



MYKOLAS ROMERIS UNIVERSITY

FACULTY OF LAW

DEPARTMENT OF INTERNATIONAL AND EUROPEAN UNION LAW

MONIKA DAILIDAITE

JOINT MASTER IN INTERNATIONAL LAW

RESPONSIBILITY FOR VIOLATIONS OF HUMAN RIGHTS BY
TRANSNATIONAL CORPORATIONS

MASTER THESIS

SUPERVISOR:

ASSOC. PROF. DR. LAURYNAS BIEKŠA

VILNIUS, 2012

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INTRODUCTION

RELEVANCE OF THE TOPIC

„Tonight you have power over me, but tomorrow I will tell the world“ – Dolly Filàrtiga, 1976¹

States might still be the main actors on the international arena, but in this time of globalization and integration other actors gain more and more importance as well. Those other actors are of course international organizations, transnational corporations, various action groups and individuals. Their impact is different and depends on the rights and obligations they assume and the sphere they operate in. Moreover, that impact is not always positive, therefore the question of responsibility is unavoidable.

The economist Milton Friedman said that „[t]he discussions of the social responsibility of business are notable for their analytical looseness and lack of rigor. What does that mean to say that “business” has responsibilities? Only people can have responsibilities.”² Is it really true from the perspective of today – the beginning of the third millennium? The answer is – no. Globalization with its central figure – a transnational corporation – is spreading fast, profoundly transforming the world’s economy, encompassing the inevitable movement towards greater interdependence based on economic, communications and cultural foundations and operating rather autonomously of national regulations,³ with such important aspects as progressive elimination of barriers to trade and investment, the growing mobility of capital, also improvement of transportation and communication infrastructure which has reduced distances between different parts of the world and exchange of goods is faster and in greater capacities.⁴ But maybe the most important aspect of globalization is that it is inevitable. The UN Committee on Economic, Social and Cultural Rights has issued a statement already in 1998 in which it provided that “(globalization) has also come to be closely associated with a variety of specific trends and policies including an increasing reliance upon a free market, a significant growth in

¹ Jeffrey Davis, *Justice Without Borders: Human Rights Cases in U.S. Courts//Law & Policy*. 2006, Vol. 28. P. 60. Accessed online at: <http://onlinelibrary.wiley.com/doi/10.1111/j.1467-9930.2005.00217.x/pdf> [accessed on: 12/11/2011]

² Silvia Danailov, *The Accountability of Non-State Actors for Human Rights Violations: the Special Case of Transnational Corporations*. Geneva, October 1998. P. 3.

³ Shaw, Malcolm N. *International Law*. Cambridge University Press. Cambridge. 6th edition. 2008. P. 48.

⁴ Silvia Danailov, *The Accountability of Non-State Actors for Human Rights Violations: the Special Case of Transnational Corporations*. Geneva, October 1998. P. 4.

the influence of international financial markets and institutions in determining the viability of national policy priorities, a diminution in the role of the State and the size of its budget, the privatization of various functions previously considered to be the exclusive domain of the State, the deregulation of a range of activities with a view to facilitating investment and rewarding individual initiative, and corresponding increase in the role and even responsibilities attributed to private actors, both in the corporate sector, in particular to the transnational corporations, and in civil society.”⁵ An example of the situation when, various previously State functions and responsibilities are attributed to private actors, can be that of the AWB, an Australian corporation which primarily was a government agency – the Australian Wheat Board. The AWB had the responsibility for marketing and export of Australian wheat to foreign countries. After privatization it retained this power. Moreover, it was the largest supplier of food to the Iraqi Oil for Food program managed by the UN. This corporation was investigated on allegations that it bribed Iraqi officials in order to sell Australian wheat.⁶ The important aspect of this situation is that it shows the growing power and influence of multinational corporations because States are dependent on the world financial markets.

Taking all that into account, human rights issues become extremely important because State power seems to be becoming weaker, and influential non-state actors, which sometimes threaten and abuse human rights, are emerging. This is where it is relevant to speak of “governance gaps” which mean that there is the gap “between the scope and impact of economic forces and actors, and the capacity of societies to manage their adverse consequences.”⁷ That means that even though free market economy is needed for development in many senses, human rights included, some kind of sanctioning or reparation mechanism is a necessity as well, since these “governance gaps” create a permissive environment for unlawful acts by corporations.⁸ What is needed, on one hand, is a possibility to freely purchase businesses in foreign countries and make investments, generate profits and create new jobs. That, on the other hand, has to be balanced with parent corporations’ responsibility for an abusive conduct of its subsidiaries. Simply put, those “governance gaps” have to be reduced or compensated for. Yet, no one answer

⁵ Silvia Danailov, *The Accountability of Non-State Actors for Human Rights Violations: the Special Case of Transnational Corporations*. Geneva, October 1998. P. 4-5.

⁶ Robert McCorquodale, Penelope Simons, *Responsibility Beyond Borders: State Responsibility for Extraterritorial Violations by Corporations of International Human Rights Law*//*The Modern Law Review*. 2007, Vol. 70, Issue 4. P. 607. Accessed online at: <http://onlinelibrary.wiley.com/doi/10.1111/j.1468-2230.2007.00654.x/pdf> [accessed on: 12/11/2011].

⁷ Glen Whelan, Jeremy Moon, Marc Orlitzky, *Human Rights, Transnational Corporations and Imbedded Liberalism: What Chance Consensus?*//*Journal of Business Ethics*. 2009, Vol. 87. P. 374. Accessed online at: <http://www.springerlink.com/content/1734707260382452/fulltext.pdf> [accessed on: 12/11/2011].

⁸ *Protect, Respect and Remedy: a Framework for Business and Human Rights*//*Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises*. 7 April 2008. A/HRC/8/5. P. 3.

how to achieve it is found yet, but there is one feasible solution offered by the Alien Tort Claims Act in the United States.

The analysis of the issue of transnational corporations' responsibility needs to answer under which jurisdiction a corporation is responsible, if it is responsible at all. Does a "home" State has to be held accountable, or the "host" State? If a corporation is to be held directly accountable, what existing mechanisms are there and how effective they are?

This thesis is focused on imposing civil liability for human rights abuses committed by transnational corporations.

STRUCTURE

This thesis is divided into two main chapters, which are subsequently divided into sub-chapters. The first chapter addresses the possibility to hold States accountable for human rights abuses committed by transnational corporations. Sub-chapters analyze in detail challenges of attribution of conduct by transnational corporations to "home" States, „host“ States, or directly to transnational corporations. Relevant sub-chapters examine when conduct of corporations is attributable to States, and later explores States' obligation of due diligence. Finally, the last sub-chapter analyses whether it is possible to hold transnational corporations directly accountable for human rights violations, as well it explores possibilities of transnational corporations to gain international subjectivity, and corporations' responsibility for complicity in human rights abuses by various State actors. This chapter aims at showing that both „home“ and „host“ States' responsibility is unsatisfactory for a number of different reasons, therefore direct responsibility of corporations should be possible to invoke.

The thesis then continues to analyze approaches towards holding transnational corporations accountable for human rights abuses. The chapter begins with the overview of various initiatives towards corporate responsibility. The aim of this overview is to show that it is possible to hold transnational corporations internationally accountable for their abusive actions, but it also aims to show that a voluntary nature of these initiatives is a huge obstacle for gaining any appreciable results. The chapter then continues with the analysis of the Alien Tort Claims Act as a national tool for holding transnational corporations accountable for human rights violations committed in foreign countries by foreign nationals to foreign nationals. The last part of the second chapter overviews situation in the European Union, aiming to show that no

European Union Member State has a similar system within their national jurisdictions, nevertheless, it provides an alternative.

OBJECT, SUBJECT, METHODOLOGY, AND LITERATURE

The object of this thesis is both public international law and national law, as much as the latter concerns remedies for violations of human rights committed in foreign countries by foreign nationals. Subject – responsibility for violations of human rights committed by transnational corporations, aiming to answer who bears it – States or transnational corporations themselves.

Writing this thesis theoretical and analytical approach in literature and doctrine was employed, using such methods as comparative historic, analysis, deduction, induction, generalization, etc.

As this thesis is interdisciplinary in nature, it provides a combination of international law and domestic legal sources, as well as non-binding instruments. There is a number of legal instruments relevant in human rights field but only few are examined due to the scope of this thesis.

The issue of responsibility for human rights abuses by transnational corporations is highly debated both in literature and within the United Nations. The Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, John Ruggie, notes in his 2008 report that “the root cause of the business and human rights predicament today lies in the governance gaps created by globalization – between the scope and impact of economic forces and actors, and the capacity of societies to manage their adverse consequences.”⁹ This observation once again confirms that the subject of this thesis reaches out to various disciplines: human rights, corporate law, State responsibility, business ethics, criminal law, etc. Therefore, literature on this subject is plentiful and addresses the current problem from various perspectives. Taking that into account, only that part of abundant literature was used which was relevant to the determination what subjects are to be held accountable for human rights abuses committed by transnational corporations.

⁹ Protect, Respect and Remedy: a Framework for Business and Human Rights. Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, John Ruggie. 7 April 2008. A/HRC/8/5. P. 3.

1. ANALYSIS OF POSSIBLE SUBJECTS TO BEAR RESPONSIBILITY FOR HUMAN RIGHTS VIOLATIONS COMMITTED BY TRANSNATIONAL CORPORATIONS

1.1. PREFACE

There is no doubt that human rights are recognized by international law. The meaning of human rights and the scope of subject matter of international human rights instruments have expanded progressively over the decades after adoption of the Universal Declaration of Human Rights (hereafter “UDHR”) in 1948 by the United Nations (hereafter “UN”). The UDHR, followed by two binding Covenants adopted in 1966¹⁰, and their two Optional Protocols of 1966 and 1989¹¹ create the most influential part of the human rights law incorporated in the UN system of international law.¹² Apart from these human rights instruments there are many others, dedicated to prevention of discrimination, rights of the child, rights of women, etc., also regional human rights instruments, such as the European Convention for the Protection of Human Rights and Fundamental freedoms (1950), American Convention on Human Rights (1969), African Charter on Human and Peoples’ Rights (1981), etc., as well as various human rights standards, recommendation and declarations.¹³ These human rights instruments are of course not equal in their legal status, because some of them (conventions, protocols, covenants) are binding on States that have ratified or acceded to them, others (declarations, principles, recommendations, guidelines) are not legally binding, but they reaffirm and deepen States’ “commitment to human dignity and democratic governance, rejecting totalitarian and violent behaviour in civic life”¹⁴, and “their moral importance is never in question, nor is their place as internationally accepted

¹⁰ International Covenant on Economic, Social and Cultural Rights, International Covenant on Civil and Political Rights, U.N. General Assembly resolution 2200 A (XXI) of December 16, 1966. Entered into force on January 3, 1976. International Covenant on Civil and Political Rights.

¹¹ Optional Protocol to the International Covenant on Civil and Political Rights, U.N. General Assembly resolution 2200 A (XXI) of December 16, 1966. Entered into force on 23 March, 1976. Second Optional Protocol to the International Covenant on Civil and Political Rights, aiming at the abolition of the death penalty, U.N. General Assembly resolution 44/128 of December 15, 1989.

¹² Ann Elizabeth Mayer, Human Rights as a Dimension of CSR: The Blurred Lines Between Legal and Non-Legal Categories//Journal of Business Ethics. 2009, Vol. 88. P. 563. Accessed online at: <http://www.springerlink.com/content/t58nxkh476092847/fulltext.pdf> [accessed on: 12/11/2011].

¹³ E.g. World Conference on Human Rights, The Vienna Declaration and Program of Action, 1993. The Global Compact, 2000.

¹⁴ Frederic Quinn, Human Rights and You: Basic United Nations, Organization for Security and Cooperation in Europe and Council of Europe Human Rights Documents. 1999. Published by OSCE/ODIHR Warsaw, Poland in cooperation with the U.S. Department of State and USAID. P. 5.

human rights norms, which most nations have accepted domestically as the standards by which modern democratic states are governed.”¹⁵

The abundance of international human rights instruments prove that human rights have to be respected and protected, and in cases of abuse – remedied. The question then is, who bears these obligations to respect, protect and remedy. The obvious answer seems to be it is a burden on States. And it is true. But the simple answer gets complicated once transnational corporations (hereafter “TNC”)¹⁶ are included in the equation. They conduct their business in several States, and there is no one State that has jurisdiction over this complicated creature nurtured by globalization and by lack of international and domestic measures to put a halter on it. And when a company within a transnational corporation abuses human rights, who is to be held responsible in case domestic measures cannot provide remedies for victims of such abuses? A State where the headquarters of a transnational corporation are domiciled? A State where abuses were committed by a subsidiary? Or should and is it possible for a transnational corporation to bear direct international responsibility for abusing internationally accepted human rights standards?

It proves to be difficult to answer this question unanimously. But one is clear, that there is a move from the idea of “protection against the State” to “protection by the State”, including various human rights violations, be they committed by governmental or non-governmental authorities.¹⁷

Subsequent chapters will explore the possibilities to put accountability for violations of human rights by transnational corporations on States where TNCs have headquarters or where the controlling corporation is established – “home” States, on States where subsidiaries are established and operating – “host” States, and directly on transnational corporations.

¹⁵ Frederic Quinn, *Human Rights and You: Basic United Nations, Organization for Security and Cooperation in Europe and Council of Europe Human Rights Documents*. 1999. Published by OSCE/ODIHR Warsaw, Poland in cooperation with the U.S. Department of State and USAID. P. 4.

¹⁶ Term „transnational corporations“, or TNCs will be used interchangeably in this thesis with terms „multinational corporations“ – MNCs and „multinational enterprises“ – MNEs because differences between these types of corporations, operating in more than one country, are not relevant for the purpose of this thesis.

¹⁷ Silvia Danailov, *The Accountability of Non-State Actors for Human Rights Violations: the Special Case of Transnational Corporations*. Geneva, October 1998. P. 21.

1.2. „HOME“ STATES‘ RESPONSIBILITY

“[P]articipation in the international community of nations involves accepting a range of human rights standards and commitments to enforce them locally.”¹⁸ This leads to noting that these international human rights instruments centres the relationship between a State and an individual, not – State-to-State; and States bear responsibility of enforcing international human rights standards which persons have not because they are nationals of a particular state but because they are individuals to whom international human rights instruments are dedicated.¹⁹

The main object of international human rights instruments being the protection of human dignity, it is compelling to interpret the provisions of these instruments in a way which apart from State bodies is reaching private actors, rather than limiting States responsibilities.²⁰ Therefore, it could be efficient to impose obligations on “home” States to control the conduct of their corporate nationals regarding human rights in foreign countries.

States may want their corporate nationals to act according to the law. But acts or omissions of the State might contribute to violations that corporations commit. Therefore, it needs to be explored when do human rights violations committed by transnational corporations are attributable to their “home” States.

Economic development and other reasons carrying economic and profit gaining aspects are the main reasons (especially, in the current economic situation) for States to overlook human rights violations committed by their TNCs in other countries. The main objective is to make profit. It is acknowledged by many governments of industrialized States in various strategic plans (e.g. United States)²¹ that it is a priority in foreign relations to provide assistance to their corporations to “win contracts in foreign markets and lobby against regulatory and political barriers in other states.”²² This does not mean that States intend to allow their corporate nationals to violate human rights but through various acts (e.g. negotiation and ratification of bilateral investment treaties, services by export credit agencies, etc.) or failure to act to prevent violations

¹⁸ Frederic Quinn, *Human Rights and You: Basic United Nations, Organization for Security and Cooperation in Europe and Council of Europe Human Rights Documents*. 1999. Published by OSCE/ODIHR Warsaw, Poland in cooperation with the U.S. Department of State and USAID. P. 145.

¹⁹ *Ibid.* P. 149.

²⁰ Silvia Danailov, *The Accountability of Non-State Actors for Human Rights Violations: the Special Case of Transnational Corporations*. Geneva, October 1998. P. 19-20.

²¹ Strategic Plan for fiscal years 2007-2012. U.S. Department of State, U.S. Agency for International Development. Revised on 7 May 2007. P. 26-30.

²² Robert McCorquodale, Penelope Simons, *Responsibility Beyond Borders: State Responsibility for Extraterritorial Violations by Corporations of International Human Rights Law//The Modern Law Review*. 2007, Vol. 70, Issue 4. P. 598. Accessed online at: <http://onlinelibrary.wiley.com/doi/10.1111/j.1468-2230.2007.00654.x/pdf> [accessed on: 12/11/2011].

of human rights, they might contribute to this outcome.²³ The question then is what actions by corporations are attributable to their “home” States.

1.2.1. TERRITORY v. JURISDICTION

Article 2(7) of the UN Charter provides that States in their international affairs have to respect the principle of sovereign equality. Nevertheless, it is not an absolute rule when the situation concerns human rights issues. It is acknowledged that State’s responsibilities under international law are not limited to its territorial borders. The Inter-American Commission on Human Rights in the case *Saldano v. Argentina* stated that jurisdiction “is [not] limited to or coextensive with national territory.”²⁴ The Commission further stated that a State “may be responsible under certain circumstances for the acts and omissions of its agents which produce effects or are undertaken outside that state’s own territory.”²⁵ This position is supported by the decisions of the European Court of Human Rights and the European Commission on Human Rights which interpreted the scope and meaning of Article 1 of the European Convention for the Protection of Human Rights and Fundamental Duties (hereinafter “ECHR”).²⁶ Article 1 of the ECHR provides that the Contracting parties “shall secure to everyone within their jurisdiction the rights and freedoms defined in Section 1 of this Convention.”²⁷ This means that a State has jurisdiction not only over individuals who are within its territory but also over those who are outside that territory but subject to that State’s jurisdiction. The same is provided in Article 2 of the International Covenant on Civil and Political Rights (hereafter “ICCPR”)²⁸ and in Article 2 of the Convention on the Rights of the Child (hereafter “CRC”).²⁹ In the *Advisory Opinion on the Wall* the International Court of Justice (hereafter “ICJ”) stated that “while the jurisdiction of

²³ Robert McCorquodale, Penelope Simons, Responsibility Beyond Borders: State Responsibility for Extraterritorial Violations by Corporations of International Human Rights Law//The Modern Law Review. 2007, Vol. 70, Issue 4. P. 599. Accessed online at: <http://onlinelibrary.wiley.com/doi/10.1111/j.1468-2230.2007.00654.x/pdf> [accessed on: 12/11/2011].

²⁴ *Saldano v. Argentina*. Inter-American Commission on Human Rights. Report No. 38/99. 11 March 1999. Par. 17. Accessed online at: <http://www.cidh.org/annualrep/98eng/Inadmissible/Argentina%20Salda%C3%B1o.htm> [accessed on: 14/03/2012].

²⁵ Ibid.

²⁶ Case of *Cyprus v. Turkey*. The European Commission on Human Rights. 10 July 1978. Application nos. 6780/74 and 6950/75. P. 132. The Commission explained that under Article 1 of the ECHR the Contracting States have the obligation, „to secure the rights and freedoms defined in the Convention to all persons under their actual and exclusive authority, whether that authority was exercised within their own territory or abroad.“ Case *Drozdz and Janousek v. France and Spain*. The European Court of Human Rights. App. no. 12747/87. 26 June 1992. Para. 9: „The term „jurisdiction“ is not limited to the national territory of the High Contracting Parties; their responsibility can be involved because of acts of their authorities producing effects outside their own territory.“

²⁷ Convention for the Protection of Human Rights and Fundamental Freedoms. European Council. Rome, 4.XI.1950.

²⁸ The International Covenant on Civil and Political Rights. Adopted by the United Nations General Assembly resolution 2200A (XXI), 16 December 1966. Entered into force 23 March 1976.

²⁹ Convention on the Rights of the Child. Adopted by the United Nations General Assembly by resolution 44/25 of 20 November 1989. Entered into force 2 September 1990.

States is primarily territorial, it may sometimes be exercised outside the national territory”, adding that the object and purpose of the ICCPR bound the States parties to comply with its provisions on jurisdiction.³⁰ The Court further stated that the practice of the Human Rights Committee is consistent when finding that the ICCPR is “applicable where the State exercises its jurisdiction on foreign territory”.³¹ The ICJ upheld this interpretation in the case of *Democratic Republic of Congo v. Uganda*.³²

1.2.2. ATTRIBUTION OF CONDUCT OF NON-STATE ENTITIES

Customary international law provides that a State will incur international responsibility for a violation of an international legal obligation if it can be attributed to that State. Draft Articles on the Responsibility of States for Internationally Wrongful Acts³³ codified by the International Law Commission reflect customary international law and in Articles 4 and 5 provide that a conduct is to be considered a conduct of the State if an organ of that State exercises legislative, executive, judicial or any other function, whatever the position that organ holds in the organization of the State, and be it an organ of the central government or of a territorial unit of the State. This means that actions by any individual or collective entity in the organization of a State which exercises governmental authority, or which is not an entity of organizational structure of a State but is given certain powers to exercise elements of governmental authority (e.g. private security companies hired to guard prisons) could be attributed to the State.³⁴

The ICJ in its Advisory Opinion on the “Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights” confirmed that the rule, enshrined in Article 4 of the 2001 Articles, is of a customary character. It also stated that “[a]ccording to a well-established rule of international law the conduct of any organ of a State must be regarded as an act of that State.”³⁵ The applicability of this rule to international human rights law has been confirmed by international case law. In the case *Awat Tingni v. Nicaragua* the Inter-American Court of Human Rights held that “[a]ccording to the rules of law pertaining

³⁰ *Advisory Opinion on the Legal Consequences on the Construction of a Wall in the Occupied Palestinian Territory*. Advisory Opinion, 9 July 2004. I.C.J. Reports 2004. P. 178-181. Paras. 107-113.

³¹ *Ibid.* Para. 109.

³² *Armed Activities on the Territory of the Congo (Democratic Republic of Congo v. Uganda)*. Judgment 10 December 2005. I.C.J. Reports 2005. P. 243-245. Paras. 217-220.

³³ International Law Commission. Articles on the Responsibility of States for Internationally Wrongful Acts. A/56/10, August 2001. UN Doc A/56/10(SUPP). Article 4.

³⁴ *Ibid.*

³⁵ *Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights*. Advisory Opinion, 29 April 1999. I.C.J. Reports 1999. P. 87. Para. 62.

to the international responsibility of the State and applicable under International Human Rights Law, actions or omissions by any public authority, whatever its hierarchical position, are chargeable to the State which is responsible under the terms set forth in the American Convention [on Human Rights].”³⁶

Article 5 of the 2001 Articles deals with conduct of entities which are not State organs but are authorized to exercise governmental authority and therefore their actions can also be attributed to a State.³⁷ It includes situations where former State owned corporations have been privatized but still exercise some public or regulatory functions, because the word “entities” refer to various bodies which may be given power by the law of a State to exercise elements of governmental authority (e.g. airlines, whether State-owned or private, may have delegated powers relating to immigration control or quarantine). Therefore, it is not the State’s participation or ownership of the entity which is important in the attribution issue, but it is important that an entity exercises elements of the governmental authority. So purely private or commercial activity in which an entity is engaged is not sufficient for the conduct to be attributed to that State.

Conclusion so far is that there can be situations that conduct of transnational corporations outside the national territory of their “home” countries can be attributed to those countries. Further, two situations when it can happen, will be analysed in detail. The first situation is when corporations are exercising elements of governmental authority. The second situation deals with corporations acting under instructions, direction or control of the State.

To begin with the first situation, Article 5 of the 2001 Articles states that “the conduct of a person or entity which is not an organ of the State [...] but which is empowered by the law of that State to exercise elements of governmental authority shall be considered an act of the State under international law, provided the person or entity is acting in that capacity in the particular instance.”³⁸ It is not explained in the Article how much governmental authority should a person or entity exercise for its conduct to be attributable to the State. The Article 5 speaks of empowering some entities with governmental authority, so it is important how this empowerment is done, for what purposes and to what extent the entity is accountable to the government. If an entity has been empowered by the law to exercise elements of governmental

³⁶ Robert McCorquodale, Penelope Simons, Responsibility Beyond Borders: State Responsibility for Extraterritorial Violations by Corporations of International Human Rights Law//The Modern Law Review. 2007, Vol. 70. Issue 4. P. 602. Accessed online at: <http://onlinelibrary.wiley.com/doi/10.1111/j.1468-2230.2007.00654.x/pdf> [accessed on: 12/11/2011].

³⁷ International Law Commission. Articles on the Responsibility of States for Internationally Wrongful Acts. A/56/10, August 2001. UN Doc A/56/10(SUPP). Article 5.

³⁸ Ibid.

authority, it is not needed to prove that the conduct of the entity is attributable to the State. The conduct will be attributable to the State even if that entity act in excess of authority or in contravention of given instructions.³⁹ So the most important aspect of attribution here is not the degree of ownership of the corporation by the State but the empowerment to exercise governmental authority.⁴⁰ The examples of such situations can be the activities of Export Credit Agencies in the industrialized countries. These Agencies are not governmental organs but have a separate legal status. Nevertheless, they are regulated by national laws and regulations which give them authority to perform their functions. Export Credit Agencies support and develop foreign investment and trade opportunities. Exercising their duties in this respect these Agencies are engaging in activities in other countries. The activities include participation in facilitating partnership between home and foreign corporations, maintaining business opportunities for home corporations abroad, or gathering key information about foreign markets. By carrying out these activities the Agencies can breach human rights by breaching privacy.⁴¹

The second situation, concerning corporations acting under instructions, direction or control of the State, is different from the one discussed above in that aspect that in this situation the corporation is not exercising any elements of governmental authority. This situation is covered by the Articles 8 and 9 of the 2001 Articles.⁴² The key issue for the attribution is the degree of control that the State has exercised over the corporation. In order to decide whether a conduct is attributable to the State, the ICJ established a test of effective control over non-state actors that are acting extraterritorially in the *Nicaragua v. United States of America* case.⁴³ In this case the Court analysed the notion of “control”. It stated that for the conduct to be attributable to the State it has to be proven that the State had exercised effective control over the conduct of the non-governmental entities that committed violations.⁴⁴ The test set in the *Nicaragua* case was criticized by the European Court of Human Rights (hereafter “ECtHR”) in the case *Ilascu v. Moldova and Russia*.⁴⁵ Criticism is concerning too high a threshold that the “effective control” test set for finding that there was control of non-state entities by a State. The

³⁹ International Law Commission. Articles on the Responsibility of States for Internationally Wrongful Acts. A/56/10, August 2001. UN Doc A/56/10(SUPP). Article 7.

⁴⁰ Robert McCorquodale, Penelope Simons, Responsibility Beyond Borders: State Responsibility for Extraterritorial Violations by Corporations of International Human Rights Law//The Modern Law Review. 2007, Vol. 70. Issue 4. P. 607. Accessed online at: <http://onlinelibrary.wiley.com/doi/10.1111/j.1468-2230.2007.00654.x/pdf> [accessed on: 12/11/2011].

⁴¹ Ibid. P. 607-608.

⁴² International Law Commission. Articles on the Responsibility of States for Internationally Wrongful Acts. A/56/10, August 2001. UN Doc A/56/10(SUPP). Articles 8 and 9.

⁴³ *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*. Judgment, 27 June 1986. I.C.J. Reports 1986.

⁴⁴ Ibid. P. 64-64. Para. 115.

⁴⁵ *Case of Ilascu and Others v. Moldova and Russia*. (App. no. 48787/99). ECtHR. 8 July 2004.

Court held that the requirement of necessary degree of control is satisfied when the non-state entity is “under the effective authority, or at the very least the decisive influence, of the State.”⁴⁶ This case shows that “home” States have extraterritorial obligations under the ECHR because the Court is not requiring to show a high degree of effective control in order to find that actions of non-state entities in other countries can be attributed to the “home” State, in such a way that the “home” State is considered to have jurisdiction over such entities.⁴⁷ Despite the criticism towards the “effective control” test, the ICJ confirmed its position in the case concerning the application of the Genocide Convention.⁴⁸

It is important to note that “home” States do not have territorial jurisdiction over their transnational corporations carrying out their businesses in foreign countries. TNCs fall under territorial jurisdiction of a State where they operate. “Home” States try to deny their responsibility for their TNCs operating abroad stating that this issue concerns the “host” State in which territory the corporation is conducting its business. Therefore, it is only possible to talk about “home” State responsibility in this situation if “control” is concerning that upon a certain activity but not “control” upon a certain territorial space. The reason why follows from the specificity of transnational corporation, as it is a complex of several different corporations and affiliates operating in different countries with one highest decision-making centre which has the highest level of control on the entire spectrum of corporations and their conduct.

Therefore, tests established by the international tribunals have to be considered with care, because TNCs are rather specific entities operating internationally and being complex in that regard that no one law can be applied to the whole group of corporations forming a transnational corporation due to different nationalities. Despite this complexity, the conclusion of the ECtHR in the *Ilascu v. Moldova and Russia* setting effective authority or at least decisive influence as sufficient proof of necessary degree of control, seems to be the most promising in finding “home” State responsibility for the conduct of its corporate nationals acting in foreign countries and violating human rights. This conclusion offers itself because “home” States have means, within limits of their jurisdiction, to influence and even direct the conduct of their TNCs operating abroad (e.g. institute measures on the decision-making corporation which then will have to direct its subordinates acting abroad to act in a certain way or take certain measures in

⁴⁶ *Case of Ilascu and Others v. Moldova and Russia*. (App. no. 48787/99). ECtHR. 8 July 2004. § 392.

⁴⁷ Robert McCorquodale, Penelope Simons, Responsibility Beyond Borders: State Responsibility for Extraterritorial Violations by Corporations of International Human Rights Law//The Modern Law Review. 2007, Vol. 70. Issue 4. P. 609. Accessed online at: <http://onlinelibrary.wiley.com/doi/10.1111/j.1468-2230.2007.00654.x/pdf> [accessed on: 12/11/2011].

⁴⁸ *Case Concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*. Judgment, 26 February 2007. I.C.J. Reports 2007. §§ 399-407.

order to comply with the requirements of the “home” State measures). Therefore it is necessary that the “home” State adopts appropriate regulatory measures to control its TNCs. Otherwise, if the “home” State adopts measures that conflict with international human rights obligations or measures are inadequate to ensure appropriate control, then a “home” State may be found responsible for the conduct of its transnational corporations operating abroad.

But even though it is possible that a State can exercise the level of control required by the ECtHR in the case *Ilascu v. Moldova and Russia* and even higher one required by the ICJ in the *Nicaragua* case over its corporate nationals in rare cases when it concerns the wholly state-owned corporations, it will be difficult to show the same level of control over private corporations. Therefore, the suggestion is to prove sufficient power, effective control or authority, basing it on the ICJ’s decision in the case of *Democratic Republic of Congo v. Uganda* “that human rights treaties may apply to a state’s conduct even where that state’s level of control falls short of an [O]ccupying Power.”⁴⁹ Taking into account that most human rights violations are committed by corporations that are not state-owned, the high requirement for effective control is likely not to be found in many of the situations where private or semi-state-owned corporations abuse human rights.

Two issues can be distinguished. The first one is regarding “home” State’s capacity to regulate the conduct of its corporate nationals taking place in foreign countries, and whether a “home” State is in a position to do that, taking into account that corporations in a TNC are nationals of their “host” States. “Host” States are not willing to admit that another State can impose its national laws on the foreign territory. “Host” States want to preserve their exclusive legislative power and to protect their corporate nationals from foreign laws. So if the question on “home” State capacity to regulate conduct of its corporate nationals operating abroad is answered affirmatively, then the international responsibility of the “home” States can be entailed, if it fails to control these activities which conflict the obligation to respect human rights by private entities.

Another issue in this respect follows from the fact that no State is capable to control transnational corporations adequately on its own. This is due to different nationalities and difficulty to determine which State is responsible for the conduct of the corporations since the relationships between corporations within a certain TNC are complex. A subsidiary is a separate legal entity from a parent corporation, therefore, it is subject to the jurisdiction of the State where

⁴⁹ Robert McCorquodale, Penelope Simons, Responsibility Beyond Borders: State Responsibility for Extraterritorial Violations by Corporations of International Human Rights Law//The Modern Law Review. 2007, Vol. 70. Issue 4. P. 610. Accessed online at: <http://onlinelibrary.wiley.com/doi/10.1111/j.1468-2230.2007.00654.x/pdf> [accessed on: 12/11/2011].

it is incorporated.⁵⁰ The outcome is that a parent corporation and its subsidiary falls under jurisdictions of their respective “home” States. This explanation is based on the ICJ decision in the *Barcelona Traction Case*.⁵¹ Although it has to be noted that this decision is to be viewed in the light of changed attitude toward corporations and groups of corporations (parent companies with their subsidiaries). Groups of companies tend to utilise their legal structure so as to avoid State regulation.⁵² This practise requires different kind of approach to deal with it. Courts need to and some already do look at the whole operation of TNCs, not at the separate parts of it. This way it is possible to bring a parent corporation under the jurisdiction of the State. Subsidiaries can no longer be viewed as really separate legal entities because “home” State of a parent corporation is entitled to require the parent corporation to impose on its subsidiaries a particular course of action or to include certain terms in contracts. The State practice, intended to regulate its corporate nationals acting extraterritorially through their subsidiaries, is expanding into the areas of competition law, anti-bribery and corruption, consumer protection, tax law and shareholder protection.⁵³ What concerns bribery and corruption, there are international treaties concluded⁵⁴ between States that impose obligations on them to regulate the conduct of their corporate nationals and their subsidiaries. Nevertheless, there is not one regarding human rights. Therefore, it might be difficult to delimit where the authority of a “home” State ends and where that of a “host” State begins. Then, there is a chance that responsibility might be avoided at all, or that both States will try to impose their respective authority upon a corporation. That will also be a problem, especially if requirements are contradicting each other or it is not possible to implement all of them. Taking into account that TNCs do not fall under the competence of a single State, special attention should be paid to these corporations. It means that States should combine their efforts in order to establish common legal standard on the issue. It then might lead to direct responsibility of transnational corporations to be enhanced and controlled on the international level.⁵⁵

⁵⁰ Robert McCorquodale, Penelope Simons, Responsibility Beyond Borders: State Responsibility for Extraterritorial Violations by Corporations of International Human Rights Law//The Modern Law Review. 2007, Vol. 70. Issue 4. P. 616. Accessed online at: <http://onlinelibrary.wiley.com/doi/10.1111/j.1468-2230.2007.00654.x/pdf> [accessed on: 12/11/2011].

⁵¹ *Case Concerning the Barcelona Traction, Light and Power Company, Limited. (Second phase)(Belgium v. Spain)*. Judgment 5 February 1970. I.C.J. Reports 1970.

⁵² Robert McCorquodale, Penelope Simons, Responsibility Beyond Borders: State Responsibility for Extraterritorial Violations by Corporations of International Human Rights Law//The Modern Law Review. 2007, Vol. 70. Issue 4. P. 616. Accessed online at: <http://onlinelibrary.wiley.com/doi/10.1111/j.1468-2230.2007.00654.x/pdf> [accessed on: 12/11/2011].

⁵³ *Ibid.* P. 616-617.

⁵⁴ E.g. UN Convention Combating Bribery of Foreign Public Officials in International Business Transactions (Convention Against Corruption) 2003 (adopted 31 October 2003, entered into force 14 December 2005).

⁵⁵ Silvia Danailov, *The Accountability of Non-State Actors for Human Rights Violations: the Special Case of Transnational Corporations*. Geneva, October 1998. P. 24-26.

Taking all that into account, it is clear that a “home” State may be held responsible for extraterritorial activities of its corporate national that violates international human rights in case when a corporation is exercising governmental authority or is acting under the instructions, direction or control of the “home” State. Nevertheless, due to jurisdictional and nexus requirements to be met in order to invoke “home” State responsibility for human rights abuses by transnational corporations, this approach for responsibility is not enough effective and adequate.

1.3. „HOST“ STATES‘ RESPONSIBILITY

The basic principle of international law is the States obligation to protect human rights against violations by non-state actors (which include corporations) because States are considered to be the primary subjects in international law and international relations. They perform such central functions as negotiating and signing international agreements, including those dealing with human rights. Therefore, they are the primary subjects towards whom the human rights obligations are directed to. Claims that transnational corporations should be held responsible for human rights violations they commit should not be understood as an excuse for States to not fulfil their human rights obligations under signed agreements. Quite the opposite, the States have to take measures to make sure that corporations are conducting their business in a way that respects human rights, and hold transnational corporations accountable if they commit human rights violations.

Misconduct by a corporation should not be exaggerated, because in many cases of human rights abuses by corporations the “host” State has been involved.⁵⁶ For example, the situation that thousands of survived victims of the Bhopal tragedy, when there was a leakage from a pesticide plant owned by the Union Carbide Corporation, are waiting for compensations, adequate medical treatment and rehabilitation longer than 20 years. Another example can be the nearly 20 years pending lawsuit in Ecuador against the oil company Chevron. In this case thousands of victims are waiting for compensation for damages suffered from water contamination.⁵⁷ The problems in these situations were inadequate remedy systems which contributed to impunity of the corporations.

⁵⁶ Viljam Engström, Who Is Responsible for Corporate Human Rights Violations?// Abo Akademi University. Institute for Human Rights. January 2002. P. 10. Accessed online at: web.abo.fi/institut/imr/norfa/ville.pdf [accessed on: 22/03/2012].

⁵⁷ Corporate Accountability for Human Rights Abuses: A Guide for Victims and NGOs on Recourse Mechanisms//The International Federation for Human Rights. 2012. P. 14. Accessed online at: <http://www.fidh.org/Updated-version-Corporate> [accessed on: 24/03/2012].

There is no denying that conduct of transnational corporations can result in human rights abuses, as well as there is no denying that States can take actions to prevent those abuses. Since realization of human rights is a local matter to begin with, the responsibility of a State can still be invoked where the breach of human rights is not initially attributable to that State, but on the grounds of lack of positive action taken by the State to prevent human rights violations.⁵⁸ Obligation to take positive action was for the first time articulated in the I-ACtHR case law. In the *Velazquez Rodriguez v. Honduras* case the Court stated that “[a]n illegal act which violates human rights and which is initially not directly imputable to a State (for example, because it is the act of a private person or because the person has not been identified) can lead to international responsibility of the State, not because of the act itself, but because of the lack of due diligence to prevent the violation or to respond to it [...]”.⁵⁹ The same conclusion was reached in the case *Godinez Cruz v. Honduras*.⁶⁰ These decisions show that State responsibility can be invoked even if the alleged violations of human rights were not committed by State bodies acting under public authority, but even if violations were committed by private actors, but the State failed to act to prevent these violations or to respond to it as to punish those who were responsible. The basis for such decision by the Court is to be found the Article 1 of the American Convention on Human Rights, which states that “[t]he States Parties to this Convention undertake to respect the rights and freedoms recognised herein and to ensure to all persons subject to their jurisdiction the free and full exercise of those rights and freedoms.”⁶¹ Very similar provision is provided in Article 1 of the ECHR, and in Article 2 of the ICCPR,⁶² and other conventions that require States to take effective measures as to protect the rights provided in them.⁶³ Therefore, the consequence of a failure of the State to control the conduct of private entities that violate human rights or acquiescence in these violations committed by non-State actors makes the States as responsible as it would be if its officials that committed the violations, because the State has breached its

⁵⁸ Viljam Engström, Who Is Responsible for Corporate Human Rights Violations?//Abo Akademi University. Institute for Human Rights. January 2002. P. 17. Accessed online at: web.abo.fi/instut/imr/norfa/ville.pdf. [accessed on: 22/03/2012].

⁵⁹ *Velazquez Rodriguez v. Honduras* case. I-ActHR judgment 29 July 1988. (Ser. C) No. 4. § 172.

⁶⁰ *Godinez Cruz v. Honduras*. Inter-American Court of Human rights (IACrHR). Judgment of January 20 1989. P. 32. § 182.

⁶¹ *American Convention on Human Rights*, ‘*Pact of San Jose*’. Organization of American States. Costa Rica. 22 November 1969.

⁶² *European Convention for the Protection of Human Rights and Fundamental Freedoms*. Council of Europe. 4 November 1950, ETS 5. Article 1 states that „[t]he High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention.“ Article 2 of the ICCPR provide that „[e]ach State Party [...] undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant [...]“.

⁶³ *International Covenant on Economic, Social and Cultural Rights*. UN, General Assembly Resolution 2200A (XXI). 16 December 1966. Article 2. *Convention on the Elimination of All Forms of Discrimination Against Women*. UN General Assembly Resolution 34/180. Article 2 (e). *Convention on the Prevention and Punishment of the Crime of Genocide*. Adopted 9 December 1948. Entered into force 12 January 1951. 78 UNTS 227. Article IV.

obligations when it failed to adequately protect its citizens by not preventing, investigating and punishing the ones responsible for committing the violations.

Taking into account the multinational character of TNCs, it has to be answered which State is to take positive action. The ICCPR provides in Article 2 that it is the obligation of all States to ensure human rights to all individuals that are within its territory and subject to its jurisdiction. As TNCs operate mainly through their subsidiaries established in foreign countries, and as these subsidiaries are nationals of the countries they conduct their business in, the due diligence obligation falls in big part on a “host” State. When a corporation violates human rights it needs to be considered whether it was a regulatory failure of the State where the violation took place. If the “host” State does not possess adequate legal measures or other tools as to protect individuals from acts of corporations, then the “host” State is to be held indirectly liable for the lack of due diligence.⁶⁴

The governance gaps, as they have been identified by the UN Special Representative of the Secretary-General on business and human rights, John Ruggie, include corruption, lack of judicial independence, absence of adequate judicial systems that would allow victims to seek remedies, unwillingness or inability of “host” States to ensure that foreign corporations that conduct business in their territory respect, among other standards, human rights.⁶⁵ Although it is the right approach, it needs to be remembered that countries where TNCs conduct their business are mostly less industrialized States. It means at least two things. First, these States do not have adequate and effective tools to respect, protect and promote human rights. Second, they do not have incentives to protect human rights because the economic interests of State come first and due to that “host” States might be unable or unwilling to adopt legal measures that may hamper with foreign investment or may cause transnational corporations to relocate to other countries that, for example, do not maintain child labour prohibitions, environmental protection, minimum wage requirements, trade union protection and other.⁶⁶

Bilateral investment treaties add most to the absence of incentives to act accordingly to human rights standards. Through bilateral investment treaties “home” State provides protection to foreign investors, legitimate this protection may be, nevertheless these treaties also provide for

⁶⁴ Viljam Engström. Who Is Responsible for Corporate Human Rights Violations?//Abo Akademi University. Institute for Human Rights. January 2002. P. 18. Accessed online at: web.abo.fi/institut/imr/norfa/ville.pdf. [accessed on: 22/03/2012].

⁶⁵ John Ruggie. Guiding Principles on Business and Human Rights: Implementing the United Nations ‘Protect, Respect and Remedy’ Framework. 21 March 2011. A/HRC/17/31.

⁶⁶ Ronen Shamir, *Between Self-Regulation and the Alien Tort Claims Act: On the Contested Concept of Corporate Social Responsibility*//*Law & Society Review*. 2004, Vol. 38. Issue 4. P. 637. Access online at: <http://onlinelibrary.wiley.com/doi/10.1111/j.0023-9216.2004.00062.x/pdf> [accessed on: 12/11/2011].

possibilities for the investors to restrain the “host” States. It does so by including provisions that permit corporations to bring the “host” States to binding international arbitration, including cases of alleged damages that result from national “host” State’s legislation to improve domestic social and environmental standards. Corporations can use such provisions even if the treatment provided by national laws is applied the same to all corporations, be it foreign or domestic.⁶⁷ This kind of situation was examined by the International Centre for Settlement of Investment Disputes (hereafter “ICSID”) in the case where a European mining company conducting its business in South Africa has challenged the laws due to which the expropriation was carried out.⁶⁸

The provisions of bilateral investment treaties are construed as to protect the investors, but as it turns out, it might also aid and/or assist commission of extraterritorial violations of human rights by transnational corporations acting through their subsidiaries. Usually these agreements are based on model agreements of the industrialized and economically powerful States and aiming at protection of their corporate national investors. Bilateral investment treaties include various clauses that are not benefiting the “host” State, but the opposite.⁶⁹ These clauses may put restrictions on termination, also on the “host” State’s capacity to regulate foreign investors trying to ensure that the investment is consistent with the “host” State’s human rights obligations.⁷⁰ One example of such clauses can be found in the agreement between the Government of Canada and the government of the Republic of Ecuador for the Promotion and Reciprocal Protection of Investments. Article II (3) of the Agreement states that “[e]ach Contracting Party shall permit establishment of a new business enterprise or acquisition of an existing business enterprise or a share of such enterprise by investors or prospective investors of the other Contracting Party on a basis no less favourable than that which, in like circumstances, it permits such acquisition or establishment by: a) its own investors or prospective investors; or b) investors or prospective investors of any third state.”⁷¹ Such provisions have particular implications for human rights protection because they preclude the “host” State from screening the prospective foreign investors, therefore, it limits the State’s ability to ensure that a particular

⁶⁷ Protect, Respect and Remedy: a Framework for Business and Human Rights. Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises. 7 April 2008. A/HRC/8/5. P. 5.

⁶⁸ *Piero Foresti, Laura de Carli and others v. Republic of South Africa*. ICSID. Case No. ARB(AF)/07/1. Decision of 4 August 2010.

⁶⁹ Robert McCorquodale, Penelope Simons, Responsibility Beyond Borders: State Responsibility for Extraterritorial Violations by Corporations of International Human Rights Law//The Modern Law Review. 2007, Vol. 70. Issue 4. P. 621-622. Accessed online at: <http://onlinelibrary.wiley.com/doi/10.1111/j.1468-2230.2007.00654.x/pdf> [accessed on: 12/11/2011].

⁷⁰ *Ibid.* P. 622.

⁷¹ The Agreement between the Government of Canada and the Government of the Republic of Ecuador for the Promotion and Reciprocal Protection of Investments. 29 April 1996.

foreign investment will bring benefit to the “host” State’s development in a way that protects human rights. As it is noted in the 2003 *World Investment Report* by the UNCTAD⁷² “[t]he right to control admission and establishment remains the single most important instrument for the regulation of FDI”.⁷³

Moreover, there are bilateral investment treaties that prohibit imposition by “host” States of wide range of performance requirements on investors, which would otherwise oblige foreign investors to ensure that they conduct their business in a way that is beneficial to the “host” State’s economy (e.g. sourcing locally, engaging in technology transfers, hiring “host” State’s nationals).⁷⁴ Taking this into account it is clear that States, especially non-industrialized ones, need to possess some tools in order to ensure observance of their human rights obligations. By inserting such clauses in the bilateral investment treaties the “home” States of TNCs preclude the “host” States from protecting human rights, because it limits “host” States’ ability to provide means that would ensure that the conduct of foreign corporation has a positive impact on social development, as well as on a “progressive realisation of human rights”.⁷⁵

Another setback is that the bilateral investment treaties put no other obligation on the TNCs than to comply with the law of the “host” State.⁷⁶ In many cases the “host” State, being a less-industrialized one, may lack the institutional capacity and an effective domestic mechanisms set up to ensure that transnational corporations comply with national laws and regulations. Moreover, the provisions in these agreements allowing TNCs to bring the “host” States to binding international arbitration for a breach of a treaty, might have an effect of withholding the “host” States from enacting legislation for protecting, respecting and promoting human rights. The possible lawsuits can work as a pressure technique in such cases. It means that “host” States may have the will to observe human rights obligations, but in fact have their hands tied and feel constrained from doing so, because these States fight hard for attracting foreign investment. If standards, human rights standards included, are lower elsewhere, it is where the investors will bring their capital to.

⁷² *World Investment Report 2003: FDI Policies for Development: National and International Perspectives*. UNCTAD. United Nations: New York and Geneva, 2003.

⁷³ *Ibid.* P. 102.

⁷⁴ Robert McCorquodale, Penelope Simons, Responsibility Beyond Borders: State Responsibility for Extraterritorial Violations by Corporations of International Human Rights Law//*The Modern Law Review*. 2007, Vol. 70. Issue 4. P. 623. Accessed online at: <http://onlinelibrary.wiley.com/doi/10.1111/j.1468-2230.2007.00654.x/pdf> [accessed on: 12/11/2011].

⁷⁵ *Ibid.* P. 621-622.

⁷⁶ The Agreement between the Government of Canada and the Government of the Republic of Ecuador for the Promotion and Reciprocal Protection of Investments. 29 April 1996. Article 13.

Therefore, it could not be maintained that “host” States are to be held accountable for ensuring that subsidiaries of foreign transnational corporations are observing the international human rights standards.⁷⁷ Statement that “[e]conomic rights and internal security come first, human rights come later” holds no water, since practically all countries in the world (with a very few exceptions) are members of the United Nations. Therefore, all of them should share the vision and goals of the United Nations and acknowledge human rights since one of the purposes of the United Nations is “[t]o achieve international cooperation in solving international problems of an economic, social, cultural, or humanitarian character, and in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion.”⁷⁸ Nevertheless, it is true that there is always a gap between the ideal set by various international human rights instruments, and the real situation, where “enforcement of international human rights law and norms is incomplete and at times inadequate. Remedies are hard to come by. Corrective legislation and action take a long time to achieve.”⁷⁹ Therefore, holding “host” States accountable would be the least feasible solution due to economic, financial, political situation with authoritarian regime, corruption, and legal deficiencies in the background.

1.4. POSITIVE OBLIGATION TO TAKE ACTION

Number of international human rights instruments oblige States to respect, protect human rights and provide remedies for their abuses. This obligation means not only a requirement to abstain from infringing these rights, but includes a positive obligation to take action in order to promote human rights. International human rights law requires States to take measures, by legislation or administrative practises, to control, regulate and provide remedies for action by non-state entities that violate human rights of those within the territory of that State.⁸⁰ This responsibility forms a part of State’s obligation to exercise due diligence. Case law shows that States have been found to be in breach of this obligation regarding activities of corporations

⁷⁷ Robert McCorquodale, Penelope Simons, Responsibility Beyond Borders: State Responsibility for Extraterritorial Violations by Corporations of International Human Rights Law//The Modern Law Review. 2007, Vol. 70. Issue 4. P. 623. Accessed online at: <http://onlinelibrary.wiley.com/doi/10.1111/j.1468-2230.2007.00654.x/pdf> [accessed on: 12/11/2011].

⁷⁸ United Nations Charter. Signed on 26 June 1945, in San Francisco. Entered into force 24 October 1945. Article 1(3).

⁷⁹ Frederic Quinn, Human Rights and You: Basic United Nations, Organization for Security and Cooperation in Europe and Council of Europe Human Rights Documents. 1999. Published by OSCE/ODIHR Warsaw, Poland in cooperation with the U.S. Department of State and USAID. P. 7.

⁸⁰ Robert McCorquodale, Penelope Simons, Responsibility Beyond Borders: State Responsibility for Extraterritorial Violations by Corporations of International Human Rights Law//The Modern Law Review. 2007, Vol. 70. Issue 4. P. 623. Accessed online at: <http://onlinelibrary.wiley.com/doi/10.1111/j.1468-2230.2007.00654.x/pdf> [accessed on: 12/11/2011].

within their territories because certain actions or omissions of the State enabled corporations to act in a way that violates human rights.⁸¹ These cases show that a State can be responsible for human rights violations where acts of State authorities cause effects within or outside national territory and where intra-territorial decisions cause extraterritorial consequences.⁸² The obligation to take positive action is important because if there was not any kind of extraterritorial regulation on the State's corporate nationals, then these corporations could avoid the obligations of their national law by relocating their business to other countries where regulation of human rights is lax. In many cases the "home" States have means and sufficient knowledge to control their corporate nationals acting extraterritorially through their subsidiaries. States which have ratified the ICCPR, the ICESCR, the CRC, etc., have extraterritorial obligations including obligations in some circumstances to regulate the conduct of their corporations. The suggestion is made that under the ICESCR the obligation to protect "includes an obligation to for the state to ensure that all other bodies subject to its control (such as transnational corporations based in that state) respect the enjoyment of rights in other countries."⁸³ In case a corporation violates a right protected under the ICESCR "[i]t may be argued that states are under an obligation to regulate, investigate and even bring before the courts conduct of a transnational corporation under its home state jurisdiction where a "threshold of gravity" of human rights violations is at state."⁸⁴ When a State fails to control and prevent violations of human rights by its corporate nationals, it "would amount to a breach of international obligation to exercise due diligence, for which international responsibility arises."⁸⁵ It is not likely that State is not aware or have no means to know that their corporations or their subsidiaries conduct their business in a way which violates human rights. United Nations Economic and Social Council's documentation provide insight into the negative impact of some extraterritorial corporate conduct impacting human rights.⁸⁶

⁸¹ *Young, James and Webster v. UK* (App. no. 7601/76). ECtHR judgment, 18 October 1982. *Social and Economic Rights Action Centre for Economic and Social Rights v. Nigeria*. African Commission. Communication No. 155/96. 2001. *The Mayaga (Sumo) Awas Tingni Community v. Nicaragua*. Inter-American Court of Human Rights. 31 August 2001.

⁸² Robert McCorquodale. Penelope Simons. Responsibility Beyond Borders: State Responsibility for Extraterritorial Violations by Corporations of International Human Rights Law//The Modern Law Review. 2007, Vol. 70. Issue 4. P. 618. Accessed online at: <http://onlinelibrary.wiley.com/doi/10.1111/j.1468-2230.2007.00654.x/pdf> [accessed on: 12/11/2011].

⁸³ *Ibid.* P. 619.

⁸⁴ *Ibid.*

⁸⁵ *Ibid.*

⁸⁶ *The Resolution of Economic, Social and Cultural Rights: The Relationship between the Enjoyment of Human Rights, in particular, International Labour and Trade Union Rights, and the Working Methods and Activities of Transnational Corporations*. ECOSOC. UN Doc E/CN.4/Sub.2/1995/11. 1995. *Human Rights Principles for Transnational Corporations and Other Business Enterprises, Introduction*. ECOSOC. UN Doc E/CN.4/Sub.2/2001/WG.2/WP.1/Add.1.

Moreover, there are cases being brought in national courts against TNCs for human rights violations.⁸⁷

As mentioned above, the obligation to take positive action requires a State to be active in its obligations to protect, respect and fulfil human rights. States have knowledge that their corporations conducting their business extraterritorially might violate human rights in two sets of circumstances. The first situation is where TNCs invest, or want to invest, in conflict zones or in countries with repressive regimes, and engage in a business relationship with “host” State governments or a non-state subjects that are parties to a civil conflict.⁸⁸ In these situations, it might be so that the “host” State’s government is unable or unwilling to prevent human rights violations, stop them and provide effective remedies for victims. It might also be that the governments are themselves violators of human rights, therefore, TNCs are more likely to be involved in the violations. As the “home” States’ governments are aware of the risks involved in investments in certain countries and provide this information for their corporate nationals, they should also take action as to prevent investment in those regions or require disinvestment due to serious human rights concerns.⁸⁹

1.5. TRANSNATIONAL CORPORATIONS’ RESPONSIBILITY

Before starting the analysis of responsibility of transnational corporations, one needs to understand the notion of it. The first definition of a transnational corporation was provided by the *Institut de Droit International*. Its resolution of 1977 described transnational corporations as “[e]nterprises which consist of a decision-making centre located in one country and of operating centres, with or without the legal personality in one or more other countries (...)”.⁹⁰ Another definition is provided in the ILO’s Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy although it does not require a precise definition. In this Declaration a transnational corporation is described as including “enterprises, whether they are of public,

⁸⁷ UK House of Lords decisions in *Connelly v. RTZ*, 1998, AC 854 and *Lubbe et al v. Cape plc*, 2000, 4 All ER 268. US courts decisions in *Presbyterian Church of Sudan v. Talisman Energy, Inc* 244 F. Supp. 2d 289 (S.D.N.Y. 2001), *Wiwa v. Royal Dutch Petroleum Co* 226 F.2d 88 (2d Cir 2000), *Doe v. Unocal Corp* 248 F.3d 915 (9th Cir 2002).

⁸⁸ Robert McCorquodale. Penelope Simons. Responsibility Beyond Borders: State Responsibility for Extraterritorial Violations by Corporations of International Human Rights Law//The Modern Law Review. 2007, Vol. 70. Issue 4. P. 620. Accessed online at: <http://onlinelibrary.wiley.com/doi/10.1111/j.1468-2230.2007.00654.x/pdf> [accessed on: 12/11/2011].

⁸⁹ Ibid.

⁹⁰ Multinational Enterprises. Institut de Droit International resolution. Session of Oslo – 1977. Article I. Accessed online at: http://www.idi-iil.org/idiE/resolutionsE/1977_oslo_02_en.pdf [accessed on: 27/03/2012].

mixed or private ownership, which own or control production, distribution, services or other facilities outside the country in which they are based.”⁹¹

There are more definitions of transnational corporations, but there is no general definition. It is not that much needed as long as the main features of a transnational corporation are known because corporations are organized in a variety of ways. On the other hand, no uniform definition presents a big obstacle towards viewing a transnational corporation as a solid organism instead of viewing it as a set of separate corporations. What is important for the current issue of responsibility, is their „multinationality”. TNCs constitute private business enterprises which are established under a certain domestic law and derive their legal personality from it, and are linked together by parent corporations, which are decision-making centres that give direction to their subsidiaries.⁹² These separate corporations are interdependent with a controlling or dominating corporation which may be able to exercise significant influence over the conduct of its subsidiaries, also share knowledge, resources and responsibilities. In cases when subsidiaries do not have autonomous decision-making power, responsibility for violations committed by a subsidiary may be invoked against a parent corporation.⁹³ A transnational corporation is seen as a single entity composed of corporations with separate legal identities under the law in which they conduct their business. Nevertheless, it is difficult to define the nationality of a transnational corporation itself because of its subsidiaries being of different nationalities from each other and from a parent corporation. The outcome of that is that there is no such law which could be applied to a transnational corporation as a whole.⁹⁴ Therefore, it is very difficult for separate States to have effective authority upon TNCs. This governance gap allows corporations to escape liability for violations they commit, because neither national nor international law have enough authority over such corporations. TNCs happen to be in some kind of “grey zone” or legal vacuum. Taking this into account and understanding that national law is not sufficient the appropriate law could be international law.

This claim, though, has to be justified. It firstly invokes a question on legal international subjectivity which is a precondition in order to be subjected to international norms. Transnational corporations do not fulfil this precondition. Then the question is whether they

⁹¹ ILO’s Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy. The International Labour Office, Geneva. 1977 (Third edition 2001). P. 2. Para. 6. Accessed online at: http://www.ilo.org/wcmsp5/groups/public/@ed_emp/@emp_ent/documents/publication/wcms_101234.pdf [accessed on: 27/03/2012].

⁹² Shaw, Malcolm N. International Law. Cambridge University Press. Cambridge. 6th edition. 2008. P. 249.

⁹³ The technique of „piercing the veil“ might be employed.

⁹⁴ Silvia Danailov. The Accountability of Non-State Actors for Human Rights Violations: the Special Case of Transnational Corporations. Geneva, October 1998. P. 12.

could be directly bound by international human rights if they could be subjects of international law.

International human rights responsibilities might be traced back to 1948 when the Universal Declaration of Human Rights was signed. The concept of corporate social responsibility, encompassing the notion of business responsibility for human rights, still raises the question of how this responsibility, which is primarily the responsibility on the States, could be enforced if transnational corporations are not subjects of international law.⁹⁵ The list of duty bearers of international law does not include transnational corporations regardless the scholars' discussion that they should be included in it.⁹⁶ Theoretically, there are no obstacles to prevent non-state actors from being obliged under international human rights law. It is even much needed development for transnational corporations to be directly held accountable for violations of human rights. Otherwise it is only States that are obliged to ensure that corporations within their jurisdiction do not infringe human rights contrary to treaty obligations. TNCs in such case remain free of obligations in those treaties, and victims of human rights violations remain without tangible remedies because human rights treaties do not put obligations on transnational corporations, allowing them escape responsibility.⁹⁷

In the outcome, transnational corporations, not being subjects of international law (even in a limited capacity like individuals are) and not bound by any international human rights instruments, are only subject to their home countries' laws. It is true that States are bound by international human rights instruments to which they adhere (except for customary law and *jus cogens* norms which are binding on every State no matter if that State agrees to be bound by it⁹⁸). It is also true that corporations are subjected to and bound by their home countries' legislation in regard to human rights, besides other obligations. It would follow that if a particular State is abiding by the obligations of international human rights law, corporations operating in its territory are to do the same, because a State has specific enforcement mechanisms which can "make" corporations operate according to the laws. This seemingly simple arrangement, though, is also the reason why there is a current problem of TNCs' accountability for violations of

⁹⁵ Emily F. Carasco. Jang B. Singh. Towards Holding Transnational Corporations Responsible for Human Rights// European Business Review. 2010, Vol. 22. Issue 4. P. 433. Accessed online at: <http://www.emeraldinsight.com/journals.htm?articleid=1864974&show=abstract> [accessed on: 13/11/2011].

⁹⁶ Shaw, Malcolm N. International Law. Cambridge University Press. Cambridge. 6th edition. 2008. P. 250. Footnote: 270.

⁹⁷ Emily F. Carasco. Jang B. Singh. Towards Holding Transnational Corporations Responsible for Human Rights// European Business Review. 2010, Vol. 22. Issue 4. P. 433. Accessed online at: <http://www.emeraldinsight.com/journals.htm?articleid=1864974&show=abstract> [accessed on: 13/11/2011].

⁹⁸ Edward J. Schoen. Joseph S. Falchek. Margaret M. Hogan. The Alien Claims Act of 1789: Globalization of Business Requires Globalization of Law and Ethics//Journal of Business Ethics. 2005, Vol. 62. P. 43. Accessed online at: <http://www.springerlink.com/content/72042388417040w2/fulltext.pdf> [accessed 12/11/2011].

human rights. There are a few aspects of this problem. First, specificity of transnational corporations is that they operate in several countries. Usually such a corporation has its headquarters in an industrialized country and one or several subsidiaries in other, usually poor and underdeveloped (“third world”) country or countries. The second aspect that follows directly from the first is that a “parent” company and its subsidiaries have different nationalities. A “parent” company will have the nationality of the “home” country, and a subsidiary will have the nationality of the “host” country. Then, following from that, they are subjected to different laws and regulations. So it follows that there are jurisdictional and nexus requirements that preclude bringing of private claims in the “home” State. The governments of underdeveloped countries, where in most cases subsidiaries of a transnational corporations are operating, are usually weak and in many cases highly corrupted, their laws are underdeveloped and lax⁹⁹, especially in respect to environmental and human rights standards; these are in many instances the low income countries, also countries that have recently emerged from or are still in conflict. The combination of these factors enables the “parent” companies to purchase subsidiaries worldwide. Disregard for environmental and human rights standards in the “third world” countries works as an incentive for the TNCs from industrialized countries to have part of their business carried out in those countries. The main objective of any corporation is to generate profits for its shareholders, and moving their business to countries where certain regulations are lower or there are none, where the authorities can be bribed, that way transnational corporations are cutting their costs and generate more profit. The cost of the wealthy becoming even wealthier is loss of human lives, freedom, health, etc. Although result should be the opposite. The countries where TNCs bring their business to should at least be better off than if a company had never come at all.¹⁰⁰ From this follows that “target” countries that should theoretically be the ones to offer feasible remedies to victims of human rights violations, fail to do so due to inadequate and underdeveloped legal systems.

That means that transnational corporations have a possibility to expand their businesses to foreign countries and to control their subsidiaries without being held liable for human rights violations those subsidiaries commit or help to commit. This possibility exists because there is

⁹⁹ Ann Elizabeth Mayer. Human Rights as a Dimension of CSR: The Blurred Lines Between Legal and Non-Legal Categories//Journal of Business Ethics. 2009, Vol. 88. P. 562. Accessed online at: <http://springerlink.com/content/t58nxkh476092847/fulltext.pdf> [accessed on: 12/11/2011].

¹⁰⁰ Edward J. Schoen. Joseph S. Falchek. Margaret M. Hogan. The Alien Tort Claims Act of 1789: Globalization of Business Requires Globalization of Law and Ethics//Journal of Business Ethics. 2005, Vol. 62. P. 47. Accessed online at: <http://www.springerlink.com/content/72042388417040w2/fulltext.pdf> [accessed on: 12/11/2011].

no effective mechanism that would ensure accountability of a “parent” corporation.¹⁰¹ National law enforcement mechanisms and remedies for victims in the “host” countries are either non-existent or weak, or such country has no incentive to enforce higher human rights or other standards because it might drive the much needed investments away to other countries that still have lax or no regulations on these issues. Therefore, the “host” State cannot provide effective remedies for victims of human rights abuses carried out by the corporations, neither want/can they regulate those corporations to the point they take their investments elsewhere.

The fact that transnational corporations are not subjects of international law prevents the involvement of international courts and tribunals. That leaves the only other opportunity that is to hold the “parent” company responsible for human rights violations committed by its subsidiaries. The Human Rights Watch of 1999 stated that there are no international obligations that could *oblige* transnational corporations to respect human rights¹⁰². In contrast to the findings of this report, it has to be observed that UDHR is an instrument embodying customary international law. The basis for TNCs responsibility could be found in the Declaration because the principles enshrined in it are “a common standard for all peoples and all nations, to that end that every individual and every organ of society, keeping this Declaration constantly in mind, shall strive by teaching and education to promote respect for these rights and freedoms and by progressive measures, national and international, to secure their universal and effective recognition and observance, both among the peoples of Member States themselves and among the peoples of territories under their jurisdiction”.¹⁰³ According to the prominent human rights authority Louis Henkins, the expression *every organ of society* can be understood as including transnational corporations. Regardless assertions that this interpretation of the UDHR is too stretched and far reaching, it gained support from the Amnesty International and the United Nations. The preamble of the 2003 UN Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights (the 2003 Norms) provides that “even though States have the primary responsibility to promote, secure the fulfilment of, respect, ensure respect of and protect human rights, transnational corporations and other business enterprises, as organs of society, are also responsible for promoting and securing the human rights set forth in the Universal Declaration of Human Rights.”¹⁰⁴ Still, it is only

¹⁰¹ Glen Whelan, Jeremy Moon, Marc Orlitzky. Human Rights, Transnational Corporations and Imbedded Liberalism: What Chance Consensus?//Journal of Business Ethics. 2009, Vol. 87. P. 374. Accessed online at: <http://www.springerlink.com/content/1734707260382452/fulltext.pdf> [accessed on: 12/11/2011]

¹⁰² Ann Elizabeth Mayer. Human Rights as a Dimension of CSR: The Blurred Lines Between Legal and Non-Legal Categories//Journal of Business Ethics. 2009, Vol. 88. P. 568. Accessed online at: <http://www.springerlink.com/content/t58nxkh476092847/fulltext.pdf> [accessed on: 12/11/2011].

¹⁰³ Ibid.

¹⁰⁴ Ibid.

voluntary instruments that exist that assume that transnational corporations will conduct their business in a responsible way.

If this interpretation is not accepted, another assertion for human rights responsibilities to be put on transnational corporations is to be found in the process and actors of globalization. TNCs are the main powers in the globalization process because their resources, power and influential capacity is greater than that of national governments of underdeveloped countries where transnational corporations bring their business to. Taking this into account, it is obvious that TNCs are in a position to effectively influence the national governments to endorse human rights obligations. Nevertheless, it should not be forgotten that TNCs do not have a “national” or territorial interest as Ruggie puts it, their primary motivation is still to generate profits for its shareholders.¹⁰⁵ Therefore, the same degree of responsibility cannot be put on both, transnational corporations and States. It is true that TNCs cannot assume all responsibilities that are traditionally left to States, but understanding the potential of transnational corporations as to not only generate profits but also positively influence human rights situation in countries where people live under oppressive and exploitative regimes, the UN put forward several initiatives providing for partnership between TNCs and the UN.¹⁰⁶

1.5.1. TNCs AS SUBJECTS OF INTERNATIONAL LAW

The previous chapter determined the shortcomings of States’ responsibility and potential of transnational corporations’ responsibility for violations of human rights. That serving as an introduction to this sub-chapter it will be examined more thoroughly the possibility for transnational corporations to become duty bearers in international law.

To begin with a simple statement – transnational corporations, or corporations of whatever status for that matter, are not subjects of international law. But prior to admitting international organizations, individuals or any of the atypical subjects, such as the Holy See, Sovereign Order of Malta, etc., into its circle of subjects, international law was solely dominated by States as its creators. It took time and changes in realities of international arena to accept that States are not the only ones acting within it, therefore not the only ones to have rights and duties.

¹⁰⁵ Glen Whelan. Jeremy Moon. Marc Orlitzky. Human Rights, Transnational Corporations and Imbedded Liberalism: What Chance Consensus//Journal of Business Ethics. 2009, Vol. 87. P. 373-378. Accessed online at: <http://www.springerlink.com/content/1734707260382452/fulltext.pdf> [accessed on: 11/12/2011].

¹⁰⁶ Ann Elizabeth Mayer, Human Rights as a Dimension of CSR: The Blurred Lines Between Legal and Non-Legal Categories//Journal of Business Ethics. 2009, Vol. 88. P. 568. Accessed online at: <http://www.springerlink.com/content/t58nxkh476092847/fulltext.pdf> [accessed on: 12/11/2011].

The law, international law included, is the reflection of the conditions and traditions of society within which it operates. As the community evolves, so does the law because evolution is needed for its survival – it has to be reflecting the realities of the certain time and taking in the requirements of international life.¹⁰⁷ But the change does not come easy because it is difficult to incorporate new standards so as to ensure its relevance and to avoid disruption.¹⁰⁸ But even though “[t]he international system is a system of States, made by States, perhaps largely – still – for States, but not only for States. Law is made by States, and by their laws States have created (or recognized) other entities, and have given them status, power, rights, responsibilities and remedies, within the international system.”¹⁰⁹ The main characteristic of these new entities is their legal personality, which entails that an entity is capable of having and maintaining certain rights and being subject to perform specific duties under international law. Nevertheless, this explanation is vague because personality in international law is a “relative phenomenon varying with the circumstances.”¹¹⁰ There is a wide range of participants acting within the sphere of international law, each having different rights, duties and competences.

Transnational corporations, while being a prominent feature of international life do not have legal subjectivity under international law. Nevertheless, they stand out as promising candidates because human rights law is one of the few branches of international law¹¹¹ which generate and reflect increased participation and even wider range of subjects in international law. It is due to effects and pressures that certain entities, with TNCs in the frontline, impose upon human rights. Regardless them not being subjects of international law, TNCs are acting actively within this sphere because of their specificity – conducting business beyond national borders, having a set of corporations, each established under different national laws and having different nationalities, but being interlinked and interrelated with one another and the main corporation which is the decision-making and direction-providing centre.

TNCs enjoy the rights of accessing foreign markets and possibilities to purchase companies in other countries, generate profits and enjoy freedom to select with which country to deal with regarding their business. It follows naturally that the given scope of rights demand a set of obligations to ensure their balance. The often used notion of “social responsibility” nowadays does not mean that “there is one and only one social responsibility of business – to use its

¹⁰⁷ *Reparation for Injuries Suffered in the Service of the United Nations*. Advisory Opinion of April 11th 1949. I.C.J. Reports 1949, P. 178.

¹⁰⁸ Shaw, Malcolm N. *International Law*. Cambridge University Press. Cambridge. 6th edition. 2008. P. 43.

¹⁰⁹ Silvia Danailov, *The Accountability of Non-State Actors for Human Rights Violations: the Special Case of Transnational Corporations*. Geneva, October 1998. P. 28.

¹¹⁰ Shaw, Malcolm N. *International Law*. Cambridge University Press. Cambridge. 6th edition. 2008. P. 196.

¹¹¹ According to Shaw the other two branches of international law in this regard are the law relating to armed conflicts and international economic law. P. 197.

resources and engage in activities designed to increase its profits”, as was stated by Milton Friedman back in 1970s.¹¹² This notion integrates social, environmental, ethical, human rights and consumer concerns aiming at “maximising the creation of shared value for their owners/shareholders and for their other stakeholders and society at large”¹¹³ as well as “identifying, preventing and mitigating their possible adverse effects.”¹¹⁴ As transnational corporations do not have the status of subjects under international law their obligations under it are vague, broad, unenforceable and mostly voluntary. From the human rights perspective it is a major bump in a road towards holding transnational corporations directly responsible under international law for human rights violations.

In the *Reparations* case the ICJ stated that international subjects are not necessarily identical neither in their nature, nor in the extent of their rights, and their nature is the reflection of the needs of the community.¹¹⁵ Therefore, no limit is or can be set to determine how many rights and obligations a transnational corporation has to have under international law in order to become its subject, but it is important whether it can assume any of those rights and obligations.¹¹⁶

It can reasonably be claimed that they can. One example of corporations being increasingly recognized as participants within international sphere, having a capacity to bear some rights and responsibilities, can be the International Centre for Settlement of Investment Disputes, or ICSID system.¹¹⁷ This system is the leading international arbitration institution devoted to investor-State dispute settlement. It provides a possibility for investors to assert that their investment contracts have been breached. It is also a dispute settlement mechanism which is supported by developed States, therefore it tends to protect the investments of TNCs from those countries rather than prosecute them. Nevertheless, the development of business is that driving force that most reasonably implies an international legal position towards transnational

¹¹² Anthony Page. Robert A. Katz. Is Social Enterprise the New Corporate Social Responsibility?//Seattle University Review. 2011, Vol. 34. P. 1355. Available at: <http://ssrn.com/abstract=1851782> [accessed on: 6/3/2012].

¹¹³ A Renewed EU Strategy 2011-14 for Corporate Social Responsibility//Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions. European Commission. Brussels, 25/10/2011. COM(2011) 681 final. P. 6

¹¹⁴ Ibid.

¹¹⁵ *Advisory Opinion on Reparations for Injuries suffered in the service of the United Nations*. I.C.J. Reports 1949. Advisory Opinion of 11 April 1949. P. 178.

¹¹⁶ Silvia Danailov, *The Accountability of Non-State Actors for Human Rights Violations: the Special Case of Transnational Corporations*. Geneva, October 1998. P. 28-29.

¹¹⁷ ICSID - an autonomous international institution established within the World Bank system, which settles investment disputes between States and nationals of other States. The mandate of this institution is set forth by the Convention on the Settlement of Investment Disputes between States and Nationals of other States (adopted on 18 March 1965; entered into force on 14 October 1966). Recourse to the ICSID dispute settlement facilities is always subject to the consent of the parties. There are currently 157 signatory States to the ICSID Convention (147 of them have also deposited their instruments of ratification, acceptance or approval of the Convention). Information available online at: <http://icsid.worldbank.org/ICSID/Index.jsp>

corporations as entities having at least a partial international subjectivity. The ICSID system treats both States and MNCs as equal parties in a dispute brought to the ICSID dispute settlement mechanism.¹¹⁸

Another example might be various codes of conduct and other TNC's responsibility initiatives. These instruments show that States are willing to regulate the conduct of transnational corporations on the international level, assuming that TNCs possess the principal characteristics of an international legal person. But as those initiatives are mostly voluntary, the assumption that States agree on a status of transnational corporations as an international legal person is neither definite nor agreed upon. Therefore, it can only be discussed that there signs of States showing willingness towards it.

Yet another development in this respect is that of criminal responsibility of private corporations. The criminalization of offences committed by transnational corporations that lead to environmental, human rights disasters, violations of anti-trust laws, or commission of war crimes and crimes against humanity is an important issue since transnational corporations are the most important actors causing extraterritorial effects within the international economic arena. Moreover, the intent to hold corporations criminally responsible can be found in the decisions of the war crimes tribunals after the Second World War that prosecuted and convicted a number of businessmen for involvement in, among other crimes under international law, gross human rights abuses.¹¹⁹ Even though these precedents were set more than half a century ago, they indicate situations in which company officials can be held liable for involvement in gross human rights abuses.

Transnational corporations extend their conduct into new spheres, allowing the establishment and increase of private military companies or private security companies which operate in areas of armed conflicts, also corporations acting in spheres such as natural resource extractive industries, infrastructure, retail and garment businesses, etc., which conduct their business in countries suffering armed conflicts or in countries where crimes against humanity and other gross human rights abuses occur, which may lead to their involvement of perpetration of war crimes. Therefore international criminal law develops as to become more relevant to cross-border conduct of transnational corporations. And even though no international tribunal yet has jurisdiction to prosecute a corporation for human rights violations as legal entity, it is

¹¹⁸ Article 25 of the ICSID Convention provides that the Centre has jurisdiction if it is a dispute between a Contracting State on one hand and the national, be it natural or legal, of another Contracting State.

¹¹⁹ The Report of the International Commission of Jurists Expert Legal Panel on Corporate Complicity in International Crimes. Vol. 2. Criminal Law and International Crimes. Geneva, 2008. P. 17. The examples of cases in this regard: *United States v. Krupp*, *United States v. Carl Krauch*, *United States v. Friedrich Flick*. Available online at: <http://www.icj.org/dwn/database/Volume2-ElecDist.pdf> [accessed on 11/04/2012].

accepted that the officials of the corporation could face international criminal responsibility for those violations. At the national level, States now often include legal entities in the list of potential perpetrators,¹²⁰ proving that there are no “insurmountable *conceptual* obstacles to imposing criminal liability on businesses as legal entities” on the international level as well.¹²¹ Nevertheless, the practical situation of different approaches of States towards holding corporations criminally responsible precluded the adoption of the proposal to give the International Criminal Court (hereafter “ICC”) jurisdiction over legal persons.¹²²

As for now only directors of corporations have been facing punishments for whatever violations corporations commit under their management. It is one way that corporate responsibility is being construed. This is due to the culpability requirement and notions of intention, knowledge, malice and subjective recklessness in criminal law. It puts a challenge on holding corporations criminally responsible because it is a question to be answered if they can “display a similar type of autonomy and rationality to the one characterizing the individual human being.”¹²³ Criminal responsibility is interpreted as the congruence of the element of intention (or *mens rea*), the element of a harmful act (or *actus reus*) and a certain individual person. Corporations would in any case lack the elements of *mens rea* and *actus reus*. The issue is that a corporation does not display identical types of autonomy and rationality compared with an individual human being, because a corporation does not exist on its own. Rather the opposite, it is indispensable of its individual members, as every act of a corporation is in fact an act of an individual conducting it. Therefore, it is a person who is being punished for whatever misconduct of a corporation, but not a corporation as a separate entity.

Having in mind that many corporations today operate beyond their national borders, and many human rights violations are committed by these corporations, the approach of holding only individuals accountable for corporate conduct is both unfair and insufficient. The directors and other responsible persons are replaceable but what needs to be altered is not the management, but the way corporate behaviour is construed in the future. Having corporations responsible as separate legal entities would be a more effective approach. Therefore there is

¹²⁰ See for example, Criminal Code of the Republic of Lithuania (adopted on 26 September 2000. Law no. VIII-1968) Article 20 provides for criminal liability of a legal entity.

¹²¹ Aurora Voiculescu, Human Rights and the New Corporate Accountability: Learning from Recent Developments in Corporate Criminal Liability//Journal of Business Ethics. 2009, Vol. 87. Issue 2. P. 429. Accessed online at: <http://www.springerlink.com/content/uq482kk208023483/fulltext.pdf> [accessed on: 12/11/2011].

¹²² Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, John Ruggie. Business and Human Rights: Mapping International Standards of Responsibility and Accountability for Corporate Acts. UN General Assembly. 19 February 2007. A/HRC/4/35. P. 8.

¹²³ Aurora Voiculescu, Human Rights and the New Corporate Accountability: Learning from Recent Developments in Corporate Criminal Liability//Journal of Business Ethics. 2009, Vol. 87. Issue 2. P. 424. Accessed online at: <http://www.springerlink.com/content/uq482kk208023483/fulltext.pdf> [accessed on: 12/11/2011].

another way for shaping corporate responsibility. This way entails the extension of responsibility of international crimes to corporations under domestic law.¹²⁴ This way the impact on a corporation would likely cause effects and force it to either “bring the business back home” or change the way of operating as it would no longer abuse human rights. Of course the most fruitful results could be achieved by combining the two aforementioned ways. Still it would not be a designated international institution examining the situations but national courts. It might stand out as a disadvantage because of differences in national judiciary systems and their capacities to adjudicate on complex matters impartially without outside and inside pressures.

Taking all into account, there are theoretical grounds for considering transnational corporations as subjects of international law. As in practice there are numerous attempts to include legal entities in national laws in order to hold them criminally accountable, as well as conferring on them rights and responsibilities in international investment, it suggests that TNCs are strong candidates of gaining international subjectivity in the future, may it be civil or criminal liability depending on whether the international standards have been incorporated into a State’s criminal code or as a civil cause of action.¹²⁵

Before moving forward to international initiatives of holding transnational corporations directly accountable for human rights violations, complicity in human rights abuses needs to be addressed as well.

1.5.2. COMPLICITY IN HUMAN RIGHTS ABUSES

As the power of transnational corporations has expanded, it has also influenced, by case law or otherwise, the legal strengthening the ideas that corporations can violate or contribute to violations of human rights.¹²⁶ Moreover, corporations not only have expanding rights but increasing duties as well.

Even though corporate responsibility cannot be equated with that of an individual, national courts have drawn on principles of individual responsibility while interpreting corporate

¹²⁴ Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, John Ruggie. *Business and Human Rights: Mapping International Standards of Responsibility and Accountability for Corporate Acts*. UN General Assembly. 19 February 2007. A/HRC/4/35. P. 9.

¹²⁵ *Ibid.* P. 10.

¹²⁶ Juan Pablo Bohoslavsky, Veerle Opgenhaffen, *The Past and Present of Corporate Complicity: Financing the Argentinean Dictatorship*//*Harvard Human Rights Journal*. 2010. Vol. 23. P. 164. Accessed online at: <http://harvardhrj.com/wp-content/uploads/2010/10/157-204.pdf> [accessed on: 15/4/2012].

responsibility.¹²⁷ This approach has been employed in order to determine whether corporations have directly violated human rights or were they accomplices – knew or had reason to know about violations that their subordinated have committed but failed to prevent them.

In order to invoke corporate accountability, the causal links between corporate contributions and human rights abuses have to be established. Factors to take into account are a corporation's proximity to the principal perpetrator of the crime, its presence at the moment when the damages were provoked, duration and frequency of the relationship between the two, commercial transactions and the nature of the connection. The closer the contributions of the corporation to the commission of crimes are, the bigger the possibility that the corporation "will have the power, influence, authority or opportunity necessary for its conduct to have a sufficient impact on the conduct of the principal perpetrator to establish legal liability."¹²⁸ The contribution may be done in variety of ways, such as providing transportation, logistic support, supplying goods or technologies, providing financing. An efficient causal link exists if without this contribution the chain of causality is interrupted, or it had a substantial effect on the development on the activity which was financed.¹²⁹

As TNCs are complex structures in a way that they are combined of many separate but interlinked corporations under one title of a transnational corporation, it is usually not the direct commission that brings the most trouble but complicity. It is a "parent" corporation that is to be held accountable for the acts of its subsidiary. There is no uniform formula for "piercing the corporate veil" in order to invoke responsibility of the "parent" corporation. For example, in India it is done in cases of fraud or improper conduct of shareholders of the corporation, in Japan – for cases of fraud or avoidance of statutory or contractual obligations.¹³⁰ But there is an

¹²⁷ *Doe v. Unocal*. 395 F.3d 932 (9th Cir. 2002) The courts used a 'joint action' test in order to determine whether the Unocal corporation acted in complicity with Burmese military operatives who were contracted to protect Unocal's investments. The panel of the Ninth Circuit employed the international criminal standards developed by the International Criminal Tribunal for the former Yugoslavia and the International Criminal Tribunal for Rwanda. The panel established that there were enough evidence to satisfy both *mens rea* and *actus reus* requirements. As for the first one the Unocal was stated to have known or have had the reason to know that the Burmese military had the intent to commit the offense elements. And as for the second one – that there were elements of Unocal's practical assistance or encouragement which had a substantial effect on the realization of forced labor.

¹²⁸ Juan Pablo Bohoslavsky, Veerle Opgenhaffen, *The Past and Present of Corporate Complicity: Financing the Argentinean Dictatorship*//Harvard Human Rights Journal. 2010. Vol. 23. P. 172-173. Accessed online at: <http://harvardhrj.com/wp-content/uploads/2010/10/157-204.pdf> [accessed on: 15/4/2012].

¹²⁹ *Ibid.* P. 172-173.

¹³⁰ *Human Rights and Corporate Law: Trends and Observations for a Cross-National Study*//Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises. 23 May 2011. A/HRC/17/31/Add.2. P. 11. Accessed online at: <http://www.business-humanrights.org/media/documents/ruggie/report-human-rights-and-corporate-law-23-may-2011.pdf> [accessed on: 28/04/2012].

alternative to it. It suggests that the “home” State should impose liability on the “parent” corporation for its acts and omissions in regard to activities of its subsidiaries abroad.¹³¹

Current notions on corporate responsibility for facilitation of human rights violations emanated from the trials after the Second World War. Article 6 of the statute of the Nuremberg Military Tribunal imposed sanctions on individuals who acted in cooperation or otherwise contributed to the commission of war crimes.¹³² These trials held German businessmen, who acted in collaboration with the Nazi regime, responsible for their financial or material support. One example can be the *Zyklon B Case*.¹³³ The British Military Court found complicity of German industrialists in the murder of interned allied civilians by means of poison gas. The post World War Two tribunals recognized the notion of responsibility for complicity and, by showing that entrepreneurs can be held liable for contributing to the commission of crimes against humanity, gave content and validation for the modern status of corporate responsibility for complicity.¹³⁴ Responsibility for complicity in perpetration of international crimes and crimes against humanity has been incorporated in various international conventions and statutes of tribunals.¹³⁵ Incorporation into conventions and statutes would be worthless if it has no practical application. Indeed there is case law showing that complicity in the commission of crimes is punishable.¹³⁶

Making a reference again to individual criminal responsibility, the United States courts have also established under the Aliens Tort Claims Act (hereafter “ATCA”) a rather clear standard for determining whether an individual has been an accomplice in the crime. That is if he

¹³¹ Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, John Ruggie. Business and Human Rights: Mapping International Standards of Responsibility and Accountability for Corporate Acts. UN General Assembly. 19 February 2007. A/HRC/4/35. P. 11.

¹³² Juan Pablo Bohoslavsky, Veerle Opgenhaffen, The Past and Present of Corporate Complicity: Financing the Argentinean Dictatorship//Harvard Human Rights Journal. 2010. Vol. 23. P. 160. Accessed online at: <http://harvardhrj.com/wp-content/uploads/2010/10/157-204.pdf> [accessed on: 15/4/2012].

¹³³ *Trial of Bruno Tesch and Two Others (The Zyklon B Case)*. The British Military Court. 1946.

¹³⁴ Juan Pablo Bohoslavsky, Veerle Opgenhaffen, The Past and Present of Corporate Complicity: Financing the Argentinean Dictatorship//Harvard Human Rights Journal. 2010. Vol. 23. P. 160. Accessed online at: <http://harvardhrj.com/wp-content/uploads/2010/10/157-204.pdf> [accessed on: 15/4/2012].

¹³⁵ Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Article 4); International Convention on the Suppression and Punishment of the Crime of Apartheid (Article 3b); Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery (Article 6); Convention on the Prevention and Punishment of the Crime of Genocide (Article 3e); Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (Article 1.2); United Nations Convention Against Transnational Organized Crime (Article 5.1.b); International Convention for the Suppression of the Financing of Terrorism (Article 2.5.a); International Convention to Repress Terrorist Attacks with Bombs (Article 2.3.a). Responsibility for crimes against humanity is incorporated in the Statute of the International Criminal Court (Article 25.3); the Statutes of International Criminal Tribunals for Rwanda and the former Yugoslavia (Article 6 and Article 7 respectively).

¹³⁶ Juan Pablo Bohoslavsky, Veerle Opgenhaffen, The Past and Present of Corporate Complicity: Financing the Argentinean Dictatorship//Harvard Human Rights Journal. 2010. Vol. 23. P. 161-162. Accessed online at: <http://harvardhrj.com/wp-content/uploads/2010/10/157-204.pdf> [accessed on: 15/4/2012].

knowingly provided practical assistance, encouragement or moral support. These criteria can also be applied when determining corporate complicity. The notion of “moral support” presents a certain challenge in its interpretation since it is difficult to determine what counts as a moral support when a case concerns corporate conduct. It is claimed that a mere presence in a certain State and paying taxes are not sufficient factors to create liability, unless a corporation derives indirect economic benefit from the abusive conduct of others, if the two have a close enough association with one another.¹³⁷

The US courts have jurisdiction to hear cases under the ATCA claims, if the requirement of a violation of basic norms of international law is satisfied in order to justify the extraterritorial jurisdiction.¹³⁸ The issue is to determine what are those basic norms of international law. The doctrine and case law provide that these norms are *jus cogens*.¹³⁹ The Vienna Convention on the Law of Treaties defines *jus cogens* as norms “accepted and recognized by the international community of states as a whole as a norms from which no derogation is permitted and which can be modified only by subsequent norm of general international law having the same character.”¹⁴⁰ This definition has been employed by the US courts.¹⁴¹ Examples of *jus cogens* include an unlawful use of force, genocide, slave trading and piracy.¹⁴² Claims alleging violations of these norms will not require showing of State action in order to attach transnational corporations. This approach has been confirmed by the *Doe v. Unocal* case.¹⁴³ In the same case the Court held that when a case concerns individual killings, rape, etc., the showing of State action will be required.¹⁴⁴ Even though there is no exact list of *jus cogens* norms that a corporation could rely on, it must determine its potential for liability, meaning that a corporation should carry out a serious evaluation of any probable application of financing or any other facilitation it is providing. This evaluation can preclude a corporation

¹³⁷ Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, John Ruggie. Business and Human Rights: Mapping International Standards of Responsibility and Accountability for Corporate Acts. UN General Assembly. 19 February 2007. A/HRC/4/35. P. 11-12.

¹³⁸ Juan Pablo Bohoslavsky, Veerle Opgenhaffen, The Past and Present of Corporate Complicity: Financing the Argentinean Dictatorship//Harvard Human Rights Journal. 2010. Vol. 23. P. 165-166. Accessed online at: <http://harvardhrj.com/wp-content/uploads/2010/10/157-204.pdf> [accessed on: 15/4/2012].

¹³⁹ See Ibid. Also, Veerle Opgenhaffen. The Past and Present of Corporate Complicity: Financing the Argentinean Dictatorship//Harvard Human Rights Journal. 2010. Vol. 23. P. 165. And, Chanin, Joshua M. ,The Regulatory Grass is Greener’: A Comparative Analysis of the Alien Torts Claims Act and the European Union’s Green Paper on Corporate Social Responsibility//Indiana Journal of Global Legal Studies. Volume 12, Issue 3, Summer 2005. P. 763. Also US case law under ATCA claims in *Doe v. Unocal*.

¹⁴⁰ Vienna Convention on the Law of Treaties. Signed on 23 May 1969. Entered into force on 27 January 1980. United Nations, Treaty Series, Vol. 1155. Article 53.

¹⁴¹ See e.g. *USA v. Matta Ballesteros*. U.S. 9th Circuit Court of Appeals. 1995. 71 F.3d 754, 764 n. 4.

¹⁴² Shaw, Malcolm N. International Law. Cambridge University Press. Cambridge. 6th edition. 2008. P. 126.

¹⁴³ Chanin, Joshua M. ,The Regulatory Grass is Greener’: A Comparative Analysis of the Alien Torts Claims Act and the European Union’s Green Paper on Corporate Social Responsibility//Indiana Journal of Global Legal Studies. Volume 12, Issue 3, Summer 2005. P. 763.

¹⁴⁴ Ibid. P. 763.

from being held an accomplice in the commission of crimes, since without it there is a great chance that a causal link between the contribution and the crime will be found, and a corporation will be held liable. It is essentially important in countries with dictatorial regimes, since the presumption is that the financing will be used to support the political system, therefore it will enable the commission of the regime's crimes.¹⁴⁵ Hence, what matters in each case is whether the foreseeable application of financing and knowledge of a possible result.

An initiative has been drawn up in order to discourage financing of certain governments. This initiative provides that a designated international body should declare the character of a particular government as "odious", which in turn would put the same label on any financial contribution. Therefore, the financing corporation then would be rendered as an accomplice. Taking this into account, the financing would be discouraged.¹⁴⁶

The conclusion that follows, is that transnational corporations can be punished for complicity in the crimes against human rights with no need to show the action of a State if it is concerning violations of *jus cogens*, and with such a need if it concerns other violations. As there is no conclusive list of *jus cogens* norms the examination of cases may bring additional difficulties and controversy since it will need to be decided if a peremptory norm of international law has been breached before considering other aspects of the case, because different factors will need to be shown. Nevertheless, the development of the notion of complicity is ongoing, taking certain aspects from national and international criminal law, also aspects from individual responsibility. With configurations so as to apply to legal entities, such as to transnational corporations, the responsibility for complicity in gross human rights abuses is being invoked by national courts and provide background for future developments in this direction. Therefore, at least in theory, there are no obstacles to hold transnational corporations accountable for human rights abuses. It is the matter of agreement among States on the matter.

¹⁴⁵ Pablo Bohoslavsky, Veerle Opienhaffen, The Past and Present of Corporate Complicity: Financing the Argentinean Dictatorship//Harvard Human Rights Journal. 2010. Vol. 23. P. 174. Accessed online at: <http://harvardhrj.com/wp-content/uploads/2010/10/157-204.pdf> [accessed on: 15/4/2012].

¹⁴⁶ Ibid. P. 175-176.

2. TNCs' RESPONSIBILITY: INITIATIVES AND PRACTICE

2.1. OVERVIEW OF INITIATIVES ON TNC's RESPONSIBILITY: ETHICAL APPROACH

From the mid 70's proliferation of initiatives to hold transnational corporations accountable for violations of human rights have started. Four initiatives have been drawn up around the same time. Those were the UN Draft Code of Transnational Corporations (1977), the Sullivan Principles (1970), the OECD Guidelines for Multinational Enterprises (1976), the International Labor Organization Tripartite declaration of principles concerning MNEs (1977).

As many less developed States were concerned about the dominance transnational corporations had over their natural resource industries, they advocated strongly at the UN to take steps to reaffirm their sovereignty over their natural resources. Therefore the UN Draft Code contained a statement of human rights obligations which provided that "transnational corporations shall respect human rights and fundamental freedoms in the countries in which they operate."¹⁴⁷ Regardless that, this Draft Code was not accepted by industrialized, investor States not because of human rights reservations, but because they wanted greater protection for their investments. Other reasons for failure of this Draft Code were overly ambitious goal of universality of the Draft Code, the opposition from TNCs towards the notion of binding standards, the lack of participation of non-state actors and the economic situation, having in mind the international debt crisis in 1980s and a drastic reduction of direct foreign investment. Therefore, the 'host' States were deemed to reduce their expectations regarding the regulation of transnational corporations and the Draft Code was abandoned in 1992.¹⁴⁸

Another initiative has been crafted in opposition to the apartheid in South Africa and was called after the member of General Motors' Board of Directors, Sullivan, who developed a set of principles, titled the Sullivan Principles. This initiative called for refraining from being a part of a system directly violating human rights of millions of South Africans. There were repeated calls for divestment from the region but TNCs were reluctant to do that because of their profitable investments. The goal of the Sullivan principles was to promote racial equality within the United States corporations conducting their business in South Africa. The Sullivan principles contained six principles which were focused on elimination of racial discrimination and on concepts of equality of opportunity and fairness in the work place. These Principles had several

¹⁴⁷ Emily F. Carasco. Jang B. Singh. Towards Holding Transnational Corporations Responsible for Human Rights// European Business Review. 2010, Vol. 22. Issue 4. P. 433-434. Accessed online at: <http://www.emeraldinsight.com/journals.htm?articleid=1864974&show=abstract> [accessed on: 13/11/2011].

¹⁴⁸ Ibid. P. 434.

shortcomings. First, that they did not make any reference to human rights or international law. Second, adherence to them was voluntary. And third, there was no monitoring mechanism. Because of this, the Sullivan principles constituted a weak system which did not challenge the apartheid system directly. The real reasons why corporations were endorsing these principles were not the elimination of apartheid, but the desire to continue to prosper in South Africa and to avoid disinvestment.¹⁴⁹

Yet another initiative was developed by the Organization for Economic Co-operation and Development (OECD), which prepared the Guidelines that constitute a part of the OECD declaration on international investment and multinational enterprises. These Guidelines are voluntary recommendations for business practices relating to human rights, disclosure of information, anti-corruption, labour relations, taxation, environment and consumer protection.¹⁵⁰ The aim of this initiative was to strengthen mutual confidence between TNCs and States in which they operate. This aim was to be achieved through ‘national contact points’ (NCPs) appointed by each OECD Member State. The responsibilities of these NCPs are to promote the Guidelines within the State’s territory and to gather information regarding adherence to them. The positive aspect of this initiative was that it allowed anyone to bring a claim to an NCP, and also that it allowed for consideration of issues both in the “home” State and in the “host” State.¹⁵¹ The Guidelines were amended a number of times; the last time in 2011. The Guidelines make a specific reference to the responsibility of transnational corporations in relation to human rights. It is provided that TNCs should take fully into account established policies in the States where they conduct their business and consider the views of other stakeholders as well. The OECD noted that “[w]hile promoting and upholding human rights is primarily the responsibility of governments, where corporate conduct and human rights intersect enterprises do play a role, and thus MNEs are encouraged to respect human rights [...]”¹⁵² Even though these Guidelines are of voluntary nature and the performance of NCPs is uneven, especially in regard to human rights, the OECD Guidelines are officially endorsed by all the Member States of the OECD, and also by Argentina, Chile and Brazil, which makes this initiative stand out among others.

Similar to OECD is the initiative by the International Labour Organization (hereafter “ILO”) – the Tripartite declaration of principles concerning MNEs. The purpose of this

¹⁴⁹ Emily F. Carasco. Jang B. Singh. Towards Holding Transnational Corporations Responsible for Human Rights// European Business Review. 2010, Vol. 22. Issue 4. P. 434-435. Accessed online at: <http://www.emeraldinsight.com/journals.htm?articleid=1864974&show=abstract> [accessed on: 13/11/2011].

¹⁵⁰ Ibid. P. 435.

¹⁵¹ The OECD Guidelines for Multinational Enterprises. 2000.

¹⁵² Emily F. Carasco. Jang B. Singh. Towards Holding Transnational Corporations Responsible for Human Rights// European Business Review. 2010, Vol. 22. Issue 4. P. 435-436. Accessed online at: <http://www.emeraldinsight.com/journals.htm?articleid=1864974&show=abstract> [accessed on: 13/11/2011].

declaration is to encourage positive contribution that transnational corporations can make to the economic and social progress and to minimize difficulties arising from their business conduct in “host” States.¹⁵³ Article 8 of the paragraph “General Policies” explicitly states that transnational corporations, among other parties concerned with this Declaration, “should respect the Universal Declaration of Human Rights and the corresponding International Covenants adopted by the General Assembly of the UN as well as the Constitution of the ILO and its principles according to which freedom of expression and association are essential to sustained progress.”¹⁵⁴ It is further added that TNCs should also honour any commitments they have voluntarily entered into under national law and obligations under international law. However, this Declaration as well as the OECD Guidelines did not prove to be effective due to its voluntary nature and weak monitoring structure.

These first initiatives laid the ground for the further development in corporate responsibility, which were prepared by the United Nations.

Starting with the new millennium there were more initiatives drafted, such as the Global Compact (2000), the UN Norms on the Responsibilities for Transnational Corporations and Other Business Enterprises with Regards to Human Rights (2003), also the Report of the Special Representative of the Secretary General on the issue of human rights and transnational corporations and other business enterprises, John Ruggie – ‘Protect, Respect and Remedy: a Framework for Business and Human Rights’ (2008), with following reports for its implementation.

The Global Compact is a voluntary international citizenship network for businesses that are committed by it to align their conduct with the ten drafted principles in the areas of human rights, labour, environment and anti-corruption. The goal of this initiative is to bring businesses together with UN agencies, labour and civil society. In regard to human rights the relevant principles provide that businesses should commit to support and respect internationally proclaimed human rights, make sure that they are not complicit in human rights abuses, also mainstream freedom of association and the recognition of workers’ rights to collective bargaining, the elimination of all forms of forced and compulsory labour, the abolition of child labour and the elimination of discrimination.¹⁵⁵ The Global Compact has two objectives which complement each other. First is to mainstream the ten principles in business activities around the

¹⁵³ Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy. The International Labour Organization. Geneva, 1977 (third edition 2001).

¹⁵⁴ Ibid. Article 8. P. 3.

¹⁵⁵ The United Nations Global Compact. 2000. Principles 1-6. Available online at: <http://www.unglobalcompact.org/AboutTheGC/TheTenPrinciples/index.html> [accessed on: 16/4/1012].

world, and the second is to help start actions in support of the main goals of the United Nations. The Global Compact values are based on universally accepted human rights principles drawn from the Universal Declaration of Human Rights, the ILO's fundamental principles on rights at work, the UN Convention Against Corruption and the Rio Declaration on Environment and Development.¹⁵⁶

As this initiative is not binding, a corporation, which is willing to endorse these principles, has to submit a report showing that its business operations are complying with the Global Compact, and its principles are included in the business strategy, culture and everyday operations. Afterwards a corporation is required to provide information to its stakeholders on the annual basis about the progress of implementation of the ten principles and the undertaking of projects in support of UN goals.

Besides being voluntary, the Global Compact has other drawbacks, common to other initiatives, such as the lack of monitoring and enforcement mechanisms, and a small number of businesses that have joined the Compact, as compared with the total number of businesses.¹⁵⁷ Several corporations, such as "Statoil", "Lawin", "Apranga", "Teo", "Mazeikiu Nafta"¹⁵⁸, operating in Lithuania are members of the Global Compact. Each corporation provide their annual reports on the implementation of the Global compact.¹⁵⁹ Even though the initiative is not binding, once a member, a corporation then is more responsible in front of its stakeholders. The reports are public and easily accessible, therefore, it provides the stakeholders a possibility to monitor how the corporation is implementing the principles of the Global Compact. That is one aspect though. Another is concerning the public image of corporations. Since the public perception of a corporation is directly related to its success and profits they can generate, it motives corporations to accept the Global Compact and show to its stakeholders that a corporation is conducting a responsible business.

Putting aside its weaknesses, being voluntary, having no implementation and enforcement mechanisms, one needs to realize that this initiative also has its strong sides. Such as publicity and, again, being voluntary. Being voluntary can be both, a set back and an advantage. It is important that there is no so called "warden" who forces to comply with the

¹⁵⁶ Emily F. Carasco. Jang B. Singh. Towards Holding Transnational Corporations Responsible for Human Rights// European Business Review. 2010, Vol. 22. Issue 4. P. 438. Accessed online at: <http://www.emeraldinsight.com/journals.htm?articleid=1864974&show=abstract> [accessed on: 13/11/2011].

¹⁵⁷ Ibid. P. 438.

¹⁵⁸ The full list of corporations operating in Lithuania that are members of the Global Compact can be found online at: http://www.globalcompact.lt/en/gc_members/.

¹⁵⁹ The annual reports of corporations on the implementation on the Global Compact priciples can be found online at: http://www.globalcompact.lt/undp/list_reports.

principles of the Global Compact, because when it is voluntary and corporations are not forced to accept the initiative, it is more likely they will be willing to follow it. Of course, the important aspect is consciousness of the stakeholders. Until there is a decent understanding and observance of human rights in a certain State it is futile to think that voluntary human rights initiatives will have any effect. It explains why being voluntary can serve as both, negative and positive aspect. It also explains why this initiative is not accepted in States where human rights situation is poor.

In 2003 the UN Sub-Commission on the promotion and protection of human rights have approved the Norms on the responsibilities of TNCs and other business enterprises with regard to human rights (The Norms). From the beginning the Norms were said to have no legal effect, but indentifying some “useful elements” and therefore they should be “road-tested” along with other initiatives on the same subject.¹⁶⁰ The Amnesty International, among other NGOs, were in support of the Norms, while others, such as the International Organization of Employers, as well as the Government of the United States were against the Norms, arguing that “[w]here human rights abuses are widespread they are the result of either action or inaction of states, not generally by private enterprises”.¹⁶¹ This was one the two major flaws indicated later on by the Special Representative of the Secretary-General. Precisely, that there is no legal authority to directly impose treaty-based obligations on corporations. As the second flaw it was asserted that corporations do not have a general role in relation to human rights, because their nature is to generate profits.¹⁶²

Despite the controversial reception of the Norms they are the first comprehensive international human rights initiative that put obligations directly on corporations, because they, as organs on society, have a responsibility to promote and secure human rights within their spheres of activity and influence.¹⁶³ The Norms drafted by taking human rights obligations from various human rights instruments: from international conventions to earlier initiatives.¹⁶⁴

One of its distinctive features from other similar initiatives is that the Norms contain provisions on their implementation. Articles 15 – 19 state that corporations have to provide periodical reports, as well as be subject to periodic monitoring and verification by the United

¹⁶⁰ Emily F. Carasco. Jang B. Singh. Towards Holding Transnational Corporations Responsible for Human Rights// European Business Review. 2010, Vol. 22. Issue 4. P. 438-439. Accessed online at: <http://www.emeraldinsight.com/journals.htm?articleid=1864974&show=abstract> [accessed on: 13/11/2011].

¹⁶¹ Ibid. P. 440.

¹⁶² Ibid. P. 441.

¹⁶³ The Norms on the responsibilities of transnational corporations and other business enterprises with regard to human rights. The UN Sub-Commission on the Promotion and Protection of Human Rights. 26 August 2003. E/CN.4/Sub.2/2003/12/Rev.2. Article 1.

¹⁶⁴ The Preamble of the Norms indicates the full list of human rights instruments, based on which the Norms were drafted. Naming a few: the Universal Declaration of Human Rights, the UN Global Compact, the ICCPR, the ICESCR, etc.

Nations. Moreover, States have to establish a legal and administrative framework for providing remedies for persons adversely affected by failures of corporations to comply with the Norms. Even though it is not an explicit enforcement mechanism provided in these articles, but it indicates that the nature of the Norms is not voluntary. The Norms were supposed to evolve into a binding instrument, but faced such obstacles as an unclear list, extent, way of implementation and precise nature of obligations on corporations to promote human rights since it is still a primary responsibility of States.¹⁶⁵

Yet another distinctive feature is that the Norms were drafted by a group of independent human rights experts, who consulted with NGOs, business, governments and society, therefore there was no direct governmental input while creating the Norms.¹⁶⁶

In 2005 the Special Representative of the Secretary-General (hereafter “SRSG”) was appointed for the purpose of exploring the unresolved issues and offering the solutions. The person appointed was the professor John Ruggie. He prepared several reports in this respect, the most important, so far, being the 2008 Report “Protect, Respect and Remedy: a Framework for Business and Human Rights”¹⁶⁷ with the following reports on its operationalization.¹⁶⁸

The report, prepared by the SRSG in 2008, indicated the dilemma between businesses and human rights. The dilemma concerns the governance gaps, which were caused by globalization as this process actually blurs the lines between the spheres of influence, those of States and corporations. Because there are differences in scope of economic activities and actors, and the capacity of State institutions to deal with the adverse consequences they cause. Since corporations have a great impact on economic forces, as well as societies, it is recognized that they can have impact upon all human rights. Therefore, their responsibilities in relation to human rights also have to be recognized. And it was done in the SRSG 2008 report.

¹⁶⁵ Emily F. Carasco. Jang B. Singh. Towards Holding Transnational Corporations Responsible for Human Rights// European Business Review. 2010, Vol. 22. Issue 4. P. 440. Accessed online at: <http://www.emeraldinsight.com/journals.htm?articleid=1864974&show=abstract> [accessed on: 13/11/2011].

¹⁶⁶ Ibid.

¹⁶⁷ Protect, Respect and Remedy: a Framework for Business and Human Rights//Report by the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, John Ruggie. 7 April 2008. A/HRC/8/5.

¹⁶⁸ Business and Human Rights: Towards Operationalizing the „Protect, Respect and Remedy“ Framework. Report by the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, John Ruggie. 22 April 2009. A/HRC/11/13. Business and Human Rights: Further Steps Toward the Operationalization of the „Protect, Respect and Remedy“ Framework. Report by the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, John Ruggie. 9 April 2010. A/HRC/14/27. Guiding Principles on Business and Human Rights: Implementing the United Nations „Protect, Respect and Remedy“ Framework. Report by the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, John Ruggie. 21 March 2011. A/HRC/17/31.

The framework that was introduced in this report is based on differentiated but complementary responsibilities of States and corporations and consists of three main principles.¹⁶⁹ The first one anticipates the State duty to protect. States are to lay down the measures for human rights protection with respect to business activities as a priority in government policies, because of the proliferation of corporate-related abuses to people and communities, and the expanding exposure of social risks that corporations face, which indicate that they cannot manage the issues alone.¹⁷⁰ The States can adopt measures as to hold corporations criminally liable for human rights abuses, or support market pressures on corporations to respect human rights, etc.¹⁷¹ The second principle in the 2008 Ruggie's report covers the corporate responsibility to respect human rights. Since corporations can abuse both, labour (right to a safe work environment, freedom of association, abolition of slavery and forced labour, etc.) and non-labour rights (right to an adequate standard of living, right to education, freedom from torture or cruel, inhuman or degrading treatment, etc.) corporations have an obligation to respect human rights. This obligation is not passive. On the contrary, it includes such actions by corporations as adoption of human rights policy, conduction of impact assessments, integration of human rights policies throughout the operations of a corporation, as well as monitoring and auditing processes.¹⁷² And finally, the third principle is that of access to remedies. It is important for both aforementioned principles, since the regulations of a State without mechanisms to investigate, punish and redress abuses will have little or no impact, and those who believe that their rights have been abused should have means so as to bring this to the attention of the corporation and seek remedies within other channels than judicial ones, as well as through a company-level grievance mechanisms.¹⁷³

As various initiatives throughout time showed, when no enforcement mechanisms exist direct corporate responsibility for violations of human rights remains a little more than a mere declaration. Nevertheless, the "Protect, Respect and Remedy" Framework calls for further elaboration of the principles set out in it. The attempts have been made by revising the Organization for Economic Cooperation's Guidelines for Multinational Enterprises in May 2011

¹⁶⁹ Emily F. Carasco. Jang B. Singh. Towards Holding Transnational Corporations Responsible for Human Rights// European Business Review. 2010, Vol. 22. Issue 4. P. 441. Accessed online at: <http://www.emeraldinsight.com/journals.htm?articleid=1864974&show=abstract> [accessed on: 13/11/2011].

¹⁷⁰ Protect, Respect and Remedy: a Framework for Business and Human Rights//Report by the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, John Ruggie. 7 April 2008. A/HRC/8/5. P. 9.

¹⁷¹ Ibid. P. 10.

¹⁷² Ibid. P. 14-19.

¹⁷³ Ibid. P. 22-25.

to incorporate the principles provided for in the Ruggie's 2008 report.¹⁷⁴ Also by the review of International Finance Corporation Performance Standards on Social and Environmental Sustainability which aimed at strengthening the approach towards human rights based on the "Protect, Respect and Remedy" framework.¹⁷⁵ As well as by the introduction of Ruggie's principles into the ISO 26000 standard on corporate social responsibility released by the International Standards Association in November 2010.¹⁷⁶

This overview of initiatives towards holding transnational corporations directly accountable for human rights abuses are slowly but developing towards enforceable obligations. Various nongovernmental organizations, such as Amnesty International, Global Witness, Oxfam International, World Wildlife Fund, etc., maintain that responsible corporate behaviour can only be reached through binding norms and through institutions which could bring transnational corporations under scrutiny and supervision.¹⁷⁷ It can be asserted that the process is not easy since there are various obstacles to overcome and define how much the responsibility of corporations can be extended, what enforcement mechanisms are feasible. Until it happens, the corporate consciousness of conducting responsible business is evolving in parallel. So on the one hand, there is an intensive search for a way to bind transnational corporations to respect human rights, on the other hand, corporations themselves are becoming more willing to participate in voluntary initiatives either because of the responsible business consciousness, or because of pressures applied by States. Either way, the tendency is that corporations are beginning to realize that human rights policy within all stages of its operations is an essential component.

Attempts to bind transnational corporations to abide by international norms are one side of the coin though. Corporations are not willing to just sit and wait until some institution creates an instrument which will be binding upon them. Instead of that, they are developing a "corporate soft law", which is voluntary, non-enforceable and self-regulatory. It covers codes of conduct, mission statements, social auditing schemes.¹⁷⁸ That is the reason why corporations tend to join

¹⁷⁴ The 2011 update of the OECD Guidelines for Multinational Enterprises can be accessed online at: http://www.oecd.org/document/33/0,3746,en_2649_34889_44086753_1_1_1_1,00.html. [accessed on: 24/04/2012].

¹⁷⁵ As of 1 of January 2012 some changes relating to access to cultural sites, indigenous people's rights, biodiversity conservation and sustainable management, risk to communities, etc., have been introduced. The standards can be accessed online at: http://www1.ifc.org/wps/wcm/connect/Topics_Ext_Content/IFC_External_Corporate_Site/IFC+Sustainability/Sustainability+Framework/Sustainability+Framework+-+2012/. [accessed on: 24/04/2012].

¹⁷⁶ The ISO 26000 Standard on Social Responsibility can be accessed online at: http://www.iso.org/iso/iso_catalogue/management_and_leadership_standards/social_responsibility/sr_iso26000_overview.htm [accessed on: 24/04/2012].

¹⁷⁷ Ronen Shamir. Between Self-Regulation and the Alien Tort Claims Act: On the Contested Concept of Corporate Social Responsibility//Law & Society Review. 2004, Vol. 38. Issue 4. P. 644. Access online at: <http://onlinelibrary.wiley.com/doi/10.1111/j.0023-9216.2004.00062.x/pdf> [accessed on: 12/11/2011].

¹⁷⁸ Ibid. P. 645.

the Global Compact and include its principles in their policies – a voluntary initiative is more acceptable, and corporations are even competing over the development of these initiatives so as to become the field’s standard setting authority.¹⁷⁹

2.2. ALIEN TORT CLAIMS ACT

The initiatives overviewed in the previous sub-chapter form one way of subjecting transnational corporations to international human rights standards that would apply to them beyond the demands of any specific country. And they set a promising picture for the future. It is highly probable that in some time from now transnational corporations will be bound by some international instruments to observe human rights obligations, they might even gain international subjectivity on some level to serve this purpose. Sadly enough, the current human rights abuses cannot be left to be dealt with in the future. Remedies are needed now and the situation is still rather difficult and in many cases transnational corporations escape responsibility for human rights abuses by taking advantage of local legal systems which are ill adapted for effective corporate regulation, and by moving their businesses and investments to countries where legal regulation is most appropriate for them.¹⁸⁰

Therefore, it is relevant to talk about another way of subjecting transnational corporations to observing human rights, which is through mobilizing the legal systems of “home” States in order to police and sanction corporate conduct in places where it is either impossible or impractical to invoke the law of the “host” State.¹⁸¹ This kind of approach will be discussed in this sub-chapter, one which allows people to sue extra-territorially under the United States Aliens Tort Claims Act (hereafter “ATCA”) of 1789, which was adopted as part of the Judiciary Act. As the Court of the Second Circuit explained it, international law is not set in stone, it is changing and developing, as well as interpretation of it, therefore, this view towards it allowed to use ATCA as “a potential engine for vindication of human rights in U.S. courts.”¹⁸²

The distinctive aspects of this system are few. First aspect is that national court’s jurisdictional power is being extended to cover the events that had occurred in foreign countries to and by non-citizens of the United States. In other words, it “allows aliens to sue in U.S.

¹⁷⁹ Ronen Shamir. *Between Self-Regulation and the Alien Tort Claims Act: On the Contested Concept of Corporate Social Responsibility*//Law & Society Review. 2004, Vol. 38. Issue 4. P. 646. Access online at: <http://onlinelibrary.wiley.com/doi/10.1111/j.0023-9216.2004.00062.x/pdf> [accessed on: 12/11/2011].

¹⁸⁰ Ibid. 637.

¹⁸¹ Ibid.

¹⁸² Theodore R. Posner. *Kadic v. Karadzic*. 70 F.3d 232//American Journal of International Law. 1996, Vol. 90. Issue 4. P. 661. Accessed online at: <http://jstor.org/stable/pdfplus/2203994.pdf> [accessed on: 11/11/2011].

federal court for violations of international laws or treaties of the United States.”¹⁸³ The ATCA 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.”¹⁸⁴ Second aspect is that only non-American plaintiffs can bring a claim under the ATCA.¹⁸⁵ Further on those two issues, on causes of action and jurisdiction, will be explained more thoroughly.

Until 1980 when the *Filartiga v. Pena-Irala* case was examined the ATCA had hardly been invoked. But this case was a landmark in the ATCA jurisprudence. This case concerned a claim brought against a Paraguayan police officer who had tortured a young man to death for the political beliefs of his father, and then immigrated to the United States. The court found that federal courts had the authority to hear civil law suits that were brought by aliens for violation of international law, stating that a “deliberate torture perpetrated under color of official authority violates universally accepted norms of the international law of human rights, regardless of the nationality of the parties. Thus, whenever an alleged torturer is found and served with process by an alien within our borders, § 1350 provides general jurisdiction.”¹⁸⁶ The decision in this case demonstrated that the ATCA can be used to allow the U.S. courts to try cases of aliens seeking redress for human rights abuses that were committed against them in their home countries.¹⁸⁷ Even though this case did not concern transnational or any other type of corporations to that matter, it nevertheless opened the door for claims to be brought against transnational corporations as the court held that violations of international human rights “could trigger ATCA’s jurisdiction.”¹⁸⁸

It is important that being a national tool, litigation under ATCA requires federal courts to incorporate international human rights law into examination of ATCA claims.¹⁸⁹ The findings

¹⁸³ Bahareh Mostajeleian, Foreign Alternatives to the Alien Tort Claims Act: The Success (Or its Failure?) of Bringing Civil Suits Against Multinational Corporations That Commit Human Rights Violations//The George Washington International Law Review. 2008, Vol. 40. P. 501.

¹⁸⁴ Theodore R. Posner. *Kadic v. Karadzic*. 70 F.3d 232//American Journal of International Law. 1996, Vol. 90. Issue 4. P. 661. Accessed online at: <http://jstor.org/stable/pdfplus/2203994.pdf> [accessed on: 11/11/2011].

¹⁸⁵ Ibid. P. 658. And also, Ronen Shamir. Between Self-Regulation and the Alien Tort Claims Act: On the Contested Concept of Corporate Social Responsibility//Law & Society Review. 2004, Vol. 38. Issue 4. P. 639. Access online at: <http://onlinelibrary.wiley.com/doi/10.1111/j.0023-9216.2004.00062.x/pdf> [accessed on: 12/11/2011].

¹⁸⁶ Jeffrey Davis. Justice Without Borders: Human Rights Cases in U.S. Courts//Law & Policy. 2006, Vol. 28. Issue 1. P. 62. Access online at: <http://onlinelibrary.wiley.com/doi/10.1111/j.1467-9930.2005.00217.x/pdf> [accessed on: 12/11/2011].

¹⁸⁷ Theodore R. Posner. *Kadic v. Karadzic*. 70 F.3d 232//American Journal of International Law. 1996, Vol. 90. Issue 4. P. 660. Accessed online at: <http://jstor.org/stable/pdfplus/2203994.pdf> [accessed on: 11/11/2011].

¹⁸⁸ Bahareh Mostajeleian, Foreign Alternatives to the Alien Tort Claims Act: The Success (Or its Failure?) of Bringing Civil Suits Against Multinational Corporations That Commit Human Rights Violations//The George Washington International Law Review. 2008, Vol. 40. P. 501.

¹⁸⁹ Ochoa, Christiana. Access to U.S. Federal Courts as a Forum for Human Rights Disputes: Pluralism and the Alien Tort Claims Act//Indiana Journal of Global Legal Studies. 2005, Vol. 12. Issue 2. P. 631. Accessed online at: <http://sfxit.ugent.be/ugent?sid=LibHub&pid=&id=&issn=10800727&isbn=&date=2005&volume=12&issue=2&pages=631->

of the *Filartiga v. Pena-Irala* case have been followed by other courts. Taking these aspects into account, it can be stated that ATCA's reach is truly extraterritorial, since it allows American courts to apply international human rights norms to events that took place in foreign States and the parties are non-American citizens.¹⁹⁰

Analysing the meaning of the ATCA provision, two questions are raised. The first is whether an enforceable private cause of action is created by this Act, or does it merely have a potential to grant jurisdiction? If the answer is yes to the first question, then the second one raises the issue of identification of those causes of action, additionally asking whether federal courts are vested with the power to introduce new causes of action that would be in accordance with developments of international law.¹⁹¹ The answers are to be found in the case law. In the *Filartiga* case it was established that torture created a private cause of action, thus it opened the courts of the United States for plaintiffs seeking redress for human rights abuses (such as torture, killings, violence by authorities, etc.). It was a rather liberal view because it allowed the courts to create new causes of action, because it turned to customary international law to justify torture as a new private cause of action for individuals.¹⁹² Therefore, it shows the court's position that international law has to be interpreted according to realities of current international law, not in a way it was understood back in the day when the Act was enacted.

With a restrained approach taken by the Supreme Court of the United States in the *Sosa v. Alvarez-Machain* (2004) case, it was an end for liberalism for the courts to interpret ATCA and international law as to create new private causes of action. This case concerned kidnapping and arbitrary detention of a Mexican national in Mexico, and the court ruled that ATCA provision "enabled federal courts to hear claims in a very limited category defined by the law of nations and recognized in common law."¹⁹³ The United States Government argued that ATCA can only grant jurisdiction to U.S. courts but does not provide a cause of action, because the courts do not have a power to infer causes of action from customary international law due to its

[650&atitle=Access%20to%20U.S.%20Federal%20Courts%20as%20a%20Forum%20for%20Human%20Rights%20Disputes%20Pluralism%20and%20the%20Alien%20Tort%20Claims%20Act&title=Indiana%20Journal%20of%20Global%20Legal%20Studies&aulast=Ochoa%2C%20Christiana](#) [accessed on: 12/11/2011].

¹⁹⁰ Ronen Shamir. Between Self-Regulation and the Alien Tort Claims Act: On the Contested Concept of Corporate Social Responsibility//Law & Society Review. 2004, Vol. 38. Issue 4. P. 639. Access online at: <http://onlinelibrary.wiley.com/doi/10.1111/j.0023-9216.2004.00062.x/pdf> [accessed on: 12/11/2011].

¹⁹¹ Ibid. P. 641.

¹⁹² Chanin, Joshua M. ,The Regulatory Grass is Greener': A Comparative Analysis of the Alien Torts Claims Act and the European Union's Green Paper on Corporate Social Responsibility//Indiana Journal of Global Legal Studies. Volume 12, Issue 3, Summer 2005. P. 755.

¹⁹³ *Jose Francisco Sosa v. Humberto Alvarez-Machain*. Supreme Court of the United States. 542 U.S. (2004) Judgment of 29 June 2004. P. 17.

“inherently indeterminate nature.”¹⁹⁴ In its decision of 29 June 2004, the Supreme Court agreed with the Government’s position that the ATCA was only jurisdictional, and was designed to provide redress for three types of actionable causes: “violation of safe conduct, infringement of the rights of ambassadors, and piracy,”¹⁹⁵ and otherwise it solely grants jurisdiction to U.S. courts and that the causes of action have to be found elsewhere. Nevertheless, the court did not want to close the door for ATCA litigation for good, so it added that “[t]he statute was intended to have practical effect the moment it became law. The jurisdictional grant is best read as having been enacted on the understanding that the common law would provide a cause of action for the modest number of international law violations with potential for personal liability at the time.”¹⁹⁶ The Court did not agree with the U.S. Government’s position that the causes of action are only to be found in customary international law, but also in the international law, because international law has to be understood and applied by federal courts as part of national law. Nevertheless, the restrained understanding of the causes of action is justifiable because the ATCA was adopted more than 200 years ago and foresee only three offenses as possible causes of action. Therefore, the court set out three requirements for bringing ATCA claim, stating that “courts should require any claim based on the present-day law of nations to rest on a norm of international character accepted by the civilized world and defined with a specificity comparable to the features of the 18th-century paradigms [...]”¹⁹⁷ It means that in order to invoke liability under the ATCA, a norm “must be (1) specific or definable, (2) universal, and (3) obligatory.”¹⁹⁸

This decision in *Sosa* case is another landmark in ATCA litigation. It is not objecting the findings in *Filartiga*, but recognizes limitations of ATCA claims, it also included transnational corporations into ATCA’s jurisdictional reach, thus extending it. The court in *Sarei v. Rio Tinto* case (which was examined after *Sosa*) stated that ATCA “provides a domestic forum

¹⁹⁴ Supreme Court Interpretation of Alien Tort Claims Act//American Journal of International Law. 2004, Vol. 98. Issue 4. P. 846-847. Accessed online at: <http://www.jstor.org/stable/pdfplus/3216717.pdf> [accessed on: 11/11/2011].

¹⁹⁵ Ronen Shamir. Between Self-Regulation and the Alien Tort Claims Act: On the Contested Concept of Corporate Social Responsibility//Law & Society Review. 2004, Vol. 38. Issue 4. P. 642. Access online at: <http://onlinelibrary.wiley.com/doi/10.1111/j.0023-9216.2004.00062.x/pdf> [accessed on: 12/11/2011].

¹⁹⁶ Bahareh Mostajeleian, Foreign Alternatives to the Alien Tort Claims Act: The Success (Or its Failure?) of Bringing Civil Suits Against Multinational Corporations That Commit Human Rights Violations//The George Washington International Law Review. 2008, Vol. 40. P. 502.

¹⁹⁷ Supreme Court Interpretation of Alien Tort Claims Act//American Journal of International Law. 2004, Vol. 98. Issue 4. P. 847. Accessed online at: <http://www.jstor.org/stable/pdfplus/3216717.pdf> [accessed on: 11/11/2011]. And *Jose Francisco Sosa v. Humberto Alvarez-Machain*. Supreme Court of the United States. 542 U.S. (2004) Judgment of 29 June 2004. P. 31.

¹⁹⁸ Ochoa, Christiana. Access to U.S. Federal Courts as a Forum for Human Rights Disputes: Pluralism and the Alien Tort Claims Act//Indiana Journal of Global Legal Studies. 2005, Vol. 12. Issue 2. P. 639. Accessed online at: <http://sfxit.ugent.be/ugent?sid=LibHub&pid=&id=&issn=10800727&isbn=&date=2005&volume=12&issue=2&pages=631-650&atitle=Access%20to%20U.S.%20Federal%20Courts%20as%20a%20Forum%20for%20Human%20Rights%20Disputes%3A%20Pluralism%20and%20the%20Alien%20Tort%20Claims%20Act&title=Indiana%20Journal%20of%20Global%20Legal%20Studies&aulast=Ochoa%2C%20Christiana> [accessed on: 12/11/2011].

for claims based on conduct that is illegal everywhere, including the place where that conduct took place. It is no infringement on the sovereign authority of other nations,”¹⁹⁹ therefore, as long as personal jurisdiction requirements are met, claims under ATCA can be examined. Personal jurisdiction means that a court has a power to examine a claim involving a defendant having some contact with the place where the court is located. In order to find a personal jurisdiction when a defendant is a corporation, it is not necessary for a corporation to have its headquarters or place of business in the United States, it is enough to find that a TNC has a subsidiary, branch or office within the United States, or has any other type of connection to the forum State.²⁰⁰ Nevertheless, even if it might seem from the first look that ATCA allows bringing of claims that have no link with the U.S., it is not entirely true. It indeed has to be a link between a forum State – the United States, and a defendant. This link is satisfied when “minimum contact” is established. In order to do that “the criterion of “*presence*” or “*continuous and systematic business*” is considered.”²⁰¹ The Supreme Court in its unanimous decision in *Goodyear Dunlop Tires Operations S.A. v. Brown*²⁰² provided that sporadic sales were only “attenuated connections to the State”²⁰³ that “fall far short of ‘the continuous and systematic general business contacts’ necessary to empower North Carolina to entertain suit against them on claims unrelated to anything that connects them to the State.”²⁰⁴ The court in *Bauman v. DaimlerChrysler Corp.* established that if one two tests, “alter ego” test or “agency” test, is satisfied, then the necessary contacts for the exercise of personal jurisdiction are found.²⁰⁵ The first test is predicated upon showing of parental control over the subsidiary, namely, that there is unity between a parent corporation and its subsidiary which indicate that they are not separate entities, and “failure to disregard their separate identities would result in fraud or injustice.”²⁰⁶ The second test (“agency” test) is predicated upon showing that services of a subsidiary is of special importance to the parent corporation. The court stated that this test “is satisfied by showing that the subsidiary functions as the parent corporation’s representative in that it performs services that are sufficiently important to the foreign corporation that if it did not have a *representative* to perform them, corporation’s own officials would undertake to perform

¹⁹⁹ *Sarei v. Rio Tinto*. No. 09-56381 D.C. No. 2:00-cv-11695-MMM-MAN. Central District of California, Los Angeles. Opinion. Filed October 25, 2011. P. 19338.

²⁰⁰ Bahareh Mostajeleian, Foreign Alternatives to the Alien Tort Claims Act: The Success (Or its Failure?) of Bringing Civil Suits Against Multinational Corporations That Commit Human Rights Violations//The George Washington International Law Review. 2008, Vol. 40. P. 504.

²⁰¹ Jan Wouters, Leen De Smet, Cedric Ryngaert, Tort Claims Against Multinational Companies for Foreign Human Rights Violations Committed Abroad: Lessons from the Alien Tort Claims Act?//Working Paper No. 46. Institute for International Law K.U. Leuven. November 2003. P. 9.

²⁰² *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 2011 WL 2518815.

²⁰³ *Ibid.* P. 13.

²⁰⁴ *Ibid.* P. 13.

²⁰⁵ *Bauman v. DaimlerChrysler Corporation*. No. 07-15386 D.C. No. CV-04-00194-RMW. 2011. P. 6576.

²⁰⁶ *Ibid.*

substantially similar services.”²⁰⁷ The difference between these two tests is that the former requires to show greater level of control than the latter. In its conclusion the court ruled that these tests cannot be applied mechanically, but must take current realities into account in order to determine whether it is reasonable to subject a parent corporation to the jurisdiction of the U.S. federal courts for action of its subsidiary.²⁰⁸ In other words, the requirements of presence in the United States are minimal, so even “a mere fact that a corporation is “doing business” and maintains regular and systematic activity within a state is generally sufficient to provide a federal district court in that state with personal jurisdiction over it.”²⁰⁹

Yet another restriction on the scope of ATCA jurisdiction is the requirement of State action, with exceptions regarding slave trading, genocide and war crimes.²¹⁰ The United States Court of Appeals held that international law does not create obligations for States only, but might as well hold individual non-State actors liable for certain acts.²¹¹ The Court further ruled that a U.S. district court may exercise jurisdiction under the ATCA over a non-State actor who is charged with genocide or war crimes, because genocide and war crimes are “universally condemned regardless of whether the perpetrator is the agent of a state or an independent, nonstate actor.”²¹² The court found that there are two separate circumstances when a private actor can be held responsible for violations of international obligations. First, when the wrong committed by an individual is of such gravity that there is no need to show State action (i.e. genocide, war crimes, etc.). Second, when violations committed are sufficiently tied to State actions, then international standards will apply to action of private actors.²¹³ It means that whenever a corporation is charged on other grounds than slave trading, genocide and war crimes, it has to be showed that the corporation was acting in a capacity of a state actor.²¹⁴ As to slave

²⁰⁷ *Bauman v. DaimlerChrysler Corporation*. No. 07-15386 D.C. No. CV-04-00194-RMW. 2011. P. 6576.

²⁰⁸ *Bauman v. DaimlerChrysler Corporation*. No. 07-15386 D.C. No. CV-04-00194-RMW. 2011. P. 6596.

²⁰⁹ Liesbeth F.H. Enneking. Crossing the Atlantic? The Political and Legal Feasibility of European Direct Liability Cases//The George Washington International Law Review. 2009, Vol. 40. P. 914. Accessed online at: <http://docs.law.gwu.edu/stdg/gwirl/PDFs/40-4/40-4-2-Enneking.pdf> [accessed on: 28/04/2012].

²¹⁰ Ronen Shamir. Between Self-Regulation and the Alien Tort Claims Act: On the Contested Concept of Corporate Social Responsibility//Law & Society Review. 2004, Vol. 38. Issue 4. P. 642. Access online at: <http://onlinelibrary.wiley.com/doi/10.1111/j.0023-9216.2004.00062.x/pdf> [accessed on: 12/11/2011].

²¹¹ Theodore R. Posner. *Kadic v. Karadzic*. 70 F.3d 232//American Journal of International Law. 1996, Vol. 90. Issue 4. P. 659. Accessed online at: <http://jstor.org/stable/pdfplus/2203994.pdf> [accessed on: 11/11/2011].

²¹² *Ibid*. P. 658.

²¹³ Ochoa, Christiana. Access to U.S. Federal Courts as a Forum for Human Rights Disputes: Pluralism and the Alien Tort Claims Act//Indiana Journal of Global Legal Studies. 2005, Vol. 12. Issue 2. P. 634. Accessed online at: [http://sfxit.ugent.be/ugent?sid=LibHub&pid=&id=&issn=10800727&isbn=&date=2005&volume=12&issue=2&pages=631-](http://sfxit.ugent.be/ugent?sid=LibHub&pid=&id=&issn=10800727&isbn=&date=2005&volume=12&issue=2&pages=631-650&atitle=Access%20to%20U.S.%20Federal%20Courts%20as%20a%20Forum%20for%20Human%20Rights%20Disputes%3A%20Pluralism%20and%20the%20Alien%20Tort%20Claims%20Act&title=Indiana%20Journal%20of%20Global%20Legal%20Studies&aulast=Ochoa%2C%20Christiana)

[650&atitle=Access%20to%20U.S.%20Federal%20Courts%20as%20a%20Forum%20for%20Human%20Rights%20Disputes%3A%20Pluralism%20and%20the%20Alien%20Tort%20Claims%20Act&title=Indiana%20Journal%20of%20Global%20Legal%20Studies&aulast=Ochoa%2C%20Christiana](http://sfxit.ugent.be/ugent?sid=LibHub&pid=&id=&issn=10800727&isbn=&date=2005&volume=12&issue=2&pages=631-650&atitle=Access%20to%20U.S.%20Federal%20Courts%20as%20a%20Forum%20for%20Human%20Rights%20Disputes%3A%20Pluralism%20and%20the%20Alien%20Tort%20Claims%20Act&title=Indiana%20Journal%20of%20Global%20Legal%20Studies&aulast=Ochoa%2C%20Christiana) [accessed on: 12/11/2011].

²¹⁴ Ronen Shamir. Between Self-Regulation and the Alien Tort Claims Act: On the Contested Concept of Corporate Social Responsibility//Law & Society Review. 2004, Vol. 38. Issue 4. P. 642. Access online at: <http://onlinelibrary.wiley.com/doi/10.1111/j.0023-9216.2004.00062.x/pdf> [accessed on: 12/11/2011].

trading, the court in the *Doe v. Unocal* case made clear that “forced labour is a modern form of slavery and thus requires no state action to constitute a violation of the law of nations,”²¹⁵ and therefore, like in instances concerning war crimes and genocide, no State action needs to be shown in order to give rise to liability.

Taking that into account, it can be concluded that the ATCA provides both subject matter jurisdiction and personal jurisdiction, though restrained, in the federal courts of the United States.

In many cases transnational corporations try to avoid responsibility for human rights abuses by stating that they did not own or control those who violated human rights, nor had they any influence over or knowledge of the alleged violations by the military or paramilitary groups (as was in the *Coca-Cola* and *Unocal* cases. In the first one the human rights abuses were attributed to a paramilitary group which was hired to protect the bottling plant. The group had allegedly intimidated and murdered trade union leaders. In the second, Burmese armed forces carried out human rights abuses, but the corporation claimed that it was another corporation in the investment which was the operator of it, therefore that one should be held responsible).²¹⁶ Courts have to determine if, and to what extent, the corporation is to be held liable for the human rights abuses committed by these military/paramilitary groups. The question then is that of complicity, knowledge and influence over human rights abuses by, as in these cases, military and paramilitary groups. It means that a corporation can be found liable if it is a principal perpetrator of human rights abuses or acts as an accomplice. Therefore, ATCA does not hold corporations accountable for actions that the foreign governments carry out. There has to be a link between a corporation and an abuse. The link can be found using several tests, such as “joint action” like in the *Unocal* case, or tests applied by international criminal tribunals that require direct and substantial assistance or knowledge.

Putting aside claims from other States, international organizations and scholars that the use of ATCA amounts to the “legal imperialism” of the United States,²¹⁷ this system provides an example of holding transnational corporations directly accountable for human rights abuses using the existing tools in national law. Moreover, it does not simply provide a forum, the United States courts offer guarantees of a due process, something that is quite the opposite in many of

²¹⁵ Chanin, Joshua M. ,The Regulatory Grass is Greener’: A Comparative Analysis of the Alien Torts Claims Act and the European Union’s Green Paper on Corporate Social Responsibility//Indiana Journal of Global Legal Studies. Volume 12, Issue 3, Summer 2005. P. 760.

²¹⁶ Ronen Shamir. Between Self-Regulation and the Alien Tort Claims Act: On the Contested Concept of Corporate Social Responsibility//Law & Society Review. 2004, Vol. 38. Issue 4. P. 650. Access online at: <http://onlinelibrary.wiley.com/doi/10.1111/j.0023-9216.2004.00062.x/pdf> [accessed on: 12/11/2011].

²¹⁷ Ibid. P. 653-654.

the “host” States.²¹⁸ Since many domestic courts in countries where human rights abuses were committed “are either inadequate to handle the actions brought by victims, and are unwilling to sustain cases they believe will have negative economic consequences for the country, or are not seen as legitimate by their populations.”²¹⁹ Additionally, the benefit of ATCA litigation is publicity, and publicity not only generates sympathy for human rights victims and raise public awareness, it also impacts reputation of corporations. As negative impacts equals to monetary loses, it means that is influences decision and policy-making by transnational corporations and governments so as to include, among other, human rights standards. Nevertheless, it also has to be kept in mind that such a system is always balancing on a thread of mingling with internal affairs of another State, therefore it has to be used with great caution. And lastly, this system is suffering from the common initiatives disease – non-enforcement of decisions. It is difficult to enforce court decisions and for the plaintiffs to receive monetary awards since the defendants are usually located in foreign countries and it is impossible to reach their assets.

2.3. POSSIBILITY OF ATCA-LIKE LITIGATION IN THE EUROPEAN UNION

Claim is that there is no equivalent to ATCA in Europe, Australia or anywhere else, because of barriers arising from differences in legal culture, substantive law, and procedural and practical matters from that in the United States.²²⁰ But there is an alternative that can achieve similar results. That alternative is to use ordinary tort law, even though it in no way substitutes ATCA litigation in full, it is an important alternative.²²¹

As for situation in the European Union, it is important to note that an approach towards holding transnational corporations accountable for various violations, human rights included, is based on voluntary actions from TNCs. When in 2001 the European Commission issued a Green

²¹⁸ Chanin, Joshua M. ,The Regulatory Grass is Greener’: A Comparative Analysis of the Alien Torts Claims Act and the European Union’s Green Paper on Corporate Social Responsibility//Indiana Journal of Global Legal Studies. Volume 12, Issue 3, Summer 2005. P. 764.

²¹⁹ Ochoa, Christiana. Access to U.S. Federal Courts as a Forum for Human Rights Disputes: Pluralism and the Alien Tort Claims Act//Indiana Journal of Global Legal Studies. 2005, Vol. 12. Issue 2. P. 644. Accessed online at: <http://sfxit.ugent.be/ugent?sid=LibHub&pid=&id=&issn=10800727&isbn=&date=2005&volume=12&issue=2&pages=631-650&atitle=Access%20to%20U.S.%20Federal%20Courts%20as%20a%20Forum%20for%20Human%20Rights%20Disputes%203A%20Pluralism%20and%20the%20Alien%20Tort%20Claims%20Act&title=Indiana%20Journal%20of%20Global%20Legal%20Studies&aulast=Ochoa%2C%20Christiana> [accessed on: 12/11/2011].

²²⁰ Liesbeth F.H. Enneking. Crossing the Atlantic? The Political and Legal Feasibility of European Direct Liability Cases//The George Washington International Law Review. 2009, Vol. 40. P. 904-905. Accessed online at: <http://docs.law.gwu.edu/stdg/gwlr/PDFs/40-4/40-4-2-Enneking.pdf> [accessed on: 28/04/2012].

²²¹ Ibid. P. 904-905.

Paper on corporate social responsibility (CSR) seeking to start debate on various levels on the issue, it also defined CSR as “a concept whereby companies integrate social and environmental concerns in their business operations and in their interaction with their stakeholders on a voluntary basis.”²²² Later Commission Communication of 2006 revealed that regulatory framework is not needed and it took purely voluntary approach, even though the Parliament was favouring the mixed regulatory/voluntary approach.²²³ Another impetus for debate on this issue was given when the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, John Ruggie, published a “Protect, Respect and Remedy” framework in 2008. This framework is based on three pillars: “the state duty to protect human rights, the corporate duty to respect human rights, and the access of victims to remedies.”²²⁴ This report has been taken into account and debate indeed started, but as for now no substantive policy is achieved yet which could allow for foreign direct liability cases to be heard in European Union courts.

Nevertheless, the European Parliament in its resolutions of 2002 and 2007 on the matter of foreign direct liability, referenced to “the Brussels Convention²²⁵ or its successor the Brussels I Regulation,²²⁶ stating that they provide the necessary jurisdictional basis for foreign direct liability cases before the courts of the E.U. Member States.”²²⁷ Article 2 of the Brussels I Regulation lays down the main provision on the determination of jurisdiction. It provides that “persons domiciled in a Member State shall, whatever their nationality, be sued in the courts of that Member State.”²²⁸ Regulation further explain the meaning of a corporation or other legal person being domiciled in a Member State in Article 60, which states that “a company or other legal person or association of natural or legal persons is domiciled at the place where it has its: a) statutory seat, or b) central administration, or c) principal place of business.”²²⁹ In case the defendant is not domiciled in a Member State, then the laws of a Member State where the case is to be heard will determine the jurisdiction of its courts.²³⁰ Therefore, it is not problematic to

²²² Liesbeth F.H. Enneking. Crossing the Atlantic? The Political and Legal Feasibility of European Direct Liability Cases//The George Washington International Law Review. 2009, Vol. 40. P. 907. Accessed online at: <http://docs.law.gwu.edu/stdg/gwlr/PDFs/40-4/40-4-2-Enneking.pdf> [accessed on: 28/04/2012].

²²³ Ibid. P. 908.

²²⁴ Ibid. P. 909.

²²⁵ Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters, September 27, 1968, 1998 O.J. (C 27) 1.

²²⁶ Council Regulation 44/2001, 2001 O.J. (L. 12) 1 (EC).

²²⁷ Liesbeth F.H. Enneking. Crossing the Atlantic? The Political and Legal Feasibility of European Direct Liability Cases//The George Washington International Law Review. 2009, Vol. 40. P. 911. Accessed online at: <http://docs.law.gwu.edu/stdg/gwlr/PDFs/40-4/40-4-2-Enneking.pdf> [accessed on: 28/04/2012].

²²⁸ Council Regulation 44/2001, 2001 O.J. (L. 12) 1 (EC). Article 2.

²²⁹ Ibid. Article 60.

²³⁰ Ibid. Article 4.

bring a foreign direct liability case in a European court as long as it satisfies the aforementioned criteria.

It is obvious from these provisions that Brussels I Regulation does not provide as wide a jurisdictional framework as does the United States framework, according to which “the mere fact that a corporation is “doing business” and maintains regular and systematic activity within a state is generally sufficient to provide a federal district court in that state with personal jurisdiction over it.”²³¹ In other words, a “minimum contacts” jurisdictional threshold is not enough to invoke personal jurisdiction within the E.U., because Brussels I Regulation requires corporations to be incorporated or headquartered in one of the E.U. Member State for its courts to have jurisdiction over corporations. One example of this difference can be the case of *Wiwa v. Royal Dutch Petroleum*, in which the U.S. federal court found jurisdiction to hear the case because the two defendant corporations had an investor relations office and its manager within the U.S. jurisdiction.²³² In such situation no jurisdiction could be found under the Brussels I Regulation.

It gets more problematic when claimants bring a foreign direct liability case against a corporation which is not domiciled in any Member State of the European Union, because then jurisdiction is to be found according to the rules of a Member State in which court the case is brought. An example of such rule can be the Dutch *forum necessitatis* rule, which “allows Dutch courts to exercise jurisdiction over cases that have no contacts with the Dutch legal order in the exceptional case that no other forum is available, or where there are sufficient contacts with the Dutch legal order and it would be unacceptable to expect the plaintiff to bring his case before a foreign forum.”²³³

Regime under the Brussels I Regulation has an advantage before the U.S. framework in that respect that it precludes any decline of jurisdiction for cases, which fall within the scope of the Brussels I Regulation, by a Member State based on *forum non convenience* doctrine, which is one of the obstacles to invoke jurisdiction in ATCA litigation. Even for cases that fall outside the scope of the Brussels I Regulation, the *forum non convenience* doctrine does not hamper the foreign direct liability cases, because this doctrine is generally associated with common law

²³¹ Liesbeth F.H. Enneking. Crossing the Atlantic? The Political and Legal Feasibility of European Direct Liability Cases//The George Washington International Law Review. 2009, Vol. 40. P. 914. Accessed online at: <http://docs.law.gwu.edu/stdg/gwilr/PDFs/40-4/40-4-2-Enneking.pdf> [accessed on: 28/04/2012].

²³² Ibid. P. 916.

²³³ Ibid. P. 917.

jurisdictions, which in the European Union are only two – the United Kingdom and the Republic of Ireland.²³⁴

There is also another suggestion how to broaden the jurisdiction of the E.U. Member States courts in foreign direct liability cases, that is, by relying on Article 6 of the ECHR.²³⁵ This Article was relied upon in the 1997-2000 case *Lubbe v. Cape Plc.* in the United Kingdom. In this case the plaintiffs contended that a stay of the proceedings in favour of South African courts based on grounds of *forum non convenience*, would violate their rights under Article 6 of the ECHR, “since it would, because of the lack of funding and legal representation in South Africa, deny them a fair trial on terms of litigious equality with the defendant.”²³⁶ A right of access to a court does not flow directly from the text of Article 6 of ECHR but was developed through Court’s case law.²³⁷ Therefore, Article 6 obliges ECHR Member States “to ensure (civil) litigants a right of access to their courts that is both effective and practical [...]”²³⁸ However, the ECHR has a limited territorial reach, which raises a question whether victims from “host” States can invoke Article 6 of ECHR in foreign direct liability cases. But since “host” State victims can only have access to justice only by bringing foreign direct liability cases in courts of “home” States, the European Court of Human Rights stated in case of *Markovic v. Italy*, that “[i]f civil proceedings are brought in the domestic courts, the State is required by Art. 1 of the Convention to secure in those proceedings respect for the rights protected by Art. 6.”²³⁹ In the same case the Court further held that “once a person brings a civil action in the courts or tribunals of a State, there indisputably exists, without prejudice to the outcome of the proceedings, a “jurisdictional link” for the purposes of Article 1.”²⁴⁰ As claimants bringing a foreign direct liability case against a parent transnational corporation based on ordinary tort law, will need their case to meet threshold requirements for it, they can rely on Article 6 if their access to justice is seriously hampered by certain features of the forum State’s legal system, such as an excessively

²³⁴ Liesbeth F.H. Enneking. Crossing the Atlantic? The Political and Legal Feasibility of European Direct Liability Cases//The George Washington International Law Review. 2009, Vol. 40. P. 918. Accessed online at: <http://docs.law.gwu.edu/stdg/gwilr/PDFs/40-4/40-4-2-Enneking.pdf> [accessed on: 28/04/2012].

²³⁵ European Convention for the Protection of Human Rights and Fundamental Freedoms, November 4, 1950, 213 U.N.T.S. 221. Article 6 reads as follows: „In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law.“

²³⁶ Liesbeth F.H. Enneking. Crossing the Atlantic? The Political and Legal Feasibility of European Direct Liability Cases//The George Washington International Law Review. 2009, Vol. 40. P. 919. Accessed online at: <http://docs.law.gwu.edu/stdg/gwilr/PDFs/40-4/40-4-2-Enneking.pdf> [accessed on: 28/04/2012].

²³⁷ See e.g. Case of *Golder v. United Kingdom*, E.C.H.R. App. No. 4451/70. Judgment of 21 February 1975. §§26-36. Case of *Lupas and Others v. Romania*, E.C.H.R. App. Nos. 1434/02, 35370/02, 1385/03. Judgment of 14 December 2006. § 62.

²³⁸ Liesbeth F.H. Enneking. Crossing the Atlantic? The Political and Legal Feasibility of European Direct Liability Cases//The George Washington International Law Review. 2009, Vol. 40. P. 919. Accessed online at: <http://docs.law.gwu.edu/stdg/gwilr/PDFs/40-4/40-4-2-Enneking.pdf> [accessed on: 28/04/2012].

²³⁹ Case of *Markovic and Others v. Italy*. E.C.H.R. App. no. 1398/03. Judgment of 14 December 2006. § 54.

²⁴⁰ *Ibid.*

complicated civil procedure.²⁴¹ Therefore, the applicability of Article 6 may play an important harmonizing role and provide claimants with additional guaranties to their exercise of the right of access to a court, in such way that “judgments of the European Court of Human Rights on Article 6 may compel all European states alike to do away with certain procedural barriers to court access.”²⁴²

As for cause of action, it has to be found in the laws of E.U. Member States separately, because the specific basis in tort upon which claimants can bring foreign direct liability cases falls outside the scope of the E.U.’s regulation. The way in which such a case can be based on international law depends on how international law affects national law of a specific country. As for customary international law, the same rules as for ATCA litigation applies, that in order to be relied on, customary international law norms have to be specific, universal and obligatory. When a claim is based on *jus cogens* norms, it is no difficulty in bringing it to the court, but it gets more difficult when a claim arises from human rights violation committed by a corporation and is not based on a *jus cogens* norm. For a case not to be dismissed, the human rights violation has to be equated to a “claim actionable as a domestic tort, like wrongful death, assault, or false imprisonment,”²⁴³ meaning, that in order to have a cause of action claimants would need to “allege the domestic tort of assault in cases of torture, wrongful death for disappearances and killings, and negligence for injuries from unsafe working conditions.”²⁴⁴ Of course, such “transformation” of human rights violations into domestic torts is inappropriate, but in the light of current limitations within the E.U. Member States domestic legal systems it is “the only way to bring a civil case capable of withstanding an attempt to dismiss it for failure to state a claim.”²⁴⁵

As for the choice of law, the ATCA framework is more favourable to the victims than the regime under the Rome II Regulation²⁴⁶ which applies in the European Union. The general rule provides that “the law applicable to non-contractual obligation arising out of a tort/delict shall be the law of the country in which the damage occurs irrespective of the country in which the event giving rise to the damage occurred and irrespective of the country or countries in which

²⁴¹ Liesbeth F.H. Enneking. Crossing the Atlantic? The Political and Legal Feasibility of European Direct Liability Cases//The George Washington International Law Review. 2009, Vol. 40. P. 921. Accessed online at: <http://docs.law.gwu.edu/stdg/gwirlr/PDFs/40-4/40-4-2-Enneking.pdf> [accessed on: 28/04/2012].

²⁴² Ibid. P. 933.

²⁴³ Bahareh Mostajeleian, Foreign Alternatives to the Alien Tort Claims Act: The Success (Or its Failure?) of Bringing Civil Suits Against Multinational Corporations That Commit Human Rights Violations//The George Washington International Law Review. 2008, Vol. 40. P. 513.

²⁴⁴ Ibid.

²⁴⁵ Ibid.

²⁴⁶ Council Regulation 864/2007, 2007 O.J. (L. 199) 40 (EC).

indirect consequences of that event occur.”²⁴⁷ Of course, exceptions, such as overriding mandatory provisions²⁴⁸, or public policy²⁴⁹ of the forum country, may apply, but these would only stay exceptions. The choice of law under the ATCA is different from that in the E.U. as the “courts have not applied foreign laws so as to frustrate the purpose of ATCA, by for example applying a foreign law that grants immunity to the perpetrator of a gross human rights abuse, or that imposes a punishment that plainly fails to reflect the gravity of the offence.”²⁵⁰

Overall, it turns out that the litigation under ATCA is more favourable to the victims of human rights abuses by transnational corporations than the one in the European Union. Nevertheless, the latter framework offers itself as an important alternative to ATCA litigation, though more restricted and less favourable. This is due to the differences that lay between the U.S. and the E.U. litigation cultures, also due to the fact that some important aspects of foreign direct liability litigation is still falling outside the regulatory ambit of the European Union and are regulated by domestic laws of Member States. Another aspect different from the U.S. model is that European systems “perceive civil law as an unfit tool for prevention or punishment of offences,”²⁵¹ seeing it as a task for criminal law. But despite the fact that none of the European Union Member State has a statute like ATCA, ordinary tort law provides for a suitable solution, and therefore bringing of foreign direct liability cases in the courts of the E.U. Member States is feasible.

The only ATCA-like litigation approach has been taken in the European Union only by Belgium, when in 2003 several law suits were brought against numerous international figures, under the 1993 Belgian Genocide Act law which gave Belgian criminal courts universal jurisdiction to try foreigners for war and human rights crimes, regardless of where these crimes were committed. This law did not refer to corporations, but a claim was brought against a “TotalfinaElf” corporation for alleged complicity in human rights abuses committed by military in Burma.²⁵² Due to international pressure, the case was dismissed and the Law in question was changed on 1 August 2003 and now provide Belgian courts with much stricter jurisdiction over genocide, crimes against humanity and war crimes. Belgian courts now will only have

²⁴⁷ Council Regulation 864/2007, 2007 O.J. (L. 199) 40 (EC). Article 4(1).

²⁴⁸ Ibid. Article 16.

²⁴⁹ Council Regulation 864/2007, 2007 O.J. (L. 199) 40 (EC). Article 26.

²⁵⁰ Liesbeth F.H. Enneking. Crossing the Atlantic? The Political and Legal Feasibility of European Direct Liability Cases//The George Washington International Law Review. 2009, Vol. 40. P. 926. Accessed online at: <http://docs.law.gwu.edu/stdg/gwlr/PDFs/40-4/40-4-2-Enneking.pdf> [accessed on: 28/04/2012].

²⁵¹ Ibid. 931.

²⁵² Corporate Law Project. under the mandate of the Special Representative of the Secretary-General (SRSG) on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises. Conducted by NautaDutilh firm, August 2010. P. 6. Accessed online at: <http://www.reports-and-materials.org/Corp-law-Belgium-NautaDutilh-for-Ruggie-Aug-2010.pdf> [accessed on: 28/04/2012].

jurisdiction if “the accused is Belgian or has primary residence in Belgian territory (Article 6(1*bis*), if the victim is Belgian, is a refugee recognized by Belgium or had lived in Belgium for at least three years at the time the crimes were committed (Article 10(1*bis*).”²⁵³

Concluding, it should be stated that the 2008 Report by the U.N. Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, John Ruggie, provides that national remedies should be strengthened so as to provide remedies for corporate related abuses, obstacles, such as high costs, lack of standing of non-citizens, obstacles by statutes of limitation, etc.²⁵⁴ It is further provided that States should “strengthen judicial capacity to hear complaints and enforce remedies against all corporations operating or based in their territory [...]. States should address obstacles to access justice, including for foreign plaintiffs – especially where alleged abuses reach the level of widespread and systematic human rights violations.”²⁵⁵

Ultimately, “[o]nly a truly multinational agreement, such as a jurisdictional treaty, or the establishment of universal jurisdiction across nations can provide more thorough legal relief from these corporate human rights violations.”²⁵⁶

²⁵³ Extraterritorial Jurisdiction in the European Union. A Study of the Laws and Practice in the 27 Member States of the European Union. International Federation of Human Rights. December 2010. P. 85. Accessed online at: http://www.redress.org/downloads/publications/Extraterritorial_Jurisdiction_In_the_27_Member_States_of_the_European_Union.pdf [accessed on: 28/04/2012].

²⁵⁴ Protect, respect and remedy: a Framework for Business and Human Rights. Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, John Ruggie. 7 April 2008. A/HRC/8/5. P. 23.

²⁵⁵ Ibid.

²⁵⁶ Bahareh Mostajeleian, Foreign Alternatives to the Alien Tort Claims Act: The Success (Or its Failure?) of Bringing Civil Suits Against Multinational Corporations That Commit Human Rights Violations//The George Washington International Law Review. 2008, Vol. 40. P. 498.

CONCLUSIONS

1. Human rights obligations primarily fall on States as they are the primary subjects of international law and can become parties to various regional and universal human rights instruments. The abundant of human rights instruments prove that human rights are international concern and States have to take individual or collective steps in order to protect, respect human rights and provide remedies in case of abuses.
2. Because of the specificity of transnational corporations (having headquarters, or parent corporation, in a developed country, and subsidiaries in less developed countries), they happen to be in a grateful position to conduct their business using abusive methods but escaping responsibility for human rights abuses committed.
3. Examining “home” State responsibility it was found that a State is to be found responsible for an act or omission of its agents acting not only within its territory but also outside it if these agents fall under its jurisdiction. In order to find a State responsible in the latter situation, action of non-State entities have to be attributed to that State. According to the 2001 Draft Articles on State Responsibility and case law, actions of non-State entities can be attributed to a State when they exercise elements of governmental authority, or when act under instructions, directions or control of the State. And corporations may fall under either situation.
4. As corporations within a transnational corporation are incorporated in different countries, they fall under different jurisdictions. Then, it is a great difficulty to find nexus between the actual perpetrator and the parent corporation and invoke a “home” State responsibility, when a subsidiary falls under the jurisdiction of another State. Therefore, due to jurisdictional and attribution issues, “home” State responsibility is not enough effective and adequate.
5. Turning to “host” State responsibility, it was found that even though these State have same duties to protect, respect and remedy, but due to lax human rights regulations and vast abuses, high levels of corruption and economic dependency on transnational corporations, invoking “host” States responsibility is not feasible.
6. Then, analysis of possibility of holding transnational corporations directly accountable for human rights abuses they commit are accomplices in them, showed that they could indeed bear this responsibility if they had been accepted as subjects of international law, at least in a limited capacity. Having found that theory and practice supports international subjectivity of transnational corporations, because it is not set and cannot be set how many rights and

obligations should a subject possess in order to become a subject under international law. What matters is an ability to assume them, and at least their ability to assume rights and obligations and stand as a party in litigation under the International Convention on Settlement of Investment Disputes show that they can indeed assume rights and obligations under international law. Nevertheless, this is still a matter for States to determine in the future.

7. The analysis so far has shown that neither “home” and “host” States nor transnational corporations themselves can be effectively held responsible for human rights abuses on the international law level. Then the effort was made to analyse more ethical approach – through the overview of various initiatives on transnational corporations and human rights. These initiatives indeed have a great aim and scope but as they all are voluntary, they do not have any real effect.
8. In a search for feasible mechanism to hold corporations accountable for human rights abuses they commit or help to commit, this thesis then analyzed litigation in the United States under the Alien Tort Claims Act (ATCA). One of the advantages litigation under ATCA is the jurisdictional requirements, when access to federal courts is granted on showing minimum contacts with the United States. Another advantage is that federal courts of the United States apply only forum State’s (U.S.) law to these cases. Therefore, this mechanism is the most feasible approach for holding transnational corporations directly accountable for human rights abuses overseas.
9. The similar approach like under ATCA was tried once in Belgium, but quickly abandoned, leaving the ATCA-like litigation in the European Union stricter from jurisdictional and choice of law perspectives. Jurisdictional requirements are much higher in the European Union, and a minimum contact with a Member States is not enough for getting access to that State’s courts. The requirement is for a corporation to be domiciled in the European Union.
10. Article 6 of the European Convention on Human Rights might broaden the jurisdiction of the European Union Member States courts in foreign direct liability cases, because it grants the rights of access to a court. Bringing a claim in a “home” State court might be the last opportunity to access justice for victims of human rights abuses committed in “host” States, and the applicability of Article 6 may play an important harmonizing role and provide claimants with additional guaranties to their exercise of the right of access to a court if they can prove that their access to justice is seriously hampered by certain features of the forum State’s legal system.

11. As for the choice of law, the system of the European Union is less advantageous to victims than the one in the United States, since the general rule provides for the law of the State where abuse was committed (meaning, the law of the “host” State, which in many cases is less developed) has to be applied.
12. Overall, the litigation under the ATCA could work as a model for the approach in the European Union, since it is possible even under current legal regulation, but needs to be improved in order to be present less obstacles for victims of corporate human rights abuses in their seek for justice so that it would be at least as advantageous for human rights victims as litigation under ATCA. And “[o]nly a truly multinational agreement, such as a jurisdictional treaty, or the establishment of universal jurisdiction across nations can provide more thorough legal relief from these corporate human rights violations.”²⁵⁷

²⁵⁷ Bahareh Mostajeleian, Foreign Alternatives to the Alien Tort Claims Act: The Success (Or its Failure?) of Bringing Civil Suits Against Multinational Corporations That Commit Human Rights Violations//The George Washington International Law Review. 2008, Vol. 40. P. 498.

ANNOTATION

Dailidaitė M. Responsibility for Violations of Human Rights by Transnational Corporations/ Joint Program International Law master thesis. Supervisor: Assoc. Prof. Dr. L. Biekša, Vilnius: Mykolas Romeris University, Faculty of Law, 2012.

Key words: transnational corporations, human rights, State responsibility, initiatives on TNCs responsibility, Alien Tort Claims Act, ATCA-like litigation in the European Union.

This thesis analyses several possible subjects of responsibility for human rights violations committed by transnational corporations. This thesis analyses possibility of State responsibility, examining prospects of both types of States: ones in which headquarters of TNCs are seated, and ones where subsidiaries conduct their business. Having found that it is not feasible to hold States accountable, ethical approach is taken. The overview of initiatives for holdings TNCs directly accountable shows their major setback – voluntary nature. Then finally national tools are examined in the United States and the European Union. After examination it was found the model in United States is the most favourable solution for both holding TNCs directly accountable for human rights violations and for victims of abuses. The model in the European Union lacks lower jurisdictional requirements and more favourable choice of law regulation.

SUMMARY

Globalization opened the door for corporations to expand to foreign countries and spread not only positive effects such as creating jobs, marketing new products and services, bringing new technologies, generating more profits, but also negative effects, such as human rights abuses, among other things.

This thesis attempts to analyze options for responsibility for human rights abuses committed by transnational corporations. It first turns to analyzing realities and prospects of “home” and “host” States responsibility as they are the prime actors in human rights protection. Finding that both options are not enough effective and adequate, thesis then turns to examining possibilities to hold transnational corporations directly accountable for human rights abuses. Examination of possibility to grant international subjectivity to transnational corporations, leaves the question open, because it is indeed a theoretical possibility so far. Then the thesis moves on to overview of existing international initiatives on the matter, but the analysis provides the outcome that ethical approach in this case is hardly effective due to its voluntary nature.

Finally, this thesis turns to exploring the way of using national tools in order to invoke direct responsibility of transnational corporations in countries other than those where human rights abuses were committed. Firstly, litigation in the United States under the Alien Tort Claims Act is analysed, showing that it is indeed the only feasible way to hold corporations accountable, because of low jurisdictional requirements and application only of the United States’ law in these cases. Secondly, the thesis then analyses whether this type of litigation is possible within the European Union’s legal framework. The result is that it is possible and in some aspects even has advantages as compared to the original from overseas, but in general it is not as favourable to victims because of higher jurisdictional thresholds, and application of foreign law.

ANOTACIJA

Dailidaitė M. Atsakomybė už Tarptautinių Korporacijų Daromus Žmogaus Teisių Pažeidimus/ Jungtinės tarptautinės teisės magistro programos magistro darbas. Darbo vadovas: Prof. Dr. L. Biekša, Vilnius: Mykolo Romerio universitetas, Teisės fakultetas, 2012.

Raktiniai žodžiai: tarptautinės korporacijos, žmogaus teisės, valstybių atsakomybė, iniciatyvos dėl tarptautinių korporacijų atsakomybės, Užsieniečių deliktinių pretenzijų aktas, Amerikos modelio panaudojimo galimybės Europos Sąjungoje.

Šis magistro darbas analizuoja galimus atsakomybės už tarptautinių korporacijų daromus žmogaus teisių pažeidimus subjektus. Analizuojama galimybė atsakomybės subjektais laikyti tiek valstybes, kuriose yra įsikūręs tarptautinės korporacijos valdymo centras, tiek valstybes, kuriose veikia padaliniai. Nustačius, kad valstybių atsakomybė nebūtų pakankamai efektyvi, tyrimas tęsiamas etiniu aspektu. Peržvelgus tarptautines iniciatyvas, kuriomis siekiama atsakomybės subjektais laikyti pačias tarptautines korporacijas, buvo susidurta su didžiausiu jų trūkumu – savanoriška prigimtimi. Galiausiai buvo apžvelgtos nacionalinių ir Europos Sąjungos teisės aktų teikiamos galimybės. Išanalizavus Jungtinių Valstijų ir Europos Sąjungos modelius, paaiškėjo, kad Jungtinių Valstijų modelis yra tinkamesnis dėl žemų jurisdikcinių reikalavimų ir visada tokiose bylose taikomos Jungtinių Valstijų teisės.

SANTRAUKA

Globalizacijos procesas atvėrė kelią korporacijoms plėtis į užsienio valstybes, ir to pasekoje sukelti ne tik teigiamus padarinius, tokius kaip naujų darbo vietų kūrimas, naujų produktų ir paslaugų atvežimas, naujų technologijų įdiegimas ir didesnių pajamų gavimas, bet ir neigiamus padarinius, vienas ir kurių yra žmogaus teisių pažeidimai.

Šis magistro darbas siekia analizuoti esamas galimybes už tarptautinių korporacijų daromus žmogaus teisių pažeidimus laikyti atsakingomis pagal tarptautinę teisę valstybes, kuriose įsikūrę šių korporacijų valdymo centrai („motininės“ korporacijos), arba valstybes, kuriose veikia tarptautinės korporacijos padaliniai, arba tiesiogiai pačias tarptautines korporacijas. Pirmiausiai analizuojama valstybių atsakomybė šioje srityje, nes valstybės pirmiausiai turi pareigą saugoti žmogaus teises. Tačiau analizė parodo, kad tokia galimybė yra nepakankamai efektyvi ir tinkama dėl ryšio su valstybe nustatymo problem arba tinkamo teisinio reguliavimo valstybės viduje nebuvimo. Išanalizavus galimybę pačias tarptautines korporacijas laikyti tiesiogiai atsakingas už žmogaus teisių pažeidimus, paaiškėjo, kad dėl subjektiškumo tarptautinėje teisėje neturėjimo, šių korporacijų atsakomybė pagal tarptautinę teisę tiesiogiai kilti negali.

Antras šio magistro darbo skyrius pradedamas etinio šios problemos sprendimo ieškojimu apžvelgiant įvairias iniciatyvas korporacijoms laikytis žmogaus teisių, tačiau šis sprendimo būdas nėra efektyvus, nes visos iniciatyvos yra tik savanoriško pobūdžio.

Galiausiai šis darbas analizuoja galimybę panaudoti jau esamus nacionalinės teisės mechanizmus ir taip patraukti korporacijas atsakomybėn už žmogaus teisių pažeidimus. Pirmiausiai analizuojamas Amerikoje naudojamas mechanizmas pagal „Užsieniečių deliktinių pretenzijų aktą“, kuris dėl žemų jurisdikcinių reikalavimų ir byloje taikomos vien tik Jungtinių Valstijų teisės, kol kas yra geriausias pasirinkimas žmogaus teisių pažeidimų aukoms siekti teisingumo. Tuomet analizuojama galimybė tokį mechanizmą pritaikyti Europos Sąjungos valstybėse narėse. Nors ir įmanomas, toks mechanizmas yra nepalankus žmogaus teisių pažeidimų aukoms dėl kur kas aukštesnių jurisdikcinių reikalavimų ir dėl to, kad beveik visais atvejais byloje būtų taikoma valstybės, kurioje pažeidimas įvyko, teisė.

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