

Human Rights and Multinational Enterprises: How Can Multinational Enterprises Be Held Responsible for Human Rights Violations Committed Abroad?

Marion Weschka*

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Introduction

A considerable feature of globalization is the increasing economic power of Multinational Enterprises (MNEs) or Transnational Corporations (TNCs),¹ which

* Ass. jur., LL.M., Mag. rer. publ. This essay was written as a dissertation in the course of the LL.M. (Human Rights) programme at the University of Leicester (UK) in the academic year 2004/2005. I am grateful to my supervisor Dr. Loveday H o d s o n for her helpful advice.

¹ Although the definition of “Multinational Enterprises” or “Transnational Corporations” has created a lot of difficulties over the years, for the purposes of this essay, the terms “Multinational Enter-

occasionally even exceeds that of nation-states. A combined list of all nation-states according to their GDP and all the corporations in the world according to the size of their annual revenues from the sale of goods and services in the year 1997 shows 51 MNEs and only 49 nation-states among the top 100.² This significant economic power combined with their ability to choose globally the state with the most advantageous conditions for setting up business, which will very often include the lowest labour costs and the laxest rules for the protection of the environment, conveys substantial bargaining power to MNEs, especially with regard to developing countries. These countries have an increased interest in attracting TNCs because of the capital they bring into the country, the much-needed jobs they provide and the positive effects associated with the presence of MNEs such as their “capacity to foster economic well-being, development, technological improvement and wealth”.³ However, often TNCs do not meet these expectations. To the contrary, they can misuse their power, pose a substantial threat to human rights and have a negative impact on the “lives of individuals through their core business practices and operations, including employment practices, environmental policies, relationships with suppliers and consumers, interactions with Governments and other activities”.⁴

Accordingly, MNEs can be associated with human rights violations in a number of different ways. They can infringe human rights directly, e.g. by using child or forced labourers,⁵ by suppressing trade unions, by making their employees handle dangerous substances without the necessary health and safety precautions,⁶ by establishing inhuman working conditions in general, by discriminating against women or ethnic or religious minorities in the workplace, by using land belonging to indigenous people,⁷ by polluting the environment and destroying the health and the livelihood of the people living in the region,⁸ etc. Indirectly, MNEs can be

prises” and “Transnational Corporations” are used interchangeably. For a detailed discussion of the different definitions, see Muchlinski, P.T., *Multinational Enterprises and the Law*, 1995, at 12-15. The current trend is towards a broad and all-embracing definition of “transnational corporations”. Accordingly, “[t]he term ‘transnational corporation’ 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”; see Commentary on the Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights, UN Doc.E/CN.4/Sub.2/2003/38/Rev.2, 26/08/2003, <<http://documents-dds-ny.un.org/doc/UNDOC/GEN/G03/160/18/pdf/G0316018.pdf?OpenElement>> (last visited: 07/07/2006).

² See Loomis, W., *The Responsibility of Parent Corporations for the Human Rights Violations of their Subsidiaries*, in: Addo, M.K. (ed.), *Human Rights Standards and the Responsibility of Transnational Corporations*, 1999, 145-159, at 155.

³ Commentary on the Norms, note 1 above, Preamble.

⁴ Ibid.

⁵ See e.g. below at II.3.b) (*Doe v. Unocal*).

⁶ See e.g. below at II.2.a)-c) (*U.K.-cases*).

⁷ See e.g. below at II.3.b)-c) (*ATCA-cases*).

⁸ See e.g. below at II.3.c)-d).

complicit in or benefit from human rights violations committed by host states in order to “protect their business”, e.g. if company facilities are guarded against peaceful protesters by the state military, which uses excessive violence.⁹

Due to the campaigning of NGOs, international media coverage and increasing social awareness, MNEs can no longer merely pursue the kind of profit-oriented attitude that is supported by writers such as Milton Friedman, according to whom the ultimate social duty of a corporation is to make profit and nothing else.¹⁰ From a moral standpoint, MNEs are not only responsible for the financial benefit of their shareholders but for the well-being of all stakeholders, i.e. for their employees, the indigenous population, consumers and in general everyone affected by their business activities.¹¹ However, if MNEs are directly involved in human rights violations or profit from human rights violations by the host state, it is not sufficient to assume a mere moral responsibility. Instead, it should be possible to hold TNCs legally responsible under binding international law, which is enforceable and provides for the compensation of damages for victims. Unfortunately, this is not yet reality. Although since the end of World War II, an ever-growing number of international treaties for the protection of human rights has developed, international law is still based on nation-states and does not address TNCs directly as its subjects.¹² This ignorance of international law as regards the changing realities of globalization allows TNCs to slip through the net of human rights regulations too often.¹³

This essay examines the existing means by which TNCs can be held responsible for violations of international human rights. It asks if these means are sufficient or if the present regime must be developed in the future in order to guarantee a better protection of human rights against violations by MNEs. Firstly, this paper briefly assesses the difficulties for host states¹⁴ to implement international human rights efficiently against TNCs. The second part of this paper examines how home states¹⁵ can hold TNCs accountable for human rights violations abroad. Apart from discussing the general difficulties, it looks firstly at case law examples from the U.K. and then at examples from the U.S., where under the Alien Tort Claims Act serious human rights violations committed by TNCs abroad can be addressed. The third part briefly assesses the efficiency of Codes of Conduct, whereas the fourth

⁹ See e.g. below at II.3.b)-d).

¹⁰ Friedman, M., *Capitalism and Freedom*, 1962, 133.

¹¹ For this rather recent shift towards more “corporate social responsibility” see Pegg, S., *An Emerging Market for the New Millennium: Transnational Corporations and Human Rights*, in: Frynas, J.G./Pegg, S. (eds.), *Transnational Corporations and Human Rights*, 2003, 1-32, at 8; for a definition of “stakeholders”, see Commentary on the Norms, note 1 above, para. 22.

¹² See Shaw, M., *International Law*, 5th ed., 2003, at 224-225 and 252.

¹³ See Thürrer, D., *The Emergence of Non-Governmental Organizations and Transnational Enterprises in International Law and the Changing Role of the State*, in: Hofmann, R. (ed.), *Non-State Actors as New Subjects of International Law*, Berlin, 1999, 37-58, at 47-49.

¹⁴ For a definition of “host states” see below, part I, at 628.

¹⁵ For a definition of “home states” see below, part II, at 629.

part considers four different regulations of MNE-conduct by international organizations. Finally, this essay will consider how the legal methods of holding MNEs accountable for human rights violations might be improved in the future, and which implications result from the growing importance of MNEs for the development of international law.

I. Holding MNEs Accountable by Host States

With a few exceptions, international law recognizes only states as primary rights and duty bearers.¹⁶ While this does not necessarily imply that private actors like MNEs can violate human rights with impunity, it does mean that they are never held directly responsible for doing so by international organs.¹⁷ Responsibility, if it is to be placed anywhere, always falls back on states for failing to offer adequate protection against violations by private actors.¹⁸ International law holds the state responsible and ignores the original human rights violator, the private company. Therefore, the primary duty bearer under international law to ensure that MNEs do not infringe human rights is the state where the MNE operates and the human rights violations potentially occur, i.e. the host state.¹⁹

The host state should protect against infringements of human rights by MNEs through national laws and its own law enforcement mechanisms.²⁰ However, given the above-mentioned economic power of MNEs and their international mobility, as well as the dependence of many countries on international direct investment, it is not surprising that host states, and especially developing countries, occasionally fail to take efficient action against MNEs that violate human rights on their territory.²¹ Even if states are willing to take action, MNEs could react to state-sanctions with the relocation of their business to another more corporate-friendly state. Moreover, even before a state enforces human rights laws against them, MNEs can threaten to leave the country in such a situation, which will most certainly work as a disincentive for imposing any state-sanction, considering the danger of losing foreign investment, jobs and technical expertise.²² Even if the willingness to prose-

¹⁶ See Cassese, A., *International Law*, 2nd ed., 2005, at 71; also below part V.

¹⁷ Joseph, S., *Taming the Leviathans: Multinational Enterprises and Human Rights*, (1999) 46 *Netherlands International Law Review*, 171-203, at 175-176.

¹⁸ Muchlinski, P.T., *Human Rights and Multinationals: Is There A Problem?*, (2001) 77 *International Affairs*, 31-47, at 42 with further reference.

¹⁹ The host state is only responsible under international law if it is a party to the relevant human rights treaties or if the human rights in question form part of customary international law and *ius cogens*; see e.g. Schmalenbach, K., *Multinationale Unternehmen und Menschenrechte*, (2001) 39 *Archiv des Völkerrechts*, 57-81, at 62.

²⁰ Joseph, note 17 above, at 176.

²¹ *Ibid.*

²² See *ibid.*; Windfuhr, M., *Soziale Menschenrechte und Globalisierung*, in: von Arnim, G. et al. (ed.), *Jahrbuch Menschenrechte 2000, 1999*, 173-185, at 173: E.g. in El Salvador, workers' attempts to improve the working conditions were dismissed by MNEs and the government highlighting that the

cute MNEs existed, many developing countries would be incapable of initiating the necessary legal procedures, as they lack financial resources as well as a functioning and non-corrupt court system, which would be necessary in order to conduct efficient investigations.²³ Consequently, due to the relative imbalance of power and the dependence of developing countries on the presence of TNCs, one cannot rely on the regulation of the human rights impact of TNCs by host states, but one must look for other ways of enforcing human rights laws against TNCs.

II. Holding MNEs Accountable by Home States

As 90% of all TNCs have parent companies in developed nations,²⁴ one might expect that a more promising way to hold MNEs responsible for human rights violations committed in developing countries would be to take legal action against them in their countries of origin. This should avoid all the above-mentioned host state problems because home states in the developed world usually have higher human rights standards, a functioning and non-corrupt legal system, the financial and personal resources and the necessary knowledge to investigate efficiently and bring TNCs to justice.²⁵ Moreover, international law recognizes the right of home states to exercise extraterritorial jurisdiction over their nationals committing wrongs abroad.²⁶ However, the prosecution of MNEs by home states faces some difficulties due to the extraterritoriality of the offence and the special legal situation of TNCs.

1. Problems of Home State Jurisdiction: The Corporate Veil, State Sovereignty and *Forum Non Conveniens*

The major problem for efficient home state jurisdiction is posed by the so-called “corporate veil”.²⁷ Although the public usually perceives TNCs as single uniform enterprises, from a legal point of view, under the surface of a common corporate design complex structures of a multitude of intertwined corporate entities are hid-

neighbouring countries Honduras and Guatemala were already waiting for a relocation of the enterprise.

²³ See Joseph, note 17 above, at 177; Johns, F., *The Invisibility of the Transnational Corporation: An Analysis of International Law and Legal Theory*, (1993-1994) 19 *Melbourne University Law Review*, 893-923, at 910.

²⁴ Fowler, R.J., *International Environmental Standards for Transnational Corporations*, (1995) 25 *Environmental Law*, 1-30, at 2.

²⁵ See Joseph, note 17 above, at 177-178.

²⁶ See *ibid.*, at 177, Muchlinski, note 1 above, at 124.

²⁷ This terminology was used e.g. by the International Court of Justice, *Case concerning the Barcelona Traction, Light and Power Company, Limited*, Judgment of 05/02/1970, ICJ-Reports 1970, 4-357, at 39.

den.²⁸ These different corporate bodies may be subject to uniform control but legally they form separate entities. Accordingly, as regards their legal personality, subsidiaries operating abroad are independent from their parent companies as separate corporate bodies.²⁹ They are subject to the legal order of the host state and take on host state “nationality”,³⁰ because the principle of territoriality means that each separate entity belonging to a TNC is subject to the laws of the state where it has established its business.³¹ Therefore, the nationality-requirement for extraterritorial jurisdiction by the home state is not fulfilled and the prosecution of MNEs by the home state for human rights violations committed abroad is perceived as an interference into the *domaine réservé* of the host state and as a violation of its state sovereignty.³²

However, the concepts of state sovereignty and domestic jurisdiction are not absolute. They are limited by fundamental international human rights norms.³³ The international community agrees, for example, that torture, slavery, forced labour, genocide, ethnic cleansing, summary executions and racial or religious discriminations form intolerable violations of human rights.³⁴ These fundamental human rights principles have become part of customary international law and *ius cogens*, which all states are obliged to respect as so-called obligations *erga omnes*.³⁵ Consequently, today states can no longer claim that violations of these fundamental human rights belong to their *domaine réservé* and are out of bounds for external control.³⁶

Therefore, the enforcement by the home state of fundamental customary international human rights norms does not infringe host state sovereignty.³⁷ Consequently, under these circumstances home state jurisdiction over MNEs violating

²⁸ See Blumberg, P., Asserting Human Rights against Multinational Corporations under United States Law: Conceptual and Procedural Problems, (2002-Supplement), 50 American Journal of Comparative Law, 493-523, at 493-494; e.g. British Petroleum consists of over 1000 “separate interrelated corporations acting under common control”.

²⁹ See *ibid.*, at 495.

³⁰ The determination of a legal person’s “nationality” is very complex and controversial. The majority believes that the country where the company is registered under national law is decisive for the determination of its “nationality”. Others hold that the company’s nationality is determined by the state where the chief administration office is situated. Still others trust that the country where the company is economically controlled from should be the main criterion for determining its nationality. This theory could be interesting for human rights protection against TNCs. Unfortunately, the ICJ rejected this “control-theory” in its *Barcelona Traction* Case, note 27 above, at 39 et seq.; see Kimminich, O./Hobe, S., Einführung in das Völkerrecht, 7th ed., 2000, at 96 and Schmalenbach, note 19 above, at 74.

³¹ Schmalenbach, note 19 above, at 73.

³² See *ibid.*, at 72-73.

³³ See *ibid.*, at 75.

³⁴ See e.g. Cassese, note 16 above, at 202-203; Schmalenbach, note 19 above, at 62.

³⁵ The concept of obligations *erga omnes* with regard to human rights was established in the *Barcelona Traction* Case, note 27 above, at 32.

³⁶ See Shaw, note 12 above, at 574-575, 592-593.

³⁷ See Schmalenbach, note 19 above, at 75.

human rights abroad is possible. Still, there is no duty under international law for home states to exercise extraterritorial jurisdiction over their TNCs committing human rights violations abroad.³⁸ In the absence of such an obligation, home states are understandably reluctant to prosecute their MNEs extraterritorially, because as long as not all states exercise a similar close control over their MNEs, this would mean a “competitive disadvantage” for their own TNCs.³⁹

Accordingly, home state regulation of TNCs abroad is only possible under the above-mentioned limited circumstances in which the state sovereignty of the host state is not infringed. This would be different if the ICJ had not ruled out the “control-theory” for the determination of the law applicable to the company abroad and had allowed a “piercing of the corporate veil” acknowledging the control power that the parent company can still exercise over her subsidiary.⁴⁰

A related obstacle for the exercise of efficient home state jurisdiction over TNCs abroad is the Anglo-American doctrine of *forum non conveniens*, according to which courts have “discretion to decline to hear a case when there exists a foreign court more appropriately situated to hear the matter”.⁴¹

Since the 1990s, a series of high-profile cases against British parent companies for human rights violations abroad came before the English courts. The following paragraphs assess if the way in which the English courts dealt with the corporate veil and the principle of *forum non conveniens* gives rise to hopes for a more proactive role of home state courts holding TNCs responsible for human rights violations committed abroad.

2. United Kingdom Case Law

a) *Thor Chemicals Holdings Ltd.*

In the 1980s, Thor’s production of mercury-based chemicals in England was severely criticized by the Health and Safety Executive because blood and urine tests of the employees had revealed elevated mercury levels.⁴² Subsequently, Thor relocated its mercury manufacturing plants from England to South Africa without tackling the underlying health and safety issue and continued its production as before. Moreover, the company primarily employed untrained casual workers who were discharged as soon as their mercury levels became too high being replaced “by new casual labourers who queued at the factory gate for work each day”.⁴³

³⁸ Joseph, note 17 above, at 181.

³⁹ See *ibid.*, at 184.

⁴⁰ See note 30 above.

⁴¹ Joseph, note 17 above, at 178.

⁴² For a case summary see Meeran, R., *The Unveiling of Transnational Corporations: A Direct Approach*, in: Addo, note 2 above, 161-170, at 164-165.

⁴³ *Ibid.*, at 165.

This scandalous mercury exposure of Thor's South African employees was discovered in 1992 after three workers had died and others suffered from different levels of mercury poisoning. On behalf of 20 employees, compensation claims were brought before the English High Court alleging that the English parent company was responsible for the damage "because of its negligent design, transfer, set-up, operation, supervision and monitoring of an intrinsically hazardous process".⁴⁴ Thor's application to stay the proceedings due to the principle of *forum non conveniens* was refused because of the claims' strong connection with England, and its appeal was struck out because Thor had acceded to the jurisdiction by serving a defence.⁴⁵ Finally, in 1997, the claim was settled for £1,300,000.⁴⁶

b) *RTZ Corp. Plc.*

Rio Tinto, the Namibian subsidiary of the English-based parent company RTZ, was exploiting a uranium mine in Namibia where the plaintiff, Mr. Connelly worked.⁴⁷ During the time of his employment, the dust levels at the mine were excessively high, facemasks were not provided, and consequently, the plaintiff developed laryngeal cancer. At all times, RTZ was directly responsible for strategic decisions concerning the quantity of the output of the mine and the resulting dust levels "without ensuring that effective precautions were taken to protect workers against the hazards of uranium dust exposure".⁴⁸ Despite this direct control of the parent company, the High Court decided to stay the action on forum grounds as it found that "Namibia was the 'natural forum' for the case".⁴⁹ In the following proceedings, this decision was never doubted and the issue was limited to the question of whether the plaintiff could successfully bring a claim in Namibia where no legal aid was available for him while in England he could either obtain legal aid or hire a lawyer on a "no win, no fee" basis.⁵⁰ Finally, the House of Lords allowed Mr. Connelly's case to proceed in England due to the practical obstacles he faced pursuing his claim in Namibia.⁵¹

⁴⁴ Ibid.

⁴⁵ Court of Appeal, *Ngcobo v. Thor Chemicals Holdings Ltd.*, 09/10/1995, [1995] TLR 579; see also Court of Appeal, *Sithole v. Thor Chemicals Holdings Ltd.*, 03/02/1999, reported in *The Times* of 15/02/1999.

⁴⁶ Meeran, note 42 above, at 165.

⁴⁷ For a case summary see *ibid.*, at 165-167.

⁴⁸ *Ibid.*, at 166.

⁴⁹ *Ibid.*; High Court decision referred to and confirmed by Court of Appeal, *Connelly v. RTZ Corporation Plc. and Another*, 24/07/1995, [1996] Q.B. 361.

⁵⁰ Court of Appeal, *Edward Connelly v. RTZ Corporation Plc and RTZ Overseas Services*, 02/05/1996, [1997] I.L.Pr. 643, deciding in favour of the plaintiff.

⁵¹ House of Lords, *Connelly v. RTZ Corp. Plc.*, 24/07/1997, [1997] 3 WLR 373.

c) *Cape Plc.*

Cape Plc. mined asbestos in several locations in South Africa between 1890 and 1979.⁵² For some time, the English parent company directly controlled the business, while for the remaining time, operations were carried out by wholly-owned subsidiaries. In the 1970s, in some of the mines, virtually no health and safety precautions existed and the asbestos dust levels exceeded the UK limits by many times. Not only were workers exposed to high asbestos dust levels, but so were the villagers living nearby. In 1997, three workers suffering from asbestosis and two environmentally exposed residents with an asbestos-related lung cancer sued Cape PLC in the English High Court for compensation.⁵³ After Cape's application to stay the proceedings on forum grounds had been granted in the first instance, this decision was reversed on appeal, pointing out that "the alleged breaches of ... duty of care ... took place in England rather than in South Africa".⁵⁴

d) Conclusions from the English Case Law

This case law has been welcomed by some as "a more lenient way" of dealing with the doctrine of *forum non conveniens*⁵⁵ and a warning to TNCs that in the future they would no longer be able to apply double standards regarding health and safety protection of their workers in Britain and overseas, because their possibilities of hiding behind the corporate veil and their ability to shift all the responsibility to their subsidiaries abroad were shrinking.⁵⁶ On the other hand, it caused concerns in the Lord Chancellor's Department, which issued a warning that this case law might persuade U.K.-based MNEs to relocate their operations outside the U.K. and which subsequently contemplated introducing legislation in order to overturn this case law.⁵⁷

However, these reactions seem to be based on an over-interpretation⁵⁸ of Lord Hoffman's dissenting opinion in the *Connolly* case against Rio Tinto holding that "any multinational with its parent company in England will be liable to be

⁵² For a case summary see Meeran, note 42 above, at 167-169.

⁵³ High Court decision referred to by Court of Appeal, *Lubbe v. Cape Plc.*, 30/07/1998, [1999] I.L.Pr.113.

⁵⁴ *Ibid.*, at 127. Thereafter, in a group action more than 3000 plaintiffs made similar allegations against the defendant. A new appeal by the defendant to stay the action on forum grounds was successful in the Court of Appeals due to the mass nature of litigation, but the House of Lords allowed the case to proceed in England; Court of Appeal, *Rachel Lubbe v. Cape Plc.*, [2000] I.L.Pr. 438, 29/11/1999; House of Lords, *Lubbe and Others v. Cape Plc.*, [2000] 1 W.L.R. 1545, 20/07/2000.

⁵⁵ Joseph, note 17 above, at 178.

⁵⁶ See *ibid.*, at 179; Meeran, note 42 above, at 170.

⁵⁷ Reported by Meeran, R., *Accountability of Transnationals for Human Rights Abuses – 2*, (1998) 148 *New Law Journal*, 1706-1707, at 1706.

⁵⁸ See *ibid.*

sued here in respect of its activities anywhere in the world”.⁵⁹ Although such a “piercing of the corporate veil” would be advantageous for human rights protection worldwide, the cases do not support such an interpretation, as the English domicile of the parent company was not the only factor linking the cases to England.⁶⁰ All cases show the special characteristic that the damage was directly caused either by decisions or by omissions and negligence of the English head office company, which gave them a close connection to England.⁶¹ It does not follow from this case law that cases in which human rights violations were committed by subsidiaries abroad without the considerable involvement, control or knowledge of the parent company⁶² could proceed in the English courts in the future. Although one might hope for such a development for the sake of better human rights protection, it is by no means certain. The English case law is a first step in the right direction, but its consequences should not be overestimated.

However, a recent judgment of the European Court of Justice (ECJ) has positive repercussions for this line of case law. In the case of *Owusu v. Jackson*,⁶³ the ECJ decided on 1 March 2005 that the Brussels Convention⁶⁴ “precludes a court of a Contracting State from declining the jurisdiction conferred on it by Art. 2 on the ground that a court of a non-Contracting State would be a more appropriate forum for the trial of the action”.⁶⁵ Thereby, the ECJ effectively ruled out the application of the principle of *forum non conveniens* by U.K.-courts for the future in cases against defendants domiciled in the U.K. This is a considerable improvement for plaintiffs in cases against MNEs before U.K.-courts. Still, the problem of the “corporate veil” remains, limiting the cases with potential positive outcome for the plaintiffs to those, where the parent company itself is significantly involved in the human rights violations committed by its subsidiary abroad.

3. USA: Application of the Alien Tort Claims Act (ATCA)

a) Overview of the Development of the ATCA

During recent years, hopes have been high as regards lawsuits in the United States against MNEs for the violation of human rights abroad under the Alien Tort

⁵⁹ House of Lords, *Connelly v. RTZ Corp. Plc.*, 24/07/1997, [1997] 3 WLR 373, at 388.

⁶⁰ See Meeran, note 57 above, at 1706.

⁶¹ See *ibid.*

⁶² See Meeran, note 42 above, at 170.

⁶³ ECJ, Case C-281/02, *Owusu v. Jackson, Trading as “Villa Holidays Bal-Inn Villas” and Others*, Judgment of 01/03/2005, [2005] I.L.Pr. 25.

⁶⁴ Brussels Convention of 27/09/1968 on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters, [1978] O.J. L 304/36, consolidated version with subsequent amendments in [1998] O.J. C 27/1, now Council Regulation (EC) No. 44/2001 of 22/12/2000 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters, [2001] O.J. L 12/1.

⁶⁵ *Owusu v. Jackson*, para. R1, at 338-339.

Claims Act (ATCA).⁶⁶ Congress adopted the ATCA as early as 1789. It formed part of the Judiciary Act that regulated the judicial organization of the United States⁶⁷ and states that “[t]he district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States”.⁶⁸

Although its existence was ignored for almost 200 years,⁶⁹ the ATCA was brought back to life as “an important instrument in the fight against international human rights violations”⁷⁰ in 1980 in the case of *Filártiga v. Peña-Irala*,⁷¹ which concerned the torture of a Paraguayan boy to death by a Paraguayan police officer. The boy’s family subsequently filed a tort claim under the ATCA against the officer who was then living in New York, despite the fact that the events complained of took place in Paraguay. The Court of Appeals held that US courts had jurisdiction *ratione materiae*, because “an act of torture committed by a state official ... violates established norms of the international law of human rights, and hence the law of nations”.⁷² Regarding the question of jurisdiction *ratione personae* the case was straightforward, because the defendant had acted in his official capacity as a state representative, which was in conformity with the traditional view that states are the addressees of international law.

The question of jurisdiction *ratione personae* with regard to non-state actors was for the first time decided positively on appeal in the case of *Kadic v. Karadzic*⁷³ in 1995. Here, several Croatian and Muslim applicants sued the Serbian leader Karadzic under the ATCA for human rights violations, including genocide and war crimes, committed under his command during the war in Yugoslavia. The Court of Appeals held that the law of nations did not restrict its applicability to state action and that therefore, the ATCA was not only applicable with regard to “state actors, state officials and private actors for acts ‘under colour of law’, but

⁶⁶ 28 U.S.C. §1350.

⁶⁷ Wouters, J./De Smet, L./Ryngaert, C., Tort Claims Against Multinational Companies for Foreign Human Rights Violations Committed Abroad: Lessons from the Alien Tort Claims Act?, Institute for International Law K.U. Leuven, Working Paper No. 46 – November 2003, <<http://www.law.kuleuven.be/iir/nl/wp/WP/WP46e.pdf>> (last visited: 07/07/2006), at 2.

⁶⁸ 28 U.S.C. §1350.

⁶⁹ During this time, the ATCA “was invoked successfully only five times”; Shaw, C., Uncertain Justice: Liability of Multinationals Under the Alien Tort Claims Act, 54 Stanford Law Review 2002, 1359-1386, at 1365.

⁷⁰ Wouters/De Smet/Ryngaert, note 67 above, at 3.

⁷¹ *Filártiga v. Peña-Irala*, 630 F.2d 876, C.A.N.Y., 1980, 30/06/1980; case summary by Wouters/De Smet/Ryngaert, note 67 above, at 3; Khalil, S.A., The Alien Tort Claims Act and Section 1983: The Improper Use of Domestic Laws to “Create” and “Define” International Liability for Multi-National Corporations, (2002-2003), 31 Hofstra Law Review, 207-239, at 219-222.

⁷² *Filártiga v. Peña-Irala*, 630 F.2d 876, at 880.

⁷³ *Kadic v. Karadzic*, 70 F.3d 232, C.A.2 (N.Y.), 1995, 13/10/1995; discussed by Khalil, note 71 above, at 222-225.

also against private actors for purely private acts".⁷⁴ This was acknowledged for such crimes as genocide, war crimes, piracy and slavery because international law already recognized individual responsibility in these cases for state and non-state actors alike. However, for crimes such as murder, rape or torture, ATCA-jurisdiction does not extend to private actors unless these crimes are committed in pursuit of the above-mentioned crimes.⁷⁵

b) *Doe v. Unocal*

In "a landmark decision in 1997"⁷⁶ *Doe v. Unocal* extended the courts' personal jurisdiction to private entities including TNCs.⁷⁷ Fifteen Burmese peasants brought tort claims under the ATCA against the US-based oil-company Unocal for egregious human rights violations committed by the Burmese military in connection with the construction of the Yadana-pipeline from Burma to Thailand. Allegedly, Burmese army units were hired in order to secure and protect the project.⁷⁸ However, they violently forced people living in the region to work on the construction of the pipeline, forcefully relocated entire villages without compensation and quelled protests against the project with violence including murder, torture, rape and pillage. As "Unocal knew that the military had a record of committing human rights abuses", the Court held that the company either knew or should have known that the army units were committing human rights violations associated with its pipeline construction.⁷⁹ Furthermore, Unocal knowingly benefited from the forced labour.

Nevertheless, the case was dismissed at first instance, because the District Court applied a strict liability test and the plaintiffs had not shown that the company actually wanted the military to commit the human rights abuses.⁸⁰ This decision was overturned on appeal⁸¹ in September 2002, holding that a different standard of liability could be applied according to which it was sufficient for the plaintiffs to "demonstrate that Unocal knowingly assisted the military in perpetrating the abuses".⁸² Finally, a confidential settlement was reached in March 2005, under

⁷⁴ Case summary by Wouters/De Smet/Ryngaert, note 67 above, at 3-4 and note 12; *Kadic v. Karadzic*, 70 F.3d 232, at 239.

⁷⁵ *Kadic v. Karadzic*, 70 F.3d 232, at 244.

⁷⁶ EarthRights International, *Doe v. Unocal*, <http://www.earthrights.org/index.php?option=com_content&task=view&id=189&Itemid=25> (last visited: 07/07/2006).

⁷⁷ *Doe v. Unocal Corp.*, 963 F.Supp. 880, C.D.Cal., 1997, 25/03/1997.

⁷⁸ Case summary by EarthRights, *Doe*, note 76 above; detailed discussion by Gaedtke, J.-C., *Der US-amerikanische Alien Tort Claims Act und der Fall Doe v. Unocal: Auf dem Weg zu einer Haftung transnationaler Unternehmen für Menschenrechtsverletzungen?*, (2004) 42 *Archiv des Völkerrechts*, 241-260.

⁷⁹ EarthRights, *Doe*, note 76 above, at 1.

⁸⁰ *Doe v. Unocal Corp.*, 110 F.Supp.2d 1294, C.D.(Cal.), 2000, 31/08/2000, at 1310.

⁸¹ *John Doe I v. Unocal Corp.*, 395 F.3d 932, C.A.9(Cal.), 2002, 18/09/2002.

⁸² EarthRights, *Doe*, note 76 above, at 2.

which the plaintiffs will be compensated and funds will be provided in order to “develop programs to improve living conditions, health care and education and protect the rights of people from the pipeline region”.⁸³

c) *Wiwa v. Royal Dutch Petroleum (Shell)*

Another high-profile case under the ATCA, *Wiwa v. Royal Dutch Petroleum (Shell)*, was initiated by members of the Nigerian Ogoni tribe against Royal Dutch Petroleum (Shell) because of the MNE’s alleged complicity in massive human rights violations by the Nigerian government.⁸⁴ Amongst others, the case focuses on the torture and hangings of the leaders of the Movement for the Survival of the Ogoni People, Ken Saro-Wiwa and John Kpuinen, in 1995 “and the shooting of a woman who was peacefully protesting the bulldozing of her crops in preparation for a Shell pipeline”.⁸⁵ In general, the presence of the oil-extracting companies in Nigeria has a history of serious environmental damage to the Ogoni territory, of forced factual expropriation and of cruel suppression of the Ogoni people’s peaceful resistance.⁸⁶

The defendants alleged several grounds for dismissal including a lack of jurisdiction *ratione personae* over Royal Dutch Petroleum (Shell), a lack of jurisdiction *ratione materiae* because of the political question doctrine, the act of state doctrine and the non-applicability of the ATCA to TNCs and the principle of *forum non conveniens*.⁸⁷ While the District Court had dismissed the case on *forum non conveniens* grounds holding that England was a more appropriate forum, the Court of Appeals decided that the United States was a proper forum and confirmed the court’s personal jurisdiction.⁸⁸ The remainder of the defendants’ grounds for dismissal were rejected on 28 February 2002 by the District Court,⁸⁹ holding that the courts had subject matter jurisdiction under the ATCA to hear the case because “the actions of Royal Dutch/Shell ... constituted participation in crimes against humanity, torture, summary execution, arbitrary detention, cruel, inhuman and degrading treatment and other violations of international law”.⁹⁰

⁸³ EarthRights International, Final Settlement Reached in *Doe v. Unocal*, <<http://www.earthrights.org/content/view/114/25/>> (last visited: 07/07/2006).

⁸⁴ Case summary by EarthRights International, *Wiwa v. Royal Dutch Petroleum (Shell)*, <http://www.earthrights.org/index.php?option=com_content&task=view&id=205&Itemid=27> (last visited: 07/07/2006).

⁸⁵ Ibid.

⁸⁶ See *ibid.* and Wouters/De Smet/Ryngaert, note 67 above, at 5.

⁸⁷ See EarthRights, *Wiwa*, note 84 above.

⁸⁸ *Wiwa v. Royal Dutch Petroleum Co.*, 226 F.3d. 88, C.A.2(N.Y.), 2000, 14/09/2000. District Court decision unreported.

⁸⁹ *Wiwa v. Royal Dutch Petroleum Co.*, 2002 U.S. Dist. LEXIS 3293, 28/02/2002, <<http://www.earthrights.org/files/Legal%20Docs/Wiwa%20v%20Shell/distrctourtopinonFeb2002.pdf>> (last visited: 07/07/2006).

⁹⁰ EarthRights, *Wiwa*, note 84 above.

d) *Bowoto v. ChevronTexaco*

This ATCA-case is set against the background of immense damage to the environment in the Niger Delta due to Chevron's oil production. Chevron's activities caused massive erosion, depriving local people of their homes and livelihood, the destruction of the natural ecosystem and the riverbeds and ruined the fishing grounds and the fresh water supply. The protests of the villagers provoked two incidents that formed the substance of the action.⁹¹ In May 1998, over 100 unarmed protestors took over Chevron's Parabe off-shore Platform. After four days, soldiers arrived in Chevron-leased helicopters and killed two protestors, wounded several others, and abducted and tortured the group leader.⁹² The second incident took place in January 1999, when soldiers arriving in Chevron-leased helicopters and boats attacked the villages of Opia and Ikenyan, killing at least seven people, wounding many more and burning both villages to the ground.⁹³ This attack was precipitated by a visit of some Opia villagers to a Chevron facility trying to seek redress for the destruction of their environment.⁹⁴ Although Chevron constantly disputed any participation in the attacks, recent evidence shows that the soldiers were paid by Chevron's Nigerian subsidiary.⁹⁵

Chevron sought dismissal of the case on several grounds. It argued that under the principle of *forum non conveniens*, Nigeria was the appropriate forum, not San Francisco, where Chevron's head office is situated.⁹⁶ It contested the court's jurisdiction *ratione materiae*, alleging that the shooting of trespassers did not violate international law. Finally, it alleged that hearing the case would interfere with U.S.-foreign policy.⁹⁷ However, the District Court for the Northern District of California rejected all arguments in spring 2000.⁹⁸ Regarding the principle of *forum non conveniens*, it emphasized that "a court in California has a compelling interest in hearing cases involving allegations of international human rights violations against

⁹¹ Case summary by EarthRights International, *Bowoto v. ChevronTexaco*, <http://www.earthrights.org/index.php?option=com_content&task=view&id=211&Itemid=26> (last visited: 07/07/2006).

⁹² Ibid.

⁹³ Ibid.

⁹⁴ EarthRights International, *Chevron Documents Show Payments for Attacks on Nigerian Villages*, <<http://www.earthrights.org/content/view/121/41/>> (last visited: 07/07/2006).

⁹⁵ Ibid.

⁹⁶ United States District Court for the Northern District of California, *Larry Bowoto et al. vs. Chevron Corporation*, No. C 99-2506 CAL, Transcript of Proceedings, 7 April 2000, (Transcript of Oral Argument on Chevron's Motion for Dismissal Based on *forum non conveniens*), <<http://www.earthrights.org/files/Legal%20Docs/Chevron/0407transcript.pdf>> (last visited: 07/07/2006).

⁹⁷ United States District Court for the Northern District of California, *Larry Bowoto et al. vs. Chevron Corporation*, No. C 99-2506 CAL, Transcript of Proceedings, 12 May 2000, (Transcript of Oral Argument on Chevron's Motion to Dismiss Plaintiff's Motion for Leave to Amend Complaint), <<http://www.earthrights.org/files/Legal%20Docs/Chevron/0512transcript.pdf>> (last visited: 07/07/2006).

⁹⁸ See Transcripts, note 96 and 97 above.

a Californian corporation”.⁹⁹ As to the question of jurisdiction *ratione materiae* under the ATCA, the Court found that the alleged human rights violations included summary execution and torture, which formed part of the law of nations.¹⁰⁰ Furthermore, in March 2004, the District Court denied Chevron Texaco’s motion for summary judgment.¹⁰¹ Chevron had argued that due to the corporate veil it could not be sued for the wrongful acts of its subsidiary. The Court, however, found that the parent company could be held responsible for torts committed by its Nigerian subsidiary, where Chevron “allowed the subsidiary to hire the notorious Nigerian military and police as a security force”¹⁰² and emphasized the “extraordinarily close relationship between the parents and the subsidiary prior to, during and after the attacks”.¹⁰³

e) The Potential of the ATCA With Regard to the Protection of Human Rights Against MNEs

The expectations concerning the potential of the ATCA to hold MNEs responsible for human rights violations abroad vary between two extremes. On the one hand, there are those human rights activists who would like to see the ATCA as a means to give U.S.-courts full universal jurisdiction over human rights violations abroad,¹⁰⁴ and on the other are the U.S. business associations and the Bush-administration who are striving to see the whole act abolished.¹⁰⁵ As often, the truth lies somewhere in the middle. The following paragraphs address the campaign of the corporate lobby and the U.S. government as well as the further issues that limit the scope of the ATCA regarding its application as a strong instrument against corporate human rights violators abroad.

Since 2002, the business lobby and the U.S. administration have engaged “in a crusade to eliminate ATCA”,¹⁰⁶ which went as far as to demand that the whole law should be abolished and the line of case law since *Filártiga v. Peña-Irala* overruled.¹⁰⁷ The U.S. administration filed several *amicus curiae* briefs in ATCA-

⁹⁹ EarthRights, *Bowoto*, note 91 above.

¹⁰⁰ Ibid.

¹⁰¹ *Bowoto v. ChevronTexaco Corp.*, 312 F.Supp.2d 1229 N.D.Cal., 2004, 22/03/2004.

¹⁰² EarthRights, *Bowoto*, note 91 above.

¹⁰³ *Bowoto v. ChevronTexaco Corp.*, 312 F.Supp.2d 1229 N.D.Cal., 2004, 22/03/2004, at 1243.

¹⁰⁴ Referred to by EarthRights International, In Our Court: ATCA, Sosa and the Triumph of Human Rights. A Report about the Alien Tort Claims Act by EarthRights International, July 2004, <<http://www.earthrights.org/files/Reports/inourcourt.pdf>> (last visited: 07/07/2006), at 6; see *Wouters/De Smet/Ryngaert*, note 67 above, at 6, describing ATCA as conferring “a form of universal jurisdiction”.

¹⁰⁵ See EarthRights, In Our Court: ATCA, Sosa and the Triumph of Human Rights, note 104 above, at 5.

¹⁰⁶ Ibid.

¹⁰⁷ Ibid.

cases¹⁰⁸ and some commentators described horror scenarios painting the ATCA as an “awakening monster”.¹⁰⁹ The arguments alleged against the use of the ATCA in human rights cases, especially those involving MNEs, are as follows:¹¹⁰

The long-standing doctrinal question whether the ATCA is a purely jurisdictional clause or whether it establishes a cause of action was reiterated by the U.S. government.¹¹¹ Despite the fact that every single ATCA-decision addressing the issue so far had decided to the contrary,¹¹² it was alleged that the ATCA merely gave courts jurisdiction, which could only be exercised if Congress enacted laws in the future that provided for the necessary causes of action.¹¹³ In *Sosa v. Alvarez-Machain*,¹¹⁴ the only decision in which the Supreme Court has addressed ATCA issues so far, it ruled on 29 June 2004 that although the ATCA was a jurisdictional clause, it “was intended to have practical effect the moment it became law”¹¹⁵ and it allowed the courts to adjudicate on a limited number of “claims that are as universally recognized today as those that were actionable in 1789”.¹¹⁶

Furthermore, the business lobby feared that the ATCA would open the floodgates to thousands of human rights claims against international business and “result in untold damage to the world economy as well as to the U.S. judicial system”.¹¹⁷ It is unclear where this irrational fear comes from, as the scope of the ATCA was limited right from the start, referring only to “a violation of the law of

¹⁰⁸ See e.g. Brief for the United States of America as Amicus Curiae, *Doe I. v. Unocal*, U.S. Court of Appeals for the 9th circuit, Nos. 00-56603, 00-56628, 08/05/2003, <<http://www.hrw.org/press/2003/05/doj050803.pdf>> (last visited: 07/07/2006); Brief for the United States supporting Petitioner, *Sosa v. Alvarez-Machain*, Supreme Court of the United States, No. 03-339, 01/2004, <http://www.nosafehaven.org/_legal/atca_con_USsupportingSosa.pdf> (last visited: 07/07/2006); see also Taft, W.H., Legal Advisor, Letter of 29/07/2002 to Judge Oberdorfer in the case of *Doe v. ExxonMobil*, <<http://www.laborrights.org/projects/corporate/exxon/stateexxonmobil.pdf>> (last visited: 07/07/2006).

¹⁰⁹ Hufbauer, G.C./Mitrokostas, N.K., *Awakening Monster: The Alien Tort Statute of 1789, 2003*, summarized by Hufbauer, G.C./Mitrokostas, N.K., *International Implications of the Alien Tort Statute*, (2004) 7(2) *Journal of International Economic Law*, 245-262; discussed by Koh, H.H., *Separating Myth from Reality about Corporate Responsibility Litigation*, (2004), 7(2) *Journal of International Economic Law*, 263-274, at 263.

¹¹⁰ For an overview with discussion see Wouters/De Smet/Ryngaert, note 67 above, at 9-12; EarthRights, *In Our Court: ATCA, Sosa and the Triumph of Human Rights*, note 104 above, at 29-37.

¹¹¹ Brief for the U.S. as Amicus Curiae, note 108 above; for a discussion see e.g. Shaw, note 69 above, at 1365-1367; Khalil, note 71 above, at 233 et seq.

¹¹² EarthRights, *In Our Court: ATCA, Sosa and the Triumph of Human Rights*, note 104 above, at 30.

¹¹³ Brief for the U.S. as Amicus Curiae, note 108 above.

¹¹⁴ *Sosa v. Alvarez-Machain*, 542 U.S. 692, 124 S.Ct. 2739, U.S., 2004, 29/06/2004.

¹¹⁵ *Ibid.*, at 2743.

¹¹⁶ EarthRights, *In Our Court: ATCA, Sosa and the Triumph of Human Rights*, note 104 above, at 40.

¹¹⁷ *Ibid.*, at 40; Hufbauer/Mitrokostas, *International Implications*, note 109 above, at 252-253; floodgate-argument discussed by Koh, note 109 above, at 268-270.

nations”.¹¹⁸ This has always been defined narrowly, an interpretation confirmed by the Supreme Court in *Sosa v. Alvarez-Machain* which held that only a “small number of international norms”¹¹⁹ were actionable under the ATCA, namely those that were “definable, universal and obligatory”.¹²⁰ Consequently, only norms of customary international law and *ius cogens* can give rise to an action under the ATCA.¹²¹

Any expectation that there would be a flood of ATCA-cases is belied by a look at the statistics. As of July 2004, the overall number of ATCA-cases filed since *Filártiga v. Peña-Irala* amounts to less than sixty, with only thirty-two cases against MNEs.¹²² Almost half of the cases against TNCs “were dismissed, eight on substantive and six on procedural grounds”.¹²³ So far, no judgment on the merits has been given in an ATCA-case involving corporations and “no damages have been awarded in a corporate case”.¹²⁴ In almost twenty-five years since the decision in *Filártiga v. Peña-Irala* in 1980, these figures can hardly be considered as an opening of the floodgates that might damage the U.S. judicial system.¹²⁵

As regards the alleged economic damage, the curtailment of foreign investment¹²⁶ and the argument that MNEs subject to ATCA-jurisdiction suffer from a competitive disadvantage compared with other foreign corporations, it is suggested that there “is no evidence to support this claim”.¹²⁷ And even if there were, the aim pursued by the ATCA, that companies may not engage in egregious human rights violations, is a perfectly reasonable one that speaks in its favour.¹²⁸ Furthermore, the mere fact that MNEs are doing business in a country with a poor human rights record is not sufficient for claims to be argued successfully under the ATCA, which requires that companies are at least guilty of direct complicity in the human rights violations.¹²⁹ Consequently, TNCs that respect human rights have nothing to fear even if they invest in countries that violate human rights.¹³⁰

The Bush administration further asserts that the ATCA-jurisdiction interferes with U.S. foreign policy, which is the prerogative of the government and not the

¹¹⁸ 28 U.S.C. §1350.

¹¹⁹ *Sosa v. Alvarez-Machain*, 542 U.S. 692, 124 S.Ct. 2739, at 2764.

¹²⁰ See e.g. *Tel-Oren v. Libyan-Arab Republic*, 726 F.2d 774, C.A.D.C., 1984, 03/02/1984, at 781.

¹²¹ See Shaw, note 69 above, at 1369-1370.

¹²² EarthRights, In Our Court: ATCA, *Sosa* and the Triumph of Human Rights, note 104 above, at 35.

¹²³ Ibid.

¹²⁴ Ibid., at 36.

¹²⁵ See *ibid.*

¹²⁶ *Hufbauer/Mitrokostas*, International Implications, note 109 above, at 252-258.

¹²⁷ EarthRights, In Our Court: ATCA, *Sosa* and the Triumph of Human Rights, note 104 above, at 37.

¹²⁸ See *ibid.*; also *Wouters/De Smet/Ryngaert*, note 67 above, at 12.

¹²⁹ EarthRights, In Our Court: ATCA, *Sosa* and the Triumph of Human Rights, note 104 above, at 37.

¹³⁰ See *ibid.* and the discussion by *Wouters/De Smet/Ryngaert*, note 67 above, at 11-12.

judiciary.¹³¹ It sees the ATCA-case law as an infringement of the separation of powers.¹³² Admittedly, individual human rights cases might have a negative impact on U.S. foreign policy, but courts can dismiss these cases under the “political question doctrine”.¹³³ It is sufficient to apply this doctrine on a case-by-case basis, and there is no need to abolish the ATCA for all human rights complaints.¹³⁴

Another instrument of the judiciary to dismiss inappropriate cases is the “act of state doctrine”, according to which “courts of one country ordinarily cannot judge the official acts of another government within its own territory”.¹³⁵ However, it is hard to think of a case that violates the law of the nations and that would lend itself to an application of the act of state doctrine, especially if MNEs are involved. Still, defendants in ATCA cases frequently assert the act of state doctrine and if there was an appropriate case, courts could make use of it.¹³⁶

Moreover, the U.S.-administration alleges that ATCA-cases might be counter-productive for the war on terrorism as they could expose U.S.-allies to trial in U.S.-courts.¹³⁷ However, state immunity usually protects foreign governments from lawsuits in another state.¹³⁸ Accordingly, the range of legal instruments at the disposal of the judges is broad enough in order to separate the meritorious cases from the rest and there is no need to demand the abolition of the ATCA as such.¹³⁹

Other aspects that further limit the applicability of the ATCA are the principle of *forum non conveniens*¹⁴⁰ and the question of personal jurisdiction if a foreign MNE or the foreign subsidiary of a TNC is sued,¹⁴¹ because the ATCA does not provide for genuine universal jurisdiction. Some links with the United States must exist in order to bring the case under the jurisdiction of the U.S.-courts,¹⁴² as illus-

¹³¹ See National Foreign Trade Council, *The Business of Human Rights*, New York Times, 09/04/2004, reprinted as Appendix A in EarthRights, *In Our Court: ATCA, Sosa and the Triumph of Human Rights*, note 104 above, at 56; argument discussed by Wouters/De Smet/Ryngaert, note 67 above, at 10-11; foreign policy-argument also supported by Ramsey, M.D., *Multinational Corporate Liability Under the Alien Tort Claims Act: Some Structural Concerns*, (2000-2001) 24 *Hastings International and Comparative Law Review*, 361-380, passim.

¹³² Separation of powers-argument discussed by Ramsey, note 131 above, passim.

¹³³ See EarthRights, *In Our Court: ATCA, Sosa and the Triumph of Human Rights*, note 104 above, at 33.

¹³⁴ See *ibid.*, at 33-34.

¹³⁵ *Ibid.*, at 34.

¹³⁶ *Ibid.*, at 34; see also Gaedtke, note 78 above, at 250 and 256-257.

¹³⁷ With regard to Indonesia, see Letter from William H. Taft, note 108 above.

¹³⁸ ATCA-case law contains many examples of dismissed cases against foreign governments; see EarthRights, *In Our Court: ATCA, Sosa and the Triumph of Human Rights*, note 104 above, at 31-32 with further reference.

¹³⁹ See Koh, note 109 above, at 270.

¹⁴⁰ See above, at 2.1.; Gaedtke, note 78 above, at 255-256; Blumberg, note 28 above, at 501 et seq.

¹⁴¹ For a detailed discussion, see Blumberg, note 28 above, at 496-501.

¹⁴² See Wouters/De Smet/Ryngaert, note 67 above, at 7, referring e.g. to the “minimum contacts”-doctrine.

trated by the dismissed cases against foreign MNEs.¹⁴³ On the other hand, if the U.S. parent company is the defendant in the lawsuit, problems of corporate responsibility and the corporate veil arise.¹⁴⁴

To sum up, the ATCA grants neither mere home state jurisdiction nor proper universal jurisdiction. It is limited to the worst cases of human rights violations that are in breach of customary international law and *ius cogens*. Moreover, its practical application is restricted by a number of legal principles such as the political question doctrine, the act of state doctrine, the principle of *forum non conveniens* and the corporate veil theory with regard to MNEs. Furthermore, although the allegations are unfounded and the Supreme Court decision in *Sosa v. Alvarez-Machain* has clarified some of the issues leaving some limited room for a cautious application of the ATCA, the ATCA is threatened by the joint campaign of the Bush-administration and the corporate lobby. Even though the ATCA is currently the most powerful tool in the fight against massive human rights violations involving MNEs, these limitations and the constant threat of its complete abolition make it necessary to look for other ways of holding TNCs responsible.

III. Holding MNEs Accountable Through Codes of Conduct

A recent survey conducted by the United Nations High Commissioner for Human Rights discovered more than 200 initiatives and standards for the regulation of corporate social responsibility.¹⁴⁵ Although this paper focuses on state regulation and international instruments, it will briefly explain why voluntary initiatives such as codes of conduct of individual companies can be a first step in the right direction, but cannot be satisfactory as the only means of human rights protection against MNEs.

Very often, company codes of conduct are triggered by a massive human rights violation involving the company and damaging its reputation.¹⁴⁶ Therefore, the code's aim is primarily to restore the company's reputation towards the public. If

¹⁴³ See e.g. *Doe v. Unocal Corp.*, 27 F.Supp.2d 1174, C.D.Cal., 1998, 18/11/1998, where the claim against a Total subsidiary was dismissed; see G a e d t k e, note 78 above, at 251 and 254-255.

¹⁴⁴ See above, at 2.1.

¹⁴⁵ These initiatives and standards include international instruments, nationally based standards, certification schemes, voluntary initiatives, mainstream financial indices and tools, meetings and other initiatives, see Commission on Human Rights, 61st session, Report of the United Nations High Commissioner for Human Rights on the responsibilities of transnational corporations and related business enterprises with regard to human rights, E/CN.4/2005/91, 15/02/2005, <<http://documents-dds-ny.un.org/doc/UNDOC/GEN/G05/110/27/pdf/G0511027.pdf?OpenElement>> (last visited: 07/07/2006), at 4-5.

¹⁴⁶ See e.g. the example of Shell, which set up a corporate code of conduct in response to the international protests against the human rights violations in Nigeria; H a m m, B., Zum Einfluss multinationalen Konzerne auf den staatlichen Menschenrechtsschutz in Ländern des Südens, in: von Arnim, G. et al. (ed.), *Jahrbuch Menschenrechte* 2002, 56-67, at 60, indicating that Shell's practical policy does not respect its self-imposed standards.

codes of conduct as public relations instruments are not supported by a real commitment of the company, they are bound to remain “paper tigers”.¹⁴⁷ A crucial question is which human rights the company is willing to protect and if it will impose them also on its contractors.¹⁴⁸ As it is the company’s decision to select the rights it wants to protect, it can easily ignore rights that are troublesome to implement and still produce a code of conduct that presents the company in a positive light.¹⁴⁹ Moreover, codes of conduct are not legally binding. Their implementation and observance solely depends on the voluntary commitment of the company.¹⁵⁰

However, these disadvantages could be balanced to some extent by effective implementation mechanisms. Useful features are e.g. internal or better external independent monitoring procedures, permanent training of employees and contracting parties, an efficient complaints mechanism including compensation measures and sanctions for violations of the code of conduct.¹⁵¹ Theoretically, a code of conduct could be a very powerful tool to defend human rights against MNEs. However, the aforementioned set-up seems rather utopian given an OECD-study of 233 codes of conduct.¹⁵² Only 18 per cent of these codes of conduct referred explicitly to international standards; 38 per cent did not include any monitoring mechanisms at all, while 51 per cent were satisfied with internal control mechanisms, and only 11 per cent had established an external monitoring.¹⁵³

Nevertheless, it is only fair to point out the advantages of corporate codes of conduct as well. Their most important feature is that they avoid the lengthy negotiations necessary for the drafting of an international treaty. As they are voluntary and adapted to the wishes of the company they can be applied immediately, whereas states are often reluctant to become parties to a binding international treaty if it contains regulations to which they do not want to subscribe.¹⁵⁴ Therefore, it all depends on the individual arrangement of the code of conduct and on the willingness of the MNE to abide by its rules. This explains why there are seri-

¹⁴⁷ See Nuscheler, F., Globalisierung, Global Governance und Menschenrechte, in: von Arnim, G. et al. (ed.), *Jahrbuch Menschenrechte 2000*, 1999, 164-172, at 168; Waryk, A., *Regulating Transnational Corporations Through Corporate Codes of Conduct*, in: Frynas/Pegg, (eds.), note 11 above, 53-78, at 61.

¹⁴⁸ Waryk, note 147 above, at 60.

¹⁴⁹ *Ibid.*, at 63, relating the opinions that “private codes are often nothing more than public relations ploys with little practical effect” and “that private codes are arbitrary [and] focus on standards with emotional appeal”.

¹⁵⁰ Report of the United Nations High Commissioner for Human Rights, note 145 above, at 4 and 6.

¹⁵¹ For a detailed list, see Waryk, note 147 above, at 60-61.

¹⁵² OECD Working Party of the Trade Committee, *Codes of Corporate Conduct. An Inventory*, TD/TC/WP(98)74/FINAL, 29/04/1999, <[http://www.oalis.oecd.org/olis/1998doc.nsf/c16431e1b3f24c0ac12569fa005d1d99/c125692700622425c12569a40038da6c/\\$FILE/04E95110.pdf](http://www.oalis.oecd.org/olis/1998doc.nsf/c16431e1b3f24c0ac12569fa005d1d99/c125692700622425c12569a40038da6c/$FILE/04E95110.pdf)> (last visited: 07/07/2006); von Thadden, J., *Unternehmer, Globalisierung und Menschenrechte*, in: von Arnim, G. et al. (ed.), *Jahrbuch Menschenrechte 2001, 2000*, 164-172, at 176.

¹⁵³ von Thadden, note 152 above, at 176.

¹⁵⁴ See Waryk, note 147 above, at 61.

ous “doubts about the usefulness of a private code adopted by TNCs operating in conflict zones, particularly TNCs engaged in subsurface resource exploitations”,¹⁵⁵ as illustrated by the ATCA-cases discussed above.¹⁵⁶

IV. Holding MNEs Accountable Through a Regulation of Their Conduct by International Organizations

Regulation of MNE-conduct by international organizations could be more promising. This chapter examines four international MNE social responsibility initiatives with regard to their capacity to protect human rights. The following initiatives were chosen because they are supported by the authority of different international organizations and because they received significant attention by the public:¹⁵⁷ the ILO Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy, the OECD Guidelines for Multinational Enterprises, the United Nations Global Compact and the UN Norms on the Responsibilities of Transnational Corporations and other Business Enterprises with regard to Human Rights.

1. The ILO Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy

The ILO Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy (the ILO-Declaration) was adopted by the Governing Body of the International Labour Organization in 1977. Its latest revision took place in November 2000.¹⁵⁸ The ILO-Declaration addresses governments, workers’ organizations, employers’ organizations and MNEs, to whom it offers detailed guidelines in the fields of employment, training, conditions of work and life and industrial relations.¹⁵⁹ As regards human rights protection, the sections on equality of opportunity and treatment, on wages, benefits and conditions of work, on health and safety, on freedom of association and the right to organize and on collective bargaining are of particular interest.

¹⁵⁵ Ibid., at 63.

¹⁵⁶ See above, II.3.b)-d).

¹⁵⁷ Report of the United Nations High Commissioner for Human Rights, note 145 above, at 7.

¹⁵⁸ ILO, Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy, adopted by the Governing Body of the International Labour Office at its 204th Session (Geneva, November 1977) as amended at its 279th Session (Geneva, November 2000), (2002) 41 ILM, 186-201, at 186-187, also available at <<http://www.ilo.org/public/english/standards/norm/sources/mne.htm>> (last visited: 07/07/2006).

¹⁵⁹ Ibid., at 187.

The 2000-revision brought about further improvements in the field of human rights protection.¹⁶⁰ In the section about the conditions of work and life, a new paragraph was inserted, stating that “[m]ultinational enterprises, as well as national enterprises, should respect the minimum age for admission to employment or work in order to secure the effective abolition of child labour”.¹⁶¹ Correspondingly, governments are urged to ratify ILO-Convention No. 138 concerning Minimum Age for Admission to Employment and Convention No. 182 concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour.¹⁶² Moreover, paragraph 8 in the general policies section was amended to include the following sentence: “They [meaning: all the parties concerned by this Declaration] should contribute to the realization of the ILO Declaration on Fundamental Principles and Rights at Work and its Follow-up, adopted in 1998”. This declaration encompasses all four core labour standards, namely freedom of association and the right to collective bargaining, the elimination of all forms of forced or compulsory labour, the effective abolition of child labour and the elimination of discrimination in respect of employment and occupation.¹⁶³ While the Declaration on Fundamental Principles and Rights at Work only addresses governments, its inclusion in the ILO-Declaration makes it applicable to all four groups of addressees, including MNEs.¹⁶⁴

Although the ILO-Declaration does not include any other areas of human rights,¹⁶⁵ its coverage of workers’ human rights is broad. Moreover, its tripartite character merits praise as this indicates the support of governments, workers and employers.¹⁶⁶ Another positive feature is its almost universal geographical reach and the fact that it is supported by the ILO-Conventions that are binding on states.¹⁶⁷ The ILO-Declaration itself, however, is a non-binding instrument as its set of principles and recommendations is purely voluntary.¹⁶⁸ It does not contain any provisions concerning implementation mechanisms or monitoring schemes to verify the compliance of MNEs with the ILO-Declaration.¹⁶⁹ Nevertheless, some implementation procedures do exist. The effect given to the ILO-Declaration by

¹⁶⁰ For the 2000-amendments see ILO, Governing Body, 279th Session, Report of the Sub-Committee on Multinational Enterprises, GB.279/12, Geneva, November 2000, <<http://www.ilo.org/public/english/standards/relm/gb/docs/gb279/pdf/gb-12.pdf>> (last visited: 07/07/2006), at 9 et seq.

¹⁶¹ Para. 36 MNE-Declaration.

¹⁶² Para. 9 MNE-Declaration.

¹⁶³ ILO, ILO Declaration on Fundamental Principles and Rights at Work, 86th Session, Geneva, June 1998, <http://www.ilo.org/dyn/declaris/DECLARATIONWEB.static_jump?var_language=EN&var_pagename=DECLARATIONTEXT> (last visited: 07/07/2006).

¹⁶⁴ ILO-Governing Body, note 160 above, para. 25.

¹⁶⁵ Report of the United Nations High Commissioner for Human Rights, note 145 above, at 8.

¹⁶⁶ Ibid.

¹⁶⁷ Ibid.

¹⁶⁸ Oldenzien, J., *The Added Value of the UN Norms. A Comparative Analysis of the UN Norms for Business With Existing International Instruments*, Amsterdam, April 2005, at 15.

¹⁶⁹ Ibid.

all four parties is monitored through a periodic survey.¹⁷⁰ States, workers' and employers' organizations are expected to answer a questionnaire concerning their experience with the implementation of the ILO-Declaration. After examining the answers, the ILO Governing Body may adopt recommendations for action.¹⁷¹ Furthermore, since 1980, a procedure exists to deal with "requests for interpretation in cases of dispute on the meaning/application of its provisions".¹⁷² Although the disputes arise out of specific situations, the procedure has a promotional, non-judicial nature and "does not provide for the public shaming of MNEs".¹⁷³ So far, the Governing Body has decided only five cases.¹⁷⁴ While these procedures seem to offer some guidance for the conduct of MNEs, in terms of true enforcement they are rather weak. As the underlying ILO-Conventions are binding on states, one might conclude that ILO-implementation mechanisms rather exert indirect "pressure on a company via ... pressure on the government of its country".¹⁷⁵

2. The OECD Guidelines for Multinational Enterprises

The OECD Guidelines for Multinational Enterprises (the OECD-Guidelines) date back to 1976. While several revisions since then were considered ineffective,¹⁷⁶ the latest revision of June 2000¹⁷⁷ has been described as containing "far-reaching changes",¹⁷⁸ and might therefore be seen to give rise to new hopes. The OECD-Guidelines are a code of conduct containing recommendations by the thirty OECD member states and nine non-member countries that have adhered to them (Argentina, Brazil, Chile, Estonia, Israel, Latvia, Lithuania, Romania and Slovenia).¹⁷⁹ They are addressed to MNEs that operate either in or from the adhering

¹⁷⁰ ILO, Tripartite Declaration. Follow-up Survey, <<http://www.ilo.org/public/english/employment/multi/folupover.htm>> (last visited: 07/07/2006).

¹⁷¹ Ibid.

¹⁷² ILO, Tripartite Declaration. Interpretation Procedure, <<http://www.ilo.org/public/english/employment/multi/dispute.htm>> (last visited: 07/07/2006).

¹⁷³ Joseph, note 17 above, at 183.

¹⁷⁴ ILO, Interpretation Procedure, note 172 above.

¹⁷⁵ Oldenzien, note 168 above, at 16.

¹⁷⁶ Hamm, B., Die OECD-Leitsätze für multinationale Unternehmen in ihrer revidierten Fassung von 2000 – ihr Potential für den Schutz der Menschenrechte, in: von Arnim, G. et al. (ed.), *Jahrbuch Menschenrechte* 2003, 2002, 191-200, at 192.

¹⁷⁷ Organisation for Economic Co-operation and Development, *The OECD Guidelines for Multinational Enterprises. Revision 2000*, OECD Publications, 2000, <<http://oecd.org/dataoecd/56/36/1922428.pdf>> (last visited: 07/07/2006).

¹⁷⁸ Costello, P., Statement by the Chair of the Ministerial, June 2000, in: OECD, *The OECD Guidelines for Multinational Enterprises. Revision 2000*, 5-6, at 5.

¹⁷⁹ UN Global Compact Office/OECD Secretariat, *The UN Global Compact and the OECD Guidelines for Multinational Enterprises: Complementarities and Distinctive Contributions*, 26/04/2005, DAF/INV(2005)6, <<http://www.oecd.org/dataoecd/23/2/34873731.pdf>> (last visited: 07/07/2006), at 3.

countries¹⁸⁰ and cover a broad range of areas, such as human rights, disclosure of information, employment and industrial relations, environment, combating bribery, consumer interests, science and technology, competition and taxation.¹⁸¹

Although the document including the OECD-Guidelines and the commentary contains more than sixty pages, the principle that addresses human rights directly is rather unspecific.¹⁸² In the context of general policies, it states, “Enterprises should take fully into account established policies in the countries in which they operate, and consider the views of other stakeholders. In this regard, enterprises should ... [r]espect the human rights of those affected by their activities consistent with the host government’s international obligations and commitments.”¹⁸³ This shows that the primary aim of the OECD-Guidelines is not to protect human rights but state sovereignty.¹⁸⁴ Still, some other provisions indirectly further human rights, such as the one that advises enterprises not to seek or accept exemptions from the host state’s legal framework with regard to health, safety, environment, labour, etc.;¹⁸⁵ the one asking businesses to “[r]efrain from discriminatory or disciplinary action against employees” who report about illegal practices to the management or public authorities;¹⁸⁶ or the one requiring MNEs to make suppliers and sub-contractors accept codes of conduct like the OECD-Guidelines.¹⁸⁷ Indirectly, the recommendations on transparency¹⁸⁸ and combating bribery¹⁸⁹ also strengthen the protection of human rights because they promote accountability and reinforce state organs as an important factor for human rights implementation.¹⁹⁰ As regards human rights in the workplace, amongst many other clauses concerning general employment issues, all four major labour rights are covered as under the ILO-Declaration.¹⁹¹ However, their formulation is rather weak, because the Guidelines only state, for example, that “[e]nterprises should ... [c]ontribute to the effective abolition of child labour”.¹⁹²

¹⁸⁰ Costello, note 178 above, at 5.

¹⁸¹ These standards are grouped in ten chapters; see The OECD Guidelines for Multinational Enterprises, note 177 above, at 17-27.

¹⁸² For criticism, see Hamm, note 176 above, at 198.

¹⁸³ OECD-Guidelines-Principle II.2.

¹⁸⁴ Weiß, N., Transnationale Unternehmen – weltweite Standards? Eine Zwischenbilanz des Global Compact, [2002] MenschenRechtsMagazin, 82-89, at 86.

¹⁸⁵ OECD-Guidelines-Principle II.5.

¹⁸⁶ OECD-Guidelines-Principle II.9.

¹⁸⁷ OECD-Guidelines-Principle II.10.

¹⁸⁸ OECD-Guidelines-Principle III. on disclosure.

¹⁸⁹ OECD-Guidelines-Principle VI.

¹⁹⁰ See Hamm, note 176 above, at 195.

¹⁹¹ OECD-Guidelines-Principle IV.1.

¹⁹² OECD-Guidelines-Principle IV.1.b.; for criticism see Tully, S., The 2000 Review of the OECD Guidelines for Multinational Enterprises, (2001) 50 International and Comparative Law Quarterly, 394-404, at 399: The mere contribution to the abolition is less onerous than the obligations contained in the draft versions, which stated that “MNEs were not to ‘engage’ in the use of forced labour nor the ‘worst forms’ of child labour”.

As regards their legal status, although the OECD-Guidelines directly address businesses, they are merely voluntary recommendations without any binding effect on enterprises, whereas the participating states must commit themselves to their promotion.¹⁹³ Still, a special kind of implementation mechanism exists.¹⁹⁴ The member states must establish National Contact Points (NCPs) that promote the OECD-Guidelines and “contribute to the resolution of issues that arise relating to the implementation of the Guidelines in specific instances”.¹⁹⁵ This “specific instances’-procedure applies if a third party alleges violations of the OECD-Guidelines by a company.¹⁹⁶ In such cases, the “NCP will offer a forum for discussion”, offer its good offices, consult with the parties and with other NCPs if necessary, seek advice from the Committee on International Investment and Multinational Enterprises (CIME) on “the interpretation of the Guidelines in particular circumstances” and offer and facilitate access to conciliation or mediation.¹⁹⁷ If no agreement is reached, the NCP will “issue a statement, and make recommendations ... on the implementation of the Guidelines”.¹⁹⁸ However, sensitive business information will be protected and during the procedures it will be confidential. Afterwards, the results can be published if the parties agree.¹⁹⁹ Moreover, NCPs must report annually to CIME,²⁰⁰ and CIME must consider submissions by member countries or an advisory body questioning the proper fulfilment of the duties of an NCP.²⁰¹

This array of NCP-measures shows that the whole procedure is based on cooperation instead of confrontation and that considerable emphasis is placed on the protection of the enterprises’ interests with regard to confidentiality. Even if the case reaches CIME, CIME will only deal with it abstractly without mentioning the company concerned.²⁰² Therefore, if companies are unwilling to abide by the OECD-Guidelines, there is no way of forcing them to do so. This means that “non-adherence will not render an MNE in strict technical breach of the Guidelines”.²⁰³ Due to the confidentiality-principle, one cannot even rely on public pres-

¹⁹³ Report of the United Nations High Commissioner for Human Rights, note 145 above, at 7; due to their legal status, the OECD-Guidelines have been characterized as “a more unusual hybrid”, see Oldenzien, note 168 above, at 9.

¹⁹⁴ See The OECD Guidelines for Multinational Enterprises, note 177 above, Part 2. Implementation Procedures of the OECD Guidelines for Multinational Enterprises, at 29-37.

¹⁹⁵ Report of the United Nations High Commissioner for Human Rights, note 145 above, at 7.

¹⁹⁶ Oldenzien, note 168 above, at 9.

¹⁹⁷ The OECD Guidelines for Multinational Enterprises, note 177 above, at 36, Procedural Guidance. I.C.1.-2.

¹⁹⁸ Ibid., I.C.3.

¹⁹⁹ Ibid., I.C.4.

²⁰⁰ The OECD Guidelines for Multinational Enterprises, note 177 above, at 37, Procedural Guidance. D.1.

²⁰¹ Ibid., II.3.b.

²⁰² See Hamm, note 176 above, at 197.

²⁰³ Very critical Tully, note 192 above, at 403.

sure, as the public may never know about the incidents. Consequently, confidentiality runs counter to the transparency-requirement and can damage the credibility of the NCPs work.²⁰⁴

However, some positive aspects of the OECD-Guidelines' reform in 2000 must be pointed out:²⁰⁵ Their geographical reach extends to states where member state-based enterprises do business. The OECD-Guidelines not only address MNEs, but also encourage medium-sized and small enterprises to abide by them. The inclusion of contractors and subcontractors is also noteworthy. Finally, it must be appreciated that the OECD-Guidelines explicitly refer to international treaties and other documents in the field of human rights, labour rights, the environment etc.

Nevertheless, the OECD-Guidelines rely upon the commitment of the adhering states. Although it is emphasized that this lends considerable credibility to them as they enjoy "the backing of governments whose territories are home to almost 90 per cent of foreign direct investment flows and to 97 out of the top-100 multinational enterprises",²⁰⁶ their success depends on the willingness of the states to establish NCPs that take advantage of the rather weak tools for the "enforcement" of the OECD-Guidelines as efficiently as possible.²⁰⁷

3. The United Nations Global Compact

UN-Secretary General Kofi Annan introduced the UN Global Compact at the World Economic Forum in Davos in January 1999²⁰⁸ and launched its operational phase together with 50 business leaders in July 2000 at the UN Economic and Social Council.²⁰⁹ The Global Compact is a voluntary initiative open to businesses, which strives to promote ten principles²¹⁰ through a variety of instruments, such as dialogue, learning and projects.²¹¹ The principles cover the areas of human rights,

²⁰⁴ Ibid., at 401; see also Oldenzien, note 168 above, at 10, pointing out that "in terms of transparency, the OECD Guidelines procedure is not very clear".

²⁰⁵ Hamm, note 176 above, at 195-196.

²⁰⁶ UN Global Compact Office/OECD Secretariat, note 179 above, at 3.

²⁰⁷ So far, the procedures are considered to be "slow and not transparent, and the outcomes are often unsatisfactory"; Oldenzien, note 168 above, at 10.

²⁰⁸ UN Global Compact Homepage, <<http://www.unglobalcompact.org/AboutTheGC/index.html>> (last visited: 07/07/2006); Global Compact Office, The United Nations Global Compact. Advancing Corporate Citizenship, June 2005, <http://www.unglobalcompact.org/docs/about_the_gc/2.0.2.pdf> (last visited: 07/07/2006).

²⁰⁹ See King, B., The UN Global Compact: Responsibility for Human Rights, Labor Relations, and the Environment in Developing Nations, (2001), 34 Cornell International Law Journal, 481-485, at 482; UN Global Compact Office/OECD Secretariat, note 179 above, at 2.

²¹⁰ See UN Global Compact Homepage, <<http://www.unglobalcompact.org/AboutTheGC/TheTenPrinciples/index.html>> (last visited: 07/07/2006); originally, there were only nine principles. The tenth principle concerning corruption was added in June 2004; see Oldenzien, note 168 above, note 5.

²¹¹ Global Compact Office/OECD Secretariat, note 179 above, at 2.

labour rights, the environment and corruption. The first two principles concerning human rights state that “[b]usinesses should support and respect the protection of internationally proclaimed human rights” and “make sure that they are not complicit in human rights abuses”.²¹² Principles 3 to 6 deal with labour rights, including all four core labour standards, principles 7 to 9 promote environmental rights, and principle ten speaks out against corruption.

While the principles concerning labour rights are rather precise, the first two general human rights principles are broad and unspecific. This general promotional approach with its simplicity is on the one hand appealing to participating companies,²¹³ on the other hand, the lack of specificity is detrimental to the Global Compact’s efficient implementation.²¹⁴ The operational aspects of the Global Compact have also encountered criticism.²¹⁵ Starting out with fifty companies, the Global Compact has now more than 1700 formal participants.²¹⁶ All that the companies have to do in order to participate in the Global Compact is to express publicly their commitment to the ten principles.²¹⁷ Moreover, every year, they must submit a report describing one concrete example where the company has made some progress or has learned a lesson in the implementation of the ten principles.²¹⁸ Otherwise, there are no monitoring or implementation mechanisms provided.²¹⁹ Consequently, so far only very few members of the Global Compact have complied with the reporting requirement in an appropriate way.²²⁰ Basically all the criticisms that were discussed above with regard to voluntary corporate codes of conduct are equally applicable to the Global Compact.²²¹ Moreover, the special authority and the good reputation connected with participation in a UN-initiative have led critics to coin a new word to describe companies that take advantage of their partnership with the UN for public relations purposes: “to bluewash”, which is defined as “allowing some of the largest and richest corporations to wrap themselves in the UN’s blue flag without requiring them to do anything new”.²²²

²¹² Global Compact Office, The United Nations Global Compact, note 208 above, at 3.

²¹³ Global Compact Office/OECD Secretariat, note 179 above, at 4; Oldenzien, note 168 above, at 11.

²¹⁴ Oldenzien, note 168 above, at 11.

²¹⁵ For a summary of the criticism against the Global Compact, see e.g. Taylor, A.M., The UN and the Global Compact, (2000-2001), 17 *New York Law School Journal for Human Rights*, 975-984, at 980-981.

²¹⁶ Report of the United Nations High Commissioner for Human Rights, note 145 above, at 8.

²¹⁷ See Weiß, note 184 above, at 86.

²¹⁸ Oldenzien, note 168 above, at 11.

²¹⁹ Ibid.

²²⁰ Ibid., at 12.

²²¹ See above, chapter 3.

²²² Definition by the New York Times cited according to The Alliance for a Corporate-Free UN, *The United Nations Global Compact vs. Corporate Accountability*, <<http://www.earthrights.org/files/Reports/UNCompact.pdf>> (last visited: 07/07/2006), at 1; discussed by King, note 209 above, at 482; Oldenzien, note 168 above, at 12; Taylor, note 215 above, at 980.

In order to deal with this criticism, on 15 June 2004, a “sanctioning”-mechanism was established.²²³ If a member of the Global Compact does not submit its “communication on progress” to the Global Compact website for two years in a row that participant will be regarded “inactive” until such a submission is made.²²⁴ An inactive member is no longer allowed to participate in Global Compact events and it is labelled “inactive” on the Global Compact website.²²⁵ While the declaration of inactivity in this case refers to the non-fulfilment of the formal reporting requirement, it might in the future also be used in order to deal with the “bluewashing” criticism, because the UN Secretary-General’s Guidelines on UN-cooperation with the business community of 17 July 2000 state that “[b]usiness entities that are complicit in human rights abuses ... are not eligible for partnership”.²²⁶ The constant criticism of the Global Compact has created another positive result, with the introduction of a written complaints mechanism by the Global Compact Office.²²⁷ If a credible complaint of systematic or egregious abuse of the Global Compact’s principles is submitted to the Global Compact Office, it will forward the complaint to the company concerned and request its written comments as well as information of any actions taken to address the situation.²²⁸ The Global Compact Office is “available to provide guidance and assistance” and may take the following actions: It may “[u]se its own good offices to encourage resolution of the complaint”; it may ask the relevant country/regional Global Compact network for assistance; it may “[r]efer the complaint to one or more of the UN entities that are the guardians of the Global Compact principles for advice, assistance or action”; it may inform the parties “about the specific instance procedures of the OECD Guidelines for Multinational Enterprises and, in the case of complaints relating to the labour principles, the interpretation procedure under the ILO Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy” or it may “[r]efer the complaint to the Global Compact Board”.²²⁹ If the company concerned does not engage in dialogue within three months of being informed of the complaint by the Global Compact Office, it may be regarded as “inactive” and would be labelled as such on the Global Compact website.²³⁰ As a final step “the Global Compact Office reserves the right to remove that company from the list of participants and to so indicate on the Global Compact website” if it turns out that

²²³ Global Compact, “Guidance Packet on Communication on Progress”, <http://www.unglobalcompact.org/CommunicatingProgress/guidance_package_on_cop.html> (last visited: 07/07/2006).

²²⁴ Global Compact, “Note on Integrity Measures”, <<http://www.unglobalcompact.org/AboutTheGC/integrity.html>> (last visited: 07/07/2006).

²²⁵ Ibid.

²²⁶ Secretary General of the United Nations, Guidelines on Cooperation between the United Nations and the Business Community, 17 July 2000, <<http://www.un.org/partners/business/otherpages/guide.htm>> (last visited: 07/07/2006), Chapter III, para. 12c.

²²⁷ See Oldenzien, note 168 above, at 12.

²²⁸ Global Compact, note 224 above.

²²⁹ Ibid.

²³⁰ Ibid.

“the continued listing of the participating company on the Global Compact website is ... detrimental to the reputation and integrity of the Global Compact”.²³¹ While this development can be seen as leading towards greater accountability, due to the “past experience and the vague procedures”, critics doubt that it will actually lead to positive change.²³² However, the new measures demonstrate that public criticism can be an efficient tool for strengthening the Global Compact.²³³

4. The UN Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises With Regard to Human Rights

In August 2003, the UN Sub-Commission on the Promotion and Protection of Human Rights unanimously adopted the UN Norms on the Responsibilities of Transnational Corporations and other Business Enterprises with regard to Human Rights (the UN-Norms).²³⁴ They have been hailed as “the first authoritative and comprehensive set of global business standards bearing the UN imprimatur”.²³⁵ Directly addressing TNCs and other business enterprises alike, they encompass the right to equal opportunity and non-discriminatory treatment,²³⁶ the right to security of persons,²³⁷ workers rights,²³⁸ a right to development,²³⁹ indigenous peoples’ rights,²⁴⁰ transparency and anti-corruption regulations,²⁴¹ consumer protection,²⁴² obligations with regard to environmental protection²⁴³ and a whole range of civil and political as well as economic, social and cultural rights, such as “the rights to development, adequate food and drinking water, the highest attainable standard of physical and mental health, adequate housing, privacy, education, freedom of thought, conscience, and religion and freedom of opinion and expression”.²⁴⁴

²³¹ Ibid.

²³² Oldenzien, note 168 above, at 13.

²³³ Taylor, note 215 above, at 983 refers to the opinion that the spotlight of public criticism “can be as powerful a force as any enforcement mechanism that can be devised”.

²³⁴ Commentary on the Norms, note 1 above; for the historical background see Amnesty International, *The UN Human Rights Norms for Business: Towards Legal Accountability*, Amnesty International Publications, 2004, <[http://web.amnesty.org/library/pdf/IO420022004ENGLISH/\\$File/IO4200204.pdf](http://web.amnesty.org/library/pdf/IO420022004ENGLISH/$File/IO4200204.pdf)> (last visited: 07/07/2006), at 6.

²³⁵ Amnesty International, note 234 above, at 15.

²³⁶ Para. 2 UN-Norms.

²³⁷ Paras. 3-4 UN-Norms.

²³⁸ Paras. 5-9 UN-Norms.

²³⁹ Commentary para. 10b UN-Norms.

²⁴⁰ Commentary para. 10c UN-Norms.

²⁴¹ Para. 11 UN-Norms.

²⁴² Para. 13 UN-Norms.

²⁴³ Para. 14 UN-Norms.

²⁴⁴ Para. 12 UN-Norms.

It is noteworthy, that the section on the right to security of persons encompasses the prohibition for business enterprises to “engage in [or] benefit from war crimes, crimes against humanity, genocide, torture, forced disappearance, forced or compulsory labour, hostage-taking, extrajudicial, summary or arbitrary executions”²⁴⁵ etc., thereby including all human rights violations that form part of customary international law and *ius cogens*. Furthermore, apart from prohibiting direct violations of or direct complicity in these crimes, the UN-Norms also apply to companies that merely benefit from these crimes.²⁴⁶ This extends the responsibility of enterprises for human rights violations considerably in comparison with the above-mentioned international instruments. The UN-Norms also address the problem that was dominant in the above-discussed ATCA-cases, emphasizing that “[s]ecurity arrangements for transnational corporations and other business enterprises shall observe international human rights norms ...”²⁴⁷

Amongst other workers rights, the UN-Norms, like all other international instruments discussed above, take account of the four core labour standards.²⁴⁸ The principle stating that “enterprises shall not use forced or compulsory labour”²⁴⁹ shows that the language of the UN-Norms is much clearer and stricter than e.g. the wording of the OECD-Guidelines which merely require that enterprises “[c]ontribute to the elimination of ... forced or compulsory labour”.²⁵⁰ Still, the UN-Norms also reflect an awareness of the difficulties that they present for countries whose economies are based to some extent on child labour. Therefore, they do not forbid child labour instantly, but call for enterprises to make a plan to abolish child labour and to provide for the future of former child workers, in areas such as schooling.²⁵¹

Without going into further detail, these few examples already demonstrate that the range of human rights covered by the UN-Norms is much broader than those protected by the other instruments. The human rights protection is also stricter and more precise which is illustrated by the wording and the detailed commentary of the UN-Norms.²⁵² Additionally, in the preamble of the UN-Norms, extensive reference is made to a broad range of UN treaties and other international instruments including the instruments discussed above, which lends significant authority to the UN-Norms. Still, the UN-Norms make it perfectly clear that “[s]tates have the primary responsibility” for the protection of human rights, which includes their responsibility to ensure respect for human rights by business enterprises.²⁵³

²⁴⁵ Para. 3 UN-Norms.

²⁴⁶ Commentary para. 1b UN-Norms.

²⁴⁷ Para. 4 UN-Norms.

²⁴⁸ Paras. 2, 5, 6, 9 UN-Norms.

²⁴⁹ Para. 5 UN-Norms.

²⁵⁰ OECD-Guidelines-Principle IV.1.c., note 177 above.

²⁵¹ Commentary para. 6d UN-Norms.

²⁵² See Oldenziel, note 168 above, at 19.

²⁵³ Para. 1 UN-Norms.

However, it is likewise obvious that this state responsibility does not absolve business enterprises from their own responsibility for the protection of human rights “[w]ithin their respective spheres of activity and influence”.²⁵⁴

Another remarkable characteristic distinguishes them from the other instruments regarding human rights and business: The UN-Norms directly envisage provisions for their implementation in the text itself.²⁵⁵ The implementation mechanisms work on different levels.

Initially, enterprises shall incorporate the UN-Norms in their internal policies and also in their contracts with third parties.²⁵⁶ They shall strive to do business only with third parties that support the UN-Norms.²⁵⁷ In order to ensure internal compliance, effective training measures for managers, workers and their representatives must be provided.²⁵⁸ Moreover, workers must be enabled to file complaints concerning human rights violations without fear of disciplinary or other action and these claims must be independently investigated.²⁵⁹ In case of an infringement of the UN-Norms, “plans of action or methods of reparation and redress” shall be established²⁶⁰ and “prompt, effective and adequate reparation” for victims must be ensured.²⁶¹ On a second, external level, states must provide the necessary framework in order to guarantee the implementation of the UN-Norms by enterprises.²⁶²

Finally, on a third level, enterprises “shall be subject to periodic monitoring and verification by United Nations, other international and national mechanisms already in existence or yet to be created”.²⁶³ The UN human rights treaty bodies, country rapporteurs and thematic rapporteurs and the Sub-Commission on the Promotion and Protection of Human Rights could play a role in the monitoring process, as well as the Commission on Human Rights, which is invited to consider the creation of an expert group or a special rapporteur.²⁶⁴ The details of this international monitoring, however, are yet to be decided.²⁶⁵ In this respect, the UN-Norms have suffered a slight setback as the Commission on Human Rights concluded at its 56th meeting on 20 April 2004, that at the moment “the Sub-Commission should not perform any monitoring function”.²⁶⁶ Furthermore, al-

²⁵⁴ Ibid.

²⁵⁵ Oldenzien, note 168 above, at 18.

²⁵⁶ Para. 15 UN-Norms.

²⁵⁷ Commentary para. 15c UN-Norms.

²⁵⁸ Commentary para. 15b UN-Norms.

²⁵⁹ Commentary para. 16e-f UN-Norms.

²⁶⁰ Commentary para. 17h UN-Norms.

²⁶¹ Para. 18 UN-Norms.

²⁶² Para. 17 UN-Norms.

²⁶³ Para. 16 UN-Norms.

²⁶⁴ Commentary para. 16b UN-Norms.

²⁶⁵ Oldenzien, note 168 above, at 19.

²⁶⁶ Commission on Human Rights, Report to the Economic and Social Council on the Sixtieth Session of the Commission, Resolution 2004/116. Responsibilities of transnational corporations and

though the UN-Norms have the outward appearance of a treaty, the Commission pointed out that so far they are merely a draft proposal and as such have no legal standing.²⁶⁷

5. Discussion and Future Perspective

Despite these shortcomings regarding the legal status of the UN-Norms, they have the potential to develop in the future into a treaty that holds MNEs and other business enterprises directly responsible under international law for human rights violations. From the perspective of efficient human rights protection, they are superior to the other instruments as they cover the broadest range of human rights, as their protection is stricter and more precise, and as they provide for enforcement mechanisms that include compensation for victims of human rights abuses. Except for a good coverage of the four core labour standards in all instruments, the protection of human rights outside the area of workers rights is rather wanting in the other instruments. As it does not fall into its competence, the ILO-Declaration does not cover other human rights at all, while the OECD-Guidelines and the Global Compact address human rights outside the areas of labour rights only in very general terms without specifying any rights as such. The UN-Norms manage to fill the existing gap and present “the most comprehensive, clear and complete initiative or standard on business and human rights that goes beyond labour standards”.²⁶⁸ Also the inclusion of implementation mechanisms in the UN-Norms themselves is unprecedented. If the UN-Norms were to become a binding treaty, MNEs could be held directly responsible under international law for the human rights violations they commit. This would enable the UN-Norms to deal also with violations of human rights by companies operating in states that are unwilling or unable to enforce human rights efficiently²⁶⁹ – a situation where the classical state-centred approach of international human rights law is bound to fail. Moreover, a future direct responsibility of MNEs under the UN-Norms is also preferable to a purely voluntary approach as reflected in the Global Compact, or to the state-centred approach of the OECD-Guidelines that do not hold MNEs directly responsible either, because in contrast to the UN-Norms, these last mentioned instruments are incapable of dealing with recalcitrant TNCs efficiently.

Therefore, the UN-Norms should be turned into a binding international treaty directly addressing MNEs and other business enterprises. However, as many states, some businesses and employer groups take a very critical stand towards the

related business enterprises with regard to human rights, E/CN.4/2004/L.11/Add.7, <[http://www.unhcr.ch/huridocda/huridoca.nsf/e06a5300f90fa0238025668700518ca4/169143c3c1009015c1256e830058c441/\\$FILE/G0413976.pdf](http://www.unhcr.ch/huridocda/huridoca.nsf/e06a5300f90fa0238025668700518ca4/169143c3c1009015c1256e830058c441/$FILE/G0413976.pdf)> (last visited: 07/07/2006), 81–82, at 82.

²⁶⁷ Ibid.

²⁶⁸ Report of the United Nations High Commissioner for Human Rights, note 145 above, at 10, including a list of arguments in favour of the UN-Norms.

²⁶⁹ Ibid., at 11.

UN-Norms,²⁷⁰ this is not a realistic short term goal. The ratification process of such a comprehensive treaty might take a very long time, as states might be reluctant to sign it being afraid of competitive disadvantages for their TNCs in comparison with those coming from other countries that are not members of the treaty. Consequently, an alternative to aiming at a ratification of the treaty as a whole would be to endeavour a step-by-step ratification starting with a core document containing only those standards that are already norms of customary international law and *ius cogens*. Taking the ECHR²⁷¹, for example, as a model, one might start with the four core labour standards and the *ius cogens* norms detailed in the section on the right to security of persons combined with an efficient international enforcement mechanism. Subsequently, protocols encompassing the other rights and requiring separate ratification could be added. Such a framework convention might be more appealing to states, as after the ratification of the core document, they are free to choose which document they want to accede to at what time. However, the final aim must be to guarantee the respect of the full range of human rights by business enterprises within their sphere of influence.

While pursuing this long-term goal, the promotion of the other instruments and especially the Global Compact with its attraction for TNCs should not be neglected, as on a voluntary basis further-reaching results may be achieved in the short-term perspective.²⁷² Above all, MNEs should not be antagonized. Still, in the long run, only an international treaty that holds MNEs directly responsible for human rights violations can adequately address the situations where soft law and state-centred instruments fail.

V. The Future Development of International Law Regarding MNEs

One might ask whether the creation of an international human rights treaty that holds MNEs directly responsible for human rights violations is compatible with the traditionally state-centred international law and whether MNEs can be recognized as subjects of international law.²⁷³ In this respect and in order to illustrate the long process of establishing a binding and enforceable international law system, an

²⁷⁰ Ibid., at 9-10, listing the arguments against the UN-Norms. However, from a human rights perspective, these arguments are not substantiated.

²⁷¹ European Convention on Human Rights, adopted on 04/11/1950, entered into force on 03/09/1953, as amended by Protocol No. 11, adopted on 11/05/1994, entered into force on 01/11/1998, CETS Nos. 5 and 155, <<http://conventions.coe.int/Treaty/Commun/ListeTraites.asp?CM=8&CL=ENG>> (last visited: 07/07/2006).

²⁷² See Report of the United Nations High Commissioner for Human Rights, note 145 above, at 10.

²⁷³ Subjects of international law are all entities possessing rights and duties under international law; see e.g. Schmalenbach, note 19 above, at 63; definitions vary; e.g. Shaw, note 12 above, at 176 contemplates the additional criterion of enforceability of claims.

interesting parallel can be drawn between the creation of a new international regime for human rights protection against MNEs and the emergence of human rights law in general after World War II.

While before the war human rights could be virtually ignored on the international level, the atrocities of World War II highlighted the need for their international protection, and their success-story began.²⁷⁴ Apart from the very general references to human rights in the UN-Charter,²⁷⁵ international human rights were set out in detail by the Universal Declaration of Human Rights,²⁷⁶ a standard-setting, non-binding international instrument, which was followed by an ever-increasing number of binding international human rights treaties.²⁷⁷ Monitoring mechanisms emerged based on the UN-Charter and on the treaties. Apart from the very efficient human rights courts operating on a regional level, the development of international human rights enforcement mechanisms culminated after the establishment of the International Criminal Tribunals for the former Yugoslavia²⁷⁸ and Rwanda²⁷⁹ in the creation of the International Criminal Court (ICC).²⁸⁰

This development shows that the creation of a new international normative regime goes through four different phases: standard setting, monitoring and exposing abuses, the creation of binding law and the establishment of enforcement mechanisms.²⁸¹ This process is already under way for human rights protection against TNCs. While standard setting and monitoring are now a reality, the creation of a binding treaty and efficient enforcement mechanisms are the next steps that have to follow.²⁸² As demonstrated above, the development of international human rights law in general has been a lengthy process and the same is to be expected for human rights protection against MNEs. Nevertheless, it also shows that under the impres-

²⁷⁴ Detailed overview of the development of human rights law by Cassese, note 16 above, at 375-398.

²⁷⁵ Preamble and Articles 1(3), 13(1b), 62(2), 55(c) and 56 Charter of the United Nations, adopted 26/06/1945, entered into force 24/10/1945, latest amendment by G.A. Res. 2847 (XXVI) of 20/12/1971, entered into force 24/09/1973 (892 UNTS 119).

²⁷⁶ Universal Declaration of Human Rights, adopted 10/12/1948, G.A. Res. 217A (III), UN Doc. A/810, at 71 (1948).

²⁷⁷ See e.g. International Covenant on Civil and Political Rights, adopted on 16/12/1966, entered into force on 23/03/1976, G.A. Res. 2200A (XXI), UN Doc. A/6316 (1966), 999 UNTS 171; International Covenant on Economic, Social and Cultural Rights, adopted on 16/12/1966, entered into force on 03/01/1976, G.A. Res. 2200A (XXI), UN Doc. A/6316 (1966), 993 UNTS 3.

²⁷⁸ Statute of the International Criminal Tribunal for the Former Yugoslavia, Security Council Resolution 827 of 25/05/1993, <<http://www.un.org/Docs/scres/1993/scres93.htm>> (last visited: 07/07/2006).

²⁷⁹ Statute of the International Criminal Tribunal for Rwanda, Security Council Resolution 955 of 08/11/1994, <<http://www.un.org/Docs/scres/1994/scres94.htm>> (last visited: 07/07/2006).

²⁸⁰ Rome Statute of the International Criminal Court, adopted on 17/07/1998, entered into force on 01/07/2002, UN Doc. A/CONF. 183/9; <<http://www.un.org/law/icc/statute/rome.htm>> (last visited: 07/07/2006).

²⁸¹ Meyer, W.H., Activism and Research on TNCs and Human Rights: Building A New International Normative Regime, in: Frynas/Pegg (eds.), note 11 above, 33-52, at 42.

²⁸² *Ibid.*, at 43.

sion of certain – unfortunately mostly terrible – historic events and if the necessary political will of the states is given, even enforcement mechanisms can develop rather quickly as exemplified by the creation of the International Criminal Tribunals and the ICC in the 1990s.

As regards subjects of international law, the events since 1945 also show an interesting development. While traditional international law was only law between states, since the end of World War II the protection of individuals became increasingly more important, as demonstrated by the multitude of human rights treaties. Individuals were consequently recognized as human rights bearers. Additionally, the creation of the International Criminal Tribunals and the ICC in the 1990s identified individuals as potential violators of *ius cogens* human rights norms who must be held responsible on the international level. Therefore, apart from states as the original subjects of international law, individuals are also now recognized to have at least partial international personality.²⁸³

As international law is constantly developing, there is no reason why MNEs should not also be acknowledged as partial subjects of international law with regard to their duty to abstain from human rights violations. While this is currently not yet the case,²⁸⁴ the inability of the existing mechanisms on the national and international level to deal efficiently with human rights violations by MNEs shows that there is a need for a powerful international legal regime in this respect.²⁸⁵ It is time that international law takes account of the changed realities and the enormous impact of MNEs on people's fundamental rights and adapts to the fact that states are no longer the only rights and duty bearers but that MNEs must also be held responsible as partial subjects of international law. Therefore, states should create a binding and enforceable international regime for efficient human rights protection against MNEs, thereby recognizing their partial international legal personality.²⁸⁶

Conclusion

As shown above, the primary responsibility for the protection of human rights against MNEs still falls upon the host state, on the territory of which potential violations might occur. Unfortunately, the power of TNCs combined with economic

²⁸³ For the development of the legal status of individuals under international law, see Cassese, note 16 above, at 142-150.

²⁸⁴ See e.g. Shaw, note 12 above, at 225; Johns, note 23 above, at 903; Kimminich/Hobe, note 30 above, at 154; Schmalenbach, note 19 above, at 64; Schmalenbach sees MNEs as partial subjects of international law regarding their rights, but not their duties.

²⁸⁵ Cautiously in favour of acknowledging international legal personality for MNEs, Johns, note 23 above, at 903; Kimminich/Hobe, note 30 above, at 154.

²⁸⁶ See Gaedcke, note 78 above, at 260. As this partial international legal personality and the corresponding duties of MNEs would be state-derived, they would, of course, always be open to change according to the will of the states, which retain the power to amend or even to abrogate the relevant treaties.

interests of the host state make efficient human rights protection sometimes impossible.

Home state jurisdiction in the country where the parent company is based could offer alternative protection for human rights against MNEs if host state jurisdiction fails. However, due to the “corporate veil”, state sovereignty and many procedural obstacles caused by the special structure of MNEs and the extraterritoriality of potential violations, home state jurisdiction applies only to a very limited category of cases. Moreover, even this limited range of home state jurisdiction is threatened by political resistance striving for its abolition.

Despite these difficulties, litigation under the U.S. Alien Tort Claims Act is currently the most powerful tool against human rights violations by MNEs. Although so far no MNE-case has been decided on the merits, ATCA-litigation is capable of exercising considerable public pressure on companies, which has at least led to extra-judicial settlements of claims in individual cases. With the recent judgment of the ECJ precluding the applicability of the principle of *forum non conveniens* in English Courts in cases against U.K.-based MNEs in the future, prospects for litigation against MNEs have also improved before the English Courts.

However, it cannot be the duty of single national jurisdictions to solve the whole world community’s problems regarding human rights and globalization. Although the home state approach must be very much appreciated and should be intensified in the future, states are understandably reluctant to establish this kind of jurisdiction because as long as not all states offer home state jurisdiction, those that do pose a competitive disadvantage on their own MNEs. This explains why home state jurisdiction is not able to tackle the problem of human rights violations by MNEs either.

Consequently, there is a need for universal regulation. So far, all initiatives on the international level, such as the MNE-Declaration of the ILO, the OECD-Guidelines, the Global Compact and the UN-Norms are not legally binding on MNEs. While the scope of the other initiatives is somewhat limited and implementation mechanisms are weak, the UN-Norms have the potential to develop into a binding international treaty with appropriate enforcement mechanisms for the universal protection of a broad range of human rights against MNEs. As this is a rather ambitious long-term project, this paper suggests starting its implementation on a step-by-step basis beginning with a core document containing *ius cogens* human rights norms applicable to MNEs supported by additional protocols containing groups of other rights that the states can ratify consecutively.

Meanwhile, the other initiatives should not be neglected as they do not compete with each other but complement each other and because they can bring about better results in the short-term perspective. However, the final aim must be a universal human rights treaty that holds MNEs directly responsible for human rights violations. This is not only desirable from a human rights perspective, but also from an economical perspective, because if all companies are bound to abide by human rights law, the problem of competitive disadvantage no longer exists.

It is certainly a novelty to create international law that holds MNEs directly responsible for human rights violations. Still, international law is open to such a development as it is no inflexible dogmatic construct but an ever-developing system that takes account of the realities of a changing world, which is demonstrated by the evolution of human rights law in general after World War II. If international law does not want to become irrelevant, it has to acknowledge the partial international personality of MNEs and provide for an efficient human rights treaty that holds them directly responsible. Finally, this would allow MNEs to focus on their positive potential of improving the economic situation, the living conditions and the human rights situation in developing countries alike.

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