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## The Accountability of Multinational Corporations for Human Rights' Violations

*«A horrible atrocity has happened to these people – how do you fix it? What do you do? If you are not going to take up arms, and if you cannot do anything in your own country, what do you do? This is the most civilized thing we know of. It's not perfect. It may not be the best model. It's sort of what we learned at Nuremberg – it what we have, for as far as we have evolved as a culture.»<sup>1</sup>*

### I. INTRODUCTION. MULTINATIONAL CORPORATIONS AND HUMAN RIGHTS

One of the main features that are shaping the contemporary world is globalization. Nowadays, our planet has become a «global village» with a single global market that is launching multinational companies to an unprecedented expansion.<sup>2</sup> A further, crucial aspect of globalization is the nature and power of multinational corporations.

Following the jurisprudence of the European Communities Court of Justice, a multinational corporation<sup>3</sup> (hereinafter referred to as MNC) is constituted by a

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<sup>1</sup> Pamela Merchant: «Interview with Jeffrey Davis, July 18, 2006», in Jeffrey Davis: *Justice Across Borders*, Cambridge University Press, Cambridge, 2008, p. 284. Merchant is executive director of the Centre for Justice and Accountability

<sup>2</sup> During the ten years that followed the fall of the USSR, these companies' collective headcount surged from 24 to 54 million, while their turnover doubled.

<sup>3</sup> They are also called *transnational corporations* (TNC) or *multinational enterprises* (MNE). According to the «Norms of the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights (Norms)» of United Nations (art. 20), «the term transnational corporation refers to an economic entity operating in more than one country

matrix society created according to the legislation of an specific country that manages production or delivers services at a global scale through affiliated societies, according to the legislation of the hosts countries where those processes take place. Therefore, it is not just that large corporations operate across many different countries, but they have also developed a vast net of offices, branches, contractors, and manufacturing plants acting through different legal regimes and under the jurisdiction of diverse national courts and Tribunals.

It is a fact that MNCs have become the biggest players in world trade reaching such a level that many of them have budgets that exceed some nations' GDPs.<sup>4</sup> As a consequence, the power of individual nation states to establish and control the rules of the economic system is fading, both in the industrialized world and among developing countries. Problems arise when the host countries have no capacity to apply their own national laws to the MNCs acting on their territories or when home countries are not willing to regulate or limit the activities or the MNCs under their jurisdiction. The former international economy, with a political and diplomatic sphere and with a total and unique State power has been replaced by a multinational economy where MNCs play an increasingly decisive role in globalization.

The arrival of such a new and powerful player as MNCs has had a huge impact on the sphere of Human Rights compliance all over the world in general, and on developing and non-democratic countries in particular. The Center for Human Rights and Global Justice at New York University School of Law and Human Rights Watch elaborated a report in February 2008<sup>5</sup> determining the factual foundation to know the different ways in which business practices affect human rights. Their conclusions perfectly outline the aspects that should be targeted to tackle the multinational corporations' human rights abuses. They establish that:

- « • Business impacts on human rights are not limited to specific sectors or particular enterprises as manufacturing or extractive industries. Rather, the activities of all types of businesses –large and small, domestic and international, public and private– in all sectors can implicate human rights. Therefore, to properly combat business - related human rights abuse, this broader set of actors and contexts needs to be addressed.
- In assessing the impact of business activity on human rights, it is important to focus as much on corporate ties with third parties that commit abuse (such as suppliers or government security forces), as on cases in which businesses themselves directly cause harm. Many times the Corporations endorse, facilitate, encourage or aid the human right violation.
- Economic interests and other factors can lead governments to neglect victims of business-related abuses. If business-related abuses are to be curbed, greater attention

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or a cluster of economic entities operating in two or more countries –whatever their legal form, whether in their home country or country of activity, and whether taken individually or collectively».

<sup>4</sup> Statistics show that the influence of multinationals is replacing that of States, since over two thirds of the 100 largest economic entities are now companies and not States.

<sup>5</sup> Available online at [www.hrw.org/en/node/62409/section/2](http://www.hrw.org/en/node/62409/section/2).

needs to be paid to governmental obligations in the face of abuses perpetrated or facilitated by private actors.

- Individuals whose rights are affected by businesses often are unable to obtain meaningful redress; in too many cases, they face retaliation for even trying. This finding reinforces the need to promote access to justice for victims of business-related abuses and the importance of further examination of the reasons why States are not providing appropriate remedies and reparations.
- Many companies have not ascribed to business standards addressing relevant human rights and, even when codes of conduct or commitments to social responsibility exist, they often are not adequately implemented. Additional standards and compliance mechanisms are needed.»

A first approach could suggest that International Human Rights Treaties and Instruments along with local legal systems should be enough to regulate business activity. But the real situation is that MNCs are in a position to effectively escape from both, international and national legislation. That is so because International Human Rights Treaties were created to be applied mainly to states and, as a consequence, the subsequent legal development of those instruments was mainly made neglecting MNCs as legal actors. We must keep in mind that the legal construction of the Human Rights doctrine was made right after the end of the Second World War, when MNCs was a phenomenon still unknown. On the other hand, as Ronen Shamir <sup>6</sup> says

«Large MNCs can escape national regulatory control and national jurisdictions through relocating their production to countries offering more favorable terms, by playing one legal system against the other or by taking advantage of local legal systems ill-adapted for effective corporate regulation. At stake, therefore, is the widening gap between the transnational character of corporate activity and the availability of both national and transnational regulatory regimes that may be invoked to monitor and restrain corporations irrespective of the territory in which they happen to operate.

In addition, impoverished countries, often desperate for foreign investment, are unable or unwilling to introduce legal measures that may inhibit corporate investment or may cause MNCs to relocate to more hospitable countries (e.g., countries that do not endorse or enforce minimum wage requirements, child labor prohibitions, health and safety standards, environmental protections, collective bargaining rights, etc.).»

As a consequence of this development the traditional notion that only states and state agents can be held accountable for human rights violations is being challenged. In recent years, multinational corporation's human rights practices have been a topic of much concern. It can safely be concluded that the mechanisms for attributing human rights responsibilities to non-state actors are still very much in the making. In such a context the question of responsibility for corporate human rights violations remain uncertain. This responsibility is measured for instance, through environmental sustainability, respect for human

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<sup>6</sup> Ronen Shamir: «Between self-regulation and the Alien Tort Claims Act: on the contested concept of corporate social responsibility», *Law & Society Review* Vol. 38, No. 4 (2004), p. 637.

rights and workers rights, accountability and transparency. This development is highly interesting, especially if it lays the ground for legal arrangements.

The debate cannot be addressed just by applying the entire Human Rights doctrine and *corpus iuris* as a whole to MNCs, since it remains unclear that MNCs can be equated with states in terms of the legal human rights obligations that can and should be placed on them. States have public functions and public purposes whereas MNCs normally do not, so it is inappropriate to impose the same duties on both entities.

Many questions arise on this issue. There is no doubt that states have the obligation to grant and guarantee freedom of expression. But it is absolutely doubtful that a corporation is obligated to concede right of free speech to its workers within its premises, for example in order to support a political or religion option. And it also remains unclear if a corporation should not follow the laws of a host state if those laws are not consistent with Human Rights standards and, for instance, forbid to hire workers on the basis of gender or religion considerations. But, on the other hand it is clear that some human rights (i.e. physical integrity or labor rights) are fully applicable to the business sector.

## 2. STRATEGIES TO HOLD MULTINATIONAL CORPORATIONS ACCOUNTABLE FOR HUMAN RIGHTS ABUSES

In this context, the importance to develop mechanisms of control over the MNCs is, obviously, a huge and urgent task. Nowadays, efforts to curb corporate power by legal means operate at two distinct levels.

- First, there are growing attempts to subject MNCs to a set of universal standards that will apply to corporations above and beyond the demands of any specific locality.
- Secondly, activists try to mobilize the «developed» legal –and judicial– systems of rich countries in order to police and sanction corporate practices in places where it is impractical or impossible to invoke local laws.

Let us analyze each one of these proposals separately.

### 2.1 Attempts to establish a set of universal standards

There are several possibilities for global actors to develop a *corpus iuris* that would recognize obligations on businesses to protect human rights.

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<sup>7</sup> Ronen Shamir: «Between self-regulation...», cit., p. 637.

### **2.1.1 Corporate self-regulations**

The most basic way for implementing a business regulating system is through a form of self-regulation. Corporate self-regulations are codes made up of voluntary commitments adopted by companies, business associations, or other entities, which put forth behaving standards and principles for business activities.<sup>8</sup>

Such codes date back at least to the beginning of the twentieth century but they have proliferated in the last twenty years. Although those codes imply a step forward showing the concerns of MNCs in order to respect Human Rights, many critics have arisen on this self-regulating activity. The main one is that they are «soft law» which implies that they are not legally binding and, therefore, their implementation is left to the good will of the corporations.

At the same time, codes are not fully comprehensive of the entire Human Rights *spectrum*. On the contrary, they address a limited range of human rights issues.<sup>9</sup> Normally just those connected to the type of business run by the corporation, and many times with the ultimate purpose to obtain a «social» or «green» label, that will be able to improve the enterprise public image. Those labels certify that harmful practices are not used in the production processes (for instance, «dolphin-safe» tuna, or Rugmark label on carpets not involving child labor). Recently NGOs and Labor Unions are pressing corporations trying to set up procedures for independent monitoring that enterprises are reluctant to accept. At the end of the day, through self-regulation codes enterprises seek a mechanism to keep companies away from any kind of external regulation and control imposed by Parliaments or any other public instance, which, we should not forget, are the genuine depositaries of democracy and holders of the responsibility to create mandatory-for-all laws.

Today's situation offers a picture of different companies and industries refusing to accept uniform standards of behavior and adopting stronger or weaker codes, each one of them being observed with varying degrees of seriousness.<sup>10</sup>

### **2.1.2 Soft International law**

«Soft law» is not just created by multinational corporations. There are others actors producing it:

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<sup>8</sup> Kathryn Gordon & Maiko Miyake: «Deciphering Codes of Corporate Conduct 31», *OECD Directorate for Fin., Fiscal & Enter. Affairs, Working Paper on International Investment No. 1999/2* (2000). This definition would also cover codes drafted by international organizations.

<sup>9</sup> Andreas Georg Scherer: «The Downward Spiral and the U.S. Model Business Principles - Why MNEs Should Take Responsibility for the Improvement of World-Wide Social and Environmental Conditions», *University of Zurich - Institute of Organization and Administrative Science, Management International Review (MIR)* Vol. 40, No. 4 (2000), pp. 351-371.

<sup>10</sup> Steven Ratner: «Corporations and human rights: a theory of legal responsibility», *Yale Law Journal*, December 2001, pp. 531-532.

1.— International organizations are not only welcoming this new process of lawmaking and creation of corporate duties, but many of them have followed such a path and are issuing their own «soft law» instruments. Namely, among others, the International Labor Organization (ILO), who has so far produced significant «hard» and «soft law» regarding corporate behavior, such as the ILO Tripartite Declaration of Principles Concerning MNCs, and the ILO core conventions.

This is also the case of the Organization for Economic Co-operation and Development (OECD) through the OECD's proposed «Multilateral Agreement on Investment» and the «OECD Guidelines on Multinational Enterprises Convention on Combating Bribery of Foreign Public Officials in International Business Transactions».

The United Nations represents as well a possible venue for «soft» lawmaking. In this sense we should keep in mind the Global Pact Initiative,<sup>11</sup> the «Norms of the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights» (Norms), Resolution 2003/16<sup>12</sup> or the «Code of Conduct for Law Enforcement Officials».<sup>13</sup>

The World Bank promulgated the 1992 «Guidelines for the Treatment of Foreign Investment».<sup>14</sup> In recent years, the Bank has begun to take into account the human rights implications of the projects that it finances.

At a regional level we should also mention the steps taken within the European Union, such as the existing European environmental protection instruments or the fact that, in January 1999, the European Parliament adopted a set of proposals on the accountability of European based MNCs. The target of all of these measures is to conduct the Union «towards a European Code of Conduct».<sup>15</sup>

2.— Soft law can even result from bilateral understandings. In December 2000, the United States and British governments, companies, and NGOs agreed on «Voluntary Principles on Security and Human Rights in the Extractive Sectors». This document reiterates that public institutions should follow international human rights law and include strong recommendations to companies in order to ensure that private security forces also respect

<sup>11</sup> Available online at [www.unglobalcompact.org](http://www.unglobalcompact.org).

<sup>12</sup> Available online at [www.unhchr.ch/html/menu2/2/55sub/55sub.htm](http://www.unhchr.ch/html/menu2/2/55sub/55sub.htm).

<sup>13</sup> G.A. res. 34/169, annex, 34 U.N. GAOR Supp. (No. 46) at 186, U.N. Doc. A/34/46 (1979)

<sup>14</sup> World Bank: *Report to the Development Committee and Guidelines for the Treatment of Foreign Investment* (1992), reprinted in 31 I.L.M. 1363, 1379

<sup>15</sup> There are efforts at all levels to achieve such a goal. At a local level (Castilla-La Mancha region in Spain) see: J. Sanchez, F. Guadamillas & N. Espinosa: *La dirección de la empresa responsable. Guía práctica de implementación y buenas prácticas en Castilla-La Mancha*, APM, 2009.

human rights, relying on soft law United Nations documents concerning law enforcement personnel.<sup>16</sup>

3.— Finally we should note that several tools for human rights impact assessment are also available, for example, the «Human Rights Compliance Assessment tool», produced by the Danish Institute for Human Rights; the «Guide to Human Rights Impact Assessments» (road-testing draft from June 2007), produced by the International Finance Corporation, the International Business Leaders Forum and the UN Global Compact; and «Human Rights Impact Assessments for Foreign Investment Projects», produced by Rights & Democracy (for use by affected communities).

The weak aspect for many of the above mentioned proposals is that –as it happens with the OECD Guidelines on Multinational Enterprises Statutes– they «establish principles and voluntary norms to achieve responsible corporate conduct compatible with the applicable law». Such a situation might, as well, be seen as a victory of the Economic Power, which once again has been able to achieve that the states accept to leave within the business hands, through a voluntarist way of acting, the fulfillment of the legality both at national and international level. Nowadays, many critics consider corporate responsibility as an abdication of the role of the state.

## **2.2 The use of national, extraterritorial and universal jurisdiction**

From a legal point of view it should be undoubted that companies must be subject to direct obligations under international human rights law, the main challenge being to set up the proper mechanisms by which these obligations can be enforced. However, few options have been explored for holding Multinationals Corporations accountable.

By using national legislation, states could control corporate human rights activity. State laws may and do foresee a variety of sanctions for companies violating their duties that range from mere publication of a list of companies not respectful with the appropriate standards, to loss of particular benefits, such as preferential loans, contracts with the Public Administration, permits or licenses, up to public intervention of the enterprise administration or criminal fines.

The effectiveness of national regimes is directly connected to the scope of a state's jurisdiction to legislate. In this field there are two options: the principle of territoriality and the principle of nationality. The first one implies that a state can make and apply laws that cover acts committed within its borders, while the

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<sup>16</sup> See Voluntary Principles on Security and Human Rights in the Extractive Sectors (Dec. 2000), at [www.state.gov/www/global/human\\_rights/001220\\_fsdrp\\_principles.html](http://www.state.gov/www/global/human_rights/001220_fsdrp_principles.html).

second one grants a state jurisdiction over subjects of its own nationality, irrespective of the place where the conduct took place. Most governmental regulations are based on the principle of territoriality. Both mechanisms require the existence of a nexus between the state that pretend to have the jurisdiction and the facts or the subjects involved.

But coordination of national regimes based on two different principles is not an easy task. As Ratner puts it:

«States would agree that each State can regulate the human rights abuses that take place on its territory (even by foreign-based MNCs) as well as the activities of MNCs headquartered on the territory (even if the abuses take place overseas). If both the state of nationality and the territorial state (which is also likely to be the state of any victims of abuses) choose to regulate the activity, the result may well be an effective regime if the two states did not place different demands on corporations. But the developing world States might well place fewer requirements on businesses, in which case companies would seek to challenge the more restrictive laws. Litigation or diplomatic disputes over the limitations of jurisdiction-in particular the relevance of the reasonableness test-would inevitably arise.»<sup>17</sup>

Would it be possible to jump over the requirement of such a connection by establishing a principle of universal jurisdiction? The possibility to regulate conducts based on universal jurisdiction, which permits a state to legislate over or prosecute offenses particularly harmful to mankind, regardless of any nexus the state may have with the offense, the offender, or the victim has been proposed as a manner to avoid those conflicts, and to apply the higher possible standards in regards to human rights respect. But beyond the potential for conflicts of jurisdiction noted above, there are many obstacles that lie in the way of states to endorse this option. First, it is not at all clear that universal jurisdiction extends beyond the most grave human rights abuses.<sup>18</sup> If a state tried to regulate corporate conduct over a broad range of human rights activities (e.g., violations of free speech), it might face protests from other states. Such protests would suggest an absence of acceptance of universal jurisdiction.<sup>19</sup> Second, as a practical matter, despite the increased tendency in recent years of states to prosecute foreign nationals for human rights abuses committed abroad, they remain, on the whole, rather hesitant to legislate or prosecute based on universal jurisdiction. Some governments fear foreign policy repercussions of trials based on universal

<sup>17</sup> Steven Ratner: «Corporations and human rights: a theory of legal responsibility», cit., pp. 534-536.

<sup>18</sup> Offenses subject to universal jurisdiction include: piracy, slave trade, war crimes, genocide, crimes against humanity, torture, crimes against diplomats, aircraft hijacking and sabotage. See, e.g., *Prosecutor v. Furundzija*, Case No. IT-95-17-T, para. 156 (Int'l Crim. Trib. for Former Yugoslavia Trial Chamber II Dec. 10, 1998), available online at [www.un.org/icty/furundzija/trialc2/judgement/index.htm](http://www.un.org/icty/furundzija/trialc2/judgement/index.htm). Referred in Steven Ratner: «Corporations and human rights: a theory of legal responsibility», cit., p. 535.

<sup>19</sup> Steven R. Ratner & Jason S. Abrams: *Accountability for Human Rights Atrocities in International Law* (2d ed.), Oxford University Press, New York, 2001, p. 165.



jurisdiction; others are concerned about the diversion of resources entailed by such prosecutions or civil suits, especially since the evidence and witnesses are typically located abroad. These factors would suggest an even greater hesitancy by states to regulate purely extraterritorial activity by foreign corporations.<sup>20</sup> Even if a state had jurisdiction, a court might dismiss the case based on *forum non conveniens* or analogous grounds.

The *forum non conveniens* is a principle from the common law that it is very frequently used by courts to reject a case that has been presented in a tribunal of the home country of the enterprise in relation to illegal actions committed by an affiliated society within the territory of the host country.

Nevertheless, some attempts to implement the principle of extraterritorial jurisdiction have been set up in diverse countries from both sides of the ocean. Within this strategy, a specific attention is due to the US Alien Tort Claims Act (better known as ATCA), since it has proved to be –with ups and downs– a prolific arm in the struggle to hold MNCs accountable for the violations of human rights. So, in the United States, a series of lawsuits have been brought against companies under the ATCA claiming damages for alleged human rights violations. Such is the case of Unocal, Texaco, Royal Dutch Shell, Coca-Cola, or Talisman Inc., among others.

### **2.2.1 The United States approach. The Alien Tort Claims Act (ATCA)**

The Alien Tort Claims Act is a Law that was passed in 1789 by the United States Congress that grants jurisdiction to US Federal Courts over «any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States». Therefore, ATCA allows foreigners to sue individuals or companies with or without North American citizenship but who are located within the United States, for the abuses committed in violation of «the law of Nations or a treaty signed by the United States», even if those abuses took place out of American soil. The Act is suitable just for civil suits (obtaining economical compensation for damages) and never to demand criminal responsibility for the acts committed.

We should keep in mind that ATCA does not prescribe substantive law and, therefore, it does not imply that US courts must recognize any tort that violates individual rights provided by international law. Instead, the ATCA has a jurisdictional nature, which means that the set of justiciable torts is limited to those included in the law of nations or treaties adopted by the United States.

Initially created to fight against piracy on high seas and long forgotten over two centuries, ATCA came back to use in 1980 with the *Filártiga v. Peña-Irala* case. In that trial, a Paraguayan man successfully used ATCA to sue the policeman who

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<sup>20</sup> Setting up an International Criminal Court (with world wide jurisdiction) would be an excellent way of avoiding those problems and homogeneously prosecute the most serious offenses.

had tortured his son to death in Paraguay and that had moved later to live in the United States. The Court accepted the case and supported the applicability of ATCA to the most serious violations of the International humanitarian Law arguing that «the torturer, like the pirate or the slave's trader, has turned into an enemy of the entire mankind».

During the 80s and 90s, the use of ATCA was limited to sue individuals, some of them military men or even dictators such as Zimbabwe's Robert Mugabe. In the 90s, human rights activists started to use ATCA as a tool to fight against the violations of fundamental rights committed by MNCs, always seeking compensation for damages resulting from breaches of international law. ATCA first surfaced on the corporate front in 1993, when Cristóbal Bonifaz and fellow lawyers filed the first ATCA case against a company, Texaco. Since that time, businesses linked to human-rights abuses around the globe have been put under legal prosecution. The outcomes have been diverse.

In the suit filed against Union Carbide for the massive toxic contamination in Bhopal (India), in which a few thousand people died and hundred of thousands were severely injured, the court in New York decided to refuse its own jurisdiction over the case based on the doctrine of the *forum non conveniens*, as Judge Keenan considered that sustaining its own competence would imply «an example of imperialism, a situation in which a developed sovereign State would impose its laws, standards and values over a developing country». Therefore, the judge decided to send the case to the Indian courts despite of the protests filed by the defendants underlying the risk that the local courts in India might be put under high pressure by Union Carbide that could jeopardize their own neutrality. The case finalized by a settlement in which the defendant agreed to pay certain compensation to the victims.<sup>21</sup>

The case of *Doe v. Unocal and Total* initiated in a US District Court in 1997 for the abuses (forced relocation, forced labor, rape, torture, and murder) committed during the construction of the Yadana pipeline in Myanmar. Judge Richard Páez held that the two referred MNCs and their managers could, in principle, be directly liable for violations of human rights that happened out of the United States territory, under the Alien Tort Claims Act. However, in the appellation the Court considered not to have jurisdiction *ratione personae* over the French company Total and left it out of the case despite of the subsidiary enterprises and commercial branches kept by Total on American soil.

In the Unocal case, the Federal District Court in Los Angeles concluded that «the evidence does suggest that Unocal knew that forced labor was being utilized and that Unocal and Total benefited from the practice» and that «the violence perpetrated against Plaintiffs is well documented in the deposition testimony filed under seal with the Court». Despite those evidences, the case was rejected. Judge Ronald Lew followed a series of decisions by US military tribunals

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<sup>21</sup> A global compensation of 470 million was awarded –which can only be evaluated as a small amount considering the high number of victims.

after the Second World War, involving the prosecution of German industrialists for their participation in the Third Reich's slave labor policies.<sup>22</sup> These established that, in order to be liable, the defendant industrialists had to take active steps in cooperating or participating in the forced labor practices. Mere knowledge that someone else would commit abuses was insufficient. By analogy with these cases, the Court decided that Unocal could not be held liable as a matter of international law and so the claim under the Alien Tort Claims Act failed.<sup>23</sup>

Plaintiffs appealed this decision. On September 18, 2002, the United States Court of Appeals for the Ninth Circuit reversed the District Court's decision allowing the lawsuit against Unocal to go forward. The three-judge panel held that the District Court was wrong in determining that the plaintiffs had to show that Unocal controlled the Burmese military's actions in order to establish Unocal's liability. The Ninth Circuit held that the plaintiffs need only to demonstrate that Unocal knowingly assisted the military in perpetrating the abuses for Unocal to be held liable. Under this standard, the Court determined that the plaintiffs had presented enough evidence to go to trial.

After few others motions and appeals, Judge Victoria Chaney had set a trial date for June of 2005 for a jury trial on the plaintiffs' claims of murder, rape, and forced labor. But in March of 2005, Unocal agreed to compensate the plaintiffs in a historic settlement that ended the lawsuit. In August 2002 Total was also sued in France and no sentence was issued since another settlement was reached in 2005 in which the company accepted to compensate each victim with 10.000 €.

In the 1996 case of *Wiwa v. Royal Dutch Petroleum Company and Shell Transport and Trading Company*, the Oil Company and Brian Anderson –Ex-CEO of Shell Nigeria– were charged of collaborating in the torture and murder of a few leaders of the Ogoni People. The US Court of Appeal in 2001 held the US interest in pursuing claims for torture under the Alien Tort Claims Act and the more recent Torture Victim Prevention Act and declared its competence as a forum where the case could be heard despite of the facts that the crimes were committed abroad, the plaintiffs were not American residents and Shell has its headquarters in Great Britain. In this case the Court followed a much open interpretation of the Act than at the Unocal suit.

Coming to this point, it is important to mention that the basic fact about most ATCA cases is that the «facts», it is to say, the claim that human rights were violated, do not constitute the heart of the dispute between both parties, but the concrete dispute, and the real one, is often about chains of causality in general and about the responsibility of the corporation to the actions of state in particular.

Nevertheless, the scope of use of ATCA remains uncertain. Alike the Shell case, in the *Sosa v. Alvarez Machain* case the Supreme Court issued a much more restricted ruling in 2004, really narrowing the legal possibilities to use ATCA,

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<sup>22</sup> *US v. Flick*, 6 Trials of War Criminals Before the Nuremberg Military Tribunals Under Control Council Law, No. 10 (1952); *US v. Carl Krauch*, Vol. 8; *US v. Alfred Krupp*, Vol. 9; *Flick v. Johnson*, 85 US App. DC 70, 174 F.2d 983 (DC Cir 1949).

<sup>23</sup> *Doe v. Unocal*, US Dist Ct, C.D.Cal. 31 August 2000, 2000 U.S. Dist. LEXIS 13327.

maybe due to the massive and orchestrated initiative launched against the Act by the private sector.

Thus, when plaintiffs started to use ATCA as a legal tool to challenge corporations for their abuses against Human Rights, a counteroffensive arose among the corporative sector trying to fade and minimize the use of the Act in future suits.<sup>24</sup> That is the case of USA-Engage, a wide coalition of hundreds of MNCs, including many of those sued under ATCA, which considers that the use of ATCA to evaluate the conduct of sovereign nations implies a new form of colonialism and a show of American imperialism threatening the principle of equal sovereignty among free Nations. The National Foreign Trade Council and the American Chamber of Commerce also took part in the campaign to discredit ATCA.

The Bush Administration also joined this orchestrated movement against ATCA, and US General Attorney John Ashcroft presented an argument at the Federal Court of Appeal in the Ninth Circuit in the *Unocal* Case arguing that ATCA should be immediately revoked since the «Law of Nations» does not include the International Humanitarian Law nor the Treaties signed by the United States after 1789. He also suggested that ATCA might interfere the US Foreign Policy, since the national interests of friend Nations might be put under exam by the American courts.

Although a finding of direct responsibility for human rights violations is as yet unprecedented, ATCA remains as a powerful tool to put under judicial scrutiny the performance of MNCs anywhere in the world, or at least to focus the media and public opinion attention on what corporations are doing in the field of Human Rights while running there business. If these suits are allowed to proceed, then ATCA and national systems via judicial mechanism provide framework for defining corporate responsibility which could become a powerful tool to increase corporate accountability.<sup>25</sup>

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<sup>24</sup> «When Thomas Niles (President of the United States Council for International Business) was asked whether there were violations that were sufficiently serious to justify actions under the ATCA he responded: My answer to that would be that there are none. In reality, even if a narrowly circumscribed line could be drawn, it would be in the nature of advocacy generally, and certainly of human rights advocacy, to push against that line and seek to expand whatever jurisdictional limits are laid down... [This approach] overlooks the costs of litigating those issues – economic, legal, political, etc. and the reputational issues involved and that is why, in my view, there is no way in which the ATCA can be used “responsibly”» (See «E-Mail Correspondence from Thomas Niles, July 9, 2007», in Jeffrey David: *Justice across Borders*, cit., p. 237.

<sup>25</sup> Terry Collingsworth, executive director of the International Labour Rights Fund says: «I think ATCA is the *only* effective tool out there right now for advancing corporate respect for human rights, and I think it will continue to be a very effective tool».

### **2.2.2 The European Union and South American perspectives**

The principle of universal jurisdiction has also been provided by several national legislations mainly in many South American and European Union countries. Universal jurisdiction is not just a theoretical issue but also a real practice in use by many states. By the end of 2009 a total of 27 states had used universal jurisdiction to prosecute alleged illegal actions, and over twelve condemnatory sentences had been issued.<sup>26</sup>

Belgium used to be the country in which the principle of Universal Jurisdiction was more widely formulated. The 1993-1999<sup>27</sup> laws statuted the competence of Belgian Courts to judge a certain number of criminal actions (war crimes, genocide, etc.) irrespective of the place where they were committed and the nationality of the perpetrators or the victims. The Belgium prosecuting Code also granted to the victims the right to initiate a criminal investigation. The legislation was wide even in the cases of defendants awarded with personnel immunity since it could not be an impediment for the application of the law.

Such a wide legal perspective motivated a high number of lawsuits against many foreign military men and high politicians from many different countries (like Yasser Arafat, Ariel Sharon, or Jiang Zemin) specially after the Gulf War or Irak (President H. W. Bush, Dick Cheney or Norman Schwarzkopf). But at some point, the Belgian government became unable to bear the subsequent international political pressure that threatened to put in risk the national interests,<sup>28</sup> so the law was modified twice in 2003. A new and much more restrictive law was approved establishing that the competence of Belgian Courts was limited to the cases in which the suspect or the victim have Belgian nationality or live in Belgian soil. The exception of immunity was also restored according to the International Law and Treaties.

Similar to this situation is the case of Spain, where article 23.4 of the Ley Orgánica del Poder Judicial declares the competence of Spanish courts in order to judge criminal acts committed by Spaniards or foreigners out of the Spanish territory provided that these acts constitute proof of genocide, terrorism and piracy, among others.

For a few years such a principle was limited to those cases in which the victims were Spanish citizens, but a resolution from the Constitutional Court expanded it to cases affecting victims of any nationality. As it had happened in Belgium, a flood of cases arrived to the Audiencia Nacional (denouncing the practise of genocide in Tibet and Guatemala, war crimes in Gaza, tortures in

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<sup>26</sup> Vidal Martín: «Justicia universal: la nueva dimension de la justicia transicional», *FRIDE, informe de proyecto*, (2010), p. 8.

<sup>27</sup> «Loi relative à la repression des violations graves de droit international humanitaire», from 16 February 1993, modified in 1999.

<sup>28</sup> The United States threatened with the blockage of the Amberes Port and with the possibility to take NATO headquarters out of Belgium.

Guantanamo, etc.). Once again the international pressure from many States motivated a change in the Spanish Law in the sense that a nexus with Spain was now required («when the victims have Spanish nationality or the suspects are on Spanish soil»).

In the same sense, article 445bis from the Spanish Criminal Code grants jurisdiction to Spanish courts in order to try people accused of bribing national or international officials belonging to international organizations or foreigner countries.

### 3. A PROPOSAL: THE COMBINATION OF SELF-REGULATION AND NATIONAL CRIMINAL LAW

As seen above, the application of International Human Rights Laws to MNCs is very much in the making. Similarly, the use of national legislations to sue MNCs through the principle of extraterritoriality is both difficult to articulate and a potential source of bilateral conflicts. Therefore, it is necessary to explore different ways to address the accountability of enterprises. Maybe the soundest possibility would be to use a combination of both mechanisms: the self-regulation technique along with the creation of a Business Criminal Act at the national level.

<sup>29</sup> Let us analyze it.

Self-regulation is essential and states should work on improving it. Otherwise, the state will fail in the gigantic task of controlling such big actors as many corporations have become. States do need self-regulating regimes. Once said that, the mere voluntarism is not enough, when talking about issues as important as human rights. For such a reason states should back self-regulation initiatives, but those initiatives should be supported by national Laws and Acts implementing and making real the principle of legal accountability of legal persons. It is very hard to understand that International Criminal Law considers just states and individuals as principal actors, leaving MNCs out of the criminal legal system.

It is essential to overcome the traditional perspective considering that «*moral person delinquere non potest*», and develop a new mechanism to make corporations face the consequences of breaking the principle that *corporations can do «no harm»* and, therefore, hold them criminally accountable if they do. The first steps in order to establish and declare the criminal responsibility of corporations were taken at the Nuremberg Trial, which constitutes a valuable precedent in this matter. It is true that at Nuremberg, being an early step as it was, jurists had to use indirect ways to settle the criminal accountability of enterprises, such as the aiding and abetting theory, but it represented an extraordinarily useful precedent. So, nowadays, according with Richard Herz, <sup>30</sup>,

<sup>29</sup> Adán Nieto Martín: *Autorregulación y sanciones*, Lex nova, Valladolid, 2008, pp. 113-116.

<sup>30</sup> Richard Herz is Litigation Director at EarthRights International and has served as co-counsel for the plaintiffs in a number of ATCA suits against multinational corporations, including *Doe v. Unocal* and *Bowoto v. Chevron Texaco*.

«One of the main theories of liability in *Unocal* and *Chevron*, and indeed in most of the corporate cases under the Alien Tort Statute, is aiding and abetting liability. By that, he means knowingly providing substantial assistance to the perpetrator of the crime. In international human rights law, this standard comes directly from Nuremberg. In *U.S. v. Goering*, for example, the Tribunal held that “when [businessmen] with knowledge of [Hitler’s] aims gave him their cooperation, they made themselves parties to the plan he had initiated. They are not to be deemed innocent . . . if they knew what they were doing”.»

Then, at the subsequent trials at Nuremberg,<sup>31</sup> a number of industrialists were convicted on an aiding and abetting theory. For example, Steinbrinck, in the *Flick Trial*, was convicted for giving money to the SS, even though he actually had no interest in seeing the SS commit atrocities. Likewise, other industrialists were convicted for selling poison gas to the Nazis, knowing it would be used for mass extermination. The standard applied was not whether they wanted it to be so used, but whether they knew that what they were doing would assist in the commission of the crime.

These principles of aiding and abetting liability were directly incorporated into the jurisprudence of the International Criminal Tribunals for Rwanda (ICTR) and for the former Yugoslavia (ICTY). Courts applying the ATCA have overwhelmingly held that aiding and abetting liability is actionable, although a small minority has held that it is not. The cases finding such liability have often looked directly to the jurisprudence of Nuremberg and the ICTY and ICTR.

Being useful as it is, the aiding and abetting theory should be complemented by Laws allowing courts to declare corporations liable for direct breaking of the law or for being authors of actual harm. In order to achieve such a goal, it is absolutely essential to locate the criminal actions in the territory of the home state. There are two ways to do so, but both imply a combination of self-regulation and state legislation.

- First, States legislations should penalize those enterprises that do not implement codes of conduct or other similar effective regulating measures fulfilling the basic international normative on human rights, environment, labor conditions, etc. To implement such initiative, it would be very useful that international organizations and international NGOs cooperate with corporations or their representatives in order to jointly elaborate models of business organization which are friendly with the international standards. Lately, norms for social auditing have been developed allowing a better delimitation of what a good organization should include and, consequently, allowing Criminal Law to intervene with higher doses of legal guaranties.<sup>32</sup>

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<sup>31</sup> The Nuremberg Tribunal, 6 F.R.D. 69, 112 (1947).

<sup>32</sup> To certify conformance with SA8000, every facility seeking certification must be audited. Thus, auditors will visit factories and assess corporate practice on a wide range of issues and evaluate the state of a company’s management systems, necessary to ensure ongoing acceptable

- The second way of action for Criminal Law is that Criminal Codes should demand enterprises to make public not only their approved codes of conduct but also their annual report declaring the company level of fulfillment of the code. Doing so, there would be no sanction for an enterprise clearly stating that in specific countries it has suppliers that use child labor or police agents that violate Human Rights when providing security to their factories or pipelines abroad. That strategy has already been put into practice in some States, for example France.<sup>33</sup> The key question is to obligate enterprises to publicize their reports of fulfillment with the code of conduct and, what it is more important, criminally sanctioning the falseness.

Similar to this strategy it is the fact of considering false advertising as a criminal offense committed by those enterprises that advertise themselves as being environmentally friendly or respectful with human rights in the event that it is proved that, for example, they pollute the Amazonas or use child labor. That was the case of Nike enterprise, which was sued in the USA for deceitful advertising once being proved that its activities in third countries imposed labor conditions totally incompatible with the minimum standards of human rights.

According to Adán Nieto the combination of the two measures mentioned above would imply a better judicial control of MNCs and, therefore, a better fulfillment of the international human rights standards by enterprises.

To summarize: on the one hand, the first measure would allow to sanction (criminally or administratively) the lack of voluntary impulse of the enterprises to accomplish the required international standards through the approval of self-regulation codes of conduct and, on the other hand, the second measure would oblige enterprises to audit and publish annual reports of their degree of real accomplishment of those codes, and to be criminally prosecuted if they lie about the audits. And last but not least, the offenses would be committed in the home state of the enterprises, allowing an easier prosecution.

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practices. Once an organization has implemented any necessary improvements, it can earn a certificate attesting to its compliance with SA8000. This certification provides a public report of good practice to consumers, buyers, and other companies and is intended to be a significant milestone in improving workplace conditions. Maintaining and improving the systems put in place to achieve SA8000 certification is an ongoing process and substantive worker participation can be the best means to ensuring systemic change. The benefits of adopting SA8000 are significant and may include improved staff morale, more reliable business partnerships, enhanced competitiveness, less staff turnover and better worker-manager communication. See Social Accountability Int. website at [www.sa-intl.org](http://www.sa-intl.org)).

<sup>33</sup> See French Code of Commerce.