Transnational Corporations and the European Convention on Human Rights:

Scrutinizing the "Space Between the Laws"

By: Stéfanie Khoury

Supervised by:
Dr. Dave Whyte, *University of Liverpool*

Oñati International Institute for the Sociology of Law
Master's Thesis 20 Points

September 15, 2008

Acknowledgements

I had the immense privilege of writing this Tesina under the supportive and inspiring supervision of Dr. Dave Whyte. Thank you for bouncing around ideas with me, patiently reviewing my chapters, and for turning this into a beginning.

I would like to extend my sincerest appreciation to D.S. for your thoughtfulness and generosity in sharing documents, and availability for discussion and questions.

Thanks to my family for everything, especially Mela for your advice. And JC, for understanding my quirks, and reminding me that there are no problems, only solutions.

Finally, thanks Compañeros for an unforgettable and life-changing experience in Oñati. You will always be a source of inspiration. *Eskerrik Asko*.

S.K., *Strasbourg*

States are not moral agents, people are,
And can impose moral standards on powerful institutions.

-Noam Chomsky

Y ahora el pueblo que se alza en la lucha
con voz de gigante gritando: ¡adelante!

-Quilapayún

Table of Contents

Table of Abbreviations

ATCA	Alien Tort Claims Act
CEDAW	Convention for the Elimination of all forms of Discrimination Against Women
CoE	Council of Europe
ECHR	European Convention for the Protection of Human Rights and Fundamental Freedoms
ECJ	European Court of Justice
ECtHR	European Court of Human Rights
IACtHR	Inter-American Court of Human Rights
ICC	International Criminal Court
ICJ	International Court of Justice
MNCs	Multinational corporations
NGO	Non-governmental organisation
NIMT	Nuremberg International Military Tribunal
OECD	Organisation for Economic Cooperation and Development
TNCs	Transnational corporations
UDHR	Universal Declaration of Human Rights
UN	United Nations
UN Norms	United Nations Norms on the Responsibilities of Transnational Corporations and Other Businesses with Regard to Human Rights

I. Introduction

This thesis assesses the juridical barriers to the development of the European Convention for the Protection of Human Rights and Fundamental Freedoms (hereafter ECHR or the Convention) in its application to corporate violations of human rights. It focuses on lacunae in the ECHR and the European Court of Human Rights (hereafter ECtHR), concentrating on European-based corporations. This thesis identifies a gap between home-State/municipal laws and supra-national/international laws. Even if home-States enact laws, the legal principles of legal personality (*infra* section 3.3.) and separation of corporate identity (*infra* section 3.2.) enable transnational corporations (hereafter TNCs) to apply double standards in developing countries and evade responsibility for violations at home (see Meeran, 1999). Consequently, there is a gap in human rights law concerning the responsibility of private profit-making corporations. This gap does not deal with the fact that globalisation facilitates crimes without law-breaking (Passas, 2005:772). Noam Chomsky (1997) points out massive exploitation is not exclusively occurring in so-called 'Third-World' countries, but is also manifest in the 'new' Europe. For example, he says, a corporation will happily outsource to "a country where multinational[s] can get people who are well-trained and well-educated [and who will] work for 10% of your wages, with no benefits, because of the effectiveness of capitalist reforms in pauperizing the populations and in increasing unemployment". One suggestion to reconcile these issues is to leave the regulation of TNCs to the home-States' municipal laws. However, this is insufficient when considered in light of reports such as Corpwatch's 1999 study, which found that fifty-one of the one hundred largest economies in the world are corporations, while only forty-nine are countries and the combined sales of the world's top two hundred corporations are greater than a quarter of the world's economic activity (Anderson & Cavanagh, 2000; Aparicio and Karliner, 2003; Jägers 1999; for a nuanced critique see Vasquez, 2005:948, 947-958). The economic power accrued by corporations gives them immense power to pressure home-states to take political decisions that benefit business.

Fisse and Braithwaite (1993:15) identify that corporations have the capacity but not the will to deliver clearly defined accountability for law-breaking. Courts of law, conversely, may have the will but not the capacity to hear cases of corporate responsibility due to procedural limitations, incomplete or insufficient law. This thesis contests this point, identifying judicial resistances that may not have any real basis in the law. Conversely to Fisse and Braithwaite, this study purports that courts of law and their actors may in fact have the legal capacity to hold corporations

accountable, and explores their unwillingness to do so. The ECHR has provisions that allow the Court to recognise the corporation as a legal entity with rights, but the responsibility and duties of corporations is still 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 which State of the supply chain has the responsibility to enforce the rules (home-States or host-State). Subsequently, responsibility for violations of human rights by either the corporation itself or by its subsidiaries can be evaded by hiding behind the 'corporate veil'. Related problems of accountability ("the space between the laws") 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. Indeed, there are questions of how to promote accountability when violations of those standards occur. Steiner, Alston and Goodman (2008:1388) 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. In practice, however, various problems arise:
>
> 1) Governments are often loathe to take the measures necessary to ensure compliance by TNCs, especially but not only in relation to labour matters;
> 2) Such measures are costly and perceived to be beyond the resources capabilities of governments in developing countries;
> 3) In the context of increasing global mobility of capital, competition among potential host countries discourages initiatives that may pus up labour costs and make one country less attractive than others with lower regulatory standards (the so-called race to the bottom);
> 4) The transnational complexity of manufacturing and related arrangements in tan era of globalisation makes it increasingly difficult to identify who is responsible for what activities and where; and,
> 5) Especially in the labour area, difficult issues arise about the different levels of minimum acceptable standards from one country to another.

As this thesis argues, dominant human rights discourses and institutions, when considering specifically TNCs' transgressions, encounter a kind of 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 where political-economics is involved. Thus, the crux of the issue lies in identifying the limitations of the law, in order to effectively develop it to overcome this paralysis. One such point of paralysis is the question of *forum non conveniens*. It is often suggested that criminal courts may be better suited than human rights courts to deal with corporate violations. One response to this may be that, as Glasbeek (2002; 2003) contends, criminal laws reflect the defense of capitalism through the protection of the accumulation of wealth and private property. However, human rights courts may be more aptly suited to address corporate violations of human rights

since their purpose is to protect rights and freedoms. Disconcertingly, the ECtHR and its case-law remains virtually silent on this point. The actors related to the European Court, particularly judges, lawyers, non-governmental organisations (hereafter NGOs) and State representatives have a supposed duty to protect individuals from human rights violations. But, the efficacy of human rights depends on whether the legislation exists and whether it can be implemented in effective ways where corporate violations are concerned.

The ECtHR upholds the ideal of the protection of human rights. This ideal is situated in the broader scheme of the historical context of universal rights. The Preamble of the Universal Declaration of Human Rights (1948, hereafter UDHR) contains an application that goes beyond both States and individuals. It reads:

> The General Assembly proclaims that this Universal Declaration of Human Rights as a common standard of achievement for all peoples and all nations, to the end that *every individual* and *every organ of society*, keeping this Declaration constantly in mind, shall strive by teaching and education to promote respect for these rights and freedoms and by progressive measures, national and international, to secure their universal and effective recognition and observance, both among the peoples of Member States themselves and among the peoples of territories under their jurisdiction (emphasis added).

The now famous statement of Professor Louis Henkin (1999:25) illustrates that, "*every individual* includes juridical persons. Every individual and *every organ of society* excludes no one. No company. No market. No cyberspace. The Universal Declaration applies to them all" (emphasis in original; see also Stephens, 2002:77). The European Convention makes immediate reference to the UDHR in its Preamble, acknowledging it in its first paragraph. This indicates that the ECHR too pertains to every individual and every organ of society, as emphasised by Henkin. It would equally suggest that Article 30 UDHR applies. This extends the responsibilities and obligations of human rights beyond the State, declaring,

> Nothing in this Declaration may be interpreted as implying for any State, *group* or *person* any right to engage in any activity or to perform any act aimed at the destruction of any of the rights and freedoms set forth herein (emphasis added).

Since the Universal Declaration is recognised by the ECHR, the European Court may be able to use the Declaration in order to apply more generous interpretations to the Convention's provisions to include corporations. The possibility of using external international documents as supporting sources for the Court's interpretation is an important indication of its position regarding global trends in this field.

Despite Henkin's emphasis 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 lacunae in the Court's jurisprudence regarding corporate liability may be the result of a market-friendly and trade-related paradigm of human rights (see 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, 2003b). 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. The ECHR works on a voluntary basis and Member States are free not to ratify Protocols if they so choose.[1]

This thesis explores how the ECtHR can interpret its laws in a way that confers duties upon corporations. In the last 50 years, the United Nations and regional organisations have developed many international rules to protect human rights. Though primarily concerned with the obligations of States, these rules provide a clear basis for extending international legal obligations to companies. The International Council on Human Rights Policy (2002:2) identifies these approaches:

> •States have a duty to protect human rights and in consequence must ensure that private actors, including companies, do not abuse them. This duty on States gives rise to indirect obligations on companies.
> •International law can place direct legal obligations on companies, which might be enforced internationally when States are unable or unwilling to take action themselves.

Both approaches impact States and non-state actors, albeit in different ways and to different degrees. These are explored in detail below (Chapters IV and V).

The presentation and analysis of these approaches meet the central objectives of this Master's thesis: firstly, to determine the gaps in the jurisprudence of the ECtHR vis-à-vis corporate liability for human rights violations; and secondly, to examine the Court's current and/or future role as a forum for extending human rights protection into the sphere of private corporations. Chapter II describes the methodology used throughout this thesis. Interviews were conducted with judges at the European Court, and a sample of its relevant case-law was analysed. Primary data was extensively supplemented with secondary data including books, journal articles and non-governmental documents. Chapter III contextualises the subject, providing background information and a brief discussion of some key concepts. Chapter IV focuses on the direct approach, where international law applies to corporations. It explores whether the direct approach is achievable within the present framework of the European Convention. Chapter V considers the conventional or indirect approach. This option relies on States taking greater

[1] A current example is the pending ratification of Protocols 6 and 14 by Russia.

responsibility for overseeing the human rights performance of companies themselves. The ECtHR remains a strictly supervisory mechanism. By exploring the limitations to corporate accountability, this thesis identifies the implications this has for human rights protection. It considers the possibilities for reinforcing human rights by empowering the State. Chapter VI brings to a close this investigation with some concluding remarks that critically reflect upon the interviews.

II. Methodology

Both primary empirical data and secondary data were collected. One-on-one interviews were supplemented by secondary data including books, journal articles, conventions and case-law documenting the socio-political developments of relevant themes at the European Court.

2.1. Primary Data

The empirical data in the form of semi-structured interviews was gathered over the course of three months (June-August 2008). Of the twenty-five invitations extended (Appendix 8.1. and 8.2.), five interviews were finally held with members of the European Court of Human Rights in Strasbourg. The interviewees were a Section president, vice-president and three judges. Their backgrounds were in penal/criminal law, international law, constitutional law, and human rights law. All interviews were conducted individually, and in their offices at the Court in Strasbourg, as per the request of the respondents. Each interview lasted between 45 to 60 minutes. They were audio-recorded, with the exception of one, with oral consent given at the beginning of each session. Interviews were conducted in English and French, translated to English by the author. The decision to interview only judges was strategic and practical. Strategic because for the aims and objectives of this thesis judges at the Court were best placed to respond to the research questions. And practical, because due to a limited time-frame, location, and challenging circumstances regarding respondent candidates, interviewing judges at the Court was the most feasible option.

These interviews investigated perceptions of a small number of judges at the European Court. The purpose was to explore the attitudes of these actors regarding the prospects and limitations of the ECtHR with regards to prosecuting human rights transgressions by corporations. It considered what the judges at the Court envision as the future for human rights law and the Court. Due to the limited sample, it is impossible to generalise these findings. Although they help shed light onto some of the barriers to the development of human rights law with regards to corporations and provide as a basis for future investigation.

The interviews were generally semi-structured, leaving room to adapt to the situation. Some sessions required more structure (for example where the respondent was less familiar with the subject), whilst others were much more conversational. The interviews were analysed according to the objectives outlined in the Interview Grid (Appendix 8.3.). The questions were divided into five main categories each with specific sub-objectives. The first regarding the obstacles to

corporate liability via the ECHR; the second, probing judges knowledge/awareness of the UN Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises; the third, to determine the evolution of the approaches/orientations used by the judges; the fourth, to ascertain their perception of *Drittwirkung,* or the indirect approach (*infra* section 5.2.), for human rights violations by corporations; and finally, to investigate the consequences of the state-centric approach of the Convention.

2.2. Secondary Data

Secondary analyses of European Court case-law, as well as Council of Europe (hereafter CoE) and other international conventions were conducted after identifying relevant cases and conventions from the literature review. Analyses of legal documents and pieces written by judges and former judges helped determine the gaps in the jurisprudence of the ECtHR regarding corporate liability for transgressions in the human rights sphere. They were also used to examine perceptions of former and current judges' on the Court's current and/or future role as a forum for extending human rights protection into the sphere of private corporations.

Case-law and conventions were to identify when and where the ECtHR recognises the possibility for human rights obligations in the private sphere. That is, where the European Convention applies to private relations and what role the Court has in ensuring the protection of the rights enshrined therein. This was done by cross-referencing the Court's acknowledgement of the Convention in the private sphere, by means of its case-law, with the data derived from the interviews.

2.3. Reflections on the Interviews

Gaining access to the Court actors was more difficult than expected. The original schedule was to complete the interviews by the beginning of June. However, the first interview took place in late June. This was the only judge to have initially responded to the invitations mailed in April. The interview went well and at its close, the judge asked about her colleagues' participation. This segued into requesting if she could help solicit some of the other judges. A second round of invitations were extended in late June and a few days later three more interviews were initiated for dates throughout July. These were difficult to organise because throughout July and August the judges were on holiday. During the last interview in July, the judge suggested another colleague who accepted an interview in early August. Limited to a modest number, the interviews were supplemented with documents (files, articles, and books) written by former and current judges at the Court. This was particularly helpful since the judges expressed their

opinions about various relevant issues and their positions for the Court's current and future role in the private sphere.

Throughout the interviews it was important to bear in mind what Bulmer (1979:217) calls the "degree of expected intensity". This is, he suggests, not only the "more or less specific expectations of the appropriate behaviour in a given role" (*ibid*), but also expectations of the degree of self-involvement. This was reflected on during the interviews and analyses to avoid (over-)categorising the interviewees and interviewer. The interviews were generally quite fluid. Some respondents knew more about the subject and were more comfortable interpreting the questions. This was helpful because it often led to discussions of relevant cases to investigate. In some interviews, the discussion was stunted by a firm reluctance to consider certain questions 'outside the box'. This required pushing the boundaries in terms of where the Court lies politically and the role it assumes. Very few respondents were keen to discuss this, although one interview led to a fruitful dialogue.

A technical difficulty arose during the last interview where one judge declined from having the interview audio-recorded. This was unanticipated, and it was challenging to maintain a fluid discussion whilst trying to make comprehensive and comprehensible notes. The respondent spoke quickly and made reference to several new cases throughout the interview, which he generously supplemented with articles and books. Two of the respondents subsequently provided valuable documentation, the contact information of an important scholar in the field, and loaned books that were unavailable in the libraries.

Finally, an important aspect of any interview is anonymity. According to the British Sociological Association Code of Ethical Practice's Article 18: "Research participants should understand how far they will be afforded anonymity and confidentiality and should be able to reject the use of data gathering devices such as tape-recorders and video cameras". This guideline was adhered to and all respondents maintained anonymity, even though only one respondent formally requested to remain anonymous.

III. Background to the Study

This chapter defines the terms and concepts used throughout this thesis. It begins with a brief discussion and justification of the preference for using the term 'transnational corporations'. This is followed by a discussion of the legal subjectivity of corporations, and an analysis of the corporate veil and legal fictions. It also reflects on the definition of human rights, the actors implementing them and the role and impact of globalisation. This chapter also briefly introduces the European Convention on Human Rights. Finally, it scrutinises the ECHR's state-centric approach. The changing face of human rights violators and the need to adapt human rights protection mechanisms to the reality of the 21st century is an important aspect of this study. Non-state actors have come to play a significant role in both protecting and violating human rights. This implies rethinking the state-centricity of the European Convention and acknowledging the conflation of the public/private spheres in the human rights field.

3.1. Defining Transnational Corporations: Transcending the Nation-State

This thesis adopts the terminology of 'transnational' rather than 'multinational' corporation or enterprise since 'transnational' implies an entity with an existence above and beyond the State(s) in which it operates.[2] As several 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 and directly implicated in a variety of human rights violations, including labour rights violations, destruction of the environment, and analogous forms of slave labour. This displays a method 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, 2003b:9). The preference in terminology made here is in some cases inconsequential. However, for the purposes of this thesis it is significant since key to the impunity enjoyed by the transnational corporation is its ability to situate itself in a corporate sanctuary between national and international legal systems or even beyond the law in general.

Marius Emberland (2006) suggests that the corporation is bestowed with a legal personality

[2] The debate surrounding the semantics between TNCs and MNCs is a valuable one, however for the purposes of this dissertation it cannot be addressed. For a detailed discussion on the differences between TNCs and MNCs see Muchlinksi (2007). For definitions of these entities see Wildhaber (1980), Clapham (2006), OECD *Guidelines* (2000), UN Sub-Commission on the Promotion and Protection of Human Rights *Report on the United Nations Draft Norms on the Responsibilites of Transnational Corporations and Other Businesses with Regards to Human Rights* (2005).

that allows it to benefit from legal protections by claiming its rights before the courts. Some scholars go further, asserting that the legal personality of a corporation allows it to benefit from human rights whilst evading duties (see Meeran, 1999). The Harvard Law Review (2001:2030-2031) 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. Since the nineteenth century, international law has addressed almost exclusively the conduct of States. Traditionally, States were viewed as the only "subjects" of international law, the only entities capable of bearing legal rights and duties. Over the last fifty years, though, the gradual establishment of an elaborate regime of international human rights law and international criminal law has begun to redefine the individual's role under international law. It is now generally accepted that individuals have rights under international human rights law and obligations under international criminal law. This redefinition, however, has occurred only partially with respect to legal persons such as corporations: international law views corporations as possessing certain human rights, but *it generally does not recognize corporations as bearers of legal obligations* under international criminal law (emphasis added).

Historically, legal developments enabled that the responsibility for corporate transgressions fall not on the people who own the corporation but on the corporation itself. This 'corporate veil' facilitates a number of transgressions, such as evading human rights responsibilities.

3.2. The Corporate Veil and Legal Fictions

Although the corporation is bestowed a legal personality conferring upon it the rights of an individual, its obligations are much less certain. Nicola Jäger (1999) defines legal personality by the incorporation of two central components: firstly, the capability of being conferred international rights and duties; and secondly, the capacity to maintain these rights by bringing claims before international courts. The concept of corporate legal personality is contentious and polemical, particularly when considering their human rights obligations. 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 was created to protect individuals from impoverishment by separating the individual from his/her business, thus limiting personal liability. This presented problems for creditors and the courts attempted to remedy the problem of limited liability by allowing legal action against corporations directly. This ensured that creditors could bring corporations before the courts. Although perhaps intended to protect individuals, the corporate veil indeed created problems of accountability. Corporate personality meant that the individual could conveniently hide behind the corporation and avoid any responsibility for its transgressions.

Edward, First Baron Thurlow (1731-1806) appropriately remarked, corporations have "no soul to be damned and no body to be kicked" (see Coffee, 1981). This opinion is not outdated.

Harry Glasbeek (2002; 2003) asserts the corporate personality is equivalent to arming corporations with a virtual shield from law, rather than a remedy. He helpfully reminds us that behind every corporation are individuals pulling the strings. He argues that it is those individuals who should be held responsible for any damages resulting from corporate activities. These legal fictions work to the advantage of corporations, created to empower them institutionally and legally, and enable them restitution when their rights have been violated. These fictions seem to have incongruent implications. On the one hand, assigning the corporation a personality has led to the possibility of holding it accountable for its transgressions (with acute limitations). On the other hand, it has a disturbing result, in that the people "pulling the strings" in the corporation are effectively, as Glasbeek suggests, immunised from the law. This is the case for example with the complex web of numbered companies or parent-company/subsidiary duos.[3] This explains the 'corporate veil' where the corporation and the legal fictions surrounding it mask individual responsibility.

Meeran (1999) illustrates the manipulation of the corporate veil as the following situation: the parent-company of a wholly owned subsidiary foregoes its responsibility for the actions or negligence of the subsidiary. Meaning TNCs have succeeded in separating the parent-company from the subsidiary (for example, operating locally abroad), which amounts to the legal protection of the parent-company, or TNC-central even though it may be making the locally applied company decisions. This is facilitated by the abovementioned legal possibility of weaving a complex web of corporate structures with, for example numbered companies,[4] making it extremely difficult to retrace the line of responsibility. The parent-company deviously, but legally, separates itself from the subsidiary – often 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.

[3] This web makes it virtually impossible to trace back to any one individual. If the company is brought to court and is found responsible, the individual behind the company it 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 and avoid reparations.

[4] Numbered companies are most commonly used in Canada. These are companies that are given a generic name based on an assigned corporation number, e.g. registered entity under "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 much larger enterprises to deflect attention from the parent's ultimate motives.

Additionally, the fear of consumer boycotting, especially since the 1990s, has further evidenced the strong relationship between the parent-company and the subsidiary.[5]

The OECD *Guidelines for Multinational Enterprises* (hereafter *Guidelines*) 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. The *Guidelines'* definition[6] of TNCs mentions the "degree of autonomy" between entities: the parent-company and its subsidiaries. This creates a corporate veil for the former via the latter. This is done by either out-sourcing to subsidiary companies that may have the same name but are incorporated under different laws in different countries. This actor can also transfers responsibility to the subsidiary by incorporating it under a different name whilst still being held by the parent company. 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 (PTT-EP) (see de Schutter, 2006).

The role of TNCs on the global stage poses complex questions about the international legal status of these entities. The question of rights and responsibilities is tied into the question of legal subjectivity. There are some who argue that TNCs are subjects of international law or entertain the possibility (Clapham, 2006; Higgins, 1994), whilst others reject the idea (R401, R601).

---

[5] See for example Rodriguez-Garavito (July 2007) on the struggle over the definition of the norms regulating labour relations in the global economy. He examined the way transnational advocacy coalitions mobilize national and international law in order to contest the power of transnational corporations and national states and construct a system of transnational labour rights. See also, Rodriguez-Garavito (July 2006) for a study based on ethnographic research on prominent cases of anti-sweatshop activism in the apparel industry in Mexico, Guatemala and the U.S. He examined the way in which the transnational anti-sweatshop movement has combined legal and political strategies to advance the cause of international labour rights.

[6] Article 2: A precise definition of multinational enterprises is not required for the purposes of the Guidelines. These usually comprise companies or other entities established in more than one country and so linked that they may co-ordinate their operations in various ways. While one or more of these entities may be able to exercise a significant influence over the activities of others, their *degree of autonomy* within the enterprise may vary widely from one multinational enterprise to another. Ownership may be private, state or mixed. The Guidelines are addressed to all the entities within the multinational enterprise (parent companies and/or local entities). According to the actual distribution of responsibilities among them, the different entities are expected to co-operate and to assist one another to facilitate observance of the Guidelines (emphasis added).

3.3. TNCs as Subjects of International Law

The question of legal subjectivity came to the forefront of international law after the Second World War. In the *Advisory Opinion Reparations for Injuries Suffered in Service of the United Nations* (hereafter *Reparations for Injuries*),[7] the International Court of Justice (1949:179) 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. Traditionally, following the Westphalian-inspired notions of power and influence, only States and the Holy See were considered subjects of international law.[8] Post-World War II, this group was revised and some actors with para-statal activities have been considered. Clapham (2006:59) attributes legal subjectivity 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 (see also Jägers (2006) for an analogous discussion on the personality of NGOs). Clapham questions the limitation of legal subjectivity. Why not continue to amend international law and have it mirror the evolutions of the global society it aims to regulate? Wells and Elias (2005:155) imply the same, insisting that, "…it is not such an imaginative leap to conceive a corporation as the subject of international law". These authors argue that TNCs are significant and powerful non-state actors that should be monitored and ought abide by the same rules as subjects of international law.

Notwithstanding Clapham's suggested additions, the restrictedness of legal subjectivity is emphasised by some authors as the basic rule of international law (Jessup, 1947:343). Duruigbo (2008) explains that this does not exclude the reality of interactions on the international stage, since even Phillip Jessup (1947) admits that 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 light of increasing internationalisation of organisations, transnational agreements, and globalisation, corporations have significant influence on international law that represents *de facto* legal subjectivity. However, *de jure*, and still the prevailing view among international legal scholars is that multinational corporations cannot be regarded as subjects of international law in the sense of being addressees of international legal

[7] This landmark case was the first to classify international organisations as subjects of international law.
[8] This thesis acknowledges that subjectivity does not mean the same thing in all cases. For the purposes of this study, the TNC as international subject means the recognition of the rights and duties of these entities, as well as the possibilities of imposing duties via an international supervisory/regulatory mechanism.

obligations. It is important to also consider existing normative obligations of TNCs, and insist, as did D.A. Ijalaye in 1978 that

> 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 (quoted in Clapham, 2006:ftnt 69).

What Ijalaye is saying is that there is an unavoidable involvement of TNCs on the international stage. TNCs use law to their advantage without necessarily succumbing to the inconvenient aspects of public international law that would submit them to certain obligations, such as human rights. By the international community turning a blind eye, Ijalaye is emphasising that TNCs are left unto themselves and this has dangerous results. It is thus worth reflecting on the legal personality of TNCs since juridically it seems that ultimately an entity's legal subjectivity that governs its rights and duties under law.

On the even of the signing of the UDHR and ECHR, Jessup (1946) forwarded a theory on the legal subjectivity of corporations. He claimed, contrary to the traditional view of legal subjects, that individuals were in fact subsumed into this group; and by extension, therefore, are too private companies. Two decades later, Wolfgang Friedmann (1964) took up this discussion, addressing 'new' subjects of international law. Although he was not declaring that private companies were on par with States and intergovernmental institutions or organisations, Friedmann considered that companies have at least a limited status and subjectivity under international law. The particular relationship between TNCs and States affirms this. The significance of their derivative subjectivity and particularly their growing power as global actors is a compelling argument for confirming their legal subjectivity under international law. Furthermore, the fact that TNCs are received before international tribunals, such as the ECtHR, requesting the enforcement of their rights, is indication enough that they are to some degree acknowledged as subjects of law. The ambiguity of their legal subjectivity seems to arise in circumstances that entail enforcing obligations on corporations. Human rights courts seem to consider few juridical barriers to corporations staking claim to their rights and liberties.

The corporate veil and legal fictions are further complicated (although enabled) by the phenomenon of globalisation. The impact globalisation has had on the role of non-state actors is not negligible. Let us now consider the evolution of human rights, globalisation and the significance of TNCs therein.

3.4. Human Rights in Context: Globalisation and Non-State Actors

Dinah Shelton (2003) explains that until the First World War, human rights were the internal domain of States. It was only after the atrocities of the Second World War that international human rights law was established with the purpose of protecting individuals from the State. Certain grave violations of human rights (e.g. genocide, war crimes, crimes against humanity) are internationally recognised as the concern of all nations and considered in international law as having a privileged universal jurisdiction.[9] Various international agreements were compiled in the second half of the twentieth century, beginning with the UDHR, followed by the European Convention, and numerous others. Complex systems of norms, institutions and procedures have been elaborated to reinforce human rights globally, regionally and nationally (Shelton, *ibid*: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 (R401). This element does not respond to the growing adverse human rights impacts of non-state actors, and may ultimately hinder the efficacy of human rights law.

Globalisation has impacted the role of non-state actors. They have become important participants in economics and politics, and according to Susan Strange (1996), have even surpassed the power of States. Strange emphasises the economic power of corporations even over the political power of States, concluding that markets triumph in our globalised world. Jägers (1999:260) maintains this is further illustrated by "the fact that MNCs operate across borders makes them more independent of States and therefore more difficult to control". This argument is based upon a theory of the dilution of State sovereignty. Peter Muchlinski (2001) more moderately suggests that the tradition of responsibility of the State or State actor(s) is antiquated and must be expanded to take into account the rising economic and social power of TNCs.[10] In opposition to Strange's theory, Tombs and Whyte (2003b:11-13) 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

[9] Universal jurisdiction applies to any of these 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.
[10] For more see Kamminga, M.T. and Zia-Zarifi, S. (2000).

each other. This is a convincing argument that encourages us to bear in mind that the State continues to play an important role. It has the capacity to intervene in the market and therefore has a responsibility with regards to the human rights transgressions committed by TNCs.

Globalisation, in its plethoric forms, has had both positive[11] and negative consequences for human rights. It has succeeded in giving activists the possibility to heighten awareness and increase global activism against the damaging aspects of the same phenomenon.[12] This has in turn led to bringing situations of adversity and gross infringements of human rights to public attention. Globalisation has also, however, exacerbated human rights violations. Economic globalisation has provided the impetus for the social and political growth of TNCs, which in many cases has led to human rights abuses.

Globalisation has brought to public attention the increasing violations of human rights by non-state actors[13], either acting alone or colluding with States and governments. 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 (*infra* section 3.5.). In many cases, the demand/need for direct financial investments promotes complicity between TNCs and the State.[14] Andreopoulos, Arat and Juviler (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". Some of the most mediatised examples of the less than sanguine collaboration of some States with some TNCs include BP in Colombia, Unocal and Total in Burma (Myanmar), and Dutch Shell in Ogoniland (Nigeria). The ubiquity of globalisation makes one thing clear: the world's wealthiest nations can no longer ignore, nor deny, the injustices instigated, exacerbated or

---

[11] Some may argue the positive benefits of transnational corporations (job creation, stimulation of economic activity, increased numbers of women in the labour force etc.), however due to brevity this argument cannot be addressed here. This thesis contends that the positive aspects of economic globalisation are ephemeral and without sustainable development and social justice policies their benefits cannot be considered as outweighing the damages.

[12] Examples of the positive aspects of globalisation include forums such as the WSF, solidarity and united protests such as the 2003 world protest against the war in Iraq, and collective and solidarity rights issues for instance the Zapatistas. Additionally, the People's Permanent Tribunal (PPT) 2006-2008 in Lima, Peru, is one example of global mobilisation against violations of human rights that has incorporated a judicial mechanism made possible by globalisation.

[13] "Non-state actors" encompasses a variety of entities, including armed militia, private military companies, NGOs and TNCs. For the purposes of this thesis 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).

perpetuated by TNCs. Nor can they deny the role and responsibility of the State in this regard. The lamentable role of States may provide a means for international courts to indirectly hold TNCs responsible by implementing more robust obligations on States.

The regionalisation of human rights law in Europe, with the ECHR, resulted in the incorporation of many globally protected rights. One outcome was the expansion of human rights protection by a supervisory organ that in some ways diminished State sovereignty. The Convention established the Court at Strasbourg as the first regional court 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. This is due to procedural[16] and legislative lacunae, and arguably lack of political will to prosecute TNCs. Corporations can defend their human rights at the European Court but protecting individuals from corporate infringements is more complicated. Indeed, the state-centricity of the Convention (*infra* section 3.5.1.) may be inhibiting corporate accountability since there is no clear possibility to bring claims against TNCs themselves.

3.4.1. The European Convention on Human Rights

The European Convention for the Protection of Human Rights and Fundamental Freedoms, commonly known as the European Convention on Human Rights, was opened for signature in 1949 and ratified in 1950. Forty-six States currently adhere to the ECHR (as of September 2008).[17] It was born from the atrocities of the Second World War and was drafted with the intentions of protecting individuals from the State. Unlike the Universal Declaration of Human Rights, it focused only on civil and political rights. Another defining feature of the ECHR is that it possesses an international judicial mechanism to enforce the rights it guarantees: the European Court. The European Court of Human Rights has recognised that corporations can enjoy some of the rights enshrined under the Convention, including the right to property (Art.

---

[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] For example Article 34 ECHR reads: *Individual Applications of the Convention* "The Court may receive applications from any person, non-governmental organisation or group of individuals claiming to be the victim of *a violation by one of the High Contracting Parties* of the rights set forth in the Convention or the protocols thereto. The High Contracting Parties undertake not to hinder in any way the effective exercise of this right" (emphasis added).

[17] All 46 Member States have signed and ratified all Protocols. Protocols 6 and 14 are pending ratification by Russia.

1, Protocol 1), right to a fair trial (Art. 6)[18], privacy and data protection (Art. 8.), and in some cases freedom of expression (Art. 10)[19] (see *Autronic AG* v *Switzerland* (1990)[20]). However, the judges interviewed insisted the recognition of corporations' rights under the ECHR is limited, for example, the right to life does not apply.

In recent years, the Court's hearings have multiplied exponentially resulting in the 1994 adoption and 1998 coming into force of Protocol No° 11 that restructured the Court. Under the Convention's original version, complaints could be filed either by other Contracting States or by individual applicants (individuals, groups of individuals or non-governmental organisations). However, recognition of the right of individual application was optional. It could therefore be exercised only against those States that had accepted it (CoE, Internet).[21] The ratification of Protocol No° 11 gave individuals full rights to bring their case(s) before the Court against Contracting States without having to wait for permission by the Commission.[22] Protocol No° 11 subsumed this right at Article 34 of the Convention, which guarantees individual application against the violation of Convention rights and freedoms by a Contracting State. This is important since it means that individuals, and NGOs[23] have the possibility to bring forth claims against Contracting States for human rights violations by third-parties, also known in European law as *Drittwirkung* (*infra* Section 5.2.). More importantly, for the purposes of this thesis, is that under this provision the Court has continuously declined admissibility for cases against private parties considering that it lacks jurisdiction *ratione personae*.[24] One respondent (R801) referred to the judgement of *Florin Mihailescu v. Romania* (2003) where the Court clearly identified its position:

> …According to Article 34 of the Convention, [the Court] can only deal with applications alleging a violation of the rights guaranteed by the Convention claimed to have been committed by State bodies. The Court has no jurisdiction to consider applications directed against private individuals or businesses.

---

18 For example, *Comingersoll S.A. v. Portugal* (2000).

19 For example, *Radio France v. France* (2003; 2004).

20 The material issue in question concerned the protection of the rights of corporations. The Court held at §47 that "The Article (art. 10) applies to "everyone", whether natural or legal persons. The Court has, moreover, already held on three occasions that it is applicable to profit-making corporate bodies (see the *Sunday Times* Judgment of 26 April 1979, Series A no. 30, the *Markt Intern Verlag GmbH and Klaus Beermann* Judgment of 20 November 1989, Series A no. 165, and the *Groppera Radio AG and Others* Judgment of 28 March 1990, Series A no. 173). Furthermore, Article 10 (art. 10) applies not only to the content of information but also to the means of transmission or reception since any restriction imposed on the means necessarily interferes with the right to receive and impart information.

21 For more on the historical background of the Court and its procedures see the European Court website at http://www.echr.coe.int/ECHR/EN/Header/The+Court/The+Court/History+of+the+Court/.

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

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

24 For examples see *Sevo v. Croatia* (2001); *Shestakov v. Russia* (2002); *Scientology Kirche Deutschland eV v. Federal Republic Germany* (1997); *Proszak v. Poland* (1995, §3).

Other significant features of the ECHR include its principle of evolutive interpretation, otherwise known as the "dynamic approach". This leaves the possibility for the judicial imagination to manoeuvre and respond to difficult situations (*infra* section 4.3. and 5.1.).

The ECHR enshrines predominantly civil and political rights. However, the Court's jurisprudence has, on several occasions, given precedence to the implied and inherent rights of the European Convention, which has expanded the categories of rights protected. These include, interpretations for economic, social and cultural rights. Significantly, the Court has also confirmed that the ECHR applies not just between States, and States and individuals, but also between private parties (*X and Y v. Netherlands* (1985, hereafter *X and Y*; *infra* section 3.5.2.). The question is therefore not, as some judges (R701[25], R801) commented, whether the Convention applies in the private sphere but rather how far the Court can reach into private relations directly.

One of the challenges facing the ECtHR is its traditional state-centred approach. This conveniently circumvents any possibility for a individuals to apply to the Court against TNCs for violations of human rights. Even despite the considerations of judges at the Nuremburg Trials concerning Big Business' role and responsibility during the Second World War (*infra* section 4.1.1.). The inflexible state-centred approach is hence considered here as a hindrance to human rights law and the Court of Human Rights at Strasbourg. 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.

3.5. Responding to Human Rights in the 21st Century

The impact of globalisation requires a reconsideration of the current state-centric paradigm of human rights, in order to take into account the violations of human rights 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 adequately considering the role of non-state actors in human rights violations, the efficacy of the ECHR is limited. The Convention, as progressive as its

[25] The interview from respondent R701 was translated from French by the author and will be quoted in English throughout this thesis.

supporters claim it is, remains a traditional treaty. Considering the role of TNCs as global actors, not only are civil and political rights now insufficient guarantees for human rights, but also States are no longer the sole, nor necessarily the most potent actors on the global scene.

3.5.1. 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. Although non-state actors are predominantly excluded from the legal regimes protecting human rights, they have assumed major roles in relation to their enjoyment. In their tome dedicated to human rights in the international context, Steiner, Alston and Goodman (2008:1385-1433) suggest various factors that have contributed to this, and that represent the sometimes para-statal character of TNCs. These include the privatisation of functions previously performed by the State;[26] the ever-increasing mobility of capital and foreign investment facilitated by deregulation and trade liberalisation;[27] and, the enormous growth in the role of TNCs in formerly government reserved areas.[28] They (*ibid*: 1386) propose that 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. Thus, if the European Convention 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.[29]

The ECtHR addressed the precarious relationship between State and private actor(s) acting para-stately in the case *Costello-Roberts v. United Kingdom* (1993)[30]. 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 v. United Kingdom* (§27), 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". Spielmann (2007:429) further suggests that, "the exercise of State powers which affects Convention rights raises an issue of State responsibility *regardless* of the

[26] 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.
[27] For a clear example and detailed analysis of corporations operating in deregulated areas, see Braithwaite (1984:245-278); also Nikos Passas (2005:775).
[28] A clear example of this is private military companies, e.g. in Iraq; see Walker, C. and Whyte, D. (July 2005).
[29] Other international conventions have sought to move beyond the state-centred approach such as suggestions from the International Labour Organisation; see for example the Hansenne (1994:56)
[30] See also *Van der Mussele v. Belgium* (1983, §§28-30).

form in which these powers are exercised. For instance, by a body whose activities are regulated by private law". The Court confirmed this in *Wos v. Poland* (§72). It states,

> The Court considers that the fact that a State chooses a form of delegation in which some of its powers are exercised by another body cannot be decisive for the question of State responsibility *ratione personae*. In the Court's view, the exercise of State powers which affects Convention rights and freedoms raises an issue of State responsibility *regardless of the form in which these powers happen to be exercised, be it for instance by a body whose activities are regulated by private law*. The Convention does not exclude the transfer of competences under an international agreement to a body operating under private law provided that Convention rights continue to be secured. The responsibility of the respondent State thus continues even after such a transfer (emphasis added).

Spielmann continues that where the Court is satisfied with a public element existing in the case, it will entertain the admissibility of this case regardless of whether the respondent is a private person under the domestic law concerned.

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).[31] 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).[32]

Neil Stammers (1995:506-507), 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, 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.

When asked whether the expansion of the Convention to include economic, social and cultural rights[33] was feasible, one judge (R401) commented that

> [The European Court system], has some social and economic rights, but the problem is that social and economic rights interfere so much with the financial possibilities of a State, that I think this was the most important reason why the judicial

---

[31] See *Mykhaylenky and others v. Ukraine* (2004); *Radio France and others v. France* (2003; 2004)

[32] 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* (2007); for a detailed critique see Emberland (2006). For cases of individuals claiming against corporations indirectly see *Fadeyva v. Russia* (2005).

[33] The Council of Europe's Social Charter (1961 [1988] [1996]) includes economic, social and cultural rights, however it does not have a judicial mechanism to enforce them.

> institutions are lagging behind in a way. It's easier to say that everyone has to vote then everyone has to have a SMIC[34] of one thousand Euros.

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.[35] 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.

3.5.2. The Public/Private Dichotomy: Bridging the Gap

The separation of public and private spheres was challenged by second-wave feminists in the 1970s and is epitomized by Betty Freidan's slogan "the personal is political". This implies that the private sphere can be a site of oppression and recourse should be available. Later, under the UN Convention on the Elimination of all forms Discrimination Against Women (CEDAW) the Committee stated that, "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.[36] Clapham (2006:54), 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.

The European Court acknowledges this, particularly with regards to Article 8[37] ECHR. The key case relating to the application of the Convention in the private sphere, or between individuals, is *X and Y* (1985).

The Court recognised in *X and Y* (§23) that

---

[34] SMIC is the French acronym for *Salaire Minimum Interprofessionnel de Croissance* or guaranteed minimum wage.

[35] 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* (1998; *infra* Chapter V).

[36] It is important to note that the public/private divide as it is discussed here relates to the degree to which human rights violations perpetrated in either the public or the private sphere ought be addressed by the ECHR. That is, the violations of human rights by and between private persons.

[37] Article 8 *Right to respect for private and family life*: 1. Everyone has the right to respect for his private and family life, his home and his correspondence. 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

> 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* (emphasis added).

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. The judge insisted that the European Court and the Convention were not intended for cases between individuals directly, and therefore cannot hold individuals directly responsible. 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" or the belief 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 European Convention. This is followed by an investigation into the gaps in the jurisprudence and the omissions in the law.

IV. Holding TNCs Responsible: Being Direct

The question of accountability for the purposes of the European Convention ultimately depends on the legal status of the entity. Before considering whether the TNC is responsible for human rights violations they must be situated on the legal plane. This entails examining TNCs' legal personality and subjectivity under the Convention. By so doing, we can then assess the viability of direct liability of TNCs under international law. 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; see also Ratner, 2001:461-465). This chapter reflects on whether the international legal process embodied in the European Convention can and should impose human rights obligations directly on corporations.

The ECHR prohibits the abuse of the Convention rights not only by the State but also by private groups or persons. Article 17[38] 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.

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, including private law, 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 some other international instruments where the emphasis has been on the direct liability of corporations (*infra* section 4.2.).

Although the Court has stated that the Convention applies in the private sphere within certain parameters (*infra* section 5.1.1.), 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 at §46)[39] the Court declared that "[it] does not consider it desirable, let alone necessary, to

[38] For rare cases where this provision has been applied, Spielmann (2006: ftnt 25) suggests seeing *Garaudy v. France* (2003) and *Norwood v. United Kingdom* (2004).

[39] 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.

elaborate a general theory concerning the extent to which the Convention guarantees should be extended to relations between individuals *inter se*".

Interviewees pointed to a range of reasons for this. A common rationale was the legal personality of corporations (established in section 3.2) 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). Indeed, for example, the prosecution of corporations was explicitly excluded from the International Criminal Court. We shall now consider this debate under the auspice of the ECtHR, which we shall nuance with the conclusions at the Nuremberg Tribunals that subsumed individuals into the category of subjects of international law for the worst forms of human rights violations, but ultimately avoided dealing with corporations.

4.1. 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, corporations cannot be defendants. Under Convention provisions only the State can become a High Contracting party, the State as guarantor of the rights convened is always a defendant. With this in mind, if legal personality suffices to consider an entity a subject of international law, then corporations could be considered directly responsible if they attained the status of subjects of international law. 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". As Higgins (1994:49) argues, "We have all been held captive by a doctrine that stipulates that all international law is to be divided into 'subjects' – that is those elements bearing, without the need for municipal intervention, rights and responsibilities; and 'objects' – that is, the rest". She pursues a 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 (*ibid*:48-55).

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 admission of cases directly 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 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 the 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 (*ibid*:57), 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 (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. As 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". In the *Reparations for Injuries Case* (1949), the International Court of Justice recognised the United Nations as a subject of international law, meaning the capacity to have rights and exercise them. Brownlie (2001:57)

further explains that this capacity is three-tiered: firstly, the capacity to make claims in respect of breaches of international law; secondly, the capacity to make treaties and agreements valid on the international plane; and finally, the enjoyment of privileges and immunities from national jurisdictions. Because States have those capacities, it is they who have been used to determine legal subjectivity for other entities. Clapham (2006:64) implies that such capacities in a non-state actor may be seen as evidence of international subjectivity. This sustains the respondent's (R601) quip that legal subjectivity does not really matter since it is circular. It also questions 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? It is States who are negotiating the Protocols and drafting them. They are involved in their reform. Do we want them, the non-state entities, to have the exact same functions as State entities?" This, Brownlie (2001:58) further reminds us parallels Friedmann's (1967) and Jessup's (1946) observations that the basic reason for the state-centric approach is that "the world is today organised on the basis of the co-existence of States, and that fundamental changes will take place only through State action, whether affirmative or negative".[40]

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; see also Lauterpacht, 1970; Vasquez, 2005; interview R601). In opposition to these claims, Clapham (2006) diverges, proposing instead

[40] Friedmann's citation goes on to remark that "this basic primacy of the State as a subject of international relations and law would be substantially affected, and eventually superseded, only if national entities, as political and legal systems, were absorbed in a world state", or one may even suggest the comprehensive dismantling of the state system altogether.

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.

The positions of some scholars outlined above suggest that attaining legal subjectivity entails more than just the rights/obligations paradigm, and could risk giving TNCs even more power by giving them the three-tiered capacities outlined by Brownlie (2001:57). This is a major challenge for the European Court, particularly considering its ambitions to reflect the evolutions of society using the "dynamic approach", which may imply accepting or acknowledging TNCs legal subjectivity. Former judge at the ECtHR, Lukas Loucaides (2007:13), 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 drafter or entered into force". In *Tyrer v. the United Kingdom* (1978 at §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.

It is interesting to reflect on the plausibility of legal subjectivity for corporations at the ECtHR in light of the outcome of the Nuremberg International Military Tribunals (NIMT). It placed direct obligations on individuals under international law not to engage in the worst forms of human rights abuses (war crimes, genocide, crimes against humanity, slavery). Its consideration of corporations is worth briefly analysing here.

4.1.1. The Nuremberg Tribunals: Nuanced Legal Subjectivity

The Nuremberg International Military Tribunals blurred the traditional distinction between the subjectivity and objectivity of persons under international law by holding individuals accountable for war crimes and crimes against humanity.[41] Clapham (2006: 53) suggests that it has been made clear through the Nuremberg Tribunals that, "having international law obligations does not imply respectability, legitimacy, or decency". Furthermore, he reasons that if this goes for crimes against humanity, it should also hold for violations of human rights law in general. The NIMT began a process that was later addressed by the ICJ in the *Reparations for*

[41] See *Trial of Major War Criminals (Goering et al.)* (1946).

Injuries Case (1949). Clapham (2006:87) elucidates, the process of rights and obligations recognised by general international law that are commonly applicable and binding on every entity that has the capacity to bear them.

Despite this 'progressive' recognition, Clapham (2004) criticises the Nuremberg Trials for its weaknesses, particular concerning the focus on natural individual persons as opposed to an expanded jurisdiction to include States and corporations.[42] Clapham emphasises the Tribunal's incapacity to prosecute judicial persons, since ultimately the corporations themselves were never put to trial. Notwithstanding, he demonstrates that the prosecutors attempted throughout the Nuremberg Trials to indict both individuals and their companies. Vasquez (2005:939) reminds us that although the corporations did not face prosecution, it has been argued that the Nazi corporations were themselves guilty of violating primary norms. But, concurs with Clapham's point that their condemnation was prevented due to jurisdictional limitations of the NIMT, which was restricted to natural persons. Despite this failure at the Trials, it is important to recognise its significance vis-à-vis the reflection on corporate legal subjectivity and its repercussions. Although the establishment of the ICJ as a permanent international tribunal did not include references to corporations, this has remained a concern for international courts. Recently, the International Criminal Court's (hereafter ICC) Rome Statute drafted an article that would have included the possibility to prosecute corporations – individual representatives and companies themselves.[43] This text was ultimately removed from the final version of the Rome Statute, due to political pressure. But, this is significant because it demonstrates that it was given enough importance to be drafted. This may be a preliminary attempt to bring corporations under the microscope of international tribunals. It indicates that some people are thinking of alternatives, and it implies that there are people monitoring and exploring ways to include corporations under the jurisdiction of an international court. It also strongly demonstrates that the problem is not legal *per se*.

The importance of the abovementioned near-indictment of corporations at Nuremberg and the draft statute at the ICC is twofold: first, recognising the manifest reflections of corporate liability on at international courts; and second, admitting the junction the ECtHR is facing vis-à-vis their position on the international stage. In light of this, one judge (R601) considered that

[42] The major corporations (although unsuccessfully) indicted at Nuremberg were IG Farben, Krupp and Flick – all major German chemical and industrial companies that were charged with both directly and indirectly assisting or acting in crimes against humanity and war crimes.
[43] For details on the Rome Statute see Clapham (2006:244-247).

the Court has two options: either it can isolate itself and continue on an independent and individualistic path without considering other jurisdictions. Or, it can look to coordinating its human rights efforts with other international entities pursuing the same goals. The Court's relationship with other international bodies is an important indication of its human rights strategy. This is illustrated by this respondent's sceptical reaction, "as far as I can see, the Court is right now at a crossroads. As concerns the question whether the Court will continue to look for synergies between various areas of international law or whether [it] will isolate itself". The possibilities of direct liability under international law are, according to this judge, dependent on the choice between the integrationist or fragmentationist[44] view of general international law. The Court, at this "crossroads" has an opportunity to follow an integrationist approach, looking for synergies in and with international law, as the judge suggested. Or, it risks fragmentation by becoming an isolated pocket of international law. Considering our globalised world, it is difficult to imagine how the Court can realistically pursue its own strategy without regards to the global picture whilst pretending to remain at the forefront of human rights protection. Let us consider some examples of direct liability under international law to further our appreciation of the ECtHR's position.

4.2. 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, it is municipal laws that regulate TNCs and it is only by considering an omission or breach of the municipal law with the Convention that the Court admits a case. Subsidiarity is therefore an approach that ultimately denies the direct approach for the ECtHR vis-à-vis corporate violations of human rights. Whilst discussing the role of the ECHR regarding TNCs and human rights violations, one respondent questioned whether the Convention should undertake this task. 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.

[44] This is the debate surrounding questions of unity or pluralism in public international law. It is a disagreement on the future of international law. Since the end of the Cold War, there has been an increasing fragmentation of international law with increased isolation of legal systems and splintering into regional units (Hafner, 2004; Allott, 2001; R601). Philip Allott (2001) is a firm supporter of the contrary, endorsing a full integration of international law (amongst other things, including culture, economics, etc.). He questions the fragmentation or specialisation of international regimes poses questions since it confuses whether and how to apply general international law. He also questions the accountability of regional organisations. Integrationists support the move towards a more integral *jus cogens*.

Another judge (R601), corroborating this opinion playfully remarked that to directly indict corporations would require "rewriting the whole Convention".

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. In this case it may have been willing to consider other treaties dealing with corporations. It would "maybe approve [progressive international pacts such as] the *Global Compact*[45] [or UN 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, preferring to focus solely on the ECHR (R401, R501).

With this in mind, let us first review the Norms themselves. This is 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.

[45] The *Global Compact* can be 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 their operations and strategies with ten principles in the areas of human rights, labour, the environment and anti-corruption.

4.2.1. United Nations *Norms on the Responsibility of Transnational Corporations and Other Businesses with Regard to Human Rights*

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, although all on a voluntary basis. These include efforts by the UN,[46] ILO,[47] OECD[48] and the EU[49]. The Norms are a challenge to this delicate approach to CSR, advocating direct responsibility with a non-voluntary basis. The UN Norms is sponsored by the Sub-Commission on the Protection and Promotion of Human Rights and was approved in its Resolution 2003/16.[50] They were written in consultation with unions, businesses and NGOs. Although approved by the sponsoring body, the Commission tabled the draft convention pending an investigatory report. The Sub-Commission delivered its Report in 2005. This did not result in the approbation by the Commission, but rather in requests for further investigation, this time under the auspices of a Special Representative, Professor John Ruggie. The Norms "recognise the 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 European Convention on Human Rights.

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. Weissbrodt and Kruger take a more optimistic viewpoint, remarking that the Norms "represent a landmark step…and constitute a succinct, but

---

[46] UN, *Global Compact* (2000), www.unglobalcompact.org.
[47] ILO, *Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy* (1977), www.ilo.org.
[48] OECD, *Declaration on International Investment and Multinational Enterprises* (1976); OECD *Guidelines for Multinational Enterprises* (2000) www.oecd.org.
[49] EU, *Promoting a European Framework for Corporate Social Responsibility, European Commission Green Paper* (2001), www.europa.eu.int/comm/employment_social/soc-dial/csr/greenpaper_en.pdf.
[50] *Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights*, Sub-Comm'n Res. 2003/16, UN Doc.E/CN.4/Sub.2/2003/L.11, at 52 (2003), available at http://www.unhchr.ch/huridocda/huridoca.nsf.

comprehensive, restatement of the international legal principles applicable to business with regard to human rights" (2003:901). Vasquez (2005:929) is more prudent in his analysis questioning "whether the Norms' critics are right in claiming that the Norms would represent a fundamental shift in international law". 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 the legal subjectivity of corporations (re: elevating status; *infra* section 4.2.).

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. In Article 3 Norms it provides that,

> Transnational corporations 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*:ftnt 57; also Article 11[51]). 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 IV); ensuring consumer protection, public safety, and environmental protection in business activities and marketing practices (including observance of the precautionary principle[52]).

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

---

[51] Article 11 "Transnational corporations and other business enterprises shall not offer, promise, give, accept, condone, *knowingly benefit from*, or demand a bribe or other improper advantage…"

[52] 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.

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":

- International law is not static, and is in a constant process of development. To the extent that the UN Norms command attention and respect, and are used by advocates and companies, they will take on greater force. If national and international tribunals and courts begin to make reference to and apply the UN Norms, their legal effect will increase.

- The process leading to the UN Norms is similar to that resulting in other 'soft law' standards, some of which are now seen as part of customary international law.

- In their tone and approach, the UN Human Rights Norms for Business are self-consciously normative. Unlike the Organization for Economic Cooperation and Development (OECD) Guidelines for Multinational Enterprises, and the International Labour Organization (ILO) Tripartite Declaration of Principles, the UN Norms are not limited by clauses emphasizing their non-regulatory nature.

- All of the substantive human rights provisions in the UN Norms are drawn from existing international law and standards. The novelty of the UN Norms is to apply these – within the limits of businesses' impact and influence – to private enterprises, but even in doing so to draw on a wide range of international practice (including the practice of companies themselves). The UN Norms, in other words, are well-grounded in law.

Amnesty's summary is reproduced *in extenso* because it provides a succinct account of the significance and achievements of the Norms, as well as for the purposes of this investigation, important points concerning their pertinence to the European Court. These include some of the questions raised earlier concerning the Court's approach to general international law, and particularly on the synergies or divergences of European and general international law.

Although a non-voluntary convention, the Norms are not a treaty either.[53] Vasquez (2003:913) 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. 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

[53] For a more comprehensive look at the implications of "soft law" for international law see Shelton (2003).

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 to the Norms 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. This resonates her earlier comments *a propos* the future of general international law and the important junction that the Court is facing regarding synergies with international law or its eventual isolation. 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.

The ratification of the UN Norms and their integration into the body of supporting documents for the ECHR as an instrument for judges to widen the scope of their analysis and decision-making may be one way of achieving legal subjectivity. 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". The ECtHR should strive to elaborate methods for implementing the Norms to close the space between the laws where domestic law may be deficient and international law lacks jurisdiction. 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; and 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 Norms) have never heard of them.

Judges were asked whether they felt they might be able to incorporate into their decision-making processes non-binding international normative standards such as those defined in the Norms. One respondent (R501) claimed that the European Court might face difficulties integrating the Norms. She suggested that

> Because the Council of Europe is a very specific organisation, and [the] Court is led strictly by the Convention, to introduce a new approach would require starting another procedure of drafting a protocol in front of the Committee of Ministers, the Steering Committee on Human Rights and others – a complex process.

Despite the complexities, the judge did concede its possibility since "human rights are never ending". But the hint of possibility seemed more rhetorical than purposeful. Another judge (R401) dismissed the Norms' application to the Court. She claimed that the application of the Norms according to its Article 18, which states that domestic and international courts are to implement the provisions "pursuant to international law" did not apply to the ECtHR. Her interpretation was that "[the Court's] international law is [the] Convention" and only the Convention. This respondent also stated that the Court

> Decide[s] only on [the] Convention. Sometimes [it] use[s] general law and other conventions to see the state of international law…because [it is] not working in a vacuum. But the main legal basis…or the only…well, the main legal basis for the rights is the Convention. We cannot protect directly rights, which are not in the Convention. But for interpreting them…for widening sometimes…then yes [the Court] look[s] into the larger pictures.

This seems almost contradictory to her previous statement, since it takes into consideration the possibility of using the Norms to interpret the Convention. So doing might make a real difference in the outcome of a decision where the judges may interpret the Convention in a way to subsume a provision of the Norms under the Convention rights. Perhaps in a similar way as some of the social, economic, and cultural rights have been read into the Convention or the use of the dynamic approach.

The direct responsibility of TNCs has been recognised in certain respects. Direct liability has emerged in some case law, several conventions, and treaties. It is perhaps helpful to now consider other international approaches to direct liability in order to better assess the ECtHR's position.

4.2.2. The Viability of Direct Liability: Examples on the International Stage

This section considers three examples of international responses to direct responsibility. It then examines the direct positive obligations of corporations, returning to the example of the UN Norms.

4.2.2.1. Examples of International Responses to Direct Responsibility

We shall examine three examples of direct liability of corporations are examined, beginning with two international treaties and followed by one example from the United States. Menno Kamminga (2004), reflecting on corporations' obligations under international law, acknowledges some long-standing multilateral treaties that impose direct obligations on companies. Firstly, the *International Convention on Civil Liability for Oil Pollution Damage* (1969), which provides that the owner of a ship (natural or legal person) may be directly liable for environmental damage caused by the ship's operations.[54] Secondly, the UN *Convention on the Law of the Sea* (1982) prohibits not only States but also natural and juridical persons from appropriating parts of the seabed or its minerals.[55] Kamminga continues probing what the implications of these treaties are for the direct approach to corporate responsibility. Contrary to arguments claiming loss of State power, he suggests that these provisions have demonstrated the opposite. The inclusion of corporations into these treaties illustrates their importance on the international stage. He also emphasises that the drafters of these treaties felt it necessary to address corporations directly, and congruently with States, in order to achieve the treaties' objectives. Kamminga (2004:4) deduces that, "there are no reasons of principle why companies cannot have direct obligations under international law". Ultimately, he suggests, it is not whether it is possible for companies to have direct obligations under international law, but rather whether or not it is appropriate in specific instances. Thus, it is a matter of choice and interpretation of the circumstances rather than a fundamental juridical barrier.

The concern of several respondents regarding the potential power accrued by corporations resulting from direct international obligations is a question about undermining State

---

[54] Art. III: "the owner of a ship at the time of an incident, or where the incident consists of a series of occurrences at the time of the first such occurrence, shall be liable for any pollution damage caused by oil which has escaped or been discharged from the ship as a result of the incident."

[55] Art. 137(1): No State shall claim or exercise sovereignty or sovereign rights over any part of the area or its resources, nor shall any State or natural or juridical person appropriate any part thereof. No such claim or exercise of sovereignty, or sovereign rights, nor such appropriation shall be recognized.

obligations. According to Kamminga (*ibid*:5), the "concurrence of international obligations of States and of non-state actors is an inevitable result of the globalisation process". Although the State remains an important actor, the TNC's accrued power must be matched by legal mechanisms to monitor them. The point here is not to bypass the State, but to engage the TNC within a system of checks and balances. Direct liability for corporations is not necessarily in favour of the retreat of the State – an argument based on a theory of the dilution of State sovereignty. It is important to remember the flaws in the "degradation of politics thesis" identified by Tombs and Whyte (2003b; *supra* section 3.4.). In this same way, the Norms do not suggest replacing State obligations, but rather supplementing them with direct obligations of corporations.

This brings us to our final example, the important case *Doe v. Unocal Corporation* (1997, hereafter *Unocal*), filed under the United States' *Alien Torts Claims Act* (ATCA) (1789). This is a federal law that gives jurisdiction to the district courts for any civil action by an alien for a tort. Ultimately it results in the possibility to directly hold responsible the American government, military, and corporate leaders for human rights abuses – even those committed outside of the United States. An equivalent statute does not exist under European law. The case of *Unocal* was brought forth by a group of Burmese villagers who sued the California-based TNC Unocal for collusion with the Myanmar government in their forced labour, torture, and other abuses. In this case, Muchlinksi (2001) clarifies it was held for the first time that TNCs could, in principle be directly liable for violations of human rights under the ATCA.[56] The US District Court awarded a summary judgement on 31 August 2000 that did not uphold the direct responsibility of Unocal. It stated that although there was evidence that Unocal was aware of the human rights abuses, they were not directly involved in them. This substantiated Unocal's innocence for the judges, who looked to the trials of German industrialists at Nuremberg to support their decision (*supra* section 4.1.1.). Although this is a tort case and therefore, unlike a human rights case, enables a private party to seek reparations from another private party, it is relevant here because the case in point rested upon the admissibility to the United States courts of the culpability of TNCs in human rights violations.

---

[56] Other cases filed under ATCA against corporate violations of human rights include the violence against the Ogoni people in Nigeria. These cases are *Wiwa v. Royal Dutch Petroleum* (2000) against the Royal Dutch Petroleum Company and Shell Transport and Trading Company (Royal Dutch/Shell); *Wiwa v. Anderson* (2001), the head of its Nigerian operation, Brian Anderson; and, *Wiwa v. Shell Petroleum Development Company* (2000), the Nigerian subsidiary itself, Shell Petroleum Development Company (SPDC).

What does this mean for the European Court? These examples of international uses of the direct responsibility of corporations demonstrate a number of things. They confirm that corporations can have direct international obligations without eclipsing State obligations. They demonstrate that other national and international bodies are recognising the potency of TNCs and the necessity to at least allow for the possibility to bring them under the microscope where there are potential human rights violations.

The responsibilities of corporations for human rights, much like States, are not simply negative obligations. It is unacceptable to excuse corporations of human rights violations when they are aware of these violations and when they are profiting from them. The unfortunate decision taken in *Unocal* emphasises the importance of considering the positive obligations of corporations to ensure, protect and maintain human rights.

4.2.2.2. Obligations to Ensure, Protect and Maintain Human Rights

It is difficult to deny that TNCs now play a major role in both the protection and maintenance of human rights. Considering the above discussion regarding examples of international law and developments there is a clear indication that the law is ripe for reform. The examples given throughout this chapter corroborate the position of the evolutive approach. One judge (R601) strongly stated that if the ECtHR does not take into consideration the social and legal developments on the international stage, then "one day they [may] just be taken by surprise and be completely unprepared". If the Court cocoons itself, the gaps in its human rights law will only get bigger and ultimately render it obsolete. The UN Norms is one attempt at staking this transformation. Amnesty International (2004:7) formulates the following proposition with regards to the Norms:

> Some argue that international law applies only between States, or that human rights obligations apply only to States, and that the UN Norms cannot create legal obligations for companies. This view can no longer be credibly maintained. While the major human rights treaties place obligations on States in the first instance, the substantive obligations those States are bound to enforce, include *ensuring* respect for human rights – not least by non-state actors such as enterprises and individuals. For example, the ILO Conventions follow the formal structure whereby states ensure compliance by companies. However, it is recognized that they place substantive duties such as non-discrimination and respecting freedom of association *directly* on companies (emphasis added).

Amnesty is clarifying the basis for the dual obligations of State and corporation. It is also emphasising the substantive duties derived from human rights obligations. Contrary to the *Doe v. Unocal* judgement, Amnesty states that non-state actors ought be obliged to prevent abuses, promote, and ensure human rights. It is calling for an implementation of responsibilities, considering that companies have a direct role in these duties.

Regarding positive obligations, one judge (R601) considered the differences between the ECtHR and other international organisations,

> The court has traditionally been very careful not to go into affirmative action or positive measures – because that's everywhere else, if you look at the UN standards and the EU they have different tools available. They can very much put obligations on companies or individuals…at least as far as non-discrimination and equal rights is concerned, there is a lot that goes straight into regulating the behaviour of the enterprises or private employers…Indeed, the whole discrimination area differs from positive obligations as understood by our Court and the [Inter-American Court].

Notwithstanding this comment, the judge confirmed that there was a caveat to the Court developing its law via the notion of positive obligations. She continued by summarising a recent case *DH v. Czech Republic* (2007) wherein the Grand Chamber decided that the interpretation of a measure of affirmative action for the integration of Roma children into the education system actually led to their segregation. In this case of discrimination there is clearly no difference, she emphasised, between the private and public sphere where positive obligations lie to ensure and protect the rights enshrined in the Convention. This case supports Amnesty's position on ensuring respect for human rights by State and non-state actors.

Positive obligations of non-state entities are recognised by some actors at the ECtHR. However, to impose direct obligations, according to one respondent (R401), "would [mean subsuming] corporate obligations under something which could reasonably be seen as part of a right protected by the Convention". This, the judge confirmed, easily includes discrimination but she continued "it's true that it would be mostly economic, social and cultural rights where the Convention and the Protocols are not so elaborated". This supports the position of another respondent (R701) that there is no theoretical barrier to extending the Convention to corporations, only political barriers.

The discussion of the positive obligations of corporations was only lightly deliberated. It is clear that all of the respondents were more comfortable considering the positive obligations of States. The indirect approach to obligations of TNCs for human rights was without a doubt the more feasible option for the judges, particularly if one intends to scrutinise corporations using the European Convention. It is to this that we now turn.

V. Being Indirect: Holding TNCs Accountable Via State Responsibility

When a State becomes a signatory to a treaty, in many cases it takes on the obligation to both abstain from the harmful behaviour prohibited in the treaty and to protect individuals from others' harmful behaviour. In other words, the State is responsible for preventing harms committed by third parties within its jurisdiction. This responsibility for harms not caused directly by the State is generally referred to as the 'positive obligations' of States. These obligations are included in most human rights treaties. This chapter will examine the different aspects related to State responsibility. It will address the reasons why, for the legal actors interviewed, this is the preferred mechanism for holding corporations liable for human rights transgressions. We will begin by discussing the State's traditional third party obligations vis-à-vis human rights and follow this through the development of positive obligations. This is followed by a brief focus on the principle of 'due diligence' in international law. Finally, we will examine the controversial but potentially powerful concept of *Drittwirkung*[57], or third-party effect, and its applicability to corporations and the European Convention on Human Rights. From here we will provide examples of state responsibility enshrined in other international conventions and treaties to enlighten our analysis of the indirect approach at the ECtHR.

5.1. 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 European Court, Matti Pellonpää (1993:858), simplifies this by, "the State's obligation to abstain from interfering with the sphere of liberty of the individual". These are so-called 'first generation rights' that entail political and civil rights.[58] In other words, this approach embodies the negative obligations of the 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

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

[58] 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). For more see Vasak (1977) and Fernando (1999).

deemed as human rights infringements and a second generation of human rights, associated with economic, social and cultural rights, ushered in this new approach to the role of the State.[59] 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. This entails a positive obligation on the part of the State, to prevent, ensure, and secure rights and freedoms. This obligation compels the State to look beyond self-discipline to the actions and omissions of individuals. In the words of the *Maastricht Guidelines on the Violations of Economic, Social, and Cultural Rights*[60] (1997 at §18), 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.

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* or the horizontal effect. 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 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 (emphasis added).

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

---

[59] It is interesting to note that the Council of Europe produced the European Social Charter in 1961 recognising economic, social and cultural rights. However, only 17 out of 41 Member States have ratified none of the Social Charter instruments. It is worth noting that these 2nd generation rights are not considered as important as 1st generation indicated by the fact that every Member State must ratify the ECHR (civil and political rights). It is also worth reiterating that the European Social Charter has no Court to enforce its provisions.

[60] 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…".

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",[61] 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.

5.1.1. 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 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 (see 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* (1968 at §3) 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". 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 in 1979 by *Marckx v. Belgium* (1979 at §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 "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

[61] 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 for example, de Sousa Santos (1997).

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.

The Court, a few years later, pronounced on the extent of Article 1 in the private sphere. 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 (for example Article 1) where States are obliged to 'secure to *everyone within their jurisdiction*' the rights and freedoms of the Convention.[62] This is further exemplified in *Young, James and Webster v. United Kingdom* (1981 at §29) 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 (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 at §81), 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". 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* (1985). 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 in Dutch law,

---

[62] 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. The pursuit of this question is forthcoming (for more on extra-territoriality see de Schutter (2005b); de Schutter, O. (22 Dec. 2006); 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, *infra* 63).

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* (1988, hereafter *Plattform*). 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 vis-à-vis 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.[63] Although the Court did not use the vocabulary of

[63] *Soering* is better known for its relevance to the debate on the extra-territorial application of the Convention. Dembour (2006:86) 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

positive obligations, its reasoning indicates a move away 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 *M.C. v. Bulgaria* (2003 at §150), 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 (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 (e.g. due diligence, *infra* section 5.1.2.). 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*[64] 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. Despite this, it remains an example of how and where the ECtHR can impose itself in private law; that is by influencing municipal legislation. Where a violation of the Convention (public international law) is committed in the realm of private law, according to the respondent, the Convention may still apply. If this were the case, the Court could consider the State responsible for the deficiency in the private law that led to a violation of the Convention. The State would be obliged to change its domestic law.

---

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". 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.

[64] 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" (*infra* 73) for adverse possession.

What is clear is that the ECtHR has defined the positive obligations of States in the private sphere. What remains ambiguous, is the "due diligence" of States regarding corporations' violations of human rights. This will now be examined, considering some other international examples that invoke due diligence, and how this can be applied at the European Court.

5.1.2. Due Diligence

The due diligence principle is the recognition that a violation of a private party can be attributed to a violation by the State if the State cannot show sufficient measures were taken to avoid or stop this violation. The principle of due diligence places the onus on the State to pre-emptively protect citizens against the violations of human rights norms by TNCs. This has two main implications: firstly, that it should theoretically, be very difficult for a TNC to commit a human rights violations without breaking a law, since the State should have initiated one to protect the human rights norm; and secondly, that the corporation theoretically, should be indictable since the State will have also secured a supervisory mechanism to check and enforce its law. If there is no law, and subsequently no way to enforce it, then the State is responsible before the European Court for deficient legislation.

This does not mean that the state is responsible for every human rights violation that occurs in the private sphere. Rather, the State must act or have acted in a way that supports the integrity of human rights. To explain this, we are compelled to look beyond the jurisdiction of the ECtHR to its counterpart, the Inter-American Court of Human Rights (IACtHR) (see Vasquez, 2004:27; and Ratner, 2001:470). In the Americas regional court's landmark case *Velásquez-Rodríguez v. Honduras* (1988), the IACtHR held that a State can be deemed responsible for violations occurring in the private sphere only where it can be shown that it failed to exercise 'due diligence' to prevent and respond to violations (Chirwa, 2004:9). Moreover, the IACtHR recognised that a human rights violation,

> Which is initially not directly imputable to a State (for example, because it is the act of a private person or because the person responsible has not been identified) can lead to international responsibility of the State, not because of the act itself, but *because of the lack of due diligence to prevent the violation or to respond to it* … (§172, emphasis added).

The Inter-American Court insisted that,

> An investigation must have an objective and be assumed by the State as its own legal duty, not as a step taken by private interests that depends upon the initiative of the victim or his family or upon their offer of proof, without an effective search for the truth by the government. … Where the acts of private parties that violate the Convention are not seriously investigated, those parties are aided in a sense by the government, thereby making the State responsible on the international plane … (§177).

The court found that the State is responsible for investigations into human rights violations. This is interesting since it seemingly provides a way to sidestep the problems that may arise with possibilities of settling out of court. It provides a human rights law form of redress rather than using tort or civil litigation. It also requires that the Government establish an investigation into the human rights breach(es) independent of an initiative by the victim.

The purpose of discussing the IACtHR judgement is that it has served as a basis for other international and regional human rights monitoring bodies. This illustrates its important role in the evolving international jurisprudence of human rights.[65] The proliferation of the due diligence principle has been observed at the European Court, albeit without express recognition. One judge (R801) suggested a potential for the due diligence principle in the case *Öneryildiz v. Turkey* (2004 at §94) wherein the Court concluded

> To sum up, the judicial system required by Article 2 must make provision for an *independent* and impartial official investigation procedure that satisfies certain minimum standards as to effectiveness and is capable of ensuring that criminal penalties are applied where lives are lost as a result of a dangerous activity if and to the extent that this is justified by the findings of the investigation (see, mutatis mutandis, *Hugh Jordan v. the United Kingdom*, no. 24746/94, §§ 105-09, 4 May 2001, and *Paul and Audrey Edwards v. the United Kingdom*, no. 46477/99, §§ 69-73, ECHR 2002-II. In such cases, the competent authorities *must act with exemplary diligence* and promptness and *must of their own motion initiate investigations* capable of, firstly, ascertaining the circumstances in which the incident took place and any shortcomings in the operation of the regulatory system and, secondly, identifying the State officials or authorities involved in whatever capacity in the chain of events in issue" (emphasis added).

This is indeed a strong statement by the Court even though, the judge confirmed, the due diligence principle as such is not used by the European Court. It may, however, adopt similar principles under the positive obligations doctrine. The distinction between these is subtle but can be clarified as the following: the Court has interpreted the positive obligations of States into some Convention provisions and included some social, economic and cultural rights using the dynamic approach. Positive obligations require the State to engage in an activity to protect or uphold a fundamental right but has no relation to the private actors' responsibility. Due diligence is more comprehensive in that it can be used to widen the breadth of the obligation to States and corporations. If due diligence were adopted in a similar way as it is interpreted by the Inter-American Court it "may lead to the punishment of those responsible and the obligation to indemnify the victims for damages" (*Velásquez-Rodríguez v. Honduras*, 1988 at § 175).

In *Osman v. the United Kingdom* (1998 at §116, hereafter *Osman*) the ECtHR emphasises that

[65] Chirwa (2004) explains that the due diligence test was adopted by the African Commission in the '*SERAC' v. Nigeria* (2001).

> Having regard to the nature of the right protected by Article 2 … it is sufficient for an applicant to show that the authorities *did not do all that could be reasonably expected of them to avoid a real and immediate risk to life of which they have or ought to have knowledge* (emphasis added).

This subsumes under the positive obligations doctrine some of the obligations of due diligence. This is confirmed in *Osman* (summary I-§B) where the Court simply states that, "Article 2 may imply, *inter alia*, positive obligations for States to take preventive operation measures to protect individuals whose life is at risk from the criminal act of another individual". This implies that the Convention applies in the private sphere to the extent that it compels the State to initiate legislation supporting the rights enshrined in the ECHR. Clapham (2006:351-52) contends that the ECHR extends into the private sphere and that this may imply human rights obligations for the private actor stemming directly from the Convention even in disputes before national courts (see also *Pye Ltd v. UK* (2007). We are tempted to assume that this means that the Convention applies directly to the private party however the Court frequently reiterates that the ECHR does not apply to private parties. In this case, it is not the private actor who is directly responsible under the Convention since the ECHR applies only to Member States. Under due diligence, however, the State is obliged to hold the private actor liable for any violation of the ECHR even in the private sphere. The State must have the legal mechanisms in place to ensure that the Convention is respected not only by public actors but also by private parties between themselves, otherwise it risks sanctioning by the Court for the human rights violations between private parties. This matrix stems from *Drittwirkung* or the indirect horizontal effect. *Drittwirkung* is a specific way that the Court can indirectly but effectively apply the Convention obligations to corporations.

Muchlinski (2001) identifies that the State may be held liable for the conduct of non-state actors where a third-person's human rights are violated. For example, if corporation A violates the Convention and infringes the rights of private person B, it is the State that is held accountable, not the corporation. The State may not have any direct connection to the violation of B's rights, but the Court can maintain the State's responsibility indirectly for deficient or non-existent legislation. Muchlinksi (*ibid*:42) points to the above-mentioned case-law of the ECtHR, namely *X and Y* (1985) and *Plattform* (1989) to highlight Contracting States' "obligation to 'secure' the rights of third persons against interference by a non-state actor". This is called the horizontal or third-party effect, or in the vocabulary of German Constitutional Law and adopted at the ECtHR, *Drittwirkung* (for a comparison between the uses of *Drittwirkung* in constitutional law and at the ECtHR see Spielmann, 1995). This concept

combines the positive obligations of the State with an incentive to initiate and enforce legislation by holding it accountable for private actions. In this way, the indirect horizontal effect of the Convention becomes an issue of the positive obligations of States. The question is how far the positive obligations of States under the Convention extend to their liability for violations in the private sphere (Arnardóttir, 2003:96). *Drittwirkung* is highly complex and cannot be explored in full here. The following section addresses its most salient points and analyses how it can be applied to close the gap between corporate violations of human rights and the European Convention.

5.2. *Drittwirkung*: the Horizontal Effect

Drittwirkung[66] 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 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. Clapham (2006) specifies that it is indeed more accurately *Drittwirkung der Grundrechte*, or third-party effect of fundamental rights that concerns this topic.[67] He explains that there exists a difference, in the German doctrine, between *unmittelbare Drittwirkung* and *mittelbare Drittwirkung*. The former, Clapham clarifies, means that the rights themselves can be directly applied against private bodies by national courts. They are unmediated. The latter means that the values and principles surrounding constitutional fundamental rights are to be considered by the courts when they are deciding private law cases. The rights are consequently mediated through the law (Clapham, 1993b:165; 2006:521) – or in short the accountability is indirect.[68] This thesis focuses on *mittelbare Drittwirkung* (hereafter referring simply to *Drittwirkung*), since it reflects the use of the indirect horizontal effect at the Court. In this case, the Convention is analogised to a kind of Constitution of fundamental

[66] The 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, J. 2001:64-68; Kumm, M. and Ferres Comella, V. 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'.

[67] Alkema (1990:34) emphasises that since the Federal Republic of Germany's (1949) Constitution made no explicit relation between the areas of public and private law, the concept of *Drittwirkung* was conceived and adopted by the German Federal Constitutional Court in the late 1950s; the courts and doctrine began applying not only defensive rights but also an objective order of values ("*eine objektive Wertordnung*") with the purpose of closing the so-called self-created gap.

[68] Clapham notes that *unmittelbare Drittwirkung* means that the rights themselves can be directly applied against private bodies by the national courts (2006:521). They are unmediated. This is a provocative potential for direct applicability, but reaches beyond the objectives of this thesis.

rights for Member States and individuals on their territories.[69] The rights enshrined in the Convention are not – as in many national constitutions – 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. Thus, *Drittwirkung* is a way to apply Convention rights in the realm of the private sphere.

Ralf Brinktrine (2001) clarifies that *Drittwirkung* does not allow for direct horizontal effect, but accepts that individual rights permeate throughout the law, rather than being confined to cases involving the individual and the State. This is what he refers to as the "radiating effect" throughout the legal system. This notion of radiation implies that fundamental rights contain values that penetrate the entire legal order and thus do not only apply to public authorities. If violations occur, it is considered as insufficient legislation from the State. This was later applied, Brinktrine continues, under a second "objective dimension" (*ibid*:425), which he explains obliges the State to implement effective deterrence (see *MC v. Bulgaria* (2003). The State must

> Defend [the rights protected in the Constitution] against restrictions and infringements by private persons. [Objective principles] constitute duties to protect. Therefore, the legislator is under a duty to protect the basic rights against encroachments from any actor, State or non-State (Brinktrine, 2001:426).

Drittwirkung is indirect because it may effect national legislation, which may ultimately lead to a change in corporate behaviour, but the responsibility for any violation of human rights is the State's. This sustains Alkema's (1990:38) insistence that *Drittwirkung* in no way holds the third-party (in our case the TNC) responsible for the violation. The legal position of the private party, the wrongdoer, is not affected. That person is neither forced to repair the wrong nor is there a punishment.

There are some examples of applicability and acceptance of *Drittwirkung* at the ECtHR (e.g. *X and Y* (1985). 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 (2007:428) 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" of the ECHR. Spielmann's colleague, Judge Lech Garlicki (2005), suggests that despite the uncertainty, the positive obligations of States

[69] For a more on the horizontal effect in the private sphere see Sajó and Uitz (2005).

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.[70]

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 "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 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*.[71] Clapham (2006:420) observes "one can complain that there is no avenue to effectively review

---

[70] Art. 2: requires that "everyone's right to life shall be protected by law". This protection seems to have an universal scope, thus going beyond prohibiting only the State from the taking of human life. Arts. 8-11: allow for the limiting of the rights and liberties guaranteed therein when necessary for the "protection of the rights and freedoms of others". It may be argued that the State is under a duty to adopt regulations which secure the enjoyment by 'others' other their rights and freedoms. Art. 13: guarantees to everyone the right to an effective remedy before a national authority in case of a violation of any of the Convention rights and freedoms, "notwithstanding that the violation has been committed by persons acting in an official capacity". Thus, it may be argued that the persons not acting in an official capacity are also obliged not to violate the Convention (Garlicki, 2005: 131).

[71] 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).

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". Therefore, "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).

Another way of looking at this is given by one respondent (R801) who explained that *Drittwirkung* in the ECHR means that it is the State who is indirectly responsible rather than the private actor – the Convention is binding on private parties through the medium of State courts. Private actors are therefore only liable under domestic legislation. Returning to the example of discrimination, it is conceivable to assume the Convention prohibits the State from discrimination on the basis of "sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status" (Article 14). This provision is equally binding on businesses. Natural or legal persons cannot refuse to employ someone on the bases mentioned at Article 14, any more than can the State. This is because Convention rights are supposed to be subsumed into national legislation and protected by Member States. Where discrimination occurs, the claimant may go through the national legal system. Where that is deficient, the individual may then solicit the ECtHR against the State.

Addressing the case of *X and Y* (1985), Garlicki (2005:132) suggests that although *Drittwirkung* was mentioned during the hearing, the case was ultimately decided upon the 'positive obligations' scheme. According to the judge, this illustrates, the Court's discomfort with the concept. It may appear as though the use of *Drittwirkung* at the Court is confounded with the issue of positive obligations of Member States. For some (R801) the two concepts are not antagonistic but rather complementary. This respondent suggested that "authors who are reluctant to accept *Drittwirkung* as a general concept in [the ECtHR] case-law focus on positive obligations, whereas others see the positive obligations doctrine as an effective tool to achieve a third-party effect". In this judge's view, "positive obligations are a tool to achieve respect for human rights between private parties, i.e. to achieve *Drittwirkung*".

Another way of considering the discomfort of the Court may stem from the respective implications or at least interpretations of each doctrine. Although positive obligations require

the State to act in order to fill a legislative void, *Drittwirkung* seems more intense in that it ultimately renders the State fully liable for violations in the private sphere, which may have significant political repercussions. States may be unwilling or unlikely to agree to being held internationally responsible for corporate transgressions. One way to still implement a "human rights" remedy but avoid putting States in a politically problematical position is to carefully choose which doctrine applies when a case is decided against a State – even if concretely these concepts may be analogous.

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, 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.

The discomfort with *Drittwirkung* seems to corroborate the position of the judges interviewed – none of who agreed on the status of *Drittwirkung* at the Court. One judge (R501) concluded that "[the horizontal effect] has been proven through the years [as] the best and most efficient approach". Another (R401) suggested that although, "you cannot take action against [corporations] in [the] Court" it was possible to take action against a State with repercussions on the corporation, "only with *Drittwirkung*". Still another judge (R601) diverging from her colleagues, suggested that "the concept of the German Constitutional Law of the horizontal effect [was] recently [discussed] in the *Pye* [*Ltd. v. the United Kingdom*] case [where the Court was] very clear in saying that the Convention doesn't have a horizontal effect". Notwithstanding her previous comments, the judge proposed "for the time being we haven't yet exhausted the question of positive obligations of States and the responsibility of States [for] companies". She continued,

> 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. To repeat 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.

> 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).

This reactivity is a rappel of the implications of not applying the due diligence principle (*supra* section 5.1.2.). The ECtHR is a passive surveyor of human rights. Therefore, the Court claims not to have *forum convienens* to impose State obligation/responsibility to investigate human rights violations regardless of whether action is taken by an individual.[72] 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 (1990:37-38) suggests, because the primary violator is not involved. He tells us that,

> No one assumes that the Convention rights and freedoms have exactly the same legal force for private persons as they have for the States parties. Those rights may be applicable between private persons, but *their extent will depend on the domestic law and the Convention's status therein*. So far the instances in which the Convention has actually been applied are still relatively rare … However great the Convention's enforceability in a national setting, *it does not create obligations for private persons, which can be enforced through its supervisory organs in an international setting* (emphasis added).

That the Convention applies between private parties or in the private sphere has been evidenced by many cases, including *X and Y* (1985) and *Plattform* (1989). In these cases the Court did not apply the Convention between private parties but sanctioned the State for not enforcing it.

Alkema (1990) 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

---

[72] For an interesting evolution in the Court's case-law see *Oneryildiz v. Turkey* (2003), discussed below at Ch.VI.

enforce the obligations of private persons, it is left within a State's "margin of appreciation"[73] on how to implement and ensure respect of human rights obligations between private parties. But there are potential problems to leaving the decision up to the State. For example, when a corporation has the means to settle out of court, this implies a capacity to bypass any accountability by avoiding litigation. The argument for *Drittwirkung* is that governments are responsible for the deterrence of human rights Convention breaches of their nationals (physical and legal persons) including when they occur in the private sphere. There may be incentives to settle out of Court (financial, time constraints, knowledge of rights, etc.). Corporations can exploit these issues to avoid the courts. By avoiding litigation at the domestic level, an assessment of municipal legislation is evaded and so too is the question of effective deterrence (re: *MC v. Bulgaria* (2003)[74]). 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 transnational corporation 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, in return for over 150 million Euros. These kinds of settlements illustrate how corporations can effectively bypass any formal litigation. Moreover, by settling out of court the corporation does not formally admit to liability. The settlement covered the cost of a very expensive clean-up operation and some monetary compensation for the victims, but Trafigura is ultimately scot-free and has continued its activity unscathed by this human rights tragedy.[75]

---

[73] 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 Hutchison (1999); Greer (2000); Letsas (2006))

[74] "*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).

[75] It is worth mentioning the potentially positive outcome of the Trafigura case. Approximately one month after the settlement, the Ivorian government resigned admitting negligence. Trafigura currently faces charges for allegedly breaching European rules on waste import/export, based on the Basel Convention. The *Business and Human Rights Resource Centre* published this information on their website (visited 23 July 2008 at http://www.business-humanrights.org): In November 2006, the High Court of Justice in London agreed to hear a class action filed by up to 12,500 claimants from Côte d'Ivoire against Trafigura over the alleged dumping of toxic waste from [their chartered ship], the Probo Koala. Applicants allege that the waste had high levels of caustic soda, as well as a sulphur compound and hydrogen sulphide making it hazardous waste as defined by the *Basel Convention on the Control of Transboundary Movements of Hazardous Wastes.* Trafigura denies the waste was toxic and claims the waste was standard waste from onboard operations of ships ("slops" as defined by the *International Convention for*

There is perhaps some truth to the view that *Drittwirkung* or the third-party effect may be counter-productive, since the corporation is in no way considered liable. The bleak consideration of the counter-productiveness of *Drittwirkung* can be mediated, by recognising its potential, which lies with the possibility of imposing a significant penalty on the State. If the State is held responsible for the wrongdoing of its domiciled corporations – for example explicitly applying the 'due diligence' principle and reinforcing positive obligations – there may be the necessary incentive to strengthen its legislation and impose more rigorous mechanisms for checks and balances of corporate activity. Some even argue that *Drittwirkung* may be the most viable way of holding transnational corporations responsible because it imposes a positive obligation on States to prevent violations of human rights (see Clapham, 2006 discussing *Osman* (1998)[76] and *X and Y* (1985); all interviewed respondents). Moreover, the horizontal effect enables the Court to impose and enforce State obligations including amending or initiating municipal legislation. For example, in the case of *X and Y*, the Netherlands had to adapt its criminal law.[77]

Drittwirkung is a complicated concept. It can have ostensibly unconstructive outcomes that some scholars consider damaging (see Alkema, 1990). 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. This is supported by one judge (R701), whose explanation was, "the obligation that weighs on an individual person is to allow the State to fulfil its positive obligation to ensure the right to life, the right to private life, etc. and so it is in this way that the obligation of the State ricochets onto the individual in question". This, Clapham (2006:368-369) elaborates, is not the only way that positive obligations are implied in the right to life. He suggests

> The issue of the obligations of the non-state actor as regards the right to life hardly arises in practice. Taking a life is clearly illegal under national law and there would normally be no reason to raise this before a national court in terms of human

the Prevention of Pollution From Ships). Trafigura is alleged to have shipped the untreated chemical waste to Côte d'Ivoire with knowledge that there were no facilities to treat this waste. Trafigura has denied responsibility, stating that they had entrusted the waste to an Ivorian disposal company, Tommy, which was established a few weeks before the ship's arrival. [The Dutch company] claims it had no grounds for suspecting that Tommy would improperly dispose of the waste. Trafigura denies the number of applicants/victims and avers that only 69 people suffered significant injury. The trial is planned for early 2009. In February 2008, Dutch prosecutors served notice that they intend to file criminal charges against Trafigura, among others, for its alleged part in the disposal of waste in Côte d'Ivoire. In June 2008 an Amsterdam court began hearing evidence in this case.

[76] The Court states that "…having regard to the nature of the right protected by Article 2, a right fundamental in the scheme of the Convention, it is sufficient for an applicant to show that the authorities *did not do all that could be reasonably expected of them to avoid a real and immediate risk to life of which they have or ought to have knowledge*." (§116, emphasis added).

[77] This is nuanced by Garlicki's (2005:142) suggestions that the concept of *Drittwirkung* was not applied here but rather simply positive obligations doctrine.

> rights law. [T]he issue does arise, however, in relation to whether non-state actors might themselves have positive obligations to protect life, and the parallel obligations of the state to ensure that the non-state actor fulfils these obligations with regard to everyone within the state's jurisdiction.

The issue of the appropriate forum to consider violations of human rights by corporations is not negligible. It is true that human rights violations are often illegal acts and the claim is that it should be dealt with in criminal courts. Clapham points out that human rights instruments may contain obligations for the non-state actor concurrently with the State. Where the ECHR applies in the private sphere via *Drittwirkung*, it can only be as efficient and appropriate as the legislation it works through. Meaning that if there are gaps at the domestic level and jurisdictional issues at the international level, corporations violating human rights can easily find the space between the laws where their actions go without sanction.

Having considered the indirect approach of corporate accountability via the State, it is perhaps helpful to juxtapose the Convention with other international documents. This illustrates how State responsibility is seen in international and European law. In this way, we can assess the viability of the indirect approach by reviewing the outcome of the examples below. We shall begin with the UN Norms before considering two Council of Europe agreements. The first is a Resolution on the protection of the environment. The second is a Recommendation on corporate offences. The UN Norms endorse State responsibility supplemented by direct corporate accountability.

5.3. Examples of State Responsibility in International and European Law

According to some authors, a number of treaties make clear that the international legal system is capable of defining international legal standards applicable to corporations. One scholar suggests, "the international legal order has already adapted to define corporate crimes in international law and to oblige States to criminalise this behaviour" (Clapham, 2000:178; see also Stephens, 2002). However, there appears to be a lack of interest on the part of the Court to use the Convention in a way to optimise the protection of human rights from violations by corporations. This rappels the comments of R601 related to the divergence stunting the ECtHR.[78] Instead of collaborating with other international bodies that are taking steps forward to rein in corporate power, the Court is avoiding the subject altogether. This void of corporate liability is not present across the Council of Europe. It is worth examining the Council's references to corporate offences to juxtapose them with the limitations in the ECHR. The

[78] *Supra* 44.

following section examines a few international documents and gauges how they address corporate behaviour.

5.3.1. Council of Europe *Resolution (77)28 Convention on the Protection of the Environment Through Criminal Law*

In its Preamble, the Council of Europe's *Convention on the Protection of the Environment Through Criminal Law*[79] recognises that "imposing criminal or administrative sanctions on legal persons can play an effective role in the prevention of environmental violations". Article 9 is dedicated to corporate liability. It determines that:

> 1. Each Party shall adopt such appropriate measures as may be necessary to enable it to impose criminal or administrative sanctions or measures on legal persons on whose behalf an offence referred to in Articles 2 or 3 has been committed by their organs or by members thereof or by another representative.
>
> 2. Corporate liability under paragraph 1 of this article shall not exclude criminal proceedings against a natural person.
>
> 3. Any State may, at the time of signature or when depositing its instrument of ratification, acceptance, approval or accession, by a declaration addressed to the Secretary General of the Council of Europe, declare that it reserves the right not to apply paragraph 1 of this article or any part thereof or that it applies only to offences specified in such declaration.

In its Explanatory Report, the CoE emphasises that Article 9 deals with the liability of legal persons because environmental crimes are often perpetrated within the framework of legal persons. They acknowledge the difficulty encountered due to the corporate veil, particularly in prosecuting natural persons acting on behalf of legal persons. The Report endorses the liability of a natural person in combination with the legal person, despite the international trend to recognise corporate liability in criminal law. When drafting this document, the Council of Europe reflected on developments on the international stage concerning corporations to make this treaty meaningful.

The CoE remains soft on the applicability of this Convention noting that "the provision leaves, however, open to the States to impose 'criminal or administrative sanctions or measures on legal persons' corresponding to their legal traditions". There is an exception clause at where the Report (§3) notes that because "some member States still address these problems (or part

---

[79] The Council of Europe's summary of this treaty is as follows: The Convention is aimed at improving the protection of the environment at European level by using the solution of last resort - criminal law - in order to deter and prevent conduct, which is most harmful to it. It also seeks to harmonise national legislation in this field. This new legal instrument obliges Contracting States to introduce specific provisions into their criminal law or to modify existing provisions in this field. It establishes as criminal offences a number of acts committed intentionally or through negligence where they cause or are likely to cause lasting damage to the quality of the air, soil, water, animals or plants, or result in the death of or serious injury to any person. It defines the concept of criminal liability of natural and legal persons, specifies the measures to be adopted by states to enable them to confiscate property and define the powers available to the authorities, and provides for international co-operation. The sanctions available must include imprisonment and pecuniary sanctions and may include reinstatement of the environment, the latter being an optional provision in the Convention. Another major provision concerns the possibility for environmental protection associations to participate in criminal proceedings concerning offences provided for in the Convention.

of them) in administrative law or in civil law, […] they cannot entirely apply these principles". This inhibits the harmonisation of European law making it difficult to ensure the potency of these sanctions where some countries are willing to go farther than others.

Clapham (2006:248) suggests that the Explanatory Note's reference to "international definitions of corporate offences giving rise to corporate liability are seen as part of the effectiveness of international law". For him, this is testimony to the international community's recognition of corporate offences, and indication of their willingness to respond with binding international law to deal with corporate transgressions. This is the indirect approach to corporate liability since the State is responsible for imposing obligations upon its corporations.

If the CoE is prepared to acknowledge corporate offences in environmental law – which has clear ramifications for human rights (re: Trafigura) – then we are inclined to ask why it will not look to a decisive method of dealing with corporate violations of human rights; for example, by enforcing obligations via the Strasbourg Court. The interest in corporate offences increased at the Council of Europe in the next decade. In 1988, the Committee of Ministers drafted a Recommendation for the liability of corporations for their transgressions.

5.3.2. Council of Ministers *Recommendation No. R.(88)18 Liability of Enterprises having Legal Personality for Offences Committed in the Exercise of Their Activities.*

The Recommendation takes the responsibility of corporations a step further than the 1977 Convention on the environment. It provides that,

> Considering the increasing number of criminal offences committed in the exercise of the activities of enterprises *which cause considerable damage to both individuals and the community*;
>
> Considering the desirability of placing the responsibility where the benefit derived from the illegal activity is obtained;
>
> Considering the difficulty, due to the often-complex management structure in an enterprise, of identifying the individuals responsible for the commission of an offence;
>
> Considering the difficulty, rooted in the legal traditions of many European states, of rendering enterprises, which are corporate bodies criminally liable;
>
> Desirous of overcoming these difficulties, with a view to making enterprises as such answerable, without exonerating from liability natural persons implicated in the offence, and to providing appropriate sanctions and measures to apply to enterprises, so as to achieve the due punishment of illegal activities, the prevention of farther offences and the reparation of the damage caused;
>
> Recommends that the *governments of Member States be guided in their law and practice* by the principles set out in the appendix to this recommendation.
>
> Appendix to Recommendation No. R (88) (18)

> The following recommendations are designed to promote measures for rendering enterprises liable for offences committed in the exercise of their activities, *beyond existing regimes of civil liability* of enterprises to which these recommendations do not apply.
>
> They apply to enterprises, whether *private or public*, provided they have legal personality and to the extent that they pursue economic activities.

The Recommendation demonstrates an awareness of corporate offences and a recognition of corporate liability stating its objective in 'guiding Member States in their law and practice'. This indicates a move towards harmonising principles, although not standardising any one rule. It is suggested in the Recommendation that corporate crime is an important issue to the Council of Ministers. The Council acknowledges the corporate veil and the difficulties in identifying responsibility. It encourages the enhancement of current laws to move beyond civil litigation into the criminal framework. It also emphasises that both private and public corporations are susceptible to transgressions and must be monitored. What it does not do is explicitly address human rights.

It may be argued that human rights are the relationship between the individual and the State (state-centric approach). But it has been established that the Convention can apply in the private sphere between individuals. Considering this, it would seem appropriate that the ECHR address corporate liability for human rights infringements in a way that acknowledges, as does the Recommendation, corporate offences, "which cause considerable damage to both individuals and the community". The Recommendation, like its 1977 precursor, indicates the CoE's acknowledgement that TNCs can be dangerous and this warrants measures by States. Importantly this also indicates, that the Council of Europe is not willing to extend this engagement into a supervisory framework to explicitly address human rights. The responsibility to prevent and monitor corporate offences remains within the framework of criminal, civil or tort law. There is no allusion of supplementing this with an enforcement mechanism at the international level. That corporate transgressions are not addressed at the ECtHR is an indication that the Council of Europe abdicates its potential to supervise regulation over corporate offences. Neither its 1977 Convention nor its 1988 Recommendation support the idea of direct obligations on corporations. However, there is an international document that supports both the direct and indirect approach: the UN Norms.

5.3.3. United Nations *Norms on the Responsibility of Transnational Corporations and Other Businesses with Regard to Human Rights*

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. It is important to keep in mind that although in the eventuality of its ratification the Norms are *meant* to be a binding document, they have yet to be approved by the UN Commission on Human Rights. Therefore, the UN Norms are not binding and to date has no substantive application to States or private actors.[80] In its Preamble, the Norms recall the Universal Declaration of Human Rights that refers to *every individual* and *all organs of society* (re: Henkin, 1999; *supra* Chapter I). The Norms 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 UN 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 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.

The incorporation of the Norms into judicial bodies is addressed at Article 18 that outlines its implementation and enforcement. It reads:

> …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 at the ECtHR 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

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

not [included therein]" (R401). This was echoed by one judge (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 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. For example, Protocol 6 and 14 are still pending ratification by Russia and therefore does not apply to them. 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 if they thought other Member States would not. 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*[81] (1994) and *Guerra and Others v. Italy* (1998). Both decisions involved corporate environmental pollution that infringed upon the right to private and family life (Article 8 ECHR).[82] 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 *Lopez Ostra*, the ECtHR determined that environmental pollution could be a violation of human rights. This case involved the absence of a license that resulted in deficient regulation of a polluting industry, namely the operations of a tannery waste treatment plant. The claimant held that the Spanish government was

[81] 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.

[82] See Soveroski (2007) detailing that the Court made 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) involving storage and treatment of 'special waste'. She goes on that, "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).

responsible for violations of ECHR Articles 8 (respect for private and family life) and 3 (prohibition of torture) due to its passive attitude. The application under the latter article was rejected. But, 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 "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. In *Guerra and Others*, the Court cites *López Ostra* reiterating that national authorities are compelled to take the necessary steps to ensure effective protection of applicants' right to respect for their private and family life.

These are encouraging examples of how the Norms can be used by the ECtHR to oblige States to monitor the conduct of domiciled corporations – including those working abroad – via the positive obligations inherent in the Convention.[83] 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".

[83] *Supra* 62

VI. Concluding Remarks

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.

6.1. 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? 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?

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 (see Nowrot, 2005). 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.[84] 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.

6.2. 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.[85] In Iraq, for example, there seems to be no domestic jurisdiction of State 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

[84] 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).

[85] 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 plans that allowed corporations to take over indigenous lands, for example in Sri Lanka after the 2006 Tsunami (for more on this see Klein, *ibid*).

conditionality clause for business deals.[86] 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.

One response to this procedural gap is to adopt the due diligence principle, whereby the ECtHR could oblige States to take the initiative to investigate human rights violations by corporations regardless of whether the victim or other concerned person(s) raises the issue. This compels legal obligations for States to properly investigate any violation of the Convention. Where this is not done, the Court can then sanction the State for not fulfilling its obligations under Article 1 ECHR. Judges consistently stated that the due diligence principle did not exist at the Court. This was confusing because of the ostensible similarities between the due diligence principle and positive obligations, both requiring the State to act. One respondent (R601) proposed this due to the diversity in the composition of international courts and its actors' interpretation of the doctrines. She suggested, "In international courts, people are so different with many different expertise. It is not always easy to agree on a complicated mechanism of analysis. Typically, especially in international courts, you will see lots of shortcuts. That's simply the reality". Opting for one doctrine rather than another is a strategic choice to enforce similar obligations but avoid some aspect that may be politically sensitive.

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

6.3. *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 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 (2001:543) 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". 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 (*ibid*) 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". Additionally, bringing these cases under the rubric of the human rights paradigm offers the possibility of staking a claim of universality[87] and indivisibility that would hinder the current polemic of extra-territorial jurisdiction[88] where companies can successfully outsource to

[87] *Supra* 61.
[88] *Supra* 62.

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.

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. As Lewis Carroll wrote:

> Alice: …Would you tell me please which way we should go from here?
> Cheshire Cat: That depends a good deal on where you want to get to.

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. Increasingly, we are seeing this as a real prospect, with groups that are at least thinking about 'where we want to get to' and how we can get there. These include the World Social Forum, the People's Permanent Tribunal, and a plethora of national and international NGOs. 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 possibilities of how to get there. One respondent (R801) suggested for example 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.

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 Master's thesis 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 (2003b: 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.[89] 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 boycotting[90] 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. The gap in human rights law is not inevitable. Whether the direct approach is achievable within the framework of the European Convention or whether this approach requires a new treaty, complete with its proper supervisory, complaint and enforcement mechanisms to make it work is a legitimate question. This thesis has attempted to demonstrate that although "this requires some creativity since under its current status the European Convention cannot apply directly in the private sphere" (see Zerk, 2007) it is not impossible. Moreover, it does not necessarily require a radical overhaul of the Convention. Indeed, there are conventional ways of using the ECHR to protect human rights against corporations, such as using *Drittwirkung*.

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 and individuals, 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

[89] 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.
[90] Examples include *Clean Clothes* campaigns; see also s*upra* 5.

approach the ECtHR can still be effective against corporate violations. It is the ideal candidate to initiate a strong defense of human rights from corporate violations using the indirect approach to oblige States to take serious measures. 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 developments in ways that can effectively fill the space between the laws.

VII. Bibliography

7.1. References

Addo, M.K. (1999a), "Human Rights and Transnational Corporations – an Introduction", in Addo, M.K. (ed.), Human Rights Standards and the Responsibility of Transnational Corporations. The Hague: Kluwer Law International, pp.3-37.

---------- (1999b), "The Corporation as a Victim of Human Rights Violations", in 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", in 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. Köln; Berlin; Bonn; München: Carl Heymanns Verlag KG.

Allott, P. (2001), Eunomia: New Order for a New World, 2nd Ed. New York: Oxford University Press.

Amnesty International (2004), "The UN Human Rights Norms For Business: Towards Legal Accountability". London: Amnesty International Publications.

Arnardóttir, O. M. (2003), Equality and Non-Discrimination Under the European Convention of Human Rights. The Hague: Martinus Nijhoff Publishers.

Anderson, S. and **Cavanagh**, J. (4 Dec. 2000), "Top 200: the Rise of Global Power", accessed at www.corpwatch.org on 4 August 2008.

Andreopoulos, G.J., **Arat**, Z.F.K., and **Juviler**, P., (2006), Non-State Actors in the Human Rights Universe. Bloomfield: Zumarian Press, Inc.

Baxi, U. (2005), "Market Fundamentalisms: Business Ethics at the Altar of Human Rights", in *Human Rights Law Review*, Vol.5, No.1, pp.1-26

Becker, H. (Winter 1967), "Whose Side are We On?" in *Social Problems*, Vol. 14, No. 3, pp.239-247.

Braithwaite, J. and **Geis**, G. (1982), "On Theory and Action for Corporate Crime Control", in *Crime and Delinquency*, Vol. 28, No. 2, pp.292-314.

Braithwaite, J. (1984), Corporate Crime in the Pharmaceutical Industry. London: Routeledge and Kegan Paul.

Brinktrine, R. (2001), "The horizontal effect of human rights in German constitutional law: the British debate on horizontality and the possible role model of the German doctrine of '*Mittelbare Drittwirkung der Grundrechte*'", in *European Human Rights Law Review*, Issue 4, pp.421-432.

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.

Buergenthal, T. (2007), "The ICJ, Human Rights and Extraterritorial Jurisdiction", in Breitenmoser, S. *et al* (eds.), Human Rights, Democracy and the Rule of Law: *Liber Amicorum Luzius Wildhaber*. St Gallen: Dike Verlag AG.

Chomsky, N. (15 May 1997), "How Free is the Free Market", *LIPMagazine*, accessed at www.lipmagazine.org on 6 August 2008.

---------- (16 May 2000), "Globalisation and its Discontents: Noam Chomsky Debates With Washington Post Readers", published by *Washington Post*, accessed at www.chomsky.info on 1 Aug. 2008.

Cioffi, J.W. (Dec. 2000), "Governing Globalization? The State, Law and Structural Change in Corporate Governance", in *Journal of Law and Society*, Vol. 27, No.4, pp.572-600.

Clapham, A. (1993a), Human Rights in the Private Sphere. New York: Oxford University Press, Inc.

---------- (1993b), "The '*Drittwirkung*' of the Convention" in Macdonald, R. St. J., Matscher, F. and Petzold, H. (eds.), The European System for the Protection of Human Rights. Dordrecht: Martinus Nijhoff Publishers.

---------- (2000) "The Question of Jurisdiction Under International Criminal Law Over Legal Persons: Lessons from the Rome Conference on an International Criminal Court", in Kamminga, M.T. and Zia-Zarifi, S. (eds.), Liability of Multinational Corporations Under International Law. The Hague: Martinus Nijhoff Publishers.

---------- (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", in Scott, C. (ed.), Torture as Tort: Comparative Perspectives on the Development of Transnational Human Rights Litigation. Oxford: Hart Publishing, pp.513-535.

---------- (2004), "The complexity of international criminal law: Looking beyond individual responsibility to the responsibility of organisations, corporations and States", in Thakur, R. and Malcontent, P. (eds.), From Sovereign Impunity to International Accountability: The Search for Justice in a World of States. Tokyo: United Nations University Press.

---------- (2006), The Human Rights Obligations of Non-State Actors. New York: Oxford University Press.

Clapham, A. and **Rubio**, M.G. (2002), "The obligation of states with regards to non-state actors in the context of the right to health", a Health and Human Rights Working Paper Series No. 3 submitted to the World Health Organisation, accessed at www.who.int on 9 Dec. 2007.

Coffee, J.C. Jr. (Jan. 1981) "No Soul to Damn: No Body to Kick": An Unscandalized Inquiry into the Problem of Corporate Punishment" in *Michigan Law Review*, Vol. 79, No. 3, pp. 386-459.

Collins, H. (1982), Marxism and Law. Oxford: University Press.

Cooper, J. (2001), "Horizontality: The Application of Human Rights Standards in Private Disputes", in English, R. and Havers, P. (eds.), An Introduction to Human Rights and the Common Law. Oxford: Hart Publishing.

Croall, H. (2005), "Transnational White Collar Crime", in Shepytcki, J. and Wardak, A. (eds.), Transnational and Comparative Criminology. London: Routeledge, pp.227-243.

Danailov, S. (Oct. 1998), "The accountability for non-state actors of human rights violations: the special case of Transnational Corporations", accessed at http://www.lawanddevelopment.org/articles/transnationalcorps.html.

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

De Schutter, O. (2005a), "The Accountability of Multinationals for Human Rights Violations in European Law", in Alston, P. (ed.), Non-State Actors and Human Rights. Oxford: University Press.

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

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

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

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

Deva, S. (2004), "Acting Extraterritorially to Tame Multinational Corporations for Human Rights Violations: Who Should 'Bell the Cat'?", in *Melbourne Journal of International Law*, Vol. 2.

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

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

Engle, E.A. (Feb. 2005), "Alien Torts in Europe? Human Rights and Tort in European Law", Working paper for the University of Bremen's *Zentrum Für Europäische Rechtspolitik*.

---------- (2006), "Extraterritorial Corporate Criminal Liability: A Remedy for Human Rights Violations?" in *St. John's Journal of Legal Commentary*, Vol. 20, No. 2, pp.287-329.

European Court of Justice, "The Institution: The Court of Justice of the European Communities in the Community legal order: Fundamental Rights" accessed at http://curia.europa.eu/en/instit/presentationfr/index_cje.htm

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.

Fisse, B. and **Braithwaite**, J. (1993), Corporations, Crime and Accountability. Cambridge: University Press.

Fischer, W.F. and **Ponniah**, T. (2003), Another World is Possible: Popular Alternatives to Globalization at the World Social Forum. London: Zed Books.

Forsythe, D.P. (2000), "Transnational Corporations and Human Rights", in Human Rights in International Relations. Cambridge: University Press.

Friedmann, W. (1964), The Changing Structure of International Law. New York: Columbia University Press.

Friedrichs, D.O. (2007), "White-Collar Crime in a Postmodern, Globalized World", in Pontell, H.N. and Geis, G. (eds.), International Handbook of White-Collar and Corporate Crime. New York: Springer Publishers.

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

Gibney, M., **Tomasevski**, K. and **Vedsted-Hansen**, J. (Spring 1999), "Transnational State Responsibility for Violations of Human Rights", in *Harvard Human Rights Journal*, Vol. 12.

Geis, G. (1992), "White Collar Crime, *What is it*?" in Schlegel, K. and Weisburd, D. (eds.), White Collar Crime Reconsidered. Boston: Northeastern University Press.

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

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

Gobert, M. and **Punch**, M. (2003), Rethinking Corporate Crime. London: Butterworths.

Greer, S. (2000) "The Margin of Appreciation: Interpretation and Discretion under the European Convention on Human Rights", Council of Europe Law: Human Rights files No. 17

Hafner, G. (2004), "Pros and Cons Ensuing from the Fragmentation of International Law", based on the paper submitted to the International Law Commission, Gerhard Hafner, "The Risk Ensuing from Fragmentation of International Law", in *Report of the International Law Commission on its 52nd session*, U.N. General Assembly, 55th Sess., Suppl. 10, at pp.321–339 (2000).

Hansenne, M. (1994), "Defending Values, Promoting Change, Social Justice in a Global Economy: An ILO Agenda", Report of the Director-General, International Labour Office, Geneva.

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.

Henkin, L. (1999), "The Universal Declaration at 50 and the Challenge of Global Markets" in Brooklyn Journal of International Law, Vol. 25, No.1, p.25.

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" in *International and Comparative Law Quarterly*, Vol. 48, pp.638-650.

International Council on Human Rights Policy (2002), "Beyond Voluntarism: Human Rights and the Developing International Legal Obligations of Companies: Summary". Geneva: Atar Rosa Presse.

Jägers, N. (1999), "The Legal Status of the Multinational Corporation Under International Law", in 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", in *Netherlands Quarterly of Human Rights*, Vol. 24, No. 2, pp.229-270.

Jessup, P. (1946), A Modern Law of Nations. London: Macmillan.

---------- (Feb. 1947), "The Subjects of a Modern Law of Nations", in *Michigan Law Review*, Vol. 45, No. 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, accessed at http://www2.ohchr.org/english/issues/globalization/business/docs/kamminga.doc 12 Aug. 2008.

Kamminga, M.T. and **Zia-Zarifi**, S. (2000), "Liability of Multinational Corporations Under International Law: An Introduction", in 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?", in 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", in Lauterpacht, E. (ed.), Collected Papers: Vol. 1. Cambridge: University Press.

Letsas, G. (2006) "Two Concepts of the Margin of Appreciation" in *Oxford Journal of Legal Studies*, Vol. 26, No. 4, pp.705-732

Loomis, W. (1999), "The Responsibility of Parent Corporations for the Human Rights Violations of Their Subsidiaries", in Addo, M.K. (ed.), Human Rights Standards and the Responsibility of Transnational Corporations. The Hague: Kluwer Law International, pp.145-159.

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

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

Michalowski, R. (1985), Order, Law and Crime - An Introduction to Criminology. New York: Random House.

Michalowski, R.J. and **Kramer**, R.C. (Feb. 1987), "The Space Between Laws: The Problem of Corporate Crime in a Transnational Context", in *Social Problems*, Vol. 34, No.1, pp.34-53.

Mowbray, A. (2005), "The Creativity of the European Court of Human Rights", in *Human Rights Law Review*, Vol. 5, No. 1, pp.57-79.

Muchlinski, P. (Jan. 2001), "Human rights and multinationals: is there a problem?", in *International Affairs (Royal Institute of International Affairs 1944-)*, Vol. 77, No.1, pp.31-74.

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, Number 2002/1 available at www.oecd.org.

O'Malley, P. (1997), "Marxist Theory and Marxist Criminology", in Lynch, M.J. (ed.), Radical Criminology. Sydney: Dartmouth.

Nowrot, K. (2005), "Reconceptualising International Legal Personality of Influential Non-State Actors: Toward a Rebuttable Presumption of Normative Responsibilities", paper presented at *ESIL Research Forum on International Law*, Geneva, 26-28 May 2005, accessed

http://www.esil-sedi.eu/english/pdf/Nowrot.PDF on 1 Sept. 2008.

Passas, N. (Summer 2000), "Global Anomie, Dysnomie and Economic Crime: Hidden Consequences of Neo-liberalism and Globalisation in Russia and Around the World", in *Social Justice*, pp.16-44.

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

Pellonpää, M. (1993), "Economic, Social and Cultural Rights", in 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.

Raphael, T. (2000), "The Problem of Horizontal Effect", in *European Human Rights Law Review*, Issue 5, pp.493-511.

Ratner, S.R. (Dec. 2001), "Corporations and human Rights: A Theory of Legal Responsibility", in *The Yale Law Journal*, Vol. 111, No. 3, pp.443-545.

Richardson, P. (Spring 2004), "Corporate Crime in a Globalized Economy: An Examination of the Corporate Legal Conundrum and Positive Prospects for Peace", in *Journal of Public and International Affairs*, Vol. 15, pp.165-189.

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, USA.

---------- (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, Germany.

Ryssdal, R. (1997), "The European Court of Human Rights", in Berg, L. (ed.), Bringing Cases Before the European Commission and Court of Human Rights. Turku; Åbo: Åbo Akademi University.

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

Sargent, N.C. (Spring 1990), "Law, Ideology and Social Change: An Analysis of the Role of Law in the Construction of Corporate Crime", in *The Journal of Human Justice*, Vol. 1, No. 2, pp.97-116.

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

Skogly, S.I. (1999), "Economic and Social Human Rights, Private Actors and International Obligations", in Addo, M.K. (ed.), Human Rights Standards and the Responsibility of

Transnational Corporations. The Hague: Kluwer Law International.

Slapper, G. and Tombs, S. (1999), Corporate Crime. Edinburgh: Pearson Education Limited.

Soveroski, M. (2007) "Environment Rights Versus Environment Wrongs: Forum Over Substance?" in *Review of European Community & International Environmental Law*, Vol. 16, Issue 3, pp.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", in *Annales du droit Luxembourgeois*, pp.26-87.

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

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

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

Stephens, B. (2002), "The Amorality of Profit: Transnational Corporations and Human Rights", in *Berkeley Journal of International Law*, Vol. 20, pp.45-90.

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

Sutherland, E.H. (1940), "The White Collar Criminal", in *American Sociological Review*, Vol. 5, pp.1-12.

---------- (1983), White Collar Crime: The Uncut Version. Binghamton: Vail-Ballou Press.

Tombs, S. and **Whyte**, D. (2003a), "Scrutinizing the Powerful: Crime, contemporary political economy, and critical social research", in Tombs, S. and Whyte, D. (eds.), Unmasking the Crimes of the Powerful. New York: Peter Lang.

---------- (2003b), "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.

Tushnet, M. (2005), "Judicial Review of Legislation", in Sajó, A. and Uitz, R. (eds.), The Constitution in Private Relations. Utrecht: Eleven International Publishing, pp.241-286.

United Nations Economic and Social Council (2003), "*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.

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 30: 11, Paris: United Nations Educational, Scientific, and Cultural Organization

Vazquez, C.M. (1 Oct. 2004), "Human Rights Obligations of Corporations Under International Law", paper submitted at the *International Law Workshop* for the International Legal Studies Program Fall 2004 at the University of California, Berkeley (permission to cite granted by author via email 7 Sept. 2008).

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

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

Weber, M. (1949), The Methodology of the Social Sciences. New York: The Free Press.

Wells, C. (2000), Corporations and Criminal Responsibility, 2nd Ed. Oxford: University Press.

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

Wildhaber, L. (1980), "Some Aspects of the Transnational Corporation in International Law", in *Netherlands International Law Review*, Vol. 27, No. 1, pp.79-89.

Zerk, J. (11 Jan. 2007), "Special Reports: Legal issues – Ultimate governance: the international regulation of corporate responsibility", accessed at www.ethicalcorp.com on 4 Aug. 2008.

7.2. Table of Cases

7.2.1. European Court and Commission Case-Law

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.

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

Florin Mihailescu 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.

Ilascu 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.

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

Mykhaylenky 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.

Öneryildiz 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 "Ärtze 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.

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 EHRR 439.

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

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

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

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

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

7.2.2. Other Jurisdiction Case-Law

Advisory Opinion on Reparations for Injuries Suffered in the Service of the United Nations [1949] ICJ Rep. 174.

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

'SERAC' (Social and Economic Rights Action Centre and the Centre for Economic and Social Rights) v. Nigeria (2001) Communication No. 155/96, African Comm.

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.

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

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).

.

7.3. Table of Treaties and Conventions

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.

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 *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.

VIII. Appendices

8.1. Interview Invitation Letter Template

Stéfanie Khoury
33 rue de la Gare
67118 Geispolsheim Gare
(+33) 06 87 61 25 08
stefkhoury@gmail.com

Strasbourg, xxx 2008

Hon. Justice X
Judge at the European Court of Human Rights
European Court of Human Rights
Council of Europe
67075 Strasbourg-Cedex
France

Object: Interview request for Master's thesis research regarding corporate violations of human rights and the European Court of Human Rights

Honourable Justice X,

I am currently working towards my Master's thesis at the *International Institute for the Sociology of Law* (Oñati, Spain). The study's objective is to consider the limitations of human rights law regarding corporations domiciled in Europe committing human rights violations in non-European nation-states. This is an investigation into the role of the European Court of Human Rights as a potential forum within which to address these violations. The focus of this research project is on the perspective of legal actors at the Court. Your position as Judge at the European Court of Human Rights makes your participation in this research project invaluable.

I would greatly appreciate a meeting with you at whatever date and time is most convenient for you.

Please do not hesitate to contact me via email or telephone at any time for further information. I look forward to meeting with you.

Kind Regards,

Stéfanie Khoury

8.2. Attestation of Studies for Interviews

Apdo. 28
20560 Oñati (Gipuzkoa)
Tel. +34 943 783064
Fax. +34 943 783147

CARLOS LISTA, SCIENTIFIC DIRECTOR OF THE OÑATI INTERNATIONAL INSTITUTE FOR THE SOCIOLOGY OF LAW (GIPUZKOA)

CERTIFIES THAT:

Stefanie Khoury, from Canada, with passport number JV065848, is following the 2007/2008 Official Master Programme *International Master in Sociology of Law* coordinated between the University of the Basque Country and the University of Milan at the Oñati International Institute for the Sociology of Law (IISL) – Gipuzkoa – Spain. After having followed the courses held at the IISL (40 ECTS) she is now writing the Master Thesis (20 ECTS) entitled "The Law is the Limit: The Limitations of European Human Rights Law in Indicting Corporate Violations of Human Rights Abroad", under the supervision of Dr. David Whyte, University of Liverpool.

We encourage our students to engage in empirical research for their Master Thesis; your cooperation is much appreciated.

This certificate is issued on Friday, 28th March 2008.

Carlos Lista
Scientific Director

8.3. Interview Grid

	Objectives	Questions	Key Points
1	Discover the extent to which legal professionals see the obstacles too great for corporate liability via human rights instruments. • By describing and analysing the perception that legal professionals have of the barriers to corporate liability for human rights violations. • By examining whom judges consider to be subjects of international law and analysing what this implies. • Awareness of cases implementing positive obligations and the extension of the Convention into the private sphere to relations between individuals. • Understand the position of the Court regarding the due diligence principle and how it relates to Drittwirkung.	1. What are the Convention barriers standing in the way of corporate liability for violations of human rights? ---------- 2. When TNCs acting para-stately violate human rights, do you consider that they should be held accountable in the same or similar ways as a State? ---------- 3. How far can it be considered that the Convention applies in the private sphere? Which rights apply? To what extent? ---------- 4. Can you think of a scenario when those rights might be used in cases where corporations are implicated in infringement of rights? ---------- 5. How does the Court consider the due diligence principle? ---------- 6. What is the relationship between due diligence and Drittwirkung? ----------	-subject of international law -derivative subject vs original subject -Art. 8 and 11 ECHR -*X and Y vs. Netherlands* (1985) -*Plattform Ärttze für das Leben* (1988) -due diligence -para-statal activity

2	Describe the legal professional's awareness/ perception of the Norms: • By probing awareness/knowledge of the UN Norms • By describing and analysing the barriers to implementing the UN Norms • By questioning the admissibility of the UN Norms, either in its current form as pure soft law, or in the eventuality of its ratification where it would gain binding effect. • Investigate what the Preamble's recognition of the UDHR implies vis-à-vis other external international documents (treaties, conventions, declarations, etc.).	7. Are you familiar with the United Nations Norms on the Responsibilities of Transnational Corporations and other Business Enterprises with Regard to Human Rights? --- 8.To what extent might judges incorporate international normative standards that do not have full legal status (i.e. the UN Norms). --- 9.What are the Convention barriers that stand in the way of the UN Norms? --- 10. Were the UN Norms to be ratified and enter the corpus of international law, would it be plausible to imagine the Court considering this document as a supporting document, in the same way it may the Vienna Convention or other international conventions or treaties? If so, what does this imply for the direct responsibility of corporations? --- 11. The Preamble of the Convention acknowledges the Universal Declaration of Human Rights. Considering that this Declaration establishes the obligations of States, every individual and every organ of society what does this imply for the Convention? That is, do Convention obligations equally apply in the private sphere? How?	UN Norms ECHR barriers UDHR Vienna Convention Convention barriers Soft law
3	Determine the evolution of the approaches/ orientations used by the legal professionals • By making links with the terms that they use and the different approaches: dynamic interpretation, open-textured decision-making). • By examining the role of positive obligations of states. • Investigate the extent of the judicial imagination: are the legal barriers considered too great to overcome?	12. What are the barriers to more generous interpretations of positive obligations of states against potential/real violations of human rights by TNCs? --- 13. How might the Convention be used to impose positive obligations upon states to guarantee protections from TNCs? --- 14. Do you think, that the dynamic approach and the interpretation of the Convention as a living instrument could be used to expand the scope of the ECHR to apply to corporations?	Direct responsibility Dynamic approach Open-textured decision-making Living instrument Positive obligations Judicial imagination

4	Determine their perception of the plausibility of using Drittwirkung (the horizontal effect) to make states and TNCs responsible for violations of human rights. • Understand the difference between mittelbare and unmittelbare Drittwirkung. • Explain the implications of the 'radiating effect' for the Convention. • To find out if they consider Drittwirkung an option. • To examine the extent to which the Court is willing to use Drittwirkung (what kinds of cases, for which types of violations). • To find out to which provisions impose positive obligations on States and private persons; and how these are imposed.	15. Can you please explain the horizontal effect? --- 16. Can you explain the difference between mittelbare and unmittelbare Drittwirkung. --- 17. Can you explain why mittlebare Drittwirkung is the preferred concept for its application in human rights? --- 18. Can you explain the 'radiating effect' understood under mittelbare Drittwirkung? Mittelbare Drittwirkung does not allow for direct horizontal effect, but accepts that individual rights permeate throughout the law, rather than being confined to cases involving the individual and the State. This is what he refers to as the 'radiating effect' throughout the legal system. This notion of radiation implies that fundamental rights contain values that penetrate the entire legal order and thus do not only apply to public authorities. --- 19. How can the horizontal effect apply to corporate violations of human rights? --- 20. Do you think Drittwirkung is a viable option for holding TNCs responsible for their human rights violations? Why? Why not? --- 21. Certain articles (2, 8-11, 13) can be interpreted to impose positive obligations "not only on Member States, but also, indirectly, on private persons". What precisely are the obligations placed on private parties and how are they imposed? --- 22. Would it be feasible for the Court to hold a member state responsible for TNC violations abroad using Drittwirkung (horizontal effect)? If not, what are the barriers currently preventing this?	*Drittwirkung* Indirect responsibility -X and Y vs. Netherlands Effective deterrence Positive obligations on states and private persons. *Mittlebare Drittwirkung*
5	Investigate the consequences of the state-centric approach of the Convention. • To find out whether the state-centric approach is still valid or valuable in today's globalised world.	23. Is the state-centric approach a hindrance to protecting human rights given the current paradigm of economic globalization? --- 24. Is it conceivable that the Convention could ever be expanded to include corporations as parties to the ECHR?	Globalisation State-centric approach