



TRANSNATIONAL CORPORATIONS AND THE EUROPEAN COURT OF HUMAN RIGHTS: REFLECTIONS ON THE INDIRECT AND DIRECT APPROACHES TO ACCOUNTABILITY

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ABSTRACT

The European Convention on Human Rights (ECHR) is a traditional human rights document. As a result, the focus of its supervisory mechanism in Strasbourg has been on the civil and political rights violations carried out by states. Notwithstanding, the Strasbourg Court has, in some cases, applied a wider interpretation of the Convention to include some social and economic rights. In addition, the Court has established in its case law that Convention rights apply in the private sphere, albeit indirectly. There is empirical evidence that transnational corporations are violating human rights, however their liability remains slight. The developments in Strasbourg may indicate a potential for the ECHR to have an impact on human rights violations committed by legal persons, namely corporations. Questions arise regarding the best way to deal with these violations: should human rights law consider the direct liability of corporations, implying their elevation to the status of states in international public law; or is it best to develop the current mechanism of the indirect method (Drittwirkung) and maintain the state-centred approach? This paper scrutinises the potentiality of the application of the Convention to corporate violations of human rights, as well as the suitability of the European Court of Human Rights (ECtHR) as a venue to implement the accountability of corporations.

Key words:

European Convention on Human Rights, corporate accountability, indirect approach (Drittwirkung)

I. INTRODUCTION

This preliminary paper assesses the juridical barriers to the development of the European Convention for the Protection of Human Rights and Fundamental Freedoms (hereafter ECHR) in its application to trans-national corporations (TNCs) as perpetrators of violations of rights and liberties.¹ It focuses on the lacunae in the ECHR and its implementation by the European Court of Human Rights (ECtHR). Data was gathered during interviews with judges at the Court in the period April to August 2008.²

There is an identifiable gap between home-State laws and the supra-national/international law, where even when home-States enact laws, the principles of legal personality and corporate personhood enable TNCs to apply double standards in developing countries and evade responsibility for violations at home (Meeran 1999). Consequently, there is a gap in human rights law concerning the responsibility of corporations. This gap does not deal with the fact that globalisation facilitates crimes without law-breaking (Passas 2005: 772). Courts of law may have the will but not the capacity to hear cases of corporate responsibility due to procedural limitations, incomplete or insufficient law. The ECHR has provisions that allow the Court to recognise the corporation as a legal entity with rights, but the responsibility of corporations remains unclear. Uncertainties persist regarding the most effective method of guaranteeing the enforcement of TNCs' human rights obligations, particularly whether these duties should be direct or indirect, which forum is best suited to deal with corporate violations, and whether the responsibility falls on the home-state or host-state to enforce the rules. Subsequently, responsibility for violations of human rights by either the corporation or by its subsidiaries can be evaded by hiding behind the 'corporate veil'. Related problems of accountability – also known as “the space between the laws” (Muchlinksy and Kramer 1987) – are created by the jurisdictional gaps that arise when human rights transgressions are linked to corporations.

The growth of corporate power raises the question of how to ensure that the activities of TNCs are consistent with human rights standards. There are questions of how to promote accountability when violations of those standards occur. Steiner *et al.* suggest that in principle the answer is straightforward.

The human rights obligations assumed by each government require it to use all appropriate means to ensure that actors operating within its territory or otherwise subject to its jurisdiction comply with national legislation designed to give effect to human rights (2008: 1388).

They propose either governments are not willing to ensure compliance by TNCs; the necessary measures are considered too expensive for host-states to take on; global mobility of capital increases competition and discourages regulatory initiatives; the complexity of corporate spider web makes it increasingly difficult to identify

¹ This is a pilot study for a larger project in the same field, and which has been extended to include the Inter-American Court and Commission of Human Rights.

² Five judges from the European Court of Human Rights were interviewed and coded to preserve their anonymity (R401-R801).

responsibility; there is no agreement on an international minimum standard for labour. As this article argues, when considering TNCs' transgressions dominant human rights discourses and institutions encounter a legal paralysis. They are limited to the tools they can work with, i.e. the laws that legitimise their actions, but which are often lacking in robustness. The crux of the issue lies in identifying the limitations of the law to suggest eventual ways to overcome this paralysis. The nexus of capitalism is the accumulation of wealth and the protection of private property, which is reflected in international human rights law where private property remains one of the most sacrosanct of human rights.³

Despite the Universal Declaration's (UDHR) assertion that human rights oblige *every individual* and *all organs of society* there are major obstacles to this human rights utopia. Legislative processes and implementation mechanisms are not value-free and the personal beliefs and opinions of legislators and judges play a role in determining its laws by way of drafting Protocols and interpreting existing provisions. The lacuna in the Court's jurisprudence regarding corporate liability is the result of a market-friendly and trade-related paradigm of human rights (Glasbeek 2003). States may be unwilling, and unlikely to regulate corporations for the benefit of persons in order to avoid burdening corporations unless obliged to do so by international law (Tombs and Whyte 2003). As one judge (R601) suggested, the Court is ostensibly an autonomous body, "but politics and politicians are never far and the influence of government is palpable". This article explores how judges at the ECtHR view their role in interpreting the Convention in a way that confers duties upon corporations.

The presentation and analysis of the direct and indirect approaches meet our central objectives: to determine the gaps in the jurisprudence of the ECtHR; to examine judges' views on the Court's current and/or future role as a forum for extending human rights protection into the sphere of private corporations. Interviews were conducted with judges at the ECtHR, and a sample of relevant case-law was analysed. Chapter II offers context, discussing on some of the key concepts. Chapter III focuses on the direct approach, exploring where international law applies to corporations and whether this is achievable within the framework of the ECtHR Chapter IV considers the indirect approach. This option relies on empowering States for greater responsibility in overseeing human rights. Chapter V concludes this investigation with a critical reflection on the interviews.

II. BACKGROUND TO THE STUDY

This chapter defines the terms and concepts used throughout this article, beginning with 'transnational corporations'. This is followed by a discussion of corporate legal subjectivity and an analysis of the corporate veil and legal fictions. It reflects on the role and impact of globalisation. Finally, it scrutinises the ECHR's state-centric approach.

³ A detailed critique of human rights is beyond the scope of this article. For some thoughtful reflections see Binion (1995); Stammers (1999); Mutua (2002); Teeple (2005); Santos (2007b); Chomsky (2009).

1. Defining TNCs

‘Transnational’ corporation implies an entity with an existence above and beyond the State(s) in which it operates.⁴ As scholars have noted, the corporation has an existence that transcends the nation-state, although it remains under the direction of a sole decision-making centre (Michalowski and Kramer 1987; Weissbrodt and Kruger 2003). There is empirical evidence that TNCs, as well as States, are involved in a variety of human rights violations, that display methods used by TNCs to exploit their trans-nationality “for the purpose of operating beyond the law and attempting to remain beyond the reach of the State” (Tombs and Whyte 2003: 9). Emphasising this by using TNC is significant since key to their impunity is the ability to situate themselves in a corporate sanctuary between national and international legal systems, or even beyond the law in general.

TNCs have legal personality. This allows it to benefit from legal protections by claiming its rights before the courts. Legal personality allows TNCs to benefit from human rights whilst evading duties (Meeran 1999). The Harvard Law Review confirms,

Though corporations are capable of interfering with the enjoyment of a broad range of human rights, international law has failed both to articulate the human rights obligations of corporations and to provide mechanisms for regulating corporate conduct in the field of human rights (2001: 2030-2031).

This, it continues was exacerbated by the pre-Second World War focus on States as the sole subjects of international law as the only entities capable of bearing legal rights and duties. The expansion of international law post-1945 redefined the parameters extending rights to individuals under human rights law and duties under criminal and humanitarian law in some cases. The Harvard Law Review emphasizes that international law “generally does not recognize corporations as bearers of legal obligations under international criminal law” (*ibid*).

Legal developments enabled the responsibility for corporate transgressions fall not on the people who own the corporation but on the corporation itself. This ‘corporate veil’ facilitates the evasion of human rights responsibilities.

2. The Corporate Veil and Legal Fictions

Nicola Jägers (1999) defines legal personality by the incorporation of two central components: the capability of being conferred international rights and duties; and the capacity to maintain these rights by bringing claims before international courts. Corporate legal personality is a legal fiction, meaning that it is a technique created by the courts for a party to benefit from a legal rule that is not necessarily meant for that purpose. After the Industrial Revolution, the corporate personality helped increase capital circulation by protecting individuals from losses by separating the individual

⁴ For a detailed account of the debate surrounding the semantics between TNCs and MNCs see Muchlinksi (2007). For definitions of these entities see Wildhaber (1980), Clapham (2006), OECD *Guidelines* (1999), UN *Norms* (2003; 2005).

from business: limited personal liability. It presented problems for creditors and the courts attempted to remedy the problem of limited liability by allowing legal action against corporations directly. The corporate veil produced problems of accountability since individuals could conveniently hide behind the corporation, avoiding any responsibility for its transgressions (Glasbeek 2003).

Harry Glasbeek (2002; 2003) asserts that corporate personality is equivalent to arming corporations with a virtual shield from law. He argues that individuals behind the corporation should be held responsible for damages resulting from corporate activities. Legal fictions work to the advantage of corporations, he avers, created to empower them institutionally and legally, and enable them restitution when their rights have been violated. The corporation has personality, which makes it possible to hold it accountable for its transgressions (with acute limitations); it also immunises the physical people in the corporation from law. This is the case for example with numbered companies⁵ or parent-company/subsidiary duos.⁶

Richard Meeran (1999) illustrates the corporate veil: the parent-company of a wholly owned subsidiary foregoes its responsibility for the actions or negligence of the subsidiary; this is facilitated by the abovementioned web of corporate structures making it extremely difficult to retrace the line of responsibility. This is also a protective scheme, since the parent-company deviously, but legally, separates itself from the subsidiary, by incorporating the latter under a different name. It is, as Meeran asserts, naïve and imprudent to pretend that TNCs and their subsidiaries are in fact working separately since the cross-directorship between these entities is flagrant considering formulation of policy, technological, and financial control. The fear of consumer boycotting, especially since the 1990s, has further evidenced the strong relationship between the parent-company and the subsidiary.⁷

The OECD *Guidelines for Multinational Enterprise* are recommendations providing voluntary principles and standards for ‘responsible business conduct’ – political agreements made by governments addressed to TNCs operating in or from adhering countries. Its definition of TNCs mentions the “degree of autonomy” between entities: the parent-company and its subsidiaries. This reflects out-sourcing to subsidiary companies that may have the same name but are incorporated under different laws in other countries; or, the transfer of responsibility to the subsidiary by incorporating it

⁵ Numbered companies are most commonly used in Canada; the company is given a generic name based on an assigned corporation number, e.g. "1234567 Canada Inc." as its legal name. Numbered companies may include those that have not yet determined a permanent brand identity, or shell companies used by larger enterprises to deflect attention from the parent-company's ultimate motives.

⁶ This web makes it virtually impossible to trace back to any one individual. If the corporation is brought to court and is found responsible, the physical individual is not liable since his/her personality is separate. The incorporation of a company in some countries takes a very limited amount of money that can be transferred to another company after its incorporation making it essentially hollow. When it is sued, it is possible that it has transferred its assets to a different company and therefore the individual claiming damage receives nothing because the corporation is worthless. It can simply claim insolvency (see Glasbeek 2003).

⁷ See for example Rodriguez-Garavito, C. (2006; 2007).

under a different name.⁸ The role of TNCs on the global stage poses complex questions about the international legal status of these entities.

3. TNCs as Subjects of International Law

The question of legal subjectivity came to the fore of international law post-1945. In the *Reparations for Injuries Case*, the International Court of Justice (ICJ) defined a subject of law as an entity capable of possessing international rights and duties, and having the capacity to maintain its rights by bringing forth its international claims. Under Westphalian-inspired notions of power, only States and the Holy See were considered subjects of international law. Post-1945, some scholars have reconsidered this, recognising some actors with para-statal activities (Clapham 2006); legal subjectivity may be attributed to *de facto* regimes, insurgents recognised as belligerents, national liberation movements representing peoples struggling for self-determination, even the Order of Malta, as well as inter-state organisations, e.g. the United Nations (*ibid*: 59; also Jägers 2006 for an analogous discussion on NGOs).

Notwithstanding the suggested additions, the restrictedness of legal subjectivity is emphasised by some as the basic rule of international law (Jessup 1947: 343). Although, Duruigbo (2008) explains that this does not exclude the reality of interactions on the international stage. According to Jessup non-state actors are objects rather than subjects of international law. Similarly, other authors suggest that TNCs are not formally subjects of international law, but can have a derivative subjectivity through the intermediary of the State (see Forsythe 2000; Jägers 1999). In this way, and due to the increasing internationalisation of organisations, transnational agreements, and globalisation, this category has expanded to include corporations and individuals in some cases.⁹ It is important to consider existing normative obligations of TNCs,

Since the participation of private corporations at the level of international law would now seem to be a *fait accompli*, international lawyers should stop being negative in their approach to this obvious fact ... It is only by [international lawyers'] cooperation and positive contribution (rather than by their cowardice, pessimism and conservatism, evident in their out-moded dogmas or concepts) that this new branch of [commercial] law can be developed into an acceptable part of extension of public international law (Ijalaye in Clapham 2006: ftnt 69).

Thus, there is an unavoidable involvement of TNCs on the international stage. TNCs use law to their advantage, which has been enabled by the construction of human rights

⁸ This was the case for example in Burma (Myanmar) with the Total/Unocal scandal. Total (parent-company incorporated in France) and Unocal (parent-company incorporated in the United States) claimed no responsibility for the severe human rights violations in Burma, where there was a manifest connection between Total Myanmar Exploration and Production, Unocal Myanmar Offshore Company and Unocal International Pipeline Corporation with the government enterprise MOGE (Myanmar Oil and Gas Enterprise) as well as with the Thai company (PIT-EP) (see de Schutter 2006b).

⁹ Examples from international trade law and international commercial law are perhaps the most prominent categories of law that have considered the legal subjectivity of corporations making them party to agreements.

in a Western, North-centric paradigm (Santos 2007b; Rajagopal 2004). The corporate veil and legal fictions are further complicated by the phenomenon of globalisation.

4. Globalisation and Non-State Actors

Human rights were initially the internal domain of States, established in law post-1945 with the purpose of protecting individuals from the State. Certain grave violations of human rights (e.g. genocide) are internationally recognised as the concern of all nations and have universal jurisdiction.¹⁰ Complex systems of norms, institutions and procedures have been elaborated to reinforce human rights globally, regionally and nationally (Shelton 2003: 345). Despite the evolution of human rights law to account for changes in society (e.g. environmental hazards, equality of the sexes, etc.) it remains confined for the most part to the individual-State paradigm from a North-centric perspective. This element does not respond to the growing adverse human rights impacts of non-state actors, and the demands for recognition of other kinds of rights from the South.

Globalisation has impacted the role of non-state actors; they have become important participants in economics and politics. According to Susan Strange (1996), corporations have surpassed the States with economic power over their political power. She concludes that markets triumph in our globalised world. Jägers (1999: 260) further illustrates this by “the fact that MNCs [*sic!*] operate across borders mak[ing] them more independent of States and therefore more difficult to control”. Peter Muchlinski (2001) more moderately suggests that the tradition of responsibility of the State is antiquated and must be expanded to take into account the rising economic and social power of TNCs.¹¹ These arguments are based upon a theory of the dilution of State sovereignty, which is critiqued by Tombs and Whyte (2003: 11-13). They emphasize the flaws in what they call “the degradation of politics thesis”. Firstly, they argue that there is a plethora of forms of regulation (social, economic, political, etc.); secondly, that the State is not impotent vis-à-vis market forces and indeed perform market protectionism, indicating their implication in the market; finally, that it is possible that States and markets mutually reinforce each other. This is a convincing argument that encourages us to bear in mind that the State continues to play an important role. Moreover, it highlights the collapse of the private/public spheres. The state has the capacity to intervene in the market and therefore has a responsibility with regards to the human rights transgressions committed by TNCs.

¹⁰ Universal jurisdiction applies to any of grave violations of human rights, whereby in international law any state can claim jurisdiction over persons whose alleged crimes were committed outside their territorial boundaries. The crime is considered as one against humanity in its entirety and therefore is justifiably without borders.

¹¹ For more see Kamminga and Zia-Zarifi (2000).

Globalisation¹² has brought the increasing violations of human rights by non-state actors¹³ to public attention. Wells and Elias (2005: 146-148) discuss the difficulty of economic globalisation with regards to the sovereignty of State and the power struggles between States and TNCs. They emphasise that traditional assumptions about law have obstructed its progress. In many cases, the demand/need for direct financial investments promotes complicity between TNCs and the State.¹⁴ Andreopoulos *et al.* (2006: xvi) affirm, "...the State can play crucial and alternative roles as the protector of the victims, provider of relief agencies, assistant or collaborator of the perpetrators, instigator, or an indifferent actor that permits violations" (e.g. BP in Colombia, Unocal and Total in Burma (Myanmar), and Dutch Shell in Ogoniland (Nigeria)). The ubiquity of globalisation makes clear that the global North can no longer ignore, nor deny, the injustices instigated, exacerbated or perpetuated by TNCs. Nor can they deny the role and responsibility of the State in this regard.

The regionalisation of human rights law in Europe resulted in the expansion of human rights protection by a supervisory organ that in some ways diminished State sovereignty. The ECHR established the Court at Strasbourg as the first of its kind. It provides the possibility of the individual's active role in evoking human rights and international law – a unique feature.¹⁵ However, European law is facing a regrettable reality concerning TNCs that challenges its efficacy: corporations demand protection of individual rights (property and intellectual rights in particular), whilst at the same time they are directly and/or indirectly responsible for some of the worst human rights violations with no concrete obligations.

4.1. *The ECHR*

The ECHR has forty-six adhering states (as of December 2009).¹⁶ It focuses only on civil and political rights and possesses an international judicial mechanism: the European Court. The ECtHR has recognised that corporations can enjoy some of the rights enshrined under the Convention.¹⁷ The ratification of Protocol No° 11 gave individuals the right to bring their case(s) before the Court against Contracting States.¹⁸

¹² Some scholars may argue the positive benefits of economic globalisation and transnational corporations (job creation, stimulation of economic activity, increased numbers of women in the labour force etc.), although due to brevity this argument cannot be addressed here. However, it is this author's opinion that the positive aspects of economic globalisation are ephemeral and without sustainable development and social justice policies they cannot be considered to outweigh the damages.

¹³ 'Non-state actors' encompasses a variety of entities, including armed militia, private military companies, NGOs and TNCs. Here it refers only to TNCs.

¹⁴ Kamminga (2004) refers to studies by the OECD and others that indicate TNCs' involvement in extractive industries, such as oil, gas and diamonds, are particularly prone to such complicity with the host state. See, for example, OECD (May 2002).

¹⁵ This may be contrasted with the Inter-American Court of Human Rights and the American Convention on Human Rights, which does not provide the possibility for individuals to present claims before the Court but rather maintains the traditional international law paradigm that privileges as applicant parties Member States (and in this case the Inter-American Commission of Human Rights).

¹⁶ All 46 Member States have signed all Protocols. Protocols 6 and 14 are pending ratification by Russia.

¹⁷ These include the right to property (Art. 1, Protocol 1), right to a fair trial (Art. 6), privacy and data protection (Art. 8.), and in some cases freedom of expression (Art. 10). See *Autronic AG v Switzerland* (1990: §47).

¹⁸ The Commission was ultimately suppressed by Protocol No°11 in 1998.

This is important since it means that individuals, and NGOs¹⁹ have the possibility to bring forth claims against Contracting States for human rights violations by third-parties, also known in European law as *Drittwirkung*. Conversely, under this provision the Court has consistently declined admissibility for cases against private parties considering that it lacks jurisdiction *ratione personae*. One respondent (R801) referred to the judgement of *Florin Mihailescu v. Romania* where the Court clearly identified its position, “the Court has no jurisdiction to consider applications directed against private individuals or businesses.” Other significant features of the ECHR include its principle of evolutive interpretation or the dynamic approach. This leaves a possibility for judicial imagination and manoeuvring.

The ECHR enshrines civil and political rights. Although the Court’s jurisprudence has given precedence to implied and inherent rights, which has expanded to economic, social and cultural rights (ESC rights) in specific cases. Significantly, the Court has also confirmed that the ECHR applies also between private parties (*X and Y v. Netherlands* (1985, hereafter *X and Y*). The question is therefore not, as some judges (R701, R801) commented, whether the Convention applies in the private sphere but rather how far the Court can reach into private relations. One of the challenges facing the ECtHR is its traditional state-centred approach, which is considered by some as a hindrance to human rights law (Clapham 2006; Vasquez 2005). This should not be confused with Strange’s (1996) ‘retreat of the State’ position, but rather the belief that to meet the challenge posed by TNCs and their relationship with States, both parties must be held accountable.

5. Responding to Human Rights in the 21st Century

The impact of globalisation compels us to reconsider the state-centric paradigm of human rights, in order to take into account violations committed by non-state actors. The ECHR is the cornerstone of human rights protection in Europe and a model for regional communities around the globe. Since its ratification it has been amended several times and the judicial imagination has succeeded in extending the rights guaranteed therein. However, by not considering the role of non-state actors in human rights violations, the efficacy of the ECHR is limited. Civil and political rights are insufficient guarantees for human rights, and states are no longer the sole, nor necessarily the most potent actors on the global scene.

5.1. *Beyond the State: Rethinking the State-Centred Approach*

The centrality of the State is one of the defining features of international law. The State is traditionally sole party to the treaties agreed upon, with non-state actors placed at the margins of these conventions. In their tome dedicated to human rights in the international context, Steiner *et al.* (2008: 1385-1433) suggest various factors that have contributed to this. These include the privatisation of functions previously performed

¹⁹ NGOs play an important role in bringing to public attention and mobilising the public regarding issues that may otherwise go unnoticed or undocumented. Their role in campaigns, such as the anti-apartheid movement and their role in convincing governments to sign the Kyoto Protocol, prove their significance for advocacy movements.

by the State;²⁰ the ever-increasing mobility of capital and foreign investment facilitated by deregulation and trade liberalisation;²¹ and, the enormous growth in the role of TNCs in formerly government reserved areas.²² They propose the developments on the global stage amplify the risk that a state-centred approach to human rights will become increasingly marginalised in the years ahead (*ibid*: 1386). If the ECHR is to maintain its relevancy as a leading human rights instrument, it should extend beyond the State to meet the challenges of the 21st century.²³

The ECtHR addressed the precarious relationship between State and private actor(s) acting para-stately in the case *Costello-Roberts v. United Kingdom*²⁴. One judge (R801) suggests that notwithstanding the state-centricity of the Court, the delegation of powers by the State to the private sphere cannot be decisive for the question of State responsibility *ratione personae*. In *Costello-Roberts*, the Court stated that, "...[it] agrees with the applicant that the State cannot absolve itself from responsibility by delegating its obligations to private bodies or individuals". Although a gap seems to exist at Strasbourg vis-à-vis para-statal activity, the Court has in fact pronounced that it may have jurisdiction in these cases under the proof of State involvement. The Court has a set of guidelines to determine the extent of involvement of the State, which it dubs the test of 'sufficient institutional and operational independence from the State'. Spielmann (2007: 430) tells us that this test verifies "whether a respondent body is owned by the State, whether it is exercising any public function and in general the extent to which the State is exercising effective control over it" (also interviews R401, R801).²⁵ The involvement of the ECtHR in private law is complex and ambiguous. Judges gave examples in private law where corporations claim rights (R401), but fewer were the examples of claims against corporations (R801).²⁶

Neil Stammers, in his critique of the social democratic approach to human rights, asserts that,

What we have is a debate on human rights that is highly state-centric and where there is little space for thinking about human rights in any other way. This...is tremendously problematic...The state-centricity of the human rights debate is indicative of a top-down way of thinking about human rights. The State is at the top,

²⁰ This includes the establishment of private military companies, schools, railways, health care, the supply of water, gas and electricity, and in some countries even managing and organising the prison system.

²¹ For a clear example and detailed analysis of corporations operating in deregulated areas, see Braithwaite (1984: 245-278); also Passas (2005: 775).

²² For example private military companies in Iraq; see Walker and Whyte (July 2005).

²³ Other international conventions have sought to move beyond the state-centred approach; see for example the ILO's *Defending Values, Promoting Change: Social Justice in a Global Economy: An ILO Agenda* (1994: §56).

²⁴ §27: "the Court agrees with the applicant that the State cannot absolve itself from responsibility by delegating its obligations to private bodies or individuals".

²⁵ See *Mykhaylenky and others v. Ukraine* (2004); *Radio France and others v. France* (2004).

²⁶ Corporations claiming their rights see *Comingersoll S.A. v. Portugal* (2000), where the company claimed damages for length of procedure and awarded the right to compensation for non-monetary loss provided by Article 41 of the ECHR; also, *Anheuser-Busch Inc. v. Portugal* (2005). For a detailed critique see Emberland (2006). Individuals claiming against corporations indirectly see *Fadeyva v. Russia* (2005).

human beings at the bottom, and the statism guiding debates is both a symptom and a cause of such thinking. Not only is this elitist, it is also disabling. It constrains the potential for popular mobilisation around human rights issues (1995: 506-7).

When asked whether the expansion of the Convention to include economic, social and cultural rights²⁷ was feasible, one judge (R401) commented that there were some social and economic rights, although an inherent problem remained since they “interfere so much with the financial possibilities of a State”. This was the “most important reason why the judicial institutions are lagging behind in a way. It’s easier to say that everyone has to vote than everyone has to have a SMIC²⁸ of €1000”. The lack of economic, social and cultural rights is a clear gap in the Convention and so despite creatively interpreting articles, this ultimately frustrates the ECHR’s effectiveness to respond to present-day demands for human rights.²⁹ This is in part the debate between the public/private dichotomy, a central paradigm of the liberal State. This division has been challenged and broken by feminists in the past. It must now do the same to overcome the separation in human rights law between State and individual, and private law where human rights abuses are committed.

5.2. *The Public/Private Dichotomy: Bridging the Gap*

Feminists challenged the separation of public/private spheres in the 1970s, epitomized by the slogan “the personal is political”, which defined the private sphere as a potential site of oppression. This culminated in CEDAW’s Committee statement: “under general international law and specific human rights covenants, States may also be responsible for private acts”. Some scholars and activists challenging TNCs’ violations of human rights are also contesting the public/private dichotomy. Clapham, describing the insufficiencies of keeping non-state actors at the margins of human rights instruments maintains,

Holding the public/private line risks actually undermining the opportunities for progressive change by shielding the nature of private activity that threatens human well-being to apply the traditional State/non-state applicability of human rights law to governments generates a dangerous sense of impunity for those who are undermining people’s rights (2006: 54).

The European Court concerning Article 8 recognised in *X and Y* that,

There may be positive obligations inherent in an effective respect for private or family life...these obligations may involve the adoption of measures designed to secure respect for private life *even in the sphere of the relations of individuals between themselves* (§23; emphasis added).

²⁷ The Council of Europe’s Social Charter (1961) addresses economic, social and cultural rights, however it does not have a judicial mechanism to enforce them.

²⁸ This is the French acronym for *Salaire Minimum Interprofessionnel de Croissance* or guaranteed minimum wage.

²⁹ Other conventions have sought to include economic, social and cultural rights, recognising that they are interconnected, e.g. the Convention on the Protection of the Environment Through Criminal Law.

This recognition of the blurring of the public/private spheres was addressed in interviews with judges at the court. One judge (R401) agreed that it included the possibility of applying this interpretation to the violations of human rights by corporations, but only indirectly. This opinion corresponded to all of the respondents, although moderated by more optimistic or receptive opinions; one judge (R701) contested the rigidity of some of her colleagues. She asserted that it is not a question of opening the Convention to everything, but “simply recognising that problems evolve and the nature of the problems change”. This judge claimed that the central question here is the pertinence of the Convention with regards to these problems,

The question is not to open or close the Convention. For example in Chechnya, there were suggestions that we should not bother with the war because it is humanitarian law – but humanitarian law is also a fundamental right and therefore the Convention applies. The evolution of the Court’s approach is its strength and that is why I do not understand the kind of reasoning that is closed to the [evolution of the interpretation of the Convention].

This is a good example of the “dynamic approach” that the Convention is to evolve with the changes in society.

With the elements explained above, we are now prepared to consider two fundamental possibilities for TNC accountability: the direct and indirect approach. The next chapter examines the implications and possibility of holding TNCs directly accountable for their acts within the framework of the ECHR. This is followed by an investigation into the gaps in the jurisprudence and the omissions in the law.

III. HOLDING TNCs RESPONSIBLE: BEING DIRECT

Traditionally, the responsibility for human rights has been the responsibility of the State. Increasingly, however, scholars are arguing that “international law should move in the direction of generally extending human rights obligations of States to private corporations to the extent such obligations are susceptible to application to non-state actors” (Vasquez 2005: 948; Ratner 2001: 461-65). This chapter reflects on whether the international legal process embodied in the ECHR can and should impose human rights obligations directly on corporations.

The ECHR prohibits its violation not only by the State but also by private groups or persons. Article 17 provides that

Nothing in the Convention may be interpreted as implying for any State, group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms set forth herein or at their limitation to a greater extent than is provided for in the Convention.³⁰

³⁰ For rare cases where this provision has been applied Spielmann (2006: fnnt 25) suggests *Garaudy v. France* (2003); *Norwood v. United Kingdom* (2004).

Despite this, the responsibility of the State, under the present form of the Convention, can only be triggered by an act or omission attributed to a public authority. According to the respondents, it is up to domestic courts to interpret municipal laws in a way that is compatible with the Convention. The ECtHR is only available where that duty has been neglected. This is not the case for other international instruments where the emphasis has been on the direct liability of corporations. Although the Court has stated that the Convention applies in the private sphere within certain parameters), it is explicitly reluctant to elaborate upon some general theory of applicability in the private sphere (R801). In *Vgt Verein gegen Tierfabriken v. Switzerland* (2001: §46)³¹ the Court declared that “[it] does not consider it desirable, let alone necessary, to elaborate a general theory concerning the extent to which the Convention guarantees should be extended to relations between individuals *inter se*”.

A common rationale that emerged from the interviews was the legal personality of corporations encompasses the rights derived from that status. Subjects of international law are subsumed into the international legal framework in a way that makes them accountable for their actions or negligence. Currently under international law, there is no general rule that companies are responsible for their internationally wrongful acts (Harvard Law Review 2001). The prosecution of corporations was explicitly excluded from the International Criminal Court.

1. Corporate Legal Personality and Subjectivity Under the ECHR

For some of the judges interviewed, considering corporations under the ECHR is *sine qua non* of subjectivity. Since the Court considers States subjects of international law and TNCs simply actors on the international scene (R401), corporations cannot be defendants. One judge (R701) suggested that intellectually the legal subjectivity of corporations is not a problem. She agreed that the Court could not ignore the sociological developments in society and “that if we consider the Convention in its historical development, we see that there is a social reality that forces [the Court] not to stay outside of the evolutions. So, the Court must adapt to these changes at one time or another”. This is completed by Higgins (1994: 48-55) critique of the subject-object dichotomy by vindicating the need to return international law to a particular decision-making process and avoid the intellectual and operational stunting of the legal subject prism.

The absence of corporate subjectivity in international law circumvents the direct approach and ultimately contributes to the current reticence of the Court vis-à-vis the direct admission of cases against TNCs’ human rights violations. One respondent (R401) was blocked by the idea of legal subjectivity, insisting that “[TNCs] are definitely actors of international life in the international community but they are still not subjects

³¹ This case dealt with an association dedicated to the protection of animals and its appeal to broadcast a commercial on Swiss national television against the meat industry. The applicant association complained that the refusal to broadcast its commercial was in violation of Article 10, that it had no effective remedy, relying on Article 13, and that it suffered discrimination, relying on Article 14, as the meat industry was permitted to broadcast commercials.

of international law”. Therefore, they cannot be considered in any way under the Convention except when claiming their rights. Later in our conversation, this position developed into the acknowledgement that “corporations first have to find a status acknowledged in international relations and international law and then [we] will see what is the next step. But today most violations come from States”. For this judge, the Court had no need to look beyond State abuses and therefore she did not wish to contemplate the legal subjectivity of TNCs at this time.

Another judge (R601) commented on legal subjectivity with a similar approach as Higgins. She suggested that holding TNCs accountable for human rights abuses at the international level requires certain creativity on the part of courts and legislators. The respondent commented on the real implications of TNCs subjectivity, which would mean not only holding them accountable but also elevating their status. The argument is, that by recognising the legal subjectivity of corporations the international community would place corporations on the same playing field as States. Ian Brownlie (2001) suggests that the definition of subjectivity and its implications is circular since the recognition of the capacity of this entity to act at the international level is given to an entity that is already acting at the international level. For Brownlie, the definition of a legal person is circular because,

An entity of a type recognised by customary law as *capable* of possessing rights and duties and of bringing international claims, and having these capacities conferred upon it, is a legal person. If the first condition is not satisfied, the entity concerned may still have legal personality of a very restricted kind, dependent on the agreement or acquiescence of recognised legal persons and opposable on the international plane only to those agreeing or acquiescent (*ibid*: 57; emphasis in original).

So, in order to have rights and duties you must already be recognised as a legal subject, but to be a legal subject you must have the capacity to have rights and duties. Clapham (2006: 64) elucidates “the needs of the community and the requirements of international life will throw up new subjects and new capabilities according to those needs; where those needs require the capacity to act, there will be recognition of that personality”. This forces us to question the ivory tower discussion surrounding subjectivity, a veritable “intellectual prison”, as Higgins calls it, with no credible reality.

On the other hand, and crucial to the eventual subjectivity of TNCs within the ECHR framework is what this implies for human rights. This is not a one-way relationship. The judge (R601) aptly raised the point that by including TNCs as respondents at the Court, this introduces questions regarding their involvement at the policy level. She was asked whether she envisaged the possibility of an additional Protocol that would allow the Convention to mirror the evolutions of society (re: the power of TNCs). Defending the state-centric approach, she contemplated whether, “we want to elevate [TNCs] to the level of states. Do we want them – the non-state entities – to have the exact same functions as state entities?”

Clapham associates the concern of elevating corporations to the status of States with the entrenched category of subjects of international law. He suggests that these issues are intertwined since unyielding state-centricity reflects the concerns surrounding the

authorship of international law. By accepting the expansion of the categories of legal persons recognised under international law, there may be an assumption that this may spill over into the possible authors of international law (Clapham 2001: 59; Lauterpacht 1970; Vasquez 2005; R601). In opposition to these claims, Clapham (2006) proposes that the critique of labelling human rights violators due to the legitimacy that this may assign them only holds water if one assumes that only States (can) have human rights obligations.

Former judge at the ECtHR Lukas Loucaides explains that the dynamic approach, means that the Court, “extends and applies the Convention, in light of political and social developments and changes of conditions of life, beyond the original conceptions of the period when the Convention was drafted or entered into force” (2007: 13). In *Tyrer v. the United Kingdom* (1978: §31), the Court accepted the Commission’s emphasis that the Convention is a “living instrument”, which must be interpreted with consideration of “present day circumstances”. With this, the Court acknowledged that interpretations should be purposive. The prospect of considering TNCs directly under the Convention as subjects of international law could be argued using the Court’s emphasis on the dynamic approach.

2. Possibilities of Direct Liability Under International Law

Direct liability of corporations is very rarely imposed by international law. The ECtHR functions on the principle of subsidiarity, which means that it is *ipso facto* a court of last resort. Under this schema, national laws regulate TNCs and only an omission or breach of national law with the Convention entails admissibility at the Court. When asked whether the judge (R401) saw a possibility for the Convention to be extended to TNCs, she responded,

That States would [not] like to transform this Convention [this] Convention is not here to solve all the disasters of the world [the Court] already ha[s] 100,000 pending cases [and] one has to be realistic the system of human rights envisaged and the protection and mechanism it introduces was foreseen for something else.

Another judge (R601), corroborating this opinion playfully remarked that to do so would require “rewriting the whole Convention”. One of the central issues complicating different approaches to TNC accountability is their legal subjectivity. An entity is given status under international law via subjectivity, without which it is technically not subject to the same rules.

Commenting on the Court’s position on the international stage, the judge (R601) stated that perhaps in the not so distant past the Court might have been more likely to approach the Convention with the goal of aligning it with international law. It would “maybe approve [progressive international pacts such as] the Global Compact³² [or UN

³² The Global Compact is sometimes considered the precursor to the UN Norms. However, unlike the Norms, it is a voluntary initiative without any regulatory initiative. It is a framework for businesses to align

Norms] and follow that if the case [were to arise]”. When asked about where this change in strategy was coming from, i.e. the composition of the Court or political pressure, the judge proposed it might be related to a more global quandary of the legitimacy of general international law concerning integration versus fragmentation.

Indications of the Court’s new strategy can be found in the approaches it takes to other international efforts related to corporations and human rights. There are conventions that fuse the direct and indirect approach to corporate accountability for human rights violations; the foremost being the United Nations Norms on the Responsibilities of Transnational Corporations and Other Businesses with Regard to Human Rights (hereafter UN Norms). This document is revolutionary in its approach and is the first of its kind to introduce a non-voluntary regulatory mechanism for corporations and human rights. It is important to analyse, since when and if the Norms are ratified, they will considerably alter the responsibility of TNCs in human rights. The impact this may have on the ECtHR remains uncertain. The Norms explicitly request implementation through regional human rights courts (Article 18) but some judges seem reticent to external conventions. There may be a kind of spillover effect whereby the Court would be compelled to follow international standards or it may isolate itself further.

With this in mind, let us first review the Norms themselves. Followed by a consideration of the viability of the Norms, examining how the international community has received other conventions that impose direct responsibility on corporations. Finally, we will briefly contemplate the ramifications of direct responsibility on the ECtHR, which can be understood not only as negative responsibility, but also positively under the obligation to protect and maintain human rights.

2.1. UN Norms: the Direct Approach

The UN Norms challenge the prevailing view of international organisations on corporate social responsibility (CSR). There have been several attempts to usher in standards for business, all on a voluntary basis. These include efforts by the UN³³, ILO³⁴, OECD³⁵ and the EU³⁶. The Norms are a challenge to the delicate approach to CSR, advocating direct responsibility with a non-voluntary basis (2005: §52). They were written in consultation with unions, businesses and NGOs. Although approved by their sponsoring body, the Commission tabled the draft convention pending an investigatory report, which the Sub-Commission delivered in 2005. This did not result in its approbation, but rather in requests for further investigation, this time under the auspices of a Special Representative, Professor John Ruggie. The Norms “recognise the

their operations and strategies with ten principles in the areas of human rights, labour, the environment and anti-corruption.

³³ UN, *Global Compact* (2000).

³⁴ ILO, *Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy* (1977).

³⁵ OECD, *Declaration on International Investment and Multinational Enterprises* (1976); *OECD Guidelines for Multinational Enterprises* (2000).

³⁶ EU, *Promoting a European Framework for Corporate Social Responsibility, European Commission Green Paper* (2001).

primary role of States in guaranteeing human rights”, but “identify key responsibilities of companies” (Art. 1). It is the first convention to consider the direct responsibility of TNCs in such an expansive and inclusive manner, referring human rights within TNCs “sphere of influence and activity”. Weissbrodt and Kruger (2003: 912) suggest that by taking this kind of flexible approach, and by including all businesses (domestic and international), “the Norms recognise that all can make a contribution to the development, adoption and implementation of human rights principles”. Furthermore, in its Preamble, the Norms reference a series of other relevant international treaties that TNCs are obligated to respect, amongst them the ECHR.

The UN Norms have aroused polemic amongst scholars, unions, business and the international community at large. Weissbrodt and Kruger (2003) and Vasquez (2005), in their discussions of the UN Norms, consider it a unique and innovative mechanism for holding TNCs accountable for human rights. Weisbrodt and Kruger take a more optimistic viewpoint, remarking that the Norms “represent a landmark step...and constitute a succinct, but comprehensive, restatement of the international legal principles applicable to business with regard to human rights” (2003: 901). Vasquez is more prudent in his analysis, considering “whether the Norms’ critics are right in claiming that the Norms would represent a fundamental shift in international law” (2005: 929). He does so by first examining the current position of international law vis-à-vis corporations and their human rights obligations; and second, by analysing how the direct approach would alter international law – paralleling the considerations of the judge (R601) who considered the consequences of legal subjectivity of corporations.

Vasquez (*ibid*: 943) tells us that the Norms include human rights that are directly applicable to corporations, many of which are already recognised as directly applicable to private individuals under existing international law. Article 3 provides that,

[TNCs] and other business entities shall not engage in ... war crimes, crimes against humanity, genocide, torture, forced disappearance, forced or compulsory labour, hostage taking, extrajudicial, summary or arbitrary executions, other violations of humanitarian law or other international crimes against the human person as defined by international law.

He points out the Norms may go further than the current prohibitions of international law. Article 3 further states that TNCs shall not “benefit from” such acts (*ibid*: fn1 57; also Art. 11). This reflects the originality of the Norms in directly obliging corporations not only in conformity with international law, but also even beyond it.

Some of the central points of the Norms are congruent with the principles laid out in the ECHR, making the application of the former by the Court an interesting prospect. These include, ensuring equal opportunity and non-discrimination; not violating or benefiting from the violation of the security of persons; protecting workers’ rights (including freedom from forced labour and exploitation of children, safe and healthy work environment, adequate remuneration, and freedom of association); respecting economic, social and cultural rights (to the extent that these have been recognised by the Court, discussed in Chapter III); ensuring consumer protection, public safety, and

environmental protection in business activities and marketing practices (including observance of the precautionary principle³⁷).

Although the Norms is not an international treaty open to ratification by States, and is therefore not legally binding, it was drafted with a normative tone via a formal, consultative UN process. Thus, for a number of reasons, the UN Norms are likely to have some legal effect. Amnesty International (2004) provides the following summary of these effects in their handbook entitled *The UN Human Rights Norms for Business: Towards Legal Accountability*. It emphasises the evolution of law; the normative tone of the Norms; the nuances of “soft law” as customary law; and emphasise that the Norms are well grounded in international law.

Although a non-voluntary convention, the Norms are not a treaty either.³⁸ Vasquez explains that the legal authority of the Norms derives principally from their sources in treaties and customary international law, as a restatement of international legal principles applicable to companies (2003: 913). This reflects the potential development of the Norms since it is not “hard” but “soft” law, meaning that it may become customary law if not formalised in an official treaty. This is compelling since customary international law is binding on all States. This is not insignificant since soft law can have a potent influence on the development of general international law. The direct applicability of the Norms is suggested at Article 16 which provides that, “transnational corporations...shall be subject to periodic monitoring and verification by United Nations, other international and national mechanisms already in existence or yet to be created”. This is a clear indication that the UN Norms are meant to be a ubiquitous set of standards. This would imply that international supervisory mechanisms, such as the ECtHR would be the ideal instruments to ensure respect of and enforce obligations stemming from the Norms – even in the private sphere.

One reaction was dissatisfaction with the Court’s current state of affairs. The respondent (R601) stated that although, “the Court has been very conscious of other sources of international law” she “could not guarantee that in the future the Court will be as conscious as it has been so far”. Because of the turnover of judges, with many new faces on the Bench, this uncertainty, she continued, depends on how the new composition of the Court will consider other areas of international law. If the Court is not aware of or is unwilling to address other sources of international law, it seems unlikely that corporate violations of human rights will be appropriately addressed. This is a palpable limitation to human rights law under the ECtHR. Although some judges (R401, R501) assert that States are still the largest violators of human rights, it may store up potential problems for the Court if the assumption is that some TNCs are not guilty of analogous human rights abuses.

³⁷ This is principle that states where an action or policy may entail severe or irreversible harm to the public, and where the consequences of said action or policy are unknown or uncertain, the burden of proof falls on the person who advocates it.

³⁸ For a more comprehensive look at the implications of “soft law” for international law see Shelton (2003).

The Norms have provided the most comprehensive document stipulating the responsibility of States and supplemented by, *inter alia*, the human rights obligations of corporations. As Weissbrodt and Kruger (2003: 921) point out, the Norms “help fill a major gap in the international human rights system, which already addresses the responsibilities of governments, individuals, and armed opposition groups, but has not yet focused on one category of powerful non-state actors: businesses”. One thing is clear: the Court must respond to dubious business deals that reflect a potent race to the bottom where governments, in collusion with TNCs, are effectively dismantling regulatory standards that ultimately lead to human rights violations. Applying the Norms would, however, require that court actors be at least aware of their existence. Out of five judges interviewed, two had never heard of the UN Norms, one recognised the name but knew nothing more; another knew of the UN Global Compact but not the Norms; and one respondent was vaguely familiar with them. Considering the possible impact on international law that the UN Norms may have if they are adopted, it is disillusioning to know that key human rights actors who would be responsible for interpreting or implementing the provisions (Article 18) have never heard of them.

IV. BEING INDIRECT: HOLDING TNCs ACCOUNTABLE VIA STATE RESPONSIBILITY

States are responsible for preventing harms committed by third parties within its jurisdiction. The responsibility for harms not caused directly by the State is generally referred to as the ‘positive obligations’ of States, which are included in most human rights treaties. This chapter examines why the interviewees preferred State responsibility, for holding corporations liable for human rights transgressions. Beginning with a discussion of the State’s third party obligations, it is followed by the development of positive obligations. Finally, we will examine the controversial but potentially powerful concept of *Drittwirkung*³⁹, or third-party effect, and its applicability to corporations and the ECHR.

1. States’ Obligations Not to Interfere or the Responsibility to Intervene?

Vasquez (2005) considers the indirect approach the most viable option since it is the State who can insist that its nationals conform to international law. It is more realistic to assume that the international community can monitor the members of the community of States rather than the inestimable number of natural and legal persons. The classic or traditional approach to human rights was that of a protection of the individual from the State. This approach implied that States should refrain from violating human rights and freedoms. Former President of the ECtHR, Matti Pellonpää, simplifies this by, “the State’s obligation to abstain from interfering with the sphere of liberty of the individual” (1993: 858). These are so-called ‘first generation rights’ that entail political and civil rights.⁴⁰ In other words, this approach embodies the negative obligations of the

³⁹ For a detailed analysis of the horizontal effect and relevant ECtHR case-law see Spielmann (1995; 2007)

⁴⁰ The division of human rights into three ‘generations’ was proposed in 1979 by the Franco-Czech jurist Karel Vasak; his divisions follow the three watchwords of the French Revolution: *Liberty* (civil and political rights), *Equality* (economic, social and cultural rights), *Fraternity* (solidarity or collective rights).

State. Growing inequalities and socio-economic polarisations (domestically and globally) led to pressures to expand the role of the State. The welfare State was established as a solution to meet these challenges (Dembour 2006). The inequalities were deemed human rights infringements and a second generation of human rights, associated with economic, social and cultural rights, ushered in this new approach to State responsibility.⁴¹ It was considered that to ensure the protection of these rights and freedoms it no longer sufficed to simply safeguard the individual *from* the State. It required defending individual rights *through* the State. As Dembour (*ibid*: 79) suggests, it is now widely accepted that the State cannot protect even first generation rights by simply doing nothing, implying a positive obligation to prevent, ensure, and secure rights and freedoms. This compels the State to look beyond self-discipline to the actions and omissions of individuals. This is laid out in the *Maastricht Guidelines on the Violations of Economic, Social, and Cultural Rights*⁴², the protection against these violations equally addresses non-state actors,

The obligation to protect includes the State's responsibility to ensure that private entities or individuals, including transnational corporations over which they exercise jurisdiction, do not deprive individuals of their economic, social and cultural rights. States are responsible for violations of economic, social and cultural rights that result from their failure to exercise due diligence in controlling the behaviour of such non-state actors (1997: §18).

In its Commentary, addressing non-state actors, it reminds us “that violations of economic, social and cultural rights can be committed by individuals or private entities such as transnational corporations which sometimes are more powerful than some States and consequently may dictate to them”. It is the inaction by a State in controlling the conduct of these individuals or private entities that results in State responsibility for the violations of the former, known as *Drittwirkung*. Thus, positive obligations and the horizontal effect are two sides of the same coin, as pointed out by one respondent (R701),

Everything is mediated by the obligation of the State because that is the obligation of the Convention [Article 1 ECHR]; private persons' obligations are in relation with State and the extension of State responsibility into the private sphere. The question is whether these obligations are acceptable, whether they should be developed, whether the Court should go further? This poses panoply of questions. *Because the*

For more on Vasak's explanation of the three generations of human rights see Vasak (November 1977); also, Fernando (1999),

⁴¹ It is interesting to note that although the Council of Europe produced the European Social Charter (ESC) in 1961 that recognises economic, social and cultural rights, only 17 out of 41 Member States have ratified none of the Social Charter instruments; this is peculiar considering that every Member State must ratify the ECHR (civil and political rights). It is also noteworthy that the ESC has no Court to enforce its provisions.

⁴² The Maastricht Guidelines was the initiative of the International Commission of Jurists, cooperating with various other institutions, including ECOSOC and other UN institutions. In the words of the Commentary, “The objective of this workshop was to get a better understanding of the concept of violations of economic, social and cultural rights, to compile a catalogue of types of violations of these rights and to use this catalogue to develop a set of guidelines which may further assist mechanisms that monitor economic, social and cultural rights”.

development is two-fold: positive obligations and the horizontal effect. These two things go hand in hand. Some people say that the Court has gone too far in its development of positive obligations, but it is clearly irreversible now. The move into positive obligations goes very far because by this tactic we have entered into a series of areas that are not guaranteed explicitly by the Convention.

The positive obligations of the State are therefore intimately related to its responsibility, and this can be extended into the private sphere. The State guarantees the rights in the Convention and must do everything to ensure its protection. Individuals must also abide by the Convention, by way of respecting municipal laws that conform to its provisions.

The evolution of the State's positive obligations is addressed below, followed by a discussion of the horizontal effect. Despite the leitmotif that human rights are "indivisible, interdependent and interrelated",⁴³ the European Court has only slowly introduced some of these second generation rights through interpretations of the Convention in its case-law. An investigation into the negative and positive obligations of states will further elucidate this point.

1.1. Protecting Human Rights: From Obligations to Abstain to the Responsibility to "Respect, Protect, Secure Fulfilment, and Promote"

The progression of positive obligations doctrine is evidenced by a series of judgements delivered at the end of the 1980s, wherein the Court recognised the positive obligations of States. Although these cases are predominantly concerned with Article 8 ECHR – respect for family and private life – they importantly indicate the extension of the Convention into the private sphere (Clapham 2006: 347-420). Due to brevity, we shall here content ourselves by reviewing a few key cases.

The Court inaugurated the positive obligations doctrine as early as 1968 in the *Belgian Linguistics Case* concerning the right to education guaranteed in Article 2 ECHR. It declared, "it cannot be concluded [...] that the State has no positive obligation to ensure respect for such a right as is protected by Article 2 of the Protocol" (§3). It continued by confirming that "a 'right' does exist, it is secured, by virtue of Article 1 of the Convention, to everyone within the jurisdiction of a Contracting State". This was followed by *Marckx v. Belgium* (1979: §31), wherein the Court referenced 'positive obligations' and endorsed the distinction between negative and positive obligations. This case referred to the legal status of children born out of wedlock. It held that "the object of Article [8] is 'essentially' that of protecting the individual against arbitrary interference by the public authorities". The judgement continues by recognising that

⁴³ See for example Article 4 of the Vienna Declaration and Programme of Action adopted by the UN World Conference on Human Rights in 1993. It is important to acknowledge that this oft-emphasised adage of the UN is criticised by cultural relativists. This debate can be nuanced by the difference between universality *per se* and the universal approach to human rights; it is not "universal human rights" understood as a homogenous set of rights that apply in the same way to everyone, but rather the "universality of human rights" meaning a more subjective notion of rights and freedoms to reflect the diversity of persons and cultures (for more see Santos (1997)).

“nevertheless it does not merely compel the State to abstain from such interference: in addition to this primarily negative undertaking, there may be positive obligations inherent in an effective ‘respect’ for family life”. This clearly emphasises the responsibility of the State to initiate and enforce legislation that will ensure the safeguard of ECHR rights, without which the State is in violation of the Convention.

Spielmann (2007) suggests that despite the state-centric approach the wording of many of the articles in the Convention imply a reach beyond State action where States are obliged to ‘secure to *everyone within their jurisdiction*’ the rights and freedoms of the Convention.⁴⁴ This is demonstrated in *Young, James and Webster v. United Kingdom* (1981) regarding the conditions of employment at British Rail concerning obliged participation in a union. The Court held that

Under Article 1 of the Convention, each Contracting State "shall secure to everyone within [its] jurisdiction the rights and freedoms defined in ... [the] Convention"; hence, if a violation of one of those rights and freedoms is the result of *non-observance of that obligation in the enactment of domestic legislation, the responsibility of the State for that violation is engaged*. [...] The responsibility of the respondent State for any resultant breach of the Convention is thus engaged on this basis (§29; emphasis added).

The responsibility of the State is engaged by the violation of a right by a private actor towards another private actor.

The Court has clearly stated its position with regards to the acquiescence of a State in the acts of private individuals that violate the Convention rights. In the landmark case, *Cyprus v. Turkey* (2001), the Court held that “...the acquiescence or connivance of the authorities of a Contracting State in the acts of private individuals which violate the Convention rights of other individuals within its jurisdiction may engage that State’s responsibility under the Convention” (§81). This, the Court tied to the responsibility enshrined in Article 1, Protocol 1. It asserted, “any different conclusion would be at variance with the obligation contained in [...] the Convention”. Spielmann (2007) concludes from this, that Article 1 has thus constituted one of the basic provisions engaging State responsibility for private action, particularly by establishing a robust interpretation and implementation of the doctrine of positive obligations.

This is confirmed in the judgement of *X and Y*. This was the case of the sexual abuse of Miss Y by Mr B. The victim was a 16 year-old mentally handicapped girl living in a privately run home, and the perpetrator, the son-in-law of the directress. Due to a gap

⁴⁴ Questions of jurisdiction and the application of the Convention to those within its jurisdiction raise questions regarding the extra-territorial applications of corporate liability – particularly where European-domiciled corporations act abroad and hire workers in host-state countries. Questions concerning the admissibility of applications by those workers at the ECtHR are some of the complex issues that the Court must deal with, particularly in an era of globalisation. Indeed crucial to any study of corporate violations of human rights; however, the pursuit of this question is forthcoming (see de Schutter (2005; 2006a); Engle (2006); see in ECtHR case-law *Bankovic and Others v. Belgium and Others* (2001); *Cyprus v. Turkey* (2001); *Ilascu and others v. Moldova and Russia* (2004); *Soering v. United Kingdom* (1989).

in Dutch law, neither Mr X (father of the survivor) nor Miss Y could bring an effective criminal prosecution forward. Civil remedies existed. However, it was considered that a lengthy trial would exacerbate the trauma suffered by Miss Y. In its decision, the Court recalled that, “there may be positive obligations inherent in an effective respect for private or family life...these obligations may involve the adoption of measures designed to secure respect for private life *even in the sphere of the relations of individuals between themselves*” (§23, emphasis added).

The principle of positive obligations was affirmed by the Court beyond the sphere of private life in *Plattform Ärzte für das Leben v. Austria* (1998). This was the case of an association of doctors who had planned a demonstration in the form of a protest march against another doctor who was carrying out abortions. Counter-demonstrations were banned on the same route sought by the association. The association decided to change their route but police warned that they could no longer provide protection at the demonstration since officers were already deployed. The Court emphasised that all international and regional human rights conventions grant individuals the rights to freedom of association and peaceful assembly. They allow States to impose certain permissible restrictions on those rights. European jurisprudence suggests that European States may have an obligation to take further steps to guarantee those rights. The Court judged that,

Genuine, effective freedom of peaceful assembly *cannot...be reduced to a mere duty on the part of the State not to interfere*: a purely negative conception would not be compatible with the object and purpose of Article 11 [of the European Convention]...Like Article 8, Article 11 sometimes requires *positive measures* to be taken, *even in the sphere of relations between individuals*, if need be” (§32, emphasis added).

These judgements call attention to the Court’s position on State obligations in the private sphere. According to these examples, States have a positive obligation to secure the protection of fundamental human rights even in the sphere of the relations of private individuals.

This evolution is further highlighted in *Soering v. the United Kingdom* (1989). Jens Soering, a young German national, faced extradition to the United States from the UK. He faced charges of capital murder with the possibility of the death penalty if tried in Virginia. The Court considered whether this constituted a violation of Article 3 ECHR, guaranteeing the right against inhumane and degrading treatment.⁴⁵ Although the Court did not use the vocabulary of positive obligations, its reasoning indicates a move away

⁴⁵ *Soering* is better known for its relevance to the debate on the extra-territorial application of the Convention; Dembour reminds us that, “What is important is that *Soering* has allowed amazing results to be reached [with respect to extra-territoriality]. Until then it was felt that a state could be responsible only for actions - sometimes omissions - which were directly within its jurisdiction. *Soering* changed that: an act which was happening, strictly speaking, outside the jurisdiction of a party state to the Convention could still be attributed to that state if the state could be shown to have been instrumental in allowing the infringement to take place” (2006: 86). The issues of extra-territorial and universal jurisdiction are beyond the scope of this study, however they are important to acknowledge particularly considering transnational corporations, for obvious reasons.

from focusing on negative responsibilities by enlarging the scope of state responsibility for breaches of Convention rights.

More recently, the Court has pronounced the necessity of significant action by States. In *MC v. Bulgaria* (2005), the Court expressed,

These [positive] obligations may involve the adoption of measures even in the sphere of the relations of individuals between themselves. While the choice of the means to secure compliance with Article 8 in the sphere of protection against acts of individuals is in principle within the State's margin of appreciation, effective deterrence against grave acts ... where fundamental values and essential aspects of private life are at stake, requires efficient criminal-law provisions. Children and other vulnerable individuals, in particular, are entitled to effective protection (§150; emphasis added).

In this way, the Court has required States to act with the means of “effective deterrence” in order to abide by their human rights obligations in the Convention. This can be understood not only as implementing legislation that dissuades individuals from breaching human rights, but also by initiating the supervisory elements prepared to deal with these breaches. If these are not in place, the victim is within his/her rights to petition the Court. An example of this may be seen where the Court has also recognized that Convention rights may exert a much more profound impact on the relationships between private parties under private law. One respondent (R601) illustrates this with the judgement *J.A.P. Pye (Oxford) Ltd. v. the United Kingdom* (2005)⁴⁶ where the Court pronounced on a private law dispute. In its judgement, the Court gave effect to Convention rights between private parties, although concluding on the legitimacy of State legislation. As the judge stated “[the Court] can only get involved [by looking] at what the State has done to regulate [the] relationship between private individuals”. Hence, the judge emphasised, in this case the Court did not feel it necessary to impose municipal legislative change via the enforcement of positive obligations upon the Contracting State.

2. *Drittwirkung*: the Horizontal Effect

*Drittwirkung*⁴⁷ is a reference to the German theory of the application of fundamental rights values in cases between private parties. It is otherwise known as the horizontal effect. It distinguishes itself from the vertical effect that protects individuals from

⁴⁶ This is the case of an individual who had occupied a certain terrain for over a decade; this individual claimed the right to stay on the property as having assumed proprietary status under the Common Law. The land was owned by Pye Ltd., a UK developing company; they claimed, under Article 1, Protocol 1 ECHR, that the UK legislation regarding property was defective. The Court judged that there was no arbitrariness in the legislation and left it within the state's “margin of appreciation” for adverse possession.

⁴⁷ This German theory of the horizontal effect was later adopted in some form by many European countries, Canada, the United States and South Africa (see Cooper 2001: 64-68; Kumm and Ferres Comella 2005: 242). Varying terminology is used, for example in Germany: *Drittwirkung*, in the United States: ‘state action doctrine’, in the United Kingdom, Canada and South Africa: ‘third-party or horizontal effect’.

violations from the State or other public authorities. *Drittwirkung* is a highly complex and controversial concept in international human rights law. It has a certain interpretation and application that may provide an interesting use for corporate accountability.⁴⁸ The rights enshrined in the Convention are not directly applicable between individual parties since they are construed as limitations on state organs. But, private parties and States are both capable of infringing liberties and rights. *Drittwirkung* is a way to apply Convention rights in the realm of the private sphere.

There are some examples of applicability and acceptance of *Drittwirkung* at the ECtHR (e.g. *X and Y*). However, it remains highly controversial and there is no unanimous approval of the concept. Several judges at the Court uphold the existence and use of the horizontal effect. Judge Spielmann maintains that on the basis of the Convention's textual indications (particularly Article 1), the "Court has developed its 'positive obligations' doctrine, which has constituted a robust tool for the enforcement of the Convention rights, in conferring indirect horizontal effect on the substantive provisions" (2007: 428) of the ECHR. Spielmann's colleague, Judge Lech Garlicki (2005), suggests that despite the uncertainty, the positive obligations of States comprise the horizontal effect in some form. He demonstrates how the Convention affects private relations, despite Article 34. He elucidates the positive obligations directed at the protection of individual rights against infringements by other private persons. These are drawn from specific provisions of the Convention: articles 2, 8-11, and 13.

Garlicki continues that the applicability of *Drittwirkung* depends on the organs enforcing the Convention - so, it depends on the interpretation of the Court and the Committee of Ministers. He evaluates these organs stating that although, "true horizontal effect does not occur in Strasbourg". He continues,

This does not mean, that the Court rejects the idea that the Convention has a 'radiating' effect on relations between private actors. Indeed, in the past thirty years there have been numerous examples of cases in which, as a matter of fact, the Court has been confronted with private actions violating the rights and liberties of other persons. In many of these cases it would have been possible, intellectually, to follow the German concept of 'indirect third party effect' to 'discover' the same concept in the 'living text' of the Convention and to draw from it some obligations of the Member States. However, the new Court, following the approach adopted by the earlier Court and Commission, *simply did not want to develop the Convention in this direction* (*ibid*: 142, emphasis added).

Articles 3, 8-11 and 13, he argues, point to the possibility of judicial manoeuvring through more generous interpretations of the Convention into the sphere of private persons. Instead of adopting *Drittwirkung*, as such, the Court has assumed these provisions may be interpreted to impose positive obligations "not only on Member States, but also, indirectly, on private persons" (Garlicki 2005: 132) and in this way engineer the horizontal effect. In other words, private actors do not have direct obligations that stem from the Convention, even though they may violate it by infringing the rights it protects. For example, if a company rejects the candidacy of an

⁴⁸ For a more on the horizontal effect in the private sphere see the edited work of Sajó and Uitz (2005).

individual based on sexual orientation it has infringed the ECHR rights of that individual. However, the corporation is not directly liable under the Convention. If a national remedy does not exist, then the individual could take his/her case before the European Court against the State for insufficient or non-existent legislation. Following a decision in favour of the applicant, the State would then be obliged to initiate or change its legislation, which would then provide national remedies for the company's discriminatory policies *in the future*.⁴⁹ Clapham observes "one can complain that there is no avenue to effectively review the governmental policy which has led to interference with the right by the non-state actor [...and...] one can complain that the absence of an effective remedy in private law against the non-state actor may result in a violation of Article 13 by the State" (2006: 420). So, "the lack of an effective remedy before a national authority to ensure respect by a private person of a Convention right [...] could give rise to a violation of Article 13, and could be sanctioned at the international level" (*ibid*: 358).

Garlicki (2005: 142) concludes his article with the recognition that the relations between private actors, even if not included into the mainstream of the Convention guarantees, do not entirely escape the scope of the Court's interest". He continues that "although there is no formal procedure in Strasbourg that allows the lodging of a complaint against a private person" (*ibid*), this does not preclude the eventuality of assessing the actions of private persons with regards to the rights and liberties protected by Convention. Garlicki (*ibid*) affirms that even though private relations are not expressly included in the Convention, since it is understood as an expression of universal values. Thus, it may be reasonably expected that everyone shall respect the rights and freedoms of other persons". Nonetheless, he remains resolute that the Convention cannot but be indirect. One judge [R601] suggested that

The modern state does not reach or does not live up to all of the changes [of the modern world] ... that is of course a factor to bear in mind for the future; developments of human rights law should very much be conscious of that ... Maybe the solution is to admit the horizontal effect of the Convention and see where that leads us ... One thing is true that we, certainly in the Court, we are slightly behind with our case-law compared to where the economic and social developments in the world are - but that's law ... it's always lagging behind!

Thus, the hesitation of using *Drittwirkung* at the Court may not be so much in its implications - that is third-party responsibility via the State - but rather that the Court is simply unprepared for it. In the words of Judge Garlicki (2005: 142) the Court "simply did not want to develop the Convention in this direction". Because, as the judge (R601) acknowledges, the Court is not up-to-date with social and global developments, and in that way has indeed remained conservative, or classical, as to its approach to human rights. The intellectual exercise of imagining the obligations of corporations under the Convention via the horizontal approach, are not in and of themselves a problem. Another respondent's (R701) remarks designate the inherent limitation of the Court.

⁴⁹ This is also one of the reasons that some scholars do not support the indirect approach of *Drittwirkung* since the corporation is not held responsible. This is discussed below (see Alkema 1990).

I do not see what could be the major objection to expanding the horizontal effect of the Convention not only to individual persons *per se* but also to corporations...reflecting on it in a completely neutral way, I do not see the major objection [...]. However, of course, the other question is that we do not have many claims relating to this, and in my opinion, this is the difficulty because *the Court is not proactive, it is reactive* (original emphasis).

The ECtHR is a passive surveyor of human rights. Therefore, the Court claims not to have *forum conveniens* to impose State obligation/responsibility to investigate human rights violations regardless of whether action is taken by an individual. This is a limitation to the efficacy of the Court if it is unable to intervene where human rights are violated.

Drittwirkung is additionally contentious, as Alkema suggests, because the primary violator is not involved. However enforceable the Convention may be upon states, "it does not create obligations for private persons, which can be enforced through its supervisory organs in an international setting" (1990: 37-38). With this, he identifies a major lacuna that can be found in the indirect approach to the human rights law endorsed by the ECtHR. Without an international supervisory mechanism to enforce the obligations of private persons, it is left within a State's "margin of appreciation"⁵⁰ on how to implement and ensure respect of human rights obligations between private parties. This poses potential problems. For example, when a corporation has the means to settle out of court, this implies a capacity to bypass any accountability by avoiding litigation. Corporations can exploit these issues to avoid the courts and by so doing at the domestic level, an assessment of national legislation is evaded; so too is the question of effective deterrence (re: *MC v. Bulgaria*⁵¹).

In other words, the window of opportunity to use the ECtHR as a supervisory organ over domestic law can be circumvented by a TNC's astute avoidance of litigation at the domestic level. This may have implications for human rights cases. A recent example in Europe is the TNC Trafigura BV. This is a Netherlands-based trading company (with holdings in Switzerland and the UK) that was responsible for the 2006 petrochemical-waste dumping disaster in Côte d'Ivoire. Over fifteen people died and thousands were poisoned. A deal was made between the Ivorian government and Trafigura, in which the government agreed to drop all prosecutions or claims, including in the future, settling for €150M. These kinds of settlements illustrate how corporations can effectively bypass any formal litigation. Perhaps the clearest example is the Bhopal disaster in India in 1984.

⁵⁰ The term "margin of appreciation" has been used in hundreds of decisions by the Strasbourg organs to refer to the discretion that national authorities may be allowed in fulfilling some of their principal obligations under the European Convention on Human Rights (see Greer (2000); Letsas (2006); Hutchison (1999)).

⁵¹ "These [positive] obligations may involve the adoption of measures even in the sphere of the relations of individuals between themselves. While the choice of the means to secure compliance with Article 8 in the sphere of protection against acts of individuals is in principle within the State's margin of appreciation, *effective deterrence against grave acts* ... where fundamental values and essential aspects of private life are at stake, requires efficient criminal-law provisions. Children and other vulnerable individuals, in particular, are entitled to effective protection" (§150, emphasis added).

Drittwirkung is a complicated concept. It can have ostensibly unconstructive outcomes that some scholars consider damaging. But, it can also represent a powerful possibility for enforcing the protection of human rights by placing the responsibility directly on States and having the result ricochet onto corporations by reinforced legislation. Having considered the indirect approach of corporate accountability via the State, it is perhaps helpful to consider the Convention with the UN Norms. The UN Norms endorse State responsibility supplemented by direct corporate accountability.

3.3. UN Norms: the Indirect Approach

The UN Norms combine the direct and indirect approaches to corporate liability. Having dealt with the direct approach in the previous chapter, we will focus here on the Norms' implications for States and international bodies. The UN Norms as of this moment are not binding and have no substantive application to States or private actors.⁵² In its Preamble, the Norms recall the UDHR's reference to *every individual* and *all organs of society*. They recognise the traditional view that, "States have the primary responsibility to promote, secure the fulfilment of, respect, ensure respect of and protect human rights". But equally, assume that "transnational corporations and other business enterprises, as organs of society, are also responsible for promoting and securing the human rights set forth in the Universal Declaration of Human Rights". The Norms make acute reference to the actions that States ought take to ensure the responsibilities for TNCs and other businesses. Article 17 requires States to "establish and reinforce the necessary legal and administrative framework for ensuring that the Norms and other relevant national and international laws are implemented by transnational corporations". Considering the construction of the Norms as a human rights document, it seems commonsensical to presume that the European Court would be an ideal instrument to monitor States implementation of the Norms. However, when asked about this possibility, few respondents were even aware of the Norms. This bluntly illustrates that regarding TNCs, the Court is not applying the dynamic approach. It is not currently taking into consideration the impact of corporations on human rights. This is certainly a major gap in human rights protection.

Article 18 of the Norms outlines its incorporation into judicial bodies, reading "...in connection with determining damages, in regard to criminal sanctions, and in all other respects, these Norms shall be applied by national courts and/or international tribunals, pursuant to national and international law." This places a direct duty on the courts, at the national and international levels, to apply the Norms. When asked about what this means for the ECtHR, the respondents' reactions to this clause varied. There was the general acknowledgement of the difficulty of implementing the Norms since "the main legal basis, or the only legal basis for the rights [protected at the Court] is the Convention. [The Court] cannot directly protect rights which are not [included therein]" (R401). This was echoed by her colleague (R501) who affirmed that, "whatever [the judges] ambitiously want to introduce in practice in the Convention, [it must be] first implemented in a Protocol or future Protocol". She did not see this as

⁵² Despite this, Weissbrodt and Kruger (2003) indicate that some NGOs have begun using the Norms as standards against which to evaluate corporations.

being a real possibility, although she emphasised that the judges would be more likely to discuss the Norms in their “Reflection Groups.” Another response (R601) recalled the oft-cited concern of elevating corporations to State status. This judge suggested that that a Protocol is not in itself difficult to draft, but its implications can have great consequences for the efficacy and integrity of the Court. Having countries opt-out of Protocols is a destabilising factor that weighs heavily on the Court. If a revolutionary Protocol related to corporate accountability was drafted, countries may be reluctant to sign it. Moreover, drafting a Protocol is a politically charged and highly time-consuming process that entails a general consensus on a subject before beginning.

Weissbrodt and Kruger (2003) anticipate the Norms for both the direct and indirect approaches. Supporting the use of the Norms for the indirect approach they demonstrate its utility for regional human rights commissions and courts and illustrate the possible use of the Norms at the ECtHR in two decisions: *López Ostra v. Spain*⁵³ (1994) and *Guerra and Others v. Italy* (1998). Both involved corporate environmental pollution that infringed upon the right to private and family life (Article 8 ECHR).⁵⁴ These judgements illustrate that the State can be held accountable where there has been some irregularity at the domestic level (deficient legislation, negligence, etc.). In *López Ostra*, the ECtHR determined that environmental pollution could be a violation of human rights. Referring to Article 8, the Court stated, “Admittedly, the Spanish authorities...were theoretically not directly responsible for the emissions in question. However...the town allowed the plant to be built on its land and the State subsidised the plant's construction” (§52.2). If the Norms applied, under its Article G the corporation had an “obligation with regard to environmental protection”. Moreover, the State could be held under its Article H§17 to “establish and reinforce the necessary legal and administrative framework for ensuring that the Norms and other relevant national and international laws are implemented”.

In *Guerra and Others* the problem lay in the lack of sufficient information about pollution from a chemical fertilizer plant. It related to the failure to fulfil the statutory duty to provide information. The Court detailed the case as an investigation into the

⁵³ This case dealt with the pollution emitted from the plant of a limited company called SACURSA, for the treatment of liquid and solid waste built with a State subsidy on municipal land twelve metres away from the applicant's home. According to the facts of the case, the plant began to operate in July 1988 without the licence (*licencia*) from the municipal authorities required by Regulation 6 of the 1961 regulations on activities classified as causing nuisance and being unhealthy, noxious and dangerous and without having followed the procedure for obtaining such a licence. The claimant applied to the Court on violations “an unlawful interference with her home and her peaceful enjoyment of it, a violation of her right to choose freely her place of residence, attacks on her physical and psychological integrity, and infringements of her liberty and her safety” under the Spanish Constitution (Articles 15, 17 para. 1, 18 para. 2 and 19); she claimed violation of Articles 8 and 3 ECHR.

⁵⁴ See Soveroski (2007) where she details the court's similar findings in *Fadeyeva v. Russia* (2005) involving pollution from the Severstal steel plant, the largest iron smelter in Russia; and *Giacomelli v. Italy* (2006), which involved storage and treatment of 'special waste'. She notes, “the court has continued to follow this reasoning in subsequent cases. It found Article 8 violations arising from the granting of a permit to a gold mining operation that used the cyanidation process, in *Taskin v. Turkey* (2004). However, the court has generally limited its environmental rights rulings to situations involving serious and intrusive pollution, ruling against applicants who challenged the lack of a permitting hearing, and also where it considered the individual rights concerned were subservient to socio-economic interests” (2007: 265).

“failure to provide [the] local population with information about [the] risk factor and how to proceed in event of an accident at a nearby chemical factory”. A claim was lodged under Article 10 ECHR (freedom of expression) for the existence of a positive obligation of the State with regards to disseminating information. In the judgement the Court (§II.B.52) acknowledges that the Commission recognised a positive obligation of the State affirming that “consequently, the words ‘This right shall include freedom...to receive information...’ in paragraph 1 of Article 10 had to be construed as conferring an actual right to receive information, in particular from the relevant authorities, on members of local populations who had been or might be affected by an industrial or other activity representing a threat to the environment”. However, the Court (§II.B.53) rejected the Commission’s position claiming that, “freedom to receive information basically prohibit[s] a Government from restricting a person from receiving information that others wished or might be willing to impart tot him [or her]”. Although this predominantly features in cases regarding freedom of the press, the Court continued, “that freedom could not be construed as imposing on a State, in circumstances such as those of the present case, positive obligations to collect and disseminate information of its own motion”. The application was thus admitted under Article 8 ECHR (respect to private and family life) where a positive obligation is inherent therein.

These are encouraging examples of how the Norms can be used by the ECtHR to oblige States to monitor the conduct of domiciled corporations via the positive obligations inherent in the Convention. Weissbrodt and Kruger (2003: 919) explain that in these cases the ECtHR “found States liable for not adopting regulations and pursuing inspections to prevent the corporate misconduct”. They suggest, “in such situations, regional courts could refer to the Norms in determining states’ obligations”.

V. CONCLUSION

The issues emerging from the interviews can be organised around three key issues: legal subjectivity, procedural limitations and *forum non conveniens*. This conclusion will explore how these issues can be used to elucidate the limits on developing human rights law to apply to corporations.

1. Legal Subjectivity

There was a great deal of apprehension towards the feasibility and usefulness in reconsidering the legal subjectivity of corporations. One judge (R601) confirmed that, “there is certainly a concern that legal entities can access international courts as claimants and they can definitely try to uphold their rights”. She went on to question “when it comes to their responsibility [...] how do you hold them accountable?” This is a valid question, and what better a venue to consider the possibilities of how to hold corporations accountable for human rights violations than at a human rights court? What is particularly notable about this is that some judges lack any appreciation towards developing more robust mechanisms to hold corporations liable. Moreover, some judges were simply unwilling to consider possible developments. When asked about the juridical barriers to extending the Convention to include obligations on corporations, one respondent (R401) casually stated that there was “... no [feasible]

way, even in the long term future, of the Convention being changed in this respect because [the Court] already ha[s] problems in amending the Convention slightly in some other respects, which are much less far reaching". Does this mean that because there may be significant political hurdles to overcome with regards to the liability of corporations that the Court should dismiss its development?⁹ This indicates a defeatist attitude amongst judges that calls to question the degree to which human rights courts can respond dynamically to changes in social conditions. More fundamentally, if pivotal human rights actors such as judges, are claiming that aspects of human rights protection are unattainable, how can we rely on human rights law to fulfil its *raison d'être* and protect vulnerable parties?⁹

One possibility for holding corporations accountable is to consider them subjects of international law, which would subsume them under the rights and duties of that law – a fundamental requirement for the Convention, as suggested by one respondent (R401). The understandable apprehension stems from the elevation of TNCs to a position of power that they ostensibly do not hold, for example as policy-makers. This is what Clapham (2001: 59) identifies as the concern over extending authorship of international law. One response to this would be: corporations, regardless of whether they have a place at the decision-making table or not, are capable of and more than willing to do what it takes to have governments push through policies that benefit their means and their ends. They are in many cases the puppet-masters, as seen time and again through powerful lobby groups and 'friends in high places', where they are just as active behind the scenes as they would be if they were officially policy-makers.⁵⁵ That is not to say that corporations should be authors of international law, but rather to emphasise the political influence of TNCs, and their significant clout in government decision-making. It is imprudent to be naïve to the reality of the relationship between Big Business and government. For this reason, it must be addressed in an effective manner to allow for the enforcement of the duties of TNCs.

2. Procedural Limitations

The point was made by all of the respondents that there are procedural limitations, not only to direct corporate responsibility, but also to some degree the indirect approach. Since under Article 34 ECHR, the Court is reactive and not proactive, it can only consider cases against States. As Ratner points out, the breadth of international law "has expanded through erosion of much of the notion of the *domaine réservé*, the area seen as falling exclusively within the domestic jurisdiction of states" (2001: 540). Ratner's point can be illustrated by economic globalisation where jurisdictional limits are unclear in some areas of law, and more insidiously in light recent neo-colonial ventures.⁵⁶ In Iraq, for example, there seems to be no domestic jurisdiction of State

⁵⁵ A clear example of this is Halliburton and other corporations that have key government officials either as friends or on their Board of Directors that promote their requests at the policy table, and regardless of the costs. For a detailed depiction of these corrupt practices see Klein (2007).

⁵⁶ The reference to neo-colonial ventures includes recent cases of pillage in transition countries, such as Iraq and Afghanistan. This also includes countries recovering from massive destruction by natural disaster, where international development agencies and corporations confiscated prime seaside land during the clean-up and recovery process. This has provided opportunities for neo-liberal development

since other countries are deciding what to do with its natural resources, massive denationalisation and privatisation, and rewriting of its Constitution with the asphyxiating assistance of countries that cannot wait for their corporations to bite into the new markets (Klein 2007; Walker and Whyte 2005).

The issue of jurisdiction is allegedly the reason that the European Court of Human Rights lacks the capacity to enforce duties and human rights obligations on corporations. One judge (R601) suggested overcoming jurisdictional issues by implementing human rights as a conditionality clause for business deals.⁵⁷ According to this judge, the human rights conditionality clause would require that

In all [business] contracts [the] European company is obliged to respect the European human rights law - in its labour policies, labour recruitment, non discrimination, etc. There is the minimal available. In order to make European companies acting abroad comply with State human rights standards, as we would [do in Europe] you basically have to have legislation in Europe, which has this kind of provision. Whenever you carry out your business activities abroad, whether in China or wherever, you have to comply with European human rights standards, and if you don't then you will be held liable in [a] European court. There is absolutely nothing in international law that prevents Europe from doing that. It's a question of positive obligations to pass this legislation and to ask European companies to do so.

Again, there seems to be no legal basis in international law for not extending human rights obligations onto corporations, even though the Court seems to stall or defer from developing its law in this way. It is dangerous to ignore human rights violations on the pretext of procedural limitations. Insofar as law is a construction, neither the TNC, nor the State, nor the Court can claim that it is a *fait accompli*. What becomes evident is that there is a lack of political will to amend laws in ways that bring corporations under the scrutiny of courts or that oblige States to impose more robust legislation that may encumber economic gains by imposing human rights and environmental standards.

3. Forum Non Conveniens

Forum non conveniens - the appropriate forum to deal with corporate violations of human rights - emerged as a key issue. For most of the judges, civil or tort courts, or arbitration were better *fora*, one reason being the *ratione personae* of individuals before those bodies. When asked whether the judge (R501) envisaged the eventuality of individuals bringing corporations before the ECtHR, she explained that the European Court of Justice (ECJ) at Luxembourg is already doing this, although only for EU countries. In her opinion, the ECtHR does not because under the Convention "the State is the one who should establish legal order or legal protection". She continued that "[the ECtHR] will [not] become a fourth instance court for European countries

plans that allowed corporations to take over indigenous lands, for example in Sri Lanka after the 2006 Tsunami (for more Klein 2007).

⁵⁷ The EU already applies this to third parties; for an analysis and recommendations for improvement see Fierro (2002).

because the issue of economical and social rights is addressed mainly by the Luxembourg court". The ECJ looks to the constitutional traditions of its Member States and international treaties on the protection of human rights that Member States have signed, *in particular* the European Convention (ECJ, Internet). Does this mean that the most appropriate forum to deal with corporate violations of human rights is a court that applies the ECHR as its fundamental human rights document but that is not the Convention's supervisory organ? If other courts are using the ECHR to provide remedies for human rights violations, including those between corporations against individuals, surely the European Court can interpret its own Convention in a similar manner. Or at least consider the possibility to do so.

Ratner refers to attitudes that seeking human rights remedies for corporate violations of human rights is futile in the respect that appropriate *fora* are criminal or tort courts. He cautions against "such a position [that] assumes too much about tort law and too little about human rights law" (2001: 543). There are examples of courts addressing these cases in the United States applying the Alien Tort Claims Act (1789) (re: *Doe v. Unocal*). However, the responsibility of corporations in the human rights paradigm has yet to be officially acknowledged. Convincingly, Ratner takes the position that "reformulating the problem of business abuses as a human rights matter might well cause governments and the population to view them as a legitimate issue of public concern and not as some sort of private dispute" (*ibid*). Additionally, bringing these cases under the rubric of the human rights paradigm offers the possibility of staking a claim of universality and indivisibility that would hinder the current polemic of extra-territorial jurisdiction where companies can successfully outsource to countries that are unable or unwilling to enforce human rights standards. This is the case for example where the need for foreign direct investment may, and does in some cases, trump the enforcement of existing national or international laws.

4. Concluding Remarks

These issues are complex and no single avenue is the right one. Corporations are powerful non-state actors that time and again put profit above all else; and States are too often complicit in this venture. In the face of such adversity we are not impotent. The space between the laws can be filled if, *inter alia*, we systematically put people over profit. This must be accomplished with a combination of the international/domestic and direct/indirect approaches to TNCs human rights responsibilities. Although for the most part the interviews revealed a lack of enthusiasm to develop the Convention in ways to encompass corporate violations of human rights, some judges were willing to consider how to get there. One respondent (R801) suggested that

Concerning *Drittwirkung*, Protocol N° 12 prohibiting any discrimination, contains in Article 1(1) an important positive obligation to ensure non-discrimination as to any right protected under domestic law. This could prove to become, in future, an important tool to monitor private companies who discriminate.

This kind of alternative interpretation to the Convention may eventually extend its reach to corporations. If judges are willing to consider the possibility they can realise

creative ways to defend human rights, even where procedural limitations might seem overwhelming.

This article has demonstrated that there is a critical need to explore the various avenues for asserting responsibility for corporate violations of human rights. It has identified some of the gaps in the human rights law applied by the European Court. The main issue discussed throughout this study was the viability of reducing the space between the laws by exploiting both the direct and indirect approaches. Considering the complexities of the corporate veil, the complicity between States and TNCs, and the human and environmental calamities resulting from insufficient or non-existent legislation, both States and corporations are accountable and both have obligations to fulfil. The State, compellingly argued by Tombs and Whyte (2003: 11-13) and Vasquez (2005), is not impotent in the face of corporations and has a plethora of forms of regulation (social, economic, political, etc.). It structures the conditions of existence of markets, and their key actors: corporations.⁵⁸ The State has the capacity to intervene in the market and therefore also has an important role in asserting human rights above the interests of Big Business. But, TNCs are also powerful actors. Effective consumer boycotting⁵⁹ demonstrates their capacity to initiate, implement or alter human rights standards wherever they are active. The real obstacle, bluntly and appropriately put by one judge, “is simply political” (R701).

Human rights law needs its protagonists to defend its potential, rather than secede to the obstacles they face to envisage the proliferation of human rights. The European Court may be a regional body that focuses on political and civil rights, but human rights are supposed to be borderless both metaphorically and geographically. Judges at the Court seemed to have three central positions: either indifference to ways to develop the Convention to respond to corporate violations; defeatism related to an evolution of international law they do not agree with; or, the ability to consider possibilities theoretically, but a disinclination to consider its practical implementation. For this reason, the response to the growth of corporate power requires legislators, human rights courts and other organisations to explore new ways to ensure that the activities of TNCs are consistent with human rights standards in enforceable ways. It is important that the mechanisms developed to challenge and rein in corporations to respect human rights are not co-opted and watered-down to voluntary processes. The direct approach is an important aspect of corporate accountability and warrants consideration. But, even without the direct approach the ECtHR can still be effective against corporate violations. Its judges need to recognise its potential and fulfil the Court’s mandate: to protect human rights. One thing is clear. The Court’s conservatism is not due to any intrinsic legal barrier (though the law does present some obstacles). Rather, it is in the application of the law and the lack of judges’ imagination and/or commitment to change that is impeding its evolution.

⁵⁸ See for example the People’s Permanent Tribunal, Lima 2008 where European TNCs active in Latin America were accused and judged before the Tribunal; the accused included the national and international mechanisms (financial, media, legal, etc.) and actors (the EU, the governments of its Member States as well as the governments of Latin American countries, WTO, World Bank) which enable, legitimate and support the companies in their actions.

⁵⁹ Examples include *Clean Clothes* campaigns.

VI. REFERENCES

- Addo, M.K. (1999) "Human Rights and Transnational Corporations - an Introduction". Addo, M.K. (ed.) *Human Rights Standards and the Responsibility of Transnational Corporations*. The Hague: Kluwer Law International, pp. 3-37.
- (1999) "The Corporation as a Victim of Human Rights Violations". Addo, M.K. (ed.) *Human Rights Standards and the Responsibility of Transnational Corporations*. The Hague: Kluwer Law International, pp. 187-196.
- Alkema, E.A. (1990) "The third-party applicability or 'Drittwirkung' of the European Convention on Human Rights". Matscher, F. and Petzold, H. (eds.) *Protecting Human Rights: the European Dimensions/ Protection des droits de l'Homme: la dimension européenne: Studies in honour of/ Mélange en l'honneur de Gérard J. Wiarda: 2nd ed.* Berlin: Carl Heymanns Verlag KG, pp. 33-57.
- Amnesty International (2004) "The UN Human Rights Norms For Business: Towards Legal Accountability". London: Amnesty International Publications.
- Andreopoulos, G.J., Arat, Z.F.K., and Juviler, P., (2006) *Non-State Actors in the Human Rights Universe*. Bloomfield: Zumarian Press, Inc.
- Binion, G. (Aug. 1995) "Human Rights: a Feminist Perspective". *Human Rights Quarterly*, (17)3, pp. 509-256.
- Braithwaite, J. (1984) *Corporate Crime in the Pharmaceutical Industry*. London: Routledge.
- Brownlie, I. (2001) *Principles of Public International Law: 5th Ed.* Oxford: University Press.
- Bulmer, M. (ed.) (1984) *Sociological Research Methods: An Introduction 2nd Ed.* London: Macmillan Publishers.
- Chomsky, N. (29 Oct. 2009) "Human Rights in the New Millenium". Lecture at the LSE <http://www.chomsky.info/talks/20091029.htm> (01 Dec. 2009).
- Clapham, A. (2001) "Revisiting Human Rights in the Private Sphere: Using the European Convention on Human Rights to Protect the Right of Access to the Civil Courts". Scott, C. (ed.) *Torture as Tort: Comparative Perspectives on the Development of Transnational Human Rights Litigation*. Oxford: Hart Publishing, 513-535.
- (2006) *The Human Rights Obligations of Non-State Actors*. New York: Oxford University Press.

Dembour, M.B. (2006) *Who Believes in Human Rights? Reflections on the European Convention on Human Rights*. Cambridge: University Press.

De Schutter, O. (2005) "Globalisation and Jurisdiction: Lessons from the European Convention on Human Rights". CRIDHO Working Papers.

----- (2006a), "Extraterritorial Jurisdiction as a tool for improving the Human Rights Accountability of Transnational Corporations". Background paper in collaboration with Office of the UNHCHR.

----- (2006b), "Les affaires *Total* et *Unocal*: complicité et extraterritorialité dans l'imposition aux entreprises d'obligations en matière de droits de l'homme". *Annuaire français de droit international*, Paris: LII - CNRS Éditions.

Duruguibo, E. (Spring 2008) "Corporate Accountability and Liability for International Human Rights Abuses: Recent Changes and Recurring Challenges". *Northwestern Journal of International Human Rights*, 6(2), pp. 222-261.

Emberland, M. (2006) *The Human Rights of Companies: Exploring the Structure of ECHR Protection*. Oxford: University Press.

Fernando, A. (ed.) (1999) *Karel Vasak: Amicorum Liber. Human Rights at the Dawn of the 21st Century*. Brussels: Bruylant.

Fierro, E. (2002) *The EU's Approach to Conditionality in Practice*. The Hague: Martinus Nijhoff Publishers.

Garlicki, L. (2005) "Relations Between Private Actors and the ECHR". Sajó, A. and Uitz, R. (eds.) *The Constitution in Private Relations*. Utrecht: Eleven International Publishing, pp. 129-144.

Glasbeek, H. (2002a) "Shielded by Law: Why Corporate Wrongs and Wrongdoers are Privileged". *University of Western Sydney Law Review*, 1.

Glasbeek, H. (2003) *Wealth by Stealth: Corporate Law, Corporate Crime and the Perversion of Democracy*. Toronto: Between the Lines.

Greer, S. (2000) "The Margin of Appreciation: Interpretation and Discretion under the European Convention on Human Rights". Council of Europe Law: Human Rights files, 17

Harvard Law Review (2001), "Developments in the Law - Criminal Law - Part V: Corporate Liability for Violations of International Human Rights Law", in *Harvard Law Review*, Vol. 114, No. 7, pp.2025-2048.

Higgins, R. (1994) *Problems & Process: International Law and How We Use It*. Oxford: University Press.

Hutchison, M.R. (1999) "The Margin of Appreciation Doctrine in the European Court of Human Rights". *International and Comparative Law Quarterly*, 48, pp. 638-650.

Jägers, N. (1999) "The Legal Status of the Multinational Corporation Under International Law". Addo, M.K. (ed.) *Human Rights Standards and the Responsibility of Transnational Corporations*. The Hague: Kluwer Law International, pp. 259-270.

----- (June 2006) "Mainstreaming Human Rights in International Economic Organisations: Improving Judicial Access for NGOs to the World Trade Organisation". *Netherlands Quarterly of Human Rights*, 24(2), pp. 229-270.

Jessup, P. (Feb. 1947), "The Subjects of a Modern Law of Nations". *Michigan Law Review*, 45(4), pp. 383-408.

Kamminga, M. (17 August 2004) "Do Companies Have Obligations Under International Law?" Paper presented at the 71st Conference of the International Law Association, plenary session on Corporate Social Responsibility and International Law: Berlin,
<http://www2.ohchr.org/english/issues/globalization/business/docs/kamminga.doc>.

Kamminga, M.T. and Zia-Zarifi, S. (2000) "Liability of Multinational Corporations Under International Law: An Introduction". Kamminga, M.T. and Zia-Zarifi, S. (eds.) *Liability of Multinational Corporations Under International Law*. The Hague: Martinus Nijhoff Publishers.

Kumm, M. and Comella Ferreres, V. (2005) "What is so Special About Constitutional Rights in Private Litigation?" Sajó, A. and Uitz, R. (eds.) *The Constitution in Private Relations*. Utrecht: Eleven International Publishing, pp. 241-286.

Lauterpacht, H. (1970) "General Laws of the Law of Peace". Lauterpacht, E. (ed.) *Collected Papers: Vol. 1*. Cambridge: University Press.

Letsas, G. (2006) "Two Concepts of the Margin of Appreciation". *Oxford Journal of Legal Studies*, 26(4), pp. 705-732.

Loucaides, L.G. (2007) *The European Convention on Human Rights: Collected Essays*. Boston: Martinus Nijhoff Publishers.

Meeran, R. (1999) "The Unveiling of Transnational Corporations: A Direct Approach". Addo, M.K. (ed.) *Human Rights Standards and the Responsibility of Transnational Corporation*. The Hague: Kluwer Law International, pp. 161-170.

Michalowski, R.J. and Kramer, R.C. (Feb. 1987) "The Space Between Laws: The Problem of Corporate Crime in a Transnational Context". *Social Problems*, 34(1), pp. 34-53.

Muchlinski, P. (Jan. 2001) "Human rights and multinationals: is there a problem?" *International Affairs (Royal Institute of International Affairs 1944-)*, 77(1), pp. 31-74.

Mutua, M. (2002) *Human Rights: A Political & Cultural Critique*. Philadelphia: University of Pennsylvania Press.

Organisation for Economic Cooperation and Development (May 2002) "Multinational Enterprises in Situations of Violent Conflict and Widespread Human Rights Abuses", OECD Working Papers on International Investment, No. 2002/1 available at www.oecd.org.

Passas, N. (2005) "Lawful but Awful: 'Legal Corporate Crimes'". *The Journal of Socio-Economics*, 34, pp. 771-786.

Pellonpää, M. (1993) "Economic, Social and Cultural Rights". Macdonald, R. St. J., Matscher, F., and Petzold, H. (eds.) *The European System for the Protection of Human Rights*. Dordrecht: Martinus Nijhoff Publishers, pp. 855-874.

Ratner, S.R. (Dec. 2001) "Corporations and human Rights: A Theory of Legal Responsibility". *The Yale Law Journal*, 111(3), pp. 443-545.

Rodriguez-Garavito, C. (July 2006) "Nike's Law: The Anti-Sweatshop Movement, Transnational Legal Mobilization, and the Struggle over International Labor Rights in the Americas". Paper presented at the annual meeting of the *Law and Society Association*, Baltimore.

----- (July 2007) "Contesting the Global Governance of Labor: Law and the Transnational Labor Movement in the Americas (1990-2005)". Paper presented at the annual meeting of the *Law and Society Association*, Berlin.

Sajó, A. and Uitz, R. (eds.) (2005) *The Constitution in Private Relations: Expanding Constitutionalism*. Utrecht: Eleven International Publishing.

Santos, B. de Sousa (1997), "Toward a Multicultural Conception of Human Rights". *Zeitschrift für Rechtssoziologie*, 18: 1-15 reproduced in McCorquodale, R. (ed.) (2003) *Human Rights*. Burlington: Ashgate Publishing Company.

----- (2007a) "Beyond Abyssal Thinking: From Global Lines to Ecologies of Knowledges". *Eurozine (Revista Crítica de Ciências Sociais)* www.eurozine.com.

----- (2007b) "Human Rights as an Emancipatory Script: Cultural & Political Conditions". Santos, B. de Sousa (ed.) *Another Knowledge is Possible: Beyond Northern Epistemologies*. London: Verso, pp. 3-40.

Shelton, D. (ed.) (2003) *Commitment and Compliance: the Role of Non-Binding Norms in the International Legal System*. Oxford: University Press.

Soveroski, M. (2007) "Environment Rights Versus Environment Wrongs: Forum Over Substance?" *Review of European Community & International Environmental Law*, 16(3): 261-273.

Spielmann, D. (1995) *L'effet potentiel de la Convention européenne des droits de l'homme entre personnes privées*. Brussels: Bruylant.

----- (2004) "La Convention Européenne des Droits de l'Homme et le Droit Pénal". *Annales du droit Luxembourgeois*, pp. 26-87.

----- (2007) "The European Convention on Human Rights The European Court of Human Rights". Olivier, D. and Fedtke, J. (eds.) *Human Rights and the Private Sphere: A Comparative Study*. London: Routledge-Cavendish, pp. 427-464.

Stammers, N. (1995) "A critique of Social Approaches to Human Rights". *Human Rights Quarterly*, 17, pp. 488-508.

Steiner, H.J., Alston, P., Goodman, R. (2008) *International Human Rights in Context: Law, Politics, Morals 3^d ed.* Oxford: University Press.

Strange, S. (1996) *The Retreat of the State: The Diffusion of Power in the World Economy*. Cambridge: University Press.

Teeple, G. (2005) *The Riddle of Human Rights*. New York: Humanity Books.

Tombs, S. and Whyte, D. (2003), "Introduction: Corporations Beyond the Law? Regulation, Risk and Corporate Crime in a Globalised Era", in *Risk Management*, Vol. 5, No. 2, *Special Issue: Regulation, Risk and Corporate Crime in a 'Globalised' Era*, pp.9-16.

Vasak, K. (November 1977) "Human Rights: A Thirty-Year Struggle: the Sustained Efforts to give Force of law to the Universal Declaration of Human Rights". UNESCO Courier: Paris, pp. 30: 11.

Vazquez, C.M. (2005) "Direct vs. Indirect Obligations of Corporations Under International Law", in *Columbia Journal of Transnational Law*, 43, pp. 927-959.

Walker, C. and Whyte, D. (July 2005) "Contracting Out War?: Private Military Companies, Law and Regulation in the United Kingdom". *International and Comparative Law Quarterly*, 54, pp. 651-690.

Wells, C. and Elias J. (2005) "Catching the Conscience of the King: Corporate Players on the International Stage". Alston, P. (ed.) *Non-State Actors and Human Rights*. Oxford: University Press.

Wildhaber, L. (1980) "Some Aspects of the Transnational Corporation in International Law". *Netherlands International Law Review*, 27(1), pp. 79-89.

Case-Law

Advisory Opinion on Reparations for Injuries Suffered in the Service of the United

Nations [1949] ICJ Rep. 174

Anheuser-Busch Inc. v. Portugal (GC) [Judgement of 11 January 2007] (App. No. 73049/01) ECHR 2007

Autronic AG v Switzerland [1990] Eur.CT.HR. Series A.178; 12 [1990] EHHR 485

Bankovic and Others v. Belgium and Others [Judgement of 12 December 2001] (App. No. 52207/99) ECHR

Belgian Linguistics Case [Judgement (merits) of 23 July 1968] Series A no. 6

Costello-Roberts v. United Kingdom [Judgement of 25 March 1993] Series A no. 247-C

Comingersoll S.A. v. Portugal (GC) [Judgement 6 April 2000] (App. No. 35382/97) ECHR 2000-IV

Cyprus v. Turkey (GC) [Judgement of 10 May 2001] (App. No. 25781/94) ECHR 2001-IV

DH & Others v. Czech Republic (GC) [13 November 2007] (App. No. 57325/00) ECHR

Doe v. Unocal Corp. (9th Cir. 18 September 2002) No. 00-56603, WL 31063976

Fadeyva v. Russia [Judgement of 9 June 2005] (App. No. 55723/00) ECHR 376

Florin Mihăilescu v. Romania (dec.) [26 August 2003] (App. No. 47748/99) ECHR 2003-II

Garaudy v. France (dec.) [24 June 2003] (App. No. 65831/01) ECHR 2003-IX (extracts)

Giacomelli v. Italy [Judgement of 2 November 2006] (App. No. 59909/00)

Guerra and Others v. Italy [Judgement 19 February 1998] (App. No. (116/1996/735/932) 26 EHHR 357

Ilaşcu and others v. Moldova and Russia (GC) [Judgement of 8 July 2004] (App. No. 48787/99) EECHR 2004-VII

J.A. Pye (Oxford) Ltd. and J.A. Pye (Oxford) Land Ltd. v. United Kingdom [30 August 2007] (App. No. 44302/02)

López Ostra v. Spain [Judgement of 9 December 1994] (App. No. 16798/90) ECHR Series A No. 303-C.

Marckx v. Belgium [Judgement of 13 June 1979] Series A, No. 31, (1970-1980) 2 E.H.R.R. 330.

Makaratzis v. Greece [20 Dec. 2004] App. No. 50385/99 Eur. Ct. H.R. 2004-XI.

M.C. v. Bulgaria [Judgement of 4 December 2003] (App. No. 39272/98) ECHR 2003-XII.

Mykhaylenko and others v. Ukraine [Judgement (merits) 30 November 2004] (Applications nos. 35091/02, 35196/02, 35201/02, 35204/02, 35945/02, 35949/02, 35953/02, 36800/02, 38296/02, and 42814/02) ECHR 2004-XII.

Norwood v. United Kingdom (dec.) [16 November 2004] (App. No. 23131/03) ECHR 2004-XI

Öneriyildiz v. Turkey [Judgement of 30 November 2004] (App. No. 48939/99) ECHR 2004-XII

Osman v. United Kingdom [29 October 1998] (App. No. 23452/94) Reports of Judgements and decisions, EHRR 1998-VIII

Plattform "Ärzte Für Das Leben" v. Austria [Judgement of 21 June 1988] (App. No. 10126/82) Series A, App 13 EHRR 204

Proszak v. Poland (Comm. dec.) [17 January 1995] App. No. 25086/94

R. v. Birmingham and Gloucester Rly. Co. [1842] 3 Q.B. 223.

Radio France and others v. France [Judgement of 30 March 2004] (App. No. 53984/00) ECHR 2004-II; (dec.) (App. No. 53984/00) ECHR 2003-X

Scientology Kirche Deutschland eV v. Federal Republic Germany [Comm. Dec. of 7 April 1997] (App. No. 34614/96)

Shestakov v. Russia (dec.) [18 June 2002] (App. No.48757/99) ECHR 2002-IV

Ševo v. Croatia (dec.) [14 June 2001] App. No. 53921/00 ECHR 2001-IV

Soering v. the United Kingdom [Judgement of 9 July 1989] Series A, No. 161 (1989) 11 E.H.R.R. 439

Taskin v. Turkey [Judgement of 10 November 2004] (App. No. 46117/99) Reports of Judgments and Decisions 2004-X

Trial of Major War Criminals (Goering et al.) (1946), International Military Tribunal (Nuremberg) Judgement and Sentence, 30 September and 1 October (London: HMSO) Cmd. 6964.

Tyrer v. the United Kingdom [Judgement of 25 April 1978] (App. no. 5856/72) Series A, No. 26, 2 EHRR 1

Van der Musselle v. Belgium [Judgment (merits) of 23 November 1983] (Application no. 8919/80) Series A no. 70

Velásquez-Rodríguez v. Honduras [29 July 1988] Inter-Am. Ct HR (Ser. C) No. 4

Vgt Verein gegen Tierfabriken v. Switzerland [Judgement 28 June 2001] App. No. 24699/94 ECHR 2001-VI

Wiwa v. Royal Dutch Petroleum (Shell); Wiwa v. Shell Petroleum Development Company et al. (2nd Cir. 2000) 226 F. 3d 88; *Wiwa v. Anderson* (2001)

Wos v. Poland (dec.) [1 March 2005] App. No. 22860/02, ECHR 2005-IV

X and Y v. The Netherlands [Judgement (merits) of 26 March 1985] (App. 8978/80) Ser. A No. 91

Young, James and Webster v. United Kingdom [Judgement of 13 August 1981] Series A no.44

Conventions and Treaties

Council of Europe (1950 [2003]) *Convention for the Protection of Human Rights and Fundamental Freedoms as Amended by Protocol No. 11 with Protocol Nos. 1, 4, 6, 7, 12, 13 (European Convention on Human Rights)* CETS 005.

Council of Europe (Turin, 18.X.1961) *European Social Charter* CETS 035; (Strasbourg, 5.V.1988) *Additional Protocol to the European Social Charter* CETS 128; (Strasbourg, 3.V.1996) *European Social Charter (revised)* ETS 163

Council of Europe (20 October 1988 [1990]) Recommendation No. R.(88)18 of the Committee of Ministers to Member States concerning *Liability of Enterprises having Legal Personality for Offences committed in the Exercise of their Activities*.

Council of Europe (Strasbourg, 4.XI.1998) Resolution (77)28 *Convention on the Protection of the Environment Through Criminal Law*, and Explanatory Report ETS 172

European Parliament (2001) Resolution on the Commission Green Paper on Promoting a European framework for Corporate Social Responsibility (COM(2001) 366 – C5-0161/2002 – 2002/2069(COS)).

International Labour Organization (16 November 1977) *Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy*, Official Bulletin

1978, Vol. LXI, Series A, No.1; Official Bulletin 2000, Vol. LXXXIII, Series A, No. 2 (amended)

International Commission of Jurists (Maastricht, 22-26 January 1997) *Masstricht Guidelines on Violations of Economic, Social and Cultural Rights in Human Rights Quarterly* (1998), Vol. 20, pp. 691-705.

Organization for Economic Cooperation and Development (2000) *The OECD Guidelines for Multinational Enterprises: Text, Guidelines, Commentary*, DAFFE/IME/WPG(2000)

United Nations (10 December 1948) *Universal Declaration of Human Rights* G.A. R217 A (III)

United Nations (Brussels, 29 November 1969 [1976] [1992]), Inter-Governmental Maritime Consultative Organization, *International Convention on Civil Liability for Oil Pollution Damage and its Protocols*, No. 14097

United Nations (Montego Bay, Jamaica, 10 December 1982) *Convention on the Law of the Sea*, U.N. Doc. A/Conf.62/121, 21 I.L.M. 1245

United Nations (26 June 2000) *Global Compact*; Secretary-General Kofi Annan, Address at the World Economic Forum in Davos, Switzerland (Jan. 31, 1999), UN Doc. SG/SM/6448 (1999).

United Nations (26 August 2003) Economic and Social Council *Draft Norms on the Responsibilities of Transnational Corporations and other Business Enterprises with Regard to Human Rights*, Dist. General E/CN.4/Sub.2/2003/12/Rev.2.

United Nations (2003) Economic and Social Council *Commentary on the Draft Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights* Dist. General E/CN.4/Sub.2/2003/38.

United Nations (2005) Economic and Social Council *Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights*, Sub-Comm'n on the Promotion and Protection of Human Rights Res. 2003/16, U.N. Doc. E/CN.4/Sub.2/2003/12/Rev.2

United Nations (9 December 1999) *International Convention on the Suppression of the Financing of Terrorism* G.A. Res. 109, U.N. GAOR, 54th Sess., Supp. No. 49, U.N. Doc A/54/49 (Vol. I) (1999), S. Treaty Doc. No. 106-49 (2000), 39 I.L.M. 270 (2000)

United States of America (1789) *Alien Torts Claims Act*, 28 U.S.C. s. 1350