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Violations of Human Rights in  
the Supply Chain: Conjoining  
Human Rights with Corporate  
Law in the Search for  
Accountability

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# Summary

The notion of corporate violations of human rights is gaining ground. Using an inductive method, this report explores the level of responsibility of multinational enterprise for violations of human rights law committed by business partners and affiliates, i.e. the “imputability”. The topic is important as the ability to reconstruct the organizational structure provides corporate entities with means to deviate from liability. However, the conclusion indicates that the enacted incentives to comply with human rights along the supply chain are disjointed and not attuned to the reality of international business: domestic regulations lack coordination and applicable international norms are unsatisfactory both in numbers and scope. Having identified a discrepancy between policy aims and the law, four suggestions for improvement are subsequently analyzed: 1) legal recognition of multinational enterprises, 2) development of a distinct form of complicity for corporate entities, 3) construction of a particular form for corporate command responsibility, and 4) investigation of ways to capitalize on corporate codes of conduct. Finally, in a constructive attempt to consolidate objectives and conclusions drawn in the foregoing analysis, and by deploying a deductive method, it is proposed that a norm of accountability contingent on control be instituted.

**Keywords:** public international law, human rights and business, corporate social responsibility, sub-contracting, imputability

# Abbreviations

ANCOM	Andean Common Market
ATAC	Alien Tort Claims Act
BYIL	British Yearbook of International Law
CBG	Coalition Against Bayer Danger
CSR	Corporate Social Responsibility
ECJ	European Court of Justice
ETI	Ethical Trading Initiative
EU	European Union
FDI	Foreign Direct Investment
GA	General Assembly
GRI	Global Reporting Initiative
HASTICLR	Hastings International and Comparative Law Review
ICJ	International Court of Justice
ICRC	International Committee of the Red Cross
ICTR	International Criminal Tribunal for Rwanda
ICTY	International Criminal Tribunal for Former Yugoslavia
IGO	International Governmental Organization
ILC	International Law Commission
IRENE	International Restructuring Education Network Europe
ITGLWF	International Textile, Garment and Leather Workers' Federation
MNC	Multinational Corporation
MNE	Multinational Enterprise
NGO	Non-Governmental Organization
OECD	Organization for Economic Cooperation and Development
SME	Small and Medium sized Enterprise
SRI	Socially Responsible Investments
TBL	Triple Bottom Line
TNC	Transnational Corporation
TNN	Transnational Network
TRAC	Transnational Resource and Action Center
UNCTAD	United Nation Conference on Trade and Development
UN	United Nations
UNDP	United Nations Development Program
USTR	Office of the United States Trade Representative
WIR	World Investment Report
WTO	World Trade Organization

# 1 Introduction

## 1.1 Alleged Corporate Abuses of Human Rights

### 1.1.1 This is a company accused of violating human rights I

*You have to meet the quota before you can go home.  
She hit all 15 team leaders in turn from the first one to the  
fifteenth... The physical pain didn't last long,  
but the pain I feel in my heart will never disappear.*

This statement was made by Thuy and Lap, female workers at a Nike plant in Vietnam and reported by Vietnam Labour Watch on the homepage *Boycott Nike*.<sup>1</sup> Vietnam Labour Watch argued that Nike was exploiting and abusing workers in the third world and compared Nike's conduct with that of "the colonial masters of the 19<sup>th</sup> century".<sup>2</sup> In particular, Vietnam Labour Watch accused Nike of violating domestic and international customary law by not observing regulations on minimum wage, for using corporal punishment, for allowing sexual harassment of female workers by foreign supervisors, for forcing the personnel to work overtime and for inhumane working conditions.

In the mid-1990s Nike became one, or even *the*, main target in the pursuit of eradicating "sweatshops" within the apparel industry. In April 1998, Marc Kasky, an environmental activist, filed a civil lawsuit against Nike, Inc. with a Californian court. Kasky claimed that Nike Inc. was willfully misleading consumers of the conditions surrounding the manufacturing of Nike products through promotional material, which portrayed Nike as "socially responsible".<sup>3</sup>

### 1.1.2 This is a company accused of violating human rights II

*On 8 December 1995 my husband Joao Jose Vilete (49) worked  
with Baysiston; I found him lying in the field. He did not have  
the strength to walk and was in a glow. He had a headache and  
was vomiting a lot; he had pain in his chest, no voice and held*

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<sup>1</sup> See <<http://www.saigon.com/~nike/>>, (accessed October 14, 2002). See also the homepage of Oxfam Australia – Community Aid Abroad: <<http://www.caa.org.au/campagins/nike/action/may03/index.html>>, (accessed June 15, 2003) and the homepage of Corporatewatch, which monitors and criticizes illicit corporate behavior: <<http://www.corporatewatch.org.uk/>>, (accessed October 14, 2002).

<sup>2</sup> See <<http://www.saigon.com/~nike/fact-sheet.htm>>, (accessed October 14, 2002).

<sup>3</sup> Kasky v. Nike, Inc. (2002) 27 Cal. 4th 939. [Hereinafter the Nike case] The case was not appealed to the U.S. Supreme Court, that granted cert. (123 S.Ct. 817). Note that the case has not yet been tried on its merits.

*his stomach with his eyes shot. In the end he lost his balance completely. He died that same day from breathing paralysis. He is survived by a daughter.*<sup>4</sup>

Mrs. Marly Avidel Vilete made the above statement during the official investigation of the German enterprise Bayer AG on allegations of serious health damages and numerous deaths in Manhuacu, province of Minas Gerais, in Brazil. According to the allegations, Bayer's pesticide Baysiston, has poisoned more than 30 coffee growers and killed 12. The pesticide had arguably been put on the market without proper information of potential dangers and retailers have allegedly occasionally even boasted about the chemical's fertilizing effects.<sup>5</sup> Bayer AG is facing criminal and civil charges. The top manager risks being personally indicted under criminal procedures.<sup>6</sup>

### **1.1.3 This is a company accused of violating human rights III**

*We vigorously deny any wrongdoing regarding human rights violations in Colombia and are deeply concerned by these allegations against our company, says Pablo Largacha, spokesperson for Coca-Cola de Colombia. We have been and continue to be assured by our bottlers that behavior such as that depicted in the claim has in no way been instigated, carried out or condoned by these bottling companies. (...)*<sup>7</sup>

The union activist Oscar Dario Seto Polo was shot dead as he walked down the street with his youngest daughter. At the time, Polo was involved in negotiations with the management of Coca-Cola's plant in Monertia, Cordoba province, Colombia over proposals to provide security to trade unionists under threat. Since 1994, five union members working for Coca-Cola bottling plants in Colombia have been killed. On July 20, 2001 a claim was filed with the District Court in Florida, U.S., accusing the Coca Cola Company and associates for use of paramilitary security forces to carry out murder, torture, kidnappings and for threatening union leaders.<sup>8</sup>

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<sup>4</sup> Mimkes Philip of the Coalition Against Bayer Dangers (CBG). Summary of the "Bayer case", campaign "Coordination against Bayer-danger". See homepage of CBG <<http://www.cbgnetwork.org/index.html>>. See also <<http://BayerWatch.com>> (both addresses accessed June 16, 2003).

<sup>5</sup> Andreac SachässIIer, "Itinerary for Minas Gerais", *Id.*

<sup>6</sup> *Id.*

<sup>7</sup> Cray Charlie. "Coke Abuse in Columbia", I: *Multinational monitor*, Sept. 2001, vol. 22:9.

<sup>8</sup> Plaintiff's complaint brief. Available at <<http://news.findlaw.com/hdocs/docs/cocacola/clmbiacocacola72001.pdf>>, (accessed June 12, 2003). [Hereinafter the Sinaltranal case]

## 1.2 The Research Question

### 1.2.1 Unfolding the legal issue

Milton Freedman (a)famously stated in 1970 that “there is only one social responsibility of business – (...) to increase its profits so long as it stays within the rules of the game”.<sup>9</sup> This view, although still found in some places, is becoming less accepted, both within the public international, and international business, community. Instead multinational enterprises are increasingly understood to have a part to play in realizing societal goals and within human rights. With respect to human rights, the role of multinationals has allegedly two sides: multinationals are plausible perpetrators of human rights law as well as potential partners in the challenge to enhance compliance with the same.<sup>10</sup> Former High Commissioner for Human Rights Mary Robinson, acknowledging this ambiguous role, stated, “harmonizing economic growth with the protection of human rights is one of the great challenges we face today”.<sup>11</sup> Non-binding recommendations and concepts, such as corporate social responsibility (CSR), socially responsible investments (SRI), ethical trading initiative (ETI), the triple bottom line (TBL), codes of conduct, social reporting and auditing, ethical trading, specific norms pertaining to business and extended jurisdictions for courts provides the tools.<sup>12</sup>

It is problematic to hold a corporation accountable before a court of law on allegations of human rights abuses. In putting a case together the aim, nature, victims, venue, legal constrains, time frame, monetary capacity, legal representation etc. needs to be considered. The allegations against Nike, Inc., Bayer AG and the Coca Cola Company points towards an increasingly difficult problem: the kind of responsibility a business has for its supply chain and violations of human rights committed by business partners and affiliated companies. In the legal sense, the violations that the allegations attributed to Nike, Inc., Bayer AG and Coca Cola Company were committed by other businesses; third parties. In fact, Nike was not the legal proprietor of the factories where the violations took place and nor did Nike run, directly or via subsidiaries, these factories. It was local businesses that were supplying Nike or Nike subsidiaries that held the formal titles to

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<sup>9</sup> “The Social Responsibility of Business Is to Increase Its Profits”, *New York Times Magazine*. September 13, 1970.

<sup>10</sup> Foreign direct investments (FDIs) are replacing inter-governmental aid as the most important means of transferring capital and technological know-how from the developed to the developing world. Zia-Zarifi Saman - Kamminga Menno. *Liability of Multinational Corporations under International Law*. 2000. Haag: Kluwer. P. 2. See also World Investment Report (WIR) 2002. Pp. 117-120.

<sup>11</sup> Office of the United Nations High Commissioner for Human Rights. *Business and Human Rights: a Progress Report*. January 2000. Geneva: OHCHR. P. 3.

<sup>12</sup> It is generally thought that the next step will be to integrate the individual core business concept with a sustainable societal development (commonly referred to as the “Third Generation of CSR”).

the “scene of the crime”. With respect to the allegations against Coca Cola, the human rights violations were committed by “*hired, contracted or otherwise directed* paramilitary security forces”.<sup>13</sup> This perception implies that multinationals have, at least some form for, responsibility for the conduct of their supply chain. Neil Kearney, General Secretary of The International Textile, Garment and Leather Workers' Federation (ITGLWF), stated with respect to accusations against Benetton for use of child labor in sub-contracting factories in Turkey that "Benetton must take care to indicate very clearly that no worker, of whatever age, will be victimized for speaking freely of working conditions in their supplying plants. Benetton must emphasize that if abuses of workers' rights occur, they will work with their suppliers to secure remedies."<sup>14</sup> The spokesperson for the Coca Cola Company presented a similar view.<sup>15</sup>

This view merits further analysis from a legal point of view. Prima facie, the law does not recognize the multinational enterprise as a particular form for business association. In law, a multinational enterprise constitutes a group of legal persons. Each person is a national of the State in which it has been incorporated and accordingly endowed with a set of rights and duties that may be distinct from those of other entities in the group. One entity is as a point of departure no more responsible for the conduct of an affiliated entity than for the conduct of any other afar business. Hence, liability is limited to the entity's own sphere. Despite this consequence of enterprise entity law, a group of commercial entities is habitually conceptualized as one unit in the eyes of the general public and also often by economists. Coca Cola provides a prominent example: for legal purposes the bottlers of Coca Cola soft drinks usually operate as independent franchise and are not owned by the Coca Cola company, which is an entity incorporated in the U.S. state of Delaware.<sup>16</sup> Consequently, a *de facto* and a *de jure* enterprise do not necessarily correspond. Popularly put: the fact that there are two legal entities involved in a matter does not automatically mean that there also are two multinationals involved.

This paper commences here and will focus on the following questions:

- What legal responsibility is imposed on multinational enterprises for human rights violations committed in the supply chain? With a more precise

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<sup>13</sup> Sinaltranal case, para. 5. (*emphasis added*)

<sup>14</sup> International Textile, Garment and Leather Workers' Federation (ITGLWF), press release November 30, 1998. Available at <<http://www.cleanclothes.org/companies/benneton9811-30.htm>>, (accessed December 11, 2002).

<sup>15</sup> *Supra*.

<sup>16</sup> Prendergast Mark. "For God, Country and Coca Cola". 1993. London: Weidenfeld and Son. Cited in van Liemt Gijsbert. "Codes of Conduct and International Subcontracting : a "private" road towards ensuring minimum labour standards in export industries", I: Gereffi, G – Palpaucer, F. - Parasite. A. *Global Production and Local Jobs*. 1999. Geneva: International Institute for Labour Studies. Note that the expression "Coca Cola's plan" *supra* was in a legal sense used incorrectly.

legal vocabulary, which legal-technical provisions to impute responsibility is available with respect to CSR?

• Moreover, is the *de legal lata* regulatory system appropriate, and if not, what are the alternatives?

### 1.2.2 Statement of purpose

Multinational enterprises have been on the human rights agenda for a few decades now.<sup>17</sup> It is however not until recent years that the debate is moving into the stage where explicit norms pertaining to commercial or industrial entities are being identified. The purpose of the present report is to contribute to this process of standard setting.

The topic is important. Professor Philip I. Blumberg argues that human rights violations overseas are highly likely to involve foreign affiliates of the corporate group.<sup>18</sup> Sir Geoffrey Chandler, chairperson of Amnesty International's UK Business Group, has stated regarding the consequences of this fact that "CSR will be largely cosmetic if there is no commitment to labour conditions based on acceptable standards for a company's own employees and its supply chains, if there is no acceptance of responsibility for the environmental and human rights impact of its operations, if there is no monitoring and reporting on that impact as rigorous in principles as reporting on money".<sup>19</sup> adidas-Salomon publicly articulated that "Outsourcing supply should not mean outsourcing moral responsibility".<sup>20</sup> If multinational enterprises cannot be held accountable for violations committed by associates, they will be able to hide behind enterprise entity law. Therefore, identifying provisions that hold multinationals accountable for third party violations constitutes an essential step in the standard setting process of fighting corporate impunity.

### 1.2.3 Delimiting the problem

This work adopts a legal perspective. Ample scholars and activists believe that voluntary rather than mandatory measures are appropriate. Their opponents claim that voluntary measures are used by business as an argument to impede stricter regulations and justiciable duties. The role of law as a means to produce a safer and more prudent corporate conduct is conclusively not settled. Nevertheless, it is fact that activists have started

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<sup>17</sup> The Nuremberg charter contained a provision that authorized the tribunal to declare organizations to be criminal ventures. A UN group of Eminent Persons reported on the role of multinationals on development and international relations 1974. See UN Doc. E/550/Add.1 (Part.1), *reprinted in* 13 ILM 800 (1974).

<sup>18</sup> "Asserting Human Rights Against Multinational Corporations Under United States Law: Conceptual and Procedural Problems". *50 Am J Comp. L.* 493, \*496.

<sup>19</sup> Chandler Geoffrey Sir. *All Party Parliamentary Group on Corporate Social Responsibility*, submission. July 1, 2002.

<sup>20</sup> adidas Salomon: Supply-chain management, <<http://www.unglobalcompact.org>>, (accessed November 14, 2002). Note the word "moral".

taking companies to court on charges of human rights violations and that courts have asserted jurisdiction over these claims. I/NGOs and researchers have started elucidating provisions pertaining to business, governments are discussing sustainable development and taken together, human rights is something that business and business lawyers must start taking into account if they want to be prudent. The notion of corporate social responsibility does have a legal aspect, and that is the one that will be explored here.<sup>21</sup>

There is a long-standing debate on whether certain questions with international dimensions are preferably solved by applying international law or by using principles of conflicts of law and the selected municipal law. It is here presumed that international law can be applied.

The question of third party violations of human rights is complex and inter-linked to a host of other issues. The first limitation that should be noted is that here, only substantive provisions and norms will be considered. Consequently, matters connected with procedural requirements and jurisdiction, including the principle of extraterritorial jurisdiction and the U.S. code Alien Tort Claims Act of 1789 (“ATCA”),<sup>22</sup> will not be discussed in the following. The question of forums and the ATCA in particular is challenging but has been extensively discussed elsewhere.

Substantive provisions that in the following will not be considered include selective purchasing regulations. Selective purchasing regulations were adopted by the U.S. state of Massachusetts against Myanmar for its human rights record, but later challenged in court on charges of being unconstitutional.<sup>23</sup> Theories of joint tortfeasorship are similarly left outside the scope of this paper.

There is an on-going debate on host- versus home country regulations: Should the home country, perceived as being a stronger party, enforce regulations on “their” companies operating abroad or should the host countries, often situated in the less developed parts of the world and in need of foreign investments, try to curb illicit behavior? This question touches upon the relationship between international and municipal laws, it has

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<sup>21</sup> Halina Ward has thoroughly explored the legal side to CSR. Her conclusion is that “The ‘voluntary only’ dogma of corporate social responsibility does no one any favours” and that legislation and regulations already form part of CSR. See *Legal Issues in Corporate Citizenship. Prepared for the Swedish Partnership for Global Responsibility (Globalt Ansvar)*. February 2003. Stockholm: Ministry for Foreign Affairs. P. 35.

<sup>22</sup> 28 U.S.C. §1350 (1994). The ATCA has been revived to create a forum. The ATCA converts a “violation of the law of nations” into a tort. The relevant section reads: “any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States”. U.S. courts are perceived as particularly attractive forums because of the so-called American Rule where the financial burden of the dispute is attributed to the loser, the possibility of a class action, contingency fees and the amount stood to gain (according to “the deep pocket theory”). Note that the ATCA is not restricted to claims against U.S. companies.

<sup>23</sup> Billenness, S. “Burma Law on Trial: Case Threatens Anti-Apartheid Legacy”, I: *Investing for a better world*, vol. 12:4. 1999. P. 1.

extraterritorial implications and is politically sensitive. Within legal literature it is often discussed as a question of jurisdiction, and such questions have already been left outside the scope of this work.

Concerning the implementation in domestic courts, legal systems have different procedural rules and may therefore chose to treat the topic for this paper as a pre-trial question and a procedural hurdle to trial, or try it with the merits of the case. This procedural question will not be discussed in the following, as it has no direct bearing on the substantive norm.

This work adopts an actor perspective and the actor in focus is the multinational corporation. As indicated in the allegations against Bayer AG, there can also be an individual responsibility for the managers of the corporation, the shareholders and the employees. A human being has usually for practical reasons committed the violation. In this work only the corporate responsibility will be assessed and the appropriateness of targeting the corporate entity instead of the leaders of the organization, when and how to share the responsibility, etc. will not be discussed. Moral consideration for the *locus* of accountability with the central legal individual is discussed in connection with direct liability.

Along the same line, some legal systems, and common law systems in particular, embraces the notion of corporate crime, and it has been possible to draw on criminal law too. In the U.S. where the bulk of corporate human rights violations have been tried, the ATCA turns the case into a tort and municipal criminal law will therefore not be further discussed.

A complicating issue in identifying and delimiting a legal person and its responsibility is the fact that mergers and acquisitions of commercial and industrial entities are becoming increasingly common.<sup>24</sup> This is an issue that will have to be addressed and determined when asserting responsibility but for the sake of this work, it will be left aside.

It has been estimated that if the Nike's sub-contractors in Indonesia had upheld the required minimum wages they should have paid their employees an additional \$ 390,000.<sup>25</sup> Possible or appropriate punishments, restitution, or redresses in the case a business is found liable will not be considered as that question has no direct bearing in elucidating the gist of the topic of this paper.

Finally, something should be mentioned about the philosophical approach towards multinationals as it has far-reaching implications on the type and extent of regulation that can be considered desirable. Strong concerns have

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<sup>24</sup> *Infra.*

<sup>25</sup> The calculation is based on 280 working days times 600 new employees times thirty-six cents times six and half years. Ballinger Jeff - Olsson Claes. *Behind the Swoosh The struggle of Indonesians Making Nike Shoe.* 1997. Uppsala: Global Publication Foundation, UFFN Förlag. P. 12.

indeed been raised over illicit corporate conduct and impact on developing societies. “Pro-multinationals” occasionally counter by arguing that regardless of conduct and affect, the result is better than it would be if multinationals’ growth were hindered. This paper rejects this utilitarian and effect-oriented view and agrees with the balanced opinion of the UN Groups of Eminent Persons, which stipulate that corporate power should be curtailed only when it is used in an abusive manner and that multinationals can bring positive contributions to society.<sup>26</sup> A more elaborated vision is outside the scope of this paper.

## 1.3 The Theoretical, Methodological and Semantic framework

### 1.3.1 Theoretical framework

Non-state actors are increasingly held to standards of international law. Multinational enterprises, as non-state actors, have long been recognized as important players on the international arena but their place within the framework of international law is still ambiguous. Regardless of the theoretical discussion of multinationals’ status, the reasons and the appropriateness for addressing this line of questioning within the scope of international law depends on the nature of the problem. Some multinationals wield greater economic power than States.<sup>27</sup> It is thus plausible that corporate activities pose greater danger to humans, the environment and property than both smaller States and private individuals. As these large enterprises operate across state borders and may transcend effective national regulation, scholars and practitioners have considered it appropriate to use human rights as a yardstick to measure these enterprises societal impact. Margaret Jungk summarizes the usefulness of human rights law as a yardstick for salient behavior as “a vase resource of law”, “tightly defined”, proven of practical use, “drafted for an international forum”, “helping businesses to conceptualize and frame their responsibilities” and concurrently “reliable and flexible”.<sup>28</sup> Furthermore, as human rights challenges municipal laws when States fail to counter certain acts it is appropriate to remedy misconduct in international law.

It appears to be a natural development to include multinationals into human rights theory in light of the theory’s utopia. Arguing that human rights represent a set of moral choices that we have consciously chosen to attribute to all human beings, if any actor, State or non-State actor, is impeding with

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<sup>26</sup> UN Doc.E/5500/Add 1 (Part I) 24 May 1974. *Reprinted in* 13 ILM 800 (1974).

<sup>27</sup> See Annex 1. It has been estimated that the world’s ten largest companies (by the number of employees) employ a total of 4.3 million people. If dependants of these employees are included, the welfare of up to 21 million individuals are affected by these ten companies. Parkinson J.E. *Corporate Power and Responsibility Issues in the Theory of Company Law*. 1993. Oxford: Clarendon Press. P. 5.

<sup>28</sup> Jungk Margaret. *Defining the scope of Business Responsibility for Human Rights Abroad*. P. 4. Available at <<http://www.humanrights.dk>>, (accessed June 10, 2003).

the full realization, it is logical that the violation be remedied. As human rights law has not been created with non-state actors in mind, an effective theory necessitates interaction between theory and empirically proven facts; the ideal and the reality. Therefore, incorporating non-state actors and multinationals into human rights law represents an inter-paradigm shift, but not a shift of paradigm. The aim stays the same, while the means may vary.<sup>29</sup>

### 1.3.2 Methodology approach

This study is a traditional desk study, based on review of, investigations into and analysis of, relevant material. Two different legal scientific methods of analysis are utilized. While attempting to ascertain applicable provisions, an *inductive* approach is used. The inductive method is widely practiced and it provides a tool to uncover existing international norms and to safeguarding international law against subjectivity and simplified illustrations.

Distinctively, an inductive method expressively separates between *lex lata* and *lex ferenda* but does not reject the proposal that provisions can be altered in favor for more effective norms and does endorse empirical facts as rationale for change.<sup>30</sup>

When no applicable norm can be identified, where contemporary law or practice is scant, when attempting to provide legal answers and norms that the law is expected to give but they are not found with the inductive method, it can be advantageous to turn to a *deductive* method. Through recourse to underlying principles and policies the deductive method attempts to realize a progressive development of the law, which is also the purpose of this study. The scientific value may however be downgraded if the results are based on principles, premises and sources that are vague. The deductive method is practiced in the closing chapter in a constructive attempt.

An alternative methodological approach could have been to conduct an evaluation study, trying to evaluate current jurisprudence with reference to human rights law and in order to recommend the most appropriate approach. There are however several reasons why it is here preferable to analyze the material: there is often not a single best and enduringly valid option, it is difficult to locate indicators to use as measurer, legally bearing arguments can be located in alternatives that would not be enforceable in a court of law or they have not yet been recognized by any legal authority and maybe foremost; there are few provisions and scant jurisprudence to evaluate at this stage.

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<sup>29</sup> For a study on corporations' human rights obligations and how they can be enforced, see Jägers Nicola. *Corporate Human Rights Obligations: in Search of Accountability*, School of Human Rights Research series. 2002. Antwerpen/Oxford: Intersentia.

<sup>30</sup> Schwarzenberger George. *The inductive approach to international law*. 1965. London: Steven & Sons. P. 4-7.

### 1.3.3 Material

The utilized material is steered by the choice of theory, limitations and methods. The choice of theory and the inductive method suggests acknowledged sources of public international law.<sup>31</sup> Corporate codes of conduct are not a recognized legal source of international law. Even so, and in particular while applying a deductive method, it is appropriate to consider them. There seems however to be no consensus on how to treat these codes. Under international law, codes of conduct could be treated as *soft law*, which eventually may turn into hard law. Domestic courts can treat codes of conduct as single-handed undertakings, and as contracts with the consumer, which was evidenced by the Nike case.<sup>32</sup>

With respect to the introductory cases, domestic judicial decisions can constitute a source of international law, either by their own virtue, as a subsidiary means of interpretation, as a proclamation of general principles of law<sup>33</sup> or as evidence of customary law<sup>34</sup>. Herein all mentioned approaches will be adopted.

The international business literature was earlier mainstreamed to “ways to go international” and FDI. More recently, it has become topical to carry out research on multinationals, leading to a more multifaceted assembly of literature that encompasses more than merely economic considerations. Peter Muchlinski’s “Multinational Enterprises and the Law” presents the most up-dated and comprehensive work on multinationals from a legal point of view.<sup>35</sup>

### 1.3.4 Definitions

#### 1.3.4.1 CSR and stakeholder

Corporate social responsibility is a concept that presumes that business has a responsibility beyond making a profit for its owners. Parkinson has explained CSR as “incurring uncompensable costs for socially desirable but not legally mandated action”.<sup>36</sup> Others use the term more broadly to refer to all types of social, environmental and economic performance and impact.

The term “stakeholder” generally refers to a person or entity who/that has an interest in the specific issue, (i.e. somebody who has something “at stake”).

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<sup>31</sup> Article 38(1)(d) of the Statute of the International Court of Justice (ICJ) is generally considered to list these sources.

<sup>32</sup> See *infra*.

<sup>33</sup> Malanczuk Peter. *Akehurst's Modern Introduction to International law*. 1997: 7<sup>th</sup> revised edition. London: Routledge. P. 49.

<sup>34</sup> Dixon Martin. *Textbook on International Law*. 1990: 3<sup>rd</sup> edition. London: Blackstone Press Limited. P. 41.

<sup>35</sup> 1995. Oxford, UK & Cambridge, USA: Blackwell.

<sup>36</sup> Parkinson, 1993, p. 260.

The Draft Principles relating to the Human Rights Conduct of Companies<sup>37</sup> defines “stakeholder” as a term that “includes any group or individual which is affected by the operation of the company”. Examples include owners, stockholders, employees, customers and suppliers, neighboring communities, individuals and governments. Other stakeholders could include consumers’ groups, NGOs, local authorities, media, investors, universities, insurance companies, citizens, business organizations, national and international legislators. Potential stakeholders should also be included.

#### **1.3.4.2 Multinationals, business partners and affiliates**

The terms transnational corporation (TNC), multinational enterprise (MNE), multinational corporation (MNC) are sometimes used interchangeably when referring to a commercial or industrial entity that operates in several countries. Economists, lawyers and I/NGOs have adopted different definitions of this business organization. The definition used by Detlev Vagts accords with the most commonly accepted definitions. Vagts explains that a multinational is a “cluster of corporations or un-incorporated bodies of diverse nationality jointly together by ties of common ownership and responsive to a common management strategy”.<sup>38</sup> The UN Working Group on the Working Methods and Activities of Transnational Corporations endorses the two terms “transnational corporation” and “other business enterprise”. A transnational corporation is defined as “an economic entity operating in more than one country” *or* as “a cluster of economic entities operating in two or more countries”. The term “other business enterprise” is broader and refers to any business entity, including a transnational corporation, regardless of its legal form and regardless of the international or domestic nature of its activities.<sup>39</sup> In this paper, the more neutral and non-defined term “multinational” is used.

No, or few, legal systems have acquired a separate form for association for multinationals, and the term multinational is not a legal term. Instead municipal laws utilize different forms for associations or legal forms for commercial and industrial entities, separating between associations, corporations, partnerships and sole proprietorships. According to the specific municipal legal system under which the entity is incorporated there can be sub-forms of these entities. Thus a business can be formed as a closed, governmental, moneyed, public, shell and foreign corporation. There are holding investment, joint-stock, mutual, surety, trust and limited liability corporations. Moreover, associations can be organized with varying degrees of formality and attributed different rights and duties. A legal and judiciary personality is one of the attributes that can be conferred to any of the

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<sup>37</sup> UN Doc. E/CN.4/Sub.2/2000/WG.2/WP.1. Pp. 21-28.

<sup>38</sup> Vagts Detlev. “The Multinational Enterprise: A New Challenge for Transnational Law”, I: 83 *Harv. L. Rev.* 1970, \*739. See also Muchlinski, Peter. *Multinational Enterprises and the Law*. 1995. Oxford UK & Cambridge USA: Blackwell. Pp. 12-15.

<sup>39</sup> See “Commentary for the Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights: Advanced Unedited Version”. Last edited April 11, 2003. *Unpublished*. Section I, paras. 20 and 21.

mentioned entities, i.e. the entity is recognized as a legal person under domestic law. To make things increasingly complicated, different legal systems confer the same type of association different attributes.<sup>40</sup>

A business partner is usually defined as one of two or more persons who are associated as joint principles in carrying on a business for the purpose of enjoying a joint profit. A partnership does not have to be equal and there are limited partners and partners with restricted management authority and liability. There are also partners in commendam, silent and dormant partners, etc., and governments or other official bodies can be business partners to multinationals.<sup>41</sup>

Whereas the expression “business partner” implies a joint venture or a similar arrangement, a business affiliate is a business entity that is effectively controlled by another or associated with others under a common ownership or control.<sup>42</sup> The cardinal example of an affiliate is a subsidiary/daughter company. Some legal systems proscribe that a business is only a parent company of another company if it holds more than a certain portion of the equity’s share capital, often 50%. If that limit is not reached, the principal company can call entities in which it has an aggregated interest of share capital for “associated companies”.<sup>43</sup>

A supplier is a vendor in respect to the multinational. Social Accountability International defines a “sub-supplier” as a “business entity in the supply chain, which, directly or indirectly, provides the supplier with goods or services, integral to, and utilized in/for the production of the supplier’s, and/or the multinational’s goods and/or services”.<sup>44</sup>

#### **1.3.4.3 International and municipal law**

There has been some controversy as to whether multinationals are most properly regulated under international or municipal laws. Some scholars have pointed to the fact that the same act can have different labels under international and municipal laws. Hence, summary executions can be tried as wrongful deaths, slave labor as false imprisonment, treaty violations as violations *per se*, torture as battery, outrage, intentional infliction of emotional distress, and so on.<sup>45</sup> The two sets of regulations interact and overlap. Sometimes it is necessary to establish that both are instituted and applicable.<sup>46</sup> The term municipal law here refers to norms instituted by individual States and recognized as norms according to domestic

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<sup>40</sup> It appears that civil law consider a partnership to be a legal person but that common law treat partnerships as an association of individuals rather than an entity with separate and independent existence.

<sup>41</sup> See <[www.dictionary.lp.findlaw.com/](http://www.dictionary.lp.findlaw.com/)>, (accessed June 10, 2003).

<sup>42</sup> *Id.*

<sup>43</sup> *Id.*

<sup>44</sup> See SA 8000.

<sup>45</sup> Bernstein Anita. “Conjoining International Human Rights Law with Enterprise Liability for Accidents”, I: 40 *Washburn L.J.* \*382, pp. 383-384.

<sup>46</sup> Concerning the ATCA, see *supra*.

regulations. International law encompasses statutory and customary norms recognized as a source of international law.

#### **1.3.4.4 Responsible, accountable or liable**

When a right has been violated and a breach of international law established, the wrongdoer can be held responsible, accountable and liable. The term responsibility can be interpreted broadly to encompass both moral and legal responsibility. Sometimes responsibility used side by side with the term liability. The term liability however can be used when specifically referring to an obligation to pay compensation or may refer to obligations arising from harmful consequences that are not prohibited by law. Accountable can be restricted to violations of criminal law and used in connection with guilt. There is however no uniform use of the words<sup>47</sup> and they will here be used interchangeably.

## **1.4 The Structure of the Inquiry**

Having detected and restricted the research question, identified the relevant terms and sources for information, the stage is set for attacking the inquiry. Chapter 2 provides a description of international business and multinationals' organizations structure and annotates on their implications for human rights. Chapter 3 and 4 scrutinizes applicable norms, and explains why the *de lege lata* approach is not satisfactory. Chapter 5 explores a *de lege ferenda* approach. The subsequent chapter, Chapter 6, capitalizes on previous findings and elaborates with an alternative concept. The last chapter, Chapter 7, sums up, expressively responses to the research questions and ends off by pointing towards unresolved issues.

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<sup>47</sup> Muchlinski, 1995, p. 254.

# 2 Globalization and multinationals

## 2.1 Globalization

The background and rationale behind the materializing of corporate social responsibility is multifaceted. One of these faces is globalization, which is generally thought to accommodate a wide matrix of issues. Phenomenon as crisis of the nation-state, statecraft, humanitarian interventions, terrorism, tourism, transnational trade, increased economic interdependence, communications and flows of capital and individuals across borders are all features that have been attributed to the notion of globalization. The research community appears to be divided whether the pros or cons of globalization outweigh the other. As Professor Zygmunt Bauman points out: for some globalization is what the world should pursue if it wants to be happy, for others globalization is the cause for the world's unhappiness.<sup>48</sup>

A prominent feature of globalization is the strengthened position of capitalism through the expansion of supraterritorial money and finances, emergence of transworld products, and the creation of transborder corporations and strategic alliances.<sup>49</sup> The result of this altered business environment is sometimes referred to as the new economic world order. Capital migrates according to the most favorable conditions, to where there are foreign direct investments to gain and where the wage market is lucrative. The result of this new world economy is, as popularly pointed out, that some businesses yield more economic power than certain States<sup>50</sup> and critics allege that unconstrained capitalism exploits the developing world and the earth's scanty resources and that global reckoning is therefore required along with an incorporated notion of sustainable development and good governance. A sustainable business and a good governed company comply with human rights and environment standards. The managerial strategy TBL proscribes that in order to achieve a sustainable development, a business has to take on environmental and social concerns while ensuring a return to the investors, i.e. business has to balance the monetary aim with its impact on society and the environment. When business achieves this, they become well-behaved corporate citizens.<sup>51</sup>

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<sup>48</sup> Bauman Zygmunt. *Globalisation – The Human Consequences*. 1998. Cambridge: Polity Press. P. 1.

<sup>49</sup> Scholte Jon Aart. *Globalization: a critical introduction*. 2000. Basingstoke: Palgrave. P. 111.

<sup>50</sup> See Wood Stephen G. - Scharffs Brett G. "Applicability of human rights standards to private corporations: An American perspective", I: *Am. J. Comp. L.* 531. See also Annex 1.

<sup>51</sup> Zadek Simon - Hojensgard Niels - Raynard Peter (eds.). *Perspectives on the New Economy of Corporate Citizenship*. 2001. Copenhagen: The Copenhagen Center. P. 19.

## 2.2 The Business Structure of Multinationals

Globalization has conclusively altered the premises for economic activities and production. Arguably, business success in the era of globalization is less depending on product innovation and knowledge, and more on institutional innovation, branding and the ability to diffuse company products. In this aspect, United Nations Conference on Trade and Development (UNCTAD) has identified key features entailing globalization at the corporate level, which include<sup>52</sup>:

- Global manufacturing or service activities, global sourcing, and global customers.
- Emergence of integrated international production systems. Regionally and later global integrated production and distribution networks are replacing geographically dispersed affiliates and fragmented production systems.
- Changes in corporate governance where hierarchical relationships between parent company and subsidiaries can be replaced by more heterarchical and network relations.
- The emerging networks are connected to other corporate networks through a greater range of alternative forms of co-operations and alliances.

It has been accounted that there are approximately 63,000 multinationals globally. They control a somewhat 500,000 affiliates and there are numerous sub-contractors that are linked to the multinationals and their affiliates.<sup>53</sup> The result is an intricate web with layers of licensees, brokers, importer-exporters, component suppliers, and subcontractors on top of subcontractors.<sup>54</sup> In this new globalized economy and international sub-contracting, flexibility has become crucial for survival. To remain competitive, sellers need to reduce costs, inventories and turnaround times. Modifying the formal relationship between the enterprise entities; i.e. subcontracting, out-sourcing or contracting tasks, including administrative posts, passes on these factors in addition to uncertainties for flighty demands to others. This process leads to an ability to adapt to shifting circumstances and particularly in the apparel industry, the manufacturing chain is remarkably mobile. Contracts can be shifted around between subcontractors within and between countries. Licensees can move production between subcontractors within as short periods a period as weeks. The rational behind substituting a supplier or sub-contractor can be found in the price competition and search for lower prices, changes in fashion, fluctuations in exchange rates and import/export quotas.<sup>55</sup> As of evidence of the accuracy of this scenario, international subcontracting is

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<sup>52</sup> UNCTAD: 1994.

<sup>53</sup> WIR: 1999.

<sup>54</sup> O'Rourke Dara. *Available at* <<http://www.ethicalcorp.com/News.Template.asp?IDNum=152>>, (accessed November 11, 2002).

<sup>55</sup> *Id.* See also Starcher George. "Socially Responsible Enterprise Restructuring", I: The European Bahia Business Forum. *Available at* <<http://ebbf.org/publications/english/publications004.html>>, (accessed September 20, 2002).

nowadays standard practice in industries,<sup>56</sup> global manufacturing is the fastest growing area of manufacturing globally<sup>57</sup> and there is an unprecedented scale of technology transfer through licensing agreements and sub-contracting.<sup>58</sup>

The traditional, but increasingly out-dated, way for an enterprise to internationalize is to establish foreign subsidiaries, sometimes by using sales agents as an initial step. The result is a pyramid-shaped business structure with the principal company at the top, controlling the wholly owned companies beneath. Each separate entity has a distinct formal and legal corporate existence, incorporated under domestic regulations. The line of control goes from the parent company on top as the policy-maker down to the subsidiaries carrying out orders. OECD has published an extensive review of empirical studies, which deduces that the level of autonomy of a subsidiary varies greatly. Some subsidiaries have relatively little autonomy depending on such factors as if the subsidiary produces standardized products, if the activities of the multinational group on the whole is integrated, if the subsidiary serves a market that extends beyond its own country, and if the parent company holds a large portion of the subsidiary's stock of shares. Contrary, the subsidiary is likely to be more autonomous if it mainly serves the local market, if it belongs to a smaller multinational group, if the subsidiary is running an activity different from that of the other members of the group, if an important share of the equity is owned by local investors and if the multinational group pursues a growth strategy.<sup>59</sup> These factors do accurately suggest that there is a big variety to the unitary pyramid business model. Even so, the model with one dominant and several servant entities probably represents the most commonly found perception of a multinational.

As already indicated, the contemporary reality is more complex and amplified. Firstly, abundant multinationals are not giant entities but quiet a few are small and medium-sized enterprises (SME) that are qualified as multinationals because they have global value chains, multiple connected with each other and other companies. They can operate globally both with respect to demands and supplies, although they may be petite in terms of capital, resources and employees. In some instances, suppliers are stronger

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<sup>56</sup> van Liemt, 1999, p. 1.

<sup>57</sup> Mathews John A. *Dragon Multinational: A New Model of Global Growth*. 2002. New York: Oxford University Press.

<sup>58</sup> WIR: 2001. See also WIR: 2002 and the Network Spread Index which measures the degree of transnationalism of a company by the number of counties in which it has foreign affiliates. P. 107.

<sup>59</sup> OECD. *Structure and Organization of Multinational Enterprises*. 1987. Paris: OECD. P. 35. See also Art. 6 of the ILO Tripartite declaration which stipulate: "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".

than the entity that qualifies as a multinational both in terms of capital, size and sophistication.

Secondly, commentators seem to agree that there has been a shift in emphasis away from the hierarchical, vertical control structures towards horizontal and network-like relationships.<sup>60</sup> This type of transnational network (TNN) allows for a greater organizational flexibility but necessitates a reconfiguration of the function of the parent company, the role of the subsidiaries, and the relationship with entities outside the own enterprise group and an increase in numbers of strategic alliances. The connection between the entities can be “horizontal”, e.g., joint ventures or other forms for alliances, or more “vertical”, e.g. supplier, distributor, or direct ownership and can be dressed in contracting, out-sourcing, licensing agreements or the alike. Sometimes that parent company is no more than a shell or a holding company. Additionally, the entities in a business venture can be self-standing units of decisions-takers, seeking its own customers and supposed to raise its own capital and does not rely on the parent company for strategic planning. The entities within the group may thus not necessarily interact on a regular basis but may only produce according to explicit demands from the other entities and will only seek the group’s assistance when it is cost effective. This matrix structure may result in conflicting competition within the network and sometimes the entities will turn to external suppliers whenever they can offer a more lucrative price rate. By operating this way, costs are reduced as each entity will not have to invest in all stages of the manufacturing and distribution chain. The Italian office equipment manufacturer Olivetti provides a classical empirical example. Olivetti operates a network of small and medium sized businesses through joint ventures and strategic alliances and has out-sourced a larger portion of its production.<sup>61</sup>

With respect to legal titles, Muchlinski has identified the most commonly found legal structures of multinationals as those based on contracts, equity based corporate groups, joint ventures between independent firms, informal alliances, publicly owned multinationals and supranational forms of international business.<sup>62</sup> Among the contractual arrangements are retail and franchising chains, licensing agreements and consortiums. An equity based group comprehends the unitary pyramid business structure. With respect to joint-ventures, the specific details that guides a joint venture are laid down in domestic statutes. According to some statutes, the state or a domestic firm must own a certain portion of the venture but the parties usually exercise

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<sup>60</sup> See e.g. Delapierre Michael - Mytelka-Krieger Lynn. "Blurring Boundaries: New Inter-Firm Relationships and the Emergence of Networked, Knowledge-based oligopolies", I: Colombo Massimo G. (ed.), *The Changing Boundaries of the Firm – Explaining evolving inter-firm relations*. 1998. London/New York: Routledge; Brewer Thomas L. - Young Stephen. *The Multilateral Investment System and Multinational Enterprises*. 1998. New York: Oxford University Press; Mathews, 2002; Muchlinski, 1995.

<sup>61</sup> Muchlinski, 1995, p. 63.

<sup>62</sup> *Id.*, pp. 61-81. Note that Muchlinski’s definition of a multinational is not concurrent with the legal person.

joint influence over areas of common concern. These ventures usually do not become independent legal persons, may take the legal form of a contract, a partnership or a limited liability company. Concerning supranational business firms, the European Union (EU) and the Andean Common Market (ANCOM) have introduced mechanisms for the creation of supranational multinationals as a means to encourage commercial and industrial cooperation. The choice of legal association will depend on indefinite number of facts including transaction costs, national and cultural characteristics and permissibility under regulations of the State in which the equity is incorporated. The important conclusion that Muchlinski draws after having compared the multinational in fact with the multinational in law is that multinationals have outgrown the simple managerial structure of the entrepreneurial corporation. In particular, Muchlinski argues that none of today's legal forms accommodate the linking of separate entities into an unified business structure.<sup>63</sup>

A complex structure of a corporate group and lack of formal titles can have implications for the line of managerial control. In the absence of direct formal owner titles or a chain of command, a parent company can exert influence over other entities through cross-directorship, policy formulations, technological control, and financial control.<sup>64</sup> Some companies exchanges formal titles and demand that suppliers adhere to the company's code of conduct, a right to make unannounced visits to the business' associates' sites, educate managers and/or include subsidiaries and sub-contractors in financial and social reports and audits. All these procedures are potential tools in a strategy of supply chain management.

Purchasing power is an additional type of *de facto* influence. Multinationals have a particularly high degree of leverage over their suppliers in the clothing and sports goods manufacturing industry, which are often wholly dependent on the multinationals for orders.<sup>65</sup> With respect to the civil action against Coca Cola, the plaintiffs explained that although the principal entity operated through wholly owned subsidiaries that in turn had their own wholly-owned subsidiaries, the corporate separation was illusory. The management control and direction was retained through a detailed supply agreement, which encompass most aspects of production and distribution. The headquarter additionally imposed standards on the subordinated entities through a code of conduct, required a right to make frequent inspections and to monitor day-to day activities with respect to the supply agreement, and required comprehensive and frequent compliance reports. Moreover, the bottlers' existence relied on "solely to bottle and distribute Coke products" and failure to comply with directives and to submit data would give the

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<sup>63</sup> *Id.*, 1995, p. 57 and pp. 80-82.

<sup>64</sup> Meeran Richard. "Liability of Multinational Corporation: A critical Stage in the UK", I: Kamminga – Zia-Zarifi, 2000, p. 252.

<sup>65</sup> EIRIS Research – Global Sourcing Standards. Cited in OECD. *Managing Working conditions in the supply chain – A fact-finding study of corporate practices*. 2002. P. 5.

Coca Cola Company the right to end the concession and the bottlers would be out of business.<sup>66</sup>

## 2.3 Implications for Human Rights Law

The process of globalization provides indefinite implications for human rights law. As an initial theoretical addendum to the human rights and business doctrine, we need to include a non-territorialistic cartography because as Scholte argues, we no longer inhabit a territorialistic world<sup>67</sup>. Multinationals operate at territorial places but have no territorial form and are not restricted to certain territorial areas like governments. A state-centered discipline like human rights might habitably treat accountability and governance as a territorial question but multinationals can operate across territorial borders. A flagrant example is the fact that multinationals can make a profit by merely transferring goods, i.e. exporting and importing, between entities located within different States but that all belong to the same multinational group. We will need to rethink accepted assumptions in order to incorporate multinationals into existing theories, or when creating new forms for accountability.

Furthermore, we need to draw on the findings of other disciplines to make human rights law effective. As discussed, social scientists have shown that multinationals are no unitary specie and that they are more adaptable than state actors, both in terms of location and organizational structure. In factual terms, a multinational is perhaps more accurately described as a cluster or web of beneficiary relationships between commercial and industrial entities, which are separated by corporate and contractual walls and combined by formal and informal mechanisms of control. A linked and additionally important conclusion is that the term subsidiary is not *per se* synonym to subordinate.

It appears that today's multinationals cannot operate without co-operating with other entities. Co-operations create cost advantages and flexibility, which is crucial for survival. Concurrently, contracting out chores constitutes a means to deviate responsibility and liability. In relation to suppliers and subcontractors, multinationals are buyers and the question must then be raised what kind and what degree of responsibility the law imposes on entities separated by contractual rather than corporate walls. In the subsequent chapters, the judicial way to over-bridge illicit use of corporate and contractual separation is explored in greater detail.

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<sup>66</sup> Sinadtrainal case, para. 24 *et seq.*

<sup>67</sup> Scholte, 2000, p. 61.

# 3 Responsibility According to Municipal Laws

## 3.1 Direct Liability and the Corporate Veil

The twin principles of individual personality of corporations and limited liability are universal and basic legal assumptions.<sup>68</sup> The inherent policy of these concepts is risk management and facilitation of capitalization. As a point of departure, the separating walls between distinct corporate identities are massive and a parent company does not carry any more responsibility over wholly owned subsidiaries than it does over any other commercial or industrial entity. There are however cases where corporate identities have been used for illicit reasons and to the detriment effects of third persons. To avoid misuse, courts have been empowered see through or disregard the corporate separation and to allow plaintiffs to receive compensation from the owners, corporate officers or directors for damages. This procedure of allowing a recovery that extends beyond the corporate resources is referred to as “piercing the corporate veil”; the veil being the imagined walls surrounding each corporate individual.

When the veil is pierced, the risk is transferred. This shift is not a foreseeable alteration, and with respect to the need of predictability and access to risk capital, the veil is upheld in most cases and only overlook when the abusive element is apparent. The risk for personal liability supposedly encourages corporations to observe legal requirements and to avoid damage to third parties. Moreover, it preempts the private entities the choice of where to place the risk in favor of ethics and concern for the plaintiff. Therefore, when a court disregards the corporate structure, it makes a moral statement between on the one hand the right of the owner to organize his/her business the way s/he sees fit and on the other hand, when the advantages gained by the particular business organization are unjust. As stated with respect to French law: “Il as sans doute le droit d’user des avantages que présent l’emploi de certaines forms juridiques, par exemples pour limiter sa responsabilité, mais encore faut-il que la société créée ait une vie réelle et ne serve pas seulement à masquer ses agissements.”<sup>69</sup>

Domestic jurisprudence has outlined morally justifiable grounds specifying when the corporate veil should be lifted. In the last section of the above quotation, a basic reason for pulling down the veil is found: the subsidiary cannot be regarded as a “bona fide independent entity”. In the case of CPC

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<sup>68</sup> Meeran, I: Kamminga – Zia-Zarifi, 2000, p. 252. See also Blumberg, 2001, \*494.

<sup>69</sup> Ripart, Georges, Roblart René, Germain Michael. *Traité de droit commercial, Tome 1*, 1996: 16e édition. Paris: Librairie Générale de Droit et de Juridsprudence, E.J.A. P. 615. See also Loi 25 janvier 1985, Art. 182.

and Capasco the plaintiffs argued that the corporate formation was only a façade and that:

alternative marketing arrangements of 1978 were *a device or sham or cloak for grave impropriety* on the part of Cape or Capasco, namely to ostensibly remove their assets from the United States of America *to avoid liability* for asbestos claims whilst at the same time continuing to trade in asbestos there.<sup>70</sup>

In the latter case the dependent entity was acting as an agent, and under the control, of the parent company. Such a deceptive agency relationship constitutes a justified reason as recognized by Lord Denning in *Littlewoods Mail Order Stores Ltd v. Inland Revenue Commissioners*:

I think that we should look at the Fork Manufacturing Co. Ltd. and see it as it really is – the wholly owned subsidiary of Littlewoods. It is the creature, the puppet, of Littlewoods, in point of fact: and it should be so regarded in point of law.<sup>71</sup>

When the entities have acted together, but not necessarily jointly or as equal parties, and although only the subsidiary acted as a formal contractual party, there could be deserving reasons for why the responsibility should be rerouted. If the multinational is the party that initially requested or even planned the actions, if the acting party has been instrumentally for a specific purpose, a court might find it appropriate to let the burden of accountability, at least subsidiary, fall on the principal. In *United States v. Yellow Cab Co.*,<sup>72</sup> and concerning anti-trust constrains, the court held that this was the case where there was “a conspiracy among those who are affiliated or integrated under common ownership (...) and further, (...), a conspiracy among those who are otherwise independent”.<sup>73</sup> The same stands have been taken in subsequent cases: when a principal acts as though the another entity was an office or an employee of the principal, the second entity is considered an *enterprise of convenience*.<sup>74</sup>

The intent when registering separate entities need not necessarily be to create a corporate veil. French law recognizes the intent to confer other attributes to the entities can be a reason to disregard the veil: “(...) la personnalité morale état librement créée peut être, par la force de l’acte créateur, dotée d’attributs ou des qualités arbitrairement conférés, par exemple une nationalité qui ne répondrait pas à celle des associés, ou un

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<sup>70</sup> Cited in Hicks Andrew – Goo S.H. *Cases and Materials on Company Law*. 1994. London: Blackstore Press Ltd. P. 93. (*emphasis added*)

<sup>71</sup> Cited in *id.*, p. 95.

<sup>72</sup> 332 U.S. 218, 67 S.Ct. 1560, 91 L. Ed. \*2010 (1947).

<sup>73</sup> *Id.*, \* 2018.

<sup>74</sup> Sullivan Lawrence Antony. *Hardback on the Law of Antitrust*. 1977. St. Paul: West Publishing Co. P. 326. This argument is also referred to as the “alter ego-argument”.

siège sociale fictif, ou un objet statutaire que masque l'activité réellement exercée par le groupement”<sup>75</sup>.

Where the multinational has benefited from the illicit action of a subsidiary entity it has been argued that “justice demands” that the separation of corporate identities is overridden in order to prevent fraud and to “achieve equity”.<sup>76</sup> The case against the U.K. based Cape *plc* provides an example. The Cape relocated its operations from Britain due to the prevalence of asbestos related diseases. The company then took advantage of the apartheid regime with asbestosis related cancer following suit. The profits were transmitted back to the home country, passing multiple layers of corporations on the way there.<sup>77</sup>

The inference which we draw from all the evidence was that Cape's *intention* was to enable sales of asbestos from the South African subsidiaries (...) while (a) *reducing the appearance of any involvement* therein of Cape or its subsidiaries, and (b) *reducing by any lawful means* available to it the risk of any subsidiary or of Cape as parent company *being liable* for United States taxation or subject to the jurisdiction of the United States courts, (...), and the risk of any default judgment by such a court being held to be enforceable in this country. (*emphasis added*)

Here the intent to deprive somebody of his/her rights was used to demand that the veil be lifted. Similar examples include cases when the subsidiary is insolvent and uninsured and it is plausible that the multinational have means for reparation (if e.g. the revenues have been transmitted from the subsidiary to the headquarter). It can also be that the affiliate has been dissolved and if accountability is limited to that subsidiary entity, the victim is left without means of redress. Under such circumstances, it can be perceived as fair that victims of a subsidiary's operations is given the possibility to address their claims towards an other person alongside the subsidiary as the direct violator.<sup>78</sup>

This procedure of ignoring the separation of legal identities has been imposed in a variety of situations and for the purposes noted, but also for situations that qualify as human rights violations. Whereas both common and civil law systems have endorsed the doctrine of piercing the corporate veil, the bulk of lawsuits when the doctrine has been invoked in connection

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<sup>75</sup> Ripart-René-Germain, 1996, p. 616.

<sup>76</sup> Equity principles have been employed by the ICJ and other international judicial bodies and are recognised as a source of law according to Article 38(1)(c) of the ICJ Statute.

<sup>77</sup> Narrated in Meeran, 2000, pp. 258 *et seq.*

<sup>78</sup> In sum, indicators of the above justifiable grounds are as follows. The subsidiary is under-capitalized; it is not a viable entity in and of itself. The parent company and the subsidiary have been organized for a common purpose and mutual advantage. The entities have common managing officers. One entity has given financial support to the other entity. No one factor is determining; it is the aggregated effect, which allows a court to disregard the corporate separation.

to human rights abuses have taken place in the UK and in the U.S. In the UK, cases include, *inter alia*, the *Ngcobo and Others v. Thor Chemicals Holdings Ltd*,<sup>79</sup> *Connelly v. TRZ*,<sup>80</sup> *Lubbe & Others v. Cape, plc*,<sup>81</sup> and *T & N Ferodo*.<sup>82</sup> They all concern the legal duty a parent company owes the victim of a subsidiary's operations and the majority of the cases has not resulted in a verdict of the merits or is still pending. Generally speaking, courts tend to uphold the veil in favor of the smooth functioning of the economic life and with the argument that a company is entitled to arrange and carry out the affairs of its group in such a way that it deems appropriate. It should also be observed that both in common and civil law systems the doctrine of piercing the corporate veil is applied to the relationship between a physical person and a limited corporation and between a parent company and a, foremost fully owned, subsidiary. A contractual veil, as between a seller and a buyer or between certain types of entities within a corporate group, is not surpassed with this procedure.<sup>83</sup>

### 3.2 Advertising Codes and Consumer Rights

An alternative legal ground with the same aim and potential of reaching a principal was invoked in the still pending case *Marc Kasky v. Nike, Inc.*<sup>84</sup> The basis for the legal action was a code of conduct, a memorandum<sup>85</sup> and public statements. The U.S. based apparel and shoe producer Nike, Inc. had in 1992 made public the company's code of conduct, vowing to uphold labor standards contained in the code. From the beginning of October 1996 through December 1997 Nike was subject to massive criticism for the working conditions at sub-contractors' plants in China, Vietnam and Indonesia. The workers at these plant were foremost women under the age of 24, who allegedly received revenues that were inferior to the applicable minimum wage, and who were required to work overtime, who were subject to physical, verbal and sexual abuse, and exposed to toxic chemicals, noise,

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<sup>79</sup> TLR 10 November 1995. See also *Sithole & Others v. Thor Chemicals Holdings Ltd and Anonh*, TLR, 15 February 1999.

<sup>80</sup> (1996) 2 WLR 251. [Hereinafter the Rio Tinto case]

<sup>81</sup> (2000) 1 WLR. 1545.

<sup>82</sup> Cited in Meeran Richard, "Unveiling of Transnational Corporation", p. 161-170, I: Addo Michael K. *Human rights Standards and the Responsibility of Transnational Corporations*. 1999. The Hague/London/Boston: Kluwer Law International. P. 169.

<sup>83</sup> There are examples of cases where the reasoning suggests openings for broadening the applicability to other entities. According to *Merchandise Transport Ltd v. British Transport Commission* (1962) 2 QB 173, 2006-7 "where the character of a company, or the nature of the persons who control it, is a relevant feature the court will go behind the mere status of the company as a legal entity, and will consider *who are the persons as shareholders or even as agents who direct and control the activities* of a company which is incapable of doing anything without human assistance". (*emphasis added*) Even though there is no specific reference made to business associates, the statement shows points in the direction of a wider use of the doctrine. At least, it cannot be ignored that when the requisites are fulfilled, and the elements of control and illicit conduct are satisfied, the doctrine could be found applicable.

<sup>84</sup> See *supra*.

<sup>85</sup> Exhibits marked R and JJ.

heat and dust without access to adequate safety equipment.<sup>86</sup> In 1993, Nike, Inc. released a memorandum stating that it assumed responsibility for its subcontractors' compliance with applicable domestic regulations and regulations on minimum wage, overtime, occupational health and safety, and environmental protection. Later, Nike issued press releases, wrote letters to newspapers, university and athletic directors and bought full-page advertisements saying that the workers producing Nike products were shielded from abuses, paid in accordance with applicable local laws, even paid on average the double, that the workers received free meals and health care and that the working conditions were in accordance with governing occupational and health regulations.

In 1998 the activist Mark Kasky filed a suit with a Californian court against Nike, Inc. and individual employees of Nike in managerial positions. Kasky argued that Nike, Inc *et al* had violated the California Business and Professions Code, § 172000 *et seq*; a consumer protection regulation aimed at safeguarding fair business practices<sup>87</sup> and § 175000 *et seq*; a regulation designed to curb false advertisements.<sup>88</sup> The plaintiff argued that the Nike code of conduct and the Nike Memorandum fitted the definition of an advertisement and that Nike had made false and misleading statements because of negligence and carelessness by purporting that their products had been produced under the circumstances put forward in the Nike code of conduct. Kasky claimed that Nike had assumed responsibility for its subcontractors' compliance with applicable domestic and international regulations. The plaintiff demanded that the court should require Nike, Inc. to cease with current conduct and denounce the allegedly false statements by undertaking a corrective public information campaign. Nike, Inc on the other hand argued that they were protected by the right to free commercial speech, as guaranteed under the first amendment of the U.S. Constitution. The Californian Supreme Court, reversing the verdict of the Court of Appeal, held with a vote of 4-3 that Nike had indeed violated Californian statutes:

(...) we conclude that when a corporation, to maintain and increase its sales and profits, makes public statements defending labor practices and working conditions at factories where its products are made, those public statements are commercial speech that may be regulated *to prevent consumer deception*.<sup>89</sup>

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<sup>86</sup> Nike case, \*7.

<sup>87</sup> The regulation defines "unfair competition" as: "any unlawful, unfair or fraudulent business act or practice and unfair, deceptive, untrue or misleading advertising and any act prohibited (...)".

<sup>88</sup> The advertisement code, § 17500 reads it "unlawful for any person (...) corporation, (...) or any employee thereof with intent directly or indirectly to dispose of real or personal property or to perform services (...) or to induce the public to enter into any obligation relating thereto, to make or disseminate (...) before the public in this state, (...) in any manner whatever (...) any statement, concerning that real or personal property or those services (...) which is untrue or misleading (...)".

<sup>89</sup> Nike case, \*"V. Conclusion" and \*970.

Strong concerns have been raised within the corporate world following the verdict. Critics fear a suit of similar lawsuits, and that corporations are required to uphold an “absolute truthfulness standard” in their operations. The critics see this as an inequality; the plaintiffs can bid their time investigating possible misconduct whilst corporations faced with allegations need to respond without delay to effectively advert and mitigate damage to the corporate reputation.<sup>90</sup> Secondly, the benchmark of the edged deceitful behavior, the one that Nike had debased, was the company’s individual code of ethics and a memorandum of understanding that Nike claimed to apply to its business partners. As such codes are voluntary and serve as a proactive measure, corporations might refrain from issuing or making codes public following the Nike verdict. The result of the judgment therefore only strikes down on those corporations that try to act on societal concerns for human rights abuses, while those that remain silent are secure from legal action. A code of conduct turns into a competition *disadvantage*.<sup>91</sup> Thirdly, critics have argued that the Nike code of conduct and memorandum were merely a way to deflect critics<sup>92</sup>, i.e. a tactic to fend off criticism and directed towards the public rather than the sub-contractors and their labor and that the advertisements should therefore not be legally enforceable between the multinational and its sub-contractors.

Moreover, the verdict reflects the view that a code of conduct made public is a contract between the issuer and the consumer of the issuer’s products. The Supreme Court of California stated that the underpinning justification for disregarding the corporate structure was concern of and for competitors and consumers<sup>93</sup>. The question has been raised if consumers have a right to be informed of the conditions surrounding the production.<sup>94</sup> This approach, if single-handed, raises concerns since the human rights violations and victims are handled as a *question of fact*. Without a Marc Kasky, a concerned Californian equipped with the will and ability to act on his concerns, Nike’s decision to release a memorandum and to make its code of conduct public, and the fact that the information reached Californians (Nike, Inc is registered in the state of Oregon), there would have been no trial. Thus, this approach might stop or prevent the abuses since the legal ground attempts to surpass entity law but it is not ideal since victims are marginalized. Consumers are put in focus and remedies are due to consumers and competitors, not to Asian workers.

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<sup>90</sup> Faulk Richard O. “A chill wind flows: California’s Supreme Court muzzles corporate speech”, I: 16 No. 21 *Andrews Del. Corp. Litig. Rep.* 11. June 24, 2002.

<sup>91</sup> The U.S. Federal Sentencing Guidelines for Corporations, where applicable, provides a mitigating factor as a base fine can be adjusted if the company has an effective program to prevent or detect crime. Such a program can include a code of conduct. See Federal Sentencing Guidelines – Sentencing of Organizations, Part A – General Application Principles. *Narrated in van Liem*, 1999, p. 10.

<sup>92</sup> See *e.g.* Ballinger - Olsson, 1997, p. 14.

<sup>93</sup> Nike case, \*V. Conclusion and \*970, *supra*.

<sup>94</sup> See *e.g.* Dejmepe Pierre. *The consumers’ right to be informed of the conditions of production*. Paper submitted to the Permanent Peoples’ Tribunal, International Forum. May 3, 1998: Worker and Consumer Rights in the Garment Industry.

### 3.3 Specialized Group Liability Laws and Product Liability

A substantive norm that is increasingly put in connection to human rights violations and that can be invoked to curtail illicit use of corporate identity is product liability regulation.<sup>95</sup> The allegations against Bayer AG provide such a case where the subject-matter may correspond with a human rights violation. Concerning the Bayer case, Brazilian health regulations required that protective measures, e.g. breathing devices and protective clothing, were utilized when dealing with the pesticide. Proper precautions were allegedly not taken, as this type of equipment was too costly for many manual workers, because many workers were illiterate and due to the tropical temperatures.<sup>96</sup> In order for a dangerous product to give rise to an actionable claim, the product must qualify as “defect”. There must be a proven production flaw, design defect or a situation of inadequate information.<sup>97</sup> With respect to the pesticide the latter category appears to be most feasible.

While the procedure of piercing the corporate veil allows for an exemption from the chief rule, product liability regulations is a type for specialized group liability that considers all or parts of the commercial chain as potential defendants. Hence, this ground offers the advantages of providing predictability. An overwhelming majority of all industrial countries have enacted liability regulations which target harmful consequences caused by products that are unsafe and put into circulation. The policy aim of product damage norms is to strike a balance between the general benefits of a prosperous economy of production and trade on the one hand, and the societal benefits of cutting down the rate of product accidents and provide compensation if they do occur, on the other hand. The balance is struck by allocating the risk to actors that presumably are best placed to control the release of unsafe products and best equipped to stand the risk. The range of potential defendants for a product-caused damage is given in a particular legal system and varies accordingly. As a point of departure, however, product liability regulations respect the legal entity and allocate the responsibility to the entity to which sphere of activity the faulty component can be attributed. Frequently, any member of the supply chain, such as processors, assemblers, processors, exporters, importers, wholesale

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<sup>95</sup> See also Addo who suggests that a corporation manufacturing goods, which causes pain to the level that exceeds the threshold for ill treatment, has breached a duty to respect the human rights of the victim. Addo, 1999, p. 27-28.

<sup>96</sup> See *supra*.

<sup>97</sup> Tebbens Duintjer H. *International Product Liability – A Study of comparative and International Legal Aspects of Product Liability*. 1979. Alpen Aau der Riju: Sijtholf & Noordholf International Publishers. P. 6-9.

distributors, retail sellers, lessors, bailers and donors are potentially liable.<sup>98</sup> In certain legal systems, importers as agents of foreign manufacturers carry an extended responsibility towards consumers and a claimant can arraign the importer directly and for the full loss instead of going after the manufacturer in a foreign country.<sup>99</sup> The applicability of product liability norms does thus extend beyond the vertical privacy of contract and along the commercial chain of production and distribution<sup>100</sup> and suppliers' duties are important as they affect the seller's obligations and ability to perform the contract with the buyer without damages.

Conclusively, product liability regulations help shape standards of conduct along the supply chain in certain aspects, comparable to the effect of codes of conduct. The legal-technical construction of product liability potentially reaches a multinational enterprise when a business partner or affiliate has violated human rights. The scope and applicability of product liability regulations does however make a wider use of claims on these grounds less feasible.

### 3.4 Agency Law

Something should also be mentioned about agency law, as it refers to the alter ego-argument for piercing the corporate veil.<sup>101</sup> According to agency law, a principal is bound and liable for acts of an agent within the limits of the agency and in both contract and tort.<sup>102</sup> The agency can be an *actual agency*, such as when the agent is employed by the principal. If the agency is established by a written or spoken word by the principal, the agency is said to be *expressed*. The agency relationship can however also be *implied*, meaning that it is reasonable to suggest that there was an intention to create an agency. Furthermore, the scope of the agency can be general or contained to a specific task or field. The relationship between a multinational and a business partner or affiliate can take either of these forms. It has been suggested that certain cases from the U.S. imply that a supposition of an

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<sup>98</sup> E.g. the EC Product Liability Directive places the obligation to place safe goods on the market on each of the producers jointly and on all professionals in the supply chain. 85/374/EEC, Art. 3.

<sup>99</sup> E.g. the EC Product Safety Directive holds the importer subsidiary responsible in case the manufacturer is absent. 92/59/EEC.

<sup>100</sup> In some legal systems general principles of contract may offer additional protection. Ordinarily however, both contractual and tort remedies are available and product liability is often treated as a specific form for tort.

<sup>101</sup> For an exemption, see *Adams v. Cape Industries plc*, 1990, Ch 433; 1991 1 All ER 929 (Scott J and CA). Cited in Muchlinski, 1995, p. 340, footnote 3.

<sup>102</sup> A principal – agent link creates a fiduciary relationship, which results in a fiduciary duty to act for the benefit of the other party. The possibility of using regulations guiding these types of relationships will not be discussed here, but their applicability should not be disregarded without consideration.

agency can arise simply out of the fact of common ownership between a parent and a subsidiary or between other affiliates.<sup>103</sup>

### 3.5 Concluding Remarks

The law uses legal identities as a basis for description of norms, responsibility and accountability. Nevertheless, both common and civil law systems admit exceptions to enterprise entity law. With respect to the procedure of piercing the corporate veil, numerous scholars have concluded that the procedure was formulated with the notion of sole proprietorship and entrepreneurs in mind.<sup>104</sup> So while objectives for piercing the corporate veil suggest that the illicit use of the twin concepts of legal personality and limited liability should be curtailed, the means are off target. Firstly because only the corporate veil and the relationship parent company-subsubsidiary is considered. Secondly because ways of doing business have conclusively changed. Furthermore, the level of detail of the means vary from tightly codified product harm provisions and advertisements codes to less applied and comprehensive doctrines and principles of law. The fact that there today is an increasing reliance on consumer power and engagement is noteworthy and also that both product liability regulations and advertising codes are enacted out of concern of consumers. This appears to be misdirected care from the point of view of human rights.<sup>105</sup> Taking a step back, the aggregated picture of incentives to comply with human rights standards along the supply chain is arguably fragmented and lacks considered coordination.

A quiet different observation; human rights violations, along the supply chain and others, are actionable through civil litigation and under contractual and tort law. Even in States that recognize the notion of corporate crime, human rights violations are actionable under civil litigation rather than under criminal charges. No case of alleged corporate human rights violations has as of yet been tried as a criminal case.<sup>106</sup> Professor Beth Stephens has repeatedly raised concerns over the appropriateness of this approach.<sup>107</sup> The litigation approach in general places the responsibility of

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<sup>103</sup> *Frummer v Hilton Hotels International* 19 NY 2d 533,227 NE 2d 851, 281 NYS 2d 41 cert., denied 389 US 923 (1967); *Delagi v Volkswagenswerk AG* 29 NY 2d 426, 278 NE 2d 895, 328 NYS 2d 653 (1972). The business model of TNNs was not considered in these cases. Cited in Muchlinski, 1995, pp. 323-324 and p. 340.

<sup>104</sup> See e.g. Blumberg, 2002, \*495. Blumberg argues that the law is developed for the entrepreneur businesses and that courts unconsideratly applied the concepts of entity law onto corporate groups.

<sup>105</sup> It could be argued that if the result under this approach is that the violations ceases, the care is not misdirected but indeed properly directed.

<sup>106</sup> This is to my understanding an accurate assumption. A more widely spread use of criminal charges does not seem feasible due to the political implications on inter-state relations.

<sup>107</sup> See “Enforcing Human Rights Through Domestic Litigation”, I: 24 *Hastings Int’l & Comp. L. Rev.* 401, spring 2001; “Conceptualizing Violence: Present and Future Developments in International Law”, I: 60 *Alb. L. Rev.* 579; “Translating Filartiga: A

holding corporations accountable on individual, and not on official bodies, which additionally enforces the importance of consumer power, possibly to the detrimental effect of other stakeholders.

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Comparative and International Law Analysis of Domestic Remedies for International Human Rights Violence”, 1: 27 *Yale J. Int’L.* 1. Winter 2002. The most commonly used argument is founded in the advocacy strength of human rights law, and suggest that it is appropriate that the State is involved in cases where acts that qualify as human rights violations have occurred. That increases the ”weight” of the claim and the stigmata if the corporation is found responsible. On the other hand, civil litigation allows plaintiffs to receive monetary compensation.

# 4 Responsibility According to International Law

## 4.1 Responsibility and Imputability as General Principles of International Law

Certain conduct generates proclaimed international responsibility. International law has related the concrete acts and omissions to rights and duties and subsequently in detail outlined the elements that make up responsibility generating breaches. The question of imputing responsibility has however gained less attention. Brownlie has even suggested that imputability may be a superfluous notion and that it erroneously creates a fiction.<sup>108</sup> It is outside the scope of this paper to examine if Brownlie's stipulation is accurate for international law in general. For CSR, the question of attributing responsibility to corporate headquarters for misdeeds of affiliated entities is, if not paramount, at least highly significant and two focal points are to be noted with respect to general principals of international responsibility. Firstly, international law endorses the concepts of agency, joint tortfeasorship and has developed theories of imputability.<sup>109</sup> For example, in some cases a State can be responsible for an illicit act committed by a private entity. Secondly, there is substantive authority in support of the view that international law relies on objective tests to determine international responsibility, and that international law to a lesser extent is concerned with the mental state of mind of alleged offenders.<sup>110</sup> Brownlie ascribes this unique trait of international law to the nature of international life and as a consequence of States being the centre of attention and the difficulties of establishing the mental state of a natural person.<sup>111</sup> The same arguments can be made for corporate life and corporate entities. The objective responsibility test is however subject to exceptions and not mechanically applied. A party can exculpate his or herself by showing proof of due diligent conduct. Thus, international responsibility is generally activated by the breach of duty and by imputing that duty to a certain actor, but without the requirement of a criminal mind or fault in its ordinary sense.

## 4.2 Complicit Liability

In applied international law, our research question has chiefly been treated as a situation of complicit liability. Complicity is the notion of indirect

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<sup>108</sup> Brownlie Ian. *Principles of Public International Law*. 1998. 5<sup>th</sup> ed. Oxford: Clarendon Press. P. 438.

<sup>109</sup> *Id.*, pp. 457 and 675. Malanczuk, 1997, pp. 257-260, incl. auxiliary footnotes.

<sup>110</sup> Brownlie, 1998, p. 439 and 441. Malanczuk merely states that the issue of a subjective element is controversial. 1997, p. 258.

<sup>111</sup> Brownlie, 1998, p. 440.

participation in a criminal enterprise and should be separated from joint liability where more than one party together commits the violations, such as joint tortfeasorship. The Special Rapporteur on State Responsibility has stated that Article 16 of the International Law Commission's (ILC) Draft on Responsibility of States for internationally wrongful acts defines conduct that in municipal law would be considered as complicity.<sup>112</sup> The scope can also be found in the article which states:

A State which *aids or assists* another State in the commission of an *internationally wrongful act* by the latter is internationally responsible for doing so if: (a) That State does so *with knowledge* of the circumstances of the internationally wrongful act; and (b) The act would be internationally wrongful if committed by that State.<sup>113</sup>

Subsequently, complicity has been interpreted to encompass more than aid and assistance as Article 16 suggests. The International Criminal Tribunal for Rwanda (ICTR) has through a comparative analysis of common and civil law found that “aid and abet, counsel and procure”, (“l’aide et l’assistance, la fourniture des moyens”) reflects the main forms for complicity.<sup>114</sup> Moreover, the International Tribunal for the Former Yugoslavia (ICTY) has suggested that mere presence can constitute complicity. In the Furundzija Judgment the trial chamber found that “an approving spectator who is held in such respect by the other perpetrators that his presence encourages them in their conduct, may be guilty of complicity in a crime against humanity”.<sup>115</sup> According to the court “moral support which has a substantial effect on the perpetration of the crime” can satisfy the demand of *actus reus*.<sup>116</sup> With this view, complicity comes both in the form of tangible and non-tangible assistance, starting with the planning, passing over instigation, orders, aiding or abetting in the planning and preparation, to the actual execution of the crime. Importantly, it is not necessary that the principal perpetrator has been identified or proven guilty to find somebody to be an accomplice. Complicit liability is suggestively independent of the principal.

The objective element that makes up the physical action in complicity to a crime is according to above cited Article 16 an *internationally wrongful act*. That is clarified in Article 3 in the same as being a breach of an international obligation attributed to the State under international law. The fundamental subjective element of an internationally wrongful act, the *mens rea*, appears to be knowledge, which has been codified in Article 16. This entails that omission in the face of an internationally wrongful crime can

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<sup>112</sup> Crawford James, International Law Commission. “Second Report on State Responsibility”. UN. Doc. A/CN.4/498/Add.I. 1 April, 1999.

<sup>113</sup> GAOR 56st Session Supp. U.N. Doc. A/56/10, chp. I.V. E.I., Article 16. [Hereinafter the ILC Draft] (*emphasis added*)

<sup>114</sup> Prosecutor v. Furundzija, IT-95-17/1, (10 December 1998), para. 535. [Hereinafter the Furundzija case]

<sup>115</sup> *Id.*, para. 207.

<sup>116</sup> *Id.*, para. 249.

constitute complicity. Similarly, the ILC draft recognizes in Article 3 that omissions can satisfy the required *mens rea* when States are implicated in internationally wrongful acts.

### 4.3 Corporate Complicity

Ample statements imply that corporations can be considered complicitly liable for human rights violations. When launching the Global Compact, Kofi Annan stated that corporations should refrain from becoming implicated in human rights deprivations.<sup>117</sup> Human Rights Watch has clearly stated that they believe that corporations have a responsibility to avoid being complicit in human rights violations.<sup>118</sup> A U.S. District Court has regarding corporate complicity stipulated: “It would be a strange tort system that imposes liability on State actors but not on those who conspire with them to perpetrate illegal acts through the coercive use of State power”.<sup>119</sup>

Andrew Clapham of Graduate Institute of International Studies, Geneva and Scott Jerbi of the Office of the High Commissioner for Human Rights have categorized three scenarios where a business may be declared complicitly liable along with an offending State actor.<sup>120</sup> *Direct* complicity would occur when a business knowingly assists a State in violations. Examples include Dutch Shell that is under charges in an American court for, *inter alia*, having provided logistic support for a military campaign aimed at ending peaceful demonstrations against oil corporation’s extraction operations in Nigeria.<sup>121</sup>

*Beneficial* complicity refers to when a corporation directly benefits from violations committed by someone else.<sup>122</sup> Clapham and Jerbi conclude that businesses that knowingly benefit from violations are liable on charges of complicity. They have further qualified the case against Unocal on charges of torture, forced relocation, forced labor and child labor in Myanmar as a case of beneficial corporate complicity. In the case in question, the State controlled oil company carried out the alleged violations.<sup>123</sup>

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<sup>117</sup> Address to World Economic Forum (January 31, 1999), UN Doc. SG/SM/6881/Rev.1. 1999. See also Principle 2 of the Global Compact that suggest that: “Businesses should ensure that their own corporations are not complicit in human rights abuses”.

<sup>118</sup> Human Rights Watch. *The Enron Corporation: Corporate Complicity in Human Rights Violations*. 1999. New York/Washington/London/Brussels: Human Rights Watch. P. 105.

<sup>119</sup> *Eastman Kodak v. Kavlin*, 987 F. Supp. 1078 (S.D. Fla 1997), \*1091.

<sup>120</sup> “Categories of Corporate Complicity in Human Rights Abuses”, I: 24 *HASTICLR*, \*339.

<sup>121</sup> See *e.g.* the Magazine Tomorrow, 26 Sept. 2002. <<http://www.tomorrow-web.com/2002/sep/020926.html#020926b>>, (accessed February 24, 2003).

<sup>122</sup> ICHR argue that beneficial complicity is not a question of legal responsibility but rather a moral issue. ICHR. *Beyond Voluntarism Human rights and the developing international legal obligations of companies*. 2002. P. 132.

<sup>123</sup> Clapham - Jerbi, \*347.

Finally, a business is *silent* complicit when it fails to raise concerns of human rights violations that occur on a systematic and continual basis.<sup>124</sup> This assumption complies with the *mens rea*-standard of knowledge and claims stipulating that multinationals have a duty to act and respond to human rights abuses or even withdraw their operations where abuses are widely spread.<sup>125</sup> One of the most well known cases of corporations actually making public their concern for widespread human rights abuses was when Shell International spoke up concerning the status of Apartheid-South Africa.

The fact that the crime of complicity is considered independent of the principal will be important in cases where a multinational acted in commission with a State actor. An argument for disregarding the requisite of State action is that when the principal actor is a sovereign government or governmental body, that actor is able to render itself untouchable of compensatory claims with its law-making and enforcement powers. In Myanmar, e.g., “the Government continued to rule by decree and was not bound by any constitutional provision providing for fair public trials or any other rights. Although remnants of the British-legal system were formally in place, the court system and its operation remained seriously flawed, particularly in the handling of political cases.”<sup>126</sup> Cases involving multinationals are potentially politically sensitive due to the economic consequences and in these and similar cases host States might lack the will to enforce human rights. If the corporate complicity is self-standing, the business can still be tried elsewhere.

#### 4.4 Complicity Between Non-State Actors

So far we have only considered the case where a non-State actor is acting in commission with a State actor and this perception is prevalent in literature and jurisprudence. The traditional perception of human rights law suggests that its applicability demand State action and that the law does not reach the realm between private actors. Quiet contrary, the introductory examples evidence cases where human rights violations allegedly have been committed within the relationship between parties that are fully within the private sphere. In the debate of the horizontal effects of rights or *drittwirkung*, claims in favor of succumbing the State action element are usually built on one or more of the following rational:<sup>127</sup>

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<sup>124</sup> See <<http://www.unglobalcompact.org/Portal/>>, under Principle 2, (accessed February 18, 2003).

<sup>125</sup> See Jungk Margaret. *Deciding Whether to do Business in States with Bad Governments*. 2001, p. 3. Available at <<http://www.humanrightsbusiness.org/>>, (accessed February 20, 2003).

<sup>126</sup> U.S. Dept. of State, Burma Country Report on Human Rights Practices for 1998, 815 (1999). Cited in Forcese Craig. “ATAC’s Achilles Heel: Corporate Complicity, International Law and the Alien Tort Claims Act”, I: 26 *YJIL* 487, \*494.

<sup>127</sup> Another argument not discussed here is crimes committed *ultra vires*. If a multinational could be found complicit with a partner or affiliate in defiance with international law, would that include all acts where the subject and objective elements are satisfied, or should

1. The relevant provision makes no explicit reference to State action and the provision therefore applies to all actors.
2. When a norm has the character of *erga omnes* it applies to all actors regardless of the wording in codifications.
3. A contextual interpretation suggest that all, including non-State actors are required not to violate human rights although only States are responsible for preventive measures, to punish offenders and possibly compensate victims.<sup>128</sup>
4. It is impossible to differentiate between the public and the private sphere, and attempting to do so can be both illusory and dangerous.<sup>129</sup>

Regarding the first argument, when a provision does not explicitly mention the State or government, that fact could be interpreted as the provision applies to all actors. The Convention on the Prevention and Punishment of the Crime of Genocide for example explicitly prohibits genocide whether committed by “constitutionally responsible rulers, public officials or private individuals.”<sup>130</sup> Hence, a tentative conclusion implies that international rules only apply to corporations, including other non-State actors, when the standard does not demand State action or when the non-State actor is in complicity with the State.<sup>131</sup> With this argument, provisions are divided into those that are relevant to non-State actors and those that are not.

With respect to the second argument, obligations of *erga omnes* character should with the words of the International Court of Justice (ICJ) be “of concern of all by their very nature”,<sup>132</sup> and should thus also apply to non-State actors.<sup>133</sup> Presuming that the prerequisite of complicity is satisfied, a multinational could thus be found liable for human rights abuses perpetrated by a third party if the violations qualify as *erga omnes* norms. This approach however creates a distinction between the set of human rights that are of *erga omnes* character and the rest.

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there be a distinction made between acts committed within the scope of the cooperations, and acts outside. The first option is probably the most plausible one in respect of control of the chain of action.

<sup>128</sup> Clapham Andrew. *Human Rights in the Private Sphere*. 1993. Oxford: Clarendon Press. P. 93 *et seq.* Clapham discusses “two approaches”: a contextual interpretation and the impossibility of differentiating between the private and the public sphere. See pp. 94-95.

<sup>129</sup> *Id.*, p. 94.

<sup>130</sup> Convention on the Prevention and Punishment of the Crime of Genocide (1948). Article IV.

<sup>131</sup> Stephens Beth. “The Human Rights Obligations of Multinational Corporations Under International Law, Draft—discussion paper for University Seminar on Human Rights 2000: Non-State Actors and Human Rights, November 14, 2000”. *Unpublished*.

<sup>132</sup> Barcelona Traction Light and Power Co., Ltd, (Belgium v. Spain). 1970.

<sup>133</sup> Jungk Margaret. “Human Rights Concerns for Companies Operating Abroad”, I: Addo, 1999, p. 176. Jungk argues that *erga omnes* obligations should be given prioritized concern.

Concerning the third argument,<sup>134</sup> the State action requirement can be overlooked through a contextual interpretation by focusing on the aim of the relevant provision. Indirectly, by prohibiting a State to act in a certain way or to place the responsibility to punish persons under the State's jurisdiction for certain acts does arguably raise a duty to respect the rights of others. This argument is often raised in connection with corporate abuses on allegations that multinationals take into account host States' will and ability to control and punish abuses when moving their activities.<sup>135</sup> With respect to the State action requirement in the UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment,<sup>136</sup> Michael K. Addo, barrister and of the University of Essex, argues that while the Convention require that torture is conducted in the sphere of State power, the underlying justification behind the prohibiting against torture is the concern for the victims. For a victim, it is purportedly without much distinction by whom and where the ill-treatment takes place. All actions amounting to actions comparable to torture would thus fall under the prohibition. Also concerning torture, the court in the Unocal case reached the same result by arguing that "while crimes such as torture and summary execution are prohibited by international law only when committed by State officials or under color of law (...) the law of nations has historically been applied to private actors for the crimes of piracy and slave trading."<sup>137</sup>

In addition, a contextual interpretation can lead to the conclusion that the State action element is satisfied in cases where the State has a duty, deriving from international law, to punish but fails to do so. This corollary aspect of the State duty to secure the rights of everyone is expressed elsewhere and, *inter alia*, found in the European Convention for the Protection of Human Rights and Fundamental Freedoms, Article 1; the American Convention on Human Rights, Article 1(1); and the African Charter on Human and Peoples' Rights, Article 1. States and governments are hence conferred supervisory and punishing roles but all persons are required not to impede the effective implementation. With this view, States are the only actors that are responsible for the *protection* of human rights, but other actors are still obliged not to impede with that protection and full realization. To be implicit in human rights infringements could thus be perceived as a

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<sup>134</sup> A contextual interpretation is similar to what sometimes is referred to as *indirect obligations*, which are formulated as a request to States to bring municipal law into conformity with obligations under international law. According to the writings of the philosopher Kelsen, if domestic courts apply municipal laws that incorporates and enforces international law, they indirectly give effect to international law.

<sup>135</sup> Examples include *Ngcovo and Others v. Thor Chemicals Holdings Ltd.*, TLR 10 November 1995; *Sithole & Others v. Thor Chemicals Holdings Ltd and Anoth*, TLR, 15 February 1999. Thor manufactured mercury-based chemicals in England but transferred their operations to Natal, South Africa after criticism from the British Health and Safety Executive when elevated mercury levels were found in the blood and urine of the workers. In Natal, three workers died and others were poisoned. Criminal prosecutions led to a fine equivalent to 3000 British pounds.

<sup>136</sup> UN Doc. A/Res/39/46.

<sup>137</sup> Unocal, 110 F. Sup. 2<sup>nd</sup>, \*1303.

violation regardless if the perpetrator is a State actor, and regardless if the State fulfils its duty.

With respect to the last argument, an increasing number of what has been perceived as official functions are nowadays contracted to private entities<sup>138</sup>, and the effective realization therefore demands that non-State actors can be perpetrators of human rights. If human rights law makes a distinction between public and private breaches of human rights, the application of human rights law to non-State actors would be adjusted according to the State. Cultural relativism, usually contested, could then be perceived as justified. On the other hand, a greater scope of application would increase the “privatization” of human rights.

Based on arguments underpinning *drittwirkung* combined with complicity, a multinational could be proven accountable for violations of human rights committed by business associates. The Nike case could be considered as beneficial complicity: Nike was allegedly able to buy the suppliers’ products for a lower price because of some of the alleged human rights violations. If the knowledge standard is fulfilled, it is possible to invoke silent complicity. The case of the South American bottlers is arguably a case of beneficial or silent complicity. Depending on the nature of assistance, it might also qualify as direct complicity. The Bayer case could be tried on any of the three forms for complicity based on the support the vendors received from the multinational; the benefits gained and knowledge held.

## 4.5 Concluding Remarks

International law has developed few substantive rules openly pertaining to multinationals. There are more indirectly applicable norms but it appears that emphasis henceforth will continually surround multinationals’ status under international law and voluntary measures, rather than actionable and practical obligations. Public international law is not at a point where it applies to the commercial relationship between private entities that infringe on human rights law. *A fortiori*, a multinational could be found complicit liable where the crime can be attributed to a State actor.

Conclusively, domestic litigation and civil action law presently provides the bigger piece of the puzzle. The domestic litigation approach has however several drawbacks to it. For example, it opens up for bargaining between States to attract foreign investments. An unequal bargaining power between States and corporations can result in lenient standards in order to create jobs. More lenient enforcement of existing standards can lead to competition between domestic sub-contractors to cut costs and offer competitive prices. Apart from lack of will to regulate corporate abuse, a weaker State might be deficient in power to proscribe or uphold illicit

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<sup>138</sup> Examples include medical facilities, penitentiaries, churches, broadcasting and tutoring institutions.

corporate conduct. There have even been cases when States have sought access to other States' courts in order to enforce the rights of its citizens<sup>139</sup>.

Furthermore, the process of shaping standards for multinationals depends heavily on municipal common law for analogy and pragmatics.<sup>140</sup> Coupled with the conclusion that domestic litigation is found applicable to corporate human rights cases should attract attention from international and civil law lawyers: it is Anglo-American litigation lawyers who are controlling the development. The appropriateness aside, *de lege lata*, we will need to capitalize on corporate laws to enforce human rights law.

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<sup>139</sup> The South African Government joined their compatriot plaintiffs against a British company for deeds that took place in South Africa (Statement of Case on Behalf of the Republic of South Africa, 26 May 2000, *Lubbe v. Cape Plc*, 1 W.L.R. 1545 (2000). Appeal taken from Eng. C.A. *Cited in* Stephens, 2001, \*409). The Government of Ecuador asked U.S. federal courts to settle a case against Texaco for damages to the environment. The Ecuador legislator stated that the US represented the only possibility of "finding just treatment" for the victims (*Jota v. Texaco, Inc.*, 157 F.3rd 153, 156-58 (2d Cir. 1998)). *Cited in* Stephens, 2001, \*409.

<sup>140</sup> Bernstein Anita. "Conjoining International Human Rights Law with Enterprise Liability for Accidents", I: 40 *Washburn L.J.* 382, \*407. The view is not surprising considering that the US and England provides generous rules of jurisdiction. The appropriateness of such an order and usefulness in locating norms of customary international law can however be questioned.

# 5 Rethinking Means of Imputability

## 5.1 The Need for Progressive Development

Recent intensified integration and interdependence in the global economy and global production has altered the relationship between the State, the civil society and multinational enterprises. As we have seen, this alternation has been reflected in *inter alia* societal outcries over salient corporate behavior, in a number of non-binding legal instruments and via an emerging string of lawsuits against corporations for violations of international human rights law. There have been several court cases, in foremost common law countries, where plaintiffs have tried to attribute accountability to a principal entity or violations of human rights committed in the supply chain. Pursuant to this end, human rights law is conjoined with corporate law and how arguments and reasonings are conditioned by the existence of two, possibly competing, objectives: the need to make human rights effective and the need to create a favorable investment climate. Nevertheless, in the foregoing analyses we have concluded that, at this stage, there is an evident lack of applicable substantive norms on the one hand and suggestively also a deficiency in oversight and coordination of the plausible norms on the other hand. There is irrefutably a need for progressive development. In the subsequent sections, we will look into attempts to reconcile the competing objectives within the legal paradigm and in light of the need to curb corporate human rights violations along the supply chain.

## 5.2 Redefining the Legal Notion of a Multinational

As already concluded, multinationals have outgrown their legal perception. In factual terms a multinational is often detached from the legal perception. In this connection, it has been proposed that the legal notion should be redefined. Muchlinski argues that multinational enterprises can and should be treated as a distinct type for business organization under the law and for the purposes of economic regulation.<sup>141</sup> Now, Muchlinski does not consider human rights but it would equally be possible to adopt a definition more suitable to CSR. Such a definition could disregard the legal personality of the entities for the purposes of human rights violations. By adopting a definition limited for the purposes of CSR, the twin concepts of legal personality and limited liability would in other respects remain untouched. Accountability would follow the definition of the multinational and the concept of limited liability stay intact. Detlev Vagts stated already in 1970

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<sup>141</sup> Muchlinski, 1995, p. 15.

that “the understanding of lawyers as to the characteristics of the MNE is often unsophisticated and erroneous, for there has been no merger between law and economics”<sup>142</sup> and further “To deal realistically with the MNE, one must go beyond the conceptions of legal entity or surrogate-entrepreneur to an understanding of its internal structure.”<sup>143</sup>

The most recent attempt by the UN to create a code for multinationals, “The draft norms on the Responsibilities of Transnational Corporation and Other Business Enterprises with Regard to Human Rights”,<sup>144</sup> deploys two methods that can be used to deal with the entity veil. It is firstly the definition and secondly the requirement that TNCs apply the norms in relation to other entities. The alternative definition of a multinational implies that the draft code is mindful of entity law, stipulating that an assembly of entities qualifies as a single TNC.<sup>145</sup> Both individual and collective acts are covered by the substantive parts of the draft norms and apart from the fact that the draft norms are only applicable if the multinational operates in more than one country, the definition is flexible and applies to limited corporations, thrust, joint ventures, Japanese keiretsu, and so on. Moreover, the draft code does not draw a line between wholly owned and other subsidiaries and therefore appear to apply to all entities in which the multinational holds equity shares.

Redefining the notion of a multinational has been successfully deployed and made operational. EC competition law in particular has worked with this approach and has created a dynamic definition. The European Court of Justice (ECJ) has ruled that the term “undertaking” in Article 81 of the EC Treaty encompasses companies under common economic control and that the unity of the group shall be the determination and not the legal personality. In *Imperial Chemical Industries Ltd v. EC Commission*<sup>146</sup> the court held that:

The fact that a subsidiary has separate legal personality is not sufficient to exclude the possibility of imputing its conduct to the parent company.<sup>147</sup>

The court implied that this is the case where there is a finding of a concerted practice or common interest, which allows leverage and autonomy for the legally separated entities. The level of independence is thus used to limit the notion of a multinational:

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<sup>142</sup> Vagts, 1970, \*744.

<sup>143</sup> *Id.*, \*751.

<sup>144</sup> The alternative definition reads: “a cluster of economic entities operating in two or more countries”. UN. Doc. E/CN.4/Sub.2/2002/13, annex and the advanced unedited version of the draft code of April 9, 2003, *unpublished*. [Hereinafter the draft norms See also *supra*.

<sup>145</sup> *Id.*, Articles 20 and 21.

<sup>146</sup> Case 48-69, decided on 14 July 1972: (1972) ECR 619, (1972) CMLR 557. [Hereinafter the “ICI case”]

<sup>147</sup> *Id.*, para. 132.

Such may be the case in particular where the subsidiary, although having separate legal personality, *does not decide independently upon its conduct on the market, but carries out, in all material respects, the instructions given to it by the parent company.*<sup>148</sup>

And further:

In the circumstances the formal separation between these companies, resulting from their separate legal personality, cannot outweigh the unity of their conduct on the market for the purpose of applying the rules on competition.<sup>149</sup>

Redefining the notion of a multinational provides a means to attack corporate separation, which is not imposed *ex post facto* as the doctrine of piercing the corporate veil and which relief potential claimants of having to prove fraudulent intent. However, part of the problem remains. Firstly, a non-dynamic reconceptualized understanding of a multinational pushes the corporate veil further away but it does not tear the veil down. Secondly it is easier to see how a wholly owned subsidiary could be included in the multinational's sphere than how suppliers and sub-contractors would. In particular, when there is no direct link between the core person of the multinational and a sub-contractor of a supplier, reshaping the understanding of the multinational to reach the sub-contractor is a drastic measure and creates a non-predictable alternation of the business structure. Moreover, creating a distinct legal concept for multinationals for the purpose of human rights may have unwanted effects on other areas of law such as tax and anti-trust law.

### 5.3 A Distinctive Form of Corporate Complicity

A non-*ex post facto* to delimit responsibility is combining the development of distinct substantive norms with the notion of complicity. ICHR suggests that international law is indeed embarking down this road by incorporating two standards of corporate complicity; the notion of the sphere of influence or the standard of proximity.<sup>150</sup> According to the ICHR there are several reasons why corporate accountability should be assessed based on the connection with the victims and/or offenders. The first argument is founded on the notion of power. The company is assumed to possess power, authority, influence, leverage or opportunity to act or intervene on a human rights violation and should therefore be obliged to do so. The second argument is built on the access to information and the well-recognized legal principle of predictability. The company is the party that is most likely to be aware of and realize, or at least should be able to, human rights implications

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<sup>148</sup> *Id.*, para. 133. (*emphasis added*) Note that these elements are similar to those used to decide when to pierce the corporate veil.

<sup>149</sup> *Id.*, para. 140.

<sup>150</sup> ICHR, 2002, p. 136.

steaming from its acts and omissions.<sup>151</sup> Thirdly, enterprises have an obligation to care for their employees since they make use of them in their operations. These “closeness-standard” also take the nature of the violations into account. The positive duty to act and react is increased when the violation directly concerns the ability to survive.<sup>152</sup>

Both the standard of sphere of influence and the standard of proximity have been used on several occasions and the concepts are recognized in criminal law as well as in tort law. The first principle of UN Global Compact calls on businesses to “support and respect the protection of international human rights within their *sphere of influence*”. The Caux Round Table principles similarly advocate for “responsible action by individuals in their *sphere of influence*”.<sup>153</sup> In the U.S. the proximity standard has been used when asserting the State action requirement. The court in the Unocal case, concerning a joint venture, stated, “when the state actor commits the challenged conduct, the plaintiffs must establish that the private individual was the *proximate cause* of the violation”.<sup>154</sup> In the end, the plaintiffs did not succeed in doing so, because they did not offer sufficient evidence that Unocal “*controlled* the Myanmar military’s decisions to commit the alleged tortuous acts”.<sup>155</sup> Following the Unocal case, U.S. jurisprudence combines proximity with control.<sup>156</sup> The proximate causation standard was also used to dismiss a case against adidas-Salomon for human rights violations allegedly committed by the Chinese government.<sup>157</sup> The court stated that it was not possible to hold adidas-Salomon liable for the violations committed during the production of footballs by Chinese prison labor because the only facts that linked the company to the project was the logo on the soccer balls. Proximity was not established since the plaintiffs failed to identify any formal agreement and because they had not alleged that adidas-Salomon played direct role in either the plaintiff’s incarceration or their treatment while in prison.<sup>158</sup>

The most prominent advantage of the idea of a substantive norm for corporate complicity is its inherent flexibility, which may be difficult to incorporate in a classification. As corporate complicity is imposed *ex post facto* and *in casu* only where there is an illicit action it does not affect other areas of law or legal concepts. Moreover, there is a risk that either standards or at least the standard of proximity will tend to focus on analyses of the corporate structure in question. A look at the complex corporate figure of

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<sup>151</sup> *Id.*

<sup>152</sup> *Id.*, p. 141.

<sup>153</sup> Preamble of the Principles.

<sup>154</sup> Unocal, 110 F. Sup. 2d, \*1307 (citing *Browner v. Inyo County*, 817, F. 2d 540, 547 (9th Cir. 1987)).

<sup>155</sup> *Id.*, \*1310. (*emphasis added*)

<sup>156</sup> Breed Michael Logan. “Regulating Our 21st-Century Ambassadors: A New Approach to Corporate Liability for Human Rights Violations Abroad”, I: 42 *Va. J. Int’l L.* 1005, \*1019.

<sup>157</sup> *Bao Ge v. Li Peng*, 2000 U.S. Dist. LEXIS 12711, 15-16 (D.D.C. 2000).

<sup>158</sup> *Id.*, \*16.

RTZ, where the distance between the English mother company and the asbestos generating subsidiaries was significant and highly complicated, explains why that would not be feasible or appropriate approach to impute responsibility.

If there are no applicable norms and acts to be complicitly liable to, developing the standards of corporate complicity will lack teeth. Even if complicity as such is considered self-standing, it is difficult to imagine that a court of law would find a compliciting party liable while the perpetrating part walks free. Along the same line of reasoning, as complicit liability is the notion of *indirect* participation, it may prove to be too minor and feeble with respect to its policy implications. The argument that certain rights augment the duty to interfere may prove counteractive to being prudent and pro-active and to the process of embedding human rights into business practices.

## 5.4 Command Responsibility

Along a line of reasoning raised by Professor Beth Stephens, an alternative legal ground not yet invoked but that could provide guidance and serve as a source for analogies is *command* or *superior responsibility* of international criminal law.<sup>159</sup> The concept and scope of the doctrine is comparable to the ditto of domestic agency law as superior responsibility confers on certain persons an increased vicinity of liability that stretches beyond that person's own acts and omissions. The doctrine is applicable when three elements are satisfied. The person in superior authority must have known or had reasons to know that the subordinate was about to commit a crime. The superior must have possessed the ability to intervene but failed to do so, or to punish the active person.

Command responsibility has been found to apply to private individuals. ILC has expressed the view that the doctrine extends to civilian superiors to the extent that they exercise a degree of control over their subordinates which is similar to that of military leaders.<sup>160</sup> Similarly, the ICTR found a tea plant owner guilty on charges of *inter alia* genocide according to the doctrine of command responsibility.<sup>161</sup> Along the same line of argumentation, a legal

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<sup>159</sup> Cecilia Wells discusses agency law in connection to corporate crime committed by an employee, acting as an agent for the corporation. She explains how a corporation can be held "criminal 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". *Corporations and Criminal Responsibility*. 1993. Oxford: Clarendon Press. P. 379.

<sup>160</sup> ILC Draft Code Commentary on Article 6, Report of the ILC on the work of its 48th session, GAOR, 51st. Sess., Supp. No. 10, UN Doc. A/51/10 (1996) *reprinted in* 18 HUM. RTS. L.J. 96, 108. 1997.

<sup>161</sup> Prosecutor v. Alfred Musema, IT 96-13-T. Musema was the director of the Gisovna Tea Factory in the Kibuye Préfecture, and as such appointed by the President and in contact with the military (*id.*, paras. 866-882). The Judgement states: "the authority, either de facto or de jure or the effective control exercised, may provide the basis for such individual criminal responsibility" (*id.*, para. 864).

person could be found to exercise a similar authority and a parent company could possibly constitute a principal and a superior comparable to a commander and a business affiliate could equate an inferior person. A chain of command leading up to the crimes could be investigated and it could be established that the parent company *de facto* and/or *de jure* could direct the inferior's conduct. A multinational would consequently have to keep itself up-dated of inferior companies' societal impact, as they do about associates' financial situation. A practical example could be that a multinational is able to purchase merchandise for a price that is clearly below production costs and the price level is not temporary. The multinational would then have to ask itself how the seller was able to offer such a lucrative price and investigate further if no satisfactory answer is evident. To allude on the commission's opinion in the case against the Japanese General Tomoyuki Yamashita;<sup>162</sup> when offences are widespread and there is no effective attempt to discover or control the criminal acts, although the possibility existed, the superior could be held accountable as a compliciting party. In order to satisfy the element of superiority, a price suggestion from the multinational that clearly is less than the average production costs, including a fair profit on the part of the seller, could constitute a disguised order. Threats to relocate in order to reach a more competitive price could additionally be perceived as an indirect order, resulting in human rights violations and expanded accountability. Where the multinational was found to be the superior party, a legally binding duty to act upon human rights violations would emerge. In such a situation, a corporation would have to demand that the violating party cease breaching human rights law and condemn the violations in order to escape charges of complicity. The result might be that the multinational has to pay a greater price for the ordered products and services, or ultimately disengage from the commercial relationship.<sup>163</sup>

This line of argument is hypothetical and without acknowledged legal bearing. Nevertheless, corporations were already in the Nuremberg Charter held to possess the ability to constitute criminal ventures under international law and a membership in such a venture could amount to an international crime<sup>164</sup> and agency law has been invoked in several CSR-related cases. On

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<sup>162</sup> Trial of General Yamashita (US Military Commission, Manila (Oct. 8 – Dec. 7, 1945)), United Nations War Crimes Commission, Law Reports of Trials of War Criminals, \*1, \*88.

<sup>163</sup> This demand is enshrined in several business wide codes of conduct. See also Jungk, 2001.

<sup>164</sup> For an elaborated study on international corporate crimes and contemporary law suits against multinationals, see Ramasatry Anita. "Corporate Complicity: From Nuremberg to Rangoon An Examination of Forced Labor Cases and Their Impact on the Liability of Multinational Corporations", I: 20 *BERKJIL* \*91. Note also that CBG argues that Bayer AG is connected to the business organizations that were tried in connection to the Nuremberg Trail on allegations for use of slave workers at Auschwitz and for providing gas for the gas chambers. Allegedly Bayer AG was part of the conglomerate IG Farben, which used slave workers at their plants in Auschwitz and a IG Farben manufactured the poisonous gas used in the gas chambers. Philip Mimkes. "How and Why a Major Pharmaceutical and Chemical Company "Bluewashes" its Image", I: Coalition Against

the other hand, establishing the casual linkage; the chain of command leading up to the violation will indeed be a difficult task. In the case a supplier has more than one customer, such a link might not exist or be problematic to prove to a sufficient degree. Further, the idea of expanding the scope of superior responsibility is constructed on the perception that multinationals are on the top of a hierarchy and thus, ignores business partners and network-connected multinationals.

## 5.5 Capitalizing on Codes of Conduct

The legal ground presented in the Nike case was not unique. The National Labour Committee was already investigating the possibility of taking legal action against multinationals on the basis of “consumer fraud” and against businesses that did not uphold standards enshrined in their own code of conduct.<sup>165</sup> In line with the Nike verdict, codes could be perceived as single-handed promises and viewed as an integrated part of the product or service performed. Distinctively, codes of conduct show that multinationals perceive that they have some form of responsibility for their supply chain and its performance. Consumer fraud is however but one of several methods to use codes of conduct to enhance corporate human rights performance along the supply chain. Another already mentioned technique to enact incentives to adopt and comply with codes of conduct is evidenced by the U.S. sentencing guidelines.<sup>166</sup> Besides these possibilities, emphasis so far has been on articulation of the codes and their content<sup>167</sup> and convincing companies of the business sense of adopting a code.<sup>168</sup> The result being that companies strive towards different ends and that codes are placed in the PR tool kit to be used to deflect criticism.

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Bayer Dangers, July 19, 2002. Available at <<http://www.corpowatch.org/campaigns/PCD.jsp?articleid=3129>>, (accessed June 16, 2003). The allegations could qualify as beneficial and silent complicity and, depending on the circumstances, maybe also as direct complicity.

<sup>165</sup> Meijtjes Grath. “An International Human Rights Perspective”, pp. 83-103, I: Oliver F. Williams, C.S.C. (ed.). *Global Codes of Conduct – An Idea whose time has come*. 2000. Notre Dame: University of Notre Dame Press. P. 89.

<sup>166</sup> See *supra*.

<sup>167</sup> There is for example the discussion of “rights versus issue based approach”. The World Trade Organisation’s code on marketing of breast milk substitutes is issue based, whereas other codes build on human rights and usually the Universal Declaration on Human Rights serve as a point of departure. Issue based codes are criticised for being less proactive and more conservative, only addressing existing problems or problems the company has been criticised for. A rights based and more uniform code that is being imposed on employees and affiliates and business partners might create unnecessary and time and resource consuming demands. A survey from OECD of 246 voluntary codes, i.e. codes of conduct, showed that there was only one single issue that was incorporated in all of the codes, namely the prohibition on child labor. Cited in ICHR, 2002, p. 16.

<sup>168</sup> Teresa Fabian, consultant with PricewaterhouseCoopers, London, UK argues that “poor environmental or social performance at any stage of the supply chain will damage a company’s most important asset, it’s reputation”. See Fabian Teresa. “Supply Chain Management in an Era of Social and Environmental Accountability”, I: *Sustainable Development International*. Pp. 27- 30.

The PR-approach retains however several drawbacks. It relies on the assumption that businesses care about their reputation and their brands' image.<sup>169</sup> Companies with no obvious connection to the branded products they trade as well as less resourceful and conscious businesses may thus lack the business rationale and consumer call to invest in increasing their social responsibility. Similarly they might not become targets of NGOs' campaigns because of their relative size and impact. Even a large-sized enterprise may fail to see the business sense of a voluntary code if they risk being targeted by NGOs that use the company code as a benchmark for criticisms, which is what happened with Nike, Inc. Instead of the wanted competition advantage, the code becomes a *disadvantage*. In addition, as activists make use of the corporate code and may try to have it judicially enforceable, it becomes more difficult to be proactive and to set standards that the company is not absolutely sure they and their business partners already fulfill. If the suppliers have more than one buyer, which is a common scenario, they may be exposed to a number of different codes,<sup>170</sup> and potentially even contradictory codes. People in the developing parts of the world further claim that their needs are not reflected in the codes,<sup>171</sup> but rather consumers' perception of workers' wishes.

Voluntary codes rely heavily on applying human rights criteria in the supplier selection process.<sup>172</sup> Imposing a code or social clause on business partners as abundant codes suggests, increases, at least in the eyes of the public and it might also in the eyes of a court of law, the level of control over partners and affiliates' social performance. It also makes it more

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<sup>169</sup> Barrientos Stenphanie. "Mapping codes through the value chain: from researcher to detective"; I: Jenkins Ryhs - Pearson Ruth – Sayfang Gill. *Corporate Responsibility and Labour Rights – Codes of Conduct in the Global Economy*. 2002. London: Earthscan Publications. P. 73. Barrientos argues that codes of conduct are more common in "buyer-led value chains".

<sup>170</sup> *Id.*, p. 61.

<sup>171</sup> Pearson Ruth – Sayfan Gill. "I'll tell you what I want ...": women workers and codes of conduct", I: Jenkins – Pearson – Sayfan, 2002, p. 56.

<sup>172</sup> SA 8000 from Social Accountability International generally prescribes that companies shall "establish and maintain appropriate procedures to evaluate and *select suppliers/sub-contractors*. (SA8000: 2001, para. 9.6). The Caux Round Table Principles for Business is more concise and state that companies have a responsibility *to seek, encourage and prefer suppliers and subcontractors whose employment practices respect human rights*. (Section 3: Suppliers, *in fine*). The Ethos Indicators on Corporate Social Responsibility similarly prescribes that multinationals shall adopt supplier selection criteria that encompass social responsibility, child labor and discriminatory practices. The Ethos Indicators also require that companies demand that the affiliates use the same requirements for social responsibility in dealing with their suppliers. (Instituto Ethos de Empresas e Responsabilidade Social, Ethos Corporate Social Responsibility Indicators 2001 Edition, Suppliers: para. 20, indicator no. 3 and 4. Forbrugerinformationens Etikdatabase (a Danish organization) judges that supplier selection process should take into consideration the potential partner's compliance with labor rights. (Section II. General policies, para. 10).

difficult to suggest that the company was not knowledgeable of *de facto* or potential violations since they previously had addressed the issue.<sup>173</sup>

Another example of how a voluntary code can be counter productive is provided by the Royal Dutch Shell Company's activities in Niger a few years ago. In response to public outcry following the Brent Spar disaster and the execution of activist Ken Saro-Wiwa in Nigeria, Shell adopted a widely recognized inventive code of conduct. Subsequently, Shell decreased its activities in the Niger delta and transferred operations to its competitors, subcontractors and smaller operators,<sup>174</sup> whom are likely to have inferior human rights records.

Without rendering codes into judiciary enforceable instruments, a global code could settle some of the problems that stem from lack or unequal distribution of information, misunderstandings, deficiency in uniform standards and application and that globalization and the integration of the world's economy have created a need to leave ad hoc standards behind and move on to enforceable and uniform codes.<sup>175</sup> A globally recognized code of conduct could add consistency of material content, implementation and a point of departure for social auditing. A monitoring and verifying mechanism can increase the reliability. A global code could serve as the benchmark for social audits, popularly performed by accounting firms and sometimes even published. A global code might also fend off some ill-founded societal outcries or misinterpretations from NGOs. It can help increase the awareness of the constraints that businesses face and it might help distinguish which companies are doing more than others instead of targeting companies that are relatively transparent and proactive in their foreign operations or just larger in size. A worldwide code can additionally help to neutralize the competition disadvantages exposed by the Nike case. Writers have suggested that the time indeed is ripe for a global code.<sup>176</sup>

While the value of a global code in educating and raising the awareness over human rights among business should not be underestimated, the underlying obstacles still prevail. Suppliers and business partners may not be able to implement new standards and adopt new measures without going out of business if the financial burden is placed on them and no suppliers and contractors are unable to meet the demands of the codes.<sup>177</sup> They may see the codes as yet another consumer driven request and there may also be a practical problem to implement standards in the informal sector. In the end, codes of conduct are not a universal cure and at its best a proactive measure.

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<sup>173</sup> Note that here again we are discussing the elements of control and knowledge, which where proved to be the most determining questions in complicity claims and municipal doctrines to pierce the corporate veil.

<sup>174</sup> Kamminga - Zia-Zarifi, 1999, p. 9, footnote 12.

<sup>175</sup> Meijtjes, 2000, p. 90.

<sup>176</sup> See S. Prakash Sethi. "Gaps in Research in the Formulation, Implementation, and Effectiveness Measurement of International Codes of Conduct", I: Williams, 2000.

<sup>177</sup> Shaw Linda – Hale Angela. "The Emperor's new clothes: what codes mean for workers in the garment industry", I: Jenkins Ryhs – Pearson – Sayfang, 2002, p. 108.

## 6 Synergy

There is no “quick fix” to the problems posed by corporate separation as the need for a prosperous economy and risk facilitation on the one hand, speaks in favor of upholding the corporate veil, and while human rights concerns favor tearing it down. An additional problem is the lack of oversight and coordination as rules pertaining to multinationals are few and progressively crystallized through domestic litigation. It is therefore imperative that a comprehensive theory is adopted that incorporates human rights concerns, a recognition of the fact that the international business is developing towards more loosely held co-operations, and that concurrently provides stability and leverage to take advantage of business opportunities. I will attempt to map out an alternative route leading towards a balanced idea of accountability, and here incorporate previously raised concerns.

Firstly, it is clear that the behavior that should trigger accountability is provided by human rights law; i.e. a violation of human rights. Indeed, recent jurisprudence on corporate law and notably the application of the doctrine of piercing the corporate veil and product liability regulations recognize that there are situations where human rights should take the upper hand over for economic concerns.

Secondly, in order to catch the dynamics of multinationals’ business structure, the notion of accountability must be adaptable and not limited to certain categories. At the same time however, it must provide some form for predictability for the purpose of the smooth functioning of economic life. The technique that appears most appropriate in light of the aforementioned ends of moral objectives, elasticity and predictability is to make accountability contingent on control. A theory of control is grounded in the moral presumption that with involvement, the potential profit increases and thus expands responsibility. Further, it does not categorize, as any attempts to categorize would impede with a prudent law-making approach. With regards to predictability, the linkage between control and responsibility is made in the doctrine of command responsibility, and was implied in the Unocal case and by the alter ego-argument for lifting the corporate veil.<sup>178</sup> The fact that international law deploys an objective test to determine responsibility additionally reinforces the suggestion that the existence of a control apparatus can justify the materialization of responsibility in case of a human rights violation. In essence, a theory of control responsibility can create a synergy between the underlying justifications for the doctrine of piercing the corporate veil, the rudimentary application of consumer fraud and product liability regulations and with human rights. It establishes a middle ground between the non-explicit complicity approach and the more radical step of using command responsibility.

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<sup>178</sup> See *supra*.

A control responsibility analysis entails that responsibility is established *in casu*. In the *in casu*-analysis, the finding of a beneficial relationship between the core entity or the group and the perpetrating entity would give rise to a claim against the principal entity where moral grounds proscribed by human rights law are pertinent. The *in casu* approach will keep the notions of corporate separation and limited liability intact for the benefit of predictability and it will allow courts leverage to counter violations regardless of the legal titles of the relationship between the cooperating entities.

A theory of control further implies that it is plausible that the principal entity exercised more control over affiliates than over business partners. This conclusion fits the current reliance of the procedure of lifting the corporate veil and may prove that certain sectors have a great level of control, that the level of control is greater in certain countries or that SMEs have restrained responsibility. But these distinctions cannot, and ought not to be taken for granted and any distinction between the two could backfire and produce the incentive to favor commercial relationships that qualify as partnerships rather than affiliations.

A complicating factor when imputing responsibility is that suppliers often have more than one customer. To establish a casual link in case a violation of human rights occurs may prove to be virtually impossible. With a theory of control however, such a link would not necessary have to be required and an *in casu* analysis of the control relationship acknowledges that the multinational is not always the permissive party. Moreover, if a particular multinational was not the only customer of the supplier, several entities could be found liable. This would of course affect the foreseeability but as with complicity, each entity should carry an individual responsibility. Combined, this creates an incentive for multinationals to acquire not only financial information but additionally to incorporate affiliates', and partners' social performance into economic considerations and into supply chain management.

A further consequence of control responsibility is that no distinction is made between different rights or sets of rights.<sup>179</sup> Although it might be an accurate assumption that businesses are more likely to infringe labor rights than, for example, the right to a fair trial or the right to be recognized as a person before the law, in the absence of dispositive evidence that business are incapable of violating certain rights, it is more unailing to institute a comprehensive theory of control, both in respect to the Vienna Declaration and Programme of Action<sup>180</sup> and with respect to potential corporate impact.

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<sup>179</sup> The Global Compact makes a distinction between “human rights” and “labor rights” and ICHR argues that rights closer to the immediate survival of people should be of particular concern for business, see *supra*.

<sup>180</sup> U.N. Doc. A/Conf. 157/24 (part I) at 20.

Combining the need to bring the law in line with practical life with the desirable principle of justice to remedy human rights violations, a substantive norm incorporating the foregoing observations could suggestively declare:

*A legal person is accountable for violations of human rights law, committed by another commercial or industrial entity over which conduct the legal person possessed control.*

## 7 Final Remarks and Outstanding Issues

This report examined an issue that is renowned from corporate law but unsettled within the evolving framework of corporate human rights violations. It is indeed a thorny issue but one that needs to be addressed in order for international lawmakers to be serious about countering corporate abuses of human rights. To reiterate to the questions posed in the initial chapter: municipal laws provide substantive provisions through the doctrine of piercing the corporate veil, advertising and consumer protection codes, product liability statutes and theories of agency law which serve as means to impute responsibility. An overall analysis however indicates that the domestic regulatory framework is disjoint and not attuned to the ways and means of international business. Moreover, substantive international law is virtually non-existent. With respect to the need for progressive development, four proposals are commented upon: a redefined concept of a multinational which encompasses several corporate entities, the establishment of a particular form for corporate complicity, authority responsibility and methods to capitalize on corporate codes of ethics. It is finally proposed that a comprehensive theory of control would most fittingly address objectives and concerns raised in the foregoing analysis. Regardless, a lot remains to be done until we have a comprehensive, sophisticated and fully conceptualized framework with respect to human rights violations in the supply chain, and this includes considerations of policy aims, the business reality and enforcement constraints. The issues below represent a sample of matters, which will need to be addressed in this pursuit.

- To make human rights and business effective along the supply chain it is necessary to reach outside the human rights community and to increase cooperation with social scientists, economics and auditors in particular.
- Additionally, we need to cooperate more closely with scholars of other legal disciplines, in particular business law. To this effect, it would be interesting to see a “shadow report” of Muchlinski’s book which considers the issues therein, but with respect to human rights and including how human rights affect corporate law. For example, how does business law handle questions of accountability in cases where a business has merged or been taken over by another company?
- We should explore the possibility of making analogies other areas of law such as environmental law and product liability regulations. This possibility has been given little attention within the research community and it may prove to be productive since in some ways, these areas deal with similar problems regarding the doctrine of human rights and business.

- We need to consider potential clashes with other areas and principles of law: how does human rights law interact with international trade regulations and competition/anti-trust laws; how do norms pertaining to multinational interact with the right to development; where is the socially and legally acceptable line between economic progress and foreign direct investments on one hand and the pace of the progressive realization of human rights on the other: how do we accommodate substantive norms with rules of jurisdiction; how does the principle of due diligence apply to multinationals?
- As entities along the supply chain today can be stronger than the actual multinational, we will need to ask the level of responsibility a supplier owes the victims of a multinational's operations.
- On an academic level; what methodological and theoretical options do we have? How can we accommodate different policies and rights and in particular how do we balance economic and societal aims? Who sets the standards, who controls the evolution and what are multinationals' and other commercial entities' roles in policy-making?
- On a practical level, how do we create tools of implementation, to "operationalize" the law along the supply chain? Hence, we will need more detailed regulations and consider issues like mitigating circumstances and financial restrains. How do we supervise the implementation; how and where do victims seek redress, and what types of remedies are appropriate?
- We should also explore how the business community can help to implement and possibly enhancing human rights compliance in the countries where they operate and additionally if they have a duty to do so, e.g. by cooperating with IGOs.
- Finally, we need triangulating studies on all areas previously discussed, including the topic selected for this report.

# Annex A

## 50 Largest Entities Comparison: Nation States and TNCs-MNEs 1999

(Nation State or GDP or Gross Sales Nation State or GDP or Gross Sales)

TNC-MNE	(in \$billion)	TNC-MNE	(in \$billion)
1. United States	9,255	26. Poland	276.5
2. China	4,800	27. Colombia	245.1
3. Japan	2,950	28. Belgium	243.4
4. Germany	1,864	29. Malaysia	229.1
5. India	1,805	30. Egypt	200.0
6. France	1,373	31. Switzerland	197.0
7. United Kingdom	1,290	32. Saudi Arabia	191.0
8. Italy	1,212	33. Austria	190.6
9. Brazil	1,057	34. Bangladesh	187.0
10. Mexico	865.5	35. Chile	185.1
11. Canada	722.3	36. Sweden	184.0
12. Spain	677.5	37. Venezuela	182.8
13. South Korea	625.7	38. General Motors	176.6
14. Russia	620.3	39. Walmart	166.8
15. Indonesia	620.0	40. Exxon Mobil	163.9
16. Australia	416.2	41. Ford Motor	162.6
17. Turkey	409.4	42. Daimler Chrysler	160.0
18. Thailand	388.7	43. Hong Kong	158.2
19. Argentina	367.0	44. Portugal	151.4
20. Netherlands	365.1	45. Greece	149.2
21. Taiwan	357.0	46. Algeria	147.6
22. Iran	347.6	47. Vietnam	143.1
23. South Africa	296.1	48. Denmark	127.7
24. Pakistan	282.0	49. Czech Republic	120.8
25. Philippines	282.0	50. Peru	116.0

Source: Wood Stephen G. - Scharffs Brett G. "Applicability of human rights standards to private corporations: An American perspective". I: *Am. J. Comp. L.* \*531 .

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