

The Accountability of Non-State Actors for Human Rights Violations:
the Special Case of Transnational Corporations

Silvia Danailov
Sulgenbachstrasse 10
3007 Berne
Switzerland
Silvia.Danailov@eda.admin.ch

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CONTENTS

Introduction:

1. Phenomena.....	3
a. Globalisation and the State.....	3
b. The International Human Rights System and Non-State Entities.....	6
2. The Methodology.....	7
3. The Transnational Corporation: Definition and Debates.....	10

Part I: State Responsibility and TNCs' Violations of Human Rights under International Law.....16

1. International Responsibility of States for Human Rights Violations by Non-State Actors.....	16
2. International Responsibility of States for Human Rights Violations by TNCs.....	22

Part II: The Direct Responsibility of TNCs for Human Rights Violations under International Law.....27

1. TNCs as Subjects of International Law.....	27
2. The Accountability of Non-State Actors under Existing International Human Rights Norms.....	32

Part III: Practical Evidence of TNCs' Direct Accountability under International Human Rights Law: Examples of the Codes of Conduct.....39

1. Codes of Conduct: Definition and Content.....	40
a. On the International Inter-Governmental Level.....	41
b. On the National Level.....	44
c. On the Corporate Level.....	45
d. On the International Non-Governmental Level.....	46
2. The Legal Nature of Codes of Conduct.....	49
3. The Question of the Implementation of Codes of Conduct.....	53

Conclusion(s).....59

Bibliography.....62

The discussions of the social responsibility of business are notable for their analytical looseness and lack of rigor. What does it mean to say that «business» has responsibilities? Only people can have responsibilities.

Milton Friedman¹

As we approach the third millenium and prepare the commemoration of the Universal Declaration of Human Rights, it is a critical task before us that the rapidly globalising regime of trade and finance conform to the international human rights standards. Third party accountability is yet to be defined within the framework and actions of the international human rights regime.

Miloon Kothari and Tara Krause²

Introduction

Globalisation and human rights are largely used today (some would say mis-used) in popular catchphrases about recent transformations in our contemporary world. Both represent new developments on the international level that affect the States and societies. The following introductory remarks suggest a framework of analysis for understanding the relationship between transnational corporations - as one of the central actors of the economic globalisation - and the international system of human rights protection.

1. Phenomena

a. Globalisation and the State

The concept of globalisation can be called upon to play the most important role in explaining modern phenomena and processes. For the Sociologist Anthony Giddens has asserted, « modernity is inherently globalising »³. Yet, finding a definition of globalisation is a difficult task.⁴ The process of

¹ FRIEDMAN, M. (Septembre 13, 1970) « The Social Responsibility of Business Is to Increase Its Profits » in *New York Times Magazine*.

² Kothari and Krause (1998: 5).

³ GIDDENS, A. (1990) *The Consequences of Modernity* (Cambridge: Polity Press).

⁴ While there is an extensive list of literature about globalisation, it is not always very convincing. For a good recent account about the debates surrounding this term, see: BECK, U. (1997) *Was ist Globalisierung?* (Frankfurt a. M. : Suhrkamp

globalisation is a multidimensional phenomenon pertaining to various forms of social action, be they economic, political or cultural.⁵ Networks of economic and cultural interaction have also existed in the past, that never corresponded to the political space of States, always constrained by and forced to cope with territorially defined networks of cultural, economic and military power. What is new about the contemporary processes termed as « globalisation » is the unprecedented rate at which they are taking place. In particular, this concept best captures the profound transformation of the world economy in the last decade. It refers primarily to the progressive elimination of barriers to trade and investment and the growing international mobility of capital. Globalisation refers also to the considerable improvement of communication and transportation infrastructure, that has reduced distances between different parts of the world, bringing about not only a greater exchange of goods and services, but also more exchanges between people, whether in the fields of ideas, technologies or information. The particular globalisation of capital, markets and services, paralleled by the removal of national barriers to trade and investments, is a development that tends to be seen as an inevitable trend of the contemporary world.

These accelerated transformations affecting the world economy, and the shift from production for local and national markets to world-wide markets, lead the analyst to conclude that large structural changes are now affecting States and that States are brought to share authority both in economy and society with other entities. Not only does their political and legal authority seem to be challenged by alternative governmental structures both « above »⁶ and « below »⁷, them but they are also losing chunks of their power and sovereignty to non-governmental forms of organisation. Indeed, if sovereignty « in relations between States signifies independence. Independence in regard to a portion of the globe is the right to exercise therein, to the exclusion of any other State, the function of a State. »⁸, then this freedom of action is seriously put into question with the emergence of forces that are global in scale and affect the State's internal and external independence. On this very subject, the UN Committee on Economic, Social and Cultural Rights has issued a Statement on Globalisation and Economic, Social and Cultural Rights, where it recognised the fact that « (globalisation) has also come to be closely associated with a variety of specific trends and policies including an increasing reliance upon

Verlag.) (translation in process) and RODRIK, D. « Sense and Nonsense in the Globalization Debate » in *Foreign Policy*, (Summer 1997) at 65.

⁵ The term « globalisations » (in the plural) might be more appropriate to understand the processes at stake. See de SOUSA SANTOS (1997: 82).

⁶ e.g., by the European Communities, to new regional trade zones or to regional human-rights structures, such as the European Court of Human Rights or the imminent creation of an African Court of Human and Peoples' Rights.

⁷ e.g., religious or cultural communities challenging the hegemony of the State, especially in its role as the sole giver of values and laws. See DAS, V. (1995) *Communities as Political Actors: The Question of Cultural Rights* (Cambridge: Law & Society Trust) and, also from the same author: *Cultural Rights: The State, The Community and the Individual* (Geneva: lecture given on May 26, 1997).

⁸ Island of Palmas Case (United States v. The Netherlands), Reports of International Arbitration Awards, Vol 2 (1949), p. 838.

the free market, a significant growth in the influence of international financial markets and institutions in determining the viability of national policy priorities, a diminution in the role of the State and the size of its budget, the privatisation of various functions previously considered to be the exclusive domain of the State, the deregulation of a range of activities with a view to facilitating investment and rewarding individual initiative, and corresponding increase in the role and even responsibilities attributed to private actors, both in the corporate sector, in particular to the transnational corporations, and in civil society. »⁹

Indeed, different entities claim, or are given, a growing influence within the international arena: notable among those are transnational corporations, which often have more global importance than do small and poor sovereign States with seats in the United Nations. Transnational corporations are a major driving force within the globalisation process, allowing the accelerated growth of foreign direct investment through their transborder activities.¹⁰ States are left dependent upon the world financial markets, at least within their economic prerogatives, and this process is even accelerated by the growing multinationalisation of enterprises that removes decision-making power further and further away from the actual national workplaces.¹¹ Parallel to these discernible material features of the process of globalisation, there is also an ideological construct backing the idea of a free market economy, seen as the only way to bring economic welfare, that is the sole prerequisite for truly global welfare on social and human terms.¹²

⁹ Statement of the Committee on Economic, Social, and Cultural Rights on *Globalisation and Economic, Social and Cultural Rights* adopted on 11.5.1998. See at <http://www.unhchr.ch/html/menu2/6/cescrnote.htm>. On this issue, see also REISMAN, M. (1997): « Designing and Managing the Future of the State » in 8 (3) *European Journal of International Law* as well as SUR, S. (1997): « The State between Fragmentation and Globalization » in 8 (3) *European Journal of International Law*.

¹⁰ The terms multinational and transnational will be used as synonyms throughout this work. However, some authors argue that we should no longer speak of *multinational* corporations, as the use of this adjective could imply that the company or enterprise has national status in various different countries. The term *transnational* is said to refer more aptly to a form of autonomy that corporations with establishments scattered over the territories of several states have been able to acquire in their relations with each one of them. Cf. RIGAUX (1991: 121). B. R. Barber is even speaking of « postnational » or « antinational » corporations, affirming that these terms are better capturing the nature of their status. See: BARBER, B.R. (August 1998): « Culture McWorld contre démocratie » in *Le Monde Diplomatique*, at 14.

¹¹ See *Defending Values, Promoting Change, Social Justice in a Global Economy: An ILO Agenda* (1994) (Geneva: ILO Publications).

¹² The ideology can be defined as a representation of the social reality tending to validate, justify and reify the reality in order to make it last. The « deconstruction » of the actual neo-liberal economic discourse is beyond the reach of this work. The following analysis should however be read in the light of the various critical assessments of the current economic order and the inequalities it inherently entails. See, for example: WILKIN, P. (1996) « New Myths for the South: Globalisation and the Conflict Between Private Power and Freedom » in 17 (2) *Third World Quarterly. A Journal of Emerging Areas*. For an analysis concerning the lack of accountability and democracy underlying economic globalisation, see the works of HELD, D., especially *Democracy and the Global Order: From the Modern State to Cosmopolitan Governance*, (1995)

b. The International Human Rights System and Non-State Entities

We usually consider, from a historical perspective, that the international framework of human rights developed as a means of ensuring protection for the individuals from the abuses of state power.¹³ England's Revolution of 1688 and the resulting Bill of Rights, the French Declaration of the Rights of Man and of the Citizen of 1789, the American Constitution of 1776, were among the first documents to proclaim the « inalienable » rights of men, from which emerged the idea of human rights that played a key role in times of struggles against State's absolutism. As we have mentioned, State power seems today to be weakening to the advantage of other sources of authority that have been shown to influence, and sometimes even threaten what we call fundamental human rights. In this new context, there is undoubtedly a need to start thinking about how to best ensure respect for human dignity: indeed, if human rights were historically granted to individuals to shield them against the State's abusive action, and some States' functions are taken over by other entities susceptible to violate those rights, we can then argue that these entities should be called upon to respect human rights obligations towards the individuals.

Transnational corporations are accused of having been involved in many direct or indirect violations of human rights of a political, civil, social, economical or cultural dimension.¹⁴ An example is the serious allegation that Royal Dutch Shell was involved in the repression of the Ogoni people in Nigeria, notably in helping the Nigerian military regime to arrest Ken Saro-Wiwa and other opponents.¹⁵ The fact that thousands of workers, especially children, are exploited, underpaid and often

(Cambridge: Polity Press).

¹³ See, The American Law Institute (1987) *Restatement of the Law (Third. The Foreign Relations Law of the United States* (St. Paul: American Law Institute Publishers) Vol. 2, part VII, introductory note, at pg. 144. It notes that « international law has long held states responsible for « denials of justice » and certain other injuries to nationals of other states. Increasingly, international human rights agreements have created obligations and responsibilities for states in respect of all individuals subject to their jurisdiction, including their own nationals, and a customary international law of human rights has developed and has continued to grow. »

¹⁴ There are at least five different situations where a company's position towards human rights has been raised, and has led several actors to react by thinking of ways to hold such companies accountable. First, a company may do business in a country where human rights violations are occurring, which can be considered as direct or indirect support for these violations; second, the means of production involved, e.g.: if suppliers are using child labour, forced labour or labour involved in work representing a health and security risk; third, the possible use of company products in situations involving violation of human rights; four, the attitude within the company as, for example, the prohibition of trade unions, the discrimination of workers on the basis of race, colour, sex, religion or other criteria, unfair wages, etc.; five, the information given as to the use or application of the product, in cases when, for example, consumers are exposed to risks and are not informed and made aware of these risks. See SCHIERBECK (1998).

¹⁵ The *Peoples' Tribunal on Human Rights and the Environment*, created by different NGOs in order to provide an alternative forum for complaints coming from the civil society on issues such as the impacts of trade liberalization and the role of transnational corporations on human rights or ecologically unsound economic activities, has examined the case of Royal Dutch Shell's activities and possible responsibility for violations of human rights in Ogoniland through direct and indirect military operations. The Tribunal has heard the complainants, reviewed the documents and proof, and gave Shell the opportunity to defend its position. See reports of the case in MENDLOVITZ (1998: 134-5). See also other accounts on that particular case in CASSEL (1996: 1967-8).

left in terrible living conditions in order to produce clothes and commodities that consumers, in their countries or world-wide, are buying everyday, is just an example of the grey areas of the role and influence that TNCs are said to have in the respect or violation of human rights.¹⁶ A Statement of the Committee on Economic, Social and Cultural Rights mentions this issue: «None of these developments (related to globalisation) in itself is necessarily incompatible with the principles of the Covenant or with the obligations of governments thereunder. Taken together however, and if not complemented by appropriate additional policies, globalisation risks downgrading the central place accorded to human rights by the United Nations Charter in general and the International Bill of Human Rights in particular.»¹⁷ It refers then to some aspects of the problem such as for example «respect for the right to work and the right to just and favourable conditions of work is threatened where there is an excessive emphasis upon competitiveness to the detriment of respect for the labour threatened by restrictions upon freedom of association, restrictions claimed to be «necessary» in a global economy, or by the effective exclusion of possibilities for collective bargaining, or by the closing off of the right to strike for various occupational and other groups.»¹⁸

2. The Methodology

In order to address this new phenomena described above from a human rights perspective, there are two main approaches which should be conducted in parallel, and in a mutually reinforcing manner:

- First, it is highly necessary to think how best to reinforce the human rights system based on state responsibility. Indeed, even if it can be shown that States are losing power and that they are unable to control new entities influencing people's lives, human rights protection is still predominantly based on a State-centred approach: to leave it aside would dramatically weaken its purpose. The State remains

¹⁶ The major questions related to the repercussions that TNCs' activities have on the enjoyment of human rights are dealt in the Background document prepared by the Secretary-General : *The relationship between the enjoyment of human rights, in particular, international labour and trade union rights, and the working methods and activities of transnational corporations*, (E / CN. 4 / Sub. 2 / 1995 / 11: 18-29). Concerning the specific question of the impact of TNCs' activities on indigenous people's rights, the UN Centre on Transnational Corporations conducted a research whose summary can be found in the report of the Transnational Corporations Centre: *Investissements et opérations des sociétés transnationales sur les terres des peuples autochtones*, (E / CN. 4 / Sub. 2 / 1994 / 40: 8-11). On the adverse effects of the illicit movement and dumping of toxic and dangerous products and wastes - often the result of TNCs' activities - on the enjoyment of human rights, see the preliminary report presented by Ms. Farma Zohra Ksentini , Special Rapporteur of the Commission on Human Rights: *The Adverse Effects of illicit movement and dumping of toxic and dangerous products and wastes*, (E / CN. 4 / 1996 / 17) and *ibid.* (E / CN. 4 / 1998 / 10). For a view on a more positive role of TNCs in the field of human rights, see MEYER, W. H. (1996): « Human Rights and MNCs: Theory Versus Quantitative Analysis » in 18 *Human Rights Quarterly*, at 368.

¹⁷ Statement of the Committee on Economic, Social, and Cultural Rights on *Globalisation and Economic, Social and Cultural Rights* adopted on 11.5.1998. See at <http://www.unhchr.ch/html/menu2/6/cescrnote.htm>. at §2

¹⁸ *ibid.* at §3

accountable for the protection of human rights, which means that the focus should first be directed to find new solutions as to how the ability of the State responsibility system might be improved to respond to human rights violations. We will thus attempt to show how State responsibility doctrine should include violations of international human rights obligations by private entities such as TNCs. Part I will deal with the problematic of how to hold States responsible under international human rights law for the actions of private bodies (in the present case study, transnational corporations). Circumstances that were not envisioned at the time when the international human rights treaties were drafted may require progressive interpretation by the human rights supervisory bodies to ensure that the purpose behind the laws is fulfilled.¹⁹ The advantage of this first approach to hold TNCs accountable for human rights violations through State responsibility is that it bases itself on existing international obligations which are binding States.

The assumption underlying this analysis is that there is one home-country, whose nationality the TNC possesses, which is responsible for the activities of the transnational corporation, home and abroad. However, the *de jure* nationality of a TNCs does not always actually correspond to the *de facto* statelessness of this transnational actor, as we will argue in this work. The transnational corporate entity is indeed described as being « stateless », a notion that has come to symbolise the escape of business from nation-state control. Besides this last observation, the application of this method for examining the relationship between TNCs and human rights through the mediation of the state has another drawback. Even if, not long ago, the United Nations World Conference on Human Rights held in Vienna affirmed that States are primarily responsible to develop and encourage respect for human rights and fundamental freedoms²⁰, this reality has been put into question. Indeed, if we bear in mind the « disenchanting » vision and discourse on the State's power dominating the prevalent debates within social sciences, we have to prove the ability of the State to function as a coherent and viable actor, responsible for the implementation of human right protection.

As the globalising trends - economic, environmental, cultural, military, political or social - increasingly affect social sectors and transcend national boundaries, so are States' traditional capabilities undermined, in such a way that sound claims are voiced that the state is an institution that became (or will become) hollow and defective.²¹ The classical positivist doctrine has always placed

¹⁹ This progressive approach is also called upon concerning other new emerging issues regarding the protection of human rights. See, for example: LAWYERS COMMITTEE FOR HUMAN RIGHTS (1997), *The Neglected Right: Freedom of Association in International Human Rights Law*, (New York).

²⁰ "Human rights and fundamental freedoms are the birthright of all human beings; their protection and promotion is the first responsibility of Governments." United Nations World Conference on Human Rights, *Vienna Declaration and Programme of Action* in 32 ILM 1661 (1993), Part 1, paragraph 1.

²¹ As Susan Strange abruptly writes, if the state is still the most important unit of analysis, can we argue that much of social science is obsolescent? See STRANGE (1995:56). It is again very difficult to sort out the antagonistic arguments and visions

the State as the central actor of international law. Nonetheless, the debates around State's sovereignty and ability to regulate on national and international levels are challenging this traditional vision.²² The fact that TNCs can be sometimes described as stateless entities, as well as the assumption of State's weakened position at the international level, renders fruitless an approach aimed solely at strengthening the State's capacities to control transnational corporations by making it accountable for human rights violations committed by such non-State actors.

- A second complementary approach is therefore necessary to answer the new needs faced by the human rights system, stemming from the increased demand for protection against non-State entities. Possible ways to hold these new actors directly accountable in law are thus needed. This attempted extension of the international human rights system so as to embrace in its framework the matter of these non-State actors is a considerable challenge that not only theoretical legal analysts but also the international community, or at least the elements militating for a better and more effective protection of human rights will have to address. Part II will thus examine the question of TNCs' direct liability under international human rights law. We shall discuss the question of the legal responsibility of TNCs, and of possible ways to impose duties upon TNCs under international law, especially under international human rights law. First, we shall examine the question of TNC's legal subjectivity under international law or, in other words, if a TNC can be considered as a subject of international law, so that the direct applicability of international norms to it can be envisaged. (Part II 1.) Then, we shall examine new developments within the international human rights discourse, trying to apply the human rights instruments directly to non-State actors (Part II 2.). Since the emergence of a theoretical possibility to

concerning state's autonomy: for example, the « hyperglobalizers » are predicting state's disappearance, while the « skeptics » advise to abstain to consider the issue of globalisation. Furthermore, alternatively to the more « alarming » discourses on the states' weakened position, there are voices claiming that state sovereignty is not being put into question. And indeed, despite all the defects attributed to it, the state still appears as the only actor susceptible of assuring some kind of protection for individuals against the new « global order » introduced mostly by the economy. It is paradoxical that, even if the dominant neo-liberal discourse claims that social progress and prosperity will only be attainable when states cease to interfere with the economic market forces, it is at the same time up to the states to ensure the protection and « to improve the functioning of the market, to promote equity and to protect the vulnerable workers » affected by the economic global rationality. See with that regard WORLD BANK: *World Development Report 1997, The State in a Changing World* (New York, Oxford: Oxford University Press). Indeed, the World Bank after having fought against the State's over-regulation and its counter-productive results, is now praising the State without which economic, social and sustainable developments are impossible. « It is increasingly recognised that an effective state - not a minimal one - is central to economic and social development, but more as partner and facilitator than as director. States should work to complement markets, not replace them. » WORLD BANK (1997: 18). In any case, as HELD (1997: 283) claims it, « it is reasonable to assert that states today do face a more complex array of international or global problems than hitherto; (in addition,) they are more deeply enmeshed in global networks of interaction; crucially, they have seen their own expansion in size and absolute power diminished by the relatively greater increases in the direct power, exit options, and collective structural power available to foreign actors and global networks. »

²² These debates go so far as to try to redefine what is, or should be, international law. For example, the Commission on Global Governance claims that international law includes a body of legal rules and principles applied between States and also between States and other actors, including the one from the global civil society and other international organisations. See COMMISSION ON GLOBAL GOVERNANCE (1995), *Our Global Neighbourhood*, (New York: Oxford University Press) at 304 and seq. , and also JANIS (1991: 368) for other insights in this debate.

hold non-State entities directly responsible for human rights violations has to be reflected in practice so that this new way of thinking about human rights does not remain only in the abstract realm, part III will examine the different codes of conduct, adopted by various actors of the international society to guide TNCs' activities in the fields of human rights. The objective will be to show these different codes as elements reflecting an emerging conviction that international human rights law should apply directly to non-State actors, and more specifically to TNCs.

The framework of this study hinges upon the question of the relations between the international system of human rights protection and the challenges brought by a powerful actor bred by the globalisation process, the transnational corporation. However, the primary purpose of this research is rather to indicate some possible ways to analyse the issues at stake, in the hope of contributing to the quest for an interpretation of the existing international human rights legal system that would provide more justice and human dignity.

3. The Transnational Corporation: Definition and Debates

The literature on the nature of TNCs is quite abundant.²³ While TNCs are viewed as a late twentieth century phenomenon, one can date back to a much earlier era the transnational activities of privately-organised enterprises. In the 17th C., the East India Company and the East African Trading Company operated abroad under charters issued in various European capitals. These companies engaged mainly in trading activities between Europe and those of Asia. It is the complexity of the diverse operations, the degree of the internationalisation of production and the degree of concentration and interlacing relations within today's TNCs that makes them different from their ancient counterparts.²⁴ The past 20 years saw a dramatic expansion of the number of such enterprises. World-wide, some 35000 TNCs operate through 170000 foreign subsidiaries. The 100 largest TNCs control an estimated 16 % of the world's productive assets, and the 300 largest 25 %. Furthermore, it is estimated that over 73 million people are employed by transnationals.²⁵ The major sectors where they are prevalent are petroleum refining, automobile industries, electronics, chemical and pharmaceutical. The financial power of some TNCs surpasses some national economies; for example, annual sales of the Royal Dutch/Shell Group oil company are twice New Zealand's gross domestic product (GDP) and Siemens AG, the German

²³ Cf. SLOMANSON, W.R. (1989), *International Business Bibliography* (Buffalo: William S. Hein.).

²⁴ TIEWUL (1988: 106).

²⁵ See UNCTAD, *World Investment Reports 1996 and 1997*; Secretary General Report: *Activities of the transnational corporation and management division and its joint units: the universe of TNCs*, (E / C.10 / 1993 / 11 : 36) and WINDSOR and PRESTON (1997: 51).

electronic firm, has annual sales that exceed the combined GDP of Chile, Costa Rica and Ecuador.²⁶ More generally, the twenty largest TNCs have annual incomes greater than those of eighty developing countries, and forty percent of the largest TNCs have their headquarters in the United States.²⁷

One can find numerous definitions of the transnational corporate entity. The *Institut de Droit International* was the first to provide a legal definition of a TNC: «Enterprises which consist of a decision-making centre located in one country and of operating centres, with or without the legal personality in one or more other countries should, in law, be considered as multinational enterprises.»²⁸ According to a UN study, the concept of transnational corporation refers to enterprises «irrespective of their country of origin and their ownership, including private, public or mixed, comprising entities in two or more countries, regardless of the legal form and fields of activity of these entities, which operate under a system of decision-making, permitting coherent policies and a common strategy through one or more decision-making centres, in which the entities are so linked, by ownership or otherwise, that one or more of them may be able to exercise a significant influence over the activities of others and, in particular, to share knowledge, resources and responsibilities with the others.»²⁹ Another definition of a Multinational Enterprise is to be found in the ILO Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy: «Multinational Enterprises include 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.»³⁰ This term includes the various entities (parent companies, local entities, entities of both types or the organisation as a whole). However, there are many types of firms and the differences in their structure and ownership have significant impact on their status and treatment.³¹

Aside from the definition of a transnational corporation, the determination of its legal status is of great relevance in order to understand the issue at stake. In order to come into existence, transnational corporations have to be established under the domestic law of a given State, and thus derive their legal personality from a national legal system. The picture gets more muddled in situations where legally separate corporations are in a relationship of «unequal» interdependence with one corporation controlling or dominating the others. The subordinated affiliates or corporations operate distinctively but are nevertheless controlled by the parent corporation and sometimes do not even have an

²⁶ KOLODNER (1994: 2).

²⁷ MEYER (1996: 374).

²⁸ Annuaire de l'Institut de Droit International II (1978: 341).

²⁹ Report of UN Centre on Transnational Corporations: E / 1988 / 39 / Add.1, par.1 a.

³⁰ «Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy», ILO, 16.11.1977 reproduced in *International Legal Materials*, 422 (1978: 424).

³¹ For a classification system of TNCs', differentiating by type of ownership and according to their national/international status, see WINDSOR and PRESTON (1997: 47-50).

autonomous decision-making power: for example, when a subordinated corporation violates international economic law, the parent company's responsibility may be invoked. « Piercing the veil » of the controlled corporation's legal status is one of the techniques employed by the Court of Justice of the European Communities when dealing with Community law on competition.³²

However, the dense network of international inter-firm arrangements that are ultimately organised and driven by producers, buyers or distributors from industrialised countries makes it difficult, even for the « parent » enterprise, to regulate its subcontractors. This is why, although there may be several different legal arrangements by which corporate entities organise their relationships and affiliations, the transnational corporation is ultimately seen as one single entity even if it is composed of corporations with separate identities under the law of the states in which they operate. Today, it has become difficult to trace the « nationality » of a TNC, since « the structure of a TNC is characterised by diversification of branches in such a manner that although each of her affiliates or subsidiaries is regulated by a particular legal system, there is no such law which could be applied to the TNC as a whole. »³³

Even if the various legal entities making up a transnational group may come under the jurisdiction of different States, they have managed to stake out a territory for themselves within which no State has effective authority.³⁴ As François Rigaux observes, no State today is capable of controlling adequately the phenomenon on its own and the different legal entities forming the so-called transnational group have created a space removed from the effective authority of any State.³⁵ Therefore, TNCs may be taking advantage of the fragmentation of the different jurisdictions to keep themselves beyond the reach of concurrent and competent State authorities. Hence, the claim that TNCs have created a new transnational economic space that transcends the traditional legal territorial boundaries: « The corporations possess an increased capability to evade, disregard or subvert national law and policy in any one of the countries in which they operate, a capability based on their possession of financial, technological and other resources which are in each case extra-national. »³⁶ Furthermore, many observers warn the development of a so-called « grey » zone where States' jurisdictions do not hold and where international law has not yet filled in the legal vacuum concerning the accountability of transnational corporations.³⁷ This allows TNCs to act with virtual impunity and escape the

³² RIGAUX (1991: 123).

³³ RAHMAN (1994: 234).

³⁴ RIGAUX (1991: 124).

³⁵ RIGAUX (1989: 338).

³⁶ RUBIN and HUFBAUER (1983: 103).

³⁷ This acknowledgement, following from a theoretical legal approach, is paralleled by the perceived de facto impunity that transnational economical actors including TNCs have in international fora. « While individual citizens remain accountable to the laws of their national governments, transnational corporations are allowed to operate in a largely lawless global realm. It should be not surprising that there has been little discussion of corporate accountability at the UN in the preparatory process leading to Earth Summit II. Instead of accountability, the trend is toward corporate immunity. » See MENDLOVITZ (1998: 117-8) and the examples he quotes in that regard.

consequences of their actions, especially the ones violating internationally recognised human rights.³⁸

One of the reasons for the growing presence of TNCs on the international economic scene is the competitive advantage of a global network of production. For example, product components requiring mostly unskilled labour would be produced in low-wage nations and shipped elsewhere for assembly. TNCs usually have better access to international capital markets and can obtain more favourable terms than can national firms; they are also more apt and able to finance larger projects. TNCs' control of capital, technology, information and services gives them enormous power in the developing world. Because the presence of those enterprises is essential to the economy of the developing countries, the TNCs have a strong negotiating position which allows them to dictate the conditions for their stay. There are now less and less countries that close themselves off from inward investment. Many of those that, in the 1970s, preferred to rely on State-owned enterprises as the engine of economic growth are now competing desperately to attract multinationals. The increased mobility of capital and the virtually boundless possibilities for investments almost anywhere puts pressure on countries trying to attract those investments: they may consider lowering standards of workers' rights and conditions, leading to what is called « social dumping », a process whereby countries make use of unacceptable labour practices in order to lower the price of production.³⁹ Those practices include forced labour, child labour, unsafe and unhealthy working conditions, unfair wages, the use of the working force of marginalised groups, such as women and migrants⁴⁰. Furthermore, TNCs are in the position to choose or « shop around » for the nation that offers the better conditions, in terms of tax and trade benefits.

The development of Export Processing Zones (EPZ) also encouraged a growing competition between governments in an attempt to attract foreign direct investment, based in part on the suppression of core labour standards.⁴¹ An EPZ, also known as a « free zone », « industrial free zone » or « special economic zone », is defined as a zone which « permits the importation of the means of production and equipment, raw material requirements, and components free of duty and without customs control, provided that these goods as well as semi-manufactured or finished goods do not

³⁸ At this stage, it should be stressed that this work's purpose is not to prove the allegation that TNCs are violating human rights. It is rather to discuss how it is possible to make them accountable in cases when such allegations are confirmed.

³⁹ de WET (1995: 448).

⁴⁰ As the final report of Mr. José Bengoa to the UN Sub-Commission on Prevention of Discrimination and Protection of Minorities (entitled *Globalisation, Income Distribution and Human Rights*) shows, globalisation has meant in many cases a deregulation or flexibilisation of labour markets. Further examples of these practices include elimination of labour laws preventing the dismissal of workers, wage reductions, changes in pensions and social security systems, recourse to temporary labour, subcontracting and outsourcing of tasks essential to enterprises. (E / CN.4 / Sub.2 / 1997 / 9 : 19).

⁴¹ Several reports have dealt with that subject. See: ICFTU (1998), *Behind the wire: Anti-union repression in the export processing zones* at <http://www.icftu.org/english/tncs/etnexpzo.html>., HUMAN RIGHTS WATCH (1998) and also ILO (1988) *Economic and Social Effects of Multinational Enterprises in Export Processing Zones*, United Nations Centre on Transnational Corporations, Geneva.

cross the border limit of the free zone into the customs territory. ».⁴² A background document, prepared by the Secretary-General for the UN Sub-Commission on Prevention of Discrimination and Protection of Minorities⁴³, stated that it is primarily in the EPZs that workers rights to join a national union for collective bargaining, or to strike, are largely restricted by governments: in some instances, these restrictions were even introduced in response to conditions laid down by TNCs as a prerequisite for investment.⁴⁴ In some countries, wide trade union activities in the industry were prohibited due to pressure from certain TNCs from the electronics industry. The Trade Union Advisory Committee to the OECD estimates that approximately 6 million workers are employed in EPZs, most of which are women.⁴⁵

It should be noted, however, that an important OECD study demonstrated that the gains of this deliberate strategy of denying core labour rights to workers⁴⁶, or to refrain from enforcing them, in the hope of improving sectoral trade competitiveness or attracting investment into export-processing zones proved short-lived, and could be outweighed in the longer term by the economic costs associated with low core standards.⁴⁷ Other position papers on the link between economic efficiency and respect for human rights show as well that economic arguments militate for a better respect of core labour standards.⁴⁸ Yet, even if a dialogue involving the economic community should be encouraged in order to build a common view on the subject of the social impacts of trade, services and investment liberalisation, it is first of all on considerations based on internationally recognised human rights and on a discussion of the accountability of the transnational corporations with regard to these rights that the issue should be addressed. Speaking in terms of legal rights and entitlements of human beings, notably in their working relations, is the strongest way to ascertain the soundness of certain arguments. The OECD Committee on Trade and Employment, Labour and Social Affairs recognised this, stating that core labour standards cannot be considered primarily as a means to improve market efficiency,

⁴² Trade Union Advisory Committee to the OECD (TUAC) discussion paper on *Foreign Direct Investment and Labour Standards* (1996), at 5.

⁴³ E / CN.4 / Sub. 2 / 1995 / 11: Background document prepared by the Secretary-General : *The relationship between the enjoyment of human rights, in particular, international labour and trade union rights, and the working methods and activities of transnational corporations.*

⁴⁴ See ICFTU (1998), *Behind the wire: Anti-union repression in the export processing zones* at <http://www.icftu.org/english/tncs/etnexpzo.html>. and HUMAN RIGHTS WATCH (1998) for illustrating examples.

⁴⁵ Trade Union Advisory Committee to the OECD (TUAC) discussion paper on *Foreign Direct Investment and Labour Standards* (1996), at 6.

⁴⁶ The OECD identified the following core labour standards concerning working conditions, referred to as basic human rights by the Copenhagen Social Summit: freedom of association and collective bargaining (ILO Conventions 87 and 98); freedom from forced labour (ILO Conventions 29 and 105); freedom from discrimination in employment (ILO Convention 111) and freedom from child labour (ILO Convention 138).

⁴⁷ OECD (1996): *Trade, Employment and Labour Standards. A Study of Core Workers' Rights and International Trade.* The economic argument suggests that low wages and labor standards in developing countries threaten the living standards of workers in these countries and are, in the longer run, counter-productive. See also GOLUB (1997).

⁴⁸ See for example: DEAKIN and WILKINSON (1994): « Rights vs. Efficiency? The Economic Case for Transnational Labour

because they are first of all *fundamental rights* of the workers.⁴⁹ Indeed, it is rather difficult to reconcile the economic logic, based on the search of efficiency, with the social and human rights logic, based on equity and the essential value of humanity.⁵⁰

The different elements outlined so far with regard to the link between the existence of TNCs and the protection of human rights can be summarised as follows: the legal status of the entity called TNC is difficult to circumscribe from a national perspective, and hence, there is a lack of legal accountability of these entities vis-à-vis allegations of human rights violations stemming from their international activities; the necessity to reason in terms of legality rather than morality, ethics or economic efficiency is due to the fact that humans are granted international protected legal rights and deserve a means to offer possible redress for human rights abuses. To ascertain that there is only a moral obligation incumbent on TNCs to respect human rights does not enable individuals to seek reparations from national courts or from international institutions.⁵¹

The next steps in our analysis aim to show how the violations of these rights by a non-State entity do entail responsibility. We will first address the possibility of invoking the State's international legal responsibility in cases of human rights violations by a TNC, and will then tackle the international legal responsibility of the non-State entity itself.

Standards » in 4 *Industrial Law Journal* 23, at 289.

⁴⁹ see Joint statement in 1996...

⁵⁰ BOURDIEU (1998:3).

Part I:**State Responsibility and TNCs Violations of Human Rights under International Law**

The State is traditionally seen as the entity primarily responsible for upholding human rights on the international level as well as in the national sphere. With the appearance of a whole spectrum of non-State entities on the global scene, the primacy of the State's position in international relations is being questioned, as is its power to control and regulate these new actors. A UN Secretary-General report on minimum humanitarian standards affirms: « the development of international human rights law as means of holding Governments accountable to a common standard has been one of the major achievements of the United Nations. The challenge is to sustain that achievement and at the same time ensure that our conception of human rights remains relevant to the world around us. »⁵² It also means that human rights violations committed by private persons against other private persons « cannot be placed outside the ambit of human rights law if that law is ever to gain significant effectiveness »⁵³.

Two questions should be addressed in this first part:

- When is a State liable for human rights violations committed by non-State actors?
- When is a State liable for transboundary human rights violations committed by non-State actors, and especially by TNCs?

We will first review the State responsibility doctrine concerning international human rights law in the light of new developments tending to interpret it in a such a way as to include the extended obligation of a State to account for acts of non-State entities (section I.1). We will then try to draw a parallel between these new developments and ways to hold States specifically responsible for TNCs human rights violations, when the transnational corporations are private entities and not acting on behalf of a State (section I.2).

1. International responsibility of States for human rights violations by non-state actors

Many questions can be asked in connection with the liability of States for human rights violations committed by private actors. For example, when does a State's failure to act give rise to its international responsibility? How extensive are the duties of States to promote and protect human

⁵¹ See SPAR (1998).

⁵² Secretary-General report on minimum humanitarian standards (E / CN. 4 / 1998 / 87 : 16-7)

⁵³ MERON (1984: 162).

rights, especially when powerful non-governmental entities threaten these rights?⁵⁴

The International Law Commission's work of the law of State responsibility affirms that the conduct of private individuals shall not be considered as an act of the State; the State is responsible if it fails to carry out an international obligation to act.⁵⁵ Hence, a failure to exercise due diligence to prevent or remedy an attack on an alien, or failure to exercise due diligence to apprehend and hold any person committing such an act give rise to State responsibility even if committed by private individuals.⁵⁶ As Ian Brownlie points out, the acts of private persons do generate state responsibility when a particular rule of international law is breached by the State itself, as for example in the case of breach of the duty to exercise due diligence in controlling private persons.⁵⁷ He refers to the *Janes Claim*⁵⁸ and the *Massey Claim*⁵⁹, both of which were concerned with acts of murder committed by individuals followed by inadequate steps to apprehend and punish the culprit and which lead to invoke the responsibility of the State⁶⁰.

Although this standard developed in regard to the protection of aliens, it has recently been adopted and applied in regard to State responsibility for human rights violations. The Inter-American Court of Human Rights thus decided that the State was responsible, even if the alleged human rights violations were not carried out by agents who acted under cover of public authority, and this because the State's apparatus failed to act to prevent these violations or to punish those responsible.⁶¹ Confirmation of this rule is to be found in a famous judgment of the Inter-American Court on Human Rights in the *Velasquez Rodriguez Case*, which affirmed: « An illegal act which violates human rights and which is initially not directly imputable to a State (for example, because it is the act of a private person or because the person responsible has not been identified) can lead to international responsibility of the State, not because of the act itself, but because of the lack of due diligence to prevent the violation or to respond to it as required by the Convention. »⁶² Indeed, the American Convention on Human Rights

⁵⁴ SHELTON (1993: 265-6).

⁵⁵ Article 11 (1) of the ILC Draft articles on State Responsibility states that « the conduct of a person or a group of persons not acting on behalf of the State shall not be considered as an act of the State under international law. » See Report of the International Law Commission on the work of its forty-eighth session (6.5-26.7. 1996); A / 51 / 10, at 128.

⁵⁶ See Sentence of Max Huber, *Affaire des Biens britanniques au Maroc espagnol* (RSA, vol.II, p.642) and also the case of the United States Diplomatic and Consular Staff in Teheran (U.S. v. Iran), Judgment of May 24, 1980, I.C.J. Rep. (1980). For a development of this last case in relation to the ILC draft articles on State responsibility, see CONDORELLI (1984: 93-96).

⁵⁷ BROWNLIE (1983: 160-3).

⁵⁸ United Nations, Report of International Arbitral Awards, Vol. IV, p. 82.

⁵⁹ United Nations, Report of International Arbitral Awards, Vol. IV, p. 155.

⁶⁰ Brownlie (1983 : 161).

⁶¹ *Velasquez Rodrigues case*, Inter-American Court of Human Rights, Decisions and Judgments (ser.c) No. 4 (1988) and *Godinez Cruz case*, Inter-American Court of Human Rights, Decisions and Judgments (ser.c) No. 5 (1989). See also the analysis in SHELTON (1989-1990).

⁶² *Velasquez Rodrigues case*, Inter-American Court of Human Rights, Decisions and Judgments (ser.c) No. 4 (1988: 151).

states at its Article 1: « The States Parties to this Convention undertake to respect the rights and freedoms recognised herein and *to ensure to all persons subject to their jurisdiction the free and full exercise of those rights and freedoms..* »⁶³ (emphasis added). This article being very similar to Article 2 of the Covenant on Civil and Political Rights, and to Article 1 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (herein the European Convention), this decision has been of general relevance for the international law of human rights.⁶⁴ The consequence is that failure to control private violations of human rights or acquiescence in human rights violations committed by non-State actors renders the State as guilty as if its officials had initially committed the violations, for it has breached its obligation to prevent, investigate and punish such violations.⁶⁵ As Fernando Teson affirms it: « liberal theory must therefore postulate an affirmative obligation in international law on the part of the state to have a reasonably effective legal system in which assaults against life, physical integrity, and property are not tolerated. Thus, a state is in breach of its international obligations not only if it violates human rights in the traditional sense but also if it fails adequately to protect its citizens - if it fails to punish enough, as it were.»⁶⁶

Many United Nations Conventions contain explicit obligations for States to take effective measures to prevent private violations of human rights: for instance, the Covenant on Civil and Political Rights, in its Article 2 (3a), imposes a duty on each Party to ensure an effective remedy to any person whose rights or freedoms are violated, whether or not by persons acting in an official capacity.⁶⁷ In his commentary to that article, Manfred Nowak refers to the "horizontal effects" that human rights produce between private parties, as opposed to the « vertical level » which exists between the individual and the State. He adds that "it is possible to read art.2 (3) as inferring that the Covenant rights are not protected only from violations by the State, since a remedy for a violation is to be afforded "notwithstanding" ("alors même") that it was committed by State organs."⁶⁸ The *travaux préparatoires* of that Covenant also state that: « although a suggestion was made that freedom of assembly should be protected only against « governmental interference », it was generally understood that the individual should be protected against all kinds of interference in the exercise of this right. »⁶⁹ The Covenant on Economic, Social and Cultural Rights also requires States to achieve the realisation of the rights recognised in it,

⁶³ American Convention on Human Rights; Nov.22, 1969.

⁶⁴ MERON (1989 :164).

⁶⁵ SHELTON (1993: 275).

⁶⁶ TESON (1998: 164).

⁶⁷ International Covenant on Civil and Political Rights, G.A. Res. 2200 (XXI), December 16, 1966.

⁶⁸ NOWAK, M. U.N. Covenant on Civil and Political. CCPR Commentary (1993) (N.P. Engel: Kehl am Rhein) at 38.

⁶⁹ UN Doc.A/2929 Chap. VI para.139.

thus providing for affirmative obligations upon States both domestically and internationally.⁷⁰

Other Conventions require effective measures to protect the rights enshrined in them. The UN Convention on the Elimination of All Forms of Racial Discrimination which require the State to bring to an end racial discrimination by any persons, group or organisation⁷¹; the Article 2 (e) of the Convention on the Elimination of All Forms of Discrimination Against Women enjoins States to undertake «all appropriate measures to eliminate discrimination against women by any person, organisation or enterprise»⁷²; the prohibition of genocide applies to private persons or groups⁷³, as does the prohibition of slavery.⁷⁴

In the interpretation of human rights treaties, good use can be made of the principle of effectiveness as a means to gauge the behaviour of non-state actors regarding human rights protection. « Because the object of human rights treaties is to ensure effective protection of human dignity, due weight must be given to the principle of effectiveness in construing human rights treaties. When a human rights treaty establishes an obligation of result, and that result may be frustrated by private action, the arguments for an interpretation reaching private action are compelling. »⁷⁵

Various UN Supervisory Committees have given their opinion on States' duties to promote human rights among private actors, making them potentially accountable if there is a failure to act in this sense. For example, the Committee on the Elimination of Racial Discrimination analysed the obligation to guarantee the enjoyment of civil, political, economic, social and cultural rights and freedoms without

⁷⁰ International Covenant on Economic, Social and Cultural Rights, G. A. Res. 2200A (XXI), December 16, 1966. According to article 2 of this Covenant, the States Parties undertake to take steps, to the full extent of their available resources, to progressively achieve the full realisation of the rights recognised in the Covenant, which include the freedom of association and collective bargaining (art. 8 and 9), the abolition of child labour (art.10) and also just and favourable working conditions, including fair wages, limitation of working hours and periodic holidays with pay (art.7).

⁷¹ Art. 2 of the International Covenant on the Elimination of All Forms of Racial Discrimination, 60 U.N.T.S.195, entered into force January 4, 1969. However, see FORDE (1985: 262) for limitation of that article regarding the prohibition of private discrimination on the ground of race.

⁷² Convention on the Elimination of All Forms of Discrimination Against Women, G.A. res. 34 / 180, UN GAOR Supp. (No.46) at 193, UN Doc. A / 34 / 180, entered into force Sept. 3, 1981. On this issue, see also the analysis of Rebecca J.COOK on "State Accountability Under the Convention on the Elimination of All Forms of Discrimination Against Women" in Cook (1994: 229), who states that: "If a state facilitates, conditions, accommodates, tolerates, justifies, or excuses private denials of women's rights, the state will bear responsibility. The state will be responsible not directly for the private acts, but for its own lack of diligence to prevent, control, correct, or discipline such private acts through its own executive, legislative, or judicial organs." .

⁷³ Article IV of the Convention on the Prevention and Punishment of the Crime of Genocide states: « Persons committing genocide or any of the other acts enumerated in article III shall be punished, whether they are constitutionally responsible rulers, public officials or private persons. » Convention on the Prevention and Punishment of the Crime of Genocide, adopted 9 Dec. 1948, entered into force 12 Jan. 1951, 78 UNTS 277.

⁷⁴ Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery, adopted 7 Sept. 1956 entered into force 30 August 1957, E.S.C. Res. 680 (XXI), 226 UNTS 3.

⁷⁵ MERON (1989: 169). (Human Rights and Humanitarian Norms as Customary Law (1989): (Oxford: Clarendon Press), pg. 263.

racial discrimination: « to the extent that private institutions influence the exercise of rights and the availability of opportunities, the State Party must ensure that the result has neither the purpose nor the effect of creating or perpetuating racial discrimination. »⁷⁶ The Committee on the Elimination of Discrimination against Women emphasised that discrimination under the Convention is not restricted to action by or on behalf of Governments for Article 2 (e) of the Convention, for example, calls on States parties to take all appropriate measures to eliminate discrimination against women by any person, organisation or enterprise.⁷⁷

On the regional level, the question of the use of the European Convention to regulate the behaviour of private actors has been addressed. Guisepppe Sperduti, among many others, has pleaded for this possibility by invoking the "*Drittwirkung*" of the Convention.⁷⁸ He also argued that interpretations of the Convention should be aimed at achieving the goals of the Convention rather than limiting the responsibilities of the Contracting Parties.⁷⁹ The fact that only States are parties to the European Convention and can be the object of a claim to the Commission or the Court makes the question of private abuses of human rights difficult to consider. However, even if the traditional conceptions of human rights relate only to the State and its organs, the behaviour of non-State actors towards human rights violations has arisen in connection with the Convention in several ways. The analysis of Andrew Clapham shows how various articles of the European Convention on Human Rights have been applied by the Strasbourg organs to regulate the behaviour of private actors. Article 17 of the Convention was referred to to justify the fact that human rights violations can be conducted by private organs, but it is unlikely that one could actually use it to ground a claim in the national courts against a private body not respecting the rights and freedoms contained in the Convention.⁸⁰ It would then not only be sufficient to show a lack of legislation regarding the control of non-State actors in preventing human rights violations. It should also be proven that *but for* the government's lack of legislation a particular injury

⁷⁶ HRI / GEN / 1 / Rev. 3 (15.8.1997): *Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies*; Committee on the Elimination of Racial Discrimination, General Recommendation XX (48th session, 1996), pg. 113.

⁷⁷ HRI / GEN / 1 / Rev. 3 (15.8.1997): *Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies*; Committee on the Elimination of Racial Discrimination against Women, General Recommendation No. 19 (11th session, 1992), pg. 129.

⁷⁸ The term of "*Drittwirkung*" has its origin in a debate on the possible application of the German Basic Law in cases where both parties are private. Some authors have specifically studied the notion of the "horizontal effects" (or the *Drittwirkung*) of human rights. See in particular FORDE (1985) and the analysis of CONDORELLI (1984: 149-156).

⁷⁹ CLAPHAM (1993a: 171).

⁸⁰ Article 17 of the (European) Convention for the Protection of Human Rights and Fundamental Freedoms states: « Nothing in this Convention may be interpreted as implying for any State, *group or person* any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms set forth herein or at their limitation to a greater extent than is provided for in the Convention. » It was on the basis of that article that the Commission decided that the German Communist Party, being a private organization, is obliged to respect the rights contained in the Convention and if not, may face dissolution. Application no. 250 / 57, *Kommunistische Partei Deutschland v. Federal Republic of Germany*, *Yearbook* 1 (1955-57), p.223.

would have probably been avoided.⁸¹

According to Andrew Clapham, there are, in given circumstances, duties and obligations stemming from the Convention which are incumbent upon non-State actors even if these actors are not the respondents in front of the Strasbourg organs: « first, the Commission and Court admit the *philosophical possibility* that private groups have to respect the rights guaranteed by the Convention; and second, any case-law on this topic may be very relevant for national courts should they have to decide on a case brought directly against a private body. »⁸² The Commission has furthermore concluded that: « (if) it is the role of the Convention and the function of its interpretation to make the protection of individuals effective, the interpretation of Article 11 should be such as to provide, in conformity with international labour law, some protection against « private » interference. »⁸³ Another well known case is the *case X and Y v. The Netherlands*, when the Court agreed that the European Convention entailed positive as well as negative obligations on the part of the State, meaning that it is required from international law to mandate that States provide remedies for violations of human rights by private individuals.⁸⁴

These remarks allow us to ascertain that there is a move from the idea of « protection *against* the State » to « protection *by* the State » which includes all kinds of human rights violations, be they governmental or non-governmental.⁸⁵ Also, « the very essence of human rights is that they are inalienable rights of individuals and not just restrictions on what the government may do; that the protection of individual rights is the primary, direct and basic content of human rights rather than a consequence of restrictions on public power. »⁸⁶

These remarks lead to the conclusion that the State is responsible for human rights violations committed by non-State actors when it fails to control - prevent and punish - their actions, contrary to its international human rights obligations. Furthermore, even if the instruments protecting human rights are binding upon States, the possibility to apply them to activities of non-State actors has been recognised.

The liability of States for private acts is however meant to address conducts within its territory and

⁸¹ The "*but for*" test is discussed in CLAPHAM (1995: 30) and CLAPHAM (1993a: 179).

⁸² CLAPHAM (1993a: 170). However, FORDE (1985: 264) argues by considering the *travaux préparatoires* of the European Convention that State Parties to the Convention believed that they were assuming obligations only with reference to governmental interferences with the rights contained in it.

⁸³ *Swedish Engine Drivers' Union Case*, Application No. 5614/72 (1974), 18 Eur.Ct. HR (Ser. B) 42-6 (1977).

⁸⁴ *X and Y v. The Netherlands*, 91 European Court of Human Rights (ser. A) at 8 (1985),

⁸⁵ The wording is taken from CLAPHAM (1993a: 190).

⁸⁶ FORDE (1985: 279).

subject to its jurisdiction. How can we address the specific case of transnational corporations, which are private actors operating across many States and having the nationality of different countries, in light of the above conclusions? Is it possible to find ways to hold States accountable for the eventual violations of international human rights obligations by TNCs, since those actors extend beyond domestic boundaries and affect several countries?

2. International Responsibility of States for Human Rights Violations by TNCs

Having so far established the possibility of the international responsibility of States for violations of human rights by private actors, we have to try to determine if responsibility and territorial sovereignty are reciprocally linked or, in other words, if the territorial space is set as a limit for the exercise of State responsibility in the context of private violations of international human rights law.

A first question to be examined in the light of the above developments is the possibility of home-state liability for damages caused by the activities of their transnational enterprises abroad. Imposing obligations on States to control their corporate citizens abroad could maybe be an efficient way to control the activities of the TNCs regarding human rights. Luigi Condorelli has stated that the drafting of article 11 by the ILC was predominantly aimed at the obligations incumbent on a State with regard to the control of territories under its exclusive jurisdiction.⁸⁷ Hence, the State has an obligation to prevent and punish individual wrongful acts occurring within its territorial jurisdiction. In that regard, Ian Brownlie affirms that a State is in general not under a duty to control the activities of its nationals beyond the bounds of state territory.⁸⁸ However, according to Luigi Condorelli, the territorial localisation of individual activities is considered to be the most current approach used to invoke State responsibility, but not the only one. Individual behaviour is likely to catalyse international responsibility of States independently of their localisation within a territory under its jurisdiction. Thus, the emergence of obligations susceptible of entailing the responsibility of States in relation with the behaviour of individuals occurring outside the territorial jurisdiction of that State begins to be recognised. Yet, such a hypothesis is possible only if a primary international norm does not exclusively concern the obligation to exercise control upon a certain territorial space but the obligation to exercise control upon a certain activity. The condition is that the State has the capacity to exercise the required control over such an activity even if the private behaviour to be supervised is taking place in a

⁸⁷ CONDORELLI (1984: 104-5).

⁸⁸ BROWNLIE (1983: 65).

territorial space outside its jurisdiction and control.⁸⁹

It is precisely in the context of these developments that the discussion of an eventual invocation of a State's responsibility for activities of TNCs, under its control but operating abroad, can take place. The question is then whether a State is in a position to regulate the activities and operations of its national TNCs taking place outside its territory and weigh upon the decisions of the controlled corporations which have the national status of other States⁹⁰. If we can answer in the affirmative to that question, then the failure to control these activities, in our case especially with regard to the obligation of the respect for human rights by private entities being here the TNCs, should entail the international responsibility of the State.⁹¹

States have usually tried to deny any responsibility for the activities of their corporate citizen abroad by arguing that the issue concerns the host State in the territory of which the TNC is operating. The principle of territorial jurisdiction is seen in this context as the dominant one. However, the question of the predominance of the territorial State may reveal itself as "meaningless" since the decisive factor is the one of the effective exercise of control on TNCs activities: the host State has indeed the control on the enterprise established on its territory. But, since the TNC is a complex entity including several different enterprises and affiliates operating across countries, the localisation and control of the "ultimate" centre of decision brings certainly the highest level of control on the entire spectrum of activities of the TNC. The home State has the means, by exercising its sovereign powers within its jurisdiction, to influence the conduct of the transnational corporation abroad and even to direct it. This can be done, for example, by establishing appropriate measures within its territory on TNCs, which entail the consequent control on the activities abroad.⁹² As two authors are affirming, there are many difficulties in this approach, but the long-term trend appears to be increased extraterritorial application

⁸⁹ The arguments of this analysis are found in CONDORELLI (1984: 111-114). WYLER (1995: 92-119), analysing cases in the European context, also affirms that the evolution of the doctrine in the field of State responsibility leads to the conclusion that even if the principle of territoriality is still implicit for the notion of due diligence, there is a certain « delocation » of the infraction that can entail the responsibility of the State. However, his analysis does not go as far as Condorelli's, for this author refrains from going further than the analysis on the condition set upon State's organs to exercise a jurisdiction on the territory of another State.

⁸⁹ HENKIN (1989: 292).

⁹⁰ We set apart the case when the acts of TNCs can be equated to acts of State, if their status as *de facto* organs of State can be proved.

⁹¹ Since 1987, the International Law Commission has been trying to draft principles relating to the possibility of home-state liability for damages (environmental) arising out of the operations of their multinationals abroad and also on the question of more direct private liability of multinationals. Under this assumption, the United States could be for example liable to Thailand for the environmental damages caused by American transnationals there. These attempts to regulate TNCs could also apply for human rights violations by TNCs in host countries. See the report of Quentin-Baxter, Q. in the *Yearbook of the International Law Commission* (1980) and the report of Barboza, J. in the *Yearbook of the International Law Commission* (1986). See also Francioni, F. and Scovazzi, T. (ed) (1991) *International Responsibility for Environmental Harm* (London: Graham and Trotman), 499 p.

of domestic laws over corporate activities abroad.⁹³ However, in order to invoke the regime of international responsibility of the State, a primary international norm prescribing rights and obligations upon the controlling State must exist. Luigi Condorelli states very appropriately that criticism should not be addressed towards the gaps in the international responsibility regime concerning the TNCs but more on the low consistency level of State regulation concerning these transnational entities. The attempts, on inter-governmental level, to set such regulations have not yet been successfully concluded.⁹⁴

Apart from the concerted creation of international human rights standards applicable to TNCs, the analysis conducted in point I 1. above shows that States are being held responsible for violations of international human rights obligations by private actors within their jurisdiction. Furthermore, with the help of Luigi Condorelli's analysis, we have admitted that there is an obligation for States to regulate private entities operating outside their territory. The corollary of these two conclusions is that TNCs, as non-State actors operating mostly outside the territory of their home State, may trigger the latter's responsibility for their human rights violations occurring abroad. Hence, the home State of a TNC has, in principle, the means to influence the activities of its TNCs outside its territory: it is necessary for that State to display appropriate regulatory measures to control TNCs. State responsibility could then be invoked either if these measures are contrary to the international human rights obligations of the home State, or if the State does not adequately control the activities of its TNCs abroad. In this case, it is its failure to act that entails its international responsibility.⁹⁵

This positive theoretical conclusion is however not easily implemented in practice. Several limitations are impinging on the possibility to hold home-States accountable:

- First, it is difficult for a State to admit that another one is allowed to impose its national laws on its territory. For example, controversies have developed when a State applied its law to economic activities elsewhere, such as in the case of the Helms - Burton law. States resist this strongly, since they wish to preserve their exclusive legislative authority and to protect their nationals from foreign regulation. Also, as Louis Henkin points out, it is difficult to require from a parent company to issue directives to a wholly owned subsidiary incorporated in another country; problems are also raised when the State of incorporation of a subsidiary comes to regulate its activities in ways that impinge on the parent or on another subsidiary of the same parent in another State.⁹⁶

⁹² CONDORELLI (1984: 159-160).

⁹³ JENKINS and HUNTER (1993:15).

⁹⁴ See the third part of this work.

⁹⁵ CONDORELLI (1984: 160).

⁹⁶ Henkin proposes, in order to resolve this problem of conflicting interests in regulation, to apply the principle of

- Second, as we have shown in the first part, no State today is capable of controlling adequately the phenomenon of the TNC on its own, and it is sometimes impossible to identify which State should be responsible for the company since its affiliates are in complicated relations with it and with other TNCs with different nationalities. A TNC could easily claim that it has no responsibility upon its subsidiary or subcontractors, and that, in fact, the corporate structure goes beyond the jurisdiction of the countries in which it operates. Furthermore, it could be rather difficult to delimit the respective power and authority of home and host states vis-à-vis the TNCs, and the possibility of having conflicting requirements being imposed on the TNC from different countries has proved to be a real problem.

- Third, as Jamie Cassels notes in an analysis of cases of TNC's role in environmental damage - which can be compared to the analysis of human rights violations - unless it is the government who takes over the litigation, the burden is upon the individual victims to prosecute the powerful TNCs. It would also not be surprising to find courts reluctant to entertain litigation in respect of cases that took place outside the national boundaries. Finally, questions would certainly arise in relation to the identification of a defendant, in the view of the complex institutional organisation of multinational enterprises.⁹⁷

These few remarks show that the national approach has several political, legal and practical limitations. In that regard, El Hadj Guissé has concluded that since the violations committed by transnational corporations in their transboundary activities do not come within the competence of a single State, they should be the subject of special attention. He has further suggested that States and the international community should combine their efforts so as to constrain such activities by the establishment of legal standards capable of achieving that objective.⁹⁸ This point of view emphasises the fact that governments are not able to sufficiently supervise corporate operations, and that there exists, de facto, a domestic « accountability deficit ». Accountability should then be enhanced and controlled on the international level, while still continuing to hold States responsible for the implementation of their international obligations. Indeed, the legal arguments analysed above have clearly shown that the responsibility of home States is entailed when they fail to prevent and to control the human rights violations of national TNCs abroad. This has been conducted by determining, in the first place, the state's responsibility for private violations of international human rights obligations and, in a second step, by acknowledging the state's responsibility for private action occurring outside its

reasonableness, which should be used in determining whether it is reasonable for a State to apply its laws in a particular context, or in deciding which of the States involved in a situation should give way to the one other State. He does also quote the *Restatement of Foreign Relations Law of the United States* which sets principles of reasonableness that might suggest limitations on the exercise of jurisdiction. See HENKIN (1989: 296-7).

⁹⁷ This question is also analysed in an article which is to be found at the "Corporate Watch" internet site: <http://www.corpwatch.org/trac/resrch/legal.html> (Legal Action and TNCs)

⁹⁸ EL HADJ GUISSÉ (E / CN.4 / Sub. 2 / 1996 / 15: 32-33).

territory. The fact that there are several obstacles to the effective implementation of that responsibility renders more pressing the adoption of additional means in order to strengthen States' and TNCs' accountability for violations of international obligations of human rights.

Part II:

The Direct Responsibility of TNCs for Human Rights Violations under International Law

The first part of this work showed that it is possible under international law to hold States accountable for human rights violations committed by non-State actors. This could be defined as an "indirect horizontal effect" of the international human rights norms, which apply to non-State entities but with the mediation of the State. The second part of this study will address the issue of the "direct horizontal effect" of international human rights law, whereby non-State entities are directly responsible for violations without the need to invoke State responsibility. This second approach is mainly justified by the concern that transnational corporations are actually able to escape State's regulations and operate in so-called "grey zones" outside of the scope of the legal control of States.

A two-step approach will be used in that regard. First, we have to consider the traditional doctrine, which claims that in order to be subjected to international norms, legal international subjectivity is a precondition, that TNCs do not fulfil. We will refer primarily to Julio A. Barberis' observations in order to show that it is by being subjected directly to international norms that an entity acquires international legal subjectivity. Having demonstrated that TNCs can be subjects of international law if international obligations are bestowed upon them, we will then, in the second part of this section, determine if non-State entities can be directly bound by international human rights law.

1. TNCs as Subjects of International Law

The recognition of the international subjectivity of private legal persons remains a theme of doctrinal controversy and constitutes an actual problem.⁹⁹ The positivist doctrine, especially since the end of the 19th Century considered, almost in a dogmatic way, that the only subjects of international law were States.¹⁰⁰ The notion of subject of international law was analysed from the assessment of the participation or not in the formation of international norms.¹⁰¹ In that conception, the TNCs can have no existence as a subject of international law. The separate identity of the component units that together formed the economic entity named TNC could only be recognised and dealt with as subjects of domestic legal orders. It was difficult for the doctrine to assess the modifications undergone by the international community, and especially to devise a test by which to gauge when non-State entities can be entitled to the international subjectivity.¹⁰² The view that only States are subjects of international

⁹⁹ NGUYEN (1994: 673) and MALANCZUK (1997: 100-2).

¹⁰⁰ QUADRI (1964: 383).

¹⁰¹ RIGAUX (1989: 49).

¹⁰² For example, one way used to refer to these new entities was to postulate the existence of a third legal order, distinct from the international legal order and the national one, and which encompasses the new entity in question. The agreements

law begun to be challenged by the "School" of Georges Scelle¹⁰³ and also by Philip Jessup when he stated the hypothesis that individuals are in fact subjects of international law.¹⁰⁴

A first criticism of the classical approach is the fact that States are the sole source of authority and law in the international system does not lead to the conclusion that they are the only subjects of international law: « The international system is a system of States, made by States, perhaps largely - still - for States, but not only for States. Law is made by States, and by their laws States have created (or recognised) other entities, and have given them status, powers, rights, responsibilities and remedies, within the international system. »¹⁰⁵ Furthermore, in a well known case, the International Court of Justice has asserted that subjects of international law are different, as are the rights and obligations held by them: « The subjects of law in any legal system are not necessarily identical in their nature or in the extent of their rights. »¹⁰⁶.

In order to examine more systematically the concept of international subjectivity, we will adopt the analysis conducted by Julio A. Barberis in his General Course on Public International Law at The Hague. After examining two known theories on the subjects of international law¹⁰⁷, he comes up with an original way to circumscribe the subject: for him, the definition of a subject of international law is « celui dont la conduite est prévue directement et effectivement par le droit des gens en tant que contenu d'un droit ou d'une obligation. »¹⁰⁸ This view holds that only the examination of international positive norms can reveal the international subjectivity of the entities under scrutiny as direct holders of rights or obligations. The international subjectivity does not depend on the quantity of rights or obligations held by the entity in question. Referring again to the statement of the ICJ in the Reparations case, international subjects are not necessarily identical. In an extreme case, one could imagine an

concluded between States and foreign enterprises, which are usually defined as quasi-international agreements, were said to belong neither to the international legal order nor to the legal order of states. Transnational enterprises were also said to be ruled by an intermediate legal order, a third one, sometimes called a transnational order. However, as Barberis observed, the analysis has shown that the relation between a new entity, or, as Barberis calls it, « entité en marge », and the other subjects of the international community can only take the character of a subordinate or of a coordinate relation. In the first case, the norms ruling that subordinate relation come under the internal legal order of the subject of law. In the other case, the norms will come under international law. Hence, an alternative from these two choices for a third order is inconceivable. See BARBERIS (1984:173-6) and RIGAUX (1989: 68-9).

¹⁰³ See Scelle, G (1932-1934): *Précis de droit des gens (principes et systématiques)*, (Paris: Sirey), 2 vol 312 and 559 p and (1948): *Manuel de droit international public* (Paris: Domat-Montchrétien), 1008p.

¹⁰⁴ JESSUP (1946): *A Modern Law of Nations* (London: Macmillan), 236p.

¹⁰⁵ HENKIN (1989: 35).

¹⁰⁶ Reparations for Injuries Suffered in Service of UN (Advisory Opinion), International Court of Justice Reports (1949:178).

¹⁰⁷ The two theories are Kelsen *théorie pure du droit* according to which an entity being the direct recipient of an international norm can be qualified as having the international subjectivity, and the so-called « theory of responsibility » principally developed by Eustathiades. The latter fixes two criteria, which have to be fulfilled by an entity in order to be considered as a subject under international law: to be entitled of a right or a legal obligation, and to have at the same time the capacity to commit an international wrongful act. In other words, the first case implies the ability to invoke international responsibility and the second case refers to the ability to assume international responsibility. BARBERIS (1983: 160-168).

¹⁰⁸ BARBERIS (1983: 168). CAHIER (1984: 93) also defends that same approach.

entity being the holder of just one obligation stemming from the international regime, and that alone would allow us to consider it as a subject of international law.¹⁰⁹

Bearing this definition in mind, nothing should prevent TNCs from being seen as subjects of international law. The mere existence of international norms applying directly to them allows us to regard them as international legal subjects.¹¹⁰ We will examine four different areas of international law regulation that have addressed directly TNCs by conferring on them international rights or obligations¹¹¹. (a) The issue of rights is discussed in the dispute settlement mechanisms that provide TNCs with a procedure to complain about their rights' violations. (b) The international obligations incumbent upon TNCs are discussed in light of some UN General Assembly resolutions and (c) referring briefly to international codes of conduct. (d) Finally, the recent emergence of the international criminal responsibility of TNCs is a good example of how international law is beginning to bind TNCs directly.

a. The Convention on the Settlement of Investment Disputes between States and Nationals of other States was drawn up in 1965 within the World Bank system.¹¹² It provides the possibility for States to refer a problem related to investments directly to the so-called Center for the International Regulation of Investment Disputes, created under this Convention, which will then judge between a Contracting State and a national of another Contracting State, being mainly transnational enterprises.¹¹³ In reality, this forum materialises the possibility for investors to assert that their investment contracts have been breached. This internationalised dispute settlement mechanism, supported by developed States in order to protect the investments of their transnational corporations abroad, leaves little option for developing States and creates a system that protects TNCs rather than prosecute them.¹¹⁴ This Convention shows the tendency of the international legal order to give privileges - in fact, real international rights - to TNCs without imposing on them new responsibilities. Finally, their international subjectivity stems from the fact that they enjoy rights asserted and protected under international law.

¹⁰⁹ CAHIER (1984: 95).

¹¹⁰ This view is not universally shared. Some authors refuse to consider TNCs as subjects of international law for different reasons, legal or political. See for example ABI-SAAB (1987) and MERCIAI (1993). KOKKINI-IATRIDOU and de WAART (1983: 88-90) give a good account of these different views.

¹¹¹ The recourse to international law in order to regulate TNCs on the economic level is justified by the fact that it is the only legal system, which is able to cover, by its very nature, the world economy as a whole, in scope and in content. See KOKKINI-IATRIDOU and de WAART (1983: 104).

¹¹² Convention on the Settlement of Investment Disputes between States and Nationals of other States in 575 UNTS 159, adopted 18.3.1965; entered into force 14.10.1966.

¹¹³ Nguyen Quoc Dinh (1994: 693).

¹¹⁴ Andrew Clapham and Silvia Danailov (June 1998): *Whiter the State of Human Rights Protection? New Ways to Hold Non-State Actors Accountable*, background paper for the International Council on Human Rights Policy (Geneva), at 8.

b. In the 60s and 70s, the increasing use of nationalisation by newly independent States as means to assert their economic sovereignty led to several new developments that took place regarding TNCs, the primary economic actors whose assets were nationalised. Several United Nations Resolutions were adopted and tried to establish norms aiming at the direct regulation of TNCs. At the time of apartheid, several UN General Assembly resolutions have directly called upon TNCs to abide by the measures calling for a suspension of co-operation with South Africa.¹¹⁵ Another example is article 2 of the Charter of Economic Rights and Duties of States, which stipulates that multinationals are not to interfere with the internal affairs of a host country.¹¹⁶ As an author states it, these instruments explicitly refer to and by implication confer legal personality on the TNC.¹¹⁷

c. Codes of conduct addressed to regulate the behaviour of TNCs are signs of States' willingness to regulate directly TNC operations on the international level. Hence, «the (draft) codes of conduct contain elements which could serve as an indication of the willingness of states to assume that MNEs possess the principal qualities characteristic of an international legal person: the capacity to be the drafter before international fora in disputes on the interpretation and application of these rules.»¹¹⁸ Indeed, as we will show it in the third section of this work, the different international codes show that TNCs are direct addressees of the rules of conduct contained therein.

Recently, the question of establishing a legally binding multilateral framework for investment has become a issue of priority on the international economic agenda. There is an ongoing negotiation in the Organisation for Economic Co-operation and Development to establish a Multilateral Agreement on Investments (MAI) as a treaty to regulate the foreign direct investments by setting standards on TNCs activities.¹¹⁹ This agreement, which is still under negotiation, seeks to codify the free trade agenda. Its principal feature is that it favours the right of transnational corporations to challenge state legislation by suing governments for lost competitiveness and profits within a special investor-state dispute mechanism. Thus, TNCs can directly intervene against State's interference with the rights that are directly given to them by the international community. The same possibility, for States to intervene in cases when TNCs are not respecting their obligations, has not yet been acknowledged.¹²⁰

¹¹⁵ Commission on Transnational Corporations, Report on the Eighth Session, Supplement No. 8. Doc. E / 1982 / 18 (E / C.10 / 1982 / 19)

¹¹⁶ Charter of Economic Rights and Duties of States, adopted 12. 12. 1974, A/RES/3281 (XXIX).

¹¹⁷ TIEWUL (1988: 105).

¹¹⁸ KOKKINI-IATRIDOU and de WAART (1983: 114).

¹¹⁹ GANESAN (1997: 136); See also other literature on the subject such as: SAFARIAN (1996); Graham (1996) and Kothari & Krause (1998).

¹²⁰ Furthermore, the analysis conducted on the MAI have not really acknowledged the fact that the international human rights instruments could be undermined by some of its provisions. This issue deserves a further research, which goes beyond this paper's scope. For a good summary of the problems implied by the MAI for the international protection of human

d. There are different developments on the national and international level concerning the criminal responsibility of private corporations. As Theodor Meron's remarks on that issue: "The new offences in the economic arena to which (Wolfgang Friedmann) alluded, especially those with extraterritorial effects such as violations of anti-trust legislation, have become extraordinarily important. These offences, as well as acts resulting in major environmental disasters, are nearly always caused by corporate or legal persons. Since corporations are by far the most important actors in our contemporary experience, the criminalisation of their offences is a vital issue for debate."¹²¹ The extraterritorial effects of TNCs violations of human rights can be added to the crimes that should be sanctioned.

Thus, after the Second World War, the criminal law of some countries, mainly from the common law system, came to recognise the concept of corporate criminal liability.¹²² Furthermore, in 1988 the Council of Europe has asked those member States whose criminal law had not yet provided for corporate criminal liability to reconsider the matter.¹²³ Thus, the criminal responsibility of corporations is emerging as a well recognised concept on the national level. In that regard, Roberto Ago, Special Rapporteur of the ILC on State responsibility, reported that "it used to be said that *societas delinquere non potest*, but forms of corporate criminal responsibility are rapidly developing at the national level, and are providing to perform a useful function."¹²⁴

The explanation of this phenomena lies in the fact that " an important part of crime nowadays takes place through corporations (and) compels every legal order to take action. The only effective way to combat corporate crime is to direct punitive sanctions against corporations. To prosecute individuals only is not simply unfair, it is inefficient too. Even if the prosecution of a corporate officer results in a conviction, it will seldom affect the way the corporation (not to mention other corporations) will behave itself in the future; structural flaws in the functioning of an organisation will not cease to exist because one of its members has been brought to trial."¹²⁵ Bearing in mind the emergence of the corporate criminal liability on the national level, the international legal order has also begun to consider the question of the international responsibility of corporations. One way to think about the subject is to refer to the concept of "general principles of law" which is one of the sources of international law. If criminal corporate responsibility is recognised within the domestic systems, then its recognition on the international level should not set any problem. This is an opinion shared by Theodor Meron, who

rights, see Kothani & Krause (1998).

¹²¹ MERON (1998: 19).

¹²² See the comparative analysis of different legal systems with regard to the question of corporate criminal liability in STESENS (1994) and also PRADEL (1995: 306-313).

¹²³ Council of Europe, Recommendation R(88)18.

¹²⁴ International Law Commission; (A / CN. 4 / 490 / Add. 3: §92). Other examples revealing this trend are the developments within the Council of Europe of a project for a convention on the protection of environment by penal law, where the penal legal responsibility of legal persons is inscribed. See analysis in (E / CN. 4 / 1996 / 17: § 55-56).

recalls that "the role of parallel developments in many countries, which influences general principles of law and, in many cases, general principles of criminal law, reinforces the impact of treble damages."¹²⁶ These outlined developments delineate a tendency towards the emergence of a direct responsibility of legal persons with respect to certain international obligations that are laid down in international criminal law and in international humanitarian law.

In conclusion, as Samuel Asante affirms: "This development (TNCs growing influence) poses a challenge to the traditional confines of international law and presages a new era in which the international community, aware of the potential impact of powerful international economic entities such as transnationals, is shaping the corpus of international law to encompass the imposition of appropriate restraints on these entities, thereby recognising them as subjects of international law."¹²⁷ This acknowledgement of the international legal personality of TNCs is not always easy to undertake, especially if we consider the « political » objections that are raised. The main one is linked to the fact that a subject of international law has rights and that TNCs should not have a regime of rights too favourable, of which they could take advantage to impose their already *de facto* power in the economic world. Many of those defending this point of view originate from developing countries and consider that giving an international legal status to TNCs will make them comparable to States. However, it should not be forgotten that the fact for the TNC to be able to claim rights opens the way to assume also international obligations. Indeed, one main characteristic defining the subject of international law is that it is an entity capable of possessing rights and duties under international law.¹²⁸

2. The accountability of non-State actors under existing international human rights norms

International law, as the traditionalist view would claim, is said to be primarily concerned with the rules of State behaviour and these standards, which include human rights, can only be violated by State officials according to that view so that violations committed by private actors fall within the purview of

¹²⁵ STESENS (1994: 518-9).

¹²⁶ MERON (1998:20). At the preparatory committee discussing the draft statute for an international criminal court, there were propositions to include "jurisdiction over legal persons, with exception of States, when the crimes committed were committed on behalf of such legal persons or by their agencies or representatives." The proposed text was further to state that "the criminal responsibility of legal persons shall not exclude the criminal responsibility of natural persons who are perpetrators or accomplices in the same crimes." A/CONF.183/2/Add.1 (14.4.1998): Report of the Preparatory Committee on the Establishment of an International Criminal Court; art. 23 § 6. The transnational corporation would thus be held directly accountable under international law for war crimes, crimes against humanity and also gave breaches of international humanitarian law. However, the final statute of the International Criminal Court states, in its 25th Article « The Court shall have jurisdiction over natural persons pursuant to this Statute. » The proposition was abandoned for lack of general support.

¹²⁷ ASANTE (1991: 687).

¹²⁸ BROWNLIE (1984:51).

the ordinary national law.¹²⁹ Indeed, the term "human rights" is a historical construct that emerged in parallel to the concept of state sovereignty. The rising of the sovereign's power embedded the danger of the sovereign's arbitrary power and abuse of authority. "Human rights were, then, primary the historical response to the rise of the modern national state. They were the limitations on the authority of the sovereign over his, her or, gradually, its subjects."¹³⁰

As we have shown it in the first part of the work, there was already a shift in that conception by the fact that human rights are not merely seen as limitations on State's authority anymore; they are also deemed to impose positive obligations on States to prevent and sanction private violations of human rights. While, according to Nigel Rodley, the notion of human rights concerns only rules that "mediate the relationship between governments and their subjects"¹³¹, we will argue that there are new developments within different fields of human rights protection that tend to acknowledge as fact that human rights are also applicable in the direct relations between non-State actors and individuals.¹³² This new way of thinking about human rights is primarily motivated by the current circumstances, which see the State's position decline in its ability to ensure respect for human dignity. If governmental prerogatives and power are increasingly exercised by other entities, such as for example TNCs, individual human rights protection should also be addressed directly to these entities.

The most important obstacle to an acceptance of this possibility seems to be the fact that the UN human rights treaties are instruments of international law that bind ratifying States rather than non-State actors. However, if we look at certain provisions found in the Universal Declaration of Human Rights, the Covenant on Economic, Social and Cultural Rights as well as the Covenant on Political and Civil Rights, it seems that the responsibilities of private actors to uphold the human rights of individuals are also addressed by these instruments. For example, according to the proclamatory paragraph of the Universal Declaration Human Rights, "*every individual and every organ of society, keeping this Declaration constantly in mind, shall strive by teaching and education to promote respect for these rights and freedoms and by progressive measures, national and international, to secure their universal and effective recognition and observance, both among the people of Member States themselves and among the peoples of territories under their jurisdiction.*" Article 29 of the Universal

¹²⁹ TESON (1998: 163).

¹³⁰ RODLEY (1993: 299).

¹³¹ RODLEY (1993: 299).

¹³² Many authors are opposing this view. For example, the NGO Human Rights Watch, analyzing precisely the behaviour of transnational corporations with regard to human rights, clearly stated that: "these companies are private actors not bound by international human rights treaties, Human Rights Watch believes they nonetheless have a moral duty to avoid complicity in human rights violations by state agents." See Dicker, R. (1998) Human Rights Watch: Corporate Social Responsibility for Human Rights: A Challenge for the 21st Century in *Proceedings of the Meeting of the Royal Institute of International*

Declaration states that: "1. Everyone has duties to the community in which alone the free and full development of his personality is possible". Also, according to art. 30 of the Declaration and respective art. 5 (1) of the two Covenants, no person or private entity may engage in an activity which treads upon any other person's rights and freedoms.¹³³ These words are often quoted by those who argue that human rights obligations are incumbent upon non-State actors.¹³⁴ For example, the report on Minimum Humanitarian Standards to the Fifty-fourth Commission on Human Rights states that: "the Universal Declaration of Human Rights, as well as the two International Covenants, in their preambular paragraphs recognise duties on individuals to promote respect for human rights".¹³⁵ However, the problem is to know if the responsibility of individuals is only limited to the promotion of human rights, or if it does include legal obligations regarding human rights violations. Nigel Rodley suggests that the articles of the Universal Declaration and of the Covenants, we have examined above, are merely giving an indication to private entities to strive and secure the universal and effective recognition of the said rights, as well as their observance, while not imposing upon them direct duties: "the Declaration seems, therefore, a most fragile basis on which to construct a doctrine of individual duties to respect human rights, in the sense that a failure to comply would make the individual a human rights violator."¹³⁶

The responsibility of non-State entities have already been addressed by some particular international instruments. The abolishment of the slave trade, though not explicitly framed in the language of human rights, was concerned by the suppression of slavery, an activity carried out also by non-State actors.¹³⁷ One can also find other provisions that render private individuals responsible for violations on the international level: the Convention on the Prevention and Punishment of Genocide states that it applies to "constitutionally responsible rules, public officials or private individuals"¹³⁸, while the Convention on Apartheid¹³⁹ also addresses the international responsibility of individuals for human rights violations.

Affairs with Control Risks Group. Multinational Investment and Human Rights. Forging a Consensus. (London).

¹³³ Art. 30 of the Universal Declaration states. « Nothing in this Declaration may be interpreted as implying for any State, group or person any right to engage in any activity or to perform any act aimed at the destruction of any of the rights and freedoms set forth herein. », and art 5 (1) of the two Covenants: « Nothing in the present Covenant may be interpreted as implying for any State, group or person any right to engage in any activity or to perform any act aimed at the destruction of any of the rights or freedoms recognized herein, or at their limitation to a greater extent than is provided for in the present Covenant. ».

¹³⁴ Even if the Declaration by being a resolution of the General Assembly is a recommendation, the view nowadays is that the rights and freedoms it proclaims are those referred to in Articles 55 and 56 of the UN Charter. RODLEY (1993: 305).

¹³⁵ (E / CN. 4 / 1998 / 87: 15).

¹³⁶ RODLEY (1993: 307).

¹³⁷ See the Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery, adopted 7 sept 1956, entered into force 30 April 1957, E.S.C. Res. 680 (XXI), 226 UNTS 3.

¹³⁸ Convention on the Prevention and Punishment of the Crime of Genocide, adopted 9 Dec. 1948, entered into force 12 Jan. 1951, 78 UNTS 277.

¹³⁹ International Convention on the Suppression and Punishment of the Crime of Apartheid, GA. Res. 3068 (XXVIII), adopted 30.12.1973, entered into force 18.7.1976.

In the debates prevailing among international law doctrine, several new developments and phenomena show that the context of interpretation is changing and that the exclusive applicability of human rights law to governments is being challenged from many sides.

The first of these developments has begun to shape a new vision of human rights law comes from the side of those working for another understanding of accountability in order to reflect women's experiences and the protection of women's rights.¹⁴⁰ The fact that international law reinforces the division between the public world and private life lead to isolate important aspects of private life from being subject to international standards. "International human rights law assumed a public sphere where the state and the international system could intervene and a private sphere where state intervention and international scrutiny were prohibited.(..) As critics have argued, the absence of legal intervention to protect women in the community and in the home devalued women and kept intact the traditional male-dominated hierarchy of the family."¹⁴¹ Feminist movements have been the first to mention and study many "forgotten" issues such as domestic violence, discrimination against women in the workplace or child abuse. On the international level, recent efforts have been made by the UN to act against violations in the private sphere. The Declaration on the Elimination of Violence Against Women, adopted by the UN General Assembly in 1993 and near-universally accepted, does include non-State subjects within its purview: violence against women can occur in public or private life, including for example sexual abuse, domestic violence or harassment at work. The State is not more the sole responsible entity for respecting the obligations enshrined in that Declaration anymore. This larger scope of action is reiterated in the mandate of the Special Rapporteur on Violence Against Women, since there is therein a call for the elimination of violence in the family, in the community and by the State.¹⁴² Furthermore, the Beijing Declaration urges « the United Nations system, regional and international financial institutions, other relevant regional and international institutions and all women and men, as well as *non-governmental organisations*, with full respect for their autonomy, and all sectors of civil society, in co-operation with Governments, to fully commit themselves and contribute to the implementation of the Platform for Action. »¹⁴³ Even if the text is a general promotional call without binding force, and was initially aimed at human rights NGOs rather than private business corporations, one can place the wording in the context of the objective which is targeted: the fact that

¹⁴⁰ Cf. ROMANY, C. (1994) « State Responsibility Goes Private: A Feminist Critique of the Public/Private Distinction in International Human Rights Law » in COOK, R.J. *Human Rights of Women* (Philadelphia: University of Pennsylvania Press), 85 and BUNCH, C. (1993) « Feminist Visions of Human Rights in the Twenty-First Century » in MAHONEY, K.E. and MAHONEY, P. (eds.) *Human Rights in the Twenty-First Century* (Netherlands: Kluwer Academic), 967.

¹⁴¹ COOMARASWAMY (1997:8).

¹⁴² COOMARASWAMY (1993: 13) and Report of the Special Rapporteur on the question of the violence against women including its causes and consequences, E / CN.4 / 1998 / 54 / Add.1

¹⁴³ Fourth World Conference on Women (4-15 September 1995): *Platform for Action and the Beijing Declaration*; Beijing

TNCs are not specifically mentioned should not be taken to mean that they do not fall within the group of concerned actors in women's human rights protection. As Radhika Coomaraswamy remarks, "traditional human rights scholars and activists claim that this breadth and scope in the women's human rights movement will destroy human rights and its meaning in the world today. An angry human rights activist once told me, "Now human rights is the kitchen sink." Others such as myself argue that the women's question enriches human rights and is an important part of the flexibility and adaptability of the human rights paradigm to meet new challenges."¹⁴⁴

There are other recent efforts by UN bodies to act against violations in the private sphere, which are indicating the growing importance of private actors in respecting and promoting human rights. For example, in the report of the Secretary-General on Minimum Humanitarian Standards submitted at the Fifty-fourth session of the Commission on Human Rights,¹⁴⁵ the issue of the accountability of non-State entities for human rights violation has been raised, and the report concludes: "it seems beyond doubt that when an armed group kills civilians, arbitrarily expels people from their homes, or otherwise engages in acts of terror or indiscriminate violence, it raises an issue of potential international concern. (..) But very serious consequences could follow from a rushed effort to address such acts through the vehicle of existing international human rights law, not least that it might serve to legitimise actions taken against members of such groups in a manner that violates human rights. The development of international human rights law as a means of holding Governments accountable to a common standard has been one of the major achievements of the United Nations. The challenge is to sustain that achievement and at the same time ensure that our conception of human rights remains relevant to the world around us."¹⁴⁶ This report furthermore notes that "there are different schools of opinion regarding the proper standard of accountability. Some Governments argue that armed groups can commit human rights violations, and should be held accountable under international human rights law. Other Governments maintain that, while the abuses of armed groups are deserving of condemnation, they are not properly speaking human rights violations since the legal obligation which is violated is one that is only binding on Governments. This divergence of views is found also among scholars and commentators."¹⁴⁷

China, United Nations, Department of Public Information, Par.38 of the Declaration.

¹⁴⁴ COOMARASWAMY (1993: 13).

¹⁴⁵ Secretary-General report on minimum humanitarian standards presented at the 53th session of the UN Commission on Human Rights (E / CN.4 / 1998 / 87). See also a paper presented at a NGO workshop on *Holding Non-Governmental Entities Accountable under International Law. Problems and prospects from an NGO perspective*, organized by the Quaker United Nations Office and the Quaker Peace and Service Conciliation Program; London 22-24 September 1997.

E / CN. 4 / 1998 / 87.

¹⁴⁶ (E / CN. 4 / 1998 / 87: §64).

The same preoccupation - the undermining of the present state of human rights protection by broadening its scope so as to include non-State entities - was raised in relation to the accountability of terrorist groups for human rights abuses. A resolution adopted by the UN Commission of Human Rights concerning terrorism states that the international community is preoccupied by the flagrant violations of human rights committed by terrorist groups.¹⁴⁸ In this case, States are responsible to undertake all measures in order to stop these violations. But the possibility of non-State entities such as terrorist groups violating human rights has been clearly agreed upon by 33 States out of 53. This resolution goes against an opinion found in a report to the UN Commission on Human Rights, stating that "...most mechanisms dealing with human rights violations had adhered so far to the system of State responsibility for human rights violations. Giving terrorist groups the quality of violators of human rights would be dangerous and could amount to a sort of justification of human rights violations committed by Governments. A distinction should be made between citing such groups as human rights violators and the adverse effects their actions might have on the enjoyment of human rights."¹⁴⁹

This fear of opening the door to human rights violations by States as a consequence of defining the violations committed by non-State entities, as human rights violations is a legitimate one. However, it is not a sufficient reason not to consider an eventual shift in the traditional conception of international human rights law.¹⁵⁰ As a working paper on terrorism and human rights presented to the UN Sub-Commission on the Prevention of Discrimination and Minorities suggested, there is a need to "...assess objectively whether (and to what extent) international human rights law is moving beyond the traditional dichotomy of individual versus State, beyond the duty of States to respect and ensure the observance of human rights, and towards the creation of obligations applicable also to private individuals and other non-State actors including liberation movements and terrorist organisations."¹⁵¹

A new development with regard to the applicability of international human rights law is also needed

¹⁴⁷ (E / CN. 4 / 1998 / 87: §59).

¹⁴⁸ (E / CN. 4 / 1998 / 47: pg. 3).

¹⁴⁹ Report of the meeting of special rapporteurs / representatives, experts and chairpersons of working groups of the special procedures of the Commission on Human Rights and of the advisory services programmes Geneva, 28-30 May 1996 (E / CN. 4 / 1997 / 3, annex, para.44).

¹⁵⁰ It has been recognized in international humanitarian law that individuals can commit war crimes even if they are not State agents but rather members of non-State groups. Paragr. 134 of the Tadic Case (Case No. IT-94-1-AR72, International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian law Committed in the Territory of Former Yugoslavia since 1991; 2 Oct. 1995) states: "All of these factors confirm that customary international law imposes criminal liability for serious violations of common Article 3, as supplemented by other general principles and rules on the protection of victims of internal armed conflict, and for breaching certain fundamental principles and rules regarding means and methods of combat in civil strife." This conclusion, in the framework of international humanitarian law, shows that there should be no reason not to recognise that non-State actors can commit violations of international obligations, of humanitarian law but also of human rights law.

¹⁵¹ E / CN. 4 / Sub. 2 / 1997 / 28, para. 16.

by the fact, previously mentioned, that States have given away many of their prerogatives to private entities, and especially to private economic enterprises. Such examples include the existence of private prisons, of private security companies, of private education or health care providers, which are influencing people's human rights (such as the right not to be subjected to torture or humiliating and degrading treatment, or the right to education and the right to health care). There are all rights enshrined in the International Bill of Human Rights. The United Nations Human Rights Commission has acknowledged these new developments by issuing reports on the matter of private prisons and of private mercenaries¹⁵². In this latter case, the report showed that mercenaries are often hired by big TNCs operating in regions where the State has no effective means for protecting their installations. TNCs insist on the fact that the security of their investing zones be assured by men who have been recruited and trained by security services operating on the international level.¹⁵³ In cases when these mercenaries commit violations of human rights during their activities, the State is no longer able to control these non-State entities and there is an urgent need to be able to convict the corporations that have trained them, hired them and in some cases given them instructions on how to conduct their illegal security activities.

The affirmation of the new way of thinking about human rights obligations can only be upheld by a shift from a State-centred vision towards an individual-centred one. The interpretation of the different international human rights standards will then rather focus on the *effective protection* of the rights of individuals, rather than on the entities from which these rights have to be protected. In this perspective, all social actors have an international legal responsibility to assure the effective protection of human rights, which means that every organisation, every group, every community and every multinational or national corporation have human rights duties. The defence of this view is not to be found in technical legal arguments since its purpose is precisely to show how these legal arguments should evolve as to include new development occurring the society.¹⁵⁴ The international norms and their dominant interpretations are still reflecting the context which saw their creation. A change with that regard is starting to be perceived as a necessity within different fora dealing with activities of non-State actors that are violating the principles that international human rights law is said to protect.¹⁵⁵

¹⁵²Report on the question of the use of mercenaries as a means of violating human rights and impeding the exercise of the right of peoples to self-determination, submitted by Mr. Enrique Bernales Ballesteros, Special Rapporteur of UN Commission on Human Rights, E / CN.4 / 1998 / 31 : 28 and 77).

¹⁵³ Ibid.

¹⁵⁴ VAN MINH, T.: *Droits de l'homme et pouvoirs privés: le problème de l'opposabilité* in Thuan (1984: 150-1). This author refers to the "ethical unity" of human rights which seems to imply that they should be opposable to all organs of societies and not just to States.

¹⁵⁵ At this point of the analysis, a further clarification seems necessary concerning the concept of duties in light of international human rights law. Indeed, it has been recently in the center of debates led by an international group of former political leaders named the InterAction Council, who have come to the conclusion that besides human rights, as declared

Part III: Practical Evidence of TNCs' Direct Accountability under International Human Rights Law: the Example of the Codes of Conduct

The preceding pages have followed two lines of discourse. First, we have posited that TNCs can be regarded as subjects of international law in light of existing international positive norms that are directly regulating their behaviour, without State's mediation, on the international level. Second, we looked at the way some recent developments are changing the concept of the international human rights protection by including non-State actors' responsibility in that regard within the realm of possibility. The logical synthesis of these two approaches, in the context of the subject-matter at hand, opens the road for a legal framework for the direct application of international human rights law to transnational corporations. The theoretical plausibility of this conclusion needs now to be judged in the light of the practical developments pertaining to this new interpretation. Indeed, it is not sufficient to ascertain the direct applicability of international human rights norms on TNCs and the corollary of the latter's direct international accountability for violations of these norms. The necessary next step will be to bring up elements of practice on the international level proving the theory has started to gather adherents. In other words, having tried to show that there is a growing openness - from States and the international civil society - to the possibility of holding non-State actors legally accountable for violations of international human rights, we have now to examine the practice - from States, the main subjects of international law, but also from the other actors making up the international civil society - in order to be able to mention the existence of a uniform pattern of thought and behaviour. If we can prove that conviction is present - as well as the practice - then we are definitely able to posit the emergence of a new custom of direct applicability of international human rights norms on TNCs' behaviour.

and guaranteed in international documents, individual duties towards the community should also be emphasised. For this purpose, they have proposed a declaration of 19 articles, named « The Universal Declaration on Human Duties ». The objective of this declaration is to ascertain the responsibilities that everyone has to have towards the societies and to reconcile at the same time the various cultural understandings of the situation of individuals towards their communities. Some articles address the responsibility of economic and political actors to bring about social justice and to fight against poverty and inequalities: among these, TNCs can be included even if not directly mentioned. Without entering into the details of this proposal which is symptomatic of the current trend, mostly orchestrated by South-Asiatic governments, to question the validity of the Universal Declaration of Human Rights, it is nevertheless important to stress that our analysis of the responsibilities that transnational private corporations should have towards human rights stemming from their position as organs of the society can not be equated with the debate on the individual duties discussion. Indeed, this new proposed declaration shifts the debate on duties of individuals, or other social groups, rather than to try to strengthen the power of the universal rights that have been affirmed within international instruments. It is not necessary, and it is even dangerous, to separate the human duties from the human rights through new international standards, such as the proposed declaration, for rights are always bound to duties, while the opposite can not be true. Besides, to declare desirable ethical behaviour in the form of human duties towards the community is in the realm of morals while human rights, as they have developed and affirmed themselves since the 1689 Bill of Rights of the British Parliament, are more than just morals: they are legally binding for individuals can base themselves on their content when they invoke them. See the different articles on that subject, that have been published in the German Newspaper *Die Zeit* in November and December 1997, and among them more particularly: SCHMIDT, H. (3.10.1997) « Zeit, von den Pflichten zu sprechen! »; STELZENMÜLLER, C. (10.10.1997): « Die gefährlichen achtzehn Gebote » and KLEINE-BROCKHOFF, T. (17.10.1997): « Pflichten gibt es sowieso »; DEILE, V. (21.11.1997): « Rechte bedingungslos verteidigen ».

For this purpose, we will analyse different international codes of conducts intended to regulate TNCs' activities in the human rights field.¹⁵⁶ Delimiting first their content with regard to human rights (section 1) we will examine the question of their legal nature (section 2) and their implementation in national orders (section 3). We will then argue that these codes are the most tangible form of a growing adhesion to the idea of direct applicability to TNCs of (at least some) of the international human rights norms.

1. Codes of Conduct: Definition and Content

A consistent definition of the term « code of conduct » is difficult to find. One definition of the term can be found in Patricio Merciai's study on the Multinational Enterprises in International Law: " Un code international de conduite est un ensemble de règles, élaborées et adoptées par les Etats, visant de façon complémentaire trois objets: la réglementation des activités des entreprises, la réglementation de la politique des pouvoirs publics et l'institution d'une procédure multilatérale permettant la supervision régulière de la mise en oeuvre de l'ensemble."¹⁵⁷ However, in opposition to the definition, the drafting of so called codes of conduct to regulate TNCs' overall activities has been carried out by different actors and not only by States. There are many attempts to regulate corporate behaviour regarding the respect of international human rights law so that today, five different sources of codes of conduct can be identified: single States; international or regional organisations; workers unions; transnational corporations themselves and international non-governmental organisations. Furthermore, all codes of conduct are not necessarily formally designed under this term. It is the case for *OECD's Guidelines for Multinational Enterprises* or the *ILO Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy*. Then, some codes regulate only the activity of the TNCs, leaving aside that of States.¹⁵⁸ Finally, even if the institution of a supervisory body for the implementation of such a code is a useful idea, the initiatives for regulating TNCs' activities have not always foreseen this possibility.

When the phenomenon of drafting codes of conduct began, the primary goal was to regulate TNCs so as to prevent interference with the internal politics of host countries, and to limit the adverse effects that TNC activities may have on national economies. The phenomenon proceeds from the common

¹⁵⁶ An author has described the new development of codes of conduct for TNCs as a "second human rights revolution". See CASSEL (1996).

¹⁵⁷ MERCIAI (1993: 88)

¹⁵⁸ The OECD distinguish themselves from the ILO and United Nations efforts in that they not only deal with TNCs activities but they also intend to regulate host and home countries rights and obligations towards the TNCs. In these two latter fora, State sovereignty has been invoked in order to limit the codes on TNCs behaviour.

premise that the shortcomings of national regulation of TNCs argue strongly for the creation of some international mechanism of control of these powerful non-State actors.¹⁵⁹ According to Samuel Asante, the philosophical inspiration for this regulatory attempts on TNCs was the "quest" by the developing world for a new international economic order involving a more equitable restructuring of the international economic system, including the pattern of international investments.¹⁶⁰ Recently, the discussions on the inter-State level have departed from this trend, by focusing primarily on the international protection of investments and TNCs' activities against State limitations, rather than the regulations of the TNCs themselves.¹⁶¹ This new development has however not prevented many more "private" initiatives, in opposition to those on the "public" level of international law still represented by States, to address the issue of human rights and social impacts of the activities of these powerful non-State entities. In order to systematically address the issue of the various attempts to regulate TNC's activities from the point of view of human rights, we will examine some of the codes that have been drafted within different fora¹⁶².

a. On the International Inter-Governmental Level

A Commission on Transnational Corporations was created by the UN Economic and Social Council in 1974 and an Intergovernmental Working Group on the Code of Conduct on Transnational Corporations started in 1977 to propose drafts for regulating at an international level the growing power of TNCs. There were many debates on what should be the content as well as the legal character of such an instrument, which, in the end, was never adopted. The Code of Conduct provided that: « Transnational Corporations shall respect human rights and fundamental freedoms in the countries in which they operate. In their social and industrial relations, transnational corporations shall not discriminate on the basis of race, colour, sex, religion, language, social, national and ethnic origin or political or other opinion. »¹⁶³ The requirement of respect for the social and cultural objectives, values and traditions of the countries in which they operate was also an important prescription to be included in this UN code.

International efforts to promote an international legal instrument which would regulate TNCs have

¹⁵⁹ ASANTE (1991: 694).

¹⁶⁰ ASANTE (1991: 683).

¹⁶¹ The Multilateral Agreement on Investments is the main example of that shift. According to KOKKINI-IATRIDOU and de WAART "the eighties have been characterized more by de-regularization, for the purpose of giving investors more freedom of movement in times of economic recession." (1983: 88).

¹⁶² It will not be possible to mention all existing codes of conduct which have been adopted by different actors. We focus on some examples in order to show the direction taken by these recent developments.

¹⁶³ Draft United Nations Code of Conduct on TNCs as for of 1988. Commission on TNCs, Report of the Special Session (E / 1989 / 17 / Rev.1 : point 13). See also UNCTC Current Studies (1988) *The United Nations Code of Conduct on Transnational Corporations* (Graham & Trotman Limited).

certainly been hindered by the contradictory interests of developed and developing countries. Jamie Cassels notes that the traditional notions of sovereignty, as well as the world's inability to redress the vast disparities in wealth and power that characterise international relations, are other causes that prevented a general agreement on TNCs' global accountability, and more specifically of TNCs' accountability in regard to the respect of human rights.¹⁶⁴ At the forty-eighth session of the UN Sub-Commission on Prevention of Discrimination and Protection of Minorities, there was a proposition to establish a working group with the mandate to « identify and examine the adverse effects of the methods of work and activities of TNCs on economic, social and cultural rights and the right to development » as well as to « make recommendations and proposals aimed at regulating (..) the methods of work and activities of TNCs.. ».¹⁶⁵ The proposed body was eventually reduced, in a Sub-Commission resolution entrusting Mr. El-Hadji Guissé, expert of that Sub-Commission, with the task of « preparing, without incurring financial implications, a background document on the question of the relationship between the enjoyment of human rights and the working methods and activities of transnational corporations, for submission to the Sub-Commission at its fiftieth session. »¹⁶⁶ He presented a report on the item « The Realisation of Economic, Social and Cultural Rights: the Question of Transnational Corporations », where he states, after a rather disappointing brief analysis, that « in view of the complexity of the problems surrounding the activities of transnational corporations and the realisation of economic and social rights, it would be appropriate to examine all these questions in a broader framework and to present them to the Sub-Commission at future sessions. »¹⁶⁷

At least, this attempt shows that the subject of TNCs impact on human rights still deserves a debate even if the UN was not able to agree until now on a unique approach to the matter.

In the ILO, a *Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy* was adopted in 1977.¹⁶⁸ The emphasis was given to the encouragement of positive contribution which multinational enterprises could provide to the economic and social conditions world-wide. "All the Parties concerned by this Declaration should respect the sovereign rights of States, obey the national laws and regulations, give due consideration to local practices and respect relevant international standards. They should respect the Universal Declaration of Human Rights and

¹⁶⁴ CASSELS (1993: 46).

¹⁶⁵ UN Doc. E / CN. 4 / Sub. 2 / 1996 / L. 47 , pg. 4.

¹⁶⁶ Sub-Commission resolution 1997/11: *The relationship between the enjoyment of economic, social and cultural rights and the right to development, and the working methods and activities of transnational corporations.*

¹⁶⁷ *Working document on the impact of the activities of transnational corporations on the realization of economic, social and cultural rights*, prepared by Mr. El Hadji Guissé, E / CN. 4 / Sub. 2 / 1998 / 6 , para. 28.

¹⁶⁸ In depth analysis on the Declaration can be found in: GÜNTHER, H. (1980) "The Tripartite Declaration of Principles (ILO): Standards and Follow-Up" in HORN, *Legal Problems of Codes of Conduct*. See also JORDAN, B. (1998): *The ILO points the Way Forward. Trade Unions and Multinationals*, International Confederation of Free Trade Unions (ICFTU), at web site: <http://www.icftu.org/english/tncs/tncs98ilo.html>.

corresponding International Covenants adopted by the General Assembly of the United Nations as well as the Constitution of the ILO and its principles according to which freedom of expression and association are essential to sustained progress."¹⁶⁹ TNCs, being one of the main parties concerned by these principles, are thus targeted by the declaration. The principles set out in it concern the fields of employment, training, conditions of work and life and industrial relations. The Declaration is reinforced by a number of ILO Conventions and Recommendations which define obligations and rights in more specific terms.

Also, the Organisation for Economic Co-operation and Development (OECD) had adopted in 1976 the OECD Guidelines for Multinational Enterprises. The twenty-four member countries agreed to control their multinationals doing business abroad¹⁷⁰. The provisions, with regard to human rights, recommend that member countries cooperate with non-member countries, in particular developing countries, by encouraging positive contributions from MNCs to improve the living standards and welfare of all people.

The scope of these three main examples of inter-governmental codes of conduct limits itself with regard to the issue of human rights, to recall the main human rights instruments such as the Universal Declaration or some of the ILO instruments concerning workers. The fact that provisions in codes of conduct with respect to TNCs emphasise the obligation to enterprises to comply with the legislation of the country where their business is conducted is balanced by the fact that at the same time, regarding human rights obligations, references are made to internationally agreed human rights norms. A criticism often bestowed upon them is that they express general statements rather than specific requirements concerning the respect for human rights. Furthermore, the issue of liability should also be included in the codes, for it is not clear that the parent corporations should take over the responsibility of their subsidiaries. Also, a comparison of the different inter-State international codes show that they are intended to apply directly to TNCs. The UN draft conduct stated that: "The Code is applicable to each transnational corporation as a whole or to its entities to the extent relevant in each case in accordance with the actual distribution of responsibilities among them and on the understanding that the entities will co-operate with one another to facilitate observance of the Code."¹⁷¹ Regarding the OECD Guidelines, the Committee on International Investment and Multinational Enterprises of the OECD requires from all enterprises "that they indicate publicly their acceptance of the Guidelines, preferably in their annual reports. Furthermore, enterprises are invited to include in their subsequent

¹⁶⁹ ILO Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy (1977) para. 8

¹⁷⁰ See « The OECD Declaration on International Investment and Multinational Enterprises » by LÉVY, P. in RUBIN and HUFBAUER (1983: 47-63)

annual reports brief statements on their experience with the Guidelines".¹⁷²

b. On the National Level

The United States government has been particularly active in the question of corporate responsibility towards human rights. For example, the Department of Labour has published a study on the influence of codes of conducts adopted by the apparel industry on child labour.¹⁷³ The US have also adopted the « Model Business Principles » which is a voluntary business ethics code elaborated by the Clinton Administration in order to encourage American and foreign companies to respect, when doing business overseas, safe and healthy workplace, avoid discrimination on race, religion or sex, avoid the use of child labour or forced labour and promote free expression¹⁷⁴. The Principles were set up after human rights activists denounced the reappearance of the « most-favoured-nation trade status » in China towards the United States. However, these Principles are criticised for their vagueness in urging the respect of workers' rights to organise and their lack of asking clearly the companies to encourage such activities¹⁷⁵.

Other countries are also beginning to raise the question of the link between TNCs and human rights respect¹⁷⁶. Their initiatives are nonetheless not as widespread and developed as the ones stemming from the private sector or from professional associations such as trade unions. Some examples of trade unions initiatives in that regard include the International Confederation of Free Trade Unions (ICFTU)/ITS Basic Code of Labour Practice¹⁷⁷, the document « Child Labour: A charter by European social partners in the footwear industry »¹⁷⁸ and the « Magna Carta » ou « Charte de principes fondamentaux pour le commerce mondial textile-habillement » signed by representative interests groups from producers and free trade unions of twelve Member States from the European Community as well

¹⁷¹ Doc, E / C. 10 / 1983 / S / 3 of 20 January 1983, *Transnational Corporations: A code of conduct*, para. 3.

¹⁷² OECD, *International Investment and Multinational Enterprises, Review of the 1976 Declaration and Decisions* (1979: para. 77) and KOKKINI-IATRIDOU and de WAART (1983: 114-5).

¹⁷³ US Department of Labor; Bureau of International Labor Affairs (1996) « The Apparel Industry and Codes of Conduct: A solution to the international Child Labor Problem? », Washington, 242 pp.

¹⁷⁴ See U.S Dept. of Commerce, *Model Business Principles* at web site: <http://www.depaul.edu/ethics/principles.html> and Bureau of Democracy, Human Rights and Labor, Department of State Publication 10486: *Promoting the Model Business Principles*, at web site: http://www.state.gov/www/global/human_rights/business_principles.html.

¹⁷⁵ LEWIS (1995) and CASSEL (1974-76) for a critical analysis of the principles.

¹⁷⁶ States are usually taking initiatives with the help of the private sector in order to suggest guidelines that should govern the activities of national companies abroad. See for example the initiative of the Swiss Foreign Ministry to hold a debate on the issue of Human Rights and the Economy, where representatives of big TNCs and from the NGOs will debate on the question of investors' responsibility towards human rights (7.9.1998).

¹⁷⁷ The International Confederation of Free Trade Unions (ICFTU)/ITS Basic Code of Labour Practice adopted in Dec. 1997, at web site: <http://www.icftu.org/english/tncs/tncscode98.html>.

¹⁷⁸ This charter is based on a european directive from the Commission's Council as well as on ILO Convention with regard to child labor. See summary of the charta in SAJHAU (1997: 57), signed in 1997.

as other European countries¹⁷⁹. Another recent example is the Guide published by the Danish Industry named: « Industry and Human Rights », which tries to establish some guidelines for Danish companies to consider concerning the observance of fundamental human rights in their relationships with countries where they are active.¹⁸⁰

The same observations as concerning the intergovernmental attempts to regulate TNCs' behaviour in the field of human rights can be made concerning these national attempts and trade unionist ones. The codes of conduct refer directly to TNCs by requiring from them to respect international human rights.¹⁸¹

*c. On the Corporate Level*¹⁸²

Initiatives of the private business sector have taken various forms, including voluntary codes of conduct put forward by investor companies, model business codes introduced by private economic associations as well as labelling programs sponsored by private interests, often in co-operation with the affected government or exporting industry.¹⁸³ Several TNCs, under public pressure, have begun to adopt human rights codes of conduct and policies for their activities and the activities of their contractors abroad. Companies having their headquarters in US and UK are the most active in that regard, while very few corporations from Europe have initiated such actions.¹⁸⁴ Some companies go quite far in their involvement. For example, the Levi Strauss has severed links with Burma and China and introduced new terms of collaboration for business partners that forbid child labour or forced labour, and address the issues of worker health and safety, minimum wages and maximum hour guidelines. Levi Strauss has also taken some « positive » action by providing schooling for child

¹⁷⁹ The Charta was signed in 1993, see in SAJHAU (1997: 56).

¹⁸⁰ SCHIERBECK (1998).

¹⁸¹ « Company codes of labour practice can be one trade union response to some of the challenges presented by globalisation. These codes, which are meant to apply to the international operations of a multinational company, are aimed at limiting the worst forms of abuse and exploitation caused by the international competition to attract investment. (...) Codes are also *meant to address the responsibility of a company* for the labour practices of its contractors, sub-contractors and principal suppliers. » ICFTU / ITS Basic Code of Labour Practice, adopted in Dec. 1997, at web site: <http://www.icftu.org/english/tncs/tncscode98.html>. See also the U.S. Model Business Principles which are « recognizing the *positive role of U.S. business in upholding and promoting adherence to universal standards of human rights*, the Administration encourages all businesses to adopt and implement voluntary codes of conduct for doing business around the world(...) » at <http://www.depaul.edu/ethics/principles.html>.

¹⁸² There has been an important increase in both company awareness of human rights issues and public disquiet about standards of business behaviour. This has led to the fact that many companies now have codes of conduct for themselves and for their suppliers. We do not intend to mention them all but just to point out some examples in that regard. For a thorough review on codes of conduct in the textile, clothing and footwear industry see SAJHAU (1997).

¹⁸³ DILLER and LEVY (1997: 694). See: PEREZ-LOPEZ, J. Promoting International Respect for Worker Rights through Business Codes of Conduct, in 17 Fordham International Law Journal. 1 (1993); CASSEL (1996: 1972- 74).

¹⁸⁴ The study of NASH, L (1992): « American and European Corporate Ethics Practice: A 1991 Survey » in MAHONEY, J. and VALLANCE, E. (eds.) *Business Ethics in a New Europe* (Dordrecht: Kluwer) is still relevant for the comparison he has

workers in its suppliers' plants in Bangladesh¹⁸⁵. Other examples are that of IKEA, a Swedish furniture store which has decided not to sell carpets unless they could be certified as made without the use of child labour.¹⁸⁶ However, according to a Boston-based ethical-investment firm, Franklin Research & Development, fewer than 5% of American retailers and branded-goods companies are concerning themselves with human rights issues. Nevertheless, some of them include world famous names, such as Wal-Mart, Reebok, The Gap or Nike, as well as Shell that had, after all the international public pressure, adopted its own code of conduct.¹⁸⁷

While comparing the content of the different codes adopted by these corporations, two observations can be made:

- the codes are as different as the enterprises that are adopting them. Some state general principles that have to be respected, while others give detailed information on how to apply the codes. Most of them refer to the moral and ethical duty of TNCs to respect human dignity and human rights rather than to some legal obligations;

- according to the study of SAJHAU, reference to a number of principles concerning human rights of workers is a constant within the codes he has examined.¹⁸⁸ These mention mainly the ILO fundamental norms (especially for the codes' parts that address the issues such as child work, forced labour and non-discriminatory principles). However, according to the same author, only few codes have specific dispositions concerning the liberty to form free trade unions or the right to organisation and collective negotiation.¹⁸⁹

d. On the International Non-Governmental Level

The growing awareness of citizens on the impact of TNC operations on human rights has led many non-governmental organisations to attempt to influence TNC's activities by examining the question of their corporate responsibility. There are several ways by which NGOs are trying to sway corporate behaviour. For example, by providing information on human rights norms and corporate activities,

made some years ago. See also SAJHAU (1997: 53-4).

¹⁸⁵ Levis has also adopted two guidelines stating its involvement to promote human rights: « Business Partners Terms Engagement » and « Country assessment guidelines ». The general environment concerning human rights protection is under analysis and allows the company to decide on its activities. If a country does not offer sufficient guarantees concerning human rights, the company should avoid making business with that company. See a further examination of these guidelines in SAJHAU (1997: 26-30).

¹⁸⁶ See KOLODNER (1994: 25) and THE ECONOMIST (1995:66).

¹⁸⁷ See for example Reebok International's *Human Rights Production standards* (1992) and The Royal Dutch/Schell Group of Companies, *Statement of General Business* (March 1997).

¹⁸⁸ SAJHAU (1997: 44).

¹⁸⁹ SAJHAU (1997: 44). The author has drawn up a table which shows the different references to international human rights norms and labour rights referred to by the codes he analyses. (pg. 46-9).

helping with the drafting of corporate codes of conducts, monitoring the implementation of codes of conduct, sensibilising the public on the theme, or putting forward recommendations or more specific codes of conduct to regulate TNCs' activities in the field of human rights.¹⁹⁰

The Sullivan Principles were one of the first attempts to try to influence corporate activities in South Africa. They were developed by an American Protestant Minister and were first adopted in 1977 by twelve US firms. By 1986, approximately 200 out of the 260 US corporations doing business in South Africa had adopted the Sullivan Principles. Those firms committed themselves to practice racially non-discriminatory employment, to pay fair wages above the minimum cost of living, to provide managerial training programs for blacks and other non-whites, to provide their workers support services for housing and health care, and to use corporate influence to help end apartheid in South Africa.¹⁹¹

Two of the numerous NGO attempts to draft codes of conduct for TNCs regarding human rights are particularly interesting: the Amnesty International (AI) Human Rights Principles for Companies and the Council on Economic Priorities (CEP)' Social Accountability 8000.¹⁹² Both of the codes state that international human rights instruments shall apply directly to TNCs. For AI « multinational companies have a responsibility to contribute to the promotion and protection of human rights. In an increasingly globalised economy, their decisions and actions impact directly on governmental policies and on the enjoyment of human rights. The Universal Declaration of Human Rights calls on *every individual and every organ of society* to play its part in securing universal observance of human rights. Companies and financial institutions are organs of society, and as their operations come under scrutiny around the world, this is increasingly demanded by consumers, shareholders and the communities with whom they interact. All companies have a direct responsibility to respect human rights in their own operations.(...) Multinational companies should adhere to these international standards (concerning international and regional human rights protection) even if national laws do not specify them.»¹⁹³ For CEP, the companies shall respect the principles of several international instruments, such as ILO Conventions on Forced and Bounded Labour, on Freedom of Association, on Right to Collective Bargaining, on Minimum Age and the Universal Declaration of Human Rights and the United Nations Convention on

¹⁹⁰ See for example the guidelines produced by the NGO Group for the Convention on the Rights of the Child (1997): *Working with companies to prevent the exploitation of child labour*, Geneva; The Human Rights Watch *1994 Working Paper on Human Rights measures for corporations doing business in the People's Republic of China* (see reference...); *Principles for Global Corporate Responsibility: Bench Marks for Measuring Business Performance*, proposed by the Eucumenical Committee for Corporate Responsibility, the Interfaith Center on Corporate Responsibility and the Task Force on the Churches and Corporate Responsibility reproduced in SAJHAU (1997: 15-17).

¹⁹¹ The Sullivan Principles in the International Legal Materials (1984: 1496-1499) and CASSEL (1996: 1970-1971).

¹⁹² Amnesty International - Report - ACT 70/01/98, *Human Rights Principles for Companies*, January 1998, see at web site: <http://www.amnesty.org/ailib/aipub/1998/ACT/A7000198.html>; and Council on Economic Priorities Accreditation Agency (CEPAA), *Social Accountability 8000*, October 1997. See Spar (1998) for an account on Social Accountability 8000.

¹⁹³ Amnesty International - Report - ACT 70/01/98, *Human Rights Principles for Companies*, January 1998, see at web site: <http://www.amnesty.org/ailib/aipub/1998/ACT/A7000198.html>.

the Rights of the Child¹⁹⁴. At the present time, the AI principles are the most comprehensive and progressive guidelines for regulating TNCs' activities towards human rights. Indeed, while the other codes, such as CEP's, only refer to the ILO Conventions and Recommendations dealing with the fundamental norms and to those of the International Human Rights Instruments which are the most universally agreed upon, AI chooses to broaden the scope of norms that should be applicable to TNCs. For example, the question of security arrangements, to which we have referred above¹⁹⁵, is dealt with by referring in particular to the United Nations Code of Conduct for Law Enforcement Officials and the United Nations Basic Principles on the Use of Force and Firearms by Law Enforcement Officials.¹⁹⁶

Finally, after the examination of several attempts stemming from the initiatives of different actors, it appears that two main conclusions can be drawn: first, businesses, among which transnational corporations, are the principal addressees of the codes (intergovernmental codes also confer responsibility upon States for the implementation of the principles set out in them, but they also point to the enterprises); second, international conventions regulating human rights and workers' rights are referred to as benchmarks indicating the minimum rights that should be respected.¹⁹⁷ However, the basis of TNCs' responsibility is almost always expressed as a moral or ethical duty, save for Amnesty International Principles for Companies where the legal responsibility of business to use its influence to promote respect for human rights is also emphasised.¹⁹⁸ We have tried to show in the second part of our study how current developments within the international human rights law framework are leading to a direct legal responsibility of non-State actors for human rights violations. The fact that many of the codes of conduct analysed above, defined as legally non-binding, are recognising the direct applicability of international human rights norms on non-States actors cannot be neglected, and it certainly represent a sign towards a change at the conception of international human rights obligations applying to non-State actors.

¹⁹⁴ Council on Economic Priorities Accreditation Agency (CEPAA), *Social Accountability 8000*, October 1997.

¹⁹⁵ See at

¹⁹⁶ Amnesty International - Report - ACT 70/01/98, *Human Rights Principles for Companies*, January 1998, see at web site: <http://www.amnesty.org/ailib/aipub/1998/ACT/A7000198.html>.

¹⁹⁷ A more thorough analysis on the different codes can also show the degrees of the conduct required from the TNCs. For example, if the obligation aims at avoiding human rights violations, or if it goes further as to state TNCs' responsibility for the promotion of human rights.

¹⁹⁸ Amnesty International - Report - ACT 70/01/98, *Human Rights Principles for Companies*, January 1998, see at web site: <http://www.amnesty.org/ailib/aipub/1998/ACT/A7000198.html>.

2. The Legal Nature of Codes of Conduct¹⁹⁹

The plethora of codes of conduct analysed above is written in the language of political agreements, or "soft law": this means that the codes are recommendations, which are not legally binding upon States that have adopted them.²⁰⁰ The OECD-Guidelines state in its introduction that the observance of the Guidelines is voluntary and not legally enforceable. Usually, there is a tendency to favour the legal norm and see "hard law" instruments as more "desirable" than soft law ones.²⁰¹ The "soft" form of the existing codes, however, does entail that transnational corporations have no legally binding obligation to respect them.²⁰² Indeed, the codes adopted by States express their intention to impose certain internationally agreed human rights obligations upon TNCs. They also insert some implementation mechanism in order to make the codes as effective as possible.²⁰³ Once established, a code constitutes a regulating factor that cannot be neglected. Furthermore, even if this intention expresses itself within a "soft law" instrument, the possibility remains that the status of the principles originally expressed in them could change towards "hard law" obligations. The possible transformation of soft law into hard law has led to many doctrinal discussions.²⁰⁴ However, there are claims that some of these non-legal propositions can acquire, and have acquired, legal force.²⁰⁵ Any such claim in that regard requires an analysis to determine whether the would-be norm indeed represents the actual commitments of States. The doctrine has also addressed the possibility of a change in the status of some instruments of soft law which are expressing principles that can gradually be considered as customary norms of international law²⁰⁶. Furthermore, as an author observes: "since soft law is used in international economic relations

¹⁹⁹ For a good review of the issues involved with the subject, see SANDERS (1987).

²⁰⁰ As an author notices, the fact that the OECD's Guidelines for Multinational Enterprises are in the realm of soft law is partly due to the fact that the OECD's member States are committed to the ideology of liberal market economy that objects against any regulations by strict rules. SEIDL-HOHENVELDERN (1992: 20). His constation reveals itself true for regulations imposing obligations on the TNCs considered as one of the main actors in the contemporary world economy. The OECD countries have however agreed upon the necessity to adopt a multilateral agreement on investments (MAI) with a binding force on States, requiring them not to put any obstacle to foreign direct investments. In opposition to the codes of conduct we are discussing in this part, the MAI is a product of this liberal market ideology, which explains the fact that it has been proposed as an international treaty legally bounding for all the ratifying States.

²⁰¹ Whether these standards are characterized as "soft" international law or non-binding guidelines, they represent, according to Asante, a departure from the traditional preoccupations of investor protection by spelling out the obligations to TNCs to the host as well as home countries with regard to human rights. ASANTE (1991: 685).

²⁰² In spite of the voluntary approaches adopted in regard to codes of conduct, there are existing pressures to develop binding agreements. For example, labor representatives strongly urged that the initial OECD Guidelines be adopted in binding form. See WINDSOR and PRESTON (1997: 72).

²⁰³ The effectiveness of the codes is mostly dependant on their implementation and on their acceptance by governments and TNCs especially. An assessment of the acceptance degree of the codes analysed above is outside the scope of this research.

²⁰⁴ CHINKIN (1989: 856); BAADE (1980): "The Legal Effects of Codes of Conduct for MNEs", in HORN (ed.) *Studies in Transnational Economic Law*, Vol. 1, *Legal Problems of Codes of Conduct for Multinational Enterprises*; BROWNLIE (1980): "Legal Effects of Codes of Conduct: Commentary" in *ibid*.

²⁰⁵ CHINKIN (1989: 856). She is also referring to an article by HORN (1982): "Normative Problems of a New International Economic Order" in 16 *Journal of World Trade Law*, pg. 343.

²⁰⁶ The ICJ case *Military and Paramilitary Activities in and against Nicaragua* (Nicaragua v. United States) (1986) conclusions have been analysed as having contributed to a greater recognition of General Assembly resolutions as constituting a source of international law and as such representing a willingness by the Court to accept the transformation of

precisely where there is an intention in at least some of the participants to develop and change the law, it cannot be expected that this will happen instantly or readily (...)."207 Uniform and repeated practice, accompanied by the conviction of the necessity of that practice, are required in order for a custom to emerge.

The implementation into domestic law of some soft law principles found in the codes of conduct regulating TNCs activities can be a good evidence of State practice. States can indeed adopt into their national law whatever aspects of soft law they desire to adhere to.²⁰⁸ Furthermore, to quote a document prepared by the UN Secretariat on behalf of the Intergovernmental Working Group on the UN Code of Conduct, and which is still relevant today: "A Code of Conduct on transnational corporations, whether in legally binding or non-binding form, represents an effort to formulate expectations which Governments collectively feel justified to hold with regard to the conduct of transnational corporations. It becomes thereby a "source" of law for national authorities as well as for the transnational corporations themselves, since both can rely on and utilise the Code to fill gaps in the relevant laws and practices. In this manner, the Code may become a springboard for legally creative action by national courts and other authorities, and even by the transnational corporations themselves, to the extent that the latter may help to shape permanent legal principles through their continuous practice."²⁰⁹ However, only a small number of States have begun to formulate domestic codes of conduct and guidelines for the regulation of their TNCs' activities abroad, with regard to the respect and promotion of the international human rights. These formulations emanate principally from the national trade unions or from the national employers' organisations. The growth of soft law instruments concerning TNCs has thus only been rarely mirrored domestically. As an author notes: "although adoption from one soft law instrument into another does not alter the legal status of the principles in the way that incorporation into legislation or judicial decisions in common law countries does, this process would continue the pattern of creation of expectations as to future behaviour among those accepting the regulations."²¹⁰ Some State practice with regard to the applicability of international human rights norms on TNCs is also visible when considering the many bilateral investment treaties (BITs), the majority of which have been concluded between Western capital-exporting countries and developing countries. References to labour standards may be found in some of these treaties, especially in US practice.²¹¹

soft law principles into hard law. See CHINKIN (1989: 858).

²⁰⁷ CHINKIN (1989: 857).

²⁰⁸ See SANDERS (1987: 290) and REICH and SMITH (eds.) (1984), "Special Issue: Implementing the Consumer-Supplier Dialogue Through Soft Law" in 7 *Journal on Consumer Policy*.

²⁰⁹ Modalities-paper, UN Doc. E / C. 10 / AC. 2 / 9 of Dec. 22, 1978.

²¹⁰ CHINKIN (1989: 859).

²¹¹ For example, the Treaty Concerning the Reciprocal Encouragement and Protection of Investment of Nov. 14 1991 concluded between the United States and Argentine approves respect, in its preamble, for "internationally recognized

These nascent developments at State level show that there is consensus on the establishment of human rights obligations addressed directly to TNCs. These international obligations are gradually imposed by States to these non-State actors who, by the virtue of positive international rules directly targeting them, acquire the status of international legal subjects, following the analysis of Julio A. Barberis outlined above. The content of these codes of conduct show that they are taking over principles agreed upon in international human rights instruments, which bind States but which, come to bind non-State actors as well. Indeed, States have to adopt rules, within their national legal orders, in order to respect their international obligations. If the codes of conduct impose obligations on TNCs, States would have to regulate TNCs' behaviour according to these rules. It does not, however, undermine the fact that TNCs can still be considered as subjects of international law. Taking the example of the individuals under international law, an author remarks that even if all of international human rights norms are addressed to the individuals, most of them must be implemented by national State jurisdictions. That does not mean that the individual is not a subject of international law since the norm referred to is an international one.²¹² The same argumentation can be conducted concerning TNCs and codes of conduct. Even the fact that there is an internal implementation of international codes of conduct on TNCs does not mean that they are not direct subjects of international law on which international human rights obligations could apply. Finally, by imposing obligations on States to regulate TNCs' activities, international codes of conduct, incorporating international human rights norms, require TNCs to abide by these norms.

However, the recent developments are taking place rather at a level on which States are absent. Focusing on State practice concerning the development of an international norm which would state that TNCs have a direct international responsibility towards States (and also towards individuals) to protect international human rights, misses the main picture. Indeed, codes of conduct have been mostly drafted and adopted by non-State actors, such as NGOs and corporations themselves. The impact of these activities on the birth of an international law norm is difficult to assess. Custom is defined as State practice and opinion juris. However, this State practice is largely influenced, especially in a globalised world, by different actions stemming from the practice of non-State actors. ***For example, pressures put on governments by international non-governmental organisations protecting human rights are sometimes decisive in their actions. The same is true for the influence that powerful TNCs can have on the labour legislation of some host-countries, eager to adapt themselves to the needs of these non-State

worker rights" without defining the phrase. See in DILLER and LEVY (1997: 692-3).

²¹² See MÜLLERSON, R. A. (1992) « Human Rights and the Individual as Subject of International Law » in *European Journal of International Law*, Vol 1, No. 1/2 at 38-41.

actors rather than to follow their own policies.^{213***} The fact that States are referring to these non-governmental codes of conduct in order to define their policy towards the subject of TNCs accountability is pertinent here. The question is then whether it is possible to affirm that the conviction from the part of non-State actors to hold TNCs directly accountable in international human rights law could not be a sign of the emergence of a customary norm taking over that content. In an article that examines new trends within international law, Steven Ratner points to the fact that non-State actors are insistently requesting to have a say about the content of new international norms and guidelines and to participate in international legal grouping and processes.²¹⁴ In that regard, corporations are setting the example. They have not only tried, with a certain success, to further their interests in international negotiations on new rules, but they have also begun to act outside government channels by promulgating private regulations, which are mainly called codes of conduct. States are still the primary makers of international law, but private actors contribute more and more to its development and enforcement. Today, for example, private codes written by the companies themselves govern much of US business in developing countries and as it has been pointed out, they can affect the welfare of workers and the environment more than most treaties. Furthermore, as Richard Falk has hypothesised, an "international civil society" has developed within which groups form to take normative initiatives and actions without state authorisation on issues affecting the international community. Among these initiatives, the ones focusing on TNCs' activities with regard to human rights are prominent.²¹⁵ The ILO Director-General has also addressed the issue of the mobilisation of non-governmental actors within the process of standard-setting action: « (...) one of the two limits placed on the ILO's standard-setting action in the context of globalisation was that its interlocutors were member States whose will and capacity to follow its guidelines were inevitably affected by international competition. (...) Social progress is no longer only a matter for States; it is increasingly becoming a matter for other actors, in particular manufacturing enterprises, wholesalers and retailers, and consumers. »²¹⁶

The growing number of codes of conduct has sometimes been examined with scepticism and the desirability of such a form of control can be mitigated by several criticisms:

1. The focus on such voluntary measures will take pressure off governments to work towards more systematic means of encouraging respect for international human rights, such as linkages between trade and human rights.

²¹³ The phenomena is often discribed as « social dumping ». See in KOLODNER (1994: 22).

²¹⁴ RATNER (1998: 68-72).

²¹⁵ FALK, R.: "The Rights of Peoples (in Particular Indigenous Peoples)", in *The Rights of Peoples*, ed. James Crawford (Oxford: Clarendon Press, 1988), pg.27-31.

²¹⁶ Report of the ILO Director-General (1997: 27).

2. Private codes, initiated by the companies themselves, are seen as largely ineffectual and unenforceable partly because corporations treat codes as public relations measures facilitated by their voluntary character, rather than obligatory covenants. Hence they only pay lip service to them without changing their behaviour where profits are at issue. As the title «Should the Fox Guard the Henhouse?»²¹⁷ indicates, it is difficult for a TNC to be party and judge at the same time. It is a first and welcome step for an enterprise to adopt an internal code of conduct concerning human rights. The most important thing is to implement it and to disclose information regarding it.

3. Many third-world countries accuse the human rights concern within the TNCs as a new form of developed countries' protectionism.

4. Finally, and this can be the most serious criticism, it could be of little use to set normative standards which provide a high level of protection for individuals with regard to TNCs if effective collective or procedural means for their implementation do not exist, even if the norms are binding.

3. The Question of the Implementation of Codes of Conduct:

The implementation of international agreements, be they of binding or non-binding character, is a sensitive issue for international law, and especially for international human rights law. For the question of codes of conduct imposing obligations upon TNCs, it is not sufficient to define what these obligations should be. The important step is to ensure that these actors do indeed respect the norms that are imposed upon them. The starting point of this paper was the fact that TNCs are global economic actors able to escape national regulations concerning human rights. Our analysis intended to demonstrate the possibility to hold them accountable under international human rights law. The important step is to be able to show that there is an emerging trend to accept this possibility within international human rights law and practice. The next step is to assess the best way to effectively implement the human rights obligations incumbent upon TNCs. And indeed, the international law system has always been criticised for its lack of effective means of control.

Most of the codes of conduct contain rules for their implementation. The common feature of the intergovernmental codes is the emphasis they put upon consultation and solutions to be first found on the national level before going to the international one.²¹⁸ Each of the codes also provides for its own institutional machinery responsible for its implementation. Concerning the OECD Guidelines, "The Committee (on International Investment and Multinational Enterprises) is responsible for clarification. Clarification will be provided as required. (...) If it so wishes, an individual enterprise will be given an

²¹⁷ BAKER (1992-3).

opportunity to express its views either orally or in writing on issues concerning the Guidelines involving its interest."²¹⁹ However, the creation of a judicial or quasi-judicial forum has been avoided on purpose. The ILO Tripartite Declaration's follow-up procedure provides for the establishment of a new standing Governing Body Committee responsible to examine requests for interpretation of provisions of the Tripartite Declaration which are addressed to the ILO by governments, either on their own initiative or after consultation with employers and workers organisations.²²⁰ However, unlike under the OECD-Guidelines, there are no specific provisions which allow individual TNCs to intervene.²²¹

The monitoring mechanisms provided within the non-governmental codes of conduct are variable. Most of the private corporate guidelines have created some kind of internal audit for that purpose²²². The Gap and some other enterprises have however tried to set an external audit for a better accountability of their practices.²²³ Reebok International contracts with outside consultants in order to assist the monitoring process of its *Human Rights Production Standards*. In March 1997, the company developed a *Guide to the Implementation of the Reebok Human Rights Production Standards* to be used by employees and factory managers as a audit instrument. There are some examples of collaboration between TNCs and human rights NGOs for monitoring the activities of foreign subsidiaries with regard to human rights norms. The US-based corporation Phillips-Van Heusen accepted recommendations presented by a Human Rights Watch delegation which had conducted an investigation on allegations of discriminatory treatment of trade unionists by the company in Guatemala. Human Rights Watch was invited to examine the operations of that TNC abroad and by accepting the recommendations, the TNC committed itself to change its policy and to incorporate more thoroughly human rights concerns into its activities.²²⁴ Also Charles Veillon S.A., a Swiss textile enterprise, has collaborated with a NGO, *Association François-Xavier Bagnoud*, in order to assess its activities in India, especially towards children and their rights.²²⁵

²¹⁸ SANDERS (1987: 284-5).

²¹⁹ The OECD Guidelines for Multinational Enterprises' OCDE / GD (97) 40.

²²⁰ See BIT, Conseil d'administration (March 1997) « Suite donnée à la Déclaration de principes tripartite sur les entreprises multinationales et la politique sociale et promotion de ladite déclaration »: a) *Résumé des rapports soumis par les gouvernements et par les organisations d'employeurs et de travailleurs pour la sixième enquête sur la suite donnée à la Déclaration de principe tripartite sur les entreprises multinationales et la politique sociale*; GB.268/MNE/1/1 and b) *Rapport du Groupe de travail chargé d'analyser les rapports soumis par les gouvernements, les organisations d'employeurs et les organisations de travailleurs*; GB.268/MNE/1/2

²²¹ See for a more detailed presentation SANDERS (1987: 286-89).

²²² TNCs do often declare within their annual reports, for example, that they observe rules of the code they adopted or that apply to them.

²²³ SAJHAU (1997: 20).

²²⁴ Human Rights Watch Report (March 1998a).

²²⁵ CHALES VEILLON S.A. (1998) *Politique de prévention du travail forcé des enfants. Bilan après quatre ans d'engagement*, (Lausanne).

These implementation mechanisms, linked to some specific codes of conduct, do not address the question of the extent of TNCs obligations under the provisions of the different codes. Furthermore, if we admit that TNCs should abide by general international human rights norms, the problem becomes more acute, since there are no established mechanisms to monitor their compliance in that regard. At the present state of the international human rights system, the monitoring means are only conceivable under the form of *soft enforcement procedures*.²²⁶ However, if these means reveal no real advance towards a greater respect for human rights norms from the TNC side, other possibilities could be envisioned in order to assure a better implementation of these norms. We can point to four different procedures of supervision that could be used with that regard:

- While the drafting of the UN International Code of Conduct for Transnationals was being discussed, it was agreed that the UN Centre on TNCs should take over certain functions of an international institutional machinery for the implementation of the Code. Similarly, we could assume that an organ could be created within the UN, or within another international fora, in order to monitor the implementation of an international treaty regulating TNCs' human rights activities. Even if the proposition to create a working group, appointed by the Commission on Human Rights, on the activities of TNCs with regard to economic, social and cultural rights has not been accepted until now, this could be a good way to supervise the activities of TNCs.²²⁷

- United Nations monitoring bodies could be prepared to accept complaints which concern a State's inability to control violations of human rights by private individuals, as Andrew Clapham suggests.²²⁸ This means that States should reinforce the protection of human rights in the private sphere, including TNCs' violations of them. Indeed, the State's international responsibility to protect human rights is the first priority with regard to these new economic entities. Even if we have addressed, in the framework of this research, the issue of TNCs' responsibility and monitoring more at length, the strengthening of State's responsibility still remains a primary objective.

- The intergovernmental working group of experts on international standards of accounting and reporting of the United Nations Conference on Trade and Development (UNCTAD) has issued a report on ways to achieve standardisation and harmonisation of accounting practices on the activities of

²²⁶ See FRANCONI (1984: 176-8).

²²⁷ See *The relationship between the enjoyment of human rights, in particular economic, social and cultural rights and the right to development, and the working methods and activities of transnational corporations*; E / CN. 4 / Sub. 2 / 1996 / L.47.

²²⁸ CLAPHAM (1993: 107).

transnational corporations.²²⁹ The goal was to help users of financial statements gather adequate data relative to performance and situation of the enterprise (as a whole, and through its individual member entities) by improving the availability and international comparability of information presented in the general purpose reports of transnational corporations. The disclosure of information relevant to the impact of TNCs' activities on human rights is not included in the review by the working group. However, in the context of our discussion, the report has identified several obligations that lie upon TNCs and which are of direct relevance to efforts made to hold them accountable. Indeed, the obligation to disclose information on the structure of the TNC (such as the names of the main enterprises, the geographical area or country of operations of the main enterprises and the controlled and associated enterprises) is of great importance when trying to clear out the different linkages that exist between several entities. The escape from responsibility for a parent company for its subsidiary's activities by appealing to a lack of linkage would become more difficult with an effective implementation of the UNCTAD conclusions.

- A recent interesting example is the International Peoples Tribunal on Human Rights and the Environment. It was created by non-governmental organisations attending Earth Summit II focusing on the theme "Sustainable Development in the Context of Globalisation". The mission statement of the Tribunal states that it "seeks to hold governments and corporations accountable to the many international standards and conventions that already are in existence but remain, often, not enforced. These include the 27 Principles adopted at the Earth Summit in Rio, the Universal Declaration of Human Rights and the large number of international conventions and declarations on human rights and the environment."²³⁰ This Tribunal is a unique attempt to provide a forum for peoples who have no other forum in which they can claim accountability, justice, remedies and compensation. Its proceedings are conducted in such a way that they give the possibility, for persons, governments, TNCs etc. , to respond to the allegations made against them. By now, twelve cases have been tried there, most of which involve violations of environmental and human rights committed by TNCs.

So far, soft means of enforcement, such as monitoring or follow-up bodies, have been considered as the best way to assure compliance with codes of conducts. As Chinkin remarks, monitoring or watchdog bodies can be established on the international as well as on the national levels and can lobby corporations or governments, as well as document violations. "Since adjudication has never been the primary means of resolving international disputes, especially those involving economic matters, the

²²⁹ UNCTAD (1994)

²³⁰ International Peoples Tribunal on Human Rights and the Environment on the web site of Corporate Watch: <http://www.corpwatch.org/trac/corner/worldnews/other/other93.html> and Mendlovitz...

unsuitability of soft law for adjudication should not be viewed as a major disadvantage."²³¹ Finally, if these means are not able to safeguard the respect of fundamental rights by TNCs, sanctions can come from shareholders' dissatisfaction as well as from consumer boycotts, aimed at corporate policies which do not comply with internationally accepted human rights. International pressure has already been a « fruitful » mean to compel some TNCs to adopt a more « human rights friendly » profile, such as in the case of Reebok or The Royal Dutch Shell Company.

The purpose of this paper is not to assess the different views on the subject of codes of conduct. We have rather tried to show, by invoking some attempts to hold TNCs accountable, that there is a growing concern on the side of different actors within the international community to "do something". The codes have proven to be one quite "fashionable" way to address the issue, since they allow for a greater flexibility thanks to their voluntary character and the possibility to adapt their content depending on the context. However, as the US Department of Labour warns: « it is important to keep in mind (...) that codes of conduct are not a panacea.»²³², especially in the present context, where there are a multitude of codes, resulting from various initiatives and with sometimes different objectives.

Hence, direct international legal responsibility of TNCs towards human rights has imposed itself as an important principle that should be implemented. When the existing international human rights law, as well as the international arrangements aimed at controlling TNCs' activities, are duly respected, they leave no doubts as to the fact that TNCs should obey human rights obligations. However, this conclusion and its consequences have not been fully acknowledged, and TNCs may still escape the consequences of their human rights violations. One way to « accelerate » the implementation of these obligations incumbent upon TNCs would be to crystallise them in an international binding agreement, which would state that TNCs have to respect certain human rights²³³. This agreement would be signed by States, but would impose direct obligations on TNCs. An international system to monitor their compliance with the rules would also be established. This idea was left aside after the failure of the UN initiative to regulate TNCs activities. However, the « new » version of this older attempt could rely on the experience of the various codes of conduct, and should target more specifically the human rights dimension of TNCs' activities, thus leaving aside some more controversial aspects. We have shown that more and more actors are relying on these codes and are adopting them. All the problems posed by the

²³¹ CHINKIN (1989: 863).

²³² Quoted at <http://www.ichrdd.ca/PublicationsE/consE.html>

²³³ The content of such an international treaty would of course be extremely difficult to determine. As we have mentioned it already, the view on the scope of TNCs human rights obligations varies depending of the actor that is determining it. NGOs are more « progressive » than the coproate actors themselves. Many questions concerning such an international agreement would have to be resolved in the future. This task goes beyond the scope of this mémoire but would be a good starting point for another research trying to improve the actual state of international human rights protection.

drafting of the UN Code of conduct would of course arise again. However, a new attempt to convince the international community of the necessity to act effectively to effectively regulate TNCs could have a positive influence on the outcome of such an international attempt at achieving binding regulations.

Conclusion(s)

In a recent article, Professor Philip Alston, while analysing the implications of globalisation for international law, warns to the fact that today's international law self-depiction could one day realise

that: « While non-state actors were building the Global Village, we were busy with yesterday's issues and concepts. »²³⁴

And indeed, the primary objective of this research was to try to analyse how the system of international human rights law can already effectively address, and is already addressing, the challenges - manifesting themselves especially as threats - posed by these new non-State actors. The special case of economic transnational corporations, being the principal non-State actors within the globalised world, has been analysed with regard to their responsibility for human rights respect and accountability for human rights violations. The conclusions of the three parts of this work show that international human rights law has different possibilities to tackle this issue: First, within the framework of States' international responsibility, secondly, by invoking TNCs direct responsibility under the international human rights system and, finally, by adopting one international common instrument that would bind TNCs. This last possibility could be obtained by drawing from the different attempts analysed above - expressed principally as international or national codes of conduct - and adopted by States or by TNCs themselves.²³⁵ The remarks made by G. Handl at the meeting of the American Society of International Law, to describe future developments with regard to TNCs, is still pertinent for today's situation: « Although it is too early to tell which way practice will develop in the short run, it is quite plausible that the concept of nationality will eventually be considered meaningless in relation to TNCs, that the notion that a particular state might be responsible internationally for the conduct of a TNC accordingly will become untenable and that TNCs will acquire the status of actors directly subject to and entitled through « international » law in their own right, i.e. without prejudice to states' rights and obligations. »²³⁶ We are presently beginning to realise the absolute necessity that the international business community respects its subjection to international human rights law standards that set clear boundaries to their human rights violation propensity and potential. However, this need to address adequately the challenges brought by TNCs has not yet been fully recognised, even by recent important and progressive attempts aimed to envision a new world order on the eve of the third millennium. This is the case of the work conducted by the Commission on Global Governance called *Our Global Neighborhood*.²³⁷ Even if that report stresses the need to shift the focus from states to people and « is exuberant in stressing the pivotal role of transnational capital; it is anaemic in its approach to the

²³⁴ ALSTON (1997: 447).

²³⁵ Research is still needed in order to explore the possibility and the form of a new international instrument that would impose human rights obligations upon TNCs. The comparison between the advantages and the shortcomings of the existing codes of conduct is a good starting point for such an analysis.

²³⁶ Proceedings of the American Society of International Law, 1985, Remarks by Handl, G. on *International Transfer of Hazardous Technology and Substances: Caveat Emptor or State Responsibility? The Case of Bhopal, India*, at 322.

²³⁷ COMMISSION ON GLOBAL GOVERNANCE (1995); *Our Global Neighborhood* (New York: Oxford University Press).

accountability of transnationals for their flagrant violations of human rights. »²³⁸

The lack of will to remedy to TNCs' escape from international human rights obligations is balanced by the increased awareness, especially within international civil society, that justice with regard to human rights is not respected by actors of the international economic world. Sensibilisation towards the issue is a first step that will have to be followed by efforts, at all levels and from various approaches - may they derive from economical, political, ethical or legal arguments - in order to ensure that human rights are not just ideals but also a reality.

However, and following the Vienna Declaration on Human Rights and Plan of Action, the existing link between human rights, development and democracy should be stressed with regard to the field of our research.²³⁹ It is difficult, not to say absurd, to believe in the implementation of human rights, even with regard to transnational economical actors, when poverty and inequality are prevailing and when most of the individuals and people have no influence on decisions affecting their everyday life. The process of globalisation has increased the gap between national economies leaving many people deprived of their most basic rights, such as the right to food.²⁴⁰ Furthermore, as Susan Marks notes: « While globalizing processes are certainly registered, the ways in which they are putting democracy under strain receive limited attention. »²⁴¹ Indeed, if the basis on which individuals were traditionally included in participation in decisions affecting their lives was a national one, the implications of today's power of transnational actors and their escape from effective accountability towards their actions is that the principle of democratic legitimacy is seriously challenged in this globalised context.²⁴² Everything that hinders the realisation of one of these the fundamentals - being human rights, development and democracy - puts a break to the realisation of the others. Similarly, all the efforts that advance the promotion of one, reinforce the respect of the others. We have tried, throughout this work, to advance modestly the attempt of a better defence of human rights with regard to the

²³⁸ See BAXI, U (1996): « Global Neighborhood and the Universal Otherhood: Notes on the Report of the Commission on Global Governance » in 4 *Alternatives*, 21, at. 537.

²³⁹ WORLD CONFERENCE ON HUMAN RIGHTS: The Vienna Declaration on Human Rights and Plan of Action, (June 1993) (United Nations), Paragraph 8.

²⁴⁰ See the report prepared by Mr. José Bengoa for the Sub-Commission which demonstrates that even if the growth of the world economy over the last 35 years has been enormous while measured only by GDP, the poor countries are comparatively poorer today than 35 years ago. Final Report prepared by Mr. José Bengoa, Special Rapporteur on *The relationship between the enjoyment of human rights, in particular economic, social and cultural rights, and income distribution*, (E / CN.4 / Sub. 2 / 1997 / 9). See also in that regard: BRADSHAW, Y. and WALLACE, M. (1996): *Global Inequalities* (Indiana University: Pine Forge Press) and the Report of the Special Rapporteur Mr. LEANDRO DESPOUY on *Human rights and extreme poverty*, (E / CN. 4 / Sub. 2 / 1996 / 13).

²⁴¹ MARKS (1997: 272).

²⁴² See HELD (1997: 260) and HELD, D. (1995): *Democracy and the Global Order: from the Modern State to Cosmopolitan Governance* (Cambridge: Polity) and HELD, D. as well as the analysis in MARKS (1997); MARKS, S.R. (1996): *The Riddle of All Constitutions. A Study of Democratic Ideas in International Law* (Cambridge: Emmanuel College) and GOLDBLATT, D., HELD, D., MCGREW, A AND PERRATON; J. (1997): « Economic Globalization and the Nation-State: Shifting Balances of

activities of transnational corporations. The efforts will have to continue in that direction so that everyone shall be entitled to all the rights and freedoms set forth in the Universal Declaration of Human Rights, as stated in the article 2 of this universally accepted international instrument:

« 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 other status.»²⁴³

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²⁴³ 1948 - 1998: 50th Anniversary of the Universal Declaration of Human Rights, G.A. res. 217 A(III), UN Doc. A/810 at 71.

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