Non-State Actors and Human Rights

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The Changing International Legal Framework for Dealing with Non-State Actors

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1. INTRODUCTION

Individuals are held civilly liable before national courts for genocide and humanitarian law violations.[1] Transnationally operating corporations may equally be held liable for human rights abuses by courts in various countries.[2] Firms are boycotted by consumers because they or their subsidiaries or even contractors do not comply with basic labour standards in foreign production sites.[3] The acts of international organizations are annulled by international courts for infringing human rights guarantees of individuals.[4] Lending decisions of international financial institutions are reconsidered if they would have a demonstrable negative human rights impact.[5]

These examples are evidence of a radical change of the way we are dealing with human rights issues today. Human rights seem to be everywhere. But are we still talking about traditional 'human rights law'? Where are the good old days when everyone knew that human rights violations can only be committed by states against individuals? Do 'human rights' provide the correct conceptual framework for the problem areas outlined above?

These questions are intrinsically linked to the fact that international as well as national lawyers have traditionally been trained to conceive of human rights as

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[1] See the US civil action of *Kadic v. Karadzic*, *infra* note 255.

[2] See the human rights cases brought, in particular, before US, UK and other Common Law courts. For a discussion see Ralph G Steinhardt, Chapter 6 in this volume.

[3] See the consumer boycotts referred to *infra* at note 162.

[4] See the fundamental rights case-law developed by the ECJ *infra* note 236.

[5] See the reports of the Word Bank Inspection Panel *infra* at note 77.

fundamental guarantees and standards of legal protection for individuals against the power, and particularly, against the abuse of power, of states. Over the last half-century, human rights lawyers have fought for and have largely attained general acceptance that these guarantees are not merely contingent rights conferred by the goodwill of sovereign states (with the implication that they can always be taken away again). Instead, a shared understanding has developed that they are inherent and inalienable rights which, leaving aside all the philosophical problems of this concept, at least means that they are no longer at the disposal of states, but form part of international law giving rights and entitlements directly to individuals.[6] However, these developments have not affected the basic conceptual premise that human rights are limitations of state power, that they apply in the public sphere, and that they protect the (weak) individual against the (strong) state.

The introductory examples seem to indicate, however, a radical conceptual change in the way we use and think about human rights. Immediately, a number of theoretical and practical trends come to mind as possible causes of this change: the questioning of the public/private divide,[7] the debate on 'third-party effects' or *Drittwirkung* of human rights,[8] the 'good governance' discussion,[9] and the transfer of powers from states to non-state actors, be it through privatization or by shifting powers to international organizations.[10] All these are interrelated developments on the level of legal doctrine, of social conditions, of political realities, and the like. They seem to have contributed to a new awareness of the need to protect human rights, beyond the classic paradigm of the powerful state against the weak individual, to include protection against increasingly powerful non-state actors.

2. WHAT IS A 'LEGAL FRAMEWORK'?

What do we mean when we talk about a 'legal framework'? Are we talking about rules, about norms, laws, treaties, ethical standards, morality? Does it make sense to conceive of a legal framework as different sources of law? Or should we look at procedures and forums wherein we make legal arguments? Are we talking about political or legal processes? Is the framework defined by national or international courts, political bodies in international organizations, special accountability mechanisms, NGOs, the public, and/or the press?

Probably, all of these elements constitute a 'legal framework' in a broad sense wherein we have to come to terms with non-state actors and their human rights

[6] See only Rosalyn Higgins, *Problems and Process: International Law and How We Use it* (1994) 96.

[7] For a feminist critique, see Catherine MacKinnon, 'On Torture: A Feminist Perspective on Human Rights', in Kathleen Mahoney and P. Mahoney (eds), *Human Rights in the Twenty-First Century* (1993) 21.

[8] See Ingo von Münch, Pablo Salvador Coderch, and Josep Ferrer i Riba (eds), *Zur Drittwirkung der Grundrechte* (1998). See also *infra* text at note 169.

[9] See *infra* text at note 70.

[10] See *infra* text at note 195.

'performance'. Without entering a deeper debate about how to understand, to define and construct, or even deconstruct the notion of a legal framework, I propose to look at a number of elements that are generally considered to form, at least part of, a legal framework:

(1) the standards or behavioural rules themselves, substantive rules in an old-fashioned diction;
(2) the procedures used in discussing, supervising, and maybe even enforcing compliance with standards; and finally
(3) the institutions, forums, networks, etc. within which procedures are activated to invoke the standards.

The traditional instruments under international law, setting standards for human rights protection, were treaties binding the respective contracting parties.[11] This standard-setting was accompanied by an increased concerted effort on the part of international organizations and human rights bodies to develop the concept of unwritten human rights law (via customary law or general principles). Under the so-called 1235 and 1503 procedures[12] the UN ECOSOC (and thereby the Human Rights Commission) has assumed powers with regard to 'a consistent pattern of gross and reliably attested' human rights violations even in the absence of any treaty violations.[13] The International Court of Justice (ICJ) has held that the Universal Declaration of Human Rights constitutes at least partly customary international law.[14] By and large the human rights discourse was based on the traditional sources of international law as referred to in Article 38(1) of the Statute of the ICJ.[15]

[11] Standard-setting via treaty law led, on the universal level, to the two 1966 UN Covenants and to a number of special UN human rights treaties: International Covenant on Civil and Political Rights (ICCPR), G.A. Res. 2200A (XXI), 16 December 1966, 21 U.N. GAOR Supp. (No.16) at 52, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171; the International Covenant on Economic, Social, and Cultural Rights (ICESCR), G.A. Res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 49, U.N. Doc. A/6316 (1966), 993 U.N.T.S. 3; the International Convention on the Elimination of All Forms of Racial Discrimination, G.A. Res. 2106 (XX), Annex, 20 U.N. GAOR Supp. (No.14) at 47, U.N. Doc. A/6014 (1966), 660 U.N.T.S. 195; the Convention on the Elimination of All Forms of Discrimination Against Women, G.A. Res. 34/180, 34 U.N. GAOR Supp. (No. 46) at 193, U.N. Doc. A/34/46 (1979), 1249 U.N.T.S. 13; the Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment, G.A. Res. 39/46, Annex, 39 U.N. GAOR Supp. (No. 51) at 197, U.N. Doc. A/39/51 (1984), 1465 U.N.T.S. 85; the Convention on the Rights of the Child, G.A. Res. 44/25, Annex, 44 U.N. GAOR Supp. (No. 49) at 167, U.N. Doc. A/44/49 (1989), 28 ILM (1989) 1448 corrected at 29 ILM (1990) 1340.

[12] See *infra* text at note 22.

[13] In addition to the fact that under both procedures UN organs investigate the human rights record of states in the absence of any submission by these states to the supervisory mechanism.

[14] In the *Tehran Hostages* case the Court held '[w]rongfully to deprive human beings of their freedom and to subject them to physical constraint in conditions of hardship is in itself manifestly incompatible with the principles of the Charter of the United Nations, as well as with the fundamental principles enunciated in the Universal Declaration of Human Rights'. *United States Diplomatic and Consular Staff in Tehran (United States of America v. Iran)*, ICJ Reports (1980) 3, 42.

[15] See, however, the scholarly debates about the nature of human rights obligations as customary law and/or general principles of law: See Theodor Meron, *Human Rights and Humanitarian Norms as*

Today's human rights discourse is far more diverse.[16] We are using national law, voluntary codes of conduct, ethical standards, etc.[17] to discuss and analyse state, but increasingly also non-state, behaviour. International organizations[18] and NGOs[19] are expected more and more not only to advocate human rights compliance by states, but also to abide by these same rules themselves. The same expectation arises *vis-à-vis* TNCs.[20]

The traditional procedures by which human rights issues were addressed were based on treaty obligations by which states agreed to have their human rights record debated,

Customary Law (1989); Martti Koskenniemi, 'The Pull of the Mainstream', 88 *Michigan Law Review* (1989/90) 1952; Bruno Simma and Philip Alston, 'The Sources of Human Rights Law: Custom, Jus Cogens, and General Principles', 12 *Australian Year Book of International Law* (1992) 88.

[16] In this context Henry Steiner speaks of 'an expanding framework of relevant norms': Henry Steiner, *Business and Human Rights* (1999) 11.

[17] See *infra* text starting at note 29.

[18] International organizations are understood as inter-governmental organizations created by states (or other international organizations) usually on the basis of a treaty, endowed with a minimum of permanent organs, for the purpose of fulfilling certain common tasks. See C.F. Amerasinghe, *Principles of the Institutional Law of International Organizations* (1996), 8. For present purposes, 'international organisations' includes the group of highly integrated supranational organizations such as the EC and Euratom.

[19] NGOs are usually formed by private persons (individuals, bodies corporate) operating on a transnational level, but regularly associated under a domestic system of law. NGOs are frequently defined negatively by the fact that they are not established by states through a governmental agreement under international law. Cf. ECOSOC Res. 31, UN ESCOR, 49th Sess., Supp. No. 1, at 54, U.N. Doc. E/1996/96 (1996), stating that '[a]ny such [...] international governmental organization that is not established by agreement shall be considered a non-governmental organization for the purpose of these arrangements'. In addition to the requirements of private foundation, international scope, and independence from state influence, there are further typical features of NGOs, such as the requirement of a minimal organizational structure, of established headquarters, and a non-profit purpose.

[20] There are no generally accepted definitions of TNCs (transnational corporations), MNCs (multinational corporations), or MNEs (multinational enterprises). Various attempts have been made. According to the UN Draft Code of Conduct on TNCs, a TNC is an enterprise 'comprising entities in two or more countries, regardless of the legal form and fields of activity of these entities, which operate under a system of decision-making, permitting coherent policies and a common strategy through one or more decision-making centres, in which the entities are so linked, by ownership or otherwise, that one or more of them may be able to exercise a significant influence over the activities of others and, in particular, to share knowledge, resources and responsibilities with the others': Code of Conduct on Transnational Corporations, UN ESCOR, U.N. Doc. E/1988/39/Add. 1 (1988). In the more recent Sub-Commission on the Promotion and Protection of Human Rights, 'Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights', E/CN.4/Sub.2/2003/12/Rev.2, Sec. 20, the term TNC 'refers to an economic entity operating in more than one country or a cluster of economic entities operating in two or more countries—whatever their legal form, whether in their home country or country of activity, and whether taken individually or collectively'.

The ILO Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy defines multinational enterprises as 'enterprises, whether they are of public, mixed or private ownership, which own or control production, distribution, services or other facilities outside of the country in which they are based': International Labour Organisation, Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy (1977), 17 ILM (1978) 422, para. 6. The OECD used the term MNEs in a similar way. See also P.T. Muchlinski, *Multinational Enterprises and the Law* (1995) 13.

discussed, maybe scrutinized, and ultimately even held unlawful.[21] This is accompanied by a gradual development of procedures: from 'weak' forms, such as an obligation to file state reports with a treaty body or to accept that individuals complain by way of 'communications', to a full-fledged judicial system with a direct right for victims to bring claims against states. In addition, some international organizations were able to develop non-treaty based methods of exercising at least some form of human rights supervision (e.g. ECOSOC 1235[22] and 1503[23] procedures) by publicly or confidentially discussing human rights problems with states. The 'mobilization of shame' has also worked in other international organizations, such as the ILO.[24]

Today, the human rights compliance of non-state actors such as TNCs may be the subject of litigation before national courts, it may be a topic at shareholder meetings, or it may be extensively discussed in the media or addressed by NGOs in a campaign to stop certain labour practices.

A far as the institutional framework is concerned, human rights issues were traditionally debated by the political bodies of international organizations. The development of more and more independent institutions, from expert organs, such as the Human Rights Committee[25] or the Committee on Economic, Social, and Cultural Rights,[26] to veritable international tribunals, such as the European Court of Human Rights or the Inter-American Court of Human Rights, was a clear advance in strengthening human rights protection against states.

[21] See for the UN system Philip Alston and James Crawford (eds), *The Future of UN Human Rights Treaty Monitoring* (2000).

[22] Economic and Social Council Resolution 1235 (XLII), 42 U.N. ESCOR Supp. (No. 1) at 17, U.N. Doc. E/4393 (1967). According to this resolution ECOSOC '[a]uthorize[d] the Commission on Human Rights and the Sub-Commission on Prevention of Discrimination and Protection of Minorities [. . .] to examine information relevant to gross violations of human rights and fundamental freedoms', and to 'make a thorough study of situations which reveal a consistent pattern of violations of human rights'.

[23] Economic and Social Council Resolution 1503 (XLVIII), 48 U.N. ESCOR (No. 1A) at 8, U.N. Doc. E/4832/Add.1 (1970). In this resolution ECOSOC '[a]uthorize[d] the Sub-Commission on Prevention of Discrimination and Protection of Minorities to appoint a working group consisting of not more than twenty-five members, with due regard to geographical distribution, to meet once a year in private meetings [. . .] to consider all communications [. . .] together with replies of Governments, if any, which appear to reveal a consistent pattern of gross and reliably attested violations of human rights and fundamental freedoms within the terms of reference of the Sub-Commission'. On the two procedures see Philip Alston, 'The Commission on Human Rights', in Philip Alston (ed), *The UN and Human Rights: A Critical Appraisal* (2nd ed. 2004).

[24] James Avery Joynce, 'Mobilization of Shame', in *The New Politics Of Human Rights* (1978) 79. See also Peter R. Baehr, 'Mobilization of the Conscience of Mankind: Conditions of Effectiveness of Human Rights NGOs', in *Reflections on International Law from the Low Countries in Honour of Paul de Waart* (1998) 135.

[25] Set up in accordance with Arts. 28 *et seq.* ICCPR, *supra* note 11. See Dominic McGoldrick, *The Human Rights Committee* (1991).

[26] The Committee on Economic, Social, and Cultural Rights was not set up through the ICESCR, rather it was established by ECOSOC resolution in 1985, Res. 1985/17 (28 May 1985). See Matthew C.R. Craven, *The International Covenant on Economic, Social, and Cultural Rights: A Perspective on its Development* (1995); and Philip Alston, 'The Committee on Economic, Social and Cultural Rights', in Philip Alston (ed), *The UN and Human Rights: A Critical Appraisal* (2nd ed. 2004).

Today we are confronted with a far wider panoply of institutions concerned with human rights, from national and international courts sitting in judgment over human rights violations committed by corporations or individuals, to accountability mechanisms, such as Inspection Panels of the World Bank and other international financial institutions (IFIs),[27] scrutinizing the human rights performance of international organizations, political bodies in international organizations, NGOs and their advocacy networks, the media, and the public at large.

Change lies in broadening the legal framework, both in the sense of a wider scope of application of substantive norms of behaviour and in the sense of more and more diverse procedures and institutions available where substantive norms can be challenged. This also has repercussions on the way we practise and think about human rights law. Human rights is no longer the arcane sub-field of specialists of public international law, frequently even from other fields of the law such as (domestic) constitutional law. Rather, it has not only become a subject rooted firmly in international law but it has also developed into an increasingly densely interwoven part of international law which can no longer be theoretically or practically separated from the rest of international law.[28]

3. THE CHANGING FRAMEWORK

I propose a rather modest start by trying to search for empirically observable elements of change. What kind of changes can be readily ascertained with regard to human rights and non-state actors? What are the most visible elements of human rights protection against infringements by non-state actors? This inquiry involves only the surface of change. I revert to deeper structural causes later.

Let us first focus on two very visible developments:

A. The more frequent and increasingly diverse use of codes of conduct addressed directly to non-state actors and
B. The increased use of extraterritorial regulation by states of the behaviour of non-state actors.

A. Increased Use of Codes of Conduct

The increased use of codes of conduct applicable to non-state, and especially corporate, behaviour could be seen as a new form of 'privatization' of human rights. Of course, the term 'privatization' is used here not in the sense of *Drittwirkung* or 'third-party effect',[29] but rather as an allusion to the increased self-regulation instead

[27] See *infra* text at note 77.

[28] See also on the 'intrusion' of human rights law into international law text *infra* at note 184.

[29] As used by Andrew Clapham, *Human Rights in the Private Sphere* (1993); Andrew Clapham, 'The Privatisation of Human Rights', 1 *European Human Rights Law Review* (1995) 20. See also *infra* note 169.

of state regulation. In this sense, 'privatization' of human rights means adopting human rights norms in the form of voluntary codes of conduct without state fiat.

With codes of conduct we normally associate legally non-binding rules, usually adopted voluntarily by corporations in order to guide their operations. Their substance is not limited to human rights, where they may focus on labour and social rights. Rather, they may extend to environmental issues[30] and shareholder interests.[31] But codes of conduct are not only addressed to TNCs: there is a recent trend to extend this type of self-regulation to other non-state actors. The following discussion is structured according to different non-state addressees of codes of conduct.

1. Corporate Codes of Conduct

Codes of conduct intended to regulate corporate, in particular TNC, behaviour are not a new phenomenon. In the 1970s, as a response to increased concerns over TNC interference with host state affairs, a first wave of codes of conduct was elaborated in the framework of various international organizations.[32] The UN set up a Commission on TNCs, the UNCTC, which was mandated to draw up a comprehensive code of conduct for TNCs.[33] A draft code was made public in 1984.[34] However, due to intense controversy surrounding the project, which in many respects suffered from the ideological controversy concerning the New International Economic Order, the UN abandoned its efforts to create such a code of conduct in 1993. In 1994 the Commission on Transnational Corporations became the Commission on International Investment and Transnational Corporations.[35] The OECD was more successful and produced a code of conduct in 1976[36] which was revised

[30] Valerie Ann Zondorak, 'A New Face in Corporate Environmental Responsibility: The Valdez Principles', 18 *Boston College Environmental Affairs L. Rev.* (1991) 457.

[31] Disclosure and transparency requirements in codes of conduct are typically aimed at protecting shareholder interests.

[32] See on these early codes: Baade, 'Codes of Conduct for Multinational Enterprises: An Introductory Survey', in N. Horn (ed), *Legal Problems of Codes of Conduct for Multinational Enterprises* (1980) 407; Jonathan I. Charney, 'Transnational Corporations and Developing Public International Law', *Duke Law Journal* (1983) 748; Norbert Horn, 'International Rules for Multinational Enterprises: The ICC, OECD, and ILO Initiatives', 30 *American University Law Review* (1981) 923; Seymour J. Rubin, 'Transnational Corporations and International Codes of Conduct: A Study of the Relationship Between Legal Cooperation and Economic Development', 30 *American University Law Review* (1981) 903.

[33] ECOSOC Res. 1913, UN ESCOR, 57th Sess., 5 December 1974, Supp. No. 1, 3, U.N. Doc. 5570/Add. 1 (1975).

[34] See United Nations Draft International Code of Conduct on Transnational Corporations, 23 ILM 626 (1984).

[35] See ECOSOC Res 1994/1, Integration of the Commission on Transnational Corporations into the institutional machinery of the United Nations Conference on Trade and Development, 14 July 1994, available at http://www.un.org/documents/ecosoc/res/1994/eres1994–1.htm.

[36] Cf. Organization for Economic Cooperation and Development (OECD), Guidelines for Multinational Enterprises, 21 June 1976, reprinted in 15 ILM (1976) 969.

in 2000.[37] In 1977, the ILO adopted a 'Declaration of Principles' addressing labour rights and TNCs.[38] Traditionally, these codes of conduct were formulated in the framework of international organizations by state representatives or at least under the control of states and were addressed to non-state actors, primarily to corporations. The UNCTC, OECD, and ILO codes are examples of this approach.

This international organization-driven formulation and adoption of codes of conduct was succeeded by a generation of private-initiative codes such as the Sullivan[39] and the MacBride Principles,[40] the Slepak Principles,[41] the Miller Principles,[42] the Maquiladora Standards of Conduct,[43] and others.[44] Most of these codes, that were very specifically tailored for specific countries and situations, were promoted by highly visible political figures. Trade unions also became more and more involved in the production of such codes. The 1997 'Basic Code of Conduct covering Labour Practices' of the International Confederation of Free Trade Unions[45] is an example.

Today we are witnessing a trend towards self-regulation, largely motivated by the wish of TNCs to escape the defensive position in which they found themselves after consumer boycotts and litigation. Many recent corporate codes of conduct have been adopted by TNCs themselves,[46] frequently with the collaboration of NGOs.

[37] OECD, Guidelines for Multinational Enterprises, Revision 2000, http://www.oecd.org/daf/investment/guidelines/index.htm; see Steinhardt, *supra* note 2, [34–35].

[38] International Labour Organization (ILO) 'Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy' 16 November 1977, reprinted in 17 ILM (1978) 423. See also the ILO Declaration on Fundamental Principles and Rights at Work and its Follow-Up, adopted by the International Labour Conference at its 86th session, Geneva, 18 June 1998, analysed by Steinhardt, *supra* note 2, at 203–204.

[39] See Steinhardt, *supra* note 2.

[40] The MacBride Principles are nine principles named after the late Sean MacBride in November 1984, aimed at eliminating anti-Catholic discrimination via U.S. companies doing business in Northern Ireland: http://www1.umn.edu/humanits/links/macbride.html. On both the Sullivan and the MacBride Principles see Christopher McCrudden, 'Human Rights Codes for Transnational Corporations: What Can the Sullivan and MacBride Principles Tell Us?', 19 *Oxford Journal of Legal Studies* (1999) 167.

[41] The Slepak Principles are named after the Soviet emigré and human rights activist Vladimir Slepak, a member of the original Moscow Helsinki Monitoring Group. They were developed for American companies doing business in the former Soviet Union. See Jorge F. Perez-Lopez, 'Promoting Respect for Worker Rights Through Business Codes of Conduct', 17 *Fordham International Law Journal* (1993), 13.

[42] The Miller Principles were developed by U.S. Representative John Miller (R-WA), aimed at encouraging political freedom and liberalization with the People's Republic of China and Tibet.

[43] The Maquiladora Standards of Conduct are directed at US TNCs operating production facilities in Mexico along the U.S.-Mexico border. See http://enchantedwebsites.com/maquiladora/cjm.html.

[44] See Lance Compa and Tashia Hinchliffe-Darricarrere, 'Enforcing International Labor Rights Through Corporate Codes of Conduct', 33 *Columbia J. Transnat'l L.* (1995) 663; see also Steinhardt, *supra* note 2 at [5].

[45] Adopted by the ICFTU Executive Board (Brussels, December 1997). Available at http://www.icftu.org/displaydocument.asp?Index=991209513&Language=EN and at http://www.itcilo.it/english/actrav/telearn/global/ilo/guide/icftuco.htm.

[46] See the list of 'Self-Imposed Company Codes' in Proposed draft human rights code of conduct for companies, Working paper prepared by Mr David Weissbrodt, Addendum, List of the principal source

This corresponds with a declining role for international organizations. Sometimes the self-regulation is also carried out within the framework of more or less formal business organizations. The International Chamber of Commerce guidelines are an early example of this,[47] the Caux Round Table Principles for Business are a more recent one.[48] The UN has also shown renewed interested, with initiatives such as the Global Compact and the Working Group on the Activities of Transnational Corporations.[49]

On the regional level, too, international organizations have rediscovered codes of conduct. For instance, in the EU, under the label 'corporate social responsibility', the European Commission reacted to the European Parliament's call for a code of conduct for European Multinationals[50] by adopting a Green Paper on a European framework for 'corporate social responsibility',[51] defined as 'a concept whereby companies integrate social and environmental concerns in their business operations and in their interaction with their stakeholders on a voluntary basis'.[52] One of the purposes of such EU action is to develop a legally binding framework to address issues of verification and monitoring. It is exactly such problems of the supervision of compliance and enforcement of codes of conduct which have brought back the governments, at least as facilitators or negotiators. For instance, the US Fair Labor Association includes NGOs, lawyers, and government representatives.[53] In the UK,

materials for the draft code of conduct for companies, U.N. Doc. E/CN.4/Sub.2/2000/WG.2/WP.1/Add.2 (25 May 2000).

[47] *International Chamber of Commerce* (ICC) 'Guidelines for International Investment', ICC Pub. No. 272 (1972).

[48] The Caux Round Table Principles for Business were issued in 1994 by senior business leaders from Europe, Japan, and North America 'to express a world standard against which business behavior can be measured.' See http://www.cauxroundtable.org/ENGLISH.HTM.

[49] The *Global Compact* was launched by Secretary-General Kofi Annan in 1999, Address at the World Economic Forum in Davos, Switzerland (31 January 1999), U.N. Doc. SG/SM/6448 (1999). Information on *The Global Compact* is available at http://www.unhchr.ch/global.htm and http://www.unglobalcompact.org./.

On 13 August 2003 the UN Sub-Commission on the Promotion and Protection of Human Rights approved and transmitted for adoption to the UN Human Rights Commission the Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights, E/CN.4/Sub.2/2003/12/Rev.2, available at http://www.unhchr.ch/pdf/55sub/12rev2_AV.pdf. See Weissbrodt and Kruger, *infra* Chapter 8.

[50] European Parliament (EP), Resolution on EU standards for European Enterprises operating in developing countries: towards a European Code of Conduct, adopted on 15 January 1999, Resolution A4-0508/98 of 1998, OJ C 104/180, 14 April 1999. http://europa.eu.int/eur-lex/pri/en/oj/dat/1999/c_104/c_10419990414en01800184.pdf.

[51] Commission of the European Communities, Green Paper: Promoting a European Framework for Corporate Social Responsibility, COM (2001) 366 final, 18 July 2001. http://europa.eu.int/eur-lex/en/com/gpr/2001/com2001_0366en01.pdf. See also in more detail Olivier De Schutter, 'The Accountability of Multinationals for Human Rights Violations in European Law', *infra* Chapter 7.

[52] Green Paper, *supra* note 51, para. 20.

[53] See http://www.fairlabor.org/. Cf. David Kinley, 'Human Rights as Legally Binding or Merely Relevant?', in Stephen Bottomley and David Kinley, *Commercial Law and Human Rights* (2002) 25, at 34.

the 'Ethical Trading Initiative'[54] is 'supporting collaboration between business and the voluntary sector in promoting ethical business, including the development of codes of conduct and ways of monitoring and verifying theses codes'.[55]

Modern codes of conduct clearly focus on TNCs. They have received most public attention and they form the majority of the proliferating field of codes of conduct. Less noticed is the fact that other non-state actors also seem to have been addressed by codes of conduct.

2. *Codes of Conduct for International Organizations*

Though not usually called 'codes of conduct', international organizations have also increasingly been addressed by (strictly not legally binding) codes that include human rights norms. At first sight, this may seem an odd development. International organizations have now clearly been accepted as subjects of international law.[56] Thus, one would rather expect a discussion on whether, in the absence of any treaty law obligation, unwritten human rights norms are legally binding on them. This question has indeed been at the centre of the discussion about the human rights obligations of international organizations for quite some time.[57] It was most prominently addressed in the context of the question whether the European Communities are legally bound to respect fundamental rights. It also played an important role with regard to the issue whether UN forces had to comply with the humanitarian rules enshrined in the Geneva Conventions. The underlying tenor of recent developments appears to be that international organizations, as a result of their international legal personality, are considered to be bound by general international law, including any human rights norms, that can be viewed as customary law or as general principles of law. Still, there seems to be enough uncertainty in this area to leave room for voluntary guidelines.

The UN's 'voluntary' adoption of its own humanitarian law rules, applicable in UN military operations, may be regarded as an example of human rights-relevant self-regulation by an international organization. In 1999 the UN Secretary-General unilaterally promulgated 'fundamental principles and rules of international humanitarian law applicable to United Nations forces conducting operations under United Nations command and control.'[58] This initiative followed years

[54] The Ethical Trading Initative was formed in 1997 as an alliance of companies, NGOs, and trade unions operating in the UK, whose aim is to improve labour conditions in the global supply chains which produce goods for the UK market. See http://www.ethicaltrade.org/ and http://www.eti.org.uk.

[55] White Paper, Eliminating World Poverty: A Challenge for the 21st Century, Cmnd 3789 at 64 (1997), http://www.dfid.gov.uk/PoliceAndPriorities/files/whitepaper1997.pdf, cited in McCrudden, *supra* note 40, 169.

[56] See only Malcolm N. Shaw, *International Law* (4th ed., 1997), 190.

[57] Cf. August Reinisch, 'Securing the Accountability of International Organizations', 7 *Global Governance* (2001) 131.

[58] Observance by United Nations forces of international humanitarian law, United Nations, Secretary-General's Bulletin, ST/SGB/1999/13, 6 August 1999, reprinted in 81 *Int'l Rev. Red Cross*, No. 836, December 1999, 812; 36 ILM 1656 (1999). See, on the bulletin in general, Daphna Shraga, 'UN

of legal uncertainty about the relevance of the Geneva Conventions for UN operations.[59]

Though being a very special case, one might also draw a parallel to the development of human rights protection within the European Union. In the early stages of human rights protection against the acts of the supranational European Communities one finds the voluntarily adopted 1977 joint declaration by the European Parliament, the Council, and the Commission to respect human rights in any legislative act.[60] By this declaration the three institutions pledged to respect these rights in the exercise of their powers under the EC Treaty.[61] Much of the need to guarantee fundamental rights against Community action was accommodated by the judicially developed human rights protection of the ECJ. However, to some extent the recent, voluntary, 'solemn' declaration of the EU Fundamental Rights Charter in 2000 may also be regarded as an example of a self-regulatory human rights code.[62]

Another example of a voluntary code for international organizations which includes human rights norms can be found in the standards for the 'Accountability of International Organisations' currently elaborated by the International Law Association (ILA), a private association of international lawyers.[63] It is the ILA Committee's understanding of accountability to focus not only on the issue of

Peacekeeping Operations: Applicability of International Humanitarian Law and Responsibility for Operations-Related Damage', 94 *AJIL* (2000) 406.

[59] The Red Cross has repeatedly called for formal adherence by the United Nations to the Geneva Conventions. The UN's official view, however, has always been that 'the United Nations is not substantively in a position to become a party to the 1949 Conventions, which contain many obligations that can only be discharged by the exercise of juridical and administrative powers which the Organization does not possess, such as the authority to exercise criminal jurisdiction over members of the Forces, or administrative competence relating to territorial sovereignty. Thus the United Nations is unable to fulfil obligations which for their execution require the exercise of powers not granted to the Organization, and therefore cannot accede to the Conventions': Legal Opinion of the Secretariat of the United Nations, 'Question of the Possible Accession of Intergovernmental Organizations to the Geneva Conventions for the Protection of War Victims', *UN Juridical YB* (1972) 153.

[60] Joint Declaration by the European Parliament, the Council, and the Commission on Fundamental Rights of 5 April 1977, OJ C 103, 27 April 1977. Available at http://europa.eu.int/eur-lex/en/treaties/selected/livre602.html.

[61] The declaration contains the following two operative paragraphs:

> 1 The European Parliament, the Council and the Commission stress the prime importance they attach to the protection of fundamental rights, as derived in particular from the constitutions of the Member States and the European Convention for the Protection of Human Rights and Fundamental Freedoms.
> 2 In the exercise of their powers and in pursuance of the aims of the European Communities they respect and will continue to respect these rights.'

[62] The Charter of Fundamental Rights of the European Union was solemnly proclaimed at the meeting of the European Council held in Nice from 7 to 9 December 2000. Available at http://ue.eu.int/df/default.asp?lang=en.

[63] See the ILA Committee on Accountability of International Organisations which first met at the 68th ILA Conference 1998 in Taipei, ROC, in International Law Association (ed), *Report of the 68th Conference* (1998), 584; ILA Committee on Accountability of International Organisations, Second Report, in

securing accountability by way of procedures and remedies. Rather, the Committee has initiated its work by drafting a set of recommended rules and practices applicable to international organizations in general.

3. Codes of Conduct for NGOs

Some NGOs have come under public pressure for their activities. Criticism has been voiced with regard to conduct—sometimes violent street protests—attributable to or at least sponsored and advocated by some NGOs during world economic summits, WTO, World Bank, and IMF meetings, and on other occasions.[64] As a response, some NGOs have not only publicly distanced themselves from such acts of violence, but have also adopted codes of conduct as evidence of their adherence to non-violent protests. For instance, the New Economics Foundation (NEF) adopted a code of conduct after the violent protests surrounding the G7 Genoa summit.[65] According to the central provision of this 'code of conduct' the NGO pledges to set its 'actions within a framework of non-violence at all times'.

A different background for a more critical attitude towards NGOs stems from sometimes questionable advocacy campaigns. NGOs may occasionally, with differing degrees of culpability, make inaccurate or even outright false statements about a potential environmental harm or social damage which, coupled with a threat of inciting consumer boycotts or the like, causes their targets to change behaviour in ways that are sometimes very costly. The controversy surrounding the *Brent Spar* is a case in point.[66] Various environmental NGOs, among them Greenpeace, had claimed that scuttling an oil rig owned by Shell in the North Sea posed a serious ecological threat to the region. Despite the company's assurances to the contrary they demanded an expensive alternative of disposing of the oil platform. Subsequently, it turned out that most of the NGO allegations were incorrect. Shell did not recover the additional costs incurred. Incidents like *Brent Spar* raise a number of troubling questions concerning the accountability of NGOs. In particular, advocacy

International Law Association (ed), *Report of the 69th Conference* (2000), 875. See also Karel Wellens, 'ILA Committee on Accountability of International Organisations', 1 *Int'l L. Forum* (1999) 107.

[64] 'Luddites, extremists and the "leftover left"; unaccountable interest groups that undermine the authority of elected officials; armchair radicals from the rich world who have no right to speak for the Third-World poor. Reactions to the recent Prague street protests confirmed that NGO bashing has become a favourite sport for government officials, business and the Press': Mike Edwards, Time to put the NGO House in Order, *Financial Times*, 6 June 2000. Available at http://fpc.org.uk/hotnews/writes. See also Lisa Jordan and Peter van Tuijl, Political Responsibility in NGO Advocacy Exploring Emerging Shapes of Global Democracy, Europe's Forum on International Cooperation (April 1998) available at http://www.globalpolicy.org/ngos/role/globdem/credib/2000/1117.htm.

[65] Available at http://www.neweconomics.org/default.asp?strRequest=newsarchive&strNewsRequest=newsitem&intNewsID=116.

[66] Elizabeth A. Kirk, 'The 1996 Protocol to the London Dumping Convention and the Brent Spar', 46 *ICLQ* (1997) 957; Peter J. Spiro, 'New Global Potentates: Nongovernmental Organizations and the "Unregulated" Marketplace', 18 *Cardozo Law Review* (1996) 957, at 964.

NGOs have an immense interest in keeping and protecting their credibility, which is one of their most precious assets, comparable to the goodwill and reputation of business firms.

Some NGOs have taken up the challenge and voluntarily adopted their own codes of conduct. To date, NGOs express 'codes of conduct' focus on conduct relevant in the course of their advocacy. In the field of service provision too, equivalents of codes of conduct have been used.[67] One only has to think of the legion of NGOs active in the field of emergency and disaster relief.[68] In the course of UN and other international organizations subcontracting[69] they have partly taken over official tasks such as administrative functions. It is not difficult to imagine that in the course of such activities their actions may constitute what would be called a human rights violation if committed by a state.

4. Common Background and Motivation for Codes of Conduct

Some tentative conclusions as to the origin and shared background of these ethically inspired codes of conduct may be drawn. It appears that all these codes are to some extent a result of the 'good governance' debate which appeared under different guises on different levels but which still seems to have enough in common to be identified as a single phenomenon. Similar developments have taken place at different levels, which enable us to identify certain core elements of any good governance debate, such as the emancipation of the governed, accountability, transparency, and participation.

The demand for good governance was initially made of states, calling for open and transparent administration, accountability, and the rule of law.[70] Under the auspices of the international financial institutions, 'good governance' was demanded of borrowing governments. The underlying idea was a growing awareness that a stable and functioning framework would be a crucial element for enhancing

[67] See the Codes of Conduct of the International Red Cross (Principles of Conduct for The International Red Cross and Red Crescent Movement and NGOs in Disaster Response Programmes) or the Australian Council for Overseas Aid (Code of Conduct for Non Government Development Organisations). Available at http://www.ifrc.org/publicat/conduct/code.asp. and http://www.acfoa.asn.au/code/code.PDF.

[68] See Ralph Wilde, '*Quis Custodiet Ipsos Custodes*? Why and How UNHCR Governance of "Development" Refugee Camps Should be Subject to International Human Rights Law', 1 *Yale H.R. & Dev. L.J.* (1998) 107, at 109.

[69] Cf. Thomas G. Weiss (ed), *Beyond UN Subcontracting: Task-sharing with Regional Security Arrangements and Service-providing NGOs* (1998).

[70] The ILA Committee on Accountability of International Organisations, Second Report, lists the following characteristics as elements of good governance: 'transparency in both the decision-making process and the implementation of the ensuing institutional and operational decisions; a large degree of democracy in the decision-making process; access to information open to all potentially concerned and/or affected by the decisions at stake; the well-functioning of the international civil service; sound financial management; and appropriate reporting and evaluation mechanisms': *supra* note 63, at 878.

long-term development, as well as repayment capabilities.[71] Thus, the IMF and the World Bank started to advocate certain non-economic reforms, initially with a narrower focus, such as the development of an independent judiciary and the fight against corruption,[72] then more broadly demanding modernization of the state, consolidation of democratic institutions, protection of human rights and the environment, and social policy reform.[73] By the mid-1990s 'good governance' had become an important area of attention for the IMF.[74] At the regional level, the debate about EU accession and its political preconditions, as laid down in the 'Copenhagen criteria',[75] can also be viewed as a 'good governance' issue.

Once the 'good governance' box was opened, its demands could not be limited to states. Increasingly, international organizations were also confronted with requests for 'good governance'.[76] As institutional responses, again under the guidance of the international financial institutions, Inspection Panels were set up, first by the World Bank and subsequently by other development banks.[77] Other organizations, such as the EU, created ombudsman offices[78] in order to rectify instances of maladministration, the opposite of 'good governance'. Also at the universal level, organizations can no longer avoid being questioned about their governance. In the wake of the report of the UN Commission on Global Governance,[79] the UN has undertaken

[71] Michel Camdessus, 'Toward a Second Generation of Structural Reform in Latin America', Presentation at the *Annual Conference of the National Banks Association*, Buenos Aires (1997), http://www.imf.org/external/np/speeches/1997/mds9706.htm. See also Diana Tussie and Maria Pia Riggirozzi, 'Pressing Ahead with New Procedures for Old Machinery: Global Governance and Civil Society', in Volker Rittberger (ed), *Global Governance and the United Nations System* (2001) 158, at 168.

[72] See World Bank, *Helping Countries Combat Corruption: The Role of the World Bank* (1997), http://www1.worldbank.org/publicsector/anticorrupt/corruptn/coridx.htm. See also Carlos Acuña and M. Fernanda Tuozzo, 'Civil Society Participation in World Bank and Inter-American Development Bank Programs: The Case of Argentine', 6 *Global Governance* (2000) 443.

[73] See K. Ginther, E. Denters, and Paul J.I.M. de Waart (eds), *Sustainable Development and Good Governance* (1995).

[74] International Monetary Fund, Good Governance: The IMF's Role (1997). Available at http://www.imf.org/external/pubs/ft/exrp/govern/govern.pdf.

[75] The 1993 Copenhagen criteria require, *inter alia*, stability of institutions guaranteeing democracy, the rule of law, human rights, and respect for and protection of minorities; the existence of a functioning market economy as well as the capacity to cope with competitive pressure and market forces within the Union; the ability to take on the obligations of membership including adherence to the aims of political, economic, and monetary union. See http://europa.eu.int/comm/enlargement/intro/criteria.htm.

[76] World Bank, *Wapenhans Report* (1992).

[77] The World Bank Inspection Panel was set up in 1993 to provide an independent forum to private citizens who believe that they or their interests have been or could be directly harmed by a project financed by the World Bank. See Steinhardt, *supra* note 2 at [32–33].

[78] See Katja Heede, *European Ombudsman: Redress and Control at Union Level* (2000). See also Linda C. Reif (ed), *The International Ombudsman Anthology: Selected Writings from the International Ombudsman Institute* (1999).

[79] The Commission on Global Governance was established in 1992 and produced its main report entitled 'Our Global Neighborhood' in 1995. For information on the Commission see http://www.cgg.ch/.

a number of *ad hoc* reports to scrutinize its own governance record, for instance, in the field of peacekeeping.[80]

Most directly linked to the issue of codes of conduct for TNCs is the 'corporate governance' debate,[81] nowadays, partly filled with new content, frequently termed as 'social responsibility' discussion.[82] The debate on the role of corporations and their ethical standards has clearly gone beyond the famous Milton Friedman assertion that the 'only social responsibility of business [is] to increase profits'.[83] Even if the 'generation of long-term economic profit' is still considered to be a 'corporation's primary objective',[84] corporate 'good governance' clearly requires the balancing of all stakeholders' interests, 'stakeholders' being understood as all those who may affect and be affected by a corporation, including investors, employees, creditors, customers, and suppliers.[85] But the question remains, if one enlarges the group of stakeholders in corporations beyond the narrow confines of shareholders, how the

[80] See The Fall of Srebrenica, U.N. Doc. A/54/549 (15 November 1999), Report of the Secretary-General Pursuant to General Assembly Resolution 53/35; available at http://www.un.org/peace/srebrenica.pdf. Report of the Rwanda Genocide (15 December 1999); available at http://www.un.org/Depts/dpko/dpko/reports.htm. See also the Brahimi report, Report of the Panel on United Nations Peace Operations, U.N. Doc. A/55/305–S/2000/809 (21 August 2000); available at http://www.un.org/peace/reports/peace_operations/.

[81] See generally the journal *Corporate Governance: An International Review* and Daniel Fischel, 'The Corporate Governance Movement', 35 *Vanderbilt Law Review* (1982) 1259.

[82] See only the EU Commission Green Paper Promoting a European Framework for Corporate Social Responsibility, *supra* note 51. See also United Nations Conference on Trade and Development, The Social Responsibility of Transnational Corporations, U.N. Doc. UNCTAD/ITE/IIT/Misc.21 (1999) at 6. See also Editorial, Corporate Governance, 'Institutional Investors and Socially Responsible Investment', 10 *Corporate Governance: An International Review* (2002) 1; John Parkinson, 'The Socially Responsible Company', in Michael K. Addo, (ed), *Human Rights Standards and the Responsibility of Transnational Corporations* (1999) 49.

[83] The entire quotation is, of course, more encompassing: 'One and only one social responsibility of business [is] to increase profits so long as it stays within the rules of the game, which is to say, engages in open and free competition without deception or fraud': Milton Friedman, *Capitalism and Freedom* (1962) 133; see also Milton Friedman, 'The Social Responsibility of a Business is to Increase Profits', *N.Y. Times*, 13 September 1970 (Magazine) at 32; cited in UN Sub-Commission on the Promotion and Protection of Human Rights, Sessional working group on the working methods and activities of transnational corporations, Transnational Corporations and Other Business Enterprises, E/CN.4/Sub.2/2002/WG.2/WP.1/Add. 1, 24 May 2002, 15.

[84] I. Millstein *et al.* (OECD Report), *Corporate Governance: Improving Competitiveness and Access to Capital in Global Markets* (1998) 27.

[85] Michael K. Addo, 'Human Rights and Transnational Corporations: An Introduction', in Michael K. Addo (ed), *Human Rights Standards and the Responsibility of Transnational Corporations* (1999) 3, at 19; Robert McCorquodale, 'Human Rights and Global Business', in Bottomley and Kinley, *supra* note 53, 89, at 108. See also the wide definition in Sub-Commission on the Promotion and Protection of Human Rights, Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights, E/CN.4/Sub.2/2003/12/Rev.2, Sec. 22, including 'stockholders, other owners, workers, and their representatives, as well as any other individual or group that is affected by the activities of transnational corporations or other business enterprises', mentioning, *inter alia*, 'consumer groups, customers, governments, neighbouring communities, indigenous peoples and communities, non-governmental organizations, public and private lending institutions, suppliers, trade associations, and others'.

diverse and sometimes contradictory interests of different stakeholders should be reconciled with each other. And surely, as long as ethically responsible behaviour can be translated into long-term profitability, it will be difficult to see whether TNCs are really willing to 'regard ethical and social values as possessing independent value.'[86] The good news for human rights is, of course, that—regardless of whether TNCs comply with them as a result of more or less enlightened self-interest—a higher degree of compliance will follow.

5. Problems with Codes of Conduct: The Supervision and Enforcement Deficit

It came as no surprise that the self-regulation of non-state actors, in particular of TNCs, entails serious problems. Some codes have been criticized for being more protective of the companies that adopted them than of the people they were intended to protect.[87] The supervisory and/or enforcement structures of many TNC-adopted codes are either non-existent or very weak. Thus, mere voluntary codes are frequently perceived to be insufficient to increase TNC human rights accountability effectively.[88] It is therefore not surprising that steps 'beyond voluntarism' are demanded.[89] The weak structure of codes of conduct is not limited to guidelines adopted by companies. Codes of conduct adopted under the auspices of international organizations also rarely provide for strong supervisory mechanisms. Frequently, they envisage no procedures or institutions at all. Some have adopted weak informal procedures such as the OECD guidelines with their National Contact Points[90] or the ILO with its Subcommittee on Multinational Enterprises with regard to the ILO Declaration on Fundamental

[86] Parkinson, *supra* note 82, at 62.

[87] According to Lena Ayoub, 'Nike Just Does It—and Why the United States Shouldn't: The United States' International Obligation to Hold MNCs Accountable for Their Labor Rights Violations Abroad', 11 *DePaul Bus. L.J.* (1999) 395, at 405, '[w]hile publicized codes of conduct impress consumers and the media, they have been largely ineffective at realizing the goals they purport to represent [. . .] due in large part to the lack of any legal enforcement mechanism upon these codes'. See also McCrudden, *supra* note 40, 168, on the controversy surrounding the Nike and Shell Codes.

[88] See UN Sub-Commission on the Promotion and Protection of Human Rights, Sessional working group on the working methods and activities of transnational corporations, Transnational Corporations and Other Business Enterprises, E/CN.4/Sub.2/2002/WG.2/WP.1/Add. 1, 24 May 2002, 17: 'The use of an entirely voluntary system of adoption and implementation of human rights codes of conduct, however, is not enough. Voluntary principles have no enforcement mechanisms, they may be adopted by transnational corporations and other businesses enterprises for public relations purposes and have no real impact on the business behavior, and they may reinforce corporate self-governance and hinder efforts to create outside checks and balances.'

[89] See International Council on Human Rights (ed), *Beyond Voluntarism: Human Rights and the Developing International Legal Obligations of Companies* (2002), available at http://www.cleanclothes.org/ftp/beyond_voluntarism.pdf.

[90] The OECD has demanded the establishment of National Contact Points for handling inquiries and contributing to the solution of problems that may arise in connection with the OECD Guidelines. It has also set up a Committee on International Investment and Multinational Enterprises (CIME) that can periodically or at the request of a member country hold an exchange of views on matters related to the Guidelines. See http://www.oecd.org/daf/investment/guidelines/faq.htm. See also Joachim Karl, 'The

Principles and Rights at Work.[91] In this context, it should be noted that, on the EU level, the European Parliament has at least expressed its wish that the planned code of conduct for European Multinationals[92] should constitute a legally binding standard whose implementation should be ensured by a monitoring mechanism.

These developments, however, are the exceptions rather than the rule. The rule still is the weakness of supervisory and enforcement elements in codes of conduct. It is a fascinating phenomenon that they are nevertheless not wholly ineffective. It would not be surprising to find that codes of conduct are regularly ineffective because no enforcement mechanism exists. What is far more astonishing is the fact that, broadly speaking, codes of conduct are often relatively effective in spite of the absence of any legally enforceable obligations under the codes themselves. A 'realist' answer may be readily available, arguing that all depends upon external pressure: TNCs are willing to abide by human rights standards only if threatened by 'sanctions', such as consumer boycotts, costly litigation (maybe involving class actions and punitive damages), or other economic disadvantages as a result of negative publicity in the media. Similarly, NGOs would only abide by ethical codes if they would otherwise lose contributions; and international organizations would only do so if they were likely to lose the support (including financial and political support) of their member states. While such a 'realist perspective' is surely helpful in explaining much of corporate and other non-state behaviour, it remains an interesting aspect of these developments that the extra-legal 'enforcers' (consumers, contributors, member states, etc.) have been willing to use their leverage. The fact that such pressure has been successfully mobilized shows that ethics are not irrelevant.

B. A Revival of Extraterritoriality

One way to secure human rights against non-state activities is for states, as primary addressees of international human rights law, to legislate and thus to 'translate' international human rights guarantees into the domestic legal order.[93] Primary

OECD Guidelines for Multinational Enterprises', in Michael K. Addo (ed), *Human Rights Standards and the Responsibility of Transnational Corporations* (1999) 89.

[91] ILO Declaration on Fundamental Principles and Rights at Work and its Follow-Up, adopted by the International Labour Conference at its 86th session, Geneva, 18 June 1998. The ILO Declaration is monitored through a quadrennial survey and through interpretations rendered by the Subcommittee on Multinational Enterprises. As of 15 November 1999, the Subcommittee had received over 23 requests for interpretations with very few passing the test of receivability so that an interpretation has been issued. Follow-up and Promotion March 2000 by Subcommittee on Multinational Enterprises, ILO Doc. GB.277/MNE/1 (2000). http://www.ilo.org/public/english/standards/relm/gb/docs/gb277/pdf/mne-1.pdf.

[92] European Parliament Resolution, *supra* note 50.

[93] This is most clearly expressed in Art 2(2) ICCPR, *supra* note 11, providing: 'Where not already provided for by existing legislative or other measures, each State Party to the present Covenant undertakes to take the necessary steps, in accordance with its constitutional processes and with the provisions of the present Covenant, to adopt such legislative or other measures as may be necessary to give effect to the rights recognized in the present Covenant.'

legislative tools for this purpose are criminal law provisions protecting life, liberty, property, etc. of individuals against intrusion by other private parties. States may thereby fulfil their obligation under various international instruments, not only 'to respect', but also 'to ensure' or 'to secure' human rights.[94] Where states create domestic legal frameworks which are similar, or at least of a comparable quality, the ensuing level playing field for non-state actors should prevent them from human rights 'forum', or rather 'jurisdiction', shopping.

1. Different National Legal Standards

A general and broad assimilation of this human rights-relevant national legislation is, however, far from being realized. Instead, domestic legal guarantees and the effective levels of protection are highly diverse. They range from countries which have legislated in a way which broadly requires private parties also to comply with certain human rights norms, such as non-discrimination obligations,[95] to states which still have a culture of impunity, leaving unpunished violations of rights of individuals both by the state and by non-state actors. At the far end of this scale one would probably have to list so-called failed[96] or rogue states[97] which are no longer able or willing to ensure the minimum of legal security demanded from a state. However, even at the other end, at the high level of legal protection, the differences in national legislation and practice relevant for the enjoyment of human rights are significant. Thus, non-state actors may deliberately assess regulatory differences and choose specific countries for their operations in order to reduce their legal burdens. This type of calculation may be made primarily by business entities such as TNCs, but it could apply equally to other non-state actors: international organizations will be induced to establish their headquarters and to operate in countries where they will be offered the widest range of privileges and immunities isolating them from the otherwise applicable and enforceable national law. It is said that some countries engage in a veritable 'immunity dumping' in order to attract international organizations. After all, such an approach is nothing but rational behaviour which—if translated into economics—means that TNCs will seek to reduce regulatory costs. This type of cost-reduction by regulation-avoidance has frequently been described when 'forum shopping' by TNCs with regard to social or environmental regulations

[94] Cf. Art 2(1) ICCPR, *supra* note 11, Art 1 ECHR, Art 1 AmCHR, *infra* note 209, and the relevant case-law starting *infra* text at note 211.

[95] See the equal treatment legislation in some states, such as the UK Disability Discrimination Act 1995 (c. 50); French Articles 225-1 to 225-4 *Code Pénal*, or the Irish Employment Equality Act 1998.

[96] See Daniel Thürer, 'The "Failed State" and International Law', *International Review of the Red Cross* No. 836 (1999) 731; Matthias Herdegen, 'Der Wegfall effektiver Staatsgewalt im Völkerrecht: "The Failed State" ', 34 *Berichte der Deutschen Gesellschaft für Völkerrecht* (1996) 68.

[97] See Thomas H. Henriksen, 'The Rise and Decline of Rogue States', 54 *Journal of International Affairs* (2001) 349; Petra Minnerop, 'Rogue States: State Sponsors of Terrorism?', 3 *German Law Journal* (1 September 2002). http://www.germanlawjournal.com/past_issues.php?id=188#fuss1.

is analysed. However, it equally occurs with respect to national legislation intended to protect human rights. The proximity of national labour and social security law to social human rights is an obvious example.

It is worth reflecting on the possible responses to reduce or at least mitigate such 'human rights forum shopping' by TNCs. The straightforward and ideal answer would clearly lie in increasing coherence between the diverse national legal frameworks. Legislative harmonization or regulatory assimilation, a process called 'approximation of the law' in the EC context,[98] eliminates the incentive for forum shopping. This is as true of human rights as it is of biodiversity, pollution control, or any other legislation. However, it is also a truism that we are currently very far from achieving such an approximation of human rights-relevant national legislation.[99]

2. US and Other Common Law Human Rights Litigation

Thus it is not surprising that, at least sometimes, an alternative option is pursued in order to make TNCs as well as other non-state actors comply with domestically translated human rights obligations. This alternative avenue lies in extending the application of national law to domestic and partly even foreign non-state actors operating abroad.[100] In other words, the extraterritorial application of human rights-relevant legal provisions is used to prevent regulatory avoidance strategies of non-state actors. Recent litigation in the US, involving corporations such as Unocal, Shell, Chevron, Texaco, ExxonMobil, and Coca Cola, bears witness to this trend. All these cases are legally based on the Alien Tort Claims Act (ATCA) of 1789.[101]

There is also some movement in other common law jurisdictions.[102] In the UK tort cases have been filed against British corporations, such as Rio Tinto,[103] Thor

[98] Art 94 (ex Art 100) TEC, the central authorization for harmonization measures entitled 'approximation of the laws', gives the European institutions wide-ranging powers of harmonization in areas directly affecting the establishment of the common market. See K. Armstrong and S. Bulmer, *The Governance of the Single European Market* (1998); G. Majone, *Regulating Europe* (1996).

[99] On second thoughts, this is less self-evident than it may seem. More and more states are adhering to the relevant human rights treaties and there is probably an increasing role for customary international law. These developments should contribute to a harmonized body of international human rights law.

[100] See Mark Gibney and R. David Emerick, 'The Extraterritorial Application of United States Law and the Protection of Human Rights: Holding Multinational Corporations to Domestic and International Standards', 10 *Temple International and Comparative Law Journal* (1996) 123; Gregory G.A. Tzeutschler, 'Corporate Violator: The Alien Tort Liability of Transnational Corporations for Human Rights Abuses Abroad', 30 *Columbia Human Rights L. Rev.* (1999) 359.

[101] See generally Steinhardt, *supra* note 2 [19–28].

[102] See Richard Meeran, 'The Unveiling of Transnational Corporations: A Direct Approach', in Michael K. Addo (ed), *Human Rights Standards and the Responsibility of Transnational Corporations* (1999) 161.

[103] Employee of a UK firm in Namibia brought compensation claim for contracting cancer while working at defendant's uranium mine with insufficient heath safeguards: *Connelly v. RTZ Corporation plc* [1996] 2 WLR 251; [1997] 3 WLR 373.

Chemicals,[104] and Cape Asbestos[105] for their activities abroad. Australian litigation against the Australian firm BHP Mining Company[106] led to an out-of-court settlement. In Canada a case was brought against Cambior[107] before the courts of Quebec which follows a civil law tradition. The common feature of these tort actions lies in the fact that they are based on a tort theory which recognizes that human rights violations, wherever committed, may trigger legal responsibility. The major (procedural) obstacles to recover damages have been rather technical doctrines, such as *forum non conveniens* (questioning whether the extraterritorial litigation is appropriate)[108] and the separate legal status of corporations (questioning the appropriateness of piercing the corporate veil in order to hold parents, or sometimes, subsidiaries, liable for the actions of related companies).[109]

3. Extraterritoriality and International Law

It is interesting to compare this recent 'revival' of extraterritoriality with earlier examples of extraterritoriality, considering that extraterritorial jurisdiction of any kind—whether to prescribe, to adjudicate, or to enforce[110]—always requires a specific justification in order to be considered lawful under international law.

The first wave of extraterritoriality focused on technical, corporate, and business law aspects such as competition law, corrupt practices, accounting, tax law, export controls, etc. In particular, US anti-trust law was at the forefront of using domestic law to take action against anti-competitive behaviour taking place abroad but having

[104] Personal injury claims brought by South African workers against UK firm for negligent failure to take protective measures against mercury poisoning at factory in South Africa: *Ngcobo and Others v. Thor Chemicals Holdings Ltd*, TLR 10 November 1995; *Sithole and Others v. Thor Chemicals Holdings Ltd and Another*, TLR 15 February 1999.

[105] Tort action by South African victims of asbestos mining by defendant company: *Lubbe v. Cape plc* [2000] 1 WLR 1545; *Adams v. Cape Industries plc* [1990] Ch. 433; [1991] 1 All E.R. 929.

[106] For environmentally harmful activities in Papua New Guinea. The settlement agreement again reached the courts in *Gagarimabu v. Broken Hill Proprietary Co Ltd and Another* [2001] VSC 517 (21 December 2001). See http://www.austlii.edu.au/au/cases/vic/VSC/2001/517.html.

[107] For environmental damage through mining activities in Guyana. See http://www.business-humanrights.org/Guyana.htm.

[108] Cf. for the English courts *Spiliada Maritime Corporation v. Cansulex Ltd* [1987] AC 460. The *forum non conveniens* argument was rejected by the House of Lords both in *Connelly v. RTZ Corporation plc* and in *Lubbe, supra* notes 103 and 105. For the US see the Bhopal case: *In re Union Carbide Corp Gas Plant Disaster*, 809 F. 2d 195 (1986). See also Andrew S. Bell, 'Human Rights and Transnational Litigation: Interesting Points of Intersection', in Stephen Bottomley and David Kinley (eds), *Commercial Law and Human Rights* (2002) 115; Malcolm J. Rogge, 'Towards Transnational Corporate Accountability in the Global Economy: Challenging the Doctrine of forum non conveniens in In re: Union Carbide, Alfaro, Sequihua, and Aguinda', 36 *Texas International Law Journal* (2001), 299.

[109] See Stephen Bottomley, 'Corporations and Human Rights', in Stephen Bottomley and David Kinley (eds), *Commercial Law and Human Rights* (2002) 47; Meeran, *supra* note 102.

[110] Cf. American Law Institute, *Restatement (Third) Foreign Relations Law of the United States* (1986) § 401. See also Shaw, *supra* note 56, 456.

a substantial, direct, and foreseeable effect within the US.[111] The *Alcoa* case[112] from the 1940s is the early leading decision establishing the use of the effects doctrine in this field of commercial law. Initially, extraterritoriality was fiercely opposed by the Europeans, in particular by Britain, as an unlawful extension of jurisdiction.[113] This even led to anti-suit injunctions between English and American courts as well as to blocking and claw-back legislation.[114] The *Fruehauf* affair[115] in the 1960s and the Siberian pipeline dispute[116] in the early 1980s are also examples demonstrating the underlying clash of interests about whether the home state of the parent company may compel the subsidiary to act in a particular way abroad. While the Europeans stressed territoriality to fend off any intrusion of US influence on 'their' companies, the Americans invoked personality, control, and effects theory to exercise extraterritorial jurisdiction. With the effects doctrine remaining controversial in a number of areas, it is remarkable that the European Commission, the 'anti-trust enforcement agency' within the EU, and backed by the ECJ,[117] has meanwhile adopted the effects principle *de facto*. It did so by exercising extraterritorial jurisdiction in order to extend the application of EC competition law to include conduct taking place outside the territory of the EU member states.[118]

These traditional examples of extraterritoriality basically involved a clash of national policy goals (securing fair competition law, fighting corrupt practices, etc.) with international law principles of jurisdiction emphasizing territoriality over any form of extraterritoriality. This has to do with the traditional function of international law as a law of co-ordination, separating spheres of competence of states and allocating spheres of jurisdiction within which states are free to act in their national

[111] See the formula used in US anti-trust legislation, *infra* note 122.

[112] *United States v. Aluminum Co of America*, 148 F.2d 416 (2d Cir. 1945).

[113] Andrea Bianchi, 'Extraterritoriality and Export Controls: Some Remarks on the Alleged Antinomy Between European and U.S. Approaches', 35 *GYIL* (1992) 366.

[114] For instance the British Protection of Trading Interests Act 1980, ch. 11, reprinted in 21 ILM (1982) 834; the Canadian Foreign Extraterritorial Measures Act, 33 Eliz. II, reprinted in 24 ILM (1985) 794; or the Australian Foreign Proceedings (Excess of Jurisdiction) Act 1984, No. 3 of 1984, reprinted in 23 ILM (1984) 1038.

[115] A jurisdictional dispute arose between France and the US over whether a French company had to comply with US export control legislation against China: *Fruehauf v. Massardy* (1964–65), [1968] D.S.Jur. 147, [1965] J.C.P. II 14274 bis, [1965] Gaz. Pal. See Andreas Lowenfeld, *Trade Controls for Political Ends* (2nd ed., 1984) 90.

[116] See A. Vaughan Lowe, 'The Problems of Extraterritorial Jurisdiction: Economic Sovereignty and the Search for a Solution', 34 *ICLQ* (1985) 724.

[117] The ECJ was initially reluctant to affirm extraterritorial jurisdiction. In the *Wood Pulp* case, the Court basically relied on a territorial principle finding that anti-competitive agreements entered into abroad were in fact 'implemented . . . within the common market'. See *Ahlström Osakeyhtiö v. Commission*, Joined Cases 89, 104, 114, 116–117, and 125–129/85, [1988] ECR 5193.

[118] See *ICI v. Commission*, Case 48/69, [1972] ECR 619, [1972] CMLR 557 and the so-called *Wood Pulp* cases, *supra* note 117. See also P.J. Kuyper, 'European Community Law and Extraterritoriality: Some Trends and New Developments', 33 *ICLQ* (1984) 1016.

interest.[119] In order to avoid conflicting jurisdictions, and based on the Westphalian and post-Westphalian concept of the territorial nation state, a state's territory was traditionally regarded as the basic unit for jurisdiction. Any extension of territorial jurisdiction had to be justified by other jurisdictional links, such as the personality principle or the effects doctrine or, in the field of criminal law, the protective as well as the universality principles. Jurisdictional conflicts were traditionally solved by recourse to these more or less technical principles without having regard to the content of the extraterritorial legislation.[120]

4. Can Shared International Interests Justify Extraterritoriality?

With the current 'new wave' of extraterritoriality, it is no longer purely national policy interests that are pursued by extending the borders of national jurisdiction. Rather, states are using their extraterritorial jurisdiction in order to enforce not (only) their own policy goals, but also international ones. Of course, one has to be very careful in assessing whether states truly enforce international law or whether they use this as a pretext to pursue their own national policies.[121] If we can take it as a valid assumption—at least for the sake of the argument—that states are increasingly using their extraterritorial jurisdiction in order to enforce human rights concerns, they could be seen as utilizing their national legal system to enforce international law. From this perspective, extraterritorial human rights litigation can be viewed as a form of decentralized enforcement of international law. This would, of course, also mean that the issue is no longer a clash between effective (extraterritorial) national policy enforcement *versus* neutral international law principles of jurisdiction, but rather a clash of substantive international law principles, i.e. human rights, with formal international law principles, i.e. territorial jurisdiction. Under these changed parameters, there is a possibility that 'substance' might override 'form'. Thus, there are new chances for extraterritoriality since affected states will have a hard time justifying their disregard of human rights in rejecting the extraterritorial acts of others. While international law only provided a value-neutral framework within which states were free to adopt and pursue their own policy through legislation, each state could easily defend its own sovereign right to determine its own policies and thus to legislate and remain unaffected by the legislation of other states. The growing convergence of policies, or at least the increasing substantive determination of national policy choices through international law, for

[119] 'There is no more important way to avoid conflict than by providing clear norms as to which state can exercise authority over whom, and in what circumstances. Without that allocation of competences, all is rancour and chaos': Higgins, *supra* note 6, 56.

[120] Except insofar as international law might provide recourse to a particular type of jurisdictional link, e.g. competition rules—effects doctrine; counterfeiting money—protective principle, etc. See also Shaw, *supra* note 56, 458.

[121] See the Helms-Burton debate where the US intention to portray its action as decentralized enforcement of the human right to property was contested by other states, *infra* text at note 132.

our purposes the increasing pressure to fulfil human rights obligations by enacting implementing legislation, has weakened the shield of national sovereignty and territorial jurisdiction.

The traditional approach of international law to allocate jurisdiction between the traditional subjects of international law, the states, was fairly straightforward—nowadays one would probably say 'user-friendly'—based on territoriality and nationality: states have jurisdiction over persons and things located within their territory and, to some extent, over persons and things, such as ships and aircraft, outside their territories if there is a special ('genuine') link to them such as citizenship or the like. Only very reluctantly, international law has recognized additional justifications for the exercise of extraterritorial jurisdiction. The objective territoriality principle or effects doctrine, according to which any conduct that has, for instance, a 'direct, substantial and reasonably foreseeable effect'[122] on a state's territory may be subject to that state's extraterritorial jurisdiction, is one example, by now largely accepted in the context of anti-trust/competition law. Whether it could be developed into a more general principle according to which any 'substantial or effective connection' with a state would give that state a legitimate basis for extraterritorial jurisdiction remains to be seen.[123]

As already indicated, it is worth considering whether, in addition to these 'formal' jurisdictional principles, issues of substance, of the content of legislation, may have an impact on the legality of the exercise of extraterritorial jurisdiction. In this regard, it is useful to look to other fields of extraterritorial jurisdiction, such as humanitarian law and other forms of international criminal law providing for universal jurisdiction of contracting parties over very serious crimes. The Geneva Conventions give all Contracting States the right—some argue even the obligation—to prosecute war crimes committed by anyone, anywhere, without the need for any territorial or personal link to the crimes.[124] The traditional connecting factor is no longer required, but is replaced by the shared interests of the international community in

[122] See e.g. 1982 Foreign Antitrust Improvements Act, Public Law 97–290, Title IV, Section 402; 96 Stat. 1246; 15 USC Section 6a.

[123] See K.M. Meessen (ed), *Extraterritorial Jurisdiction in Theory and Practice* (1994); Werner Meng, *Extraterritoriale Jurisdiktion im öffentlichen Wirtschaftsrecht* (1994).

[124] According to Arts 49 *et seq.* Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field. Geneva, 12 August 1949, 75 UNTS 31; Arts 50 *et seq.* Convention (II) for the Amelioration of the Condition of Wounded, Sick, and Shipwrecked Members of Armed Forces at Sea, Geneva, 12 August 1949, 75 UNTS 85; Arts 129 *et seq.* Convention (III) relative to the Treatment of Prisoners of War, Geneva, 12 August 1949, 75 UNTS 135; Arts 146 *et seq.* Convention (IV) relative to the Protection of Civilian Persons in Time of War, Geneva, 12 August 1949, 75 UNTS 287, the Contracting Parties are under a special duty to prosecute and try persons alleged to have committed 'grave breaches' regardless of their nationality and regardless of the place where such 'grave breaches' occurred (principle of universality) or at least to extradite such persons. See Antonio Cassese, 'On the Current Trends towards Criminal Prosecution and Punishment of Breaches of International Humanitarian Law', 9 *EJIL* (1998) 2 at 5; Michael P. Scharf, 'Application of Treaty-Based Universal Jurisdiction to Nationals of Non-Party States', 35 *New England Law Review* (2001) 363.

preventing certain acts. The history of legal steps against bribery and corruption in general also provides an interesting lesson with regard to the gradual acceptance of extraterritoriality. The initial unilateral approach of the US in passing the 1977 Foreign Corrupt Practices Act[125] met with considerable disfavour and was rejected by some countries 'affected' by the extraterritorial application of this legislation.[126] The 1997 OECD Anti-Corruption Convention[127] broadly prohibits bribery both at home and abroad and permits the use of extraterritorial legislation. This has largely eliminated the controversy.[128] Parties to the OECD Convention would hardly be in a convincing position to complain about extraterritorial anti-corruption enforcement by other states if that action were prompted by their own inactivity contrary to their obligations under the convention.

At this point one could draw a parallel with the extraterritorial 'prosecution' of human rights violations as exemplified by current human rights litigation before US and other mostly common law jurisdictions. Whether they use traditional criminal law instruments or civil liability there is also a shared interest in preventing human rights infringements, not only by states but also by non-state actors. The prime instrument of national legislation is the incrimination of certain acts leading to criminal or civil responsibility regardless of whether they were committed within or outside the territory of the forum state. If the territorial state is bound by international agreements to ensure human rights, any opposition to extraterritorial enforcement would be hard to justify. In such a case the territorial state would be obliged to take action itself. If it refused to do so and coupled this refusal with a rejection of action by other states to enforce the same treaty rights extraterritorially, this non-co-operation could be qualified as an act of bad faith.

The common rationale would be that the defence of shared substantive interests, protecting human rights, gives additional weight to the exercise of extraterritorial jurisdiction.[129] Of course, behind such a model always lurks the danger of a unilateral assessment of what are human rights, which types of human rights deserve extraterritorial protection, etc. This, in turn, is related to the question who determines substance. The Helms-Burton controversy may serve as a useful illustration of the problem. This 1996 US legislation[130] provides, *inter alia*, for a cause of action before US courts against investors from anywhere in the world who happen to invest in property in Cuba formerly belonging to persons expropriated by the Castro

[125] 15 U.S.C. § 78dd, http://www.usdoj.gov/criminal/fraud/fcpa/fcpastat.htm.

[126] See P.M. Nichols, 'Regulating Transnational Bribery in Times of Globalization and Fragmentation', 24 *Yale Journal of International Law* (1999) 257.

[127] OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, adopted 21 November 1997, entered into force 15 February 1999. http://www.imf.org/external/np/gov/2001/eng/091801.pdf.

[128] It has also eliminated the competitive disadvantage for American companies *vis-à-vis* others which were 'lawfully' bribing abroad.

[129] See McCorquodale, *supra* note 85, at 101.

[130] Cuban Liberty and Democratic Solidarity (LIBERTAD) Act of 1996, Public Law 104–114, H.R. 927; reprinted in 35 ILM (1996) 357–78.

regime.[131] Among many other issues, one of the problems concerned the weight of the US claim that this legislation was in essence a measure permitting human rights enforcement by US courts.[132] For the US, the protection of private property against unlawful expropriation constitutes a general international law standard which they felt entitled to enforce even against private 'accomplices',[133] those who 'traffick' in former US property by purchasing land from the Cuban government today, in the governmental human rights violation, the discriminatory and uncompensated expropriation of American property in the 1960s. For the Europeans and many other affected countries, the Helms-Burton Act amounted to an impermissible extension of American values by prohibiting non-American companies from investing in Cuba.[134] Leaving many other technical aspects aside, one of the central issues in the Helms-Burton controversy was whether the right to property belongs to a core of customary international law principles which merit not only universal respect but also enforcement even by other states. It is obvious that the national interest and perspective of legislators and courts will play a great role in this issue. The same is true for litigation under the ATCA (which in a way served as a model for the Helms-Burton Act) where a national interpretation of what is to be considered international human rights law may depart from the *communis opinio scholarum*, the general opinion of international lawyers. This problem is related to the larger issue of the universality debate of human rights, to the question of which human rights call for universal respect and which may be regionally divergent. As with the question of universal human rights, so also in the context of Helms-Burton: hypocrisy appears to be the true problem.

The entire issue of extraterritorial human rights enforcement also displays interesting parallels to the debate currently taking place within the WTO with regard to the controversial insertion of a 'social clause' into the WTO legal order.[135]

[131] See Clagett, 'Title III of the Helms-Burton Act Is Consistent with International Law', 90 *AJIL* (1996), 435; Vaughan Lowe, 'US Extraterritorial Jurisdiction: The Helms-Burton and D'Amato Acts', 46 *ICLQ* (1997), 378; Andreas Lowenfeld, 'Congress and Cuba: The Helms-Burton Act', 90 *AJIL* (1996), 419–35; Brigitte Stern, 'Vers la mondialisation juridique? Les lois Helms-Burton et D'Amato-Kennedy', 100 *Revue Générale de Droit International Public* (1996) 979.

[132] See August Reinisch, 'Widening the US Embargo Against Cuba Extraterritorially. A few public international law comments on the "Cuban Liberty and Democratic Solidarity (LIBERTAD) Act of 1996" ', 7 *EJIL* (1996), 545–62.

[133] In relation to the concept of complicity in human rights violations see Celia Wells, 'Catching the Conscience of the King: Corporate Players on the International Stage', *infra* Chapter 5.

[134] See European Union: Démarches Protesting the Cuban Liberty and Democratic Solidarity Act, reprinted in 35 ILM (1996) 397; Inter-American Juridical Committee, Opinion of 23 August 1996, CJI/SO/II/doc.67/96 rev 5; adopted by CJI/RES.II-14/96; reprinted in 35 ILM (1996) 1322.

[135] See Christopher McCrudden and Anne Davies, 'A Perspective on Trade and Labour Rights', in Francesco Francioni (ed), *Environment, Human Rights and International Trade* (2001), 179; Friedl Weiss, 'Internationally Recognised Labour Standards and Trade', in Friedl Weiss, Erik Denters, and Paul de Waart (eds), *International Economic Law with a Human Face* (1998), 79; Erika de Wet, 'Labor Standards in the Globalized Economy: The Inclusion of a Social Clause in the General Agreement On Tariff and

4. COMMON FEATURES

At this point, let me try to draw a few preliminary conclusions relating to the broader picture of the changing legal framework set out above. The common features I present in the following part are not an exhaustive description. Rather, they serve to illustrate and partly to explain some of the new approaches to non-state actors and human rights.

A. New Positions and New Alliances of Non-State Actors

Under traditional human rights law, the roles were clearly distributed among the main players. NGOs and international organizations were keeping an eye on the human rights performance of states and increasingly also of TNCs.[136] International organizations and NGOs were the 'good guys' and it was their role to advocate and promote human rights, to campaign for human rights observance, and to supervise compliance and find violations. The 'bad guys', powerful states or even less powerful ones which in relation to individuals always had a threatening potential of power, were the primary targets of human rights scrutiny.

These roles have been partially reversed today: international organizations are now increasingly questioned about their human rights performance. A prime example lies in the EU/EC, where a human rights case-law has been developed by the European Court of Justice,[137] but other international organizations, such as the UN with regard to its activities (or rather failure to act) in situations like

Trade/World Trade Organization', 17 *Human Rights Quarterly* (1995) 443. See also discussion in Steinhardt, *supra* note 2 at [35–37].

[136] See Felice D. Gaer, 'Reality Check: Human Rights NGOs Confront Governments at the UN', in Thomas G. Weiss and Leon Gordenker (eds), *NGOs, the UN and Global Governance* (1996) 51; Margaret E. Keck and Kathryn Sikkink, *Activists beyond Borders: Advocacy Networks in International Politics* (1998); Dianne Otto, 'Nongovernmental Organizations in the United Nations System: The Emerging Role of International Civil Society', 18 *Human Rights Quarterly* (1996) 107; Peter Willets (ed), *The Conscience of the World: The Influence of Non-Governmental Organizations in the U.N. System* (1996).

In its 1998 annual report, Amnesty International criticized not only individual governments and militant groups for human rights violations, but also businesses and international financial institutions, including Royal Dutch Shell, the World Bank, the International Monetary Fund, and the World Trade Organization. The report is available at http://amnestyusa.org/scripts/exit.cgi?www.amnesty.org/ailib/index.html.

See also the mission statement of 'CorpWatch. Holding Corporations Accountable': 'CorpWatch counters corporate-led globalization through education and activism. We work to foster democratic control over corporations by building grassroots globalization—a diverse movement for human rights, labor rights and environmental justice.' And see its report on the Nike lawsuit, available at http://www.corpwatch.org/trac/nike/lawsuit.html. Similarly, Human Rights Watch has gone beyond criticizing only states. In a 1999 report it was highly critical of Enron's activities in the course of a controversial electricity project in India where local opposition was harshly repressed. See Human Rights Watch, The Enron Corporation: Corporate Complicity in Human Rights Violations (1999), available at http://www.hrw.org/reports/1999/enron.

[137] See *infra* note 236.

Srebrenica[138] or with regard to its economic sanctions policy,[139]are becoming the subject of scrutiny by NGOs, affected states, and the public. A similar development can be witnessed in the context of international financial institutions: the IBRD and the IMF are questioned increasingly about the human rights compatibility of their development policies, in particular, in their lending practices.[140] NGO accountability is another new topic: their activities are subject to intensified scrutiny, and they are attacked for their lack of democratic structures and transparency. In some instances they are even accused of acting contrary to human rights.[141] In addition, the human rights implications of TNC activities have received renewed attention. TNCs as potential perpetrators of human rights violations have become the focus of much recent human rights discourse. But this is not the only aspect of human rights and TNCs. There is also the positive story about TNCs and human rights: TNCs may induce change and contribute to an enhanced human rights environment in the states where they operate.[142] On the macro level, the foreign investment they contribute to a national economy may raise living standards and create better social and economic conditions in the host countries. On the micro level, TNCs may act as promoters, serving as role models in adopting human rights (labour rights) standards

[138] This involved the failure of UN peace-keeping forces to protect civilians in the UN-declared 'safe areas' of former Yugoslavia, particularly, in and around Srebrenica where a massacre was carried out by Serb forces on Muslim civilians in summer 1995. The widespread criticism and allegations of responsibility prompted the General Assembly to commission an investigation which resulted in the Secretary-General's report on Srebrenica, *supra* note 80, which acknowledged that 'There is an issue of responsibility, and we in the United Nations share in that responsibility, as the assessment at the end of this report records': ibid., para. 5.

[139] See Hans-Peter Gasser, 'Collective Economic Sanctions and International Humanitarian Law: An Enforcement Measure Under the United Nations Charter and the Right of Civilians to Immunity: An Unavoidable Clash of Policy Goals?', 56 *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* (1996) 871; August Reinisch, 'Developing a Human Rights and Humanitarian Law Accountability of the UN Security Council for the Imposition of Economic Sanctions', 95 *AJIL* (2001), 851; W. Michael Reisman and Douglas L. Stevick,'The Applicability of International Law Standards to United Nations Economic Sanctions Programmes', 9 *EJIL* (1998) 86.

[140] See François Gianviti, 'Economic, Social, and Cultural Human Rights and the International Monetary Fund', Chapter 4 *infra*; and Philip Alston, 'Can the International Human Rights Regime Accommodate Non-State Actors', Chapter 1, *supra*. See also Patricia Armstrong, 'Human Rights and Multilateral Development Banks: Governance Concerns in Decision Making', 88 *American Society of Int'l Law Proc.* (1994) 271; Daniel D. Bradlow, 'The World Bank, the IMF, and Human Rights', 6 *Transnat'l Law and Contemp. Problems* (1996) 47; Sabine Schlemmer-Schulte, 'The World Bank and Human Rights', 4 *Austrian Review of International and European Law* (1999) 230; Sigrun Skogly, *The Human Rights Obligations of the World Bank and the International Monetary Fund* (2001).

[141] Michael Edwards/David Hulme (eds), *Non-Governmental Organizations—Performance and Accountability in the Post-Cold War World: Beyond the Magic Bullet* (1995); Ian Smillie, *The Alms Bazaar: Altruism Under Fire—Non-Profit Organizations and International Development* (1995).

[142] See Deborah Spar, 'The Spotlight and the Bottom Line: How Multinationals Export Human Rights', 77 *Foreign Affairs* (1998) 7; Jennifer Johnson, 'Public-Private Convergence: How The Private Actor Can Shape Public International Labor Standards', 24 *Brook. J. Int'l L.* (1999) 291; W.H. Meyer, 'Human Rights and MNCs: Theory versus Quantitative Analysis', 18 *Human Rights Quarterly* (1996) 368.

that should be copied by other firms. This concept of the alternative role of TNCs is a clear reversal of the 'stay out' policy advocated after heavy criticism of the involvement of some TNCs in the domestic affairs of host states, such as ITT in the overthrow of the Allende regime in Chile in 1973 and Elf Aquitaine's role in the ousting of the Congo-Brazzaville government in 1997.[143]

These changes, among others, witness that the roles have been, at least partly, reversed. There is a greater number of potential human rights violators, but there are also more potential human rights promoters and defenders and they may enter into new alliances with each other. Traditionally, international organizations could count on the support of NGOs in advocating human rights, in exposing state practices in violation of human rights, etc. Today, NGOs sometimes antagonize international organizations by severely criticizing the latter.[144] On the other hand, TNCs are trying to get NGOs on board in their human rights code of conduct campaigns to enhance their own standing; they have realized that 'human rights are good business'.[145] They are relying, *inter alia*, on NGO and other independent professional expertise for 'social accounting'.[146] Furthermore, international organizations partly try to co-opt NGOs. In particular, the International Financial Institutions (IFIs) such as the IMF, the World Bank Group, and regional development banks, as well as the WTO, have learned their lessons from Seattle and Genoa by creating NGO links.[147] The UN has tried to get NGOs 'on board' by changing the system of NGO consultative status,[148] by using their aid delivery services through UN subcontracting,[149] etc.

[143] See Menno T. Kamminga, 'Holding Multinational Corporations Accountable for Human Rights Abuses: A Challenge for the EC', in Philip Alston (ed), *The EU and Human Rights* (1999), 553, at 554.

[144] See the NGO criticism of the IMF and IBRD as well as the EU by 'statewatch' (http://www.statewatch.org/) and of the UN by 'unwatch' (http://www.unwatch.org/).

[145] Cf. Kinley, *supra* note 53, 26.

[146] Social Accountability 8000, for instance, is a monitoring and certification standard mainly for labour standards at factories. Modelled on the auditing process developed by the International Standards Organization, such as ISO 9000 and ISO 14000, it relies on certified monitors to verify compliance. SA 8000 was first issued in 1998 and revised in 2001. See http://www.cepaa.org/SA8000/SA8000/htm.

[147] See WTO Guidelines for Arrangements on Relations with Non-Governmental Organizations, WTO, WT/L/162, 23 July 1996. See also Steve Charnovitz, 'Participation of Nongovernmental Organizations in the World Trade Organization', 17 *U. Penn. J. Int'l Econ. L.* (1996) 331; Daniel C. Esty, 'Non-Governmental Organizations at the World Trade Organization: Cooperation, Competition, or Exclusion', 1 *J. Int'l Econ. L.* (1998) 123; Wolfgang Benedek, 'Developing the Constitutional Order of the WTO: The Role of NGOs', in *Development and Developing International and European Law*: Essays in Honour of Konrad Ginther on the Occasion of his 65th Birthday (1999) 228; Ibrahim F.I. Shihata, 'The World Bank and Non-Governmental Organizations', 25 *Cornell Int'l L. J.* (1992) 623.

[148] According to Art 71 UN Charter, the UN 'Economic and Social Council may make suitable arrangements for consultation with NGOs which are concerned with matters within the [Council's] competence'. Based on this Charter authorization, ECOSOC adopted Res. 288 B (X) (27 February 1950), Res. 1296 (XLIV) (23 May 1968), and Res. 1996/31 (25 July 1996), laying down the specific requirements for NGO accreditation. See http://www.un.org/documents/ecosoc/res/1996/eres1996–31.htm.

[149] See Leon Gordenker and Thomas G. Weiss, 'Devolving Responsibilities: A Framework for Analysing NGOs and Services', in Thomas G. Weiss (ed), *Beyond UN Subcontracting: Task-Sharing with Regional Security Arrangements and Service-Providing NGOs* (1998) 30.

The reversal of roles is also nicely encapsulated in the classical 'Who guards the guardians?'.[150] After the recent Enron disaster this could be rephrased into a more current 'who accounts for the accountants?' In any event, accountability is no longer a one-way exercise. Rather, it has become a multi-faceted issue.

B. Indirect Human Rights Enforcement—'Going After the Accomplices'

On a fairly general and abstract level another common attribute may be identified from recent trends in dealing with the human rights performance of non-state actors: a growing tendency to turn against 'accomplices' in case the main perpetrators cannot be held accountable. The underlying rationale and message of the (legal) accountability of companies complicit in direct human rights violations is clear: ultimately, TNCs will be deterred from investing in countries where they might be held responsible for acts of that state.

More and more frequently, legal devices are chosen to induce compliance via indirect sanctioning. The combination of extraterritoriality and vicarious liability has produced some remarkable examples, based on the philosophy: 'if you can't get the direct perpetrators, put pressure on those who collaborate with them or profit from their acts'. Examples are the *Unocal* litigation where direct action against Myanmar (Burma), the alleged direct human rights violator, appears unfeasible because, on the traditional inter-state plane, there is not sufficient leverage and because state immunity would prevent a direct claim against Myanmar in US courts.[151] Even if jurisdiction were upheld by national courts, the chances of enforcing an eventual judgement would be very low. Thus, it makes sense to seek redress against corporate accomplices to state action.

Corporate complicity is, of course, a very complex issue and it is useful to differentiate between various degrees of involvement and 'culpability' of corporate behaviour.[152] There is an obvious distinction between a company investing or otherwise doing business in a country with a questionable human rights record and actively supporting forced population transfers or using slave labour provided by government units. It has thus been suggested that different categories of 'complicity' be applied, such as actively assisting in human rights violations by others, benefiting from the opportunities created by human rights violations, or silence and inactivity in the face of human rights violations.[153]

[150] '*Quis Custodiet Ipsos Custodes*' ('But who guards the guardians?'), *Decimus Junius Juvenal*, Satires VI, 347. See also Ralph Wilde, 'Quis Custodiet Ipsos Custodes? Why and How UNHCR Governance of "Development" Refugee Camps Should be Subject to International Human Rights Law', 1 *Yale H.R. & Dev. L.J.* (1998) 107.

[151] In *Doe v. Unocal Corp*, 963 F. Supp. 880 (C.D. Cal. 1997) the claim against the State Law and Order Restoration Council of Myanmar and the Myanmar Oil and Gas Enterprise was dismissed for state immunity reasons.

[152] See Steven R. Ratner, 'Corporations and Human Rights: A Theory of Legal Responsibility', 111 *Yale Law Journal* (2001) 443, at 497. See also Celia Wells, *supra* note 133.

[153] See International Council on Human Rights (ed.) *Beyond Voluntarism: Human Rights and the Developing International Legal Obligations of Companies* (2002) 126. See also Human Rights Watch,

Some aspects of the Holocaust litigation before US courts follow this pattern. The *Princz* case is a pertinent example: an action for slave labour against the Federal Republic of Germany failed before US federal courts because of the immunity of the defendant.[154] Subsequent cases were instituted against companies which profited from slave labour either in a direct way, such as industrial firms,[155] or in a less direct way, such as banks and insurance companies.[156] In all these cases it is clear that the primary target of the US litigation is the atrocious policy of forced and slave labour organized by the Third Reich. The corporate defendants did not plan or institute this exploitative programme, but some may have willingly benefited from it. And because the direct perpetrator is unavailable as a defendant, the indirect 'beneficiaries' which may be subject to the jurisdiction of US courts today are named as defendants now.

The above examples all relate to US civil actions based on a concept of corporate liability for complicity in human rights violations perpetrated by governments. This appears to be by far the most likely situation when one is confronted with corporate human rights violations, although it may also happen that TNCs themselves engage in human rights violations. The precise legal standards for civil liability for such corporate complicity in human rights violations is, however, as unexplored as standards for their criminal responsibility.[157] Some tentative guidelines can be found in some of the codes of conduct mentioned above, although they are usually not helpful to the search for precise standards. The UN Global Compact, for instance, demands that businesses 'make sure they are not complicit in human rights abuses'.[158] The Commentary to the Norms on the Responsibilities for Transnational Corporations and Other Business Enterprises with Regard to Human Rights provides that '[t]ransnational corporations and other business enterprises shall have

The Enron Corporation: Corporate Complicity in Human Rights Violations (1999), available at http://www.hrw.org/reports/1999/enron.

[154] *Princz v. Federal Republic of Germany*, 813 F. Supp. 22 (1992), 26 F.3d 1166, 1180 (D.C. Cir. 1994).

[155] See e.g. *Iwanowa v. Ford Motor Co*, No. 98-CV-959, 1999 WL 719888 (D.N.J. 14 September 1999); *Gross v. Volkswagen*, No. 98-CV-4104 (D.N.J. filed 31 August 1998). See also the list of known World War II and National Socialist era cases against German companies pending in U.S. courts, at http://www.stiftung-evz.de/doku/stiftunginitiative/statement_english_annex_c.html.

[156] See among others the complaints filed in US federal courts *Duveen v. Deutsche Bank AG*, No. 99-CV-0388 (S.D.N.Y. filed 19 January 1999); *Watman v. Deutsche Bank*, No. 98-CV-3938 (S.D.N.Y. filed 3 June 1998); *Bodner v. Banque Paribas*, No. 97 Civ. 7433 (E.D.N.Y. filed 20 March 1998).

[157] Cf. Andrew Clapham and Scott Jerbi, 'Categories of Corporate Complicity in Human Rights Abuses', 24 *Hastings Int'l & Comp. L. Rev.* (2001) 339, who suggest a differentiation between direct corporate complicity, requiring intentional participation; beneficial or indirect corporate complicity, merely requiring knowledge of human rights violations from which companies will benefit; and silent complicity, where companies may be faulted for not acting or speaking out against systematic human rights abuses of host states. See also Celia Wells, 'Corporate Criminal Liability in Europe and Beyond', 39 *New South Wales Law Society Journal* (2001) 62.

[158] UN Global Compact, *supra* note 49; see Steinhardt, *supra* note 2 at 206.

the responsibility to use due diligence in ensuring that their activities do not contribute directly or indirectly to human rights abuses, and that they do not directly or indirectly benefit from abuses of which they were aware or ought to have been aware'.[159] Similar demands are formulated in a number of voluntary human rights codes of conduct and they are also expressed in the guidelines of ethical investments etc. This shows that, although no clear rules have yet crystallized with regard to this form of indirect human rights enforcement, the idea of putting (even just economic) pressure on non-state actors to improve human rights situations has gained broad support.

The idea of holding accountable those who are subject to accountability mechanisms even if they are only indirectly responsible for human rights infringements has also received renewed attention in the context of the European system of human rights protection. It lies at the heart of a new trend in the case-law of the European Court of Human Rights, marked by the Gibraltar voting case,[160] holding states accountable for human rights violations of international organizations of which they are members.

One could even draw an (admittedly rather far-fetched) parallel to recent US action against states harbouring terrorists. Although the roles are reversed here, it follows a similar pattern insofar as the US tries to hold governments accountable not for directly perpetrating terrorist acts or directly engaging in state-sponsored terrorism, but rather for aiding, supporting, not preventing, and not co-operating in the fight against, terrorism.[161]

This latter example may be evidence of a general theme of a changed international environment willing to enforce human rights, whether directly or not, against accomplices. It is, in any event, probably more than just the result of a growing frustration over the ineffectiveness of human rights protection against states.

C. Increasing Use of Non-Legal Means of Enforcing Human Rights Compliance of Non-State Actors

Recent developments with regard to TNCs and human rights may teach another interesting lesson. Legal enforcement techniques, holding human rights

[159] Sub-Commission on the Promotion and Protection of Human Rights, Commentary on the Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights, E/CN.4/Sub.2/2003/38/Rev.2, Commentary (b) to Sec. 1.

[160] See *infra* note 219.

[161] This logic was first relied upon by the US against Sudan and Afghanistan. See Jules Lobel, 'The Use of Force to Respond to Terrorist Attacks: The Bombing of Sudan and Afghanistan', 24 *Yale J. Int'l L.* (1999) 537; Ruth Wedgwood, 'Responding to Terrorism: The Strikes Against bin Laden', 24 *Yale J. Int'l L.* (1999) 559. For post-11 September 2001 action see Antonio Cassese, 'Terrorism is also Disrupting Some Crucial Legal Categories of International Law', 12 *EJIL* (2001) 993; Jost Delbrück, 'The Fight Against Terrorism: Self-Defense or Collective Security as International Police Action? Some Comments on the International Legal Implications of the "War Against Terrorism"', 44 *German Yearbook of International Law* (2001) 9.

violators legally accountable before international or national tribunals, may become less central as a mechanism to protect human rights effectively. More 'non-legal' enforcement techniques are used to induce human rights compliance.

Consumer boycotts are now almost a classical 'non-legal' enforcement technique to induce human rights compliance by TNCs.[162] The threat of lost sales of products produced in an environmentally harmful way, by disregarding core labour standards, or otherwise having negative human rights implications has proven to be a highly effective deterrent against such activities. This effectiveness is, in turn, predicated and depends upon a growing awareness and sensitivity of consumers. The goodwill, reputation, and publicity attaching to a company's human rights performance has become an important intangible business asset which is vigilantly guarded.

The non-legal enforcement mechanisms are not exhausted with the 'stick' of consumer boycotts. 'Socially responsible investing' has developed from an initial policy of excluding investments in certain sectors (such as arms production, genetically modified organisms, tobacco, etc.) into a positive pro-investment choice concerning businesses that conform to certain standards.[163]

One of the reasons for this development may be the simple legal impossibility of using the 'normal' human rights enforcement mechanism of human rights scrutiny by international human rights monitoring bodies, courts, and tribunals. Non-state actors are not subject to the relevant human rights protection systems under various universal and regional human rights conventions. This is as true for TNCs as it is for international organizations and NGOs.[164] However, may be it is less the non-availability of legal means than their non-effectiveness, or at least their lesser degree of effectiveness, which has induced the turn towards non-legal means of enforcement. The far more compelling force of the non-legal mechanisms mentioned above—consumer boycotts and ethical investment strategies—can be directly translated into costs and gains for companies. This economic argument has not fallen on deaf ears on the part of some non-state actors, particularly TNCs.

[162] An early well known consumer boycott arose from the controversy about the marketing of infant formula in developing countries. See Nancy E. Zelman, 'The Nestlé Infant Formula Controversy: Restricting the Marketing Practice of Multinational Corporations in the Third World', 3 *Transnat'l L.* (1990) 697. A list of currently enforced boycotts is available at http://www.ethicalconsumer.org/boycotts/boycotts_list.htm. See also Kenneth A. Rodman, '"Think Globally, Punish Locally": Nonstate Actors, Multinational Corporations, and Human Rights Sanctions', 12 *Ethics & International Affairs* (1998) 19. See further Steinhardt, *supra* note 2 at 185–6.

[163] See www.neweconomics.org as well as www.socialinvest.org. See also the Sustainable Investment Research International Group (SIRI) a coalition of 12 research organizations aiming to provide and promote high quality social investment research products and services: http://www.sirigroup.org. See generally Steinhardt, *supra* note 2 at 181 and 184 for a discussion of 'rights sensitive' products and socially responsible investment.

[164] See, however, *infra* text starting at note 225, for the potential of future development.

D. Enforcing Human Rights Compliance of Non-State Actors Regardless of Whether they are Strictly Bound by Human Rights Obligations

Another common feature of recent developments in the field of non-state actors and human rights seems to be the decreasing relevance of the legal quality of the standards invoked. Apparently, it is becoming less and less important whether the human rights standards sought to be enforced are legally binding or not. Regardless of whether a strict obligation to respect human rights exists *de lege lata*, many of the current 'enforcement' measures are used in order to induce compliance. This is true not only of the 'non-legal' means of consumer boycotts *vis-à-vis* TNCs and 'socially responsible' investments, but it also applies to the recent surge of suing TNCs before national courts as long as they are 'doing business' within the forum state.[165]

Of course, consumers and investors are free to choose where to buy or to invest. They may rely on moral or ethical choices when making their business decisions. If it comes, however, to holding business entities civilly liable (as in many of the ATCA actions before US courts) the question of legal responsibility arises. This clearly presupposes that obligations legally binding on TNCs have been breached. Findings of liability in the absence of a legal obligation would be irreconcilable with fundamental notions of the rule of law. One need not even invoke the *nulla poena sine lege* analogy of criminal law.[166]

There is another risk involved in the increasing demand for accountability regardless of whether those held accountable are legally bound by certain standards. It creates a danger of blurring the line between legal obligations and *de lege ferenda* standards which might ultimately backfire by weakening the obligatory character of human rights law.[167]

E. The Issue of Non-State Subjects of International Law: A Fresh Start or a Cul de Sac?

The question of personality or subjectivity under international law has fascinated generations of international lawyers and it has remained a precarious and complicated one.[168] It also arises in the context of non-state actors and human rights. The precise question is whether non-state actors are more than just indirect addressees of human rights norms which are directly addressed to states. We have seen that, at

[165] According to many US 'long arm' statutes, foreign defendants may be subject to the jurisdiction of US courts if they are considered to be 'doing business' within the US. See *Restatement (Third)*, *supra* note 110, § 421.

[166] Art 15(1) 1st Sentence ICCPR, *supra* note 11.

[167] See also UN Sub-Commission on the Promotion and Protection of Human Rights, Sessional working group on the working methods and activities of transnational corporations, Transnational Corporations and Other Business Enterprises, E/CN.4/Sub.2/2002/WG.2/WP.1/Add. 1, 24 May 2002, 17, noting the concerns expressed that 'that universal principles [for transnational corporations] will only dilute already established more specific standards focused on particular issues facing an industry, a transnational corporation, or other business enterprise'.

[168] Shaw, *supra* note 56, at 137 *et seq.*

least *prima facie*, non-state actors are increasingly the direct addressees of human rights standards. Numerous voluntary codes of conduct clearly formulate direct obligations for companies. Does that mean that they have become, at least partially, subjects of international law?

To some extent this discussion relates back to the *Drittwirkungs* debate of past decades.[169] However, one should clearly recognize that in German doctrine and jurisprudence, where the theory of 'third-party effect' was most intensely debated, *Drittwirkung* really dealt with the private law repercussions of fundamental rights norms, with the effect on the legal relationship between private parties. It did not elevate private, non-state actors to the level of direct addressees of constitutional rights and obligations.

In a traditional international law understanding, only subjects of international law can be addressees of international obligations. If one narrowly defines subjects of international law as comprising states, international organizations, as creatures of states, and a few historic subjects of international law, such as the Holy See and the Sovereign Order of Malta,[170] most non-state actors relevant for our purposes would be excluded from the outset. However, if one follows a more 'liberal' delimitation of subjects of international law, for instance, one that would hold that an entity can be considered a subject of the international legal system if it has rights and/or obligations under that system, then a closer examination of the relevant human rights standards appears to be necessary in order to find out which non-state actors may qualify.

The underlying rationale of considering certain non-state actors as subjects of international law is usually that international law directly endows them with certain rights and obligations. For instance, the ICRC enjoys partial international legal personality because the Geneva Conventions directly confer certain (international law) rights on it;[171] individuals are considered to be, at least partly, subjects of international law because they enjoy human rights directly as a result of international law and because they are directly obliged by international law not to commit certain internationally criminal acts such a genocide, crimes against humanity, and war crimes.[172] In all these cases the international legal order wants to confer a certain status upon non-state actors by directly giving them rights and/or obligations. If the international legal personality of non-state actors really depends upon international law then it seems appropriate to take a closer look at the meaning of international law in order to find out whether non-state actors really are direct addressees of human rights obligations.

Today, there is renewed interest in the question whether there are real direct legal obligations for non-state actors contained in international human rights

[169] See A. Drzemczewski, 'The European Human Rights Convention and Relations between Private Parties', 26 *NILR* (1979) 163; Andrew Clapham, 'The *Drittwirkung* of the Convention', in R.St.J. MacDonald *et al.* (eds), *The European System for the Protection of Human Rights* (1998) 22; M. Hunt, 'The Horizontal Effect of the Human Rights Act', *Public Law* (1998) 423; Ingo von Münch *et al.*, *supra* note 8.

[170] Shaw, *supra* note 56, at 171.

[171] Ibid., at 192.

[172] Ibid., at 182.

instruments. In this context one point of departure is the fact that, while states are clearly the primary addressees of human rights obligations, the language of core human rights instruments does not narrowly restrict itself to states. The 1948 Universal Declaration of Human Rights and the two 1966 UN Human Rights Covenants stipulate that '[n]othing 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.'[173] Similarly, the idea of 'private' duties with regard to human rights[174]—in addition to the traditional, exclusive 'public' duties of states—finds some support in positive law. The Universal Declaration speaks of a duty of 'every individual and every organ of society' to 'strive to [. . .] promote respect'[175] and the two UN Covenants even of a 'responsibility' 'to strive for the promotion and observance' of human rights.[176] Although this development may not yet lead to the availability of adequate procedural remedies, it has now been reaffirmed by various human rights bodies that the core of human right obligations are binding on all parts of society including the non-state actors. For instance, the CESCR stated in its General Comment No. 14 that '[w]hile only States are parties to the Covenant and thus ultimately accountable for compliance with it, all members of society—individuals, including health professionals, families, local communities, intergovernmental and non-governmental organizations, civil society organizations, as well as the private business sector—have responsibilities regarding the realization of the right to health. State parties should therefore provide an environment which facilitates the discharge of these responsibilities.'[177] With respect to TNCs the recently adopted Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights of the UN Sub-Commission on the Promotion and Protection of Human Rights similarly provide that '[w]ithin their respective spheres of activity and influence, transnational corporations and other business enterprises have the obligation to promote, secure the fulfilment of, respect, ensure respect of and protect human rights recognized in international as well as national law [. . .].'[178]

[173] Art 30 Universal Declaration of Human Rights, UN G.A. Res. 217 (1948). Similar language can be found in Art 5(1) of the two 1966 UN Covenants as well as in Art 17 ECHR.

[174] Chris Jochnick, 'Confronting the Impunity of Non-State Actors: New Fields for the Promotion of Human Rights', 21 *Human Rights Quarterly* (1999), 56; Jordan J. Paust, 'The Other Side of Right: Private Duties Under Human Rights Law', 5 *Harv. Hum. R. J.* (1992), 51.

[175] Preamble, Universal Declaration of Human Rights, *supra* note 173.

[176] The last preamble paragraph of both Covenants reads in full: '*Realizing* that the individual, having duties to other individuals and to the community to which he belongs, is under a responsibility to strive for the promotion and observance of the rights recognized in the present Covenant'.

[177] UN Committee on Economic, Social, and Cultural Rights, General Comment No. 14: 'The right to the highest attainable standard of health', 11 August 2000, U.N. Doc. E/C.12/2000/4, para. 42.

[178] UN Sub-Commission on the Promotion and Protection of Human Rights, Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights, E/CN.4/Sub.2/2003/12/Rev.2, Sec. 1 2nd sentence.

This trend has also manifested itself in the privately endorsed, legally non-binding Asian Human Rights Charter 1998 which confirms the 'primary responsibility' of states for the promotion of human rights but declares in paragraph 2.8: 'The capacity of the international community and states to promote and protect rights has been weakened by processes of globalization as more and more power over economic and social policy and activities has moved from states to business corporations. States are increasingly held hostage by financial and other corporations to implement narrow and short sighted economic policies which cause so much misery to so many people, while increasing the wealth of the few. Business corporations are responsible for numerous violations of rights, particularly those of workers, women and indigenous peoples. It is necessary to strengthen the regime of rights by making corporations liable for the violation of rights.'[179]

All these developments point in a similar direction. It can be credibly asserted that a contemporary reading of human rights instruments shows that non-state actors are also addressees of human rights norms. If this interpretation is supported by the adoption of legally binding codes of conduct in the future, for instance via treaties, there remains no serious obstacle to considering non-state actors, in this context most likely TNCs, to have gained, at least to some extent,[180] international legal personality.[181]

As convincing as this reasoning may appear, it still has not wholly rid itself of a certain feeling of circularity.[182] Why would we want to show that non-state actors are subjects of international law? To demonstrate that they may be direct addresses of human rights obligations. How do we try to show that they are subjects of international law? By asserting that they are direct addressees of human rights obligations under international law. Truly, the suspicion that the whole matter of international legal personality forms a vast intellectual prison and that 'the whole notion of subjects and objects has no credible reality and [. . .] no functional purpose'[183] is sometimes hard to suppress.

F. Human Rights and General Public International Law: New Intersections Instead of Fragmentation

Nowadays, the fragmentation of international law into special sub-fields, maybe sub-systems, or even self-contained regimes, is frequently deplored as threatening

[179] Asian Human Rights Charter, declared in Kwangju, South Korea, 17 May 1998. Available at http://www.ahrchk.net/charter/pdf/charter-final.pdf.

[180] As early as *Reparation for Injuries Suffered in the Service of the United Nations*, Advisory Opinion, ICJ Reports (1949), 174, 178 the ICJ held that '[t]he subjects of law in any legal system are not necessarily identical in their nature or in the extent of their rights, and the nature depends on the needs of the community'.

[181] See Nicola Jägers, 'The Legal Status of the Multinational Corporation Under International Law', in Michael K. Addo (ed), *Human Rights Standards and the Responsibility of Transnational Corporations* (1999) 259, at 270.

[182] See Derek W. Bowett, *The Law of International Institutions* (4th ed., 1982) 337.

[183] Higgins, *supra* note 6, 49.

the coherence and unity of international law. Remarkably, this concern apparently prompted the UN's International Law Commission to create a working group to study the phenomenon.[184] It has also led other institutions to pay attention to the various aspects of fragmentation such as the Project on International Courts and Tribunals,[185] focusing on the proliferation of specialized international courts which, institutionally, may also contribute to the fragmentation of international law.

With all due respect for the perceived and actual risks of fragmentation in international law, it appears that with regard to human rights law and non-state actors this danger has not materialized, quite the contrary. Whereas human rights law may traditionally have been regarded as a rather arcane sub-field of international law where only specialists had a say, something outside of the international law mainstream, today's human rights law seems to have entered the broader international law arena. The changing framework under which human rights are no longer relevant not only *vis-à-vis* states but also with regard to non-state actors may have contributed considerably to this situation. Business and trade lawyers have to deal with human rights issues today. In the past, lawyers advising TNCs or international organizations could probably state confidently that they did not have to care about human rights law because it had no practical relevance for them. With increasing demands for human rights compliance by these non-state actors, they are forced to deal with human rights. Human rights law appears to 'encroach' upon all other fields of law, including trade and investment, commercial law, etc.[186] One might even speak of a slow human rights 'intrusion'. Hardly any field of international law remains unaffected by human rights. At a minimum, it seems that the inter-relatedness of human rights and other parts of international law is increasingly recognized.[187] One also witnesses such cross-fertilization of sub-fields of international law in other areas. The traditionally separate areas of GATT and EC law have increasingly become interrelated, and

[184] See Report of the Study Group on the Fragmentation of International Law, A/CN.4/L.628, 1 August 2002, available at http://daccess-ods.un.org/doc/UNDOC/LTD/G02/632/93/PDF/G0263293.pdf?OpenElement.

The original title of the subject of the ILC Working Group was 'The risks ensuing from the fragmentation of international law', a topic included in the ILC's programme of work. Subsequently, the title of the topic was changed to 'Fragmentation of international law: difficulties arising from the diversification and expansion of international law'. See http://www.un.org/law/ilc/sessions/54/54sess.htm.

[185] See http://www.pict-pcti.org/home.html.

[186] See also recent academic literature, for instance, Stephen Bottomley and David Kinley, *Commercial Law and Human Rights* (2002); Janet Dine, 'Human Rights and Company Law', in Michael K. Addo (ed), *Human Rights Standards and the Responsibility of Transnational Corporations* (1999) 209. See also the report of the UN High Commissioner for Human Rights, *Business and Human Rights: A Progress Report*, available at www.unhchr.ch/business.htm; Amnesty International (Dutch Section) and Pax Christi International, *Multinational Enterprises and Human Rights* (1998) available at http://www.paxchristi.nl/mne.html.

[187] See Philip Alston, 'The Myopia of the Handmaidens: International Lawyers and Globalisation', 8 *EJIL* (1997), 435, at 447, who, in 1997, was not convinced that the 'compartmentalization' of human rights values within a small part of the discipline of international law had been overcome.

while lawyers could once specialize in one field, totally ignoring the other, such isolation is no longer feasible.[188]

5. UNDERLYING CAUSES OF THE PERCEIVED CHANGES

Once we try to look beyond certain trends and features describing the changing framework of dealing with non-state actors by trying to explain it, or (more appropriately) trying to identify possible underlying causes of the perceived changes, we are entering highly speculative grounds. Nevertheless, I would like to put the phenomena observed into a broader context and offer some possible partial explanations.

A. Demise of the Nation State; Rise of Non-State Actors

The trend towards viewing non-state actors as direct addressees of human rights and other norms of international law may have to do with a major structural change in the international legal order: the decrease and partial disappearance of the concept of the state as a 'mediating'[189] factor between the international law level and the rights and duties of non-state actors. The 'waning', 'retreat', or 'demise' of the sovereign state, the centrepiece of the Westphalian concept of the international legal order, has been described, denied, deplored, and applauded for some time in the discourses of international relations and international law, history and sociology, and other disciplines.[190]

The declining role of states, manifested through their declining power, leads to the attempt to address non-state actors directly and goes hand in hand with the increase of power and influence of the latter. If it is true that 'with power comes

[188] Cf. J.H.H. Weiler, 'Cain and Abel: Convergence and Divergence in International Trade Law', in J.H.H. Weiler (ed), *The EU, the WTO and the NAFTA* (2000) 3.

[189] German international law doctrine uses the term *Mediatisierung* of non-state actors through states to describe the fact that international law norms are addressed to states only. Even if they ultimately intend to regulate non-state behaviour, states have to come in as 'intermediaries' in order to translate the international law norms into domestic ones. See Karl Zemanek, 'Verantwortlichkeit und Sanktionen', in Hanspeter Neuhold, Waldemar Hummer and Christoph Schreuer (eds), *Österreichisches Handbuch des Völkerrechts* (3rd ed., 1997) 463.

[190] See Joseph A. Camilleri and Jim Falk, *The End Of Sovereignty? The Politics Of A Shrinking And Fragmenting World* (1992); Martin van Creveld, *The Rise and Decline of the State* (1999); Kenichi Ohmae, *The End of the Nation State* (1995); Vivien A. Schmidt, 'The New World Order, Incorporated: The Rise of Business and the Decline of the Nation-State', *Daedalus* (1995) 75; Oscar Schachter, 'The Decline of the Nation-State and its Implications for International Law', 36 *Colum. J. Transnat'l L.* (1997) 7; Christoph H. Schreuer, 'The Waning of the Sovereign State: Towards a New Paradigm for International Law?', 4 *EJIL* (1993) 447; Susan Strange, *The Retreat of the State: The Diffusion of Power in the World Economy* (1996); Serge Sur, 'The State between Fragmentation and Globalization', 8 *EJIL* (1997) 421.

responsibility'[191] then it is only logical to demand human rights observance by those non-state actors which are now as powerful as some states and may thus violate human rights in the same way as states.[192]

B. The Retreat of the State as Human Rights Addressee and as Human Rights Guarantor

In the current discourse states appear to be no longer the sole addressees of human rights obligations. Attention has shifted to a large degree to non-state actors. But states have also retreated as prime guarantors of human rights. Non-state actors have taken over to set standards, to secure compliance, and to enforce human rights expectations. NGOs, trade unions, church groups, and others no longer rely on the willingness of states and governments to regulate TNC behaviour. Rather, they increasingly put direct pressure on companies and international organizations by mobilizing public opinion.[193] This can already be viewed as another form of the 'privatization' of human rights through 'privatized' standard setting, 'privatized' supervision, and 'privatized' enforcement.[194]

C. Global Trends Toward Privatization

If one reflects upon the changing legal framework of dealing with non-state actors and upon the question why non-state actors are more and more conceived as addressees of human rights norms, potential causes for this change come to mind. One very tempting explanation lies in the fact that non-state actors become more and more powerful and increasingly take over hitherto state functions. This development is, in turn, closely linked to the dual trends of shifting governmental tasks to international organizations on one hand and to private entities on the other.[195] 'Privatization' has not stopped at making inefficient state-owned enterprises more competitive. TNCs have entered what used to be in many countries 'reserved' state businesses in the 'public service' fields, through the privatization of electricity, gas, and other energy supply services.[196] But they have not halted there. Private

[191] UN Sub-Commission on the Promotion and Protection of Human Rights, Sessional working group on the working methods and activities of transnational corporations, Transnational Corporations and Other Business Enterprises, E/CN.4/Sub.2/2002/WG.2/WP.1/Add. 1, 24 May 2002, 5.

[192] See Ratna Kapur, 'From Human Tragedy to Human Rights: Multinational Corporate Accountability for Human Rights Violations', 10 *Boston College Third World L.J.* (1990) at 2.

[193] See McCrudden, *supra* note 40, 172.

[194] See *infra* text at note 195, for the consequences of traditional 'privatization' in the sense of delegating or outsourcing hitherto state functions to private non-state actors.

[195] See August Reinisch, 'Governance without Accountability?', 44 *German Yearbook of International Law* (2001), 270. See also Wilde, *supra* note 68, at 113.

[196] Where non-state actors, usually TNCs, enter the public service-providing industry the traditional sphere of the *Drittwirkungs* debate comes into play. It may limit party autonomy and thus the providers' contractual freedom by an obligation to contract with private consumers, etc. In addition, competition

companies are now even running prisons and detention centres for immigration services.[197] It is obvious that this requires additional checks and controls on these private actors in the public field. The security forces in 'private prisons' may treat the inmates as badly as public police forces have done. This danger of the privatization of public functions has been clearly recognized by human rights bodies. For instance, in its Comment on the UK's state report under the ICCPR, the Human Rights Committee stated that it was 'concerned that the practice of the State party in contracting out to the private commercial sector core State activities which involve the use of force and the detention of persons weakens the protection of rights under the Covenant'.[198]

At the same time states are increasingly transferring large areas of public functions to international organizations. It is the combined pressure of 'out-sourced' activities that makes human rights protection against non-state behaviour such an urgent task for the future, because only an effective system of dealing with non-state actors will prevent a situation of unaccountability.

D. Globalization

Not surprisingly, since all the above reasons are already pointing towards it, globalization is also a prime suspect giving rise to many of the changes perceived in dealing with non-state actors and human rights. Of course, one should be very careful when talking about 'globalization' which means too many different things to different people. Pointedly, 'globalization' has been called 'the most overused and underspecified concept in the lexicon of the social sciences and policy sciences since the end of the cold war'.[199] It is not intended to develop a new theory or even a new definition of globalization here. However, building on a commonly shared understanding of some of the characteristic elements of globalization, it is interesting to see how many of the changes observed may be nicely explained. For our purposes, we can take 'globalization' to mean an increasing process of cross-border societal exchanges and transactions, not limited to economic ones, but including among others communication, security, culture, mobility, and environment, or, as it has been termed, the 'widening, deepening and speeding up of worldwide interconnectedness in all types of contemporary social life, from the cultural to the criminal, the financial to the spiritual'.[200] But 'globalization' did not just 'happen', it

law devices, similar to the prohibition against abusing a dominant position under Art 82 TEC, may help to tame the free play of market forces to the detriment of consumers through discriminatory pricing, etc.

[197] According to Kamminga, *supra* note 143, at 559, in the US 5% of prison capacity is run by private companies. The largest of these, Corrections Corporation, also operates overseas in the UK and Australia. See www.correctionscorp.com.

[198] Comments of the Human Rights Committee, U.N. Doc. CCPR/C/79/Add. 55, 27 July 1995.

[199] Richard Higgott, 'Economic Globalization and Global Governance: Towards a Post-Washington Consensus?', in Rittberger, *supra* note 71, 127, at 128.

[200] David Held, Anthony McGrew, David Goldblatt, and Jonathan Perraton, *Global Transformation: Politics, Economics and Culture* (1999) 2.

is also, to an important degree, the result of deliberate political choices. The neo-liberal credo of 'Reaganomics' and 'Thatcherism,' advocating economic liberalization, deregulation, and privatization,[201] subsequently espoused by the IFIs as Washington Consensus,[202] contributed largely to the 'retreat of the state'.[203]

If we identify as products of 'globalization' the increased influence of TNCs and other non-state actors, the role of global communications and the media, the enormously enhanced interdependence of states in the fields of trade and investment, services, and finance[204] we can observe the preconditions for some of the perceived changes described above. The way we deal with human rights and non-state actors can be seen both as a response to globalization and as a way of using the vehicles of globalization. Demands for human rights accountability on the part of non-state actors is in many respects a consequence of the fall-out, the negative spill-over, of an increasingly globalized economy. The loss of state control over TNCs, and the promotion of liberalization, privatization, and deregulation by IFIs, contributed to a situation where human rights, particularly social and labour rights, but also the environment and other societal goods, are increasingly threatened by non-state actors.[205] Codes of conduct may be regarded as the self-regulatory (or market-induced) approach to the loss of control over powerful non-state actors. Whereas increased resort to extraterritorially, feasible only for the few remaining powerful state or quasi-state actors such as the US and the EU, demonstrates the resolute will of the main international actor, the sovereign state, not to give in.

At the same time, the human rights response to globalization relies on the advances of globalization. Global consumer boycotts require an effective flow of information between activist NGOs and the media in order to convey their messages. They rely on the internet as a crucial vehicle of communication and have on various occasions masterfully employed modern technology for their purposes.[206] The information revolution makes corporate wrong-doing more rapidly and more broadly visible. At the same time, the enhanced information flow created by globalization has also contributed to a strengthening of the notion of truly universal and indivisible human rights, to what could be called a 'globalization of human

[201] See Christoph Scherrer, *Globalisierung wider Willen? Die Durchsetzung liberaler Außenwirtschaftspolitik in den USA* (1999).

[202] See Higgott, *supra* note 199, 127.

[203] See Susan Strange, *The Retreat of the State* (1996).

[204] See Andrew Clapham, 'Globalization and the Rule of Law', *The Review: International Commission of Jurists* No. 61 (1999) 17.

[205] See also UN Sub-Commission on the Promotion and Protection of Human Rights, Sessional working group on the working methods and activities of transnational corporations, Transnational Corporations and Other Business Enterprises, E/CN.4/Sub.2/2002/WG.2/WP.1/Add. 1, 24 May 2002, 3.

[206] The International Campaign to Ban Landmines, the NGO Coalition for an International Criminal Court, and the Anti-MAI campaign during the 1990s are impressive examples of the ability of non-state actors to influence political decisions of states. See Tanja Brühl and Volker Rittberger, 'From International to Global Governance: Actors, Collective Decision-Making, and the United Nations in the World of the Twenty-First Century', in Rittberger, *supra* note 71, at 8. See also Margaret E. Keck and Kathryn Sikkink, *Activists beyond Borders: Advocacy Networks in International Politics* (1998).

rights',[207] although one should not overlook the fact that this may be a one-sided Western view whose universality is denounced elsewhere as 'cultural imperialism'.

6. INSTEAD OF A CONCLUSION—OUTLOOK: WHAT CAN BE DONE TO SAFEGUARD HUMAN RIGHTS AGAINST INFRINGEMENTS BY NON-STATE ACTORS?

Where non-state actors replace states in the exercise of public functions, where states are no longer directly responsible for those activities, there is an apparent need to devise systems of accountability, including legal responsibility, for non-state behaviour, particularly, of behaviour that may infringe upon human rights. We are currently witnessing a very dynamic evolution of accountability mechanisms ranging from a more structured form of economic pressure, such as consumer boycotts and ethical investing, to legal liability enforced by national courts. All these are expressions of changes in legal thinking, in the conceptualization of the content and safeguarding of human rights. New frontiers are explored in theory and practice, by doctrine and litigation, and it is hard to predict which trends might ultimately crystallize into a new framework of human rights law relevant to non-state actors.

The following section focuses on the *lex lata* as well as the future potential for legal responsibility for non-state behaviour. Such responsibility systems could be located either on the level of international law or on the level of national law. The following section addresses these two options in turn. It starts by describing the growing perception that states may continue to be held responsible for non-state activities, including those of international organizations, TNCs, and NGOs. Still on the international law level, the question of direct responsibility of non-state actors and the concomitant issue of the availability of procedures and institutions is then addressed. Finally, the very lively development with regard to liability under domestic law before national courts is analysed and its potential for the future is addressed.

A. State Responsibility for Non-State Activities

In the traditional concept of human rights, only states were considered to be bound by human rights law and thus only state behaviour could lead to its responsibility in international law. However, we are now witnessing a clear departure from this purely state-centred approach. It has become more and more evident that even existing international human rights instruments could be interpreted so as to lead to state responsibility for non-state activities. This awareness has found its expression not only in legal doctrine,[208] but also in a number of decisions by international bodies.

[207] McCorquodale, *supra* note 85, at 91.

[208] See Clapham, *supra* note 29; Kamminga, *supra* note 143; Kinley, *supra* note 53, at 38; Peter T. Muchlinski, 'Human Rights and Multinationals: Is There a Problem', 77 *Foreign Affairs* (2001) 31.

The basic theoretical premise for 'vicarious' or 'indirect' human rights liability of states for non-state activities is deduced from various human rights instruments, which demand that states not only 'respect' human rights, but also 'ensure', 'protect', or 'secure' them.[209] If there is an obligation on states to ensure human rights for 'all individuals' then this obligation can be understood to imply that such duty may be violated if states fail effectively to protect against human rights infringements by non-state parties. Building on the traditional 'due diligence' requirement under customary international law,[210] human rights bodies have interpreted obligations to 'ensure' as state obligations to take measures to prevent non-state violations of human rights. As a consequence, the UN Human Rights Committee held states responsible for failing to do so adequately.[211] Also in its General Comments the Committee has used a concept of the 'horizontal effect' of human rights provisions. In its General Comment on the ICCPR's torture prohibition it stated: 'It is the duty of the State Party to afford everyone protection through legislative and other measures as may be necessary against the acts prohibited by Article 7, whether inflicted by people acting in their official capacity, outside their official capacity or in a private capacity'.[212] This idea of a vicarious state responsibility for non-state acts was formulated even more expressly by the UN

[209] For instance, Art 2(1) ICCPR, *supra* note 11, provides that 'each State Party [...] undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant [...]' Similarly, Art 1 of the American Convention on Human Rights provides that 'The States Parties to this Convention undertake to respect the rights and freedoms recognized therein and to ensure to all persons subject to their jurisdiction the free and full exercise of those rights and freedoms [...]' According to Art 1 ECHR 'The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention'.

[210] See Shaw, *supra* note 56, at 556. See also Giuseppe Sperduti, 'Responsibility of States for activities of private law persons', in Rudolf Bernhardt (ed), IV *Encyclopedia of Public International Law* (2nd ed., 2000) 216; Astrid Epiney, *Die völkerrechtliche Verantwortlichkeit von Staaten für rechtswidriges Verhalten im Zusammenhang mit Aktionen Privater* (1992).

See also the reasoning of the *Velásquez Rodríguez* case, *infra* note 214.

There is a clear tendency by international courts to interpret this due diligence requirement broadly. In 1997 the ECJ stunned many observers by holding France responsible for a violation of the free movement of goods provisions under the EC Treaty resulting from a failure by French officials to take all necessary measures to prevent private parties, French farmers, from obstructing the free movement of Spanish agricultural products: Case C-265/95, *Commission v. France* [1997] ECR I-6959.

[211] For instance, in *Delgado Paéz v. Colombia*, No. 195/1985, the Human Rights Committee found a violation of the right to personal security under Art 9(1) ICCPR because the respondent government had failed to take appropriate measures to protect the applicant. In *Santullo v. Uruguay*, No. 9/1977, a case involving torture by unidentified persons, the same Committee held that Arts 2 and 7 ICCPR had been violated because the government had failed to ensure the applicant's physical integrity with an official investigation.

[212] General Comment No. 20 (44) 1992 Art 7, CCPR/C/21/Rev. 1/Add.3. This broad view clearly contrasts with the restrictive notion used in the Convention against Torture, G.A. Res. 46 (XXXIX) (1984) Art 1 defines torture as: 'any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information

Committee on the Elimination of Discrimination against Women, which stated that: 'discrimination under the Convention is not restricted to action by or on behalf of Governments... Under general international law and specific human rights covenants, States may also be responsible for private acts if they fail to act with due diligence to prevent violations of rights or to investigate and punish acts of violence, and for providing compensation.'[213]

Regional human rights institutions have also espoused this reasoning in their case-law. In its well known *Velásquez Rodríguez* judgment, the Inter-American Court of Human Rights held in the case of disappearances that 'an illegal act which violates human rights and 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 as required by the Convention'.[214]

The Strasbourg Court has also adopted a similar reasoning with regard to human rights violations by non-state actors. In *Costello-Roberts*, a case concerning corporal punishment in a privately run school in the UK, the European Court of Human Rights held that 'the State cannot absolve itself from responsibility by delegating its obligations to private bodies or individuals'.[215] Though a majority found that the treatment did not amount to a violation of the Convention's prohibition of inhuman or degrading punishment, the Court's minority view expounded on the potential liability of the UK by adding that '[a] State can neither shift prison administration to the private sector and thereby make corporal punishment in prisons lawful, nor can it permit the setting up of system of private schools which are run irrespective of Convention guarantees'.[216] The European Court of Human Rights continues to rely on the underlying rationale of the *Costello-Roberts* case that states parties to the Convention cannot absolve themselves from their human rights obligations by delegating their tasks to non-state actors. It has also applied it with regard to acts of international organizations. In *Waite and Kennedy*, a case more narrowly dealing with the human rights compatibility of wide-ranging grants of

or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.'

[213] UN Committee on the Elimination of Discrimination against Women, *General Recommendation 19, 'Violence against women'*, 30 January 1992, U.N. Doc. A/47/38, para. 9.

[214] *Velásquez Rodríguez v. Honduras*, Inter-American Court of Human Rights, 29 July 1988, Ser. C, No. 4, 9 HRLJ 212 (1988), para. 172.

[215] *Costello-Roberts v. United Kingdom*, European Court of Human Rights, 1993, Series A, No. 247-C, para. 27.

[216] Ibid., Joint Partly Dissenting Opinion of Judges Russdal, Thór Vilhálmsson, Matscher, and Wildhaber, 64.

jurisdictional immunity to international organizations,[217] the Strasbourg Court stated very broadly that '[i]t would be incompatible with the purpose and object of the Convention, however, if the Contracting States were thereby [i.e. by establishing international organizations in order to pursue or strengthen their cooperation in certain fields of activity and by attributing to these organizations certain competencies and according them immunities] absolved from their responsibility under the Convention in relation to the field of activity covered by such attribution'.[218] Most recently, in the *Matthews* case, also known as the Gibraltar voting case,[219] this reasoning was re-confirmed. There the European Court of Human Rights found a human rights violation on the part of the UK stemming from an act of the international organization, the European Community. In the Court's view the violation of the Convention by the EC member state resulted from the member's failure to ensure that its obligations under EC law did not violate the ECHR. This case is also remarkable in respect of the procedural issue of bringing a complaint against an international organization's behaviour. For a long time it was well settled case-law of the European Commission of Human Rights that it would not allow claims against an organization's member states, either individually or collectively, for human rights violations attributable to the organization.[220]

The policy rationale underlying such 'vicarious' or 'subsidiary' liability is clear: to increase pressure on states by continuing to hold them responsible for 'out-sourced' or 'delegated' activity in order to make sure that they have a direct interest in regulating the behaviour of non-state actors to whom they have transferred stat. tasks. This idea was clearly expressed by the UN Human Rights Committee which, after displaying its concern about 'the practice of [a] State party in contracting out to the private commercial sector core State activities which involve the use of force and the detention of persons weakens the protection of rights under the Covenant',[221] underlined that a 'State party remains responsible in all circumstances for adherence to all articles of the Covenant'.[222] This reasoning applies to both international

[217] *Case of Waite and Kennedy v. Germany*, Eur. Court H.R., Judgment of 18 February 1999; available at http://ww.dhcour.coe.fr/hudoc. See August Reinisch, '*Case of Waite and Kennedy v. Germany*, Application No. 26083/94; *Case of Beer and Regan v. Germany*, Application No. 28934/95, European Court of Human Rights, 18 February 1999', 93 *AJIL* (1999) 933.

[218] *Waite and Kennedy v. Germany, supra* note 217, para. 67.

[219] *Denise Matthews v. United Kingdom*, ECtHR, Application No. 24833/94, Feb. 18, 1999; available at http://ww.dhcour.coe.fr/hudoc. See Henry G. Schermers, 'European Court of Human Rights: Matthews v. United Kingdom, case note concerning the decision of the European Court of Human Rights', 18 February 1999, 36 *Common Market L. Rev.* (1999), 673.

[220] Concerning the European Communities see *M(elchers) & Co. v. Federal Republic of Germany*, ECommHR, Application No. 13258/77, 9 February 1990, 64 DECISIONS AND REPORTS (1990), 138; concerning the European Patent Organization see *Heinz v. Contracting Parties who are also Parties to the European Patent Convention*, ECommHR, Application No. 12090/92, 10 January 1994, 76-A DECISIONS AND REPORTS (1994), 125.

[221] Comments of the HR Committee, U.N. Doc. CCPR/C/79/Add. 55, 27 July 1995.

[222] Ibid.

organizations and TNCs as well as to other non-state actors. States cannot 'absolve' themselves from their human rights obligations by delegating their tasks to private parties, individuals, or international organizations. The privately sponsored Maastricht Guidelines on Violations of Economic, Social, and Cultural Rights of 1997, going beyond the idea of continuing responsibility of states even for delegated activities, revert back to the original core of the responsibility of states to protect human rights by insisting that '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'.[223]

Clearly this reasoning has a great potential for the future. States, by becoming indirectly responsible for non-state human rights violations, will have a strong incentive to prevent such non-state behaviour. They can do so either by reducing the scope of delegated activities—a rather unlikely scenario given the present trends of privatization, outsourcing, and empowering of international organizations[224]—or by strengthening the legal framework calling for the observance of human rights by non-state actors.

B. Direct Accountability of Non-State Actors under International Law and before International Tribunals?

Direct accountability of non-state actors is underdeveloped in human rights instruments, and in international law in general, but it is not wholly excluded, either on the level of substance or that of procedure. At present one certainly cannot speak of any established system of international mechanisms whereby non-state actors are held directly accountable for human rights violations, even though one might recognize an increasing awareness that they are considered to be directly bound by human rights obligations.[225] However, a number of recent developments may lead to a profound change in how we conceptualize human rights obligations and the human rights accountability of non-state actors. It is not surprising that these are most advanced with regard to international organizations which have been considered to enjoy subjectivity or personality under international law for some time. Thus, the basic idea that they may be directly obliged under international law to respect human rights no longer meets major objections as a matter of principle. But we still seem to be far from establishing the 'jurisdiction' of international bodies to scrutinize the human rights performance of international organizations.[226]

International organizations are most likely to be considered potential 'objects' of human rights complaints before international human rights forums. Nevertheless,

[223] Maastricht Guidelines on Violations of Economic, Social, and Cultural Rights of 1997, reprinted in 20 *Human Rights Quarterly* (1998) 691. [224] See *supra* text at note 195.
[225] See *supra* text at note 173. [226] See Reinisch, *supra* note 57.

even in the most 'progressive' human rights forums, including the Strasbourg institutions, it is well settled case-law that human rights bodies generally do not consider themselves competent to decide upon human rights complaints against international organizations which are not parties to the relevant treaty instrument, even if all or some of its member states are.[227] The *Matthews* case suggests that the European Court of Human Rights might be willing to hear complaints against member states of international organizations with regard to activities attributable to those international organizations[228] but that does not appear to change the basic premise that international organizations, not parties to the ECHR, are not subject to the Court's jurisdiction. In the view of the European Court of Human Rights its jurisdiction is strictly limited to Contracting Parties.

However, insisting on such a formal requirement is not an absolute legal necessity in order to exercise jurisdiction. It would be possible to transfer the idea of a 'functional treaty succession' for these purposes. A 'functional treaty succession' of the EC into the legal position of the EC member states was assumed in the framework of the GATT.[229] When the EC had taken over all the relevant foreign trade powers from the member states it was treated as a member of the GATT without ever formally adhering to the agreement.[230] Conceivably, such a functional succession could be pertinent with regard to states which have transferred their human rights-sensitive tasks to international organizations.[231]

In the EU context, the *via regis* appears to be accession to the ECHR on the part of either the Union or at least the supranational organizations, EC and EURATOM. Such accession, rejected by an advisory opinion of the ECJ in the early 1990s,[232] would eliminate the procedural dilemma by directly subjecting the organization to the jurisdiction of the European Human Rights Court. It is interesting to note that, maybe partly as a result of the *Matthews* case,[233] the EU member states are

[227] See *Confédération Française Démocratique du Travail v. European Communities, alternatively their Member States (a) jointly and (b) severally*, European Commission on Human Rights, Application No. 8030/77, 10 July 1978, 13 DECISIONS AND REPORTS 231. [228] See *supra* note 219.

[229] Cf. Ernst-Ulrich Petersmann, 'The EC as a GATT Member: Legal Conflicts between GATT Law and European Community Law', in Hilf/Jacobs/Petersmann (eds), *The European Community and GATT* (1986) 23, at 73.

[230] The ECJ held in this regard that '[...] in so far as under the EEC Treaty the Community has assumed the powers previously exercised by Member States in the area governed by the General Agreement, the provisions of that agreement have the effect of binding the Community': *International Fruit Company v. Produktschap voor Gruenten en Fruit*, Joined Cases 21–24/72, [1972] ECR 1219, 1227.

[231] See the argument advanced by the European Commission in *Watson and Belmann* that '[f]ollowing its ratification by [all] the Member States, the Convention is now legally binding upon the Community': Case 118/75, [1975] ECR 1185, at 1194.

[232] *Accession of the Community to the European Convention for the Protection of Human Rights and Fundamental Freedoms*, Opinion 2/94, 28 March 1996, ECR I-1753. See also J. Kokott and F. Hoffmeister, 'Opinion 2/94, Accession of the Community to the European Convention for the Protection of Human Rights and Fundamental Freedoms', 90 *AJIL* (1996) 664.

[233] See *supra* note 219.

reconsidering this option.[234] Apparently they dislike being held accountable for acts of international organizations which they cannot fully control. If this motive can be verified it demonstrates that the indirect enforcement of human rights obligations of non-state actors by holding states liable in a 'vicarious' or 'subsidiary' fashion may prove effective.

To remain with the special case of the EU, one must also mention the possibility of bringing a human rights challenge against acts of the EC and EURATOM, and to a limited extent now also of the EU, before the ECJ. Though not originally provided for in the 1957 Treaty of Rome and never expressly included in any of the subsequent amendments, the fundamental rights challenge has been developed by the ECJ as one of the grounds for annulment,[235] thus opening up the procedural avenue of annulment actions for human rights complaints.[236] From a traditional international law perspective one could say that in such a case an international court scrutinizes the human rights performance of an international organization. Without entering into the debate about whether the European supranational organizations fit into the traditional category of international organizations,[237] one has to acknowledge that at present the fundamental rights jurisprudence of the ECJ more closely resembles the task of judicial/constitutional review of a national supreme or constitutional court than an outside human rights body assessing the human rights

[234] See Working Group on Incorporation of the Charter/Accession to the ECHR, Modalities and consequences of incorporation into the Treaties of the Charter of Fundamental Rights and accession of the Community/Union to the ECHR, CONV 116/02, WG II 1, Brussels, 18 June 2002, at 21, available at http://register.consilium.eu.int/pdf/en/02/cv00/00116en2.pdf. Meanwhile the Draft EU Constitution provides in Art 7 para. 2 first sentence that 'The Union shall seek accession to the European Convention for the Protection of Human Rights and Fundamental Freedoms', Draft Treaty establishing a Constitution for Europe, Brussels, 18 July 2003, CONV 850/03, available at http://european-convention.eu.int/docs/Treaty/cv00850.en03.pdf.

[235] According to Art 230 (ex 173) EC Treaty, the ECJ is competent to annul any 'act' of the EC institutions if its adoption constituted an 'infringement of the treaty or any rule of law relating to its application'.

[236] The early leading cases are Case 29/69, *Stauder v. City of Ulm* [1969] ECR 419; Case 11/70, *Internationale Handelsgesellschaft v. Einfuhr- und Vorratsstelle für Getreide und Futtermittel* [1970] ECR 1125; Case 4/73, *Nold v. Commission* [1974] ECR 491; Case 44/79, *Hauer v. Rheinland-Pfalz* [1979] ECR 3727. This judicial approach was 'codified' in Art 6(2) (ex F(2)) EU Treaty: 'The Union shall respect fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms signed in Rome on 4 November 1950 and as they result from the constitutional traditions common to the Member States, as general principles of Community law'.

See also B. De Witte, 'The Past and Future Role of the European Court of Justice in the Protection of Human Rights', in Philip Alston (ed), *The EU and Human Rights* (1999) 883; Antonio Cassese/Andrew Clapham/Joseph Weiler (eds), *European Union: The Human Rights Challenge* (1991); M. Dauses, 'The Protection of Fundamental Rights in the Community Legal Order' (1985) 10 *European Law Rev.* 398; J. Weiler and N. Lockhart, '"Taking Rights Seriously" Seriously: The European Court and its Fundamental Rights Jurisprudence', 32 *CMLRev.* (1995) 51 and 579; N. Neuwahl and A. Rosas (eds), *The European Union and Human Rights* (1995).

[237] Since its 1964 landmark case *Costa v. ENEL*, Case 6/64 [1964] ECR 585, the ECJ asserted that the EC stands for a 'new autonomous legal order'.

conformity of an international organization. Apart from such doctrinal difficulties with the possibility of generalizing from the EU example one has to recognize that the fundamental rights protection within the EU legal order is unique and has not (yet) been followed by other international organizations.

It is unclear whether the potential for human rights scrutiny of the acts of international organizations can be extended to other non-state actors, such as TNCs or NGOs. On the international level there is a definite lack of procedures and/or institutions available for this task. The question is whether it is still convincing to attribute this accountability gap to the lack of international legal personality of these non-state actors. International law provides many examples where non-state actors, particularly TNCs, have direct access to international dispute-settlement procedures and where they are considered to enjoy rights directly under international law.[238] TNCs appear as plaintiffs against states in various *ad hoc* and institutionalized arbitration systems, such as that under the ICSID Convention.[239] One could thus argue that they should have not only rights but also obligations. If one remains with the ICSID Convention as a point of reference, one can see that the reciprocal element of direct obligations is already included there. The investors as non-state parties may not only institute arbitration, they may also be sued before an ICSID panel. Thus, one might argue that it would be a progressive next step to establish judicial or quasi-judicial forums competent to hear human rights complaints against TNCs. The problem in the human rights field is, of course, that we would be dealing with complaints by non-state actors, the victims of human rights violations, against other non-state actors: private actors against private actors. This is different from the mixed arbitration in the area of investment law. Nevertheless, the broadening of the spectrum of entities considered to be in a position to enjoy rights and obligations, including procedural standing before international dispute-settlement systems, demonstrates that human rights mechanisms for non-state actors are no longer wholly inconceivable on the international level.

It would appear, though, that such a major structural change required action by states to create such mechanisms. One would expect that states could decide to establish human rights institutions competent to deal with violations by non-state actors by treaty law. Given the reluctance of human rights bodies to extend their jurisdiction even with regard to international organizations, it appears unlikely that existing institutions would be willing to do so with regard to other non-state actors. However, one should not underestimate the possibility of a progressive case-law that may at least provide fertile ground for enlarging the circle of human rights obligees. It is perfectly possible that human rights institutions may become more assertive in

[238] Mixed arbitration is evidence that TNCs may have direct access to dispute settlement on the international level. See Peter Malanczuk, *Akehurst's Modern Introduction to International Law* (1997) 101.

[239] Convention on the Settlement of Disputes between States and Nationals of Other States, 18 March 1965, reprinted in 4 ILM (1965) 532. See Christoph C. Schreuer, *The ICSID Convention: A Commentary* (2001).

the exercise of their jurisdiction. While at present one could hardly conceive of, for example, the UN Human Rights Committee entertaining a communication complaining of TNC or NGO behaviour,[240] there are already indications in the current practice of adopting General Comments on provisions of the ICCPR and the ICESCR by the two Committees that they are willing to express their view on the human rights conformity of non-state behaviour. A pertinent example can be found in General Comment No. 8 on economic sanctions and respect for economic, social, and cultural rights[241] of the UN Committee on Economic, Social, and Cultural Rights. In this Comment the Committee, on the one hand, carefully stated that it did not in any way call into question the necessity for the imposition of sanctions in appropriate cases in accordance with Chapter VII of the UN Charter; on the other hand, it went on to assert that the Charter's human rights provisions 'must still be considered to be fully applicable in such cases'.[242] Thus, it did—though only incidentally—pronounce on the human rights obligations of an international organization, the UN. In its General Comment No. 14 on the right to the highest attainable standard of health[243] the CESCR also went beyond reaffirming an indirect human rights obligation on states to ensure that non-state actors do not violate human rights. It broadly asserted that '[w]hile only States are parties to the Covenant and thus ultimately accountable for compliance with it, all members of society—individuals, including health professionals, families, local communities, intergovernmental and non-governmental organizations, civil society organizations, as well as the private business sector—have responsibilities regarding the realization of the right to health'.[244] Similarly, the UN Human Rights Commission has indicated its willingness to consider non-state human rights violations under the 1235 and 1503 procedures.[245] The examples of the ILO and OECD supervision mechanisms[246] may also be worth considering. Although both codes are also legally non-binding, they provide for standardized reporting obligations and for systematic periodic review by an independent body.

[240] This is suggested by UN Sub-Commission on the Promotion and Protection of Human Rights, Sessional working group on the working methods and activities of transnational corporations, Transnational Corporations and Other Business Enterprises, E/CN.4/Sub.2/2002/WG.2/WP.1/Add. 1, 24 May 2002, 26, as the 'creation of additional reporting requirements by States' which would 'request States to include reports about the compliance of business enterprises' or even the power 'to receive [individual] communications regarding States that have failed to take effective action in response to businesses that have violated the respective treaties'.

[241] UN Committee on Economic, Social, and Cultural Rights, General Comment No. 8: 'The relationship between economic sanctions and respect for economic, social and cultural rights', 5 December 1997, E/C.12/1997/8.

[242] Ibid., para. 1.

[243] UN Committee on Economic, Social, and Cultural Rights, General Comment No. 14: 'The right to the highest attainable standard of health', 11 August 2000, U.N. Doc. E/C.12/2000/4.

[244] Ibid., para. 42.

[245] At least with regard to irregular armed groups and drug traffickers. See U.N. Doc. E/CN.4/1990/SR.54.

[246] See *supra* notes 90 and 91.

On the EU level, the plans of the European Parliament go even further. It has recommended that a 'code of conduct for European Multinationals'[247] should comprise the establishment of a European Monitoring Platform. While no legislative action has been taken yet, the European Parliament decided to set up its own monitoring mechanism comprising public hearings with TNC representatives 'in order to discuss specific cases, of both good and bad conduct'.[248]

Another potential for a truly international human rights scrutiny of non-state actors may lie in the development of international criminal procedures. The example of the Nuremberg Tribunal already shows that it is not only individuals whose activities may be investigated, but also corporations. There was also some debate about including a provision enabling the new ICC to exercise criminal jurisdiction over legal persons.[249] Although no such provision was eventually included in the Rome Statute, it demonstrates that there is potential for corporate criminal responsibility for human rights violations before international institutions.

If even criminal responsibility under international law is no longer wholly excluded for non-state actors this demonstrates that there is a clear potential for direct human rights accountability under international mechanisms to be created if the necessary political will exists. Though the formation of such political will may be a formidable task, the important point is that it should be no longer possible to object to it on the basis of theoretical conceptions about the structure of international law. To put it differently and more simply: as long as states do not want non-state actors to be directly accountable for human rights violations, they will not become accountable. When states want them to become accountable, they can achieve this by establishing the required institutions and procedures.

C. Direct Human Rights Accountability Before National Courts

We have seen that national courts play an increasingly important role in forcing non-state actors to respect human rights standards. Of course, one has to differentiate between the various types of non-state actors. Domestic courts generally lack jurisdiction over international organizations. Whether as a result of constituent treaties, headquarters agreements, or customary international law, courts in virtually all countries respect the functional—and as a matter of practice largely

[247] EP Resolution *supra* note 50.

[248] Ibid., para. 20. Such hearings took place in October 2001 concerning European oil companies in Burma. See De Schutter, *supra* note 51.

[249] Cf. Art 23 para. 5 Draft Statute of the International Criminal Court, A/CONF.183/2/Add.1 (1998). See Andrew Clapham, 'The Question of Jurisdiction Under International Criminal Law Over Legal Persons: Lessons from the Rome Conference on an International Criminal Court', in Menno T. Kamminga and Saman Zia-Ziarifi (eds), *Liability of Multinational Corporations Under International Law* (2000) 139. See also Theodor Meron, 'Is International Law Moving Towards Criminalization?', 9 *EJIL* (1998) 18, at 19.

absolute—immunity of international organizations.[250] There is no noticeable trend yet that, in the aftermath of the *Pinochet* decisions,[251] the jurisdictional immunity of international organizations would be narrowed by carving out a *jus cogens* or human rights exception, although that may be an option. Even where plaintiffs have asserted claims phrased as human rights violations national courts have not pierced the immunity shield of international organizations.[252]

The role of national courts *vis-à-vis* TNCs and NGOs is quite different. These non-state actors do not enjoy any privileged standing. As legal persons constituted under the laws of a particular state, or in the case of TNCs and international NGOs frequently under the laws of a number of states, they are subject to the law and jurisdiction of (all) these states. The 'only' jurisdictional problems that may arise are those stemming from the extraterritoriality issue often involved.[253] In this context the open questions are mainly: whether national courts may lawfully (from an international law perspective) extend their jurisdiction over foreign non-state entities; whether they may hold non-state actors which are clearly subject to their jurisdiction liable for acts of other non-state actors, such as foreign subsidiaries or foreign parent companies; and whether (probably least controversially) they may extend their jurisdiction over their own non-state entities for activities abroad. Of course, this entails some very precarious issues and it will be difficult to find the right balance in each case. To the critics of extraterritorial human rights litigation this legal tool sometimes amounts to 'legalized coercion' by putting pressure upon domestic subsidiaries (or parents) of TNCs. By this type of litigation, foreign parents may be compelled to act or refrain from acting in a particular way. Similarly pressure may lie upon domestic parent companies in order to force foreign subsidiaries to behave in a certain way.

The currently booming transnational tort litigation in the US and elsewhere displays remarkable parallels to the 'vicarious liability' concept pursued before

[250] See August Reinisch, *International Organizations Before National Courts* (2000). See also Karel Wellens, *Remedies against International Organizations* (2002).

[251] See Andrea Bianchi, 'Immunity Versus Human Rights: The Pinochet Case', 10 *EJIL* (1999) 237; Jürgen Bröhmer, 'Diplomatic Immunity, Head of State Immunity, State Immunity: Misconceptions of a Notorious Human Rights Violator, Case Note concerning the Decision of the House of Lords, 9 December 1998', 12 *Leiden Journal of International Law* (1999) 361; Curtis A. Bradley and Jack L. Goldsmith, 'Pinochet and International Human Rights Litigation', 97 *Michigan Law Review* (1999) 2129; Ruth Wedgwood, 'International Criminal Law and Augusto Pinochet', 40 *Virginia Journal of International Law* (2000) 829.

[252] In *Abdi Hosh Askir v. Boutros Boutros-Ghali, Joseph E. Connor, et al.*, 933 F.Supp. 368 (S.D.N.Y. 1996) plaintiff tried to recover damages for unauthorized and unlawful possession of his property in Somalia, making a quasi-expropriation claim, and thereby implicitly challenged the legality of the UN's peace-keeping activities. The court, however, dismissed the case for lack of jurisdiction because the defendant organization enjoyed immunity from suit. See Reinisch, *supra* note 250, at 200 and 206. See also Michael Singer, 'Jurisdictional Immunities of International Organizations: Human Rights and Functional Necessity Concerns', 36 *Virginia Journal of International Law* (1995) 53.

[253] See *supra* text starting at note 93.

various human rights bodies.[254] But these national court decisions may also provide a fertile ground for the growing acceptance of direct human rights obligations on non-state actors.[255]

Finally, and here the discussion of extraterritoriality in pursuit of human rights completes the circle to the re-emergence of codes of conduct for the same purpose, this type of direct accountability before national courts appears to be the most efficient legal tool in securing human rights *vis-à-vis* corporate activities. The reason for this success can probably be found in the fact that the specific characteristics of human rights litigation in common law countries have effectively incorporated the economic arguments in favour of human rights compliance into legal ones. With the cost of the negative publicity surrounding such high-profile cases, and the threat of punitive damages at the end of an already very damaging process, TNCs have realized that respecting human rights makes good business sense. When courts no longer accept the TNC argument that human rights are 'none of their business', this will become costly. It is thus not surprising that prudent corporations make provisions for this eventuality by adopting their own codes of conduct in order to forestall any cases of potential liability. With all the problems of supervision and enforcement surrounding purely voluntary codes, the ultimate threat of costly legal liability remains a valuable counterpart to them.

[254] See *supra* text starting at note 209.

[255] Cf. *Kadic v. Karadzic*, 70 F.3d 232, 239 (2d Cir. 1995): 'We do not agree that the law of nations, as understood in the modern era, confines its reach to state action. Instead, we hold that certain forms of conduct violate the law of nations whether undertaken by those acting under the auspices of a state or only as private individuals.'