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Corporate Social Responsibility and the application of the US Alien Tort State Act: the Kiobel case

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Abstract

Questa tesi si inserisce all'interno di un dibattito molto ampio e che è stato oggetto di ricerca da parte di numerosi studiosi. Il punto di partenza di tutta l'analisi qui svolta sono le imprese multinazionali, vero e proprio colosso dell'economia globale odierna. Numerosi studi si sono concentrati su questo tipo di impresa negli ultimi decenni e molte critiche di diverso genere le sono state rivolte. Alla base del mio studio c'è un profondo lavoro di analisi della struttura interna delle imprese multinazionali e del particolare modo che esse hanno di condurre la loro vita economica. Tuttavia, l'analisi svolta in questa tesi non vuole essere di tipo strettamente economico, bensì giuridico. Infatti, a partire proprio da un punto di vista economico e più ampio, la ricerca qui svolta si indirizzerà verso un argomento sempre più noto ai giorni nostri, ossia la responsabilità sociale delle imprese multinazionali. Di conseguenza, un capitolo specifico sarà rivolto al rapporto tra il diritto internazionale e le imprese multinazionali e tenterà di analizzare tutti i vari tentativi sviluppatisi a livello internazionale per regolare le attività di queste imprese. Nello specifico verrà dimostrato come le stesse oggi cerchino fermamente di dimostrarsi responsabili agli occhi di tutti, specialmente dei consumatori, per reagire contro le accuse rivolte loro da parte di numerose personalità ed organizzazioni. Un altro capitolo invece analizzerà il rapporto tra esse e i diritti umani e si inserirà all'interno di un dibattito più ampio esistente a livello di diritto internazionale. L'ultima parte di questa tesi invece sarà dedicata ad un caso di studio specifico, il caso *Kiobel*. Nonostante sia stato anch'esso già oggetto di studio, la decisione finale di questa vicenda è stata emanata nello scorso mese di Aprile dalla Corte Suprema degli Stati Uniti. Questo caso, oltre a fungere da esempio delle violazioni commesse dalle imprese multinazionali, si inserisce nello specifico all'interno di un altro dibattito caro ai nostri giorni, ossia la possibilità di perseguire legalmente le stesse a seguito di danni da esse perpetrati. Inoltre, questo caso prenderà in analisi l'applicabilità *dell'Alien Tort Statute* statunitense, una legge emanata nel 1789 e la cui applicabilità ha cominciato ad essere sempre più richiesta a partire dagli anni ottanta del '900, proprio a seguito dei numerosi danni e delle varie atrocità attribuite all'azione delle imprese multinazionali.

È indubbio come l'oggetto di analisi di questa tesi parta da un forte interesse personale verso i diritti umani e la loro regolazione a livello internazionale,

accompagnata anche da un interesse per la struttura dell'economia globale ed i meccanismi sui quali essa si fonda e svolge. In particolare, il punto di partenza del mio lavoro è stato il tentativo di capire come e se le operazioni delle imprese multinazionali potessero essere regolate a livello internazionale. Finora, infatti, non sono stati purtroppo sviluppati dei meccanismi che possano realmente perseguirle e tutelare chi ha subito le conseguenze delle loro azioni. Il diritto internazionale, nello specifico, non riesce a fornire una risposta adeguata ed univoca a questo quesito. Il punto di partenza di ciò è la classica assunzione secondo cui sono solo gli Stati ad essere i veri soggetti di diritto internazionale. Questi ultimi infatti sono stati i creatori del diritto internazionale, il quale avrebbe dovuto regolare il loro reciproco rapporto e, quindi, la comunità internazionale stessa. A partire da questa analisi sono giunta però alla conclusione che se il diritto internazionale continuerà solo ed esclusivamente a considerare gli Stati come soggetti internazionali e quindi ad attribuire esclusivamente a loro una responsabilità internazionale, rischierà di fallire nel tentativo di regolare la comunità internazionale stessa fino in fondo. È innegabile come i meccanismi che hanno portato all'apice della popolarità le imprese multinazionali si siano sviluppati solo a partire dalla seconda metà dello scorso secolo e siano quindi tuttora oggetto di analisi e ricerca. È anche giusto ricordare che a livello internazionale numerosi sono stati i tentativi di regolamentare la vita e le azioni delle multinazionali, primi fra tutti i lavori svoltisi all'interno delle Nazioni Unite. Tuttavia, la loro efficacia si scontra con il loro carattere non vincolante, il quale non consente quindi di perseguire le multinazionali qualora esse violassero una o più norme dettate da questi strumenti.

Le imprese multinazionali sono l'attore principale dell'economia globale odierna e si sono sviluppate all'interno del fenomeno più ampio della globalizzazione. Le caratteristiche di quest'ultima sono ormai note a tutti in quanto analisi di studio di numerosi settori e aree di ricerca. L'eliminazione delle distanze e dei confini tra le varie parti del mondo sono quelle che io considererei le caratteristiche più salienti di questo fenomeno. La globalizzazione infatti, grazie allo sviluppo delle nuove tecnologie e, nello specifico, di Internet, ha portato all'avvicinamento globale. Le distanze oggi non sono più un problema e l'informazione raggiunge anche gli angoli terrestri più remoti. Una conseguenza di ciò è anche l'azzeramento delle differenze nei consumi dato che si ritiene che siamo giunti ad una quasi affermata situazione di omogeneizzazione. Da un punto di vista strettamente economico, la globalizzazione ha accentuato il consumismo e l'affermarsi delle imprese multinazionali, le quali

svolgono un ruolo principale all'interno dell'economia odierna. Tuttavia, è proprio a partire da un'analisi economica che alcune criticità particolari del fenomeno della globalizzazione possono essere sollevate. Prima fra tutte, l'idea che la lontananza e le diversità siano state annullate dalla globalizzazione si scontra con la realtà. Infatti, se così fosse, ogni persona dovrebbe godere delle stesse possibilità, qualunque sia la sua origine. Al contrario, ciò non si verifica. Grandi imprese multinazionali dominano il mercato globale e sottraggono lavoro alle piccole aziende, le cui attività vengono assorbite. È giusto domandarsi che relazione ciò possa avere con l'analisi, più giuridica, della mia tesi. La risposta parte da una semplice considerazione sulla struttura organizzativa delle multinazionali. Queste imprese si differenziano dalle classiche imprese per la loro capacità di condurre le loro operazioni in più di un Paese e di sfruttare i vantaggi esistenti nelle differenti località in cui esse basano le loro attività. Le multinazionali infatti, riescono a coordinare e localizzare la loro catena di produzione in più Paesi. La loro struttura è ovviamente molto flessibile e oggi ci si riferisce ad esse affermando che presentano una organizzazione *a rete*, nella quale ogni singola filiale riveste la sua primaria importanza. È proprio questa particolarità organizzativa a sollevare il problema principale della mia analisi. Infatti, dovendo localizzare la loro produzione in più Paesi, quali parametri vengono addottati dalle multinazionali per giungere alla loro scelta? È ormai chiaro a tutti come questa decisione si basi su considerazioni di tipo economico e pure giuridico. È stata infatti ormai dimostrata la loro specifica tendenza a prediligere come sede quei Paesi in cui il costo del lavoro sia meno caro e la presenza di risorse da sfruttare elevata, tutto ciò accompagnato da una scarsa regolamentazione in materia lavorativa. Le multinazionali sembrano cioè optare per quei Paesi in cui i lavoratori sono meno tutelati, così come anche l'ambiente, e le conseguenze per le loro attività quasi inesistenti. Da ciò deriva come varie multinazionali abbiano deciso di stabilirsi nei cosiddetti Paesi in via di sviluppo. Molte tra loro sono state accusate di sfruttare le persone e di arrecare danni inestimabili all'ambiente, sfruttandone le risorse in maniera non razionale e provocando danni irrecuperabili. Molte altre, cosa ancora più grave, sono state agevolate dalla collaborazione con alcuni governi i quali, pur di attrarre le multinazionali e convincerle a stabilirsi nei loro territori, hanno scavalcato i diritti delle loro stesse popolazioni e taciuto le loro irregolarità, quasi aiutandole nei loro crimini. Queste situazioni hanno portato allo sviluppo di numerose critiche verso queste imprese. Molte organizzazioni non-governative si sono sollevate contro di esse ed a favore della tutela dei diritti umani. Ecco come allora numerose imprese

multinazionali, per ovviare alla critiche loro rivolte e per dimostrare al mondo le loro buone intenzioni e l'interesse per la tutela dei diritti di tutti, hanno cominciato a sviluppare dei codici di condotta e a dotarsi degli strumenti sviluppati a livello internazionale da organizzazioni come l'Organizzazione Internazionale del Lavoro, ormai nota per i suoi tentativi di regolamentare la vita delle imprese e la tutela dei lavoratori. Nonostante ciò, sarebbe sbagliato pensare che, a seguito di questi sviluppi positivi, il problema dei danni provocati dalle imprese multinazionali sia oggi gestibile e completamente regolato. Come accennato in precedenza, tutti questi meccanismi non hanno validità legale e quindi ogni loro eventuale violazione non comporterebbe alcun danno all'impresa. Le multinazionali stesse sono poi restie a permettere ad organismi esterni la verifica della loro conformità con le norme internazionali. Ecco allora il sorgere del problema della necessità di trovare altri modi per perseguire queste imprese legalmente. Il caso *Kiobel* si inserisce esattamente in questo ambito. All'origine di questo caso vi sono le accuse rivolte da cittadini nigeriani verso società petrolifere nigeriane, inglesi e olandesi per gravi crimini di violazione dei diritti umani, tra i quali la tortura e l'omicidio. Nel tentativo di giudicare le società per i crimini da loro eseguiti, vi è stato il tentativo di giudicare le stesse attraverso un sistema nazionale, nello specifico quello statunitense, per ovviare alla lacune esistenti in materia a livello internazionale. Purtroppo, con una sentenza dello scorso 17 Aprile 2013, l'applicabilità dell'Alien Tort Statute a questo caso è stata negata, poiché le vicende si sono verificate al di fuori del territorio degli Stati Uniti ed hanno interessato soggetti stranieri.

Dopo questa breve analisi, è ovvio pensare che la salvaguardia dei diritti umani rimarrà sempre incompleta e a rischio. La stessa conclusione di questo caso ha sferzato un grosso colpo a chi da sempre lotta per la loro difesa. Tuttavia, la speranza di arrivare ad una vera e propria tutela dei diritti umani a livello internazionale non deve essere abbandonata ed ogni sforzo deve essere fatto per raggiungere questo obiettivo di importanza fondamentale per tutti.

Introduction

The main subjects of this dissertation are multinational enterprises (hereinafter MNEs). Our analysis will be centred on international law, even though it will be also necessary to have an insight into international economics. Our primary aim is to examine the concept of corporate social responsibility (hereinafter CSR), and to link the study of MNEs to a recent case of corporate violation of human rights: the *Kiobel v. Royal Dutch Petroleum case*. The study of this case will mark a fundamental part of this dissertation.

MNEs have been the focus of many researches during the last decades. From an economic point of view, they represent the main way through which the global economy is performed today. On the other hand, from a legal perspective, they are a challenge to the historical legal categories we were used to dealing with.

Historically, MNEs were not recognised the status of subjects of international law. Scholars coped with them mainly from a strict economic standpoint. Nevertheless, their power and wealth have grown to such a degree that many researchers have started to focus on them also from a different perspective. Hence, during the last decades it became of crucial importance to understand if MNEs could be the holders of some duties in the international legal arena. Indeed, MNEs had begun to be seen with suspicion. People had started to accuse them of violating human rights and of taking advantage of the resources of many countries for the only sake of their profit. Furthermore, MNEs were also accused of exploiting human and environmental resources and of creating huge global damages and losses. As a result, the need to regulate their activities emerged. According to many scholars, MNEs should have conducted their activities in accordance with global standards and codes. The latter would have assured that MNEs' operations respected some fundamental rights and met some particular ethical standards. Therefore, CSR started to develop and spread.

As far as the structure of this dissertation is concerned, it must be said that it will be divided into four chapter. Each of them will be dedicated to a specific topic.

The first chapter will be theoretical. It will start with an insight into the process of globalisation, which has undoubtedly favoured the spread of MNEs. The first part of the chapter will adopt an economic perspective. Indeed, MNEs' structure will be analysed and it will be also shown how these enterprises conduct and coordinate their activities. On the other hand, the second part of this chapter will introduce the

concept of international legal personality and it will manage to make an assessment of MNEs' status under international law.

The second chapter will cope more deeply with the relationship between MNEs and international law. MNEs' attempts at becoming socially responsible will be examined in detail. Moreover, the most important instruments developed at the international level for the protection of people and workers' rights will be considered. A special focus will be on CSR. Indeed, an entire paragraph will face its study and analysis. Finally, we will deal also with the concept of corporate limited liability and we will shortly analyze corporate criminal liability.

The third chapter will be centred on the study of the relationship between MNEs and human rights. In particular, apart from analysing human rights in general and the responsibilities for their protection addressed to every State, we will seek also to understand if corporations do hold some human rights obligations under international law. We will divide them into soft law and international human rights law obligations. Our analysis will conclude that it is still very hard to find a set of human rights obligations directly imposed on MNEs.

The fourth and final chapter will be dedicated to the study of a recent case of corporate human rights abuses: the already mentioned *Kiobel v. Royal Dutch Petroleum Co. case*. Although the cases dealing with corporate human rights violations have been many during the last decades, this case will probably mark a change in the way these cases will be legally dealt with in the future. Throughout the study of this case, we will have to take into account the United States Alien Tort Statute (hereinafter ATS) and we will manage to clarify if it can be considered a perfect tool when prosecuting MNEs. We will have inevitably to conclude that the answer to corporate human rights abuses has not to be found in the legislation of one single country but should be developed globally. Finally, we will make an assessment of the future of human rights litigations after the US Supreme Court decision in the *Kiobel* case.

An international law subject holds both rights and duties under international law. Traditionally, only States were considered international law subjects. Nonetheless, globalisation and the spread of MNEs have created so many challenges to the international legal order that many authors argue that MNEs should be international law subjects too. By doing this, it would be possible to charge them with their human rights violations responsibilities. Furthermore, the protection of human rights would probably be an easier goal.

In the conclusion of this dissertation, we will make a short review of our study. Furthermore, we will reconsider what the future of human rights litigations will presumably be and how corporate abuses of human rights will need to be handled.

1. MULTINATIONAL ENTERPRISES (MNEs)

1.1. Basic features of Multinational Enterprises (MNEs) – 1.2. Why do MNEs cross national borders? The relevance of MNEs for International Law – 1.3. International legal personality: can MNEs be regarded as international legal persons? – 1.3.1. The Regulation of MNEs

Introduction

Globalisation is, without doubts, the driving force of today's international economics. Obviously, this is not a new concept, as this term started being used in the 1960s by many scholars, especially of French and English origin. Indeed, in those years, a new global order has been developing and spreading.

The phenomenon of globalisation has been depicted in a great number of ways and by employing many metaphors. Its most well-known features are "the growing economic interdependence between Nation-States, (...) the fast expansion of global trade, linked to international financial mobility".[1] In addition, the globalisation is characterised by the increasing mobility of people, the growing role played by technology and knowledge, by trade liberalisation and by the privatisation of many sectors. Globalisation can be analysed as a process favoured by two intertwined elements: the technological progress and the development of commercial transactions. From the point of view of a 2006 UN Economic and Social Council (hereinafter ECOSOC) Report,

> Today we also live in a global world wherein a variety of actors for which the territorial State is not the cardinal organizing principle have come to play significant public roles. In the immediate post-Second World War era, the term "inter-national" economy was still an accurate spatial description of the prevailing reality [...] this picture contrasts with the most visible manifestation of globalization today. Some 70,000 transnational firms, together with roughly 70,000 subsidiaries and millions of suppliers spanning every corner of the globe[2].

[1] A. PERULLI, *Globalisation and Social Rights*, in W. BENEDEK, K. DE FEYTER, F. MARRELLA, *Economic Globalisation and Human Rights*, EIUC, Cambridge, Cambridge University Press, 2007, p. 93.

[2] United Nations Economic and Social Council, Commission on Human Rights, *Interim report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises*, Doc. n. E/CN.4/2006/97, 22 February 2006, pp. 4-5, available at:
http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G06/110/27/PDF/G0611027.pdf?OpenElement
http://dacny.un.org/doc/UNDOC/GEN/G06/110/27/PDF/G0611027.pdf?OpenElement

The extract of this report we here reported highlights the difference between the first globalization, which developed after the Second World War, and the globalization characteristic of our times, characterized by the already mentioned developments in communications and transfer of information. Nowadays, "Globalisation is characterised by competitiveness, technological innovation, *know how*, culture. It is the place in which the power of the State materializes. It represents the main arena in which future challenges are occurring and will occur"[3].

The spread of multinational enterprises (hereinafter MNEs), also called multinational corporations, is another relevant element of today's globalisation. Indeed, an author highlighted that

> The economic power of MNEs has been strengthened by the process of globalization. What is commonly defined as globalization refers to a set of far-reaching changes in the global economy and in the regulation of international trade since the 1970s. As a consequence of the collapse of the Bretton-Woods system and the oil crisis, the flexibility of exchange rates stimulated the growth in financial speculation and enhanced dependence on OPEC countries. At the same time, international trade barriers and exchange controls were loosened between North America and Western Europe, so that from the 1980s the integration of global capital and commodity markets intensified[4].

This quotation succeeds in underling the link between the growth and spread of MNEs and the process of globalisation. In fact, it is only thanks to globalisation and to the innovations it brought about that MNEs managed to overcome States' power and achieve the leading role they possess today.

1.1. | Basic features of Multinational Enterprises (MNEs)

Multinational enterprises are considered "the most talked forms of business association in the contemporary 'globalizing' world and economy".[5] Moreover, it has also been affirmed that "the corporation has risen from relative obscurity to become

[3] G. LIZZA, *Scenari Geopolitici*, Novara, UTET Università, 2009, p.25, translated from Italian, original text: "la globalizzazione è il luogo della competitività, dell'innovazione tecnologica, del *know how*, della cultura, dove si concretizza la forza di uno Stato e rappresenta l'arena principale in cui si svolgono e svolgeranno le maggiori sfide del futuro".

[4] A. GATTO, Multinational Enterprises and Human Rights. Obligations under EU Law and International Law, Cheltenham, Edwar Edgar, 2011, p. 3.

[5] P. T. MUCHLINSKI, *Multinational Enterprises and the Law*, Oxford, the Oxford International Law Library, 2007, p. 3.

the world's dominant economic institution".[6] Finally, MNEs have also been defined as "the most effective structure for capital accumulation".[7]

The corporate form is the one through which all economic activity is organised today. On the opposite side, the public sphere remains, but is weaker.

Corporations first appeared at the end of the sixteenth century, in the form of joint-stock companies. Examples of them were the *Company of the Mines Royal* and the *New River Company*.[8] A century later, the corporations became synonymous with colonialism, as they were employed with the scope of financing colonial enterprises. Already during these times there was a strong opposition to them. One of the fathers of the economic theory, Adam Smith, outlined that corporations would have brought to "negligence and profusion".[9] A clear example of the enmity suffered by corporations was the decision of the English Parliament to outlaw them in 1720, through the passing of the *Bubble Act*, according to which it was a criminal offence to create a company.[10]

However, with the spread of the industrial revolution, originated by the discovery of the steam-driven machine by Thomas Newcomen, the corporate form for businesses started to spread hugely.

According to Joel Bakan, "American's 19th century railroad barons were the true creators of the modern corporate era".[11]

The development of today MNEs worldwide is obviously linked to the rise of American MNEs. In the US, 1800 corporations were grouped into 157 from 1898 to 1904, signalling the beginning of the era of corporate capitalism.[12] In particular, it was the internationalisation of US companies that showed the growing dominance of multinationals, accompanied by the spread of the new technologies for communication and transport, which proved that distance was no longer an issue. In addition, also labour organization developed and changed. Thanks to Henry Ford form of production, many productive processes started being divided into smaller and less valuable ones, bringing later to the outsourcing model for production. It is

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[6] J. BAKAN, *The Corporation. The pathological pursuit of profit and power*, London, Constable, 2005, p. 5.

[7] A. DE JONGE, *Transnational Corporations and international law. Accountability in the global business environment*, Cheltenham, Edwar Edgar UK, 2011, citing M. SPISTO, *Stakeholder interests in corporate governance: is a new model of governance a change for the better for South Africa*, Part I, (2005) 18 Australian Journal of Corporate Law 129, 129 – 30.

[8] See n. 6 above, pp. 8-9.

[9] *Ibid.*, p. 6.

[10] *Ibid.*, p. 7.

[11] *Ibid.*, p. 10.

[12] *Ibid.*, p. 14.

then worth remembering how the Bretton Wood System mentioned above undoubtedly favoured the spread of US MNEs in Europe. The US, in fact, were those who promoted this Conference.

The adjective *multinational* was added to the corporate form only during the second half of the 20th century. It is believed that the first to use this adjective was David E. Lilienthal in his paper "Management and Corporations 1985", published under the title "The Multinational Corporation". According to this scholar, MNEs are "corporations (...) which have their home in one country but which operate and live under the laws and customs of other countries as well".[13]

Even though MNEs have been the focus of many authors, it is not possible to find a generally accepted definition of them. Despite this, it is important to highlight that, in order to be considered as a MNEs, a corporation should fit some characteristics. Indeed, a MNEs is a kind of enterprise which operate flexibly, which has the capacity to coordinate different phases of its productive chain taking place in more than one country and to take advantage of the different resources, input and know-how and also of the different policies of the foreign countries in which it is based.[14]

One of the mechanisms through which multinational enterprises conduct their operations is foreign direct investment (hereinafter FDI). The FDI can be defined as an investment which takes place outside the home country of a MNE. Taking in mind the latter, economists have sought to distinguish between companies that engage in *direct investment* and those engaging in *portfolio investment*, in order to delineate a definition of MNE. The former is a kind of investment that provides the firm with a financial stake and a managerial control, while the latter gives the firm only a financial stake. They finally agreed on the idea that any MNE is a corporation that "controls and manages income generating assets in more than one country"[15], which means that it is an enterprise which engages in *direct investment* outside its home country.

The relationship between MNEs and direct investment has been analysed by making reference to four different elements. Firstly, it has been affirmed that, through their investments, MNEs increase the employment levels of host states, as they have the capacity to create new jobs. Secondly, it has been also argued that, by bringing new

[13] P. T. MUCHLINSKI, *Multinational Enterprises and the Law*, Oxford, the Oxford International Law Library, 2007, p. 5.
[14] A. VANOLO, Geografia economica del sistema-mondo. Territori e reti nello scenario globale, Novara, UTET Università, 2010, p. 99.
[15] See n. 13 above, p. 5.

capital in a host country, MNEs improve a host country's balance of payments. Thirdly, it has been suggested that MNEs have the ability to provide the host country with new technologies and skills. Finally, it has been underlined that, by entering a host country, MNEs will induce home firms to be more competitive and, as a consequence, more efficient[16].

On the other hand, the United Nations managed to distinguish between 'multinational corporations' and 'transnational corporations'; the latter definition was then preferred at the fifty-seventh Session of ECOSOC in 1974. The term 'transnational' succeeds in underlining the company's ability to coordinate and perform operations across national borders. However, this distinction is no longer adopted.

According to the definition provided by the *United Nations Draft Code of Conduct on Transnational Corporations*, the term transnational corporations is used when hinting at

> (..) an enterprise, comprising entities in two or more countries, regardless of the legal form and fields of activity of these entities, which operates through one or more decision-making centres, in which the entities are so linked, by ownership or otherwise, that one or more of them may be able to exercise a significant influence over the activities of others, and, in particular, to share knowledge, resources and responsibilities with the others.[17]

Another important definition of MNE is the one provided by the Organisation for Economic Cooperation and Development (hereinafter OECD) *Guidelines on Multinational Enterprises*; according to them, MNES

> usually comprise companies or other entities established in more than one country and so linked that they may co-ordinate their operations in various ways. While one or more of these entities may be able to exercise a significant influence over the activities of others, their degree of autonomy within the enterprise may vary widely from one multinational enterprise to another. Ownership may be private, state or mixed[18].

The International Labour Organisation (hereinafter ILO) drafted the *Tripartite Declaration on Multinational Enterprises and Social Policy* in 1977. This instrument does not provide a legal definition of multinational enterprises. However, it defines them as

[16] P. T. MUCHLINSKI, *Multinational Enterprises and the Law*, Oxford, the Oxford International Law Library, 2007, pp. 87-88.
[17] United Nations Draft Code of Conduct on Transnational Corporations, 1983, 1 (a).
[18] OECD Guidelines For Multinational Enterprises 27 June 2000, Concepts and Principles para 3.

> Enterprises, whether they are of public, mixed or private ownership, which own or control production, distribution, services or other facilities outside the country in which they are based. The degree of autonomy of entities within multinational enterprises in relation to each other varies widely from one such enterprise to another, depending on the nature of the links between such entities and their fields of activity and having regard to the great diversity in the form of ownership, in the size, in the nature and location of the operations of the enterprises concerned[19].

Another important definition of MNEs is the one reported in the United Nations *Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights*. This instrument, defines transnational corporations as

> an economic entity operating in more than one country or a cluster of economic entities operating in two or more countries – whatever their legal form, whether in their home country or country of activity, and whether taken individually or collectively[20].

The above definitions reveal some differences. The main of them relies on the choice of whether to adopt the term *corporation* or the term *enterprise*. Another relevant difference is represented by the use of the term *transnational* or the use of the term *multinational*. With regard to this, the ILO definition opts for the adjective *multinational* and the term *enterprise*. Its choice matches the economists decision to favour the term *enterprise* as it encompasses a wider field of study. On the other hand, the UN preferred the term *corporation* and the adjective *transnational*. Indeed, the UN has long been favouring a distinction between TNCs and MNEs activities. While the former are performed across national borders but owned in just one country, the latter are owned in more than one single country. Finally, the OECD definition too adopted the term *multinational enterprises*. The OECD Guidelines set a broader definition of MNEs and focuses on MNEs' capacity to own and control operations in different countries.

When considering MNEs, we are making reference to transnational groups "di diritto interno ove il carattere transnazionale va attribuito all'impresa esercitata dalla

[19] ILO Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy, 1977, p. 2, para 6.

[20] United Nations, Sub-Commission on the Promotion and Protection of Human Rights, *Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights*, Doc. n. E/CN.4/Sub.2/2003/12/Rev.2, 13 August 2003, para 20.

capogruppo ad ai rapporti che si intrecciano tra le varie società che del gruppo fanno parte"[21].

Multinational enterprises are the principal actors of today's economy,

> annual budgets of TNCs indicate that they represent almost half of the top one hundred world economic power. Recent corporate scandals have shown that TNCs are borderless: each TNC is a single unit operating simultaneously in all countries where its branches are located[22].

To conclude, when considering MNEs we are making reference to "un groupement de sociétés commerciales présentant une certaine permanence, placé sous la direction d'une mère, située en un État, et comprenant des sociétés filiales ou affiliées situées en plusieurs autre États"[23]. Even though the history of MNEs can be traced back to the 16th century, the rise of the modern corporation took place during the 20th, during a long period interrupted only by the two World Wars. In particular the history of their growth has been divided into four distinct phases.[24]

Modern MNEs started to appear at the end of the 19th century; more precisely, the first phase of their growth started in 1850 and finished in 1914, with the outbreak of First World War. This period was marked by the dominance of British investments which were directed mainly towards US, Canada and Australia. It was during these years that the first internationally integrated companies started to emerge. Without doubts, the economic growth characteristic of this period together with the initial spread of corporations were favoured by lower transportation costs and by the introduction of the rail system and of the steamship. In addition, about six million people migrated from Europe to North America from 1870 to 1914[25]. This has also been labelled the first "golden age" of trade market[26].

The second phase of their growth begun in 1918 and finished in 1939; obviously these years correspond with the end of WWI and with the beginning of the Second.

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[21] F. GALGANO, F. MARRELLA, *Diritto del commercio internazionale*, terza edizione, Lavis, Cedam, 2011, p. 160.

[22] F. MARRELLA, Human Rights, Arbitration, and Corporate Social Responsibility in the Law of International Trade, in W. BENEDEK, K. DE FEYTER, F. MARRELLA, *Economic Globalisation and Human Rights*, EIUC, Cambridge, Cambridge University Press, 2007, p. 289.

[23] D. CARREAU, P. JUILLARD, *Droit international économique*, 5e édition, Paris, Dalloz, 2013, pp. 43-44.

[24] P. T. MUCHLINSKI, *Multinational Enterprises and the Law*, Oxford, the Oxford International Law Library, 2007, pp. 8 – 25.

[25] I. MUSU, *Le sfide dell'economia globale*, Note di Lavoro, Doc. No. 19/NL/2006, Università Cà Foscari, Venezia, Dipartimento di Scienze Economiche, 2006, available at: *http://www.unive.it/media/allegato/DIP/Economia/Note_di_lavoro_sc_economiche/NL2006/NL_DSE_Musu_19_06.pdf*

[26] R. C. FEENSTRA, A. M. TAYLOR, *Economia Internazionale, teoria e politica degli scambi internazionali*, Milano, Hoepli, 2009, p. 14.

This period was marked by the general instability which was used to affecting every kind of activity in those years. In particular, during this phase, British companies started to invest more in both South Africa and India.

The years between the two World Wars marked a period of stagnation. The process of globalisation slowed down and many countries showed a return to protectionism, favoured by the great depression of the 1930s. For instance, the US introduced the *Smoot-Hawley Tariff Act* in 1930; this act raised duties in order to safeguard some US economic sectors and caused other countries to introduce duties as well[27]. The result of the increasing duties and of the protectionist policies between 1929 and 1933 was the decrease of international trade and a great reduction in people and capital movements.

The period which begun in 1945, with the end of WWII, and finished in 1990, represents the third phase of our debate. This is the fundamental period in MNEs history as it was during these years that MNEs acquired the power and reached the worldwide diffusion they have today. During the first half of this phase, US MNEs prevailed over the others, obviously favoured by the devastation suffered by Europeans firms and countries. Thanks to the introduction of the *Marshall Aid* in 1948, of the *International Monetary Fund*, of the *World Bank* and of *General Agreement on Tariffs and Trade*, US MNEs managed to expand in Europe and to gain supremacy. However, after the resurrection of European societies, this phase was then marked by the growth of European corporations, together with that of Japanese firms and accompanied by a reconsideration of US companies' rule. This period represented a sort of partial globalization as it embraced only the developed countries and we can refer to it as the second "golden age" of international trade[28].

The fourth and final period of MNEs growth started in 1990 and is still going on. It was accompanied by the growth of the so-called four Asian Tigers or Asian Dragons, that is, Hong Kong, Singapore, South Korea and Taiwan, which reached a high degree of industrialisation and huge growth rates. According to an author, this period has been characterised by

> (...) important qualitative changes in the patterns of FDI, the adoption of truly global production chains by MNEs and their associates, a marked shift from raw materials and manufacturing towards services based FDI,

[27] R. C. FEENSTRA, A. M. TAYLOR, *Economia Internazionale, teoria e politica degli scambi internazionali*, Milano, Hoepli, 2009, pp. 15-16.
[28] *Ibid*., p. 17.

> and the development of major regional trade and investment liberalization regimes, alongside the establishment of the WTO.

Obviously, the US-led revolution in the communication technologies was a fundamental development in this period. Thanks to the introduction of Internet and to the increased speed in the accessibility, transmission and storing of information the world reached the type of interdependence we all are so used to today.

Today's economy is marked by the presence and power of new actors, among which the already mentioned Asian countries and, furthermore, the so called 'BRICs': Brazil, Russia, India, and China. Asian countries, such as Taiwan and South Korea, distinguish themselves for the fact that the State keeps a close relationship with the MNEs' managerial heads and coordinates the activities they conduct abroad[29]. The pattern of investment has changed. Moreover, it would be wrong to think that the only home country of MNEs still are only developed countries as today, as the United Nations Conference on Trade and Development (UNCTAD) Report issued in 2007 has shown,

> the number of firms from developing economies in the list of the world's 100 largest non-financial TNCs increased from five in 2004 to seven in 2005 [...], in line with the rise of TNCs from the South. [...] Large TNCs from emerging economies are internationalizing particularly fast. [...] Asia dominates the list of the 100 largest developing-country TNCs, with 78 firms, followed by 11 each from Africa and Latin America[30].

Actually, MNEs rule over global chains of production, giving birth to a new international division of labour. It is also worth highlighting the leading role played by regional trade agreements today, in particular of agreements such as the NAFTA (North American Free Trade Agreement) and MERCOSUR (Mercado Común del Sur).

As it has already been showed, MNEs peculiarity is their ability to conduct their business across national countries. It is for this reason that it is then important to distinguish between the *home state* and the *host state* of a corporation.

A firm's *home state* usually represents the state in which it is based; this state is usually characterised by a developed legal system and financial market. Sometimes a corporation may have more than just one home state. The *UN Draft Code of Conduct*

[29] G. LIZZA, *Scenari Geopolitici*, Novara, UTET Università, 2009, p.31.
[30] UNCTAD World Investment Report, Transnational Corporations, Extractive Industries and Development, 2007, p. 17.

on Transnational Corporations defines it as "the country in which the parent entity is located"[31] considering the parent entity as the "corporate legal person that exercises control over other legal-person entities in other parts of the world".[32]

On the other hand, a firm's *host state* is the state in which this corporation bases its operations, apart from its home state. According to the already mentioned *UN Draft Code of Conduct on Transnational Corporations*, this term refers to the "country in which an entity other than the parent entity is located".[33]

Multinational enterprises play such a crucial role in today's international economics, international relations and societies, that is not possible to avoid studying them. It is undeniable that the leading economic power they have gained through the last decades enables them to bring some benefits and improvements to today's world. However, on the contrary, this power may also give them the possibility of abusing of their superiority to exploit workers, countries and to increase their supremacy.

MNEs' capacity to own and control productions outside their home country brings us to the next paragraph of this dissertation.

1.2. | Why do MNEs cross national borders? The relevance of MNEs for International Law

The processes of globalization, accompanied by the liberalization of international trade and the reinforcement of investors, have all contributed to the MNEs' ability to cross their national borders, which means to conduct operations outside their home country. Modern company law has favoured the flourishing of large scale business too. However, "economic factors have been the primary stimulants to the development of large corporations".[34]

The majority of world natural resources are exploited by MNEs today. While crossing its home state borders, each corporation bases its decision on four patterns of foreign direct investment. By analysing these patterns, the firm will start its activities in the countries it considers the most suitable.

The first kind of investment is the *Natural Resource Seeking*. According to this pattern of investment, a MNE will focus on the distribution of natural resources, on

[31] Draft United Nations Code of Conduct on Transnational Corporation, 1983 version, 1 (b).
[32] A. DE JONGE, *Transnational Corporations and International Law. Accountability in the Global Business Environment*, Corporations, Globalisation and the Law, Cheltenham, Edwar Edgar UK, 2011.
[33] G. LIZZA, *Scenari Geopolitici*, Novara, UTET Università, 2009, p. 31.
[34] P. T. MUCHLINSKI, *Multinational Enterprises and the Law*, Oxford, the Oxford International Law Library, 2007, p. 35.

the level of infrastructure development and on the kind of regulatory conditions existing in another country. In fact, it is undeniable that these factors are located in a specific area and that to gain them it is necessary to migrate there. The resources acquired in another country, will help the firm supply its operations. Historically, this has represented the most important determinant of FDI[35].

The second pattern of investments is the *Strategic Asset Seeking*, which is aimed at gaining strategic assets which are not present at home and that will assist the firm in increasing its expansion and in augmenting its competitiveness either by weakening the position of its competitors or by creating some advantages that will help the firm support its growth both at home and abroad[36].

Another type of international investment is the *Market Seeking*. A MNE will engage in a market seeking FDI when it will find an attractive foreign market which the firm will manage to supply with its production and services. According to this kind of investment a MNE will take advantage of the host country's market size, the market growth and the per capita income. It is undeniable that by acquiring new markets a company manages to enhance its competitiveness and to achieve scale and scope economies[37].

Finally, the *Efficiency Seeking* is the last kind of FDI a firm engages in. The determinant of this pattern of investment will be the culture, the economic policy and system and the market structure of foreign countries which the firm will exploit in order to settle its production in a limited number of places and to supply with it a huge number of markets[38].

The power of MNEs has become unchallengeable since the 1950s. In those years, the economic development started to be pursued through a state-driven model which finally increased companies' hegemony. During the last two decades of the 20th century, the international economic system seemed to be favourable to MNEs.[39]

It is worth noting that not all countries can engage in foreign direct investment; with regard to this, the habitual distinction between *developed* and *developing countries*

[35] F. B. CASTRO, *Foreign Direct Investment in the European Periphery: the competitiveness of Portugal*, University of Leeds, 2000, p. 23, available at: *http://www.fep.up.pt/docentes/fcastro/chapter%202.pdf*

[36] Ibid., p. 24.

[37] See n. 35 above.

[38] P. T. MUCHLINSKI, *Multinational Enterprises and the Law*, Oxford, the Oxford International Law Library, 2007, pp. 23-24.

[39] J. A. ZERK, *Multinationals and Corporate Social Responsibility. Limitations and Opportunities in International Law*, Cambridge Studies in International and Comparative Law, Cambridge, Cambridge university press, 2006, p. 14.

seems to reappear. In fact, while, on the one hand, developed countries favour their interests, among which their ability to move their capital to foreign countries, on the other, the developing ones, which usually host the operations of developed countries' enterprises, manage to protect their autonomy. Indeed, while developed countries are capital exporting and seek to exploit foreign countries' resources to the utmost, developing countries are capital-importing and see in the companies performing FDIs a challenge to the authority they possess over exploitation of their territories.[40]

The main reason driving a company's decision to cross its national borders, settle in a foreign country and exploit its resources is its desire to increase its competitiveness over similar companies. However, nowadays it is generally agreed that this competitiveness is conducted disregarding the social rights of the individuals.[41]

Labour rights and labour conditions have been defined by many Charters and Conventions during the second half of the gone century. However, the majority of them remained statements rather than duties to fulfil. Everybody should agree on the idea that international labour law should favour the rights of workers living in countries whose governments focus more on the interests of their companies rather than of those of their citizens.

It is worth remembering the main Conventions focusing on MNEs activities to understand how international law and workers' rights have evolved during the last decades.

Without doubts, the main organisation championing the rights of workers is the International Labour Organisation. The ILO has adopted more than one hundred and fifty Conventions dealing with workers' labour conditions and rights. In addition, as far as the subject of this dissertation is concerned, the ILO Governing Body adopted the *Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy* in 1977. The aim of this Declaration was to set some international instruments that should regulate MNEs' conduct and determine how these enterprises should behave with host countries. At its right beginning, it is underlined that " the aim of this Tripartite Declaration of Principles is to encourage the positive contribution which multinational enterprises can make to economic and social progress and to minimize and resolve the difficulties to which their various

[40] A. DE JONGE, *Transnational Corporations and International Law. Accountability in the Global Business Environment*, Corporations, Globalisation and the Law, Cheltenham, Edwar Edgar UK, 2011, p. 74.

[41] A. PERULLI, *Globalisation and Social Rights*, in W. BENEDEK, K. DE FEYTER, F. MARRELLA, *Economic Globalisation and Human Rights*, EIUC, Cambridge, Cambridge University Press, 2007, p. 94.

operations may give rise (...)".[42] This Convention should be respected by all the countries members of the ILO. However, unfortunately, in case a violation of this code should occur, the violator wouldn't incur into any sanction.

Another important Code, even though characterised by a narrower scope of application, are the *Guidelines for Multinational Enterprises*, elaborated by the Organisation for Economic Cooperation and Development in 1976. These Guidelines were updated for the fifth time in 2011 and they have been adopted by forty-four countries. They are recommendations that multinationals operating in or from the countries which endorsed them are expected to respect. However, as occurs for the ILO Tripartite Declaration, these Guidelines are not binding, even though the adhering countries created some agencies with the aim of implementing them. In particular, the aim of these Guidelines is to "(...) encourage the positive contributions that multinational enterprises can make to economic, environmental and social progress and to minimise the difficulties to which their various operations may give rise (...)". [43]

In the mid-1970s, the UN promoted the *UN Code Of Conduct for Transnational Corporations*, which was never formally adopted. According to this Code, "Transnational corporations should/shall respect the national sovereignty of the countries in which they operate and the right of each State to exercise its full permanent sovereignty in accordance with international law (...)".[44]

In addition, the UN sub-commission for the promotion and protection of Human Rights adopted a resolution including the *Draft Norms on the Responsibilities of Transnational Corporations and other Business Enterprises with regards to Human Rights* in 2003. According to these Norms,

> States have the primary responsibility to promote, secure the fulfilment of, respect, ensure respect of and protect human rights recognized in international law as well as national law , including ensuring transnational corporations and other business enterprises respect human rights. Within their respective sphere of activities and influence, transnational corporations and other business enterprises have the obligation to promote, secure the fulfilment of, respect, ensure respect of and protect human rights recognized in international law as well as

[42] ILO Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy, 1977, p. 2 para 2.
[43] OECD Guidelines for Multinational Enterprises, 2011 edition, para 9, p. 15.
[44] Draft United Nations Code of Conduct on Transnational Corporations, 1983 version, para 6.

> national law, including the rights and interests of indigenous people and other vulnerable groups.[45]

It goes without saying that MNEs' activities are difficult to regulate and control. Obviously, not all MNEs violate human rights and/or evade their responsibilities. Although many MNEs regulate their activities with codes of conduct and seem to adhere to general rules for the protection of workers and territories, MNEs appear to be more and more mistrusted. This is because sometimes MNEs' violations are also tolerated by their host countries, especially by the ones in the South, that wish to integrate themselves in the world's economy regardless of their population dignity and desires.

It is from the latter claim that we can start analysing the subject of the following paragraph.

1.3. | International legal personality: can MNEs be regarded as international legal persons?

Can MNEs be regarded as *International Legal Persons*? Or, better, what do we refer to when taking into consideration the *international legal personality*? Who is generally considered an *international legal person*?

Before facing more deeply the subject of this paragraph, it is fundamental to understand what one refers to when hinting at international legal personality. Once this concept will be explained, it will be possible to wonder if MNEs can be considered international legal persons too.

Firstly, let us focus on the concept of subjectivity under International Law.

The concept of *legal personality* entails the capacity of a subject to hold both rights and duties under a particular legal system. The term *international personality* is linked to that of *subject of International Law*. A subject of international law possesses rights and duties under the international law system. As a result, the term subject of the law is synonymous with the concept of legal person. Similarly, a subject who has an international personality is the beneficiary of rights and the holder of duties under international law.

[45] Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regards to Human Rights, 2003.

It was traditionally accepted that the actors of the international legal system should be divided into *subjects* of international law, and *objects* of international law. At the very beginning, only States could be subjects of international law, while its objects were many, among them also companies.

An author explains that "according to the doctrine of the general law theory, 'subjectivity' or 'legal personality' represent the capacity to be endowed with rights and duties under a particular legal order".[46] Furthermore, from another author point of view, "[…] international law can be defined as the law of the 'community of States'"[47] and "(…) the only useful alternative to identify the State as an international law subject is that between State-community and State-organization".[48]

The concept of legal personality entails the concepts of duties and rights under a particular legal order. As a result, being subjects of international law means having rights and, of course, duties under international law. Indeed,

> (...) at the international level, an entity is said to have 'international legal personality' if it is the beneficiary of rights under international law, is subject to international obligations, is able to enter into legal relations on the international plane, and has the capacity to enforce international law rights and obligations.[49]

The international level and the domestic level differs when conferring legal personality. In fact, while domestic law considers as legal persons both individuals and abstract entities, among which also companies, the only generally accepted subject of international law has been the State.[50]

In fact, "traditionally, States are the international law subjects 'par excellence'. Affirming that States are subjects means that the international law norms confer rights and impose duties on them".[51]

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[46] C. FOCARELLI, *Diritto Internazionale*, seconda edizione, Padova, Cedam, 2012, p. 25, translated from Italian, original text: "nella teoria generale del diritto per 'soggettività' o 'personalità' giuridica si intende la titolarità di diritti e di obblighi nell'ambito di un ordinamento giuridico di riferimento".

[47] B. CONFORTI, Diritto Internazionale, ottava edizione, Napoli, Editoriale Scientifica, 2010, p. 3, translated from Italian, original text: "(…) il diritto internazionale può essere definito come il diritto della 'comunità degli Stati".

[48] *Ibid.*, p. 13, original text: "(…) l'unica alternativa utile ai fini dell'individuazione dello Stato come soggetto internazionale è quella tra Stato-comunità (…) e Stato-organizzazione (…)"

[49] J. A. ZERK, *Multinationals and Corporate Social Responsibility. Limitations and Opportunities in International Law*, Cambridge Studies in International and Comparative Law, Cambridge, Cambridge University Press, 2006, p. 73.

[50] *Ibid.*, pp. 72-74.

[51] See n. 46 above, translated from Italian, original text: "gli Stati sono tradizionalmente i soggetti 'per eccellenza' del diritto internazionale. Che gli Stati siano soggetti vuol dire che ad essi le norme internazionali attribuiscono diritti e impongono obblighi".

The State is, as a consequence, the real subject of international law, and hence it is the State itself that has the capability of creating international norms and of regulating international life. A UN Report issued in 2006 underlined that

> The United Nations were created to provide a *State-based* international order. In 1945, States were the sole international decision-makers of any significance; they were the *subjects* of their joint decisions and were responsible for enforcing those decisions. [...] States were designated as the only *duty-bearers* who could violate international human rights law and they alone were held *responsibl*e for implementing human rights principles [...][52].

Nevertheless, it has been also generally agreed that there are other subjects of international law. This assumption derived mainly from the following two developments.

The first one was the International Court of Justice (hereinafter ICJ) opinion in the *Reparation for Injuries Suffered in the Service of the UN* case in 1949, while the second one was linked to the *1948 Universal Declaration of Human Rights*.[53] Thanks to these two developments, the idea of extending the number of subjects of international law begun to gain ground. In any case, the international subjectivity of other entities, different from States, is made possible by the existence of international norms that endowed them with rights and duties. These norms are created by States themselves[54].

As main subjects of international law, States choose who can or cannot be a subject of international law. Indeed, an entity is considered an international legal person if, as already highlighted, the States themselves confer him duties and rights under international law. [55] In other words, we can argue that "le società di capitali [...] esistono solo in quanto un ordinamento statale dato ne ha permesso la costituzione e ne regola il funzionamento"[56].

Turning to the topic of our research, MNEs are the principal actors of today globalisation and they are among the strongest world economic powers. Although they represent more an economic rather than a legal entity, today their role in the

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[52] United Nations Economic and Social Council, Promotion and Protection of Human Rights, 22nd February 2006, p. 4, emphasis added, available at: *http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G06/110/27/PDF/G0611027.pdf?OpenElement*

[53] See n. 44 above and A. GATTO, *Multinational Enterprises and Human Rights. Obligations under EU Law and International Law*, Cheltenham, Edwar Edgar, 2011, pp. 48-49.

[54] C. FOCARELLI, *Diritto Internazionale*, seconda edizione, Padova, Cedam, 2012, p. 26.

[55] *Ibidem*.

[56] F. GALGANO, F. MARRELLA, *Diritto del commercio internazionale*, terza edizione, Lavis, Cedam, 2011, p. 131.

international arena is so fundamental that it poses challenges to traditional legal categories. Business has always been hard to regulate. It is for this reason that, even though MNEs should be beyond the control of their national government, it usually appears difficult for States to control and regulate their corporations acting abroad.

MNEs role could be studied by adopting two different points of view. On the one hand, their power could favour the enforcement of the interests of the participants in today's international relations; on the other, however, their power could lead to increasing abuses of human and labour rights and of the environment.

Despite their influential role, MNEs were generally denied international legal personality. In fact, even though everybody knows that sometimes MNEs are even stronger and more powerful than States, it is difficult to find out international norms that are specifically addressed to them. We can argue that the enormous economic influence played by MNEs today clashes with the fact that MNEs have never been among traditional international law subjects. In this regard, it has been asserted that "l'entreprise multinationale n'est pas un sujet de droit international au sens classique du terme. Mais certaines entreprises multinationales n'en disposent pas moins d'une capacité d'influence qui excède celle de nombre d'États souverains"[57].

To sum up this point, it is sufficient to affirm that MNEs were not considered as subjects of international law under traditional international law. In this regard,

> apart from their radical difference from States, it is difficult to accept the international subjectivity of multinational corporations as unitary entities. This is due also to the fact that multinational corporations do not represent a single entity, as they are organised into various national firms, each of one possessing its own national subjectivity.[58]

In addition, an author claimed that "according to Cassese, despite the fact that MNEs can conclude transactions with States and their disputes with States can be submitted to international tribunals, they have not been upgraded by States as proper international subjects".[59]

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[57] D. CARREAU, P. JUILLARD, *Droit international économique*, 5e édition, Paris, Dalloz, 2013, p. 44.

[58] C. FOCARELLI, *Diritto Internazionale*, seconda edizione, Padova, Cedam, 2012, p. 80, translated from Italian, original text: "a parte la differenza radicale con gli Stati, è difficile ammettere la soggettività internazionale delle multinazionali come enti unitari, anche perché di regola esse giuridicamente non costituiscono un'unità, essendo composte di numerose società nazionali ciascun dotata di una propria soggettività statale".

[59] A. GATTO, *Multinational Enterprises and Human Rights. Obligations under EU Law and International Law*, Cheltenham, Edwar Edgar, 2011, p. 54.

Traditionally, "the multinational had no separate status under international law, aside from that enjoyed by its constituent entities by virtue of domestic law"[60]. We can argue that MNEs "on fait craquer le moule traditionnel du droit international classique qui leur déniait toute personnalité «internationale»"[61]. This is due to the fact that "le droit international classique […] ne faisait aucune place à ces entreprises dans la mesure où il ne reconnaissait que des sujets « publics » et non « privés »"[62]. Indeed, although traditional international law refused to confer them international subjectivity, MNEs "avec l'accord de nombreux États [...] se sont appropriées une certain «personnalité internationale» ".

However, MNEs status under international law has gradually evolved, especially because MNEs were recognized the ability to take part in contracts regulated by international law. While, at first, the focus was on the protection of companies and investors, international law started then to regulate MNEs' duties, especially because their violations of human rights begun to be unbearable.[63]

According to some, conveying the international subjectivity to MNEs could be a great breakthrough, as they could be led to enhance the promotion of human rights and of core labour and social standards.

MNEs do possess some degree of international legal personality if we consider the existence of some treaties that impose liability to corporations and which belong mainly to labour and environmental law. Examples of them are *the ILO Convention on Occupational Safety and Health*[64], the *Convention Relating to Civil Liability in the Field of Maritime Carriage of Nuclear Material*[65] and the *UN Convention against Transnational Crime*[66]. Thanks to these conventions, MNEs can hold some duties under international law and, as a result, they can enjoy a degree of international subjectivity.[67] In addition to treaties, there seem to be other elements in favour of MNEs' international subjectivity. Firstly, MNEs play a role in the

[60] J. A. ZERK, *Multinationals and Corporate Social Responsibility. Limitations and Opportunities in International Law*, Cambridge Studies in International and Comparative Law, Cambridge, Cambridge University Press, 2006, p. 75.
[61] D. CARREAU, F. MARRELLA, *Droit International*, 11ème edition, Paris, Pedone, 2012, p. 66.
[62] *Ibid*., p. 67.
[63] *Ibid*., pp. 54-55.
[64] ILO Convention on Occupational Safety and Health, 1981.
[65] Convention Relating to Civil Liability in the Field of Maritime Carriage of Nuclear Material, 17 December 1971.
[66] United Nations Convention against Transnational Crime, 29 September 2003.
[67] A. GATTO, *Multinational Enterprises and Human Rights. Obligations under EU Law and International Law*, Cheltenham, Edwar Edgar, 2011 pp. 60-61.

international law creation[68] and they are also the addressees of some rights under international law. In this regard, corporations possess rights under international investment law. To give an example, according to the latter, MNEs must not be discriminated against national firms[69]. Moreover, corporations possess rights also under international human rights law. For instance, among the others, MNEs are conferred the right to a fair trial and also property rights. Secondly, another element in favour of MNEs' international subjectivity is represented by the fact that MNEs have signed contracts with States to regulate the exploitation of the resources of some territories[70]. Thirdly, MNEs have also signed accords with other MNEs to regulate the economy; for instance, they have sometimes created some cartels[71]. Hence, it is commonly accepted that MNEs do play a fundamental role in our contemporary society and do shape international relations and economy.

As a consequence, even though MNEs are not still generally recognized as international legal persons, they are already taking part in the international legal arena. In fact, they are currently recognized as addresses of certain rights and responsibilities under international law and they were also granted the possibility of entering international courts in order to give them effect. Obviously, many remember that, in contrast with the other subjects of international law and with the concept of legal personality, MNEs seem to enjoy more rights rather than duties under the international legal order. This is due to their ability to fragment their activities and conduct them in many countries. By doing this, MNEs sometimes are able to escape controls. It is for this reason that nowadays many scholars stress the importance of regulating MNEs' activities.

1.3.1. | The Regulation of MNEs

Regulation "is generally taken to refer to the control over private activities exercised by public authorities. However, this term can also refer to more diverse sources of social control or influence, including unintentional and non-state processes".[72]

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[68] D. CARREAU, F. MARRELLA, *Droit International*, 11ème edition, Paris, Pedone, 2012, p. 66.
[69] J. A. ZERK, *Multinationals and Corporate Social Responsibility. Limitations and Opportunities in International Law*, Cambridge Studies in International and Comparative Law, Cambridge, Cambridge University Press, 2006, p. 75.
[70] A. GATTO, *Multinational Enterprises and Human Rights. Obligations under EU Law and International Law*, Cheltenham, Edwar Edgar, 2011 pp. 60-61.
[71] *Ibidem*.
[72] See n. 69 above, p. 41.

As far as MNEs regulation is concerned, it has been commonly accepted that it can be analysed and developed adopting two different perspectives: the first one is that of the corporation host state and it has been labelled *host country control*, and the other one is that of the corporation home country and it has been named *home country control*[73].

The host country control mechanism implies that it is the country which hosts the operations of the corporation that has the duty to regulate its activities. Indeed, as the corporation invests in a country which is not its country of origin, it has the duty to respect the norms and standards adopted by that country. This perspective is obviously influenced by the international law basic principle that the primary responsibility to protect, respect and provide for the respect of human rights relies on States. However, this crashes with reality. In fact, many States, in order to attract corporate activities in their territories, often prefer to put at risk the human rights in their countries rather than effectively control corporations. This has been called a *race to the bottom* or *race to laxity* process and it implies the fact that sometimes governments cooperate with corporations in the violations and abuses of human rights to make sure they continue investing in their countries rather than prosecuting them. Furthermore, sometimes host countries may favour the entry of foreign firms to provide their territories with factors, such as technology or goods, that local enterprises do not produce[74]. As a result, the host country control has proved an inadequate method to regulate MNEs operations and guarantee an equal and universal respect of human rights globally[75]. However, it must not be forgotten that some host countries do set conditions for the entry of foreign firms and they can also deny them some particular economic sectors of their economy[76].

On the other hand, the home country control expects the country of origin of the corporation, that is its home state, to control its activities. This method implies that the corporation must comply with its country of origin norms even when conducting its operations abroad. It is its home state that has the duty to control its activities and prosecute it in case a violation of its norms should occur. However, this method

[73] F. MARRELLA, *Imprese multinazionali e responsabilità per violazioni dei diritti umani*, in M. NORDIO, V. POSSENTI, *Governance globale e diritti dell'uomo*, Reggio Emilia, Diabasis, 2007, p. 82.
[74] P. T. MUCHLINSKI, *Multinational Enterprises and the Law*, Oxford, the Oxford International Law Library, 2007, p. 85.
[75] J. A. ZERK, *Multinationals and Corporate Social Responsibility. Limitations and Opportunities in International Law*, Cambridge Studies in international and comparative law, Cambridge, Cambridge University Press, 2006 , p. 83.
[76] *Ibid*., pp. 85-86.

seems inadequate too, as it would rely on the internal norms of a State which are bound to change quickly and cannot assure a real protection of human rights[77]. What is more, home countries have long been more interested in

> the protection of domestic labour against the export of jobs abroad, adequate revenue from the repatriation of dividends earned by overseas subsidiaries of home-based parent companies, the promotion and protection of technological leads enjoyed by home-based MNEs, and access to raw materials in short supply in the home state[78].

Finally, a MNEs' home state is not always easy to identify and its regulation over MNEs' activities abroad crashes with the restrictions that international law imposes on it when regulating operations outside its territory.

As a result, as these methods have both proved to be insufficient, it seems that only an international court would have the capacity to control the effective application of international norms under national law[79].

Regulating MNEs has proved to be a difficult task as many have also doubted that international law could have the prerequisites to fulfil this role. MNEs regulation is generally seen with scepticism as often the MNE home state itself do not have neither the possibility nor the will to control it. In addition, thanks to their high mobility and flexibility, MNEs easily succeed in avoiding any kind of national regulation. However, despite this, MNEs regulation has not been abandoned. Nowadays, many different organisms focus on it, among them "shareholder, public authorities, inter-governmental bodies, trade unions, NGOs, insurers and consumer groups"[80]. MNEs regulation should be considered necessary as it would confer MNEs a set of responsibilities which many consider fundamental to counterbalance their huge amount of power.

Conclusion to the first chapter

In this chapter we sought to introduce the topic of MNEs, the role they play in today's economy and the issue their power arises. Firstly, we managed to trace back the history of their development and to describe the main features of their economic

[77] J. A. ZERK, *Multinationals and Corporate Social Responsibility. Limitations and Opportunities in International Law*, Cambridge Studies in international and comparative law, Cambridge, Cambridge University Press, 2006, pp. 83-85.
[78] *Ibid.*, p. 86.
[79] D. CARREAU, F. MARRELLA, *Droit International*, 11ème edition, Paris, Pedone, 2012, p. 85.
[80] See n. 77 above, p. 41.

activities. Secondly, we sought to describe their principal economic patterns and to outline the most well-known definitions of MNEs provided by different entities. Thirdly, we introduced the concept of legal personality and we questioned whether MNEs could be considered subjects of international law too.

We have shown that even though there is not a generally agreed definition of MNEs, everybody agree that MNEs stand for their ability to conduct operations outside their home country and to exploit the resources of their host countries. In addition, we have defined the concept of legal personality and highlighted that MNEs cannot be fully included among the principal subjects of international law. With regard to this, it must be reiterated that international law scholars do not agree on whether to confer international subjectivity to MNEs or not. Historically, MNEs were not among international law subjects. Hence, corporate increasing international role and power have augmented MNEs' influence in the international arena. As a consequence, the debate over corporate international personality has started to develop. Some scholars have simply not focused on it. Others have refused to include them into international law subjects. Finally, others have accepted the existence of at list a degree of corporate international personality. The latter have managed to analyse the elements in its favour and also to delineate the advantages that conferring international personality to corporations would bring. To make this point clearer, it can be underlined that, those authors that are opposed to MNEs' international subjectivity maintain that MNEs' international subjectivity would be controversial. For example, they state that even though corporations can sign agreements with foreign States, these agreements are not regulated by the law of treaties[81]. On the other hand, those who are in favour of MNEs' international personality, for example affirm that, as already mentioned, MNEs possess some rights under international investment law and human rights law. Even though these opinions are diverging we have concluded that nowadays MNEs do possess a certain degree of limited international personality. The scholars in favour and against MNEs' international personality have both important reasons. However, the role played by MNEs globally today is so huge that we can argue that their international personality cannot simply be denied. Indeed, as two authors highlighted, "les «multinationales » ne concluent pas de «traités » au sens formel du terme; cependant, sur le plan materiel, les actes qu'elles passent avec les États sont-ils bien different d'un accord international traditionnel quant à leur contenu?".

[81] D. CARREAU, F. MARRELLA, *Droit International*, 11ème edition, Paris, Pedone, 2012, p. 67.

Finally, we briefly introduced the issue of MNEs regulation, which will be developed in the next chapter.

2. MULTINATIONAL ENTERPRISES AND INTERNATIONAL LAW

2.1. MNEs attempt at becoming socially responsible – 2.1.1. MNEs Codes of Conduct – 2.1.2. The development of Corporate Codes of Conduct - 2.1.3. MNEs Global Codes of Conduct – 2.1.4. Core Labour Standards – 2.2. Corporate Social Responsibility – 2.3. An introduction to company law and corporate limited liability – 2.4. Corporate criminal liability and a brief insight into extra-territorial legislation

Introduction

This chapter moves a bit further and analyzes a different subject matter. Indeed, it will deal with the theme of social responsibility and it will outline the efforts of companies at creating and adhering to social, ethical and moral values shared all over the world.

This chapter is divided in four parts.

In the first part, we will focus on the attempt of multinational corporations at being socially responsible. In particular, we will try to explain why this happens and how.

In the second part, we will cope with corporate social responsibility, *alias* CSR, a term which defines the goal of many multinational corporations today: being socially responsible in their everyday activities in people's eyes.

The third and four parts will focus on International Law, trying to show which responsibilities multinational corporations bear and how these can be handled. In particular, the third and fourth paragraph will analyze the concept of corporate liability by coping in particular with a specific form of liability, that is criminal liability.

2.1. | MNEs attempt at becoming socially responsible

"Where there is Coke there is hospitality"

The Coca-Cola Company, 1948

"You're never alone with a Strand"

Strand Cigarettes, 1959

"You can be sure of Shell"

Shell Oil, 1982

"We love to see you smile"

McDonald's, 2000

Multinational enterprises life has not always been easy. Their capacity to develop huge markets and create enormous quantity of money has led many people to wonder if their operations were as undefiled as they wanted them to appear.

Right from the beginning of their life, multinational enterprises main goal has been profit and profit has always been carried out at all costs. No matter how this goal was to be achieved, the only important thing was to reach it.

Nevertheless, it was soon realized that this kind of business could not be accepted by everyone and that it would have raised many protests. Opposition to multinationals started to emerge after the end of the Second World War. In particular, criticisms towards US-owned MNEs started to spread in Europe during the 1960s[82]. MNEs activities begun to be seen with suspicion. People concerns started to grow and being shared all over the continents. Despite their claim of creating new jobs, new opportunities, new markets and of bringing modernity and technology to less developed parts of the world, MNEs negative sides became evident to everyone. Their capacity of causing harm and damage to people, the environment and society was then viewed as the predominant part of their activity. As an author maintained in her book,

> Trade liberalization can have positive consequences for the environment by providing poorer nations with the material capacity to implement environmental policies, and by mandating the removal of subsidies to

[82] J. A. ZERK, *Multinationals and Corporate Social Responsibility. Limitations and Opportunities in International Law*, Cambridge Studies in International and Comparative Law, Cambridge, Cambridge University Press, 2006, pp. 8-9.

> uneconomic and ecologically unsustainable agricultural or fishing industries. However, trade liberalization can also have negative environmental effects by, among other things, creating incentives for industry to move production to states with poor environmental standards (the so-called 'race to the bottom').[83]

In particular, MNEs were strongly criticised especially by developing countries, which accused them of exploiting their territories and of negatively influencing their politics. Obviously, this was due to the fact that the majority of MNEs were born in developed countries[84].

The reason why MNEs have usually been strongly criticised is explained by some of the disasters and tragic events that arose disdain all over the world and that were caused by them. Among the latter are the *Bhopal*[85], *Unocal*[86] and *Wiwa v Royal Dutch Petroleum Co*[87] cases. Multinational enterprises have always been able to profit from their bad behaviour. They have been accused of benefiting from people oppressive working conditions, sometimes translated into a sort of slavery, especially in the less developed countries in the world. Their activities have been a huge source of environmental destruction and pollution. They have also cooperated with some governments which have helped them hiding the appalling conditions of their workers. In addition, as an author outlined in his book, "on numerous occasions the organization has required nations, under threat of punishing penalties, to change or repeal laws designed to protect environmental, consumer, or other public interests"[88]. Everybody would agree with the assumption that multinationals are a mix of power and wealth. It is for this reason that, from the 1970s onwards, people concerns about them intensified. In particular, less developed countries feared multinationals intrusion into their economies as they linked them to the passed Colonial period and also because they did not want to serve foreign economic interests.[89]

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[83] A. DE JONGE, *Transnational Corporations and international law. Accountability in the global business environment*, Corporations, Globalisation and the Law, Cheltenham, Edwar Edgar UK, 2011, p. 191.
[84] D. CARREAU, P. JUILLARD, *Droit international économique*, 5e édition, Paris, Dalloz, 2013, p. 44.
[85] *Bano v. Union Carbide Corp.*, 273 F. 3d 120 (2d Circuit 2001).
[86] *Doe v. Unocal Corp.*, 963 F. Supp. 880 (US District C.D. Cal. 1997).
[87] *Wiwa v. Royal Dutch Petroleum Co.*, Settlement Agreement and Mutual Release, June 8, 2009.
[88] J. BAKAN, *The Corporation. The pathological pursuit of profit and power*, London, Constable, 2005, p. 24.
[89] J. A. ZERK, *Multinationals and Corporate Social Responsibility. Limitations and Opportunities in International Law*, Cambridge Studies in International and Comparative Law, Cambridge, Cambridge University Press, 2006, p. 9.

The international economic system proved to be favourable to multinational enterprises during the 1980s and 1990s. However, during these years, multinationals begun to cope with new demands. The civil society, in fact, expected MNEs to be socially responsible and to develop better business practices. People demanded a more sustainable market and more moral activities. Environmental pressures grew as well as the need to create a positive corporate image. The mid-1990s saw an explosion of mass demonstrations against multinational corporations power. Obviously, corporations could not stand silently vis-a-vis these protests; they needed to find an answer to civil society concerns. This answer is named *Corporate Social Responsibility*.[90]

As an author stated, "companies, particularly US companies, have long recognised that demonstrations of compassion and humanity are attractive to consumers"[91]. Multinational enterprises understood that it was crucial to develop a good image of themselves, thanks to which everybody should have estimated them. As a result,

> By the end of World War I, some of America's leading corporations, among them General Electric, Eastman Kodak, National Cash Register, Standard Oil, U.S. Rubber, and the Good year Tire & Rubber Company, were busily crafting images of themselves as benevolent and socially responsible. "New Capitalism", the term used to describe the trend, softened corporations' images with promises of good corporate citizenship and practices of better wages and working conditions.[92]

Without doubts, corporations' attempt at creating a good image of themselves has evolved during the decades. Nowadays, MNEs' main aim is to create a good brand image. This goal can be reached through various ways. First of all, by developing a well-thought advertisement campaign, characterized, for example, by the endorsement of celebrities and by the use of slogan suggesting their good corporate behaviour. Moreover, by boasting a green brand commitment, that is, by trying to persuade the society of their deep interest in the protection of the planet, the reduction of greenhouse gases, the use of renewable sources of energy, the effort not to waste water, the use of recyclable materials and the creation of green stores. For instance, Shell Oil advertisement slogan in 2007 was "*Don't Throw anything away. There is no away*". It was obviously aimed at convincing anyone of their

[90] J. BAKAN, *The Corporation. The pathological pursuit of profit and power*, London, Constable, 2005, pp. 26-27.
[91] J. A. ZERK, *Multinationals and Corporate Social Responsibility. Limitations and Opportunities in International Law*, Cambridge Studies in International and Comparative Law, Cambridge, Cambridge University Press, 2006, p. 17.
[92] *Ibid*., p. 18.

environmental commitment. Furthermore, by praising in their websites and annual reports their achievements in their battle towards corporate social responsibility. As an author posited in his book, " social responsibility is on the agenda wherever business leader meet [...] and corporations compete against one another for ever higher moral ground"[93]. Corporations would like people to be persuaded that "corporations care about the environment and communities, not just the soulless pursuit of profit; they are part of the solution to world ills, not the cause; they are allies of governments and nongovernmental organizations, not enemies"[94].

It is for this reason that we started this paragraph by putting in italics four multinational corporations slogans used in different periods. We wanted to give an example of how corporations strive to depict themselves in people's eyes. The slogan of Shell Oil, "You can be sure of Shell", can be explained by focusing on an article published on *The Guardian* newspaper which reported a letter written by Mark Moody-Stuart, a Shell Chairman, in which he managed to highlight that Shell Oil would have not sacrificed anything for the sake of profit. In particular, in this article he stated that

> We at Shell believe that it is possible, and desirable, to run a profitable business without sacrificing values for profit. [...] We also believe that our business must uphold certain values that are completely separate from purely commercial considerations. That is why we have had for many years a published statement of principles which govern the way we operate. They cover a wide range and include our policy on the environment and human rights.[95]

This quotation is a clear example of how MNEs leaders expect their activities to be nowadays. This change in MNEs attitude depends mainly on the fact that today's consumers are more exigent about companies' behaviour. The society is evolving and nowadays corporate social responsibility seems to be a moral imperative. In other words, "many global corporations have themselves become concerned to persuade both themselves and others that they are serious about behaving responsibly both at home and abroad"[96].

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[93] J. BAKAN, *The Corporation. The pathological pursuit of profit and power*, London, Constable, 2005, p. 32.
[94] *Ibidem*.
[95] J. DONOVAN, *You can be sure of Shell: the biggest confidence trick in history*, The Guardian, 2nd December 1997, available at: *http://royaldutchshellplc.com/2011/03/31/you-can-be-sure-of-shell-the-biggest-confidence-trick-in-history/*
[96] A. DE JONGE, *Transnational Corporations and international law. Accountability in the global business environment*, Corporations, Globalisation and the Law, Cheltenham, Edwar Edgar UK, 2011, p. 21.

In the following paragraphs of this chapter we will manage to analyse the main attempts of multinational enterprises at being socially and legally responsible.

2.1.1. | MNEs Codes of Conduct

The distinctive traits of multinational enterprises explain the differences existing between them and domestic enterprises. The real nature of their activities give them many advantages. It is commonly agreed that MNEs can benefit from employing cheaper labour force, from weaker labour and environmental standards and from custom and fiscal differences existing worldwide. However, even though at first multinational corporations have been able to conduct their activities unchallenged, the second half of the nineteenth century marked a sharp change. MNEs started being criticised by the public opinion and some of them started being publicly boycotted. It was argued that corporations violated human rights and took advantage from awful working conditions. Corporations were accused of imposing over workers inhuman conditions that made it possible for them to achieve more profit at no costs[97].

It is for this reason that the need to create global standards and generally accepted rules regulating the working conditions of workers started being addressed. Various groups, among which intergovernmental organizations and workers organizations, begun to underline the importance of introducing such mechanisms.

As a response to this need, many intergovernmental organizations, above all the United Nations, suggested that corporations should endorse a set of rules and standards globally agreed which should have regulated the conduct of their activities. As a commentator points out,

> NGOs and investment managers have also begun to publish 'corporate responsibility indices' and 'ethical investment rankings' to inform shareholders and potential shareholders with concerns about the ethical standards of behaviour demonstrated by companies they invest in[98].

In addition to this, many corporations, in an effort to react to the public campaign developed against them, decided to create themselves some codes of conduct which they then endorsed.

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[97] A. PAGNETTI ZANOBETTI. *Il Diritto Internazionale del Lavoro*. *Norme Universali Regionali e comunitarie*, Bologna, Patron Editore, 2005, pp. 90-92.

[98] A. DE JONGE, *Transnational Corporations and international law. Accountability in the global business environment*, Corporations, Globalisation and the Law, Cheltenham, Edwar Edgar UK, 2011, p. 21.

There is a clear difference between the codes developed by corporations and the ones written by intergovernmental organizations, that is to say, between *external* and *internal codes*[99]. In fact, while the former represents a set of rules which corporations impose upon themselves to show to the world their social commitment and interest in favouring people's health and freedom, the latter are external codes proposed to corporations by subjects who are not part of their structure[100]. Despite their good intentions, both these codes are soft law, thus they do not create obligations on corporations. In fact, while external codes of conduct can be adopted only voluntarily by corporations and their violation do not entail any kind of sanctions, internal codes are regulated by corporations themselves and it is the corporate body itself that possess the authority to monitor its application[101]. It easily follows that these codes can be violated without consequences.

A more detailed distinction is that between "codici di origine statale, intergovernativa ed a-statuale"[102]. The first ones are codes elaborated by national authorities, the second are developed by NGOs, and the latter are created by corporations themselves.

Corporation internal codes

> represent […] a sort of obligations imposed by corporations upon themselves which reflects the managerial philosophy, through which the MNEs group manage to impose some norms on its employees, clients, suppliers, and sometimes also on its subsuppliers and licensees. From a legal perspective, corporate internal codes are basically business regulations; therefore, their validity arises when linked to the managerial power of the employer. Some of these codes are drafted inside a single enterprise, while others are developed inside a specific field […].[103]

MNEs codes of conduct do not possess a legally binding status. They represent a sort of moral and ethical obligation addressed to corporations. What is particular about them is that there is not a specific entity whose task is to create and impose these

[99] A. PAGNETTI ZANOBETTI. *Il Diritto Internazionale del Lavoro*. *Norme Universali Regionali e comunitarie*, Bologna, Patron Editore, 2005, p. 94.
[100] *Ibid*., pp. 94-99.
[101] A. PERULLI, *Globalisation and Social Rights*, in W. BENEDEK, K. DE FEYTER, F. MARRELLA, *Economic Globalisation and Human Rights*, EIUC, Cambridge, Cambridge University Press, 2007, pp. 123-125.
[102] F. GALGANO, F. MARRELLA, *Diritto del commercio internazionale*, terza edizione, Lavis, Cedam, 2011, p. 908.
[103] See n. 99 above, p. 99, translated from Italian, original text: "Essi costituiscono […] una sorta di normativa auto-prescritta che rispecchia la filosofia aziendale, con la quale il gruppo multinazionale intende dettare regole valide per i proprio dipendenti, per i clienti, i fornitori, e a volte anche per i subfornitori e licenziatari. Sul piano giuridico, si tratta in sostanza di regolamenti aziendali; hanno pertanto valore come espressione del potere direttivo del datore di lavoro. Alcuni codici vengono elaborati all'interno di una singola azienda, mentre altri sono elaborati in un determinato settore […]".

codes upon corporations. MNES codes of conduct have been introduced by governments, trade unions, employers' organizations, and intergovernmental organizations. In addition to this, there is not a specific field to which corporate codes of conduct are addressed. MNEs codes of conduct can tackle a variety of issues, from labour to safety issues[104]. Finally, as an author, referring to the European Union, stated, "non è stato creato, a livello comunitario, nessun tipo di hard law e la soluzione del problema dell'effettività della responsabilità sociale d'impresa viene lasciato alla discrezione delle imprese transnazionali"[105].

A distinction between Corporate codes of conduct, Codes of conduct for multinationals and Framework Agreements is necessary.

ILO defines Corporate codes of conduct as "individual company policy statements that define a company's own ethical standards", while Codes of conduct for multinational "are externally generated and to some degree imposed on multinationals". Framework Agreements are "concluded between trade union organizations and individual companies regarding the companies' international activities". The codes of conduct addressed to multinationals are just recommendations, that is to say that they "impose no legal, but only moral, obligations on companies, and they are not capable of enforcement by the application of external sanctions"[106]. As a result, "for multinationals, the commitment to the code is voluntary"[107]. Hence, the credibility of these codes derives from three factors: "the governments that have adopted them or companies that have subscribed to them [...],; the nature of the substantive provisions of the code; and any related monitoring mechanisms [...]"[108].

It would be wrong to think that corporate codes of conduct were born in the nineteenth century. Indeed, they existed also before, as they started to emerge with the beginning of the industrial era. However, the corporate codes of conduct we nowadays deal with begun appearing during the second half of the nineteenth century. The development of corporate codes of conduct in this period can be divided into three phases. The first is the period around and following the Second World

[104] Codes of Conduct for Multinationals, ILO, p. 1, available at: *http://www.actrav.itcilo.org/actrav-english/telearn/global/ilo/guide/main.htm*

[105] F. MARRELLA, *Imprese Multinazionali e responsabilità per violazioni dei diritti umani*, in M. NORDIO, V. POSSENTI, *Governance Globale e Diritti dell'Uomo*, Reggio Emilia, Diabasis, 2007.

[106] See n. 104 above.

[107] *Ibidem.*

[108] *Ibidem.*

War, the second period is represented by the 1970s, and the third is the one going from the 1980s to the present.

2.1.2. | The development of Corporate Codes of Conduct

The first period started with the development of the *Code of Standards of Advertising Practice* by the International Chamber of Commerce (hereinafter ICC) in 1937. With the end of the war, MNEs activities started to spread more and corporations started achieving the economic role they possess today. As a response to the need of controlling corporate activities and investments, the ICC created another code, the *International Code of Fair Treatment for Foreign Investment*[109]. The 1937 Code has then been revised many times. In addition to these two Codes, the ICC issued other Codes, among which the *International Code of Practice on Direct Marketing*[110], the *Code on Environmental Advertising*[111], the *International Code of Sales Promotion*[112] and others.

In the 1970s the need to control and regulate MNEs activities regained power. Year 1974 was marked by the passing of the UN resolution whose aim was to foster a New International Economic Order[113] and by the issuing of the Report of the Group of Eminent Persons drafted by the United Nations Economic and Social Council[114]. Both these initiatives had to regulate corporate behaviour and power and were followed by new developments both at the global and regional level. For instance, at the global level, the ILO passed its *Tripartite Declaration* on MNEs in 1977[115] and the OECD its *Declaration on International Investment and Multinational Enterprises* in 1976[116]. In this period the ICC passed its first anti-corruption code and new legislation on MNEs control was passed also at the national level, both in developed and developing countries. For example, the Canadian government passed the

[109] J. MURRAY, *Corporate Codes of Conduct and Labor Standards*, International Labour Organization, 3rd May 1998, p. 3, available at: *http://www.actrav.itcilo.org/actrav-english/telearn/global/ilo/guide/jill.htm*

[110] The OECD International Code of Practice on Direct Marketing, 1998.

[111] The OECD Code on Environmental Advertising, 1991.

[112] The OECD International Code of Sales Promotion, 1987.

[113] Declaration of establishment of a new economic order, 1 May 1974, adopted by the General Assembly of the United Nations.

[114] Report on the Impact of Multinationals Corporations on the Development Process and on International Relations, United Nations Economic and Social Council, E/5500, 14th June 1974.

[115] ILO Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy, 1977.

[116] OECD Declaration on International Investment and Multinational Enterprises, 21th June 1976, available at: *http://www.oecd.org/daf/inv/investmentpolicy/oecddeclarationoninternationalinvestmentandmultinationalenterprises.htm*

Guiding Principles of Good Corporate Behaviour for Subsidiaries in Canada of Foreign Companies in 1967[117]. However, it is important to remind that the first guidelines for multinationals developed at the governmental and inter-governmental level were those addressed to companies conducting business with and in South Africa[118]. Obviously, the European Union too passed its first code in those years. In fact, the *Code of the European Community* was adopted in September 1977. It replaced the *Code of Practice for British Firms* and it was followed by criticisms as the employers did not accept it. As far as the United States are concerned, year 1977 was marked by the passing of the *Sullivan Principles*, which were favoured also by the Carter administration. These principles should have regulated the activities of those US companies who operated in South Africa. Moreover, the *MacBride Principles* were then adopted in 1984, with the goal of regulating the operations of US companies in Northern Ireland. The Sullivan and the MacBride Principles were drafted in a similar way[119].

The 1980s represented a period of decline in codes activity. This stalemate was then overtaken by a renewed codes creation in the late 1980s and 1990s. The codes which emerged in those years were based on new elements. They had now to regulate not only corporate behaviour but also other fundamental issues related to workers' health and life, such as the environment, labour standards and the disparities affecting developed and developing countries. The impact of corporate activities started being analysed worldwide and business was asked to take on its own responsibilities always more and more. This new wave of codes production was based on different reasons. Firstly, a great number of groups, such as lobby groups and political parties, started claiming the need to regulate corporate operations, scared by the issues that corporate activities had begun to raise. Secondly, globalization, together with all its consequences, such as the employment of new technologies, more economic integration worldwide and the growing internationalisation, highlighted the need to safeguard some groups from corporate behaviour. Thirdly, the World Trade Organization (hereinafter WTO) too managed to draft a system aimed at regulating labour in those years. Finally, some companies too begun to show interest in the creation of such codes, as it started being agreed that the introduction of labour

[117] J. MURRAY, *Corporate Codes of Conduct and Labor Standards*, International Labour Organization, 3rd May 1998, p. 4, available at: *http://www.actrav.itcilo.org/actrav-english/telearn/global/ilo/guide/jill.htm*

[118] Codes of Conduct for Multinationals, ILO, p. 3, available at: *http://www.actrav.itcilo.org/actrav-english/telearn/global/ilo/guide/main.htm*

[119] *Ibid*., p. 4.

standards might have made them more efficient and brought some advantages to the economic growth[120]. In fact, even though it may sound strange, corporations can be motivated by different things when elaborating their codes. For instance, they may use them as a way to govern themselves internally, or to depict themselves as benevolent, or, in addition, to protect themselves from external complains. Codes of conduct created by the firms themselves appear to be more important in countries lacking the binding labour regulation as only through their application can workers' rights be protected. "Codes of conduct are thus paradoxical and controversial. They are a creature of the firm, yet are used to temper the power of the firm in relation to its dealing with employees"[121]. This quotation explains in few words why codes of conduct drafted by corporations may sometimes raise doubts. An example of an individual company code of conduct is the *Australian Minerals Industry's Framework for Sustainable Development*[122], which was launched in December 1996[123].

An author reports in her book the five generations of individual corporate codes of conduct created by Mendes and Clark during the late 1990s[124]. According to them, the first codes faced "conflicts of interest between management and the firm and were primarily designed to address the agency risks arising from the corporate form"[125]. The second generation of individual corporate codes, "broadened their scope to deal with issues of ethical business conduct, such as the bribing of foreign officials"[126]. The third generation was addressed more to companies' workers, in order to favour the respect of their rights but also to recognize "the interests of creditors, suppliers and customers"[127]. The fourth generation dealt with more general issues, among which the environment. Finally, the fifth generation arose from concerns deriving from the investment activities based in countries lacking a good governmental environment and regulations in favour of workers' right.

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[120] J. MURRAY, *Corporate Codes of Conduct and Labor Standards*, International Labour Organization, 3rd May 1998, pp. 4-5, available at: *http://www.actrav.itcilo.org/actrav-english/telearn/global/ilo/guide/jill.htm*

[121] *Ibid*., p. 1.

[122] Available at: *http://www.minerals.org.au/focus/sustainable_development/enduring_value*

[123] A. DE JONGE, *Transnational Corporations and international law. Accountability in the global business environment*, Corporations, Globalisation and the Law, Cheltenham, Edwar Edgar UK, 2011, p. 23.

[124] J. A. CLARK, E. P. MENDES, *The five generations of corporate codes of conduct and their impact on corporate social responsibility*, 18th September 1998, available at: *www.cdphrc.uottawa.ca/eng/publication/centre/five.php*

[125] See n. 123 above, 2011, p. 22.

[126] *Ibidem*.

[127] See n. 125 above.

All these things said, the main dilemma now seems to be the implementation of these corporate codes. This is to say that it is obvious to wonder if these codes have a tangible effect on corporate behaviour and truly affect positively people's working conditions. According to a scholar, to be effective, a code should comply with some requirements. Firstly, it must deal with a specific issue and must be accompanied by a specific process of implementation. Secondly, the code must be connected to the real need of the community to which it is addressed and it must also be in line with the ILO standards. Thirdly, the firm that adopts it must be really interested in its enforcement and must control its adherence to it. Finally, to make the adoption of the code effective, the company should accept to let an external body assess it[128]. It is obvious to think that an individual code would lack in efficacy if let to self-monitoring while it would be more effective if controlled by independent bodies. Individual codes of conduct which are in force nowadays lack three particular elements

> a minimum degree of consensus on the content of uniform global standards; reliable and consistent reporting practices that are globally standardized, and independent verification and monitoring mechanisms that also meet minimum standards agreed upon at a global level[129].

However, corporate individual codes of conduct are not the only non-binding regulatory mechanisms existing. Another kind of corporate regulation stems from the global standards for corporate activity.

2.1.3. | MNEs Global Codes of Conduct

The Global Standards are instruments of soft law and their adoption is voluntary. In this regard, they are similar to corporate codes of conduct, as there is not a legal binding commitment to endorse them. The main peculiarity about them, is that they are drafted by global intergovernmental organisations. The best-known examples of these codes are those passed by the United Nations, among which, the 1990 *Draft UN Code of Conduct on Transnational Corporations* and the *Global Compact*. Others important codes are the *OECD Declaration on International Investment and*

[128] J. MURRAY, *Corporate Codes of Conduct and Labor Standards*, International Labour Organization, 3rd May 1998, p. 2, available at: *http://www.actrav.itcilo.org/actrav-english/telearn/global/ilo/guide/jill.htm*

[129] A. DE JONGE, *Transnational Corporations and international law. Accountability in the global business environment*, Corporations, Globalisation and the Law, Cheltenham, Edwar Edgar UK, 2011, p. 27.

Multinational Enterprises and the *ILO Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy*. We will now go deeper into these mechanisms.

OECD Guidelines for Multinational Enterprises

The Organisation for Economic Co-operation and Development was born in 1960, thanks to the efforts of the US, Canada, and eighteen European countries. These countries joined in an organization which should have focused on the promotion of development globally. The OECD passed its *Guidelines for Multinational Enterprises* in 1976. The guidelines are part of the *OECD Declaration on International Investment and Multinational Enterprises* and they represent a set of recommendations addressed to OECD member countries. The nature of the Guidelines is expressed in the Guidelines foreword, where it is stated that

> The OECD Guidelines for Multinational Enterprises are recommendations addressed by governments to multinational enterprises operating in and from adhering countries,. They provide non-binding principles and standards for responsible business conduct in a global context consistent with applicable laws and internationally recognised standards. The Guidelines are the only multilaterally agreed and comprehensive code of responsible business conduct that governments have committed to promoting[130].

The aim of these Guidelines is to set a variety of standards which should then be endorsed by corporations and whose aim is guiding their activities. Or better, the Guidelines "provide voluntary principles and standards for responsible business conduct consistent with applicable laws and internationally recognised standards"[131]. Nonetheless, it is important to underline that the Guidelines cannot bypass the State's law. In fact, at the very beginning of the Guidelines outlined that "obeying domestic law is the first obligation of enterprises. The *Guidelines* are not a substitute for nor should they be considered to override domestic law and regulation"[132]. The OECD Guidelines face different topics, among them: general policy, human rights, the environment, bribery competition. The text of the guidelines has not remained fixed during the years, as it has been revised many times. In addition to this, the OECD

[130] OECD Guidelines for Multinational Enterprises, 2011 edition, p. 3, available at: *http://www.oecd.org/daf/inv/mne/48004323.pdf*
[131] *Ibid*., p. 13.
[132] *Ibid*., p. 17.

started publishing an annual report discussing adhering countries' behaviour in relation to the Guidelines' statements. If any matters connected to the Guidelines might arise, it would been dealt with by the *Committee on International Investment*, which is the result of the merging of the *Committee on International Investment and Multinational Enterprises* and of the *Committee on Capital Movements and Invisible Transactions*, which took place in April 2004. One of the roles of the Committee is to implement the OECD 1976 Declaration. As far as the enforcement of the Guidelines and the resolution of any kind of issue related to them and business is concerned, each member state is asked to set *National Contact Points* (hereinafter NCPs). According to the OECD website, their role is to "further the effectiveness of the Guidelines by undertaking promotional activities, handling enquiries, and contributing to the resolution of issues that arise from the alleged non-observance of the Guidelines in specific instances"[133]. The capability of the Guidelines to reach their aims is strictly linked to strong collaborative attitudes. It is mainly for this reason that the NCPs' goal is also to increase the relationships existing between, among the many, workers organisations, NGOs, and business representative. Moreover, each country NCP must collaborate with those of other countries. A country's NCP must be organised in a way that allows it to handle a huge range of issues. Each NCP must be impartial and has to regularly meet with the other NCPs each year. These meetings usually occur in June and are fundamental as they help new issues to emerge. During these meetings NCPs are asked to report to the OECD Investment Committee and to share their experiences. In practice, the NCPs represent a ground in which to discuss and assist stakeholders facing issues linked to the violation of the OECD *Guidelines*, but they are not judicial bodies. The NCPs must deal with alleged instances of non-observance of the *Guidelines* arising from any party. When facing an instance, NCPs first assess the problem and decide if it requires further analysis. If they accept to examine the issue more in detail, they manage to solve it through consensual means. Finally they raise awareness of the problem by drafting reports and statements. In particular, with regard to issues that, according to them, do not require further examination the NCPs issue a statement. When parties reach an agreement on the problem the NCPs issue a report. Finally, when the parties do not reach an agreement the NCPs issue again a statement[134].

[133] OECD website, available at: *http://mneguidelines.oecd.org/ncps/*
[134] OECD Guidelines for Multinational Enterprises, 2011 edition, p. 73, available at: *http://www.oecd.org/daf/inv/mne/48004323.pdf*

Therefore, the NCPs adopt an informal problem-solving method. In addition, they must spread knowledge of the *Guidelines* and of their implementation. Nonetheless, their effectiveness is negatively affected by the reluctance of many MNEs to assess their adherence to them in their annual report[135]. Unfortunately, it seems that, as an author asserts, "the OECD views the Guidelines as a 'problem solving' mechanism rather than a means of holding TNCs to account"[136].

ILO Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy

A mechanism similar to the Guidelines is represented by the *ILO Tripartite Declaration*[137], whose name reflects the tripartite structure of the organization itself, which represents governments, business and labour. This declaration arose from the need to control and regulate MNEs activities, which begun being discussed in the 1960s and 1970s. Its negotiating process started in 1972 and it was finally adopted by the *ILO Governing Body* in 1977. This body has a limited membership of governments, workers and employers and, as a result, possesses a weaker legal status[138]. The *Tripartite Declaration* is addressed to ILO member countries and it is reinforced by a set of international labour Conventions and Recommendations which the countries adhering to the Tripartite Declaration have to respect. The goal of this declaration is to establish a set of guidelines useful for, above all, workers and governments, and related to different topics among which employment, workers' life and working conditions. As the declaration itself states

> The aim of the Tripartite Declaration of Principles is to encourage the positive contribution which multinational enterprises can make to economic and social progress and to minimize and resolve the difficulties to which their various operations may give rise, taking into account the United Nations resolutions advocating the establishment of a New International Economic Order, as well as subsequent developments

[135] J. MURRAY, *Corporate Codes of Conduct and Labor Standards*, International Labour Organization, 3rd May 1998, p. 11, available at: *http://www.actrav.itcilo.org/actrav-english/telearn/global/ilo/guide/jill.htm*

[136] A. DE JONGE, *Transnational Corporations and international law. Accountability in the global business environment*, Corporations, Globalisation and the Law, Cheltenham, Edwar Edgar UK, 2011, p. 42.

[137] ILO Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy, 1977.

[138] See n. 135 above, p. 29.

> within the United Nations, for example, the Global Compact and the Millennium Development Goals[139].

This declaration, together with the *ILO Declaration of Fundamental Principles and Rights at Work*, which was adopted by the ILO in June 1998, are the two ILO-drafted guidelines addressed to corporations facing social policy and labour practices issues. In particular, it deals with basic labour issues such as employment, training of workers, safety and health at work, the minimum working age and the freedom of association. The implementation of the *Tripartite Declaration* is controlled by an *ILO Committee on Multinational Enterprises*, whose task is "to conduct periodic studies on labour issues involving MNEs"[140]; to "interpret the declaration though a disputes procedure"[141] and to collect the periodic reports completed by states "on the implementation of the declaration on the basis of questionnaires sent through governments to unions and business organizations"[142]. In fact, in order to make the enforcement of the declaration more effective, governments, workers and employers' organizations of adhering countries are asked to adopt a procedure through which they have to ask to periodical questions referring to its implementation. The ILO Governing Body then has to assess the results of this procedure, which are finally made available to everybody in an ILO summary. In case a country should have doubts regarding the application of the declaration, the ILO established a procedure in 1981, through which it is possible to question the ILO how to interpret its provisions. The effectiveness of the Declaration may be negatively affected by the declaration promotion of the primacy of national law. In fact, the Declaration states that

> All the parties concerned by this Declaration should respect the sovereign rights of States, obey the national laws and regulation, give due consideration to local practices and respect relevant international standards[143].

It is now useful to compare the OECD Guidelines and the ILO Declaration. The principal difference is that while the Guidelines are addressed to MNEs operating in the territories of member countries, the Tripartite Declaration is addressed to MNEs

[139] ILO Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy, 1977, p. 2, para 2.
[140] P. T. MUCHLINSKI, *Multinational Enterprises and the Law*, Oxford, the Oxford International Law Library, 2007, p. 475.
[141] *Ibidem*.
[142] *Ibidem*.
[143] See n. 139 above, para 8, p. 3.

and to governments, employers' and workers' organizations of both home and host countries. Moreover, the ILO code is more detailed than the OECD one, and the OECD Guidelines refer only briefly to human rights. On the other hand, the two mechanisms share three important characteristics. They can be voluntarily adopted, they are both addressed to MNEs and they both respect the supremacy of national law. In addition to this, it could be added that both codes' provisions have a general nature. Finally, both codes are still in effect and can be considered as a reference point when studying MNEs regulation.

UN Code of Conduct on Transnational Corporations

In the same years in which the OECD and the ILO were working to draft their codes, the United Nations too were focusing on the same need. Indeed, the UN made clear that it was essential to start dealing with business related issues and with the regulation of corporate behaviour. Therefore, by the 1960s, the UN agencies started working on the development of a code addressed to corporations which yet failed. Nonetheless, the UN Economic and Social Council (ECOSOC) established the *Commission on Transnational Corporations* in 1974. This Commission was charged with the role of drafting the *UN Code of Conduct on Transnational Corporations*[144]. The result of this work was the drafting of a series of codes, which went on for sixteen years. Among them, the most fundamental are the 1983 and the 1990 codes. The *UN Code of Conduct on Transnational Corporations* was addressed to corporation, governments and, obviously, the UN. Its aim was to provide a set of provisions which should have guided MNEs activities and encouraged the development of the countries hosting corporate activities. In its 1983 version, paragraph seven of the Code stated that

> Transnational corporations shall/should carry on their activities in conformity with the development policies, objectives and priorities set out by the Governments of the countries in which they operate and work seriously towards making a positive contribution to the achievement of such goals at the national and, as appropriate, the regional level, within the framework of regional integration programmes[145].

[144] UN Doc E/1990/94, Draft Code of Conduct on Transnational Corporations, 1990.
[145] UN Doc E/1990/94, Draft Code of Conduct on Transnational Corporations, 1983 version, para 7, p. 4.

Moreover, the Code managed to favour the cooperation between states in any issue relating to MNEs. According to the provisions of this Code, corporations had to contribute to the development of the countries in which they were settled by collaborating with their governments. The governments, instead, had to favour the compliance with the Code throughout their territories and to report to the UN how they were actually implementing it. Finally, the UN Commission on Transnational Corporations had to stand as a reference point for the observance of the Code. It had to assess periodically its implementation worldwide and to report to the General Assembly the initiatives it took to enforce the provisions of the Code.

It is important to highlight that, as far as the field of employment, training, conditions of work and life and industrial relations are concerned, the Code relies on the ILO Tripartite Declaration.

With regard to the status of the Code, some wanted it to be legally binding where others were in favour of a voluntary Code. However, despite all the efforts of the Commission, the Code was never adopted and its drafting process was set aside in 1994. Nowadays, the *Commission on Transnational Corporations* no longer exists. Nevertheless, the Code is still said to have a normative value and it has contributed to the drafting of others UN based initiatives on the regulation of MNEs activities.

Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with regard to Human Rights

Between 1999 and 2003, a working group of the United-Nations Sub-Commission on the Promotion and Protection of Human Rights drafted the *Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with regard to Human Rights*[146]. Throughout the drafting process, the working group has benefited from the comments and adjustments that NGOs, business leaders and other personalities made to their text. Like the *Draft UN Code on Transnational Corporations*, the norms relies on the *ILO Tripartite Declaration*. In addition to this, they are based also on the *Universal Declaration of Human Rights*, the *International Covenant on Civil and Political Rights* and, finally, the *International Covenant* on *Economic, Social and Cultural Rights*. The *Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with regard to Human Rights* have to be considered as soft law instruments, even though their statements

[146] Doc.n. E/CN.4/Sub.2/2003/12/Rev.2 2 (2003)

may represent the starting point for the drafting of a treaty. The main aim of these *Norms* is to prevent the abuse of human rights by corporations and States. They take into account different human rights related fields, such as child labour, wages, working environment and workers' rights.

According to this document, MNEs should endorse the provisions of the *Norms* and control their internal application. They should also be open to self-evaluate themselves in the application of the norms and to adjust their violation in case it might occur. Governments, on the other hand, should take the norms as an example for the conduct of corporations residing in their countries. The United Nations, instead, have to oversee the adoption of the norms and to solve any kind of complaints coming from above norms' abuse or implementation. Finally, NGOs have the role of reporting on the norms' violations and also on the efforts to implement them. Thanks to the broad range of field they face, these *Norms* can be applied by any kind of enterprise and multinational corporation.

However, these *Norms* were not openly welcomed. In particular, "the business world was particularly offended by the suggestion that negative impacts of corporations activity required regulation at the international level"[147]. The *Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with regard to Human Rights* were adopted on 13 August 2003, but were then set aside.

Global Compact

UN Secretary-General Kofi Annan, launched the Global Compact project in January 1999. According to the UN Global Compact website, the Global compact is a "strategic policy initiative"[148] and it "works towards the vision of a sustainable and inclusive global economy which delivers lasting benefits to people, communities and markets"[149].

Under the Global Compact, MNEs, business organizations, public sector bodies, NGOs, academic institutions and other bodies are asked to adhere to and follow ten principles. This set of principles deal with labour standards, environment, human rights and anti-corruption. As a result, by signing up this principles, MNEs accept to

[147] A. DE JONGE, *Transnational Corporations and international law. Accountability in the global business environment*, Corporations, Globalisation and the Law, Cheltenham, Edwar Edgar UK, 2011, p. 34.
[148] United Nations Global Compact website, available at: *http://www.unglobalcompact.org/AboutTheGC/index.html*
[149] *Ibidem*.

render them part of all their operations and to report on their activities and implementation. The Global Compact principles relies on the *Universal Declaration of Human Rights*[150], the *ILO Tripartite Declaration*[151], the *Rio Declaration on Environment and Development*[152] and, finally, the *United Nations Convention Against Corruption*[153].

An important way of assuring the implementation of the Global Compact is given by an instrument named Communications on Progress (hereinafter COP), which was introduced in 2005. Through this mechanism, companies have to report annually their COP by employing specific indicators. Each company has then to put its COP on the Global Compact website. If a company does not act coherently with the Global Compact, its status changes and its participation then might risk ceasing.

Unlike the *Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with regard to Human Rights*, the Global Compact has been widely accepted at various intergovernmental contexts, among which also the G8. However, the Global Compact has been signed by a too limited number of MNEs.

ISO 26000:2010

After five years of negotiations, the International Organization for Standardization (hereinafter ISO) launched the ISO 26000 standard. It arose from the partnership of NGOs, industries, governments, labour organization and other bodies, which gave it a fundamental global consensus. The aim of this initiative, is to establish a standard through which business should be led in a responsible way. Not being addressed only to corporations, this ISO standard resembles the Global Compact. Moreover, unlike others ISO standards, it cannot be employed as a certification standard as it stands only as a guidance mechanism and it does not involve any kind of requirements. In fact, as an ISO brochure on ISO 26000 standard states

> ISO 26000 is not a management system standard. It is not intended or appropriate for certification purposes or regulatory or contractual use. Any offer to certify, or claims to be certified, to ISO 26000 would be a

[150] The Universal Declaration of Human Rights, 10 December 1948.
[151] ILO Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy, 1977.
[152] United Nations Conference on Environment and Development, Rio de Janeiro, 3-14 June 1992.
[153] United Nations Conventions Against Corruption, 31st October 2003.

> misrepresentation of the intent and purpose and a misuse of this International Standard[154].

The ISO 26000 standards faces seven different topics: organizational governance, human rights, labour practices, the environment, fair operating practices, consumer issues and community involvement and development.

Guiding Principles on Business and Human Rights

Professor John Ruggie was conferred the mandate as Special Representative of the Secretary General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises (SRSG) in 2005. This initiative led to the welcoming of the "Protect, Respect and Remedy" Framework addressed to business and human rights. His mandate was extended for two times and it finally ended in 2011. Professor John Ruggie proposed the Guiding Principles on Business and Human Rights: Implementing the United Nations 'Protect, Respect and Remedy' Framework, which was endorsed by the UN Human Rights Council on 16 June 2011. In their resolution, the United Nations decided to

> Establish a Forum on Business and Human Rights under the guidance of the Working Group to discuss trends and challenges in the implementation of the Guiding Principles and promote dialogue and cooperation on issues linked to business and human rights, including challenges faced in particular sectors, operational environments or in relation to specific rights or groups, as well as identifying good practices[155].

The global codes of conduct for MNEs are the most popular standards addressed to corporations. A common feature of all these mechanisms is their voluntary basis. In this regard, each corporation is free to comply with them and adopt them in its everyday practices.

To sum up, is easily follows that in the case of a violation of a code of conduct, it would be really hard for a corporation to be prosecuted and to undergo any kind of sanction.

[154] Social Responsibility – Discovering ISO 26000, available at: *http://www.iso.org/iso/discovering_iso_26000.pdf*

[155] Available at: *http://www.business-humanrights.org/media/documents/un-human-rights-council-resolution-re-human-rights-transnational-corps-eng-6-jul-2011.pdf*

2.1.4. | Core Labour Standards

The Conference reaffirms the fundamental principles on which the organization is based and, in particular, that :

(a) labour is not a commodity;
(b) freedom of expression and of association are essential to sustained progress;
(c) poverty anywhere constitutes a danger to prosperity everywhere;
(d) the war against want requires to be carried on with unrelenting vigour within each nation, and by continuous and concerted international effort in which the representatives of workers and employers, enjoying equal status with those of governments, join with them in free discussion and democratic decision with a view to the promotion of the common welfare[156].

The ILO was born at the Versailles Conference of 1919, which was held after the end of First World War. This Conference was marked by the will of States to shape a new environment for international relations. This aim could be reached by establishing international organisations which would have made the world a peaceful place. In particular, the ILO was created to respond to work related needs, among which the need to improve workers' conditions, to deal with the growing cases of workers' uprisings and to bring economic benefits to society[157]. The ILO became a UN Special Agency in 1946.

The ILO adopted its first six Conventions during the first Labour Conference which was held in Washington in 1919. However, the period between the two World Wars proved to be a prolific period, as sixty-seven Conventions and sixty-six Recommendations were adopted[158].

All of ILO Conventions and Recommendations, together with the *Universal Declaration of Human Rights*[159], the *European Social Charter*[160] and all the bilateral agreements focused on foreign workers' rights, have created International Labour Law. Obviously, the *International Labour Organization Constitution*[161] is one of the most powerful sources of International Labour Law. Furthermore, the ILO has had a vital role in the creation of labour standards.

[156] Declaration concerning the aim and purposes of the International Labour Organisation (Declaration of Philadelphia), 10th May 1944.
[157] A. PAGNETTI ZANOBETTI. *Il Diritto Internazionale del Lavoro*. *Norme Universali Regionali e comunitarie*, Bologna, Patron Editore, 2005, pp. 31-36.
[158] *Ibid*., p. 36.
[159] The Universal Declaration of Human Rights, 10 December 1948.
[160] European Social Charter, 1966.
[161] Constitution of the International Labour Organization, 1919. The Constitution was revised in 1922.

Labour standards can be defined as important guidelines addressed to governments with the aim of implementing international labour law and social policy in their countries' economic activities. They stand as a reference point for the development of local and national policies and for the creation of administrative structures aimed at regulating working conditions. Labour standards take the form of international Conventions and Recommendations and they represent the basis for workers' social protection. According to the ILO official website, labour standards are

> Legal instruments drawn up by the ILO's constituents (governments, employers and workers) and setting out basic principles and rights at work. They are either conventions, which are legally binding international treaties that may be ratified by member states, or recommendations, which serve as non-binding guidelines[162].

ILO labour standards cope with different aspects of labour markets and they can be divided into six categories. The first of them is the *respect for fundamental human rights*. This category is linked, among the others, to ILO Convention number eighteen-seven of year 1948[163], according to which workers and employers are recognised the right to take part in any kind of representative organization, and also to the ILO twenty-nine Convention of 1930[164], which forbids forced labour. The second category regulated by ILO labour standards is the *protection of wages*, which is regulated by different Conventions setting minimum wages, among which ILO Convention twenty-six of 1928[165]. *Employment security* is the third field which labour standards define. This is a wide topic which deals with all the security aspects of labour. For instance, ILO Convention one hundred and fifty-eight of 1982[166], specifies how employment contracts can end, in order to provide workers with a significant level of employment security. The fourth category of labour standards faces the widest aspect of labour, that is, *working conditions*. This topic ranges from the minimum age for the admission to employment and the maximum admitted hours of work a week, to the need to train workers and safeguard them from dangerous aspects of their activity. For instance, from the use of hazardous products. *Labour market and social policy* represent the fifth category of ILO labour standards. Its aim is to highlight the importance of pursuing good national policy interested in

[162] International Labour Organization website, available at: *http://www.ilo.org/global/standards/introduction-to-international-labour-standards/conventions-and-recommendations/lang--en/index.htm*
[163] Convention Co87 – *Freedom of Association and the Right to Organize Convention*, 1948 (No. 87).
[164] Co29, *Forced Labour Convention*, 1930 (No. 29).
[165] Co26 – *Minimum Wage-Fixing Machinery Convention*, 1928 (No. 26).
[166] C158 – *Termination of Employment Convention*, 1982 (No. 158).

improving labour environments and in assuring workers a good living standard. Finally, the sixth category of labour standards deals with the need to develop good *industrial relations*. An example of ILO Convention related to this field is Convention one hundred forty-four of 1976[167], whose goal is favouring the application of labour standards through the adoption of tripartite consultative procedures.

The ILO Constitutions defines a narrower category of labour standards: Core Labour Standards. These standards are the funding principles of workers' protection policy and they are "a framework of internationally agreed conventions which determine minimum expectations of rights at work"[168]. Indeed, it is crucial to identify this smaller group of rights as they refer to what we can define as basic human rights.

As far as the respect of human rights at work is concerned, the ILO Governing Body has signalled the importance of eight ILO Conventions. The ILO strived to get these Conventions universally ratified through a 1995 campaign. These conventions can be divided into four category. The first one is related to workers' freedom of association and is dealt with by the *Freedom of Association and Protection of the Right to Organize Convention* of 1948 and the *Right to Organize and Collective Bargaining Convention* of 1949. The second category cope with the abolition of forced labour and is connected to the *Forced Labour Convention* of 1930 and the *Abolition of Forced Labour Convention* of 1957. The third topic analysed by these Convention is the need for equal opportunities in the workplace. This is faced by ILO Convention on *Equal Remuneration* of 1951 and by the *Discrimination (Employment and Occupation) Convention* of 1958. Finally, the two final conventions deal with the abolition of child labour, and they are the *Minimum Age Convention* of 1973 and the *Worst Forms of Child Labour Convention* of 1999.

Furthermore, the ILO Governing Body highlighted the importance of four more conventions in defining labour standards and managed to persuade governments to ratify them. These conventions are: the *Labour Inspection Convention* of 1947, the *Employment Policy Convention* of 1964, the *Labour Inspection (Agriculture) Convention* of 1969 and the *Tripartite Consultation (International Labour Standards) Convention* of 1976.

[167] C144 – *Tripartite Consultation (International Labour Standards) Convention*, 1976 (No. 144).
[168] S. GIBBONS, S. LADBURY, *Core Labour Standards – Key Issues and a Proposal for a Strategy*, a report submitted to the UK department for International Development, January 2000.

All these Conventions being considered, the fundamental ILO instrument setting *core labour standards* is the 1998 ILO *Declaration of Fundamental Principles and Rights at Work*[169]. The development of this Declaration was due to the 1995 United Nations World Summit on Social Development which was held in Copenhagen. Among its goals, the Summit wanted to achieve full employment worldwide and the protection of workers' basic rights. Finally, during this Summit the four areas of principles and rights at work were highlighted. Thanks to this, the ILO Declaration of 1998 was later born. According to this Declaration, within the group of human rights at work, four fundamental areas defining core labour standards can be identified. This Declaration expects Member States to respect these rights, even in the case in which they did not ratify some of above Conventions. Indeed, point two of the Declaration affirms that

> All Members, even if they have not ratified the Conventions in question, have an obligation arising from the very fact of membership in the Organization to respect, to promote and to realize, in good faith and in accordance with the Constitution, the principles concerning the fundamental rights which are the subject of those Convention [...][170].

The four areas are: freedom of association and the effective recognition of the right to collective bargaining[171], elimination of all forms of forced or compulsory labour[172], the effective abolition of the worst forms of child labour and implementation of minimum wages of employment[173] and, finally, the elimination of discrimination in respect of employment and occupation[174]. Year 1999 marked the adoption of another fundamental ILO Convention, the one banning the worst forms of child labour.

In addition to the ILO efforts, the OECD too published a study on core labour standards in 1996. This study was entitled *Trade, Employment and Labour Standards: a Study of Core Workers' Rights and International Trade*. According to the OECD study, the eight ILO Conventions mentioned above represent the basis of consensus among the ILO Member states in defining core labour standards.

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[169] ILO Declaration on Fundamental Principles and Rights at Work, 1998.
[170] ILO Declaration on Fundamental Principles and Rights at Work, 1998, para 2.
[171] See Freedom of Association and Protection of the Right to Organize Convention (1948) and Right to Organize and Collective Bargaining Convention (1949).
[172] See Forced Labour *Convention (1930)* and Abolition of Forced Labour Convention (1957).
[173] See Minimum Age Convention (1973) and Worst Forms of Child Labour Convention (1999).
[174] See Equal Remuneration Convention (1951) and Discrimination (Employment and Occupation) Convention (1958).

The ILO and OECD efforts in protecting and getting a consensus on labour standards, were rewarded at the 1996 first World Trade Organization Ministerial Meeting in Singapore. At this meeting, the ILO was recognised as the body whose role was setting and coping with labour standards. In addition to this, core labour standards were included in the Summit final Ministerial Statement. In fact, the Ministerial Statement stressed that

> We renew our commitment to the observance of internationally recognized core labour standards. The International Labour Organization (ILO) is the competent body to set and deal with these standards, and we affirm our support for its work in promoting them. We believe that economic growth and development fostered by increased trade and further trade liberalization contribute to the promotion of these standards. We reject the use of labour standards for protectionist purposes, and agree that the comparative advantage of countries, particularly low-wage developing countries, must in no way be put into question. In this regard, we note that the WTO and ILO Secretariats will continue their existing collaboration[175].

The importance of core labour standards was underlined also in the UK 1997 *White Paper on International Development*[176]. This paper focused mainly on the need to eliminate poverty and to achieve global development. According to this paper, sustainable development is a way to eliminate poverty. Moreover, the paper stressed the correlation between core labour standards and poverty elimination. Showing the importance of sustainable development, this paper takes into consideration also the Rio Declaration of 1992[177].

To sum up, *core labour standards* represent basic human rights, identified by international conventions and recommendations, which must be respected in the workplace everywhere in the world, in both developing and developed countries and in every kind of work. We cannot avoid highlighting how also corporate responsibility can bring to the respect of these standards. In fact, the 1999 Global Compact, the 2000 OECD Guidelines on Multinational Enterprises and also the ILO Tripartite Declaration analysed workers' rights. It goes without saying that every

[175] Singapore Ministerial Declaration, adopted on 13 December 1996, available at: *http://www.wto.org/english/thewto_e/minist_e/min96_e/wtodec_e.htm*

[176] UK Government, Eliminating World Poverty: A Challenge for the 21st Century. White Paper on International Development, November 1997, available at: *http://www.bristol.ac.uk/poverty/downloads/keyofficialdocuments/Eliminating%20world%20poverty%20challenge.pdf*

[177] UN, The Rio Declaration on Environment and Development, 12 August 1992, available at: *http://www.un.org/documents/ga/conf151/aconf15126-1annex1.htm*

efforts coming from every business' related agency or organization towards the promotion and adoption of these standards would enable workers' of every part of the world to work in better conditions and live a better life. It is not only in favour of workers' conditions that these standards should be respected. Indeed, it has been proved that there is a correlation between the respect of workers' rights and productivity. In fact, when working in good conditions and enjoying human respect a worker seems to be more motivated and works better. This inevitably bring benefits to the economy of the firm in which he works.

Throughout the years the ILO has regulated many aspects of work, from wages to holidays, from working hours to part-time or overnight work. The field of work is so wide that its regulation will have to be updated constantly and through the help of both workers, employers and governments of every country.

2.2. | Corporate Social Responsibility

> *Business leaders today say their companies care about more than profit and loss, that they feel responsible to society as a whole, not just to their shareholders. Corporate social responsibility is their new creed, a self-conscious corrective to earlier greed-inspired visions of the corporation. Despite this shift, the corporation itself has not changed. It remains, as it was at the time of its origins as a modern business institution in the middle of the nineteenth century, a legally designated 'person' designed to valorize self-interest and invalidate moral concern*[178].

The negative impact of business activities on the people and on the world and the need to conduct business in a responsible way has been the focus of different kind of studies throughout the history of commercial activity. "Ancient Chinese, Egyptian, and Sumerian writings often delineated rules for commerce to facilitate trade and ensure that the wider public's interests were considered"[179]. At first, to counterbalance their negative operations, corporate leaders started engaging in philanthropy. Indeed, throughout the centuries, corporations have made donations to charity organizations and have helped in creating artistic and religious buildings addressed to their communities. However, with the beginning of the twentieth century, it was clear that this kind of donations was no longer enough. Corporations started being felt as a source of damage and they were accused of bringing more

[178] J. BAKAN, *The Corporation. The pathological pursuit of profit and power*, London, Constable, 2005, p. 28.
[179] W. B. WERTHER, JR. D. CHANDLER, *Strategic Corporate Social Responsibility. Stakeholders in a global environment*, Second Edition, US, SAGE Publications, 2011, pp. 9-10.

harm than benefits, especially to the environment and to the people living in it. As a result to this, corporations begun developing a sort of responsibility towards society and to add to their activities a new value: *corporate social responsibility*[180].

Business writers started dealing with corporate social responsibility at the beginning of the twentieth century[181]. After the first decades of studies, this concept gained more power after the end of the Second World War, when people started being persuaded that corporations possessed too much power and that they were conducting their economic activities unchallenged. As an author maintained in her book, at its basis, the corporate social responsibility movement was intimately linked to this question: "did business have any inherent responsibilities towards society?"[182]. Indeed, before the accuses coming from every part of civil society of causing negative externalities with their business, many corporate leaders started developing their CSR agenda. Nowadays

> corporations boast about social and environmental initiatives on their Web sites and in their annual reports. Entire departments and executive positions are devoted to these initiatives. The business press runs numerous features on social responsibility and ranks corporations on how good they are at it. Business schools launch new courses on social responsibility, and universities create centres devoted to its study [...][183].

Despite its long history, CSR started being addressed as a social movement only during the last decades, when the harm deriving from corporate activities became apparent to everyone, thanks to a more conscious attitude of consumers towards the corporate way of conducting their activities and thanks also to the global situation of interconnection created by the diffusion of internet and globalisation[184]. The CSR movement arose also from the anti-globalisation and anti-capitalistic campaigns, which focused on the excessive amount of power possessed by corporations[185]. In addition to this, corporations were accused of exploiting the most vulnerable people,

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[180] See J. BAKAN, *The Corporation. The pathological pursuit of profit and power*, London, Constable, 2005, pp. 31-33 and J. A. ZERK, *Multinationals and Corporate Social Responsibility. Limitations and Opportunities in International Law*, Cambridge Studies in International and Comparative Law, Cambridge, Cambridge University Press, 2006, p. 15.

[181] R. MUSHKAT, *Corporate Social Responsibility, International Law, and Business Economics: Convergences and Divergences*, Vol. 12, 55, 2010.

[182] J. A. ZERK, *Multinationals and Corporate Social Responsibility. Limitations and Opportunities in International Law*, Cambridge Studies in International and Comparative Law, Cambridge, Cambridge University Press, 2006, p. 15.

[183] J. BAKAN, *The Corporation. The pathological pursuit of profit and power*, London, Constable, 2005, p. 32.

[184] See n. 181 above, p. 21.

[185] See n. 182 above, pp. 19-22.

of causing environmental degradation and of developing illegal market practices which affected people rights and brought benefits only to corporate leaders.

Even though every corporate leader seems to openly embrace CSR today, this has always been a voluntary choice. Nowadays, the change in the attitude towards it derives from the fact that an environmental and social damaging conduct of a corporation would distance consumers from its products. It is mainly for this reason that many corporations manage hardly to persuade consumers of their values and good intentions. As a scholar affirms, "even President Bush now says that corporate responsibility is a fundamental business value, indeed a patriotic duty"[186].

Nowadays companies race with each others to be socially responsible and show their efforts through different channels. For instance, many firms have developed think tanks, bodies and press aimed at describing their CSR initiatives and achievements.

However, it is now fundamental to give some popular definitions of what CSR actually is.

To begin with, everybody would agree that the term *corporate social responsibility* alone easily makes us understand what we are talking about, that is, a kind of business characterised by a socially responsible behaviour. However, we find it useful to report some international official definitions.

According to the definition given by the new policy on CSR issued by the European Community in 2001, CSR is "a concept whereby companies integrate social and environmental concerns in their business operations and in their interaction with their stakeholders on a voluntary basis"[187]. In the same year, the EU published the European Green Paper[188], in which CSR is defined as "a concept whereby companies decide voluntarily to contribute to a better society and cleaner environment"[189]. Later on, in October 2011, the EC published the *new policy on corporate social responsibility*[190], which brought to a new definition of CSR. In fact, in this document,

[186] J. A. ZERK, *Multinationals and Corporate Social Responsibility. Limitations and Opportunities in International Law*, Cambridge Studies in International and Comparative Law, Cambridge, Cambridge University Press, 2006, p. 33.
[187] COM(2001)366.
[188] COMMISSION OF THE EUROPEAN COMMUNITY, *Green Paper – Promoting a European Framework for Corporate Social Responsibility*, Brussels, 18th July 2001.
[189] *Ibid*., para 8.
[190] Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions. *A renewed EU strategy 2011-14 for Corporate Social Responsibility*. Brussels, 25th October 2011, COM(2011) 681 final.

CSR was described as "the responsibility of enterprises for their impacts on society"[191]. Moreover, it was stated that

> To fully meet their corporate social responsibility, enterprises should have in place a process to integrate social, environmental, ethical, human rights and consumer concerns into their business operations and core strategy in close collaboration with their stakeholders[192].

This policy includes the implementation of an agenda for actions related to CSR. In particular, among the aims of this agenda, there is the goal of spreading CSR and increasing its visibility, of highlighting the importance of CSR policies, of including CSR into education, training and research and of bringing European and global approaches to CSR closer, in particular by focusing on, among the others, the ILO Tripartite Declaration and the OECD Guidelines.

In addition to this, according to the European Community there are strong links between CSR and competitiveness. This idea has been reinvigorated also by the EU decision of committing to become "the most competitive and dynamic knowledge-based economy in the world, capable of sustainable economic growth with more and better jobs and greater social cohesion, and respect for the environment by 2010"[193] during the Lisbon European Council meeting of March 2000.

From another point of view, the United Kingdom government Department for Business Innovation & Skills gives this definition of corporate social responsibility

> Corporate responsibility – the increasingly more acknowledged term for corporate social responsibility – is the responsibility of an organisation for the impacts of its decisions and activities on society and the environment through transparent and ethical behaviour above and beyond its statutory requirements[194].

Both the UK government and the European Union have always been persuaded that CSR should be conceived as voluntary, but they differ in the fact that while the UK

[191] Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions. *A renewed EU strategy 2011-14 for Corporate Social Responsibility*. Brussels, 25th October 2011, COM(2011) 681 final, para 3.1.
[192] *Ibidem*.
[193] *Lisbon European Council 23rd and 24th March 2000*, Presidency Conclusion, paragraph five.
[194] *Corporate Responsibility: a call for review*, Department for Business Innovation & Skills, June 2013.

government considers CSR as separated from the law, the EU consider respect and implementation of CSR as being part of it[195].

According to a United Nations paper entitled "CSR and Developing Countries: what scope for government action?"[196], "the concept of corporate social responsibility (CSR) aims both to examine the role of business in society, and to maximise the positive societal outcomes of business activity"[197]. Instead the World *Business Council for Sustainable Development* defined CSR as "the continuing commitment by business to contribute to economic development while improving the quality of life of the workforce and their families as well as the community and society at large"[198].

Moreover, the OECD website, while managing to answer to the question "what is CSR?", maintains that

> Corporate responsibility involves the search for an effective "fit" between business and the societies in which they operate. [...] The core element of corporate responsibility concerns business activity itself – the function of business in society is to yield adequate returns to owners of capital by identifying and developing promising investment opportunities and, in the process, to provide jobs and to produce goods and services that consumers want to buy. [...] However, corporate responsibility goes beyond the core function of conducting business[199].

In addition, according to a 2006 ILO report, CSR

> is a way in which enterprises give consideration to the impact of their operations on society and affirm their principles and values both in their own internal methods and processes and in their interactions with other actors. CSR is a voluntary, enterprise-driven initiative and refers to activities that are considered to exceed compliance with the law[200].

Many governments, NGOs, international bodies and writers have attempted to give their own definition of CSR. Finally, according to an author CSR

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[195] J. A. ZERK, *Multinationals and Corporate Social Responsibility. Limitations and Opportunities in International Law*, Cambridge Studies in International and Comparative Law, Cambridge, Cambridge University Press, 2006, p. 30.
[196] UN, *CSR and Developing Countries: what scope for government action?*, Innovation Briefs, February 2007.
[197] *Ibid*., p. 1.
[198] CSR: meeting changing expectations, p. 3, available at: *http://content.wbcsd.org/pages/edocument/edocumentdetails.aspx?id=82&nosearchcontextkey=true*
[199] OECD website, available at: *http://www.oecd.org/corporate/mne/corporateresponsibilityfrequentlyaskedquestions.htm*
[200] ILO, Subcommittee on Multinational Enterprises, *InFocus Initiative on Corporate Social Responsibility (CSR)*, Geneva, March 2006.

> refers to the notion that each business enterprise, as a member of society, has a responsibility to operate ethically and in accordance with its legal obligations and to strive to minimise any adverse effects of its operations and activities on the environment, society and human health[201].

From their side, two different scholars affirmed that "CSR indeed covers a wide range of issues and topics such as human rights, health, renewable energy, child labour and eco-efficiency. It is regarded positively, yet it is often not integrated in the core business of an organization"[202].

Defining *corporate social responsibility* is a very hard task. It is a very popular concept to which a different variety of issues are addressed at the moment. Even though it appeared during the first decades of the twentieth century, it has not been widely developed until the middle of the century. The debate over CSR arose due to the necessity of considering not only shareholders' interests, but also those of the stakeholders'. Obviously, the debate proved to be more important when corporations' excessive power became apparent to everyone, precisely during the 1960s and 1970s.

To understand what we refer to CSR today, it is fundamental to take into consideration the words *sustainability* and *responsibility*. While "sustainability refers to a normative perspective on the internal and external environment regarding tangible and intangible resources"[203], "responsibility nowadays refers not only to economic, but also to social and environmental responsibility"[204]. These two words mark a strong difference in the debate over MNEs. In fact, while at first corporations' only responsibility was their economic survival, during the 1970s it became clear that corporations should endorse some responsibilities also towards their stakeholders. As an example, according to this new view, MNEs had to make sure that the negative impacts of their activities were drastically reduced and always balanced. On the other hand, the term sustainability is obviously linked to the survival of the environment. It was first dealt with by the Club of Rome in 1972, in a

[201] J. A. ZERK, *Multinationals and Corporate Social Responsibility. Limitations and Opportunities in International Law*, Cambridge Studies in International and Comparative Law, Cambridge, Cambridge University Press, 2006, p. 32.
[202] J. JONKER, M. DE WITTE, *Management Models for Corporate Social Responsibility*, Berlin, Heidelberg - Springer; 2006, p. 1.
[203] *Ibid*., p. 2.
[204] *Ibidem*.

report entitled *The Limits to Growth*[205]. This report focused on global sustainability taking into consideration the food, population, industrial production, pollution and consumption of non-renewable natural resources variables. In addition to this, it was after the *Rio Conference on Environment and Sustainable Development* which was held by the United Nations in 1992 that MNEs were asked to respect basic human and workers' rights, and to respect the environment in their operations. Indeed, this Conference provided the concept of sustainability with strong relevance. Before the Rio Conference, the Global Compact had arranged the Corporate Sustainability Forum which took place in 2012. During this Forum, seven different sustainability areas were discussed by different personalities, such as business leaders and governments. The areas discussed where those of energy and climate, water and eco-systems, agriculture and food, economics and finance, social development, urbanization and cities and, finally, education for sustainable development and responsible management education[206].

While at the very beginning CSR was understood as a sort of philanthropic initiative, nowadays, especially thanks to international meetings such as the above mentioned Rio Conference, there seems to be a general agreement on the fact that CSR should be considered more globally and to refer to general practices of good business that corporations should endorse in their everyday operations.

When talking about CSR everybody commonly thinks at corporations. However, corporate social responsibility should also be the focus of governments. Indeed, governments should create an environment which favours the spread of CSR practices and should also develop a regulatory framework which expects any kind of firms to behave responsibly and in accordance with international labour standards. Indeed, the relationship between law and corporate social responsibility has never been clearly defined. This issue has been termed *voluntary versus mandatory* debate. As an author has affirmed

> The difficulties in defining CSR (and its relationship with the law) also reflect a lack of agreement about the role the law should play in this area in future. [...] On the one hand, representatives of companies and industry organisations argue that CSR should not be regulated. Regulation, it is argued, would stifle innovation and damage national 'competitiveness'.

[205] D. H. MEADOWS, D. L. MEADOWS, J. RANDERS, W. W. BEHRENS III, *The Limits to Growth*, New York: New York American Library, 1972, available at: *http://www.donellameadows.org/wp-content/userfiles/Limits-to-Growth-digital-scan-version.pdf*

[206] M. PROKSCH, *From CSR to Corporate Sustainability: moving the CSR Agenda to the Next Level in Asia and the Pacific*, available at: *http://business.un.org/en/documents/11132*

> [...] Many NGOs, on the other hand, remain unconvinced that the 'business case' for CSR is sufficient in itself as a guarantee of responsible corporate behaviour[207].

This issue easily brings to the problem of deciding if CSR should be a voluntary or mandatory practice, that is, if it should be a practice that corporations may decide or not to comply with or, on the other hand, if corporation should be legally bounded to endorse it.

This issue brings us to the development of another argument: why should companies comply with CSR practices? There are several answers to this question.

Firstly, it has been demonstrated that workers' productivity increases if their working environment is safe and motivating. Companies' leaders should constantly train and take care of their workers, showing them that they appreciate their human and labour values and that they respect and safeguard them. This would bring workers' closer to the firm they work in, and would also prevent companies from changing their workforce due to its dissatisfaction[208].

Secondly, endorsing CSR practices would increase the reputation of the company worldwide and would benefit also the brand image of the firm[209]. As an example, many companies are striving to spread their green brand image, to show their commitment in respecting the environment. This is linked to the fact that nowadays many consumers are interested in the way corporations conduct their business and many of them also refuse companies which, for instance, make use of child labour or damage the environment for the sake of their own profit.

Another reason which should lead companies to comply with CSR practices is the fact that even costumers tend to be more loyal to a company that proves its social responsible commitment[210]. This would safeguard the business of the firm.

In addition to the above examples, there are many other reasons why companies should endorse CSR. The most obvious of them, is given by the idea that every company should feel the need to behave responsibly. Every company should

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[207] J. A. ZERK, *Multinationals and Corporate Social Responsibility. Limitations and Opportunities in International Law*, Cambridge Studies in International and Comparative Law, Cambridge, Cambridge University Press, 2006, p. 33.

[208] Sustainable Development through the Global Compact, *International Instruments and Corporate Social Responsibility. A booklet to accompany Training. The Labour Dimension of CSR: from Principles to Practice*, Italian Ministry of Foreign Affairs, 2007, p. 2, available at: *http://www.ilo.org/wcmsp5/groups/public/---ed_emp/---emp_ent/---multi/documents/instructionalmaterial/wcms_101247.pdf*

[209] *Ibidem*.

[210] *Ibidem*.

understand that a socially responsible behaviour would obviously bring it many advantages, also from an economic point of view.

The last decades have been characterised by an explosion of the literature on CSR. Experts of every type have managed to give their own version of CSR. Despite this, I believe that, as far as CSR is concerned, all the companies should behave similarly. Each of them should comply with the provisions contained in international declarations, such as the ILO Declaration or the OECD Guidelines. This would avoid the existence of differences in the working conditions of workers' all around the world.

We managed to give a brief report on CSR for the purpose of this dissertation. What should not be forgotten is that CSR is not addressed only to MNEs but, instead, to all kind of firms.

Without doubts, there would be many other things to take into account and explain, but the primary aim of this paragraph was to bring this topic, corporate social responsibility, into the wider argument of this dissertation, that is, the relationship between MNEs and International Law.

2.3. | An introduction to company law and corporate limited liability

Company law is the branch of law which directly takes into account the activities of companies. The origins of company law can be traced back to the Ancient Rome, when the Romans developed their own kind of corporations and paved the way for their regulation. However, it was with the explosion of the Industrial Revolution that the urgency to make companies subject of law became apparent to everyone. The first modern company act is the *Joint Stock Companies Act*, which was passed in England and was introduced by William Gladstone in 1844. This Act still forms the basis of British company law. It was then replaced by the *Limited Liability Act* of 1855 and, later on, by that of 1862. Nowadays, the 2006 Companies Act represents the most modern set of rules addressed to corporations in England[211].

According to an author, "the company is the most successful organizational form made available by the law for business activities"[212], and that is why its regulation has proved to be a fundamental step towards the development of a better business

[211] P. DAVIES, *Introduction to Company Law*, Second Edition, Oxford, Oxford University Press, 2010, p. 1.
[212] *Ibid.*, p. 2.

conduct too. Each country has developed its own company law and, obviously, their provisions differ.

United Kingdom company law takes into account three different groups and seeks to regulate their reciprocal relationships. The first group is that of the *shareholders*. They usually have a huge influence over the decisions of the company as, having invested in it, they consequently possess the right to vote. A shareholder might be a single individual, a company or also an organization. When investing in the company, the shareholder receive shares. As two scholars underlined, "the word shareholder in particular can be misleading because it seems to imply that a shareholder owns a share of a company"[213]. Indeed, "a shareholder does own a share of the participation rights in the company [...] but shareholders do not own a share of the company's property"[214]. The *directors* belong to the second group. They "typically manage, or arrange for the management of, the company, constituting themselves into a board of directors for that purpose"[215]. Sometimes, the directors and the shareholders may also be a unique group. Finally, the third group is that of *creditors*. Creditors are persons who lend money to a company and, by doing so, invest in it. Although they invest in the company too, unlike the shareholders, creditors usually do not possess any right to vote[216].

Company law revolves around two basic and separate concept: *corporate separate personality* and *limited liability*. It is important not to conceive these concepts as if they are overlapping, as they are not the same thing. Indeed, a company's limited liability is the direct consequence of its separate personality[217]. Stating that a corporation has a separate personality means that its personality is divided from that of all the people who are part of its business, who usually are the shareholders, the creditors, the directors and the employees. Corporate separate personality is a term used interchangeably with *separate legal personality*. Separate legal personality is the direct consequence of *incorporation*, which means of the forming of a new corporation possessing its own legal entity. Although possessing a separate personality before the law, a corporation still remains an artificial person. A company separate legal personality is not a misleading concept, as it

[213] A. DIGNAM, J. LOWRY, *Company Law*, Seventh Edition, Core Text Series, Seventh Edition, Oxford, Oxford University Press, 2012, p. 25.
[214] *Ibid*., pp. 25-26.
[215] P. DAVIES, *Introduction to Company Law*, Second Edition, Oxford, Oxford University Press, 2010, p. 5.
[216] *Ibid*., pp. 6-7.
[217] See n. 213 above, p. 17.

> facilitates the task of identifying and separating the assets and liabilities which are properly attributable to the business carried on by the company and those which are properly attributable to the individuals who have invested in the company (shareholders) or who manage it (directors and others)[218].

Limited liability first appeared with the adoption of the *Limited Liability Act* of 1855. The concept of limited liability "means that the rights of the company's creditors are confined to the assets of the company and cannot be asserted against the personal assets of the company's members (shareholders)"[219]. Nonetheless, it would be wrong to think that companies have a limited liability, as it is its members that possess such a prerogative. This makes us understand that inside a company two personalities must be distinguished: the first one is that of its members and the other one is separated from them. "Limited liability permits the company to act opportunistically towards its creditors in ways which are not open to those without limited liability"[220]. Furthermore

> Separate legal personality makes it easier to distinguish business assets from personal assets, a distinction upon which limited liability depends. It also permits shares, which belong to the members, to be transferred from one person to another, whilst the property and contractual rights and obligations of the company, ie its business assets and liabilities, remain unaffected. With hard work and ingenuity, limited liability and the transfer of interests can be (and have been) achieved without separate legal personality, but only at a much higher cost of transacting, and so separate legal personality is the efficient rule[221].

Moreover, according to a scholar, corporate limited liability must be understood at least from three points of view. Firstly, it secure the shareholders against claims coming from the creditors of the company, or better, "the claims of the business creditors can be asserted only against the assets of the company"[222], and not those of its shareholders. Secondly, it protects also the agents and the directors of the company against claims coming from the creditors. Finally, the third meaning of corporate limited liability makes sure that "the creditors of the shareholders cannot assert their claims against the assets of the company"[223].

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[218] P. DAVIES, *Introduction to Company Law*, Second Edition, Oxford, Oxford University Press, 2010, p. 53.
[219] *Ibid*., p. 10.
[220] *Ibid*., p. 7.
[221] *Ibid*., p. 31.
[222] *Ibid*., p. 54.
[223] *Ibid*., p. 55.

Despite being a generally accepted concept, sometimes there can be exceptions to corporate separate legal personality. In other words, it may occur that the separation between a company's personality and that of its members must be overcome. This process is labelled *piercing* or *lifting the veil*. The veil which, in those situations, is lifted, is that of incorporation. As a result of this process, shareholders become liable for the activities of the company. Veil lifting is not easy to define and the various researchers have adopted different methods in explaining it. There is not a general rule aimed at teaching how and why the veil should be lifted.

> The most accurate statement about this that can be made is that sometimes the courts lift the veil and sometimes they refuse to. It may be frustrating and unsatisfactory but that is the reality. Having said that, there have been periods where the courts were more inclined to uphold the veil of incorporation than not[224].

Corporate limited liability possesses both advantages and disadvantages. The primary advantage is given by the fact that it makes the choice of investing easier, as it implies lesser risks. In addition, it facilitates also the managers' choice of taking risks[225]. Finally, it encourages "public share market"[226]. Finally, two authors report Hansmann and Kraakman discovery of another advantage deriving from limited liability, according to which "not only does limited liability protect the shareholders from the company's creditors but it can also serve to put the business assets of an individual out of reach of that individual's personal creditors"[227].

As far as limited liability disadvantages are concerned, the first of them, which should be apparent to everybody now, is the fact that the creditors result sometimes poorly protected, as the risk fall back on them. Another disadvantage relating to this one, is the fact that limited liability could be used in an opportunist way and, as a consequence, penalize the creditors[228]. Finally,

> the most disturbing use of limited liability occurs within group structures. In group structures limited liability's facilitation of asset partitioning allows a very effective double limitation of liability for parent companies and their members. Investors in a parent company can achieve limitations

[224] A. DIGNAM, J. LOWRY, *Company Law*, Seventh Edition, Oxford, Oxford University Press, 2012, p. 34.
[225] *Ibid*., p. 48.
[226] *Ibidem*.
[227] *Ibid*., p. 49.
[228] P. DAVIES, *Introduction to Company Law*, Second Edition, Oxford, Oxford University Press, 2010, p. 62.

> of liability not only for themselves but also for the parent company by structuring its business through a number of subsidiaries[229].

We will now manage to analyze a fundamental part of corporate liability, that is, corporate criminal liability, taking into account different legislations.

2.4. | Corporate criminal liability and a brief insight into extra-territorial legislation

Corporate criminal liability has been faced in different ways in every country. Nowadays, there is a general agreement on the need to hold corporations liable for crimes committed in their interest. In particular, corporate criminal liability became a highly debated concept during the 1990s. In fact, during those years, corporate wrongdoings became apparent to everyone and the urgency to regulate their misconducts started being addressed by many. Corporations started being accused of a wide number of crimes, from environmental degradation to fraud, and from bribery to money laundering. Obviously, corporations were also seen as a cause of damage to people too, as their activities proved to cause illnesses and, in some cases, also deaths. Various countries have endorsed their own kind of corporate criminal liability. Even though the majority of them agree on the necessity to apply corporate criminal liability in their jurisdictions, some among them have refused to do so. Due to a different variety of reasons, based mainly on history, politics, economics and society, corporate criminal liability has developed differently throughout the world. With regard to this, the main difference between the most developed legal systems addressing corporate criminal liability is between those systems that consider corporations criminally liable and those who think that, unlike human beings, who are subject of law, corporations cannot be prosecuted. Indeed

> Legal systems differ in their approaches to the principles which determine the criminal liability of companies. Some (such as Germany) historically have treated guilt as something which can be attributed only to human beings, so that companies escaped criminal liability. At the other end of the spectrum, some (such as federal law in the United States) apply the doctrine of vicarious liability to crimes in much the same way as they have applied it to torts[230].

[229] A. DIGNAM, J. LOWRY, *Company Law*, Seventh Edition, Oxford, Oxford University Press, 2012, pp. 49-50.
[230] P. DAVIES, *Introduction to Company Law*, Second Edition, Oxford, Oxford University Press, 2010, pp. 48-49.

In the past, some countries rejected the idea of holding corporation criminally liable basing their decision on the antique concept *societas delinquere non potest*, which was introduced by Pope Innocent IV. The aim of this sentence was to mark the difference between human beings and those entities which resembled modern corporations: unlike human beings, the latter did not possess a soul and a body and so they could not perform any kind of decision[231]. That is to say that corporations could not possess the *mens rea* and *actus reus* elements which are considered the necessary conditions for a crime. An example of legal systems who still favours the idea of a criminal liability as limited only to natural persons is that of Germany. "The main arguments in defence of the lack of corporate criminal liability in Germany are: corporations do not have the capacity to act, corporations cannot be culpable, and the criminal sanctions are appropriate, by their nature, only for human beings"[232]. However, this does not mean that corporations cannot be held liable in Germany but only that Germany refuse to hold them criminally liable.

A fundamental effort towards the recognition of the harm caused by corporations was made by the European Union which issued a Recommendation specifically addressed to them in 1988[233]. This recommendation acknowledged "the increasing number of criminal offences committed in the exercise of the activities of enterprises which cause considerable damage to both individuals and the community"[234], and set a number of measures aimed at making corporations, both public and private, liable. In particular, "enterprises should be able to be made liable for offences committed in the exercise of their activities, even where the offence is alien to the purposes of the enterprise"[235]. Obviously, this Recommendation takes into account also the sanctions which a corporation considered liable should undergo. For instance, a corporation might be punished through the closure of the enterprise, a fine, the exclusion from fiscal advantages and subsidies, or, in addition, through the removal of managers and by being obliged to comply with many other different sanctions.

Holding corporations criminally liable should achieve some important aims. Firstly, any corporate future crime should be avoided; this goal has been labelled *deterrence*. Secondly, those who caused the damage would be punished. Thirdly, corporate

[231] A. I. POP, *Criminal Liability of Corporations,* Michigan State University College of Law, 2006, p. 9.
[232] *Ibid.*, p. 13.
[233] Recommendation No. R (88) 18 of the Committee of Ministers to Member States Concerning Liability of Enterprises Having Legal Personality for Offences Committed in the Exercise of their Activities, adopted on 20th October 1988.
[234] *Ibid.*, p. 1.
[235] *Ibid.*, p. 2.

criminals should be rehabilitated. Finally, also the goals of clarity, consistency, predictability and efficiency would be achieved and, last but not least, also that of general fairness[236].

As mentioned above, corporate criminal liability has developed differently in different countries, even though the starting point of each of them has been human criminal liability. Another important step in determining if companies should be held liable is deciding for which crimes they should be prosecuted. With regard to this, three different ways of thought have developed. According to the first of them, corporations should be held liable for any type crime, just as happens for human beings. This model has been endorsed by, among the others, United Kingdom and Australia. From the second system point of view, the law should make clear for every crime if corporate criminal liability might be addressed, that is to say, if for a specific crime corporation should be held liable. An example of country applying this method is France. Finally, the third method requires the law of the country to clarify every crime for which the corporation should be considered criminally liable. This model has been developed in the United States, whose legal system is considered the most efficient in regulating corporations nowadays[237].

As multinational corporations conduct their business in more than just one country, it easily follows that they could provoke harm also outside their home country. Moreover, they might also take advantage of less developed countries' lack of regulation to develop their operations unchallenged. As a result, "since the Second World War, globalization has seen an expansion of the willingness of states to enact and implement extra-territorial criminal legislation with extra-territorial effect, and to make such legislation applicable to legal persons as well as natural persons"[238]. However, it has never been easy to hold corporations liable for the criminal operations they were conducting outside their home country. Extra-territorial legislation is traditionally based on three different principles. Firstly, the territorial principle, according to which "criminal laws can be applied throughout the territory of the state that enacted the law. This territorial principle is almost universally recognised and is the most common basis for the exercise of criminal jurisdiction"[239].

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[236] A. I. POP, *Criminal Liability of Corporations*, Michigan State University College of Law, 2006, p. 3.
[237] *Ibid.*, pp. 23-24.
[238] A. DE JONGE, *Transnational Corporations and international law. Accountability in the global business environment*, Corporations, Globalisation and the Law, Cheltenham, Edwar Edgar UK, 2011, p. 127.
[239] *Ibid.*, p. 92.

The nationality principle is the second one. It involves "the ability of any state to exercise jurisdiction in respect of its own nationals for acts committed anywhere in the world"[240]. The third and final principle is the universal principle. It "recognizes the right of any country to exercise jurisdiction over a defendant with respect to 'universal crimes' such as piracy, genocide and war crimes"[241].

In an effort to provide the international community with a valid method to prosecute international criminals, the International Criminal Court (hereinafter ICC) was established on 17th July 1998. Its basis was the Rome Statute which was immediately endorsed by one hundred and twenty states. This Statute was then ratified by sixteenth states in 2002. The Court "shall be a permanent institution and shall have the power to exercise its jurisdiction over persons for the most serious crimes of international concern, as referred to in its Statute, and shall be complementary to national crimes jurisdiction"[242]. The ICC is an independent international organisation and it bases its activities on the standards of fairness and due process. Its jurisdiction is limited to the prosecution of the crimes of genocide, crimes against humanity, war crimes and the crime of aggression[243]. The Court has no jurisdiction over a case that is being investigated by a national judicial system. Unfortunately, being corporations the subject of this dissertation, it is fundamental to underline that the ICC tries only persons and not corporations. Due to this, the ICC cannot be considered a point of reference in the prosecution of corporate crimes.

In order to make an investigation over how different countries dealt with multinational corporations' crimes, the Fafo Institute performed a survey focusing on sixteen country in 2006[244]. These countries were: Australia, Belgium, Canada, France, India, Japan, the Netherlands, Norway, South Africa, the United Kingdom, the United States, Argentina, Germany, Indonesia, Spain and Ukraine. The report started from the premise that

> [...] the global trading system has outstripped the ability of our multilateral institutions to respond effectively to the economic dimensions of human rights abuse and armed conflict. Although victims and their supporters have increasingly resorted to the courts in attempts to seek redress from the abuses resulting from the links between

[240] A. DE JONGE, *Transnational Corporations and international law. Accountability in the global business environment*, Corporations, Globalisation and the Law, Cheltenham, Edwar Edgar UK, 2011, p. 92.
[241] *Ibidem*.
[242] Rome Statute of International Criminal Court, 17th July 1998, p. 2.
[243] ICC, Rome Statute of the International Criminal Court, 17 July 1998, p. 3.
[244] See n. 240 above, p. 126.

> economic actors, wars and dictatorships, there remains a climate of impunity surrounding economic activities that promote or sustain conflict and human rights abuses and a resulting lack of regulatory clarity so as to what might constitute real liabilities in such situations[245].

The Survey found out that more than an half of the analysed countries had made the three crimes of genocide, crimes against humanity and war crimes, which had been the focus of the Rome Statute, part of their domestic law[246]. In addition, the Survey proved that all of the sixteen countries had developed their own kind of extra-territorial legislation. In particular, eleven out of sixteen countries had decided to hold legal persons criminally liable while two of the remaining five countries had endorsed statutes that made legal person criminally liable only in relation to important crimes, such as corruption or commercial crimes[247].

Another important effort towards the regulation of extra-territorial international crimes has been made by the United Nations through the adoption of international treaties. The UN managed to deal with some defined extra-territorial issues by regulating them through international mechanisms, such as conventions and declarations. Indeed, if a crime is dealt with by an international treaty, there would be more possibilities that it will be faced with more uniformity by different jurisdictions. Furthermore, this crime will probably be more internationally accepted and faced. Among the international treaties focusing on extra-territorial legislation issues, one of the most fundamental is the *United Nations Convention against Transnational Organized Crime* (CATOC)[248] which was adopted on 15th November 2000. Three Protocols are added to this Convention: the first one faces the trafficking of persons, the second the smuggling of migrants and the third the illicit manufacturing and trafficking of firearms. Transnational organised crime is a global challenge as it crosses different countries. As a consequence, it is fundamental to cope with it with an international instrument. This Convention represents this international mechanism. Another important instrument developed by the UN and targeting an extra-territorial matter is the *Declaration Against Corruption and Bribery in International Commercial Transactions*, which was adopted earlier, on 16th December 1996. This Declaration was based on the idea that "a stable and

[245] A. RAMASASTRY, R. C. THOMPSON, *Commerce, Crime and Conflict: Legal Remedies for Private Sector Liability for Grave Breaches of International Law: A Survey of Sixteen Countries*, Fafo Report 536, 2006, available at: *http://www.fafo.no/pub/rapp/536/536.pdf*
[246] *Ibid*., p. 15.
[247] *Ibid*., p. 13.
[248] United nations Convention Against Transnational Organized Crime, 15th November 2000, available at: *http://www.unodc.org/unodc/treaties/CTOC/*

transparent environment for international commercial transactions in all countries is essential for the mobilization of investment, finance, technology, skills [...]"[249]and on "the need to promote social responsibility and appropriate standards of ethics on the part of private and public corporations, including transnational corporations [...]"[250].

To sum up, it can be concluded that, apart from the differences existing between different legislations, holding legal persons criminally liable seems to be always more and more feasible. Obviously, these differences may induce corporations to take advantage of the regulation of the countries which have not applied corporate criminal liability to continue performing their wrongdoings without suffering the consequences. However, countries' legislators have focused on corporate criminal liability only during the last three decades and so there will probably be the possibility of new developments in the near future. Nevertheless, international norms addressing corporate criminal behaviours are lacking. International law still lacks legally binding instruments targeting corporate criminal acts. As a consequence, even though the international community has showed to put a growing effort in its path towards the regulation of corporate criminal operations, it seems that for the time being these facts will continue to be faced at a national level. With regard to this, an area that will continue to be dealt with by national courts is that of human rights. In fact, there are no binding international remedies to human rights abuses committed by corporations. One of the national legislation that provides victims of corporate human rights abuses with the hope for justice is the US *Alien Tort Statute*.

[249] United Nations Declaration Against Corruption and Bribery in International Commercial Transactions, 16th December 1996, Annex, available at: *http://www.un.org/documents/ga/res/51/a51r191.htm*

[250] United Nations Declaration Against Corruption and Bribery in International Commercial Transactions, 16th December 1996, Annex, available at: *http://www.un.org/documents/ga/res/51/a51r191.htm*

Concluding remarks

This chapter has dealt with multinational corporations and the law from a general point of view. All the approach has obviously been based on international law. It has also been highlighted that corporations share an interest for self regulation too. Particular importance has been given to the analysis of corporate social responsibility. Furthermore, the issues of corporate limited liability and criminal liability have been faced.

In the next chapter we will focus more on the issue of human rights and on the relationship between them and transnational corporations.

3. MULTINATIONAL ENTERPRISES AND HUMAN RIGHTS

3.1. MNEs' impact on human rights – 3.2. State responsibility and human rights law – 3.3. Corporate human rights obligations – 3.3.1. Human rights "obligations" under soft law – 3.3.2. Responsibility under international human rights law

Introduction

The aim of this chapter is to make an assessment of the influence that multinational corporations' operations have on human rights. In order to achieve this goal, it will be necessary to show the relationship between the respect of human rights and State responsibility for their protections. In addition, this chapter will provide an insight into how corporate behaviour can negatively affect human rights. Moreover, we will also report the various international mechanisms aimed at the protection of human rights existing at the global level nowadays.

Globalisation has proved to have a sort of dual impact on human rights, and human rights protection has never been globally uniform. Even though the topic of this chapter may seem to have been overly debated, I think that a research into these matters need to be constantly performed and updated, as the protection of human rights is an issue that involves all of us and that should never be set aside.

3.1. | MNEs' impact on human rights

During the years following the end of Second World War, it became of crucial importance to plan the post-war period. At the Bretton Wood Conference of 1944, the International Monetary Fund (hereinafter IMF), the World Bank (hereinafter WB) and the International Trade Organisation (hereinafter ITO), later replaced by the General Agreement on Tariffs and Trade (hereinafter GATT) were born. The aim of these institutions was to favour trade liberalisation. Discussing the programs of these institutions is not the topic of this paragraph. However, it is crucial not to avoid underling that, according to many, they encouraged MNEs exploitative behaviour and favoured MNEs' increasing power which was pursued at all costs. In particular, the WB and IMF, through the imposition of structural readjustment plans, favoured corporate exploitation and the subsequent violation of human rights. In addition, "the General Agreement on Tariffs and Trade (GATT) and the World Trade Organization (WTO) are primarily designed to encourage international capitalism, not regulate it according to social values"[251] and, "anti-globalisation groups blamed the WTO for not being sensitive to the consequences of its legal rules which can result in serious human rights violations"[252]. Indeed, both the WB and the IMF constitutive agreements did not focus on human rights. Their primary aim was to help reconstruct Europe and its economy and to assist their members financially, but there was no place for human rights[253].

The power that MNEs succeeded in achieving during their history has managed to challenge the supremacy of governments. Without doubts, governments still possess their basic roles and duties to fulfil, but corporations have sometimes been able to overcome them as a new centre of power. In addition, the power of corporations seems to be so strong that they also have an influence over the economic and social policy of governments both at the local and global levels[254].

During the last decades, many cases of illegal corporate behaviour became popular and people started considering corporations from a negative point of view. As

[251] A. PASRICHA, Multinational corporations and human rights, 2008, available at: *http://www.moderngeografia.hu/tanulmanyok/azsia/ashu_pasricha_2008_3.pdf*

[252] W. BENEDEK, *The World Trade Organization and human rights*, in W. BENEDEK, K. DE FEYTER, F. MARRELLA, *Economic Globalisation and Human Rights*, EIUC, Cambridge, Cambridge University Press, 2007, p. 137.

[253] L. BOISSON DE CHAZOURNES, The Bretton Woods Institutions and Human Rights: Convercing Tendencies, in W. BENEDEK, K. DE FEYTER, F. MARRELLA, *Economic Globalisation and Human Rights*, EIUC, Cambridge, Cambridge University Press, 2007, p. 212.

[254] A. GATTO, *Multinational Enterprises and Human Rights. Obligations under EU Law and International* Law, Cheltenham, Edwar Edgar, 2011, p. 8.

already underlined, MNEs are a kind of enterprise that conduct their business in more than one country. As a result, they lead operations also outside their home state. The ability of fragmenting and conducting their business in a variety of countries is part of their inner nature and represents their most peculiar characteristic. However, this has proved to have very often negative results. Indeed, MNEs, while choosing where to settle their activities, very frequently chose those countries were the regulatory measures were softer and lacking. Indeed,

> In a period of deterritorialization and transnationalization, MNEs move their operations towards strategical regions. In these regions, thanks to favourable wages and taxation systems, and by taking advantage of the openness of markets, MNEs succeed in maximizing their profits. This process negatively affects less competitive enterprises, which are not able to modernize themselves technologically and to adapt to a global and interdependent system[255].

In particular, many corporations delocalised their operations in the developing countries, where labour and social standards were weaker and sometimes also non-existent. "In the face of the intensification of the competition, companies follow strategies of delocalisation to countries with ever-lower social costs"[256], but "production from those companies which have delocalised in order to save on social costs is not for the local market, but for exportation to third countries"[257]. Other MNEs also received the help of the governments of the states in which they settled, which encouraged them and helped them hiding their wrong practices. In this regard, some governments did what has been labelled a *race to the bottom*, that is to say that they managed to attract corporations inside their countries at all costs, without considering the importance of regulating their activities and safeguarding their environment and people. Those government sought to attract corporations also by cutting the labour and living standards of their workers, by cutting their salaries and finally by denying them some fundamental rights. In fact, corporations would have been more inclined to set their operations where the costs of labour were lower and

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[255] G. LIZZA, *Scenari Geopolitici*, Novara, UTET Università, 2009, p. 29, translated from Italian, original text: "In un'epoca di deterritorializzazione e di transnazionalizzazione, esse decentrano le loro attività verso regioni strategiche dove possono massimizzare i profitti grazie a salari e regimi tributari vantaggiosi, sfruttando appieno l'apertura dei mercati. È proprio questo processo a soffocare le imprese meno competitive, incapaci di rinnovarsi tecnologicamente e adattarsi ad un sistema globale e interdipendente".

[256] A. PERULLI, *Globalisation and Social Rights*, in W. BENEDEK, K. DE FEYTER, F. MARRELLA, *Economic Globalisation and Human Rights*, EIUC, Cambridge, Cambridge University Press, 2007, p. 101.

[257] *Ibidem*.

the rights lesser. As a result, those governments that behaved in this way became complicit of MNEs' human rights violations.

These lines can be summarized by stating that MNEs'

> Network of operative bases in different countries and regions of the world provide TNC – especially the very large ones – with the opportunity to take advantage of the regulatory, economic, and political differences between countries and regions on the one hand, and to respond flexibly to new challenges by shifting resources and operations within their operative system on the other hand. Their economic strength and international field of operations make it easier for TNC to escape the regulatory reach of national authorities. At the same time, these advantages often enable them to influence domestic politics more effectively than other private business entities with a more limited reach[258].

Human rights are frequently divided into "generations" of rights, with regard to the historical periods in which those rights emerged. The first generation of rights encompasses civil and political rights. Among them there are, for example, the right to life and the right to freedom of expression. The second generations, instead, includes economic, social, and cultural rights. An example of the latter is the right to education. Finally, the so called collective/solidarity rights belong to the third generation. One of them is the right to self-determination[259].

In order to understand what we mean when discussing corporate impact on human rights, it is important to give some examples. Which rights have corporations violated? Nowadays, thanks to the globalised world in which we live and to the ability internet gives us to obtain information as quickly as never before in history, everybody would be able to answer this question. To give a brief summary, in their history, corporations have been accused of employing child labour, of damaging the environment, of ignoring the union and workers' rights, of obliging workers to work in inhuman conditions, of denying rights to their workers and people in general, of forced labour, of bribery, of being involved in the illegal financing of political parties and, more in general, of financing dictatorial regimes and governments, of causing the illnesses and deaths of huge numbers of workers, of financial crime and of many other abuses[260].

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[258] M. HERDEGEN, *Principles of international economic law*, Oxford, Oxford University Press, 2013, p. 39.

[259] J. F. ADDICOTT, Md. J. H. BHUIYAN, T. M. R. CHOWDHURY, *Globalization, international law, and human rights*, Oxford, Oxford University Press, 2012, pp. 9-10.

[260] M. ÖZDEN, *Transnational corporations and human rights*, Part of a series of the human rights programme of the Europe-Third World Centre (CETIM), Berne, 30th October 2005.

Corporations have long been accused of acting only on behalf of their profit, with no sensitivity towards neither their workers nor their consumers. Indeed, when a corporation decides to employ poor quality assets in order to save money and earn more, it is the consumer that takes a loss. This is better explained by a fact that happened in 1993 and that evolved into a judicial case, which is the *Anderson v. General Motors* case[261]. The case was decided by the Los Angeles Superior Court. Mrs Patricia Anderson and her four children suffered a car incident on the night of 24th December 1993, while they were driving home. They were waiting the red light to become green when they were struck by another car. Due to the violent impact, the fuel tank of their car was broken and Mrs Anderson car started bursting. Fortunately, nobody died but each passenger suffered heavy body injuries. This case stands as an example of corporate carelessly towards its consumers. Indeed, it was proved that the fuel tank of that car had exploded because General Motors, the corporation responsible for its creation, had positioned the tanks in a position that permitted them to save costs. In this regard, the trial later showed that General Motors were aware that this would have probably caused these kind of incidents. The lawsuit against General Motors was filed in 1994. The plaintiffs maintained that the Malibu car has started bursting because its fuel tank had been placed 10 inches from the rear bumper. By doing this, the corporation had taken into account only its benefits, disregarding those of who would have probably employed their products. No matters if this would have probably caused the injuries or, even worse, deaths of people. General Motors denied this presumption and replied that the Malibu car had been well designed, that it met safety standards, and that its probability of fire risk was low. Moreover, General Motors charged the drunk driver who had hit the Anderson car with the responsibility for the accident. Nonetheless, the plaintiffs refused to file a lawsuit against him. The plaintiffs' attorneys, instead, succeeded in demonstrating that the General Motors company had focused more on making profits rather than building a safe car. Its reasoning was based only on a costs-saving base. Moreover, they said that the Malibu car met safety standards because the Nixon administration, persuaded by General Motors, had kept rear-end crashes standards low. The plaintiffs were awarded $4.8 billion by the jury on 9 July 1999[262]. General Motors later filed a lawsuit for a new trial and it stated that the award had been excessive. The amount

[261] *Anderson v. General Motors Corp.* (Super Ct., Los Angeles. County (Calif.) Superior Court No. BC 116926).
[262] J. BAKAN, *The Corporation. The pathological pursuit of profit and power*, London, Constable, 2005, p. 63.

was then reduced to $1.09 billion by Judge William of the Los Angeles Superior Court[263]. The defendants were supported by a brief of the US Chamber of Commerce, which was presented to the California Court of Appeal for the Second Appellate District in 2001. They affirmed that the jury decision had been wrongly based on a cost-benefits analysis[264]. Furthermore, they claimed that the jury had "slammed General Motors with an unprecedented $4.8 billion punitive exaction"[265]. Moreover, they stated that "the uncontroverted evidence at trial was that some 98% of all automobile fuel tanks in the 1970s were located, like the Malibu's, under the floor of the vehicle behind the rear axle"[266].

However, as an author states in his book,

> As a psychopath creature, the corporation can neither recognize nor act upon moral reasons to refrain from harming others. Nothing in its legal makeup limits what it can do to others in pursuit of its selfish ends, and it is compelled to cause harm when the benefits of doing so outweigh the costs. Only pragmatic concern for its own interests and the laws of the land constrain the corporation's predatory instincts, and often that is not enough to stop it from destroying lives, damaging communities, and endangering the planet as a whole[267].

As it may appear clear, the relationship between multinational corporations and human rights is not easy to define and involves many elements. According to an author, this relationship can be analysed by three different points of view.

First of all, corporations can have the role of direct violators of human rights by, for example, employing forced labour, causing harm to the environment, and exploiting children. In this instance, corporations directly affect people's rights and cause a negative impact on their lives[268]. Secondly, corporations can be indirect violators of human rights by being complicit of the violations of other entities, for instance of governments. In particular, a firm can assist a government in its negative practices by increasing "a regime's repressive capacity by producing products or by providing major sources of revenues or infrastructures that are used by the regime and enhance

[263] J. BAKAN, *The Corporation. The pathological pursuit of profit and power*, London, Constable, 2005, p. 63.
[264] California Court of Appeal for the Second Appellate District – Division Four, Brief of Chamber of Commerce of the United States as Amicus Curiae in Support of the Appellant, p. 7, available at: *http://www.appellate.net/briefs/Anderson%20final%20DMG.pdf*
[265] *Ibid*., p. 11.
[266] *Ibid*., p. 15.
[267] See n. 263 above, p. 60.
[268] A. GATTO, *Multinational Enterprises and Human Rights. Obligations under EU Law and International* Law, Cheltenham, Edwar Edgar, 2011, p. 9.

its repressive capacity"[269], by providing "international credibility to an otherwise discredited regime"[270] or, in addition, "government abuses may benefit companies commercially in the case in which governments commit abuses to produce infrastructure designed for business use"[271]. The third relationship between MNEs and human rights is different from the previous ones. Indeed, MNEs can have also a positive impact on human rights. In fact, it would be wrong to think that corporations can cause only harm, as it has been proved that sometimes they can enhance workers' standards of living by, for instance, contributing to the economic development of some areas and by promoting the respect of human rights[272].

Even though the relationship between MNEs and human rights can vary from corporation to corporation, it cannot be denied that MNEs affect human rights. Indeed, for instance, a corporation that exploits child labour in a developing country negatively affects the enjoyment of human rights in this country. In addition to this, the benefits brought by corporations though globalisation are not shared equally all over the world. As an author affirms, "corporations are conduits for personal gain, an aim that may, or may not be, in the wider social interest at any given time"[273].

MNEs represent the major actors of today's economy and that is why they can so easily have an impact on human rights. As a consequence, in the final part of this chapter we will analyze the relationship between them and their human rights obligations. For the moment, it is first necessary to focus on human rights law and on the first responsible for its protection: States.

3.2. | State responsibility and human rights law

The *Universal Declaration of Human Rights*[274] is the founder of international human rights law. This Declaration affirms the rights of every human being. Indeed

> Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or status. Furthermore, no distinction shall be made on the basis of the political, jurisdictional or international status of the country

[269] A. GATTO, *Multinational Enterprises and Human Rights. Obligations under EU Law and International* Law, Cheltenham, Edwar Edgar, 2011, p. 10.
[270] *Ibidem*.
[271] *Ibidem*.
[272] See n. 269 above, p. 12.
[273] P. T. MUCHLINSKI, *Multinational Enterprises and the Law*, Oxford, the Oxford International Law Library, 2007, p. 509.
[274] The Universal Declaration of Human Rights, 10th December 1948.

> or territory to which a person belongs, whether it be independent, trust, non-self-governing or under any other limitation of sovereignty[275].

Nowadays, human rights are reserved a specific area in international law and numerous conventions and international treaties have focused on them. One of the characteristics of these treaties is that they "are arranged into a series of affirmations, each affirmation introducing a right that all individuals have by virtue of the fact that they are human"[276]. The most fundamental aim of human rights law is to make sure States rule over their citizens in a uniform way which must respect the standards provided by human rights norms[277]. Nowadays, human rights norms can be considered as the most fundamental international law norms[278]. Indeed, States have always been and are still considered to be the primary subject of international law. This is due to the fact that States created international law and that their main task is to regulate the international community[279]. Even though, apart from States, there are other subjects of international law, State actors "remain at the heart of the international legal system and, as such, will continue to possess the most extensive international legal personality of the various different categories of participants"[280]. As a result to this, the responsibility to protect human rights lies predominantly on them.

Even though rights and duties are recognised also to non-state actors today, States still are the only generally accepted international law subjects. In this regard, "depuis la fin da le seconde guerre mondiale, la société internationale a connu des bouleversements considérables"[281]. The authors explain that these changes can be divided into two different types of transformations. "Sur le plan horizontal, de nouveaux acteurs de la société international sont apparus"[282] while "sur le plan vertical, de nouveaux et nombreux domaines sont apparus et ont ainsi élargi la sphère d'influence du droit international"[283]. As a result, we can argue that the role of States in the international arena is nowadays counterbalanced by the activities of new

[275] The Universal Declaration of Human Rights, 10th December 1948, art. 2.
[276] A. GATTO, *Multinational Enterprises and Human Rights. Obligations under EU Law and International* Law, Cheltenham, Edwar Edgar, 2011, p. 41.
[277] C. FOCARELLI, *Diritto Internazionale*, seconda edizione, Padova, Cedam, 2012, p. 340.
[278] *Ibidem*.
[279] *Ibid*., p. 25.
[280] J. A. ZERK, *Multinationals and Corporate Social Responsibility. Limitations and Opportunities in International Law*, Cambridge Studies in International and Comparative Law, Cambridge, Cambridge University Press, 2006, p. 75.
[281] D. CARREAU, F. MARRELLA, *Droit International*, 11ème edition, Paris, Pedone, 2012, p. 59.
[282] *Ibidem*.
[283] *Ibidem*.

actors. While on the one hand "many argue that the utility of the nation-state has lost significance in an ever shrinking world due to the impact of globalization"[284], on the other "the rule of law, that is, how to deal with problems associated with globalization, is still primarily understood in terms of the nation-state". Without doubts, States can create and take part in international treaties, they can bring legal matters, they possess direct legal responsibilities, duties and rights and their actions shape international law[285]. Furthermore, States are also given the duty to protect, respect, and provide for the respect of human rights. They are the primary responsible for the protection of human rights and they must safeguard them against non-state actors violations. As an author states, "in the traditional legal discourse, the responsibility for ensuring that Transnational Corporations (TNCs) respect human rights [...] is a matter for territorial State action at the domestic level and under international law"[286]. In addition, the United Nations are convinced that "international human rights law lays down obligations which *States* are bound to respect"[287]. It easily follows that the obligation to protect and respect human rights lies on them. Indeed, "the domestic legal system [...] provides the principal legal protection of human rights guaranteed under international law"[288]. The first step towards its affirmation was the development of the Universal Declaration of Human Rights in 1948.

The development of human rights law begun in 1945. Since that year, various instruments, among which obviously treaties, have been adopted to protect human rights. The category of human rights sets both rights and duties.

When managing to trace back the history of human rights law, it should be remembered that the need to safeguard human rights was first put at the very beginning of the Charter of the United Nations, where article three asserts that the principles established by this Charter are set also

> To achieve international cooperation in solving international problems of an economic, social, cultural, or humanitarian character, and in

[284] J. F. ADDICOTT, Md. J. H. BHUIYAN, T. M. R. CHOWDHURY, *Globalization, international law, and human rights*, Oxford, Oxford University Press, 2012, pp. XIII-XIV.
[285] J. A. ZERK, *Multinationals and Corporate Social Responsibility. Limitations and Opportunities in International Law*, Cambridge Studies in International and Comparative Law, Cambridge, Cambridge University Press, 2006, p. 75.
[286] F. MARRELLA, *Human Rights, Arbitration, and Corporate Social Responsibility in the Law of International Trade,* in W. BENEDEK, K. DE FEYTER, F. MARRELLA, *Economic Globalisation and Human Rights*, EIUC, Cambridge, Cambridge University Press, 2007, p. 266.
[287] United Nations Human Rights, Office of the High Commissioner for Human Rights, available at: *http://www.ohchr.org/EN/ProfessionalInterest/Pages/InternationalLaw.aspx*, emphasis added.
[288] United Nations website, available at: *http://www.un.org/en/documents/udhr/hr_law.shtml*

> promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language or religion[289].

As already said, at the very heart of international human rights law lies the *Universal Declaration of Human Rights*. It was adopted in 1948, few years after the end of Second World War. The desire to avoid the atrocities that had characterised this war, together with those of First World War, led to the birth of the United Nations and the adoption of this Declaration. This Declaration established the core principles of human rights, which are universality, interdependence and indivisibility, non-discrimination and equality[290] and has represented the starting point for the development of binding human rights treaties. The Universal Declaration set a variety of rights, relating to all the fields of human life. Indeed, it refers to civil, economic, social, political and cultural rights. As an example of a political right set by this Declaration, article eight affirms that "everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law"[291].

To provide this Declaration with more power, two other treaties were developed. These treaties, together with the Universal Declaration and two optional Protocols, created the *International Bill of Human Rights*. The first treaty was the *International Covenant on Economic, Social and Cultural Rights* (ICESCR) which was adopted by the General Assembly of the United Nations on 16th December 1966. This Declaration, as its name states, established economic, social and cultural rights for both men and women, whose equality had to be accepted, and developed also some measures to implement those rights into the States that were part of the Covenant. The other treaty, adopted the same day, was the *International Covenant on Civil and Political Rights*, which instead set civil and political rights. In their preamble, both Covenants reaffirm the duty of States to respect and promote human rights. In addition, each Covenant promotes the right to self-determination, which they both consider a universal right. Both Covenants entered into force in 1976 and they now are legally binding treaties. The Universal Declaration and the two Covenants are universal documents. In addition to them, specific human rights are addressed and protected by particular declarations and treaties. We will now focus on the most important of them.

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[289] Charter of the United Nations, Article 1(3).
[290] Available at: *http://www.un.org/en/documents/udhr/hr_law.shtml*
[291] The Universal Declaration of Human Rights, 10th December 1948, Article 8.

On 21st December 1965 the *International Convention on the Elimination of All Forms of Racial Discrimination*[292] was adopted by the General Assembly of the United Nations. Its implementation is controlled by the Committee on the Elimination of Racial Discrimination (hereinafter CERD), which regularly receives reports made by States in which they show how they implement the rights of this Convention.

On 26th June 1987 the *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*[293] entered into force, after having been adopted by the General Assembly of the UN on 10th December 1984. The implementation of this Convention is monitored by the Committee Against Torture (hereinafter CAT). This Convention reaffirms the importance of equality and links it to the dignity of human beings, as any kind of torture inevitably affects it. Both the Universal Declaration and the Covenant on Civil and Political Rights violated torture and any type of inhuman treatment and punishment.

The *Convention on the Rights of the Child*[294] was adopted on 20th November 1989. According to this Convention, a child is a human being below the age of eighteen years and "should grow up in a family environment in an atmosphere of happiness, love and understanding"[295]. Eighteen experts make up the Committee on the Rights of the Child (hereinafter CRC) which is the responsible body for the implementation of this Convention. This Convention is also characterised by two optional protocols, focusing on the relations between children and armed conflicts and on children sale, prostitution and pornography.

Apart from these Conventions, the United Nations developed also other instruments. Among them, the *International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families*[296], the Convention on the Rights of Persons with Disabilities[297], the *International Convention for the protection of All Persons from Enforced Disappearance*[298]. All these Conventions stress the

[292] International Convention on the Elimination of All Forms of Racial Discrimination, 21st December 1965. It entered into force on 4th January 1969.
[293] Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment and Punishment, 10th December 1984, it entered into force on 26th June 1987.
[294] Convention on the Rights of the Child, 20th November 1989, it entered into force on 2nd September 1990.
[295] *Ibid*., preamble, available at: *http://www.ohchr.org/EN/ProfessionalInterest/Pages/CRC.aspx*
[296] International Convention on the protection of the Rights of All Migrant Workers and Members of Their Families, 18th December 1990.
[297] Convention on the Rights of Persons with Disabilities, 13th December 2006, it entered into force on 3rd May 2008.
[298] International Convention for the Protection of All Persons from Enforced Disappearance, 20th December 2006, it entered into force on 23rd December 2010.

importance of the principle of the universality of human rights. This principles was reiterated also by the UN World Conference on Human Rights which was held in Vienna in 1993 and led to the *Vienna Declaration and Programme of Action*[299]. This Declaration was adopted by consensus and was the point of arrival of a long process of debate over human rights.

Human rights have been debated also at the regional level. For instance, the Council of Europe adopted the *Convention for the Protection of Human Rights and Fundamental Freedoms*[300] (ECHR). This Convention recalls the Universal Declaration and maintains that

> The aim of the Council of Europe is the achievement of greater unity between its members and that one of the methods by which that aim is to be pursued is the maintenance and further realization of human rights and fundamental freedoms[301].

The African Continent instead adopted the *African Charter on Human and People's Rights*[302], which is called also the Banjul Charter. This Charter implementation is controlled by the African Commission on Human and People's Rights. Along the same line followed by the Universal Declaration, this Charter affirms that

> Every individual shall be entitled to the enjoyment of the rights and freedoms recognized and guaranteed in the present Charter without distinction of any kind such as race, ethnic group, color, sex, language, religion, political or any other opinion, national and social origin, fortune, birth or other status[303].

Finally, the American Continent adopted *the American Convention on Human Rights*[304] on 22nd November 1969, which entered into force on 18th July 1978. This Convention reiterates that "the essential rights of a man are not derived from one's being a national of a certain state, but are based upon attributes of human personality"[305].

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[299] Vienna Declaration and Programme of Action, 25th June 1993.
[300] Council of Europe, European Convention for the Protection of Human Rights and Fundamental Freedoms, it entered into force on 3rd September 1953.
[301] *Ibid*., Preamble, p. 5, available at: http://www.echr.coe.int/Documents/Convention_ENG.pdf
[302] African Charter on Human and People's Rights, 27th June 1981, it entered into force on 21st October 1986.
[303] African Charter on Human and People's Rights, 27th June 1981, it entered into force on 21st October 1986, Article 2, available at: http://www.achpr.org/files/instruments/achpr/banjul_charter.pdf
[304] *American Convention on Human Rights*, it entered into force on 18th July 1978.
[305] *Ibid*., Preamble, p. 1, available at: http://www.oas.org/dil/treaties_B-32_American_Convention_on_Human_Rights.pdf

Without doubts, there has been an evolution on the concept of human rights in history. Nowadays, we have come to conceive them as indivisible. "The recognition of the indivisibility and interdependence of civil, political and economic social and cultural rights is one of the most important features of the contemporary conception of human rights"[306]. In addition to this, nowadays also a globalization of human rights has taken place. Given the widely acceptance of human rights today, also States with weaker governments should ensure their respect. The respect of every human beings rights implies also the respect of our rights, this is why human rights should be put at the top of each government agenda.

As should be clear now, international human rights law is made up of international treaties and customary law. A variety of treaties and different instruments focusing on human rights have been adopted at the international, regional and local levels. In addition to this instruments, also the various Declaration, guidelines and principles on human rights developed at the international level help in understanding and promoting international human rights law provisions.

3.3. | Corporate human rights obligations

Historically, the international obligation to respect human rights has been addressed only to States. Indeed, human rights have always been conceived in a vertical dimension, as they were seen as the rights of the human beings whose state had the duty to respect and safeguard[307]. In other words, "international human rights were conceived in a vertical dimension as claims against the state, as instruments to safeguard the dignity and autonomy of human beings against the hitherto unlimited authority of the state in respect of its subjects"[308]. It easily follows that only states have to comply with human rights' international regulation and constantly guarantee their respect.

However, during the last decades, there has been a change in this field. In fact, with the growing interdependence created by the process of globalisation, it started being felt that states could no more be the only addressees of human rights' obligations.

[306] A. GATTO, *Multinational Enterprises and Human Rights. Obligations under EU Law and International* Law, Edwar Edgar, 2011, p. 43.
[307] F. MARRELLA, *Imprese multinazionali e responsabilità per violazioni dei diritti umani*, p. 81, in M. NORDIO, V. POSSENTI, *Governance globale e diritti dell'uomo*, Reggio Emilia, Diabasis, 2007.
[308] F. FRANCIONI, *Alternative perspectives on International responsibility for human rights violations by multinational corporation*, in W. BENEDEK, K. DE FEYTER, F. MARRELLA, *Economic Globalisation and Human Rights*, EIUC, Cambridge, Cambridge University Press, 2007, p. 245.

Indeed, it was clear that other non-state actors, among which corporations, should have held the responsibilities for the impact of their conduct on human rights. Without doubts, this is linked to the fact that "states are less able than in the past to exercise effective control over human activities carried out in their territory or abroad. New centres of power have emerged"[309].

However, despite a global economic environment favourable to corporations, the need to regulate business started gaining ground during the 1960s and 1970s. This period was marked by the era of decolonisation, during which developing countries were managing to achieve their independence over the developed ones, and was then followed by the period of the Cold War, characterised by the opposition between the Western countries, whose economy was based on the market, and the Socialist countries of the East, more favourable to governmental interventions[310]. In accordance with these developments, the United Nations General Assembly adopted the *Declaration on the Establishment of a New International Economic Order*[311] in 1974. This new economic order had to be based on

> equity, sovereign equality, interdependence, common interest and cooperation among all States, irrespective of their economic and social systems which shall correct inequalities and redress existing injustices, make it possible to eliminate the widening gap between the developed and developing countries and ensure steadily accelerating economic and social development and peace and justice for present and future generations [...][312].

Obviously, the environment surrounding MNEs today is different from that of the last decades. Nowadays, many intergovernmental organizations and the civil society at large put attention on corporate behaviour and strive to achieve the respect of at least basic human rights worldwide. As already explained in the second chapter of this dissertation, corporations themselves boast their social commitment and respect for people rights through a huge variety of mechanisms today. This change in their attitude is inevitably linked to the numerous critiques that have been addressed to corporations from the 1960s onwards. As a result, our aim now is to understand where corporate human obligations stem from.

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[309] F. FRANCIONI, *Alternative perspectives on International responsibility for human rights violations by multinational corporation*, in W. BENEDEK, K. DE FEYTER, F. MARRELLA, *Economic Globalisation and Human Rights*, EIUC, Cambridge, Cambridge University Press, 2007, p. 246.

[310] *Ibid*., pp. 246-247.

[311] United Nations, *Declaration on the Establishment of a New International Economic Order*, 1st May 1974.

[312] *Ibidem*.

Even though it is commonly agreed that the primary duty to respect and safeguard human rights relies on States, the *Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights* highlight that also other entities, among which corporations themselves, possess this task. In fact, they states 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[313].

This quotation charge all business enterprises with the duty of respecting and promoting human rights, and not only multinational corporations. In fact, a separation between the responsibilities of MNEs and those of other firms would be a nonsense, as they both have to assure the respect of fundamental human rights. However, we should not forget that the Norms, as explained before in this dissertation, are soft law instruments, that is, they do not impose binding responsibilities. Furthermore, they were not adopted, representing a failure in the path towards the regulation of the activities of MNEs[314]. With regard to this, it is fundamental to highlight that the norms imposing direct obligations on MNEs are very few. As already underlined, the only international instruments existing belong to soft law. "Le corporations non sono titolari di obblighi internazionali di fonte consuetudinaria"[315]. This also brings us to another question: should MNEs be held responsible for the protection of human rights? It is MNEs' structure and organization that makes it difficult to impose human rights obligations on them[316]. In fact, there is not a law that provides for the existence and establishment of multinational enterprises and, moreover, there is no law regulating their power and limiting their activities. Corporations are essentially private entities and so they do not seem to be obliged to comply with any international law provisions. Nonetheless, corporations must comply with the standards of their host State and with their home States national law. Still, according to corporations, the responsibility to protect human rights is of States only, as business and human rights must be considered as

[313] United Nations, *Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights*, third preamble, 2003.
[314] F. GALGANO, F. MARRELLA, *Diritto del commercio internazionale*, terza edizione, Lavis, Cedam, 2011, p. 895.
[315] *Ibid*., p. 903.
[316] A. GATTO, *Multinational Enterprises and Human Rights. Obligations under EU Law and International* Law, Cheltenham, Edwar Edgar, 2011, p. 14.

two separate spheres[317]. Despite the fact that nowadays many business leaders themselves have acknowledged the importance of granting the protection of human rights in the workplace, imposing human rights responsibilities on MNEs arises some relevant issues. Firstly, the only real responsibility of business has always been creating profit for its shareholders[318]. Secondly, as corporation are not state actors, they do not possess any obligation to respect human rights. The only duty they possess is acting in compliance with the law[319]. In addition, it would be difficult to distinguish which rights corporations should respect, as some rights, among which political rights, can be safeguarded only by the states themselves[320]. Moreover, "the extension of human rights obligations to corporate actors will create a 'free rider' problem as it is predictable that not all states and not all firms will take the same care to observe fundamental human rights"[321]. Finally, also the policies of many NGOs may negatively affect human rights as, in spite of controlling all corporations equally, these organisations may be interested only in implementing their campaigns[322].

In addition to this,

> Corporations are not willing to accept an international status, unless the obligations they will be bound by are reasonable and the general effect of the status is to enhance their public position and facilitate their operations, rather than subjecting them to tiresome constraints inconsistent with economic efficiency[323].

However, as already underlined, nowadays corporations themselves show a great interest in the enhancement of a form of social responsibility which involves also the respect for human and obviously social rights. With regard to this, an analysis of the effective corporate respect of human rights should be based on three different mechanisms. The first of them is *informal accountability*, which involves the different campaigns and boycotts realised by many NGOs to give popularity to some unethical corporate behaviours[324]. Indeed

[317] A. GATTO, *Multinational Enterprises and Human Rights. Obligations under EU Law and International* Law, Cheltenham, Edwar Edgar, 2011, pp. 14-15.
[318] P. T. MUCHLINSKI, *Multinational Enterprises and the Law*, Oxford, the Oxford International Law Library, 2007, p. 515.
[319] *Ibidem*.
[320] *Ibidem*.
[321] *Ibidem*.
[322] *Ibidem*.
[323] See n. 317 above, p. 15.
[324] See n. 317 above, p. 18.

> many prominent corporations have suffered the wrath of exposure to negative NGO campaigns and boycotts, including Nestlé, Shell, McDonald's, Coca-Cola and Nike. Grassroots activism may be the best known mechanism for encouraging MNEs to respect human rights[325].

The second mechanism refers to corporate self-regulation and involves the adoption of voluntary instruments, among which codes of conducts and social labels, aimed at the respect of some standards. All these instruments share a non-binding nature and they can be adopted voluntarily. In addition, only rarely have they focused on human rights, giving importance only to workers' rights[326]. However, all these initiatives have not proved enough, also because "companies are generally reluctant to open their operations and activities to independent monitoring or verification of these codes"[327].

Finally, a third instrument to provide for corporate respect of human rights relies on international and national laws. In a first instance, it has been generally accepted that it is the State in which multinational enterprises conduct their business that has the duty to control their respect and avoid any violation of human rights. In fact, corporations have to respect some human rights responsibilities which national laws impose on them. Instead, from a different point of view, it has been argued that it is the corporation home state that has to bear the responsibility of MNEs' violations of human rights.

Nevertheless, even though the attempts at regulating corporate conduct have multiplied from the 1960s onwards, neither States, nor intergovernmental organizations, have succeeded in effectively limiting corporate conduct[328]. Furthermore, "international law still does not directly extend human rights obligations to private companies"[329].

Even though the imposition of human rights obligations on corporations and the mechanism to provide for their respect are still two debated topics, it is widely accepted that there has been a positive development in this field, demonstrated by

[325] A. GATTO, *Multinational Enterprises and Human Rights. Obligations under EU Law and International* Law, Cheltenham, Edwar Edgar, 2011, p. 18.
[326] *Ibid*., pp. 18-19.
[327] *Ibid*., p. 22.
[328] F. GALGANO, F. MARRELLA, *Diritto del commercio internazionale*, terza edizione, Lavis, Cedam, 2011, p. 896.
[329] M. HERDEGEN, *Principles of international economic law*, Oxford, Oxford University Press, 2013, p. 108.

"the expansion of State responsibility in the private sphere; the rise of individual duties; and direct international soft-law obligations on companies"[330].

An example of business interest in the development of standards aimed at providing for the respect of human rights are *the Voluntary Principles on Security and Human Rights* (hereinafter VPs)[331]. These Principles were established in December 2000 and were developed through the efforts of six oil and mining MNEs, the US, the UK the Netherlands and Norway governments, human rights interest NGOs, and trade unions groups. They developed together a set of principles which should have helped corporations in conducting their operations in a human rights responsible way. Obviously, the nature of these principles is voluntary. The emphasis that this instrument puts on human rights is made clear at the very beginning, where it is affirmed that

> The participants recognize the importance of the promotion and protection of human rights throughout the world and the constructive role business and civil society – including non-governmental organizations, labor/trade unions, and local communities – can play in advancing these goals[332].

The corporations that took part in this instrument are twenty-two, among them, the most popular are Shell and Total. Obviously, given their voluntary nature, these principles do not provide any sanctions in case of non-compliance.

A similar instrument is that of the *Equator Principles*[333], which were adopted by the financial industry in 2003. The aim of these Principles is to deal with the environmental and social risk involved in financial projects. They were developed through the efforts of ten banks together with some NGOs. These Principles are non-binding too. In their preamble it is stated that these Principles are adopted "in order to ensure that that the projects we finance are developed in a manner that is socially responsible and reflect sound environmental management practices"[334].

Both these instruments stand as a clear example of how also business leaders have an interest in the implementation of human rights, even though at different degrees. Although the existence of human rights responsibilities on corporations seems to

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[330] A. GATTO, *Multinational Enterprises and Human Rights. Obligations under EU Law and International* Law, Cheltenham, Edwar Edgar, 2011, p. 26.
[331] *Voluntary Principles on Security and Human Rights*, December 2000.
[332] *Ibid*., p. 1.
[333] The Equator Principles, a financial industry benchmark for determining, assessing, and managing social and environmental risk in project financing, available at: *http://www.equator-principles.com/resources/equator_principles.pdf*
[334] *Ibid*., p. 1.

have been widely accepted, it cannot be denied that these responsibilities must be distinguished by those of States, as some responsibilities are actually not performable by business. As a result, it is important to classify the different obligations concerning human rights addressed to corporations.

A first group is represented by the provisions arising out of the norms coping with what are called 'traditional human rights'. Examples of these rights are civil and political rights, such as the freedom of thought, the prohibition of compulsory labour, and the rights of security[335]. These rights are promoted by, among the others, the *ILO Declaration on Fundamental Principles and Rights at Work*[336], by the *OECD Guidelines on Multinational Enterprises*[337] and by UN *Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights*[338]. Obviously, also these instruments do not impose duties only on MNEs but on all firms. For instance, the OECD Guidelines maintains that

> The Guidelines are not aimed at introducing differences of treatment between multinational and domestic enterprises; they reflect good practice for all. Accordingly, multinational and domestic enterprises are subject to the same expectations in respect of their conduct wherever the Guidelines are relevant to both[339].

A second group refers to the provisions dealing with economic, cultural and social rights[340]. These rights are included in the UN Norms mentioned before and also in the ILO Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy[341]. Examples of these rights are the right to health and to a safe working environment. For example, according to the ILO Tripartite Declaration

> All governments should pursue policies designed to promote equality of opportunity and treatment in employment, with a view to eliminating any

[335] P. T. MUCHLINSKI, Multinational Enterprises and the Law, Oxford, the Oxford International Law Library, 2007, pp. 521-522.
[336] ILO Declaration on Fundamental Principles and Rights at Work, Geneva, 18th June 1998.
[337] OECD Guidelines for Multinational Enterprises, 2011 edition, available at: *http://www.oecd.org/daf/inv/mne/48004323.pdf*
[338] United Nations, Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights, 2003.
[339] See n. 337 above, p. 18, para 5.
[340] See n. 335 above, p. 522
[341] ILO Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy, 1977, available at: *http://www.ilo.org/wcmsp5/groups/public/---ed_emp/---emp_ent/---multi/documents/publication/wcms_094386.pdf*

> discrimination based on race, colour, sex, religion, political opinion, national extraction or social origin[342].

A third group of provisions deals with the respect of the other groups of people, especially for the most vulnerable, and are called 'rights of collective solidarity'[343]. Finally, the fourth set of provisions faces the different issues arising when MNEs manage to comply with the previous rights, while the fifth group of provisions deals with corporate social responsibility and corporate codes of conduct[344].

As far as the issue of human rights is concerned, it is commonly agreed that it should not be left to corporate self-regulation. Indeed, human rights refer to a group of rights so wide and fundamental that we should prevent any violations of them. In addition, it would be inappropriate to charge corporations with a set of rights that historically have always been addressed to States. As a result, it is also important to understand which human rights obligations should be carried by MNEs.

This is not an easy point to discuss, as not all human rights can directly rely on companies. Indeed, as already said, business cannot take over the role of State actors. As a result, some human rights norms "need to be reformulated before being applied to companies"[345]. In a first attempt it would seem important to make a list of corporate human rights duties. For instance, corporations may be expected to respect the rights which are part of *jus cogens*. However, drafting a list of corporate human rights duties would be too risky as it would probably bring to dealing with some rights and ignoring others, while all human rights are universal and have the same importance.[346] As a consequence, corporations should hold human rights duties as much as States and non-state actors.

To sum up, nowadays it is undisputable that MNEs must respect and provide for the respect of human rights in their business operations. Although the primary role to safeguard the respect of those rights relies on States, corporations must bear the responsibilities for their conduct and make sure that basic human rights respect is assured. Nowadays, with regards to business, human rights provisions are included in corporate codes of conduct, and this has led to what an author has called

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[342] ILO Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy, 1977, p. 5, n. 21, available at: *http://www.ilo.org/wcmsp5/groups/public/---ed_emp/---emp_ent/---multi/documents/publication/wcms_094386.pdf*

[343] P. T. MUCHLINSKI, Multinational Enterprises and the Law, Oxford, the Oxford International Law Library, 2007, p. 522.

[344] *Ibid*., p. 523.

[345] A. GATTO, *Multinational Enterprises and Human Rights. Obligations under EU Law and International* Law, Cheltenham, Edwar Edgar, 2011, p. 94.

[346] *Ibid*., pp. 94-97.

"contrattualizzazione dei diritti umani"[347]. Indeed, as each State sets its own standards for the protection of human rights, this phenomenon could be a positive improvement for human rights. In fact

> Through their international contracts, highly globalised TNCs can develop a network of fundamental "contractual" rights which would eventually be able to establish standards higher than those developed by the law of a particular country (be it the host or the home state of the enterprise)[348].

Nevertheless, even though, on the one hand, MNEs should continue to develop and adhere to mechanisms setting standards for human rights protection, "the primary responsibility for realizing human rights lies with national governments"[349] and "recognizing the responsibility of non-state actors should never undermine this responsibility"[350]. MNEs, in their activities, must respect the standards of their host country. Every State "has and shall freely exercise full permanent sovereignty, including possession, use and disposal, over all its wealth, natural resources and economic activities"[351]. In particular, according to the *Charter of Economic Rights and Duties of States*, each State has the right to regulate foreign investment within its territory, to regulate the activities of MNEs and to make sure MNEs respect its norms[352]. Therefore, we can argue that the fundamental issue here is what to do in the case of a host State unwilling or incapable to assure the respect of human rights within its territory. Very often, the inability of a host State to regulate MNEs' wrong conduct mainly derives from the already mentioned State desire to attract foreign investments which sometimes has, in many States, led to the so called *race to the bottom*. Emblematic examples of this are the *export processing zones*, where "è lo stesso Stato territoriale che abbassa il livello di guardia in ordine alla tutela dei diritti

[347] F. MARRELLA, *Imprese multinazionali e responsabilità per violazioni dei diritti umani*, p. 95, in M. NORDIO, V. POSSENTI, *Governance globale e diritti dell'uomo*, Reggio Emilia, Diabasis, 2007.
[348] *Ibidem*, original text: "imprese transnazionali altamente globalizzate possono istituire, attraverso i propri contratti internazionali, un network di diritti fondamentali 'contrattualizzati' che potrebbero stabilire standard perfino più elevati di quelli previsti dal diritto di un determinato Paese (sia esso lo Stato ospitante o anche lo Stato di origine dell'impresa".
[349] J. F. ADDICOTT, Md. J. H. BHUIYAN, T. M. R. CHOWDHURY, *Globalization, international law, and human rights*, Oxford, Oxford University Press, 2012, p. 3.
[350] *Ibidem*.
[351] UN General Assembly, *Charter of Economic Rights and Duties of States*, 12 December 1974, article 2, available at: *http://www.aaas.org/sites/default/files/SRHRL/PDF/IHRDArticle15/Charter_of_Economic_Rights_and_Duties_of_States_Eng.pdf*
[352] *Ibidem*.

umani"[353] and the *weak governance zones*, where "lo Stato non vuole o non è in grado di imporre la propria autorità"[354]. The *export processing zones* are usually to find in some developing countries and take many forms, among which maquiladoras, free ports and free trade zones. Here, MNEs can take advantage of incentives among which the exemption from certain types of business regulation and from some taxes. The ILO has defined them as "industrial zones with special incentives set up to attract foreign investors, in which imported materials undergo some degree of processing before being (re)exported again"[355]. Even worse, *weak governance zones* are defined by the OECD as "an investment environment in which governments are unable or unwilling to assume their responsibilities"[356]. Even though, according to the OECD work on *weak governance zones*, corporations must bear here the same responsibilities they hold in other investment environments[357], among which obviously also human rights obligations, this usually is not bound to happen. The inadequacy of the host State control on MNEs' activities is also linked to the fact that nowadays we have to face a splitting of MNEs' control[358]. While on the one hand, it is the host State that bear the responsibility for the juridical control of the MNE, on the other it is its home State that controls the MNE from an economic point of view[359]. As a consequence, the host State control alone cannot assure a uniform protection of human rights worldwide[360]. On the other hand, also the home State control has proven inadequate, mainly because "l'esercizio extraterritoriale della giurisdizione statale va circoscritto a casi eccezionali"[361]. Hence, as both these models have proven insufficient, on what should MNEs' regulation rely on, especially before a State incapable of prosecuting MNEs' violations of human rights? We can argue that the only solution to this issue seems to be found in the development of a international conference aimed at drafting an international

[353] F. GALGANO, F. MARRELLA, *Diritto del commercio internazionale*, terza edizione, Lavis, Cedam, 2011, p. 897.
[354] *Ibidem*.
[355] ILO Governing Body, Employment and Social Policy in respect of export processing zones, Geneva, March 2003, article 2, available at: *http://www.ilo.org/public/libdoc/ilo/GB/286/GB.286_esp_3_engl.pdf*
[356] OECD, *OECD Risk Awareness Tool for Multinational Enterprises in Weak Governance Zones*, June 2006, p. 9, available at: *http://www.oecd.org/daf/inv/corporateresponsibility/36885821.pdf*
[357] *Ibid*., p. 15.
[358] See n. 353 above, p. 898.
[359] *Ibidem*.
[360] *Ibidem*.
[361] *Ibid*., p. 899.

convention on MNEs[362]. This convention should be aimed at regulating MNEs and at assuring they comply with international norms.

A final point we would like to make is the following: even though MNEs exploitative and harmful practices have led different NGOs and groups of people to criticize them and see them as evils, we should not forget remembering that there are many other sources of human rights violations. Although States are the main supervisors of human rights, they commit abuses too. It would be wrong to think that all States perfectly respect and protect their people rights today, as our world is filled with disparities and contradictions.

We will now briefly analyze the major sources of corporate human rights obligations.

3.3.1. | Human rights "obligations" under soft law

International soft law mechanisms refer to a variety of instruments weaker than hard law instruments, which are legally binding, but stronger than mere declarations, which do not carry any legal force. Soft law instruments' legal force varies from documents to documents. In the previous chapter, while analysing corporate social responsibility and codes of conduct, we took into account soft law instruments. Corporate soft law obligations on human rights arise from four instruments, which we have already analysed.

The *OECD Guidelines for Multinational Enterprises* were the first instrument to be drafted. Their first text of 1976 did not consider much human rights. However, the Guidelines were revised in 2000 and then in 2010 and their text now recommends the respect of human rights, by making also reference to the *Universal Declaration of Human Rights*. In particular, in the 2011 version part four of the text is dedicated to human rights. Even though the Guidelines underlines that the primary duty to respect human rights is of States, also enterprises should respect human rights and avoid causing negative and different human rights impact[363]. In addition, the Guidelines underlines that

> A State's failure either to enforce relevant domestic laws, or to implement international human rights obligations or the fact that it may

[362] F. GALGANO, F. MARRELLA, *Diritto del commercio internazionale*, terza edizione, Lavis, Cedam, 2011, p. 903.

[363] OECD Guidelines for Multinational Enterprises, 2011 edition, p. 31, available at: *http://www.oecd.org/corporate/mne/48004323.pdf*

> act contrary to such laws or international obligations does not diminish the expectation that enterprises respect human rights[364].

Making clear that the obligations to respect human rights must be respected by each kind of enterprise and always.

Another soft law instrument recommending MNEs the respect of human rights is the *ILO Tripartite Declaration on Multinational Enterprises and Social Policy*[365]. The ILO had adopted the Declaration on fundamental principles and rights at work[366] in 1998 and the principles of this declaration became part of the 2000 revised Tripartite Declaration. This principles cover four different areas of workers' rights and are aimed at protecting human rights in the workplace. These areas are the freedom of association and the right to collective bargaining, the elimination of all forms of forced or compulsory labour, the abolition of child labour and the elimination of discrimination in respect of employment and occupation.

The *Global Compact*[367] recommends business to respect human rights too. According to this instrument, corporations are asked to adopt ten universal principles, some of which refer to human rights. The human rights principles were inspired by the *Universal Declaration of Human Rights*, the *ILO Declaration on Fundamental Principles and Rights at Work*, the *Rio Declaration on Environment and Development* and the *UN Convention Against Corruption*. According to the Global Compact business is asked to support and respect international human rights and should avoid human rights abuses.

Finally, as already mentioned before, the principal international instruments asking multinational corporations to respect human rights are the *UN Norms on the Responsibility of Transnational Corporations and Other Business Enterprises with Regard to Human Rights*[368]. These *Norms* deal with a wider set of human rights than the instruments discussed before. They ask each business enterprise to adopt their provisions and to report periodically on their implementation. However, just as like as the three previous instruments, these *Norms* put the primary responsibility to safeguard human rights on States too.

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[364] OECD Guidelines for Multinational Enterprises, 2011 edition, p. 32, para 38, available at: *http://www.oecd.org/corporate/mne/48004323.pdf*

[365] ILO Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy, Geneva, 2006.

[366] ILO Declaration on Fundamental Principles and Rights at Work, 1998.

[367] UN Global Compact, 1999, available at: *http://www.unglobalcompact.org*

[368] United Nations, Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights, 2003.

3.3.2. | Responsibility under international human rights law

Human rights law obligations still have not been imposed on corporations. As a result, corporations might be asked to comply with the obligations that are addressed to non-state actors under international human rights law. Indeed, it is very difficult to find out international norms that directly impose duties on multinational enterprises as such[369]. However, the previous paragraphs should have underlined that corporations have already been asked to endorse human rights duties and responsibilities. In fact, it has been stated that, at least as regards human rights violations, corporations should be held directly responsible at the international level[370]. For example, this first happened in the *Universal Declaration of Human Rights*. Nonetheless, the Declaration, as regards all the other instruments described above, is not a legally binding instruments. As a consequence, the issue we have to face here is to understand if there are binding norms conferring human rights responsibility on corporations under international law.

As explained in many occasions, corporate codes of conduct are not legally binding. Therefore, we cannot employ them in the discussion of this paragraph. Nevertheless, among corporate codes of conduct, those developed by States could bind corporations legally. For instance, this happened in the UK, thanks to new norms passed by the government in 2003. According to them, companies had to endorse the *Companies Audit Investigation and Community Enterprise Bill*[371]. The aims of the Bill are "improving confidence in companies and financial markets; and promoting social enterprise"[372]. In line with this initiative, France, had introduced the *nouvelles regulations économiques*[373] on 15 May 2001. Recently, the Danish government, passed an amendment to the *Danish Financial Statements Act*[374] on first January

[369] C. FOCARELLI, *Diritto Internazionale*, seconda edizione, Padova, Cedam, 2012, p. 81.
[370] F. GALGANO, F. MARRELLA, *Diritto del commercio internazionale*, terza edizione, Lavis, Cedam, 2011, p. 905.
[371] UK Government, Companies (Audit, Investigations and Community Enterprise) Act, 2004, available at: *http://www.legislation.gov.uk/ukpga/2004/27*
[372] Available at: *http://webarchive.nationalarchives.gov.uk/+/http://www.dti.gov.uk/cld/companies_audit_etc_bill/*
[373] Loi n° 2001-420 du 15 mai 2001 relative aux nouvelles régulations économiques, available at : *http://www.legifrance.gouv.fr/affichTexte.do;jsessionid=EEC8E7164BB9532D9648CED23BD89B87.tpdjo14v_1?cidTexte=LEGITEXT000005630963&dateTexte=20140115*
[374] The Danish Financial Statement Act, Danish Act no. 448 of 7 June 2001, available at: *http://policy.mofcom.gov.cn/english/flaw!fetch.action?libcode=flaw&id=b461664c-d0b8-4286-9f82-242ff98e2e11&classcode=324*

2009. This amendment obliges big trading companies to let known their corporate social responsibility initiatives[375].

From another point of view, in order to find out some hard law obligations for corporations, it could seem useful to think that corporate human rights obligations should be the same of individuals'. Indeed, as far as both the individuals and MNEs are concerned, we can argue that "l'affermazione di una capacità internazionale dell'individuo e quindi dell'impresa transazionale non è inconciliabile con il modello "westfaliano" radicato nel dogma della personalità piena ed "originaria degli Stati"[376]. However, this has proved to have negative results. Firstly, while individuals' obligations refer to international humanitarian law and international crimes, corporations are able to violate a wider range of rights which would be set aside if corporations were regulated as if they were individuals. Secondly, there are also many other types of human rights violations that are not addressed to individuals but only to States and that corporations would have the capacity to abuse. Moreover, corporations differ from individuals in their inner structure[377].

On the other hand, if we compare corporations to states, it inevitably follows that corporations are different from them and hence they cannot hold all their obligations.

As a result, although the majority of scholars would agree that the huge power of business should be counterbalanced and that business should be held accountable for its wrong conduct, the main issue here is finding a legal basis for MNEs' responsibility. Obviously, as regards this paragraph, we are now interested in identifying a legal basis for business human rights obligations. "Human rights scholars and activists are increasingly pointing at the human rights responsibilities of business. They argue that corporations are bound by human rights laws and that they should be held accountable for violations of these laws"[378]. We can argue that corporate human rights obligations derive from both the international and the national legal orders[379]. Indeed, "there are tendencies at the national level to hold individuals as well as corporations accountable for violations of elementary human

[375] See F. GALGANO, F. MARRELLA, *Diritto del commercio internazionale*, terza edizione, Lavis, Cedam, 2011, p. 909.
[376] *Ibid*., pp. 904-905.
[377] A. GATTO, *Multinational Enterprises and Human Rights. Obligations under EU Law and International* Law, Cheltenham, Edwar Edgar, 2011, pp. 91-92.
[378] J. F. ADDICOTT, Md. J. H. BHUIYAN, T. M. R. CHOWDHURY, *Globalization, international law, and human rights*, Oxford, Oxford University Press, 2012, p. 1.
[379] *Ibid*., pp. 3-9.

rights committed abroad"[380]. Obligations arising from national legal orders are part of constitutions and ordinary legislation. "Human rights obligations derive from ordinary criminal legislation, civil law legislation, consumer protection laws, company law, and national law covering the extraterritorial operations of corporations"[381]. An example of a national tendency to hold MNEs accountable for human rights violations is the United States Alien Tort Claims Act (ATCA, also called Alien Tort Statute, ATS) which allows foreign people to bring claims in violation of the law of nations or of a treaty of the US under this Statute. From the 1980s onwards US Courts have allowed foreigners to bring human rights violation claims under the ATS. Nonetheless, "it is controversial whether US law recognizes corporate liability for human rights violations under the ATCA"[382]. Furthermore, "only a handful of constitutions contain explicit provisions that the constitutional protection of fundamental human rights applies to both natural and legal persons"[383]. Apart from the national order, corporate human rights obligations may derive also from international treaties. It seems that this kind of obligations "bind corporations to the extent that further national and international measures are taken. Most of the international treaties only directly regulate corporations as states are their primary addressees"[384].

Unfortunately, corporate human rights law obligations have not been developed yet. Their existence both under domestic and international law is controversial[385]. This is reflected by a statement of the US Court of Appeals for the Second Circuit in the case *Kiobel v Royal Dutch Petroleum*[386]. It was stated that "the relatively few international treaties that impose particular obligations on corporations do not establish corporate liability as a 'specific, universal, and obligatory' norm of customary international law"[387]and that "no corporations has ever been subject to any form of liability (whether civil or criminal) under the customary international law of human rights"[388].

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[380] M. HERDEGEN, *Principles of international economic law*, Oxford, Oxford University Press, 2013, p. 113.
[381] J. F. ADDICOTT, Md. J. H. BHUIYAN, T. M. R. CHOWDHURY, *Globalization, international law, and human rights*, Oxford, Oxford University Press, 2012, p. 4.
[382] See n. 380 above, p. 114.
[383] See n. 381 above.
[384] See n. 381 above, p. 5.
[385] See n. 380 above, p. 116.
[386] *Kiobel v. Royal Dutch Petroleum Co.*, 133 S. Ct. 1659 (2013).
[387] *Kiobel v Royal Dutch Petroleum* (2d Cir, 17 Sep 2010), p. 39, available at: *http://www.ca2.uscourts.gov/decisions/isysquery/3b6c7a2e-4d70-4306-973e-d0ed3eff5b40/1/doc/06-4800-cv_opn.pdf*
[388] *Ibid*., p. 2.

Even though some states do have imposed obligations on corporations, these still are not available at the international level. A mechanisms charging corporations with international human rights obligation will need to be drafted as soon as possible, in order to prevent any further human rights abuse and especially due to the crucial role played by corporations today and to the fact that the huge variety of rights possessed by these companies should be counterbalanced by duties at the international level. In fact, MNEs "are granted the kind of legal protection which had been conceived for individuals. Though MNEs have the ability to violate the human rights of those who allow them to conduct their operations, they possess an economic power superior to that of certain states"[389]. We can argue that the only adequate regulation of MNEs' global activities must be determined by "una convenzione interstatale multilaterale a vocazione universale"[390]. For the time being, MNEs' regulation continues to be faced differently by each State. Nevertheless, until now, it seems that MNEs have globally been let free to develop their own systems of norms, giving birth to a sort of new *laissez faire*[391].

Concluding remarks

This chapter has coped with human rights. Their protection is granted by numerous instrument under international law, above all by the Universal Declaration of Human Rights. In particular, the impact that multinational enterprises have on them has been faced, together with the issue of corporate obligations to respect them. However, the obligation to safeguard human rights does not rely only on corporations. As a consequence, a specific paragraph has addressed States' obligations and another individuals' obligations. It must be underlined that the obligation to respect human rights relies on everyone.

[389] F. GALGANO, F. MARRELLA, *Diritto del commercio internazionale*, terza edizione, Lavis, Cedam, 2011, p. 932, translated from Italian, original text: "beneficiano di una tutela concepita per le persone fisiche possedendo a volte una potenza economica maggiore di quella di alcuni Stati pur essendo in grado di violare i diritti umani di coloro che ne consentono l'attività".
[390] *Ibid*., p. 895.
[391] *Ibid*., p. 896.

4. KIOBEL v. ROYAL DUTCH PETROLEUM Co.

4.1. A brief history of the case – 4.2. A case study: can corporations be held liable for torts in violation of International Law under the ATS? – 4.3. US Alien Tort Claims Act: extraterritorial reach? – 4.4. 17th April 2013: the Decision of the Court. Future prospects of human rights litigation in civil courts

Introduction

The aim of this chapter is to deal with a specific case study extremely linked to the main subject of this dissertation. While the previous chapters have been more argumentative and theoretical, this chapter will report a real legal case which will serve as a proof of what has been deeply analysed.

The main subject of this chapter is the *Kiobel v. Royal Dutch Petroleum Co.*[392] case, a legal case which took eleven year to reach a final decision. It is based on the violation of human rights by a multinational corporation, Royal Dutch Petroleum Co., to the detriment of twelve people in Nigeria.

The *Kiobel v. Royal Dutch Petroleum Co*. case will stand as basis for the study of how human rights litigations can be dealt with at the international level. Firstly, we will analyse the case and make a description of what happened, in order to highlight how the legal case arose. Secondly, we will focus on the United States Alien Tort Statute in order to clarify if it can and should be considered a reference point when prosecuting corporations. Thirdly, we will deal with the presumption of extraterritoriality of the Alien Tort Statute, called also Alien Tort Claims Act, and we will link it to the United States Supreme Court final decision of the *Kiobel* case. Finally, by using again the *Kiobel* decision as a starting point, we will show how this decision has influenced human rights litigations and how it has also risked to affect negatively human rights. We will also manage to draw the possible future of human rights violations legal litigations.

[392] *Kiobel v. Royal Dutch Petroleum Co.*, 133 S. Ct. 1659 (2013).

4.1. | A brief history of the case

The origins of the *Kiobel v. Royal Dutch Petroleum* case date back to the early 1990s in Nigeria. In this period a region of this country, the Ogoniland, which was inhabited by 500 thousand Ogoni people, was hosting the operations of Royal Dutch Shell, an Anglo-Dutch company, which cooperated there with its Nigerian affiliate, Shell Petroleum Development Company of Nigeria (hereinafter SPDC). The activities of those Nigerian, Dutch, and British corporations were linked to the extraction of oil and they had already started in 1958. However, according to the Nigerian people, these corporations were causing a huge environmental damage to their territories and, in particular, they were destructing the Niger Delta. Indeed, their operations were polluting the river and, in addition to this, they were destroying their farmland. As a result, a group of Nigerians belonging to the ethnic group of the Ogoni people decided to react against the harm that this company was producing and created the Movement for the Survival of the Ogoni People (hereinafter MOSOP), which exposed the environmental catastrophe which was going on. The MOSOP was a peaceful movement that, apart from struggling to put an end to Shell environmental damage, fought also to achieve a broader autonomy for their ethnic group, the Ogoni. In addition, this Movement wanted to obtain some benefits from the oil extraction too. Although it was a peaceful movement, the Nigerian military government reacted to its campaigns savagely. The Rivers State Internal Security Task Force, which was a Nigerian government military unit, was reinforced, and it started carrying out raids against Ogoni villages. The raids took place during all the nights of 1994 summer[393]. Moreover, in order to stop its protests, which were negatively targeting their economic interests, the Royal Dutch Shell group illegally cooperated with the Nigerian military government with the aim of spreading terror among civilians and get rid of the population in the areas inhabited by the Ogoni people and destined to oil extraction. In particular, Royal Dutch Shell financed, helped and armed the Nigerian military government which then started to oppress the leaders of the Ogoni Movement, all the people having links with it and also their families. According to the accuses with which was charged,

> Shell, through its Nigerian subsidiary Shell Petroleum Development Company of Nigeria (SPDC), provided transport to Nigerian troops,

[393] M. E. DANFORTH, *Corporate Civil Liability under the Alien Tort Statute: Exploring its Possibility and Jurisdictional Limitations*, Cornell International Law Journal, Vol. 44, 2011, p. 660.

> allowed company property to be used as staging areas for attacks against the Ogoni and provided food to the soldiers and paid them[394].

The plaintiffs alleged that the military government was involved in the rape, tortures, and deaths of the Ogoni people. In particular

> Throughout the early 1990s, the complaints alleges, Nigerian military and police forces attacked Ogoni villages, beating, raping, killing, and arresting residents and destroying or looting property. Petitioners further allege that respondents aided and abetted these atrocities by, among other things, providing the Nigerian forces with food, transportation, and compensation, as well as by allowing the Nigerian military to use respondents' property as a staging ground for attacks[395].

To escape their government's torture, some people left Nigeria[396].

To go to the roots of what then evolved into a legal case, we have to go to year 1994. In this year, Doctor Barinem Kiobel, together with many other members of the Ogoni movement, among which also Ken Saro Wiwa, an internationally known writer and activist, were illegally arrested by the Nigerian militaries. The military arrested and detained the Ogoni members, holding them incommunicado in military custody and subduing them to tortures. The people detained were known as the "Ogoni Nine". Then the military established a special court and tried the people in short. Without doubts, this Court was created without respecting the international fair trial standards. Through unfair and illegal procedures the Court prosecuted the Ogoni members, charged them with death penalty and executed them in November 1995. Even though this unfair trial had reached international attention and many foreign governments, such as the US and the UK governments, had condemned it, the Nigerian military government killed them anyhow. After the execution, Nigeria was suspended from the Commonwealth of Nations.

As already said, the Nigerian military government persecuted also the families of the Ogoni movement members. Among the persons who underwent their harmful acts there was also the wife of Doctor Kiobel, Esther Kiobel. The woman was stripped, beaten and detained illegally for three weeks, without adequate food and facilities, only because she had sought to bring some food to her husband. In addition, an

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[394] Business and Human Rights, *Case profile: Shell lawsuit (re Nigeria)*, available at: *http://www.businesshumanrights.org/Categories/Lawlawsuits/Lawsuitsregulatoryaction/LawsuitsSelectedcases/ShelllawsuitreNigeria*

[395] *Kiobel v. Royal Dutch Petroleum Co.*, 133 S. Ct. 1659 (2013), p. 2.

[396] Earth Rights International, *Out of Bounds, Accountability for Corporate Human Rights Abuse After Kiobel*, September 2013, p. 17, available at: *http://dg5vd3ocj3r4t.cloudfront.net/sites/default/files/documents/Out-of-Bounds-Report.pdf*

official tried to rape her[397]. In order to escape from the continuous persecutions which targeted her and her family, Esther Kiobel finally resorted to move to the United Nations refugee camp in Benin until she was then granted asylum from the United States in 1998[398].

Esther Kiobel together with eleven other Nigerians, all victims of Shell abuses and violations, sued Royal Dutch Shell, in this instance the Nigerian, British and Dutch corporations, under the US Alien Tort Statute (ATS) in the United States District Court for the Southern District of New York in 2002. This was not the only lawsuit performed against Shell in this case as six other members of the labelled "Ogoni Nine", among which the family of Ken Saro-Wiwa, filed a similar lawsuit. As far as the *Ken Saro-Wiwa v. Royal Dutch Petroleum* case is concerned, it must be reported that this case was finally concluded in favour of the plaintiffs as the parties agreed to a settlement on 8 June 2009 according to which Royal Dutch Shell had to give the plaintiffs 15.5 million dollars[399]. The claim had been filed by the son of Ken Saro-Wiwa and other members of the MOSOP movement who had accused Shell of being complicit in the human rights violations committed by the Nigerian military government. The 15.5 million dollars settlement was the compensation for ten plaintiffs. All the petitioners, among which obviously also Esther Kiobel, had moved to the US, had been given political asylum, and had became then US legal residents. It is fundamental to explain why the petitioners chose to raise their lawsuits alleging jurisdiction for the ATS. Indeed, the ATS states that "the 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"[400]. With regard to this, the petitioners accused Shell of violating the law of Nations by

> Aiding and abetting the Nigerian Government in committing (1) extrajudicial killings; (2) crimes against humanity; (3) torture and cruel treatment; (4) arbitrary arrest and detention; (5) violations of the rights to life, liberty, security, and association; (6) forced exile; and (7) property destruction[401].

[397] Earth Rights International, *Out of Bounds, Accountability for Corporate Human Rights Abuse After Kiobel*, September 2013, p. 17, available at: *http://dg5vd3ocj3r4t.cloudfront.net/sites/default/files/documents/Out-of-Bounds-Report.pdf*
[398] *Ibidem*.
[399] *Wiwa v. Royal Dutch Petroleum Co.*, Settlement Agreement and Mutual Release, June 8, 2009, available at: *http://wiwavshell.org/documents/Wiwa_v_Shell_agreements_and_orders.pdf*
[400] 28 USC § 1350 – Alien's action for tort.
[401] *Kiobel v. Royal Dutch Petroleum Co.*, 133 S. Ct. 1659 (2013), p. 2.

However, the ATS permits non-US citizens to file lawsuits only with regard to the most serious violations of human rights, among which, for example, the crimes against humanity, torture and war crimes. As a result, the District Court did not accept to deal with the claims of extrajudicial killings, violations of the rights to life, liberty, security, and association, forced exile and property destruction in 2006. The remaining claims were let to proceed under the ATS as it was affirmed that these claims were ruled by this statute. After dismissing the defendants' motion for lack of personal jurisdiction in March 2008, the District Court accepted to reconsider the plaintiffs' motion to reconsider this on 16 November 2009. However on 21 June 2010 the lawsuit was dismissed by the judge of the District Court[402]. In addition, on 17th September 2010, the Second Circuit dismissed the entire case maintaining that the ATS did not permit to sue corporations for torts performed in violation of the law of nations and that the law of nations did not recognize corporate liability. To reach this decision, the Judges based their reasoning on the Nuremberg judgment which maintained that "crimes against international law are committed by men, not by abstract entities"[403]. In reality the Judges misunderstood this reasoning as it was meant to imply that both abstract entities and individuals could be persecuted for this type of crimes[404]. This decision was dramatic as it indirectly claimed that it was not possible to hold claims against a corporation under the ATS and that, as a consequence, it was not possible to punish the responsible for the violations of the *Kiobel* case. However, the US ten judges were divided. To react to this, the petitioners asked them to rehear the case but the judges could not reach an agreement. Then, on 4 February 2011, the Court of Appeals refused to rehear the case. Finally, the plaintiffs addressed the US Supreme Court, by filing a petition on 6 June 2011, and the Court accepted to hear the plaintiffs appeal on 17 October 2011. The petitioners asked the Court to answer

> (1) whether the issue of corporate civil tort liability under the Alien Tort Statute ("ATS"), 28 U.S.C. § 1350, is a merits question, or an issue of subject matter jurisdiction as the court of appeals held, and (2) whether corporations are excluded from tort liability for violations of the law of nations such as torture, extrajudicial executions or other crimes against

[402] Business and Human Rights, *Case profile: Shell lawsuit (re Nigeria)*, available at: *http://www.businesshumanrights.org/Categories/Lawlawsuits/Lawsuitsregulatoryaction/LawsuitsSelectedcases/ShelllawsuitreNigeria*

[403] International Military Tribunal Judgment, Nuremberg, 41.

[404] A. DE JONGE, *Transnational Corporations and international law. Accountability in the global business environment*, Corporations, Globalisation and the Law, Cheltenham, Edwar Edgar UK, 2011, p. 106.

> humanity, as the Second Circuit held, or instead may be sued in the same manner as any other private actor under the ATS for such egregious violations [...][405].

In other words, the petitioners asked the Court whether corporations could be sued when committing or taking part in gross rights abuses or whether they were totally immune under the ATS. The Court heard oral argument relating to these questions on 28 February 2012 and, on 5 March 2012, ordered that the case had to be heard again and that the parties had to provide supplemental briefing. As a result, the Court decided not to rule the case in the term 2011-2012 but to do so in the next term. In particular, as far as the supplemental brief is concerned, the Court focused on two questions. Firstly, the Court asked whether the ATS was the right tool for suing corporations for violations occurred in foreign countries. Secondly, the Court asked to highlight under what circumstances could the ATS be used for suing corporations for the just mentioned kind of torts. "The question here is not whether petitioners have stated a proper claim under the ATS, but whether a claim may reach conduct occurring in the territory of a foreign sovereign"[406]. By posing these questions, the Court was wondering if this case could have been heard elsewhere, apart from the US. Furthermore, one of the fears of the Court was to expose US corporations to lawsuits abroad. The plaintiffs supplemental brief was reported on 6 June 2012. Throughout their words, they managed to persuade the Court that the ATS had been charged with an extraterritorial scope right from the beginning, that is to say that it could be applied to acts taking place outside the US. To prove this, the counsels for the petitioners, Carey d'Avino and Paul Hoffman, made reference to the same Court's decision in the case *Sosa v. Alvarez-Machain*[407] in 2004. In addition, they affirmed also that piracy, which is one of the claims usually filed under the ATS, refers to extraterritorial acts. They focused on the fact that the Court had never imposed a geographical restriction for torts claims which could be ruled under the ATS and they maintained that "this Court should not craft a novel territorial limitation that is unsupported by precedent and that Congress has not seen fit to impose"[408]. As far as the two questions asked by the Court are concerned, the petitioners gave their opinion. Their answer to the first question was that the Court had already rejected a territorial limitation under the ATS, and they proved this by

[405] Petitioners' Supplemental Opening Brief, No. 10-1491, 6 June 2012, p. 5.
[406] *Kiobel v. Royal Dutch Petroleum Co.*, 133 S. Ct. 1659 (2013), p. 4.
[407] *Sosa v Alvarez-Machain* 542 US 692 (714) (2004).
[408] Petitioners' Supplemental Opening Brief, No. 10-1491, 6 June 2012, p. 2.

making reference to the *Sosa* case, where the Court had ruled over acts committed abroad. The *Sosa* case was employed also to answer to the second question of the Court. In this instance, the petitioners argued that "this Court recognized that modern international human rights law bars States from committing certain egregious acts against their citizens within their own territory and endorsed the exercise of ATS jurisdiction in this context"[409]. The petitioners also stated that

> A central purpose of the ATS was to provide a federal forum for alien tort claims involving violations of international law. A categorical territorial limitation would undermine that purpose, because no equivalent limitation applies to transitory tort claims heard in state courts. The state courts were not then, and are not now, limited in the scope of their jurisdiction over claims between parties before them and would have accepted jurisdiction over transitory torts committed on foreign soil based on established common law doctrine by the time the ATS was enacted[410].

The respondents gave their opinions on first August 2012. According to them, the ATS could not be applied to the *Kiobel v. Royal Dutch Petroleum* case. They explained this by saying that when it is not possible to find out a well-established extraterritorial status in a statute it must be accepted that this statute has no extraterritorial application. Furthermore, they argued that by applying the ATS to foreign acts the Court would have risked violating international law, as it would have suggested that the ATS and the US federal common law have a universal civil jurisdiction. As a result, the respondents stated that

> the presumption against extraterritoriality applies here and is not overcome. This Court need not reach the separate presumption against construing federal law to violate international law, but if reached, that presumption too applies and is not overcome[411].

Finally, on 31 August 2012 the petitioners issued a supplemental reply brief. They reacted against the respondents' restriction of the ATS and underlined that the US had always been a refuge for violators of human rights. According to them, the respondents' opinion

> would prevent the victims of the universally condemned human rights violations from bringing ATS claims against perpetrators found in the United States...The first Congress passed the ATS so that our country

[409] Petitioners' Supplemental Opening Brief, No. 10-1491, 6 June 2012, p. 7.
[410] *Ibid.*, p. 9.
[411] Supplemental Brief for Respondents, No. 10-1491, 1 August 2012, p. 10.

> would not become a safe haven for pirates or other enemies of mankind. Respondents offer no persuasive reason to abandon this Nations' commitments to human rights and the enforcement of the law of nations[412].

The Court then held the second round of argument and reheard the case on first October 2012. In this instance, the Court unanimously accepted the presumption of extraterritoriality of the ATS.

The Obama administration was involved in the history of this case too. In particular, during the first round of briefing the Obama administration urged the Supreme Court to rule in favour of the plaintiffs and, as a consequence, human rights, by letting the lawsuit to go on and accept that corporations could be sued. During the second round of briefing the Obama administration changed its opinion and required the Supreme Court to place limits to the applicability of the ATS[413]. The Department of Justice stated that the case had to be dismissed by underlying that the ATS could not be applicable to cases relating to foreign corporations and taking place outside the territory of the United States. It motivated this argument by saying that the torts had entirely took place outside the US soil. As a consequence, although during the first round the administration had proved to encourage the respect of human rights and the prosecution of corporations, it then endorsed a pro-corporate attitude[414]. Furthermore, in the same period, President Obama appointed Srinivasan as judge of the US Court of Appeals for the DC Circuit, a judge popular for his numerous defences of corporations against accuses of human rights violations[415].

On 17 April 2013 the Court finally ruled on the case. The Supreme Court decided unanimously to dismiss the case stating that it was not possible to hold a corporation liable in the US under the ATS for torts committed outside the US territory. However, the ten judges split in the reasoning. The Court decision stated that

> There is no clear indication of extraterritoriality here, and petitioners' case seeking relief for violations of the law of nations occurring outside the United States is barred.
> On these facts, all the relevant conduct took place outside the United States. And even where the claims touch and concern the territory of the

[412] Petitioners' Supplemental Reply Brief, No. 10-1491, 31 August 2012, pp. 3-4.
[413] J. KAMENIR-REZNIK, R. MESSINGER, *Applying American Law to Far-Off Crimes, from Nazi-Germany to Nigeria, Victims of Abuses Need Tools*, The Jewish Daily Forward, available at: *http://forward.com/articles/161951/applying-american-law-to-far-off-crimes/*
[414] Earth Rights International, *Out of Bounds, Accountability for Corporate Human Rights Abuse After Kiobel*, September 2013, pp. 20-21, available at: *http://dg5vd3ocj3r4t.cloudfront.net/sites/default/files/documents/Out-of-Bounds-Report.pdf*
[415] *Ibidem*.

> United States, they must do so with sufficient force to displace the presumption against extraterritorial application. Corporations are often present in many countries, and it would reach too far to say that mere corporate presence suffices. If Congress were to determine otherwise, a statute more specific than the ATS would be required[416].

With this decision, the US Supreme Court denied the applicability of the ATS to this case, as the facts had taken place outside the territory of the US. The Court underlined that in the *Sosa* case it had "repeatedly stressed the need for judicial caution in considering which claims could be brought under the ATS, in light of foreign policy concerns"[417]. Moreover, it highlighted that the text of the ATS did not suggest that the Congress had intended it to have extraterritorial reach[418]. Indeed, "the ATS covers actions by aliens for violations of the law of nations, but that does not imply extraterritorial reach"[419]. Moreover, to underline again that the Congress had not meant the ATS to have extraterritorial reach, the Court claimed that

> nothing in the text of the ATS evinces the requisite clear indication of extraterritoriality. Nor does the historical background against which the ATS was enacted overcome the presumption against application to conduct in the territory of another sovereign[420].

Finally, the Court underlined that General Bradford opinion "hardly suffices to counter the weighty concerns underlying the presumption against extraterritoriality"[421] and that nothing could prove that the ATS had been pass to make the US "a uniquely hospitable forum for the enforcement of international norms"[422]. Therefore, the ATS could not apply to the *Kiobel* case.

Hence, the Court indirectly limited the power of the ATS. Obviously, this decision was very dramatic for Esther Kiobel and the others petitioners who had been struggling for so long to achieve justice for the abuses they had suffered. Even though the case was unanimously dismissed, the Court did not agree on the reason to do so. The majority of the judges, among which Chief Justice Roberts, argued that the presumption against the extraterritoriality of the US law applied also to the ATS. Three more Judges, namely Justice Kennedy, Justice Alito, and Justice Thomas, agreed with the decision of the Court but considered it to be too narrow. For instance,

[416] *Kiobel v. Royal Dutch Petroleum Co.*, 133 S. Ct. 1659 (2013), pp. 13-14.
[417] *Ibid.*, p. 5.
[418] *Ibid.*, p. 7.
[419] *Ibidem*.
[420] *Ibid.*, p. 8.
[421] *Ibid.*, p. 12.
[422] *Ibidem*.

Justice Kennedy affirmed that "the opinion of the Court is careful to leave open a number of significant questions regarding the reach and interpretation of the Alien Tort Statute. In my view that is a proper disposition"[423]. On the other hand, the four more liberal judges, Justice Breyer, Justice Ginsburg, Justice Sotomayor and Justice Kagan, shared the same opinion which was issued by Justice Breyer. They agreed to accept the decision of the Court but they did not agree with its reasoning. Justice Breyer stated that the jurisdiction under the ATS would be possible when

> (1) the alleged tort occurs on American soil, (2) the defendant is an American national, or (3) the defendant's conduct substantially and adversely affects an important American national interest, and that includes a distinct interest in preventing the United States from becoming a safe harbour (free of civil as well as criminal liability) for a torturer or other common enemy of mankind[424].

By issuing this decision, the Court inevitably narrowed the possibilities of those seeking a judicial remedy for human rights abuses to find it under the US legal framework and, obviously, under the Alien Tort Statute. In other words, the Court restricted the application of the ATS with regard to cases of human rights violations occurred outside the US. The decision marked a victory for Royal Dutch Shell and corporations in general. However, the reason why the Court dismissed the case was that there were not sufficient connections with the US territory. The only connection was that Shell conducted business in the US too. The decision of the Court was based on the "presumption against extraterritoriality" doctrine. According to this doctrine, a US federal law could apply outside the US only if the US Congress had indicated its extraterritorial reach[425]. The Court's decision mainly focused on the extraterritorial implications that the application of the ATS to this case would have had. It concluded that, as the violations had taken place entirely in Nigeria, and neither the perpetrators nor the victims were US citizens at the time in which the events occurred, the ATS could not apply to the *Kiobel* case.

The same day in which the decision was rendered, Shell's legal director, Peter Rees, issued an email statement in which he affirmed that "Today's decision doesn't weaken the human rights of people around the world. It makes clear that the Alien

[423] *Kiobel v. Royal Dutch Petroleum Co.*, 133 S. Ct. 1659 (2013), Justice Kennedy J. concurring, p. 1.
[424] Opinion of the Court, No. 10-1491, 17 April 2013, Justice Breyer concurring, p. 1.
[425] Earth Rights International, *Out of Bounds, Accountability for Corporate Human Rights Abuse After Kiobel*, September 2013, p. 20.

Tort Statute does not provide a means for claims to be brought in the US which have nothing to do with the US"[426].

Although the Court had accepted the applicability of the ATS for a strict number of international law violations in 2004, with this decision it definitely denied its applicability to operations committed by foreign companies and in a foreign soil. Without doubts, this decision crashed with many cases which, prior to *Kiobel*, had coped with human rights violations occurred outside the United States. The main risk of this decision is that victims of human rights abuses would not even try to bring lawsuits under the ATS. This adds to the fact that often, prosecutors, lack the resources to suit corporations and, what is more, fear corporations' reprisal. Nevertheless, we must always remember that the applicability of the ATS had been defined by the First Congress in 1789. Furthermore, it is still not clear whether the ATS can apply or not to cases involving corporate conduct. As a result, as already suggested, it seems that the solution to cases involving corporate wrong conduct everywhere has to be found in international law. International norms should be enforced by an international Court[427].

In order to understand which implications the decision the Court will have on human rights litigations in the future, and also to better understand why the Court finally dismissed the *Kiobel* case, we will examine the Alien Tort Statute and its applicability in the next two paragraphs. Firstly, we will trace its history and its reach. Secondly, we will analyze its alleged presumption of extraterritoriality. All this taking in mind the *Kiobel* case, which will always be at the basis of this debate.

4.2. | A case study: can corporations be held liable for torts in violation of International Law under the ATS?

In recent years, the Alien Tort Statute (hereinafter ATS) has proved to be a unique tool for foreign victims of human rights abuses who sought to find a remedy in the United States. The ATS is also known as the Alien Tort Claims Act (hereinafter ATCA). It is a statute which was passed by the First Congress in 1789 and which was part of the original Judiciary Act. In this period, US courts possessed already the capability to hear any kind of claim raised by foreign people. However, the ATS was

[426] G. STOHR, *Companies shields as US Court cuts human rights suits*, Bloomberg, 17 April 2013, available at: *http://www.bloomberg.com/news/2013-04-17/companies-get-shield-as-top-u-s-court-curbs-human-rights-suits.html*

[427] F. GALGANO, F. MARRELLA, *Diritto del commercio internazionale*, terza edizione, Lavis, Cedam, 2011, p. 903.

created to have a different reach. It was developed to deal with claims focusing on international law violations. This kind of torts usually requires state action, as international law regulates their conduct. The law of nations was considered to be part of the common law of the US and so the Congress did not develop a legislation highlighting which claims could be sued under the ATS. More in general, it can be argued that the ATS was created to encourage foreign citizens to find a remedy in US courts to acts of piracy, which usually took place outside the US territory. Indeed, until the 1980s, the ATS was addressed only with relation to piracy acts. The ATS permits non-US citizens to bring to the US Courts tort claims relating to the violation of the law of nations, of customary international law and of a US treaty. In the words of the statute, which I already reported, "the 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"[428]. As an author points out, the practical effect of the ATCA is

> To allow victims of TNCs abroad abuses to obtain the reparation of their harm through an enforceable judgement in the US and, possibly, in those States who are willing to accept it. This may prove to be particularly useful whenever facing a TNC whose whole management and coordination are strictly connected to the US, that is, a foreign firm possessing assets in the US[429].

The ATS remained dormant for about two centuries. It was the *Filartiga v. Peña-Irala*[430] case that brought this statute to life in 1979. This case was a landmark for both US and international law. Its history extended the jurisdiction of the US outside their territory and permitted the punishment of an alien, non-US citizen, for torts in violation of the law of nations committed abroad. The events took place in Paraguay in the mid-1970s. Joelito Filartiga, whose father was popular for his political ideas and activities, was tortured to death by Américo Peña-Irala, the Inspector General of Police in Paraguay capital, Asunción. When he was killed, Filartiga had only seventeen years. His father and his sister moved to New York after his death and

[428] 28 USC § 1350.
[429] F. MARRELLA, *Imprese multinazionali e responsabilità per violazioni dei diritti umani*, pp. 84-85, in M. NORDIO, V. POSSENTI, *Governance globale e diritti dell'uomo*, Reggio Emilia, Diabasis, 2007, translated from Italian, original text: "Consentire alle vittime degli abusi commessi dalle imprese transnazionali all'estero il risarcimento dei danni attraverso una sentenza esecutiva negli Stati Uniti ed, eventualmente, negli altri Stati disposti a riconoscerla. Ciò potrebbe risultare particolarmente efficace ogni qualvolta si abbia a che fare con un'impresa transnazionale fortemente collegata agli Stati Uniti sotto il profilo della direzione e coordinamento dell'intero gruppo ovvero con un'impresa straniera dotata di assets negli USA".
[430] *Filartiga v. Peña-Irala* 630 F.2d 876 (2d Cir. 1980).

managed to file a lawsuit under the ATS against Peña-Irala, who was living there too. They claimed that the Inspector General was responsible for crimes of torture, which is prohibited by customary international law. Unexpectedly, this case met all the necessary requirements to be dealt with under the ATS. Indeed, as the ATS establishes, the plaintiffs were non-US citizens, they brought a lawsuit regarding a tort, which was torture, and this tort violated the law of nations. The ATS jurisdiction on this claim was granted during the Second Circuit by Judge Irving R. Kaufman of the Court of Appeals. In fact, while at first the district court dismissed the case for lack of personal jurisdiction, the Second Circuit claimed that the abuses committed by an official authority correspond to the violation of the law of nations. Inspector General Peña-Irala was found liable and human rights finally triumphed. This case stood as an example of many other cases which were later brought to the US under the ATS by foreign plaintiffs. Indeed, since then, about 150 tort claims were filed under this statute. In particular, the ATS became a reference point for human rights lawyers, who "began to use it as the basis for civil claims against perpetrators of torture, genocide, war crimes and other crimes under international law"[431]. This statute became a powerful tool to hold individuals liable for human rights' violations and abuses.

It is now fundamental to clarify who might be sued under the ATS. In the *Filartiga* case, an Inspector General, who is a government official, was found liable. As a result, it was agreed that officials of governments could be sued and that, more generally, the responsible of the tort had to have a governmental involvement. On the other hand, the possibility of bringing claims against governments was restricted[432]. In addition, it was accepted that in the case of gross human rights violation, such as the genocide and was crimes, it was possible to bring claims also against private individuals. This decision was reached during the *Kadic v. Karadzic*[433] case, when the Second Circuit "confirmed that the ATCA could ground certain actions against individuals acting in private rather than official capacity"[434]. This case was brought against Radovan Karadzic, responsible for a variety of crimes, among which torture and genocide, which he performed together with his unofficial Bosnian Serb army.

[431] A. DE JONGE, *Transnational Corporations and international law. Accountability in the global business environment*, Corporations, Globalisation and the Law, Cheltenham, Edwar Edgar UK, 2011, p. 100.
[432] Earth Rights International, *Out of Bounds, Accountability for Corporate Human Rights Abuse After Kiobel*, September 2013, p. 33, available at: http://dq5vd3ocj3r4t.cloudfront.net/sites/default/files/documents/Out-of-Bounds-Report.pdf
[433] *Kadic v. Karadzic*, 70 F.3d 232 (2d Cir. 1995).
[434] See n. 431 above.

The abuses he committed fell within the group of gross human rights violations. He was not an official leader; as a consequence, his actions did not fall within the authority of a State[435]. As a consequence, as far as private individuals liability can be held under the ATS, it has been decided that apart from those violations of human rights that can take place also without a connection with States, such as piracy and slavery,

> private actors can only be held liable under the ATCA if a sufficient connection exists between the private actor and abuses committed by a government or, alternatively, between the private actor's abusive acts and a government[436].

Nowadays, even though at first it was not clear, it is also accepted that the ATCA can be addressed against private companies whose lawsuits have been allowed like those brought against individuals[437]. Just like individuals, a lawsuit against companies can be filed when companies are responsible for human rights violations which show a link with state action, and which were approved and hidden by the State in which the abuses were committed. If there is not the 'state action' element, companies, like individuals, can be held liable only in relation to gross human rights violations. Among them are genocide, piracy, forced labour and slave trading[438]. This principle has been accepted due to the all too often corporate perpetration of human rights abuses to safeguard their activities. Many companies, in fact, use their economic power to favour repressive governments. Corporations have long benefited from human rights violations and, even worse, have long been able to escape their accountability thanks to legal, political and economic resources[439]. Lawsuits against corporations started to increase since the 1990s. One of the most crucial cases brought against corporations under the ATS was the *Doe v. Unocal*[440] case. It involved a group of Burmese nationals who suffered a variety of abuses, among which slavery, rape, and forced labour, perpetrated by Burmese military forces to

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[435] A. DE JONGE, *Transnational Corporations and international law. Accountability in the global business environment*, Corporations, Globalisation and the Law, Cheltenham, Edwar Edgar UK, 2011, p. 100.
[436] *Ibid*., p. 103.
[437] J. A. ZERK, *Multinationals and Corporate Social Responsibility. Limitations and Opportunities in International Law*, Cambridge Studies in International and Comparative Law, Cambridge, Cambridge University Press, 2006, p. 207.
[438] *Ibid*., pp. 210-211.
[439] Earth Rights International, *Out of Bounds, Accountability for Corporate Human Rights Abuse After Kiobel*, September 2013, p. 42, http://dg5vd3ocj3r4t.cloudfront.net/sites/default/files/documents/Out-of-Bounds-Report.pdf
[440] *Doe v. Unocal Corp*., 963 F. Supp. 880 (US District C.D. Cal 1997).

favour the building of a gas transportation pipeline in Yandana. According to the plaintiffs, two corporations, Total and Unocal, were part of the abuses and, above all, knew that these violations were occurring and were related to the construction of their project. In addition, the two corporations had employed police and military services[441]. As a result, they were complicit in the government abuses. The reason is that the corporation and the Burmese military government were in a consortium for the pipeline construction. The case was ruled by the California State Court and it ruled against Unocal, a Californian energy corporation, in 1996. The corporation was found guilty because it had provided the military government with assistance even though it was aware that it was committing human rights abuses on its behalf. The case went on for about ten years until Unocal finally decided to compensate the plaintiffs and set also funds for the development of programmes aimed at improving living conditions and safeguarding the rights of Burmese people in 2005. Thanks to this settlement, it became possible for victims of corporate human rights abuses to seek justice in the US under the ATS. From this case onwards, Courts have continued to accept the idea that corporation can be sued for human rights abuses. As a consequence, as far as the title of this paragraph is concerned, the answer is yes, corporations can be held liable for torts in violation of international law under the ATS. This point may be reassumed by this quote

> A company can be liable under the ATCA either if its activities amounted to 'state action' in breach of the 'law of nations' or where the obligation alleged to have been breached is one which is applicable directly to private individual or company under customary international law[442].

This can obviously occur only with regards to corporate most terrible violations of human rights. As the *Unocal* case has illustrated, in the majority of cases corporations abuses are involved in natural resources extraction, among which oil, mining and natural gas. In this instance,

> extractive companies have proven more than willing to partner with abusive regimes to exploit such resources...Corporations that have been

[441] See J. A. ZERK, *Multinationals and Corporate Social Responsibility. Limitations and Opportunities in International Law*, Cambridge Studies in International and Comparative Law, Cambridge, Cambridge University Press, 2006, p. 208, and F. MARRELLA, *Imprese multinazionali e responsabilità per violazioni dei diritti umani*, p. 84, in M. NORDIO, V. POSSENTI, *Governance globale e diritti dell'uomo*, Reggio Emilia, Diabasis, 2007.

[442] J. A. ZERK, *Multinationals and Corporate Social Responsibility. Limitations and Opportunities in International Law*, Cambridge Studies in International and Comparative Law, Cambridge, Cambridge University Press, 2006, p. 209.

> sued under the ATS have typically utilized government troops to provide security for their projects, despite the fact that those troops have poor human rights records[443].

The *Kiobel* case too involved abuses perpetrated by a corporation and it represented the first time the issue of corporate liability under the ATS was dealt with by the US Supreme Court.

Having accepted that corporations can be held liable for gross human rights violation in the US Courts under the Alien Tort Statute, it is now important to explain what urged them to accept this principle. In a first instance, Courts wanted to counterbalance the great power of MNEs. It was necessary to make sure that the power MNEs possessed included also responsibilities on their side. It was not admissible that MNEs did not hold any kind of accountability and carried on their activities unnoticed. Indeed, MNEs power had been developing and spreading since their birth and it had reached its highest point during the last decades. In addition to this, Courts understood the need to create a mechanism that could be employed also by persons living and suffering the abuses of MNEs in those countries in which governments were brutal regimes and cooperated with them in their violations. In fact, as we have already underlined, many governments, especially military and dictatorial regimes, instead of protecting their citizens, usually help MNEs and hide their abuses, to make sure they will not move their activities in countries with even laxer regulations. The ATCA is a statute that is clearly aimed at counterbalancing this attitude. It allows US Courts to hear claims coming from foreign people and those claims include also MNEs harms caused abroad. Unfortunately, holding corporations liable has never been easy and in the majority of cases claims against corporations have been dismissed. One of the mechanism for the dismissal of ATS has frequently been the *forum non conveniens* principle, according to which Courts can decide that the case should be dealt with by a different jurisdiction. For example, the ATS application has been dismissed for this reason on the *Bhopal*[444] case[445]. This case involved the Union Carbide India Ltd, which was an Indian company partly controlled by the Union Carbide Corporation, and Indian workers. It took place in India on the second and third of December 1984. The case was based on a Union

[443] Earth Rights International, *Out of Bounds, Accountability for Corporate Human Rights Abuse After Kiobel*, September 2013, p. 42, available at: *http://dg5vd3ocj3r4t.cloudfront.net/sites/default/files/documents/Out-of-Bounds-Report.pdf*

[444] *Bano v. Union Carbide Corp.*, F.3d 120 (2d Cir. 2001).

[445] F. MARRELLA, *Imprese multinazionali e responsabilità per violazioni dei diritti umani*, p. 85, in M. NORDIO, V. POSSENTI, *Governance globale e diritti dell'uomo*, Reggio Emilia, Diabasis, 2007.

Carbide pesticide plant gas leak which exposed workers to gas methyl isocyanate, a deadly gas[446]. Due to this gas leak, thousands of people died, thousands of people remained disable and about 15 thousand people were killed some time later. Furthermore, many people still suffer the consequences of this leak which inevitably polluted the site. Among the injured people, some attempted to find justice bringing the claim in the US under the ATS. However, in the US the case was dismissed in 1986 basing this decision on the already mentioned principle of *forum on conveniens* and suggesting that the case had to be dealt with by Indian Courts. Union Carbide settled the civil suit in 1989, by agreeing to pay a settlement of 470 million dollars approved by the Indian Supreme Court. A group of victims sought again justice in US Courts for the injuries they suffered and also for the environmental damage caused by the gas leak in 1999. The claims were partly dismissed because of the already ordered settlement by the Indian Supreme Court. The remaining claims, regarding the environmental damage, were then dismissed in 2012 by the district court. Thanks to this decision, the Union Carbide corporation successfully evaded its liability and its shareholders did not suffer the consequences of the incidents. As this case should have made clear, holding corporations liable for civil torts is a difficult task. There are indeed many obstacles that prevent victims from obtaining justice. First of all, corporate separate legal personality makes it very difficult for the law to charge the responsibilities of corporate abuses on corporate managers, directors and owners. Thanks to this principle parent companies do not even suffer the consequences of the operations of their subsidiaries. In addition, another obstacle is created by the concept of limited liability which avoids shareholders from assuming their responsibilities[447]. It is worth highlighting how MNEs internal structure, which brings them to fragment their activities in more than one country, strongly favours their success and their ability to evade regulation. The *Bhopal* case stand as an example of how "even in states which are politically stable and have a well-developed legal system, local remedies for harms caused by the operations of foreign TNCs are either unavailable or ineffective"[448].

The *forum non conveniens* doctrine has been employed in a variety of cases and does not represent the only issue for plaintiffs when assessing corporate liability. Another

[446] A. DE JONGE, *Transnational Corporations and international law. Accountability in the global business environment*, Corporations, Globalisation and the Law, Cheltenham, Edwar Edgar UK, 2011, p. 79.
[447] *Ibid*., p. 84.
[448] *Ibid*., pp. 84-85.

obstacle is the doctrine of 'sovereign immunity' established by international law and which derives from the international law principle according to which all states are equal. According to this doctrine, states cannot have jurisdiction over the activities of other states. In other words, states are immune from the jurisdiction of other states[449]. Indeed, the *UN Convention on Jurisdictional Immunities of States and their Properties* establishes that "A State enjoys immunity, in respect of itself and its property, from the jurisdiction of the courts of another State subject to the provisions of the present Convention"[450]. As a result, the application of the ATCA is limited by this doctrine with regards to the claims against governments, state agencies, and heads of state[451]. Another issue is arisen by the 'political question' doctrine, which "can be invoked in relation to very serious human rights violations where, for instance, a judicial pronouncement on a subject could conflict with or undermine a political settlement"[452]. Furthermore, apart from war crimes and crimes against humanity, a Court can dismiss a case brought under the ATCA basing its decision on the 'international comity' principle, which can be defined as legal reciprocity. The comity clause is part of article four of the US Constitution, which states that "the Citizens of each State shall be entitled to all privileges and immunities of Citizens in several States"[453]. With regard to this principle, Courts should not establish proceedings that are bound to affect negatively the decision of other jurisdictions. By applying this doctrine, "courts may exercise a discretion to defer to the laws or interests of a foreign country and decline to exercise the jurisdiction they otherwise have"[454]. All these doctrines have made the application of the ATCA harder. Nevertheless, after the *Unocal*[455] case, it became accepted that the ATS could be addressed by people seeking remedies for corporate abuses. As a consequence, this Statute went under attack by corporations. Their aim was undermining its efficacy in order to protect their interests. It was suggested that the victims of corporate abuses had to address their countries' jurisdiction, despite the fact that many government do

[449] J. A. ZERK, *Multinationals and Corporate Social Responsibility. Limitations and Opportunities in International Law*, Cambridge Studies in International and Comparative Law, Cambridge, Cambridge University Press, 2006, p. 213.
[450] United Nations Convention on Jurisdictional Immunities of States and their Properties, New York, 2 December 2004, Article 5.
[451] A. DE JONGE, *Transnational Corporations and international law. Accountability in the global business environment*, Corporations, Globalisation and the Law, Cheltenham, Edwar Edgar UK, 2011, p. 111.
[452] See n. 449 above, p. 212.
[453] U.S. Constitution, Article 4, Section 2, Clause 1 (the 'Comity Clause').
[454] See n. 451 above, p. 116.
[455] *Doe v. Unocal Corp*., 963 F. Supp. 880 (US District C.D. Cal 1997).

not possess the instruments and the ability to prosecute corporations. In addition, corporations managed to evade their responsibilities in human rights abuses[456]. Despite this, US courts reiterated the possibility to hold companies liable under the ATS through the 2004 *Sosa v. Alvarez-Machain*[457] decision which reaffirmed the Court's decision in the *Filartiga* case. In particular, the Ninth circuit in this case admitted that gross human rights violations could be sued under the ATS. Moreover, with its decision in this case the Second Circuit established that it is possible to hold liable under the ATS also actors who were not the primary perpetrators of the abuses. As already said, since the *Filartiga v Peña-Irala*[458] case, more than one hundred lawsuits have been brought to the US under the ATS. Many among them were related to torts claims against corporations. Examples of them are the *Almog v. Arab Bank*[459] and the *Re South African Apartheid Litigation*[460]. Due to the amount of cases brought against corporations, the latter started feeling under attack and managed to **ch**allenge the ATS even more. For instance, they claimed that the ATS would have caused economic consequences and that, in addition, it would have put foreign policy at risk. This presumption crashes with the above mentioned doctrine of the 'act of state' which allows courts to dismiss cases involving the acts of other governments. Moreover, another doctrine, the 'political question', permits them to dismiss cases that could interfere on US foreign policy[461]. Finally, the *forum non conveniens* doctrine too prevents US courts from dismissing cases that should be ruled by other jurisdictions. As a result, claiming that the application of the ATS would undermine US foreign policy is simply a nonsense. Moreover, many corporations affirmed that by accepting to bring claims regarding torts occurred abroad under the ATS, the US would have violated international law. For example, Shell defendants in the *Kiobel* case affirmed that

> application of the ATS and federal common law to foreign conduct involves an assertion of universal civil jurisdiction that clearly violates international law as to foreign defendants and raises concerns under international law as to US defendants as well[462].

[456] Earth Rights International, *Out of Bounds, Accountability for Corporate Human Rights Abuse After Kiobel*, September 2013, p. 36, available at: *http://dg5vd3ocj3r4t.cloudfront.net/sites/default/files/documents/Out-of-Bounds-Report.pdf*
[457] *Sosa v. Alvarez-Machain* 542 US 692 (714) (2004).
[458] *Filartiga v. Peña-Irala* 630 F.2d 876 (2d Cir. 1980).
[459] *Almog v. Arab Bank*, PLC, 471 F. Supp. 2d 257 (E.D.N.Y. 2007).
[460] *re South African Apartheid Litig*., 617 F. Supp. 2d 228 (S.D.N.Y. 2009).
[461] See n. 456 above, p. 58.
[462] Supplemental Brief for Respondents, No. 10-1491, 1 August 2012, p. 4.

This position was refused by many human rights experts, especially because it would have led to a sort of corporate immunity[463]. In the *Kiobel* case, Shell's defendants claimed that "the application of the US law to conduct on foreign soil 'creates a serious risk of interference with a foreign nation's ability independently to regulate its own commercial affairs' "[464], by taking into account the US Court decision on the case *F. Hoffman-La Roche Ltd v. Empagran S.A*[465]. Furthermore, corporations maintained that, by applying the ATS, the US would have dramatically interfered in the jurisdiction of other nations and would have attempted to impose their law onto other countries. However, they failed to understand that the ATS does not apply to claims of violations of national law but, instead, to international law abuses[466]. Moreover, corporations feared that people would have been led to bring torts claims under the ATS for the only reason that corporations' activities were settled in developing countries, where human rights are everyday at risk.

To sum up, it is now commonly accepted that victims of human rights abuses can address the US ATS when seeking a remedy for the violations of corporations. This Statute provides victims with the hope for justice. In order to have success, a plaintiff bringing a claim under the ATS should make sure that the tort he suffered meets some requirements. Firstly, he must prove that he was the victim of a gross violation of human rights. Secondly, he must show the presence of state action in the tort. Indeed, "private actors can only be held liable under the ATCA if a sufficient connection exists between the private actor and abuses committed by a government or, alternatively, between the private actor's abusive acts and government"[467]. Thirdly, he must prove that the defendant really knew or intended that he was violating international law through his actions[468]. With regard to this, "the courts have consistently required evidence of the state of mind, or the *mens rea* of the defendant, but the question remains whether the test for ATCA liability is knowledge or intent"[469]. Finally, a strict territorial nexus to the US is fundamental. Indeed, the

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[463] Earth Rights International, *Out of Bounds, Accountability for Corporate Human Rights Abuse After Kiobel*, September 2013, p. 58, available at: *http://dg5vd3ocj3r4t.cloudfront.net/sites/default/files/documents/Out-of-Bounds-Report.pdf*, p. 55.
[464] Supplemental Brief for Respondents, No. 10-1491, 1 August 2012, p. 2.
[465] *F. Hoffmann-La Roche Ltd. V. Empagran S.A.*, 542 US 155, 165 (2004).
[466] See n. 463 above, p. 56.
[467] A. DE JONGE, *Transnational Corporations and international law. Accountability in the global business environment*, Corporations, Globalisation and the Law, Cheltenham, Edwar Edgar UK, 2011, p. 103.
[468] *Ibid.*, pp. 101-105.
[469] A. DE JONGE, *Transnational Corporations and international law. Accountability in the global business environment*, Corporations, Globalisation and the Law, Cheltenham, Edwar Edgar UK, 2011, p. 104.

US Supreme Court decision in the case *Kiobel* highlighted that a case can be ruled under the ATS only if the relevant conduct occurred in the US territory.

As far as the relationship between the application of the ATS and corporations is concerned, the majority of cases addressing corporate liability under the ATS until today have been dealing with corporate complicity in governments' abuses. It is indeed fundamental to make sure that as the activities of MNEs touch many countries, so does the ability of victims to find justice. The ATS permits the Unites States not to leave victims of corporate abuses alone. In addition, it avoids corporations from evading accountability in the US[470]. Despite this, people should not rely only on the ATS when seeking a remedy to the abuses perpetrated against them. It is fundamental to consider it a very useful legal mechanism, but it must not be forgotten that it is a US unilateral instrument. As a result, its application has also some drawbacks, as an author easily highlighted

> The ATCA is a US government unilateral instrument aimed also at permitting the extraterritorial application of US law. Internal norms can change. As a result, being the ATCA a unilateral instrument, it can be repealed or limited, without guarantee of a risk of double standard. Moreover, the ATCA application can be dismissed through the doctrine of *forum non conveniens*[471].

In this regard, we can argue that the application of the ATS can provoke different reactions at the international level. On the one hand it may be criticized by, for example, corporations, while on the other it may be encouraged. Indeed,

> From an international perspective, the implications of the ATCA give rise to an ambivalent assessment. Whilst some criticize what they perceive as 'human rights imperialism' and unilateral definition of international standards, others welcome the existence of a forum for redressing human rights violations within a strong and fair judicial system, granting quality in the administration of justice as the US federal courts provide[472].

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[470] Supplemental Brief for Respondents, No. 10-1491, 1 August 2012, p. 41.

[471] F. MARRELLA, *Imprese multinazionali e responsabilità per violazioni dei diritti umani*, p. 85, in M. NORDIO, V. POSSENTI, *Governance globale e diritti dell'uomo*, Reggio Emilia, Diabasis, 2007, translated from Italian, original text: "L'ATCA, infatti, altro non è se non una misura unilaterale del governo USA tesa, peraltro, a consentire l'applicazione extraterritoriale del diritto statunitense. […] Le norme interne possono mutare e proprio perché l'ATCA è misura unilaterale, quest'ultima può essere revocata o limitata senza fornire alcuna garanzia contro il rischio di un double standard […] Inoltre l'applicazione dell'ATCA può essere inibita attraverso l'istituto processuale (e discrezionale) del *forum non conveniens".*

[472] M. HERDEGEN, *Principles of international economic law*, Oxford, Oxford University Press, 2013, p. 117.

4.3. | US Alien Tort Claims Act: extraterritorial reach?

Prior to the US Supreme Court decision in the *Kiobel* case[473], it was commonly agreed that the ATS, was applicable to cases concerning activities performed outside the territory of the United States. With regard to this, before *Kiobel*, US courts had coped with a variety of cases that did not possess a real link to their nation under the ATS. The 17 April 2013 decision of the Court changed completely this scenario. In a book written before this judgement, in 2011, when defining the ATCA it was affirmed that "the ATCA is unique to the United States and has gained notoriety as perhaps the most ambitiously drafted piece of extra-territorial legislation in the world"[474]. Nowadays, instead, it is no longer possible to believe firmly in such a statement. The *Kiobel* decision inevitably reduced the scope of the ATS and limited its applicability. In order to make this point clearer, we will now focus on the *Kiobel* case again.

On 5 March 2012 the Court had asked the parties to present supplemental briefing which would have had to explain "whether and under what circumstances the ATS allows courts to recognize a cause of action for violations of the law of nations occurring within the territory of a sovereign other than the United States"[475]. Many cases under the ATS had involved actions committed outside the United States. However, the issue of extraterritoriality had been raised by lawsuit against corporations, as

> some of the law applied in these cases appears to be coming from domestic rather than international law. Most of the corporate ATS cases concern alleged human rights abuses, but there is little direct support in international law for corporate liability for such abuses[476].

According to the petitioners, the ATS had a widely accepted extraterritorial application. On the other hand, the respondents clearly refused this principle and denied its extraterritoriality. The Court finally ruled in favour of the latter.

The supplemental brief filed by the petitioners on 6 June 2012 was clearly against an extraterritorial limitation of the ATS. Right at the very beginning of their brief, they underlined that the geographic scope of the ATS had to embrace the reach of the law

[473] *Kiobel v. Royal Dutch Petroleum Co.*, 133 S. Ct. 1659 (2013).
[474] A. DE JONGE, *Transnational Corporations and international law. Accountability in the global business environment*, Corporations, Globalisation and the Law, Cheltenham, Edwar Edgar UK, 2011, p. 99.
[475] *Kiobel v. Royal Dutch Petroleum Co.*, 133 S. Ct. 1659 (2013), p. 3.
[476] C. A. BRADLEY, *Attorney General Bradford's Opinion and the Alien Tort Statute*, The American Journal of International Law, Vol. 106:1:2012, pp. 4-5.

of nations. To prove their principle, as already said, the made reference to the acts of piracy, which are extraterritorial by nature, and to the Court decision in the case *Sosa v. Alvarez-Machain*. Moreover, they highlighted that no US Courts had ever defined the ATS territorial limitation. They supported their opinion by affirming that

> support for international human rights compliance and accountability for gross human rights violations is a longstanding cornerstone of US foreign policy. The proposed territorial limitation on ATS tort claims undermines both those policies and the purposes of the statute[477].

According to the petitioners, the whole history of the ATS supported the absence of an extraterritorial limit to its applicability. This Statute was indeed applicable to a strict range of gross human rights violations which could have taken place abroad. Examples of other cases to which the ATS was applicable and that the petitioners reported were the assaults to ambassadors and the violation of safe conducts. Indeed, as the Court itself had reaffirmed in *Sosa*, when the ATS was passed Blackstone had identified three specific violations of the law of nations, which were piracy, violation of safe conducts, and infringement of the rights of ambassadors[478]. While piracy is bound to occur outside the territorial jurisdiction of the US, the other examples of violations do not have to hold an extraterritorial application. With regard to piracy, pirates were considered enemies of the human race and so it was agreed that they could be prosecuted anywhere[479]. In the petitioners' view, the founders of the ATS did not intend it to be territorially limited to the US. In order to prove this principle, they made reference to the 1795 opinion of Attorney General William Bradford during the war between France and Great Britain and following the involvement of US citizens in a French attack against a British colony. General Bradford had affirmed that

> Crimes committed in the high seas are within the jurisdiction of the...courts of the United States; and, so far as the offence was committed thereon, I am inclined that it may be legally prosecuted in...those courts...But there can be no doubt that the company or individuals who have been injured by these acts of hostility have a remedy by a civil suit in the courts of the United States; jurisdiction being expressly given to these courts in all cases where an alien sues for a tort only, in violation of the laws of nations, or a treaty of the United States[480].

[477] Petitioners' Supplemental Opening Brief, No. 10-1491, 6 June 2012, p. 2.
[478] *Kiobel v. Royal Dutch Petroleum Co.*, 133 S. Ct. 1659 (2013), p. 8.
[479] C. A. BRADLEY, *Attorney General Bradford's Opinion and the Alien Tort Statute*, The American Journal of International Law, Vol. 106:1:2012, p. 3.
[480] Breach of neutrality, 1 Op. Atty. Gen. at 58-59 (1795)

This opinion is fundamental not only because it represents one of the fewer historical interpretations of the ATS, but also because it was cited by the US Supreme Court in the *Sosa v. Alvarez-Machain* case[481]. In addition, petitioners underlined that the Congress had never managed to limit the jurisdiction of the ATS since 1789. Moreover, they linked the ATS closely to the enforcement of the law of nations, which takes place extraterritorially. They also affirmed that, being the nature of the *Kiobel* case abuses that of gross human rights violation, each nation would have had a universal jurisdiction over those who were responsible for them. As a consequence, by limiting extraterritorially this Statute the Supreme Court would have prevented "the adjudication of claims where the victims or perpetrators are US nationals, where the foreign sovereign or our own government supports the suit, or where there is no adequate alternative forum available to adjudicate the claim"[482]. They pointed out that the Court had already been considering cases based on the violation of human rights and occurring in foreign soils. Examples of them are the already mentioned *Sosa v. Alvarez-Machain* and the *Filartiga v. Peña-Irala*[483] cases. Finally, they underlined that the founders of the ATS had intended it to have a territorial reach that met that of the reach of the law of nations. [484] Hence they concluded that

> The ATS applies to "any" suit by a non-citizen for transitory tort claims based on universally-recognized law of nations norms that were well-understood to be actionable wherever the tortfeasor could be found. The text leaves no doubt that ATS jurisdiction applies to conduct outside the United States, including conduct on foreign soil[485].

Respondents obviously denied the principles proposed by the petitioners. As explained before, they maintained that the ATS did not explicitly suggested an extraterritorial application of its Statute and so it could not be considered to be applicable outside the US. Indeed, they underlined that the ATS did not contain the clause "outside the United States"[486]. To reply to the petitioners' reference to the three category of torts identified by Blackstone, respondents claimed that these abuses did not occur abroad but only on the high seas and in the forum nation[487]. With regard to this, they claimed that even though piracy took place in the forum of nations, it did not occur in a foreign soil. Petitioners also maintained that "the

[481] *Sosa v. Alvarez-Machain* 542 US 692 (714) (2004).
[482] Petitioners' Supplemental Opening Brief, No. 10-1491, 6 June 2012, p. 11.
[483] *Filartiga v. Peña-Irala* 630 F.2d 876 (2d Cir. 1980).
[484] Petitioners' Supplemental Opening Brief, No. 10-1491, 6 June 2012, p. 18.
[485] *Ibid*., p. 24.
[486] Supplemental Brief for Respondents, No. 10-1491, 1 August 2012, p. 7.
[487] *Ibidem*.

geographic limitation in the ATS is textually supported by the words 'violations of the law of nations' which...Congress understood to address only conduct on US soil or the high seas"[488]. To make their point stronger, they also suggested that by applying the ATS to the *Kiobel* case the US Supreme Court would have violated international law. In fact, as the facts had entirely taken place in a foreign soil, that is Nigeria, the US would have not had to judge this case. Furthermore, they highlighted that nations to which the ATS had been applied before the *Kiobel* case, among which South Africa, had objected that this had interfered with their own jurisdiction[489]. According to them, "foreign governments and tribunals view the assertion of civil – as opposed to criminal – universal jurisdiction as a violation of international law"[490]. What is more, respondents affirmed that an application of the ATS to the *Kiobel* case in line with the petitioners' view would have caused conflict with foreign countries which would have not met the initial requirements of the Congress which had created the ATS to avoid the eruption of bad consequences for US foreign affairs[491]. Moreover, petitioners also did not agree with the petitioners' presumption that the whole history of the ATS proved its extraterritorial application. For instance, they made reference to Attorney General Bradford Opinion too and they replied that his Opinion was intended to favour the application of the ATS only with regards to a conduct on the high seas, rather than on a foreign territory, and to a conduct that expressly violated an extraterritorial treaty[492].

As the petitioners had suggested that, if a case has to be dealt with by another jurisdiction, Courts have the possibility to apply the *forum non conveniens* and the international comity doctrines, respondents replied that these doctrines are unworkable[493]. In addition, they affirmed that by employing the ATS to protect human rights extraterritorially, the US would have put their interests at risk[494].

The presumptions against the extraterritorial application of the ATS advanced by the respondents were also reinforced by a joint amicus brief filed by the governments of the United Kingdom and the Netherlands. Although these countries highlighted their commitment to the promotion of human rights and their firm desire not to leave corporations' abuses unpunished, they also refused to accept an extraterritorial

[488] *Ibid*., p. 22.
[489] *Ibid*., p. 16.
[490] *Ibid*., p. 40.
[491] *Ibid*., p. 31.
[492] *Ibid*., p. 28.
[493] Supplemental Brief for Respondents, No. 10-1491, 1 August 2012, p. 49.
[494] *Ibid*., p. 51.

application of the ATS with regard to acts committed by alien persons and with no connection with the United States. In their view, "such assertions of jurisdiction are contrary to international law and create a substantial risk of jurisdictional and diplomatic conflict"[495]. As a result, according to them, the *Kiobel* case

> Should be dealt with in an appropriate forum, respecting international law principles of jurisdiction. In relation to claims of a civil nature, the bases for the exercise of civil jurisdiction under international law are generally well-defined. They are principally based on territoriality and nationality. The basic principles of international law have never included civil jurisdiction for claims by foreign nationals against other foreign nationals for conduct abroad that have no sufficiently close connection with the forum State[496].

By claiming this, the two governments clearly showed their non acceptance of the application of the ATS on this case.

The Decision of the Court finally refused to apply the ATS extraterritorially. The Court established that there was no allusion in the ATS to its extraterritorial applicability. According to them, even though the ATS was created to face violations of the law of nations, this was not intended to include abuses committed in a foreign soil. By affirming this, the Supreme Court rejected the petitioners' argument that the history of the ATS had demonstrated its extraterritoriality. In addition, they argued that by accepting the petitioners' view, they would have probably caused diplomatic problems. In particular, they feared "accepting petitioners' view would imply that other nations, also applying the law of nations, could hale our citizens into their courts for alleged violations of the law of nations occurring in the United State, or anywhere else in the world"[497]. As a result, as all the abuses of the *Kiobel* case committed by Royal Dutch Shell had taken place outside the US, it was not possible to hold a corporation liable under the ATS for acts committed abroad.

The decision of the Court has obviously completely changed the scenario surrounding the ATS. Indeed, it seems likely that all the cases which were dealt with under this Statute before the *Kiobel* decision will be no longer possible. This decision also raises some questions. In fact, even though it denies the applicability of the ATS

[495] Brief of the governments of the Kingdom of the Netherlands and the United Kingdom of Great Britain and Northern Ireland as Amici Curiae in support of neither party, No. 10-1491, p. 2.
[496] *Ibid.*, p. 6.
[497] *Kiobel v. Royal Dutch Petroleum Co.*, 133 S. Ct. 1659 (2013), p. 13.

extraterritorially and when the relevant conduct takes place in foreign countries, it does not clarify which territorial link the claims should have with the US[498].

Moreover, the application of the ATS to civil cases should not be regarded only with fear. In fact, this Statute has the ability to bring also some benefits to the enforcement of international law. It in fact promotes international norms. With regard to this, it seems that international law too permits the application of the ATS, as it claims that each State is free to decide how to apply international law norms on its territory[499]. The ATS also gives a chance to victims of abuses of fighting for their rights, and, by doing this, it enforces the international law obligation to assist victims of human rights[500]. It cannot be denied that such a decision will have a negative impact on human rights, especially because those corporations responsible for human rights violations will seem even far more distant from being punished.

The decision of the US Supreme Court

> dealt a major blow to ATCA – statute that have been a vital tool for human rights advocates for three decades. The decision significantly narrows human rights cases that can be brought under the ATCA based on abuses outside the United States[501].

Given the spread of all these obstacles to the application of the ATS, it is more likely that human rights violation torts will have to be coped with by an international Court. In the next paragraph we will focus more in detail on the consequences that the *Kiobel* case will have on human rights litigation in the future.

4.4. | 17th April 2013: the Decision of the Court. Future prospects of human rights litigation in civil courts

The ATS has always been a hope for victims of human rights in search for a remedy to the abuses they suffered. To demonstrate its long tradition in the protection of human rights abuses victims, it is sufficient to remember that the ATS had been applied also to crimes of the South Africa Apartheid-era. However, the decision of

[498] C. E. BORDEN, C. RAJAN, *Litigation update*, in Business and Human Rights Review, Spring 2013, Issue 2, p. 32.
[499] Earth Rights International, *Out of Bounds, Accountability for Corporate Human Rights Abuse After Kiobel*, September 2013, p. 57, available at: *http://dg5vd3ocj3r4t.cloudfront.net/sites/default/files/documents/Out-of-Bounds-Report.pdf*
[500] *Ibidem*.
[501] Annual Briefing, *Corporate Legal Accountability*, Business and Human Rights Resource Centre, November 2013, p. 1.

the US Supreme Court to dismiss the case will inevitably change the path of the ATS. This decision has inevitably been a defeat for human rights defenders. In fact, even though before *Kiobel* victims of human rights considered the ATS as the most powerful tool they could employ, today this view is no more widely accepted. The US Supreme Court has limited the possibilities for human rights abuses victims to seek a remedy in the US. On the other hand, despite this decision, it must not be wrongly assumed that the ATS will no longer be available to victims of torts committed abroad. Indeed, this Statute will continue to deal with them, even when the responsible for these torts will be corporations.

Apart from the obstacles posed by the *Kiobel* case decision, there are some issues that those seeking a judicial remedy to human rights abuses usually have to overcome. In fact, very often victims' rights are not even recognized in their countries and it is usually very hard for them to find the right court in which to lay their claims. To better explain this, the UN working group on business and human rights defined the barriers that those in seek of a judicial remedy encounter in a report to the Human Rights Council in March 2013[502]. In particular, the report identifies the barriers that arose due to a negative impact of business in their country. The obstacles outlined by this report are the cost of seeking a judicial remedy, the complexity of corporate structures and contractual relationship, the lack of resources and legal assistance for victims and of access to information, jurisdictional challenges, political obstacles, the difficulties in enforcing judgements, weak regulatory regimes, the burden of proof, and the absence of legal arenas at their national level[503]. These barriers crashes with the provisions of the *Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law* adopted in 2005. According to this report, "a victim of a gross violation of international human rights law or of a serious violation of international humanitarian law shall have equal access to an effective judicial remedy as provided for under international law"[504]. In addition, the report outlined that the right of a victim to an equal remedy included the right to an equal access to justice, to an adequate reparation of the harm, and to access to information about

[502] Human Rights Council, *Report of the Working Group on the issue of human rights and transnational corporations and other business enterprises*, 14 March 2013.
[503] *Ibid*., p. 13, point 47.
[504] *Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law*, adopted on 16 December 2005, paragraph VIII, point 12.

violations and the mechanisms for reparation[505]. It is important to remember that the right to an effective remedy has been established also in article eight of the *Universal Declaration of Human Rights*. However, the access to an adequate judicial remedy for victims of human rights abuses against the harm of corporations still is a difficult task. With regard to this, even though the primary responsibility to protect human rights relies on States, business should bear its own responsibilities too, as the United Nations highlighted in the *UN Guiding Principles for Business and Human Rights*. Indeed, in this report the UN had stressed that "Business enterprises should respect human rights. This means that they should avoid infringing on the human rights of others and should address adverse human rights impacts with which they are involved"[506]. This provision is not obviously fulfilled in many countries, where the hope for a right judicial remedy rarely becomes a reality. The *Kiobel* case decision, for instance, did not provide victims with an adequate remedy to harm. It instead reaffirmed the tendency according to which lawsuits against companies will very hardly bring to a decision in favour of the victims.

The failure of the ATS to bring an adequate remedy to the *Kiobel* case, and the absence of binding mechanisms aimed at effectively holding corporations liable at the international level, can bring some negative consequences to the promotion and protection of human rights. Among them, one of the worst is an increase in international forum shopping[507]. This situation will occur, for instance, in the US, where the State and federal courts have different procedural rules and plaintiffs are so brought to address the court which is most convenient for them. In addition, this decision may affect the possibility of a victim to have access to a due process and seems also to favour corporate interests rather than limiting its abuses. On the other hand, according to some, applying the ATS to this case following the petitioners' request would have probably raised problems too. Firstly, more petitioners would have decided to bring their claims to the US, causing a congestion of US courts. Secondly, there would have probably been negative consequences for US foreign

[505] *Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law*, adopted on 16 December 2005, paragraph VII.
[506] United Nations Human Rights Office of the High Commissioner, Guiding Principles on Business and Human Rights, 2011, p. 13, point 11.
[507] M. E. DANFORTH, *Corporate Civil Liability Under the Alien Tort Statute: Exploring its Possibility and Limitations*, Cornell International Law Journal, Vol. 44:2011, p. 4.

relations and economy. Thirdly, US corporation may have suffered similar lawsuits abroad[508].

It is now important to understand what human rights defenders will have to do to safeguard human rights in the future. This means that it is now important to understand which other mechanisms exist aimed at providing a judicial remedy to human rights torts. Without doubts, this issue would be solved if every country had an effective legal system aimed at avoiding corporate abuses of human rights and at prosecuting corporations when found liable. However, bringing claims both in foreign courts and in national courts is difficult for victims. As far as the ATS is concerned, many human rights activists nowadays fear that many petitioners will not bring their case to the US, as the US Supreme Court established that a link between the tort and the US is fundamental. The decision of the US Supreme Court in the *Kiobel* case has been perceived as a failure for human rights activists especially because the ATS was a unique mechanism in the world. In addition, as regards corporations, it was in the US District Court that for the first time it was established that corporations could be prosecuted for violations of human rights under the ATS[509]. Indeed, this principle was advanced in the *Doe v. Unocal* case. The ATS is unique to the US. No other country possess a similar instrument. In order to highlight the difficulties that exist in other countries the example of Germany may be useful. Indeed, in this country, a plaintiff who is a non-European citizen has to pay a sum equivalent to the legal costs of the defendants before holding the case[510]. Apart from Germany, Europe in general has proven to be a hard venue for lawsuits against corporations, especially with regards to civil claims. Outside Europe, it has been difficult to hold companies liable in Canada too, until a 2013 decision of an Ontario Court to accept a trial against the HudBay Minerals company[511] has seemed to change this trend[512]. Nowadays, apart from the US, the best venues for litigation

[508] M. E. DANFORTH, *Corporate Civil Liability Under the Alien Tort Statute: Exploring its Possibility and Limitations*, Cornell International Law Journal, Vol. 44:2011, pp. 22-23.
[509] P. T. MUCHLINSKI, *Multinational Enterprises and the Law*, Oxford, the Oxford International Law Library, 2007, p. 527.
[510] J. FRACZEK, Activists seek sharp swords in human rights battle, Deutsche Welle, 9 December 2013, available at: *http://www.dw.de/activists-seek-sharp-swords-in-human-rights-battle/a-17268552*
[511] *Choc v. HudBay Minerals Inc.* & *Caal v. Hudbay Minerals Inc.* [2013] O.J. No. 3375, 2013 ONSC 1414, available at: *http://www.chocversushudbay.com/wp-content/uploads/2010/10/Judgment-July-22-2013-Hudbays-motion-to-strike.pdf*
[512] Annual Briefing, *Corporate Legal Accountability*, Business and Human Rights Resource Centre, November 2013, p. 5.

against corporations are Australia and the United Kingdom[513]. However, given the existence of differences in the legislations of every country, it seems arguable that human rights victims should rely on a uniform mechanism, available at the international level. According to many, this instrument should be the *UN Guiding Principles on Business and Human Rights* which were implemented by all the UN countries in 2011. This principles set duties to respect human rights for both States and corporations. Moreover, they also take into account the establishment of an adequate remedy when breaches of human rights occur. This principles stand as a very useful tool, as they establish a unique standard for countries to adhere to. However, the problem with them is that they are a non-binding mechanism and so they are part of soft law. As a result, they do not establish international obligations.

The defence of victims of human rights abuses still has to cope with many obstacles. According to the Business and Human Rights annual briefing, to make the promotion and protection of human rights a reality, business should not "avoid jurisdiction of one court, for example in their home country, if other available courts, for example in the country where the abuse took place, do not provide effective remedies"[514]. In addition, it should not employ litigation strategy that could have a destructive effect for human rights abuses already existing judicial remedies[515]. On the other hand, in this report view, governments should reduce the barriers that victims of human rights abuses have to cope with when seeking a judicial remedy, and have also to "pass, enforce and defend laws that provide effective remedies for victims of human rights abuses involving companies"[516].

After the *Kiobel* decision, the path towards the complete safeguard of human rights seems harder. Although human rights have always been at risk, the social commitment towards their promotion grows every day. Many organizations fight for their defence and the international community too always reaffirms the need to promote them through a variety of instruments.

[513] A. DE JONGE, *Transnational Corporations and international law. Accountability in the global business environment*, Corporations, Globalisation and the Law, Cheltenham, Edwar Edgar UK, 2011, p. 94.
[514] Annual Briefing, *Corporate Legal Accountability*, Business and Human Rights Resource Centre, November 2013, p. 15.
[515] *Ibidem*.
[516] *Ibid*., p. 16.

Concluding remarks

The central focus of this chapter have been corporate breaches of human rights and the US Alien Tort State Act. In particular, a specific case of human rights' abuses has been analysed in detail, the *Kiobel v. Royal Dutch Petroleum case*.

The cases coping with corporate abuses of human rights have been many from the 1980s onwards. The *Kiobel* case is just one of them. However, its importance stems from the fact that it represents the first time corporate abuses reached the US Supreme Court. Its conclusion, however, has been different from what human rights activists and victims would have expected. This inevitably would bring them to look for different ways of facing such issues and providing victims with a right remedy.

Conclusion

Different writers and researchers have coped with multinational enterprises. Many of them have focused on the relationship between MNEs and international law. Others on the one between MNEs and human rights. Some have adopted a legal approach, while others have favoured an economic point of view. Although the topic of MNEs can be faced by different perspectives, it cannot be denied that both international law and international economics focus on them. MNEs structure and way of conducting their business involve different aspects of both of them. From instance, from an economic point of view, it is important to understand and analyse the way MNEs conduct their business and make profit. On the other hand, from a legal perspective, it is important to investigate the influence that they have on international law and, as far as the subject of this dissertation is concerned, to explain which impacts do MNEs have on human rights. In this regard, many human rights abuses cases have already been analysed at the international level. As a result, why did I choose such a subject to deal with in my dissertation? What particularly characterizes this dissertation?

First of all, I chose this subject for a personal interest in this issue. The topic of human rights has always been a matter that took my attention. In addition, I have been always been interested in understanding the ways victims of breaches of human rights could be aided and in managing to find a remedy to the numerous atrocities with which our world is filled.

Secondly, the peculiarity of this dissertation is the case study in which it is based. The *Kiobel* case. What makes it different from other previous cases is that it seems to affect negatively the future of human rights litigations. After decades of studies on human rights regulation and after the efforts of many NGOs and many personalities in general, the final decision of this case seems to bring us back in history and to cancel all the improvements in human rights protection achieved before. This decision, indeed, created many obstacles. Nevertheless, it may also be seen as an opportunity to better investigate other ways to file suits regarding human rights violations and, possibly, also to find an international instrument available to everyone aimed at providing all human rights victims with an equal remedy.

Nevertheless, apart from this, it is important to focus again on the future of human rights litigations after *Kiobel*. Without doubts, the US Supreme Court decision in this case has been a defeat for human rights victims and activists. Indeed, it seemed to

inevitably change the trend that had been developing in US Courts since the 1980s. In fact, it was after the decision in the *Filartiga*[517] case in 1980, that the ATS became the perfect tool for human rights litigations in US federal Courts. After this decision, many foreign citizens started suing officials of their governments for human rights violations that had occurred in their home country[518]. The mid-1990s showed the beginning of a new type of human rights litigations, based on claims against companies. An examples of these cases is the *Doe v. Unocal Corp.*[519] case examined before. A first restriction to the applicability of the ATS to international law violations came with the US Supreme Court decision in the case *Sosa*[520] in 2004. Indeed, the Court stated that

> Federal courts should not recognize private claims under federal common law for violations of any international law norm with less definite content and acceptance among civilized nations than the historical paradigms familiar when [the ATS] was enacted[521].

After the *Sosa* decision, some ATS claims have been dismissed by US Courts of appeal. The cases were dismissed "for failure to show violations of specific and widely accepted rules of international law, including with respect to secondary liability"[522].

The US Supreme Court decision in the case *Kiobel*[523] focused mainly on the ATS' extraterritorial application rather than on the issue of corporate liability. The latter was not decided. The Court decision in this case, based on corporate violations of human rights occurred outside the territory of the US, was that "even where the claims touch and concern the territory of the United States, they must do so with sufficient force to displace the presumption against extraterritorial application"[524]. Without doubts, the scope of the ATS has been limited by this decision. When considering the future of human rights litigations, it is fundamental to focus again on the ATS. In particular, we first have to wonder if it will be no more possible to bring human rights claims under this Statute. We can argue that even though *Kiobel* has inevitably narrowed the possibility of a remedy under this Statute, human rights

[517] *Filartiga v. Peña-Irala* 630 F.2d 876 (2d Cir. 1980).
[518] G. H. FOX, Y. GOZE, *International Human Rights Litigation After Kiobel*, Michigan Bar Journal November 2013, p. 45.
[519] *Doe v. Unocal Corp*., 963 F. Supp. 880 (US District C.D. Cal 1997).
[520] *Sosa v. Alvarez-Machain* 542 US 692 (714) (2004).
[521] *Ibid*., at 732.
[522] D. E. CHILDRESS III, M. D. RAMSEY, C. A. WHYTOCK, *After Kiobel – International Human Rights Litigation in State Courts and Under State Law*, UC Irvine Law Review, Vol. 3:1:2013, p. 2.
[523] *Kiobel v. Royal Dutch Petroleum Co.*, 133 S. Ct. 1659 (2013).
[524] *Ibid*., p. 14.

litigations in federal Courts will not end. Nonetheless, human rights claimants will possibly manage to find alternatives to the ATS. With regard to this, the need to investigate other ways of dealing with human rights claims seems to be also reinforced by the idea that the remedy to such claims should not be restricted to a single country, the US.

Moreover, a fundamental step is understanding if alternatives to the ATS exist nowadays. Unfortunately, we can argue that the alternatives are limited. According to some scholars, a possibility would be to file suits in state courts or under state law. In fact, "nothing in principle bars a state court from hearing a claim under foreign or international law, as long as the plaintiffs can get personal jurisdiction over the defendant"[525]. This assumption is based on the fact that "all international human rights claims have parallels in state tort law: wrongful death, assault, battery, etc."[526]. One of the advantages of state law, is that there are fewer limits to its application, as it avoids, for instance, the *forum non conveniens doctrine*. However, it is restricted by other limits, among which the state doctrine. Furthermore, it will probably result in negative impacts on US foreign relations.

On the other hand, it is important to analyse also if the *Kiobel* decision brought some positive changes. In fact, even though it may appear odd, we can argue that this decision will probably bring some innovations too. Firstly, it has underlined that human rights claims, and the hope to find a remedy to international human rights violations, cannot rely on a single country Statute. As a result, the decision will probably lead other countries to develop their legal instruments to deal with these issues. Secondly, we can argue that it has also highlighted that the best solution to these claims will need to be found at the international level. Indeed, I firmly hope that in the next future a uniform instrument aimed at prosecuting the violators of human rights and assisting their victims will need to be developed. From my point of view, each individual should be provided with the same standards of justice. Everyone should have the same possibilities to have access to a remedy. Human rights victims should never feel alone as this would be just another suffering for them.

[525] P. B. STEPHAN, *Human Rights Litigation in the United States After Kiobel*, Volume 1 Issue 2, 2013, p. 349.
[526] G. H. FOX, Y. GOZE, *International Human Rights Litigation After Kiobel*, Michigan Bar Journal November 2013, p. 46.

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