and permanent denial of the rights of persons';[54] (4) the '[p]roposal of standards and initiatives of the juridical nature, guidelines and other recommendations for consideration by the Commission on Human Rights;

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49 Ibid.
50 Ibid.
51 Ibid.
52 UN Doc. E/CN.4/Sub.2/1997/9, para. 96(a) (1997).
53 Ibid., para. 96(b).
54 Ibid., para. 96(c).

the Working Groups on the Right to Development; the Committee on Economic, Social and Cultural Rights; the specialized agencies; and other instances of the international system of the United Nations';[55] and (5) the '[f]ollow-up to the agreements reached at the World Summit for Social Development in Copenhagen and the Earth Summit in Rio de Janeiro on the fulfilment of questions relating to this final report, and to economic, social and cultural rights in general'.[56]

The establishment of the Social Forum would raise a number of concerns. The Social Forum would require a significant amount of time during the already overloaded Sub-Commission sessions. Presently, the Sub-Commission lacks sufficient time to deliberate and consult adequately. Therefore, major restructuring of the agenda would be needed to accommodate the Social Forum and the sessional working group on transnational corporations and human rights. In addition, there is a question whether such prominent institutions as the World Bank and International Monetary Fund will bother to attend the Sub-Commission? If they do attend, will the Sub-Commission be able to manage the Social Forum with such dominant international organizations in attendance? Given the substantial doubt about the future role of the Sub-Commission, it is not surprising that the Commission on Human Rights has delayed the creation of the Social Forum. Since the working group on transnational corporations did not, however, require a Commission decision, the working group can proceed in 1999.

6 HUMAN RIGHTS AS THE PRIMARY OBJECTIVE OF TRADE, INVESTMENT, AND FINANCIAL POLICY

In its Resolution 1998/12 of August 20, 1998, the Sub-Commission expressed its concern over the controversy surrounding the Multilateral Agreement on Investment ('MAI') which was at that time being drafted by the Organisation for Economic Cooperation and Development, and further expressed its concern as to the possible negative impact on human rights resulting from the implementation of the Agreement.[57] The Sub-Commission was particularly concerned over 'the extent to which the Agreement might limit the capacity of States to take proactive steps to ensure the enjoyment of economic, social and cultural rights by all people, creating benefits for a small privileged minority at the expense of an increasingly disenfranchized

55 Ibid., para. 96(d).
56 Ibid., para. 96(e).
57 See S.C. res. 1998/12, UN Doc. E/CN.4/1999/4, E/CN.4/Sub.2/1998/45 (1998) p. 40.

majority'.[58] In keeping with a thematic focus on economic globalization, and building upon the efforts of Mr. Bengoa on income distribution, and of Mr. Guissé on the working methods of transnational corporations, the Sub-Commission urged United Nations financial agencies, such as the International Monetary Fund and the World Bank, to 'at all times be conscious of and respect the human rights obligations of the countries with which they work'.[59] This view was also consistent with the previous recommendations issued by the Committee on Economic, Social and Cultural Rights in May 1998, in which the Committee asserted that financial institutions have an obligation to formulate policies which are consistent with human rights standards, and that these obligations apply to the areas of trade, finance and investment.[60]

The Sub-Commission's work on income distribution, transnational corporations, and international trade and investment during its 50th session suggests a growing concern with the human rights implications of economic globalization. As all human rights are increasingly seen as interdependent and indivisible, the Sub-Commission expressed its concern over the potential negative impact on all aspects of human rights, engendered by economic forces which are not adequately constrained either by national borders or by international legal and normative mechanisms.

Increasing the institutional competence of UN human rights bodies in this area is a necessary step towards addressing the complexities of the issues raised. Accordingly, the Sub-Commission asked two of its members, Joseph Oloka-Onyango (expert from Uganda) and Deepika Udagama (alternate from Sri Lanka), to prepare a working paper on ways and means by which the primacy of human rights norms and standards could be better reflected in, and could better inform, international and regional trade, investment, and financial policies, agreements, and practices, and how the United

58 Ibid.

59 Ibid., p. 41.

60 Note on the eighteenth session of the Committee on Economic, Social and Cultural Rights, 27 April to 15 May 1998. Statement by the Committee on Economic, Social and Cultural Rights, May 1998 'Globalisation and Economic, Social and Cultural Rights': 'In calling for a renewed commitment to respect economic, social and cultural rights, the Committee wishes to emphasize that international organizations, as well as the governments that have created and manage them, have a strong and continuous responsibility to take whatever measures they can to assist governments to act in ways which are compatible with their human rights obligations and to seek to devize policies and programmes which promote respect for those rights. It is particularly important to emphasize that the realms of trade, finance and investment are in no way exempt from these general principles and that the international organizations with specific responsibilities in those areas should play a positive and constructive role in relation to human rights'.

Nations human rights bodies and mechanisms could play a central role in this regard.[61] The working paper may be considered in the context of the working group on transnational corporations and human rights.

7 STATUS OF THE SUB-COMMISSION

The Sub-Commission's new working group on transnational corporations may be substantially affected by the Commission's continuing review of the mechanisms of the Commission including the working methods of the Sub-Commission.[62] The future role of the Sub-Commission is in question. The Bureau of the Commission proposed to reduce the membership of the Sub-Commission to 15 individuals selected by the Chair of the Commission, rather than by election in the entire Commission, for no longer than two four-year terms and thus to reduce significantly the geographical representativeness of Sub-Commission membership.[63] The Bureau recommended that the Sub-Commission should be deprived of the authority to adopt resolutions.[64] The Sub-Commission would be authorized to continue holding its open debate on country situations, but instead of resolutions expressing concerns about specific countries, it would only be requested to summarize the debate in its report.[65] Accordingly, the Sub-Commission would apparently not be able to apply human rights issues to concrete situations and would thus be deprived of one of its most important functions. Similarly, the Sub-Commission would have no role in the confidential process under ECOSOC res. 1503 for dealing with consistent patterns of gross violations; its Working Group on Communications under ECOSOC res. 1503 would be replaced by a working group under the aegis of the Commission. At the same time, however, the Bureau would reduce the length of the sessions from four to two weeks and thus diminish drastically its capacity to have any substantive debates, summarize those controversial discussions, have a

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61 Ibid.

62 In its decision 1998/112 of 24 April 1998, the Commission, with a view to enhancing the effectiveness of the mechanisms of the Commission, acceded, without a vote, to appoint its Bureau to undertake a review of the mechanisms of the Commission with a view to making recommendations to the Commission at its fifty-fifth session. S.C. Dec. 1998/112, UN Doc. E/CN.4/1999/4, E/CN.4/Sub.2/1998/45 at 84 (1998). The Sub-Commission is a prominent mechanism of the Commission.

63 *Summary of the Main Proposals Concerning the Review of Mechanisms of the Commission Undertaken Pursuant to Commission Decision 1998/112*, UN Doc. E/CN.4/1999/104 (1999).

64 Ibid.

65 Ibid.

working group on transnational corporations, establish a Social Forum, or do other useful work.[66] Such limits would likely discourage NGOs from participating in Sub-Commission sessions and thus make the Sub-Commission much less visible and useful. One of the principal strengths of the Sub-Commission has been its accessibility to NGOs and their initiatives. It is likely that NGOs would lose interest in the Sub-Commission as restructured by the proposals of the Commission's Bureau.

Most of the proposals considered by the Bureau of the Commission, if adopted, would diminish substantially the role currently played by one of the few independent human rights bodies within the United Nations. The Bureau did sensibly recommend that the outmoded name of the Sub-Commission be updated to 'the Sub-Commission on the Promotion and Protection of Human Rights', but it simultaneously urged that the Sub-Commission be deprived of most of its role in protecting human rights.[67]

The 1999 session of the Commission did not generally accept the reform proposals of its 1998 Bureau. Instead, the Commission referred almost all of the proposals to an inter-sessional open-ended Working Group where their fate is quite uncertain. The Commission did decide to propose to the Economic and Social Council an immediate change of title to 'Sub-Commission on the Promotion and Protection of Human Rights'.[68] The Commission in its Resolution 1999/81 of 28 April 1999 also may have made an indirect objection to the establishment of the working group on transnational corporations, when it requested the Sub-Commission 'further to improve on its methods of work by: ... In view of the budgetary situation of the Office of the United Nations High Commissioner for Human Rights, doing its utmost to limit requests for the creation of new working groups ...'. Since the working group on transnational corporations was the only such body proposed in 1998, the Commission may have been expressing concern about that proposal, but the Commission certainly did not act decisively and may have only be referring to new proposals initiated in 1999 and thereafter. Indeed, it is unclear whether an intra-sessional working group, which meets during the Sub-Commission session, would have serious bud-

66 Ibid.

67 Ibid.

68 Statement by the Chairperson on behalf of the Commission on Human Rights (55th session), 22 March – 30 April 1999, para. 11. The Commission also decided, 'In drawing up its recommendations, the Working Group should focus on the role and mandate of the Sub-Commission (bearing in mind the need to avoid duplication with the Commission and the central importance of the Sub-Commission's original role as a source of research, studies and expert advice), composition (size, independence and expertise of membership, geographical balance) and questions of effectiveness and efficiency, including duration of meetings'. Ibid., para. 12.

getary implications as compared with an inter-sessional working group which might meet between Sub-Commission sessions. In any case, the weak position of the Sub-Commission in the UN human rights hierarchy may make it difficult for the Sub-Commission and its new intra-sessional working group on transnational corporations to make a useful contribution.

CONCLUSION

It is clear that the issues relevant to transnational corporations and human rights are difficult and have not been adequately explored by UN bodies. Indeed, this subject raises significant problems about the very nature of human rights, for example, as to the human rights obligations of non-State entities. The Sub-Commission is expected during its August 1999 session to establish a sessional working group to begin tackling these very thorny issues. It remains to be seen whether the Sub-Commission has the institutional competence and expertise to respond to the major challenge of making a real contribution to understanding and affecting the relationship between transnational corporations and human rights.

CHAPTER 5

The Question of Jurisdiction Under International Criminal Law Over Legal Persons:

Lessons from the Rome Conference on an International Criminal Court

ANDREW CLAPHAM*

INTRODUCTION

This article examines the debate over the inclusion of legal persons (juristic persons, juridical persons, *personnes morales*) in the jurisdiction of the International Criminal Court ('ICC' or 'the Court'). The debate illuminates current preoccupations in this field: the growth of organized crime, the role of mercenaries, the role of security corporations, the legal complexities of dealing with multinational corporations, and the opportunities for unjust enrichment through acts which are international crimes. It will be suggested that the failure of the 1998 Rome Conference to accept the final French proposal and grant the new Court jurisdiction over legal persons should not blind us to the existing and new possibilities to assert criminal jurisdiction over legal persons at the national level. Many lawyers are sceptical about the utility of criminal prosecution of corporations at the national level. There are problems regarding proving the requisite intent of the corporation and there is doubt in some jurisdictions about the applicability of crimes such as homicide to corporate defendants. Several colleagues have pointed out to me that 'you can't put a corporation in jail'. But although civil law remedies may often be more appropriate in cases involving corporate crimes, international criminal law may still be important for a number of reasons. First, some human rights violations and war crimes are currently addressed only under international criminal law. Second, national jurisdiction may derive

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from an international treaty obligation in the field of international criminal law. In these circumstances, there may be an insufficient jurisdictional link for a civil case. Third, criminal prosecution will involve the state apparatus in the investigatory process and therefore relieve the victims of the huge burden involved in bringing a civil case against a large corporation. Fourth, a certain stigma still attaches to a guilty verdict and the labelling of a person as criminal. If a court finds that a corporation has committed an international crime, the effects on the commercial success of that company could be considerable. On the other hand, payment of damages in a civil suit can sometimes be ridden out and written off.

In the following five sections we look at some of the precedents in international law which have dealt with legal persons as international actors. This survey leads to a number of findings. First, even though the negotiations in Rome failed to include legal persons within the jurisdiction of the Court the debate highlighted the importance of considering ways to tackle corporate war crimes and the perceived difficulties of devising rules of attribution. Second, that the Nuremberg judgements involving industrialists and businesspeople involved an implicit finding that the relevant corporations for which they worked had committed international war crimes (even though the Nuremberg tribunals had no jurisdiction over these companies). Third, the Nuremberg precedent left many observers with a fear that criminalizing legal persons could lead to unfair collective punishments. Fourth, that the concept of corporate crime is not as alien as is often supposed and is part of the new international legal order designed to combat corruption and other international crimes such as the transport of hazardous waste. Unlike the situation in 1946, we no longer need to divine the actual crimes from the 'general principles of criminal law as derived from criminal laws of all civilized nations' as in addition to the treaty crimes just mentioned the customary nature of international war crimes is now more settled as evidenced by the agreement surrounding the crimes included in the Rome Statute.[1]

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1 It is not suggested here that international crimes can be deduced from general principles of international law. In the trial of Krupp and other officials of the large industrial company Krupp A.G., the US Military Tribunal in the Nuremberg included in Count III that the war crimes and crimes against humanity were violations of 'the general principles of criminal law as derived from criminal laws of all civilized nations'. Case No. 58, *The Krupp Trial*, 17 Nov. 1947-30 June 1949, *Law Reports of Trials of War Criminals*, Vol. X , p. 69 at p. 75. In defining when a deportation by Krupp *et al.* would be illegal the tribunal found that one condition under which deportation becomes illegal 'occurs wherever generally recognized standards of decency and humanity are disregarded. This follows from the established principle of law that an otherwise permissible act becomes a crime when carried out in a criminal manner'. Ibid., at p. 145. Fifty years later there would be less need to have regard to general principles to define the crimes

Fifth, this article further argues that the emerging network of international treaties concerned with the criminalization of the acts of legal persons forces us to admit that legal persons have a limited international legal personality, and that we can therefore consider that corporations commit international crimes, including war crimes, and that these corporations may be tried, in some circumstances, outside the jurisdiction where the crime took place. In other words the 'Pinochet phenomenon' is applicable in the sphere of corporate international crimes.

1 BACKGROUND ON THE INTERNATIONAL CRIMINAL COURT

The original idea for an International Criminal Court can be traced back to the aftermath of World War I and the Treaty of Versailles, which in Article 227 provided for the establishment of a tribunal composed of five judges appointed by the United States, Great Britain, France, Italy and Japan, to try the former Kaiser, Wilhelm II. In 1920 the Advisory Committee of Jurists proposed a High Court of International Justice to try crimes 'constituting a breach of international public order or against the universal law of nations, referred to it by the Assembly or by the Council of the League of Nations'. This was rejected by the Assembly as premature. There then followed various non-governmental initiatives and the eventual establishment of the Nuremberg and Tokyo Tribunals in the wake of World War II. In 1948 the UN General Assembly asked the International Law Commission ('ILC') to study the desirability of a Criminal Chamber for the International Court of Justice. But neither this, nor the 'international penal tribunal' foreseen in the 1948 Genocide Convention, were ever realized. Despite work on a number of drafts in the 1950s, the project lay dormant until 1992 when the General Assembly directed the ILC to elaborate a draft statute for an international criminal court. In 1994 the ILC adopted a draft

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due to their elaboration in the Geneva Conventions of 1949 and the protocol I of 1977, as well as the Statute of the International Criminal Court adopted in July 1998. In this regard it is important to note the customary nature of large sections of international humanitarian law including the international crimes created by it. See T. Meron, *Human Rights and Humanitarian Norms as Customary Law* (1989). The ongoing project of the International Committee of the Red Cross to clarify the current state of customary international law should add considerable clarity in this field. It seems clear that this customary international humanitarian law will bind natural and legal persons where this creates international criminal responsibility. However, what is important for us in this context is the national law concerning agency, vicarious liability, representation of the corporation before the Court, and execution of judgement.

statute. Taking this draft statute as a starting point the UN General Assembly established an *ad hoc* committee in 1994 to review this draft. In 1996 a preparatory committee met for the first time, and, after five more meetings, submitted a draft statute to the Diplomatic Conference in Rome. The text contained significant areas of disagreement and included a total of 1,500 square brackets, signifying alternative versions of the text.

By the start of the Rome Conference there was considerable enthusiasm for such a new Court based in part on the now familiar work of the Tribunals established to try crimes committed in the Former Yugoslavia and Rwanda. The notion that there could be international trials based on existing international law was no longer strange. In fact to many delegates it seemed logical to consolidate the International Criminal Tribunals and not simply add on new Tribunals to deal with new situations. However, the implications of expanding jurisdiction outside these two regions are enormous. There was considerable concern that the new Court should not undermine national jurisdiction over crimes and that the new Court should complement rather than supplant national courts. This notion became known as the concept of 'complementarity'.

The final text of the Statute was adopted on 17 July 1998 by a non-recorded vote of 120 in favor to 7 votes against with 21 abstentions. The non-recorded vote was called for by the United States of America. Those who stated on the record that they voted against the Statute were: the United States of America, Israel, and China.[2] Of the States that abstained only Mexico, Singapore, Sri Lanka, Trinidad and Tobago, and Turkey stated publicly that they had abstained. The Statute was opened to signature the next day in Rome. On 18 July 1998, 26 States signed the Statute. As of 30 August September 1999 over 80 States have become signatories; four States, Senegal, Trinidad and Tobago, San Marino, and Italy have ratified the Statute.

1.1 The Definition of Crimes

Article 5 of the Statute grants the new Court jurisdiction over three categories of crimes. The definitions of acts which can constitute genocide are found in Article 6. Crimes against humanity are set out in Article 7 and include the definition of acts such as murder; extermination; deportation or forcible transfer of populations; torture; rape, sexual slavery, enforced prostitution, forced pregnancy, and enforced sterilization; persecution on the basis of political or other grounds; and enforced disappearance of persons.

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2 UN Press Release L/ROM/22, 17 July 1998.

There is no link to the existence of armed conflict. However, for the crime to occur, the Statute requires that the acts are committed 'as part of a widespread or systematic attack directed against any civilian population, with the knowledge of the attack'. According to the Statute the term 'directed against any civilian population' means 'a course of conduct involving the multiple commission of acts ... pursuant to or in furtherance of a State or organizational policy to commit such attack'.

War crimes are set out in Article 8. The war crimes specified in this Article fall under four main sub-sections of paragraph 2 of Article 8. They cover grave breaches of the 1949 Geneva Conventions, violations of prohibitions in the two Additional Protocols, in addition to violations of customary international law. The Statute explicitly covers both international and non-international armed conflict. It is important to note in the present context that all these different types of crimes can be committed not only by governmental actors but also by private persons.

1.2 The Scope of Jurisdiction

Article 12 specifies the preconditions for jurisdiction. It states that if the case is initiated by a State Party or the Prosecutor, the ICC will have automatic jurisdiction only if the crime occurs on the territory of a State Party to the Statute, or if the accused is a national of a State Party.

However, there is another way in which the Court can get jurisdiction in the absence of a relevant State Party. The Security Council can decide under Chapter VII of the UN Charter to refer a situation in which one or more crimes appear to have been committed to the Prosecutor (Article 13b). In addition, the Security Council has a second role that is one of deferral of jurisdiction. The Security Council may request in a resolution adopted under Chapter VII of the UN Charter that no investigation or prosecution be commenced or proceeded with under the Statute for a period of 12 months. The request is renewable under the same conditions.

1.3 The Question of Jurisdiction over Legal Persons

1.3.1 The Draft Statute and the Eventual Articles on Reparations and Punishment

The draft statute on the table at the start of the Conference contained bracketed text granting the Court jurisdiction not only over natural persons but also over legal persons. Article 23 paras 5 and 6 read as follows:[3]

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3 UN Doc. A/CONF.183/2/Add.1 at p. 49.

23(5) [The Court shall have jurisdiction over legal persons, with the exception of States, when the crimes committed were committed on behalf of such legal persons or by their agencies or representatives.

(6) The criminal responsibility of legal persons shall not exclude the criminal responsibility of natural persons who are perpetrators or accomplices in the same crimes.][4]

N.B. In the context of paragraphs 5 and 6, see also articles 76 (Penalties applicable to legal persons) and 99 (Enforcement of fines and forfeiture measures).

The relevant parts of Articles 76 and 99 read as follows:

[Article 76[5] [6]

Penalties applicable to legal persons

A legal person shall incur one or more of the following penalties: fines;

[(ii) dissolution;]

[(iii) prohibition, for such period as determined by the Court, or the exercise of activities of any kind;]

[(iv) closure, for such a period as determined by the Court, of the premises used in the commission of the crime;]

[(v) forfeiture of [instrumentalities of crime and] proceeds, property and assets obtained by criminal conduct;[7]] [and]

[(vi) appropriate forms of reparation.][8]'

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4 'There is a deep divergence of views as to the advisability of including criminal responsibility of legal persons in the Statute. Many delegations are strongly opposed, whereas some strongly favor its inclusion. Others have an open mind. Some delegations hold the view that providing for only the civil or administrative responsibility/liability of legal persons could provide a middle ground. This avenue, however, has not been thoroughly discussed. Some delegations, who favor the inclusion of legal persons, hold the view that this expression should be extended to organisations lacking legal status'. [Footnote in original.]

5 Inclusion of a provision on such penalties would depend on the outcome of considerations in the context of individual criminal responsibility for legal persons. [Footnote in original.]

6 It was suggested that such provisions may give rise to issues of enforcement in the context of Part 10. [Footnote in original.]

7 See [original] footnote 6 concerning forfeiture for natural persons. There may be merit in adopting a unified approach in both provisions, including all relevant qualifications. [Footnotes in original, the relevant part of the original footnote 6 read: 'It was suggested that forfeiture not be included as a penalty, but instead be included as a mechanism which the Court would request States to use with regard to execution of an order for reparations'.]

8 See [original] footnote 6 concerning reparation in the context of natural persons. There may be merit in adopting a unified approach in both provisions, including all relevant qualifications'. [Footnotes in original.]

[Article 99
Enforcement of fines and forfeiture measures[The provisions of this article shall apply to legal persons.]]

No reference to legal persons was included in the final article on jurisdiction. Article 25 (1) simply reads: 'The Court shall have jurisdiction over natural persons pursuant to this Statute'. However, it is worth noting that the same final Article 25 specifies that in its sub-paragraph (3)(d) that individual criminal responsibility is incurred where the individual contributes to the commission of a crime within the jurisdiction of the Court committed 'by a group of persons acting with a common purpose'. The Article adds further conditions: 'Such contribution shall be intentional and shall either: (i) Be made with the aim of furthering the criminal activity or criminal purpose of the group, where such activity or purpose involves the commission of a crime within the jurisdiction of the Court; or (ii) be made in the knowledge of the intention of the group to commit the crime'. The concept of criminalizing the individual participation in a crime committed by a collective entity is therefore present and operative in the Statute of the International Criminal Court as adopted on 17 July 1998.

The eventual Article which was adopted on reparations reads as follows:

Article 75
Reparations to victims

1. The Court shall establish principles relating to reparations to, or in respect of, victims, including restitution, compensation and rehabilitation. On this basis, in its decision the Court may, either upon request or on its own motion in exceptional circumstances, determine the scope and extent of any damage, loss and injury to, or in respect of, victims and will state the principles on which it is acting.
2. The Court may make an order directly against a convicted person specifying appropriate reparations to, or in respect of, victims, including restitution, compensation and rehabilitation. Where appropriate, the Court may order that the award for reparations be made through the Trust Fund provided for in article 79.
3. Before making an order under this article, the Court may invite and shall take account of representations from or on behalf of the convicted person, victims, other interested persons or interested States.
4. In exercising its power under this article, the Court may, after a person is convicted of a crime within the jurisdiction of the Court, determine whether, in order to give effect to an order which it may make under this article, it is necessary to seek measures under article 93, paragraph 1.

5. A State Party shall give effect to a decision under this article as if the provisions of article 109 were applicable to this article.
6. Nothing in this article shall be interpreted as prejudicing the rights of victims under national or international law.

The eventual Article which was adopted on penalties reads as follows:

Article 77
Applicable penalties
1. Subject to article 110, the Court may impose one of the following penalties on a person convicted of a crime referred to in article 5 of this Statute:
(a) Imprisonment for a specified number of years, which may not exceed a maximum of 30 years; or
(b) A term of life imprisonment when justified by the extreme gravity of the crime and the individual circumstances of the convicted person.
2. In addition to imprisonment, the Court may order:
(a) A fine under the criteria provided for in the Rules of Procedure and Evidence;
(b) A forfeiture of proceeds, property and assets derived directly or indirectly from that crime, without prejudice to the rights of *bona fide* third parties.

I will discuss below in detail what happened to the unsuccessful proposal to include legal persons in the Statute. What emerges from the adopted texts on punishment and reparations is important in the context of the question of any Tribunal's jurisdiction over legal persons, because of the scope to order not only terms of imprisonment but also reparations, fines and forfeiture.

1.3.2 The Attempt at the 1998 Rome Diplomatic Conference to Include Legal Persons Within the Jurisdiction of the ICC

The very first question raised in the Committee of the Whole at its first meeting was whether the bracketed suggestion concerning legal persons should be retained, and, if so, whether its reach should be refined. The French delegate took the floor and explained the reasons behind the French proposal to include *personnes morales* within the jurisdiction of the Court.

The genesis of the idea was the recognition in the French legal system of legal personality for *personnes morales* and a sense that criminal organizations such as those mentioned in the Nuremberg trials should be outlawed by this new Court and declared illegal, closed down, or even dissolved. The proposal was that the declaration by the Court that an organization is a criminal organization would oblige States Parties to the Statute to take measures in response to the Court's declaration. This last dimension was

modeled on Article 10 of the Charter of the Nuremberg International Military Tribunal[9]. The immediate reaction in the Committee of the Whole was far from uniform. Jordan, Tunisia, Tanzania, Algeria and South Korea all expressed interest in the French proposal. On the other hand, notwithstanding the Nuremberg precedent, scepticism about the utility and practicality of introducing such a clause was expressed by Australia, China, Argentina, Sweden, Lebanon, Mexico, Thailand, Venezuela, Denmark, Syria, Greece, Portugal, Egypt, Poland, Slovenia, El Salvador and Yemen. A third group were doubtful that the French proposal could work as it stood but were prepared to work on it to try to develop a viable text. In this group we could include Ukraine, Cuba, Japan, Kenya and Singapore.

The question was sent to the Working Group on General Principles, and in that Working Group it was agreed that France would hold informal consultations to see what sort of formulation could be proposed to the Committee of the Whole for adoption by the whole Conference. The Solomon Islands delegation was approached by the French delegation and asked to assist France in organizing the consultations. This was due in part to the need to have a delegation which could relate to the issue from a common law perspective as the drafting progressed.

A number of factors suggested that it could be useful to include legal persons in the jurisdiction of this new Court. First, in some cases the individual criminal might not have the assets to pay the reparation ordered by the Court. Fixing responsibility on a legal person could mean that victims were assured compensation where otherwise they would get nothing. Second, the opprobrium attached to conviction for an international crime would attach to a legal person and ensure that it would be penalized in its operations. Third, the possibility of a conviction for a legal person could force greater caution in any decision-making that might lead to criminal acts. This in turn could prevent war crimes or crimes against humanity being committed.

In the public discussions, there was a sense that it was wrong for commercial organizations to profit from international crimes such as genocide. The companies involved in the fabrication and distribution of the gas used

9 Article 10 read: 'In cases where a group or organisation is declared criminal by the Tribunal, the competent national authority or any Signatory shall have the right to bring individuals to trial for membership therein before national, military or occupation courts. In any such case the criminal nature of the group or organisation is considered proved and shall not be questioned'. 82 U.N.T.S. 280, signed 8 August 1945 London, Agreement by the Government of the United Kingdom or Great Britain and Northern Ireland, the Government of the United States of America, the provisional Government of the French Republic and the Government of the Soviet Socialist Republics for the prosecution and Punishment of the Major War Criminals of the European Axis.

in the concentration camps during the Holocaust came to mind. Although this sort of activity seemed to belong to another era and to present few political problems the issue has a strangely contemporary feel as German companies and Swiss banks are sued in domestic courts in the United States for assisting genocide, profiting from slave labour, plundering of public and private property, and laundering these funds on behalf of the Nazi regime.[10] The actual discussion in Rome later took on a different flavour. Various delegations pointed to the possible involvement of construction companies in covering up mass graves and several delegates referred to the role of the radio station that had urged the killing of Tutsis during the Rwanda genocide. The representative of Tanzania made a reference to coffee companies in Rwanda that had assisted in the genocide by storing arms and equipment. The involvement of multinational oil companies in population transfers and acts of violence in other countries were also sometimes considered. It was mentioned that in the South Pacific there had been considerable misgivings over the use of private armed forces in Bougainville and the inclusion of legal persons in the jurisdiction of the Court could prevent, deter, punish and compensate any future violations of international law in the context of private armies.[11] South Africa and the United Kingdom as

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10 I. Traynor, 'Deutsche Bank Auschwitz Link'. *The Guardian* (5 Feb. 1999) p. 1. For the details of the case brought against the Swiss banks in the US courts, see A. Ramasastry, 'Secrets and Lies? Swiss Banks and International Human Rights', 31 *Vand. J. Int'l L.* (1998) p. 325. Some of the German companies have recently paid out compensation for farmer slave labourers during World War II. Volkswagen paid 17 claimants in Poland and 31 in the Netherlands 10,000 DM each. *Record of World Events, Keesing's Contemporary Archives*, (1998) 42705. See also the funds for former slave labourers set up by Volkswagen and Siemens for DM 20m each. *Keesing's* (1998) 42532; the fund agreed by the Credit Suisse and UBS for $1.25billion, *Keesing's* (1998) 42469; and the Swiss/US fund for $59m set up in 1997, and the claims brought against the insurance companies Allianz, Axa, Der Anker, Zurich Basler, *Keesing's* (1998) 42470. Assicuriazione Generale agreed a $100m settlement and cases have also been filed against BMW, Krupp Hoesch, Leica, Seimens and Daimler Benz, the German Government has set up a 1,5 billion DM fund for Easter Europe and is unwilling to add to this sum, *Keesing's* (1998) 42470. East Germans are unhappy that their compensation payments are lower than those living in the west who received 5,000 DM each or more. 'Germany forced to face compensation issue again', *Financial Times*, (28 Apr. 1999) p. 3. See also 'Slave labour at Auschwitz used by Ford', *The Independent* (20 Aug. 1999) p. 8, which mentions that the shareholders of I.G. Farben (the *Farben* case is discussed in section 2.3 below) voted at a meeting on 18 August to set up a million-pound compensation fund for former slave labourers who worked under the Nazis. According to the article the company does not trade has assets worth over £6.6m.

11 For background on this issue see T. McCormick, 'The "Sandline Affair": Papua New Guinea Resorts to Mercenarism to End the Bougainville Conflict', 1 *Y.B. Int'l Humt. L.* (1998) p. 292.

key countries in this context were concerned to take the necessary steps to curtail any abuses by security companies operate from these countries.

In a parallel initiative Comoros and Madagascar proposed for inclusion in the Statute of the ICC a new crime of mercenarism. This proposal gained no support even though the treaty crime is already elaborated in international law.[12] However, this last proposal concentrated on the individual person and not the legal person. But it should also be noted that it is far from clear that the sorts of private armed forces being employed by governments in the 1990s would fall within the various definitions of mercenaries found in international law. It is suggested that the issue may be better dealt with through regulating the activities of the these security corporations rather than considering the individuals involved simply as criminal mercenaries or participating in an illegal interference in the internal affairs of a State. Modern mercenaries may often be more accurately considered as agents of the State.[13] According to Yves Sandoz of the ICRC, 'Most private

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12 A/CONF.183/C.1/L.46, 3 July 1998. Note also the African Mercenary Convention of 3 July 1977 which entered into force on 22 April 1985, and the Mercenary Convention of 1989, UN Doc. A/RES/44/34, adopted 4 December 1989, 29 *ILM* (1990) p. 90. This last treaty creates an international crime and an obligation to extradite or prosecute for States parties, however it has not entered into force. The African treaty contains the following 'Article 1 DEFINITION: 1.) A mercenary is any person who: a) is specially recruited locally or abroad in order to fight in an armed conflicts; b) does in fact take a direct part in the hostilities; c) is motivated to take part in the hostilities essentially by the desire for private gain and in fact is promised by or on behalf of a party to the conflict material compensation; d) is neither a national of a party to the conflict nor a resident of territory controlled by a party to the conflicts; e) is not a member of the armed forces of a party to the conflict; and f) is not sent by a state other than a party to the conflict on official mission as a member of the armed forces of the said state. 2.) The crime of mercenarism is committed by the individual, group or association, representative of a State or the State itself who with the aim of opposing by armed violence a process of self-determination stability or the territorial integrity of another State, practises any of the following acts: a) Shelters, organizes, finances, assists, equips, trains, promotes, supports or in any manner employs bands of mercenaries; b) Enlists, enrols or tries to enrol in the said bands; c) Allows the activities mentioned in paragraph (a) to be carried out in any territory under its jurisdiction or in any place under its control or affords facilities for transit, transport or other operations of the above mentioned forces. 3.) Any person, natural or juridical who commits the crime of mercenarism as defined in paragraph 1 of this Article commits an Offence considered as a crime against peace and security in Africa and shall be punished as such'. Note that the crime can be committed by a 'group or association'.

13 See generally D. Shearer, 'Outsourcing War', *Foreign Policy*, No. 112 (Fall 1998) p. 68. For an examination of issue in Sierra Leone see D.J. Francis, 'Mercenary intervention in Sierra Leone: providing national security or international exploitation?', 20 *Third World Q.* (1999) p. 319. Consider also Article 47 of the 1977 Protocol I to the 1949 Geneva Conventions. For an explanation to the background political debates at the UN and the OAU on the issue of mercenaries and the eventual adoption of Article

security companies have understood the situation and restrict themselves to assisting governments in office'.[14] Although the home State will have some duties of due diligence under the international law of state responsibility, and will have to ensure that it does not breach the law of neutrality, that State will not be held easily accountable for illegal acts of security companies operating outside its territory.[15] In order to prevent and punish war crimes committed by 'hired guns' (whether they are hired by the government, the rebels or a multinational corporation) we need to consider their special position in fact and not just their legal status. Humanitarian law training aimed at the regular armed forces will elude these professionals. At the end of the conflict these hired soldiers are unlikely to remain within the jurisdiction of the State where the conflict to place. Of course if an individual war crime has been committed that will always attach to the individual who committed it, but a sensible strategy in this field will start to consider how to deal with the security corporation itself, its personnel, its training methods, its disciplinary structure and its assets. One of the most effective ways to do this may be through the prism of possible legal criminal responsibility for the corporation itself for war crimes and crimes against humanity.

Despite three weeks of negotiation, and the circulation and discussion of a number of texts, no agreement could be found amongst delegations to include jurisdiction over legal/juridical persons. The last and most developed draft text on the subject was circulated as a working paper: A/CONF.183/C.1/WGGP/L.5/Rev.2 (the final French proposal) and demonstrates how far the concept had developed over the weeks of discussion.

WORKING PAPER ON ARTICLE 23, PARAGRAPHS 5 AND 6[16]

[Footnotes in the original]

5. Without prejudice to any individual criminal responsibility of natural persons under this Statute,[17] the Court may also have jurisdiction over a juridical person for a crime under this Statute.

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47 see A. Cassese, 'Mercenaries: Lawful Combatants or War Criminals?', 40 *ZaöRV* (1980) p. 1.

14 Y. Sandoz, 'Private security and international law', in: J. Cilliers and P. Mason (eds.), *Peace, Profit or Plunder? The Privatisation of Security in War-torn African Societies* (1991) p. 201 at p. 221.

15 Ibid., at pp. 212-214.

16 A/Conf.183/C.1/WGGP/L.5/Rev.2, 3 July 1998.

17 This new phrase was inserted to replace former paragraph 6 of article 23 A/CONF.-183/2/Add.1): 'The criminal responsibility of legal persons shall not exclude the criminal responsibility of natural persons ...'.

Charges may be filed by the Prosecutor[18] against a juridical person, and the Court may render a judgement over a juridical person for the crime charged, if:

a) The charges filed by the Prosecutor against the natural person and the juridical person allege the matters referred to in subparagraphs (b) and (c); and
b) The natural person charged was in a position of control within the juridical person under the national law of the State where the juridical person was registered at the time the crime was committed; and
c) The crime was committed by the natural person acting on behalf of and with the explicit consent of that juridical person and in the course of its activities; and
d) The natural person has been convicted of the crime charged.

For the purpose of this Statute, 'juridical person' means a corporation whose concrete, real or dominant objective is seeking private profit or benefit, and not a State or other public body in the exercise of State authority, a public international body[19] or an organisation registered, and acting under the national law of a State as a non-profit organisation.

6. The proceedings[20] with respect to a juridical person under this article shall be in accordance with this Statute and the relevant Rules of Procedure and Evidence. The Prosecutor may file charges against the natural and juridical persons jointly or separately. The natural person and the juridical person may be jointly tried.[21]

   If convicted, the juridical person may incur the penalties referred to in article 76.[22] These penalties shall be enforced in accordance with the provisions of article 99.[23]

A number of features of this final text deserve explanation. First, the text emphasizes that the Court is primarily concerned with individual prosecu-

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18 Language will have to be consistent with the eventual language in Part 5. [Footnote in original.]

19 The applicable law under this Statute is defined in article 20. [Footnote in original.]

20 Footnote 45 on page 41 of A/CONF.183/2/Add.1 states: 'The terms "proceedings" covers both investigations and prosecutions'. [Footnote in original.]

21 N.B. The Rules of Procedure and Evidence of the International Tribunal for the Former Yugoslavia include rule 48, Joinder of accused: 'Persons accused of the same or different crimes committed in the course of the same transaction may be jointly charged and tried'. United Nations document IT/ 32/Rev.9, 5 July 1996. Rule 82 A reads: 'In joint trials, each accused shall be accorded the same rights as if he were being tried separately'. [Footnote in original.]

22 Once there is final agreement on articles 76 and 99, references to these articles could be deleted. [Footnote in original.]

23 Ibid. [Footnote in original.]

tions and any jurisdiction over juridical persons is in addition to this primary role. Individuals may not hide behind any notion of collective responsibility. The terminology changed from legal persons to juridical persons partly to dispel the idea that illegal organizations would escape the Court's jurisdiction. The term 'legal' suggested a legitimacy which was seen as inappropriate in the circumstances. We might open a parenthesis at this point to note that Article 8(1) of the South African Constitution states that the South African Bill of Rights binds in some circumstances 'a natural or a juristic person'. The word 'juridical' would seem synonymous with juristic and could cover different types of bodies recognized by national law as having legal personality.[24] In the draft article of the Criminal Court Statute the message that individuals are at the forefront of the Courts' concerns is prominently positioned in the header to the conditions for prosecuting of a legal person.

Second, there is no question of individual criminal liability simply flowing from the fact of having held a particular position within a criminalized legal person. The criminal liability of the organization flows from the separate conviction of the individual for offences which constitute a crime due to the nature of the individual's own acts and the individual's own intent and knowledge. In the field of corporate law questions of knowledge by directors of an offence under national law can be problematic in a world of increasing corporate complexity. In a situation where directors may be convicted for the corporate offence committed by their corporation under the officer liability provisions there are real questions of *mens rea* and ignorance of the law to be considered.[25] In the field of war crimes and crimes against humanity there is less scope for a defence based on ignorance on the part

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24 The International Convention against the Taking of Hostages (1979) includes a reference to 'natural or juridical person' in Articles 1 and 6(2) (although a previous draft referred to a 'body corporate under national law'), UN Doc. A/AC.188/L.3, 18 *ILM* (1979) p. 1456, entered into force 3 June 1983. However, as will be seen in section 4 below, recent treaties creating crimes which can be committed by juridical persons refer to 'legal persons'. In the amended Dutch Penal Code the new paragraph 51(1) reads: 'Offences can be committed by natural persons and corporations'. Para. 51(3) reads: 'For the application of the former subsections, equal status as a corporation is given to: the corporation without civil legal status, the partnership, the firm of shipowners and the separated property'. As a result of this amendment '*all* offences can be committed (by natural persons and) corporations, for instance forgery and deceit and even maltreatment or theft!', H. de Doelder, 'Criminal Liability of Corporations – Netherlands', in: H. de Doelder and K. Tiedemann (eds.), *La Criminalisation du Comportement Collectif* (1996) p. 289 at p. 292. All citations from the Penal Code are from De Doelder at p. 292.

25 See J. Gray, 'Company Law and Regulatory Complexity', in: C.E.F. Rickett and R. B. Grantham (eds.), *Corporate Personality in the 20th Century* (1998) p. 149, and B. Robertson, 'Commentary on Gray', ibid., at p. 169.

of an individual, although the provisions of the ICC Statute are relatively generous to the individual defendant (see Articles 30, 31, 32 and 33). The final French proposal therefore did not suggest that directors (or any other employee) could be convicted for the crime committed by their corporation – it provides for a legal person to be convicted following the conviction of an individual of the relevant crime. The question of knowledge and mistake for the individual would be the same whether or not the corporation was added to the indictment. In contrast to company law the individual under the ICC is tried for an individual crime and not for what might be primarily a corporate crime or regulatory offence. The company would have been tried as a sort of 'accessory' to the individual's crime.

Third, legal persons would only be charged where a natural person in a position of control in the legal person has also been charged and convicted.[26] Because the issue of control is a complex question that is dealt

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26 It may seem strange that one would only be entitled to try a legal person in the event of a conviction of the natural person who physically committed the crime. But this is not far from the solution suggested in national law in those contexts where the definition is that the crime is committed against a human being by 'another'. '[I]f it be accepted that manslaughter in English Law is the unlawful killing of one human being by another human being (which must include both direct and indirect acts) and that a person who is the embodiment of a corporation and acting for the purposes of the corporation is doing the act or omission which caused the death, the corporation as well as the person may also be found guilty of manslaughter'. *R* v *P & O European Ferries (Dover) Ltd.*, [1991] 93 Crim. App. Rep. 72 at 88-89 referring to Henry, J. in *Murray Wright's case* in New Zealand [1969] New Zealand L. Rep. 1069. Note also the solution adopted in the Council of Europe's Criminal Convention on Corruption discussed in Section 4 below which demands for the liability of a legal person that a natural person has committed a crime and that that natural person had a *leading position* and had a power of *representation*, or *authority to take decisions*, or authority to exercise *control* or where there has been *lack of supervision* by this natural person. These agreed terms could prove useful should the question be discussed again in the context of the ICC. The Article from the Council of Europe Convention is reproduced in Section 4 below. For the position in Japan see N. Kyoto, 'Criminal Liability of Corporations – Japan', in: De Doelder and Tiedemann, op. cit. n. 24, p. 275 at p. 284 who suggests that the majority opinion is that 'It is necessary to identify the natural person who has committed the crime to punish an enterprise'. In the US a corporation may be criminally liable even where no individual agent is or where 'all conceivable agents who participated in the wrongdoing have been absolved'. E.M. Wise, 'Criminal Liability of Corporations – USA', in: De Doelder and Tiedemann, ibid., p. 383 at p. 393. The draft ICC Article did not adopt the approach of the Québec Charter of Human Rights and Freedoms, which includes a special provision concerning the linkage between a *corporation* that commits an offence and certain individuals who may become parties to the offence even if the corporation is neither prosecuted nor found guilty. Article 135 reads as follows: 'If a corporation commits an offence referred to in section 134, any officer, director, employee or representative of such corporation who prescribed or authorized the committing of the offence, or who consented thereto or acquiesced or

with differently in different jurisdictions, it was decided to determine this question by reference to the national law of the State in which the company was registered at the time of the commission of the crime. In this way, juridical persons could not suddenly become implicated through the actions of someone unauthorized under the relevant national law.

Fourth, for a legal person to be charged, the crime must have been committed on behalf of the legal person and must have been carried out with the explicit consent of the legal person. In order to understand the rationale for this condition we need to consider the purpose of corporate criminal responsibility. If the individual is acting solely for his or her own benefit then the corporation could be considered the victim of the crime rather than the perpetrator, and the case for corporate liability as such is weak.[27] This condition owes much to the concept of agency found in US jurisprudence. Celia Wells in her comprehensive and thought-provoking book entitled *Corporations and Criminal Responsibility* explains how a corporation can be held 'criminally liable for the acts of any of its agents if an agent commits a crime within the scope of his employment and with intent to benefit the corporation'.[28] She cites a US case which details the elements of the test:

> We believe, first of all, that the jury must be told that it must be satisfied beyond a reasonable doubt that the acts of the individual agent constitute the acts of the corporation. Secondly, as to the kind of proof required, we hold that a corporation may be guilty of a specific intent crime committed by its agents if: (1) the agent was acting within the course and scope of his or her employment, having the authority to act for the corporation with respect to the particular corporate business which was conducted criminally; (2) the agent was acting, at least in part, in furtherance of the corporation's business interests, and (3) the criminal acts were authorized, tolerated, or ratified by corporate management.[29]

Under this rule, collective knowledge can be used to convict the corporation without proving which particular employee had the requisite intent

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participated therein, is deemed to be a party to the offence whether or not the corporation has been prosecuted or found guilty'.

27 See Harding, 'Criminal Liability of Corporations -United Kingdom', in: De Doelder and Tiedemann, op. cit. n. 24, p. 369 at p. 379.

28 C. Wells, *Corporations and Criminal Responsibility* (1993) p. 118.

29 *State* v. *Christy Pontiac-GMC Inc.*, 345 Nw. 2d 17 (Minn. S.C. 1984), per Simonett J.

or knowledge.[30] Moreover, the tests are not as strict as they seem. 'The employee must have "general authority" to perform the act; but apparent authority is sufficient. Indeed, in practice, the requirement that the act must have been performed within the scope of employment means hardly more than that it must have occurred while the offending employee was acting [in] a job-related capacity. It is no matter that the act was *ultra vires* or unauthorized or contrary to corporate policy or to specific instructions given to the agent'.[31] Attributing the mental state of the employee or director to the corporation is part of the process undertaken by courts at the national level,[32] and national courts have developed considerable flexibility in acts and mental states to companies in the absence of specific rules of attribution.[33]

30 Wells, op. cit. n. 28, at p. 118. For Wells a system which recognizes corporations as aggregate bodies can only capture the essence of corporate wrongdoing when it moves away from the idea that a corporation can only be liable 'through the unlawful activities of one particular officer or worker.... Inevitably there is far more information within an organization as a whole than is possessed by one individual'. Ibid., at p. 132. Her proposed aggregation test would ask whether 'given the information held amongst a number of 'responsible officers', it can be said that the corporation itself was reckless'. Ibid. at p. 144. Alternatively she suggests that liability could be based on the 'company's internal decision structures, its CIDs. Liability would flow where the CIDs themselves disclose a reckless attitude to safety or other harms'. Ibid. Wells explains how a CID structure has three elements: 'an organisational or responsibility flow-chart, procedural rules, and policies. Because these latter two amount to an organisational rule of recognition (in the Hart sense), it is possible to conclude that corporations have their own reasons for acting, or their own intentionality. Thus, it is not the flow-chart which is responsible, but what the flow-chart represents, which is the corporate "mind". The policies, standard operating procedures, (SOPs), regulations, and institutionalized practices are evidence of corporate aims, intentions, and knowledge. These are not reducible to individuals within the corporation'. Ibid. at p. 89. Harding also makes the point that 'the fact that a great deal of harmful corporate behaviour arizes from failure to adhere to standards of public safety and welfare, this resistance to the aggregation argument may enable much corporate action to evade liability'. Harding, op. cit. n. 27, at p. 376.

31 Wise, op. cit. n. 26, at p. 391.

32 Meron in an article entitled 'Is International Law Moving towards Criminalization?', 9 *EJIL* (1998) p. 18, states that 'in the modern business world a corporation itself may be criminally liable for the actions or omissions of agents acting on the corporations behalf, i.e., in the scope of their employment. The movement towards this form of criminalisation began in areas of strict liability, where no *mens rea* was required, but soon expanded to crimes requiring a certain mental state. This was achieved through imputing to the corporation not only the acts but also the mental state, of its employees. Whereas individuals would be punished by imprisonment or even death, corporations have been penalized by fines or punitive damages'. At p. 20 (footnotes omitted).

33 See for example the approach of the Privy Council in *Meridian Global Funds Management Asia Ltd* v. *Securities Commission* [1995], 3 All ER 918 at 923-924 and at 927. See also Denning LJ (as he then was) in *Bolton (Engineering) Co., Ltd* v. *Graham and Sons, Ltd.*, [1956] 3 All ER 624 at 630; *R.* v. *I.C.R. Haulage Ltd.*, [1944] 1 All ER 691 at 695;

Fifth, the legal person was specifically limited to certain types of corporation. In order to understand the limited definition of juridical person for the purposes of the Statute we need to consider the interests of governments and what their delegations wanted to exclude from the jurisdiction of the Court. Crucially States themselves are excluded from the definition of juridical person. States are always wary of politically inspired law suits and no government would be prepared to see itself, or one of its corporations or public bodies, defending itself before the new International Criminal Court. One only has to consider the lengths that States go to avoid the compulsory jurisdiction of the International Court of Justice to realize how unattractive international judicial proceedings are for a defendant State. In the case of the Criminal Court the risk of finding oneself a defendant is always higher because, even if one refused to ratify the Statute, any act committed by the non-State Party on the territory of a State Party could be brought before the Court by the Prosecutor, or referred to the prosecutor by a State Party. Furthermore, governments would be unlikely to allow a clause which could eventually be used to find them liable to pay large sums in reparations.[34]

In addition to States, non-State entities such as inter-governmental organizations and non-profit organizations were excluded from the definition. The reference to 'a public international body' is unsurprising considering the exclusion of these bodies in Conventions creating crimes for legal persons already adopted in the context of bribery (see below). More surprising is perhaps the reference to non-profit organizations. In fact this is probably governmental interest resurfacing. As we shall see when we consider the Nuremberg judgements, the organizations declared criminal by the International Criminal Court included the Leadership Corps of the Nazi Party. There would be little point in excluding the State as defendant only to find that the governing party could be indicted. There was also a fear that legitimate humanitarian organizations could be targeted by unscrupulous States and they too should be protected.

The definition therefore only includes a 'corporation whose concrete, real or dominant objective is seeking public profit or benefit'. This would seem to exclude terrorist groups that exist for purely political aims. But it is really inconceivable that such a group would be registered as such under national law. It seems more likely that the criminal organization would operate through a registered legal person which would be an ostensibly

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Tesco Supermarkets Ltd v. *Nattrass*, [1971] 2 All ER 127 at 131-132. Applied in *R.* v. *Andrews Weatherfoil Ltd. and others*, [1972] 1 All ER 65, CA at 70. See also the House of Lords judgement *Re Supply of Ready Mixed Concrete (No2) Director General of Fair Trading* v. *Pioneer (UK) Concrete Ltd. and another*, [1995] 1 All ER 135.

34 See Article 75 reproduced in full in Section 1.3.1 above.

profit making corporation. The point is that one can not really indict something that does not exist in law. It is possible that a criminal organization has funds but these would seem to be recoverable from the individuals indicted. If the organization has no legal personality (through registration as a corporation) then it is futile to consider seeking criminalisation and reparations. Furthermore the procedural problems which would arise in the context of prosecuting an organization with no official structure, representatives, controlling officers, or authorized agents would be almost impossible in the context of the International Criminal Court. In fact so many procedural issues would need to be addressed that paragraph 6 deliberately referred to the eventual Rules of Procedure and Evidence in order not to completely overload the Article on jurisdiction.

In the end it proved impossible to satisfy all delegations that the proposal could be finalized in the remaining two weeks of the Conference in a form that would satisfy everyone's queries about this innovative use of international criminal law. This proposal was finally withdrawn by the French delegation when it became clear that there was no possibility that a text could be adopted by consensus. Many delegations worked to support the various versions of the proposal. However it proved impossible to satisfy both those who wanted to cover criminal and terrorist organizations and those who feared that this could be used against those struggling for self-determination or against state entities. Many delegations felt there simply was no time to elaborate such a provision during the five-week negotiating process. For some delegations the whole notion of corporate criminal responsibility was simply 'alien', raising problems of complementarity. In addition there were perceived procedural problems relating to who would represent the legal person in Court and how assets could be taken without affecting the rights of third persons.

According to representatives of the Lelio Basso Foundation, the only nongovernmental organization which took an active role in trying to ensure the inclusion of legal persons within the jurisdiction of the new International Criminal Court,[35] the following delegations spoke in favour of the proposal at the final Working Group meetings on the topic: Rwanda, France, Italy, Portugal, Solomon Islands, Egypt, Tanzania, and Libya. The following spoke against: Belgium, Colombia, Venezuela, Sweden, Switzerland, Austria, Japan, Finland, and Norway. Several states had certain mis-

35 The Foundation produced a position paper on the issue of legal persons. The paper referred to the fact that at the last session of the Permanent Peoples' Tribunal in Brussels 'a number of clothes producer corporations whose activity has violated fundamental human rights' had been charged. Position paper (undated) on file with the author.

givings about the text as proposed and its ability to cover issues such as drug traffickers, and terrorism, and they also saw problems regarding the use of national law. This group included: Trinidad and Tobago, Israel, Australia, Russia, Singapore. One might add that during the three weeks of discussions a number of other countries (not mentioned above) interested in supporting the proposal made serious attempts to find a workable solution. These included Thailand, the United Kingdom and South Africa (on behalf of, and with the co-operation of, the SADC [Southern Africa Development Community] countries). The United States, despite early assurances that they were not against the proposal in principle, raised a number of problems and joined with those delegations that suggested that there was no time to work out acceptable solutions.

1.4 The Work of the Preparatory Commission in 1999

The Final Act which was adopted by the UN Diplomatic Conference in Rome, and signed even by those Representatives whose delegations had opposed the adoption of the Statute, decided to establish a preparatory Commission for the International Criminal Court. Among other things this Commission is to prepare proposals for draft texts of 'Elements of Crimes'.[36] In the present context it is particularly interesting that the document prepared by the International Committee of the Red Cross in the section on general points common to the grave breaches of the 1949 Geneva Conventions includes a sub-section entitled 'potential perpetrators' and here includes a passage headed 'industrialists and business men' [*sic*]. The ICRC cites the *Zyklon B* case where two 'German industrialists, undoubtedly civilians, were sentenced to death as war criminals for having been instrumental in the supply of poison gas to concentration camps, knowing of its use there in murdering allied nationals'.[37]

To recall the facts of the case: Dr. Tesch was the sole owner of a firm which distributed Zyklon B (prussic acid) gas and gassing equipment for disinfecting buildings, the major use in war time being for the extermination of lice. According to the prosecution the Zyklon B gas was sent in vast

36 Annex I part F, UN Doc. A/CONF.183/10, 17 July 1998.

37 ICRC Working Paper prepared for the Preparatory Commission, 16 February 1999, (on file with the author) at p. 9. The *Zyklon B Case* (Trial of Bruno Tesch and Two Others) was tried before the British Military Court, Hamburg, 1-8 Mar. 1946. The substantive law was a crime alleged under Article 46 of the Hague Convention of 1907. Two of the accused were convicted of supplying the Zyklon B gas to Auschwitz and were sentenced to death by hanging. The sentences were confirmed and carried out. Case no. 9, *The Zyklon B Case*, 1-8 Mar. 1946, *Law Reports of Trials of War Criminals*, Vol. I, p. 93.

quantities to concentration camps and in one camp alone, Auschwitz/Birkenau, 4.5 million people were exterminated. The other industrialist was the 'Procurist' for the company and so was fully empowered to act for the owner during the owner's absence. According to one of the witnesses, the owner's travel report recorded:

> an interview with leading members of the Wehrmacht, during which he was told that the burial, after shooting, of Jews in increasing numbers was proving more and more unhygienic, and that it was proposed to kill them with prussic acid. Dr. Tesch, when asked for his views, had proposed to use the same methods, involving the release of prussic acid gas in an enclosed space, as was used in the extermination of vermin. He undertook to train the S.S. men in this new method of killing human beings.[38]

We will examine some of other cases concerning industrialists below when we look at the Nuremberg judgements in some detail. Suffice it to say that the Swiss Delegation have highlighted this issue in their own proposal on elements of crimes. In their proposal they include in their general elements section the following assertion: '(5) In addition to military personnel, potential perpetrators may be members of Government, party officials and administrators, industrialists and businesspeople, judges, prosecutors, doctors and nurses, executioners as well as concentration camp inmates'.[39] Whether or not this language is finally adopted, the ICRC/Swiss clarification has not been challenged on this point, and the reminder that businesspeople remain under the jurisdiction of the new Court removes any last doubts about the Court's jurisdiction over individuals in the private sector.

1.5 Amendments

The ICC Statute can be amended. For the first seven years after it enters into force, however, there is no possibility of proposing non-institutional amendments.[40] According to Article 123, seven years after the Statute enters into force, a Review Conference will be held to consider amendments of the Statute. Adoption of any amendment is by consensus of the States Parties or by a two-thirds majority if consensus can not be reached. The

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38 Ibid., at p.95.

39 Swiss Proposal on the Elements of Crimes, <http://www.igc.apc.org/icc/html>, accessed on 4 June 1999.

40 An amendment to include legal persons would probably not be considered an institutional amendment as Article 25 on individual responsibility is not included in the list contained in Article 122(1).

procedures for dealing with amendments, as provided for in Article 121, are complex, particularly with regard to the inclusion of new crimes. There were some corrections agreed to in the English text in the months that followed the Conference. The new corrected version of Article 121 makes it clear that any amendment to articles 5, 6, 7 and 8 (the Articles which define the crimes within the jurisdiction of the Court) will only enter into force: 'for those States Parties which have accepted the amendment one year after the deposit of their instruments of ratification or acceptance. In respect of a State Party which has not accepted the amendment, the Court shall not exercize its jurisdiction regarding a crime covered by the amendment when committed by that State Party's nationals or on its territory'. An amendment to any of the other Articles (i.e., not Articles 5, 6, 7 and 8) comes into force for all States Parties one year after seven-eighths of the States Parties have deposited their ratifications or acceptances of the amendment.

It is quite possible that an amendment concerning legal persons could be introduced in the first round of substantive amendments seven years after the entry into force of the Statute. In the final analysis the political support necessary for an amendment to the ICC Statute will only be forthcoming should cases arise at the ICC level where there is seen to be a manifest injustice due to the exclusion of corporations from the jurisdiction of the international court. But, as the following survey shows, the use of international criminal law against corporations is not dependent on an amendment to the ICC Statute. This branch of international law is, it is argued here, already applicable against corporations, even if jurisdiction is limited for the moment to domestic courts.

2 DECLARATIONS OF THE INTERNATIONAL MILITARY TRIBUNAL IN NUREMBERG CONCERNING CRIMINAL ORGANIZATIONS AND THE SUBSEQUENT TRIALS

2.1 The International Military Tribunal Judgement

As explained in the introduction, the International Military Tribunal ('IMT') in Nuremberg dealt with the question of criminal organizations. It included the following passages in its judgement of 1 October 1946:[41]

41 41 *AJIL* (1947) p. 172.

The Accused Organisations

Article 9 of the Charter provides:

At the trial of any individual member of any group or organisation the Tribunal may declare (in connection with any act of which the individual may be convicted) that the group or organisation of which the individual was a member was a criminal organisation.

After receipt of the Indictment the Tribunal shall give such notice as it thinks fit that the prosecution intends to ask the Tribunal to make such declaration and any member of the organisation will be entitled to apply to the Tribunal for leave to be heard by the Tribunal upon the question of the criminal character of the organisation. The Tribunal shall have power to allow or reject the application. If the application is allowed, the Tribunal may direct in what manner the applicants shall be represented and heard.

Article 10 of the Charter makes clear that the declaration of criminality against an accused organisation is final, and cannot be challenged in any subsequent criminal proceeding against a member of the organisation. Article 10 is as follows:

In cases where a group or organisation is declared criminal by the Tribunal, the competent national authority of any Signatory shall have the right to bring individuals to trial for membership therein before national, military or occupation courts. In any such case the criminal nature of the group or organisation is considered proved and shall not be questioned.

The effect of the declaration of criminality by the Tribunal is well illustrated by Law Number 10 of the Control Council of Germany passed on 20 December 1945, which provides:

Each of the following acts is recognized as a crime:

(d) Membership in categories of criminal group or organisation declared criminal by the International Military Tribunal...

(3) Any person found guilty of any of the crimes above mentioned may upon conviction be punished as shall be determined by the Tribunal to be just. Such punishment may consist of one or more of the following:

(a) Death.

(b) Imprisonment for life or a term of years, with or without hard labor.

(c) Fine, and imprisonment with or without hard labor, in lieu thereof.

In effect, therefore, a member of an organisation which the Tribunal has declared to be criminal may be subsequently convicted of the crime of membership and be punished for that crime by death. This is not to assume that international or military courts which will try these individuals will not exercise appropriate standards of justice. This is a far reaching and novel procedure. Its application, unless properly safeguarded, may produce great injustice.

Article 9, it should be noted, uses the words 'The Tribunal may declare', so that the Tribunal is vested with discretion as to whether it will declare any organisation criminal. This discretion is a judicial one and does not permit arbitrary action, but should be exercised in accordance with well-settled legal principles, one of the most important of which is that criminal guilt is personal, and that mass punishments should be avoided. If satisfied of the criminal guilt of any organisation or group, this Tribunal should not hesitate to declare it to be criminal because the theory of 'group criminality' is new, or because it might be unjustly applied by some subsequent tribunals. On the other hand, the Tribunal should make such declaration of criminality so far as possible in a manner to insure that innocent persons will not be punished.

A criminal organisation is analogous to a criminal conspiracy in that the essence of both is cooperation for criminal purposes. There must be a group bound together and organized for a common purpose. The group must be formed or used in connection with the commission of crimes denounced by the Charter. Since the declaration with respect to the organisations and groups will, as has been pointed out, fix the criminality of its members, that definition should exclude persons who had no knowledge of the criminal purposes or acts of the organisation and those who were drafted by the State for membership, unless they were personally implicated in the commission of acts declared criminal by Article 6 of the Charter as members of the organisation. Membership alone is not enough to come within the scope of these declarations.

Since declarations of criminality which the Tribunal makes will be used by other courts in the trial of persons on account of their membership in the organisations found to be criminal, the Tribunal feels it appropriate to make the following recommendations:

1. That so far as possible throughout the four zones of occupation in Germany the classifications, sanctions, and penalties be standardized. Uniformity of treatment so far as practical should be a basic principle. This does not, of course, mean that discretion in sentencing should not be vested in the court; but the discretion should be within fixed limits appropriate to the nature of the crime.
2. Law No. 10, to which reference has already been made, leaves punishment entirely in the discretion of the trial court even to the extent of inflicting the death penalty.

The De-Nazification Law of 5 March 1946, however, passed for Bavaria, Greater-Hesse, and Wüttemberg-Baden, provides definite sentences for punishment in each type of offense. The Tribunal recommends that in no case should punishment imposed under Law No. 10 upon any members of an organisation or group declared by the Tribunal to be criminal exceed the punishment fixed by the De-Nazification Law. No person should be punished under both laws.

3. The Tribunal recommends to the Control Council that Law No. 10 be amended to prescribe limitations on the punishment which may be imposed for membership in a criminal group or organisation so that such punishment shall not exceed the punishment prescribed by the De-Nazification Law.

The Indictment asks that the Tribunal declare to be criminal the following organisations: The Leadership Corps of the Nazi Party; the Gestapo; the SD; the SS; the SA; the Reich Cabinet and the General Staff and High Command of the German Armed Forces.

In the end the Tribunal only declared criminal the Leadership Corps of the Nazi Party, the Gestapo and the SD (*Der Sicherheitsdeinst des Reichführer SS*), and the SS (*Schutzstaffen*). It is worth including the passage from the Judgement which outlines the proposed test for future individual prosecutions based on the declaration of criminality. This was included to assuage the fears of prosecutions being commenced against thousands of potential defendants who may have not had the sort of criminal intention or state of mind which would justify the harshest penalties including the death penalty:

Conclusion

The Leadership Corps was used for purposes which were criminal under the Charter and involved the Germanisation of incorporated territory, the persecution of the Jews, the administration of the slave labor program, and the mistreatment of prisoners of war. The Defendants Bormann and Sauckel, who were members of this organisation, were among those who used it for these purposes. The *Gauleiters*, the *Kreisleiters*, and the *Orts-gruppenleiters* participated, the one degree or another, in these criminal programs. The *Reichsleitung* as the staff organisation of the Party is also responsible for these criminal programs as well as the head of the various staff organisations of the *Gauleiters* and *Kreisleiters*. The decision of the Tribunal on these staff organisations include only the *Amtsleiters* who were heads of offices on the staffs of the *Reichsleitung*, *Gauleitung*, and *Kreisleitung*. With respect to other staff officers and Party organisations attached to the Leadership Corps other than the *Amtsleiters* referred to above, the Tribunal will follow the suggestion of the Prosecution in excluding them from the declaration.

The Tribunal declares to be criminal within the meaning of the Charter the groups composed of those members of the Leadership Corps holding the positions enumerated in the preceding paragraph who became or remained members of the organisation with knowledge that it was being used for the commission acts declared criminal by Article 6 of the Charter, or who were personally implicated as members of the organisation in the commission of such crimes. The basis of this finding is the participation of the organisation in War Crimes

> and Crimes against Humanity connected with the war; the group declared criminal cannot include, therefore, persons who had ceased to hold the positions enumerated in the preceding paragraph prior to 1 September 1939.[42]

Although none of the natural persons convicted at the Nuremberg International Military Tribunal were convicted of membership of these 'criminal organisations' the linkage is extremely important. The issues are not as separate as they seem. In the run up to the trial, different indictment Committees came up with different lists of individual defendants. In an apparent attempt to introduce some system into the procedure, the Americans responded to the British list by putting forward their own list. According to a detailed account by Bradley Smith:

> Bernays and one of his aides spent June 22 developing the American roster of defendants. Significantly, they first listed the five Nazi German organisations that they most wanted to have declared criminal: the 'Leadership Corps' of the Nazi party, the Reich Cabinet, the General Staff and High command of the armed forces, the SS, and the Gestapo. In the actual trial, the prosecution asked that six organisations be declared criminal, the sixth being the SA (the Stormtroopers or 'Brownshirts') ... Bernays began choosing individual defendants by deciding which German leaders best represented the five organisations he had cited. His initial list included forty-six names, but when duplications occasioned by multiple memberships and marginal individuals were eliminated, the number was cut first to twenty-six and then to sixteen. Of these sixteen, all ended up in the dock at Nuremberg except Ley and Hitler, the latter appearing as a gratuitous contribution from the land of the dead.[43]

So the Prosecutors in Nuremberg in fact started with the investigation of the legal persons,[44] and chose their human defendants in order to be able to ensure the representation and defence of the legal persons. But, by the time of the trial, some of the American members of the Tribunal realized the potential problems related to the implications of declaring organizations criminal under the Charter.

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42 Ibid., at pp. 255-256.

43 B. Smith, *Reaching Judgment at Nuremberg* (1979) at p. 63.

44 The Chief Prosecutor explained that the indicted organizations were not on trial 'in the conventional sense of that term'. According to him 'They were more nearly under investigation as they might have been before a Grand-Jury in Anglo-American practice'. The competence of the International Military Tribunal was held to extend only to natural persons. UN War Crimes Commission, *History of the United Nations War Crimes Commission and the Development of the Laws of War* (1948) at p. 306.

But he [Biddle] worriedly ended his note on the October 3 meeting by observing that merely to follow the Charter provisions on branding organizations criminal could have the unpleasant result of giving the Soviets, or anyone else, authority to shoot merely on proof of membership, unless the consequences of membership were specified.[45]

These misgivings explain the rather detailed explanations as to exactly which subgroups within the criminal organizations were involved in order to clarify the participation which a natural person would have to exhibit in order to be convicted of the crime of belonging to a criminal organization.

The judgement of the IMT meant two important developments in this area. First, an international tribunal prosecuted a number of organizations (legal persons), heard from defence lawyers for the organizations, and declared some of these political organizations to be criminal under the terms of its international statute. Secondly, because this meant that members were liable for criminal conviction with the severest penalty as a result of these declarations of criminality a certain caution developed with regard to the prosecution of legal persons.

2.2 *The United States Military Tribunal at Nuremberg Applies the Declarations of the IMT*

In the aftermath of the IMT judgement a number of trials did indeed convict individuals for membership of organizations declared criminal. One relevant early case is the *Trial of Karl Brandt et al. ('Medical case')*:

> In the first trial held by United States Military Tribunals at Nuremberg, 23 German doctors and scientists were prosecuted for carrying out criminal medical experiments. The trial opened on 9th December, 1946, and was commonly known as the 'Medical Case'. The judgement was delivered on 19th and 20th August, 1947. The chief defendant, Karl Brandt, was personal physician to Hitler, *Gruppenführer* in the S.S. and Major General in the *Waffen S.S.*, Reich Commissioner for Health and Sanitation, and member of the Reich Research Council. He was charged with the other defendants for medical experiments amounting to war crimes and crimes against humanity as defined in the Allied Control Council Law No. 10.
>
> Karl Brandt and nine other accused were indicted for having committed such criminal acts as members of the S.S. and were, accordingly, also prosecuted as 'guilty of membership in an organisation declared to be criminal by the International Military Tribunal' at Nuremberg.

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45 Smith, op. cit. n. 43, at p. 75

> When deciding upon this particular charge, the United States Military Tribunal referred to the general ruling of the International Military Tribunal and applied in each case the tests of individual guilt defined by the latter. On the face of the evidence submitted, Karl Brandt and eight other defendants were found guilty of membership on the ground that they had been in the S.S. until the end of the war and that, as such, they were actually and personally 'implicated in the commission of war crimes and crimes against humanity'. One defendant was found guilty of having 'remained in the S.S. voluntarily throughout the war, with actual knowledge of the fact that that organisation was being used for the commission of acts declared criminal by Control Council Law No. 10'.[46]

In addition to the other trials (such as the *Flick* trial[47]) under Law No. 10 tried by the US Military Tribunal in Nuremberg, national legislation in countries such as Canada, Czechoslovakia, France, Great Britain, Norway, Poland and the United States created the offence of being a member of such criminal organizations.[48] The Israeli law refers to 'enemy organisations'.[49]

2.3 The US Military Tribunal Convicts the Directors of I.G. Farben for Belonging to a Group Which Had Committed War Crimes

Another well-known and important case is the *I.G. Farben Trial.*[50] In the trial of Carl Krauch and twenty others, the US Military Tribunal in Nu-

46 *History of the UN War Crimes Commission*, op. cit. n. 44, at pp. 333-334.

47 Friedrich Flick was the head of a large group of industrial enterprises and was found guilty of war crimes so far as the counts related to employment of slave labour and spoliation of public and private property. He was also convicted of financial support to the S.S. So that the Tribunal found that financial support to a criminal organization such as the SS is in itself a crime subject to the contributor having knowledge of the criminal aims and activities of the organisation. Case no. 48, *Trial of Friedrich Flick and Five Others*, 20 Apr.-22 Dec. 1947, *Law Reports of the Trials of War Criminals*, Vol. IX p. 1 at p. 29. See also the crucial passage in the present context: 'But the International Military Tribunal was dealing with officials and agencies of the State, and it is argued that individuals holding no public offices and not representing the State, do not, and should not, come within the class of persons criminally responsible for a breach of international law. It is asserted that international law is a matter wholly outside the work, interest and knowledge of private individuals. The distinction is unsound. International law, as such, binds every citizen just as does ordinary municipal law. Acts judged criminal when done by an officer of the Government are criminal also when done by a private individual. The guilt differs only in magnitude, not in quality.... There is no justification for a limitation of responsibility to public officials'. At p. 18.

48 *History of the UN War Crimes Commission*, op. cit. n. 44, at pp. 325-332.

49 18 *Int'l L. Rep.* (1951) at p. 539.

50 Case no. 57, The I.G. Farben Trial, US Military Tribunal, Nuremberg, 14 Aug. 1947-29 July 1948, *Law Reports of Trials of War Criminals*, Vol. X, p. 1.

remberg found that the Company had committed war crimes and then went on to convict the directors. This infamous case included allegations of deportation, slave labour, terrorisation, torture, killings, plunder and spoliation of invaded countries, and the production and supply of drugs and poison gas for experimental and extermination purposes. The Tribunal reiterated its previous approach and clearly stated: 'It can no longer be questioned that the criminal sanctions of international law are applicable to private individuals'.[51]

The accused were charged individually and collectively and in addition to the counsel representing them for the purposes of their individual charges, they 'as a group, had the services of a specialist of their own selection in the field of international law, several expert accountants and an administrative assistant to their chief counsel'.[52] Some of the counts against the defendants alleged that the accused had acted 'through the instrumentality of Farben'. But despite the fact that the Tribunal pointed out that 'the corporate defendant, Farben, is not before the bar of this Tribunal and cannot be subjected to criminal penalties in these proceedings',[53] the Tribunal did in fact treat Farben *as a legal entity (juristic person) capable of violating the laws of war*:

> Where private individuals, *including juristic persons*, proceed to exploit the military occupancy by acquiring private property against the will and consent of the former owner, such action not being expressly justified by any applicable provision of the Hague Regulations, is in violation of international law. The payment of a price or other adequate consideration does not, under such circumstances, relieve the act of its unlawful character. Similarly where a private individual or a *juristic person* becomes a party to unlawful confiscation of public or private property by planning and executing a well-defined design to acquire such property permanently, acquisition under such circumstances subsequent to the confiscation constitutes conduct in violation of the Hague Regulations.[54]

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51 Ibid., at p. 47.

52 Ibid., at p. 6.

53 *Trials of War Criminals before the Nuremberg Military Tribunals*, Vol. VIII, at p.1153. See also at p. 1108 'While the Farben organisation, as a corporation, is not charged under the indictment with committing a crime and is not the subject of prosecution in this case, it is the theory of the prosecution that the defendants individually and collectively used the Farben organisation as an instrument by and through which they committed the crime enumerated in the indictment. All the members of the Vorstand or governing body of Farben who were such at the time of the collapse of Germany were indicted and brought to trial'.

54 Ibid., at pp. 1132-1133 [emphasis added].

The Tribunal went on to decide that these broad principles deduced from the Hague Regulations were enough to consider the acts as criminal offences.

In fact the Tribunal developed separate rules of evidence for the consideration of private action as opposed to the action of soldiers in this context: 'The mere presence of the military occupant is not the exclusive indication of the assertion of pressure. Certainly where the action of private individuals, including juristic persons, is involved, the evidence must go further and must establish that a transaction otherwise apparently legal in form is not voluntarily entered into because of the employment of pressure. Furthermore there must be a causal connection between illegal means employed and the result brought about by employing such intimidation'.[55] The Tribunal continued:

> With reference to the charges in the present indictment concerning Farben's activities in Poland, Norway, Alsace Lorraine, and France, we find that the proof establishes beyond a reasonable doubt that offences against property as defined in Control Council Law No. 10 were committed by Farben, and that these offences were connected with, and an inextricable part of the German policy for occupied countries as above described. In some instances, following confiscation by Reich authorities, Farben proceeded to acquire permanent title to the properties thus confiscated. In other instances involving 'negotiations' with private owners, Farben proceeded permanently to acquire substantial or controlling interests in property contrary to the wishes of the owners. These activities were concluded by entering territory that had been overrun and occupied by the Wehrmacht, or was under its effective control. The action of Farben and its representatives under these circumstances, cannot be differentiated from acts of plunder and pillage committed by officers, soldiers, or public officials of the German Reich. In those property acquisitions which followed confiscation by the Reich, the course of action of Farben clearly indicates a studied design to acquire such property. In most instances the initiative was Farben's. In these instances in which Farben dealt directly with the private owners, there was the ever-present threat of forceful seizure of the property by

55 *Int'l L. Rep.* (1948) p. 668 at p.675; *Trials of War Criminals before the Nuremberg Military Tribunals*, Vol. VIII , op. cit. n. 52, at p. 1136. For the test regarding waging aggressive war see Vol. VIII at p. 1125: 'In this case we are faced with the problem of determining the guilt or innocence with respect to the waging of aggressive war on the part of men of industry who were not makers of policy but who supported their government during its period of rearmament and who continued to serve that government in the waging of war, the initiation of which has been established as an act of aggression committed against a neighboring nation'. None of the defendants were convicted under counts one and five which related to crimes against peace.

> the Reich or other similar measures, such, for example, as withholding licences, raw materials, the threat of uncertain drastic treatment in peace-treaty negotiations, or other effective means of bending the will of the owners. The power of the military occupant was the ever-present threat in these transactions and was clearly an important, if not a decisive factor.[56]

Importantly we need to recall that the profit motive in this context actually constitutes part of the crime. Article 55 of the Regulations respecting the laws and customs of war on land annexed to the Hague Convention IV of 1907 reads as follows:

> The Occupying State shall be regarded only as administrator and usufructuary of public buildings, real estate, forests, and agricultural estates belonging to the hostile State, and situated in the occupied country. It must safeguard the capital of these properties, and administer them in accordance with the rules of usufruct.

The crimes under discussion were not interpreted as exclusively aimed at the Occupying State. Article 47 of the Hague Regulations simply states 'Pillage is formally forbidden'.[57] This meant that the applicable international criminal law attached to the private company and its directors. The Tribunal continued:

> The result was the enrichment of Farben and the building of its greater chemical empire through the medium of occupancy at the expense of the former owners. Such action on the part of Farben constituted a violation of rights of private property, protected by the Laws and Customs of War, and in the instance involving public property, the permanent acquisition was in violation of the Hague Regulations which limits the occupying power to a mere usufruct of real estate. The forms of the transactions were varied and intricate, and were reflected in corporate agreements well calculated to create the illusion of legality. But the objective of pillage, plunder, and spoliation stands out, and there can be no uncertainty as to the actual result.[58]

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56 *Int'l L. Rep.* (1948) at pp. 675-676.

57 Cf., Article 33 of the 1949 Geneva Convention IV which includes the injunction: 'Pillage is prohibited.' See also Article 154 of the Geneva Convention which refers back to Sections II and III of the Hague Regulations. On the customary status of these provisions see Meron, op. cit. n. 1, at p. 45.

58 *Int'l L. Rep.* (1948) at p. 676; *Trials of War Criminals*, Vol. VIII, op. cit. n. 53 at p. 1140.

The Tribunal is clear that it is the action of Farben which has violated the Hague Regulations. Because of this 'organisation or group' violation the consequences are individual convictions under Control Council Law No. 10. It is important to understand that the Tribunal is not basing itself on the Declarations of criminality under the Charter that we discussed above when we looked at the IMT declarations concerning political organizations. In the context of the *Farben* case we have to consider Article II(2)(e) of Law No. 10: 'Any person without regard to nationality or the capacity in which he acted, is deemed to have committed a crime as defined in paragraph 1 of this Article if he ... (e) was a member of any organisation or group connected with the commission of any such crime'. In Counts one, two and three the indictment stated that the defendants 'were members of organisations or groups, including Farben, which were connected with the commission of said crimes'.[59] The Tribunal concluded on the war crimes counts:

> As the action of Farben in proceedings to acquire permanently property interests in the manner generally outlined is in violation of the Hague Regulations, any individual who knowingly participated in any such plunder or spoliation with the degree of connection outlined in Article II, paragraph 2 of Control Law No. 10, is criminally responsible thereafter.[60]

The Tribunal referred in its judgement to the arguments adduced in defence of the Company which included the 'contention that private industrialists can not be held criminally responsible for economic measures which they carry out in occupied territories at the direction of, or with the approval of, their government'.[61] This contention and other arguments concerning the necessity of economic warfare were dismissed as 'unsound'. Thirteen of the defendants were convicted on charges covering plunder and spoliation, employment of prisoners of war, forced labour and concentration camp inmates in illegal work under inhuman conditions. They were sentenced to terms of imprisonment from seven to one and a half years.

The important distinction here is between, on the one hand, the work of the International Military Tribunal which declared certain political organizations criminal (thereby making thousands of individuals criminally liable for membership of these criminal organizations), and, on the other hand, the US Military Tribunal's findings. The US Military Tribunal in Nuremberg found that industrialists were members of an industrial organization which was connected with the commission of a war crime. Their *Farben*

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59 *Trials of War Criminals*, Vol. VIII, op. cit. n. 53, at p. 1085.
60 Ibid., at p. 677.
61 Ibid.

judgement can be read as implying that the Farben company itself had committed the relevant war crime, even though the Tribunal had no jurisdiction over Farben as such.

3 DRAFTING A CONVENTION FOR AN INTERNATIONAL CRIMINAL COURT IN THE POST-NUREMBERG WORLD

This historical background is important if we are to make sense of the reticence of experts to include legal persons within the jurisdiction of any new International Criminal Court. In the early 1950s there were a number of drafts which owed their origin to texts prepared by the International Law Commission.[62]

The Report of the Committee on International Criminal Jurisdiction of 1 to 31 August 1951 includes the following section:

> Should the court be competent to try individuals only, or should it also be competent to try legal entities *(Article 25 of the draft statute)*
>
> 88. With respect to other legal entities, it was pointed out that penal responsibility of private corporations was not unknown in some national systems of penal law. Punishments, such as payment of fines or confiscation of property, might be inflicted upon legal entities found to be responsible for illegal acts. Other national legal systems, however, did not recognize such a penal responsibility on the part of legal entities, and it was therefore felt by most members of the Committee that the introduction of such a responsibility in international law would be a matter of considerable controversy.

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62 For a detailed look at this process see UN Doc A/AC/48/4 of 5 Sept. 1951 as well as J. Stone and R.K. Woetzel (eds.), *Towards a Feasible International Court* (1970). For an even earlier draft see Q. Saldaña, 'La justice pénale internationale,' 10 *Recueil des Cours* (1925) No. V. at p. 401 where he proposes a draft loi pénale internationale which foresaw criminal responsibility for States as well as for individuals. Opposition to the idea of State crimes seems to have eclipsed discussion of international criminal responsibility of other collective entities such as corporations. In this context Jean Graven pointed to the fact that different European civil law traditions have recognized at different times corporate crimes and their punishment. 'L'ancien droit admettait (selon une tradition remontant jusqu' à Bartole) l'existence de délits, "corporatifs" et leur punition, thèse qui fut dominante en Europe et ne fut contestée et remplacée que tardivemnet (principalement sous l'influence de Savigny, le fondateur de l'école historique allemande).' 'Le projet de cour criminelle internationale principes et structures. 'Analyse critique' in: Stone and Woetzel, p. 176 at p. 187. The Common Law countries and some of the recent developments in France and the Netherlands are dealt with in Section 5 below.

89. By 11 votes to none, with 3 abstentions, the Committee therefore expressed itself in favour of the principle that the court should be competent to pass judgement on the penal responsibility of individuals only.[63]

The Report of the 1953 Committee on International Criminal Jurisdiction 27 July - 20 August 1953 is only slightly more revealing:

Jurisdiction as to persons *(Article 25 of the revized draft statute)*

85. Two main problems concerning jurisdiction as to persons were discussed by the Committee. One was whether the court should be competent to judge corporations – that is, juridical persons – as well as natural persons, and the other concerned jurisdiction over heads of States. The member from Australia proposed that the court should be competent to judge juridical persons. It was argued that the criminal responsibility of corporations was not excluded either by doctrine or by jurisprudence, and that the mere fact that the responsibility of corporations under existing international criminal law was not entirely clear should not mean that all possibility of conferring jurisdiction over them should be denied. On the other hand, in opposition to such competence of the court, it was urged that the idea of giving such competence to the court had been rejected by the Geneva Committee (paragraphs 88 and 89 of its report). In view of the experience at the Nürnberg and Tokyo trials, it was undesirable to include so novel a principle as corporate criminal responsibility in the draft statute. The Committee rejected the Australian proposal by 11 votes to one, with 4 abstentions.[64]

4 INTERNATIONAL TREATIES CREATING INTERNATIONAL CRIMES FOR LEGAL PERSONS

Let us consider whether the idea of an international Convention criminalizing the activities of legal persons is as alien as the opponents of the suggestion imply. The International Convention on the Suppression and Punishment of the Crime of *Apartheid* states that *apartheid* is an international crime and declares 'criminal those organisations, institutions and individuals committing the crime of *apartheid*'.[65] Although ratified by over 80 States (including China and Russia) this Convention has not been ratified by most Western States. Proposals for a protocol which would have created an inter-

63 UN Doc. A/2136 (1952).
64 UN Doc. A/2645 (1953).
65 Article I(2), entered into force 18 July 1976.

national court in this context foresaw jurisdiction over legal entities and was aimed at multinational corporations.[66]

For present purposes it is perhaps more helpful to concentrate on more recent international treaties that have led to criminal jurisdiction over 'legal persons' and 'corporations'. International treaties in other areas have obliged states to prevent and punish transnational corporate crimes such as the transboundary illegal traffic of hazardous waste. The Global Convention on the Control of Transboundary Movements of Hazardous Wastes, Basel, 1989, defines illegal traffic as transboundary movement of hazardous wastes without the relevant authorisation (Articles 2(21) and (9)) and defines it as 'criminal' (Article 4(3)). The Convention demands that each State Party 'introduce appropriate national/domestic legislation to prevent and punish illegal traffic' (Art. 9(5)).[67] For the purposes of the Convention a 'carrier' is defined in Article 2(17) as 'any person who carries out the transport of hazardous wastes or other wastes'. Similar definitions exist for importers, generators, and disposers in that all include a reference to 'any person'. Most importantly the Convention defines 'person' as 'any natural or legal

66 For completeness we might mention the Draft Convention on the Establishment of an International Penal Tribunal for the Suppression and Punishment of the Crime of Apartheid and Other International Crimes and the Study on ways and means of insuring the implementation of international instruments such as the International Convention on the suppression and punishment of the crime of apartheid, including the establishment of the international jurisdiction envisaged by the Convention. Prepared by M. Cherif Bassiouni as a special consultant to the Human Rights Working group on Southern Africa. All texts reproduced in *The Statute of the International Criminal Court: A Documentary History*, Compiled by M.C. Bassiouni (1998). Articles 5 and 6 gave the Tribunal competence over 'any person or legal entity; and Article 21(4) made provision for collective responsibility for 'A group or organisation other than a State or an organ of a State' this was to be 'irrespective of the responsibility of its members'. A natural person was to be 'responsible for crimes committed by a group or organisation, if he knew of or could reasonably foresee the commission of such crime and remained a member thereof.' Group and organization were used interchangeably and were defined as consisting 'of more than one person, acting in concert with respect to the performance of a particular act.' Omissions by groups or organizations were deemed to have occurred 'whenever a person in authority having power to act and having knowledge of the facts requiring action fails to take reasonable measures to prevent or terminate' the commission of a crime. Penalties for groups were to include fines and other sanctions as promulgated by the rules of the Court. UN Doc E/CN.4/1426 (1981). At p. 19 of the UN Document, Bassiouni suggests that 'one of the most promising areas for deterring apartheid may be in connection with transnational corporations (TNCs). Because TNC's may have property in the territory of States parties to the draft convention and protocol, the threat of fines to be levied against such property may be a very real and effective deterrent.'

67 *The Australian Hazardous Waste Act of 1989* includes the a section on the Regulation of import, export and transit of hazardous waste which specifically provides for penalties for a body corporate found guilty of an offence.

person'. (Article 2(14)). The Convention has nearly 100 States parties including China, Russia and Japan.

The Convention therefore creates an international crime of unauthorized transboundary movement of hazardous wastes and suggests that States parties are obliged to criminalize this activity in national law. We might even draw a further conclusion that it appears that legal persons as well as natural persons should be subject to this criminal jurisdiction. If we take the national implementing legislation in the United Kingdom which is based entirely on the European Community Regulation, we see that according to the Statutory Instrument Transfrontier Shipment of Waste Regulations 1994 that the shipment of illegal traffic can constitute various offences.[68] Regulation 13 makes it quite clear that these offences can be committed by legal persons and then goes on to spell out a separate complementary regime for situations where corporations, partnerships and associations have committed the offence so that those individuals who were responsible are also made liable to be proceeded against and punished.

Regulation 13 Offences by corporations etc. (Date in force 6 May 1994)

(1) Where an offence under regulation 12 above which has been committed by a body corporate is proved to have been committed with the consent or connivance of, or to have been attributable to any neglect on the part of, a director, manager, secretary or other similar officer of the body corporate, or any other person purporting to act in any such capacity, he, as well as the body corporate, shall be guilty of that offence and shall be liable to be proceeded against and punished accordingly.

(2) Where the affairs of a body corporate are managed by its members, paragraph (1) above shall apply in relation to the acts or defaults of a member in connection with his functions of management as if he were a director of the body corporate.

(3) Where, in Scotland, an offence under regulation 12 above which has been committed by a Scottish partnership or an unincorporated association (other than a partnership) is proved to have been committed with the consent or connivance of, or to have been attributable to any neglect on the part of, a partner in the partnership or, as the case may be, a person concerned in the management or control of the association, he, as well as

68 SI (1994), No 1137 (22 Apr. 1994) which takes effect through European Communities Act 1972, section 2(2); Control of Pollution (Amendment) Act 1989, sections 2, 3, 9(1); Environmental Protection Act 1990, section 74(6), regulation 12 Offences, entered into force 6 May 1994.

> the partnership or association, shall be guilty of that offence and shall be liable to be proceeded against and punished accordingly.[69]

This regulation is not so different from the Nuremberg logic in that it concentrates on the body corporate and draws conclusions so that individuals could be found liable due to their involvement with the corporate crime.

The important distinction to be drawn from these precedents and the final French proposal (L.5 Rev.2) in the context of the International Criminal Court is that rather than implicating an individual by association with the legal person, those involved in drafting the final French proposal in Rome sought to implicate the legal person once the natural person had been convicted of a crime. The reason for this reversal stems in part from the misgivings expressed during the Nuremberg trials. In the area of war crimes and crimes against humanity we are dealing with offences which carry sentences of imprisonment and harsh moral opprobrium. These are not regulatory offences which relate to undesirable consequences brought about through negligence. They imply a serious level of moral turpitude. It therefore seems almost a violation of human rights to too easily imply some sort of collective guilt and punishment for anyone associated with the corporation. (And we should not forget that under Control Council Law Number 10 conviction of membership of a criminal organization carried a possible death penalty.) If on the other hand an individual has already been tried and found guilty, and that individual was in a position of control in the corporation then there may be grounds to find that the corporation is also liable and thus to impose fines or to order a forfeiture of proceeds derived from the crime.

In fact this is the approach of one of the latest Conventions adopted in the field of corruption. The Criminal Convention on Corruption adopted in the context of the Council of Europe is open to Council of Europe member States as well as other States such as Canada, Japan, Mexico and the United States. Article 18 of the Convention reads:

> 1. Each party shall adopt such legislative and other measures as may be necessary to ensure that legal persons can be held liable for the criminal offences of active bribery, trading in influence and money laundering established in

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69 Principal Regulation: Council Regulation (EEC) No 259/93 of 1 February 1993 on the supervision and control of shipments of waste within, into and out of the European Community, *O.J.* (1993) L 30/1. Articles 3(6), 5(6), 6(6), 8(6), 11, 15(4), 20(9), 26, 29: Council Regulation (EEC) No 259/93, arts 3(6), 5(6), 6(6), 8(6), 11, 15(4), 20(9), 26, 29: *O.J.* (1993) L 30/1.

accordance with this Convention, committed for their benefit and by any natural person, acting either individually or as part of an organ of the legal person, who has a leading position within the legal person, based on:
- a power of representation of the legal person; or
- an authority to take decisions on behalf of the legal person; or
- an authority to exercise control within the legal person;

as well as for involvement of such a natural person as accessory or instigator in the above mentioned offences.

2. Apart from the cases already provided for in paragraph 1, each Party shall take the necessary measures to ensure that a legal person can be held liable where the lack of supervision or control by a natural person referred to in paragraph 1 has made possible the commission of the criminal offences mentioned in paragraph 1 for the benefit of that legal person by a natural person under its authority.
3. Liability of a legal person under paragraphs 1 and 2 shall not exclude criminal proceedings against natural persons who are perpetrators, instigators of, or accessories to, the criminal offences mentioned in paragraph 1.

Article 1 (d) of the Convention states 'legal person' shall mean any entity having such status under the applicable national law, except for States or other public bodies in the exercise of State authority and for public international organisations'. The Convention was opened for signature on 27 January 1999 and immediately attracted 20 signatures. This Convention conclusively proves that legal persons are to be prosecuted for crimes defined in international treaties at the national level in different types of legal orders. Thus international treaties can overcome the comparative law problems of demanding trials against such legal persons by referring to the national law defining the status of the legal person. Moreover, the Council of Europe Corruption Convention answers and reflects many of the fears expressed by certain governments in the context of the Rome negotiations by excluding both public bodies in the exercise of State authority and public international organizations. The controversial problem of crimes of States is thereby expressly excluded.

This Council of Europe Convention has much in common with the developments at the level of the European Union where a Joint Action, two Conventions and Protocols on corruption have been adopted.[70] The Euro-

70 Joint Action of 22 December 1998 adopted by the Council on the basis of Article K.3 of the Treaty on European Union, on corruption in the private sector, *O.J.* (1998) L 358/2; Convention drawn up on the basis of Article K.3 (2) (c) of the Treaty on the European Union on the fight against corruption involving officials of the European Communities or officials of Member States of the European Union, *O.J.* (1997) C 195/2 (although legal persons are not included in this Convention see Explanatory

pean Union texts take us a little further in that they list the sorts of penalties which Member States are expected to impose on legal persons convicted of corruption.

Both the 1997 Second Protocol to the Convention on the protection of the EC's financial interests and the Joint Action of 22 December 1998 include the same test for liability of legal persons in Articles 3 and 5 respectively (almost identical to Article 18 of the Council of Europe Convention above) but add an Article on sanctions. The list is interesting as it goes beyond sanctions foreseen in other international texts. Consider the Article from the Joint Action:

> Sanctions for legal persons
> 1. Each Member State shall take the necessary measures to ensure that a legal person held liable pursuant to Article 5(1) is punishable by effective, proportionate and dissuasive sanctions, which shall include criminal or non-criminal fines and may include other sanctions such as:
> (a) exclusion from entitlement to public benefits or aid;
> (b) temporary or permanent disqualification from the practice of commercial activities;
> (c) placing under judicial supervision;
> (d) a judicial winding up order.
> 2. Each Member State shall take the necessary measures to ensure that a legal person held liable pursuant to Article 5(2) is punishable by effective, proportionate and dissuasive sanctions or measures.

The Joint Action is aimed at combating corruption in the private sector on an international level and demands that Member States take the necessary measures to establish jurisdiction over the crimes of passive and active corruption under normal territorial and active personality principles of jurisdiction. In other words, Member States have to establish jurisdiction where the offence was committed in their territory or by one of their nationals. But a third ground for jurisdiction is added. Member States are to take the necessary measures to establish jurisdiction where the offence has occurred (c) for the benefit of a legal person operating in the private sector that has

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report, *O.J.* (1998) C 391/1, on Article 6 which refers to the member State obligations under the Second Protocol to the Convention on the protection of the European Communities; financial interests, *O.J.* (1997) C 221/22, which includes an Article 3 which is the same as Article 18 of the Council of Europe Convention except that active bribery is replaced with active fraud, and 'trading in influence' is replaced with fraud. The 'Convention drawn up on the basis of Article K.3 of the Treaty of the European Union on the protection of the European Communities financial interests' is published in *O.J.* (1995) C 316/49.

its head office in the territory of that Member State' (Article 7(1)(c)). The result is that Member States are to have criminal jurisdiction over the crime of corruption even when the action took place abroad in a non-Member State by a non-EU national. The jurisdictional link is provided by the fact of the presence of the head office in the EU Member State.

Two other Conventions should also be briefly noted here. The OAS Inter-American Convention against Corruption of 29 March 1996 entered into force on 3 June 1997. The Convention states in Article VIII that

> Subject to its Constitution and the fundamental principles of its legal system, each State Party shall prohibit and punish the offering or granting, directly or indirectly, by its nationals, persons having their habitual residence in its territory, *and businesses domiciled there*, to a government official of another State, of any article of monetary value, or other benefit, such as a gift, favor, promise or advantage, in connection with any economic or commercial transaction in exchange for any act or omission in the performance of that official's public functions'.[71]

The OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions of 23 May 1997 includes an Article 2 on 'Responsibility of Legal Persons': 'Each Party shall take such measures as may be necessary, in accordance with its legal principles, to establish the liability of legal persons for the bribery of a foreign public official'.

As suggested at the start of this article, the international legal order has already adapted to define corporate crimes in international law and to oblige States to criminalize this behaviour. If corporate corruption is already subject to international criminal law there are no theoretical barriers to subjecting corporate war crimes to the developed international criminal legal order designed to tackle violations of international humanitarian law and international human rights law. The absence of jurisdiction for the ICC over the crime of corruption does not prevent the international law of corruption entering into force for corporations. Similarly, lack of ICC jurisdiction over legal persons for war crimes should not mislead us into thinking that the laws of war and international human rights law do not apply to companies.

71 Emphasis added. The question of how to determine domicile is discussed in the next section.

5 THE NATIONALITY OF COMPANIES IN INTERNATIONAL LAW AND THE EMERGENCE OF INTERNATIONAL LEGAL PERSONALITY

5.1 Determining the Nationality of Companies

At this point we might have felt the need to consider the vexed question of the nationality of companies. But the nationality of companies is irrelevant in the context of the proposal we have been discussing in the context of the International Criminal Court. In fact the EU law which provides for criminal jurisdiction over legal persons sidesteps the nationality issue. A close examination of the relevant texts reveals that, in fact, the nationality of the company is not deemed relevant in the context of the EU law concerning criminal jurisdiction in the field of corruption, because jurisdiction is assumed where the legal person has its head office in the Member State. In the case of the final French Proposal at the Rome Conference, jurisdiction of the new International Criminal Court would only turn on nationality where the natural person was accused of a crime in a non-State Party. In this case the natural person would have to be a national of a State Party. But there would be no nationality requirement with regard to the corporation. For the purposes of jurisdiction for the ICC the nationality of the corporation (if indeed it needs to have one at all for these purposes) is irrelevant. It would be sufficient under the final French proposal that the convicted natural person was in a position of control in the corporation (whatever the nationality of the corporation). In the context of the OAS Corruption Convention the jurisdiction is based on *domicile* and the Model legislation states that 'the intention of the Convention seems to be to include all entities that perform their principal activities in a permanent manner within the territory of the country, whether or not they are of an economic or commercial nature'.[72]

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72 Note *the Inter-American Model legislation on illicit enrichment and transnational bribery* (OEA/Ser.Q CJI/doc.70/98 rev.2), adopted on 22 August 1998 by the Inter-American Juridical Committee, includes the following paragraph under 'III Observations for the use of the legislator [A1]. The term "domiciled" may require adaptation to the legislation or legal terminology of the legislating country (e.g., companies "that have established domicile in the country", "that are incorporated under the laws of the country", or "whose head offices or senior management are in the country"). The juridical arrangements of some States include the concept of the nationality of corporate legal entities, while others use the term "national company." In this case also, the intention of the Convention seems to be to include all entities that perform their principal activities in a permanent manner within the territory of the country, whether or not they are of an economic or commercial nature'.

It is conceivable that objections may be raised over the orders of the ICC where this involves one State seizing the assets of a foreign owned or registered company. States might object to 'their' companies having their assets frozen or confiscated in another State. However, it is difficult to see why this problem is really any different than the problems surrounding inter-State co-operation over the execution of judgements involving natural persons. Under the ICC Statute, State Parties are obliged to give effect to fines and forfeitures ordered by the Court. It is quite possible that this would involve enforcing a fine against a non-national. The Statute states that this is to be done in accordance with the procedure in the State's national law. Similarly a State might give effect to a fine against a corporation which was not incorporated under the laws of that State. It is suggested that these issues are more properly dealt with by analogy to the way in which a national system recognizes foreign judgements, as well as co-operation with international courts, than by suggesting that international law prohibits such an extraterritorial jurisdiction by a State over 'national companies' or 'non-national companies'. We need to consider carefully the idea that objections to extraterritorial jurisdiction stem in part from the fact that the act might not be a crime in the territory where it was carried out.[73] In the context of the ICC we can suggest that the crimes involved constitute international crimes under customary international law.[74]

5.2 Nationality Issues in Public International Law

Nevertheless, it is probably worth pausing here to consider some aspects of how international law has determined the nationality of companies in other contexts. Even if corporate nationality is irrelevant in the context of the Rome ICC discussion it could turn out to be very relevant in the context of national jurisdiction over treaty crimes or even crimes of universal jurisdiction. Nationality in international law can not be simply determined through a reference back to national law. First, because national law does not usually concern itself with formally conferring nationality on companies; no passports are issued, no entry visas are considered, there is no

73 'Some States may consider that the fact that punishing a person for an act not banned by the legislation of the State in whose territory such act is committed would constitute an abusive extra-territorial application of its laws and jurisdiction, in accordance with the standards and principles of international law and its own legislation.' *Inter-American Model Legislation*, ibid., IIIC3(iii).

74 The question of double criminality with regard legal persons may or may not pose a problem depending on the national context. For discussion with regard to Switzerland in comparative perspective see R. Roth, 'Responsabilité pénale de l'entreprise: modèles de réflexion', 115 *Revue Pénale Suisse* (1997) p. 345 at pp. 375-376.

question of voting in national elections. Second, because one State can not simply dictate to other States that its determination has to be recognized by another State or by an international tribunal. According to Brownie 'legal experience suggests that a doctrine of real or genuine link has been adopted, and, as a matter of principle, the considerations advanced in the *Nottebohm* case apply to corporations'.[75] In the context of determining an individual's nationality for the purposes of a claim of state responsibility on behalf of that individual the International Court of Justice held in *Nottebohm* that:

> nationality is a legal bond having as its basis a social fact of attachment, a genuine connection of existence, interests and sentiments, together with the existence of reciprocal rights and duties. It may be said to constitute the juridical expression of the fact that the individual upon whom it is conferred, either directly by the law or as the result of an act of the authorities, is in fact more closely connected with the population of the State conferring nationality than with that of any other State.[76]

The International Court of Justice rejected the claim by Liechtenstein that a genuine connection with the state existed between the naturalized Mr. Nottebohm and that State. However, Brownlie is careful to point out that 'much depends on the terms of the relevant agreements'.[77] He dismisses as 'quite without point' the rejection of the *Nottebohm* test by the International Court of Justice in the *Barcelona Traction case* as the 'manifold' links to the country of incorporation were undisputed by the parties to the case. For Brownlie:

> there is a considerable body of opinion both on the Court and elsewhere in favour of the *Nottebohm* principle to the diplomatic protection of limited companies. It would seem that the process whereby an individual embarks on a voluntary naturalisation and the incorporation of a company in the country of choice are significantly similar. Fears that the 'genuine' or 'effective' link principle will lead to instability and absence of diplomatic protection are by no means groundless. However the *Nottebohm* principle is essentially the assertion that in referring to institutions of municipal law, international law has a reserve power to guard against giving effect to ephemeral, abusive, and simulated creations. Moreover, there is a presumption of validity in favour of the nationality created by incorporation and, in the case of multi-national

75 I. Brownlie, *Principles of Public International Law* , 5th edn. (1998) at p. 488.

76 ICJ Rep. [1955] at p. 23 (referred to by Brownlie, op. cit. n. 75, at p. 488 and excerpted more fully by him at pp. 397-402.)

77 Brownlie, op. cit. n. 75, at p. 488.

> corporate bodies, no very exacting test of substantial connection should be applied.[78]

However Brownlie goes on to point to other situations where there are suggestions that the shareholders are independently entitled to protection by their State of nationality where the act complained of is aimed at the actual rights of shareholders themselves and where the company no longer has the legal capacity to appear in the domestic courts to defend the company's rights. The other possibility is that the shareholders' State of nationality may exercize diplomatic protection where the corporation has the same nationality as the State against whom they are complaining. Brownlie rejects this exception to the rule as he sees it as difficult to square with the 'traditional' rule referred to by Judge Jessup in the *Barcelona Traction* case 'that a State is not guilty of a breach of international law for injuring one of its own nationals'.[79] Even when we consider the fact that international human rights law has driven a cart and horses through this 'traditional rule', we have to admit that a treaty such as the European Convention on Human Rights still reflects the fact that general international law demands a higher level of compensation for foreigners than for nationals in the context of expropriation.[80] Brownlie concludes by suggesting that one has to exclude diplomatic protection for shareholders by their State of nationality where the company is incorporated in the host State 'if one accepts the general considerations of policy advanced by the Court'.[81]

It would be tempting to lazily carry these conclusions on nationality over into our own field of concern. But on reflection it becomes clear that the policy considerations in the case of international crimes are quite different.

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78 Ibid., at p. 491 (footnotes omitted).

79 *Case Concerning the Barcelona Traction, Light and Power Company, Ltd. (Belgium v. Spain)*, ICJ Reports [1970] p. 3 at p. 192 (para. 52). See also G. Abi-Saab, 'The International Law of Multinational Corporations: A Critique of American Legal Doctrines', in: F.E. Snyder and S. Sthirathni (eds.), *Third World Attitudes Towards International Law: An Introduction* (1987) pp. 549-574, who takes a cautious approach which questions whether there really exists any general right of protection for shareholder in international law and sees the doctrinal efforts as essentially American and self-serving and unsupported by State practice or any sort of consensus across different groups of States. Ibid., at p. 570.

80 See Article 1 of the First Protocol to the European Convention on Human Rights and the discussion of the case-law by Y. Dinstein, 'Diplomatic Protection of Companies under International Law', in: K. Wellens (ed.), *International Law: Theory and Practice – Essays in Honour of Eric Suy* (1998) pp. 505-517 at p. 506.

81 Brownlie, op. cit. n. 75, at p. 495, but compare Dinstein, op. cit. n. 80, at p. 515, 'where no international legal remedy is at anyone's disposal unless the foreign ownership of the injured company is revealed, the "lifting of the veil" should be permitted'.

In the context of the rights of aliens the company and the shareholders may be the victims of an internationally wrongful act. In the context of corporate crime the company is the actor who commits the crime. The policy considerations for divining nationality (if this is indeed necessary) are rather different.

The Court in *Barcelona Traction* was concerned to see whether 'considerations of equity' might require that the State of nationality of the shareholders be held to possess a right of diplomatic protection where the company has been the victim of a violation of international law.[82] The Court was also concerned to avoid a rule which could introduce into an inter-state negotiation 'a lack of security which would be contrary to the stability which is the object of international law to establish in international relations'.[83] In both these contexts the Court foresaw situations where the State of incorporation could act and therefore the inclusion of a second State of protection was not necessary to ensure protection and would almost inevitably lead to confusion. Because diplomatic protection is a discretionary option for the State of incorporation the Court seemed uncomfortable when asked to allow the shareholders to by-pass this State. Because the company was not incorporated in the host State the Court did not consider the option of protection by the shareholders' State in that context.[84] We can see therefore that the policy considerations for the Court turned around the importance of eliminating overlapping or competing claims to diplomatic protection and ensuring legal certainty. When we move from the area of diplomatic protection to the world of international corporate crime, the concerns will be different. In this situation we may need to fix the nationality of the criminal in order to decide whether an international crime has been committed which falls within the relevant jurisdiction. The effectiveness of international law may demand that all routes to jurisdiction are explored. Second there are unlikely to be States queuing up to identify with the company. Justice (or arguably equity) may demand that a nationality be fixed on the company by international law in order to avoid encouraging impunity and leaving the victims with no avenues for redress.

It is suggested that in most circumstances the rule is that nationality flows from the place of incorporation and the seat of management; this will be the obvious starting point. But there may be situations where it will be appropriate to fix nationality based on a more genuine connection. This could be the case where a company was incorporated in one State in order to avoid

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82 *Barcelona Traction*, loc. cit. n. 79, at p. 48 (para. 92).

83 Ibid., at p. 50 (para. 97).

84 Ibid., at p. 48 (para. 93), 'This hypothesis does not correspond to the circumstances of the present case'.

coming within a criminal jurisdiction which followed the nationality of the legal person. At this point we are closer to the concerns which influenced the International Court of Justice in the *Nottebohm* case and we can remind ourselves of Brownlie's conjecture that: 'It would seem that the process whereby an individual embarks on a voluntary naturalisation and the incorporation of a company in the country of choice are significantly similar'.[85] Where these processes are designed to avoid corporate responsibilities imposed under international criminal law it would seem that international law should use its 'reserve power'.[86]

The tricky question remains: Where does this reserve power take us? We need to look for analogies not in the law of state responsibility, which is concerned with protecting the rights of the company, its shareholders, and the State of nationality, but rather in a body of law that seeks to fix nationality in order to ensure the effective protection from that company's activities. Perhaps one source of inspiration could be the rules concerning the determination of nationality for the purposes of dealing with enemy companies in time of war.

As Watts and Jennings point out: 'The concept of nationality in relation to companies does not have the legislative basis in national laws which exists in the case of individuals, and is thus much more open to a pragmatic assessment on the basis of the extent of a company's attachment to a state'.[87] They go on to explain that 'for purposes of laws restricting trading with the enemy, many states attribute enemy character to a company even if it is not incorporated under the laws of the enemy state, as where a company incorporated in a non-enemy state is controlled by enemy nationals'.[88] The emergence of the concept of control here is perhaps more appropriate than the conditions we found in the context of state responsibility. This is because national law often demands criminal intent in the controlling mind of the natural person. It therefore seems correct to suggest that: where nationality is a pre-requisite for jurisdiction, and the controlling mind is of a different nationality than that of the State of incorporation, then the nationality of the controlling mind could also be relevant for the purposes of ensuring jurisdiction. We will look at the concept of the controlling mind in the next section. What is important here is the international law of jurisdiction. Our logic suggests that where a State has agreed by treaty that there will be criminal jurisdiction for crimes committed by its national, wheresoever committed, then where that crime was committed by a nation-

85 Brownlie, op. cit. n. 75, at pp. 490-491.
86 See Brownlie, op. cit. n. 75, at p. 491.
87 *Oppenheim's International Law*, Vol.1, 9th edn. (1996) parts 2-4 at pp. 861-862.
88 Ibid., at p. 863.

al using his or her control over a company then jurisdiction should also cover the crime committed by the company. The company is the instrument through which the individual commits the crime.

In fact, national legislation criminalizing corporate behaviour in response to international treaty obligations may not use nationality as condition for jurisdiction at all. Consider the S.3 of the UK's Biological Weapons Act 1974:

> Where an offence under section 1 of this Act which is committed by a body corporate is proved to have been committed with the consent and connivance of, or to be attributable to any negligence on the part of, any director, manager, secretary or other similar officer of the body corporate, or any person who was purporting to act in any such capacity, he as well as the body corporate shall be guilty of that offence and shall be liable to be proceeded against and punished accordingly.[89]

Nevertheless in a situation where the nationality of a corporation could be crucial for determining the existence of criminal jurisdiction, either at the international level or at the national level, we need to canvass the possibility that control could be a subsidiary but additional criteria for awarding nationality. As already explained there is some practice in the context of enemy corporations in times of war.

5.3 Examples from National Laws on Enemy Corporations

The position regarding in the UK is set out in detail in *The Legal Effects of War* where it is stated that in the context of a corporation being denied the right to sue due to it being an enemy alien, a corporation is regarded as an enemy '(i) when it owes its legal existence and incorporation to the laws of an enemy State; (ii) when wherever incorporated, it has acquired enemy character by reason of the hostile residence or activities of its agents or other persons in *de facto* control of its activities; (iii) when even though registered in the United Kingdom, it is carrying on business in enemy terri-

89 Consider also Article 4 of the *Convention on the Prohibition of the Development, production and Stockpiling of Bacteriological, Biological and Toxic Weapons and on their Destruction* (10 Apr. 1972): 'each State party to this Convention shall, in accordance with its constitutional processes, take any necessary measures to prohibit and prevent the development, production, stockpiling, acquisition or retention of the agents, toxins, weapons, equipment and means of delivery specified in Article 1 of the Convention, within the territory of such State, under its jurisdiction or under its control anywhere.'

tory'.[90] But this is not the end of the story, because a company can acquire the nationality of an enemy in addition to another nationality for the purposes of the criminal offence of trading with the enemy. At this point, we have to consider the Trading with the Enemy Act 1939 (as amended) which includes the following paragraphs concerning the definition of an 'enemy': '(c) any body of persons (whether corporate or unincorporate) carrying on business in any place, if and so long as the body is controlled by a person who, under this section, is an enemy. (d) any body of persons constituted or incorporated in, or under the laws of, a State at war with His Majesty, and (e) as respects any business carried out in enemy territory, any individual or body of persons (whether corporate or unincorporate) carrying on that business'.[91]

What seems to be clear from both these definitions and the relevant case-law is that the mere fact that shareholders or directors are enemy nationals is not enough to bestow enemy character on a corporation. 'Nevertheless, the national status and character of the shareholders and directors does have a bearing upon the question whether the company's agents or the persons in *de facto* control of its affairs are in fact adhering to, taking instructions from, or acting under the control of enemies, which in turn is relevant to a determination of the enemy character of the company itself'.[92] Despite some resistance to this concept in the US, the Supreme Court saw the importance of the 'control' test in a 1947 judgement. The Court saw that to refuse to apply the test would undermine the point of the US legislation.

> All a corporate claimant would need to do to recover the property seized would be to show that it was organized in some friendly or neutral country and was not doing business within the territory of an enemy or any of its allies. The fact that it was owned or controlled by enemy interests and might sap the strength of this nation through economic warfare would be immaterial.[93]

In the sphere of trading with the enemy, or the sequestration of enemy assets, it is this concept of *control* which can be crucial and which is sometimes used by tribunals to ensure that the legal fiction of corporate personality does not lead to a company evading the reach of the law. The Belgian *Cour de Cassation* decided the company Aeroxon was under indirect enemy

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90 Lord McNair and A.D. Watts, *The Legal Effects of War*, 4th edn. (1966) at pp. 236-237.

91 Section 2(1) as amended by the Emergency Laws (Miscellaneous Provisions) Act, 1953, s. 2 and Second Schedule, as quoted by McNair and Watts, op. cit. n. 90, at p. 104.

92 Ibid., at p. 237.

93 *Clark* v. *Uebersee Finanz-Korporation*, 332 US 480 (1947), at p. 486.

control even though the 80 percent of the shares of the parent company Orion were transferred to a Swiss national in July 1939. Two German brothers, the Kaisers, had been the sole owners of the entire share capital of the parent company and the parent company sought a ruling that its assets were not enemy property. The mixed Allied-Swiss Commission set up under the Washington Agreement of 26 May 1946 had approved a decision of the *Office Suisse de Compensation* that because 80 percent of the shares belonged to Swiss nationals then the company must be considered a Swiss company. The Belgian Court was not bound by the Commission in this matter and reaffirmed the Court below's finding that the sale of the shares was not a genuine operation and the Swiss national (Spahn) concerned had been 'the close associate of the brothers, at no time exercized the rights of ownership supposedly transferred to him except in appearance; that Spahn carried out the instructions of the brothers Kaiser in order to safeguard them against any action, German or Allied which could cause them prejudice'.[94]

5.4 International Law Concerning the Nationality of Companies in Investment Disputes

A last field of international law we should examine in this context is the law concerning the determination of the nationality of companies for the purposes of international investment disputes. Under the International Convention on the Settlement of Investment Disputes between States and Nationals of Other States (1965) a Centre is established which has jurisdiction over legal disputes arising directly out of an investment between a Contracting State and a national of another Contracting State. Article 25 defines 'national of another Contracting State' for these purposes as:

> Any juridical person which had the nationality of a Contracting State other than the State party to the dispute on the date on which the parties consented to submit such dispute to conciliation or arbitration and any juridical person which had the nationality of the Contracting State party to the dispute on that date and which, because of foreign control, the parties have agreed should be treated as a national of another Contracting State for the purposes of this Convention.

The practice of the Centre has been to consider that the mere agreement to include an ICSID arbitration clause suggests that there was an intent to treat

94 *Société Anonyme Etablissements Aeroxon* v. *Office des Séquestres*, 20 *Int'l L. Rep.* (1953) p. 615 at p. 617.

a 'national' company as under foreign control. Although there is no obligation to specify the nationality of the investor in the agreement, the ICSID model rules suggest that this is done both where the investor has a different nationality from the host state and where the nationality is the same but the investor is to be treated as the national of another Contracting state. Even where the company is controlled by a parent company and that company is not a national of a Contracting Party, the Centre has held that if the controlling company is controlled by nationals from a Contracting party then the Centre has jurisdiction.[95] So indirect foreign control may be enough to constitute nationality for the purposes of this jurisdiction. Perhaps the key to understanding the inclusion of a control criterion for determining nationality in this context is the fact that the States concerned are in each case freely determining the fact that they are accepting such a definition. This is not only the case with States accepting ICSID settlement in the context of an investment agreement. This additional control criteria may also arise in the context of bilateral treaties which specify that a legal person may be treated as a national of the State whose nationals are in control.[96] We are not suggesting that general international law recognizes control as a criteria for determining nationality. What is being highlighted is that in some contexts where States are choosing to enter into treaties control has been seen as a realistic criterion to fix nationality for the purposes of dispute settlement jurisdiction. By analogy States are free to consider control as an additional criterion for determining nationality for the purposes of ensuring jurisdiction over legal persons accused of international crimes.[97]

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95 *SOABI* v. *Senegal*, ICSID ARB/82/1, as cited and discussed by C.B. Lamm, 'Jurisdiction of the International Centre for Settlement Of Investment Disputes', 6 *ICSID Rev.* (1991) p. 462 at p. 473.

96 On this point see J-P. Laviec, *Protection et promotion des investissements* (1985) pp.38-48 especially p. 46 where he quotes from the Netherlands – Kenya Convention which includes an explicit clause allowing a legal person to be treated as the national of the other Party where it is controlled by a national or nationals of the other Contracting Party.

97 Cf., the position in Switzerland for determining nationality of companies for the purposes of exercising diplomatic protection on behalf of Swiss companies: 'En Suisse la nationalité des personnes morales, quel que soit leur siege, est fonction du critère du controle, dont les éléments sont notamment la proportion du capital en mains suisses, la composition du conseil d'administration et de la direction, l'existence d'importantes créances non commerciales en mains étrangères créant un déséquilibre entre fonds propres et fonds étrangers meme le fait d'agir au titre fiduciare pour le compte d'un ressortissant étranger'. Decision of the Conseil fédéral of 30 October 1996, quoted by L. Caflisch, 'La practique suisse en matière de droit international public 1996', 7 *Revue suisse de droit international et de droit européen* (1997) p. 637 at p. 673 (para. 3.1 of the decision).

5.5 Towards Accepting International Legal Personality for Corporations

The fact that corporations may be ascribed a nationality by States and that international bodies have been generous in applying nationality rules so as to ensure that corporations can be parties to disputes at the international level could lead us to reassess the international legal personality of corporations as they can not be simply considered as completely dependent on their state of nationality at the international level. The nationality of individuals is no longer determinative in international law as they can seize an international court such as the European Court of Human Rights irrespective of their nationality. To a limited extent, individuals have rights under international law and a limited international personality. Corporations can seize the Court under the same conditions as individuals and therefore they also enjoy limited international personality in that context. Now that individuals can be prosecuted at the international level before the International Criminal Tribunals for the Former Yugoslavia and Rwanda it is accepted that individuals are also subject to duties under international law. We can continue this reasoning outside the context of the these Security Council created Tribunals. Any individuals who commit acts of torture have committed international crimes, and could find themselves caught up in the criminal jurisdiction of a State which has no jurisdictional connection with the crime. That State may simply have a desire to prosecute international crimes. The duty exists irrespective of the perpetrator or the victim's nationality. Similarly, under the Statute for the International Criminal Court an individual commits the international crime irrespective of the nationality link. Jurisdiction may turn on the nationality of the offender – but it need not. The Security Council may simply refer the situation to the Prosecutor.

We can consider that even without an international jurisdiction the acts of corporations can be regarded as international crimes and they therefore have not only limited international personality with respect to their rights under human rights law, but they also have duties under international law. The resistance to the recognition of international legal personality for corporations owes much to a fear that they would somehow be able more easily to interfere in the political, and economic affairs of States and that they would be able to invoke excessive diplomatic protection for national companies of the host State where nationals from investing States were in control. Abi-Saab has suggested that proponents of international legal personality for companies display theoretical incoherence by suggesting that 'internationalizing' contracts between governments and alien companies allows one to conclude that the company has achieved international personality.[98]

98 See Abi-Saab, op. cit. n. 79.

For him, the additional argument that 'transnational law' has elevated the status of multinationals is unconvincing due to the absence of a separate transnational legal order which is more than 'an amalgam of rules' from which the judge makes 'an eclectic choice'. For Malanczuk the problem is that: 'A unilateral elevation by the host state of the foreign company to the international level is not possible because it would also interfere with the rights of the home state of the company'.[99] For Malanczuk this interference would occur 'whether this state is determined on the basis of the seat theory, the control theory or any other theory relevant to the difficult problem of identification of the nationality of multinational companies'.[100] He sees such an elevation as creating a subject of international law having *erga omnes* effect.[101] Similarly Cassese is clear that 'States have not upgraded these entities [private companies] to international subjects proper'. For him:

> Socialist countries are politically opposed to them and the majority of developing countries are suspicious of their power; both groups will never allow them to play an autonomous role in international affairs. Even Western countries are reluctant to grant them international standing; they prefer to keep them under their control – of course, to the extent that this is possible. It follows that multinational corporations possess no international rights and duties: they are only subjects of municipal and 'transnational law'.[102]

But these concerns lose much of their sting when one reorients the issue and simply asserts that corporations have limited international legal personality rather than pretending that multinationals are proper subjects of international law. As long as we admit that individuals have rights and duties under customary international human rights law and international humanitarian law, we have to admit that legal persons also have the necessary international legal personality to enjoy some of these rights and conversely be prosecuted or held accountable for violations of their international duties.[103]

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99 *Akehurst's Modern Introduction to International Law*, 7th edn. (1997) at p. 102.

100 'Multinational Enterprises and Treaty-Making – A Contribution to the Discussion on Non-State Actors and the "Subjects" of International Law', paper presented at Forum Geneva, organized by the American Society of International Law and the Graduate Institute of International Studies, Geneva on 16 May 1998, publication forthcoming, at p. 22 of the manuscript.

101 Ibid.

102 *International Law in a Divided World* (1986) at p. 103.

103 This is not the place to discuss the civil actions brought against companies in the United States for violations of international law which represent torts in federal common law and under the Alien Claims Tort Act. *Doe I* v. *Unocal Corp.*, 963 F. Supp.

6 CONCLUSIONS AND FUTURE DIRECTIONS

6.1 International Law Can Bind Legal Entities such as Corporations 'As Such'

As the US Military Tribunal Judgements in Nuremberg show, corporations are bound by international criminal law concerning war crimes and crimes against humanity. Fifty years later at the Rome Conference on the International Criminal Court, no delegation challenged the conceptual assumption that legal persons are bound by international criminal law. The question *whether* legal persons are bound by international criminal law was never posed. The disagreements arose over the complexities involved in international trial of a non-natural person: *how* to serve the indictment, *who* would represent the interests of the legal person, *how much* intention need be proved, *how* to ensure that natural persons could not hide behind group responsibility. Ironically, it was not the move into the private sector from the military sphere that caused most misgivings in Rome. An examination of the last draft of the relevant article reveals that the real preoccupation was with shielding the public sphere from the jurisdiction of this new Court. The real fear from the governmental side is the fear of the introduction of State crimes through the back door. States with public corporations, mixed ventures and fuzzy lines separating governmental activity from the world of commerce, foresaw not only prosecutions of the government but also the risk of major financial penalties.

New developments in the field of corruption at the level of Conventions in the framework of the OAS, OECD, Council of Europe and the European Union look set to change attitudes to the irrelevance of 'legal persons' in the international criminal legal order. 'You can't put a corporation in jail' is no longer a valid response to those insisting on the importance of the inclusion of legal persons in the new international criminal jurisdictions. National law will have to adapt to meet the obligations undertaken through the ratification of these anti-corruption treaties.[104] In the context of

880 (1997). The civil action revolves around a claim for damages for among other things: forced labour, crimes against humanity, torture, violence against women, arbitrary arrest and detention, cruel, inhuman, or degrading treatment, wrongful death, battery, false imprisonment, assault, etc. The Court under this jurisdiction has to determine whether there has been a violation by the company of a norm of international law which is recognized by the US. See also *Iwanowa* v *Ford Motor Company*, 98 Civ. 959 (D.N.J. filed 4 Mar. 1998). For more on these cases, see B. Stephens contribution to this volume, as well as the contribution of J. Green and P. Hoffman.

104 Note the *Inter-American Model legislation on illicit enrichment and transnational bribery*, op. cit. n. 72, includes the following paragraph on the legislative issues surrounding the definition of company: 'The term "company" or "corporation" may

Europe, many of these definitional and jurisdiction complications have been negotiated away.

The prospects for inclusion of legal persons within the jurisdiction of the ICC probably depend on the sort of cases that will be prosecuted in the first few years of the Court's existence. Should these include directors of corporations involved in international crimes, and should the possibilities for reparations to victims appear derisory, the efforts aimed at the inclusion of legal persons within the Statute of the ICC could be rekindled. However, to concentrate on this one forum is to miss the point about the potential uses of a greater recognition of the international obligations of legal persons.

6.2 Companies can be Monitored According to the Standards Contained in International Treaties and Customary International Law

Human rights organizations have tended to adhere to a self-denying ordinance that runs something like this: 'multinational companies are not bound by international treaties. Obligations under treaties fall only on the States Parties to these treaties'. This is clearly not true. I.G. Farben and the directors of I.G. Farben were not parties to any international treaty, yet they were found in Court to have violated international law contained in international treaties. Individuals who find themselves indicted before the new ICC will not be parties to the Statute but they will be bound at the international level by the obligations in the Rome Statute.

The quest to find 'State complicity' and 'lack of due diligence' or 'State inaction' may not always be absolutely necessary in order to report on

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require adaptation to the legislation or legal terminology of the legislating country, since in many systems this is a commercial rather than a juridical term, or is used only in economic or fiscal legislation. The apparent intention of the Convention is to include all entities that manage capital and labor and which could receive benefits. It would seem that the intention of the Convention is to endow this category with ample scope within the limits allowed by international law. Therefore, the legislating State should thus consider the inclusion in this category of not only corporate legal entities (e.g., "companies" or "corporations"), but also entities with no corporate status under law, and non-profit entities that may carry out their activities within its territory, whether or not they have an economic or commercial purpose. The intention of the Convention seems to be to include State-owned enterprises or companies under its control. The legislating State should study whether special provisions are required in this case, as well as whether to include other State entities in the establishment of this offense. The thrust of this Model legislation is to suggest a wide definition of legal persons for the purposes of this Convention. Not only are entities with no legal status under law to be included but also State-owned enterprises and non-commercial enterprises. Although some legal systems do not allow for criminal sanctions the intention is that the legislating State will adapt its law to so as to comply with the Convention'.

MNCs and hold them accountable. As we have already seen, a treaty such as the Basel Convention explicitly creates crimes for 'legal persons'. Those legal persons are not parties to the treaty, yet they assume obligations once it enters into force. It is only a small step to extend the point from international crimes to international human rights obligations. Many obligations in human rights treaties contain norms which should be binding on legal persons. The fact that a corporation can not be a defendant before the Human Rights Committee under the Optional Protocol to the International Covenant on Civil and Political Rights does not mean that that legal entity is not bound in law to respect the standards found in the treaty.

Corporations can not be tried in the new ICC, but they have obligations under the laws or war; and violations of those obligations by corporations led to the imprisonment of their directors in the US Military Tribunal cases (discussed above). One conclusion to be drawn at this point is that we can be bolder in attaching international legal obligations to multinational corporations in the field of human rights.

6.3 Criminal Prosecution of MNCs at the National Level for International Crimes

We have already seen how, in some fields, there are now obligations to assert national jurisdiction over international crimes committed by MNCs. We might mention at this point that the Bamako Convention on the Ban of the Import into Africa and the Control of Transboundary Wastes within Africa goes further than most treaties and actually explicitly demands national legislation 'for imposing criminal penalties on all persons who have planned, committed, or assisted in such illegal imports. Such penalties shall be sufficiently high to both punish and deter such conduct'.[105] The Convention defines 'person' as meaning 'any natural or legal person'. There may also be a latent national jurisdiction in some human rights fields. Those States such as France and the Netherlands which have national legislation extending criminal jurisdiction over legal persons may find that this implies jurisdiction over international crimes committed outside the jurisdiction.[106]

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105 29 January 1991, reproduced in 30 *ILM* (1991) p. 773. See especially Articles 1(16), (definition) 4(1) 'Such import shall be deemed illegal and a criminal act'. 9(2) (Obligation on States parties to introduce criminal penalties on all persons guilty of illegal imports).

106 Wells, op. cit. n. 28, has explained with great clarity how different national legal orders have dealt with the problems associated with attribution. She explains the system under the revised Netherlands Criminal Code and how a hospital was convicted of negligent homicide in 1987. Ibid., at p. 121. She also cites the Council of Europe Recommendation No. R (88) 18 which sets out principles for member States

National courts have only very recently begun to experiment with the exercise of criminal jurisdiction where the crime and the defendant are only linked to the national jurisdiction through the international definition of the crime and the fact that the State has an international obligation to prosecute these crimes.[107] In States such as the United Kingdom and the United States, where Interpretation Acts simply define 'person' as including legal persons and corporations where the context allows, the consequences will depend on the legislation in question. Even though personal violence offences such as corporate manslaughter or negligent homicide cases have only been rarely prosecuted, this is due to prosecutorial restraint rather than any sense of legal impossibility.[108] So, for example, it is possible that the crime of torture as defined in the Convention against Torture may be attributable to a legal person (where it has acted with the acquiescence of a public official in the country in question). Where national legislation allows for the trial of a 'person' accused of torture outside the jurisdiction we have essentially a sort of 'universal' jurisdiction over legal persons involved in torture with State acquiescence. In other words the 'Pinochet phenomenon' could apply to MNCs. This may seem far-fetched to some, but the abstract points

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for corporate liability. Breaking with the maxim *'societas non delinquere potest'* has not been obvious for some legal orders. Some of the problems encountered by Switzerland in attempting to give effect to the Council of Europe Recommendation are set out in E. Stauffacher, 'La Criminalisation du comportement collectif – Suisse', in: De Doelder and Tiedemann, op. cit. n. 24, at pp. 347-367 at p. 360. In France the Code pénale includes *personnes morales* and a distinction is made between public and private *personnes morales.* The sanctions of dissolution and probation are not applicable to public *personnes morales.* Wells, op. cit. n. 28, at p. 122. For a discussion of the US law see Wells, at pp. 116-120. 'The US Title 1 Code, section 1 states that in Acts of Congress, 'the words "person" and "whoever" include corporations, companies, associations, firms, partnerships, societies, and joint stock companies, as well as individuals'. Quoted by Wells, ibid., at p. 96. The UK Interpretation Act 1978, demands that 'In any Act, unless the contrary intention appears, words and expressions listed in Schedule 1 to this Act are to be construed according to that Schedule', the Schedule states that: "Person" includes a body of persons corporate or unincorporate'. Wells makes a compelling case throughout her book for going beyond the regulatory sphere and invoking criminal law. In particular she highlights the lack of resources available in the regulatory field and that 'what is lacking in the regulatory sphere is the element of social control and of denunciation or censure'. Ibid., at p. 26.

107 See R. Maison, 'Les premiers cas d'application des dispositions pénales des Conventions de Genève par les juridictions internes', 6 *EJIL* (1995) pp. 260-273. For a comprehensive overview of the steps that have been taken in this field see M.T. Kamminga, 'The Exercise of Universal Jurisdiction in Respect of Gross Human Rights Offences: First Report', *68th Report of the International Law Association* (forthcoming). For the position in English law see G. Gilbert, 'Crimes Sans Frontières: Jurisdictional Problems in English Law', 63 *Brit. Y.B. Int'l L.* (1992) pp. 415, especially, pp. 423-424 and pp. 427-430 and p. 442.

108 See Wells, op. cit. n. 28.

are as important as the practical possibilities. Let us end with a brief glance at some of the possible positive side-effects of considering jurisdiction over MNCs for violations of international criminal law.

6.4 Taking Corporate Crime Seriously

This short paper, with long excerpts from judicial decisions and relevant international texts, has demonstrated that criminal law can fix on legal persons such as multinational corporations. It has also tried to show how the question of creating international jurisdiction over legal persons has often been overshadowed by fears of creating collective punishment or State crimes or jurisdiction over State responsibility. This paper concludes that lack of international jurisdiction is no bar to the enforcement of the substantive obligations that international criminal law places on MNCs. But we would go further and suggest that not only can these standards be applied to MNCs but that criminal jurisdiction itself needs to be taken more seriously.

The advantages of criminal prosecution may not be obvious. In fact there is usually a higher burden of proof, penalties are designed around imprisonment, lines of authority concerning the plea may be complex, and the cost to the public purse may seem prohibitive. But the prospect of criminal prosecution brings with it the sense of public censure, the threat of punitive damages, a sense of justice that the death of hundreds of people through corporate recklessness should be treated the same way as a single death through individual thoughtlessness.

By highlighting the international legal duties of MNCs one also changes the overriding rationale for the detailed codes of conduct which are emerging. Instead of suggesting that codes of conduct are desirable because they are moral, or profitable, or efficient, or good public relations – one can suggest that MNCs need to regulate their behaviour as otherwise they will face possible prosecution and fines. Once one has highlighted the enforceable legal obligations, the preventive procedures and educational programmes will seem more urgent and less sentimental.

Of course, detailed codes of conduct and human rights programmes still need to be elaborated and promoted, as the existing norms are not tailored for daily use by decision makers and employees in MNCs. But stressing potential criminal liability at the corporate and individual level is likely to generate greater attention than appeals to the importance of ethics in business. Corporations may not end up in jail but they are likely to be keen to stay out of the dock.

CHAPTER 6

The Multilateral Agreement on Investment and the Review of the OECD Guidelines for Multinational Enterprises

JAN HUNER*

INTRODUCTION

This paper descibes the state of play in the attempts to negotiate a multilateral discipline on the treatment of foreign investment. It focuses mainly on the experience with the negotiations on the Multilateral Agreement on Investment ('MAI') which took place in the Organisation for Economic Cooperation and Development ('OECD') from 1995 to 1998. The MAI package was to have included a revised version of the existing OECD Guidelines for Multinational Enterprises. The review process of the Guidelines is currently under way in the OECD. The aim is to conclude it in time for the OECD ministerial meeting in the Spring of 2,000.

1 THE MULTILATERAL AGREEMENT ON INVESTMENT

1.1 Why the MAI?

Whereas international trade is now firmly embedded in a system of multilateral rules guarded over by the WTO, such rules do not exist for international investment. And yet investment has grown faster than international trade since the mid-1980s. Developing and developed countries alike are eager to attract direct investment, and many have been successful in doing so. Most OECD countries have concluded bilateral agreements with non-OECD countries on the mutual promotion and protection of investment. In the case of the Netherlands, nearly 70 such agreements have been concluded. Although it appears more efficient to conclude a single multilateral agreement on investment, attempts to do so have so far not been successful.

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The most notable example is the UN Code of Conduct on Transnational Corporations. Negotiations on this Code, which was to have included not only rules for transnational corporations ('TNCs') but also rules for the treatment of investors by host countries, began in 1977 and were finally abandoned in 1992.[1]

The OECD is the only multilateral organization which has adopted disciplines on investment. This is not surprising, given that it is a group of like-minded countries which agrees on the need for disciplines in this area. The Code of Liberalization of Capital Movements dates back to 1961, the year the OECD was founded.[2] In 1976, at the height of the debate on the role of multinational enterprises ('MNEs'), the OECD adopted a 'package deal' consisting of the National Treatment Instrument ('NTI') and the Guidelines for Multinational Enterprises ('Guidelines').[3] The NTI is a commitment of OECD member countries to treat foreign and domestic investors identically. The Guidelines are recommendations to OECD-based investors as to their behaviour in other OECD host countries.

The experience with these instruments has been largely positive. Although they are not subject to a formal dispute settlement mechanism, the application of peer pressure has ensured a reasonable degree of compliance. In the late 1980s however a tendency towards discrimination of foreign investors became apparent in some OECD countries. Europe and Japan were worried about increasing protectionist sentiments in the United States Congress, triggered mostly by huge investment flows from Japan. The US in turn saw potential dangers in the ongoing process of European integration, where certain European Community members were arguing for preferential treatment for European investors (the 'fortress Europe' debate). The US also wanted a tool with which to fight the closed nature of Japanese industry. Thus, a strengthening of the OECD disciplines was called for. When attempts to revise the current instruments proved unsuccessful, the US launched the idea of negotiating a wholly new comprehensive agreement, covering all aspects of investment. Thus, it would include the right of establishment on a non-discriminatory basis, as well as provisions on investment protection. All this was to be backed up by an independent dispute settlement mechanism. The MAI, as it was to be called, would also be open to signature by non-OECD countries.

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1 For more information on United Nations efforts to craft a code of conduct for multinational enterprises, see P. Muchlinski's contribution to this volume.

2 Organisation of Economic Cooperation and Development, *Code of Liberalization of Capital Movements* (1997).

3 OECD, *Declaration on International Investment and Multinational Enterprises* (1976, revised in 1979, 1982, 1984 and 1991). See Appendix 3 to this volume.

1.2 The Status of the Negotiations on the MAI

Negotiations on the MAI began in September 1995, chaired by Frans Engering, the Netherlands' Director-General of Foreign Economic Relations. In the three years preceding the decision to start negotiations, much preparatory work had been done in the OECD's Committee on Investment and MNEs.[4] This explains the aim to conclude the negotiations by mid-1997. That proved too optimistic a goal, however. It soon became apparent that most negotiators had under-estimated the complexity of the MAI. Countries encountered problems in lodging appropriate lists of draft exceptions. Paradoxically it was the US which by early 1997 seemed least ready to finish the negotiations. The US Congress had not been told what was coming. One reason was that the individual states had only just begun to check their legislation on compliance with the national treatment principle. Also, the US negotiators began to realise that, like the NAFTA in 1994, the MAI would not pass without provisions on labour and environment. This however was opposed by Mexico, Korea, Australia and New Zealand. France and Canada, for their part, insisted on a broad cultural exception, but this in turn was strongly opposed by the US and Japan.

All of this provoked a slowdown in the negotiations in the spring of 1997. With NGOs and parliaments becoming increasingly hostile to the MAI, most OECD governments began to see the MAI as a liability rather than an asset. One interesting feature of the MAI-negotiations has been that business support was always lukewarm at most. The International Chamber of Commerce, the most authoritative voice of international business, has consistently favoured a World Trade Organization ('WTO') investment discipline over anything that could be done in the OECD.[5] Any support that was there was further weakened when it became obvious that provisions on labour and environment were inevitable. So whereas many MAI-opponents saw the hands of big business behind all of this, big business itself didn't really care too much whether or not the MAI came about.

As the new deadline of April 1998 approached, the OECD and its member states faced a well-orchestrated protest campaign by various interest groups which communicated via the Internet. The French government decided that the MAI was not worth the fight: it forced a 6-month moratorium on the negotiations. When the negotiations were set to resume in October 1998 Prime Minister Lionel Jospin, not surprisingly, announced that

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4 OECD, *A Multilateral Agreement on Investment*, Report by the OECD Committee on International Investment and Multinational Enterprises (1995).

5 International Chamber of Commerce, *Business and the global economy*, statement to the G-7 Birmingham summit (15-17 May 1998).

France would no longer take part. France still favoured the conclusion of a multilateral investment agreement but she felt that, given its worldwide membership, the WTO was the proper framework for such an agreement. Thus ended the MAI experiment.

At this time, discussions in the OECD on a multilateral framework on investment are still continuing, but it has to be said that they are not as focused as they should be, given the OECD's potential contribution. The main concern is how to announce that the MAI as such will not come about but that the OECD will continue work in this area. The OECD will also stress the importance of the review of the OECD Guidelines for MNEs.

2 THE OECD GUIDELINES FOR MULTINATIONAL ENTERPRISES

2.1 What They Are and How They Work

The Guidelines are unique in that they are the only existing general code of conduct for international business. As mentioned at the outset, a UN Code of Conduct never came about. The most relevant other instrument is the International Labour Organization's Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy, adopted in 1977.[6] This Declaration has worldwide applicability, but it only covers labour matters. The Guidelines apply only to investors from and investment in OECD countries, but they cover all relevant aspects of MNE operations: information disclosure, competition, financing, taxation, labour relations, environment, and technology application.[7]

Legally speaking the Guidelines are recommendations from OECD governments to their firms that operate in other OECD countries. The only formal obligation is that countries should set up National Contact Points which act as forums to deal with any questions having to do with the operations of MNEs. These Contact Points usually have a tripartite set-up, i.e., government, business and labour. Contact Points in different countries are required to work together in finding solutions for any problems caused by operations in one or more countries by an investor from another country.

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6 International Labour Organization, *Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy*, 2d edn. (1991).

7 The current text of the Guidelines may be found on the OECD's website at <http://www.oecd.org/daf/cmis/mneguide.htm>, accessed on Sept. 20, 1999.

If there is a dispute about the applicability of the Guidelines, the OECD Committee on Investment and MNEs (the 'CIME') may be asked to consider an amendment to the text or a clarification of a particular clause. The CIME cannot pronounce itself on the question whether a particular firm has or has not respected the Guidelines in any given case.

A key feature of the Guidelines is that they are supported by both business and labour. Both have been extensively consulted when they were drawn up in 1976 and during subsequent reviews in 1979, 1982, 1984 and 1991. The next review was due in 1996 but was postponed until after the completion of the MAI negotiations.

2.2 The Guidelines in Practice

Their overall support for the Guidelines does not mean that business and labour are necessarily happy with all that is in them, or with all the clarifications adopted by the CIME over the years. Business dislikes changes to the Guidelines: it strongly opposed the addition of a chapter on environmental protection in 1991. Labour is frustrated with the inability of the OECD to act in settling disputes on the applicability of the Guidelines.

From the member countries' point of view the initial experience with the Guidelines was mostly positive. OECD governments were happy with them because it was, in their view, an adequate response to the discussion about the behavior of MNEs that had arisen in the 1970s. One of the causes for that debate was the involvement of some MNEs in the internal politics of host countries. The alleged role of American company ITT in the overthrow of the democratically elected government of Salvador Allende in Chile is the best known example. But the 1970s also saw a wider debate about the secretive nature of MNEs, caused in part by the role played by the oil companies during the so-called energy crisis in 1973 and 1974. The Guidelines were, and still are, a clear signal by governments that MNEs are expected to be transparent and to respect basic norms in their international operations.

The initial publicity following the adoption of the Guidelines, and their dissemination among the management of most OECD-based MNEs ensured that they were reasonably well known. Although disputes about the application of the Guidelines have been frequent, particularly in the early 1980s, examples of blatant disregard of the Guidelines have been rare. The most recent one was the decision by Renault in early 1997 to close the assembly plant at Vilvoorde in Belgium. It clearly contravened the requirement in the Industrial Relations chapter that reasonable notice should be given to employees when considering the closure of an entity. The ensuing joint request by Belgium and France for a clarification of the Guidelines was

therefore largely symbolic. It did however lead both countries to argue for a strengthening of the Guidelines in order to increase their authority.

In fact, most of the requests for clarification that were put to the CIME since 1976 arose out of decisions by an MNE to close a subsidiary operation in one of the OECD countries. Many of those requests were brought by TUAC, the Trade Union Advisory Council to the OECD. TUAC, like their business counterpart BIAC ('Business Interests Advisory Council'), can bring their own requests for clarification. Successful requests for clarification, of which there have been a dozen or so, were often seen as a *de facto* condemnation of an MNE's behaviour in a particular case.[8]

Towards the end of the 1980s the Guidelines began to disappear from public awareness. A number of factors seem to have been at play here:

- with an increased pro-business attitude among the public, the role of MNEs was less of a subject of debate;
- a new generation of managers had taken over in most MNEs, and to the extent that they were aware of the Guidelines they tended to regard them as a relic from the past;
- trade unions in many countries had lost interest in the Guidelines: they looked at other avenues to pursue their interests;
- the debate in the UN about regulating MNEs was fading in the light of an emerging consensus about the merits of foreign investment. Most developing countries and all the former communist states in Eastern Europe were now preoccupied with getting their share of MNE investment.

By the mid 1990s, many OECD governments had come to believe that the Guidelines had more or less outlived themselves. Where MNEs were criticised, they reacted by adopting their own codes of conduct or by engaging directly with NGOs. Governments applauded and encouraged these developments. In 1997, however, the debate about the MAI woke them out of their dreams. The point made by the MAI critics that rights for investors should be balanced by obligations for investors was countered by restating that the existing OECD Guidelines were to be attached to the MAI. In addition, the Guidelines would be updated. Their voluntary nature would remain unchanged, however.

Business did not like any of this but did not dare say so publicly. Labour was generally happy with the idea because they saw opportunities for amendments which they had long sought. The MAI critics reacted by saying that attaching the Guidelines to the MAI would only be credible if these

8 All clarifications appear in *The OECD Guidelines for Multinational Enterprises* (1997).

Guidelines underwent drastic changes, such as making them binding and universally applicable. The dialogue on this issue has meanwhile shifted to the review of the Guidelines which is now underway

2.3 The Review of the Guidelines

When the fate of the MAI was sealed in October 1998, the review of the Guidelines had just begun. The aim is to finish this process by Spring 2,000 with the adoption of the revisions by the OECD Ministerial Meeting. This is an ambitious goal, given that the Guidelines cover a wide area which means involving a number of policy areas within the OECD committee and Secretariat structure, as well as in national capitals. A number of non-OECD countries that have associated themselves with the Guidelines, such as Argentina and Brazil, will take part in the debate.

The review of the Guidelines has been delegated to a working group of the CIME. Whereas this working group is only manned by government representatives, the review is in fact a negotiation between the OECD countries, business, labour and, for the first time, NGOs. Special consultative sessions will be held regularly with those three groups of stakeholders. This process of consultation and negotiation takes place not only in Paris, but also in other capitals. When national delegations come to Paris, the positions they are to take have often been negotiated at home with the other stakeholders. This is fact reduces the ability of delegations to make major concessions on the spot. That is only one of the reasons why the review process is unlikely to be completed by Spring 2,000.

The review discussion so far shows that three main questions will dominate the negotiations:

(1) Should the Guidelines apply outside the OECD;
(2) What changes should be made to the text; and
(3) How can follow-up procedures be strengthened.

2.3.1 Making the Guidelines apply outside the OECD

This appears a desirable change, but it needs a thorough examination as to its legal consequences. This certainly holds true if we decide to strengthen follow-up procedures. It is a fact nonetheless that most delegations, including the Netherlands, agree that the added value of the Guidelines is to be found mostly in situations where national legislation is either vague or poorly implemented. It is here that the basic requirement that MNEs should respect national laws is simply not enough. Some countries have doubts, however. They feel that extending the applicability to third countries may be interpreted as encroaching on these countries' sovereignty. The proponents counter this by saying that restricting the applicability to the OECD could

imply that standards for MNE conduct are lower outside the OECD than within.

2.3.2 Changing the Text of the Guidelines

This clearly presents a more controversial question. Some countries, such as Belgium and France, are very ambitious and argue for extensive changes. France, for instance, wants the fundamental labour standards, as recognised by the International Labour Conference in June 1998, to be made a mandatory part of the otherwise voluntary Guidelines. Others, such as the United States and Japan, argue for a cautious approach. Like business, they attach importance to keeping the Guidelines stable so as not to create the impression that our expectations of MNE conduct are constantly changing.

Whereas most countries agree that the chapter on environmental protection needs updating, ambitions here vary widely. Radical proposals for changes are either explained by hopes to pacify NGOs or by frustration with the lack of progress in implementing the Rio Declaration and other international environmental agreements. There is wide agreement that this chapter should in any case reflect the state of the art as expressed by the Rio Declaration and Agenda 21.

The question of adding clauses on the respect for human rights also generates considerable debate. Proponents argue that MNEs have a responsibility of their own in ensuring respect for basic human rights, particularly in cases where the host government does not adequately implement these rights. They also note that some voluntary corporate codes of conduct contain language on respect for human rights.

Opponents argue that the Guidelines contain adequate provisions on respect for labour rights, such as freedom of association. They feel that in the context of the Guidelines it is not appropriate to add more general language on respect for human righst. This could create doubts as to the prime responsibility of governments to uphold these rights.

Where these views appear difficult to reconcile, a possible compromise could be that a reference is made to the Universal Declaration of Human Rights in the introductory chapter of the Guidelines.

Other parts of the text, such as the chapters on competition and on industrial relations, are likely to generate considerable discussion, but they are not expected to present insurmountable obstacles. On the question of labour rights, the prevailing view is that the text should reflect the current state of the ILO instruments.

2.3.3 Strengthening the Follow-Up Procedures

Such a change also presents two difficult questions: (1) whether less than unanimity should be required for adopting clarifications and (2) whether

individual firms should be named when CIME discusses cases of alleged non-implemetation of the Guidelines. There are as yet no proposals that CIME should be able to actually pronounce itself on individual cases. A decision to do so will undoubtedly provoke business into withdrawing their support for the Guidelines.

The adoption of a consensus-minus-one voting rule for adopting clarifications, as proposed by France and Belgium, has more of a chance to be acceptable. It would remedy a recurrent problem encountered in discussions in the CIME on requests for clarification, in that the country of origin of the company whose actions gave rise to the request company will block consensus.

There is near-unanimity on the need to strengthen the role of the National Contact Points. Many of them lead a dormant existence.[9] The Dutch National Contact Point recently held its first meeting in 10 years! One certain result of the review is that the Contact Points will be asked to make new efforts to promote and disseminate the Guidelines which, after all, are among their main functions. In most OECD countries there is a near-total ignorance of the Guidelines with the public as well as with business. This is not surprising, given that the actions of MNEs had become less of a topic in the latter half of the 1980s. Now that this issue has re-appeared, we have to disseminate them as soon as the review process has been completed. NGOs have now also declared themselves stakeholders in the Guidelines. They will be closely consulted throughout the review process. The Guidelines should not only be supported by business and labour, but also by society at large.

9 The functioning of the National Contact Points is described in S.C. van Eyk, *The OECD Declaration and Decisions concerning Multinational Enterprises: An Attempt to Tame the Shrew* (1995).

SECTION III

Domestic Approaches

CHAPTER 7

Corporate Accountability: International Human Rights Litigation Against Corporations in US Courts

BETH STEPHENS*

INTRODUCTION

The regulation of multinational corporations looms as one of the major challenges facing the international legal system at the start of the 21th century. Dramatic changes in the world economy, coupled with tremendous advances in communication and transport, have spurred the growth of corporations larger and more powerful than most national governments. Although these corporations have a dramatic impact on individuals, communities and nations, the vast scope of their activities make it difficult for any one government to hold them accountable.

Nevertheless, despite the rapid transformation of the global economy, existing human rights norms provide tools from which an international system of accountability can develop. Basic international human rights provisions applicable to multinational corporations can be enforced through both domestic court systems and international bodies. Potential enforcement actions include complaints to international agencies, as well as a range of civil and criminal proceedings in domestic courts, on behalf of both public and private plaintiffs.

One model of private litigation has emerged in the United States. With a series of recent decisions in civil lawsuits, the US federal courts have

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articulated standards by which multinational corporations can be held accountable for violations of international human rights norms committed both within the United States and abroad. These decisions are the latest application of a US statute, the Alien Tort Claims Act ('ATCA'),[1] that provides domestic remedies for egregious international law violations. Beginning in 1980 with a lawsuit for torture against the actual torturer, the ATCA over the past 20 years has been applied to a wide range of violations and violators, including certain private actors and both corporations and unincorporated associations.[2] Approximately a dozen ATCA suits against corporations have been filed over the past few years.[3] Although none has yet reached a final judgment, a series of preliminary rulings from trial courts around the country lays the groundwork for defining corporate responsibility for egregious human rights violations.

Human rights litigation against corporations in US courts rests upon the combination of the jurisprudence of the ATCA, including its application to private actors, with general legal principles that both permit suits against corporations for a wide range of torts and also permit suits in the United States for events taking place in other countries.

1 THE JURISPRUDENCE OF THE ALIEN TORT CLAIMS ACT

1.1 The Alien Tort Claims Act and the Filártiga Decision

The framers of the US Constitution in the late 18th century were deeply concerned about the need to enforce international law and to punish those who violated international norms.[4] One of the first statutes passed in 1789 by the first session of the US Congress, the Alien Tort Claims Act authorized civil lawsuits for money damages by those injured by violations of

1 28 United States Code § 1350 (1789).

2 For a full discussion of the statute, its history, and the key case decisions, see Stephens, op. cit. n.*. For a recent update on the status of pending cases, see J. Green and P. Hoffman's contribution to this volume.

3 This article does not address the ATCA claims in cases arising out of corporate violations committed during the Holocaust. For more information on this subject, see the contribution by J. Green and P. Hoffman to this volume.

4 In marked contrast to the attitude of recent US political leaders, the 19th century framers viewed international law as a morally binding commitment, and also worried that the more powerful European nations would take reprisals if the United States were to violate its international obligations. See B. Stephens, 'The Law of Our Land: Customary International Law As Federal Law After *Erie*', 66 *Fordham L. Rev.* (1997) p. 393 at pp. 399-408.

international law. In its current form, the ATCA provides federal court jurisdiction over suits by aliens (noncitizens of the United States) for 'a tort ... in violation of the law of nations'.

Within the federal US legal system, most civil claims for damages caused by torts are litigated in the courts of the 50 states;[5] the federal courts have jurisdiction over categories of claims only where both authorized by the Constitution and implemented by congressional statute. The novelty of the ATCA is that the statute authorizes *federal* court jurisdiction over such torts, and defines the tort by reference to the law of nations, or international law.

Largely dormant for almost 200 years, the ATCA was revived in 1980 in a lawsuit by the family of a young man tortured to death in Paraguay, Joel Filártiga.[6] The Filártigas discovered that the police officer who had tortured Joel to death, Americo Norberto Peña-Irala, had moved to New York City. With the assistance of lawyers at the Center for Constitutional Rights, the Filártigas sued Peña-Irala under the ATCA. The trial court initially rejected the claim, holding that human rights abuses committed by a government against its own citizens did not violate international law. The appellate court disagreed, reinstating the lawsuit. Holding that the statute permits aliens to sue for violations of international law about which there is an international consensus, the court found such a consensus prohibiting the torture of an individual by an official of his own government. The court concluded, '[T]here are few, if any, issues in international law today on which opinion seems to be so united as the limitation on a state's power to torture persons held in its custody'.[7] The *Filártiga* court placed its decision squarely within the post-World War II development of international human rights norms:

> In the modern world, humanitarian and practical considerations have combined to lead the nations of the world to recognize that respect for fundamental human rights is in their individual and collective interest. ... Indeed, for purposes of civil liability, the torturer has become – like the pirate and slave trader before him – *hostis humani generis*, an enemy of all mankind. Our holding

5 Similarly, most crimes are prosecuted in State courts; only crimes specifically defined by federal statutes may be heard by federal courts. Note that in the US legal system, crimes can be prosecuted only by public prosecutors – there are no private criminal prosecutions. However, a private individual injured by tortious behaviour that also constitutes a crime can pursue civil remedies for damages whether or not the public prosecutor has filed criminal charges against the perpetrator.

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

7 Ibid., p. 881.

> today ... is a small but important step in the fulfillment of the ageless dream to free all people from brutal violence.[8]

In that spirit, plaintiffs and their attorneys have sought successfully to expand the reach of the ATCA over the past 20 years.

1.2 The Torture Victim Protection Act (TVPA)

In 1992, the US Congress enacted a new statute containing a modified version of the ATCA, the Torture Victim Protection Act ('TVPA').[9] The TVPA expands the doctrine to protect US citizens as well as aliens, but only for two specific international law violations: torture and summary execution. The statute also constitutes a modern congressional endorsement of the *Filártiga* court's interpretation of the ATCA: In a legislative report, Congress expressed strong support for the ATCA and the *Filártiga* decision, stating that the case 'has met with general approval'.[10] The report notes that the ATCA has 'important uses' and 'should not be replaced' by the TVPA. Rather, the ATCA 'should remain intact to permit suits based on other norms that already exist or may ripen in the future into rules of customary international law'. Congress also noted the need to provide enforcement mechanisms to the 'many thousands of victims of torture and summary execution around the world'.

The importance of the TVPA lies both in its expansion of the civil remedy to US citizens and ringing endorsement of the *Filártiga* line of cases. However, in addition to the limitation to only two human rights abuses, torture and summary execution, the statute requires that the underlying violation be committed 'under actual or apparent authority, or color of law, of any *foreign nation*'.[11] It thus excludes suits against US government officials, unless they can be shown to be acting under the authority of a foreign State. Moreover, the TVPA limits its reach to an 'individual' as a defendant[12]; one court has held that the word 'individual' excludes corporate defendants.[13]

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8 Ibid., p. 890.
9 28 United States Code § 1350 [note] (1992).
10 House of Representatives, Report No. 367, 102d Congress, 1st Session (1992).
11 TVPA, section 2 (a) [emphasis added].
12 Ibid.
13 *Beanal* v. *Freeport-McMoran, Inc.*, 969 F.Supp. 362 at 381-382 (E.D. La. 1997).

1.3 Expanding the Relevant Human Rights Norms

The language of the Alien Tort Claims Act directs US federal courts to assert jurisdiction over torts in violation of 'the law of nations'. The US courts have defined the 'law of nations' for the purpose of the statute as including international law norms that are universal, obligatory and definable.[14] Thus, there must be a general international acceptance of the prohibition, and it must be both binding without exception and subject to a clear definition. Recognising that international law evolves over time, the courts look to modern views of the content of international law. Applying this principle, the *Filártiga* court found that international human rights norms now prohibit torture committed by public officials against their own citizens, even though earlier decisions had restricted the scope of international law to a state's treatment of aliens. To determine the content of evolving international law norms, the courts rely on treaties, conventions, declarations, resolutions and judicial decisions, as well as the opinions of international law scholars.

The 'universal, obligatory and definable' standard has been applied to incorporate a range of international human rights violations into the ATCA jurisprudence. In a case against an Argentine general for violations committed as part of the 'dirty war', a court in the 1980s held that international law had recognised 'disappearance' as an international human rights violation, along with summary execution and prolonged arbitrary detention.[15] A decision in a lawsuit against Radovan Karadzic, leader of the Bosnian Serbs during the war in Bosnia, found that genocide, war crimes and crimes against humanity triggered ATCA jurisdiction.[16] Other cases have upheld ATCA claims based on slavery[17] and certain acts of cruel, inhuman or degrading treatment.[18] In a case filed by Sister Dianna Ortiz, a US nun kidnapped and brutally tortured by Guatemalan security forces, the court recognised gender violence such as rape as a form of torture.[19] As norms develop, additional claims can be raised. Cases currently pending ask the

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14 The standard was first articulated in *Forti* v. *Suarez Mason*, 672 F.Supp. 1531 at 1540 (N.D. Cal. 1987) [hereafter, *Forti I*].

15 *Forti* v. *Suarez-Mason*, 694 F.Supp. 707 (N.D. Cal. 1988) (on reconsideration)(disappearance); *Forti I*, loc. cit. n. 14, at 1541-1542 (summary execution, prolonged arbitrary detention).

16 *Kadic* v. *Karadzic*, 70 F.3d 232 (2d Cir. 1995).

17 *Doe I* v. *Unocal Corp.*, 963 F.Supp. 880 at 891-892 (C.D. Cal. 1997).

18 *Xuncax* v. *Gramajo*, 886 F.Supp. 162 at 185-189 (D. Mass. 1995).

19 Ibid., at 173-175.

courts to find gender violence to be an independent violation of human rights,[20] along with egregious violations of environmental standards.[21]

1.4 Expanding the Categories of Defendants

In a similar manner, the cases over the past 20 years have gradually expanded the range of defendants who can be held accountable under the ATCA.

1.4.1 Command Responsibility

The original ATCA lawsuit, *Filártiga*, involved the actual torturer, Americo Norberto Peña-Irala. Later suits expanded the notion of accountability to reach those in a position of command responsibility: those who planned, ordered or directed human rights abuses, or who knew or should have known about the abuses and failed to prevent their occurrence or punish those responsible. A series of lawsuits held accountable the Argentine general, Carlos Guillermo Suarez-Mason, for abuses committed by troops under his command.[22] Similarly, Guatemalan General Hector Gramajo was held responsible for egregious violations committed by his forces.[23]

1.4.2 Private Actors

Kadic v. Karadzic,[24] the appellate decision in the case against the leader of the Bosnian Serbs at the time of the Bosnian war, addressed several issues of defendant responsibility. Karadzic was the head of an unrecognised *de facto* state: although based on an illegal seizure of power, his 'government' controlled both territory and population, through a legislature, executive

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20 *Doe* v. *Islamic Salvation Front (FIS)*, 993 F.Supp. 3 (D.D.C. 1998) (suit against Islamic fundamentalist group sued for attacks on women and girls).

21 *Jota* v. *Texaco, Inc.*, 157 F.3d 153 (2d Cir. 1998); *Beanal* v. *Freeport-McMoran, Inc.*, loc. cit. n. 13. In a lower court ruling in the *Jota* case, *Aguinda* v. *Texaco*, 1994 WL 142006 (S.D.N.Y.), at *6-*7, a district court judge indicated support for the argument that certain egregious environmental harms violate international law; the appellate court reversed on other grounds and declined to address this question, 157 F.3d at 159, n. 6. In *Beanal*, the district court held that corporate actions that harm the environment did not violate established norms of international law, *Beanal*, loc. cit. n. 13, at 382-384; this issue is currently on appeal.

22 *Forti I*, loc. cit. n. 14, at 1537-1538 ; *Forti* v. *Suarez-Mason*, loc. cit. n. 15; *Forti* v. *Suarez-Mason*, Civ. No. 87-2058 (N.D. Cal. Apr. 20, 1990) (final judgement) (unpublished opinion); *Quiros de Rapaport* v. *Suarez-Mason*, Civ. No. 87-2266 (N.D. Cal. Apr. 11, 1989) (unpublished opinion); *Martinez-Baca* v. *Suarez-Mason*, Civ. No. 87-2057 (N.D. Cal. Apr. 22, 1988) (unpublished opinion).

23 *Xuncax* v. *Gramajo*, loc. cit. n. 18, at 171-173, 174-175.

24 Loc. cit. n. 16.

officers and a powerful military force. The plaintiffs charged him with a series of human rights violations, including genocide, war crimes and crimes against humanity, as well as summary execution and torture, including rape.

The court first held that certain international human rights norms prohibit private conduct as well as public acts.[25] The Convention on the Prevention and Punishment of the Crime of Genocide of 9 December 1948 ('Genocide Convention'), for example, specifically prohibits genocide whether committed by a public or private actor.[26] Moreover, common article 3 of the Geneva Conventions, applicable to internal conflicts, is binding on all parties to a conflict, whether or not they constitute State actors.[27] The *Kadic* decision concluded that the ATCA applies to suits against private parties where, as in genocide and common article 3, the international law definition of the offense indicates that the prohibition binds private parties as well as public actors.

1.4.3 De Facto Governments

The *Kadic* court recognized that human rights violations such as torture and summary execution, as defined by international law, do require State action. The Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment of 10 December 1984 ('Torture Convention'),[28] for example, prohibits acts of torture 'inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity'.[29] The court held that the requisite 'official capacity' could be supplied by an official of a *de facto* State as well as by a representative of a formally recognized government. The opinion notes that underlying the State action requirement is a regime's ability to exert official power over those living under its control, not diplomatic recognition:

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25 Ibid., at 239-243.

26 *Convention on the Prevention and Punishment of the Crime of Genocide*, GA Res. 260 A (III), UN GAOR 3rd Sess. (I), UN Doc. A/810 (1948), 78 U.N.T.S. 277, art. 4, entered into force 12 June 1951.

27 *Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field*, 12 Aug. 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31; *Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea*, 12 Aug. 1949, 6 U.S.T. 3217, 75 U.N.T.S. 85; *Geneva Convention Relative to the Treatment of Prisoners of War*, 12 Aug. 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135; *Geneva Convention Relative to the Protection of Civilian Persons in Time of War*, 12 Aug. 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287.

28 GA Res. 39/46, Annex, 39 UN GAOR Supp. (No. 51) at 197, UN Doc. A/39/51 (1984), 1465 U.N.T.S. 277, entered into force 26 June 1987.

29 Ibid., art. 1.

> [I]t is likely that the State action concept, where applicable for some violations like 'official' torture, requires merely the semblance of official authority. The inquiry, after all, is whether a person purporting to wield official power has exceeded internationally recognized standards of civilized conduct, not whether statehood in all its formal aspects exists.[30]

Liability under the ATCA, therefore, can be triggered by a wide range of *de facto* regimes exerting official control over persons living under their command.[31]

1.4.4 Private Complicity in State Action

The *Kadic* court also recognized that the State action requirement may extend accountability to otherwise private actors who act in complicity with public actors – where the public actor, for example, instigates, consents to, or acquiesces in the violation, to paraphrase the language of the Torture Convention. Thus, plaintiffs' allegation that Karadzic's forces had acted 'in concert with Yugoslav officials or with significant Yugoslavian aid' would be sufficient to satisfy the State action requirement of the Torture Convention.[32] In more general terms, one district court confirmed the liability of private actors who conspire with State actors, noting, '[I]t would be a strange tort system that imposed liability on State actors but not on those who conspired with them to perpetrate illegal acts through the coercive use of state power'.[33]

In defining the State action requirement in ATCA cases, US courts have followed a detailed line of US cases applying the concept to violations of the US Constitution, in order to determine when a private actor's actions are sufficiently 'public' so as to trigger liability under provisions requiring State action. Several courts have agreed that the standards applicable to a key US civil right statute[34] should also be used to determine State action for the purposes of ATCA and TVPA cases. 'To the extent a state action requirement is incorporated into the ATCA, courts look to the standards devel-

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30 *Kadic* v. *Karadzic*, loc. cit. n. 16, at p. 245.

31 See *Doe* v. *Islamic Salvation Front*, loc. cit. n. 20, at p. 9, in which the district court recognised that, for the purposes of the State action requirement, the Islamic Salvation Front in Algeria might constitute a *de facto* State in the areas under its control, but withheld determination of that factual issue until later in the litigation.

32 *Kadic* v. *Karadzic*, loc. cit. n. 16, at p. 245.

33 *Eastman Kodak* v. *Kavlin*, 978 F.Supp. 1078 (S.D. Fla. 1997) at 1091.

34 42 United States Code § 1983.

oped under 42 U.S.C. § 1983', the federal statute defining violations of constitutional rights by public officials.[35]

The US Supreme Court has found otherwise private action to satisfy the US State action requirement in many factual settings, including where a private party performs a public function (if, for example, a nominally private security force performs the functions of a public police force); where the State commandeers private parties and assigns them public responsibilities; where the State and private actions are so interrelated as to be indistinguishable; and where the private and State parties are engaged in 'joint action'.[36]

As the *Doe v. Unocal* court noted, a private party's actions will be considered State action where the private party 'wilfully participate[s] in joint action with the state or its agents'; enters into an agreement with a government actor; 'engages in a conspiracy' or 'acts in concert' with State agents; or aids and abets State agents.[37] As the court summarized, '[W]here there is "a substantial degree of co-operative action" between the State and private actors in effecting the deprivation of rights, State action is present'.[38]

The application of these principles to corporate defendants will be discussed in Section 3.

1.5 Sovereign and Diplomatic Immunity

Governmental immunities strictly limit ATCA litigation. In a major setback, the US Supreme Court held in 1989 that foreign States are immune from suit for gross human rights abuses under the ATCA, unless those cases fall within the standard statutory exceptions to sovereign immunity.[39] Sovereign immunity in the United States is governed by the Foreign Sovereign Immunities Act ('FSIA'),[40] which permits suits against foreign sovereigns

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35 *Doe I* v. *Unocal*, loc. cit. n. 17, at 890, citing *Kadic* v. *Karadzic*, loc. cit. n. 16, at 245. See also *Beanal*, loc. cit. n. 13, at 375-80; *Forti I*, loc. cit. n. 14, at 1546; *TVPA Legislative Report*, op. cit. n. 10.

36 See summaries of this doctrine in *Doe I* v. *Unocal Corp.*, loc. cit. n. 17, at 890-891; *National Coalition of Government of the Union of Burma* v. *Unocal, Inc.*, 176 F.R.D. 329, at 345-349 (C.D. Cal. 1997); *Beanal*, loc. cit. n. 13, at 376-80.

37 *Doe* v. *Unocal*, loc. cit. n. 17, at 890-891.

38 Ibid. (citation omitted). In a related case against Unocal, the same judge found the allegations of State action to be sufficient where 'defendants' challenged actions are allegedly inextricably intertwined with those of the [Burmese military] government'. *National Coalition of Government of the Union of Burma* v. *Unocal, Inc.*, loc. cit. n. 36, at 349.

39 *Amerada Hess Shipping Corp.* v. *Argentine Republic*, 488 U.S. 428 (1989).

40 28 United States Code § § 1330, 1602-1611.

only in a narrow range of cases.[41] In *Amerada Hess*, the Supreme Court refused to create an additional exception for gross human rights abuses; as a result, the court held that the Argentine government could not be sued in US courts for an attack on a civilian ship, despite the allegation of a clear violation of international law. A lower appellate court later applied this rule to bar a lawsuit against the German government for Nazi-era human rights abuses.[42]

The FSIA, however, did permit a human rights lawsuit to proceed against Argentina where the claims fell within the statutory exceptions.[43] Foreign States have also been sued successfully when responsible for the assassination of political opponents who had sought sanctuary in the United States.[44] A highly politicized 1996 amendment to the FSIA permits suits by US citizens against foreign sovereigns for torture and extrajudicial killing, but only when the defendant government is on the US government's list of foreign States designated as 'countries supporting international terrorism'.[45]

Litigation against the US government is regulated by the restrictive Federal Tort Claims Act, which permits such claims for many torts committed within the United States, but prohibits claims arising out abuses in foreign countries as well as most of those committed as intentional acts or in the implementation of discretionary policy decisions.[46] It is possible, however, to sue US government officials for abuses committed outside the scope of

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41 The exceptions are set forth in 28 United States Code § 1605; the most common exceptions apply to torts committed within the United States and to certain commercial matters.

42 *Princz* v. *Federal Republic of Germany*, 26 F.3d 1166 (D.C. Cir. 1994). *But see* dissenting opinion of Wald, J., 26 F.3d, at 1176-1184.

43 *Siderman de Blake* v. *Republic of Argentina*, 965 F.2d 699 (9th Cir. 1992). In *Siderman*, the appellate court found that the confiscation of plaintiffs' property fell within the commercial activity exception of the FSIA, as well as an exception for the expropriation of property in violation of international law; the court also held that Argentina had used the US courts in its attempt to persecute Siderman, triggering an additional FSIA exception.

44 *See*, e.g., *Domingo* v. *Republic of Philippines*, Civ. No. 82-1055 (W.D. Wash. July 17, 1984) (unpublished opinion); *Letelier* v. *Republic of Chile*, 488 F.Supp. 665 (D.D.C. 1980).

45 This FSIA exception is codified at 28 United States Code § 1605(a)(7). As of April 1999, the State Department had designated seven countries as 'countries supporting international terrorism' and therefore subject to suit under this exception: Cuba, Iran, Iraq, Libya, North Korea, Sudan, and Syria. 15 Code of Federal Regulations, part 772. Pursuant to the statute, judgements have been issued against both Cuba and Iran. *Cicippio* v. *Islamic Republic of Iran*, 18 F.Supp.2d 62 (D.D.C. 1998); *Flatow* v. *Islamic Republic of Iran*, 999 F.Supp. 1 (D.D.C. 1998); *Alejandre* v. *Cuba*, 996 F.Supp. 1239 (S.D. Fla. 1997).

46 The Foreign Tort Claims Act and the exceptions to US government liability are codified at 28 United States Code §§ 1346, 2680.

their authority – that is, if the US government does not assume legal responsibility for an official's actions, or if those acts constitute violations of the Constitution or specific statutory protections, governmental immunities will not shield the individual. Thus US courts have refused to dismiss claims against immigration officials for violations of the rights of detainees,[47] and against individual employees of the Central Intelligence Agency accused of responsibility for torture and execution in Guatemala.[48]

2 SUING CORPORATIONS IN THE UNITED STATES

Alien Tort Claims Act cases against corporations draw upon the ATCA jurisprudence governing private actors, along with two broad areas of US procedural law: principles that permit both civil and criminal claims against corporate defendants for a wide range of wrongs, and civil procedure rules that allow suits in the United States for wrongs committed in other countries.

2.1 Corporate Defendants Under Tort and Criminal Law

US law permits a wide range of both criminal prosecutions and civil tort claims against corporations.[49] Corporations are liable in tort to the same extent as a natural person. The legal consequences of the actions and mental states of a corporation's agents and employees are imputed to the corporation. As a result, 'Corporations can commit almost any kind of tort that individuals can commit, and are liable for the acts of their agents and servants in the same degree as natural persons are liable for the acts of their servants and agents'.[50] As with natural persons, the corporate employer will be held responsible where an agent's tortious act is committed within the scope of the agent's authority and in the course of the agent's employment.[51]

Similarly, well-established rules of criminal responsibility hold corporations accountable for the illegal acts of their agents, if committed within

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47 *Jama* v. *US Immigration and Naturalization Service*, 22 F.Supp.2d 353, at p. 365 (D.N.J. 1998).

48 *Harbury* v. *Deutch*, Civ. No. 96-00438 (D.D.C. March 23, 1999) (Order granting in part/denying in part defendants' Motion to Dismiss) (unpublished opinion).

49 Similar concepts permit claims against unincorporated associations as well.

50 W.M. Fletcher, et al., *Fletcher Cyclopedia of the Law of Private Corporations*, Vol. 10, rev. ed. (1993), section 4877, pp. 337-338.

51 Ibid., at p. 338.

the scope of their employment and intended to benefit the corporation.[52] The penalty for corporate criminal activity most commonly involves monetary fines; however, the corporation can also be ordered to cease certain activities or to undertake remedial actions. In extreme cases, a court can also inflict the equivalent of the corporate 'death penalty', ordering that the corporation be dissolved. As noted earlier, private parties cannot bring criminal charges within the US legal system. The common acceptance in the United States of the concept of corporate crimes, however, undoubtedly contributes to the acceptance of the related concept that corporations can be held legally accountable for human rights violations.

2.2 Jurisdiction over Extraterritorial Torts

In order to decide a case, courts in the United States require both jurisdiction over the subject matter of a dispute and personal jurisdiction over the defendant.

2.2.1 Subject Matter Jurisdiction

Most States have courts of general jurisdiction that assert subject matter jurisdiction over virtually any claim brought against a defendant over whom the court has personal jurisdiction. The rules governing federal court subject matter jurisdiction are far more restrictive, but the restrictions stem from the constitutional division of powers between the federal government and the states, not from any requirement of a connection between the underlying dispute and the courts of the United States. Thus, if a case falls within any category over which the federal courts have been granted authority –such as most, if not all, suits arising under international law, or suits between a citizen of a foreign State and a US citizen– then the federal subject matter jurisdiction requirement has been satisfied. The ATCA's grant of federal jurisdiction over torts in violation of the law of nations therefore affords federal courts subject matter jurisdiction over all claims falling with the reach of the statute, without the need to show any ad-

52 These rules have been read broadly by US courts. Thus, virtually any job-related activity may be sufficient to satisfy the 'scope of employment' requirement. Similarly, actual benefit to the corporation is generally not required; it is sufficient if it appears that the employee intended some such benefit. J.C. Coffee, 'Corporate Criminal Responsibility', in: S.H. Kadish (ed.), *Encyclopedia of Crime and Justice*, Vol. 1 (1983) p. 253. Finally, where a specific intent, or *mens rea*, is required as an element of a crime, courts may find the requirement satisfied by the intent of the actor, the intent of a supervisor, or even the 'collective' intent of a group of employees, even if no one individual intended to commit the crime. Ibid., at pp. 255-256; R.S. Gruner, *Corporate Crime and Sentencing* (1994) p. 263.

ditional connection to the United States. Thus, if a case alleges a 'tort ... in violation of the law of nations', the federal court has subject matter jurisdiction even in the absence of any other tie to the United States.

2.2.2 *Personal Jurisdiction*

US courts recognise two central categories of personal jurisdiction over both individuals and corporations: specific jurisdiction and general jurisdiction.[53] The rules governing specific jurisdiction are surprisingly complex and vary among the 50 states, but most states assert personal jurisdiction over a defendant where the lawsuit arises out of the defendant's in-state activities. The courts evaluate the defendant's contacts with the State, looking at both the nature of those contacts and their relationship to the litigation.

General personal jurisdiction is a much broader concept, affording a court the authority to resolve any and all claims against a defendant, no matter where the underlying events took place. Conflict of laws principles may point the court to apply the law of another US state or a foreign State, or the court may choose as a matter of discretion to decline to hear the case,[54] but the court has the *power* to decide such a case. Individuals are subject to general jurisdiction where domiciled, and corporations in the State of incorporation. Most of the ATCA lawsuits against individual defendants have involved defendants living in the United States, and most of the cases filed against corporate defendants have been filed in the State in which the defendant is incorporated.

In addition, individuals are subject to general jurisdiction if they are served with a complaint while physically present in a State. Thus, an individual who is served while visiting or passing through a State is thereby subject to the court's authority to resolve all claims alleged in the lawsuit, even if the individual has no other connection to the forum State. This

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53 These concepts have developed in the United States to regulate assertions of jurisdiction among the 50 states. Each state has an independent legal system, bound only by the minimal rules guaranteed by the US Constitution, and each has its own rules as to personal jurisdiction; although there are similarities among those sets of rules, there are also significant differences.

The federal courts sitting in each state apply the local state's personal jurisdictional rules to most claims, whether the underlying claim is based on state or federal law. For federal claims, in two narrow situations, a federal court may look to the *nation-wide* contacts of a foreign defendant, rather than only contacts with the particular state in which the claim is filed: (1) where the defendant does not have sufficient contacts with any one state to support jurisdiction, but the assertion of jurisdiction based on nation-wide contacts would satisfy the constitutional requirement of due process, or (2) where a federal statute authorizes nation-wide service. See Federal Rules of Civil Procedure, Rule 4(k).

54 See discussion of *forum non conveniens* in next section.

form of 'tag' or 'transient' jurisdiction has been upheld by the US Supreme Court as recently as 1990,[55] and has been used as a basis for some of the ATCA cases against individual defendants.[56]

A parallel notion of 'physical presence' applicable to corporations relies on the concept that a corporation that is 'doing business' in a State is thereby 'present' in that State. As a result, most of the states permit the assertion of general jurisdiction over corporations 'doing business' in the State. The relevant 'business' must entail some kind of continuous or systematic involvement with the State, rather than isolated contacts, but the exact standard varies among the 50 states. The presence of an agent or an office may be sufficient to trigger general jurisdiction over all claims asserted against the corporation. Under this principle, many multinational corporations are subject to suit in the United States for conduct occurring in other countries. The threshold requirement is that they meet the 'doing business' standard in the State in which the lawsuit is filed.

The US courts have struggled to determine how to apply the 'doing business' standard to multinational corporations with subsidiaries in the United States. The states in general do not automatically attribute *all* of the activities of *all* subsidiaries to the parent company – but neither do they permit the legal fiction of separate corporate entities to insulate the parent from liability for the subsidiaries' activities.

Drawing the line has proved difficult in corporate litigation, and ATCA litigation has been no exception. Determining the jurisdictional significance of multinational corporate activities in the United States has led to heated litigation and multiple opinions in two pending human rights cases.

In *Wiwa* v. *Royal Dutch Shell*,[57] the plaintiffs sued corporations involved in oil extraction in Nigeria, alleging complicity in human rights abuses that included the summary execution of Ken Saro-Wiwa, as well as torture and other violations. They asserted jurisdiction in the United States on several theories, including nationwide contacts; attribution of the activities of various subsidiaries to the parent companies; and, on the basis of the actions of defendants' agent in the state of New York. A federal magistrate recommended against a finding of jurisdiction on all of these theories. The district court judge disagreed, however, relying in particular on the presence of the

55 *Burnham* v. *Superior Court of California*, 495 U.S. 604 (1990).

56 In *Kadic* v. *Karadzic*, loc. cit. n. 16, the defendant was served while on a visit to the United States.

57 *Wiwa* v. *Royal Dutch Petroleum Co. and Shell Transport and Trading Co.*, Civ. No. 96-8386 (Order granting Motion to Dismiss, 25 Sept. 1998) (unpublished opinion).

agent, an individual paid by the defendants to maintain an office and represent the defendants in New York.[58]

In *Doe* v. *Unocal*, however, a co-defendant, the French oil company Total, won its motion to dismiss the claim for lack of jurisdiction.[59] The court refused to consider nationwide contacts or to hold Total responsible for the actions of its multiple California subsidiaries. In addition, the court found that Total's direct contacts with Unocal in California were insufficient to support specific jurisdiction over Total.[60]

2.3 Corporate Litigation Applying US Domestic Law

US corporations operating abroad may be subject to claims arising under domestic US law. A lawsuit on behalf of Palestinians killed after exposure to tear gas, for example, charged that the tear gas manufacturer had violated US tort standards in its manufacture and sale of the deadly product.[61] Several claims filed in California rely on a strict state law that prohibits unfair business practices; the cases charge the corporations with a range of deceptive practices, including misrepresenting the conditions under which their products are manufactured.[62] A lawsuit recently filed on behalf of workers in a US protectorate, the Pacific island of Saipan, relies on several applicable US federal labour statutes.[63] Again, these cases are possible because of the combination of corporate tort principles and US jurisdictional rules. Nevertheless, the cases do face significant hurdles: courts may choose to apply the law of the place where the abuses took place, rather than US law, or may dismiss the case in favour of litigation in another forum.[64] If plaintiffs can show that significant tortious acts took place within the United States – decisions about labour practices, for example, or the manufacture of a product exported for use abroad – the courts are less likely to grant a discretionary dismissal, and more likely to apply US law to the claim.

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58 As discussed in the following section, however, the case was dismissed on the basis of *forum non conveniens*. An appeal is currently pending.

59 *Doe I* v. *Unocal Corp.*, 27 F.Supp.2d 1174 (C.D. Cal. 1998) (Order granting Total's Motion to Dismiss).

60 The dismissal of Total is currently pending on appeal.

61 The plaintiffs in *Gurab* v. *Federal Laboratories*, Civ. No. 2958 (Common Pleas, Philadelphia, PA), recently settled their claim with the manufacturer.

62 *Kasky* v. *Nike*, Civ. No. 99446 (San Francisco Superior Court, filed 20 April 1998). The case was dismissed without a written opinion on 8 Feb. 1999, and is currently on appeal.

63 See *Doe* v. *Gap*, Civ. No. 99-329 (C.D. Cal., filed January 13, 1999), and related state complaints.

64 See discussion of *forum non conveniens* in the following section.

3 ATCA HUMAN RIGHTS LITIGATION AGAINST CORPORATIONS

The foundation for ATCA litigation against corporations rests on standard rules as to corporate liability and extraterritorial jurisdiction discussed above, along with ATCA jurisprudence as to private party liability for international human rights violations.[65]

Under the same principles applicable to individual private actors, corporate actors can be held liable for such violations in two situations: when they are responsible for violations of international human rights norms that apply to private actors, or when they act in complicity with government officials to commit other human rights violations.[66] Thus, a corporation can be held liable for using slave labour, as alleged in the *Doe v. Unocal* case,[67] or when responsible for genocide, as alleged in *Beanal v. Freeport*,[68] since both of these international law prohibitions apply to private actors as well as government officials.

On the other hand, corporate actors can be held liable for violations requiring State action, such as torture and summary execution, when they act in complicity with State actors. As the *Beanal* court concluded, '[A] corporation found to be a State actor can be held responsible for human rights abuses which violate international customary law'.[69] Applying the standards developed in dozens of US domestic civil rights cases, corporations will be found to satisfy the State action requirement when they engage in 'joint action' with a government or government officials or conspire with

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65 Further details about the cases discussed in this section and related claims can be found in J. Green and P. Hoffman's contribution to this volume.

66 Similar doctrines permit human rights litigation against unincorporated associations. For example, the plaintiff in *Belance* v. *FRAPH*, Civ. No. 94-2619 (E.D.N.Y., filed 1 June 1994), seeks to hold the Front for Advancement and Progress in Haiti (FRAPH), a terrorist organisation, liable for her torture in Haiti. The complaint charges that the association acted in complicity with the illegal Haitian military regime, and was 'present' in New York because it had opened an office with a representative in New York City. A decision on plaintiff's motion for default judgement is pending; the judge has asked for further briefing on the jurisdictional issues.
In *Doe* v. *Islamic Salvation Front*, loc. cit. n. 20 (suit against Islamic fundamentalist group sued for attacks on women and girls), the defendant association may be held liable as an unincorporated association and/or as a de facto government.

67 *Doe I* v. *Unocal Corp.*, loc. cit. n. 17.

68 *Beanal* v. *Freeport-McMoran*, loc. cit. n. 13, at pp. 370-373. In *Beanal*, however, the district court dismissed plaintiff's third amended complaint, holding that even as amended it still did not adequately allege genocide, *Beanal* v. *Freeport-McMoran, Inc.*, 1998 WL 92246 (E.D. La. March 3, 1998) (unpublished opinion); an appeal is pending.

69 *Beanal*, loc. cit. n. 13, at p. 376.

or otherwise act in concert with those officials.[70] Corporations will also be considered State actors where they perform a public function – taking responsibility for law enforcement, for example, or running a 'company town' in which the basic functions of the State are fulfilled by corporate agents. In a suit against a private corporation operating a detention facility, for example, a court held that the defendant corporation and its employees were State actors because they were 'acting under contract' with the US government and were 'performing governmental services'.[71]

Although most ATCA cases concern violations occurring abroad, some cases do address international law violations within the United States. In the case on behalf of immigrants detained at an immigration detention facility in the United States, a trial court judge recently upheld the immigrants' right to sue their jailers for cruel, inhuman or degrading treatment and other human rights violations.[72] The immigration officials had contracted with a private corporation to operate the facility; the defendants include the corporation, as well as both private individuals and government officials.

The more common ATCA cases involve abuses that take place in other countries. Plaintiffs often choose to sue in US courts because the defendants are present in the United States; other relevant factors include the favourable ATCA jurisprudence, as well as the danger of reprisals or lack of an independent judiciary in their home country; access to *pro bono* legal representation in the United States; more favourable US rules as to pre-trial discovery and punitive damages; and the greater likelihood of collecting damages against a US defendant if the suit is successful.

One of the most advanced ATCA corporate lawsuits at this time is *Doe* v. *Unocal*, a case filed in California on behalf of a group of Burmese citizens who have suffered torture, forced labour and other human rights violations.[73] The case alleges that Unocal and the Burmese military government are engaged in a joint venture to build an oil pipeline, in the course of which they have inflicted gross human rights violations on the local residents. In an initial ruling on the validity of the legal theory underlying the case, the trial court judge ruled that the company can be held liable under the ATCA for actions taken in concert with the military government, including torture, and can be held independently liable for the use of forced labour. The parties are currently involved in pre-trial discovery, with a trial possible early in the year 2000.

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70 Plaintiff in *Belance* v. *FRAPH*, loc. cit. n. 66, has applied similar theories of private party complicity in State action in her lawsuit against the FRAPH organisation.

71 *Jama* v. *US Immigration*, loc. cit. n. 47.

72 Ibid.

73 *Doe I* v. *Unocal Corp.*, loc. cit. n. 17.

On a similar timetable, *Jama* v. *Immigration and Naturalization Service,* is also currently in discovery. The case challenges gross human rights abuses allegedly committed in a US immigration detention facility. As in *Doe* v. *Unocal,* the trial court judge ruled that the suit can go forward, holding that the private corporate defendant can be sued for international human rights violations committed at the facility.

Beanal v. *Freeport-McMoran*,[74] however, has run into greater difficulty. In *Beanal*, plaintiffs alleged that the corporate defendant's mining operations in Indonesia had caused such destruction as to amount to genocide and environmental harm in violation of international law. They were unable, however, to convince the trial court judge that the facts they alleged amounted either to genocide or to an internationally cognizable environmental violation. The case is currently on appeal.

Other pending cases against corporate defendants, described in detail in the contribution by J. Green and P. Hoffman to this volume,[75] include a series of cases arising out of the Holocaust,[76] and a case filed against clothing manufacturers for a series of violations in their factories in Saipan.[77] In addition, two cases are currently pending against unincorporated defendants: *Belance* v. *FRAPH*[78] seeks to hold the Front for Advancement and Progress in Haiti (FRAPH), a terrorist organisation, liable for plaintiff's torture in Haiti, while *Doe* v. *Islamic Salvation Front (FIS)*[79] seeks damages from an Islamic fundamentalist group for human rights violations against women and girls.[80]

3.1 Forum Non Conveniens

The *forum non conveniens* doctrine grants a judge the discretion to dismiss a case if an adequate alternative forum exists, and if, after considering a list of public and private interests, it appears that trial in another country would be more appropriate. The factors include the relationship of the

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74 *Beanal* v. *Freeport-McMoran,* loc.cit. n. 13; *Beanal* v. *Freeport-McMoran, Inc.*, loc. cit. n. 68 (unpublished opinion) (appeal pending).

75 See J. Green and P. Hoffman's contribution to this volume.

76 Ibid.

77 *Doe* v. *Gap*, loc. cit. n. 63.

78 Loc. cit. n. 66.

79 Loc. cit. n. 20.

80 Two cases raising the issue of *forum non conveniens* are discussed in the following section, *Jota* v. *Texaco*, loc. cit. n. 21, and *Wiwa* v. *Royal Dutch Shell*, loc. cit. n. 57. In addition, a corporate defendant was dismissed without written explanation in *Eastman Kodak* v. *Kavlin*, loc. cit. n. 33, apparently for failure to establish personal jurisdiction.

litigation to the particular US state in which it is filed, as well as the location of witnesses and other evidence. Most human rights cases will survive a *forum non conveniens* challenge because the courts of the place of the abuse are not open to the plaintiffs, often because bringing such a lawsuit would endanger the plaintiffs' lives or because the judicial system simply will not rule on such issues.[81] Trial courts, however, have dismissed two cases on the basis of *forum non conveniens*; one of the two has been reversed and remanded to the trial court for reconsideration, while the other is currently under appeal.

In the *Wiwa* case against Royal Dutch Petroleum arising out of actions in Nigeria,[82] all parties recognised that the courts of Nigeria did not present a viable alternative, but the trial court found that the case should be tried instead in England, where one of the co-defendants is incorporated; that decision is currently on appeal.

A series of claims against Texaco for egregious environmental harm in Ecuador were dismissed by the trial court in favour of suit in Ecuador, despite the Ecuadorean government's argument that plaintiffs would have a better opportunity to obtain redress in the courts of the United States.[83] The *Jota* appellate court, however, ordered the trial court to reconsider its *forum non conveniens* dismissal, taking into account plaintiffs' allegation that most of the key decisions were made in New York. The appellate court also ordered the trial court to consider plaintiffs' argument that application of *forum non conveniens* is inappropriate where Congress has indicated an intent to permit human rights litigation to proceed in the United States, an argument made by the plaintiffs in *Wiwa* as well.[84] The *Jota* court instructed the lower court to consider plaintiffs' claim 'that to dismiss the present case would frustrate Congress's intent to provide a federal forum for aliens

81 In the absence of a military oppressive regime, US courts are often unwilling to find the courts of a foreign nation to be inadequate. However, even if a country's judicial system is functioning and available to resolve more typical litigation, those courts may be unable to objectively resolve a human rights claim or the claim of a particular human rights plaintiff. In *Eastman Kodak* v. *Kavlin*, loc. cit. n. 31, at 1082-1087, the court found that the defendants had failed to meet their burden of showing that Bolivia constituted an adequate alternative forum, in light of extensive evidence of corruption in the Bolivian legal system, coupled with the claim that the Bolivian courts had already been used to violate the plaintiffs' rights.

82 *Wiwa* v. *Royal Dutch Shell*, loc. cit. n. 57. This decision is also pending on appeal.

83 *Jota* v. *Texaco*, loc. cit. n. 21. The case has been complicated by several shifts in the position of the government of Ecuador.

84 See K.L. Boyd, 'The Inconvenience of Victims: Abolishing Forum Non Conveniens in U.S. Human Rights Litigation', 39 *Va. J. Int'l L.* (1998) at pp. 41-87.

suing domestic entities for violation of the law of nations'[85]; a decision is currently pending.

Studies of *forum non conveniens* dismissals have shown that the cases are rarely, if ever, litigated in the home country after a dismissal in the United States.[86] At this point, the US courts offer an opportunity to remedy international human rights violations that simply is not available in other nations. Until such time as other states, or the international community as a whole, offer victims of human rights violations meaningful options to obtain redress, dismissals on the basis of *forum non conveniens* deprive such plaintiffs of their only chance at a remedy.

CONCLUSION

Human rights litigation against corporations rests soundly on the foundation of several US legal principles: corporate accountability for tortious acts, subject matter jurisdiction over extraterritorial torts, personal jurisdiction over entities incorporated or doing business in the United States, and the line of cases applying the Alien Tort Claims Act to private parties.

As the discussion of these cases makes clear, however, such cases nevertheless face daunting legal hurdles. ATCA litigation is possible only where plaintiffs have suffered violations that meet the strict requirements of the statute, which often includes a State action requirement, and where a defendant responsible for the abuses is subject to the jurisdiction of the court. Where the basic facts appear to be in place, cases may yet founder on issues of jurisdiction and *forum non conveniens.*

Moreover, no matter how sound the legal theory, proof of the underlying facts is bound to be extremely difficult, especially when the events took place in another country – and even more so if the plaintiffs risk ongoing abuse if they openly investigate their claims. Compounding the hurdles, corporate defendants usually have extensive resources at their command, while plaintiffs generally rely on some combination of *pro bono* lawyers or a legal team advancing the costs of litigation out of their own pockets.

The impact of such litigation is likely to be limited as well so long as the cases are largely filed only in the United States. A global response to the global problems caused by transnational corporations requires either an international means to impose accountability for human rights abuses, or, at least, domestic remedies in countries around the world.

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85 *Jota* v. *Texaco,* loc. cit. n. 21.

86 See J. Duval-Major, 'One Way Ticket Home: The Federal Doctrine of Forum Non Conveniens and the International Plaintiff', 77 *Cornell L. Rev.* (1992) p. 650.

Nevertheless, despite these limitations, the cases raise the possibility of imposing significant financial penalties on the corporate defendants. The damage awards in cases against individual defendants have been huge, ranging from $1.5 million against an indigent Ethiopian individual,[87] to over $2 billion (US) against Ferdinand Marcos, the ex-dictator of the Philippines.[88] Collection of these judgements has been difficult: most of the individual defendants have been able to hide their assets outside of the United States to avoid payment. Corporations, however, will have greater difficulty hiding assets. And moving assets will be less successful as a tactic to avoid payment: a multinational corporation may be unwilling to forgo its business activities in the United States, and so long as any assets are subject to US jurisdiction, a US court will be able to enforce its judgement.

Moreover, human rights lawsuits against corporations contribute to the development of an important legal principle: corporations can be held accountable for human rights abuses inflicted in the course of their economic activities. Thus, in addition to the possibility that individual cases may obtain redress for their plaintiffs, each case also has the enormous potential recognised by the court in *Filártiga* – to constitute 'a small but important step in the fulfilment of the ageless dream to free all people from brutal violence'.[89]

87 *Abebe-Jiri* v. *Negewo*, Civ. 90-2010 (N.D. Ga. Aug. 20, 1993).

88 *In re Estate of Marcos Litigation*, MDL 840 (D. Haw. Feb. 3, 1995), aff'd, *Hilao* v. *Estate of Marcos*, 103 F.3d 789 (9th Cir. 1996). See also Stephens, op. cit. n*, Appendix K, Summary of Damage Awards; B. Stephens, 'Litigating Customary International Human Rights Norms,' 25 *Ga. J. Int'l & Comp. L.* (1995/1996) p. 191, at p. 193.

89 *Filártiga* v. *Peña-Irala*, loc. cit. n. 6, at 890.

CHAPTER 8

US Litigation Update

JENNIFER GREEN AND PAUL HOFFMAN*

[Editor's Note: The following chapter presents a number of lawsuits in the US against MNCs, based on alleged violations of international law. One significant addition to this list is the lawsuit *Bowoto et al.* v. *Chevron*, filed in the San Francisco federal district court in the Northern District of California. The lawsuit, claiming Chevron oil company has violated international human rights standards by its alleged role in the killing of several Nigerian protestors, will proceed in US federal court despite the company's move to transfer the case to Nigeria.

The claim, brought under the Alien Tort Claims Act, was filed by the Center for Constitutional Rights on behalf of Nigerians who were injured while protesting the company's activities in the oil-rich but impoverished Delta region. On may 25, 1998, over 100 activists took over Chevron's Parabe off-shore oil platform. The ensuing stand off, which lasted for four days, only ended when members of the notorious Nigerian security forced, The Mobile Police, landed on the platform on Chevron transports. In the ensuing melee, two activists were killed and several were injured.

US District Judge Charles Legge rejected Chevron's argument that Chevron's California-based parent company could not be held responsible for the activities of its Nigerian subsidiary. However, Judge Legge did not address the substance of the allegations against Chevron. A motion to dismiss the case by Chevron is likely to be heard in the late Spring or Summer of 2000.]

* Jenifer Green is with the Center for Constitutional Rights. Paul Hoffman is with the law firm of Postwick & Hoffman, and is a member of the International Executive Committee of Amnesty International.

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1 CASES AGAINST CORPORATIONS

Doe v. Unocal, 963 F.Supp. 880 (C.D. Cal. 1997),
NCGUB v. Unocal, 176 F.R.D. 329 (C.D. Cal. 1997)

These cases have been in an intensive discovery phase, including numerous depositions in the United States and Asia. For months the parties and the Court struggled over the terms of a Protective Order that would govern the defendants' use of plaintiff identifying information in their investigation because of the security risks to the plaintiffs. These issues, and issues regarding the scope of privileges in discovery have taken a prominent role in the litigation of the case. The District Judge has dismissed the giant French oil company Total from the *Doe v. Unocal* case for lack of personal jurisdiction and this decision has been appealed.

The Court had stated that it wants most of the discovery completed by September 1999 and for a hearing on expected summary judgement motions to be set in December 1999. The trial is scheduled to start in the late spring of 2000.

Wiwa v. Royal Dutch Petroleum (Southern District of New York)

This case charges Royal Dutch Petroleum Company and Shell Transport and Trading Company (Royal Dutch/Shell) with complicity in the November 10, 1995 hanging of Ken Saro-Wiwa, John Kpuinen, two of nine leaders of MOSOP (Movement for the Survival of the Ogoni People), the torture and detention of Owens Wiwa, and the wounding of a woman who was peacefully protesting the bulldozing of her crops in preparation for a Shell pipeline, who was shot by Nigerian troops called in by Shell. The case was brought under Alien Tort Claims Act and alleges violations of the Racketeer Influenced and Corrupt Organizations Act (RICO).

Defendants moved to dismiss both the initial and the amended complaints on the grounds of lack of personal jurisdiction over Royal Dutch/Shell, *forum non conveniens* (defendants argued that the case should be heard in the Netherlands or England), and lack of subject matter jurisdiction (defendants argued, *inter alia*, that ATCA did not apply to a corporation and that the claim was precluded by the political question and act of state doctrines, as well as Nigerian law on corporate liability). The court then ordered preliminary discovery on the question of personal jurisdiction over the corporation.

Final briefing on the motion to dismiss was completed at the end of September and the motion was argued December 5, 1997. On March 31, 1998, Magistrate Judge Henry Pitman recommended that the Court grant defendants' motion to dismiss (1) for lack of personal jurisdiction and (2) pursuant to the doctrine of *forum non conveniens*. Both parties filed timely

objections to those portions of the Magistrate Judge's Recommendations and Report with which they disagreed. On September 25, 1998, Judge Kimba Wood concluded that personal jurisdiction was appropriate in New York, but adopted and accepted the Report in concluding that defendants' motion to dismiss should be granted for *forum non conveniens* and that England was a more convenient forum.

Plaintiffs filed a Motion for Reconsideration of the dismissal for *forum non conveniens*, arguing that the Court failed to impose the conditions necessary to ensure that an adequate forum against all defendants was available and that *forum non conveniens* dismissal of their claims brought under the Alien Tort Claims Act was inappropriate.

Plaintiffs' Motion for Reconsideration was granted in part but denied in part. The Court granted plaintiffs' motion solely to the extent that it imposed the following conditions on its dismissal for *forum non conveniens*: that defendants consent to service of process, comply with all applicable discovery rules, consent to pay any judgement rendered, waive any security bond that might be required and waive any statute of limitations defence if the action is committed within one year of the final disposition of this matter. The Court denied plaintiffs' motion to condition dismissal on defendants' waiver of procedural doctrines that plaintiffs argued could preclude plaintiffs from any remedy before English courts.

The Court further denied plaintiffs' motion for reconsideration made in light of a Second Circuit October 5, 1998 decision. In *Jota v. Texaco, Inc.*, 157 F.3d 153 (2d Cir. 1998). Plaintiffs argued that the District Court should determine that a *forum non conveniens* dismissal is inappropriate in this action brought under the Alien Tort Claims Act, and that a dismissal in this case would vitiate Congressional intent. Plaintiffs have appealed the ruling; defendants have cross-appealed the ruling on personal jurisdiction. The briefing will be completed by June 1999.

The plaintiffs are represented by Center for Constitutional Rights, and attorneys Julie Shapiro, Paul Hoffman, Lee Crawford Boyd, and Jody Kelley, Alex Ward and Greg Lisa of Jenner & Block.

Doe v. Gap, Civ. 99-329 (filed C.D. Cal. January 13, 1999)

Class action lawsuit challenges garment production system on US soil based upon peonage and involuntary servitude, and violations of the rights of women, under which tens of thousands of foreign guest workers work for unfair wages in unlawful sweatshop conditions in the Commonwealth of the Northern Mariana Islands. The defendants are garment contractors and retailers and manufacturers of the CNMI-manufactured garments sold in the U.S.A.: The Gap, Inc., The Associated Merchandising Corp., Cutter & Buck, Inc., Dayton-Hudson Corp., J.C. Penney Company, Inc., J. Crew

Group Inc., Jones Apparel Group, Inc., Lane Bryant, Inc., The Limited, Inc., The May Department Stores Company, Nordstrom Inc., Oskosh B'Gosh, Inc., Sears Roebuck and Company, Tommy Hilfiger USA, Inc., Wal-Mart Stores Inc., Warnaco Group Inc., American Pacific Textile, Inc., Concorde Garment Manufacturing Corp, Diorva Saipan Ltd. Global Manufacturing Inc., Hansae (Saipan), Inc., Marianas Garment Manufacturing, Inc., Micronesian Garment Manufacturing Inc., Mirage (Saipan), Inc., Top Fashion Corp., United International Corp, U.S. CNMI Development Corp. The complaint alleges violations of the Alien Tort Claims Act, the Racketeer Influenced and Corrupt Organizations Act ('RICO') and torts actionable under the federal indentured servitude and anti-peonage statutes and state common and international law.

The case was brought by the law firms of Milberg, Weiss, Bershad, Hynes & Lerach; Altshuler, Berzon, Nussbaum, Berzon & Rugin, Galloway & Associates, and Bushnell, Caplan & Fielding, LLP.

Two related cases were filed in 1999, one under the Fair Labor Standards Act in federal court and another in state court by Global Exchange, Sweatshop Watch and UNITE charging unfair business practices under California Business and Professions Codes. (*Union of Needletrades Industrial and Textile Employees v. The Gap*, 300474, plaintiffs alleged clothing retailers including The Gap Inc., Tommy Hilfiger and J. Crew deceived the public about labour abuses at their Saipan factories and that the manufacturers clothes are mislabelled. For more information, see www.saipan.com.

Eastman Kodak v. Kavlin, 978 F. Supp. 1078 (S.D.Fla. 1997)

Eastman Kodak employee Juan Jose Carballo brought suit against Kodak subsidiary Casa Kavlin and one of its officers, Susuana Kavlin. Carballo claimed that false criminal charges were brought against him and that he was maltreated and arbitrarily detained for eight to ten days in Bolivia. The defendant filed a motion to dismiss the complaint on the grounds of lack of personal jurisdiction, *forum non conveniens* and failure to state a claim under Bolivian law and the Alien Tort Claims Act.

The district court rejected this motion. The court's opinion contained a detailed analysis of arbitrary arrest and detention and held that those who conspire with state actors are liable. An evidentiary hearing on personal jurisdiction was held and the corporate defendant was dismissed. The case against Susana Kavlin proceeded. On February 12, 1998, a Bolivian court entered a final judgement against Eastman Kodak and awarded damages to the plaintiff Casa Kavlin, S.A., the former defendant in the U.S. action. In March 1998, defendants moved for leave to amend their answer and affirmative defences, adding the affirmative defence of collateral estoppel. The court rejected this motion because of 'the current state of the judicial system

and Defendant's alleged influence over litigation in Bolivia'. The case recently reached a successful settlement for plaintiffs; the terms of the settlement are undisclosed.

Beanal v. Freeport-McMoran, 969 F. Supp. 362 (E.D. La. 1997)[1]
Plaintiff Tom Beanal, Indonesian citizen and member of Amungme tribe, filed class action against Freeport McMoran for cultural genocide, human rights violations and environmental torts for open pit copper, gold and silver mine at the Grasberg Mine in Indonesia. On April 10, 1997, the court ruled that the plaintiff had standing to allege cultural genocide of the Amungme tribe, certain human rights violations and environmental torts, but stated that plaintiff should amend the complaint. 969 F.Supp. 362 (E.D. La. 1997)). Defendants' motion to strike the second amended complaint was granted on August 7, 1997 for failure to state a claim, 1997 U.S. Dist. LEXIS 12001. On March 3, 1998, the court granted defendant's motion to strike the third amended complaint and dismissed with prejudice plaintiffs's claims. Plaintiffs appealed to the Fifth Circuit. Briefing was completed in January 1999. Plaintiffs are represented by Martin Regan, Regan & Boishea, a New Orleans law firm.

Amici curiae were filed by EarthJustice and EarthRights International arguing environmental human rights violations constitute customary international law violations. The Center for Constitutional Rights, Center for Justice and Accountability and Four Directions Council filed an *amicus* arguing that the court erred in its ruling on genocide, failing to properly analyze the standards for cultural genocide and ignoring customary international law which provides a right to culture.

Alomang v. Freeport-McMoran, 97-1349; 718 So. 2d 971 (La.App. 4 Cir, 1998)
Yosofa Alomang brought a class action in state court of Louisiana charging state torts related to cultural genocide and environmental violations. A March 1998 appellate ruling reversed the lower court dismissal, rejecting defendants' arguments that there were no state law violations alleged, that the defendants was a separate legal entity from the corporation in Indonesia, that the Act of State doctrine precluded the claims and that the Indonesian government was an indispensable party. The case was remanded for further proceedings consistent with the opinion. Rehearing was granted April 15, 1998. Reported at 1998 La. App. LEXIS 2119. Another motion to dismiss was denied on February 25, 1999.

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1 [Editor's note: On November 29, 1999, the Fifth Circuit Court of Appeals upheld the dismissal of the case on the grounds that plaintiff had failed to provide adequate factual underpinning for his claims.]

Jota v. Texaco, Inc., 157 F.3d 153 (2d Cir. 1998)

Two consolidated cases, *Aguinda v. Texaco*, S.D.N.Y. Dkt. No. 93 Civ. 7527 (on behalf of residents of the Oriente region of Ecuador) and *Ashanga v. Texaco Inc.*, S.D. Dkt. No. 94 Civ. 9266 (residents of Peru), allege that Texaco polluted the rain forests and rivers in Ecuador and Peru during oil exploration activities in Ecuador between 1964 and 1992: dumping toxic by-products in local rivers, leaked petroleum into the environment, resulting in physical injuries, including pre-cancerous growths.

In 1993, Texaco moved to dismiss on the grounds of *forum non conveniens*, comity, and failure to join an indispensable party – the Republic of Ecuador. The Ecuadoran ambassador wrote a letter to the court in support of this motion. The late Judge Vincent Broderick reserved decision on the motion. *Aguinda v. Texaco, Inc.*, No. 93 Civ. 7527, 1994 WL 142006 (S.D.N.Y. 1994).

After a period of discovery, Texaco renewed its motion to dismiss. Counsel for the Republic of Ecuador again supported the motion and submitted an affidavit by the Ecuadoran ambassador. The court granted Texaco's motion to dismiss as to the Aguinda plaintiffs. *Aguinda v. Texaco, Inc.* 945 F.Supp. 625 (S.D.N.Y. 1996), for *forum non conveniens* and comity, citing *Sequiha v. Texaco, Inc.,* 847 F.Supp. 61 (S.D. Tex. 1994), and failure to join indispensable parties (Petroecuador and the Republic of Ecuador). Plaintiffs filed a motion for reconsideration and the Republic of Ecuador filed a motion to intervene, this time in favour of plaintiffs due to a change in government, which resulted in the Ecuadoran government's statement that the case should be heard in the U.S. court. The District Court (Judge Rakoff) denied both motions. The plaintiffs appealed.

On October 5, 1998, the Second Circuit ruled that dismissal on the ground of *forum non conveniens* was erroneous in the absence of a condition requiring Texaco to submit to jurisdiction in Ecuador. The Second Circuit ordered the District Court to make an evaluation of whether a dismissal on the grounds of *forum non conveniens* 'would frustrate Congress's intent to provide a federal forum for aliens suing domestic entities for violation of the law of nations'. On the question of the failure to include indispensable parties, the Court ruled that it was necessary on remand for the District Court to reconsider this issue in light of the government of Ecuador's changed litigation position. The case was remanded and oral argument was heard in February 1999. The ruling by the District Court is pending.

The plaintiffs-appellants are represented by the Law Office of Cristobal Bonifaz; Kohn, Swift & Graf, and Sullivan & Damen. The government of Ecuador and Petroecuador (movant-appellants) are represented by Ronald Minkoff.

Kasky v. Nike, San Francisco Superior Court

This suit charges Nike Inc. with violating California Business and Professions Code 17200. The suit alleges that workers who make Nike products in China, Indonesia and Vietnam are not paid living wages and must work long hours in dangerous working conditions for little pay, and the company violated 17200 because Nike mislead the public about the working conditions of labourers, claiming that its contracts with suppliers forbid slave labour, corporal punishment and other abusive practices.

Defence counsel moved to dismiss the case based on a First Amendment defence, saying that Nike can't be sued for speech made in 'self-defense' after its labour practices were subject to public criticism. On February 8, 1999, Judge David Garcia dismissed the case without written opinion. Plaintiffs' counsel Allan Caplan of Bushnell, Caplan & Feilding announced that plaintiffs would appeal. Plaintiffs are also represented by Milberg, Weiss, Bershad, Hynes & Lerach.

Gurab v. Federal Laboratories, Inc.& TransTechnology Corp.

In 1992 CCR filed a claim in Pennsylvania state court on behalf of two of the plaintiffs in a related case in the Western District of Pennsylvania, *Abu-Zeinah et al. v. Federal Laboratories, Inc. and TransTechnology Corp.* (W.D. Pa.)

The suit was brought by families of Palestinians who were killed by exposure to CS gas, a lethal 'riot control' weapon manufactured and distributed by Federal Laboratories, Inc. and TransTechnology Corp. It alleged that the companies sold CS gas to the Israeli armed forces despite their knowledge that Israel's use of CS gas had resulted in many civilian deaths.

The plaintiffs asserted that even though this gas was designed to be sprayed outdoors, Israeli forces fired it directly at people or in enclosed or confined residential spaces without giving any warning or allowing people any means of escape, thereby exposing peaceful civilians not involved in 'rioting' or other unlawful activity to the gas. International human rights groups, including the UN Relief and Works Agency and Amnesty International, reported that at least 80 Palestinians have died since December 1987 as a result of exposure to CS gas.

While the federal claim was still active, CCR did not pursue the state action, but upon dismissal of the federal claim on jurisdictional grounds in December 1994, CCR re-activated this suit. Federal Labs and TransTechnology moved to dismiss the case, filing an almost identical motion to that filed in federal court (which the federal court denied). CCR opposed this motion. In fall 1996, the court rejected the defendants' new attempts to end the case and ruled that plaintiffs would be permitted to go to trial. A second

motion to dismiss was filed and rejected in 1998. The case was set for trial in 1999; however, a settlement has been reached, subject to court approval.

2 SELECTED HOLOCAUST CASES

Since 1996, a series of cases have been brought against Swiss, Austrian and German banks for the return of money belonging to Holocaust victims, against European insurance companies for refusing to pay out on insurance policies purchased by Holocaust victims, German and U.S. companies for the use of slave labour during the Holocaust, and claims concerning the Nazi theft of art. A forthcoming article summarizes the 46 cases pending and gives a detailed legal analysis of their development. Michael Bazyler, 'Litigating the Holocaust', *University of Richmond Law Rev.* (1999). The cases summarized below are discussed in more detail in Professor Bayzler's articles.

In addition to Professor Bayzler's article, a recent article by Anita Ramasastry discusses the Swiss bank litigation: 'Secrets and Lies? Swiss Banks and International Human Rights', 31 *Vand.J. Transnat'l L.Rev.*, p. 325 (1998).

2.1 Cases Against Swiss Banks

In re Holocaust Victims Assets Litigation

Series of three unjust enrichment cases brought in the Eastern District of New York against three Swiss banks. In mid-August 1998, a settlement agreement was reached for $1.2 billion. The defendants made the first installment into a trust account in November 1998; distribution will be left to a Special Master appointed by the court.

2.2 Cases Against German and Austrian Banks

Watman v. Deutsch Bank, et al. (No. 98 Civ. 3938) (S.D.N.Y. filed June 3, 1998) and *Duveen v. Deutsch Bank* (No. 98 CV 06620) (E.D.N.Y., filed October 28, 1998).

Two class action suits against German and Austrian banks for, *inter alia*, looting gold and other personal property from Jews during the Holocaust, and financing and profiting from the proceeds of slave labour.

2.3 Cases Against Insurance Companies

Drucker Cornell v. Assicurazionie Generali S.P.A. (97 CV 02262) (S.D.N.Y., March 31, 1997). *Winters v. Assicurazioni Generali S.P.A.* (98 CV 9186) (S.D.N.Y. December 30, 1998).

Two class action lawsuits brought against 16 European insurance companies. A series of individual actions by individual heirs are also pending in state courts. Currently the national Association of Insurance Commissioners is negotiating with the defendant companies for the establishment of a fund to pay on the disputed.

Iwanowa v. Ford, 98 Civ. 959 (D.N.J. filed March 4, 1998)

The first class action brought under ATCA on behalf of thousands of persons who were compelled to perform forced labor under inhuman conditions for defendant Ford Werke, A.G., the German subsidiary of defendant Ford Motor Company between 1941 and 1945. The suit also alleged unjust enrichment. A motion to dismiss was filed March 30, 1998, arguing that plaintiffs' unjust enrichment and implied employment contract claims fail to state a cause of action upon which relieve can be granted. The defendants argued that the claims would fail under German law, that they would be time-barred under state law (Michigan, Delaware, or New Jersey); that they failed to state a cognizable claim against Ford for alleged violations of the law of nations. Briefing was completed in August 1998. The ruling is pending.

Counsel for the plaintiffs are Goldstein, Lite and DePalma (New Jersey); Milberg, Weiss, Bershad, Hynes & Lerach LLP (New York and Los Angeles, Dohen, Milstein, Hausfeld & Toll, P.L.L.C. (Washington, D.C.), and Professor Burt Neuborne of New York University Law School.

Similar suits have been filed against Volkswagen, Siemens and Heinkel. Milberg, Weiss, Berhad, Hynes & Lerach intends to file shortly a series of similar suits against Daimler-Chrysler, AEG, Telefunken, General Motors, Continental, BMW and others. Milberg Weiss is also representing plaintiffs in a suit against Degussa for having invented and provided to the SS the poison gas Zyklon B, used to murder millions in Nazi concentration camp gas chambers and for his profiteering through the smelting of precious metals seized from victims of Nazi persecution including dental gold, glasses frames, jewelry and religious and ornamental items seized from the victims. (For regular updates, see the Web site of Milberg, Weiss <www.milberg.com>.)

Kor et al. v. Bayer AG, No. TH99-036-C (SD IN, Feb. 17, 1999) Class action lawsuit filed against German chemical and pharmaceutical giant, Bayer AG, alleging that the company assisted Joseph Mengele in experiments on concentration camp inmates by supplying chemicals and germs to inject the subjects, supplying experimental drugs and medications to infected inmates, and then using the results of these experiments to develop and market new products. The named plaintiff, Eva Kor, and her twin sister Miriam, were subjected to experiments at Auschwitz. Specific documentation links a concentration camp doctor and Bayer employee, Dr. Helmuth Vetter to the experiments, and correspondence between Bayer and the camp commander discusses Bayer's purchase of 150 female concentration camp inmates. Violations of international law alleged include the Geneva Convention on the Treatment of Non-Combatants.

Lawyers for the plaintiffs are Cohen & Malad of Indianapolis; Lieff, Cabraser, Heimann & Bernstein in New York; Milberg, Weiss, Bershad, Hynes & LeRach in New York, and Cohen, Milstein, Hasefeld & Toll in Washington, DC; Martin Mendelshohn in Washington, D.C.; Professor Burt Neuborne of New York University Law School; Much, Shelist, Freed, Dennenberg, Ament & Rubinstein in Chicago.

CHAPTER 9

English Courts and Serious Human Rights Violations Abroad: A Preliminary Assessment

MICHAEL BYERS*

INTRODUCTION

Do the English courts provide a forum in which transnational corporations could be sued for their activities abroad which amount to, or contribute to, serious human rights violations? Or is there something particular about the United States legal system which makes it unlikely that we will see cases similar to those involving Unocal oil company and Royal Dutch Shell being taken before the courts of other countries.[1] This article seeks to provide a preliminary answer to these questions in light of some recent work by a committee of British lawyers, and in light of the *Pinochet* case.[2]

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1 For discussion of these cases, see B. Stephens' contribution to this volume.

2 *Regina* v. *Bartle and the Commissioner of Police for the Metropolis and Others Ex Parte Pinochet, and Regina* v. *Evans and Another and the Commissioner of Police for the Metropolis and Others Ex Parte Pinochet*, 25 Nov. 1998 [1998] TLR 735; 37 *ILM* (1998) p. 1302; in which the House of Lords held that English courts had jurisdiction over General Pinochet and decided that the doctrine of sovereign immunity did not protect Gen. Pinochet from extradition to Spain for claims that he had violated international human rights norms. This original decision was overturned on the grounds that one of the presiding judges was involved with one of the human rights organizations intervening against Gen. Pinochet. *In re Pinochet*, 17 Dec. 1998, 38 *ILM* (1999) p. 430. A later panel of the House of Lords reached the same decision, though in a somewhat more circumscribed ruling. *Regina* v. *Bartle and the Commissioner of Police for the Metropolis and Others Ex Parte Pinochet and Regina* v. *Evans and Another and the Commissioner of Police for the Metropolis and Others Ex Parte Pinochet*, 24 Mar. 1999, 38 *ILM* (1999) p. 589. All decisions cited from and available on the House of Lords website under Judgements, <http://www.parliament.the-stationery-office.co.uk>, accessed on Sep. 20, 1999.

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1 HUMAN RIGHTS CIVIL SUITS IN THE UK

During the 1980s and 1990s there was a rapid increase in the number of civil suits in the United States concerning serious human rights violations abroad.[3] However, it was not until 1996 that the English Court of Appeal heard its first case of this kind. *Al-Adsani* v. *Government of Kuwait and others* concerned acts of torture that had allegedly been committed in Kuwait by a member of that country's royal family.[4] The Court of Appeal held that the Government of Kuwait was, under Section 5 of the State Immunity Act 1978, immune from the jurisdiction of the English courts in respect of all non-commercial torts committed abroad.

Despite the loss experienced by the plaintiff, the case did serve an important purpose by galvanizing a group of British-based international lawyers into considering whether, and to what degree, the English courts could serve as a potential forum for the pursuit of justice for the victims of atrocities committed abroad. In 1997 the British Branch of the International Law Association re-activated its Human Rights Committee for the specific purpose of studying this issue. Jeremy McBride of Birmingham University was appointed chair of the committee, while I was appointed its rapporteur. A number of experts drawn from both academia and practice were invited to join the committee: experts not only in public international law, but also in private international law, criminal law, and civil procedure. By October 1998, after several preliminary drafts and a number of meetings, a final draft report was being prepared. The report deals with a wide range of issues, including jurisdiction, the stay of proceedings, State and diplomatic immunity, the applicable law, the effect of amnesties, evidential issues, damages, the allocation of costs, and the relationship between criminal and civil actions. However, before the report could be completed, an extremely important – and completely unexpected – development occurred.

That development was, of course, the arrest of General Augusto Pinochet in a private London hospital on 16 October 1998. Having worked closely on a number of the issues, and in particular the key issue of the application of the State Immunity Act 1978 in cases involving serious human rights violations, several members of the British Branch committee – myself included – were quickly brought into the case by a coalition of non-governmental human rights organizations. The coalition, which included Amnesty

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3 See, generally, B. Stephens and M. Ratner, *International Human Rights Litigation in US Courts* (1996).

4 [1996] TLR 192, CA. For commentary, see: M. Byers, 'Decisions of British Courts During 1996 Involving Questions of Public International Law', 67 *Brit. Y.B. Int'l L.* (1997) p. 537 at pp. 537-42.

International, the Redress Trust, the Medical Foundation for the Care of Victims of Torture, and a number of individual victims, was granted leave to make written and oral submissions to the House of Lords in three sets of hearings during late 1998 and early 1999.[5] The substantive issues that arose in the *Pinochet* case are part of the public record and will be examined by myself, and no doubt many others, elsewhere.[6] Suffice it to say that the work carried out by the British Branch committee proved extremely helpful as the coalition's legal team (led by Professor Ian Brownlie QC of Oxford University) made sure that the most relevant arguments against immunity, which included arguments of both international law and statutory interpretation, were put before the Law Lords in a rigorous yet readily comprehensible way.

The arrest of Augusto Pinochet and the subsequent litigation has, however, delayed the completion of the committee's report, for a number of reasons, not least the need to wait for the Law Lords' decision on the issue of immunity. Given my own involvement in the case, and the need for the committee's work to be seen as objective if it is to have any real effect in stimulating law reform, I chose to step down as rapporteur, while remaining an active member of the committee. Chanaka Wickremasinghe of the British Institute of International and Comparative Law has been appointed as the new rapporteur and intends to produce an agreed final report by December 1999.

2 POSSIBILITY OF HUMAN RIGHTS LIABILITY FOR TNCS IN THE UK

Although the work of the committee has focused on the possibility of civil suits against natural persons, and though the *Pinochet* case is (so far) limited to a criminal extradition, my involvement in both developments does enable me to make a preliminary assessment of whether English courts might be used as a venue for imposing liability on transnational corporations ('TNCs') for violations of public international law committed abroad. In light of developments elsewhere, and in the context of this volume, it makes

5 Human Rights Watch chose not to participate in the coalition and sought to intervene on its own. It was granted the right to make written submissions only.

6 *Regina* v. *Bartle and the Commissioner of Police for the Metropolis and Others Ex Parte Pinochet and Regina* v. *Evans and Another and the Commissioner of Police for the Metropolis and Others Ex Parte Pinochet*, loc. cit. n.2.

sense to do so by considering the advantages and disadvantages of the English courts as compared to courts in the United States.[7]

2.1 Problems With TNC Human Rights Litigation in the UK

There are a number of reasons why the English courts may be considered a less desirable venue than the United States courts for cases of this kind. First and most importantly, the loser of a civil suit in England generally has to pay the legal costs incurred by the winner. This means that the average plaintiff in a human rights suit against a foreign State or TNC faces the very real possibility of hundreds of thousands of Pounds in legal bills. Added to this financial disincentive is the increasingly restricted availability of legal aid in civil litigation in the United Kingdom, a much less developed system of contingency fees, and the relative absence of a culture of volunteer work among English lawyers and law firms.

Second, the limitation period in personal injury cases in England is an extremely short three years, though in exceptional situations this restriction may be waived at the discretion of the judge (something which has recently occurred in tobacco litigation). The very short limitation period is one of the reasons why a civil writ has not yet been served on Augusto Pinochet, whose alleged crimes were committed more than a decade ago.

Third, in cases concerning torts committed abroad, English law (especially following the introduction of the Private International Law Miscellaneous Provisions Act 1995) considers the law of the country in which the tort was committed to be the 'applicable law'. In cases involving serious human rights violations such as torture this will not normally pose a problem, in that most if not all national legal systems consider torture to be a tort or delict. However, it may well raise problems in respect of torts which are not universally recognised, not to mention in respect of amnesties granted abroad (Does an amnesty in the country where the tort was committed operate as an amnesty in terms of the applicable law under the 1995 Act?). It remains to be seen how these difficult issues will be dealt with by the English courts in such human rights cases.

To make matters worse, in 1997 the English Court of Appeal rendered judgement in a case which suggests that, absent law reform and notwithstanding the more recent decision of the House of Lords in the *Pinochet* case, the State Immunity Act 1978 provides much more of an impediment to civil actions against many human rights violators than does the equival-

7 On the current situation in the United States, see B. Stephens' contribution to this volume.

ent legislation in the United States. In *Propend Finance Pty. Ltd. and others* v. *Alan Sing and the Commissioner of the Australian Federal Police*, the court held that under Section 14 of the Act, employees and agents of foreign States fall within the definition of 'States' rather than that of 'separate entities'.[8] The consequence of this definitional allocation is that employees and agents benefit from a presumption of immunity even when acting outside the scope of their official functions. It is therefore conceivable that an English court would hold that a TNC violating human rights while acting as an agent of a foreign State benefits from that State's immunity, whereas in the same situation a United States court would deny immunity.

2.2 *Advantages of TNC Human Rights Litigation in the UK*

At the same time, there are reasons why the English courts may be considered a more desirable venue than the courts of the United States. One such reason is that, in addition to exercising 'tag jurisdiction', English courts are in certain circumstances able to grant leave to serve a writ on a defendant abroad.[9] Although the circumstances are quite restricted, for example requiring that damage have occurred within England, where victims have come to England for medical treatment and similar purposes there is a very real possibility of such leave being granted.

Another possible advantage of English courts is that many English judges demonstrate a greater knowledge and receptivity towards public international law than most of their colleagues in other countries, especially the United States. Following the 1977 Court of Appeal decision in *Trendtex Trading Corp.* v. *Central Bank of Nigeria*, English judges have generally accepted that customary international law is automatically part of the law of England and that the doctrine of *stare decisis* does not apply to customary international law.[10] This receptivity towards public international law has made ground-breaking decisions like that concerning head of State immunity in the *Pinochet* case possible, and should be a consideration when deciding where to commence future cases of this and other kinds. That said, many English judges are still far from being full-fledged experts in public international law. They still make mistakes on issues arising at the interface

8 [1997] TLR 238. For commentary, see: M. Byers, 'Decisions of British Courts During 1997 Involving Questions of Public or Private International Law', 68 *Brit. Y.B. Int'l L.* (1997) p. 301 at pp. 312-318.

9 See Order 11 of the Rules of the Supreme Court of England and Wales.

10 [1977] 2 WLR 356; [1977] 1 All ER 881, CA. For commentary, see J. Crawford, 'Decisions of British Courts During 1976-1977 Involving Questions of Public International Law', 48 *Brit. Y.B. Int'l L.* (1978) p. 332 at pp. 353-362.

of international and national law, as demonstrated by the decision in the *Pinochet* case to limit universal jurisdiction to those alleged acts of torture which were committed after the adoption, in 1988, of implementing legislation for the 1984 Torture Convention. The mistake here was that the judges ignored the existence of universal jurisdiction in customary international law – and therefore the common law.[11]

In the last couple of years, thanks in large part to the important work of Richard Meeran, English courts have also adopted a refreshingly liberal approach to the issue of *forum non conveniens* when it is clear that the plaintiff will not obtain justice in the country in which the tort occurred – for economic as well as other reasons.[12]

Finally, unlike in the United States, the situation in the United Kingdom concerning the Act of State doctrine and serious human rights violations is in no way ambiguous, following the 1980 decision in *Oppenheimer* v. *Cattermole*. There the House of Lords considered whether English courts were bound to recognise and give effect to a Nazi nationality law that deprived Jews outside Germany of their nationality.[13] The majority of the judges agreed that the courts must 'be very slow to refuse to give effect to the legislation of a foreign State in any sphere in which, according to accepted principles of international law, the foreign state has jurisdiction'.[14] However, they held that there were certain exceptional situations when this was not the case. The most important of these is that the courts will not recognise foreign legislation that constitutes a grave infringement of human rights. Lord Cross stated:

> [I]t is part of the public policy of this country that our courts should give effect to clearly established rules of international law. Of course on some points it may be by no means clear what the rule of international law is. But what we are concerned with here is legislation which takes away without compensation from a section of the citizen body singled out on racial grounds all their property on which the state passing the legislation can lay its hands and, in addition, deprives them of their citizenship. To my mind a law of this sort

11 For commentary, see M. Byers, '*Trendtex* under Siege: The *Pinochet* case and Customary International Law', *Int'l & Comp. L. Q.* (forthcoming).

12 See Richard Meeran's contribution to this volume.

13 [1976] AC 249. For commentary, see P. Carter, 'Decisions of British Courts During 1974-75 Involving Questions of Private International Law', 47 *Brit. Y.B. Int'l L.* (1975) p. 369 at pp. 372-374.

14 Ibid, at p. 277.

> constitutes so grave an infringement of human rights that the courts of this country ought to refuse to recognise it as a law at all.[15]

This conclusion is supported by a number of the individual judgements in the *Pinochet* case, as well as by a consideration of the reasons for the act of State doctrine, or non-justiciability more broadly speaking. As Lord Wilberforce explained in the leading case of *Buttes Gas and Oil Co.* v. *Hammer*, the concern is that 'there are ... no judicial or manageable standards by which to judge these issues'.[16] Traditionally, international law provided no standards for what a State did within its own territory. This situation has clearly changed in the latter half of the twentieth century, at least in respect of the most fundamental of human rights.

2.3 Challenges for TNC Human Rights Litigation in the UK

However, any consideration of the prospects for civil suits of this kind should not confine itself to considering only the legal issues. At a more general level, those who attempt to litigate against TNCs in English courts and elsewhere will encounter a series of major challenges, all of which arose during the course of the *Pinochet* case. The most important of these is that the defendant will almost invariably be extremely wealthy, or at least have extremely wealthy supporters. The old saying that justice is open to all, just like the Ritz Hotel, is highly appropriate here. Good lawyers are usually expensive lawyers, and expensive lawyers have the support staff and resources that are essential to fighting a complicated case. Victims and human rights organisations planning to sue a TNC must plan on a long and extremely expensive litigation in which they will face large, highly paid and extremely well-supported legal teams seizing every opportunity for delay and procedural challenge. Having financial backing, logistical support and sympathetic, able and experienced counsel in place before a case begins should be considered a prerequisite to any such suit. The alternative, for plaintiffs and at least the smaller human rights organizations, may extend beyond failure into bankruptcy and closure.

A good example of the importance of these practical considerations is the 'McLibel' case which has tied up the English courts for the last five years. The fast food chain McDonald's sued two unemployed 'green' campaigners

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15 Ibid, at p. 278. See also R. Higgins, *Problems and Process: International Law and How We Use It* (1994) p. 218.

16 [1981] 3 WLR 787 at 810; [1981] 3 All ER 616 at 633. For commentary, see J. Crawford, 'Decisions of British Courts During 1982 Involving Questions of Public International Law', 53 *Brit. Y.B. Int'l L.* (1983) p. 253 at pp. 259-268.

for allegations in a leaflet published by them in the late 1980s. The two campaigners had to represent themselves (legal aid not being available in England for libel cases) in a 314 day trial spread over two and one half years, with McDonald's being represented by some of London's most expensive lawyers. Although some of the allegations were held to be well founded, McDonald's was awarded £60,000 in damages, which enabled it to claim a highly public victory.[17] Moreover, appeals have been sought on a variety of issues throughout the process, with the most recent judgement being issued –against the campaigners– on 30 April 1999.[18]

Apart from the wealth and persistence of TNCs, this example demonstrates that cases against them will be fought as much in the public arena as in the courts. Victims and human rights organisations must be prepared to engage in a lengthy and costly public relations campaign, because professional public relations agencies and lobbying firms will be engaged to discredit their efforts and motives in the eyes of the general public – and in government (not to mention judicial) circles. Given that a favourable public image is essential to the long-term financial existence of most human rights organisations, and that good-will on the part of (democratic) governments is necessary for a variety of purposes, including pro-human rights law reform, the battle to retain these constituencies must be fought in the course of each and every litigation against a wealthy defendant, be it Shell, UNICAL, or Augusto Pinochet.[19] If such battles are not fought –and won– the short and long term consequences could be serious indeed. In the *Pinochet* case, for example, there was a very real possibility of political discretion being exercised to release the accused. The fact that this discretion has not been exercised is a tribute to the hard work done by the human rights coalition to retain public support and thus exert pressure on government ministers.

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17 *McDonald's* v. *Steel and Morris*, Judgement of the High Court of Justice, Queen's Bench Division, 19th June 1997, available at <http://www.open.gov.uk/lcd/mclsum2.htm>, accessed on Sept. 20, 1999. See also F. Gibb and J. Bale, 'Victory for McDonald's after David and Goliath libel fight', *The Times* (London) (20 July 1997) p. 27.

18 *Steel* v. *McDonald's Corporation*, unreported judgment of the Court of Appeal, available in LEXIS, Enggen Library, Cases File.

19 On the political context surrounding the *Pinochet* case, see M. Byers, 'The Significance of Pinochet', 21 *London Review of Books* (1999) No. 2, pp. 26-27, also available at <http://www.lrb.co.uk/v21/n02/byer2102.htm>, accessed on 20 Sept. 1999.

CONCLUSION

The upshot of all of this is that those who wish to use national courts to pursue TNCs for violations of international human rights have to prepare themselves well in advance of any particular case arising. Coalitions must be built, strategies developed, resources and expertise marshalled and improved upon. Moreover, the educating of judges, politicians, government officials and the general public on international human rights and the important role of national courts must be made an immediate and continuing priority. Without such long-term thinking and planning, there is little real prospect of ever successfully suing a TNC in this way. Yet it is precisely because TNCs are immensely wealthy, powerful, and legally literate that they must be made subject to the very real possibility of such suits – for the simple reason that their activities have a profound – and growing – impact on the lives of individual human beings everywhere.

CHAPTER 10

Liability of Multinational Corporations: A Critical Stage in the UK

RICHARD MEERAN*

INTRODUCTION

During the last four years a series of cases have created the potential for overseas workers to hold multinational companies ('MNCs') liable in the English Courts to pay them compensation for their injuries. In the process, these cases highlight the protection given to MNCs by the legal principles of 'separation of corporate identity' and *forum non conveniens*. The effect of these 'principles' has been to enable MNCs to apply 'double standards' in developing countries. If a proper balance is to be achieved, the law must continue to develop to reflect the reality of MNC operations and adapt to counter MNC methods of avoiding legal responsibility.

It is no coincidence that these areas of law which have been formulated and developed by reference to commercial interests, have been challenged by workers in developing countries who were subjected to the most abysmal of working practices and sustained serious injuries as a result.

It is of grave concern therefore that a large group action brought in 1999 by more than 2000 South Africans suing Cape plc has elicited a negative responses from the English High Court and Court of Appeal which may signal a shift towards the approach taken by the US Courts in relation to foreign Claimants generally. A reasoned judgement from the Court of Appeal has not yet been delivered but the High Court's first instance endorsement of the decision of the New York District Court in the *Bhopal* jurisdiction dispute is of particular concern.

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1 BACKGROUND

1.1 Corporate Veil

The principle of separation of legal identity between different limited companies is a universal legal assumption regarded as fundamental by the commercial world.

Thus the parent company of a wholly-owned subsidiary is, on the face of it, no more responsible, legally, for the unlawful behaviour of the subsidiary, than, e.g., would be a member of the public for the negligence of a large public company , in which he or she owns a single share. Save in exceptional circumstances (e.g., where it can be shown that the company is a 'sham' or the 'agent' of the shareholder[1]), the parent company is regarded simply as a shareholder.

Using complex and confusing corporate structures, MNCs have been able to distance and separate the parent, headquarters, company from the local operating subsidiaries, thereby protecting the MNC from legal liability. One only needs to glance at the RTZ Corporate Tree.[2] At the same time in order to retain control, MNC organizations invariably include extensive cross-directorships between parent and subsidiaries, formulation of policy, technological control and financial control. Notwithstanding those control mechanisms, there was no significant fear of legal accountability on the part of MNCs until fairly recently.[3]

As far as overseas operations are concerned, this corporate structure and relationship has a dual purpose. First, it enables the control of the business from the centre to be ensured; secondly, it protects MNC the group as a whole since legal obstacles[4] and difficulties in obtaining access to justice in local courts[5] against local subsidiaries (which are often insolvent and uninsured), means that the MNC escapes responsibility altogether and victims go without redress.

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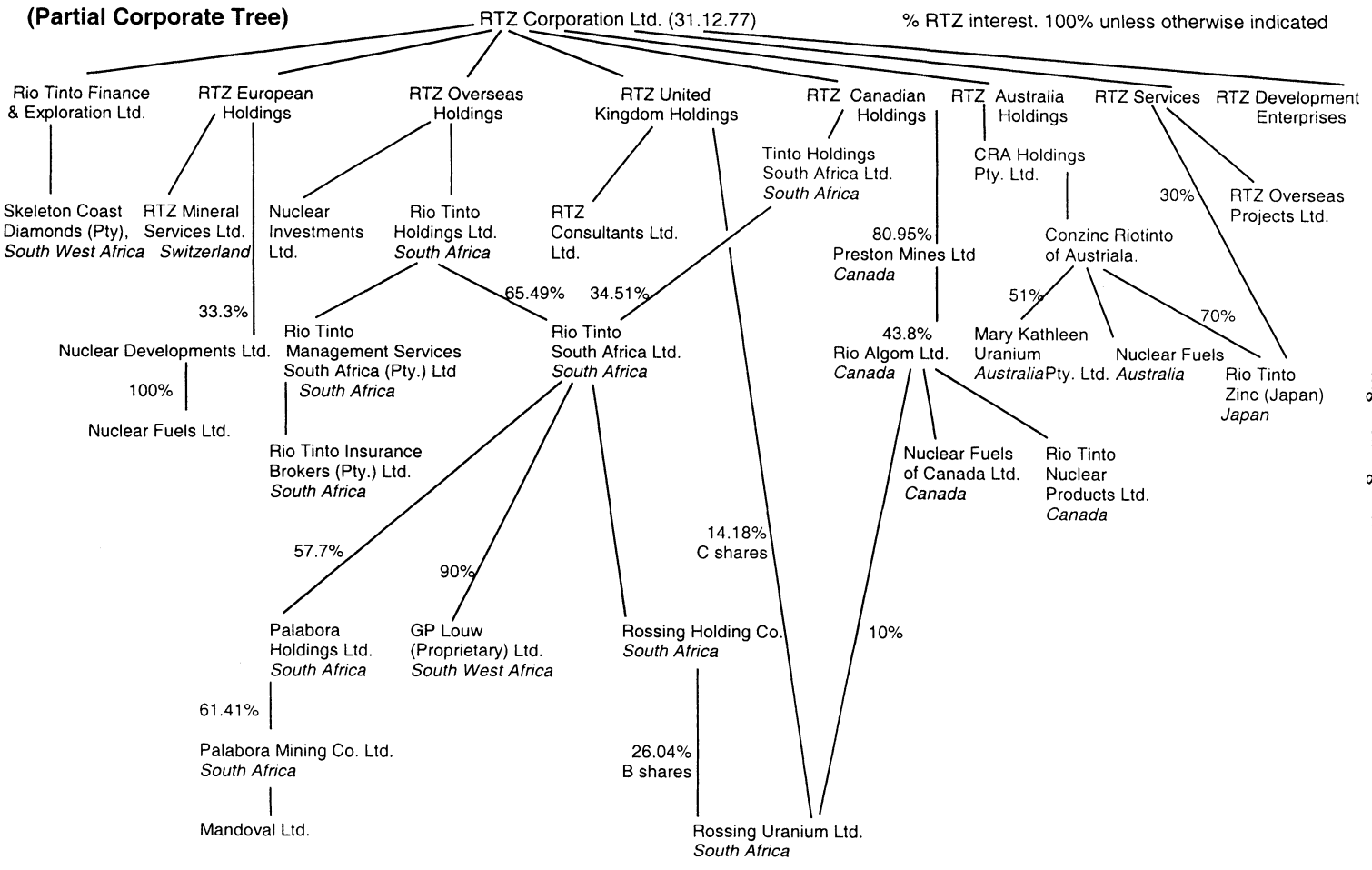
1 *Adams* v. *Cape Industries plc*, [1990] 1 Ch. 433.

2 See diagram at the next page.

3 'The risks of being a multi-national', *Commercial Lawyer* (Sept. 1997).

4 In South Africa and Namibia, Workmens Compensation legislation – originally from the UK – precludes claims against the employer and instead provides a system of paltry compensation.

5 *Connelly* v. *RTZ Corp. plc*, [1997] 3 WLR 373. It was accepted that the Plaintiff could never obtain adequate funding to pursue his claim in Namibia, consequently 'substantial justice' could not be done in Namibia and the stay was refused on that basis alone.


(Partial Corporate Tree)
RTZ Corporation Ltd. (31.12.77)
% RTZ interest. 100% unless otherwise indicated
Rio Tinto Finance & Exploration Ltd.
RTZ European Holdings
RTZ Overseas Holdings
RTZ United Kingdom Holdings
RTZ Canadian Holdings
RTZ Australia Holdings
RTZ Services
RTZ Development Enterprises
Skeleton Coast Diamonds (Pty), South West Africa
RTZ Mineral Services Ltd. Switzerland
Nuclear Investments Ltd.
Rio Tinto Holdings Ltd. South Africa
RTZ Consultants Ltd. Ltd.
Tinto Holdings South Africa Ltd. South Africa
CRA Holdings Pty. Ltd.
30%
RTZ Overseas Projects Ltd.
80.95%
Preston Mines Ltd Canada
Conzinc Riotinto of Austriala.
33.3%
65.49%
34.51%
51%
70%
Nuclear Developments Ltd.
Rio Tinto Management Services South Africa (Pty.) Ltd South Africa
Rio Tinto South Africa Ltd. South Africa
43.8%
Rio Algom Ltd. Canada
Mary Kathleen Uranium AustraliaPty. Ltd.
Nuclear Fuels Australia
Rio Tinto Zinc (Japan) Japan
100%
Nuclear Fuels Ltd.
Rio Tinto Insurance Brokers (Pty.) Ltd. South Africa
Nuclear Fuels of Canada Ltd. Canada
Rio Tinto Nuclear Products Ltd. Canada
14.18% C shares
57.7%
90%
10%
Palabora Holdings Ltd. South Africa
GP Louw (Proprietary) Ltd. South West Africa
Rossing Holding Co. South Africa
61.41%
Palabora Mining Co. Ltd. South Africa
26.04% B shares
Mandoval Ltd.
Rossing Uranium Ltd. South Africa

1.2 Forum Non Conveniens

English law in this area (which originated from Scottish law) has been developed in commercial cases, the object being to ensure that cases are tried in the country in which they can be litigated most cost effectively subject to the burden being on the Defendant to demonstrate that – jurisdiction having been founded in England as of right – there is another 'clearly and distinctly more appropriate forum' elsewhere and that justice as between the parties will be done in that forum.[6] Although the same basic principle is applied by US Courts, its genesis and rationale are rather different.[7]

Determination of forum disputes involves the court in a consideration of the pleadings assess the essential nature of the case and with which jurisdiction the claim has its 'most real and substantial connection'; convenience factors such as the location of witnesses and documents; comparative procedures in the competing for enforceability of subpoenas and judgements and discovery, etc.[8] If the court concludes that there is 'another clearly and distinctly more appropriate forum, more suitable for the trial and the ends of justice', the burden shifts to the Plaintiff to show why, if at all, justice could not be done in that forum.

The implications of the doctrine are quite different in a commercial as opposed to personal injury case. In the former cases, the commercial parties are usually contesting forum because they wish to secure the best deal for themselves. Thus the financial advantage to one party of suing in a particular forum will carry with it a corresponding financial disadvantage to the other party. It is rarely a question of one commercial party being denied justice altogether.

By contrast, a foreign personal injury victim bringing an action in England is likely to be in an 'all or nothing situation'. The pejorative phrase, 'forum shopping', arose in the United States in a personal injury context in US cases to describe the practice of foreign claimants seeking to use the US courts simply to obtain higher damages, although in reality this is doubt-

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6 *Spiliada Maritime Corporation* v. *Cansulex Ltd.*, [1987] AC 460.

7 US law in this area must be viewed in the context of jury trials and the distinction made in the application of the principle depending on whether the alternative forum is in another US State or a foreign jurisdiction. See for example, *Piper Aircraft* v. *Reyno*, 454 U.S. 235 (1981), and *Gulf Oil Corporation* v. *Gilbert*, 330 U.S. 501 (1947).

8 See, for instance, *Connelly* v *RTZ Corp. plc*, [1997] 3 WLR 373 at 374; *Oppenheimer* v. *Louis Rosenthal & Co*, [1937]1 All ER 23, CA; *The 'Vishva Ajay'*, [1989] 2 Lloyd's Rep. 558; and *The 'Jalakrishna'*, [1983] 2 Lloyd's Rep. 628.

ful.[9] Nevertheless, the recent trend in the US is strongly against foreign plaintiffs suing there.[10]

'Forum shopping' is certainly not the objective of foreign (non EU) personal injury claimants who choose to sue in England.[11] In developing countries there may be a variety of obstacles to justice, e.g., fear in local courts of persecution, delays, and lack of funding. Obviously, there is a powerful incentive on the part of defendants to try to stay claims in favour of a forum in which they know claimants will face obstacles to justice.[12]

2 THOR CHEMICALS HOLDINGS LTD/DESMOND COWLEY

During the 1980s, Thor manufactured mercury-based chemicals in Margate, South East England. Health and safety at the Margate factory came under considerable criticism over a prolonged period from the Health and Safety Executive ('HSE') due to elevated levels of mercury in the blood and urine of the workers. In about 1986, the company terminated mercury-based processes in Margate and shifted its Margate mercury operations (including key personnel and plant) to Cato Ridge, Natal, South Africa. At that factory, precisely the same deficiencies which had been identified by the HSE were replicated. In addition, the South African operation relied extensively on casual untrained labour. Workers with high levels of mercury were laid off and replaced by new casual labourers who queued at the factory gate for work each day. This 'recycling of workers', rather than a proper health and

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9 D.W. Robertson, 'Forum Non Conveniens in America and England: "A Rather Fantastic Fiction"', 103 *L. Q. Rev.* (1987) p. 398 at p. 400.

10 *Piper* v. *Reyno*, loc. cit. n. 7.

11 Levels of damages for personal injury may provide an incentive for EU Claimants to elect to sue an English Defendant in England. The situation is regulated by the '1968 Brussels convention on jurisdiction and the enforcement of judgments in civil and commercial matters', *O.J.* (1998) C 27/1. For a more detailed discussion of the impact of the Brussels Convention, see G. Betlem's contribution to this volume.

12 With respect to the rest of Europe, only the courts of the UK and Ireland have the power to decline jurisdiction on *forum non conveniens* grounds when a Defendant is sued in its domicile. In the rest of Europe, the position is regulated by the 1968 Brussels Convention (to which the UK is party). Article 2 stipulates that a defendant is to be sued in its domicile. In *Harrods (Buenos Aires) Ltd.*, [1991] 4 All ER 334, CA, the Court of Appeal held that the court retained jurisdiction to stay where the alternative forum was in a non-contracting state, notwithstanding the mandatory language of Article 2. The decision was referred to the ECJ by the House of Lords (*Ladenimor SA* v. *Intercomfinanz, SA*, Case C-314/92). Submissions opposing the Court of Appeal ruling were lodged by the German government and the European Commission. However, the case was settled before any ruling was delivered by the ECJ.

safety system, appears to have been how Thor attempted to control mercury exposures of its workforce.

In February 1992, mercury poisoning of South African workers came to light. Three workers died and many others were poisoned to varying degrees. An inquiry and a criminal prosecution in the local (Pietermaritzburg) Magistrates' Court led to the equivalent of a £3,000 fine!

Compensation claims against the parent company and its Chairman, Desmond Cowley, were commenced in the English High Court on behalf of 20 workers. The claims alleged that the English parent Holdings was liable because of its negligent design, transfer, set-up, operation, supervision and monitoring of an intrinsically hazardous process. Thus the claim was based on negligent acts and omissions (failure to take steps to protect the South African workers against the foreseeable risk of mercury poisoning).

Thor applied to stay the action on *forum non conveniens* grounds. The application was dismissed by Deputy High Court Judge Mr. James Stewart QC, the judge, noting the connections of the claim with England and holding that English law would probably be applied to the case. The defendant's appeal was struck out by the Court of Appeal on the grounds that Thor had acceded to the jurisdiction, *inter alia*, by serving a Defence.[13] In 1997, Thor settled the claim for £1.3 million.

A further 21 claims are now in progress. In July 1998 Thor's attempt to stay this further action on *forum non conveniens* grounds was rejected by Garland J. Leave to appeal was refused by the Court of Appeal.[14]

3 RTZ

A claim for compensation was brought in England by Edward Connelly, a laryngeal cancer victim employed at RTZ's Rossing uranium mine in Namibia.

Various allegations including the following were made:

Key strategic technical and policy decisions relating to Rossing were taken by the English-based RTZ companies. For example in order to meet contractual deadlines for the supply of uranium internationally by RTZ companies, directors of their English companies were directly responsible on the ground, for substantially increasing the output of uranium – and the consequent dust levels – without ensuring that effective precautions were taken to protect workers against the hazards of uranium dust exposure.

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13 *Ngcobo and others* v. *Thor Chemicals Holdings Ltd. and another*, [1995] TLR 579.

14 *Sithole and others* v. *Thor Chemicals Holdings Ltd. and another*, [1999] TLR 110.

In March 1995, RTZ succeeded, initially, in persuading the Court that Namibia was the 'natural forum' for the case. Thereafter, the argument was limited to the relevance of Mr. Connelly's inability, to obtain funding to bring a claim in Namibia (whereas funding was available here, in the form of legal aid or lawyers willing to act on a 'no win, no fee' basis).

The case went to the Court of Appeal twice before reaching the House of Lords. On the first occasion, in August 1995, the Court of Appeal held that, in determining whether Namibia was an 'available forum', S31 of the 1988 Legal Aid Act precluded the Court from having regard to the fact that the plaintiff was unable to obtain funding to litigate in Namibia, but had Legal Aid to litigate in England.[15] The plaintiff applied to lift the stay on the grounds that the funding of his English action had switched to 'no win, no fee' conditional fee agreements (the UK variant of contingency fees) having been made lawful in August 1995. His application was rejected at first instance in October 1995. However, in May 1996 the Court of Appeal, referring specifically to Article 6 of the European Convention on Human Rights and Article 14 of the International Covenant on Civil and Political Rights, allowed the appeal. Bingham MR stated:

> But faced with a stark choice between one jurisdiction, albeit not the most appropriate in which there could in fact be a trial, and another jurisdiction, the most appropriate in which there never could, in my judgement and interests of justice tend to weigh, and weigh strongly in favour of that forum in which the Plaintiff could assert his rights.

The Lords held, by a 4-1 majority, that Mr. Connelly's inability, in practice, to litigate in Namibia meant that the case should be allowed to proceed in England. In the lead judgement,[16] Lord Goff stated:

> The question, however, remains whether the plaintiff can establish that substantial justice will not in the particular circumstances of the case be done if the plaintiff has to proceed in the appropriate forum where no financial assistance is available.

A further claim was subsequently brought by the widow of another (oesophageal) cancer victim employed at Rossing, Peter Carlson. Mr. Carlson worked at Rossing during the same period, and for a substantial period in the same areas of the mine, as Mr. Connelly. Almost immediately after

15 *Connelly* v. *RTZ Corp. plc*, [1996] 2 WLR 251.
16 *Connelly* v. *RTZ Corp. plc*, loc. cit. n.5.

the House of Lords reversed the stay, RTZ applied to strike out the Connelly claim (including on limitation grounds) and to stay the Carlson action on the ground of *forum non conveniens*.

In December 1998 the court struck out Mr. Connelly's claim on limitation grounds but dismissed RTZ's application to stay the Carlson action on the grounds that Mr. Carlson's widow could not obtain funding to achieve substantial justice in Namibia.[17]

4 CAPE PLC

The asbestos mined in South Africa has caused a chain of injuries worldwide – asbestos miners and millers, people involved in transportation of asbestos, stevedores loading/unloading ships, ship workers, workers at factories in South Africa, the UK and the US as well as people living in the vicinity of these operations. Whereas victims in the US and the UK can and have been compensated, victims in South Africa have not been.

Cape plc, formerly 'The Cape Asbestos Company Limited', was involved in mining blue and brown asbestos in the Northern Cape and Northern Provinces respectively from 1890 until 1979. Until 1948 the operations in the North Western Cape were carried out directly by the parent company but for the remainder of the period, through wholly-owned subsidiaries.

The Prieska mill (N. Cape) was situated in the middle of the town, close to the school. In and around Prieska, the focus of the blue asbestos mining and milling operations, the incidence of asbestos-related disease (including many victims whose exposure was purely environmental) was very high, with whole families being affected by the tragedy.

In 1962, the Chief Medical Officer of Cape based in London visited South Africa and reported: '[A]t Prieska the conditions around and about the mill are not good. The crusher is out of doors – it was obvious that quite a cloud of dust was being produced and blown away by a fairly strong wind towards the town.'

At Cape's Penge mine (named after Penge in Kent) in the Northern Province, the conditions were just as bad with asbestos dust levels during the 1970s being many times higher than the UK limit during the corresponding period. A government health inspector, Dr. Gerritt Schepers observed:

> Exposures were crude and unchecked. I found young children completely included within large shipping bags, trampling down fluffy amosite asbestos,

17 *Carlson* v. *RTZ Corp. plc*, Decision of Wright J [Nov. 1998, unreported].

> which all day long came cascading down over their heads. They were kept stepping down lively by a burly supervisor with a hefty whip. I believe these children to have had the ultimate of asbestos exposure. X-ray revealed several to have asbestosis with cor pulmonale before the age of 12.

In February 1997, compensation claims were commenced in the English High Court on behalf of three Penge workers who had also lived near the mine and two Prieska residents who had lived in the vicinity of the mine (*Lubbe & Others* v. *Cape plc*).[18] The former suffered from asbestosis and the latter from mesothelioma, an asbestos-related cancer of the lining of the lung.

The claims were based principally on the negligent control of the company's world-wide asbestos business from England and failure to take measures to reduce asbestos exposures to a safe level. Claims were also lodged on behalf of four Italian workers, employed at Cape's Turin manufacturing operation, purportedly run by another wholly-owned subsidiary, Capamianto.[19] By virtue of Article 2, Brussels Convention, the Italian Claimants could not be prevented from suing in England where Cape plc is domiciled.

Cape applied to stay the South African claims on forum grounds. In January 1998, following an eight day hearing spread over six months, their application was granted, but on appeal in July 1998, the Court of Appeal reversed this decision. The Court paid particular heed to the fact that 'the alleged breaches of ... duty of care ... took place in England rather than South Africa', and the fact that since the company no longer had any connection with South Africa (and hence the South African courts only acquired jurisdiction by virtue of Cape's offer to submit to the jurisdiction, there being no equivalent of RSC Order 11 in South Africa), to grant a stay would effectively be allowing Cape to 'forum shop in reverse'. The court also indicated that on the basis of the pleaded case there were good arguments in favour of the application of English or South African law[20] but that, *prima facie*, the 'duty' owed by an English Company should be determined by English law.

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18 *Lubbe* v. *Cape plc*, [1999] Int'l Litigation Procedure 113, CA.

19 Capamianto was liquidated in 1977 and manslaughter proceedings were brought in 1993 by the Turin State Prosecutor against the Managing Director. These proceedings have been suspended as the Managing Director was diagnosed with Alzheimer's disease.

20 The nature of the allegations pleaded were expressly distinguished from those in *Durham* v. *T&N plc*, [1 May 1996, unreported]: A Canadian asbestos victim employed by the English defendant's wholly-owned Canadian subsidiary sued the English parent company on the basis of employers' and occupiers' liability allegations. The Court of Appeal held that Canadian law applied to the tort.

Following an oral hearing in December 1998, the House of Lords dismissed Cape's petition. In January 1999 two further actions comprising almost 2000 claims were commenced in England against Cape plc by South African claimants exposed to asbestos in the same geographical regions of South Africa.[21]

Cape applied to stay the 2000 claims on forum grounds contending that the emergence of the group was a sufficiently material change to warrant a different conclusion from that of the Court of Appeal in the first five cases. Cape also sought a stay of the first five cases on the grounds that the Court of Appeal had been misled as to the true nature of the case.

At first instance, the Judge Buckley J granted a stay of all the actions including the five Lubbe claims holding that South Africa was a 'clearly and distinctly more appropriate forum for the group action.' He also held, apparently contrary to the Court of Appeal – in the five cases – that by reason of Cape's offer to submit to the South African jurisdiction, the South African courts were 'available' as required by the *Spiliada* doctrine. He also dismissed the Claimants' argument that because the Defendant had not identified a single alternative forum – it being common ground that the Claimants would have to initiate their claims in two or three different jurisdictions in South Africa – there was no jurisdiction to stay.

South Africa is divided into nine separate provincial jurisdictions, each of which exercises jurisdiction over a Claimant if; the cause of action arose in the jurisdiction and, the Defendant is based, or has assets in the jurisdiction, or the Defendant submits to that jurisdiction. However, in the case of the Northern Cape Provincial Division, mere submission will not suffice. There, money will also have to be lodged in a bank account and 'attached' by the Claimants in order for the N. Cape Court to have jurisdiction. However, Buckley J concluded that once he had decided to stay the action, the manner of its progress in South Africa was a matter for the South African Courts.

Buckley J said he was also 'comforted' by decisions of the US Courts in which public policy considerations had influenced the decision of the courts to stay proceedings in favour of the alternative forum.[22] The specific reference to the *Bhopal* case was perhaps surprising given that it is widely known

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21 *Afrika and 1539 others* v. *Cape plc*, (1999) A No. 40, and *Mphahlele and 336 others* v. *Cape plc*, (1999) M No. 146.

22 In the *Union Carbide* litigation bought by the Indian Government on behalf of Bhopal victims in the New York District Court, Keenan J held that the US Public interest was not as great as the Indian public interest in dealing with the case and accordingly the action was stayed (In re *Union Carbide Corp. Gas Plant Disaster*, 643 F.Supp. 842 (S.D.N.Y., 1986)).

that the settlement of these cases in India was approved by the Indian Courts on the grounds of expediency[23] and did not result in compensation being paid to more than a small number of Claimants and even then in paltry amounts.

CONCLUSIONS

Corporate Veil

The central issue in these cases is whether a parent company of a MNC owes a legal duty of care to those affected by its subsidiary operations. It must be emphasised that the legal approach of direct negligence, adopted in these cases is not dependant on the parent company's share holding in its operating subsidiaries – although the shareholding is of course the mechanism by which the parent company exercises control. It is suggested that provided there is sufficient involvement in, control over and knowledge of the subsidiary operations by the parent there is no reason why the general principles of negligence should not apply so that in certain circumstances such a duty should exist. Save that one is dealing with 'processes' rather than 'products', there is no reason in principle why an analogous duty to that owed by a manufacturer to consumers for its defective products should not be imposed ('process' liability). Indeed, the proximity of a MNC to overseas employees of its subsidiaries is arguably closer than that of a manufacturer to consumers of its products.

Forum Non Conveniens

It is worth pointing out that if a claimant pursues a claim against a parent company but has no real evidence against the parent company, then the claim is likely to be struck out. Consequently it would be pointless for claimants to pursue claims in England solely in order to secure jurisdiction in England.

The plain truth of the matter is that claimants want to sue in England because they cannot get justice overseas and MNCs want to stay the claims for precisely the same reason. Claims against English-based MNCs should be able to proceed in their home bases precisely because the Defendant is domiciled in England, a strong connecting factor with this jurisdiction and

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23 *Union Carbide Corporation* v. *Union of India, etc.*, [4 May 1989] Sup. Ct. Rep. (128-143) (India).

indeed the single most important factor given the unqualified application of Article 2 of the Brussels Convention by other European countries.

Sooner or later, however, the *Harrods* point will be referred to the European Court of Justice and a decision will be made as to whether Article 2 precludes the Court from staying proceedings from *forum non conveniens* grounds where the alternative forum is in a non convention country. The fact that a group action brought in any other EU Country against a company domiciled in that country could not be stayed, whereas the increased number of foreign Claimants encourages the grant of a *forum non conveniens* stay, serves to highlight the discrepancy between England and the rest of the EU in relation to the application of Article 2. Resolution of this point by the ECJ may well result in the total demise of *forum non conveniens* in cases involving English-based companies.

Moreover the recent Hague Conference negotiating towards a global convention on jurisdiction suggests that a consensus may be emerging to the effect that a Defendant should be sued in its domicile and that *forum non conveniens* will be confined to circumstances where the only basis of jurisdiction is based on the Defendant's registered office as opposed to its centre of control and administration.[24]

Public Policy

It is submitted that the legal system of the country from which a MNC orchestrates its world-wide operations and which receive the profits of those operations do indeed, have a significant interest in regulating the conduct of MNC.

The question of 'public policy' here raises an issue which seems to be exclusively of a political nature, namely whether foreign claimants should be permitted to bring mass tort claims in the English Courts against UK-based MNCs. It seems hard to justify delegation of such overtly political decisions to unelected Judges from unrepresentative (primarily commercial) backgrounds.

A strength (and a weakness) of the legal system is its dependence on the resolution of individual cases rather than issues. However, the focus on the wider public policy implications of these cases may have caused the courts to sideline and ignore the conduct of the particular defendant and the suffering of the individual claimants. For example, in the *Cape* case, the following points may have been overlooked:

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24 Article 24 Hague Convention (June 1999 draft). The UK is a member of the Special Commission.

- Cape closed its principal UK factory in 1968 due to the prevalence of asbestos related disease. However it continued to operate bad working practices in South Africa until 1979.
- In South Africa, Cape's operations took full advantage of the apartheid regime including the use of young children in its mines and mills.
- In 1973 Cape gave evidence to a UK Government Committee which was concerned to be reassured about the company's treatment of South African workers.[25]
- The profits from the South African operations owned by Cape flowed back to the UK.

Furthermore when the Government has expressly authorized the availability of UK Legal Aid to foreign claimants and the Legal Aid Board has granted Legal Aid to claimants, how can it be said that to permit the case to continue in the English Courts (where the claimants sue an English-domiciled defendant as of right) contravenes public policy?[26] The question of public policy in a jurisdiction dispute arises only because it is raised by the defendant. Had the parties agreed that their dispute should be litigated in England (as might be the case, for example in a contractual dispute between thousands of South African individuals and a British Insurance Company) neither public policy (nor *forum non-conveniens*) would arise. Why should the litigating of such a (commercial) case in the English Courts be any more compatible with public policy than a case such as the *Cape* case?

The obstacles to holding MNCs accountable under international human rights law have been the subject of much writing.[27] At the same time as acknowledging the 'rights' of MNCs, great reluctance has apparently been demonstrated for rights to be accompanied by 'responsibilities' in relation to the issue of human rights. This has been evident in the negotiations surrounding the Multilateral Agreement on Investment. Having signalled, in cases involving small numbers of claimants (such as *Thor*, *Connelly*, *RTZ* and the first five *Cape* cases), that it is appropriate for victims of human

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25 Fifth Report of the Expenditure Committee, Trade and Industry Sub-committee on Wages and Conditions of SA Workers employed by British firms in South Africa, 1973 - 1974

26 Statement of Government Minister Mr. Geoff Hoon: 'No members of my Department have had discussions with GJW concerning the wish of Cape plc to amend the Access to Justice Bill to band foreign employees of British companies from obtaining Legal Aid. The Government has no plans to exclude from Legal Aid people pursuing actions in England and Wales solely because they live outside this country'. (Hansard, 21 Apr. 1999).

27 See, e.g., M.K. Addo (ed.), *Human Right Standards and the Responsibility of Transnational Corporations* (1999).

rights abuses of UK companies to sue in the English Courts on conventional negligence principles, the Courts are now confronted with the question as to whether mass tort claims by foreign claimants can be brought in the English Court. If the Cape case is rejected, this may well spell the end of this means of corporate accountability (pending resolution of the *Harrods* point or adoption of a global convention along the lines of the present Hague draft). This is so even though the European Court of Human Rights and Commission have recognised 'equality of arms' as an essential element of a 'fair trial' under Article 6 of the European Convention on Human Rights[28] and the Convention will come into effect in the UK in October 2000 as the Human Rights Act. The absence of either an international or domestic means of accountability would represent a total denial of access to justice for victims of MNC operations in developing countries.

28 *Case of Dombo Beheer BV* v. *Netherlands*, 274 Eur. Ct. H.R. (series A) [1993].

CHAPTER 11

Public International Law in Transnational Litigation Against Multinational Corporations: Prospects and Problems in the Courts of the Netherlands

ANDRÉ NOLLKAEMPER*

INTRODUCTION

In this article I will examine the prospects and problems for Dutch courts when they are called upon to apply norms of public international law in transnational litigation, that is: litigation involving one or more private parties and involving one or more foreign jurisdictions. This question is located at the intersection between public international law, private international law and constitutional law. The interplay between these fields of law raises grand theoretical questions concerning the wisdom and validity of the separation of legal fields – the issues examined below provide support for the view of Philip Jessup that the proper unit of analysis should be 'transnational law' in which these once separated fields are merged.[1] It also raises thorny technical legal issues that only to a very limited extent have been addressed by courts or that otherwise have been resolved. This article will provide a survey of the prospects and problems involved in the application of public international law in transnational litigation.

The examination of the question as phrased above is set against the backdrop of the legal questions that have inspired the book of which this article is part: can a corporation registered in the Netherlands and operating in a foreign country be held liable if it breaches certain norms of public international law, particularly international human rights law, labour law and environmental law? Cases in which such norms allegedly have been breached have been reported, Royal Dutch Shell in Nigeria perhaps being the most famous example. The possibility that a case against such a corporation may end up in a Dutch Court is a real one. In the case of *Ken Wiwa v. Royal Dutch Petroleum Company*, filed at the US District Court for the Southern

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1 P.C. Jessup, *Transnational Law* (1956), Chap.1. *See also* H.H. Koh, 'Transnational Legal Process', 75 *Neb. L. Rev.* (1996), p. 181.

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District of New York, experts for the defendants argued that the Netherlands is an available forum in which plaintiffs could file the lawsuit.[2] At the time of writing, the possibility that eventually this cases might be transferred to a Dutch court still appears to exist. One could also conceive of the possibility that the often alleged violations of environmental law by the same corporation in Nigeria could form the basis of a complaint in a Dutch court. As yet, very few cases have been brought against multinational corporations registered in the Netherlands. However, in view of the possibility that this may be done in the future, it is pertinent to examine the applicable legal techniques that may be relevant to determining liability in this type of situation.

One qualification is in order. The article is only concerned with the direct liability of private parties under international law - that is, with findings of liability of private parties based in whole or in part on a finding of a breach of international legal norms. The analysis excludes findings of liability based exclusively on national law - even when that incorporates, or is inspired by, international law. As a practical matter, this is an important restriction. In many cases national law – either Dutch law or the applicable foreign law – will be more than adequate to determine wrongfulness in cases of gross violations of human rights, labour standards or environmental standards, and there will be no need to examine international standards. Of course, the applicable national law may be influenced by international law. If may be said, following Kelsen, that if Dutch courts apply national law that incorporates and gives effect to international law, they *indirectly* give effect to international law. However, I will leave that construction aside, and focus on the narrow set of cases where application of international law would offer more protection to the injured parties than the applicable norm of national law, and the question arises whether these norms can be applied in a civil case.

The article shows that Dutch constitutional law and the system of private international law as it applies in the Netherlands leave much room for Dutch courts to give effect to public international law where the applicable national law – as determined by rules of private international law – is either incompatible with international law or offers less protection than the rules of public international law. However, in various contexts exceptions apply that limit the practical use of this general principle, the most important one being that few norms of public international law are suited to determine directly the lawfulness of acts of private parties.

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2 Declaration of J.K. Franx, 21 Mar. 1997, on file with author.

1 GENERAL OBSERVATIONS ON THE APPLICABLE LAW

When a claim is presented to a Dutch court and the court, under international private law, qualifies the claim as a tort, the Court has to decide on the basis of what law it has to determine whether a tort was committed. Normally the court then will determine that either Dutch law or foreign law is applicable. The principle that guides the court's decisions on this point is the principle of the *lex loci delicti*: The place where the harm has occurred determines the applicable law.[3] In the type of cases with which this book is concerned, it can readily be seen that in and by itself this principle does not give us an answer as to what rules are applicable. In case of a corporation registered in the Netherlands and causing harm in a foreign country, the *lex loci delicti* can, depending on the case, be either Dutch law or the law of the foreign country. Dutch law may be the *lex loci delicti* to the extent that the activities in question are planned or otherwise initiated in the Netherlands. Dutch law also may extend to certain isolated parts of the claim that have little connection to the foreign jurisdiction involved, such as the release of documents or other information by a Dutch corporation to plaintiffs seeking relief in a Dutch court. On the other hand, foreign law may apply as the actual effects of the activities takes place in the foreign country – that is: if the persons whose international rights are allegedly violated or the environment that has been damaged are located in that country. Thus, in particular circumstances, either Dutch law and foreign law, or a combination thereof will be applicable to the types of claims with which we are concerned. In both cases the question arises under what circumstances *international* law can, in conjunction with the applicable national law, be applied in this transnational litigation. I will proceed below (sections 3 and 4) to examine the application of public international law when either Dutch law of foreign law is the applicable law.

Before that, however, we need to examine why one would need to turn to national law at all at this stage, and whether we could not *directly* determine the legality of the contested activity on the basis of international law. There are good arguments for an affirmative answer.[4] In cases of transnational litigation public international law appears more neutral and fairer to the parties than application of the law of one state. Applying national law has the inevitable consequence that one party is subjected to laws of another state, in the making of which its own country has played no role. Public international law is the more objective law – assuming that the rule

3 See, e.g., HR 19 Nov. 1993, *NJ* 1994, 622, *Stg. COVA* v. *Banque Generale du Luxembourg (Suisse) SA*, m.nt. JCS and PvS, para. 4.2.

4 E.g.: A. d'Amato, in: A. d'Amato (ed.), *International Law Anthology* (1994), p. 405.

of international law in question is binding on all jurisdictions involved. Application of public international law would also prevent the somewhat arbitrary choice of law in the type of cases indicated above – where an act is initiated in one country, but the effects are felt in another country. Application of the laws of both states is possible, and the choice for one over the other, that may lead to different outcomes, is to some extent arbitrary. Applying rules of public international law accepted by all states involved can prevent this. Moreover, in certain cases public international law may be the *only* relevant rules of decision. This is in particular true when national norms are tied to the national legal context, and cannot easily be applied abroad. For instance, many environmental standards are specifically made for national context, e.g., through links with zoning plans, etc., and cannot out of legal context be applied to foreign territory.[5] This too would plead against application of these norms, and norms of public international law then may prove more proper.

Yet, these considerations are not generally accepted in the case law. The somewhat arbitrary and on its face unfair application of national law to subjects for whom that law has no legitimacy is generally accepted as a necessary part of the co-ordinating function of international private law in cases involving different jurisdictions. When the national law of one of the parties is considered inappropriate, parties turn to the national law of the other jurisdiction involved rather than to international law. The one exception concerns cases where a tort allegedly is committed outside the national jurisdiction of any state. Courts have accepted that in these cases public international law is the proper rule of decision. Consider the following example. A dispute arose between the State of the Netherlands and the United Kingdom Post Office on the one hand, and the owner of a fishing vessel, *GO4*, on the other, concerning damages caused to telephone cable on the North Sea outside territorial waters allegedly caused by the vessel. The District Court of Rotterdam held that:

> Since the event occurred on the high seas, no system of national law can be identified, on the basis of which it can be determined whether this event constitutes a tort and what legal relationship between parties would result therefrom. However, at the place where the event occurred norms of public international law do apply, on the basis of which the aforementioned determination

5 Cf., HR 5 June 1953, *NJ* 1953, 613, *Melchers* v. *Nationale Handelsbank NV* (holding that provisions of Dutch labour law concerning dismissal are not applicable on a labour contract that is governed by Dutch law but is to be performed abroad – whether or not Dutch law was applicable, the labour relationship was outside the scope of the provision concerned).

> can be made. In particular is applicable the 'Agreement for the protection of submarine telegraph-cables', signed at Paris on 14 March 1884 (*Stb.* 1888, 74).[6]

In this case, the Court recognized that public international law could provide an acceptable neutral normative sphere to determine legality of private acts. Note that in this case the treaty expressly laid down liability rules to be applied to private parties. This construction is extremely rare for treaties applicable to the disputes in which multinational corporations may be involved. In any case, for cases not involving areas outside national jurisdiction, this practice is not followed, and courts do turn to the applicable national law,[7] and only subsequently, and in the context of the applicable national law, refer to public international law.

One other option exists for applying public international law at this early stage in the legal decision-making. Even when public international law itself is not the rule of decision, but a court proceeds on the basis of national law, it might be argued that the *choice* of the applicable national law should be determined by public international law. This obviously is the case when the states concerned are party to a treaty that lays down the applicable law. But the question I raise here is a more fundamental one: Should the court let the choice of law be determined by the question whether one of the possible systems of law is more or less acceptable in the light of public international law? For instance: in case of an alleged environmental tort in state X, a Dutch court would consider whether to apply Dutch law or the law of state X. Assume that the law of state X is totally deficient from the point of view of public international law. Should, then, the Dutch court *for that reason* opt for Dutch law? There is no case law on this matter. Apart from choice-of-law treaties, the choice of law largely is withdrawn from the directions of public international law. In any case, the question seems a theoretical one. Even if courts do not use international law to determine the choice of law, they can, once a particular national law has been chosen on the basis of private international law criteria, 'disapply' particular rules of state X's national law if these violate international law. International law thus can enter in the stage of application of foreign law, rather than in the choice of that law. This issue will be further discussed below in Section 4. The result is the same, and it seems that from the point of view of public international law that option is equally acceptable.

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6 Rb. Rotterdam 20 Nov. 1978, *Schip & Schade* 1984, 18, *'t Mannetje-van Dam* v. *Staat der Nederlanden (PTT)* (my translation, A.N.).

7 The same is true for cases located in areas outside national jurisdiction when no international law is applicable: see HR 16 Mar. 1979, *NJ* 1979, 540, *Townsend Car Ferries Ltd.* v. *Nederland.*

2 APPLICATION OF PUBLIC INTERNATIONAL LAW THROUGH DUTCH LAW

When Dutch law is the applicable law, enforcement of public international law in transnational litigation in principle is not different from application of public international law in 'normal' litigation that is wholly confined to the domestic sphere. Two questions therefore need to be addressed: what are the normal rules determining the application of public international law between private parties, and should these rules be adjusted when they are applied to transnational legal relationships?

2.1 General Rules On the Application of Public International Law Between Private Parties

As to the normal rules determining the application of public international law between private parties, the situation can be summarized as follows. In terms of Dutch tort law, a tort has been committed by a corporation when (1) the activities of the corporation in question are directly in violation of an international legal right or duty, or (2) the activities violated a duty of care, as interpreted with reference to international law (Article 6:162 Civil Code). The distinction is one between the application of public international law as a direct or an indirect basis for decision. I will review these situations separately.

For direct application, two conditions need to be fulfilled. First, the norms in question must have direct effect; and, second, the norms must have horizontal effect – that is: they must be capable of producing legal effect in the relations between two private parties. The requirement of direct effect stems from Article 93 of the Dutch constitution. Article 93 provides that: 'Provisions of treaties and resolutions by international institutions, which may be binding on all persons by virtue of their contents, shall become binding after they have been published'.

International legal norms that satisfy the criterion set forth in Article 93 have both direct effect and, in appropriate circumstances, horizontal effect, and as such can be the basis of a civil action. The criterion for direct effect has been interpreted by the Dutch Supreme Court, the *Hoge Raad*, in terms of intent of the parties and the question whether the norm in question can function objectively in the domestic legal order. As to this latter criterion, the question is whether courts can apply the norm as such, or whether the norm requires further elaboration by the legislature.[8] The direct effect of

8 See, e.g., HR 18 Apr. 1995, *NJ* 1995, 619, *E.O.* v. *Openbaar Ministerie*, para. 6.2; 28 *Neth. Y.B. Int'l L.* p. 336.

an international norm also is a minimum condition for a norm to have horizontal effect and to apply in the legal relationship between two private parties. However, it is not a sufficient condition – courts have held that not all norms that produce direct effect also apply between private parties. Whether a norm has horizontal effect depends primarily on the intention and text of a provision, but courts have much leeway (as will appear from the examples below) to determine that although a norm may only have been written with regard to the relationships between a state and an individual, or even between two states, it also is relevant in the relationship between two private parties. If so, violation of that norm then violates written law in terms of Dutch tort law. Hence, if plaintiffs that have suffered injury as a result of activities of corporations can base their claim on a directly effective rule of international law, the court will evaluate the activities of the corporation on the basis of international law and may, if the norm is violated, hold on that basis alone for the plaintiffs.[9]

The subsequent question is whether the type of norms that have been said to be implicated by alleged abusive behaviour by certain corporations in certain parts of the world pass the tests that courts have formulated for direct and horizontal effect. I will confine myself here to four categories of norms: international criminal law, international human rights law, international labour law and international environmental law.

It has been said that corporations might engage in behaviour that is criminalized by international law, such as torture or crimes against humanity (I do not express myself here on the question whether these claims are really plausible, but the claims are out there). It seems that if international norms criminalize individual behaviour of private persons (which is not the case for torture), they are directly binding for individuals in terms of the Constitution. Although there is little practice on this point, it is believed to be consistent with the Constitution – and not to violate the *nulla crimen* principle – to prosecute and convict individuals or corporations directly on the basis of international criminal norms, even if they have not been incorporated in Dutch law.[10] If so, it would seem acceptable to apply such norms in civil cases, and determine that a violation of, say, the prohibition of torture by or on behalf of a corporation constitutes a tort against victims

9 *A contrario*, this can be concluded from HR 1 June 1956, *NJ* 1958, 424, *Mettes* v. *Institut National des Appellations d'Origine des Vins et Eaux-de-Vie*, and HR 23 Sept. 1988, *NJ* 1989, 743, *Mines de Potasse d'Alsace SA (MDPA)* v. *Onroerend Goed Maatschappij Bier BV*, para. 3.2.

10 A.J.P. Tammes, 'Een ieder verbindende' verdragsbepalingen, 37 *Nederlands Juristenblad* (1962) p. 71.

(assuming of course that all other conditions are satisfied). I am not aware of any Dutch case-law that affirms this proposition, though.

It has been said that also international human rights law can be relevant to, and violated by, multinational corporations. Dutch courts have accepted that for a narrow category of international human rights norms the conditions of direct effect and horizontal effect can be fulfilled, in particular for Articles 8 of the European Convention on Human Rights (privacy) and Article 26 of the International Covenant on Civil and Political Rights (non-discrimination). In a case where the plaintiff alleged her right to privacy was violated by a neighbour, the Hoge Raad held that the contents of the right to privacy was in part determined by Article 8 of the European Convention, 'of which it must be accepted that it also applies between citizens. A violation of this right results in principle in a tort under article 1401 (old) of the Civil Code'.[11]

In a case involving alleged age discrimination of a private employer, the *Hoge Raad* held that 'It is not excluded that unequal treatment on the ground of age is in violation of Article 1 of the Constitution and Article 26 of the ICCPR'.[12]

Having, in these cases, accepted the fundamental principle that international human rights norms that can have direct effect also can have horizontal effect, there does not seem to be a principle reason why not other international human rights norms that are capable of having direct effect also are capable of having horizontal effect. Large parts of the norms contained in the ECHR and the ICCPR –that have been accepted as having direct effect– then could pass the test. In addition to the rights of privacy and non-discrimination, this could apply to freedom of speech or freedom from torture.

Dutch courts have also accepted certain treaties in the sphere of labour law as directly determinative of the legal relationship between private parties. In a dispute between a transport company and its employers concerning the right of the latter to strike, the *Hoge Raad* held that:

> If a strike in principle is governed by art. 6, introduction and par. 4, of the European Social Charter, then it must, despite harmful effects for the employer and third parties, in principle also by the employer be accepted as a lawful exercise of the fundamental rights protected by this article.[13]

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11 HR 9 Jan. 1987, *NJ* 1987, 928, *A.H.J.G.* v. *B.K.*, para. 4.4 (my translation, A.N.).

12 HR 13 Jan. 1995, *NJ* 1995, 430, *Codfried* v. *ISS Servicesystem*, para. 3.4 (my translation, A.N.).

13 HR 21 Mar. 1997, *NJ* 1997, 437, *Vervoersbond FNV* v. *Verenigd Streekvervoer Nederland*, para. 4.3 (my translation, A.N.).

On the other hand, large numbers of international standards that may be relevant to policies of corporations do *not* have direct effect. For instance, courts have determined that a variety of provisions of the European Social Charter and the International Covenant on Economic, Social and Cultural Rights do not produce direct effect.[14] Also not determinative for the legal relationship between private parties is the 1930 Forced Labour Convention. The *Hoge Raad* determined this when a registered conscientious objector who performed labour as an alternative to military service refused to perform the part of the alternative labour that exceeded the duration of the military service. In his defence, he argued that the statutory obligation to perform labour would be contrary to the 1930 Convention Concerning Forced or Compulsory Labour.[15] The Convention obliged the Netherlands to 'suppress the use of forced or compulsory labour in all its forms within the shortest possible period'. The *Hoge Raad* rejected the argument and held that the pertinent treaty provisions did not have direct effect. It held:

> Article 1 of the Convention merely contains a declaration that the members of the International Labor Organisation that have ratified the Convention – one of which is the Netherlands – undertake to suppress the use of forced or compulsory labor within the shortest possible period. Neither this provision nor Article 2 of the Convention.... contain norms that are so precisely defined as to be eligible by virtue of their contents for direct application and hence to be capable of being binding on all persons. It follows that these provisions cannot function as objectively applicable law in the Netherlands.[16]

And finally, international environmental law also seems to lack horizontal effect. Only in one case it has been held otherwise. This was the decision of the District Court of Rotterdam (overturned on appeal) in the well-known dispute concerning the pollution of the river Rhine by chlorides. When Dutch horticulturists sued the French mining company *Mines de Potasse d'Alsace* for damages, the District Court found that there was no applicable rule of national law that it could use to decide the case. It then turned to unwritten international law and found and applied the so-called *'sic utere tuo'* principle: No state can use its territory for activities that cause harm to another state. The Court held that this rule also applies in the relations

14 HR 17 Oct. 1980, *NJ* 1981, 141, *Mühren* v. *Koninklijke Nederlandsche Voetbal Bond (KNVB)*.

15 39 U.N.T.S. 56, entered into force 1 May 1932.

16 HR 18 Apr. 1995, loc. cit. n. 8, at para. 6.2.

between citizens.[17] The Court of Appeals of The Hague overturned this ruling. The Court considered it incorrect to apply unwritten rules of international law that had 'no direct effect but which apply exclusively to States as subjects of law, in a dispute between private persons as is the case here'.[18] It must be said that the opinion of the Court of Appeals was only concerned with unwritten rules of international law that apply 'exclusively to States as subjects of law'. The judgement does not tell us whether this would apply in the case of treaty law that, at least according to the Constitution, *can* bind individuals. However, in no case has environmental treaty law been accepted as having direct and horizontal effect.

Because many rules of international law appear incapable of having direct horizontal effect, the doctrine of *indirect effect* is of particular importance. As noted above, under Dutch tort law a tort is committed not only in case an act or omission violates a statutory duty or a right is violated, but also when 'an act or omission violates a rule of unwritten law pertaining to proper social conduct'. This offers a separate avenue for applying international law to the actions of corporation: It might be argued that international law – whether directly effective or not – can be relevant in constructing what is 'proper social conduct'.

Some older case-law has expressly rejected the possibility of applying provisions of treaties that do not have direct effect in the construction of a tort, holding that as long as Parliament has not adopted implementing legislation a treaty can not be considered to lay down a standard of due care.[19] Also constitutional history does not provide authority as far as non-self executing treaty provisions are concerned. It has been said that the drafters of the constitution did not wish application of non-self-executing treaties in the context of tort law because this would give virtually unlimited powers to the courts.[20] Nonetheless, in certain cases courts have employed a more flexible construction that, by analogy, appears relevant for the issues under consideration here. Particularly relevant for the context of corporations is the following case. The company Batco Nederland closed its factory in Amsterdam. The labour unions objected to the decision and argued that the policies of Batco should be considered as 'mismanagement'.

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17 Rb. Rotterdam 18 Jan. 1979, *NJ* 1979, 113, *Handelskwekerij G.J. Bier BV* v. *Mines de Potasse d'Alsace SA (MDPA)*; 11 *Neth. Y.B. Int'l L.* (1980) p. 326; 28 *Neth. Int'l L. Rev.* (1981) p. 63, and Rb. Rotterdam 16 Dec. 1983, *NJ* 1984, 341, *Handelskwekerij G.J. Bier BV* v. *Mines de Potasse d'Alsace SA (MDPA)*; 15 *Neth. Y.B. Int'l L.* (1984) p. 471.

18 Hof Den Haag 10 Sept. 1986, 19 *Neth. Y.B. Int'l L.* (1988) p. 496, *Mines de Potasse d'Alsace SA (MDPA)* v. *Onroerend Goed Maatschappij Bier BV*, para. 5.4.

19 Hof Den Haag 9 Feb. 1942, *NJ* 1942, 371, *Bally Schuhfabriken AG* v. *Dungelmann*.

20 See J.G. Brouwer, *Verdragsrecht in Nederland: Een studie naar de verhouding tussen internationaal en nationaal recht in een historisch perspectief* (1992), p. 215.

The court then had to determine whether that qualification was appropriate. In this context the court attached weight to the OECD Guidelines for multinational enterprises. These Guidelines included the following:

> Enterprises should, within the framework of law, regulations and prevailing labour relations and employment practices, in each of the countries in which they operate, in considering changes in their operations which would have major effects upon the livelihood of their employees, in particular in the case of the closure of an entity involving collective lay-offs or dismissals, provide reasonable notice of such changes to representatives of their employees and where appropriate to the relevant governmental authorities, and co-operate with the employee representatives and appropriate governmental authorities so as to mitigate to the maximum extent practicable adverse effects.

The Chairman of the company had expressly noted that 'The standards they set are very much in line with our own established policies in these matters and we certainly support their efforts to have them widely applied'. The Court held:

> It is not without significance that BAT Industries has accepted the OECD Guidelines as guideline for its policy. These Guidelines too provide that in a case like the one under consideration 'consultations' with the representatives of the employees should take place. Under these circumstances, the termination by Batco Nederland of the consultations with the unions and the works council is a serious neglect of its obligation to consult. Therefore, Batco Nederland acted in violation of fundamental principles of responsible entrepreneurship. The decision of Batco Nederland to close its factory in Amsterdam, taken in violation of these principles, therefore is to be considered as mismanagement and should be annulled.[21]

This shows that the breach of the OECD Guidelines can be relevant for a finding of mismanagement in terms of Dutch law. The same finding appears possible for a tort. There is similar practice, that need not be cited here, where courts have concretized the due care norm with reference to non-binding national or private sector norms. In view of the cited case on the OECD Guidelines, *a fortiori*, it would seem that treaties that have been approved as law by Parliament should be relevant in determining 'due care' and thereby wrongfulness. One critical difference, though, between the OECD Guidelines and most treaties on for example environmental protec-

21 Hof Amsterdam 21 June 1979, *NJ* 1980, 71, *Batco*, para. 6.

tion that have not been accepted as having direct horizontal effect, is that the Guidelines expressly were intended for corporations. Courts may be more reluctant to determine what is 'due care' for a corporation on the basis of a treaty that only imposes certain obligations for furture behaviour on the legislature. Much will depend on the nature of the provisions that in any given case apply.

3.2 Application of Public International Law Between Private Parties in Transnational Situations

Having thus summarized the prospects of applying public international law as part of national law in tort case, the question now must be considered whether these observations also apply to transnational litigation – that is, cases where the activities of the defendant were located in a foreign jurisdiction. It seems that these circumstances should not make any difference. International law does not appear to pose any restrictions.

It might be thought that this should be different when the foreign jurisdiction involved is not itself bound by the norms of public international law. For instance: a Dutch court would examine under a norm of treaty law, applied through Dutch law, the legality of a activities of a corporation, registered in the Netherlands, that took place in a country that itself is not bound by that rule. Would, in these circumstances, the application of a norm of public international law *vis-à-vis* the foreign jurisdiction not amount to a violation of the principle that states cannot extent treaties to third parties, and thereby violate the public international legal rights of that foreign jurisdiction? That question should be answered in the negative. Public international law is incorporated in Dutch law, and as such applied to an activity involving foreign jurisdiction. There is no principle difference between the application of Dutch law to that activity (which as a matter of private international law is considered unobjectionable) and the application of public international law through Dutch law, even if that international law as such is not binding on that jurisdiction. It may even be argued that there is not only a discretion but a duty involved for Dutch courts: From the point of view of public international law the Netherlands, including its courts, are bound to give effect to rules of public international law in matters under their jurisdiction. Restrictions do apply under Dutch constitutional law, but where no such restrictions apply it does not seem that separate restrictions flow from the fact that the factual situation involves a foreign element. This matter is discussed more fully below in the context of application of public international law in connection to foreign law.

4 APPLICATION OF PUBLIC INTERNATIONAL LAW THROUGH FOREIGN LAW

The question whether Dutch courts can apply international law when the *lex loci delicti* is *foreign* law presents quite different issues. Three separate dimensions should be distinguished: (1) what is the basis for applying public international law in such cases, (2) what is the possibility of applying public international law limited to cases when the foreign jurisdiction involved has accepted the norms of public international law at issue, and (3) what are the consequences of applying international law in such cases?

4.1 Basis for the Application of Public International Law

The first question is what legal system determines whether in such cases a Dutch court can apply international law. One might think that this question determined by the foreign law. Just as in the case examined in section 3 above, where Dutch constitutional law determined whether Dutch courts applied international law, in these cases the applicable foreign law would be determinative. The argument then would be that in a tort case, the applicable foreign law is not only foreign *tort* law, but also the *entire* system of foreign public law, including the foreign constitutional law, that may be relevant to the case. The foreign constitutional law then would determine whether international law is part of the foreign law in question. Thus, for instance, if the contested actions of a corporation would have caused injury in India, and Indian law would apply to the claim, the Dutch court would have to determine according to Indian law whether international law could be applied. The question whether that law is binding on the forum state then would not necessarily be relevant. If a court can apply, say Indian law, in a dispute involving a Dutch firm, why not also international law that is part of the law of the land in India but that does not bind the Netherlands?

An alternative approach would be to argue that this question is governed by the law of the forum – in our case the Netherlands. Thus, even when a court would find foreign law to be the applicable law, Dutch constitutional law would determine the interjection of public international law into that law.

There is little case-law on the matter. However, I believe both constructions to be too narrow in their approaches to the question. The question whether a Dutch court – or for that matter any national court – should apply international law in a case involving foreign law is not governed by that foreign law or by the constitutional law of the forum but *by international law itself* to the extent that it is binding on the forum. If the court of the forum is bound by rules of international law, it is, as an organ of the

state obliged to give effect to relevant rules of international law. Whether the foreign law allows for the application of international law then is not relevant. Whether the constitutional law of the forum allows for it likewise would not seem relevant. The constitutional restrictions that limit application of international law in case Dutch law is the applicable law are not relevant here. These limitations are related to separation of powers and protection of parliamentary supremacy in the forum. These concerns are immaterial if the international law is not applied to supplement or trump or supplement the law of the forum, but foreign law. The parliamentary supremacy is not at stake when a court applies public international law in connection with foreign law. Where no constitutional restrictions apply, courts are at liberty to apply international law and indeed are, as matter of public international law, compelled to give effect to international law.

That position seems accepted in case-law. In *United States* v. *Bank voor Handel en Scheepvaart*, the Hoge Raad accepted that Dutch courts could examine the legality of foreign acts under public international law. It did not make the permissibility of such examination dependent on the question whether the rule of public international law in question was part of either the applicable foreign law or the law of the Netherlands.[22] The application of public international law would seem to be not determined by the foreign law or Dutch law, but by international law itself.

It has nonetheless been argued that courts should not apply public international law directly, but do so as part of the Dutch 'public order'. The public order concept as applied in the Netherlands then is as interpreted with reference to international law – what is in violation of a norm of international law could be considered in violation of the Dutch public order. There is some support in case-law for this proposition. The Hoge Raad overruled a Dutch court that had prohibited a strike in the Netherlands, in a context relating to the Netherlands' legal order, by applying rules of foreign law that prohibit that strike. The Hoge Raad argued that the lower court's prohibition

> violated the international public order ('ordre public') as understood in the Netherlands.... In this regard it is relevant that the social and legal convictions that have emerged in the Netherlands, and that have been reflected in jurisprudence, the right to strike has been accepted as a fundamental legal principle, and the Netherlands also has acceded to the European Social Charter (*Trb.* 1962, 3; 1963, 90; 1980, 65), that Article 6 of that treaty recognizes the right of employees and employers on collective action in case of conflicts of inter-

22 HR 17 Oct. 1969, *NJ* 1970, 428, *Verenigde Staten* v. *Bank voor Handel en Scheepvaart NV.*

> ests, including the right to strike, and that the Netherlands has declared upon ratification that it considers itself bound by the article in regard of employees not in public service.[23]

However, making application of public international law contingent on the concept of public order seems to be a too narrow construction. As F.A. Mann pointed out, the public policy concept is an 'inadequate guide on account of the relativity of the conception'. Public international law provides the more uniform and precise standard for the evaluation and, where relevant, the disapplication, of foreign law.[24] This is particularly so since in Dutch courts the application of public policy exceptions generally is restricted by the 'closeness of the contact' of the facts with the forum.[25] If a foreign statute would be considered in terms of public order as interpreted in view of international law, this could result in application of foreign law in case of lack of contact, even when the foreign law would be an international illegality. A judicial decision then would assist performance of an illegal act, and indeed implicate the responsibility of the Netherlands as the forum State.[26] For these reasons, by virtue of public international law itself the courts can examine the legality of foreign law under international law.[27] It must be added though, that generalizations should be treated with caution. Much depends on the circumstances of a case, and cases can be envisaged where the facts have insufficient connection to the national legal order to justify application of international law *vis-à-vis* a State that itself is not bound by that rule.[28]

4.2 Significance of the Acceptance of the Relevant Rules of Public International Law by the Foreign Jurisdiction

The second question is whether in these circumstances it is relevant whether the State whose law is to be applied was bound by the international norms in question. For instance: a Netherlands court applies the law of State X,

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23 HR 16 Dec. 1983, *NJ* 1985, 311, *International Transport Workers Federation* v. *Ocean Trade Company* (my translation, A.N.).

24 F.A. Mann, *Studies in International Law* (1973), pp. 377-378. Similarly: A.P.M.J. Vonken, 'De reflexwerking van de mensenrechten op het IPR', in: P.B. Cliteur and A.P.M.J. Vonken (eds.), *Doorwerking van mensenrechten* (1993), p. 153 at pp. 182-183.

25 See HR 12 Feb. 1960, *NJ* 1960, 170, *Schwab* v. *Bondsrepubliek Duitsland.*

26 Mann, op. cit. n. 24, at p. 380.

27 Similarly: Vonken, op. cit. n. 24, at p. 172.

28 A.L.G.A. Stille, 'Enkele opmerkingen over de werking van mensenrechten en van de openbare orde in verband met het Erfrechtverdrag', in: G E. Schmidt, J. A. Freedberg-Swartzburg (eds.), *Het NIPR Geannoteerd* (1996), p. 57 at p. 61.

and finds that that law is incompatible with the European Convention on Human Rights, to which the Netherlands is a party, but State X is not a party. The court then would apply to that State a norm to which that State perhaps intentionally did not wish to be bound. Should this restrict application of the rule of international law by a Dutch court? Similar to what was noted at the end of section 3, it seems that this question should be answered in the negative.[29] The court is obliged to apply public international law in matters under its jurisdiction – as expressly provided for in the European Convention. Whether the foreign State involved is a party to the treaty is immaterial. A Dutch court would breach the treaty by applying a foreign law that violates a treaty to which the court, as organ of the Dutch State, is to give effect with regard to a plaintiff that is properly within the court's jurisdiction. By applying foreign law that violates international law, a Dutch court would import the wrong into the national legal order – even if the other State is not a party to he treaty establishing that particular norm.[30] The *Soering* Case of the European Court on Human Rights provides relevant precedent here – the United Kingdom would have violated the European Convention if it would have extradited a US national who would face death row to the United States, even if the United States itself was not a party to the European Convention.[31]

4.3 Consequences of Application of Public International Law

The third question is: If a Dutch court applies international law in transnational litigation otherwise governed by foreign law, what consequences the court should give to applicable rules of international law? In cases where the applicable foreign law violates international law, it seems that the correct consequence should be to disapply the foreign law. The *Hoge Raad* has accepted this consequence.[32] A hypothetical case can illustrate the relevant issue. A foreign state has a law in force that would expressly support or even direct policies by corporations that violated international labour standards or environmental standards. Dutch courts then should review the compatibility of such laws with international law. Where appropriate, they should 'disapply' foreign law to the extent incompatible with international law. The foreign statute then is not to be applied in determining the ques-

29 For a more cautious approach, see: C.W. Dubbink, 'Mensenrechten en de openbare orde in het internationaal privaatrecht', in: S.C.J.J. Kortmann, et al. (eds.), *Op recht* (1996), p. 51 at p. 55.

30 Vonken, op. cit. n. 24, at p. 174.

31 *Soering* v. *the United Kingdom*, 161 Eur. Ct. H.R. (series A) [1989].

32 HR 17 Oct. 1969, loc. cit. n. 22.

tion whether a wrong has been committed. If the norm is disapplied, Dutch law may be applied. Whether norms of public international law can be applied directly to determine the legality of the contested activity depends on whether these norms are proper for determination of legality between two private parties. This requirement may not often be fulfilled – what was observed in section 3 on the application of norms of public international law in 'horizontal relationships' is relevant here.

CONCLUSION

The above survey displays that there is little case law on the possibilities of Dutch courts to apply public international law in transnational litigation. It is difficult to speculate why this is so – it may be due to a combination of the only recently emerging awareness of a possible tension between transnational activities of certain corporations and international law, the fact that in some cases national law offers an adequate basis for decision, and a general unawareness of the possibilities to apply international law in national courts. It appears, though, that the courts of the Netherlands have significant opportunities for giving effect to rules of public international law in cases of transnational litigation, either on the basis of public international law as incorporated into national law, or as part of the applicable foreign law, and that in certain circumstances they are, as a matter of public international law, compelled to do so. The most important limitation to the application of public international law as a direct basis for decision will be that for many norms in the sphere of human rights law and environmental law, courts have not accepted that they allow for direct judicial application or that they allow for application at all in a dispute between private parties. To that extent, the limitations in judicial application of public international law in transnational litigation are not caused by the legal techniques of giving effect to public international law in national courts, but by objective, structure and contents of the rules of public international law at issue.

CHAPTER 12

Transnational Litigation Against Multinational Corporations Before Dutch Civil Courts

GERRIT BETLEM*

INTRODUCTION

In both the US and the UK, litigation is taking place by victims of alleged violations of human rights and/or environmental law by multinational corporations in developing countries. The harm involved is serious: severe personal injury and even death. The multinational is accused of either actually causing the harm or contributing to it significantly. There are a number of serious barriers to access to justice for these victims. For one thing, the complex nature of the structure of a multinational in numerous, related but legally separate, legal persons in various jurisdictions. For another the risks in terms of costs of taking on a powerful defendant. In practice, suing the local legal person in Africa is often not a viable option either because of lack of funds of that legal person (if it still exists) or lack of legal infrastructure in the home State of the victims. For those reasons the suits have been brought in the 'First World', at the place of the head office or leading company of the activity in question.[1]

Because of the transnational nature of these law suits, issues of private international law form a major part of the legal debate at this stage. One particular feature of the common law jurisdictions involved , and a major restriction on the ability of foreign plaintiffs to sue for acts outside the forum State, is the doctrine of *forum non conveniens*,[2] the power of the

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1 R. Meeran, 'Accountability of Transnationals for Human Rights Abuses', 148 *New L. J.* (1998) pp. 1686-1687 and pp. 1706-1707; see also Meeran's contribution to this volume and the contribution of B. Stephens.

2 See generally e.g., D. W. Dunham and E. F. Gladbach, 'Forum Non Conveniens and Foreign Plaintiffs in the 1990s', 24 *Brook. J .Int'l. L.* (1999) p. 665, and various documents on Australian, Canadian, US and UK law on the Web site of the US State Department's Private International Law Database (International Judicial Assistance), <htt p://www.state.gov/www/global/legal_affairs/judicial.html>, accessed 8 Sept. 1999.

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courts, even where they are legally competent to adjudicate the case, to stay the proceedings because of the availability of an allegedly more appropriate forum elsewhere. It seems useful to examine the feasibility of bringing such a suit before Dutch civil courts because – either on the basis of the EC Jurisdiction and Judgements Convention or on the basis of Dutch domestic law – the principle of *forum non conveniens* does not apply. In addition, quite a number of multinational companies have (head) offices in the Netherlands (for tax or other reasons).

A possible candidate would be Royal Dutch Shell, which is being sued in New York by the family of the executed Nigerian writer Ken Saro-Wiwa. Apparently on *forum non conveniens* grounds, the New York District Court has ruled that London would be the better venue; an appeal has been lodged before the Second Circuit Court of Appeals.[3] The plaintiffs argue that Shell facilitated Mr. Saro-Wiwa's execution. If the case will not proceed on the merits in the US, a court in the Netherlands, as well as an English court, could possibly be applied to by the plaintiffs, given that headquarters of Shell are based in both London and The Hague.

This paper focuses on the following issues: (1) the jurisdiction or competence of a Dutch civil court over the defendant, (2) the relevance of a breach of foreign law, and (3) the question of the *locus standi* or standing of an NGO, for instance a human rights defence organization, before the court. The kind of dispute to be examined primarily involves plaintiffs domiciled outside the Netherlands, be they the victims themselves (natural persons) or an NGO representing their interests – of course, such an NGO might also be based within the Netherlands. The paper complements André Nollkaemper's contribution to this volume, dealing with the impact supranational norms may produce within the applicable tort law regime.

1 JURISDICTION

1.1 Defendants Based in the Netherlands

The question of jurisdiction of the Dutch civil courts is unproblematic when the defendant is based in the Netherlands. Both under Dutch law and under the Brussels Convention (the Jurisdiction and Judgements Conven-

3 For the legal background on this case, see the contribution of B. Stephens to this volume. For the latest update on the case, see the contribution of J. Green and P.Hoffman to this volume.

tion)[4] the rule of the so-called *forum rei* applies: jurisdiction of the court of the defendant's domicile. This is the main rule on jurisdiction of Article 2 of the Brussels Convention. In ordinary civil proceedings before a Dutch court any consideration of *forum non conveniens* does not apply. By contrast, a kind of *forum non conveniens* defence is available in summary proceedings under the Brussels Convention (but not under Dutch private international law); that is, a link between the forum State and the subject matter of the dispute is required.[5]

But where is a legal person's domicile? The Brussels Convention does not itself decide this issue; instead it refers to the rules of private international law of the court before which the case has been brought. The seat of a company constitutes its domicile and must be determined by the court's private international law, which in the Netherlands refers to the doctrine of incorporation (as opposed to the doctrine of the real seat). The place of incorporation, according to its articles of association, is decisive, and not the place where a company's headquarters is based. It follows that under the *forum rei* rule, the Dutch civil courts have jurisdiction only – as a matter of domicile – over companies incorporated under the laws of the Netherlands.[6]

1.2 Defendants Domiciled Outside the Netherlands

Whether a Dutch civil court can exercise jurisdiction over a company domiciled outside the Netherlands is either governed by the Brussels Convention or by domestic (Dutch) private international law. Again, the decisive issue is the company's seat: if this is located in another EU Member State (or to be more precise: a Contracting State to the Convention) the Brussels Convention will apply. This is not the place for a full scale exploration of all the possible grounds for jurisdiction;[7] I shall briefly mention the most relevant ones and their potential applicability (if any).

Unlike under the Brussels Convention, where a company based outside the EU, say the US, is sued on the basis of Dutch internal jurisdiction law, the possibility of suing before the court of the plaintiff's domicile exists: the

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4 1968 Brussels Convention on jurisdiction and the enforcement of judgements in civil and commercial matters, latest consolidated version in *O.J.* (1998) C 27/1.

5 See, for the former, *Van Uden Maritime BV* v. *Kommanditgesellschaft in Firma Deco-Line*, Case C-391/95, ECR I-7091 [1998]; and for the latter, L. Strikwerda, *Inleiding tot het Nederlandse internationaal privaatrecht*, 5th edn. (1997), No. 228.

6 Strikwerda, op. cit. n. 5, at Nos. 199, 232, and 235.

7 See for an overview in environmental liability law, G. Betlem, *Civil Liability for Transfrontier Pollution: Dutch Environmental Tort Law in International Cases in the Light of Community Law* (1993), chap. 2.

so-called *forum actoris*, as opposed to the court of the place of domicile of the defendant. (In other words: the mirror view of the main jurisdictional rule of the place of domicile of the defendant). However, this *forum actoris* will of course not be of any use to a plaintiff based outside the Netherlands. It will only be available to natural and legal persons domiciled within the Dutch jurisdiction. It follows that victims of violations of human rights which have taken place abroad as well as a relevant NGO not based in the Netherlands cannot sue on the basis of the *forum actoris* rule.

In the situation of a defendant based within the EU, the above mentioned Brussels Convention applies and governs the question of jurisdiction of the Dutch courts. Three potential grounds of jurisdiction call for an examination: the forum of the place where a tort has occurred (the *forum delicti*), the forum of where a branch of a company is based, and the special regime for summary proceedings. A specific characteristic of the type of case presently under discussion reduces the availability of the *forum delicti*, namely the fact that the alleged violation of human rights has taken place outside the forum State (indeed outside the whole EU). The ECJ has ruled that this rule encompasses, in situations where the place where the damage arises differs from the place where the tortfeasor has acted, both these places: the place of harm as well as the place of acting. But neither of these places is in the Netherlands.

However, this limitation may be circumvented by constructing the whole case as one involving lack of supervision by the head office of a multinational corporation over its subsidiary based abroad where the actual harmful conduct and its effects took place.[8] If this head office is located in the Netherlands, a Dutch court would have jurisdiction under the rule of the *forum delicti*: the place where the harmful activity (i.e., lack of supervision) has occurred. This head of jurisdiction would of course be overlapping with the *forum rei* (jurisdiction of the court of domicile of the defendant) where the seat of the whole multinational company must be regarded as being based in the Netherlands. But this need not necessarily be the case so that the *forum delicti* (place of harmful activity) can provide an additional head of jurisdiction.

Does the forum of a company's branch produce similar additional value? Again, let us assume that the alleged tort consists in lack of supervision and that this took place at a branch of a multinational corporation located in the Netherlands. The Brussels Convention attributes competence 'as regards a dispute arising out of the operations of a branch, agency or other establishment', to 'the courts for the place in which the branch, agency or other

8 Cf., *Lubbe* v. *Cape plc*, [1999] Int'l Litigation Procedure 113, CA.

establishment is situated' (Art. 5(5)). The key aspect of this provision is that another entity than the branch itself can be sued before the courts of the location of the branch. In the main that would be the parent company of the branch if the latter is a separate legal person. If the branch is not an independent legal person it could not be sued at all and the result of this provision is that the legal entity constituting the corporation may be sued not only at its own seat but at the place of the branch as well. The provision is only applicable at all with respect to a branch of a company itself domiciled within the EU; it therefore cannot be used with respect to a branch of an American company, for example.[9]

Where this provision is applicable it is limited to disputes concerning the 'operations' of the branch. This notion has been construed by the European Court of Justice in *Somafer* to encompass both contractual and non-contractual obligations 'arising from the activities in which the branch (...) has engaged at the place in which it is established on behalf of the parent body'.[10] The Court circumscribed the activities as pertaining to the management properly so-called of the branch, such as the state of the building, the engagement of staff , or contracts entered into at the place of the branch which must be performed within the same Contracting State. This interpretation has been criticised in the literature and by an Advocate General for being unduly restrictive as it would seem to limit this forum to acts (including their impact) within the forum State.[11] However, in the subsequent case of *Llyod's Register* the ECJ made it clear that there is no such a geographical limitation to Article 5(5). This judgement concerned contractual obligations, entered into in France between a French company and the French branch of the London based Lloyd's Register of Shipping, which were to be performed in Spain. The ECJ did not accept the argument that the rule of the forum of the branch requires a limitation to performance within the State of the branch. Instead, it held that were the branch forum to be restricted to performance of obligations within the State of the branch, this rule would be rendered almost redundant in the light of Article 5(1) which already allows the plaintiff to sue before the courts of the place of performance of the obligation.[12] The ruling substantially increases the

9 This follows from the first line of Article 5(5) itself, which reads: 'A *person domiciled in a Contracting State* may, in another Contracting State, be sued: ...' [emphasis added].

10 *Somafer SA* v. *Saar-Ferngas AG*, Case 33/78, ECR 2183 [1978], at 2194.

11 Opinion of A-G Elmer in *Lloyd's Register of Shipping* v. *Société Campenon Bernard*, Case C-439/93, ECR I-961 [1995], No. 7.

12 *Lloyd's Register of Shipping* v. *Société Campenon Bernard*, Case C-439/93, ECR I-961 [1995], para. 17; comment by Hudig-van Lennep, *TVVS* (1997) p. 222.

added value of the forum of the branch compared to *Somafer*. The same reasoning applies to non-contractual obligations.[13]

But even despite the broadening of the scope of the branch forum rule in *Lloyd's Register*, in the case of a tortious lack of supervision by the branch occurring within the Netherlands, the added value of the forum of the branch may still be limited as the Dutch courts may already have jurisdiction on the basis of the place where the harmful event occurred (Art. 5(3)). In addition, where torts take place in the framework of a conglomerate of companies, they can all be joined as co-defendants in a suit brought before the court of the one domiciled in the Netherlands (Art. 6(1) Brussels Convention).

The added value of Article 5(5) is thus to be found in the situation where only a branch of a company (home)based in another EU Member State is situated in the Netherlands. If harm ensued from any operations of that branch, even where the damage occurred outside the forum State, its parent company can be sued in the Netherlands. A second head of special jurisdiction is therefore available within the State of the branch with respect to damage occurring outside that State (and outside the parent's State).[14]

Finally, in summary proceedings an additional forum is available under Article 24 dealing with provisional measures. Pursuant to case law of the ECJ, where this provision constitutes the sole basis for the court's competence, 'a real connecting link [is required] between the subject-matter of the measures sought and the territorial jurisdiction of the Contracting State of the court before which those measures are sought'.[15] It is unclear what exactly this connection between the dispute and the forum must entail. But there is a tendency by the ECJ to limit some special heads of jurisdiction to harm occurring within the forum State. In addition to Article 24, this took place under the *forum delicti* provision (Art. 5(3)) with respect to the courts of the place where the damage arises.[16] It remains to be seen whether this approach will be extended to other *fora*, such as the court of the place where the harmful activity took place. One might expect that this will not happen as that particular forum largely overlaps with the *forum rei*, the court of the place of domicile of the defendant, and the ECJ has ex-

13 See the Opinion of A-G Elmer at No. 8.

14 See (in the context of contractual obligations) F. Salerno, 'The Brussels Jurisdiction and Enforcement Convention', in B. von Hoffmann (ed.), *European Private International Law* (1998) p. 115 at p. 131.

15 *Van Uden Maritime BV* v. *Kommanditgesellschaft in Firma Deco-Line*, loc. cit. n. 5, para. 40; see also *Mietz* v. *Intership Yaching Sneek BV*, Case C-99/96, ECR I-2277 [1999]

16 *Shevill* v. *Presse Alliance SA*, Case C-68/93, ECR I-415 [1995].

plicitly indicated that that forum is competent to deal with damage assessment of loss occurring outside its State.[17]

1.3 (Ir)relevance of the Plaintiff's Domicile

Provided there is an applicable head of jurisdiction, in order for a plaintiff's claim to be declared admissible, the plaintiff's domicile is completely irrelevant. For jurisdictional purposes, as seen above, the domicile of the plaintiff is only relevant where it would provide a connecting factor for the court's competence under Dutch domestic jurisdiction law, the so-called *forum actoris* rule (the court of the domicile of the plaintiff).[18] That rule can only apply – of course – where the plaintiff is based in the Netherlands. In addition, the rule is only applicable where the defendant is based, broadly speaking, outside the EU; when based within the EU, the Convention takes precedence over Dutch domestic jurisdiction law.

Certainly where natural persons are concerned the rule regarding the plaintiff's domicile applies unreservedly. It is only in the context of a claim pursued by a public interest plaintiff (a group action) that a problem may arise. This is not a question of domicile of the plaintiff as such but rather an aspect of the issue of standing and will therefore be discussed *infra* in § 3.2. The position of foreign litigants before Dutch courts may be illustrated by referring to the most international variant, i.e., where both the plaintiff and the defendant are domiciled outside Holland. Such a situation occurs frequently in intellectual property disputes.[19] It follows that suits brought by a non-Dutch based plaintiff even against a non-Dutch based defendant before the civil courts in the Netherlands are no novelty.

2 GIVING EFFECT TO 'FOREIGN' NORMS IN DUTCH TORT LAW

Nollkaemper's contribution to this book targets the impact of public international law in a transnational dispute before the Dutch civil courts, as a matter of Dutch constitutional and substantive private law. This section complements his paper to the extent that the impact of norms issued from either the supranational level or foreign States is considered as a matter of Dutch private international law.

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17 Ibid.

18 Strikwerda, op. cit. n. 5, at No. 219.

19 J.J. Brinkhof, 'Overzicht van de octrooirechtspraak in eerste aanleg in 1992', *Bijblad bij De Industriële Eigendom* (1994) p. 113 at p. 114.

2.1 If Dutch Tort Law Governs the Dispute

Once it has been established that a Dutch court is competent to adjudicate the transnational dispute the question arises – given the international character of the case – what law this court will apply: Dutch or foreign (tort) law? Potentially complex litigation about this issue may be prevented by a choice of law by the parties. Under current Dutch private international law parties are entitled to agree on the applicable law.[20] This may be in the interest of both parties, including the non-Dutch based one, as application of foreign law is not reviewable before the Dutch supreme court. For that reason the French defendant in the French potassium mines litigation about pollution of the river Rhine opted for a choice of Dutch law.[21] The same requirements applicable to choice of law in contracts apply to choice of law in tort (albeit that the choice of law in tort is usually subsequent to the event, of course); therefore the tort must be international and mandatory rules otherwise applicable cannot be 'contracted out'. In addition, an implicit choice of law will be constituted if the parties both continue the proceedings on the basis of the same applicable law.[22] The possibility of a choice of law in this non-contractual context is confirmed by the 1999 Bill on Conflicts of Law in Tort [*Wet conflictenrecht onrechtmatige daad*], which lets a choice of law by the parties prevail over the main conflicts rule of the *lex loci delicti* (Art. 6).[23]

Absent a choice of law, the rule with which the law governing the dispute is selected is the *lex loci delicti*.[24] Application of this rule is problematic when more than one *locus* may qualify as the place of the harmful event. In cases where the actual injury occurs in another country than the one where the act causing this damage took place (a 'distance delict') such a situation obtains.[25] Just like in the context of jurisdiction, both these places might qualify; it is well known that the European Court of Justice has, in the context of the Brussels Convention, ruled to the effect that the

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20 Strikwerda, op. cit. n. 5, at No. 183.

21 Rb. Rotterdam 8 Jan. 1979, *NJ* 1979, 113, *Handelskwekerij G.J. Bier BV* v. *Mines de Potasse d'Alsace SA (MDPA)*; 11 *Neth. Y.B. Int'l L.* (1980) p. 326; 28 *Neth. Int'l L. Rev.* (1981) p. 63.

22 Strikwerda, op. cit. n. 5, at No. 183.

23 Regeling van het conflictenrecht met betrekking tot verbintenisssen uit onrechtmatige daad (Wet Conflictenrecht Onrechtmatige Daad), Voorstel van Wet, *TK* 1998-1999, 26608, No. 2.

24 HR 19 Nov. 1993, *NJ* 1994, 622, *Stg. COVA* v. *Banque Generale du Luxembourg (Suisse) SA*; 41 *Neth. Int'l L. Rev.* (1994) p. 363.

25 Opinion of A-G Strikwerda in HR 9 Dec. 1988, *NJ* 1989, 203, *Kanhai and Kanhai* v. *Vardinoyannis*, No. 3.8.

plaintiff can choose between the court of the place of the wrongful activity and the court of the place where the loss occurred.[26]

To date there is no case law of the supreme court of the Netherlands (the *Hoge Raad*) on this issue. If the emphasis would fall on the place of loss, a foreign law would govern the dispute where a multinational is alleged to have caused harm outside the Netherlands. But if one were to stress the place of activity, the Netherlands can be characterized as the *locus delicti*. For instance it may be argued, as in the English *Lubbe* v. *Cape* case,[27] that the alleged wrongful act consists of lack of supervision which occurred at the head office of the multinational (or another office) situated in the Netherlands. This approach would probably result in the application of Dutch tort law as the law governing the dispute. As such it would cover, in principle, all the legal issues, including the causal connection, heads and quantum of damages.[28] The defendant might argue that the relevant connecting factor should be the place of the impact of the alleged tort. Under current law, the outcome of this debate cannot be predicted with certainty. However, a denial of the fact that no unlawful activity has taken place in the Netherlands at all, would amount to a defence on the merits of the case and would thus not be available at this stage. It would suffice for the purpose of choice of law for the plaintiff to refer to an alleged lack of supervision in Holland.

A full examination of this issue under Dutch private international law can, however, be omitted here as it is possible, in the event of litigation before a Dutch civil court, that Dutch law would be selected as the *lex causae* (the law governing the dispute). With a view to providing relevant comparative legal information about the potential value of Dutch tort law, the remainder of this paper assumes that this has taken place and examines what has so far been established under Dutch substantive law with respect to the impact of a breach of foreign or supranational law on civil liability (Dutch tort law in cross-border disputes).

In the future, statutes or other legislation may provide more clarity as to the question of the applicable law. Legislative developments are taking place at three levels. At a world wide scale, in the context of the Hague Conference of Private International Law, the conflict of law issues with respect to

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26 *Handelskwekerij Bier BV* v. *Mines de Potasse d'Alsace (MDPA)*, Case 21/76, ECR 1735 [1976]. Subsequent case law has introduced certain restrictions, see *Dumez France and Tracoba* v. *Hessische Landesbank (Helaba)*, Case C-220/88, ECR I-49 [1990]; *Shevill* v. *Presse Alliance SA*, Case C-68/93, ECR I-415 [1995]; *Marinari* v. *Lloyds Bank*, Case C-364-/93, ECR I-2719 [1995]; *Réunion européenne SA* v. *Spliethoff's Bevrachtingskantoor BV*, Case C-51/97, ECR I-6511 [1998].

27 Op. cit. n. 8.

28 Strikwerda, op. cit. n. 5, at No. 179.

environmental disputes have been put on the Working Agenda of the The Hague Conference.[29] Secondly, the European Union intends to regulate the question of the applicable law with respect to non-contractual obligations in the context of judicial cooperation in civil matters under Title IV's Area of Freedom, Security and Justice of the EC Treaty (as amended by 'Amsterdam'), within a two-year period following the entry into force of the Treaty of Amsterdam (1 May 1999).[30] Finally, at the level of Dutch law, as said above, a Bill on Conflicts of Law in Tort [*Wet conflictenrecht onrechtmatige daad*] is pending before Parliament. Its main rule is that unless a choice of law has been made, the *lex loci delicti* applies. It also provides a rule for the situation of the multilocal tort and opts for the law of the place where the harm occurs (or is likely to occur).

2.2 Breach of Foreign Law

On the assumption that Dutch tort law will be applied as the law governing the dispute, the landmark *Interlas* judgement by the *Hoge Raad* will now be examined.[31] The case established two important rules. First, the Dutch Supreme Court held that breach of a statutory duty within the meaning of Dutch tort law (i.e., Art. 6:162 Civil Code (CC), cited *infra* section 2.4.1) covers any breach of an Act of Parliament, or a norm laid down in secondary legislation (either of a public or of a private law nature), whether of Dutch or foreign origin. In other words, where the defendant has acted contrary to an obligation of the domestic law of another country than the Netherlands, this is still a breach of a statutory duty. That concept is therefore not limited to breach of Dutch statutes. It follows that such foreign obligations can be enforced by Dutch courts, provided, of course, they have jurisdiction over the defendant in the first place. The issue of breach of foreign statutory duty must not be confused with the question of the choice of law in tort. It is only after it has first been established that Dutch tort law governs the dispute (constitutes the so-called *lex causae* in other words) that this rule – as a rule of Dutch law – applies.

Second, the *Hoge Raad* interpreted and applied the rule on injunctive relief (Art. 3:296 CC, cited *infra* section 2.4.2) in an international dispute

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29 40 *Neth. Int'l L. Rev.* (1993) p. 306 and see Preliminary Document No. 9 of May 1992, 'Note on the law applicable to civil liability for environmental damage'.

30 Action plan of the Council and the Commission on how best to implement the provisions of the Treaty of Amsterdam on an area of freedom, security and justice (Text adopted by the Justice and Home Affairs Council on 3 Dec. 1998), *O.J.* (1999) C 19/1, No. 40(b).

31 HR 24 Nov. 1989, *NJ* 1992, 404, *Focus Veilig BV* v. *Lincoln Electric Company*.

and recognized in principle the extraterritorial reach of injunctions issued by Dutch courts. The *Interlas* case involved a suit for an injunction in a dispute concerning a trade mark under uniform Benelux law. Joint plaintiffs were an American parent company and two of its subsidiaries, based in France and the Netherlands, suing a Dutch-based defendant accused of infringing the plaintiffs' trade mark. In a single suit, the plaintiffs sought to obtain a prohibition of further marketing of the infringing goods not only in the territory of the Netherlands but in Belgium and Luxembourg as well (the litigious trade mark also covered these three countries). In the proceedings before the Dutch court the plaintiffs further claimed that the defendant should be ordered to pay a periodic penalty payment of one million guilders. This so-called *astreinte* is also based on uniform Benelux law and is the 'normal' means of enforcement of injunctions in Holland; in the event of non-compliance, the penalties are due to the plaintiff, not to the State.[32] Before the *Hoge Raad*, it was argued that the Dutch court lacked jurisdiction to issue an injunction regarding the infringement of a trade mark outside the national territory. The court disagreed and held as follows, establishing the two rules relevant to transnational litigation under examination here:

> Unless the law, the nature of the obligation or a juridical act produce a different result, the person who is obliged to give, to do or not to do something vis-à-vis another, is ordered to do so by the court upon the demand of the person to whom the obligation is owed. In general there is no reason to accept that such an order cannot be given when *the obligation –possibly an obligation under foreign law– is to be complied with outside the Netherlands.* A more restrictive view as upheld in the cassation pleadings has no basis in law and would have, in a time of increasing international contacts, the undesirable effect on legal practice that, in international tort cases –such as infringement of intellectual property rights, unlawful competition involving several countries and transfrontier pollution– the Dutch victim might be compelled to apply to a court in all the countries involved.[33] [Emphasis added.]

In the italicized passage the court thus recognizes the availability of injunctive relief to enforce an obligation which must be complied with outside the forum State (i.e., the Netherlands) and that it is immaterial that the obligation is imposed by Dutch or foreign law. This is an important international interpretation of the term 'obligation' within the meaning of Article 3:296 CC. In its turn, the primary form of such an obligation con-

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32 J.M.J. Chorus (ed.), *Introduction to Dutch Law*, 3rd edn. (1999), ch. 8, No. 8.

33 HR 24 Nov. 1989, loc. cit. n. 31, at para. 4.2.4; cited from Betlem, op. cit. n. 7, at p. 123.

sists of – in the non-contractual context – both written and unwritten duties arising under tort law. It follows that a breach of a foreign statute or a foreign unwritten duty of due care may constitute an unlawful act within the meaning of Dutch tort law (assuming, as this paper does, that that is the *lex causae*: Art. 6:162 CC). This view is confirmed by the 1999 Bill on Conflicts of Law in Tort [*Wet conflictenrecht onrechtmatige daad*], which recognizes the possibility of the Dutch courts considering the safety rules applicable in the place of harm even where Dutch law governs the dispute (Art. 8).[34]

2.3 Impact of European and International Soft Law

In addition to statutory safety rules of the place of harm, that same Bill envisages the possibility of taking unwritten duties of due care into account as a matter of incorporating them into the violated norms of unwritten law (in Dutch law: the breach of a rule of unwritten law pertaining to proper social conduct within the meaning of Article 6:162 CC).[35] In other words, activities may be regarded as negligent because rules contained in codes of conduct have been taken into account. Such rules can thus be given effect in Dutch law, albeit indirectly by taking them on board when a court is deciding on a duty of due care. Nollkaemper has outlined such a breach of unwritten law with respect to the OECD Guidelines for Multinationals.[36]

Other potentially relevant codes of conduct/codes of practice specifically targeting multinational corporations pertain to labour law and environmental law in particular, and have recently been analyzed by McCrudden.[37] It appears that they have been given effect in the main along two lines: directly targeting a company or indirectly through legislation at local, regional, State (and/or federal) or European/international level. The methods most used involved shareholder resolutions, public procurement and legislation particularly with respect to investment decisions. In addition, they have also played a role in the enforcement of 'real' legislation where it left gaps.[38]

As far as European soft law is concerned, it may be noted that one specific form of it, recommendations within the meaning of Article 249 EC Treaty (ex Art. 189), has been given effect by the ECJ in that it ruled in the

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34 See *supra* n. 23.

35 Ibid. and see Memorie van Toelichting [Memorandum of Explanation to the Bill], *TK* 1998-1999, 26 608, No. 3, p. 11.

36 See his contribution to this volume.

37 C. McCrudden, 'Human Rights Codes for Transnational Corporations: What Can the Sullivan and MacBride Principles Tell Us?', 19 *Oxford J. Legal Stud.* (1999) p. 167.

38 Ibid., at p. 200.

Grimaldi case that 'national courts are bound to take those recommendations into consideration in order to decide disputes submitted to them, in particular where they are capable of casting light on the interpretation of other provisions of national or Community law'.[39] In this case, a preliminary question was asked about the possible direct effect of a Commission recommendation. The Court ruled that while recommendations cannot produce direct effects, this did not mean they have no legal effect at all. They have an interpretative effect similar to the duty to interpret national law in conformity with EC law,[40] albeit in a weaker form: the recommendation must be taken into account. An example of such use can be found in a case in the field of sex discrimination, by the English Employment Appeal Tribunal, which gave effect to an EC Commission recommendation, as an aid to the interpretation of the concept of sexual harassment.[41]

In the same vein, the ECJ has used Community Action Programmes and a Council Resolution as an aid to the interpretation of Article 30 EC Treaty in connection with consumer protection.[42] It even explicitly referred to them as law. Furthermore, Resolutions of the European Parliament are not necessarily without legal effect: under certain circumstances, judicial review may be available as they can constitute an act within the meaning of Article 230 EC Treaty (ex Art. 173).[43] However, in the latter case, the resolution dealt with the Parliaments' seat and was intended to create legal effects. Resolutions of the EP expressing an opinion about law or policy do not do so. Nonetheless, they can be used – just like a Commission recommendation as mentioned above – as an aid to the interpretation of binding rules of (unwritten) law. To this extent, Parliament's 'Resolution on EU standards for European Enterprises operating in developing countries - Towards a European Code of Conduct' can be given legal effect before a court.[44]

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39 *Grimaldi* v. *Fonds des Maladies Professionnelles*, Case 322/88, ECR 4407 [1989] at 4421. See also *Deutsche Shell AG* v. *Hauptzollamt Hamburg-Harburg*, Case C-188/91, ECR I-363 [1993], para. 18.

40 P. Craig and G. de Burca, *EU Law: Text, Cases, and Materials*, 2nd edn. (1998) p. 198 et seq.; see in particular *Von Colson and Kamann* v. *Land Nordrhein-Westfalen*, Case 14/83, ECR 1891 [1984] and *Marleasing SA* v. *La Comerical Internacional de Alimentación SA*, Case 106/89, ECR I-4135 [1990].

41 *Wadman* v. *Carpenter Farrer Partnership*, 19 *Eur. L. Rev.* (1994) p. 104, note by Dine and Watt.

42 *GB-INNO-BM* v. *Confédération du Commerce Luxembourgeois*, Case C-362/88, ECR I-667 [1990], para. 18.

43 *Luxembourg* v. *Parliament*, Joined Cases C-213/88 and 39/89, ECR I-5643 [1991], para. 25.

44 See European Parliament Resolution A4-0508/98 on EU standards for European Enterprises operating in developing countries towards an European Code of Conduct, *O.J.* (1999) C 104/18 and the accompanying Report by Richard Howitt, available over the

It may be added that the other 'Supreme Court of Europe', the European Court of Human Rights ('ECtHR'), has construed Article 11 of the European Convention on Human Rights (freedom of association) in the light of a number of non-binding international law documents.[45] The case was brought by an Icelandic taxi driver who refused to join an automobile association and therefore did not get a licence; compulsory membership was laid down by law. The ECtHR delimited the negative aspect of the freedom of association (the right not to join) by pointing to the majority of Contracting States whose legal systems contain safeguards against compulsory membership. It also referred to the growing agreement against compulsory membership at the international level as reflected in the Universal Declaration of Human Rights, the Maastricht Treaty's Social Protocol (the Community Charter of the Fundamental Social Rights of Workers) and the practice of the ILO Governing Body. In addition, it invoked a recommendation by the Parliamentary Assembly of the Council of Europe to this effect, as well as the views of the Committee of Independent Experts set up to supervise the implementation of the Council of Europe's 1961 Social Charter. Having regard to all the above instruments, the ECtHR concluded that the European Convention of Human Rights, a living instrument interpreted in the light of present day circumstances, contained a negative right of association.

It follows that through an interpretation of binding rules of law, non-binding codes of practice and recommendations or resolutions can be given legal effect before the (Dutch) civil courts.

2.4 What Remedy: Damages, Injunction, Declaration?

Briefly, some aspects of Dutch substantive liability law are examined in this section in order to point out a few differences in legal requirements between the three 'normal' civil remedies (damages, injunctive and declaratory relief). A foreign plaintiff – in particular an NGO – needs to be aware of certain applicable limitations.

2.4.1 Damages

Not surprisingly, the remedy of damages, including pain and suffering and pure economic loss, is the primary remedy envisaged in the Civil Code's

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Internet at the Parliaments's Web site, see <http://www1.europarl.eu.int/plenary/en/default.htm#adop>, accessed on 8 Sept. 1999. See Appendix 4 to this volume.

45 *Sigurjónsson* v. *Iceland*, 264 Eur. Ct. H.R. (series A) [1993], para. 35.

tort law provision.[46] For present purposes it is most useful to indicate the grounds of unlawfulness recognized by Dutch tort law. They are contained in Article 6:162 CC, which reads:

1. A person who commits an unlawful act toward another which can be imputed to him, must repair the damage which the other person suffers as a consequence thereof.
2. Except where there is a ground of justification, the following acts are deemed to be unlawful: the violation of a right, an act or omission violating a statutory duty or a rule of unwritten law pertaining to proper social conduct.
3. An unlawful act can be imputed to its author if it results from his fault or from a cause for which he is answerable according to law or common opinion.[47]

In a comparative perspective, the conceptualization of tortious liability in Dutch law is similar to the French approach, a general principle to be fleshed out by the courts, but contrary to the English approach of a system of separate torts.[48] In essence, Section 2 of the cited provision quite simply recognizes all possible forms of unlawfulness: breach of written law, both as breach of statutory duty and as infringement of a right, and breach of unwritten law (negligence or breach of the duty of due care). 'Written law here includes statutes in the strict sense but also by-laws of subordinate 'legislatures' as far as they establish regulations of a general binding character'.[49] For the purpose of establishing unlawfulness within the meaning of Article 6:162 CC not only breach of domestic statutes and subordinate legislation is pertinent, but also 'superordinate legislation': under the Dutch monist system, a violation of a directly effective provision of international law without more constitutes breach of statutory duty.[50] Also, as seen above, breach of foreign law and soft law produces effects.

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46 See for a further consideration of the law of damages, in English, Betlem, op. cit. n. 7, at para. 10.3 (regarding environmental disputes). Cf. Chorus, op. cit. n. 32, chapter on the Law of Obligations.

47 P.P.C. Haanappel and E. Mackaay, *New Netherlands Civil Code: Patrimonial Law* (1990) p. 298.

48 K. Zweigert and H. Kötz, *Introduction to Comparative Law*, translated by Tony Weir, 3rd edn. (1994) p. 662.

49 Chorus, op. cit. n. 32, ch. 8, at No. 11.

50 A.S. Hartkamp, *Verbintenissenrecht: De verbintenis uit de wet*, Asser-serie, No. 4-III, 10th edn. (1998), No. 34.

2.4.2 Injunctions

Historically, and still reflected in the text of the tort provision in the Civil Code cited above, the remedy of damages was the primary concern of the law of non-contractual liability. The legal protection offered by tort law was later extended to include injunctive relief. The Dutch Civil Code, subject to certain conditions, provides for a *right* to injunctive relief (it is no discretionary remedy).[51] This right is formulated as follows in Article 3:296(1) CC:

Unless the law, the nature of the obligation or a juridical act produce a different result, the person who is obliged to give, to do or not to do something *vis-à-vis* another is ordered to do so by the judge upon the demand of the person to whom the obligation is owed.[52]

It will be remembered that the *Hoge Raad* applied this provision in an international setting in the cited *Interlas* case (*supra* § 3.2). Next to the three possible exceptions it cites, the provision posits two crucial elements for the grant of an injunction: (i) a duty of some kind (unlawfulness aspect), which, (ii) must be owed to the plaintiff (differently put, it must protect the plaintiff in question). Pursuant to case law and the relevant Civil Code provisions, the requirements for an action for an injunction founded on tort (domestic or international) may be summed up as follows:

(i) the violated obligation in question is owed to the plaintiff;
(ii) the relevant interests are of a kind protected by the law of torts;
(iii) the plaintiff has a sufficient interest in the injunction.

It is *not* required that the plaintiff has (already) suffered any damage. The Civil Code contains one specific exception to the right to injunctive relief (retaining the right to damages) on the ground that the unlawful conduct should be tolerated for reasons of important societal interests (Article 6:168 CC). Even when it has been established that certain conduct is indeed unlawful, an injunction will nonetheless be refused on the basis of this balancing of the interest of the plaintiff against so-called important societal interests. This provision has been 'internationalized' by the *Hoge Raad* in the French potassium mines case.[53] The court accepted that this provision can be applied even where the allegedly 'important societal interest' possibly justifying a denial of injunctive relief concern *foreign* interests. There is no difference in treatment in this respect between purely domestic and international disputes: 'weighty societal interests' within the meaning of Article

51 See Chorus, op. cit. n. 32, ch. 8, at No. 8.
52 Haanappel and Mackaay, op. cit. n. 47, at p. 137.
53 HR 23 Sept. 1988, *NJ* 1989, 743, *Mines de Potasse d'Alsace SA (MDPA)* v. *Onroerend Goed Maatschappij Bier BV*; 21 *Neth. Y.B. Int'l L.*.

6:168 CC are not limited to Dutch interests of that kind. Dutch courts are thus able to fully take into account both the interests of the plaintiff and the defendant even where they are (both) non-Dutch based.

2.4.3 Declaratory Relief

Under certain circumstances, the plaintiff may suffice with seeking a declaration of unlawfulness alone (purely declaratory relief). For example to facilitate a settlement, the parties may principally disagree about the (un)lawfulness of certain conduct and seek a judicial pronouncement of this matter. Possibly, no further litigation will follow, or other forms of relief (injunction, damages) may be sought at a later stage. Also, purely declaratory relief has been made available in order to prevent future disputes. For instance two insurance companies sought clarification with respect to their mutual liability where events are covered by both a medical and personal liability insurance, instead of dealing with the issue on a case by case basis.[54] The Dutch Civil Code contains a special provision regarding the requisite interest in seeking declaratory relief, Article 3:302 CC, which provides: 'The judge renders a declaratory judgement on a juridical relationship upon the demand of the person directly concerned'.[55]

This provision adds to the general provision on sufficient interest (Article 3:303 CC) in that it also requires direct concern with the relevant legal relationship.[56] It would seem to follow that a more stringent sufficient interest test thus applies when the plaintiff seeks a purely declaratory judgement.[57] It is exactly in the field of public interest litigation where such a ruling may be of the most practical value.[58] A perhaps atypical example is a case between World War II veteran groups and the Dutch State about a pension paid by the latter to the widow of a former collaborator. The groups were regarded as not directly concerned with the legal relationship between the State and the widow.[59] The question may be raised whether a restrictive approach to declaratory relief in the case of suit by an ideological plaintiff would be out of step with legal developments which increas-

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54 See HR 27 Feb. 1998, *NJ* 1998, 764, *Europeesche Verzekering Maatschappij NV* v. *OHRA Ziektekostenverzekering NV.*

55 Haanappel & Mackaay, op. cit. n. 47, at p. 140.

56 C.J. van Zeben, et al., (eds.), *Parlementaire Geschiedenis van het Nieuw Burgerlijk Wetboek - Boek 6 Algemeen gedeelte van het verbintenissenrecht* (1981) p. 915; HR 22 Jan. 1993, *NJ* 1994, 734, *Nederland* v. *Stichting Herwaardering Pensioenen NSB-kamerleden [Widow Rost van Tonningen case].*

57 Cf. annotation of Rb. Rotterdam 8 Jan. 1979 by d'Oliveira, *Ars Aequi* (1980), p. 790 (the *MDPA* case).

58 Ibid.

59 See HR 22 Jan. 1993, loc. cit. n. 56.

ingly recognize actions by public interest groups, particularly in the consumer and environmental law fields.[60] Moreover, the precedent of the widows' pension can be distinguished in that it involved a single legal relationship between the defendant and a third party, whereas 'normal' public interest litigation typically involves an organization bringing together a diffuse group of people in their legal relationship with the defendant. Be that as it may, Dutch courts may display some reluctance in granting purely declaratory relief in cases brought by a foreign NGO. Of course this does not affect suits requesting injunctions or damages (in particular when the latter concerns natural persons as plaintiffs).

3 GROUP ACTIONS BY FOREIGN PLAINTIFFS

3.1 Locus Standi of Dutch NGOs

Under current Dutch law, an NGO can bring legal proceedings in tort where harm occurs to the general interest it is promoting as its objective, according to its articles of association (Article 3:305a CC, cited *infra* § 4.2). The application of this authority may be illustrated by a case against a Belgian defendant, Mr. Verbeke, allegedly involved in cross-border racism.[61]

The dispute related to pamphlets in which the Holocaust was denied. The leaflets emanated from the Belgian defendant who intended as large a dissemination as possible in the Dutch speaking countries. The papers ended up in the mailboxes of people with Jewish sounding names in various places in the Netherlands. The plaintiffs, anti-racism organizations, sought an injunction on pain of an *astreinte* (periodic penalty payment) restraining the defendant from further dissemination of these or similar pamphlets. Judgement was given for the plaintiffs in so far as the defendant was forbidden to distribute – directly or indirectly – the pamphlets in question in Holland; he was also ordered to refrain from propagating the revisionist views in the future in a way which would grieve Jewish inhabitants of the Netherlands. Although the order is limited to occurrences within the Netherlands, it

60 See for example Article 6:240 CC concerning standard contract terms and 'Regeling van de bevoegdheid van bepaalde rechtspersonen om ter bescherming van de belangen van andere personen een rechtsvordering in te stellen, Memorie van Toelichting' [Memorandum of Explanation on the collective actions Bill], *TK* 1991-1992, 22 486, No. 3, p. 25.

61 Pres. Rb. Den Haag 4 Nov. 1992, *KG* 1992, 399, *CIDI* v. *Verbeke*; *LBR-Bulletin* 1992-6, p. 19; *Migrantenrecht* 1993, 13, *NJCM-Bulletin* 1993, p. 303.

nevertheless has extraterritorial effect in that the defendant is ordered to refrain from activities producing their injurious effects on Dutch territory. In other words, the scope of the injunction encompasses acts occurring in the place of the wrongful activity outside Holland. In fact, it is explicitly held that: 'This case concerns a duty to prevent discrimination which (also) must be complied with outside the Netherlands' (consideration 6.12). Likewise such injunctions for the benefit of Dutch NGOs have awarded by the courts in environmental disputes against defendants based in Belgium.[62] Broadly speaking, Dutch law offers relatively generous access to justice for (Dutch) public interest plaintiffs, in the purely domestic as well as in the transnational context.

3.2 Locus Standi of Foreign NGOs

The question arises what the law is with respect to an NGO not based in the Netherlands. Two issues need to be addressed: a preliminary and a substantive one. The substantive question is whether a non-Dutch NGO has standing to sue a multinational (based in the Netherlands or otherwise) before a Dutch court.

The preliminary question underlying this issue is: according to which law will this issue of admissibility (transnational *locus standi*) be decided by the Dutch court? In turn, this raises the qualification question of whether the admissibility issue is procedural, which means the *lex fori* is applicable, or a question dealt with by the law applicable to the substantive tort law issues – the *lex causae*. In my view, the question must be regarded as a substantive law issue for Article 3:304 CC reads: 'A right of action cannot be severed from the right it serves to protect'. Given the close relationship between the right and the action, the admissibility question will then be governed by the Dutch conflicts of law rule on torts. Assuming that this rule will point to Dutch substantive law as the *lex causae*, that legal system can than be expected to determine the *locus standi* of the foreign NGO.[63]

The second issue is an interpretation in an international dispute of the provision in the Civil Code dealing with *locus standi* of public interest groups (Article 3:305a CC). It provides in Section 1:

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62 See for more details G. Betlem, 'Cross-Border Water Pollution: Two Paradigmatic Dutch Cases', 4 *Eur. Rev. Private L.* (1996) p. 159.

63 Cf. Article 7 of the 1999 Bill on Conflicts of Law in Tort (loc. cit. n. 23), which indicates that the *lex causae* will, *inter alia*, determine who shall be entitled to compensation. By way of analogy this law should then also decide who should be able to apply for an injunction, either as a public interest litigant or as an immediate victim.

> An association or foundation with full legal capacity is entitled to an action for the purposes of protecting interests of a similar nature of other persons, to the extent it promotes those interests according to its articles of association.

The relevant question, in the transnational context, is whether the description of the purpose of an NGO will match the interest that has been harmed; both in a geographical and in a functional sense. When answered affirmatively, a non-Dutch NGO will have *locus standi* before a Dutch civil court, in my view. An analogy can be drawn with a domestic case involving the genetically modified bull 'Herman'. The genes of the bull were so modified that the milk from cows it fathered would contain a medicinal component. A legal action was brought by several organizations, including animal rights groups and environmental protection groups. The *general* environmental protection organization's purpose was held by the Dutch court not to be *specific* enough in this suit dealing with animals alone; only the claim by an animal rights group was admitted.[64] If one extrapolates this decision to the transnational context, it follows that an NGO involved in the protection of the environment in e.g. Nigeria, would have *locus standi* in a suit involving damage to the environment in that country, provided it can be regarded as an equivalent to 'an association or foundation with full legal capacity' within the meaning of Article 3:305a CC.[65]

As far as environmental disputes are concerned mention may be made of the Aarhus Convention on Access to Environmental Information, which potentially enhances access to justice for the purpose of enforcement of environmental law.[66] Article 9 on 'Access to Justice' provides, in relevant part:

> 3. In addition and without prejudice to the [judicial] review procedures referred to in paragraphs 1 and 2 above, each Party [to this Convention] shall ensure that, where they meet the criteria, if any, laid down in its national law, members of the public have access to administrative or ju-

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64 Cited by M.A. Robesin, 'Procedeerlust Opwekkend en Remmend Privaatrecht', in: R.J.J. van Acht and G.C. Sicking (eds.), *Privaatrecht en milieu* (1994) p. 49 at p. 59.

65 P. Vlas, 'Het Verdrag inzake aansprakelijkheid voor milieugevaarlijke activiteiten en het internationaal privaatrecht', 1 *Aansprakelijkheid & Verzekering* (1993), p. 25, at p. 28, argues that such an organization must be recognized.

66 Economic Commission for Europe, *Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters*, 25 June 1998, UN Doc. E/ECE/1366, Sales No. E/F/R.98.II.E.27; also available at <http://www.unece.org/env/europe/ppconven.htm>, accessed on 8 Sept. 1999; cf. G. Krzywkowska, 'The Impact of the Aarhus Convention on Non-Governmental Organisations (NGOs)', *ELNI Newsletter* (1998) No. 2, p. 20.

dicial procedures to challenge *acts and omissions by private persons and public authorities which contravene provisions of its national law relating to the environment.*

4. In addition and without prejudice to paragraph 1 above, the procedures referred to in paragraphs 1, 2 and 3 above shall provide adequate and effective remedies, including *injunctive relief* as appropriate, and be fair, equitable, timely and *not prohibitively expensive.* Decisions under this article shall be given or recorded in writing. Decisions of courts, and whenever possible of other bodies, shall be publicly accessible.
5. In order to further the effectiveness of the provisions of this article, each Party shall ensure that information is provided to the public on access to administrative and judicial review procedures and shall consider the establishment of appropriate assistance mechanisms to *remove or reduce financial and other barriers* to access to justice. [Emphasis added.]

It must follow that a right to injunctive relief for the benefit of the public, including NGOs meeting requirements of national law – pursuant to the definition of 'the public concerned' of Article 2 – must be made available by the legal system of the Contracting Parties of the Aarhus Convention even against private actors who have allegedly breached that State's environmental law.[67] In addition, financial and other barriers to this remedy should be investigated and, where possible, reduced or removed. Although the exact scope of this provision is as yet untested (the Convention has not yet entered into force), it is potentially useful and may serve as a model for other international instruments.

3.3 The Consumer Injunctions Directive

Finally in this context, mention may be made of an EC law directive dealing with the recognition of, *inter alia*, foreign NGOs before civil courts, the Consumer Injunctions Directive.[68] According to the preamble, the Consumer Injunctions Directive purports to address the problem of compliance with certain listed consumer protection directives insofar as infringements of the collective interests of consumers are concerned; the current mechanisms are insufficient (recital 2). The preamble continues by noting that it is where unlawful practices produce effects outside the country where they

67 At present – September 1999 – the Convention has not yet entered into force nor have there been any ratifications; there are 40 signatories including the EC, see <http://www.unece.org/env/europe/signat.htm>, accessed 8 Sept. 1999.

68 Directive 98/27/EC of the European Parliament and the Council of 19 May 1998 on injunctions for the protection of consumers' interests, *O.J.* (1998) L 166/51.

originated that Community legislative action is required. The Directive seems to focus upon the situation where a trader in country A acts in breach of the implementing laws of a listed Directive but, according to the applicable law, nonetheless commits no tort because the effects of his acts occur outside his State of domicile. In this respect it reflects the type of situation of the multinational causing harm outside the State of its head office. The title of the Directive (Injunctions for the Protection of Consumers' Interests) is misleading as it only actually regulates access to the courts of the place where persons acted contrary to certain consumer protection laws of so-called qualified entities from another Member State. Although the Directive is not entirely clear in this respect, it would seem to follow that it is restricted to cross-border enforcement.

Both independent public bodies and private consumer protection organizations, in accordance with requirements laid down by their national law, must be given access to the remedies in the State of origin of unlawful practices as qualified entities from another Member State. The Member States must to this end draw up a list of their qualified entities and report this to the Commission, which will publish it. This provision thus seeks to ensure the recognition of the legal capacity to bring proceedings by a plaintiff from another Member State (mutual recognition), albeit qualified by a possible requirement of prior consultation with either the defendant and/or an 'internal enforcer' (Article 5). The Television Without Frontiers Directive (as amended)[69] contains a similar right of access to a foreign court.[70]

The presumed factual situations underlying this mutual recognition requirement are apparently limited to extraterritorial harmful effects of acts committed by persons within the jurisdiction. In this respect the factual context, as assumed by this Directive, resembles the one of the *Alpine Investment* case,[71] where the Dutch authorities took action against a Dutch-based trader for selling activities in connection with German-based consumers. It follows that the Consumer Injunctions Directive addresses few of the complex legal questions involved in cross-border litigation with a view to private enforcement of Community law. Nonetheless, it is a recog-

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69 Council Directive 89/552/EEC of 3 October 1989 on the coordination of certain provisions laid down by Law, Regulation or Administrative Action in Member States concerning the pursuit of television broadcasting activities, *O.J.* (1989) L 298/23; amended by Directive 97/36/EC of the European Parliament and the Council of 30 June 1997, *O.J.* (1997) L 202/60.

70 See the new Article 3(3): 'The measures shall include the appropriate procedures for third parties directly affected, including nationals of other Member States, to apply to the competent judicial or other authorities to seek effective compliance according to national provisions'.

71 *Alpine Investments* v. *Minister van Financiën*, Case C-384/93, ECR I-1141 [1995].

nition of the right to access to justice by foreign legal entities and will require, as far as the Netherlands is concerned, an adaptation of the Civil Code in order to recognize the *locus standi* of these plaintiffs. Once the courts will get more used to these possibilities, one can expect a further accomodation of foreign NGOs in transnational litigation.

CONCLUSIONS

Dutch courts will be competent to adjudicate a dispute against a multinational corporation by a foreign plaintiff either on the basis of the 1968 Brussels Jurisdiction and Judgements Convention (or the so-called Parallel or Lugano Convention) or on the basis of Dutch domestic private international law. In both contexts the doctrine of *forum non conveniens* does not apply. Unlike in the US and England, where this defence is available, plaintiffs such as the Nigerians suing Shell in the State of New York as mentioned in paragraph 1, would benefit from the more straightforward approach to jurisdiction taken in most civil law jurisdictions, including the Netherlands.

What legal system will be the law governing the dispute, is decided, absent a choice of law by the parties, by the rule of the *lex loci delicti* (law of the place of the harmful event). Depending on whether one focuses on the place of occurrence of the loss or on the place where the allegedly wrongful acts took place, Dutch or foreign law will be applied. On the assumption that Dutch tort law will be applied, events abroad contrary to foreign and/or international/European (soft) law are capable of being deemed unlawful within the meaning of the Dutch tort law provision of the Civil Code.

As far as *locus standi* of non-Dutch NGOs is concerned, broadly speaking they will have the same access as Dutch based NGOs. If they are seeking purely declaratory relief they should be aware of some reluctance by the courts. In the field of consumer law, the EU has legislated in order to facilitate access to the courts by foreign public interest groups. Dutch private international and civil law will have to be adapted to these rules, providing a useful precedent for facilitating access to the courts for other foreign plaintiffs.

Appendices

APPENDIX 1

ILO Declaration on Fundamental Principles and Rights at Work

18th June 1998

Whereas the ILO was founded in the conviction that social justice is essential to universal and lasting peace;

Whereas economic growth is essential but not sufficient to ensure equity, social progress and the eradication of poverty, confirming the need for the ILO to promote strong social policies, justice and democratic institutions;

Whereas the ILO should, now more than ever, draw upon all its standard-setting, technical cooperation and research resources in all its areas of competence, in particular employment, vocational training and working conditions, to ensure that, in the context of a global strategy for economic and social development, economic and social policies are mutually reinforcing components in order to create broad-based sustainable development;

Whereas the ILO should give special attention to the problems of persons with special social needs, particularly the unemployed and migrant workers, and mobilize and encourage international, regional and national efforts aimed at resolving their problems, and promote effective policies aimed at job creation;

Whereas, in seeking to maintain the link between social progress and economic growth, the guarantee of fundamental principles and rights at work is of particular significance in that it enable the persons concerned to claim freely and on the basis of equality of opportunity their fair share of the wealth which they have helped to generate, and to achieve fully their human potential;

Whereas the ILO is the constitutionally mandated international organization and the competent body to set and deal with international labour standards, and enjoys universal support and acknowledgement in promoting fundamental rights at work as the expression of its constitutional principles;

Whereas it is urgent, in a situation of growing economic interdependence, to reaffirm the immutable nature of the fundamental principles and rights embodied in the Constitution of the Organization and to promote their universal application;

The International Labour Conference,

1. Recalls:

(a) that in freely joining the ILO, all Members have endorsed the principles and rights set out in its Constitution and in the Declaration of Philadelphia, and have

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undertaken to work towards attaining the overall objectives of the Organization to the best of their resources and fully in line with their specific circumstances;

(b) that these principles and rights have been expressed and developed in the form of specific rights and obligations in Conventions recognized as fundamental both inside and outside the Organization.

2. Declares that all Members, even if they have not ratified the Conventions in question, have an obligation arising from the very fact of membership in the Organization, to respect, to promote and to realize, in good faith and in accordance with the Constitution, the principles concerning the fundamental rights which are the subject of those Conventions, namely:

(a) freedom of association and the effective recognition of the right to collective bargaining;

(b) the elimination of all forms of forced or compulsory labour;

(c) the effective abolition of child labour; and

(d) the elimination of discrimination in respect of employment and occupation.

3. Recognizes the obligation on the Organization to assist its Members, in response to their established and expressed needs, in order to attain these objectives by making full use of its constitutional, operational and budgetary resources, including by the mobilization of external resources and support, as well as by encouraging other international organizations with which the ILO has established relations, pursuant to article 12 of its Constitution, to support these efforts:

(a) by offering technical cooperation and advisory services to promote the ratification and implementation of the fundamental Conventions;

(b) by assisting those Members not yet in a position to ratify some or all of these Conventions in their efforts to respect, to promote and to realize the principles concerning fundamental rights which are the subject of those Conventions; and

(c) by helping the Members in their efforts to create a climate for economic and social development.

4. Decides that, to give full effect to this Declaration, a promotional follow-up, which is meaningful and effective, shall be implemented in accordance with the measures specified in the annex hereto, which shall be considered as an integral part of this Declaration.

5. Stresses that labour standards should not be used for protectionist trade purposes, and that nothing in this Declaration and its follow-up shall be invoked or otherwise used for such purposes; in addition, the comparative advantage of any country should in no way be called into question by this Declaration and its follow-up.

ANNEX

FOLLOW-UP TO THE DECLARATION

I. Overall purpose

1. The aim of the follow-up described below is to encourage the efforts made by the Members of the Organization to promote the fundamental principles and rights enshrined in the Constitution of the ILO and the Declaration of Philadelphia and reaffirmed in this Declaration.

2. In line with this objective, which is of a strictly promotional nature, this follow-up will allow the identification of areas in which the assistance of the Organization through its technical cooperation activities may prove useful to its Members to help them implement these fundamental principles and rights. It is not a substitute for the established supervisory mechanisms, nor shall it impede their functioning; consequently, specific situations within the purview of those mechanisms shall not be examined or re-examined within the framework of this follow-up.

3. The two aspects of this follow-up, described below, are based on existing procedures: the annual follow-up concerning non-ratified fundamental Conventions will entail merely some adaptation of the present modalities of application of article 19, paragraph 5(e) of the Constitution; and the global report will serve to obtain the best results from the procedures carried out pursuant to the Constitution.

II. Annual follow-up concerning non-ratified fundamental Conventions

A. Purpose and scope

1. The purpose is to provide an opportunity to review each year, by means of simplified procedures to replace the four-year review introduced by the Governing Body in 1995, the efforts made in accordance with the Declaration by Members which have not yet ratified all the fundamental Conventions.

2. The follow-up will cover each year the four areas of fundamental principles and rights specified in the Declaration.

B. Modalities

1. The follow-up will be based on reports requested from Members under article 19, paragraph 5(e) of the Constitution.

The report forms will be drawn up so as to obtain information from governments which have not ratified one or more of the fundamental Conventions, on any changes which may have taken place in their law and practice, taking due account of article 23 of the Constitution and established practice.

2. These reports, as compiled by the Office, will be reviewed by the Governing Body.

3. With a view to presenting an introduction to the reports thus compiled, drawing attention to any aspects which might call for a more in-depth discussion, the Office may call upon a group of experts appointed for this purpose by the Governing Body.

4. Adjustments to the Governing Body's existing procedures should be examined to allow Members which are not represented on the Governing Body to provide, in the most appropriate way, clarifications which might prove necessary or useful during Governing Body discussions to supplement the information contained in their reports.

III. Global report

A. Purpose and scope

1. The purpose of this report is to provide a dynamic global picture relating to each category of fundamental principles and rights noted during the preceding four-year period, and to serve as a basis for assessing the effectiveness of the assistance provided by the Organization, and for determining priorities for the following period, in the form of action plans for technical cooperation designed in particular to mobilize the internal and external resources necessary to carry them out.

2. The report will cover, each year, one of the four categories of fundamental principles and rights in turn.

B. Modalities

1. The report will be drawn up under the responsibility of the Director-General on the basis of official information, or information gathered and assessed in accordance with established procedures. In the case of States which have not ratified the fundamental Conventions, it will be based in particular on the findings of the aforementioned annual follow-up.

In the case of Members which have ratified the Conventions concerned, the report will be based in particular on reports as dealt with pursuant to article 22 of the Constitution.

2. This report will be submitted to the Conference for tripartite discussion as a report of the Director-General. The Conference may deal with this report separately from reports under article 12 of its Standing Orders, and may discuss it during a sitting devoted entirely to this report, or in any other appropriate way. It will then be for the Governing Body, at an early session, to draw conclusions from this discussion concerning the priorities and plans of action for technical cooperation to be implemented for the following four-year period.

IV. It is understood that:

1. Proposals shall be made for amendments to the Standing Orders of the Governing Body and the Conference which are required to implement the preceding provisions.

2. The Conference shall, in due course, review the operation of this follow-up in the light of the experience acquired to assess whether it has adequately fulfilled the overall purpose articulated in Part I.

APPENDIX 2

ILO Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy

[Footnotes were endnotes in original]

Description: (Multinational Enterprises: Tripartite Declaration of Principles)
Document: (OB Vol. LXI, 1978, Series A, No. 1)

Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy (adopted by the Governing Body of the International Labour Office at its 204th Session (Geneva, November 1977))

The Governing Body of the International Labour Office:

Recalling that the International Labour Organization for many years has been involved with certain social issues related to the activities of multinational enterprises;

Noting in particular that various Industrial Committees, Regional Conferences, and the International Labour Conference since the mid-1960s have requested appropriate action by the Governing Body in the field of multinational enterprises and social policy;

Having been informed of the activities of other international bodies, in particular the UN Commission on Transnational Corporations and the Organization for Economic Cooperation and Development (OECD);

Considering that the ILO, with its unique tripartite structure, its competence, and its long-standing experience in the social field, has an essential role to play in evolving principles for the guidance of governments, workers' and employers' organizations, and multinational enterprises themselves;

Recalling that it convened a Tripartite Meeting of Experts on the Relationship between Multinational Enterprises and Social Policy in 1972, which recommended an ILO programme of research and study, and a Tripartite Advisory Meeting on the Relationship of Multinational Enterprises and Social Policy in 1976 for the purpose of reviewing the ILO programme of research and suggesting appropriate ILO action in the social and labour field;

Bearing in mind the deliberations of the World Employment Conference;

Having thereafter decided to establish a tripartite group to prepare a Draft Tripartite Declaration of Principles covering all of the areas of ILO concern which relate to the social aspects of the activities of multinational enterprises, including employ-

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ment creation in the developing countries, all the while bearing in mind the recommendations made by the Tripartite Advisory Meeting held in 1976;

Having also decided to reconvene the Tripartite Advisory Meeting to consider the Draft Declaration of Principles as prepared by the tripartite group;

Having considered the Report and the Draft Declaration of Principles submitted to it by the reconvened Tripartite Advisory Meeting;

Hereby approves the following Declaration which may be cited as the Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy, adopted by the Governing Body of the International Labour Office, and invites governments of States Members of the ILO, the employers' and workers' organizations concerned and the multinational enterprises operating in their territories to observe the principles embodied therein.

1. Multinational enterprises play an important part in the economies of most countries and in international economic relations. This is of increasing interest to governments as well as to employers and workers and their respective organizations. Through international direct investment and other means such enterprises can bring substantial benefits to home and host countries by contributing to the more efficient utilization of capital, technology and labour. Within the framework of development policies established by governments, they can also make an important contribution to the promotion of economic and social welfare; to the improvement of living standards and the satisfaction of basic needs; to the creation of employment opportunities, both directly and indirectly; and to the enjoyment of basic human rights, including freedom of association, throughout the world. On the other hand, the advances made by multinational enterprises in organizing their operations beyond the national framework may lead to abuse of concentrations of economic power and to conflicts with national policy objectives and with the interest of the workers. In addition, the complexity of multinational enterprises and the difficulty of clearly perceiving their diverse structures, operations and policies sometimes give rise to concern either in the home or in the host countries, or in both.

2. The aim of this Tripartite Declaration of Principles is to encourage the positive contribution which multinational enterprises can make to economic and social progress and to minimize and resolve the difficulties to which their various operations may give rise, taking into account the United Nations resolutions advocating the Establishment of a New International Economic Order.

3. This aim will be furthered by appropriate laws and policies, measures and actions adopted by the governments and by cooperation among the governments and the employers' and workers' organizations of all countries.

4. The principles set out in this Declaration are commended to the governments, the employers' and workers' organizations of home and host countries and to the multinational enterprises themselves.

5. These principles are intended to guide the governments, the employers' and workers' organizations and the multinational enterprises in taking such measures and actions and adopting such social policies, including those based on the principles laid down in the Constitution and the relevant Conventions and Recommendations of the ILO, as would further social progress.

6. To serve its purpose this Declaration does not require a precise legal definition of multinational enterprises; this paragraph is designed to facilitate the understanding of the Declaration and not to provide such a definition. Multinational enterprises include enterprises, whether they are of public, mixed or private ownership, which own or control production, distribution, services or other facilities outside the country in which they are based. The degree of autonomy of entities within multinational enterprises in relation to each other varies widely from one such enterprise to another, depending on the nature of the links between such entities and their fields of activity and having regard to the great diversity in the form of ownership, in the size, in the nature and location of the operations of the enterprises concerned. Unless otherwise specified, the term "multinational enterprise" is used in this Declaration to designate the various entities (parent companies or local entities or both or the organization as a whole) according to the distribution of responsibilites among them, in the expectation that they will cooperate and provide assistance to one another as necessary to facilitate observance of the principles laid down in the Declaration.

7. 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; its provisions shall not limit or otherwise affect obligations arising out of ratification of any ILO Convention.

General policies

8. 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 as well as the Constitution of the International Labour Organization and its principles according to which freedom of expression and association are essential to sustained progress. They should

also honour commitments which they have freely entered into, in conformity with the national law and accepted international obligations.

9. Governments which have not yet ratified Conventions Nos. 87, 98, 111 and 122 are urged to do so and in any event to apply, to the greatest extent possible, through their national policies, the principles embodied therein and in Recommendations Nos. 111, 119 and 122.[1] Without prejudice to the obligation of governments to ensure compliance with Conventions they have ratified, in countries in which the Conventions and Recommendations cited in this paragraph are not complied with, all parties should refer to them for guidance in their social policy.

10. Multinational enterprises should take fully into account established general policy objectives of the countries in which they operate. Their activities should be in harmony with the development priorities and social aims and structure of the country in which they operate. To this effect, consultations should be held between multinational enterprises, the government and, wherever appropriate, the national employers' and workers' organizations concerned.

11. The principles laid down in this Declaration do not aim at introducing or maintaining inequalities of treatment between multinational and national enterprises. They reflect good practice for all. Multinational and national enterprises, wherever the principles of this Declaration are relevant to both, should be subject to the same expectations in respect of their conduct in general and their social practices in particular.

12. Governments of home countries should promote good social practice in accordance with this Declaration of Principles, having regard to the social and labour law, regulations and practices in host countries as well as to relevant international standards. Both host and home country governments should be prepared to have consultations with each other, whenever the need arises, on the initiative of either.

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1 Convention (No. 87) concerning Freedom of Association and Protection of the Right to Organize; Convention (No. 98) concerning the Application of the Principles of the Right to Organize and to Bargain Collectively; Convention (No. 111) concerning Discrimination in Respect of Employment and Occupation; Convention (No. 122) concerning Employment Policy; Recommendation (No. 111) concerning Discrimination in Respect of Employment and Occupation; Recommendation (No. 119) concerning Termination of Employment at the Initiative of the Employer; Recommendation (No. 122) concerning Employment Policy.

Employment
Employment promotion

13. With a view to stimulating economic growth and development, raising living standards, meeting manpower requirements and overcoming unemployment and underemployment, governments should declare and pursue, as a major goal, an active policy designed to promote full, productive and freely chosen employment.[2]

14. This is particularly important in the case of host country governments in developing areas of the world where the problems of unemployment and underemployment are at their most serious. In this connection, the general conclusions adopted by the Tripartite World Conference on Employment, Income Distribution and Social Progress and the International Division of Labour (Geneva, June 1976) should be kept in mind.[3]

15. Paragraphs 13 and 14 above establish the framework within which due attention should be paid, in both home and host countries, to the employment impact of multinational enterprises.

16. Multinational enterprises, particularly when operating in developing countries, should endeavour to increase employment opportunities and standards, taking into account the employment policies and objectives of the governments, as well as security of employment and the long-term development of the enterprise.

17. Before starting operations, multinational enterprises should, wherever appropriate, consult the competent authorities and the national employers' and workers' organizations in order to keep their manpower plans, as far as practicable, in harmony with national social development policies. Such consultation, as in the case of national enterprises, should continue between the multinational enterprises and all parties concerned, including the workers' organizations.

18. Multinational enterprises should give priority to the employment, occupational development, promotion and advancement of nationals of the host country at all levels in cooperation, as appropriate, with representatives of the workers employed by them or of the organizations of these workers and governmental authorities.

19. Multinational enterprises, when investing in developing countries, should have regard to the importance of using technologies which generate employment, both

2 Convention (No. 122) and Recommendation (No. 122) concerning Employment Policy.
3 ILO, World Employment Conference, Geneva, 4-17 June 1976.

directly and indirectly. To the extent permitted by the nature of the process and the conditions prevailing in the economic sector concerned, they should adapt technologies to the needs and characteristics of the host countries. They should also, where possible, take part in the development of appropriate technology in host countries.

20. To promote employment in developing countries, in the context of an expanding world economy, multinational enterprises, wherever practicable, should give consideration to the conclusion of contracts with national enterprises for the manufacture of parts and equipment, to the use of local raw materials and to the progressive promotion of the local processing of raw materials. Such arrangements should not be used by multinational enterprises to avoid the responsibilities embodied in the principles of this Declaration.

Equality of opportunity and treatment

21. All governments should pursue policies designed to promote equality of opportunity and treatment in employment, with a view to eliminating any discrimination based on race, colour, sex, religion, political opinion, national extraction or social origin.[4]

22. Multinational enterprises should be guided by this general principle throughout their operations without prejudice to the measures envisaged in paragraph 18 or to government policies designed to correct historical patterns of discrimination and thereby to extend equality of opportunity and treatment in employment. Multinational enterprises should accordingly make qualifications, skill and experience the basis for the recruitment, placement, training and advancement of their staff at all levels.

23. Governments should never require or encourage multinational enterprises to discriminate on any of the grounds mentioned in paragraph 21, and continuing guidance from governments, where appropriate, on the avoidance of such discrimination in employment is encouraged.

Security of employment

24. Governments should carefully study the impact of multinational enterprises on employment in different industrial sectors. Governments, as well as multinational

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4 Convention (No. 111) and Recommendation (No. 111) concerning Discrimination in Respect of Employment and Occupation; Convention (No. 100) and Recommendation (No. 90) concerning Equal Remuneration for Men and Women Workers for Work of Equal Value.

enterprises themselves, in all countries should take suitable measures to deal with the employment and labour market impacts of the operations of multinational enterprises.

25. Multinational enterprises equally with national enterprises, through active manpower planning, should endeavour to provide stable employment for their employees and should observe freely negotiated obligations concerning employment stability and social security. In view of the flexibility which multinational enterprises may have, they should strive to assume a leading role in promoting security of employment, particularly in countries where the discontinuation of operations is likely to accentuate long-term unemployment.

26. In considering changes in operations (including those resulting from mergers, take-overs or transfers of production) which would have major employment effects, multinational enterprises should provide reasonable notice of such changes to the appropriate government authorities and representatives of the workers in their employment and their organizations so that the implications may be examined jointly in order to mitigate adverse effects to the greatest possible extent. This is particularly important in the case of the closure of an entity involving collective layoffs or dismissals.

27. Arbitrary dismissal procedures should be avoided.[5]

28. Governments, in cooperation with multinational as well as national enterprises, should provide some form of income protection for workers whose employment has been terminated.[6]

Training

29. Governments, in cooperation with all the parties concerned, should develop national policies for vocational training and guidance, closely linked with employment.[7] This is the framework within which multinational enterprises should pursue their training policies.

30. In their operations, multinational enterprises should ensure that relevant training is provided for all levels of their employees in the host country, as appropriate, to

5 Recommendation (No. 119) concerning Termination of Employment at the Initiative of the Employer.

6 Recommendation (No. 119) concerning Termination of Employment at the Initiative of the Employer.

7 Convention (No. 142) and Recommendation (No. 150) concerning Vocational Guidance and Vocational Training in the Development of Human Resources.

meet the needs of the enterprise as well as the development policies of the country. Such training should, to the extent possible, develop generally useful skills and promote career opportunities. This responsibility should be carried out, where appropriate, in cooperation with the authorities of the country, employers' and workers' organizations and the competent local, national or international institutions.

31. Multinational enterprises operating in developing countries should participate, along with national enterprises, in programmes, including special funds, encouraged by host governments and supported by employers' and workers' organizations. These programmes should have the aim of encouraging skill formation and development as well as providing vocational guidance, and should be jointly administered by the parties which support them. Wherever practicable, multinational enterprises should make the services of skilled resource personnel available to help in training programmes organized by governments as part of a contribution to national development.

32. Multinational enterprises, with the cooperation of governments and to the extent consistent with the efficient operation of the enterprise, should afford opportunities within the enterprise as a whole to broaden the experience of local management in suitable fields such as industrial relations.

Conditions of work and life

Wages, benefits and conditions of work

33. Wages, benefits and conditions of work offered by multinational enterprises should be not less favourable to the workers than those offered by comparable employers in the country concerned.

34. When multinational enterprises operate in developing countries, where comparable employers may not exist, they should provide the best possible wages, benefits and conditions of work, within the framework of government policies.[8] These should be related to the economic position of the enterprise, but should be at least adequate to satisfy basic needs of the workers and their families. Where they provide workers with basic amenities such as housing, medical care or food, these amenities should be of a good standard.[9]

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8 Recommendation (No. 116) concerning Reduction of Hours of Work.

9 Convention (No. 110) and Recommendation (No. 110) concerning Conditions of Employment of Plantation Workers; Recommendation (No. 115) concerning Workers' Housing; Recommendation (No. 69) concerning Medical Care; Convention (No. 130) and Recommendation (No. 134) concerning Medical Care and Sickness.

35. Governments, especially in developing countries, should endeavour to adopt suitable measures to ensure that lower income groups and less developed areas benefit as much as possible from the activities of multinational enterprises.

Safety and health

36. Governments should ensure that both multinational and national enterprises provide adequate safety and health standards for their employees. Those governments which have not yet ratified the ILO Conventions on Guarding of Machinery (No. 119), Ionizing Radiation (No. 115), Benzene (No. 136) and Occupational Cancer (No. 139) are urged nevertheless to apply to the greatest extent possible the principles embodied in these Conventions and in their related Recommendations (Nos. 118, 114, 144 and 147). The Codes of Practice and Guides in the current list of ILO publications on Occupational Safety and Health should also be taken into account.[10]

37. Multinational enterprises should maintain the highest standards of safety and health, in conformity with national requirements, bearing in mind their relevant experience within the enterprise as a whole, including any knowledge of special hazards. They should also make available to the representatives of the workers in the enterprise, and upon request, to the competent authorities and the workers' and employers' organizations in all countries in which they operate, information on the safety and health standards relevant to their local operations, which they observe in other countries. In particular, they should make known to those concerned any special hazards and related protective measures associated with new products and processes. They, like comparable domestic enterprises, should be expected to play a leading role in the examination of causes of industrial safety and health hazards and in the application of resulting improvements within the enterprise as a whole.

38. Multinational enterprises should cooperate in the work of international organizations concerned with the preparation and adoption of international safety and health standards.

39. In accordance with national practice, multinational enterprises should cooperate fully with the competent safety and health authorities, the representatives of the workers and their organizations, and established safety and health organizations. Where appropriate, matters relating to safety and health should be incorporated in agreements with the representatives of the workers and their organizations.

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10 The ILO Conventions and Recommendations referred to are listed in *Publications on Occupational Safety and Health*, ILO, Geneva, 1976, pp. 1-3. An up-to-date list of Codes of Practice and Guides can be found in the latest edition.

Industrial relations

40. Multinational enterprises should observe standards of industrial relations not less favourable than those observed by comparable employers in the country concerned.

Freedom of association and the right to organize

41. Workers employed by multinational enterprises as well as those employed by national enterprises should, without distinction whatsoever, have the right to establish and, subject only to the rules of the organization concerned, to join organizations of their own choosing without previous authorisation.[11] They should also enjoy adequate protection against acts of anti-union discrimination in respect of their employment.[12]

42. Organizations representing multinational enterprises or the workers in their employment should enjoy adequate protection against any acts of interference by each other or each other's agents or members in their establishment, functioning or administration.[13]

43. Where appropriate, in the local circumstances, multinational enterprises should support representative employers' organizations.

44. Governments, where they do not already do so, are urged to apply the principles of Convention No. 87, Article 5, in view of the importance, in relation to multinational enterprises, of permitting organizations representing such enterprises or the workers in their employment to affiliate with international organizations of employers and workers of their own choosing.

45. Where governments of host countries offer special incentives to attract foreign investment, these incentives should not include any limitation of the workers' freedom of association or the right to organize and bargain collectively.

46. Representatives of the workers in multinational enterprises should not be hindered from meeting for consultation and exchange of views among themselves, provided that the functioning of the operations of the enterprise and the normal procedures which govern relationships with representatives of the workers and their organizations are not thereby prejudiced.

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11 Convention No. 87, Article 2.
12 Convention No. 98, Article 1(1).
13 Convention No. 98, Article 2(1).

47. Governments should not restrict the entry of representatives of employers' and workers' organizations who come from other countries at the invitation of the local or national organizations concerned for the purpose of consultation on matters of mutual concern, solely on the grounds that they seek entry in that capacity.

Collective bargaining

48. Workers employed by multinational enterprises should have the right, in accordance with national law and practice, to have representative organizations of their own choosing recognized for the purpose of collective bargaining.

49. Measures appropriate to national conditions should be taken, where necessary, to encourage and promote the full development and utilization of machinery for voluntary negotiation between employers or employers' organizations and workers' organizations, with a view to the regulation of terms and conditions of employment by means of collective agreements.[14]

50. Multinational enterprises, as well as national enterprises, should provide workers' representatives with such facilities as may be necessary to assist in the development of effective collective agreements.[15]

51. Multinational enterprises should enable duly authorized representatives of the workers in their employment in each of the countries in which they operate to conduct negotiations with representatives of management who are authorized to take decisions on the matters under negotiation.

52. Multinational enterprises, in the context of bona fide negotiations with the workers' representatives on conditions of employment, or while workers are exercising the right to organize, should not threaten to utilize a capacity to transfer the whole or part of an operating unit from the country concerned in order to influence unfairly those negotiations or to hinder the exercise of the right to organize; nor should they transfer workers from affiliates in foreign countries with a view to undermining bona fide negotiations with the workers' representatives or the workers' exercise of their right to organize.

53. Collective agreements should include provisions for the settlement of disputes arising over their interpretation and application and for ensuring mutually respected rights and responsibilities.

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14 Convention No. 98, Article 4.

15 Convention (No. 135) concerning Protection and Facilities to be Afforded to Workers' Representatives in the Undertaking.

54. Multinational enterprises should provide workers' representatives with information required for meaningful negotiations with the entity involved and, where this accords with local law and practices, should also provide information to enable them to obtain a true and fair view of the performance of the entity or, where appropriate, of the enterprise as a whole.[16]

55. Governments should supply to the representatives of workers' organizations on request, where law and practice so permit, information on the industries in which the enterprise operates, which would help in laying down objective criteria in the collective bargaining process. In this context, multinational as well as national enterprises should respond constructively to requests by governments for relevant information on their operations.

Consultation

56. In multinational as well as in national entrprises, systems devised by mutual agreement between employers and workers and their representatives should provide, in accordance with national law and practice, for regular consultation on matters of mutual concern. Such consultation should not be a substitute for collective bargaining.[17]

Examination of grievances

57. Multinational as well as national enterprises should respect the right of the workers whom they employ to have all their grievances processed in a manner consistent with the following provision: any worker who, acting individually or jointly with other workers, considers that he has grounds for a grievance should have the right to submit such grievance. without suffering any prejudice whatsoever as a result, and to have such grievance examined pursuant to an appropriate procedure.[18] This is particularly important whenever the multinational enterprises operate in countries which do not abide by the principles of ILO Conventions pertaining to freedom of association, to the right to organize and bargain collectively and to forced labour.[19]

16 Recommendation (No. 129) concerning Communications between Management and Workers within Undertakings.

17 Recommendation (No. 94) concerning Consultation and Cooperation between Employers and Workers of the Level of Undertaking; Recommendation (No. 129) concerning Communications within the Undertaking.

18 Recommendation (No. 130) concerning the Examination of Grievances within the Undertaking with a view to their Settlement.

19 Convention (No. 29) concerning Forced or Compulsory Labour; Convention (No. 105) concerning the Abolition of Forced Labour; Recommendation (No. 35) concerning Indirect Compulsion to Labour.

Settlement of industrial disputes

58. Multinational as well as national enterprises jointly with the representatives and organizations of the workers whom they employ should seek to establish voluntary conciliation machinery, appropriate to national conditions, which may include provisions for voluntary arbitration, to assist in the prevention and settlement of industrial disputes between employers and workers. The voluntary conciliation machinery should include equal representation of employers and workers.[20]

Cross references

Conventions: (C29,C87,C98,C100)
Conventions: (C105,C111,C122)
Conventions: (C130,C135,C142)
Recommendations:(R35,R69,R90,R92,R94)
Recommendations:(R100,R111,R115,R116,R119)
Recommendations:(R122,R129,R130,R134,R150)

20 Recommendation (No. 92) concerning Voluntary Conciliation and Arbitration.

Annex
(Multinational Enterprises: Tripartite Declaration of Principles)

Description:(Multinational Enterprises: Tripartite Declaration of Principles)
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List of international labour Conventions and Recommendations referred to in the Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy (adopted by the Governing Body of the International Labour Office at its 204th Session (Geneva, November 1977) [21])

Conventions

Convention (No. 29) concerning Forced or Compulsory Labour, 1930.
Convention (No. 87) concerning Freedom of Association and Protection of the Right to Organize, 1948.
Convention (No. 98) concerning the Application of the Principles of the Right to Organize and to Bargain Collectively, 1949.
Convention (No. 100) concerning Equal Remuneration for Men and Women Workers for Work of Equal Value, 1951.
Convention (No. 105) concerning the Abolition of Forced Labour, 1957.
Convention (No. 110) concerning Conditions of Employment of Plantation Workers, 1958.
Convention (No. 111) concerning Discrimination in Respect of Employment and Occupation, 1958.
Convention (No. 115) concerning the Protection of Workers against Ionizing Radiations, 1960.
Convention (No. 119) concerning the Guarding of Machinery, 1963.
Convention (No. 122) concerning Employment Policy, 1964.
Convention (No. 130) concerning Medical Care and Sickness Benefits, 1969.
Convention (No. 135) concerning Protection and Facilities to be Afforded to Workers' Representatives in the Undertaking, 1971.
Convention (No. 136) concerning Protection against Hazards of Poisoning arising from Benzene, 1971.
Convention (No. 139) concerning Prevention and Control of Occupational Hazards caused by Carcinogenic Substances and Agents, 1974.
Convention (No. 142) concerning Vocational Guidance and Vocational Training in the Development of Human Resources, 1975.

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21 It was proposed that the Office make available, on request, offprints of the international labour Conventions and Recommendations referred to in the Tripartite Declaration. *ILO: Report of the Reconvened Tripartite Advisory Meeting on the Relationship of Multinational Enterprises and Social Policy*, Geneva, 4-7 April 1977, GB.204/4/2, 204th Session, Geneva, 15-18 November 1977, p. 2.

Recommendations

Recommendation (No. 35) concerning Indirect Compulsion to Labour, 1930.

Recommendation (No. 69) concerning Medical Care, 1944.

Recommendation (No. 90) concerning Equal Remuneration for Men and Women Workers for Work of Equal Value, 1951.

Recommendation (No. 92) concerning Voluntary Conciliation and Arbitration, 1951.

Recommendation (No. 94) concerning Consultation and Cooperation between Employers and Workers at the Level of the Undertaking, 1952.

Recommendation (No. 110) concerning Conditions of Employment of Plantation Workers, 1958.

Recommendation (No. 111) concerning Discrimination in Respect of Employment and Occupation, 1958.

Recommendation (No. 114) concerning the Protection of Workers against Ionizing Radiations, 1960.

Recommendation (No. 115) concerning Workers' Housing, 1961.

Recommendation (No. 116) concerning Reduction of Hours of Work, 1962.

Recommendation (No. 118) concerning the Guarding of Machinery, 1963.

Recommendation (No. 119) concerning Termination of Employment at the Initiative of the Employer, 1963.

Recommendation (No. 122) concerning Employment Policy, 1964.

Recommendation (No. 129) concerning Communications between Management and Workers within the Undertaking, 1967.

Recommendation (No 130) concerning the Examination of Grievances within the Undertaking with a View to their Settlement, 1967.

Recommendation (No. 134) concerning Medical Care and Sickness Benefits, 1969.

Recommendation (No. 144) concerning Protection against Hazards of Poisoning arising from Benzene,1971.

Recommendation (No. 147) concerning Prevention and Control of Occupational Hazards caused by Carcinogenic Substances and Agents, 1974.

Recommendation (No. 150) concerning Vocational Guidance and Vocational Training in the Development of Human Resources, 1975.

Addendum
(Multinational Enterprises: Tripartite Declaration of Principles)

Description:(Multinational Enterprises: Tripartite Declaration of Principles)
Document:(OB Vol. LXXI, 1988, Series A, No. 1)

Addendum to the Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy (adopted by the Governing Body of the International Labour Office at its 238th Session (Geneva, November 1987) and 264th Session (November 1995))

References to Conventions and Recommendations in the Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy

A number of international labour Conventions and Recommendations containing provisions relevant to the Declaration are referred to in footnotes in the Declaration as well as in an annex. These footnotes do not affect the meaning of the provisions of the Declaration to which they refer. They should be considered as references to relevant instruments adopted by the International Labour Organization in the corresponding subject areas, which have helped shape the provisions of the Declaration.

Since the adoption of the Declaration by the Governing Body on 16 November 1977, new Conventions and Recommendations have been adopted by the International Labour Conference. This makes it necessary to include a new list of Conventions and Recommendations adopted since 1977 (including those adopted in June 1977), containing provisions relevant to the Declaration, and this list is set out below. Like the footnotes included in the Declaration at the time of its adoption, the new references do not affect the meaning of the provisions of the Declaration.

In keeping with the voluntary nature of the Declaration all of its provisions, whether derived from ILO Conventions and Recommendations or other sources, are recommendatory, except of course for provisions in Conventions which are binding on the member States which have ratified them.

List of Conventions and Recommendations adopted since 1977 (inclusive) which contain provisions relevant to the Declaration

Number and title of Convention and Recommendation and the Paragraphs of the Declaration to which the instrument is relevant

Conventions

No. 148 concerning the Protection of Workers against Occupational Hazards in the Working Environment Due to Air Pollution, Noise and Vibration, 1977 relevant to para(s) 36

No. 154 concerning the Promotion of Collective Bargaining, 1981 relevant to para(s) 9, 49

No. 155 concerning Occupational Safety and Health and the Working Environment, 1981 relevant to para(s) 36

No. 156 concerning Equal Opportunities and Equal Treatment for Men and Women Workers: Workers with Family Responsibilities, 1981 relevant to para(s) 21

No. 158 concerning Termination of Employment at the Initiative of the Employer, 1982 relevant to para(s) 9, 26, 27, 28

No. 161 concerning Occupational Health Services, 1985 relevant to para(s) 36

No. 162 concerning Safety in the Use of Asbestos, 1986 relevant to para(s) 36

No. 167 concerning Safety and Health in Construction, 1988 relevant to para(s) 36

No. 168 concerning Employment Promotion and Protection against Unemployment, 1988 relevant to para(s) 13

No. 170 concerning Safety in the Use of Chemicals at Work, 1990 relevant to para(s) 36

No. 173 concerning the Protection of Workers' Claims in the event of the Insolvency of their Employer,1992 relevant to para(s) 28

No. 174 concerning the Prevention of Major Industrial Accidents, 1993 relevant to para(s) 36

No. 176 concerning Safety and Health in Mines, 1995 relevant to para(s) 36 Recommendations

No. 156 concerning the Protection of Workers against Occupational Hazards in the Working Environment Due to Air Pollution, Noise and Vibration, 1977 relevant to para(s) 36

No. 163 concerning the Promotion of Collective Bargaining, 1981 relevant to para(s) 51, 54, 55

No. 164 concerning Occupational Safety and Health and the Working Environment, 1981 relevant to para(s) 36

No. 165 concerning Equal Opportunities and Equal Treatment for Men and Women Workers: Workers with Family Responsibilities, 1981 relevant to para(s) 21

No. 166 concerning Termination of Employment at the Initiative of the Employer, 1982 relevant to para(s) 9, 26, 27, 28

No. 169 concerning Employment Policy, 1984 relevant to para(s) 9, 13

No. 171 concerning Occupational Health Services, 1985 relevant to para(s) 36

No. 172 concerning Safety in the Use of Asbestos, 1986 relevant to para(s) 36

No. 175 concerning Safety and Health in Construction, 1988 relevant to para(s) 36

No. 176 concerning Employment Promotion and Protection against Unemployment, 1988 relevant to para(s) 13

No. 177 concerning Safety in the Use of Chemicals at Work, 1990 relevant to para(s) 36

No. 180 concerning the Protection of Workers' Claims in the event of the Insolvency of their Employer,1992 relevant to para(s) 28

No. 181 concerning the Prevention of Major Industrial Accidents, 1993 relevant to para(s) 36

No. 183 concerning Safety and Health in Mines, 1995 relevant to para(s) 36

Procedure for the Examination of Disputes (Multinational Enterprises: Tripartite Declaration of Principles)

Description:(Multinational Enterprises: Tripartite Declaration of Principles)
Document:(OB Vol. LXIX, 1986, Series A, No. 3)

Procedure for the examination of disputes concerning the application of the Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy by means of interpretation of its provisions (adopted by the Governing Body of the International Labour Office at its 232nd Session (Geneva, March 1986)[22])

1. The purpose of the procedure is to interpret the provisions of the Declaration when needed to resolve a disagreement on their meaning, arising from an actual situation, between parties to whom the Declaration is commended.

2. The procedure should in no way duplicate or conflict with existing national or ILO procedures. Thus, it cannot be invoked:
(a) in respect of national law and practice;
(b) in respect of international labour Conventions and Recommendations;
(c) in respect of matters falling under the freedom of association procedure.
The above means that questions regarding national law and practice should be considered through appropriate national machinery; that questions regarding international labour Conventions and Recommendations should be examined through the various procedures provided for in articles 19, 22, 24 and 26 of the Constitution of the ILO, or through government requests to the Office for informal interpretation; and that questions concerning freedom of association should be considered through the special ILO procedures applicable to that area.

3. When a request for interpretation of the Declaration is received by the International Labour Office, the Office shall acknowledge receipt and bring it before the Officers of the Committee on Multinational Enterprises. The Office will inform the government and the central organizations of employers and workers concerned of any request for interpretation received directly from an organization under paragraph 5(b) and (c).

4. The Officers of the Committee on Multinational Enterprises shall decide unanimously after consultations in the groups whether the request is receivable under the procedure. If they cannot reach agreement the request shall be referred to the full Committee for decision.

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22 *Official Bulletin* (Geneva, ILO), 1986, Vol. LXIX, Series A, No. 3, pp. 196-197 (to replace Part IV of the Procedures adopted by the Governing Body at its 214th Session (November 1980)). See *Official Bulletin*, 1981, Vol. LXIV, Series A, No. 1, pp. 89-90.

5. Requests for interpretation may be addressed to the Office:
(a) as a rule by the government of a member State acting either on its own initiative or at the request of a national organization of employers or workers;
(b) by a national organization of employers or workers, which is representative at the national and/or sectoral level, subject to the conditions set out in paragraph 6. Such requests should normally be channelled through the central organizations in the country concerned;
(c) by an international organization of employers or workers on behalf of a representative national affiliate.

6. In the case of 5(b) and (c), requests may be submitted if it can be demonstrated:
(a) that the government concerned has declined to submit the request to the Office; or
(b) that three months have elapsed since the organization addressed the government without a statement of the government's intention.

7. In the case of receivable requests the Office shall prepare a draft reply in consultation with the Officers of the Committee on Multinational Enterprises. All appropriate sources of information shall be used, including government, employers' and workers' sources in the country concerned. The Officers may ask the Office to indicate a period within which the information should be provided.

8. The draft reply to a receivable request shall be considered and approved by the Committee on Multinational Enterprises prior to submission to the Governing Body for approval.

9. The reply when approved by the Governing Body shall be forwarded to the parties concerned and published in the Official Bulletin of the International Labour Office.

APPENDIX 3

OECD Declaration on International Investment and Multinational Enterprises

21 June 1976

THE GOVERNMENTS OF OECD MEMBER COUNTRIES[1]

CONSIDERING:

- That international investment has assumed increased importance in the world economy and has considerably contributed to the development of their countries;
- That multinational enterprises play an important role in this investment process;
- That co-operation by Member countries can improve the foreign investment climate, encourage the positive contribution which multinational enterprises can make to economic and social progress, and minimise and resolve difficulties which may arise from their various operations;
- That, while continuing endeavours within the OECD may lead to further international arrangements and agreements in this field, it seems appropriate at this stage to intensify their co-operation and consultation on issue relating to international investment and multinational enterprises through inter-related instruments each of which deals with a different aspect of the matter and together constitute a framework within which the OECD will consider these issues;

DECLARE:

Guidelines for Multinational Enterprises

I. That they jointly recommend to multinational enterprises operating in their territories the observance of the Guidelines as set forth in Annex 1 hereto having regard to the considerations and understandings which introduce the Guidelines and are an integral part of them;

National Treatment

II.1. That Member countries should, consistent with their needs to maintain public order, to protect their essential security interests and to fulfil commitments relating to international peace and security, accord to enterprises operating in their territories and owned or controlled directly or indirectly by nationals of another Member country (hereinafter referred to as 'Foreign-Controlled Enterprises') treatment under their laws, regulations and administrative practices, consistent with international law and no less favourable than that accorded in like situations to domestic enterprises (hereinafter referred to as 'National Treatment');

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2. That Member countries will consider applying 'National Treatment' in respect of countries other than Member countries;

3. That Member countries will endeavour to ensure that their territorial subdivisions apply 'National Treatment';

4. That this Declaration does not deal with the right of Member countries to regulate the entry of foreign investment or the conditions of establishment of foreign enterprises;

Conflicting Requirements

III. That they will co-operate with a view to avoiding or minimising the imposition of conflicting requirements on multinational enterprises and that they will take into account the general considerations and practical approaches as set forth in Annex 2 hereto;

International Enterprises; Incentives and Disincentives

IV.1. That they recognise the need to strengthen their co-operation in the field of international direct investment;

2. That they thus recognise the need to give due weight to the interests of Member countries affected by specific laws, regulations and administrative practices in this field (hereinafter called 'measures') providing official incentives and disincentives to international direct investment;

3. That Member countries will endeavour to make such measures as transparent as possible, so that their importance and purpose can be ascertained and that information on them can be readily available;

Consultation Procedures

V. That they are prepared to consult one another on the above matters in conformity with the Decisions of the Council on the Guidelines for Multinational Enterprises, on National Treatment and on International Investment Incentives and Disincentives;

Review

VI. That they will review the above matters within three years with a view to improving the effectiveness of international economic co-operation among Member countries on issues relating to international investment and multinational enterprises.[2]

Annex 1
GUIDELINES FOR MULTINATIONAL ENTERPRISES[3]

1. Multinational enterprises now play an important part in the economies of Member countries and in international economic relations, which is of increasing interest to governments. Through international direct investment, such enterprises can bring substantial benefits to home and host countries by contributing to the efficient utilisation of capital, technology and human resources between countries and can thus fulfil an important role in the promotion of economic and social welfare. But the advances made by multinational enterprises in organising their operations beyond the national framework may lead to abuse of concentrations of economic power and to conflicts with national policy objectives. In addition, the complexity of these multinational enterprises and the difficulty of clearly perceiving their diverse structures, operations and policies sometimes give rise to concern.

2. The common aim of the Member countries is to encourage the positive contributions which multinational enterprises can make to economic and social progress and to minimise and resolve the difficulties to which their various operations may give rise. In view of the transnational structure of such enterprises, this aim will be furthered by co-operation among the OECD countries where the headquarters of most of the multinational enterprises are established and which are the location of a substantial part of their operations. The Guidelines set out hereafter are designed to assist in the achievement of this common aim and to contribute to improving the foreign investment climate.

3. Since the operations of multinational enterprises extend throughout the world, including countries that are not Members of the Organisation, international co-operation in this field should extend to all States. Member countries will give their full support to efforts undertaken in co-operation with non-member countries, and in particular with developing countries, with a view to improving the welfare and living standards of all people both by encouraging the positive contributions which multinational enterprises can make and by minimising and resolving the problems which may arise in connection with their activities.

4. Within the Organisation, the programme of co-operation to attain these ends will be a continuing, pragmatic and balanced one. It comes within the general aims of the Convention on the Organisation for Economic Co-operation and Development (OECD) and makes full use of the various specialised bodies of the Organisation, whose terms of reference already cover many aspects of the role ofmultinational enterprises, notably in matters of international trade and payments, competition, taxation, manpower, industrial development, science and technology. In these bodies, work is being carried out on the identification of issues, the improvement of relevant

qualitative and statistical information and the elaboration of proposals for action designed to strengthen inter-governmental co-operation. In some of these areas procedures already exist through which issues related to the operations of multinational enterprises can be taken up. This work could result in the conclusion of further and complementary agreements and arrangements between governments.

5. The initial phase of the co-operation programme is composed of a Declaration and three Decisions promulgated simultaneously as they are complementary and interconnected, in respect of Guidelines for Multinational Enterprises, National Treatment for foreign-controlled enterprises and international investment incentives and disincentives.

6. The Guidelines set out below are recommendations jointly addressed by Member countries to multinational enterprises operating in their territories. These Guidelines, which take into account the problems which can arise because of the international structure of these enterprises, lay down standards for the activities of these enterprises in the different Member countries. Observance of the Guidelines is voluntary and not legally enforceable. However, they should help to ensure that the operations of these enterprises are in harmony with national policies of the countries where they operate and to strengthen the basis of mutual confidence between enterprises and States.

7. Every State has the right to prescribe the conditions under which multinational enterprises operate within its national jurisdiction, subject to international law and to the international agreements to which it has subscribed. The entities of a multinational enterprise located in various countries are subject to the laws of these countries.

8. A precise legal definition of multinational enterprises is not required for the purposes of the Guidelines. These usually comprise companies or other entities whose ownership is private, state or mixed, established in different countries and so linked that one or more of them may be able to exercise a significant influence over the activities of others and, in particular, to share knowledge and resources with the others. The degrees of autonomy of each entity in relation to the others varies widely from one multinational enterprise to another, depending on the nature of the links between such entities and the fields of activity concerned. For these reasons, the Guidelines are addressed to the various entities within the multinational enterprise (parent companies and/or local entities) according to the actual distribution of responsibilities among them on the understanding that they will co-operate and provide assistance to one another as necessary to facilitate observance of the Guidelines. The word 'enterprise' as used in these Guidelines refers to these various entities in accordance with their responsibilities.

9. The Guidelines are not aimed at introducing differences of treatment between multinational and domestic enterprises; wherever relevant they reflect good practice for all. Accordingly, multinational and domestic enterprises are subject to the same expectations in respect of their conduct wherever the Guidelines are relevant to both.

10. The use of appropriate international dispute settlement mechanisms, including arbitration, should be encouraged as a means of facilitating the resolution of problems arising between enterprises and Member countries.

11. Member countries have agreed to establish appropriate review and consultation procedures concerning issues arising in respect of the Guidelines. When multinational enterprises are made subject to conflicting requirements by Member countries, the governments concerned will co-operate in good faith with a view to resolving such problems either within the Committee on International Investment and Multinational Enterprises established by the OECD Council on 21st January 1975 or through other mutually acceptable arrangements.

Having regard to the foregoing considerations, the Member countries set forth the following Guidelines for multinational enterprises with the understanding that Member countries will fulfil their responsibilities to treat enterprises equitably and in accordance with international law and international agreements as well as contractual obligations to which they have subscribed.

GENERAL POLICIES

Enterprises should:

1. Take fully into account established general policy objectives of the Member countries in which they operate;

2. In particular, give due consideration to those countries' aims and priorities with regard to economic and social progress, including industrial and regional development, the protection of the environment and consumer interests, the creation of employment opportunities, the promotion of innovation and the transfer of technology[4];

3. While observing their legal obligations concerning information, supply their entities with supplementary information the latter may need in order to meet requests by the authorities of the countries in which those entities are located for information relevant to the activities of those entities, taking into account legitimate requirements of business confidentiality;

4. Favour close co-operation with the local community and business interests;

5. Allow their component entities freedom to develop their activities and to exploit their competitive advantage in domestic and foreign markets, consistent with the need for specialisation and sound commercial practice;

6. When filling responsible posts in each country of operation, take due account of individual qualifications without discrimination as to nationality, subject to particular national requirements in this respect;

7. Not render and they should not be solicited or expected to render any bribe or other improper benefit, direct or indirect, to any public servant or holder of public office;

8. Unless legally permissible, not make contributions to candidates for public office or to political parties or other political organisations;

9. Abstain from any improper involvement in local political activities.

DISCLOSURE OF INFORMATION

Enterprises should, having due regard to their nature and relative size in the economic context of their operations and to requirements of business confidentiality and to cost, publish in a form suited to improve public understanding a sufficient body of factual information on the structure, activities and policies of the enterprise as a whole, as a supplement, in so far as necessary for this purpose, to information to be disclosed under the supplement, in so far as necessary for this purpose, to information to be disclosed under the national law of the individual countries in which they operate. To this end, they should publish within reasonable time limits, on a regular basis, but at least annually, financial statements and other pertinent information relating to the enterprise as a whole, comprising in particular:

a) The structure of the enterprise, showing the name and location of the parent company, its main affiliates, its percentage ownership, direct and indirect, in these affiliates, including shareholdings between them;

b) The geographical areas[5] where operations are carried out and the principal activities carried on therein by the parent company and the main affiliates;

c) The operating results and sales by geographical area and the sales in the major line of business for the enterprise as a whole;

d) Significant new capital investment by geographical area and, as far as practicable, by major lines of business for the enterprise as a whole;

e) A statement of the sources and uses of funds by the enterprise as a whole;

f) The average number of employees in each geographical area;

g) Research and development expenditure for the enterprise as a whole;
h) The policies followed in respect of intra-group pricing;
i) The accounting policies, including those on consolidation, observed in compiling the published information.

COMPETITION

Enterprises should, while conforming to official competition rules and established policies of the countries in which they operate:

1. Refrain from actions which would adversely affect competition in the relevant market by abusing a dominant position of market power, by means of, for example:
a) Anti-competitive acquisitions;
b) Predatory behaviour toward competitors;
c) Unreasonable refusal to deal;
d) Anti-competitive abuse of industrial property rights;
e) Discriminatory (i.e. unreasonably differentiated) pricing and using such pricing transactions between affiliated enterprises as a means of affecting adversely competition outside these enterprises;

2. Allow purchasers, distributors and licensees freedom to resell, export, purchase and develop their operations consistent with law, trade conditions, the need for specialisation and sound commercial practice;

3. Refrain from participating in or otherwise purposely strengthening the restrictive effects of international or domestic cartels or restrictive agreements which adversely affect or eliminate competition and which are not generally or specifically accepted under applicable national or international legislation;

4. Be ready to consult and co-operate, including the provision of information, with competent authorities of countries whose interests are directly affected in regard to competition issues or investigations. Provisions of information should be in accordance with safeguards normally applicable in this field.

FINANCING

Enterprises should, in managing the financial and commercial operations of their activities, and especially their liquid foreign assets and liabilities, take into consideration the established objectives of the countries in which they operate regarding balance of payments and credit policies.

TAXATION

Enterprises should:

1. Upon request of the taxation authorities of the countries in which they operate provide, in accordance with the safeguards and relevant procedures of the national laws of these countries, the information necessary to determine correctly the taxes to be assessed in connection with their operations, including relevant information concerning their operations in other countries;

2. Refrain from making use of the particular facilities available to them, such as transfer pricing which does not conform to an arm's length standard, for modifying in ways contrary to national laws the tax base on which members of the group are assessed.

EMPLOYMENT AND INDUSTRIAL RELATIONS

Enterprises should, within the framework of law, regulations and prevailing labour relations and employment practices, in each of the countries in which they operate:

1. Respect the right of their employees to be represented by trade unions and other bona fide organisations of employees, and engage in constructive negotiations, either individually or through employers' associations, with such employee organisations with a view to reaching agreements on employment conditions, which should include provisions for dealing with disputes arising over the interpretation of such agreements, and for ensuring mutually respected rights and responsibilities;

2. *a)* Provide such facilities to representatives of the employees as may be necessary to assist in the development of effective collective agreements;
b) Provide to representatives of employees information which is needed for meaningful negotiations on conditions of employment;

3. Provide to representatives of employees where this accords with local law and practice, information which enables them to obtain a true and fair view of the performance of the entity or, where appropriate, the enterprise as a whole;

4. Observe standards of employment and industrial relations not less favourable than those observed by comparable employers in the host country;

5. In their operations, to the greatest extent practicable, utilise, train and prepare for upgrading members of the local labour force in co-operation with representatives of their employees and, where appropriate, the relevant governmental authorities;

6. In considering changes in their operations which would have major effects upon the livelihood of their employees, in particular in the case of the closure of an entity involving collective lay-offs or dismissals, provide reasonable notice of such changes to representatives of their employees, and where appropriate to the relevant governmental authorities and co-operate with the employee representatives and appropriate governmental authorities so as to mitigate to the maximum extent practicable adverse effects;

7. Implement their employment policies including hiring, discharge, pay, promotion and training without discrimination unless selectivity in respect of employee characteristics is in furtherance of established governmental policies which specifically promote greater equality of employment opportunity;

8. In the context of bona fide negotiations[6] with representatives of employees on conditions of employment, or while employees are exercising a right to organise, not threaten to utilise a capacity to transfer the whole or part of an operating unit from the country concerned nor transfer employees from the enterprises' component entities in other countries in order to influence unfairly those negotiations or to hinder the exercise of a right to organise;[7]

9. Enable authorised representatives of their employees to conduct negotiations on collective bargaining or labour management relations issues with representatives of management who are authorised to take decisions on the matters under negotiation.

ENVIRONMENTAL PROTECTION[8]

Enterprises should, within the framework of laws, regulations and administrative practices in the countries in which they operate, and recalling the provisions of paragraph 9 of the Introduction to the Guidelines that, inter alia, multinational and domestic enterprises are subject to the same expectations in respect of their conduct whenever the Guidelines are relevant to both, take due account of the need to protect the environment and avoid creating environmentally related health problems. In particular, enterprises, whether multinational or domestic, should:

1. Assess, and take into account in decision making, foreseeable environmental and environmentally related health consequences of their activities, including siting decisions, impact on indigenous natural resources and foreseeable environmental and environmentally related health risks of products as well as from the generation, transport and disposal of waste;

2. Co-operate with competent authorities, inter alia, by providing adequate and timely information regarding the potential impacts on the environment and environ-

mentally related health aspects of all their activities and by providing the relevant expertise available in the enterprise as a whole;

3. Take appropriate measures in their operations to minimise the risk of accidents and damage to health and the environment, and to co-operate in mitigating adverse effects, in particular:

a) by selecting and adopting those technologies and practices which are compatible with these objectives;

b) by introducing a system of environmental protection at the level of the enterprise as a whole including, where appropriate, the use of environmental auditing;

c) by enabling their component entities to be adequately equipped, especially by providing them with adequate knowledge and assistance;

d) by implementing education and training programmes for their employees;

e) by preparing contingency plans; and

f) by supporting, in an appropriate manner, public information and community awareness programmes.

SCIENCE AND TECHNOLOGY

Enterprises should:

1. Endeavour to ensure that their activities fit satisfactorily into the scientific and technological policies and plans of the countries in which they operate, and contribute to the development of national scientific and technological capacities, including as far as appropriate the establishment and improvement in host countries of their capacity to innovate;

2. To the fullest extent practicable, adopt in the course of their business activities practices which permit the rapid diffusion of technologies with due regard to the protection of industrial and intellectual property rights;

3. When granting licenses for the use of industrial property rights or when otherwise transferring technology, do so on reasonable terms and conditions.

Annex 2
GENERAL CONSIDERATIONS AND PRACTICAL APPROACHES CONCERNING CONFLICTING REQUIREMENTS IMPOSED ON MULTINATIONAL ENTERPRISES[9]

GENERAL CONSIDERATIONS

1. In contemplating new legislation, action under existing legislation or other exercise of jurisdiction which may conflict with the legal requirements or established policies of another Member country and lead to conflicting requirements being imposed on multinational enterprises, the Member countries concerned should:

a) Have regard to relevant principles of international law;

b) Endeavour to avoid or minimise such conflicts and the problems to which they give rise by following an approach of moderation and restraint, respecting and accommodating the interests of other Member countries[10];

c) Take fully into account the sovereignty and legitimate economic, law enforcement and other interests of other Member countries;

d) Bear in mind the importance of permitting the observance of contractual obligations and the possible adverse impact of measures having a retroactive effect.

2. Member countries should endeavour to promote co-operation as an alternative to unilateral action to avoid or minimise conflicting requirements and problems arising therefrom. Member countries should on request consult one another and endeavour to arrive at mutually acceptable solutions to such problems.

PRACTICAL APPROACHES

3. Member countries recognised that in the majority of circumstances, effective co-operation may best be pursued on a bilateral basis. On the other hand, there may be cases where the multilateral approach could be more effective.

4. Member countries should therefore be prepared to:

a) Develop mutually beneficial, practical and appropriately safeguarded bilateral arrangements, formal or informal, for notification to and consultation with other Member countries;

b) Give prompt and sympathetic consideration to requests for notification and bilateral consultation on an ad hoc basis made by any Member country which considers that its interests may be affected by a measure of the type referred to under paragraph 1 above, taken by another Member country with which it does not have such bilateral arrangements;

c) Inform the other concerned Member countries as soon as practicable of new legislation or regulations proposed by their Governments for adoption which have

significant potential for conflict with the legal requirements or established policies of other Member countries and for giving rise to conflicting requirements being imposed on multinational enterprises;

d) Give prompt and sympathetic consideration to requests by other Member countries for consultation in the Committee on International Investment and Multinational Enterprises or through other mutually acceptable arrangements. Such consultations would be facilitated by notification at the earliest stage practicable;

e) Give prompt and full consideration to proposals which may be made by other Member countries in any such consultations that would lessen or eliminate conflicts.

These procedures do not apply to those aspects of restrictive business practices or other matters which are the subject of existing OECD arrangements.

NOTES AND REFERENCES

1 On matters falling within its competence, the European Economic Community is associated with the section on National Treatment.

2 The Declaration was reviewed in 1979, 1984 and 1991. Section III on Conflicting Requirements was added following the 1991 Review.

3 The Guidelines were reviewed in 1979, 1984 and 1991. These reviews resulted in modification of the General Policies chapter (paragraph 2); the Disclosure of Information chapter [sub-paragraph *b*]; a clarification and modification of the Employment and Industrial Relations chapter (paragraph 8); and the addition of a new chapter on the Environment.

4 This paragraph includes the additional provision concerning consumer interests, adopted by the OECD Governments at the meeting of the OECD Council at Ministerial level on 17 and 18 May 1984.

5* *For the purposes of the Guideline on Disclosure of Information the term 'geographical area' means groups of countries or individual countries as each enterprise determines is appropriate in its particular circumstances. While no single method of grouping is appropriate for all enterprises or for all purposes, the factors to be considered by an enterprise would include the significance of geographic proximity, economic affinity, similarities in business environments and the nature, scale and degree of interrelationship of the enterprises' operations in the various countries.*

6* *Bona fide* negotiations may include labour disputes as part of the process of negotiation. Whether or not labour disputes are so included will be determined by the law and prevailing employment practices of particular countries.

7 This paragraph includes the additional provision, concerning transfer of employees, adopted by OECD Governments at the meeting of the OECD Council at Ministerial level on 13 and 14 June 1979.

8 This chapter was added at the meeting of the OECD Council at Ministerial level on 4 and 5 June 1991.

9 The General Considerations and Practical Approaches were endorsed by the Ministers in May 1984. They were annexed to the 1976 Declaration as a result of the 1991 Review exercise.

10* *Applying the principle of comity, as it is understood in some Member countries, includes following an approach of this nature in exercising one's jurisdiction.*

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* These texts are integral parts of the negotiated instruments.

APPENDIX 4

Resolution on EU Standards for European Enterprises Operating in Developing Countries

Towards a European Code of Conduct

The European Parliament;

- having regard to its resolution of 9 February 1994 on the introduction of a social clause in the trading system,
- having regard to its resolution of 12 December 1996 on the human rights situation in the world and the EU's human rights policy,
- having regard to its resolution of 15 January 1998 on relocation and foreign direct investment in third countries,
- having regard to its resolutions A3-0597/93; B4-0062 and 0103/95; B4-1415/95 as well as B4-0496, 0500, 0522 and 0551/96 on Indigenous peoples,
- having regard to its resolution of 11 March 1998 on an OECD Multilateral Agreement on Investment,
- having regard to its resolution of 2 July 1998 on fair trade (A4-0198/98),
- having regard to its resolution of 17 December 1998 on human rights in the world in 1997 and 1998 and European Union human rights policy
- having regard to the two most authoritative internationally agreed standards for corporate conduct adopted by the ILO: the 1977 'Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy' and the 1976 OECD: 'Guidelines for Multinational Enterprises', and to codes of conduct agreed under the aegis of international organisations such as the FAO, WHO and World Bank and efforts under the auspices of UNCTAD with regard to the activities of enterprises in developing countries,
- having regard to the ILO Declaration on Fundamental Principles and Rights at Work, 18 June 1998, and its agreement of universal core labour standards: Abolition of forced labour (Conventions 29 and 105), Freedom of association and the right to collective bargaining (Conventions 87 and 98), Abolition of child labour (Convention 138), and Non-Discrimination in Employment (Conventions 100 and 111),
- having regard to the United Nations Universal Declaration of Human Rights and in particular its article where every individual and every organ of society is called upon to play its part in securing universal observance of human rights, the 1966 International Covenant on Civil and Political Rights, the 1966 Covenant on Economic, Social and Cultural Rights, the 1979 Convention of the Elimination of All Forms of Discrimination Against Women, the 1994 Draft United Nations Declaration on the Rights of Indigenous Peoples,

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- having regard to the decision of the European social partners to contribute to the implementation of actions aimed at eradicating all forms of child labour exploitation and to promote the rights of these children throughout the world,
- having regard to Article 220 of the Treaty of Rome regarding reciprocal recognition of court judgments, to the 1968 EEC Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters, usually known as the Brussels Convention, and to the Joint Action adopted by the Council on the basis of Article K3 of the Treaty concerning action to combat trafficking in human beings and sexual exploitation of children, of 24 February 1997,
- having regard to the 1997 OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions,
- having regard to the European Council decisions to offer enhanced General System of Preferences (GSP) with respect to compliance with core labour standards, and to the EU Code of Conduct on Arms Exports,
- having regard to numerous initiatives on the part of individual enterprises, their associations, trade unions and non-governmental organisations, together with international voluntary standards such as Social Accountability 8000,
- having regard to Rule 148 of its Rules of Procedure,
- having regard to the Hearing on 'EU standards for European Enterprises operating in developing countries' of 2 September 1998 in the Committee on Development and Cooperation and to the report of the Committee on Development and Cooperation (A4-0508/98) and the opinion of the Committee on External Economic Relations,

A. Whereas the EU as the largest development aid donor, and European enterprises, as the largest direct investors in developing countries, can play a decisive role in global sustainable social and economic development;

B. Deeply concerned about numerous cases where intense competition for investment and markets and lack of application of international standards and national laws, have led to cases of corporate abuse, particularly in countries where human rights are not upheld;

C. Stressing that no company should profit from any competitive advantage resulting from disregarding basic labour laws and social and environmental standards; and recognising increasing evidence that corporate social responsibility is linked to good financial performance;

D. Bearing in mind there is increasing consensus amongst business and industry, trade unions, NGOs and governments both from developing countries and from the industrialised world, to improve business practices through voluntary codes of conduct;

E. Whereas in this connection a process of review is under way in the OECD at the present time, in consultation with representatives of companies, labour and other components of civil society, to strengthen the guiding principles set out by the Organisation for multinational companies;

F. Stressing that voluntary and binding approaches to corporate regulation are not mutually exclusive, and adopting an evolutionary approach to the question of standard-setting for European enterprises;

Voluntary codes of conduct

1. Welcomes and encourages voluntary initiatives by business and industry, trade unions and coalitions of NGOs to promote codes of conduct, with effective and independent monitoring and verification, and stakeholder participation in the development, implementation and monitoring of Codes of Conduct; emphasises, however, that codes of conduct cannot replace or set aside national or international rules or the jurisdiction of governments; considers that codes of conduct must not be used as instruments for putting multinational enterprises beyond the scope of governmental and judicial scrutiny;

2. Reiterates its calls on the Council to develop a joint position on voluntary codes of conduct, on the lines of the code of conduct for arms exporters, taking due account of the fact that 'self-policing' is not always the answer;

3. Stresses that the content of a code, the process by which it is determined and implemented, must involve those in developing countries who are covered by it;

4. Believes that special attention must be paid to implementing codes in respect of workers in the informal sector, sub-contractors and in free trade zones, notably concerning recognition of the right to form independent trade unions; and against corporate collusion in violations of human rights;

5. Believes that a code should recognise the responsibilities of companies operating in conflict situations by ensuring that a Code covers the Amnesty International Human Rights Principles for Companies, Human Rights Watch recommendations to companies, and the UN Code of Conduct for Law Enforcement Officials;

6. Believes that under the voluntary codes of conduct European companies should comply with EU environmental, animal welfare and health standards;

7. Stresses that Indigenous peoples and their communities should benefit from such codes of conduct recognizing their important role for sustainable development;

8. Welcomes the fact that in the present context of globalisation of trade flows and communications as well as of increased vigilance of NGO's and consumer associations, it seems to be increasingly in the own interest of multinational undertakings to adopt and implement voluntary codes of conduct, if they want to avoid negative

publicity compaigns, sometimes leading to boycotts, public relation costs and consumer complaints;

9. Considers that enterprises should contribute economically and socially to the development process in the affected areas, in compliance with the guidelines laid down by the public authorities concerned;

10. Recommends that an 'evolutionary approach' be weighted towards a continuous and gradual improvement of standards; takes the view that this must reflect the enterprises' own obligations to make improvements;

European enforcement mechanism

11. Reiterates its request to the Commission and the Council to make proposals, as a matter of urgency, to develop the right legal basis for establishing a European multilateral framework governing companies operations worldwide and organize for this purpose consultations with companies' representatives, social partners and those groups of society who would be covered by the code;

12. Recommends, that a model Code of Conduct for European Businesses should comprise existing Minimum Applicable international standards:
- the ILO Tripartite Declaration of Principles concerning MNEs and Social Policy and the OECD Guidelines for Multinational Enterprises;
- in the field of labour rights: the I.L.O. core Conventions;
- in the field of human rights: the UN Declaration and different Covenants on Human Rights;
- in the field of minority and indigenous peoples rights: I.L.O. Convention no. 169, Chapter 26 of Agenda 21, 1994 Draft United Nations Declaration on the Rights of Indigenous Peoples, U.N. Declaration on the Elimination of All Forms of Racial Discrimination;
- in the field of environmental standards: U.N. Convention on Biological Diversity, the Rio Declaration and the European Commission proposal for the development of a code of conduct for European logging companies (COM(89) - 0410) and the relevant UN Conventions in the fields of protection of the environment, animal welfare and public health;
- in the field of security services: Common Article 3 of the Geneva Conventions and Protocol II, and the U.N. Code of Conduct for Law Enforcement Officials;
- in the field of corruption: the O.E.C.D. anti-bribery convention and the European Commission communication on legislative measures against corruption (COM(97) 0192/fin.);

but should also include consideration of new international standards which are currently developed;

13. Reaffirms its support for the creation of a 'Social Label'

14. Calls on the Commission to study the possibility of setting up a European Monitoring Platform (EMP), (already proposed by some trade associations) in close collaboration with the social partners, NGO's from North and South and representatives of Indigenous and local communities;

15. Believes that an independent monitoring and verification body could only prove useful if it is highly skilled, if it has appropriate procedures and, above all, if it is widely accepted as being objective and impartial;

16. Recommends that business and industry provide dissemination of information of their voluntary initiatives and conduct to the monitoring mechanism so that their compliance with a European Code of conduct, international standards and private voluntary codes of practice (if adopted) could be properly assessed;

17. Recommends that the monitoring mechanism promote dialogue on standards met by European enterprises, the identification of best practice, together with being open to receive complaints about corporate conduct from community and/or workers' representatives and the private sector in the host country, NGOs or consumer organisations, from individual victims or from any other source;

European Parliamentary action

18. Proposes that during the new legislative period, special rapporteurs are appointed for a period of one year and annual hearings are held in the European Parliament, inviting the social partners and NGOs from the South and the North until the time a European Monitoring Platform is established by the Commission;

19. Recommends that public hearings be organised regularly in the European Parliament in order to discuss specific cases, of both good and bad conduct, and that all persons concerned (including enterprises) be invited to attend them;

Role of European development cooperation

20. Recognizes that a responsibility for applying internationally agreed standards rests with the governments of the developing countries themselves; therefore welcomes recent EU initiatives to strenghten and extend the coverage of political dialogue with developing countries and to make 'good governance' an essential element of EU cooperation policy;

21. Considers that resources must be set aside to support the governments of developing countries, so as to help ensure that international standards are incorporated

in those countries' laws, and that technical and financial assistance must be granted to monitoring groups in the host countries;

22. Calls on the Commission to enforce the requirement that all private companies carrying out operations in third countries on behalf of the Union and financed out of the Commission's budget or European Development Fund, act in accordance with the Treaty of European Union in respect of fundamental rights, failing which such companies would not be entitled to continue to receive European Union funding in particular from its instruments for assistance with investment in third countries;

calls on the Commission to prepare a report on the extent to which private companies to which it awards contracts have been made aware of these obligations;

further recognises that private companies acting as agents of the Commission in the field of development cooperation are already obliged to adhere to OECD standards concerning best aid practice and human rights and sustainable development principles enshrined in the Lomé Convention;

23. Calls on the Commission to ensure that the development strategy to strengthen the private sector environment in developing countries, should specifically integrate the role of European-based MNEs, and to progress an investment agreement with the ACP to promote economic growth and poverty reduction;

Other actions at the European level

24. Calls on the Commission to improve consultation and monitoring of European companies' operations in third countries through the mechanisms of the Social Dialogue within Europe, and the operation of democracy and human rights clauses in trade agreements with third countries outside Europe;

25. Recommends that at least the ILO Declaration of Fundamental Principles and Rights at Work, of 18 June 1998, be an explicit part of any future agreement the EU negotiates with third countries, as a matter of urgency;

26. Calls on the Commission to ensure that consideration is given, with an appropriate legal base, to incorporating core labour, environmental and human rights international standards when reviewing European company law including the new E.U. Directive on a European-incorporated company;

27. Calls on the Commission to bring forward proposals for a system of incentives for companies complying with international standards developed in close consultation and cooperation with consumer groups and human rights and environmental NGOs – such as in procurement, fiscal incentives, access to E.U. financial assistance and publication in the Official Journal;

Actions within international institutions

28. Recommends that the European Union seeks to work en bloc to strengthen existing ILO and OECD instruments, in particular in the review now underway in the O.E.C.D., and within the United Nations, to ensure more powerful and effective monitoring and enforcement mechanisms, and that EU efforts notably go into reviving the UN Commission on TNCs for it to be entrusted with concrete tasks in the context of the monitoring and implementation of Codes, along with the OECD Committee for International Investment and Multinational Enterprises and the ILO's Department for Multinational Enterprises;

29. Calls on the Commission and on the Member States to take coordinated action within the OECD, the ILO and other international fora to promote the establishment of a truly independent and impartial monitoring mechanism which is internationally accepted;

30. Strongly recommends that in connection with negotiations on investment agreements which could be concluded in either the O.E.C.D. or the W.T.O., the European Union not only contributes to establishing the legitimate rights of multinational enterprises, but also their duties – with due regard to the present minimal international regulations – in the field of environment, labour and human rights; recommends that a monitoring mechanism affording every guarantee of impartiality and independence should be incorporated in such an agreement;

Conclusion

31. B. EXPLANATORY STATEMENT

European Round Table of Industrialists
World Development Movement, UK
Clean Clothes Campaign, Netherlands
Tebtebba Foundation, the Philippines
Each of these is a European company or controlled-subsidiary.

GLOBALISATION, FOREIGN INVESTMENT AND DEVELOPMENT

It is important to acknowledge that globalisation is having both positive and negative effects on the world's communities. The progressive spread of a social awareness and international recognition of human rights, free movement of goods, people, capital and services could be seen as some of the positive effects but cultural levelling and homogenisation, abandonment of labour resources, at times undermining of labour rights, environmental damage and widening the gap between the global concentration of private wealth and extreme poverty, are negative impacts. There is a role for international regulations, multinational and trade institutions to mitigate the negative effects of globalisation through a new approach which places national development

priorities, investor obligations and transparency at the centre, to ensure the benefits of international trade and investment are more equitably distributed and reach the poorest people.

More than 40,000 multi-national enterprises (MNEs), with approximately 250,000 foreign affiliates, dominate this globalised economy, accounting for two-thirds of global trade in goods and services. In fact, the turnover of four of the biggest MNEs exceeds the gross domestic product of the whole of Africa.

In 1994 foreign direct investment (FDI) into less-industrialised nations was US$80 billion, accounting for between one-third and two-fifths of global FDI inflows. Yet benefits are not evenly distributed with just ten host recipients, the majority in Asia, accounting for nearly 80 percent of all FDI to the developing world.

Burdened by debt, low commodity prices, structural adjustment, and unemployment, governments throughout the developing world queue up to attract multinationals, liberalise investment restrictions as well as privatising public sector industries.

For industry and business, developing countries offer not just the potential for market expanson but also lower wages and fewer health, tax and environmental regulations than in the North. Yet in a country like Mongolia, which has fulfilled liberalisation requirements, poverty and unemployment have increased, nutritional standards remain critical and small businesses are failing.

INTER-GOVERNMENTAL INITIATIVES ON CODES OF CONDUCT

United Nations

In 1974, the Centre for Transnational Corporations (CTC) was established with the purpose of drawing up a set of guidelines which defines the rights and responsibilities of transnational corporations (TNCs) in their international operations. It covered all aspects of transnational business activities, including political, economic, financial and social affairs. However, the code was never adopted. And by March 1993, the CTC had been converted in to a smaller agency within the weakened UN Conference on Trade and Development.

The International Labour Organisation (ILO) and the Organisation for Economic Cooperation and Development (OECD)

International standards have been drawn up by the ILO: the 1977 'Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy' and the OECD: 'Guidelines for Multinational Enterprise'. These international principles and declarations including. environmental protection, core labour standards, human and children's rights are internationally recognised but voluntary, not binding. Both international instruments are comprehensive, and have been endorsed by governments as well as by social partners. They are the most authoritative internationally agreed definitions of responsible behaviour for multinational companies.

THE EUROPEAN UNION, CODES OF CONDUCT AND MONITORING

The European Parliament, over the years, has consistently supported the need to develop and monitor codes of conduct for the corporate sector. In December 1996, the annual report on human rights called for a Code of Conduct for European Companies, operating in third countries, which obliges them to respect human rights in all thei forms (civil, social, economic, environmental) including mechanisms of control and sanction. In December 1997, the Parliament adopted its report on relocation and foreign direct investment in third countries in which it again called for a code of conduct for European Multinationals. Companies which undertake to respect its provisions are recommended to be published in the Official Journal of the EC. In July 1998, Parliament adopted its report on Fair Trade with developing countries, once more calling for the development of codes of conduct for European MNEs operating in developing countries.

The European Commission welcomed the Code of Conduct signed by the social partners in the European textile and clothing sector. It encourages European firms or sectors to adopt codes of conduct on a voluntary basis but considers that a monitoring system be an integral part of the package. The Commission has further said that Codes of Conduct should be based on ILO standards, involving the social partners. It supports the establishment of an independent monitoring and verification body to contribute to promoting the implementation of fundamental standards.

It has started an explanatory study into the ways and means available for promoting a code of conduct of European businesses which invest in developing countries. In so doing, it is reviewing the terms of the existing codes and the results of their application. At the moment, however, the Commission says there is no legal basis from which to impose binding conditions.

VOLUNTARY CODES OF PRACTICE ADOPTED BY COMPANIES AND INDUSTRY

Companies have increasingly adopted voluntary codes. They have done so for different reasons: as a recognition of the importance they attribute to their social responsibility, to improve their corporate image and at the same time minimise their vulnerability to negative consumer reaction thus avoiding damaging boycotts and bad publicity.

There is also a growing awareness that good employer practice is a profitable means of conducting business. The long term viability of a company, particularly when operating in countries troubled by social and political unrest, depends on their social and environmental performance.

The Confederation of Danish Industries, for example, has launched a set of guidelines for industry on human rights, requiring companies to pursue the same level of social responsibility in their new host country as in their home country.

An increasing number of multinationals have explicitly committed themselves to human rights in their codes of conduct including Shell and Rio Tinto.

A growing number of retailers in Europe apply ethical standards of production to the goods they import (fair trade). Eurocommerce, for example, greed that they would have the right to cancel orders from companies which supply goods produced by children or prisoners. The European Apparel and Textile Organisation (EURATEX) and the European Trade Union Federation of Textiles, Clothing and Leather (ETUF:TCL) signed an agreement for the development of a code of conduct.

NGOs, grass root organisations and trade unions have placed increasing pressure on companies to improve working conditions and better respect environmental standards in the developing world, and many have developed their own codes.

CODES OF CONDUCT AND DEVELOPING COUNTRIES

Southern governments are sometimes the most vehemently opposed to social protection measures in international agreements, seeing them as either imperialistic or protectionist. However, codes of conduct give responsibility to companies, not countries. Good codes are based on agreed international standards, signed up to by Southern governments already, and a key element should be respect for the right for a country to pursue its own development strategy. One main aim is for southern producers to get a fairer deal from global trade.

Your rapporteur consulted southern NGOs from Ecuador, Nigeria and the Philippines, and attended the UN Working Session on Indigenous Peoples, each of whom supported the concept of a European code, and in particular somewhere where complaints can be brought. These findings are backed up by new research in the Philippines, Pakistan, India, Bangladesh and Sri Lanka, co-funded by the European Commission.

Model codes were said to reflect the workers' own priorities and were supported, as long as there was freedom to organise. The findings also showed that informal sector workers, despite difficulties in inspection, could particularly benefit, whilst fears about small contractors going out of business were dismissed as 'smaller units are constantly closing down anyway'. Export Processing Zones set up in many countries precisely to evade any costs of regulation, could be seriously addressed.

The main conclusion from the consultation is that the content of a code, the process by which it is determined and implemented, must involve and empower those in developing countries who are covered by it. Full disclosure of information by companies is needed, as well as training for local management, workers and communities on implementation. Furthermore, the emphasis must be on a 'developmental approach' – one which stresses continuing gradual improvements to standards, and to the code itself, mirroring companies' own commitment to 'continuous improvement' of the quality of the product. The example of assisting child labour

in to education, rather than dismissing contractors who use child labour, demonstrates the positive and constructive approach.

WHY SHOULD EUROPE ACT?

There is a powerful case to answer that the European Union should take a more active role in standard-setting for the conduct of its enterprises in developing countries. Forty-two of the top 100 MNEs are based in Europe, only 35 in North America. Yet in the United States, 85 per cent of large companies have codes, and NAFTA provides a first mechanism where trade unions and civil society can bring complaints against companies. The world's first voluntary standard for the social impact of business, Social Accountability 8000, was first developed in America.

This counters the fear sometimes expressed that European action could undermine the competitiveness of our companies in world markets, as do the agreements already made to offerenhanced General System of Preferences (GSP) to countries respecting core labour standards, and for a Code of Conduct on Arms Sales.

The European Union is the biggest aid donor in the world, yet at present there is no coordinated support to help governments in developing countries to enshrine internationally agreed standards in national law, to assist in implementation of these standards, (including training of labour, environmental and human rights inspectors), or to provide technical and financial assistance to watchdog groups in host countries. Moreover, the Social Dialogue within Europe, and the operation for democracy and human rights clauses in trade agreements with third countries outside Europe, provide ready-made mechanisms for improving consultation and monitoring of our companies in the developing world.Meanwhile, private companies, who are carrying out operations in third countries on behalf of the Union, are already obliged to act in accordance with Treaty obligations for fundamental rights, and could be subject to annulment actions and compensation claims.

Indeed the development strategy currently being prepared by the Commission to strengthen the private sector environment in developing countries, should specifically address the role of European-based MNEs, whilst the EU should negotiate an investment agreement with the ACP to ensure that developing countries have the right to regulate inward investment to support domestic capacity through profit reinvestment, technology transfer, local content requirements, skills training and balance of payments requirements.

Perhaps most of all, there is a groundswell of activity within member states, from the Ethical Trading Initiative in the United Kingdom, to a statutory code of conduct proposed for German companies operating in China to a Belgian proposal to make companies prosecutable for breaches of core labour standards in third countries. European companies, particularly small business, cannot respond to the proliferation of often inconsistent initiatives.

An E.U. Code could create a level playing field, reward best practice and drive up standards in underperforming companies.

ALTERNATIVE WAYS FORWARD

(I) Self-regulation

Despite the adoption of hundreds of voluntary codes of conduct and business practices. Some companies who have not yet engaged in dialogue with their staff, suppliers and shareholders in this way, should be encouraged to do so However, companies should note the need to extend their provision to all parts of the production chain, and to ensure externally verified enforcement mechanisms.

(ii) Action within international institutions

After over 20 years of existence, the ILO Tripartite Declaration failed to progress into a systematised dialogue and has treated a total of only seven cases. This is not an argument for ignoring existing standard-setting in global institutions, but for working en bloc within the institutions to strengthen existing ILO and OECD instruments, to ensure more powerful and effective monitoring and enforcement mechanisms, and strong penalties for non-compliance. The current review of the OECD guidelines provides an opportunity to do this, whilst the U.N. Centre for Transnational Corporations could be revived.

Some argue for a binding regulatory system in which countries would commit themselves to withold or withdraw registration in their country, and refuse to allow access to their markets, for any enterprise which breached certain social and environmental standards. This would require an effective monitoring system, perhaps an international enforcement body with the right to monitor the activities of MNEs. As with all aspects of this report, a multilateral approach is required in order to avoid charges of imperialism and to ensure full consultation with developing countries.

There are also wider arguments, outside the scope of this report, for a social clause in trade and investment agreements. Despite the European Parliament's reservations about the Multilateral Agreement on Investmen (MAI), as previously negotiated in the OECD, in any future investment agreement there is a strong case to put respect for labour, environmental and human rights standards on the same footing as international financial regulation. The legitimate rights of corporations (for example to reasonable compensation for expropriation) must be matched with the right of governments to pursue their own development strategies and the protection of basic human rights. Any such agreement should incorporate mechanisms for systematic monitoring of MNEs and for individual complaints against them.

(iii) Legal jurisdiction by European Courts

It can be argued that, rather than setting up special mechanisms for highlighting abuse of internationally agreed standards, such abuses should be able to be dealt with through the normal jurisdiction of the courts. Indeed the 1968 Brussels Convention (Article Two) states that a company can be sued in a country where its registered office is, and most Member States currently interpret this as meaning cases from any country throughout the world. This interpretation could usefully be endorsed by the Council. A study could also be undertaken on drawing up a European version of the American Tort Claims Act, a 200-year-old statute which allows foreign citizens to take civil cases in violation of international law, and which has been used to apply international human rights standards directly to corporations.

South African mineworkers suffering from asbestosis, factory workers in Natal with mercury poisoning, and a foreman who had cancer after working in a uranium mine in Namibia, have all been successful in having cases against British-based MNEs heard in the British courts. Recourse to such legal action is an important safeguard, but one which is restricted to breaches of absolute 'duty of care' by companies.

(iv) New European Legislation

It is further suggested that European legislation for competition and state aids, (based on Articles 85, 86, 90 and 91 of the Treaty) be revised to ensure European-based companies be made accountable for complying with core standards in their operations overseas.

However, under the existing Treaty, the competence of these Articles appears to be strictly within the Member States, unless States themselves were willing to consider extended regulation of companies in third countries, under Joint Action. Given the very strong European reaction when the United States attempted to impose trade sanctions against companies operating in Cuba under the Helms-Burton Act, this seems unlikely.

Nevertheless, the 1997 European Commission communication on legislative measures against corruption, and German, Belgian and U.K. legislation against citizens guilty of sexual abuse of minors in third countries, both show an ability to promote international standards through domestic law, where the political will exists. The new E.U. Directive on a European-Incorporated company, together with discussion of stricter reporting requirements for companies on social and environmental performance, could provide an opportunity for further consideration of these arguments.

However, a more productive way forward may be to look at a system of incentives to reward companies for positive efforts to comply with international standards – 'carrots rather than sticks'. Already in Australia, 'social companies' are accorded preferential tax status, whilst in Sweden additional export credits are accorded to companies meeting the Environment Ministry's standards.

TOWARDS A EUROPEAN CODE OF CONDUCT AND MONITORING PLATFORM

However, this report suggests that the above approaches are not alternatives, but part of a complementary set of actions which can contribute to an evolutionary approach to the whole subject of standard-setting for MNEs. Voluntary regulation can do a great deal to promote better practice, but the worst offences will only ever be prevented through national and international laws and binding rules.

Such systems can operate in parallel: binding rules to ensure minimum standards and voluntary initiatives to promote higher standards. In this context, this report recommends the following initiative at the European level, which will start as a voluntary initiative, but which does not preclude moving towards mandatory regulation:
1. The creation of a Model European Code of Conduct which should contribute to greater standardisation of voluntary codes of conduct, based on international standards;

A European Code of Conduct would allow the impact of codes of conduct to spread beyond a limited number of companies with the necessary motivation and capacity to develop their own systems. However, it should be explicitly stated rather than draft a new Code including new laws and regulations (for which a legal basis in the Treaty does not exist) it is recommended that a basic model framework code is set up which comprises already internationally agreed Minimum Applicable standards. Such a code would aim to guarantee minimum standards regarding the environment, health and safety conditions in the workplace, no use of forced, bonded or child labour, respect for women's and indigenous peoples rights, and respect for basic human rights. It should aim to increase corporate accountability and apply to any company whose headquarters are registered in the European Union, their contractors, subcontractors, suppliers and licensees world-wide (meaning any legal or natural person who contracts with the company and is engaged in a manufacturing process) in different sectors. Individual codes and agreements may be required for different sectors, but it is suggested that this proposal provides a feasible starting point covering all sectors. The Code would provide the framework of reference for external monitoring and verification and could be based upon already existing international instruments outlined in the Resolution.

2. The establishment of a European Monitoring Platform, including provisions on complaint procedures and remedial action. The general objective of a European Monitoring System would be to contribute to granting workers anywhere in the world protection from oppression, abuse and exploitation and work towards socially and environmentally sustainable operations where national laws are inadequate or not enforced and international conventions are not ratified. A special case concerns conflict situations, where very careful behaviour is required to avoid collusion in the violation of human rights. The Monitoring Platform could develop the following characteristics and activities:

The Platform would consist of independent experts in addition to a board of representatives from the European business and industry sector and international trade unions, environmental and human rights NGOs, including representatives from the South; It would receive reports from business and industry about their compliance with international standards and codes of conduct submitted to the Monitoring Platform voluntarily or after request; It would receive complaints from local groups, trade unions, community representatives about corporate conduct voluntarily of after request; It would select case studies on the basis of the information submitted; It would evaluate the validity of the complaints and the reports submitted on the basis of agreed upon auditing procedures for verification; Auditing mechanisms would provide important factual and experiential background for developing international law in relation to corporate conduct; It would publicise the results of the inquiries on an annual basis.

A European Monitoring Platform should not go as far as determining working conditions and wages in developing countries. This should be negotiated by the workers, trade unions and employers where possible in the country of investment as local negotiation presents a better guarantee for implementation of standards.

A European System should aim at improving labour conditions not simply cut child labour, or exclude vulnerable workers, including women and children, casual workers and migrants, pieceworkers and home workers.

Comprehensive consultation needs to take place around the setting up of the EMP, in order to guarantee its objectivity, and to deal with difficult questions around representativeness, protection for complainants, as well as ensuring that the whole mechanism does not become over-politicised or legalistic, rendering it ineffective, or reproducing the problems seen with other international mechanisms.

Nevertheless this report concludes that as the legal basis for a binding European Code and Monitoring system does yet not exist and needs developing, the European Parliament should restate its demand to the Commission to bring this forward.

In addition, in view of the need and urgency to further a more uniform approach to codes of conduct, this report proposes the creation of a temporary European Monitoring Platform with a complaint procedure, also based on existing international conventions, declarations, standards and initiatives by industry, trade unions, intergovernmental organisations, consumer groups and NGOs under the auspices of the European Parliament. Companies could use the European Parliament's publicity to highlight their positive contributions and voluntarily become subject to its standards and external monitoring procedures and also show their stakeholders that they are conforming with best practice. This system would have several important advantages:

It does not require the creation of a whole new infrastructure in the immediate future, but would rely on the Parliament's existing resources and a simplified procedure outside the judicial format but with all necessary publicity, the European Parliament would provide a platform to all interested parties and the system would avoid the necessity to create a Model European Code relying on existing international law and public hearings. Through the affiliates of the international trade union organisations, local industry and NGOs, developing countries could be involved in the consultation process and invited to give testimonies on their experiences.

Corporations, by voluntarily complying with Parliament's auditing mechanisms, would satisfy consumers and gain positive publicity.

It would set a necessary precedent for the establishment of an independent European Code of Conduct and European Monitoring Platform.

Publicity remains the key tool on this issue, given the importance of reputation to companies, and the growing importance of consumer power.

During the new legislative period, a rapporteur could be appointed for the period of one year and receive cases submitted by different actors on corporate conduct in different sectors. Once a year, or more often, these cases would be brought out into the open by organising a joint parliamentary hearing to which all interested parties are invited; victims, companies, trade unions and NGOs from the South and the North. Corporations would be requested to submit reports regarding their compliance with a set of basic standards. Victims of abuse, trade unions, local business and industry or consumer groups and NGOs could submit complaints to the parliamentary rapporteur and an annual report on the outcome of the hearing would be submitted to plenary. In order for companies to be engaged, emphasis must be on dialogue and best practice, not simply on complaints.

Cases and Communications Relevant to the Liability of Multinational Corporations

(References to cases in the text appear in parentheses)

International Court of Justice

Case Concerning the Barcelona Traction, Light and Power Co., Ltd. (Belgium v. *Spain)*, ICJ Rep. [1970] p. 3. *(See p. 79, 181-183)*

Nottebohm Case (Liechtenstein v. *Guatamala)*, ICJ Rep. [1955] p. 4. *(See p. 181, 182, 184)*

United Nations Human Rights Committee

López Burgos v. *Uruguay*, Communication no. 52/1979, *Selected Decisions of the Human Rights Committee*, Vol. 1 (United Nations, 1985) p. 88. *(See p. 85)*

CERD

Yilmaz-Dogan v. *Netherlands*, CERD Communication No. 1 [1988], reproduced in: 2 *Int'l Hum. Rts. Rep.* 348 (1995). *(See p. 77)*

L.K. v. *Netherlands*, CERD Communication No. 4 [1991], reproduced in: 1 *Int'l Hum. Rts. Rep.* 32 (1994). *(See p. 77)*

European Court of Justice

Alpine Investments v. *Minister van Financiën*, Case C-384/93, ECR I-1141 [1995]. *(See p. 304)*

Deutsche Shell AG v. *Hauptzollamt Hamburg-Harburg*, Case C-188/91, ECR I-363 [1993]. *(See p. 295)*

Dumez France and Tracoba v. *Hessische Landesbank (Helaba)*, Case C-220/88, ECR I-49 [1990]. *(See p. 291)*

GB-INNO-BM v. *Confédération du Commerce Luxembourgeois*, Case C-362/88, ECR I-667 [1990]. *(See p. 295)*

Grimaldi v. *Fonds des Maladies Professionelles*, Case 322/88, ECR 4407 [1989]. *(See p. 295)*

Lloyd's Register of Shipping v. *Société Campenon Bernard*, Case C-439/93, ECR I-961 [1995]. *(See p. 287-288)*

Inter-American Court of Human Rights

European Court of Human Rights

International Military Tribunals

International Center for the Settlement of Investment Disputes

Australia

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HR 24 Nov. 1989, *NJ* 1992, 404, *Focus Veilig BV* v. *Lincoln Electric Company.* *(See p. 292, 293)*

HR 22 Jan. 1993, *NJ* 1994, 734, *Nederland* v. *Stichting Herwaardering Pensioenen NSB-kamerleden* [*Widow Rost van Tonningen*]. *(See p. 299)*

HR 19 Nov. 1993, *NJ* 1994, 622, *Stg. COVA* v. *Banque Generale du Luxembourg (Suisse) SA*; 41 *Neth. Int'l L. Rev.* (1994) pp. 363-376. *(See p. 267, 290)*

HR 13 Jan. 1995, *NJ* 1995, 430, *Codfried* v. *ISS Servicesystem.* *(See p. 272)*

HR 18 Apr. 1995, *NJ* 1995, 619, *E.O.* v. *Openbaar Ministerie [Public Prosecutor]*, 28 *Neth. Y.B. Int'l L.* (1997) pp. 336-338. *(See p. 270, 273)*

HR 21 Mar. 1997, *NJ* 1997, 437, *Vervoersbond FNV* v. *Verenigd Streekvervoer Nederland.* *(See p. 272)*

HR 27 Feb. 1998, *NJ* 1998, 764, *Europeesche Verzekering Maatschappij NV* v. *OHRA Ziektekostenverzekering NV.* *(See p. 299)*

Hoven [Courts of Appeal]

Hof Den Haag 9 Feb. 1942, *NJ* 1942, 371, *Bally Schuhfabriken AG* v. *Dungelmann.* *(See p. 274)*

Hof Amsterdam 21 June 1979, *NJ* 1980, 71, *Batco.* *(See p. 274, 275)*

Hof Den Haag 10 Sept. 1986, *Mines de Potasse d'Alsace SA (MDPA)* v. *Onroerend Goed Maatschappij Bier BV*, 19 *Neth. Y.B. Int'l L.* (1988) pp. 496-503. *(See p. 274)*

Rechtbanken [District Courts]

Rb. Rotterdam 16 Dec. 1983, *NJ* 1984, 341, *Handelskwekerij G.J. Bier BV* v. *Mines de Potasse d'Alsace SA (MDPA)*; 15 *Neth. Y.B. Int'l L.* (1984) pp. 471-484. *(See p. 273, 274)*

Rb. Rotterdam 20 Nov. 1978, *Schip & Schade* 1984, 18., *'t Mannetje-van Dam* v. *Nederland (PTT).* *(See p. 268, 269)*

Rb. Rotterdam 18 Jan. 1979, *NJ* 1979, 113, *Handelskwekerij G.J. Bier BV* v. *Mines de Potasse d'Alsace SA (MDPA)*; 11 *Neth. Y.B. Int'l L.* (1980) pp. 326-331; 28 *Neth. Int'l L. Rev.* (1981) pp. 63-65. *(See p. 273, 274, 290, 299)*

Kort Geding [Temporary Injunctions Procedures?]

Pres. Rb. Den Haag 4 Nov. 1992, *KG* 1992, 399, *CIDI* v. *Verbeke*; *LBR-Bulletin* 1992-6, p. 19; *Migrantenrecht* 1993, p. 13; *NJCM-Bulletin* 1993, p. 303. *(See p. 300)*

United Kingdom

Adams v. *Cape Industries plc*, [1990] 1 Ch. 433. *(See p. 252, 263)*

Al-Adsani v. *Government of Kuwait and others*, [1996] TLR 192, CA. *(See p. 242)*

The 'Amoco Cadiz', [1984] 2 Lloyd's Rep. 304.

Bolton (Engineering) Co., Ltd. v. *Graham and Sons, Ltd.*, [1956] 3 All ER 624. *(See p. 255)*

Buttes Gas and Oil Co. v. *Hammer*, [1981] 3 WLR 787; [1981] 3 All ER 616. *(See p. 247)*

Carlson v. *RTZ Corp. plc.*, Decision of Wright J., [Nov. 1998, unreported]. *(See p. 257, 258, 263)*

Connelly v. *RTZ Corp. plc.*, [1996] 2 WLR 251. *(See p. 257, 263)*

Connelly v. *RTZ Corp. plc.*, [1997] 3 WLR 373. *(See p. 79, 252, 254, 257, 263)*

Durham ' T&N plc, [1 May 1996, unreported]. *(See p. 259)*

Harrods (Buenos Aires) Ltd., [1991] 4 All ER 334, CA. *(See p. 255, 262)*

The "Jalakrishna", [1983] 2 Lloyd's Rep. 628. *(See p. 254)*

Lennard's Carrying Co. Ltd. v. *Asiatic Petroleum Co. Ltd.*, [1915] AC 705, 713.

Lubbe v. *Cape plc*, [1999] Int'l Litigation Procedure 113, CA. *(See p. 79, 259, 263, 286, 291)*

Ngcobo and others v. *Thor Chemicals Holding Ltd. and another*, [1995] TLR 579. *(See p. 256, 263)*

McDonalds v. *Steel and Morris*, judgement of the High Court of Appeal, Queen's Bench Division [19 June 1997] available at http://www.open.gov.uk/lcd/-mclsum2.htm. *(See p. 248)*

Meridian Global Funds Management Asia Ltd. v. *Securities Commission*, [1995] 3 All ER 918. *(See p. 155)*

Oppenheimer v. *Cattermole*, [1976] AC 249. *(See p. 246, 247)*

Oppenheimer v. *Louis Rosenthal & Co.*, [1937] 1 All ER 23, CA. *(See p. 254)*

In re *Pinochet* [17 Dec. 1998], http://www.parliament.the-stationery-office.co.uk; 38 *ILM* (1999) p. 430; see also *R.* v. *Bartle*. *(See p. 141, 194, 241-248)*

Propend Finance Pty. Ltd. and others v. *Sing*, [1997] TLR 238. *(See p. 245)*

R. v. *Andrews Weatherfoil Ltd. and others*, [1972] 1 All ER 65, CA. *(See p. 156)*

R. v. *Bartle and others*, Ex parte *Pinochet Ugarte*, and *R.* v. *Evans and others*, Ex parte *Pinochet Ugarte* [25 Nov. 1998], [1998] TLR 735; http://www.parliament.the-stationery-office.co.uk; 37 *ILM* (1998) p. 1302. *(See p. 141, 194, 241-248)*

R. v. *Bartle and others*, Ex parte *Pinochet Ugarte*, and *R.* v. *Evans and others*, Ex parte *Pinochet Ugarte* [24 Mar. 1999], http://www.parliament.the-stationery-office.co.uk; 38 *ILM* (1999) p. 581. *(See p. 141, 194, 241-248)*

R. v. *I.C.R. Haulage Ltd.*, [1944] 1 All ER 691. *(See p. 155)*

R. v. *P & O European Ferries (Dover) Ltd.*, [1991] 93 Crim. App. Rep. 72. *(See p. 153)*

Re Supply of Ready Mixed Concrete (No2) Director General of Fair Trading v. *Pioneer Concrete (UK) Ltd. and another*, [1995] 1 All ER 135. *(See p. 156)*

Sithole and others v. *Thor Chemicals Holding Ltd. and another*, [1999] TLR 110. *(See p. 256, 263)*

Spiliada Maritime Corporation v. *Cansulex Ltd.*, [1987] AC 460. *(See p. 254, 260)*

Steel v. *McDonald's Corporation*, judgement of the Court of Appeal [unreported], available in Lexis, Enggen Library, Cases File. *(See p. 248)*

Tesco Supermarkets Ltd. v. *Nattrass*, [1971] 2 All ER 127. *(See p. 156)*

United States

Doe v. *Karadzic*, 886 F. Supp. 734 (S.D.N.Y. 1994), rev'd sub nom. *Kadic* v. *Karadzic*, 70 F.3d 232 (2d Cir. 1995), cert. denied, 518 U.S. 1005 (1996). *(See p. 213, 214, 215, 216, 217, 222)*

Doe v. *Unocal Corp.*, 963 F. Supp. 880 (C.D. Cal. 1997) (See also *National Coalition Government of the Union of Burma* v. *Unocal*, 1997 U.S. Dist. LEXIS 20975, Oct. 29, 1997), defendant Total's motion for dismissal granted, 27 F. Supp. 2d 1174 (C.D. Cal. 1998). *(See p. 47, 79, 190, 191, 213, 216, 217, 223, 224, 225, 226, 232)*

Drucker Cornell v. *Assicurazionie Generali S.P.A.*, 97 CV 02262 (S.D.N.Y.,March 31, 1997). *(See p. 239)*

Duveen v. *Deutsch Bank*, No. 98 CV 06620 (E.D.N.Y. filed October 28, 1998). *(See p. 238)*

Eastman Kodak v. *Kavlin*, 978 F. Supp. 1078 (S.D. Fla. 1997). *(See p. 216, 226, 227, 234)*

Ebrahim v. *Shell Oil Co.*, 847 F. Supp. 65 (S.D. Tex. 1994).

Estate of Domingo v. *Republic of Philippines*, 808 F. 2d 1349 9th Cir. 1987), dismissed, 694 F. Supp. 782 (W.D. Wash. 1988).

In re *Estate of Ferdinand Marcos Human Rights Litigation*, 94 F.3rd 539 (9th Cir. 1996), damages affirmed sub nom 103 F.3d 7889 (9th Cir. 1996). *(See p. 229)*

Filartiga v. *Pena-Irala*, 630 F. 2d 876 (2nd Cir. 1980). *(See p. 211, 213, 229)*

Flatow v. *Islamic Republic of Iran*, 999 F. Supp. 1 (D.D.C. 1998), 67 F. Supp. 2d 535 (D. Md. 1999). *(See p. 218)*

Forti v. *Suarez Mason*, 672 F. Supp. 1531 (N.D. Cal. 1987). *(See p. 213, 214, 217)*

Forti v. *Suarez-Mason*, 694 F. Supp. 707 (N.D. Cal. 1988). *(See p. 213, 214)*

Hamid v. *Price Waterhouse*, 51 F.3d 1411 (9th Cir. 1995).

Hart v. *Seven Resorts, Inc.*, 947 P.2d 846 (Ariz. Ct. App. 1997). *(See p. 93)*

Helicopteros Nacionales de Colombia S.A. v. *Hall*, 466 U.S. 408 (1984).

Hilao v. *Marcos*, 25 F.3d 1467 (9th Cir. 1994), cert. denied, 513 U.S. 1126 (1995), samages affirmed 103 F.3d 789 (9th Cir. 1996). [See also: In re *Estate of Ferdinand Marcos Human Rights Litigation*]. *(See p. 229)*

In re Holocaust Victims Assets Litigation, 1998 US Dist. Lexis 18014 (E.D.N.Y. 1998). *(See p. 238)*

ITT v. *Vencap, ltd.*, 519 F. 2d 1001 (2nd Cir. 1975).

Iwanowa v. *Ford*, 98 Civ. 959 (D.N.J. filed March 4, 1998). *(See p. 191, 239)*

Jama v. *U.S. Immigration and Naturalization Service*, 22 F. Supp. 2d 353 (D.N.J. 1998). *(See p. 219, 225, 226)*

Jota v. *Texaco, Inc.*, 157 F. 3rd 153 (2d Cir. 1998). *(See p. 49, 214, 226, 227, 228, 233, 236)*

Kadic v. *Karadzic*, 70 F.3d 232 (2d Cir. 1995), cert. denied, 518 U.S. 1005 (1996). *(See p. 213, 214, 216, 217, 222)*

Kasky v. *Nike, Inc.*, Civ. No. 99446 (San Francisco Superior Court, filed April 20, 1998) available at http://www.corpwatch.org/trac/nike/lawsuit.html, accessed on 26 Apr. 1999. *(See p. 51, 223, 237)*

Select Table of Treaties, Declarations and Other International Instruments

United Nations

Beijing Declaration and Platform for Action of the U.N. Fourth World Conference on Women, UN Doc. A/CONF.177/20 (1995).

Charter of Economic Rights and Duties of States, 12 Dec. 1974, GA Res. 3281 (XXIX), 29 UN GAOR, Supp. No. 31, UN Doc. A/RES/3281 (1974); 14 *ILM* (1975) p. 252.

Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, GA Res. 39/46, Annex, 39 UN GAOR Supp. (No. 51) at 197, UN Doc. A/39/51 (1984), 1465 U.N.T.S. 85, entered into force 26 June 1987.

Convention on the Prevention and Punishment of the Crime of Genocide, GA Res. 260 A (III), UN GAOR, UN Doc. A/810 (1948), 78 U.N.T.S. 277, entered into force 12 June 1951.

Declaration on the Establishment of a New International Economic Order, 9 May 1974, GA Res. 3201 (S-VI), UN GAOR, Supp. No. 1, UN Doc. A/RES/3201 (1974); 13 *ILM* (1974) p. 715.

Declaration on the Right to Development, GA Res. 41/128, Annex, 41 UN GAOR, Supp No. 53, at 186, UN Doc. A/41/53 (1986).

International Convention against the Recruitment, Use, Financing and Training of Mercenaries (Mercenary Convention), 44 UN GAOR, Supp. No. 43, UN Doc. A/RES/44/34 (1989); 29 *ILM* (1990) p. 90.

International Convention against the Taking of Hostages, UN Doc. A/AC.188/L.3 (1979); 18 *ILM* (1979) p. 1456, entered into force 3 June 1983.

International Convention on the Elimination of Racial Discrimination, GA Res. 2106 (XX), Annex, 20 UN GAOR Supp. (No. 14) at 47, UN Doc. A/6014 (1966), 660 U.N.T.S. 195, entered into force 4 Jan. 1969.

International Covenant on Civil and Political Rights, GA res. 2200A (XXI), 21 UN GAOR Supp. (No. 16) at 52, UN Doc A/6316 (1966), 999 U.N.T.S. 171, entered into force 23 Mar. 1976.

International Covenant on Economic, Social and Cultural Rights, GA res. 2200A (XXI), 21 UN GAOR Supp. (No. 16) at 49, UN Doc. A/6316 (1966), 993 U.N.T.S. 3, entered into force 3 Jan. 1976.

Permanent Sovereignty over Natural Resources, 14 Dec. 1962, GA Res. 1803 (XVII), 17 UN GAOR, Supp., UN Doc. A/RES/1803 (1962); 2 *ILM* (1963) p.223.

The Program of Action on the Establishment of a New International Economic Order, 16 May 1974, GA Res. 3202 (S-VI), UN Doc. A/RES/3202 (1974); 13 *ILM* (1974) p. 720.

Report of the World Summit for Social Development, UN Doc. A/CONF.166/9 (1995) (Annex I: Copenhagen Declaration on Social Development, Annex II: Programme of Action of the World Summit for Social Development).

Rome Statute of the International Criminal Court, UN Doc. A/CONF.183/9

Universal Declaration on Human Rights, GA res. 217 A (III), UN Doc. A/180 (1948).

World Conference on Human Rights: Vienna Declaration and Programme of Action, UN Doc. A/CONF.157/23 (1993).

UN Economic and Social Council (ECOSOC)

Commission on Transnational Corporations, *Activities of the United Nations Centre on Transnational Corporations (and of the joint units established with the regional commissions)*, UN Doc. E/C.10/1992/9 (1992).

Commission on Transnational Corporations, *Development and International Economic Co-operation: Transnational Corporations*, UN Doc. E/1990/94 (1990)

Commission on Transnational Corporations, *Draft Code of Conduct on Transnational Corporations*, 5 June 1982, UN Doc. E/C.10/1982/6 (1982); 22 *ILM* (1983) p. 192.

Commission on Transnational Corporations, *Draft Code of Conduct on TNCs*, ESCOR, Supp. No. 7, Annex II at 12, UN Doc. E/1983/17/Rev.1 (1983).

Commission on Transnational Corporations, *Draft Code of Conduct on Transnational Corporations*, Annex I of the UNCTC Publication, The United Nations Code of Conduct on Transnational Corporations (New York, 1986), UNCTC Current Studies Series A No. 4, UN Doc. ST/CTC/Ser. A/4.

Commission on Transnational Corporations, *Draft Code of Conduct on Transnational Corporations*, 1 Feb. 1988, UN Doc. E/1988/39/Add.1 (1988).

Commission on Transnational Corporations, *Draft Code of Conduct on Transnational Corporations*, 12 June 1990, UN Doc. E/1990/94 (1990); Annex IV of the UNCTC Publication, Transnational Corporations, Services and the Uruquay Rounds, UN Doc. ST/CTC/103 (1990).

Commission on Transnational Corporations, *Information Paper on the Negotiations to Complete the Code of Conduct on Transnational Corporations*, 4 Jan. 1983, UN Doc. E/C.10/1983/S/2 (1983); 22 *ILM* (1983) p. 177.

Commission on Transnational Corporations, *International Arrangements and Agreements Relating to Transnational Corporations*, 18 Feb. 1992, UN Doc. E/C.10/1992/8 (1992).

Commission on Transnational Corporations, *The New Code Environment*, UN Doc E/C.10/1992/5 (1992).

Commission on Transnational Corporations, *Report of the Secretariat on Outstanding Issues in the Draft Code of Conduct on Transnational Corporations*, 29 May 1984, UN Doc. E/C.10/1984/S/5 (1984); 23 *ILM* (1984) p. 602.

Commission on Transnational Corporations, *Report on the First Session 17-28 Mar. 1975*, UN Doc. E/5655, E/C.10/6 (1975), 59 ESCOR, Supp. No. 12.

Commission on Transnational Corporations, *Report on the Second Session 1-12 Mar. 1976*, 61 ESCOR, Supp. No. 5; 15 *ILM* (1976) p. 779.

Commission on Transnational Corporations, *Transnational Corporations in the New World Economy: Issues and Policy Implications*, 5 Feb. 1992, UN Doc. E/C.10/1992/5 (1992).

Commission on Transnational Corporations, *The United Nations Code of Conduct on Transnational Corporations*, UN Doc. ST/CTC/Ser.A/4 (1986).

Economic Commission for Africa, *The African Charter for Popular Participation in Development*, UN Doc. E/ECA/CM.116/11 (1996).

Economic Commission for Europe, *Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters*, 25 June 1998, UN Doc. E/ECE/1366 (Sales No. E/F/R.98.II.E.27), also available at http://www.unece.org/env/europe/ppconven.htm.

Report of the group of eminent persons to study the role of Multinational Corporations on Development and on International Relations: The impact of Multinational Corporations on the development process and on international relations, 24 May 1974, UN Doc. E/5500/Add. 1 (part I) (Sales No. E/5500 ADD.1/Rev.1-ST/ESA/6); 13 *ILM* (1974) p. 800.

Sub-Commission on Prevention of Discrimination and Protection of Minorities, *Adverse Consequences of Economic Sanctions on the Enjoyment of Human Rights*, Decision 1998/112, UN Doc. E/CN.4/1999/4, E/CN.4/Sub.2/1998/45 (1998).

Sub-Commission on Prevention of Discrimination and Protection of Minorities, *Human Rights and Income Distribution*, Res. 1998/14, UN Doc. E/CN.4/1999/4, E/CN.4/Sub.2/1998/45 (1998).

Sub-Commission on Prevention of Discrimination and Protection of Minorities, *Human Rights as the Primary Objective of Trade, Investment and Financial Policy*, Res. 1998/12, UN Doc. E/CN.4/1999/4, E/CN.4/Sub.2/1998/45 (1998).

Sub-Commission on Prevention of Discrimination and Protection of Minorities, *The Impact of the Activities and Working Methods of Transnational Corporations on the Full Enjoyment of All Human Rights, in Particular Economic, Social and Cultural Rights and the Right to Development* (Report of the Secretary General), UN Doc. E/CN.4/Sub.2/1996/12 and Corr.1 (1996).

Sub-commission on Prevention of Discrimination and Protection of Minorities, *The Realization of Economic, Social and Cultural Rights: The relationship between the enjoyment of human rights, in particular, international labour and trade union rights, and the working methods and activities of transnational corporations* (Background document prepared by the Secretary-General), UN Doc. E/CN.4/Sub.2/1995/11 (1995).

Sub-Commission on Prevention of Discrimination and Protection of Minorities, *The Relationship between the Enjoyment of Economic, Social and Cultural Rights and the Rights to Development and the Working Methods of Transnational Corporations*, Res. 1997/11, UN Doc. E/CN.4/1998/2, E/CN.4/Sub.2/1997/50 (1997).

Sub-Commission on Prevention of Discrimination and Protection of Minorities, *The Relationship between the Enjoyment of Economic, Social and Cultural Rights and the Right to Development and the Working Methods and Activities of Transnational Corporations*, Res. 1998/8, UN Doc. E/CN.4/1999/4, E/CN.4/Sub.2/1998/45 (1998).

Sub-Commission on Prevention of Discrimination and Protection of Minorities, *The Relationship between the Enjoyment of Human Rights, in Particular Economic, Social and Cultural Rights, and Income Distribution: Final Report*, UN Doc. E/CN.4/Sub.2/1997/9 (1997).

Sub-Commission on Prevention of Discrimination and Protection of Minorities, *Summary of the Main Proposals Concerning the Review of Mechanisms of the Commission Undertaken Pursuant to Commission Decision 1998/112*, UN Doc. E/CN.4/1999/104 (1999).

Sub-commission on the Prevention of Discrimination and Protection of Minorities, *Working Document on the Impact of Activities of Transnational Corporations on the Realization of Economic, Social and Cultural Rights: the Question of Transnational Corporations*, E/CN.4/Sub.2/1998/6.

United Nations Conference on Trade and Development (UNCTAD)

UNCTAD, *International Investment Agreements: Concepts Allowing for a Certain Flexibility in the Interest of Promoting Growth and Development*, UN Doc. TD/B/COM.2/EM.5/2, 5 Feb. 1999.

Proceedings of the United Nations Conference on Trade and Development, Ninth Session: Midrand Declaration, 11 May 1996, UN Sales No. E.97.II.D.4, also available at http://www.unctad.org/en/special/u9midra.htm.

World Investment Report 1992.

World Investment Report 1995: Transnational Corporations and Competitiveness (1996).

World Investment Report 1996: Investment, Trade and International Policy Arrangements (1996) (Sales No. E.96.II.A.14).

World Investment Report 1997: Transnational Corporations, Market Structure and Competition Policy (1997) UN Doc. ITE/IIT/5 (Sales No. E.97.II.D.10).

World Investment Report 1998: Trends and Determinants (1998) UN Doc. UNCTAD/WIR/1998 (Sales No. E.98.II.D.5).

World Investment Report 1999: Foreign Direct Investment and the Challenge of Development (1999) UN Doc. UNCTAD/WIR/1999 (Sales No. E.99.II.D.3).

Division on Transnational Corporations and Investment, *Companies Without Borders: Transnational Corporations in the 1990s* (Boston/London: International Thomas Business Press 1996) 357p.

International Labour Organization (ILO)

Convention Concerning Forced of Compulsory Labour, 39 U.N.T.S 55 (1930), entered into force 1 May 1932.

Declaration on Fundamental Principles and Rights at Work and its Follow-Up, adopted by the International Labour Conference at its Eighty-sixth Session in Geneva (Geneva: ILO 1998).

Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy, 61 *Official Bulletin ILO* (1978) Series A, no. 1; reproduced in 17 *ILM* (1978) p. 422, also available at http://www.ilo.org/pblic/english/85multi/tridecl/index.htm.

Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy, 2nd edn. (Geneva: ILO 1991).

Working Party on the Social Dimensions of the Liberalization of International Trade, *Further Examination of Questions Concerning Private Initiatives, Including Codes of Conduct*, ILO Doc. GB.274/WP/SDL/1 (Mar. 1999), available at http://www.ilo.org/public/english/20gb/docs/gb274/sdl-1.htm.

World Trade Organization

Working Group on the Relation Between Trade and Investment, *Report to the General Council*, 8 Dec. 1998, WTO Doc. WT/WGTI/2, 8 Dec. 1998.

World Bank

World Development Report 1996: From Plan to Market (1996).

Organization of African Unity (OAU)

African Mercenary Convention, 3 July 1977, entered into force 22 Apr. 1985.

Bamako Convention on the Ban of the Import into Africa and the Control of Transboundary Wastes within Africa, 29 Jan. 1991, reproduced in 30 *ILM* 773 (1991).

Organization of American States (OAS)

Model Legislation on Illicit Enrichment and Transnational Bribery, 22 Aug. 1998, OAE/Ser.Q CJI/doc.70/98 rev.2.

Organisation for Economic Co-operation and Development (OECD)

Convention on Combating Bribery of Foreign Public Officials in International Business Transactions and Related Documents (Paris: OECD 1998).

Declaration on International Investment and Multinational Enterprises (Paris: OECD 1976), revised in 1979, 1982, 1984 and 1991.

Guidelines for Multinational Enterprises, 15 *ILM* (1976) p. 967.

Multilateral Agreement on Investment: Consolidated Text (Paris: OECD 1998).

Multilateral Agreement on Investment: Report of the Committee on International Investment and Multinational Enterprises (Paris: OECD 1995).

Open Markets Matter: The Benefits of Trade and Investment Liberalisation (Paris: OECD 1998), also available at http://www.oecd.org/publications/pol_brief/9906-eng.pdf.

Trade, Employment and Labour Standards: A Study of the Core Workers' Rigths and International Trade (Paris: OECD 1996).

Council of Europe

European Convention on Human Rights, 4 Nov. 1950, 213 U.N.T.S. 222 (1950), entered into force 3 Sept. 1953.

European Union

Action Plan of the Council and the Commission on how best to implement the provisions of the Treaty of Amsterdam on an area of freedom, security and justice (Text adopted by the Justice and Home Affairs Council of 3 Dec. 1998), *O.J.* (1999) No. C 19/1.

1968 Brussels Convention on jurisdiction and the enforcement of judgments in civil and commercial matters, *O.J.* (1998) C 27/1.

Convention drawn up on the basis of Article K.3 (2) (c) of the Treaty on the European Union on the fight against corruption involving officials of the European Communities or officials of Member States of the European Union, *O.J.* (1997) C 195/2.

Convention drawn up on the basis of Article K.3 of the Treaty on the European Union on the protection of the European Communities' financial interests, *O.J.* (1995) C 316/49.

Council Directive 89/552/EEC of 3 October 1989 on the coordination of certain provisions laid down by Law, Regulation or Administrative Action in Member States concerning the pursuit of television broadcasting activities, *O.J.* (1989) L 298/23.

Council Regulation (EEC) No. 259/93 of 1 February 1993 on the supervision and control of shipments of waste within, into and out of the European Community, *O.J.* (1993) L30/01.

Directive 97/36/EC of the European Parliament and of the Council of 30 June 1997 amending Council Directive 89/552/EEC on the coordination of certain provisions laid down by Law, Regulation or Administrative Action in Member States concerning the pursuit of television broadcasting activities, *O.J.* (1997) L 202/60.

Directive 98/27/EC of the European Parliament and the Council of 19 May 1998 on injunctions for the protection of consumers' interests, *O.J.* (1998) L 166/51.

European Parliament Resolution A4-0508/98 on EU standards for European Enterprises operating in developing countries towards an European Code of Conduct, *O.J.* (1999) C 104/180, also available at http://www.multinationals.law.eur.nl/documents.

Joint Action of 22 December 1998 adopted by the Council on the basis of Article K.3 of the Treaty on European Union, on corruption in the private sector, *O.J.* (1998) L 358/2.

Table of Statutes and Legislative Instruments

Australia

Hazardous Waste Act (1989)

Canada

Government of Canada, *Voluntary Codes: A Guide for their Development and Use* (Mar. 1998).

Netherlands

Regeling van de bevoegdheid van bepaalde rechtspersonen om ter bescherming van de belangen van andere personen een rechtvordering in te stellen, Memorie van Toelichting, TK 1991-1992, 22486, No. 3.

Regeling van het conflictenrecht met betrekking tot verbintenissen uit onrechtmatige daad (Wet Conflictenrecht Onrechtmatige Daad), Voorstel van Wet, TK 1998-1999, 26 608, No. 2.

Regeling van het conflictenrecht met betrekking tot verbintenissen uit onrechtmatige daad (Wet Conflictenrecht Onrechtmatige Daad), Memorie van Toelichting, TK 1998-1999, 26 608, No. 3.

Tweede Kamer der Staten-Generaal, *Onderzoek gedragscodes multinationale ondernemingen* (Micro-editie Staatsuitgeverij, 1993/94).

United Kingdom

Biological Weapons Act (1974).

Interpretation Act, Schedule I (1978).

Statutory Instrument Transfrontier Shipment of Waste Regulations, SI 1994, No. 1137 (1994).

Trading with the Enemy Act [as amended by the *Emergency Laws Act*, 1953] (1939).

United States

Alien Tort Claims Act (ATCA), 28 United States Code section 1350 (1789).

Foreign Corrupt Practices Act, 15 United States Code sections 78a, 78m(b), 78m(d)(1), 78m(g), 78m(h), 78dd-1, 78dd-2, 78ff(a), 78ff(c) (1977).

Foreign Sovereign Immunities Act (FSIA), 28 United States Code sections 1330 & 1602-1611 (1976).

Torture Victims Protection Act (TVPA), 28 United States Code section 1350 [note] (1992).

House of Representatives, *TVPA Legislative Report*, Report No. 367, 102d Congress, 1st Session (1992).

Select Bibliography

Abi-Saab, G., 'The International Law of Multinational Corporations: A Critique of American Legal Doctrines', in: F.E. Snyder/S. Sathirathai (eds.), *Third World Attitudes Towards International Law: An Introduction* (Dordrecht: Martinus Nijhoff Publishers 1987) pp. 549-574.

Aceves, W.J. 'Note: Doe v. Unocal', 92 *AJIL* (1998), pp. 309-314.

Adams, R./J. Carruthers/S. Hamil, *Changing Corporate Values: A Guide to Social and Environmental Policy and Practice in Britain's Top Companies* (London: Kogan Page 1991) 637p.

Addo, M.K., 'The Corporation as a Victim of Human Rights Violations', in: M.K. Addo (ed.), *Human Rights Standards and the Responsibility of Transnational Corporations* (The Hague: Kluwer Law International 1999) pp. 187-196.

Addo, M.K. (ed.), *Human Rights Standards and the Responsibility of Transnational Corporations* (The Hague: Kluwer Law International 1999) 384p.

Agarwal, J.P., 'Effect of Foreign Direct Investment on Employment in Home Countries', 6 *Transnat'l Corp.* (1997) no. 2, pp. 1-28.

Aggarwal, A., 'Liberalization, Internationalization Advantages and Foreign Direct Investment: The Indian Experience in the 1980s', 6 *Transnat'l Corp.* (1997) no. 2, pp. 33-55.

Alexander, I., *The Civilized market: Corporations, Conviction and the Real Business of Capitalism* (Oxford: Capstone 1997), 250 p.

Allen, M., 'General Policy: Lawyers see Rise in Court Cases Attempting to Apply U.S. Laws Outside Borders', *Int'l Envtl. L. Rep.* (Jun. 25, 1997) pp. 611-612.

Allmand, W., *Trading in Human Rights: The Need for Human Rights Sensitivity at the World Trade Organization* (Montreal: International Centre for Human Rights and Democratic Development 1999) 17p, also available at http://www.ichrdd.ca/111/english/contentsEnglish.html.

Alston, P., 'The Myopia of the Handmaidens: International Lawyers and Globalisation', 8 *EJIL* (1997) no. 3, pp. 435-448.

Amnesty International, *Amnesty International Report 1996* (London: Amnesty International Publications 1996) 350p.

Amnesty International, *ASEM: A Human Rights Agenda for ASEM II (Asia-Europe Meeting) 3-4 April 1998*, AI Index 01/03/98 (1998).

Amnesty International, *China: No One is Safe - An Amnesty International Briefing*, AI Index ASA 17/02/96 (1996).

Amnesty International, *Human Rights Are Everybody's Business*, AI Index ASA 17/18/96 (1996).

Amnesty International, *Human Rights Principles for Companies*, AI Index ACT 70/01/98 (1998).

Amnesty International, *Nigeria: Time to End Contempt for Human Rights*, AI Index AFR 44/14/96 (1996).

Amnesty International/Pax Christi (Dutch Sections), *The Challenge for Shell: Multinational Enterprises can make an important contribution to the enjoyment of fundamental human rights* (1996).

Amnesty International/Pax Christi International (Dutch Sections), *Multinational Enterprises and Human Rights* (1998).

Amnesty International UK Business Group, *Human Rights Guidelines for Corporations*. (London: Amnesty International 1998).

Anderson, S./J.H. Cavanagh, *The Top 200:The Rise of Global Corporate Power* (Washington D.C.: Institute for Policy Studies 1996) 16p.

Armstrong, P., 'Human Rights and Multilateral Development Banks: Governance Concerns in Decision Making', 88 *ASIL Proceedings* (1994) pp. 277-282.

Asante, S.K.B., 'United Nations: International Regulation of Transnational Corporations', 13 *J. World Trade L.* (1979) pp. 55-66.

Baade, H.W., 'The Legal Effects of Codes of Conduct for MNEs', in: A.A. Fatouros (ed.), *Transnational Corporations: The International Legal Framework* (United Nations Library on Transnational Corporations, Vol. 20) (London/New York: Routledge 1994) pp. 212-250.

Bailey, P./A. Parisotto/G. Renshaw (eds.), *Multinationals and Employment: The Global Economy of the 1990s* (Geneva: International Labour Office 1993) 325p.

Baker, M, 'Private Codes of Corporate Conduct: Should the Fox Guard the Henhouse', 24 *U. Miami Inter-Am. L. Rev.* (1992-93) no. 3, pp. 399-433.

Bakst, D.S., 'Piercing the Corporate Veil for Environmental Torts in the United States and the European Union: The Case for the Proposed Civil Liability Directive', 19 *B.C. Int'l & Comp. L. Rev.* (1996) no. 2, pp. 323-351.

Ball, G., 'Cosmocorp: The Importance of Being Stateless', 2 *Colum. J. World Bus.* (1967), pp. 25-?

Barnet, R.J./R.E. Muller, *Global Reach: The Power of the Multinational Corporations* (New York: Simon & Schuster 1974) 508p.

Baxi, U., 'The Bhopal Victims in the Labyrinth of the Law: an Introduction', in: U. Baxi/A. Dhanda (eds.), *Vailiant Victims and Lethal Litigation: The Bhopal Case* (Delhi: The Indian Law Institute 1989) 608p.

Bazyler, M.J., 'Litigating the Holocaust', 33 *U. Rich. L. Rev* (1999) pp. 601-629.

Beauchamp, T.L./N.E. Bowie (eds.), *Ethical Theory and Business*, 4th. edn. (Englewood Cliffs: Prentice Hall 1993) 653p.

Beder, S., *Global Spin: The Corporate Assault on Environmentalism* (White River Junction: Chelsea Green Publishers 1998) 288p.

Behrman, J., 'World Investment Report 1993: Transnational Corporations and Integrated Production', 2 *Transnat'l Corp.* (1993) no. 3, pp. 149-160.

Bennett, S.J./R. Freiermann/S. George, *Corporate Realities and Environmental Truths: Strategies for Leading Your Business in the Environmental Era* (New York: Wiley 1993) 232p.

Betlem, G., *Civil Liability for Transfrontier Pollution: Dutch Environmental Tort Law in International Cases in the Light of Community Law* (London/Dordrecht: Graham & Trotman/Martinus Nijhoff Publishers 1993) 627 p.

Betlem, G., 'Cross-Border Water Pollution: Two Paradigmatic Dutch Cases', 4 *Eur. Rev. Priv. L.* (1996) pp. 159-178.

Bhala, R., 'Clarifying the Trade-Labor Link', 37 *Colum. J. Transnat'l L.* (1998) no. 1, pp. 12-56.

Boatright, J.R., *Cases in Ethics and the Conduct of Business*, 2nd edn. (Upper Saddle River: Prentice Hall 1995) 402 p.

Boven, T.C./C. Flinterman/F. Grünfeld/R. Hut, *The Legitimacy of the United Nations: Towards an Enhanced Legal Status of Non-State Actors*, SIM Special 1998, no. 19 (Utrecht: SIM 1998) 189p.

Boven, T.C. van/C. Flinterman/I. Westerdorp, *The Maastricht Guidelines on Violations of Economic, Social and Cultural Rights*, SIM Special 1998, no. 20 (Utrecht: SIM 1998) 228p.

Bowersett, L., 'Doe v. Unocal: Torturous Decision for Multinationals Doing Business in Politically Unstable Environments', 11 *Transnat'l Law.* (1998) no. 1, pp. 361-382.

Boyd, K.L., 'The Inconvenience of Victims: Abolishing Forum Non Conveniens in U.S. Human Rights Litigation', 39 *Va. J. Int'l L.* (1998) no. 1, pp. 41-87.

Brack, D., 'Reconciling the GATT and Multilateral Environmental Agreements with Trade Provisions: The Latest Debate', 6 *Rev. Eur. Community & Int'l Envtl. L.* (1997) no. 2, pp. 112-120.

Bradshaw, T./D. Vogel (eds.), *Corporations and Their Critics: Issues and Answers to the Problems of Corporate Social Responsibility* (New York: McGraw-Hill 1981) 285p.

Brewer, T./S. Young, 'European Union Policies and the Problems of Multinational Enterprises', 29 *J. World Trade* (1995) no. 1, pp. 33-52.

Broadhurst, A.I./G. Ledgerwood, 'Environmental Diplomacy of States, Corporations and Non-Governmental Organizations: The Worldwide Web of Influence', 14 *Int'l Rel.* (1998) no. 2, pp. 1-19.

Buckley, P.J., 'World Investment Report 1994: Transnational Corporations, Employment and the Work Place', 3 *Transnat'l Corp.* (1994) no. 3, pp. 91-100.

Buikema, R.H., *De Multinationale Onderneming in Juridisch Perspectief: Enkele Rechtsvragen naar Aanleiding van de Discussie over Multinationale Ondernemingen* (The Hague: T.M.C. Asser Instituut 1992) 176p.

Bunn, I.D., 'Linkages between Ethics and International Economic Law', 19 *U. Pa. J. Int. Econ. L.* (1998) no. 2, pp. 319-327.

Byers, M., 'Trendtex under Siege: The Pinochet Case and Customary International Law', 48 *Int'l & Comp. L. Q.* (forthcoming). [in whole vol. 48 there is not article by Byers: there is however a special section on the Pinochet Case]

Cairncross, F., *Green, Inc.: A Guide to Business and the Environment* (London: Earthscan Publications 1995) 277p.

Cannon, T., *Corporate Responsibility: A Textbook on Business Ethics, Governance, Environment: Roles and Responsibilities* (London: Pitman 1994) 341p.

Cappuyns, E., 'Linking Labor Standards and Trade Sanctions: An Analysis of their Current Relationship', 36 *Colum. J. Transnat'l L.* (1998) no. 3, pp. 659-686.

Cassel, D., 'International Security in the Post-Cold War Era: Can International Law Truly Effect Global Political and Economic Stability? - Corporate Initiatives: A Second Human Rights Revolution', 19 *Fordham Int'l L.J.* (1996) no. 5, pp. 1963-1984.

Cassese, A., 'Mercenaries: Lawful Combatants or War Criminals', 40 *ZaöRV* (1980) pp. 1-30.

Caufield, C., *Masters of Illusion: The World Bank and the Poverty of Nations* (London (etc.): Macmillan 1997) 432 p.

The Caux Round Table Principles for Business: An International Ethics Statement for Business (1994), available at http://www.cauxroundtable.org, accessed on 25 May 1999.

Charney, J., 'Transnational Corporations and Developing Public International Law', 1983 *Duke L.J.* (1983) no. 4, pp. 748-788.

Charnovitz, S., 'Book Review: Trade, Employment an Labour Standards: The OECD Study and Recent Developments in the Trade and Labor Standards Debate', 11 *Temp. Int'l & Comp. L.J.* (1997) no. 1, pp. 131-163.

Charnovitz, S., 'Globalization of Economic Human Rights', 25 *Brook. J. Int'l L.* (1999) no. 1, pp. 113-124.

Cho, M.S.H., 'Private Enforcements of NAFTA Environmental Standards through Transnational Mass Tort Litigation: the Role of the United States Courts in the Age of Free Trade', 27 *St. Mary's L.J.* (1996) no. 4, pp. 817-869.

Chopra, S.K., 'Multinational Corporations in the Aftermath of Bhopal: The Need for a New Comprehensive Global Regime for Transnational Corporate Activity', 29 *Val. U. L. Rev.* (1994) no. 1, pp. 235-284.

Chossudovsky, M., *The Globalisation of Poverty: Impacts of IMF and World Bank Reforms* (London (etc.): Zed Books 1997) 280 p.

Cleveland, S.H., 'Book Review: Global Labor Rights and the Alien Tort Claims Act: Review of 'Human Rights, Labor Rights , and International Trade', edited by L.A. Compa & S.F. Diamond', 76 *Tex. L. Rev.* (1998) no. 6, pp. 1533-1579.

Coffee, J.C., 'Corporate Criminal Responsibility', in: S.H. Kadish (ed.), *Encyclopedia of Crime and Justice* (New York: Free Press 1983) pp. 253-264.

Compa, L.A./S.F. Diamond (eds.), *Human Rights, Labor Rights, and International Trade* (Philadelphia: University of Pennsylvania Press 1996) 311 p.

Crane, W., 'Corporations Swallowing Nations: The OECD and the Multilateral Agreement on Investment', 9 *Colo. J. Int'l Envtl. L. & Pol'y* (1998) no. 2, pp. 429-461.

Creighton, B., 'Combating Child Labour: The Role of International Labour Standards', 18 *Comp. Lab. L.* (1997) no. 3, pp. 362-396.

Davies, M., 'Just (Don't) Do It: Ethics and International Trade', 21 *Melb. U. L. Rev.* (1997) no. 2, pp. 601-620.

De George, R.T., *Competing with Integrity in International Business,* New York/ Oxford: Oxford University Press (1993) 233p.

Desai, B., 'The Bhopal Gas Leak Disaster Litigation: An Overview', 3 *Asian Y.B. Int'l L.* (1993) pp. 163-179.

Dhooge, L.J., 'A Close Shave in Burma: Unocal Corporation and Private Enterprise Liability for International Human Rights Violations', 24 *N.C. J. Int'l L. & Com. Reg.* (1998), no. 1, pp. 1-69.

Dine, J., 'Human Rights and Company Law', in: M.K. Addo (ed.), *Human Rights Standards and the Responsibility of Transnational Corporations* (The Hague: Kluwer Law International 1999) pp. 209-237.

Dinstein, Y., 'Diplomatic Protection of Companies under International Law', in: K. Wellens (ed.), *International Law: Theory and Practice - Essays in Honour of Eric Suy* (The Hague: Martinus Nijhoff Publishers 1998) pp. 505-517.

Doeker, G./T. Gehring, 'Private or International Liability for Transnational Environmental Damage: The Precedent of Conventional Liability Regimes', 2 *(Oxford U.) J. Envtl L.* (1990) nr. 1, pp. 1-16.

Doelder, H. de, 'Criminal Liability of Corporations - Netherlands', in: H. de Doelder/K. Tiedemann (eds.), *La Criminalisation de Comportement Collectif/Criminal Liability of Corporations* (The Hague: Kluwer Law International 1996) pp. 289-310.

Doelder, H. de/K. Tiedemann (eds.), *La Criminalisation de Comportement Collectif/ Criminal Liability of Corporations* (The Hague: Kluwer Law International 1996) 401p.

Donaldson, T./P.H. Werhane (eds.), *Ethical Issues in Business: A Philosophical Approach*, 5th edn. (New Jersey: Prentice Hall 1995) 516p.

Donaldson, T., *Corporations & Morality* (Englewood Cliffs: Prentice-Hall 1982) 214p.

Donaldson, T., *The Ethics of International Business* (New York (etc.): Oxford University Press 1989) 196p.

Donaldson, T., 'Values in Tension: Ethics Away from Home: When is different just different, and when is different wrong?', *Harv. Bus. Rev.* (1996) no. 5, pp. 48-64.

Dorward, D., 'The Forum Non Conveniens Doctrine and the Judicial Protection of Multinational Corporations from Forum Shopping Plaintiffs', 19 *U. Pa. J. Int'l Econ. L.* (1998) no. 1, pp. 141-168.

Drucker, P.F., *Post-Capitalist Society* (New York: Harper Business 1993) 232 p.

Dunoff, J.L., 'Does Globalization Advance Human Rights', 25 *Brook. J. Int'l L.* (1999) no. 1, pp. 125-139.

Dunoff, J.L., 'The Misguided Debate over NGO Participation at the WTO', 1 *J. Int'l Econ. L.* (1998) no. 3, pp. 433-456.

Dunoff, J.L., 'Rethinking International Trade', 19 *U. Pa. J. Int'l Econ. L.* (1998) no. 2, pp. 347-389.

Dunoff, J.L., '"Trade and": Recent Developments in Trade Policy and Scholarship: And Their Surprising Political Implications', 17 *Nw. J. Int'l L. & Bus.* (1997) no. 2-3, pp. 759-774.

Duval-Major, J., 'One Way Ticket Home: The Federal Doctrine of Forum Non Conveniens and the International Plaintiff', 77 *Cornell L. Rev.* (1992) pp. 650-686.

Eaton, J.P., 'The Nigerian Tragedy, Environmental Regulation of Transnational Corporations, and the Human Right to a Healthy Environment', 15 *B. U. Int'l L. J.* (1997) no. 1, pp. 261-307.

Eden, L., 'World Investment Report 1995: Transnational Corporations and Competivenes', 5 *Transnat'l Corp.* (1996) no. 2, pp. 145-156.

Ehrenberg, D.S., 'The Labor Link: Applying the International Trading System to Enforce Violations of Forced and Child Labor', 20 *Yale J. Int'l L.* (1995) no. 2, pp. 361-417.

Elkington, J., *Cannibals with Forks: The Triple Bottom Line of 21st Century Business* (Oxford: Capstone 1997) 402 p.

Engrácia Antunes, J., 'The Liability of Polycorporate Enterprises', 13 *Conn. J. Int'l L.* (1999) no. 2, pp. 197-231.

Esty, D.C., 'Linkages and Governance: NGOs at the World Trade Organization', 19 *U. Pa. J. Int'l Econ. L.* (1998) no. 3, pp. 709-730.

Eyk, S.C. van, *The OECD Declaration and Decisions Concerning Multinational Enterprises: An Attempt to Tame the Shrew* (Nijmegen: Ars Aequi Libri 1995) 312 p.

Fatouros, A.A., 'On the Implementation of International Codes of Conduct: An Analysis of Future Experience', in: A.A. Fatouros (ed.), *Transnational Corporations: The International Legal Framework* (United Nations Library on Transnational Corporations, Vol. 20) (London/New York: Routledge 1994) pp. 251-282.

Fatouros, A.A. (ed.), *Transnational Corporations: The International Legal Framework* (United Nations Library on Transnational Corporations, Vol. 20) (London/ New York: Routledge 1994) 545p.

Feld, W.J., *Nongovernmental Forces and World Politics: A Study of Business, Labor and Political Groups* (New York (etc.): Praeger Publishers 1972) 284 p.

Field, W.J., *Multinational Corporations and UN Politics: The Quest for Codes of Conduct* (New York (etc.): Pergamon 1980) 174p.

Fikentscher, W., 'United Nations Codes of Conduct: New Paths in International Law', in: A.A. Fatouros (ed.), *Transnational Corporations: The International Legal Framework* (United Nations Library on Transnational Corporations, Vol. 20) (London/New York: Routledge 1994) pp. 143-168.

Fletcher, W.M. (ed.) *Fletcher Cyclopedia of the Law of Private Corporations*, rev. edn., Vol. 10 (New York: Callaghan & Co 1993).

Fombrun, C.J., *Reputation: Realizing Value from the Corporate Image* (Boston: Harvard Business School Press 1996) 441p.

Forbes, J., 'Human Rights and the Regulation of Tourism', in: M.K. Addo (ed.), *Human Rights Standards and the Responsibility of Transnational Corporations* (The Hague: Kluwer Law International 1999) pp. 123-130.

Forcese, C., *Commerce with Conscience? Human Rights and Corporate Codes of Conduct*, Vol. 1 (Montreal: International Centre for Human Rights and Democratic Development 1997).

Forcese, C., *Putting Conscience into Commerce: Strategies for Making Human Rights Business as Usual*, Vol. 2 (Montreal: International Centre for Human Rights and Democratic Development 1997).

Fowler, R., 'International Environmental Standards for Transnational Corporations', 25 *Envtl. L.* (1995) no. 1, pp. 1-30.

Francis, D.J., 'Mercenary intervention in Sierra Leone: Providing National Security or International Exploitation', 20 *Third World Q.* (1999) no. 2, pp. 319-338.

French, P.A., *Collective and Corporate Responsibility* (New York: Columbia University Press 1984) 215p.

Frey, B.A., 'Legal and Ethical Responsibilities of Transnational Corporations in the Protection of Human Rights', 6 *Minn. J. Global Trade* (1997) pp. 153-188.

Garcia, F.J., 'Trade and Justice: Linking the Trade Linkage Debates', 19 *U. Pa. J. Int'l Econ. L* (1998) no. 2, pp. 391-434.

Geer, M.A., 'Foreigners in Their Own Land: Cultural Land And Transnational Corporations - Emergent International Rights And Wrongs', 38 *Va. J. Int'l L.* (1998) no. 3, pp. 331-399.

Genugten, W. van/S. van Bijsterveld, 'Codes of Conduct for Multinational Enterprises: Useful Instruments or a Shield against Binding Responsibility', 7 *Tilburg Foreign L. Rev.* (1998) no. 2, pp. 161-177.

Gibney, M./R.D. Emerick, 'The Extra-territorial Application of United States Law and the Protection of Human Rights: Holding Multinational Corporations to Domestic and International Standards', 10 *Temp. Int'l & Comp. L.J.* (1996) no.1, pp. 123-145.

Gladwin, T.N./I. Walter, *Multinationals Under Fire: Lessons in the Management of Conflict* (New York: Chichester (etc.) 1980) 689p.

Gleckman, H., 'Transnational Corporations' Strategic Responses to "Sustainable Development"', *Green Globe Y.B. 1995* (1995) pp. 93-106.

Globerman, S., 'Transnational Corporations and International Technological Specialization', 6 *Transnat'l Corp.* (1997) no. 2, pp. 95-114.

Goodpaster, K.E./J. B. Matthews, 'Can a corporation have a conscience?', *Harv. Bus. Rev.* (1982) no. 1, 132-142.

Graham, E.M., *Global Corporations and National Governments* (Washington DC: Institute for International Economics 1996) 150p.

Gruner, R.S., *Corporate Crime and Sentencing* (Charlottesville: Michie Press 1994) 1155p.

Hailbronner, K., 'Völkerrechtliche und staatsrechtlige Überlegungen zo Verhaltenskodizes für transnationale Unternehmen', in: I. Von Munch (ed.), *Staatsrecht, Völkerrecht, Europarecht: Festschrift für Hans-Jurgen Schlochauer zum 75. Geburtstag* (Berlin (etc.): De Gruyter 1981) pp. 329-362.

Hamilton, D.T., Corporate Responsibility and the Environment: Regulation of Corporations under International Environmental Law, *18th Annual Conference of the Canadian Council on International Law: Preserving the Global Environment in Ottawa* (Canadian Council on International Law 1989) pp. 71-115.

Handl, G.F./W.M. Reisman/B. Simma/P.M. Dupuy/ C. Chinkin, 'A Hard Look at Soft Law', in: A.A. Fatouros (ed.), *Transnational Corporations: The International Legal Framework* (United Nations Library on Transnational Corporations, Vol. 20) (London/New York: Routledge 1994) pp. 333-361.

Hansen, P./V. Aranda, 'An Emerging International Framework for Transnational Corporations', 14 *Fordham Int'l L.J.* (1990/91) pp. 881-891.

Harding, C., 'Criminal Liability of Corporations - United Kingdom', in: H. de Doelder/K. Tiedemann (eds.), *La Criminalisation de Comportement Collectif/ Criminal Liability of Corporations* (The Hague: Kluwer Law International 1996) pp. 369-382.

Hartley, R.F., *Business Ethics: Violations of the Public Trust (Table of Contents only)* (New York/Toronto: Wiley 1993) 324p.

Harvard Law School Human Rights Program and the Lawyers Committee for Human Rights, *Business and Human Rights: An Interdisciplinary Discussion Held at Harvard Law School in December 1997* (Cambridge: Harvard Law School 1999) 108 p.

Heine, G., 'Rethinking Criminal Liability of Enterprises: International Developments, Basic Models, National Concepts', in: M.Faure/K.Schwarz (eds.), *De Strafrechtelijke en Civielrechtelijke Aansprakelijkheid van de Rechtspersoon en zijn Bestuurders* (Antwerpen: Intersentia 1998) pp. 163-178.

Hoffman, W.M./R.E. Frederick (eds.), *Business Ethics: Readings and Cases in Corporate Morality (Table of Contents only)*, 3rd edn. (New York: McGraw-Hill 1995) 629p.

Horn, N. (ed.), *Legal Problems of Codes of Conduct for Multinational Enterprises* (Boston: Kluwer Law & Taxation 1980) 509p.

Horn, N., 'International Rules for Multinational Enterprises: The ICC, OECD and ILO Initiatives', 30 *Am. U. L. Rev.* (1981) p. 923.

Human Rights Watch, *Colombia: Human Rights Concerns Raised by the Security Arrangements of Transnational Oil Companies* (New York (etc.): Human Rights Watch 1998) ?p, also available at http://www.hrw.org/hrw/advocacy/corporations/colombia/index.htm, Apr. 1998, accessed on 27 May 1998.

Human Rights Watch, *The Enron Corporation: Corporate Complicity in Human Rights Violations* (New York (etc.): Human Rights Watch 1999) 167p, also available at http://www.hrw.org/hrw/reports/1999/enron, accessed on 26 May 1999.

Human Rights Watch, *Mexico - A Job or Your Rights: Continued Sex Discrimination in Mexico's Maquiladora Sector*, available at http://www.hrw.org/hrw/reports98/women2/, Dec. 1998, accessed on 27 May 1999.

Human Rights Watch, *Mexico - No Guarantees: Sex Discrimination in Mexico's Maquiladora Sector*, available at http://www.hrw.org/hrw/summaries/s.mexico968.html, Aug. 1996, accessed on 27 May 1999.

Human Rights Watch, *The Price of Oil: Corporate Responsibility and Human Rights Violations in Nigeria's Oil Producing Communities* (New York (etc.): Human Rights Watch 1999), also available at http://www.hrw.org/hrw/reports/1999/nigeria/index.htm, accessed on 27 May 1999.

Human Rights Watch, *Working Guidelines on Business and Human Rights*, June 1997.

Idowu, A.A., 'Human Rights, Environmental Rights, Environmental Degradation and Oil Multinational Companies in Nigeria: The Ogoniland Episode', 17 *Neth. Q. Hum. Rts.* (1999) no. 2, pp. 161-184.

Interfaith Center on Corporate Responsibility/Ecumenical Council for Corporate Responsibility/Taskforce on the Churches and Corporate Responsibility, *Principles for Global Corporate Responsibility: Bench Marks for Measuring Business Performance* (29 May 1998).

International Centre for Human Rights and Democratic Development (ICHRDD), *Globalization, Trade and Human Rights: The Canadian Perspective*, Conference Held on 22 Feb. 1992 in Toronto, available at http://www.ichrdd.ca/PublicationsE/reposum.html, accessed on 18 Mar. 1999.

Irish National Caucus, *The MacBride Principles*, Nov. 1984, http://www.knight-hub.com/inc/MacBride.html.

Jackson, J.H., 'World Trade Rules and Environmental Policies: Congruence or Conflict?', 49 *Wash. & Lee L. Rev.* (1992) no. 4, pp. 1227-1278.

Jacoby, N.H., *Corporate Power and Social Responsibility* (New York (etc.): Macmillan 1973) 282p.

Jägers, N., 'The Legal Status of the Multinational Corporation Under International Law', in: M.K. Addo (ed.), *Human Rights Standards and the Responsibility of Transnational Corporations* (The Hague: Kluwer Law International 1999) pp. 259-270.

Johns, F., 'The Invisibility of the Transnational Corporation: An Analysis of International Law and Legal Theory', 19 *Melb. U. L. Rev.* (1994) no. 4, pp. 893-923.

Johnson, J., 'Public-Private-Public Convergence: How the Private Actor can shape Public International Labour Standards', 24 *Brook. J. Int'l L.* (1998) no. 1, pp. 291-356.

Joseph, S., 'Taming the Leviathans: Multinational Enterprises and Human Rights', 46 *Neth. Int'l L. Rev.* (1999) no. 2, pp. 171-203.

Jungk, M, 'A Practical Guide to Addressing Human Rights Concerns for Companies Operating Abroad', in: M.K. Addo (ed.), *Human Rights Standards and the Responsibility of Transnational Corporations* (The Hague: Kluwer Law International 1999) pp. 171-186.

Kamminga, M.T., 'Aansprakelijkheid van (multinationale) ondernemingen voor schendingen van internationaal recht', 22 *NJCM-Bulletin* (1997) no. 6, pp. 784-790.

Kamminga, M.T., 'Holding Multinational Corporations Accountable for Human Rights Abuses: A Challenge for the EC', in: P. Alston (ed.), *The EU and Human Rights* (Oxford: Oxford University Press 1999) pp. 554-569.

Kaptein, M./H. Klamer/B.R. v.d. Loeff, *Business Ethics and Company Codes in the Netherlands: Translation, Summary and Update of a Brochure of the NCW* (The Hague: NCW 1992) 24p.

Kapur, R., 'From Human Tragedy to Human Rights: The Accountability of Multinational Corporations for Human Rights Violations', 10 *B.C. Third World L. J.* (1990) no.1, pp. 1-41.

Karl, J., 'The OECD Guidelines for Multinational Enterprises', in: M.K. Addo (ed.), *Human Rights Standards and the Responsibility of Transnational Corporations* (The Hague: Kluwer Law International 1999) pp. 89-106.

Karliner, J., *The Corporate Planet: Ecology and Politics in the Age of Globalization* (San Francisco: Sierra Club Books 1997) 320p.

Kimmerling, J., 'Disregarding Environmental Law: Petroleum Development in Protected Natural Areas and Indigenous Homeland in the Ecuadorian Amazon', 14 *Hastings Int'l & Comp. L. Rev.* (1991) no. 4, pp. 849-903.

Kobrin, S.J., 'The MAI and the Clash of Globalizations', *Foreign Pol'y* (1998) no. 112, pp. 97-109.

Kokkini-Iatridou, D./P.J.I.M. de Waart, 'Foreign Investments in Developing Countries - Legal Personality of Multinationals in International Law', 14 *Neth. Y.B. Int'l. L.* (1983) pp. 87-131.

Korten, D.C., *When Corporations Rule the World* (London: Earthscan 1997) 374 p.

Kunstle, D.P., 'Kadic v. Karadzic: Do Private Individuals Have Enforceable Rights and Obligations under the Alien Tort Claims Act', 6 *Duke J. Comp. & Int'l L.* (1996) no. 2, pp. 319-346.

Kyoto, N., 'Criminal Liability of Corporations - Japan', in: H. de Doelder/K. Tiedemann (eds.), *La Criminalisation de Comportement Collectif/Criminal Liability of Corporations* (The Hague: Kluwer Law International 1996) pp. 275-288.

Leary, V., 'Workers' Rights and International Trade: The Social Clause', in: J. Bhagwati/R.E. Hudec (eds.), *Fair Trade and Harmonization: Prerequisites for Free Trade?* (Cambridge: MIT Press 1996) pp. 177-230.

Ledgerwood, G./E. Street/R. Therivel, *Implementing an Environmental Audit: How to Gain a Competitive Advantage using Quality and Environmental Responsibility* (Burr Ridge/New York: Irwin 1994) 207p.

Lee, E., *The Asian Financial Crisis: The Challenge for Social Policy* (Geneva: International Labour Office 1998) 98 p.

Lipmann, M., 'Transnational Corporations and Repressive Regimes', 15 *Cal. W. Int'l L. J.* (1985) no. 3, pp. 542-551.

Loomis, W., 'The Responsibility of Parent Corporations for the Human Rights Violations of Their Subsidiaries', in: M.K. Addo (ed.), *Human Rights Standards and the Responsibility of Transnational Corporations* (The Hague: Kluwer Law International 1999) pp. 145-159.

Lu, J., 'Jurisdiction over Non-State Activity under the Alien Tort Claims Act', 35 *Colum. J. Transnat'l L.* (1997) no. 2, pp. 541-549.

Madeley, J., *Big Business, Poor Peoples:The Impact of Transnational Corporations on the World 's Poor* (London: Zed Books 1999) 206p.

Makower, J., *The E-factor: The Bottom-Line Approach to Environmentally Responsible Business (Table of Contents only)* (New York: Tilden Press 1993) 291p.

Makower, J., *Beyond the Bottom Line: Putting Social Responsibility to Work for Your Business and the World* (New York: Simon & Schuster 1995) 335p.

Mander, J./E. Goldsmith (eds.), *The Case against the Global Economy: And for a Turn Toward the Local* (San Francisco: Sierra Club Books 1996) 550 p.

Mayer, A.M., 'Law and Ethics in Emerging Markets: An Introduction', 18 *U. Pa. J. Int'l Econ. L.* (1997) pp. 1153-1163.

McCormick, T., 'The "Sandline Affair": Papua New Guinea Resorts to Mercenarism to End the Bougainville Conflict', 1 *Y.B. Int'l Humt. L.* (1998) pp. 292-300.

McCrudden, C., 'Human rights Codes for Transnational Corporations: What Can the Sulllivan and MacBride Principles Tell Us?', 19 *Oxford J. Legal Stud.* (1999) no. 2, pp. 167-201.

McIntosh, M., *Corporate Citizenship: Successful Strategies for Responsible Companies* (London: Financial Times 1998) 323p.

McLean, A., 'The European Code of Conduct on Arms Exports', in: M.K. Addo (ed.), *Human Rights Standards and the Responsibility of Transnational Corporations* (The Hague: Kluwer Law International 1999) pp. 115-122.

Meeran, R., 'Accountability of Transnationals for Human Rights Abuses - Part I', 148 *New L. J.* (1998) nr. 6864, pp. 1686-1687.

Meeran, R., 'Accountability of Transnationals for Human Rights Abuses - Part II', 148 *New L. J.* (1998) nr. 6865, pp. 1706-1707.

Meron, T., 'Is International Law Moving towards Criminalization?', 9 *EJIL* (1998) no. 1, pp. 18-31.

Meyer, W.H., 'Human Rights and MNCs: Theory Versus Quantative Analysis', 18 *Hum. Rts. Q.* (1996) no. 2, pp. 369-397.

Meyer, W.H., *Human Rights and International Political Economy in Third World Nations: Multinational Corporations, Foreign Aid and Repression* (Westport: Praeger 1998) 240 p.

J. Mitchell (ed.),*Companies in a World Conflict: NGOs, Sanctions and Corporate Responsibility* (London: Earthscan Publications 1998) 256p.

Muchlinski, P., *Multinational Enterprises and the Law* (Oxford (etc.): Blackwell Publishers 1995) 674p.

Muchlinski, P.T., 'The Accountability of Multinational Enterprises and the Right to Development: The Compensation of Industrial Accident Victims from Developing Countries', *Third World Legal Stud.* (1993) pp. 189-201.

Muchlinski, P.T., '"Global Bukowina" Examined: View the Multinational Enterprise as a Transnational Law-making Community', in: G. Teubner (ed.), *Global Law without a State* (Aldershot: Dartmouth 1997) pp. 79-108.

Mullen de Bolivar, M., 'A Comparison of Protecting the Environmental Interests of Latin-American Indigenous Communities from Transnational Corporations under International Human Rights and Environmental Law', 8 *J. Transnat'l L. & Pol'y* (1998) pp. 105-172.

Nichols, P.M., 'Trade without Values', 90 *Nw. U. L. Rev.* (1996) no. 2, pp. 658-719.

Nixson, F.I., 'Controlling the Transnationals? Political Economy and the United Nations Code of Conduct', 11 *Int'l J. Soc. L.* (1983) no.1, pp. 83-103.

Orentlicher, D.F./T.A. Gelatt, 'Public Law, Private Actors: The Impact of Human Rights on Business Investors in China', 14 *Nw. J. Int'l L. & Bus.* (1993) no. 1, pp. 66-129.

Osofsky, H.M., 'Environmental Human Rights under the Alien Tort Statute: Redress for Indigenous Victims of Multinational Corporations', 20 *Suffolk Transnat'l L. Rev.* (1997) no. 2, pp. 335-396.

Perez-Lopez, J.F., 'Promoting International Respect for Worker Rights Through Business Codes of Conduct', 17 *Fordham Int'l L.J.* (1993) no. 1, pp. 1-47.

Piasecki, B.W., *Corporate Environmental Strategy: The Avalanche of Change Since Bhopal* (New York/Toronto: Wiley 1995) 180p.

Picciotto, S., 'Linkages in International Investment Regulation: The Antimonies of the Draft Multilateral Investment Agreement', 19 *U. Pa. J. Int'l Econ. L.* (1998) no. 3, pp. 731-768.

Pritchard, K., 'Human Rights and Development: Theory and Data', in: D. Forsythe (ed.), *Human Rights and Development: International Views* (Basingstoke: Macmillan 1989) pp. 329-345.

Ramasastry, A., 'Secrets and Lies? Swiss Banks and International Human Rights', 31 *Vand. J. Transnat'l L.* (1998) no. 2, pp. 325-456.

Rankin, J.K., 'U.S. Laws in the Rainforest: Can a U.S. Court Find Liability for Extraterritorial Pollution Caused by a U.S. Corporation? An Analysis of Aguinda v. Texaco, Inc.', 18 *B.C. Int'l & Comp. L. Rev.* (1995) no. 1, pp. 221-263.

Reder, A., *In Pursuit of Principle and Profit: Business Success through Social Responsibility* (New York: G.P. Putnam's Sons 1995) 274p.

Rickett, C.E.F./R.B. Grantham (eds.), *Corporate Personality in the 20th Century* (Oxford: Hart, 1998) 295p.

Robé, J.-P., 'Multinational Enterprises: The Constitution of a Pluralistic Legal Order', in: G. Tuebner (ed.), *Global Law without a State* (Aldershot: Dartmouth 1997) pp. 45-78.

Robinson, J., *Multinationals and Political Control* (Aldershot: Gower 1983) 507 p.

Rosencranz, A./R. Campbell, 'Foreign Environmental and Human Rights Suits against U.S. Corporations in U.S. Courts', 18 *Stan. Envtl. L.J.* (1997) no. 2, pp. 145-208.

Rubin, S.J., 'Transnational Corporations and International Codes of Conduct: a Study of the Relationship between International Legal Cooperation and Economic Development', 10 *Am. U. J. Int'l L. & Pol'y* (1995) no. 4, pp. 1275-1289.

Sacharoff, A.K., 'Multinationals in Host Countries: Can They Be Held Liable under the Alien Tort Claims Act for Human Rights Violations?', 23 *Brook. J. Int'l L.* (1998) no. 3, pp. 927-964.

Safarian, E., 'World Investment Report 1996: Investment, Trade & International Policy Arrangements', 5 *Transnat'l Corp.* (1996) no. 3, pp. 163-174.

Samet, A.A., S. Rosen et al.,*The Apparel Industry and Codes of Conduct: A Solution to the International Child Labor Problem?* (Washington: U.S. Department of Labor, Bureau of International Labor Affairs 1996) 242p.

Sanders, P., 'The Implementation of International Codes of Conduct for Multinational Enterprises', 28 *Neth. Int'l L. Rev.* (1981) pp. 318-332.

Sauvant, K.P./V. Aranda, 'The International Legal Framework for Transnational Corporations', in: A.A. Fatouros (ed.), *Transnational Corporations: The International Legal Framework* (United Nations Library on Transnational Corporations, Vol. 20) (London/New York: Routledge 1994) pp. 83-115.

Schoenbaum, T.J., 'International Trade and Protection of the Environment: The Continuing Search for Reconciliation', 91 *AJIL* (1997) no. 2, pp. 268-313.

Seck, S., 'Environmental Harm in Developing Countries Caused by Subsidiaries of Canadian Mining Corporations: The Interface of Public and Private International Law', 37 *Can. Y.B. Int'l L.* (1999) (forthcoming).

Seidl-Hohenveldern, I., *Corporations In and Under International Law* (Cambridge: Grotius 1987) 138p.

Shahin, M., 'Multilateral Investment and Competition Rules in the World Trade Organization: An Assessment', 6 *Transnat'l Corp.* (1997) no. 2, pp. 171-211.

Skogly, S.I., 'Complexities in Human Rights Protection: Actors and Rights Involved in the Ogoni Conflict in Nigeria', 15 *Neth. Q. Hum. Rts.* (1997) no. 1, pp. 47-60.

Skogly, S.I., 'Economic and Social Human Rights, Private Actors and International Obligations', in: M.K. Addo (ed.), *Human Rights Standards and the Responsibility of Transnational Corporations* (The Hague: Kluwer Law International 1999) pp. 239-258.

Smith, J./M. Bolyard/A. Ippolito, 'Human Rights and the Global Economy: A Response to Meyer', 21 *Hum. Rts. Q.* (1999) no. 1, pp. 207-219.

Smith, J.F., 'Nafta and Human Rights: A Necessary Linkage', 27 *U.C. Davis L. Rev.* (1994) no. 4, pp. 793-841.

Smith, T., 'Transnational Influence: The Power of Business', in: *Human Rights: The New Consensus*, Richard Reoch (ed.) (London: Regency Press in association with the UN High Commissioner for Refugees 1994) pp. 149-151.

Spar, D.L., 'The Spotlight and the Bottom Line: How Multinationals Export Human Rights', 77 *Foreign Aff.* (1998) no. 2, pp. 7-12.

Spiro, P.J., 'The Decline of the Nation State and its Effect on Constitutional and International Economic Law - New Global Potentates: Non-Governmental Organisations and the "Unregulated" Marketplace', 18 *Cardozo L. Rev.* (1996) pp. 957-969.

Spiro, P.J., 'New Players on the International Stage', 2 *Hofstra L. & Pol'y Symp.* (1997) pp. 19-38.

Stephens, B., 'Litigating Customary International Human Rights Norms', 25 *Ga. J. Int'l & Comp. L.* (1995/96) no. 1-2, pp. 191-203.

Stephens, B./M. Ratner, *International Human Rights Litigation in US Courts* (Irvingon-Hudson: Transnational 1996) 377p.

Stauffacher, E., 'La Criminalisation du Comportement Collectif – Suisse', in: H. de Doelder/K. Tiedemann (eds.), *La Criminalisation de Comportement Collectif/ Criminal Liability of Corporations* (The Hague: Kluwer Law International 1996) pp. 347-367.

Sullivan, L., 'Principles for US Corporations Operating in South Africa' (4th Amplification) 8 Nov. 1984, 24 *ILM* (1985) p. 1496.

Toftoy, R.P., 'Now Playing: Corporate Codes of Conduct in the Global Theater. Is Nike Just Doing It?', 15 *Ariz. J. Int'l & Comp. L.* (1998) no. 3, pp. 905-929.

Tromans, S., 'Multinational Companies and Environmental Liability', 26 *Int' Bus. Law.* (1998) no. 10, pp. 441-451.

Tucker, A.L., 'The Energy Charter Treaty and "Compulsory" International State/ Investor Arbitration', 11 *Leiden J. Int'l L.* (1998) no. 3, pp. 513-526.

Vagts, D.F., 'Multinational Corporations and International Guidelines', 18 *Common Mkt. L. Rev.* (1981) pp. 463-474.

Vagts, D.F., 'The Multinational Enterprise: A New Challenge for Transnational Law', 83 *Harv. L. Rev.* (1970) no. 4, pp. 739-792, .

Vernon, R., 'Codes on Transnationals: Ingredients for an Effective International Legal Regime', in: A.A. Fatouros (ed.), *Transnational Corporations: The International Legal Framework* (United Nations Library on Transnational Corporations, Vol. 20) (London/New York: Routledge 1994) pp. 69-80.

Vernon, R., *Sovereignty at Bay: The Multinational Spread of US Enterprises* (New York: Basic Books 1971) 326p.

Vogelaar, T., 'Multinational Corporations and International Law', 27 *Neth. Int'l L. Rev.* (1980) no. 1, pp. 69-78.

Vossler Champion, K., 'Who Pays for Free Trade? The Dilemma of Free Trade and International Labour Standards', 22 *N.C. J. Int'l L. & Com. Reg.* (1996) no. 1, pp. 181-239.

Wäelde, T.W./P.K. Wouters, 'State Responsibility and the Energy Charter Treaty: The Rules Regarding State Enterprises, Entities, and Subnational Authorities', 2 *Hofstra L. & Pol'y Symp.* (1997) pp. 117-134.

Wallace, C.D., 'International Codes and Guidelines for Multinational Enterprises: Update and Selected Issues', 17 *Int'l Law.* (1983) pp. 435-463.

Webley, S., 'The Nature and Value of Internal Codes of Ethics', in: M.K. Addo (ed.), *Human Rights Standards and the Responsibility of Transnational Corporations* (The Hague: Kluwer Law International 1999) pp. 107-113.

Weissbrodt, D./M. Hoffman, 'The Global Economy and Human Rights: A Selective Bibliography', 6 *Minn. J. Global Trade* (1997) pp. 189-199.

Weissbrodt, D./G. Mahoney, 'International Legal Action Against Apartheid', 4 *J. L. & Inequality* (1986) p. 485.

Welch, J., 'A CEO Forum: What Corporate Social Responsibility Means to Me; Wanted: Teachers and Leaders', *Bus. & Soc'y Rev.* (1992) no. 81, pp. 88-89.

Wells, C., *Corporations and Criminal Responsibility* (Oxford: Clarendon Press 1993) 165p.

Wezel Stone, K. van, 'Labor and the Global Economy: Four Approaches to Transnational Labour Regulation', 16 *Mich. J. Int'l L.* (1995) no. 4, pp. 987-1028.

Whincup, M.J./Keyes, M.E., 'Corporation, Contract, Community: An Analysis of Governance in the Privatization of Public Enterprise and the Publicization of Private Corporate Law', 25 *Fed. L. Rev.* (1997) p. 51.

Wildhaber, L., 'Some Aspects of the Transnational Corporation in International Law', 27 *Neth. Int' L. Rev.* (1980) pp. 79-88.

Williams, M., 'Private Enterprise: Human Centred Development', in: R. Reoch (ed.), *Human Rights: The New Consensus* (London: Regency Press in association with the UN High Commissioner for Human Rights 1994) pp. 122-126.

Wike, J., 'The Marlboro Man in Asia: US Tobacco and Human Rights', 29 *Vand. J. Transnat'l L.* (1996) no.2, pp. 329-361.

Wise, E.M., 'Criminal Liability of Corporations - USA', in: H. de Doelder/K. Tiedemann (eds.), *La Criminalisation de Comportement Collectif/Criminal Liability of Corporations* (The Hague: Kluwer Law International 1996) pp. 383-401.

Wines, W.A./M.A. Buchanan/D.J. Smith, 'The Critical Need for Law Reform to Regulate the Abusive Practices of Transnational Corporations: The Illustrative Case of Boise Cascade Corporation in Mexico's Costa Grande and Elsewhere', 26 *Denv. J. Int'l L. & Pol'y* (1998) no. 3, pp. 453-515.

Woodroffe, J., 'Regulating Multinational Corporations in a World of Nation States', in: M.K. Addo (ed.), *Human Rights Standards and the Responsibility of Transnational Corporations* (The Hague: Kluwer Law International 1999) pp. 131-142.

Zadek, S./M. Forstater, 'Making Civil Regulation Work', in: M.K. Addo (ed.), *Human Rights Standards and the Responsibility of Transnational Corporations* (The Hague: Kluwer Law International 1999) pp. 69-75.

Zia-Zarifi, S., 'Suing Multinational Corporations in U.S. Courts for Violating International Law', 4 U.C.L.A. J. Int'l L. & Foreign Aff., pp. 81-147.

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