

CALE Discussion Paper No.9

October, 2012

Corporate Responsibility to Respect Human Rights

Challenges and Opportunities for Europe and Japan

Prof. Jörg Polakiewicz

Nagoya University
Center for Asian Legal Exchange

Center for Asian Legal Exchange (CALE)

Nagoya University, Japan

Corporate Responsibility to Respect Human Rights

Challenges and Opportunities for Europe and Japan

Prof. Jörg Polakiewicz

Directorate General of Human Rights and Rule of Law,

Council of Europe

Corporate Responsibility to Respect Human Rights – Challenges and Opportunities for Europe and Japan

Jörg Polakiewicz¹

Contents

Preface.....	3
Abstract.....	4
Introduction.....	5
The existing standards for the accountability of business enterprises for human rights abuses.....	7
International human rights treaties.....	7
Introduction.....	7
Case-law under the European Convention on Human Rights	8
European Social Charter	19
Bioethics	20
Data Protection.....	20
Criminal responsibility of business enterprises	21
Civil suits against business enterprises	23
United States of America	23
Europe	29
Conclusions on existing standards	31
Action by international organisations and institutions.....	33
United Nations	33
UN Global Compact	34
Guiding Principles on Business and Human Rights (Guiding Principles)	35
International Labour Organisation (ILO).....	37
Children’s Rights and Business Principles	38

¹ Professor at the *EuropaInstitut* of the University of Saarbrücken and Head of the Human Rights Policy and Development Department, Directorate General of Human Rights and Rule of Law, Council of Europe. This report was written in a strictly personal capacity and does not necessarily reflect the official position of the Council of Europe.

International Organization for Standardization (ISO)	38
Organisation of Economic Co-operation and Development (OECD)	39
Council of Europe	41
European Union	43
Corporate social responsibility and human rights in Japan	44
Origins.....	44
Modern CSR and human rights.....	45
Government initiatives.....	49
Human rights under national law	50
Conclusion	53
Challenges and opportunities for further action at regional and national level	55
The UN framework as a common baseline for future work	55
Complementary action by OECD and ISO	57
The implementation gap	60
Human rights due diligence	62
Transparency.....	64
Responsibility of parent companies regarding subsidiaries and contractors	66
Supply chain issues.....	68
Contract law	68
Responsibilities of financial actors and institutions.....	70
Civil and criminal liability of corporations.....	72
Conclusions and recommendations.....	75
Conclusions.....	75
Recommendations.....	78
Annex - Bibliography	78
Articles and books.....	78
Reports by the SRSG	82

Preface

The present paper was prepared during a two-months stay at Nagoya University (July-August 2012). During that time, I carried out the following interviews

- 23 July: Mr Toru Shimizu, Director and Ms Emi Mashiko, OECD Division, Ministry of Foreign Affairs; Ms Namiko Yamashita, Human Rights and Humanitarian Affairs Division, Ministry of Foreign Affairs; Ms Miyuki Hayashi, Economic and Industrial Policy Bureau, Corporate Accounting, Disclosure and CSR Policy Office, Ministry of Economy, Trade and Industry;
- 3 August: Ms Tomoko Sasaki, Group Manager, CSR Planning Group, CSR Implementation Office, Toshiba Corporation, Tokyo;
- 20 August: Mr Yoshitsugu Asai, Managing Executive Officer, Mr Hidemi Asai, General Manager, Mr Shun Kanishima, Manager, both Legal & General Affairs Department, Brother Industries Ltd., Nagoya.

I am grateful to all interviewees for their openness and the information provided. At the invitation of Prof Katsuhiko Kokubu, I participated in a seminar organised by Kobe University on 22 August 2012, which was a highly appreciated opportunity to discuss some of the findings of my report with Japanese scholars.

The paper was presented at Nagoya University on 31 August 2012, later developments are not taken into account. All indicated websites have been consulted during the month of August 2012.

I am indebted to Prof Katsuya Ichihashi and Prof Masanori Aikyo, who invited me to Nagoya and were helpful in many ways. I would also like to thank Prof Akiko Ejima and Prof Kaoru Obata who commented parts of my report, as well as Prof Sheldon Leader (Essex University) for valuable material and Ms Sana Hussein for assistance in the research. The responsibility for any errors, omissions or inconsistencies remains fully mine.

Jörg Polakiewicz

Nagoya, 31 August 2012

Abstract

The paper provides an analysis and overview over the existing human rights standards relating to business, focusing on the European Convention on Human Rights and selected other international treaties. It also analyses existing law and practice regarding civil and criminal liability of corporations, in particular in Europe and the United States of America, where the US Supreme Court is about to give a what could become a landmark judgment on the accountability of corporations for human rights abuses in the case of *Kiobel v. Royal Dutch Petroleum*.

The paper then presents and critically reviews the initiatives taken so far by the United Nations, the ISO, the OECD, the European Union and the Council of Europe in the field of corporate social responsibility for human rights abuses. In this context, the paper also analyses Japan's law and business practices in this field. With its deep-rooted experience of socially responsible business and worldwide operating corporations, Japan has a lot to contribute to bringing the CSR agenda forward.

The UN Framework and Guiding Principles on business and human rights brought about a paradigm shift. They present for the first time globally agreed standards, which have been taken up by other intergovernmental organisations, governments and business. Their sometimes abstract character was the price for worldwide acceptance. Despite valuable action already taken, in particular by the OECD and the ISO, the Guiding Principles need to be further developed to increase their value to individual States and businesses. This will require concerted multistakeholder action at international, regional and national level.

The paper highlights the importance of human rights due diligence as a key concept whose effective implementation presents advantages for businesses, individuals and communities at large. The introduction of human rights impact assessment in the project management process coupled with regular reporting would be a major step towards establishing human rights protection as a core business concern. For both impact assessment and reporting, however, more guidance is needed, in particular on the requirements of corporate due diligence, the responsibility of parent companies regarding their subsidiaries and supply chain, contract law and the role of financial actors and institutions.

The issue of effective remedies capable of providing redress for victims of corporate human rights abuses requires further action by governments. The OECD's national contact point mechanism is an important tool to raise cases of corporate human rights abuses. It is, however, not an effective remedy for victims. There are good reasons to introduce some form of civil and/or criminal law liability of corporations for human rights abuses, though regulation at national and/or international level raises a number of difficult questions.

Introduction

Human rights and business is a highly topical issue. The debate concerning the responsibilities of business enterprises in relation to human rights became prominent in the 1990s, as oil, gas, and mining companies expanded into zones of armed conflict or weak governance, and as the practice of offshore production in clothing and footwear drew attention to poor working conditions in global supply chains. In today's globalised world, the State is no longer the main source of power. Multinational enterprises (MNEs) with revenues exceeding the GDP of many States have more influence over the life of ordinary people than many States do.²

Though different organisations have different definitions of 'corporate social responsibility' (CSR), there is much common ground. The focus is on strategies and mechanisms whereby a business monitors and ensures compliance with ethical standards, including human rights norms in order to produce a positive sustainable impact for both society and for the business. The concept of 'corporate responsibility to respect human rights' acknowledges the fact that the conduct of business enterprises has significant impacts on human rights. The question of their accountability for human rights abuses has been the subject of intense debate at both international and national level. Several major corporations have been accused of human rights abuses, frequently in the sphere of economic and social rights, either directly or in complicity, participating or benefitting from human rights violations by corrupt or weak governments, in particular in developing countries.³ MNEs often benefit from the operations of their third-country subsidiaries and contractors, while third-country victims encounter significant obstacles in obtaining effective redress. According to a study prepared by the University of Edinburgh in 2010 on the situation in Europe,⁴ the vast majority of alleged corporate human rights and environmental abuses had been committed by subsidiaries or contractors of European corporations that are domiciled or resident in the countries where the violations occurred.

It would, however, be wrong to assume corporate human rights abuses are limited to MNE's or 'extraterritorial conduct'. They also involve small and medium-sized enterprises and purely 'domestic' cases such as discrimination or interferences with the right to respect for private and family life. Recent cases involved acts which, if committed by State authorities, would have amounted to flagrant violations of the ECHR. Examples are the illicit hacking by journalists on a UK-based tabloid newspaper into the voicemails of an estimated several thousand people, among them celebrities as well as

² See J. Wouters & L. Chanet 'Corporate Human Rights Responsibility: A European Perspective' *Northwestern Journal of International Human Rights* 6 (2008), 262.

³ The 'Business and Human Rights Resource Centre' provides continuously updated information of alleged abuses, rebuttals, court cases and other developments, see <<http://www.business-humanrights.org/>>.

⁴ University of Edinburgh 'Legal framework for human rights and the environment applicable to EU enterprises when they operate outside the EU' (2010) (report prepared for the European Commission, available at <http://ec.europa.eu/enterprise/policies/sustainable-business/files/business-human-rights/101025_ec_study_final_report_en.pdf>.

relatives of crime victims and dead soldiers,⁵ or allegations that a European-based MNE infiltrated an informer from a security company into the Swiss branch of the international non-profit organisation ‘ATTAC’ which at the time was working on a critical book about that company.⁶

With the adoption of the ‘Guiding Principles on Business and Human Rights’⁷ by the UN Human Rights Council on 16 June 2011, there now exists a standard at the global level. The social responsibility standard ISO 26000:2010⁸ and the ‘OECD Guidelines for Multinational Enterprises’⁹ have already been aligned to the UN framework. Hailed as an unprecedented achievement by many, the UN framework has also been criticised for having fallen short of its potential, as it would merely mirror the status quo, instead of addressing the problem that “*states are so weak or unwilling to protect human rights and corporations are so comparatively strong or conveniently transnational to evade human rights responsibilities.*”¹⁰ Similarly, it has been observed that “*the major weakness of the OECD Guidelines is their unenforceability. The 2010 Update fails to address this issue.*”¹¹

This paper provides a critical analysis of what has been achieved so far. It also examines what options exist to complement the existing frameworks with initiatives at regional and national level, focusing on Europe and Japan. In Europe, we are at a defining moment for CSR policy, with both the European Union (EU) and the Council of Europe poised to propose further initiatives. The European Commission is to publish a report on EU priorities for implementation of the UN Guiding Principles by the end of 2012. Following the Parliamentary Assembly’s report on ‘Human rights and business’,¹² the Council of Europe is also considering various options for further action. With the European

⁵ See the special section on the BBC website on the ‘News of the World phone hacking scandal’ at <<http://www.bbc.co.uk/news/uk-11195407>>.

⁶ ‘*Spitzel-Affäre um Nestlé*’ (‘Spy case involving Nestlé’), Spiegel online 30 January 2012, at <<http://www.spiegel.de/wirtschaft/unternehmen/spitzel-affeere-um-nestle-das-war-klassisches-profiling-a-811608.html>>.

⁷ A/HRC/17/31 of 21 March 2011.

⁸ ISO 26000: 2010 Guidance on social responsibility, International Organization for Standardization.

⁹ *OECD Guidelines for Multinational Enterprises* (OECD Publishing 2011), <<http://dx.doi.org/10.1787/9789264115415-en>>.

¹⁰ Professor David Kinley quoted in Joint Committee on Human Rights ‘Any of our Business? Human Rights and the UK Private Sector’ (House of Commons London 2009), para. 94.

¹¹ Jernej Letnar Čerňič ‘The 2011 Update of the OECD Guidelines for Multinational Enterprises’ ASIL Insights 16/4 (February 10, 2012), at <<http://www.asil.org/insights120210.cfm>>.

¹² Doc. 12361 (27 September 2010), at <http://assembly.coe.int/Main.asp?link=/Documents/WorkingDocs/Doc10/EDOC12361.htm#P388_53806>.

Convention on Human Rights (ECHR), Europe possesses the most advanced regional system for the protection of human rights. But can the ECHR standards be used as a source for corporate human rights due diligence?

It is particularly interesting to compare the situation in Europe with that of Japan, a leading industrial nation, major investor overseas, member of the G8 and OECD, as well as observer with the Council of Europe. With a tradition of socially responsible trading dating back to the Edo era in the 18th century and a relationship between business and society specific to the Japanese context, this country is uniquely placed to contribute to the worldwide CSR debate.

The existing standards for the accountability of business enterprises for human rights abuses

International human rights treaties

Introduction

The idea of human rights protection, which has found its expression since the 18th century in bills of rights, constitutions and international human rights treaties, has primarily been developed and conceived for the relationship between citizens and State authorities. In a world where States were the only actors and subjects of international law, “*the public domain, the interstate sphere, and the realm of governance were largely coterminous.*”¹³ Under the existing international treaties, human rights are enforced against States through international mechanisms. Although already the preamble to the 1948 Universal Declaration of Human Rights imposed obligations to promote human rights “*on every individual and every organ of society*”, private, nonstate actors did not appear as direct addressees of human rights obligations.¹⁴

Over the years, there has been mutual influence between the national and international sphere. Fundamental rights and freedoms guaranteed in national constitutions have been taken up in international human rights treaties. Conversely, international treaties have committed States to adopting domestic legislation securing the enjoyment of human rights without discrimination, including from nonstate actors, or providing for the criminalisation of certain private behaviour which is an affront to human dignity or undermines basic values of a democratic society (e.g. terrorist acts, trafficking in human beings, rape or violence against children and women).

On the basis of extensive analyses, Philip Alston summarised in 2005 the received wisdom on human rights and nonstate actors in the following terms: “*(i) the international legal framework is and will remain essentially state-centric; (ii) there is a very limited formal role for other international actors, although their participation in international*

¹³ J. Ruggie ‘Reconstituting the Global Public Domain – Issues, Actors, and Practices’ *European Journal of International Relations* 10 (2004), at 505.

¹⁴ Article 30 of the Universal Declaration of Human Rights and Article 17 ECHR contain a rule of interpretation which refers to the duty of individuals and groups not to engage in activities aimed at the destruction of any of the rights set forth in these treaties.

*decision-making processes is often desirable; (iii) transnational corporations should perhaps accept some moral obligations; but (iv) they have no clear legal obligations to respect human rights apart from compliance with the law of the particular country in which they are operating.*¹⁵ In 2003, Christian Tomuschat came to similar conclusion:

*“It is true that in particular in developing countries transnational corporations bear a heavy moral responsibility because of their economic power, which may occasionally exceed that of the home State. But on the level of positive law, little, if anything has materialized.”*¹⁶

In 2006, Andrew Clapham pleaded in favour of applying human rights in the private sphere. In the introduction to his comprehensive analysis on human rights obligations of nonstate actors, he declared that “[t]he legal argument developed throughout this book is that customary international law, international treaties, and certain non-binding international instruments already create human rights responsibilities for non-state actors.”¹⁷ Clapham called for a radical rethink of the traditional approach to the subjects of international law and suggested that international law can bind any entity that has the capacity to bear the relevant obligations. However, a closer reading of his book revealed only rather limited evidence for the existence of binding obligations of nonstate actors, mainly as regards international crimes. For the most part, Clapham argued *de lege ferenda*.

What is the current state of European human rights law? The following chapter will examine the existing case-law under the European Convention on Human Rights (ECHR), which is the most developed international human rights protection mechanism, as well as selected other human rights treaties. The analysis will not only present case-law regarding directly human rights obligations of business enterprises, but also case-law regarding state obligations which may be of use for the development of standards in the field of human rights and business.

Case-law under the European Convention on Human Rights

Convention rights have no direct third-party effect, but entail positive (State) obligations

Under the Convention, both individual and inter-State applications can only be brought against States. Any applications against individuals or companies are systematically rejected *ratione personae*. Responsibility under the Convention can only arise from State behaviour, action or omission. Application against business enterprises would be inadmissible as being incompatible *ratione personae* with the Convention provisions (Article 35 § 3 (a) ECHR). The Court has not recognised the principle of direct third-

¹⁵ P. Alston in P. Alston (ed.) *Non-State Actors and Human Rights* (Oxford University Press 2005), at 35-36.

¹⁶ *Human Rights: Between Idealism and Realism* (Oxford University Press 2003), at 90-91.

¹⁷ A. Clapham *Human Rights Obligations of Non-State Actors* (Oxford University Press 2006), at 21.

party effect (*unmittelbare Drittwirkung*), according to which human rights may be considered as not only enforceable against the State, but also directly against other natural or legal persons.¹⁸

However, the Court has for a long time recognised that the Convention entails positive obligations on the part of the State to protect human rights and to provide remedies for human rights abuses by private individuals. The Convention creates obligations for States which may involve the adoption of measures “*even in the sphere of the relations of individuals between themselves.*”¹⁹ Such positive obligations extend to protective, preventive, and affirmative action which may entail the adoption of measures (legislative, policy, deployment of resources) to ensure that rights can be freely exercised without interference from private individuals. It may also require changes in domestic policy and legislation. In the *Case of Moldovan and Others v. Romania*,²⁰ the Court summarised the existing case-law regarding articles 3 and 8 ECHR as follows:

“93. *The Court has consistently held that, although the object of Article 8 is essentially that of protecting the individual against arbitrary interference by public authorities, it does not merely compel the State to abstain from such interference. There may, in addition to this primary negative undertaking, be positive obligations inherent in an effective respect for private or family life and the home. These obligations may involve the adoption of measures designed to secure respect for these rights even in the sphere of relations between individuals (see X and Y. v. the Netherlands, judgment of 26 March 1985, Series A no. 91, p. 11, § 23).*

94. *In addition, the acquiescence or connivance of the authorities of a Contracting State in the acts of private individuals which violate the Convention rights of other individuals within its jurisdiction may engage the State’s responsibility under the Convention (see Cyprus v. Turkey [GC], no. 25781/94, ECHR 2001-IV, § 81). A State may also be held responsible even where its agents are acting ultra vires or contrary to instructions (see Ireland v. the United Kingdom, judgment of 18 January 1978, Series A no. 25, p. 64, § 159).*

95. *A State’s responsibility may be engaged because of acts which have sufficiently direct repercussions on the rights guaranteed by the Convention. In determining whether this responsibility is effectively engaged, regard must be had to the subsequent behaviour of that State (see Ilaşcu and Others v. Moldova and Russia [GC], no. 48787/99, §§ 317, 382, 384-85 and 393, ECHR 2004-...).*

96. *Further, the Court has not excluded the possibility that the State’s positive obligation under Article 8 to safeguard the individual’s physical integrity may extend to questions relating to the effectiveness of a criminal investigation (see*

¹⁸ So already A. Clapham *Human Rights in the Private Sphere* (Oxford University Press 1993), at 180.

¹⁹ *X and Y v. the Netherlands*, European Court of Human Rights, Series A no. 91, § 23 (1985)

²⁰ Judgment No. 2 of 12 July 2005 (nos. 41138/98 and 64320/01).

Osman v. the United Kingdom, judgment of 28 October 1998, Reports 1998-VIII, p. 3164, § 128).

97. Whatever analytical approach is adopted – positive duty or interference – the applicable principles regarding justification under Article 8 § 2 are broadly similar (see *Powell and Rayner v. the United Kingdom*, judgment of 21 February 1990, Series A no. 172). In both contexts, regard must be had to the fair balance that has to be struck between the competing interests of the individual and of the community as a whole. In both contexts the State enjoys a certain margin of appreciation in determining the steps to be taken to ensure compliance with the Convention (see *Hatton and Others v. the United Kingdom [GC]*, no. 36022/97, § 98, ECHR 2003-VIII; *Rees v. the United Kingdom*, judgment of 17 October 1986, Series A no. 106, p. 15, § 37, and *Leander v. Sweden*, judgment of 26 March 1987, Series A no. 116, p. 25, § 59). Furthermore, even in relation to the positive obligations flowing from Article 8 § 1, in striking the required balance, the aims mentioned in Article 8 § 2 may be of relevance (see *Rees*, cited above, *loc. cit.*; see also *Lopez Ostra v. Spain*, judgment of 9 December 1994, Series A no. 303-C, p. 54, § 51).

98. The obligation of the High Contracting Parties under Article 1 of the Convention to secure to everyone within their jurisdiction the rights and freedoms defined in the Convention, taken together with Article 3, requires States to take measures designed to ensure that individuals within their jurisdiction are not subjected to ill-treatment, including ill-treatment administered by private individuals (see *M.C. v. Bulgaria*, no. 39272/98, §§ 149-50, ECHR 2004-...; *A. v. the United Kingdom*, judgment of 23 September 1998, Reports 1998-VI, p. 2699, § 22; *Z. and Others v. the United Kingdom [GC]*, no. 29392/95, §§ 73-75, ECHR 2001-V, and *E. and Others v. the United Kingdom*, no. 33218/96, 26 November 2002).

99. Article 3 of the Convention enshrines one of the most fundamental values of a democratic society. It prohibits in absolute terms torture or inhuman or degrading treatment or punishment, irrespective of the circumstances and the victim's behaviour (see, for example, *Labita v. Italy [GC]*, no. 26772/95, § 119, ECHR 2000-IV)."

While private actors may not *breach* the Convention in a way which would lead to the finding of a violation by the Court, the latter seems to accept that nonstate actors may *interfere* with the rights and freedoms guaranteed by the Convention.

In *Storck v. Germany* [2005], the applicant complained under Articles 5, 6 § 1 and 8 ECHR concerning her placement and medical treatment in private clinics and about the fairness of the ensuing proceedings. Following its traditional approach, the Court found that, as regards detention in a private clinic, only the failure by the State authorities to act in order to prevent violations of the right to liberty was relevant under the Convention. It did, however, not rule out that nonstate actors may interfere with the right to liberty:

"The Court recalls that the question whether the applicant's detention was in accordance with law and with a procedure prescribed by law only needs to be answered insofar as public authorities, notably the courts, have been directly

involved in the interference with the applicant's right to liberty as such ... In so far as the interference has been solely the result of acts by private persons ..., it falls outside the scope of the second sentence of Article 5 § 1 of the Convention. In this case, the mere fact that the State has failed in its general duty under the first sentence of Article 5 § 1 to protect the applicant's right to liberty entails a violation of Article 5."²¹

In *Siliadin v. France* [2005], the applicant submitted that French criminal law did not afford her sufficient and effective protection against the "servitude" in which she had been held by a family in France. The Court considered that Ms Siliadin, a minor at the relevant time, had been held in servitude within the meaning of Article 4 of the ECHR.²² The responsibility of the French State was engaged because the criminal-law legislation in force at the material time had not afforded the applicant specific and effective protection against the actions of which she had been a victim. It emphasised that the increasingly high standard being required in the area of the protection of human rights and fundamental liberties correspondingly and inevitably required greater firmness in assessing breaches of the fundamental values of democratic societies. In *Cyprus v. Turkey* [2001], the Court noted that "*that the acquiescence or connivance of the authorities of a Contracting State in the acts of private individuals which violate the Convention rights of other individuals within its jurisdiction may engage that State's responsibility under the Convention*" (emphasis added).²³ This appears to be the only case, however, where the Court has used the terms "violate" or "violation" in respect of a nonstate actor.

In cases involving private actors, social and economic rights often apply traditionally alongside Convention rights. A direct and full application of Convention rights, traditionally conceived for relationships between State authorities and individuals has sometimes been considered problematic. In the *Botta case*, the applicant complained of an impairment of his private life and the development of his personality resulting from the Italian State's failure to take appropriate measures to remedy the omissions imputable to the private bathing establishments allowing full access of disabled people to beach facilities. According to the Commission, the rights asserted by the applicant were social in character, concerning the participation of disabled people in recreational and leisure activities associated with beaches, the scope of which went beyond the concept of legal obligation inherent in the idea of 'respect for private life' contained in Article 8 § 1 of the ECHR. The Commission added, "*in any event, the social nature of the right concerned*

²¹ Judgment of 16 June 2005, § 110.

²² Judgment of 26 July 2005, see in particular § 89 "*Dans ces conditions, la Cour estime que limiter le respect de l'article 4 de la Convention aux seuls agissements directs des autorités de l'Etat irait à l'encontre des instruments internationaux spécifiquement consacrés à ce problème et reviendrait à vider celui-ci de sa substance. Dès lors, il découle nécessairement de cette disposition des obligations positives pour les Gouvernements, au même titre que pour l'article 3 par exemple, d'adopter des dispositions en matière pénale qui sanctionnent les pratiques visées par l'article 4 et de les appliquer en pratique (M.C. c. Bulgarie, précité, § 153)*" and § 145 "*La Cour constate qu'en l'espèce, la requérante, soumise à des traitements contraires à l'article 4 et maintenue en servitude, n'a pas vu les auteurs des actes condamnés au plan pénal.*"

²³ GC judgment of 10 May 2001, § 81.

*required more flexible protection machinery, such as that set up under the European Social Charter.*²⁴ In this field, fulfilment by States of their domestic or international legislative or administrative obligations depend on a number of factors, in particular financial ones allowing for a wide margin of appreciation regarding the choice of the means to be employed to discharge the obligations set forth in the relevant legislation. The Court basically endorsed the Commission's view, arguing that the right asserted by Mr Botta concerned "*interpersonal relations of such broad and indeterminate scope that there can be no conceivable direct link between the measures the State was urged to take in order to make good the omissions of the private bathing establishments and the applicant's private life.*"²⁵

The differences between the rights guaranteed respectively by the ECHR and the ESC should, however, not be exaggerated. Positive obligations of protection and effective guarantee are also inherent in many civil and political rights and some of the standards developed under the ESC may also be enforced under the Convention. In the case of *Wilson, the National Union of Journalists and Others v. the United Kingdom* [2002],²⁶ the Court relied on the relevant case-law of the European Committee of Social Rights and the ILO's Committee on Freedom of Association. The employer, the Daily Mail, had offered substantial pay rises for those employees who acquiesced in the termination of collective bargaining and were prepared to deal in future directly with the employers over their terms and conditions of employment. In the view of the House of Lords, the mere withholding of benefits, which, according to a majority of Law Lords, had not been motivated by the purpose of preventing, deterring or penalising union membership, was not prohibited under the relevant UK legislation.²⁷ The Strasbourg Court examined this case under Article 11 ECHR. Emphasising the importance of collective bargaining, which constituted "*an essential feature of union membership*"²⁸, it found:

"Under United Kingdom law at the relevant time it was, therefore, possible for an employer effectively to undermine or frustrate a trade union's ability to strive for the protection of its members' interests. The Court notes that this aspect of domestic law has been the subject of criticism by the Social Charter's Committee of Independent Experts and the ILO's Committee on Freedom of Association ... It considers that, by permitting employers to use financial incentives to induce employees to surrender important union rights, the respondent State failed in its positive obligation to secure the enjoyment of the rights under Article 11 of the

²⁴ European Commission of Human Rights, Report of 15 October 1996 (21439/93), § 36 "*En effet, pour autant que ces droits revêtent en premier lieu un caractère social, ils appellent des mécanismes de protection plus souples, notamment du genre de celui mis en place par la Charte sociale européenne.*"

²⁵ *Botta v. Italy* (application no. 21439/93), judgment of 24 February 1998, § 35.

²⁶ Judgment of 2 July 2002 (applications nos. 30668/96, 30671/96 and 30678/96).

²⁷ Judgment of 16 March 1995, [1995] 2 A.C. 454.

²⁸ *Wilson and Others* judgment, judgment of 2 July 2002, § 47.

Convention. This failure amounted to a violation of article 11, as regards both the applicant unions and the individual applicants."²⁹

In other cases, the Court adopted a more restrictive approach, accepting that Convention rights do not automatically trigger State responsibility for all interferences occurring in the private sphere. In the case of *Appleby and Others v. United Kingdom* [2003], local residents sought to exercise their right to freedom of expression by collecting signatures on a petition in a private shopping centre. The issue in question was of considerable importance to the residents of the town, but did not directly concern the owners of the shopping centre. The latter insisted that the centre is private property and that permitting citizens to gather signatures would violate their stance of strict neutrality on all political and religious issues. They were supported by the respondent government which rejected the claim that such gathering places for the citizenry could be considered to be 'quasi-public' land. The Court upheld the right of the private owners and dismissed the free speech claim brought by the citizens' group, stating *inter alia* that other means of exercising those rights were widely available on genuinely public land and in the media.³⁰ This judgment contrasts with the approach taken by the German Federal Constitutional Court in the *Fraport* case [2011].³¹ The Constitutional Court found that the area of protection of the freedom of assembly included Frankfurt Airport. The Court distinguished places of general traffic for communication purposes, which are open and accessible to the general public, from places the access to which is controlled individually and is only permitted for individual, restricted purposes. The airport area, though serving primarily specific functions related to air traffic, was deemed to be a public forum of communication where a variety of different activities and concerns can be pursued.

The territorial scope of the Convention

Further limits on the use of the Convention in cases relating to corporate human rights abuses result from its territorial scope of application.³² If such abuses occur outside the territory of the High Contracting Parties, the ECHR will only exceptionally apply.

While the concept of 'jurisdiction' in Article 1 ECHR is not necessarily restricted to the national territory of the High Contracting Parties, it is only in exceptional circumstances that the Court has accepted that acts or omissions performed or producing effects outside their territories can come within the Court's jurisdiction.³³ States are accountable under the Convention when they enact legislation of business activities that

²⁹ *Ibid.*, § 48.

³⁰ *Appleby and Others v. UK*, judgment of 6 May 2003, § 38.

³¹ Judgment of 22 February 2011, 1 BvR 699/06.–

³² Compare O. De Schutter 'The Accountability of Multinationals for Human Rights Violations in European Law' Center for Human Rights and Global Justice Working Paper 01/04 (2004), 16-21.

³³ See, among others, *Al-Skeini and Others v. the United Kingdom* [GC], §§ 131 et seq.; *Issa and Others v. Turkey*, judgment of 16 November 2004, §§ 68 and 71; *Isaak v. Turkey*, decision of admissibility of 28 September 2006; *Ilaşcu and Others v. Moldova and Russia* [GC], §§ 314 and 318.

directly violates Convention rights outside their territory. In *Kovacic*, Croatian applicants complained that they were prevented by a Slovenian law from withdrawing funds from their accounts in the Croatian branch of a Slovenian bank. The Court found “*that the acts of the Slovenian authorities continue to produce effects, albeit outside Slovenian territory, such that Slovenia’s responsibility under the Convention could be engaged.*”³⁴

The ECHR also applies where Contracting Parties exercise effective overall control over a foreign territory, or authority and control over individuals outside their own territory. However, this case-law applies only to acts or omissions by state organs. As explained above, the conduct of private business enterprises as such does not give rise to responsibility under the Convention. It is only the State that can be held accountable if its organs failed to act (e.g. for failure to prosecute or to grant compensation for human rights abuses). It must therefore be concluded that the Convention does not generally require High Contracting Parties to exercise control on the conduct abroad of business enterprises incorporated under the High Contracting Parties’ laws or having their headquarters in their territories, even when such conduct leads to human rights abuses.³⁵

State accountability for failure to protect individuals from adverse human rights impacts resulting from the activities of companies

In numerous judgments, the Court found that States had failed to meet their positive obligations to protect individuals from the effects of certain activities by private actors.³⁶

A good example are environmental pollution cases, where the Court examines whether a fair balance between the applicant’s right to respect for private and family life and the economic well-being of the country has been struck.³⁷ In *López Ostra v. Spain* [1994],³⁸ the Court found that the nuisance and health problems caused by a neighbouring private waste-treatment plant (built on State property and funded with State subsidies) had disproportionately interfered with the applicants’ rights under Article 8 ECHR. In *Taşkin and Others v. Turkey* [2004],³⁹ the Court found that a private gold mining company had polluted the local environment to an extent that the State’s failure to protect the applicants, residents in the neighbouring area, amounted to a Convention violation. In *Fadeyeva v. the Russian Federation* [2005],⁴⁰ the Court found that the State had violated

³⁴ *Kovacic and Others v Slovenia* (admissibility decision of 1 April 2004), at 34; the case was struck out at the merits stage due to new facts that had come to the Court’s attention.

³⁵ De Schutter above note 32, at 17.

³⁶ See generally E. Fura-Sandstrom ‘Business and human rights – who cares?’ in L. Caflisch (ed.), *Human Rights: Strasbourg Views* (N.P. Engel Verlag Kehl 2007), 159-176.

³⁷ For a comprehensive presentation of the Court’s case-law see the ‘Manual on human rights and the environment’ (Council of Europe publishing, second edition 2012), available at <http://www.coe.int/t/dghl/standardsetting/hrpolicy/Other_Committees/GT-DEV-ENV_docs/Manual_Env_2012_nocover_Eng.pdf>.

³⁸ *López Ostra v. Spain* (no. 16798/90), judgment of 9 December 1994.

³⁹ *Taşkin and Others v. Turkey* (no. 46117/99), judgment of 10 December 2004.

⁴⁰ *Fadeyeva v. the Russian Federation* (no. 55273/00), judgment of 9 June 2005.

its positive obligations to take reasonable and appropriate measures to secure the applicant's right under Article 8 ECHR in view of heavy pollution from a neighbouring steel plant owned and operated by a private corporation. Pollution levels from the plant had for many years exceeded permitted levels and had caused the applicant severe health problems.

“The Court notes that, at the material time, the Severstal steel plant was not owned, controlled, or operated by the State. Consequently, the Court considers that the Russian Federation cannot be said to have directly interfered with the applicant's private life or home. At the same time, the Court points out that the State's responsibility in environmental cases may arise from a failure to regulate private industry. Accordingly, the applicant's complaints fall to be analysed in terms of a positive duty on the State to take reasonable and appropriate measures to secure the applicant's rights under Article 8 § 1 of the Convention. ...

The Court concludes that the authorities in the present case were certainly in a position to evaluate the pollution hazards and to take adequate measures to prevent or reduce them. The combination of these factors shows a sufficient nexus between the pollutant emissions and the State to raise an issue of the State's positive obligation under Article 8 of the Convention.”⁴¹

Other judgments concerned the right to join or not to join a trade union (Article 11 ECHR), e.g. *Young, James and Webster v. UK*, *Wilson & the National Union of Journalists and Others v. the United Kingdom* [2002] or *Sørensen v. Denmark and Rasmussen v. Denmark* [2006]. In the latter judgment, the Court found that a person must not be dismissed for refusing to become a member of a trade union. Both applicants had been compelled to join a trade union, “*which struck at the very substance of the freedom of association guaranteed by Article 11.*”⁴²

Further examples are corporal punishment in private schools (*Costello-Roberts v. the United Kingdom* [1993]⁴³), nuisance from private airplanes in respect of an airport whose authority had been privatised (*Powell and Rayner v. the United Kingdom* [1990]) or ill-treatment in private psychiatric institutions. Such institutions, where persons are held without a court order, need not only a licence, but competent supervision on a regular basis of the justification of the confinement and medical treatment.⁴⁴ In such cases, the relevant context for the Court remains the role of the State. Applicants need to show that the abuse would definitely have been prevented if the competent State authorities had taken the measures which could have been reasonably expected of them at the time.⁴⁵

⁴¹ *Fadeyeva, ibid.*, §§ 89, 92.

⁴² *Sørensen & Rasmussen v Denmark*, GC judgment of 11 January 2006.

⁴³ *Costello-Roberts*, judgment of 25 March 1993, Series A no. 247-C.

⁴⁴ *Storck v. Germany*, judgment of 16 June 2005, § 103.

⁴⁵ See e.g. *E. and Others v. UK*, judgment of 26 November 2002, §§99-100 and Clapham above note 17, 373.

Companies that are State-controlled or performing public functions

Companies that are owned or controlled by the State and/or exercise State functions constitute a special category, where the State itself can be held directly responsible under the ECHR.⁴⁶ The Court emphasised on several occasions that the State cannot absolve itself entirely from its responsibility by delegating its obligations to secure the rights guaranteed by the Convention to private bodies or individuals.⁴⁷ The Court uses a combination of criteria to determine on a case-by-case basis whether a corporation acted as an agent of the state, including

- the corporation's legal status (under public law/separate legal entity under private law);
- the rights conferred upon the corporation by virtue of its legal status (e.g. conferral of rights normally reserved to public authorities);
- institutional independence (including state ownership);
- operational independence (including *de jure* or *de facto* state supervision and control);
- the nature of the corporate activity ('public function' or 'ordinary business', including delegation of core state functions to private entities);
- the context in which the corporate activity is carried out (e.g. relevance of the activity for the public sector, monopoly position in the market).⁴⁸

Review of domestic court decisions intervening in judicial proceedings involving business enterprises

Judgments where the Court reviews national court decisions in private law disputes between individuals and companies can be an important source of human rights due diligence principles. Such cases often concern competing rights, such as freedom of expression and the right to respect for private life. When deciding whether the domestic courts violated the Convention by not giving sufficient weight or consideration to one of the rights at stake, the Court must address the question how competing rights of individuals and companies should be reconciled. Though its judgments will formally always focus on a Convention breach by state authorities, in such cases usually the courts but also state-owned enterprises, the principles developed therein can be used as a source of corporate human rights standards.

⁴⁶ Edinburgh report above note 4, para. 53 gives an overview over the criteria used in different EU member States to determine whether corporations can be considered state agents, usually by virtue of state ownership and control, by virtue of exercising public functions, or by virtue of a combination of both.

⁴⁷ *Van der Musselle v. Belgium*, judgment of 23 November 1983, Series A no. 70, pp. 14-15, §§ 28-30; *Costello-Roberts v. UK*, 1993, Series A no. 247-C, § 27; *Storck v. Germany*, judgment of 16 June 2005, § 103.

⁴⁸ Edinburgh report above note 4, para 54; see e.g. *Yershova v Russia*, judgement of 8 April 2010, §§ 55-58.

Examples are *Markt Intern Verlag GmbH and Klaus Beermann v. Germany* [1989] concerning restrictions to make certain statements under Germany's unfair competition legislation or *Steel and Morris v. UK* [2005]⁴⁹ concerning the non-availability of legal aid in defamation proceedings brought by a multinational corporation (McDonald's) against NGO campaigners in the UK. In the latter case, the Court found that the absence of legal aid amounted to a disproportionate interference with the applicants' freedom of expression rights, pointing to the importance to a democratic society of even small and informal campaign groups disseminating information and fostering public debate, including in relation to the activities of powerful commercial concerns. According to the Court, "*the disparity between the respective levels of legal assistance enjoyed by the applicant and McDonald's was of such a degree that it could not have failed, in this exceptionally demanding case, to have given rise to unfairness.*"⁵⁰

Good illustrations for the potential of the Court's case-law as a source for corporate human rights standards are the already mentioned cases relating to the protection of the environment and the conflict between privacy and freedom of expression. In pollution cases, the main rights at stake are the right to life, respect for private and family life as well as the home, protection of property, rights to information as well as participation in the decision-making processes in environmental matters. The recently updated 'Manual on human rights and the environment' (2012) contains a comprehensive presentation of the Court's case-law.⁵¹

The Court's case-law on privacy and media freedom is particularly developed and nuanced. In two Grand Chamber judgments of 7 February 2012, *Axel Springer AG v. Germany* and *Von Hannover v. Germany (no. 2)*, the Court set out the criteria relevant for the balancing act between Articles 8 and 10 ECHR, thereby delineating the extent to which media companies may interfere with privacy rights. In *Axel Springer AG v. Germany* [GC], the applicant company complained about the injunction imposed on it against reporting on the arrest and conviction of X for the possession of drugs. In *Von Hannover v. Germany (no. 2)* [GC], the individual applicants complained of the refusal by the German courts to grant an injunction against any further publication of the photo that had appeared on 20 February 2002 in the magazines *Frau im Spiegel*. In the first case the complaint was brought by a publishing company and in the second by a well-known public figure. In both cases, the Court considered that the outcome of the application should not vary according to whether it had been lodged under Article 10 ECHR by the publisher who has published the offending article or under Article 8 of the Convention by the person who was the subject of that article. Indeed, as a matter of principle both rights deserved equal respect and the margin of appreciation allowed to domestic courts should in principle be the same in both cases. The Court explained in some detail with reference to the relevant case-law the following criteria which should be applied in the balancing test:

- Contribution to a debate of general interest;

⁴⁹ Judgment of 15 February 2005 (6841601).

⁵⁰ *Ibid.*, § 69.

⁵¹ Above note 37.

- How well known is the person concerned and what is the subject of the report?;
- Prior conduct of the person concerned;
- Content, form and consequences of the publication;
- Circumstances in which the photos were taken;
- Severity of the sanction imposed.

Other examples include cases concerning the rights to freedom of religion and freedom from discrimination at work.⁵² Finally, the Court may also address the issue of corporate human rights abuses in judgments dealing with an alleged lack of effective remedies against human rights abuses by private companies. Applicants may rely on Article 13 ECHR (right to an effective remedy) to complain that there is no avenue to effectively review the governmental policy which has led to the interference with human rights by nonstate actors. Here again cases concerning environmental pollution provide numerous examples (e.g. with regard to aircraft noise *Hatton and Others v. UK* [2003]).⁵³

Criminal responsibility of private actors

The most serious forms of abuses committed by nonstate actors may give rise to criminal responsibility. The Court recognised that States may have a duty to protect individuals from other individuals' actions where such actions threaten rights under the Convention. In the case of serious abuses, such as rape, sexual assault or murder, effective deterrence may require the establishment of criminal offences.⁵⁴ States are under an obligation to secure the right to life by putting in place effective criminal-law provisions to deter the commission of offences against the person and that these provisions must be backed up by law-enforcement machinery for the prevention, suppression and sanctioning of breaches of such provisions⁵⁵. However, the Court also acknowledged that Article 2 ECHR does not entail the right for an applicant to have third parties prosecuted or sentenced for a criminal offence or an absolute obligation for all prosecutions to result in conviction, or indeed in a particular sentence.⁵⁶

⁵² On 4 September 2012, the Court will be holding a hearing on four cases concerning practising Christians' complaints that UK law did not sufficiently protect their rights to freedom of religion and freedom from discrimination at work: *Chaplin v. the United Kingdom* (application no. 59842/10); *Eweida v. the United Kingdom* (no. 48420/10), *Ladele v. the United Kingdom* (no. 51671/10) and *McFarlane v. the United Kingdom* (no. 36516/10).

⁵³ Clapham above note 17, 420.

⁵⁴ See e.g. *X and Y v. the Netherlands*, judgement of 26 March 1986 or *M.C. v. Bulgaria*, judgment of 4 December 2003, §150, where the Court observed that "grave acts such as rape, where fundamental values and essential aspects of private life are at stake, requires efficient criminal-law provisions. Children and other vulnerable individuals, in particular, are entitled to effective protection."

⁵⁵ *Osman v. UK*, judgment of 28 October 1998.

⁵⁶ *Öneryildiz v. Turkey*, judgment of 30 November 2004; see also *Tanlı v. Turkey* judgment of 10 April 2001; *Perez v. France*, judgment of 12 February 2004.

European Social Charter

The European Social Charter (ETS 35, 1961) and the Revised European Social Charter (ETS 163, 1996) contain several provisions which have an impact on the relation between individuals and companies, for example:

- the right to safe and healthy conditions of work (Articles 2 and 3);
- the right to a fair remuneration sufficient for a decent standard of living (Article 4);
- the right to bargain collectively (Article 6);
- the right to social security (Article 12);
- the right to social and medical assistance (Article 13);
- right to equal opportunities and equal treatment in matters of employment and occupation without discrimination on the grounds of sex (Article 20);
- the right of migrant workers who are nationals of a Party and their families to protection and assistance in the territory of any other Party (Article 19);
- the right of workers to be informed and to be consulted within the undertaking (Article 21);
- the right to take part in the determination and improvement of the working conditions and working environment in the undertaking (Article 22);
- the right to protection in cases of termination of employment (Article 24);
- the right to protection of workers' claims in the event of the insolvency of their employer (Article 25);
- the right to dignity at work (Article 26);
- the right of workers' representatives in undertakings to protection against acts prejudicial to them and should be afforded appropriate facilities to carry out their functions (Article 28);
- the right to be informed and consulted in collective redundancy procedures (Article 29).

Case-law by the European Committee of Social Rights (ECSR) relating directly to obligations of business enterprises is sparse, since the provisions of the Charter are addressed to States, and not to private entities. Moreover, the ESC applies only to the “*metropolitan territory of each Party*.”⁵⁷

Similarly to the ECHR, the existing ESC case-law focuses on positive obligations of State authorities to protect citizens from the effects of activities of business enterprises. An example is *Marangopoulos Foundation v. Greece*, concerning lignite mining in Greece.⁵⁸ The ESCR found several violations regarding the right to protection of health as well as the rights to safe, healthy and just working conditions.

⁵⁷ Revised European Social Charter (CETS 163 1996), Part VI, Article L.

⁵⁸ ECSR, *Marangopoulos Foundation for Human Rights (MFHR) v. Greece*, Collective Complaint No. 30/2005, Case Document No. 1, 26 April 2005.

Bioethics

The Convention on Human Rights and Biomedicine (ETS No. 164, 1997) seeks to protect human beings with regard to the application of biology and medicine. Together with its Additional Protocol concerning Biomedical Research (CETS 195, 2005), which covers the full range of research activities in the health field involving interventions on human beings, as well as the Additional Protocol concerning Genetic Testing for Health Purposes (CETS 203, 2008), these treaties are of particular relevance for pharmaceutical companies as well as, to a lesser extent, for insurance companies.

Article 29 of the Additional Protocol concerning Biomedical Research deals specifically with research in third States and is of interest as regards extraterritorial human rights issues:

“Sponsors or researchers within the jurisdiction of a Party to this Protocol that plan to undertake or direct a research project in a State not party to this Protocol shall ensure that, without prejudice to the provisions applicable in that State, the research project complies with the principles on which the provisions of this Protocol are based. Where necessary, the Party shall take appropriate measures to that end.”

The Protocol’s explanatory report explains the rationale behind the provision:

“At present, considerable numbers of research projects are conducted on a multinational basis. Teams of researchers based in different States may participate in a single project. Further, internationally-based organisations may be able to choose the country in which a particular research project that they are conducting or funding is carried out. This has led to concerns being expressed about the possibility of fundamentally different standards of protection for participants being applied in different countries. In particular, concern has been expressed about the possibility of research that might be widely viewed as ethically unacceptable being carried out in another State where systems for the protection of research participants are less well established.”⁵⁹

Data Protection

The Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data (ETS 108, 1981) aims to secure in the territory of each Party for everybody respect for human rights (in particular the right to privacy) with regard to automatic processing of personal data. The Convention has a cross-cutting scope of application. Article 3 defines the scope of the Convention as follows:

“The Parties undertake to apply this convention to automated personal data files and automatic processing of personal data in the public and private sectors.”

Back in 1981, it was truly visionary to prepare a single set of principles to be applied to the public as well as the private sector. The explanatory report justifies this approach as follows:

⁵⁹ Explanatory report § 137.

“According to paragraph 1 the convention applies to the public as well as the private sector. Although most international data traffic occurs in the private sector, the convention is nevertheless of great importance for the public sector and this for two reasons. First, Article 3 imposes obligations on the member States to apply data protection principles even when they process public files – as is usually the case – entirely within their national borders. Secondly, the convention offers assistance to data subjects who wish to exercise their right to be informed about their record kept by a public authority in a foreign country.”⁶⁰

The EU’s 1995 data protection directive⁶¹ is based on the Convention and followed the same logic, applying its standards to both the public and private sector.

During the last thirty years, this reality has not changed, only the technical capacities to collect and analyse data have increased exponentially. Today it is possible for a company like Google to collect in real time almost all traffic data on the internet for commercial purposes, while a similar collection by public authorities for law enforcement purposes would be prohibited under the laws of many countries.

Criminal responsibility of business enterprises

Neither past nor present international criminal tribunals have recognised the criminal liability of legal persons such as companies.⁶² Article 25 § 1 of the Statute of the International Criminal Court (ICC) limits the latter’s jurisdiction to natural persons. The ICC preparatory committee and the Rome conference debated a proposal that would have given the Court jurisdiction over legal persons (other than States), but differences in national approaches prevented its adoption.⁶³ Various civil society groups remain in favour of the establishment of an international tribunal with jurisdiction over companies.⁶⁴ In the case of Truth Commissions, the involvement of companies in widespread human rights violations was addressed for example in the case of the South African Truth and Reconciliation Commission.

Several Council of Europe conventions require Parties to enact legislation to hold companies liable for criminal offences established under those treaties, such as Article 12

⁶⁰ Explanatory report, § 33.

⁶¹ Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data, Official Journal L 281 , 23/11/1995, 31.

⁶² See generally M. Kremnitzer ‘A possible case for imposing liability on corporations in international criminal law’ *Journal of International Criminal Justice* 8 (2010), 909.

⁶³ See the report of the International Federation of Human Rights (FIDH) ‘Corporate accountability for human rights abuses – A guide for victims and NGOs on recourse mechanisms’ (2012), at 273.

⁶⁴ *Ibid*; see also A. Clapham ‘The question of jurisdiction under international criminal law over legal persons’ in T. Kamminga & S. Zia-Zarifi (eds.) *Liability of Multinational Corporations Under International Law* (The Hague Kluwer 2000), at 173.

of the Convention on Cybercrime⁶⁵ or Article 18 of the Criminal Law Convention on Corruption.⁶⁶ In 1988, the Committee of Ministers recommended that member States give consideration to “*applying criminal liability and sanctions to enterprises, where the nature of the offence, the degree of fault on the part of the enterprise, the consequences for society and the need to prevent further offences so require.*”⁶⁷

While there is certainly a trend to extend criminal liability to corporations and other legal persons, national law approaches still vary considerably. Even within the European Union, there is no common regime. According to the study prepared by the University of Edinburgh in 2010, corporate criminal liability has been established in 17 Member States (Austria, Belgium, Denmark, Estonia, Finland, France, Hungary, Ireland, the Netherlands, Portugal, Slovenia, United Kingdom, Romania, Lithuania, Latvia, Malta and Cyprus). Sanctions vary from confiscation of proceeds to financial penalties. Non-criminal (administrative or civil) liability of legal persons, either as an alternative or in addition to criminal liability, is provided for in Austria, Czech Republic, Estonia, Finland, Germany, Greece, Italy, Slovenia and Spain. The most common sanctions include the prohibition of contracts with public authorities, the revocation of the authorisation to act in a specific area, or the obligation to pay damages.⁶⁸

Legal issues in this area are further complicated by the fact that a multinational company as such does not necessarily have legal personality, and that a parent company in Europe is a different legal person from its subsidiary operating elsewhere, even though in practice the former might give binding instructions to the latter. Therefore, the possibility of imposing criminal sanctions to parent companies which may *de facto* be responsible for human rights abuses (‘piercing the corporate veil’) vary considerably throughout European States.⁶⁹

The criminal responsibility of companies must be distinguished from the individual criminal responsibility of persons employed by them. For example, German industrialists have been convicted for human rights violations by British and US courts as well the Nuremberg Tribunal after the Second World War for slave labour or the production of Zyklon B gas used in concentration camps.⁷⁰ The International Criminal Tribunal for Rwanda has convicted a company owner for the logistical involvement of his company in

⁶⁵ CETS 185, 2001.

⁶⁶ CETS 173, 1999.

⁶⁷ Recommendation No. R (88) 18 of 20 October 1988 concerning liability for enterprises having legal personality for offences exercised in the exercise of their activities, para. I.3 (a) of the Annex to the Recommendation.

⁶⁸ Edinburgh report above note 4, para. 178; see also the FIDH report, above note 63, at 275 et seq.

⁶⁹ Edinburgh report above note 4, paras. 188 et seq.

⁷⁰ See D. Cassel ‘Corporate Aiding and Abetting of Human Rights Violations: Confusion in the Courts’ *Northwestern Journal of International Human Rights* 6 (2008), at 308-309.

the Rwandan genocide.⁷¹ Dutch courts convicted a businessman for supplying Saddam Hussein's regime in Iraq in the 1980s with chemicals, a conviction which was recently upheld by the European Court of Human Rights.⁷²

Civil suits against business enterprises

In several countries lawsuits have been introduced with a view to holding private corporations accountable for human rights violations in developing countries (e.g. Nigeria, Myanmar).⁷³ In many such litigations, victims and human rights groups have relied on the concept of corporate complicity in human rights violations to cover not only situations where corporations knowingly assist in illegal acts, but also where they benefit from the abuses committed by State authorities.⁷⁴

United States of America

The United States have a particularly rich experience of litigation relating to human rights abuses by multinational corporations in other countries. The legal basis for such claims is the Alien Tort Statute (ATS), a provision in the 1789 Judiciary Act, which provides jurisdiction 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.*”⁷⁵ The ATS became an instrument for human rights litigation in 1980 when the Court of Appeals for the Second Circuit applied it in a case brought by a two Paraguayan citizens against the police inspector who had tortured their son to death in Asunción (Paraguay). It awarded \$10.4 million in damages.⁷⁶

Since then, the ATS has been frequently applied, at first against individuals, but eventually also against corporations for a variety of injuries, ranging from torture to pollution and environmental damage to non-consensual medical experimentation, for example against the US company Unocal and the French company Total S.A. for human rights violations by the Burmese military regime, against the British Barclay's Bank for doing business with the apartheid regime in South Africa or against the Swiss company Nestlé for purchasing cocoa from farmers allegedly using child labour.⁷⁷ So far no

⁷¹ The Prosecutor v Ferdinand Nahimana Nahimana Jean-Bosco Barayagwiza Hassan Ngeze, Case No. ICTR-99-52-T, judgment of 3 December 2003.

⁷² *Van Anraat v. the Netherlands* (no. 65389/09), decision of 6 July 2010.

⁷³ The Business & Human Rights Resource Centre publishes regular updates on lawsuits worldwide, available at <<http://www.business-humanrights.org/media/documents/corporate-legal-accountability-annual-briefing-final-20-jun-2012.pdf>>.

⁷⁴ See Clapham above note 17, 252 et seq. and 563-564; R. Steinhardt ‘Corporate Responsibility and the International Law of Human Rights’ in P. Alston (ed.) *Non-State Actors and Human Rights* (Oxford University Press 2005), at 198-202.

⁷⁵ 28 U.S.C. § 1350 (2010).

⁷⁶ *Filartiga v. Pena-Irala*, 630 F.2d 876 (1980).

⁷⁷ See J. Slawotsky ‘Corporate Liability in Alien Tort Litigation’ *Virginia J. Int'l L. Online* 1 (2011), 27 et seq.

corporation has ever been condemned in court to pay damages. However, several cases proceeded on the assumption that corporations can be held liable under the ATS, regardless of where plaintiffs or defendants are based. Some cases were eventually settled out of court, others resulted in verdicts for the corporate defendants.⁷⁸ In March 2005, Unocal Corporation settled claims that had been brought against it and two of its senior executives. The company accepted to pay compensation and to enhance their educational human rights programmes.⁷⁹ More recently, Royal Dutch/Shell settled ATS claims brought against it by a group of plaintiffs led by the son of the Nigerian author and environmentalist Ken Saro-Wiwa.⁸⁰

The application of the ATS to corporations and the precise limits of the exercise of extraterritorial jurisdiction in their respect are currently subject of litigation before the US Supreme Court. The case of *Kiobel and others v. Royal Dutch Petroleum and others*⁸¹ has attracted unprecedented interest. NGOs, scholars and even foreign governments have submitted *amicus curiae* briefs. The outcome of the case may have ramifications for corporate responsibility well beyond the United States. The plaintiffs, Nigerian citizens, brought claims in 2002 for extrajudicial killing, torture, crimes against humanity, and prolonged arbitrary arrest and detention. They are suing Dutch, British and Nigerian corporations, accusing them of aiding and abetting the Nigerian government in violently suppressing protests against oil exploration and development activities in the Ogoni

⁷⁸ *Bowoto v. Chevron*, No. 3:99-cv-02506 (N.D. Cal.) (jury verdict reached on Dec. 1, 2008); *Estate of Rodriguez v. Drummond*, No. CV-03-BE-0575 (N.D. Ala.) (jury verdict reached on July 26, 2007).

⁷⁹ E.g. Unocal's tentative settlement agreement. According to the press release issued following the statement of the parties regarding the settlement, "*Unocal reaffirms its principle that the company respects human rights in all of its activities and commits to enhance its educational programs to further this principle*", *AJIL* 99 (2005), 498.

⁸⁰ See Ingrid Wuerth 'Wiwa v. Shell: The \$15.5 Million Settlement' *ASIL Insights* (September 9, 2009), at <<http://www.asil.org/files/insight090909pdf.pdf>>.

⁸¹ *Esther Kiobel, Individually and on Behalf of Her Late Husband, Dr. Barinem Kiobel, et al., Petitioners v. Royal Dutch Petroleum Co., et al.* The case has given rise to countless articles, see only Slawotsky above note 77; O. Murray, D Kinley & C Pitts 'Exaggerated Rumours of the Death of an Alien Tort?: Corporations, Human Rights and the Remarkable Case of 'Kiobel'' *Melbourne Journal of International Law* 12 (2011), 57-94; G Tyler & S. Farbstain 'How Kiobel Undermines the Nuremberg Legacy and Modern Human Rights' *Harvard Int'l Law J. Online* 52 (2010); D. Shapiro 'Kiobel and Corporate Immunity Under the Alien Tort Statute: The Struggle for Clarity Post-Sosa' *Harvard Int'l Law J.* 52 (2011); M. Danforth 'Corporate Civil Liability Under the Alien Tort Statute: Exploring Its Possibility and Jurisdictional Limitations' *Cornell Int'l Law Journal* 44 (2011), 659; A. Walker 'The Hidden Flaw in Kiobel Under the Alien Tort Statute the mens rea standard for corporate aiding and abetting is knowledge' *Northwestern University Journal of International Human Rights* 10 (2011), 119; C. Keitner 'Kiobel v. Royal Dutch Petroleum: Another Round in the Fight Over Corporate Liability Under the Alien Tort Statute' *ASIL Insights* 14 (Sept. 30, 2010), Issue 30; C. Vázquez 'Alien Tort Claims and the Status of Customary International Law' *American Journal of International Law* 106 (2012), 531-546; C. Bradley 'Attorney General Bradford's Opinion and the Alien Tort Statute' *American Journal of International Law* 106 (2012), 509-530.

region of the Niger Delta. The plaintiffs allege that the companies provided transport to the troops, allowed company property to be used as staging areas for attacks and provided food to the soldiers and paid them.

On 28 February 2012, the US Supreme Court held a hearing in the case, in which both the extraterritorial application of the ATS as well as the corporate liability under international law was debated. The Supreme Court specifically raised the question of “[w]hether and under what circumstances the Alien Tort Statute, 28 U.S.C. §1350, allows courts to recognize a cause of action for violations of the law of nations occurring within the territory of a sovereign other than the United States.”⁸² The Court will rehear the case during its next term (October 2012-June 2013).

When discussing the various arguments presented in this case and their relevance for international human rights law in general, it must be kept in mind that the ATS operates at the intersection of international and domestic US law. There appears to be some controversy over the question which body of law applies to the various aspects of an ATS case.⁸³

The argument whether or not international law recognises corporate liability has become relevant for *Kiobel* because of the Supreme Court’s previous judgment in *Sosa v. Alvarez-Machain*⁸⁴ concerning the abduction of a Mexican national by US drug enforcement agents in Mexico. In that case, totally unrelated to corporate liability, the Court examined *inter alia* which international law norms qualify to be used under the ATS. The Court required a norm of “content and acceptance among civilized nations” at least as definite as “the historical paradigms familiar when § 1350 was adopted,”⁸⁵ such as piracy or attacks on diplomats. A footnote added: “A related consideration is whether international law extends the scope of liability for a violation of a given norm to the perpetrator being sued, if the defendant is a private actor such as a corporation or individual.”⁸⁶

Using this precedent, the respondents argue that since, in their view, international law has never recognised corporate liability even for the most serious human rights abuses, any

⁸² *Kiobel v. Royal Dutch Petroleum Co., et al.*, 621 F.3d 11, order for reargument (U.S. Mar. 5, 2012), available at <<http://www.supremecourt.gov/orders/courtorders/030512zr.pdf>>.

⁸³ See the articles by Vázquez and Keitner above note 81.

⁸⁴ 542 U.S. 692 (2004).

⁸⁵ *Ibid.*, at 38.

⁸⁶ The full text of footnote 20 is as follows: “A related consideration is whether international law extends the scope of liability for a violation of a given norm to the perpetrator being sued, if the defendant is a private actor such as a corporation or individual. Compare *Tel-Oren v. Libyan Arab Republic*, 726 F. 2d 774, 791.795 (CA2 1984) (Edwards, J., concurring) (insufficient consensus in 1984 that torture by private actors violates international law), with *Kadic v. Karadzic*, 70 F. 3d 232, 239.241 (CA2 1995) (sufficient consensus in 1995 that genocide by private actors violates international law).”

action against corporations under the ATS would be precluded.⁸⁷ The plaintiffs reject this interpretation of *Sosa*, arguing that nothing in the text, history or purpose of the ATS suggests that the drafters had meant to exclude corporate entities from the tort liability recognised in the statute. They refer to case-law by the D.C., Seventh, Ninth and Eleventh Circuits who all held that corporations may be sued under the ATS.⁸⁸

In its judgment of 17 September 2010, the Court of Appeals for the Second Circuit followed the defendants and rejected outright the idea that corporations can be held liable under the ATS.⁸⁹ According to the Second Circuit, no source of international law has ever established that corporate liability is a customary international norm. In the majority's view, "*the fact that corporations are liable as juridical persons under domestic law does not mean that they are liable under international law (and, therefore, under the ATS).*"⁹⁰ In order for a violation to give rise to jurisdiction under the ATS, following *Filártiga*, "*the nations of the world [must] have demonstrated that the wrong is of mutual, and not merely several, concern.*"⁹¹ The majority therefore asked whether, under international law, it is wrong for a corporation to commit, or to aid and abet, violations such as "*war crimes, crimes against humanity (such as genocide), and torture.*"⁹² Because no international tribunal has ever held a corporation liable for violating customary international law, the majority concluded that international law violations by corporations do not give rise to subject matter jurisdiction under the ATS. The Second Circuit therefore dismissed all complaints for lack of subject matter jurisdiction, noting however that "*nothing in this opinion limits or forecloses suits under the ATS against the individual perpetrators of violations of customary international law - including the employees, managers, officer, and directors of a corporation - as well as anyone who purposefully aids and abets a violation of customary international law.*"⁹³

⁸⁷ Supplemental brief for respondents (1 August 2012), at <<http://www.business-humanrights.org/media/documents/shell-rehearing-brief-1-august-2012.pdf>>.

⁸⁸ Brief for the petitioners (14 December 2011), at <<http://harvardhumanrights.files.wordpress.com/2011/12/latestpetitionersbrief-ashx.pdf>>. On the historical background and first cases under the ATS see in particular Bradley above note 81; Slawotsky above note 77, at 34-35.

⁸⁹ *Kiobel v. Royal Dutch Petroleum Co.*, 621 F.3d 111 (2d Cir. 2010). A few days before the Second Circuit issued its opinion in *Kiobel*, a California district court reached the same conclusion. See *Doe I v. Nestle*, No. 2:05-cv-05133, at 121-60 (C.D. Cal. Sept. 8, 2010). The question of corporate liability was also discussed briefly during oral argument before the Ninth Circuit *en banc* in *Sarei v. Rio Tinto*, No. 02-56256 (argued Sept. 21, 2010), but other issues have thus far predominated in that case.

⁹⁰ *Ibid.* at 6 (majority opinion).

⁹¹ *Ibid.* (quoting *Filártiga*, 630 F.2d at 888).

⁹² *Ibid.* at 8.

⁹³ *Ibid.* at 11. On December 4, 2009, a three-judge panel consisting of Judges Cabranes, Hall, and Livingston spontaneously requested supplemental briefing on this issue in the pending appeal in *Balintulo v. Daimler AG*, No. 09-2778 (2d Cir.), framing the question as "whether customary international law recognizes corporate criminal liability."

The numerous briefs supporting the petitioners point to ample evidence for the existence of corporate liability for serious human rights violations of the kind alleged in *Kiobel*. The precedents most often cited, for example in International Law Scholars brief, are international conventions and agreement which require States Parties to establish criminal liability for legal persons for certain conduct.⁹⁴ Criminal liability under domestic law is, however, not necessarily evidence for the existence of responsibility for human rights violations under international law. Even as regards individuals, international law does not require States to impose civil liability for acts of torture or other violations of international law.

On this point, it may be more convincing to question the premise of the Second Circuit's majority opinion. Is it really compelling to interpret the phrase 'scope of liability' in footnote 20 to include the question of whether or not a named defendant can be a corporation or only a natural person? It has been argued that under the ATS international law merely governs the substance of the violation, while the attribution of liability remains entirely governed by domestic law. In that case, it would become irrelevant whether there is any treaty or case-law defining the actions of corporate entities as giving rise to liability under international law. As a matter of federal common law, courts would not be prevented from recognising "*that violations of international law committed by individual corporate employees render the corporation itself liable in damages to the injured party.*"⁹⁵

The absence of international case-law on corporate liability can easily be explained by the fact that all existing international human rights treaties formulate obligations only for the States that are Parties to them. None of the existing monitoring mechanisms foresees applications or petitions against corporations. However, this does not mean that business enterprises are under no obligation to respect human rights. The various human rights and business standards adopted by the UN and other international organisations as well as voluntary commitments by business itself provide ample evidence of a worldwide consensus on this matter.⁹⁶

⁹⁴ Brief of Amici Curiae International Law Scholars No 10-1491 (21 December 2011), at 11-13, at <http://www.americanbar.org/content/dam/aba/publications/supreme_court_preview/briefs/10-1491_petitioner_amcu_law_scholars.authcheckdam.pdf>.

⁹⁵ Vázquez above note 81, at 534. This appears also to be the view taken by the concurrence which referred to the early ATS case of *Hilao v. Estate of Marcos* (103 F.3d 767, 776-77 [9th Cir. 1996]) which involved the actions of an individual, but the legal consequences were borne by his estate, a juridical entity. The concurrence characterised corporate liability as a matter of "*the appropriate remedies to enforce the norms of the law of nations*", *ibid.* at 44 (Leval, J., concurring).

⁹⁶ See below Chapter 2 'Action by International Organisations and Institutions'. See also Brief for the United States as Amicus Curiae Supporting Petitioners, *Kiobel v. Royal Dutch Petroleum Co.*, No. 10-1491 (2012): "*At the present time, the United States is not aware of any international-law norm, accepted by civilized nations and defined with the degree of specificity required by Sosa, that requires, or necessarily contemplates, a distinction between natural and juridical actors*", at

The main argument in *Kiobel* is, however, about the limits for the exercise of extraterritorial jurisdiction. The Supreme Court may eventually dismiss the case on jurisdictional grounds, without having to embark on a detailed analysis of corporate liability under international law.

Various governments have intervened on this point. Their briefs are particularly interesting because they shed some light on the *opinio iuris* of intervening States. The country directly concerned, Nigeria, after having expressed some concern a decade ago, has apparently not objected since.⁹⁷ Argentina submitted a brief strongly in support of the *Kiobel* plaintiffs, arguing that tribunals using ATS to hear human rights cases “*were important sources of international assistance for victims during the darkest days of Argentina’s dictatorship and during its transition to democracy.*”⁹⁸ The brief underlines that concerns regarding ATS litigation “*are unfounded given the universal nature of the limited set of norms*” which can legitimately be invoked and “*the fact that virtually all nations have legislated them domestically.*” The European Commission also submitted an *amicus* brief⁹⁹ confirming that ATS jurisdiction over foreign violations is “*likely to encounter relatively little resistance in the international community*” so long as it is exercised consistent with universal jurisdiction. The Netherlands and the United Kingdom¹⁰⁰ as well as Germany¹⁰¹ on the other hand intervened to dismiss the petition, objecting to the “*overly broad assertions of extraterritorial jurisdiction.*” The respondents moreover refer to a note filed by Indonesia objecting to the exercise of ATS jurisdiction in another case.¹⁰² Finally, the United States initially supported the petitioners,¹⁰³ but eventually joined the respondents on the point of jurisdiction.¹⁰⁴ The

<http://www.americanbar.org/content/dam/aba/publications/supreme_court_preview/briefs/10-1491_petitioner_amcu_unitedstates.authcheckdam.pdf>.

⁹⁷ See the supplementary brief by the US government, at 17-18 <<http://sblog.s3.amazonaws.com/wp-content/uploads/2012/06/Kiobel-US-supp-brief-6-13-12.pdf>>.

⁹⁸ <http://www.americanbar.org/content/dam/aba/publications/supreme_court_preview/briefs/10-1491_petitioneramcugovtofargentinerepublic.authcheckdam.pdf>

⁹⁹ Available at <<http://www.sdshhlaw.com/pdfs/European%20Commission%20on%20Behalf%20of%20the%20European%20Union%20%28Revised%29.pdf>>.

¹⁰⁰ Available at <http://sblog.s3.amazonaws.com/wp-content/uploads/2012/02/4587212_1_UK-Netherlands-amicus-brief-ISO-respondents-filed-2-3-12-2.pdf>

¹⁰¹ Available at <http://www.americanbar.org/content/dam/aba/publications/supreme_court_preview/briefs/10-1491_respondentamcufederalrepublicofgermany.authcheckdam.pdf>.

¹⁰² Diplomatic Note No. 145/VI/05/05/DN from the Embassy of the Republic of Indonesia to the U.S. Department of State (June 15, 2005) (filed in *Doe VIII v. Exxon Mobil Corp.*, No. 01 Civ. 1357 (D.D.C. July 18, 2005).

¹⁰³ Above note 96.

¹⁰⁴ Supplemental Brief for the US (June 2012), at <http://opiniojuris.org/wp-content/uploads/4809838_1_10-1491-bssac-United-States.pdf>.

United States argues that, in certain circumstances in which a federal common law cause of action is created under the ATS for extraterritorial violations of the law of nations, doctrines like exhaustion, *forum non conveniens*, international comity, act of state, and related doctrines could be applied if the parties and conduct have little connection to the United States.

In *Kiobel*, the Nigerian plaintiffs are suing Dutch and British corporations for allegedly assisting the Nigerian military and police forces in committing violations of international law in Nigeria. International law tolerates for both the exercise of criminal and civil jurisdiction “a wide measure of discretion” by a State to “adopt the principles which it regards as best and most suitable”, of course within prescribed limitations.¹⁰⁵ While the Second Circuit’s ‘across-the-board approach’ barring all corporate ATS cases appears unjustified, it may be necessary to provide for some conditions for the exercise of extraterritorial jurisdiction in cases which present no substantial link to the forum State. ATS jurisdiction is already restricted to a number of universally accepted and specifically defined norms, precisely to avoid negative implications for the foreign relations of the United States. In purely ‘foreign cases’, where neither the facts, the plaintiffs nor the alleged perpetrators have substantial links to the US, it may be reasonable to require furthermore that foreign plaintiffs demonstrate that they have no possibility to pursue the matter in another jurisdiction with greater nexus. Such a condition would not unduly restrict access to US courts in human rights cases, while at the same time respecting the precedence of other jurisdictions with a closer nexus to the case, provided that these jurisdictions are capable of providing effective redress for the alleged violations.

Europe

At the European level, civil proceedings by individuals against business enterprises are usually governed by the provisions of the general statutes, the civil code or specific statutes regarding employees’ rights, women’s and children’s rights, consumer protection or data protection, health and safety matters.

Much fewer lawsuits have been brought against companies for human rights abuses committed abroad than in the United States.¹⁰⁶ In 2006, a group of about 30,000 claimants from Ivory Coast brought a case against the United Kingdom-based oil company *Trafigura* for injuries and deaths following the alleged dumping of toxic waste.

¹⁰⁵ S.S. *Lotus* (France v. Turkey), 1927 P.C.I.J. (ser. A) No. 10, at 19 (Sept. 7). See Vázquez above note 81, at 542-543; C. Ryngaert *Jurisdiction in International Law* (Oxford University Press 2008) at 9; Dan E. Stigall ‘International Law and Limitations on the Exercise of Extraterritorial Jurisdiction in U.S. Domestic Law’ *Hastings Int’l and Comp. L. Rev.* 35 (2012), at 331: “*The International Court of Justice has reaffirmed the enduring force of this rule as recently as 2010, noting that the rule articulated in Lotus remains a cornerstone of the international law of jurisdiction.*”

¹⁰⁶ See generally J. Wouters and C. Ryngaert ‘Litigation for overseas corporate human rights abuses in the European Union: the challenge of jurisdiction’ *The George Washington International Law Review* 40 (2009), 939.

The case was eventually settled out of court.¹⁰⁷ It was the largest class action in UK legal history, made possible under existing ‘no win no fee’ provisions which are currently under review. Another example are suits brought against Shell and its Nigerian subsidiaries in the United Kingdom¹⁰⁸ and the Netherlands¹⁰⁹ over devastating oil spills affecting Nigerian villages in 2008 and 2009.

The main barriers appear to be not only jurisdictional, but also resulting from costs and restricted access to legal aid, complex corporate structures, the lack of support for public interest litigation or mass tort claims, time limitations, and provisions on evidence.¹¹⁰ Universal civil jurisdiction is usually foreseen only in exceptional circumstances, for example on a ‘necessity basis’ (*forum necessitatis*) where the claimant has no other forum available and the forum State has a sufficient nexus to the dispute in order to protect against a denial of justice.¹¹¹ In several European countries, universal civil jurisdiction can also be exercised through *actions civiles* which can be brought within criminal proceedings. Most reported cases concern law suits against natural persons allegedly involved in human rights violations, such as extrajudicial killings within genocide context¹¹² or torture and inhumane treatment,¹¹³ rather than against corporations.

It should be noted, however, that all EU member States as well as Switzerland, Norway, and Iceland must recognise and enforce judgments for civil damages entered in any of the

¹⁰⁷ Details of the cases against Trafigura and the company’s responses (the world’s third largest independent oil trader) in the Ivory Case, the UK and the Netherlands, are available at <<http://www.business-humanrights.org/Categories/Lawlawsuits/Lawsuitsregulatoryaction/LawsuitsSelectedcases/TrafiguralawsuitsreCtedIvoire>>.

¹⁰⁸ ‘Shell in the dock over major oil spills in Nigeria’ (20 June 2012), at <<http://royaldutchshellplc.com/2012/06/20/shell-in-the-dock-over-major-oil-spills-in-nigeria/>>.

¹⁰⁹ Edinburgh report above note 4, para. 21 referring to a judgment by the Court of the Hague Civil Law Section 330891/HA ZA 09-579 (30 December 2009).

¹¹⁰ Edinburgh report above note 4, para. 167 referring to two studies on the Dutch and Polish legal systems, A.G. Castermans & J.A. van der Weide ‘The legal liability of Dutch parent companies for subsidiaries’ involvement in violations of fundamental, internationally recognised rights’ (15 December 2009); International Commission of Jurists ‘Access to Justice: Human Rights Abuses Involving Corporations - Poland’ (Geneva, 2010); for the UK see House of Commons. Joint Committee on Human. Rights ‘Any of our business? Human Rights and the UK private sector’ (HL Paper 5-I, HC 64-I, 16 December 2009), 86-88.

¹¹¹ See Arnaud Nuyts ‘Study on Residual Jurisdiction (Review of the Member States’ Rules concerning the “Residual Jurisdiction” of their courts in Civil and Commercial Matters pursuant to the Brussels I and II Regulations)’ General Report (final version dated 3 September 2007) chapter 16, 21, available at <http://ec.europa.eu/civiljustice/news/docs/study_residual_jurisdiction_en.pdf>.

¹¹² *Cour d’Assises* [Court of Assizes] Brussels, 5 July 2007, The case of the Major (Belgium).

¹¹³ *Rechtbank’s Gravenhage*, 21 March 2012, No. 400882/HA ZA 11-2252, El-Hojouj/Derbal et al. (the Netherlands).

other thirty States under the common rules¹¹⁴ established by the ‘Brussels I Regulation’ and the 2007 Lugano Convention.¹¹⁵ They are expressly prohibited from challenging the jurisdiction of the issuing State, even on grounds of public policy.¹¹⁶ As a result, even those States that do not recognise universal civil jurisdiction can be required to enforce a judgment rendered on such basis by courts of other States bound by the common regime. In *Owusu v. N.B. Jackson* [2005],¹¹⁷ the European Court of Justice held that a court of Contracting State State is precluded from declining the jurisdiction conferred on it on the ground that a court of a non-Contracting State would be a more appropriate forum for the trial of the action even if the jurisdiction of no other Contracting State is in issue or the proceedings have no nexus to any other Contracting State (*forum non conveniens*).

Conclusions on existing standards

The preceding analysis confirmed that existing human rights standards and their control mechanisms cannot be applied directly to the activities of business enterprises. In its General Comment 31, the UN Human Rights Committee concluded that obligations under the International Covenant on Civil and Political Rights (ICCPR) “do not...have direct horizontal effect as a matter of international law.”¹¹⁸

As the example of the ECHR shows, international treaties in this field are State-centred and their mechanisms cannot be used directly to hold business enterprises accountable. The Convention does not apply directly to private entities, nor is there any case-law so far requiring High Contracting Parties to control the activities of their MNEs operating abroad, even if they participate in or otherwise contribute to human rights abuses. Only where companies are owned or controlled by the State and/or exercise State functions, can the State itself be held responsible under the ECHR.¹¹⁹ States have a duty to adequately regulate the behaviour of nonstate actors to whom they have transferred State tasks. The State cannot absolve itself of its responsibility by delegating its obligations to

¹¹⁴ Fully harmonised rules cover cases where the defendant is domiciled in one of the governed States. National laws on jurisdiction currently still apply when the defendant is not domiciled within one of the governed States.

¹¹⁵ See Council Regulation 44/01 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters, 2001 O.J. (L 12) 1-17 (EC); Lugano Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters, Oct. 30, 2007, 2007 O.J. (L 339) 3.

¹¹⁶ Council Regulation 44/01, arts. 33 § 1, 35 § 3; Lugano Convention, arts. 33 § 1, 35 § 3.

¹¹⁷ European Court of Justice, *Andrew Owusu v. N.B. Jackson*, judgment of 1 March 2005, C-281/02.

¹¹⁸ Human Rights Committee, General Comment 31, Nature of the General Legal Obligation Imposed on States Parties to the Covenant, CCPR/C/21/Rev.1/Add.13 26 May 2004, at para. 8.

¹¹⁹ Edinburgh report above note 4, para. 53 gives an overview over the criteria used in different EU member States to determine whether corporations can be considered state agents, usually by virtue of state ownership and control, by virtue of exercising public functions, or by virtue of a combination of both.

secure the rights guaranteed by the Convention to private bodies or individuals.¹²⁰ It would indeed be unacceptable if, as a result of a State's shifting, for example, prison administration or schooling to the private sector, cases of inhuman or degrading treatment or punishment would go unpunished.¹²¹

International human rights treaties oblige States Parties to provide effective remedies, including compensatory relief, to victims of human rights violations whoever the actual perpetrator is.¹²² The ECHR in particular requires States to put into place effective criminal and civil remedy mechanisms for human rights abuses by private actors. International law permits a State to exercise extraterritorial jurisdiction over abuses committed abroad by corporations domiciled in its territory provided there is an internationally recognised basis, such as the actor or victim being a national, the acts having substantial adverse effects on the State, or where specific international crimes are involved.¹²³ However, no precise legal standards for either civil or criminal liability of corporations for human rights abuses have been established in either international or national law.¹²⁴ In the absence of enforceable norms, the unaccountability of business enterprises for adverse human rights impacts remains essentially unchallenged. Victims of corporate human rights abuses seeking redress through the courts face a series of legal and practical barriers, such as costs and legal aid, the lack of support for public interest litigation or mass tort claims, time limitations, and provisions on evidence.¹²⁵ In the case

¹²⁰ *Van der Musselle v. Belgium*, judgment of 23 November 1983, Series A no. 70, pp. 14-15, §§ 28-30; *Costello-Roberts v. UK*, 1993, Series A no. 247-C, § 27; *Storck v. Germany*, judgment of 16 June 2005, § 103.

¹²¹ The same idea was expressed by the SRSG in his 2010 Report A/HRC/14/27 (2010), para. 27 (“*where companies are owned by and/or act as mere state agents, the State itself may be held legally responsible for such entities’ wrongful acts*”) and the UN Human Rights Committee. After displaying its concern about “*the practice of a State party in contracting out to the private commercial sector core State activities which involve the use of force and detention of persons weakens the protection of rights under the Covenant*”, the Committee emphasised that a “*State party remains responsible in all circumstances for the adherence to all articles of the Covenant*”, comments of the HR Committee, CCPR/C/79/Add. 55 (1995).

¹²² See e.g. Article 14 of the Convention Against Torture (“*Each State Party shall ensure in its legal system that the victim of an act of torture obtains redress and has an enforceable right to fair and adequate compensation including the means for as full rehabilitation as possible*”); Article 6 of the International Convention on the Elimination of All Forms of Racial Discrimination, 660 U.N.T.S. 195 (requiring that State Parties assure, as part of “*effective protection and remedies*”, “*the right to seek from such tribunals just and adequate reparation or satisfaction for any damage suffered as a result of such discrimination*” in violation of human rights and fundamental freedoms under the Convention).

¹²³ J. Ruggie ‘Business and Human Rights – The Evolving International Agenda’ *American Journal of International Law* 101 (2007), at 829-830.

¹²⁴ Reinisch in P. Alston (ed.) *Non-State Actors and Human Rights* (Oxford University Press 2005), 66; Clapham above note 17, Chapter 6 ‘Corporations and Human Rights’, 195 et seq.

¹²⁵ Edinburgh report, above note 4, para. 167 referring to two studies on the Dutch and Polish legal systems, A.G. Castermans & J.A. van der Weide *The legal liability of Dutch parent companies for subsidiaries’ involvement in violations of fundamental, internationally recognised*

of abuses involving third-country subsidiaries or contractors, difficulties are exacerbated by jurisdictional barriers, complex corporate structures and command chains as well as the absence of agreed standards under which corporations can be held responsible for the extraterritorial effects of their activities harmful to human rights.¹²⁶

The rather restrictive scope of existing human rights treaties contrasts with developments in domestic law, where jurisdictions increasingly apply international human rights law as the law of the land, with the result that human rights norms have become relevant for corporations as well. As Andrew Clapham observed already in 2006, “*we may be witnessing a shift in emphasis,*”¹²⁷ with human rights being privatised. Likewise, the Venice Commission has argued that “[*t]he substance of the rule of law as a guiding principle for the future has to be extended not only to the area of cooperation between state and private actors but also to activities of private actors whose power to infringe individual rights has a weight comparable to state power.*”¹²⁸ It is therefore not surprising that the issue of corporate human rights responsibility has prompted a series of initiatives by various international organisations.

Action by international organisations and institutions

United Nations

In the United Nations several attempts have been made to hold such corporations accountable. In the past, such attempts had focused almost exclusively on the activities of transnational corporations (TNCs) and had been overshadowed by differences between developed and developing nations over sovereignty and natural resources. Some considered the idea of imposing direct human rights obligations on TNCs as a neo-colonial extension of power in conflict with the host country.¹²⁹

The UN Sub-Commission for the Protection and Promotion of Human Rights approved in August 2003 “Draft Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with regard to Human Rights”.¹³⁰ The Draft Norms sought to provide a succinct, but comprehensive restatement of the international legal principles applicable to businesses.¹³¹ The Draft Norms enumerated rights that appeared to be particularly relevant to business, including non-discrimination, the security of the person,

rights (15 December 2009); International Commission of Jurists, ‘Access to Justice: Human Rights Abuses Involving Corporations - Poland’ (Geneva, 2010).

¹²⁶ Edinburgh report, above note 4, paras. 167 et seq.

¹²⁷ Clapham above note 17, at 58.

¹²⁸ ‘Report on the Rule of Law’ CDL-AD(2011)003rev, para. 66.

¹²⁹ S. Kobrin ‘Private Political Authority and Public Responsibility: Transnational Politics, Transnational Firms, and Human Rights’ *Business Ethics Quarterly* 19 (2009), at 352.

¹³⁰ UN Doc. E/CN.4/Sub.2/2003/12/Rev.2 (2003).

¹³¹ See D. Weissbrodt and M. Kruger in P. Alston (ed.) *Non-State Actors and Human Rights* (Oxford University Press 2005), 315-350.

labour standards, and indigenous peoples' rights. While it allowed that not all internationally recognised rights apply to business, the Draft Norms provided no principled approach for making that determination referring merely to rather abstract notions of "primary versus secondary obligations" and "spheres of influence."¹³² The Commission on Human Rights declined to adopt the Draft Norms and requested the UN Secretary-General to appoint a Special Representative with the goal of moving beyond the stalemate and clarifying the roles and responsibilities of States, companies and other social actors in the business and human rights sphere. This more pragmatic approach eventually led to universally acceptable standards.

UN Global Compact

At the World Economic Forum in Davos in January 1999, the then UN Secretary-General Kofi Anan asked world business leaders to make more efforts to solve world issues in the fields of labour, environment, and human rights. In 2000, the UN set up the Global Compact Initiative and asked business organisations to participate on a voluntary basis. The Global Compact is based on ten "*universally accepted principles*" two of which deal with human rights (businesses "*should support and respect the protection of internationally proclaimed human rights*" and "*make sure that they are not complicit in human rights abuses*").¹³³ The UN Global Compact Board (composed of representatives of business, civil society as well as labour, and chaired by the United Nations Secretary-General) provides on-going strategic and policy advice for the initiative as a whole and makes recommendations.

There are currently more than 10,000 signatories participating in the Global Compact, which remains however a purely voluntary initiative. The participants do not have any specific obligations other than to report on their CSR commitments in their annual reports. According to the Annual Review 2011,¹³⁴ Global Compact participants submitted a total of 4150 reports in 2011. Among the four issue areas covered by the Global Compact principles, companies are taking action on the environment and on labour standards at the highest rates. While anti-corruption efforts have increased steadily for two consecutive years, human rights action continues to lag behind. Less than a quarter of all companies on average report conducting risk assessments on human rights, labour issues or on anti-corruption. When evaluating these figures, it must be taken into account that the Annual Review is based on a voluntary and anonymous online survey by the companies themselves and their employees.

¹³² See J. G. Ruggie 'Business and Human Rights – The Evolving International Agenda' American Journal of International Law 101 (2007), at 822.

¹³³ The Global Compact's Ten Principles are available at <<http://www.unglobalcompact.org/aboutthegc/thetenprinciples/index.html>>.

¹³⁴ Available at <http://www.unglobalcompact.org/AboutTheGC/annual_review.html>.

Guiding Principles on Business and Human Rights (Guiding Principles)

In 2005, then UN Secretary-General Kofi Annan appointed Harvard Professor John Ruggie as Special Representative on the issue of human rights and transnational corporations and other business enterprises (SRSG).

In June 2008, after three years of extensive research and consultations with governments, business and civil society, the Special Representative concluded that one reason cumulative progress in the business and human rights area had been difficult to achieve was the lack of an authoritative focal point around which actors' expectations could converge - a framework that clarified the relevant actors' responsibilities, and provided the foundation on which thinking and action could build.

In June 2008, the SRSG presented a framework to the Human Rights Council. The 'Protect, Respect and Remedy' framework rests on three independent but complementary pillars: the State duty to protect against human rights abuses by third parties, including business, through appropriate policies, regulation, and adjudication; the corporate responsibility to respect human rights, which means to act with due diligence to avoid infringing on the rights of others and to address adverse impacts that occur; and greater access by victims to effective remedy, both judicial and non-judicial. The framework is intended to work dynamically: The state duty to protect and the corporate responsibility to respect exist independently of one another, and preventative measures differ from remedial ones. Yet, all are intended to be mutually reinforcing parts of a dynamic, interactive system to advance the enjoyment of human rights.

The Human Rights Council unanimously welcomed what is now referred to as the 'UN framework', marking the first time that a UN intergovernmental body had taken a substantive policy position on the issue of business and human rights. The Council also extended the Special Representative's mandate until 2011 with the task of "*operationalizing*" and "*promoting*" the framework. Norway was the main sponsor of the resolution authorising the Special Representative's mandate, together with Argentina, India, Nigeria and Russia as co-sponsors, representing one country from each UN regional group.

In 2011, the Special Representative submitted a set of Guiding Principles for the implementation of the Framework, which the United Nations Human Rights Council unanimously adopted on 16 June 2011.¹³⁵ The policy framework rests on three pillars:

1. the State duty to protect human rights, notably through policy, regulation and adjudication;
2. the corporate responsibility to respect human rights, in particular to act with due diligence to prevent and mitigate adverse human rights impact and to provide remediation where such impact was caused; and
3. access to remedy, both judicial and non-judicial.

¹³⁵ A/HRC/17/31 of 21 March 2011.

While the first and third pillars largely remain within the traditional language of State responsibility, the second pillar seeks to translate the responsibility of business enterprises to respect human rights into operational principles. Terms such as “*human rights violations*”, which are typically used when speaking about States, are avoided. Instead the Guiding Principles speak of “*adverse human rights impacts*” or “*infringements*”, the premise being that “*business enterprises can have an impact on virtually the entire spectrum of internationally recognised human rights.*”¹³⁶

The Universal Declaration of Human Rights, the two UN Covenants as well as the principles concerning fundamental rights in the eight ILO core conventions as set out in the Declaration on Fundamental Principles and Rights at Work are cited as “*benchmarks*”.¹³⁷ The underlying idea is that, compared to States, business enterprises have distinct, but complementary obligations, which exist “*over and above compliance with national laws and regulations protecting human rights.*”¹³⁸ “*While corporations may be considered ‘organs of society’, they are specialized economic organs, not democratic public interest institutions. As such, their responsibilities cannot and should not simply mirror the duties of States.*”¹³⁹

The Guiding Principles recognise a “*corporate responsibility to respect human rights*”¹⁴⁰ which business enterprises should express through a policy statement in whatever form they see most appropriate. Their main operational duty is to carry out “*human rights due-diligence*” in order to identify, prevent, mitigate and account for how they address their adverse human rights impacts.¹⁴¹ To this end, the business enterprises should draw on internal and/or external expertise, engage in consultations with potentially affected groups, carry out impact assessments, take appropriate action and communicate on all this. This is a key principle for the SRSG who emphasised that a company will only be able to know and show that it respects human rights if it has processes in place to assess and address the human rights risks of its operations.¹⁴²

While recognising that size, sector and operational context are factors to be taken into account in the due diligence exercise,¹⁴³ the Guiding Principles stress that in principle every company can abuse any right. The standard of respect applies to all businesses regardless of “*size, sector, operational context, ownership and structure*”. Heightened

¹³⁶ Commentary to principle 12.

¹³⁷ *Ibid.*

¹³⁸ Commentary to principle 11.

¹³⁹ Protect, Respect and Remedy: a Framework for Business and Human Rights, A/HRC/8/5 (2008), para. 53

¹⁴⁰ Introduction to the Guiding Principles, A/HRC/17/31 (2011), para. 6.

¹⁴¹ Principles 17-21.

¹⁴² J. Ruggie ‘Remarks at OECD Investment Committee’ in *Annual Report on the OECD Guidelines for Multinational Enterprises 2011: A New Agenda for the Future* (OECD Publishing 2011), at 179, available at <<http://dx.doi.org/10.1787/mne-2011-en>>.

¹⁴³ This is explicitly acknowledged in Principle 14.

due diligence is required in weak governance zones, areas of armed conflict and where the human rights of vulnerable groups may be at particular risk.

Finally, where human rights have been adversely affected, businesses should provide for or cooperate in “*remediation*”. The SRSG distinguishes three types of grievance mechanisms: judicial and non-judicial State-based mechanisms and company-level mechanisms.¹⁴⁴ The latter should be available both for employees and also as a method for outside stakeholders who interact with the company.¹⁴⁵ The Guiding Principles do not, however, acknowledge that access to remedy is in itself a human right recognised in all major international human rights instruments.¹⁴⁶

There is no mechanism to consider questions over the meaning of the Guiding Principles or to handle complaints. In July 2011, the UN Human Rights Council merely established a ‘Working Group on the issue of human rights and transnational corporations and other business enterprises’, consisting of five independent experts of balanced geographical representation.¹⁴⁷ The UN Human Rights Council also established a Forum on Business and Human Rights under the guidance of the Working Group to discuss trends and challenges in the implementation of the Guiding Principles. The first two sessions of the Working Group took place in Geneva in January and May 2012 and involved consultations with the relevant stakeholders, in particular with regard to the forthcoming first annual meeting of the Forum on Business and Human Rights in December 2012. The Working Group formulated preliminary strategic considerations for engaging with their mandate, focusing on dissemination, integration and global governance institutions.¹⁴⁸

International Labour Organisation (ILO)

The ILO’s main instruments on human rights and business are the ‘Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy’ adopted in 1977 (and updated in 2000) and the ‘Declaration on Fundamental Principles and Rights at Work’, which the 86th International Labour Conference adopted in 1998. This declaration identified four “*principles*” as “*core*” or “*fundamental*”, asserting that all ILO member States on the basis of existing obligations as members in the Organisation have an obligation to work towards fully respecting the principles embodied in the relevant ILO Conventions. The fundamental rights cover freedom of association and collective bargaining, discrimination, forced labour, and child labour. The ILO Conventions which embody the fundamental principles have now been ratified by most member States.

¹⁴⁴ Business and Human Rights: Further steps toward the operationalization of the “protect, respect and remedy” framework, A/HRC/14/27 (2010), para. 89.

¹⁴⁵ *Ibid.*, para. 92.

¹⁴⁶ S. Deva ‘Principles on Business and Human Rights: Implications for Companies’ European Company Law 9 (2012), at 104.

¹⁴⁷ Resolution 17/4 on human rights and transnational corporations and other business enterprises of 6 July 2011.

¹⁴⁸ Report of the Working Group on the issue of human rights and transnational corporations and other business enterprises”, United Nations Human Rights Council, 10 April 2012, A/HRC/20/29.

Children’s Rights and Business Principles

On 12 March 2012, UNICEF, the UN Global Compact and Save the Children introduced the “Children’s Rights and Business Principles” which are the first comprehensive set of principles to guide companies on the full range of actions they can take in the workplace, marketplace and community to respect and support children’s rights. The principles cover a wide range of key issues, ranging from child labour to marketing and advertising practices to the role of business in aiding children affected by emergencies. Businesses are called upon to uphold children’s rights through their policy commitments, due diligence and remediation measures, and to take action to advance children’s rights. The Principles built on existing standards, initiatives and best practices related to business and children, and seek to fill gaps to present a coherent vision for business to maximize positive impacts and minimize negative impacts on children.

International Organization for Standardization (ISO)

In 2010, the International Organization for Standardization released its social responsibility standard, ISO 26000:2010¹⁴⁹ which is particularly important because of its reach into the business community. ISO 26000:2010 was launched following five years of negotiations between many different stakeholders across the world, including representatives from governments, NGOs, industry, consumer groups and labour organisations. It provides internationally agreed CSR guidance for all types of organisations regardless of their activity, size or location. Unlike other well-known ISO standards, it cannot be certified to. Its declared purpose is merely to clarify what social responsibility is and to help businesses to translate principles into effective actions.

The human rights chapter is aligned with the UN framework. It distinguishes eight human rights issues (due diligence; human rights risk situations; avoidance of complicity; resolving grievances; discrimination and vulnerable groups; civil and political rights; economic, social and cultural rights; fundamental principles and rights at work), describing briefly the issue and presenting some related actions and expectations for each of them.

The Japanese government was particularly active during the negotiations. In January 2005, it presented a draft ‘Social Responsibility (SR) Guideline’. The Japanese draft was based on six SR principles:¹⁵⁰

1. Respecting autonomy and flexibility: An organisation should identify those SR subjects and issues that are significant to achieving its sustainable development and continuity and address them voluntarily and flexibly.

¹⁴⁹ ISO 26000: 2010 Guidance on social responsibility, International Organization for Standardization, available, together with other materials, at <<http://www.iso.org/iso/home/standards/iso26000.htm>>.

¹⁵⁰ H. Suzuki in *Management Forum: Corporate Social Responsibility* Report of the APO Top Management Forum on Corporate Social Responsibility (Asian Productivity Organization Tokyo 2006), at 21-22.

2. Maintaining continuity: To make SR activities effective, the organisation should make continuous efforts for better performance.
3. Maintaining transparency: The organisation should disclose information on its structure and activities and thereby enhance transparency.
4. Respect for human dignity and diversity: The organisation should respect differences in race, sex, age, ideology, culture, region, physical ability, and other categories of human diversity, and should refrain from and discourage discrimination on such grounds.
5. Special attention to communication with stakeholders: The organisation should promote two-way communication with stakeholders who are affected by its activities and take their interests into consideration.
6. Contributing to building a better society: In implementing SR activities, the organisation should collaborate with diverse parties to have a positive impact on solving social problems and building a better society.

Organisation of Economic Co-operation and Development (OECD)

As a response to the increasing activity of companies in developing countries, the OECD adopted already in 1976 ‘Guidelines for Multinational Enterprises’ as a set of voluntary recommendations to MNEs in all the major areas of business ethics. On 25 May 2011, the thirty-four OECD member States, as well as Argentina, Brazil, Colombia, Egypt, Latvia, Lithuania, Morocco, Peru, and Romania agreed to an updated version of the Guidelines.¹⁵¹

Unlike the original version, the revised guidelines have a specific focus on human rights (chapter IV). After reaffirming that States have primary obligations to protect human rights, including in the horizontal relationship between private actors, the Guidelines declare that enterprises “*should*” respect human rights “*within the framework of internationally recognised human rights, the international human rights obligations of the countries in which they operate*”, including domestic human rights obligations.¹⁵² Whereas the text of the Guidelines employs the verb *should*, the Commentary of the Guidelines suggests that enterprises have an obligation to respect human rights because “respect for human rights is the global standard of expected conduct for enterprises.”

The content and scope of the principles are almost identical to the UN Guiding Principles, testimony of the close coordination between UN and OECD during their drafting. Enterprises are required to “*avoid causing or contributing to adverse human rights impacts and address such impacts when they occur.*” Even where they have not

¹⁵¹ OECD (2011), *OECD Guidelines for Multinational Enterprises*, OECD Publishing, <<http://dx.doi.org/10.1787/9789264115415-en>>. They are divided into eleven chapters: Concepts and Principles; General Policies; Disclosure; Human Rights; Employment and Industrial Relations; Environment; Combating Bribery, Bribe Solicitation and Extortion; Consumer Interests; Science and Technology; Competition; and Taxation.

¹⁵² This and the following citations in this paragraph are from the Guidelines’ chapter IV – Human Rights and its Commentary, *ibid.*, 31-34.

contributed to an adverse impact, but that impact is nevertheless directly linked to their operations, they should “*seek ways to prevent or mitigate adverse human rights impacts.*” They should also conduct due diligence “*as appropriate to their size, the nature and context of operations and the severity of the risks of adverse human rights impacts.*”¹⁵³ The Guidelines also provide for a policy commitment to respect human rights. As regards effective remedies for human rights infringements, the Guidelines use rather cautious language requiring enterprises to “*provide for or co-operate through legitimate processes*” in order to ensure effective measures to address “*human rights impacts where they identify that they have caused or contributed to these impacts.*”

The chapter on general policies emphasises the importance of “*risk-based due diligence*” to “*identify, prevent and mitigate actual and potential adverse impacts.*”¹⁵⁴ Enterprises should comply with “*good corporate principles . . . throughout enterprise groups.*” More specifically, they are asked to “*engage in or support*” different proposals on “*responsible supply chain management.*”

Evidence of the emerging corporate obligation to protect human rights derives from paragraph 13 providing that enterprises “*should encourage . . . business partners . . . to apply principles of responsible business conduct.*” Enterprises should also “*avoid causing or contributing to adverse impact . . . through their own activities and address such impacts when they occur.*” The scope and nature of due diligence varies from enterprise to enterprise, depending on the size and nature of each company. Enterprises are also encouraged “*to promote Internet Freedom through respect of freedom of expression, assembly and association online*” and to “*engage with relevant stakeholders in order to provide meaningful opportunities . . . for projects or other activities that may significantly impact local communities.*” This provision, however, lacks a reference on how to obtain consent of the community in which the company operates.

Under the Guidelines, adhering governments establish National Contact Points (NCPs) which are tasked to promote the Guidelines and to deal with complaints (‘specific instances’). The NCPs also assist enterprises and their stakeholders in taking appropriate measures on human rights-related issues and provide a mediation and conciliation platform.

Under the new provisions on Procedural Guidance,¹⁵⁵ the NCPs are “*composed and organised such that they provide an effective basis for dealing with the broad range of issues covered by the Guidelines*” and must “*enable the NCP to operate in an impartial manner while maintaining an adequate level of accountability to the adhering*

¹⁵³ When addressing the OECD on 4 October 2010, the SRSR suggested that his view of due diligence was “*somewhat less discretionary*”, J. Ruggie in *Annual Report on the OECD Guidelines for Multinational Enterprises 2011: A New Agenda for the Future* (OECD Publishing 2011), at 179, but the final versions of the respective Guidelines and their commentaries do not really differ substantially.

¹⁵⁴ This and the following citations in this paragraph are from the Guidelines’ chapter II – General Policies and its Commentary, *ibid.*, 19-26.

¹⁵⁵ *Ibid.*, 71-75.

government.” The Commentary on the procedural guidance¹⁵⁶ includes provisions on the impartiality and independence of NCPs. It also encourages cooperation among the NCPs of the home and host country of a multinational enterprise. Moreover, it promotes “*appropriate assistance*” in “*a timely manner.*” Any individual or NGO may file a complaint. Depending on whether mediation between the parties is successful, the NCP will either issue a report or make a recommendation to the parties involved. In any case, NCPs are expected to make their conclusions public.¹⁵⁷ As a general rule, NCPs should conclude a procedure within 12 months.¹⁵⁸ The updated Commentary also includes a new provision on the role of the international network of non-governmental organisations - OECD Watch.¹⁵⁹ In the event of a NCP not complying with procedural obligations under the Guidelines, an adhering country, an advisory body, or OECD Watch can send “*a substantiated submission*” that will be considered by the OECD Investment Committee,¹⁶⁰ which is overseeing the functioning of the Guidelines.

Simultaneously with the Guidelines, the OECD also adopted a ‘Recommendation of the Council on Due Diligence Guidance for Responsible Supply Chains of Minerals from Conflict-Affected and High-Risk Areas’.¹⁶¹ The Recommendation contains a framework for risk-based due diligence and a model supply chain.

Council of Europe

The Council of Europe has until recently been conspicuously absent from the international debate on human rights and business. It was the Parliamentary Assembly that brought this subject on the Organisation’s agenda. On the basis of a report prepared by Holger Haibach, the Assembly adopted on 27 September 2010 Resolution 1757 (2010) and Recommendation 1936 (2010) on ‘Human rights and business’. The Assembly recommended *inter alia* that Council of Europe member States should promote ethical investment, refuse to work with corporations associated with human rights abuses, and insist that firms fully respect human rights standards when they carry out government contracts, especially if the work involves classic State functions which have been “*privatised*”. The Parliamentary Assembly’s report mentions in particular the privatisation of prisons, immigration detention centers, private escort services for the removal and deportation of immigrants as well as the use of private military and security

¹⁵⁶ *Ibid.*, 77-89.

¹⁵⁷ *Ibid.*, 80.

¹⁵⁸ Commentary on the Implementation Procedures, *ibid.*, para. 41.

¹⁵⁹ See OECD Watch, at <<http://oecdwatch.org/>> where it is stated that “*OECD Watch is an international network of civil society organisations promoting corporate accountability. The purpose of OECD Watch is to inform the wider NGO community about policies and activities of the OECD’s Investment Committee and to test the effectiveness of the OECD Guidelines for Multinational Enterprises.*”

¹⁶⁰ Commentary, *ibid.*, at 88 para. 47.

¹⁶¹ Adopted by the Council at Ministerial level on 25 May 2011, available at <[http://www.oecd.org/officialdocuments/displaydocumentpdf/?cote=c/min\(2011\)12/final&doclanguage=en](http://www.oecd.org/officialdocuments/displaydocumentpdf/?cote=c/min(2011)12/final&doclanguage=en)>.

companies in Afghanistan and Iraq.¹⁶² More generally, member States should introduce laws to protect individuals from corporate abuses of human rights enshrined in the ECHR.

The Assembly proposed that the Committee of Ministers examines the feasibility of elaborating a complementary legal instrument, such as a convention or an additional protocol to the ECHR. It also suggested preparing studies – and eventually a recommendation to Europe’s governments – on corporate responsibility in the area of human rights as well as a labelling system for assessing the social responsibility of businesses. Earlier, in its Recommendation 1858 (2009) on private military and security firms and erosion of state monopoly on the use of force, the Parliamentary Assembly had already called for the drafting of convention.

Referring to the UN framework ‘Protect, Respect and Remedy’, the Parliamentary Assembly’s report on ‘Human Rights and business’ suggested that a new legal instrument could also consider the following points:

- link public procurement to human rights performance of companies;
- make investments by public pension or other insurance schemes dependent on corporate social responsibility;
- link export credit guarantees to good human rights records of companies;
- strengthen the role of national human rights institutions;
- address the issue of judicial and non-judicial mechanisms;
- take measures for training and awareness-raising.

In its reply to Parliamentary Assembly Recommendation 1936 (2010),¹⁶³ the Committee of Ministers underlined its interest to explore ways and means of enhancing the role of business in respecting and promoting human rights, but rejected the idea of a new convention or protocol to the ECHR. The Committee of Ministers subsequently instructed the Steering Committee for Human Rights (CDDH) to carry out a feasibility study on further work on this subject before the end of 2013.¹⁶⁴

In June 2011, the Steering Committee for Human Rights (CDDH) held a first discussion on the subject, on the basis of an exchange with Ms Lene Wendland (OHCHR) and a preliminary study prepared by the Secretariat.¹⁶⁵ The CDDH asked the Secretariat to explore the feasibility and added value of various options for Council of Europe involvement such as reaffirming the UN Guiding Principles; providing sectorial guidance; providing thematic guidance; focusing on vulnerable groups; elaborating on the implications of the principle of access to effective remedy; addressing legal/governance

¹⁶² Paras. 24 and 27.

¹⁶³ Adopted on 6 July 2011.

¹⁶⁴ Terms of Reference of Intergovernmental Structures 2012-2013, CM(2011)131 final 23 November 2011, <<https://wcd.coe.int/ViewDoc.jsp?id=1875269&Site=CM>>.

¹⁶⁵ Document CDDH(2012)012, <http://www.coe.int/t/dghl/standardsetting/cddh/CDDH-DOCUMENTS/CDDH_2012_012_en.pdf>.

gaps not covered by the UN Guiding Principles. The Secretariat was also asked to explore other avenues for action, such as the identification and recognition of good business practices and awareness-raising initiatives involving the private sector. Amongst the issues deserving particular attention in the study, delegations mentioned the effective implementation of the UN Guiding Principles, the prevention of human rights violations, possible gaps in access to effective remedies, extraterritorial issues and social rights.¹⁶⁶

European Union

The European Union has been active in the area of corporate social responsibility for more than a decade.¹⁶⁷ On 25 October 2011, the European Commission published a renewed strategy for corporate social responsibility for the period 2011-2014.¹⁶⁸ The UN Guiding Principles are the main reference point for EU policy. The European Commission invited member states to develop by the end of 2012 national plans for the implementation of Guiding Principles and expects all European enterprises to meet the corporate responsibility to respect human rights as defined therein.

The European Commission intends to

- Work with enterprises and stakeholders in 2012 to develop human rights guidance for a limited number of relevant industrial sectors (oil and gas, information and communications technology, and employment and recruitment), as well as guidance for small and medium-sized enterprises, based on the UN Guiding Principles.
- Publish by the end of 2012 a report on EU priorities in the implementation of the UN Guiding Principles, and thereafter to issue periodic progress reports.

On 7-8 May 2012, the Danish EU Presidency hosted an expert conference ‘From Principles to Practice: The European Union operationalizing the United Nations Guiding Principles on Business and Human Rights’.¹⁶⁹ Focusing on Guiding Principles 1-10 (state duty to protect), the conference formulated a number of proposals for action by the European Commission and member States, in particular relating to human rights due diligence and access to effective remedies.

Already in 2010, the University of Edinburgh prepared for the European Commission a ‘Study of the Legal Framework on Human Rights and the Environment Applicable to

¹⁶⁶ CDDH meeting report, 75th meeting, para. 22, available at <http://www.coe.int/t/dghl/standardsetting/cddh/CDDH-DOCUMENTS/CDDH_2012_R75_E_final.pdf>.

¹⁶⁷ For a summary of previous activities, see the PACE report ‘Human Rights and Business’, paras. 68-72.

¹⁶⁸ Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, COM(2011) 681 final.

¹⁶⁹ The conference report is available at <<http://www.csreurope.org/data/files/Publications/EUPresidencyConferenceReport.pdf>>.

European Enterprises Operating Outside the European Union'.¹⁷⁰ It formulated a number of recommendations for further action by the EU and its member States, in particular

- promoting human rights and environmental protection through trade law, investment rules and related regulatory regimes, for example enforcing trade restrictions that prevent corporations from exporting or importing goods harmful to human rights and the environment or include human rights and environmental protection conditionality in free trade agreements or preferential trade regimes;
- adopting measures to promote human rights and environmental protection through investment rules applying to European corporations operating outside the EU, such as promotion services, financial and fiscal incentives, or insurance mechanisms;¹⁷¹
- introducing labelling schemes, such as the EU voluntary ecolabel award scheme, to encourage European corporations to control and prevent negative human rights and environmental impacts of their third-country subsidiaries and suppliers;
- introducing the consideration of corporate human rights and environmental impacts in the context of directors' duties and reporting requirements under corporate law;
- encouraging or requiring corporations to report on their human rights and environmental policies;
- reforming the Brussels I Regulation with a view to extending its scope to corporations not domiciled in the EU and creating additional grounds of jurisdiction, including *forum necessitates*.

The EU also addressed specific human rights problems with regard to businesses, such as the problem of 'blood minerals' in its raw materials initiative¹⁷² or the ban of export of drugs used for execution by lethal injection in the United States.¹⁷³

Corporate social responsibility and human rights in Japan

Origins

Japan has a long tradition to associate economic development with moral values. Traces can be found already in Edo era in the 18th century, with teachings about morality and harmony among merchants, customers and the society at large. The origins of the *sanpō yoshi* (三方良し) philosophy can be traced to this time, to the ideas and practices of the Ohmi merchants (近江商人, *ōmi-shōnin*) who lived in what is now Shiga Prefecture and travelled across the nation and abroad. This ancient strategy for corporate sustainability is

¹⁷⁰ Above note 4.

¹⁷¹ The SRSG also highlighted the need to consider strengthening the role of export credit guarantee agencies in promoting and protecting human rights, see Report of the SRSG, 'Business and human rights: Further steps toward the operationalisation of the 'protect, respect, remedy' framework', UN Doc A/HRC/14/27 (2010), at para. 29.

¹⁷² See the article published on 5 July 2011 on Euractiv.com 'MEPs want risk radar for raw materials', at <<http://www.euractiv.com/sustainability/meps-want-risk-radar-raw-materials-news-506123>>.

¹⁷³ See 'Europe bans export of death penalty drugs', at <<http://www.transcend.org/tms/2012/03/europe-bans-export-of-death-penalty-drugs/>>.

still referred to by companies today. It is based on the idea of triple satisfaction, “*good for the seller, the buyer, and society at large*”. In 1754, in a message to his grandchild, Jihei Nakamura Sōgan (1684-1757) gave the following advice:

“Think and act customers first;

Never aim for a high short term profit;

Be humble that you are dependent on God’s blessing;

Do business with a caring mind for the people in the region;

Never lose faith in God in order not to have a malicious mind.

*By so doing, you are in line with reason and will be able to keep a healthy body and mind.”*¹⁷⁴

In the 19th century, the founder of modern Japanese capitalism, Eiichi Shibusawa (1840-1931), developed a theory of harmony between morality and the economy arguing, that “*as long as it is called business, it must profit oneself as well as society and the nation.*”¹⁷⁵ His ideas and concepts were probably derived from Confucianism, but Shibusawa was also influenced by Christianity.¹⁷⁶

Modern CSR and human rights

The *Nippon Keidanren* (Japan Business Federation) adopted a ‘Charter of Corporate Behaviour’ in 1991, which has been updated several times (most recently in 2004).¹⁷⁷ Affirming that “[m]embers are expected to respect human rights and to conduct themselves in a socially responsible manner toward the creation of a sustainable society” and such improvement should “*enhance the social value*”, the Charter contains ten principles, some of which are directly related to human rights. Although this Charter is a voluntary initiative, it has had significant results in terms of influencing company behaviour.¹⁷⁸ Under the Charter, top management should be responsible for implementing its provisions. In the event of incidents contrary to the principles of this Charter, top management must investigate the causes of the incidents, develop reforms to prevent recurrence, and make information publicly available regarding their intended actions for reform. In 2003, the influential *Keizai Doyukai* (Japan Association of Corporate

¹⁷⁴ The original text in Japanese can be found in Kunitoshi Suenaga ‘A Written Will and Admonition by an Ohmi Merchant Nakamura Jihei in Edo Period: A Historical Study on Sampo Yoshi’ *Doshisha Shogaku* 15 (1999), 25 at 47-48, available at <<http://doors.doshisha.ac.jp/webopac/bdyview.do?bodyid=TB00007700&elmid=Body&lname=017050050617.pdf>>.

¹⁷⁵ Cited by Suzuki above note 150, at 16.

¹⁷⁶ *Ibid.*

¹⁷⁷ Available at <<http://www.keidanren.or.jp/english/policy/csr/charter2004.html>>.

¹⁷⁸ Cotty Vivant Marchisio & Lauzeral ‘Corporate Law Tools Project – Japan’ (September 2009), § 22.1. The Charter does not mention any international human rights instruments, referring only to the “*spirit as well as the letter of all laws and regulations applying to their activities both in Japan and abroad.*”

Executives) also published a Corporate White Paper on the ‘Evolution of Market and Socially Responsible Management.’

A relationship between business and society specific to the Japanese context appears to have been the driving factor for the development of CSR practices. From the beginning, the focus was on compliance, consumer trust, disclosure and environmental concerns and, to a lesser extent only, on human rights. Corporate scandals, such as highly publicised cases of corruption and pollution, shattered confidence in the society’s perception of the business community. Corporations felt a need to renew their commitment to ‘co-habitation’ (*kyo-sei*) with society. Corporate responsibility is strongly associated with customer relationships, as individuals make judgements about companies in relation to their experience as customers and in their behaviour as investors.¹⁷⁹

A 2006 study,¹⁸⁰ for which interviews were conducted with 22 CSR managers from 13 multinational companies, confirmed the predominance of compliance and environmental issues. The study also revealed that Japanese managers associate the term ‘CSR’ (企業の社会的責任) with corporate values and principles which already exist within their organisations. The Ministry of Trade and Industry (METI) conducted research in 2005 showing that while 60% of top managers believe that CSR is a form of cost, about 50% consider it very important and a vehicle to enhance the value and the sustainability of companies.¹⁸¹ The percentage of corporate executives who view CSR as a being central to management has risen from 51% in 2003 to 71% in 2010.¹⁸²

The Japanese Global Compact Local Network (GC-JN) was officially launched on 21 December 2003. In April 2008 GC-JN changed its structure into an independent business-led network sharing corporate responsibility practices.¹⁸³ Their website

¹⁷⁹ A. Zaman in *Management Forum: Corporate Social Responsibility* Report of the APO Top Management Forum on Corporate Social Responsibility (Asian Productivity Organization Tokyo 2006), at 70.

¹⁸⁰ Kyoko Fukukawa & Yoshiya Teramoto ‘Understanding Japanese CSR: The Reflections of Managers in the Field of Global Operations’ *Journal of Business Ethics* (2009), 133-146.

¹⁸¹ Suzuki above note 151, 23. The report of the METI Study Group on CSR can be consulted at <http://www.meti.go.jp/policy/intellectual_assets/pdf/InterimReport-eng.pdf>.

¹⁸² ‘Survey of Management Awareness of Corporate Social Responsibility’ by the Japan Association of Corporate Executives, cited in ‘Japan’s Policy for CSR’ (17 April 2012) presentation by the METI.

¹⁸³ For a views on the UN Global Compact in Japan, see the interviews with Toshio Arima, Executive Corporate Advisor, Fuji Xerox company: ‘Significance of the UN Global Compact and the Role of Companies’, at <<http://www.fujixerox.com/eng/company/st/2008/highlight/arima.html>>; ‘We Need a Stronger Global Compact Japan Network’ written, at <http://globalsecuritynews.com/showArticle3.cfm?article_id=16959>.

currently indicates 380 corporate participants.¹⁸⁴ Corporations have established special units to deal with CSR-related activities, including compliance, reporting, and correspondence for the socially responsible investment index survey.¹⁸⁵ Fukukawa and Moon analysed CSR reporting of 50 top corporations in 2002. Their study showed significant growth in the interests and engagements among Japanese MNEs.

Under Japanese law, there is no obligation to disclose information related to the impact of the company's activity on non-shareholders (especially human rights impacts) as long as such impact is not 'significant' for the company (should this be the case, for instance in case of environmental litigation with important amounts of money at stake, disclosure would become mandatory for the public interest or the protection of investors).¹⁸⁶ In practice, Japanese companies report on CSR, increasingly conforming to the guidelines of the Global Reporting Initiative (GRI).¹⁸⁷ Cotty Vivant Marchisio & Lauzeral reported that "*with 43 Japanese corporations (which are – based on our information – all large corporations), releasing GRI compliant reports in February 2009 (out of 828 in the world), Japan ranks fourth after the United States, Spain and Brazil.*"¹⁸⁸ In 2011, 99% of Japanese companies reported on their corporate responsibility, the UK being the only European country with comparable figures (100%).¹⁸⁹

In the past, it has sometimes been suggested that human rights would matter less in Japanese CSR policy. One explanation given referred to the more hermetic nature of Japanese culture and demography, where human rights concerns over race, class and faith would be less pronounced than in culturally diverse societies.¹⁹⁰ Fukukawa and Teramoto explained the fact that Japanese managers sometimes appear naïve when speaking about human rights issues by a lack of documentation, uncertainty about concepts and their applicability. They argued that certain issues, such as sweatshop labour, would go unreported because they are an all too obvious prohibition. Moreover, human rights

¹⁸⁴

See

<http://www.unglobalcompact.org/NetworksAroundTheWorld/local_network_sheet/JP.html> (last visited on 15 August 2012).

¹⁸⁵ A good overview over business practice is given by T. Ebashi, W.J. Lee & B. Yang (eds.) *Being Responsible in East Asia - CSR Practices of Global Compact Members in China, Japan, Korea* (Hosei University Press 2011).

¹⁸⁶ Report on Japan submitted by Cotty Vivant Marchisio & Lauzeral to the SRSR as part of his corporate law tools project (September 2009), at 17, available at <<http://www.reports-and-materials.org/Corp-law-tools-Japan-Cotty-Vivant-for-Ruggie-28-Sep-2009.pdf>>.

¹⁸⁷ *Ibid.*; the GRI, created in 1997, has established a common framework for harmonised and broadly user-friendly CSR Reports.

¹⁸⁸ Cotty Vivant Marchisio & Lauzeral above note 186, at 17.

¹⁸⁹ 'KPMG International Survey of Corporate Responsibility Reporting' (2011), cited in 'Japan's Policy for CSR' above note 182.

¹⁹⁰ K. Fukukawa 'Corporate Social Responsibility in Japan: A Local-Global Perspective' Bradford University School of Management Working Paper No 10/03 (May 2010), 7.

would be seen primarily as a problem for other parts of the world, in particular developing countries. As one manager explained:

*“When I think about the Japanese environment, I don’t easily recognize issues of human rights (jinken). I imagine it as something protected by our constitution. In other countries, it is a very difficult issue to identify what it is meant by human rights. ... We have been researching what is meant by human rights. It appears to mean to secure one’s well-being outside of working life – i.e., to establish work life balance.... We operate all over the world. What do we do about human rights of children in Bangladesh that suppliers may use further down the supply chain? It is a very difficult issue.”*¹⁹¹

However, during my research I found ample evidence for human rights awareness among Japanese companies. Major corporations such as Brother, Hitachi, Mazda, Mitsubishi or Toshiba affirm their commitment to respect human rights in CSR policy statements and have taken concrete measures to translate this commitment into practice, such as setting up human rights committees and counselling desks as well as human rights promotion and training activities.¹⁹² Respect for diversity appears a key human rights issue¹⁹³ to such an extent that it may eclipse other issues. Initially, the main concern appears to have been discrimination based on social origin,¹⁹⁴ whereas now also factors such as disability and sexual orientation figure explicitly in corporate standards of conduct.¹⁹⁵ Women, disabled and elderly people are the three main categories of employees regularly mentioned under human rights in CSR reports.¹⁹⁶

Corporations recognise the importance of implementing human rights policies not only within their group, but also throughout their supply chain, not only domestically but also abroad. Respect for human rights is mentioned explicitly in supplier codes of conduct,

¹⁹¹ Cited in Fukukawa & Teramoto above note 180, 143.

¹⁹² See the information given at their respective websites: Brother Group’s Global Charter <<http://www.brother.com/en/corporate/principle/index.htm>> and

Principles of Social Responsibility
<<http://www.brother.com/en/csr/brothergroup/psr/index.htm>>; Hitachi
<<http://www.hitachi.com/csr/society/respect/index.html>>; Mazda
<http://www.mazda.com/csr/csr_vision/employee/human_respect.html>; Mitsubishi
<<http://www.mitsubishicorp.com/jp/en/csr/policy/human-right.html>>; Toshiba
<http://www.toshiba.co.jp/csr/en/human_rights/index.htm> as well as Toshiba’s comprehensive CSR report 2012, at <http://www.toshiba.co.jp/csr/en/engagement/report/pdf/report12_all.pdf>.

¹⁹³ See numerous examples in Ebashi, Lee & Yang above note 185, at 91-98.

¹⁹⁴ Ebashi, Lee & Yang above note 185, 64. In particular based on the family’s origin which can be traced to one of the old social classes, or the *burakumin*, ‘hamlet or village people’ (部落民). The *burakumin* are descendants of outcast communities of the Japanese feudal era, comprising those with occupations considered ‘tainted’ with death or ritual impurity, who remained discriminated in modern Japan, see <<http://en.wikipedia.org/wiki/Burakumin>>.

¹⁹⁵ See e.g. ‘Toshiba Group Standards of Conduct’, section 15 (on file with the author).

¹⁹⁶ Ebashi, Lee & Yang above note 185, 64.

compliance of which is verified through CSR surveys.¹⁹⁷ Other strategies for supply chain management include communication, guidebooks, self-assessment and on-the-spot visits.¹⁹⁸ Corporations strive to overcome differences through dialogue rather than punishing suppliers or terminating contracts.¹⁹⁹

As regards specific instances under the OECD Guidelines, four requests have been raised with the Japanese NCP since the June 2000 review, three of which are still ongoing. The host countries concerned are Indonesia, Malaysia, the Philippines and Japan itself, with an almost exclusive focus on labour relations.²⁰⁰ Moreover, one case was jointly handled by the US NCP and the Japanese NCP (which took a supportive role).²⁰¹ This case was concluded in July 2012, but based on the US NCP procedure, results have not been published.

Government initiatives

As in many other fields of economic policy, corporate strategy and government policy are closely interwoven.²⁰² The Japanese government has from the beginning been an active supporter of human rights and business initiatives in the various international fora. Domestically, various initiatives have been taken:²⁰³

- the Cabinet Office compiled in May 2008 the ‘Report by the Study Group on Social Responsibility for a Safe and Comfortable, Sustainable Future’;
- the METI disclosed the ‘Social Business Study Meeting’ report in April 2008;
- the Ministry of the Environment, the Ministry of Health, Labour and Welfare, and the METI established their own guidelines on optional disclosure;
- numerous round-table conferences on social responsibility were organised, with representatives of business groups, consumer groups, trade unions, NGOs;
- Japan’s NCP presented information about the 2011 Update of the OECD Guidelines at more than 10 seminars, study groups, and symposia organised by various businesses, trade unions and NGOs.²⁰⁴
- the METI promotes diversity centred on women’s success.

¹⁹⁷ See e.g. Toshiba’s human rights policy statement, at <http://www.toshiba.co.jp/csr/en/human_rights/index.htm>; Xerox’s guideline for procurement referred to by Ebashi, Lee & Yang above note 185, 77.

¹⁹⁸ Ebashi, Lee & Yang above note 185, 80-83.

¹⁹⁹ *Ibid.*, 105.

²⁰⁰ For details see *Annual Report on the OECD Guidelines for Multinational Enterprises 2011: A New Agenda for the Future* (OECD Publishing 2011), 321 et seq., available at <<http://dx.doi.org/10.1787/mne-2011-en>>.

²⁰¹ *Ibid.*, 336.

²⁰² K. Fukukawa & J. Moon ‘A Japanese Model of Corporate Social Responsibility? A study of online reporting’ Bradford University School of Management Working Paper No 03/10 (May 2003), 47-48.

²⁰³ For details see ‘Japan’s Policy for CSR’ above note 182.

²⁰⁴ Annual Report 2011 above note 200, 27.

Human rights under national law

The Constitution of Japan shares the ideal of universality of human rights, which found its expression in the Constitution's preamble.²⁰⁵ The Constitution guarantees civil and political rights and refers explicitly to social rights (Article 25). Article 97 of the Constitution states:

“The fundamental human rights by this Constitution guaranteed to the people of Japan are fruits of the age-old struggle of man to be free; they have survived the many exacting tests for durability and are conferred upon this and future generations in trust, to be held for all time inviolate.”

Some provisions of the Constitution such as Article 18 (prohibition of bondage and servitude) and Article 28 (the right of workers to organise and to bargain collectively) can be directly applied in relations between private persons. As a rule, however, there is no direct third-party effect of fundamental rights guaranteed under the Constitution, which may only exceptionally deploy effects in private-law relationships through the general clauses of the applicable statutes. In the *Mitsubishi Jushi* case [1973], the Supreme Court underlined that fundamental rights are by nature and historical origin guaranteed primarily in relation with the governmental actions of the State and public entities and cannot be applied directly to disputes between private parties. *“[I]n the framework of a modern and free society, the regulation of such conflicts is entrusted as a general rule to private self-government and the law will intervene to regulate only when the mode and extent of the infringement go beyond the socially acceptable limit.”*²⁰⁶ The Supreme Court recalled that in private-law relationships victims of alleged abuses could use the general clauses of the Civil Code, such as Articles 1 and 90 which provide general limitation on private autonomy, to obtain compensation or injunctions.

Japan has ratified most major human rights conventions such as International Covenant on Civil and Political Rights (ICCPR), the International Covenant on Social, Economic and Cultural Rights (ICSECR), the International Convention on Elimination of all forms of Racial Discrimination (CERD); the Convention on the Elimination of all forms of Discrimination against Women (CEDAW); the Convention on the Rights of the Child (CRC) and Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict; the Optional Protocol to the Convention on the Rights of the Child on the Sale of children, Child Prostitution and Child Pornography, and the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment. However, it is not a party to any of the optional protocols which enable individuals to communicate human rights violations to the UN bodies.

There are no statutes specifically dealing with human rights. Respect for human rights is ensured through the provisions of general statutes, covering matters such as employees'

²⁰⁵ *“We believe that no nation is responsible to itself alone, but the laws of political morality are universal; and that obedience to such laws is incumbent upon all nations who would sustain their own sovereignty and justify their sovereign relationship with other nations.”*

²⁰⁶ Judgment of 12 December 1973, 1968(O) No. 932; The English translation is taken from <<http://www.courts.go.jp/english/judgments/text/1973.12.12-1968-O-No.932.html>>.

rights, women's and children's rights, consumer protection and environment as well as data protection, health and safety matters. One of the major domestic laws in the field, the 'Equal Employment Opportunity Act' of 1985 requires the adoption of specific policies relating to women's working conditions and prohibits discrimination against women, including discrimination in promotion, education, or retirement age. The *Equal Employment Opportunity Law* was revised (effective as of April 2007) to prohibit discrimination based on gender at any stage of employment, including indirect discrimination or detrimental treatment due to facts such as pregnancy and childbirth. The level of compliance and enforcement of the relevant provisions appears to be generally high. However, in the absence of specific procedures, a victim of human rights abuses can seek redress only when such abuses constitute a criminal offences or a breach of a specific statutory provision.²⁰⁷

The Ministry of Foreign Affairs is primarily in charge of international human rights protection, while domestic human rights protection is principally within the remit of the Ministry of Justice ('Human Rights Bureau' and related agencies).²⁰⁸ It also appoints private citizens as human rights volunteers (about 14,000 people), who carry out various activities to promote human rights protection, such as presenting lectures or conducting counselling on human rights issues.

Japan has not yet established an independent national human rights institution in line with the Paris Principles.²⁰⁹ In 2002, the government made a first attempt to introduce a 'Human Rights Protection Bill' to cope with human rights complaints. However, having been severely criticised by the media and academics, the Bill was withdrawn in 2003. The Ministry of Justice continues to review the contents of the Bill, which is expected to provide for the establishment of a human rights committee as an independent administrative committee of the State and also for the creation of a remedial system for infringements of human rights which is to be operated by the Committee.²¹⁰

As to the status of human rights treaties under national law, they are superior to statutes but inferior to the Constitution.²¹¹ The Japanese government informed the UN Human Rights Committee that treaties have legal effect as part of its internal law in accordance with Article 98 § 2 of the Constitution. Whether or not to apply directly provisions of treaties is determined in each specific situation, taking into consideration the purpose,

²⁰⁷ Taro Tsunoda, Anderson Mori & Tomotsune 'Global Business and Human Rights – Japan' (18 March 2011), at <http://www.europeanlawyer.co.uk/referencebooks_26_496.html>

²⁰⁸ See <<http://www.moj.go.jp/ENGLISH/issues/issues07.html>>.

²⁰⁹ 'Principles relating to the Status of National Institutions', adopted by General Assembly resolution 48/134 of 20 December 1993.

²¹⁰ See <http://www.moj.go.jp/JINKEN/jinken03_00062.html>.

²¹¹ See Y. Iwasawa, *International Law, Human Rights, and Japanese Law. The Impact of International Law on Japanese Law* (Clarendon Press Oxford 1998), 28 et seq.; A. Ejima 'Simultaneous Codification of the Constitution of Japan and the International Human Rights Treaty' *Journal of Law and Politics* (Tokyo University) forthcoming.

meaning and wording of the provisions concerned.²¹² Self-executing treaties can be applied without the necessity of first enacting implementing legislation. Despite a general willingness to apply international treaties domestically,²¹³ courts have occasionally refused to consider provisions of human rights treaties to be self-executing. For example, the Osaka High Court held in 1984 that the ICSECR could not be applied domestically in the absence of implementing legislation.²¹⁴

In general, the practice of national courts using or referring to international human rights treaties appears to be rather limited. The case-law of UN Human Rights Committee (views and general comments) is sometimes invoked by parties, but not systematically used by courts.²¹⁵ In a judgment of 2 March 1993, the Supreme Court refused to take into account the interpretation of the Committee regarding the right to strike of public officials under Article 3 of the ICSECR.²¹⁶

Akiko Ejima gives several reasons to explain the reluctance of national courts to refer to international human rights law.²¹⁷ Firstly, whenever the Constitution protects the same human rights, a reference to international treaties will be unnecessary in the eyes of many judges. Secondly, domestic judges are less familiar with international human rights standards, also due to the rather limited case-law by UN bodies. Thirdly, judges may expose themselves to criticism of usurping the role of legislators by finding statutes incompatible with international treaties. Finally, a violation of a treaty is not considered a valid reason to appeal to the Supreme Court.²¹⁸

The Supreme Court has rather consistently denied the existence of violations of human rights treaties.²¹⁹ A good example is a case about the right of access to court (Article 32 of the Constitution). The plaintiff, a prisoner, sued a prison warden because of ill-treatment by the prison officers, claiming that his right of access to court was denied because the head of the prison restricted the meeting time with his lawyer, and all the

²¹² Fourth periodic report submitted by Japan, CCPR/C/115/Add.3 (1 October 1997), para. 9; Annex II contains information about court decisions.

²¹³ K. Port 'The Japanese International Law "Revolution": International Human Rights Law and Its Impact in Japan' *Stanford Journal of Int'l L.* 28 (1991), at 136; Y. Iwasawa 'Legal Treatment of Koreans in Japan: The Impact of International Human Rights Law on Japanese Law' *Human Rights Quarterly* 8 (1986), at 136.

²¹⁴ Judgment of 19 December 1984, *Osaka Kōsai* [High Court], 1145 *Hanrei Jihou* 3.

²¹⁵ Tsunoda, Anderson Mori & Tomotsune above note 207. Other examples for the reluctance of the courts to find violations of international human rights law are given by Iwasawa above note 211, at 299-303.

²¹⁶ Judgment of 2 March 1993, *Roudou-hanrei* no. 629; see H. Tateishi 'L'impact du droit international sur la Constitution japonaise : du point de vue de la protection des droits de l'homme' *Hogaku-Shirin Review of Law and Political Sciences* 109 (2012) No 762, 22.

²¹⁷ Ejima above note 211; see also Iwasawa above note 211, at 303-306, who explains this reluctance as a reflection of the judicial restraint generally exercised by Japanese courts.

²¹⁸ See also Tateishi above note 216, at 18.

²¹⁹ Tateishi above note 216, at 18 et seq.

meetings were supervised by prison officers. While the local district court and the high court awarded compensation, referring to the ICCPR and ECHR case-law (particularly the *Golder* and *Silver* cases), the Supreme Court found no violation of the ICCPR without explanation.²²⁰

There are few exceptions to this general trend. In 2008, the Supreme Court referred to the ICCPR and Convention on the Rights of the Child (CRC) as well as legislative trends in other countries in a case where the constitutionality of certain provisions of the Nationality Act was questioned because Japanese nationality was denied to a child born by Japanese father and a non-Japanese mother, who were not legally married:

*“In addition, it seems that other states are moving towards scrapping discriminatory treatment by law against children born out of wedlock, and in fact, the International Covenant on Civil and Political Rights and the Convention on the Rights of the Child, which Japan has ratified, also contain such provisions to the effect that children shall not be subject to discrimination of any kind because of birth. Furthermore, after the provision of Article 3, para.1 of the Nationality Act was established, many states that had previously required legitimation for granting nationality to children born out of wedlock to fathers who are their citizens have revised their laws in order to grant nationality if, and without any other requirement, it is found that the father-child relationship with their citizens is established as a result of acknowledgement.”*²²¹

This was the first time that the Supreme Court interpreted the Constitution in the light of international human rights standards and only the eighth time since 1947 that it found a legislative provision to be unconstitutional.²²²

In light of the existing case-law, it appears rather unlikely that national courts will be prepared to use either constitutional fundamental rights or international human rights directly in cases brought by individuals against business enterprises. As a rule, they will limit themselves to apply the ordinary legislation applicable to corporations. This legislation does not provide specifically for the civil or criminal liability of corporations or their directors for human rights abuses other than through the general provisions of civil and criminal law.²²³

Conclusion

In Japan, the situation is in a number of respects different from that in Europe. The Fujitsu Research Institute underlined that CSR in Japan is “*industry-driven*”, as opposed

²²⁰ Supreme Court, first bench, 7 September 2000, 199 *Shumin* 283; see also Supreme Court, Grand Bench 24 March 1999, 53 *Minshu* 514 on communication of a suspect with lawyer during pre-trial detention. See generally on the impact of international human rights law on detention in Japan Iwasawa above note 211, at 249-287.

²²¹ Supreme Court, grand bench, 4 June 2008, 62 *Minshu* 1367. Emphases are added by the author.

²²² Tateishi above note 216, at 22.

²²³ See Cotty Vivant Marchisio & Lauzeral above note 186, at 14-15.

to EU countries where it is “*policy-driven*” or to the United States where CSR is more “*market-driven*” (pressure of investors and shareholders).²²⁴ Certain characteristics of Japanese management style such as carefully codified work standards and emphasis on harmonious relations among employees and workers have been conducive to the introduction of CSR policies. CSR policy and practice are highly developed, in particular in major corporations, whereas small and medium-sized enterprises have so far been less involved. As more attention focuses on CSR activities, there will be increasing opportunities to share these experiences with companies worldwide, in particular in Asia. The link between corporate governance and CSR will have to be developed further, a link which is being emphasised in particular in Japan.²²⁵

At the same time, one must be aware that the contents of CSR reports may not always accurately reflect the reality.²²⁶ Existing corporate practices are being questioned. Kiyoshi Kurokawa, chairman of ‘The Fukushima Nuclear Accident Independent Investigation Commission’ declared in July 2012:

*“What must be admitted – very painfully – is that this was a disaster ‘Made in Japan.’ Its fundamental causes are to be found in the ingrained conventions of Japanese culture: our reflexive obedience; our reluctance to question authority; our devotion to ‘sticking with the program’; our groupism; and our insularity.”*²²⁷

Taking the CSR agenda forward and making it a reality on the shop floor may ultimately bring existing power structures into question. Protecting and respecting human rights is, after all, closely linked to democracy. It ultimately means that individuals will have a greater role in shaping their lives and destinies and gain the dignity that comes from having that power.²²⁸ This is a challenge not only for Japan.

²²⁴ Cited by Cotty Vivant Marchisio & Lauzeral above note 186, at 22.

²²⁵ A. Zaman ‘Made in Japan—Converging Trends in Corporate Responsibility and Corporate Governance’ Royal Institute of International Affairs, London, 2003. Available at <<http://www.riia.org/pdf/research/sdp/MadeInJapan.pdf>>.

²²⁶ Ebashi, Lee & Yang above note 185, at 107.

²²⁷ Message from the Chairman in The National Diet of Japan ‘The official report of the The Fukushima Nuclear Accident Independent Investigation Commission. Executive summary’, available at <http://naiic.go.jp/wp-content/uploads/2012/07/NAIIC_report_lo_res2.pdf>.

²²⁸ J. Baker ‘The UN Guiding Principles – Opportunities, Challenges - One Year Later’ (19 June 2012), at <<http://www.ihrb.org/commentary/guest/un-guiding-principles-one-year-later.html>>.

Challenges and opportunities for further action at regional and national level

The UN framework as a common baseline for future work

The UN framework has been well received by key stakeholder groups, governments, private sector and NGOs alike. Some see them already as an equivalent of the Universal Declaration of Human Rights for business.²²⁹

From a normative point of view, it may come as a surprise that the Guiding Principles do not offer any precise legal basis for the responsibility to respect human rights. They merely affirm that this is a “*basic expectation society has of business.*”²³⁰ The idea seems to be that human rights are part of the “*social licence*” within which corporations operate.²³¹ This approach has been criticised because it would provide neither a normative basis nor clarity about nature and extent of corporate responsibilities.²³² It is argued that the resulting lack of clarity would be exacerbated by the somewhat circular approach to refer companies to the state-centred human rights standards contained in the Universal Declaration of Human Rights and other UN instruments, without explaining what these standards mean in a business environment. In short, the intentional flexibility of the Guiding Principles has resulted in them not offering concrete guidance to companies how to ascertain and fulfil their human rights responsibilities.²³³

Though there is no shortage of tools and materials, many of which having been developed by the Global Compact and its partners,²³⁴ that seek to provide guidance to business on how to implement international human rights standards, it is true that the Guiding Principles themselves do not tell business enterprises in much detail what they are expected to do. They do not give concrete examples of “*adverse human rights impacts*”, nor do they differentiate between the different spheres of influence of an enterprise (such as the company and its employees, relations with suppliers and

²²⁹ J. Kallman & M. Mohan ‘Reality Check: Just Tell It Like It Is’ Forbes Indonesia (August 2011), 37.

²³⁰ Protect, Respect and Remedy: a Framework for Business and Human Rights, A/HRC/8/5 (2008), para. 9; Guiding Principles, A/HRC/17/31 (2011), para. 6.

²³¹ L. Catá Backer ‘The United Nations’ “Protect-Respect-Remedy” Project: Operationalizing a Global Human Rights Based Framework for the Regulation of Transnational Corporations’, Conference Paper, Symposium: Corporations and International Law, Santa Clara University, 12–13 March 2010, at 45, available at <<http://law.scu.edu/corplaw/file/Santa-Clara-Symposium-Larry-Cata-Backer-Paper-Draft.pdf>>.

²³² Deva above note 146, at 104.

²³³ Deva above note 146, at 105.

²³⁴ There are, however, numerous publications that attempt to do exactly that, see for example UNGC/OHCHR/IBLF/Castan Centre for Human Rights Law *Human Rights Translated – A Business Reference Guide* (2008); UNGC/BLIHR/OHCHR *A Guide for Integrating Human Rights into Business Management* (2nd Edition 2009); These and other materials are available at <http://www.unglobalcompact.org/AboutTheGC/tools_resources/humanrights.html>.

consumers, the wider community). The SRSG addressed the concept of ‘spheres of influence’ in a separate report.²³⁵ While acknowledging that it remains “*a useful metaphor for companies in thinking about their human rights impacts beyond the workplace*”, the SRSG preferred to concentrate on “*the potential and actual human rights impacts resulting from a company’s business activities and the relationships connected to those activities*” which cannot be adequately determined by reference to the vague and sometimes misleading concept of influence.²³⁶ ‘Spheres of influence’ may indeed not be in itself a sufficiently precise notion. Yet, the idea to distinguish human rights impacts according to spheres can be helpful when establishing more precise due diligence standards in respect of individual rights. Information rights for company employees for example will differ from those for the public at large.

More importantly, however, criticism of the sometimes abstract and vague character of the Guiding Principles misses a main point. The Guiding Principles are not intended to be a comprehensive and definitive statement of all relevant human rights standards that business enterprises should observe in their operations. They remain necessarily basic and universal, a “*common foundation from which thinking and action of all stakeholders would generate cumulative progress over time.*”²³⁷ The Guiding Principles have deliberately adopted an approach entirely different from the Draft Norms on the Responsibilities of Transnational Corporations. Instead of extending to companies essentially the entire range of State obligations, with some adaptations through the use of concepts such as “*primary*” versus “*secondary*” obligations and “*corporate sphere of influence*”, the Guiding Principles seek to define the specific responsibilities of companies with regard to all rights.²³⁸ The SRSG did not intend to create new international law obligations, but rather to elaborate “*the implications of existing standards and practices for States and businesses, integrating them within a single, logically coherent and comprehensive template; and identifying where the current regime falls short and how it should be improved.*”²³⁹ Seeking global acceptance for such an approach necessarily presupposed a certain measure of pragmatism and abstractness.

The Guiding Principles have achieved a result which seemed impossible only a few years ago: a worldwide consensus among all stakeholders on a series of key principles relating to corporate responsibility to respect human rights. Their importance must be measured by their impact on other organisations and institutions, by their influence on public and corporate policy.

Several major international organisations and institutions, such as the OECD, ISO, IFC, FAO and the EU, have already recognised them as a basis for the development of their

²³⁵ Clarifying the Concepts of “Sphere of influence” and “Complicity”, Companion report, A/HRC/8/16 (2008).

²³⁶ Protect, Respect and Remedy: a Framework for Business and Human Rights, A/HRC/8/5 (2008), paras. 65-72.

²³⁷ Ruggie above note 153, at 178.

²³⁸ A/HRC/8/5 (2008), para. 51.

²³⁹ *Ibid*, para. 14.

own business and human rights policies and standards. A number of individual governments use them in conducting their own policy assessments, major global corporations are realigning their due diligence processes based on them and civil society actors employ them in their analytical and advocacy work. The Guiding Principles are the common reference point for further action at regional and national level. They offer a sound basis for new initiatives to give flesh to the often rather vague principles contained therein.

Complementary action by OECD and ISO

ISO and OECD have already aligned with the UN framework. As regards scope and substance, their standards have so far added little flesh to the rather abstract Guiding Principles. On due diligence, human rights risk situations, avoidance of complicity and resolving grievances, the “actions and expectations” contained in ISO 26000:2010 are almost identical to the language used in the Guiding Principles. On the remaining parts (discrimination and vulnerable groups; civil and political rights; economic, social and cultural rights; fundamental principles and rights at work), ISO 26000:2010 recalls the existing international standards without adding further specifications.

An assessment of the impact of the ISO standard is extremely difficult, if not impossible, because the ISO 26000:2010 includes no tools for such an assessment.²⁴⁰ There are some organisations offering to assess the implementation level of the ISO 26000 for private companies.²⁴¹ Internet webpages such as ‘26k-estimation.com’ offer self-assessment tools.²⁴² None of these tools or services seems, however, to include publication of such assessments.

The OECD presented its own updated Guidelines as a blueprint for “*a new, tougher process for complaints and mediation.*”²⁴³ According to the Guidelines’ preface, “the countries adhering to the *Guidelines* make a binding commitment to implement them in accordance with the ‘Decision of the OECD Council on the Guidelines for Multinational Enterprises’”.²⁴⁴ This statement appears to overstate the binding nature of the Guidelines. They are recommendations addressed by governments to MNEs, providing, as the official OECD publication indicates itself, only “*non-binding principles and standards for*

²⁴⁰ See <http://www.26k-estimation.com/html/iso_26000_self-assessment.html#e-i6-assmt>.

²⁴¹ See e.g. the RINA Group, at <http://www.rina.it/en/categorie_servizi/verifiche_isp_audit/servizi/assessment_iso26000.aspx>; Ecocert <<http://www.ecocert.com/en/iso-26000>>; GoodCorporation, at <<http://www.goodcorporation.com/products-iso-26000-assessment.php>>.

²⁴² Available at <http://www.26k-estimation.com/html/iso_26000_self-assessment.html>.

²⁴³ See OECD Press Release ‘New OECD Guidelines to Protect Human Rights and Social Development’, at <http://www.oecd.org/document/19/0,3746,en_21571361_44315115_48029523_1_1_1_1,00.html>.

²⁴⁴ OECD Guidelines, above note 151, at 13 para. 1.

responsible business conduct.”²⁴⁵ Ultimately compliance with the Guidelines remains voluntary. They are encouragement for business enterprises, no legally binding requirements. There is still no enforcement procedure even for those companies that choose to abide by the Guidelines and are found to have violated them.

Compared to the UN’s framework, the OECD Guidelines’ human rights provisions do not provide much additional guidance as to what exactly is expected from business enterprises. They are neither more concrete nor more substantial, repeating in almost identical language the SRS’s ‘Protect, Respect and Remedy’ framework. The major improvement of the 2011 revision is the more substantial guidance given to NCP procedures and the reinforced role of NGOs in them. The updated OECD Guidelines hold promises for the future, but the real test of their efficiency will lie in the practical use of the Guidelines’ implementation mechanism.

In May 2012, 42 out of the 43 adhering States and the European Commission had designated NCPs.²⁴⁶ Their status varies. While most are government departments (28), some have mixed structures including representatives of business and trade unions and two (the Netherlands or Norway) include independent experts.²⁴⁷ The NCP mechanism has witnessed an increase in specific instances. The Chair’s report of the 11th Annual Meeting of the NCPs summarised the information about their number and issues raised as follows:

*“The third major development is the sharp rise in the number of specific instances raised. 396 new specific instances were raised, more than double the number of specific instances raised in the 2009-2010 implementation period. A total of ten Final Statements, in addition to one revised Final Statement, were issued. With 39 new specific instances raised, the total number of instances raised since the 2000 Review exceeds the 250 mark. Of these, 178 have been accepted for consideration and 156 have been concluded or closed. A majority of new specific instances for which location information was available were raised in non-adhering countries. Additionally, half of concluded specific instances for this reporting period concerned specific instances in non-adhering countries. Furthermore, a majority of the new specific instances continue to relate to employment and industrial relations under Chapter V of the Guidelines. A growing number involves human rights, as well as environmental issues covered by Chapter VI and bribery issues covered by Chapter VII.”*²⁴⁸

Current procedures do not require NCPs to deliver final statements concerning every complaint made.²⁴⁹ The new provisions on the Guidelines’ Implementation Procedures remain recommendations. NCPs are not obliged to make a decision of whether or not the

²⁴⁵ *Ibid.*, 3.

²⁴⁶ Full list dated July 2012 available at <<http://www.oecd.org/dataoecd/17/44/1900962.pdf>>.

²⁴⁷ Annual Report 2011, above note 200, at 20; see also Copenhagen conference report, above note 169, at 17.

²⁴⁸ Annual Report 2011, above note 200, at 14.

²⁴⁹ Commentary, paras. 25-37. See also OECD Watch Statement, above note 159, at 4.

Guidelines have actually been violated. OECD Watch noted the “*update’s failure to clarify the NCP’s role in making determinations on the observance of the Guidelines when mediation has failed.*”²⁵⁰ Other commentators have deplored the high number of unenforced decisions.²⁵¹ At the same time, it should be noted that nothing prevents NCPs from issuing assessments of business behaviour (‘determinations’) even if business is unwilling to enter into mediation and some actually do so.²⁵²

Adhering governments to the OECD Guidelines appear to have differing views about the appropriateness of making determinations of whether the Guidelines have been observed or not in NCP final statements. While the United States remains opposed, arguing that such “*practice was difficult to reconcile with a procedure based upon ‘good offices’*”, Germany and the United Kingdom expressed the view that making assessments on a company’s compliance with the Guidelines was necessary in order to make meaningful recommendations.²⁵³

A major advantage of the NCP mechanism is its flexibility. NCPs are not constrained by the applicable domestic law when it comes to issues of jurisdiction or corporate responsibility.²⁵⁴ In a case of bauxite mining in India, the Supreme Court had approved the contested activities under domestic Indian law. The UK NCP nevertheless found that the corporation had failed to respect the rights of the indigenous community “*consistent with India’s commitments under various international instruments, including the UN International Covenant on Civil and Political Rights, the UN Convention on the Elimination of All Forms of Racial Discrimination, the Convention on Biological Diversity and the UN Declaration on the Rights of Indigenous Peoples.*” The UK NCP concluded that the corporation had neither conducted a satisfactory human rights impact assessment nor properly consulted the indigenous community.²⁵⁵ In another case, it was alleged that a European corporation had paid taxes to rebel forces in the Democratic Republic of Congo and practiced insufficient due diligence on the supply chain, sourcing minerals from mines that used child and forced labour under unacceptable health and safety conditions. Although the European corporation did not actively operate itself in Congo, the UK NCP found it in violation of the OECD Guidelines because it had not

²⁵⁰ OECD Watch Statement, above note 159, at 4.

²⁵¹ See e.g. L. Catá Backer ‘Rights and Accountability in Development (Raid) V Das Air (July 21, 2008) And Global Witness V Afrimex (August 28, 2008); Small Steps Toward an Autonomous Transnational Legal System for the Regulation of Multinational Corporations’ Melbourne University Law Review 10 (2009), 258.

²⁵² Statements by representatives of Germany and the UK reported in Annual Report 2011, above note 201, 42; see also Copenhagen conference report, at 17.

²⁵³ Annual Report 2011, above note 200, at 42.

²⁵⁴ Edinburgh report, above note 4, para. 150.

²⁵⁵ UK NCP Final Statement - Complaint from Survival International against Vedanta Resources plc [2009], available at <<http://www.bis.gov.uk/nationalcontactpoint/cases>>.

taken steps to influence its supply chain and to explore options how minerals could be sourced from mines that do not use child or forced labour.²⁵⁶

The major weakness of the OECD Guidelines remains their unenforceability. The NCP mechanism does not provide an effective remedy for victims of human rights abuses. The outcome of procedures depends on the voluntary cooperation of the company that is alleged to have harmed rights in the first place.²⁵⁷ In the abovementioned example of the Indian bauxite mining case, the NCP's follow-up statement contains little indication that the corporation will actually implement the NCP's recommendations.²⁵⁸

Jernej Letnar Černič has made three proposals to improve the system:²⁵⁹ transforming the current NCPs mechanism into a quasi-legal employment tribunal;²⁶⁰ creating an independent and impartial supervisory mechanism and/or establishing the role of an ombudsperson who would represent the public interest by investigating and addressing complaints against the work of respective NCPs.

The implementation gap

When it comes to the implementation of the now universally agreed principles of corporate responsibility to respect human rights, we are facing a 'compliance gap' as well as a 'governance gap'.²⁶¹ The SRSG rightly stressed that the adoption of the Guiding Principles was only "*the end of the beginning.*"²⁶² In the final analysis, the UN Guiding Principles will be worth as much as their implementation which will have to involve all stakeholders, governments, businesses, and civil society.

"The Guiding Principles are not intended as a tool kit, simply to be taken off the shelf and plugged in. While the Principles themselves are universally applicable, the means by which they are realized will reflect the fact that we live in a world of 192 United Nations Member States, 80,000 transnational enterprises, 10 times as many subsidiaries and countless millions of national firms, most of which are

²⁵⁶ UK NCP Final Statement - Complaint from Global Witness against Afrimex (UK) Ltd [2008].

²⁵⁷ See comments by Amnesty International in Edinburgh report, above note 4, at 78.

²⁵⁸ See UK NCP 'Vedanta Follow-Up Statement', above note 256; see also the Amnesty International report 'Don't mine us out of existence: Bauxite mine and refinery devastate lives in India' (20 January 2010).

²⁵⁹ Černič above note 11.

²⁶⁰ See the proposal submitted by Tim Steinweg & Joris Oldenzel 'By Invitation: The OECD Guidelines for Multinational Enterprises: A Modest Proposal' (7 August 2007), <<http://www.ethicalcorp.com/content.asp?ContentID=5299>>.

²⁶¹ Copenhagen conference report, above note 169, at 22.

²⁶² Guiding Principles on Business and Human Rights: Implementing the United Nations 'Protect, Respect and Remedy' Framework, A/HRC/17/31, 2011, para. 13.

*small and medium sized enterprises. When it comes to means for implementation, therefore, one size does not fit all.*²⁶³

The UN framework does not prescribe any particular method of implementation which needs to be embedded in specific international, regional and national contexts. It calls for a differentiated approach, the risk pictures for example of extractive companies being quite different from pharmaceutical corporations. While the Guiding Principles as such do not create new standards, their implementation may lead to the adoption of new standards, corporate, legal or otherwise.

Despite action already taken by the OECD and ISO, a lot remains to be done to use the full potential of the UN framework. The 2011 Update of the OECD Guidelines is an important step in the right direction, but its NCP mechanism is still a far cry from an independent forum to effectively respond to corporate human rights abuses. It is not a remedy for victims, but merely a means to raise alleged breaches of the Guidelines. The relationship between the NCP mechanism and judicial proceedings calls for further clarifications.²⁶⁴ The issue of effective remedies capable of providing redress for human rights abuses remains crucial. In too many countries, the obstacles for victims to take their complaints to court remain high.²⁶⁵

While many enterprises have already adopted voluntarily human rights policy statements, and codes of conduct,²⁶⁶ a lot remains to be done to ensure that human rights become a reality in the business world. It may sometimes be difficult “*to distinguish the lip service paid to ethical corporate conduct from more genuine, deeply embedded institutional commitments. But it is clear that consumers’ and investors’ expectations of ethical business conduct are rising.*”²⁶⁷ Unilateral commitments by business should be matched by the introduction of systematic human rights impact assessment in the project management process. Coupled with regular reporting, not only for zones of conflict or weak governance, but as a matter of principle, this would be a major step towards establishing human rights protection as a core business concern. For both impact assessment and reporting however, more guidance is needed, in particular on the requirements of corporate due diligence as well as on other areas left so far largely undetermined by the existing frameworks, such as the responsibility of parent companies regarding their subsidiaries and supply chain, contract law, the role of financial actors

²⁶³ Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, A/HRC/17/31 (2011), para. 15, at <<http://www.business-humanrights.org/media/documents/ruggie/ruggie-guiding-principles-21-mar-2011.pdf>>.

²⁶⁴ Discussions among NCPs are already underway, see Annual Report 2011, above note 200, 41.

²⁶⁵ M Taylor ‘A Glass Filling Up - Reflections on the first year anniversary of the UN Guiding Principles on Business and Human Rights’ (18 June 2012), at <<http://www.ihrb.org/commentary/guest/a-glass-filling-up.html>>.

²⁶⁶ See Business and Human Rights Resource Centre, Company Policy Statements on Human Rights, <<http://www.business-humanrights.org/Documents/Policies>>.

²⁶⁷ F. Stevelman ‘Globalization and Corporate Social Responsibility: Challenges for the Academy, Future Lawyers, and Corporate Law’ New York Law School Law Review 53 (2008/2009), at 829.

and institutions. Apart from business practices, the issue of access to justice for victims requires more attention, in particular as far as the civil and criminal liability of corporations is concerned.

Human rights due diligence

According to the SRSG, human rights due diligence comprises four components:

“a statement of policy articulating the company’s commitment to respect human rights; periodic assessment of actual and potential human rights impacts of company activities and relationships; integrating these commitments and assessments into internal control and oversight systems; and tracking and reporting performance. Company-level grievance mechanisms perform two functions: under the tracking and reporting component of due diligence, they provide the company with feedback that helps identify risks and avoid escalation of disputes; they can also provide remedy ... Each of these components is essential. Without them, a company cannot know and show that it is meeting its responsibility to respect rights.”²⁶⁸

Operationalising this concept faces a certain dilemma in that companies may well be willing to gather critical information to anticipate problems and avoid liability, but not necessarily for the benefit of third parties who could use this information in actions against the company.²⁶⁹ Compliance with due diligence requirements should not be seen as an exercise in ‘good PR’. Taken seriously, it has the potential to benefit more than a business’s public image with advantages for all stakeholders that outweigh the risks of exposure to litigation.²⁷⁰

How many companies are actually practicing human rights due diligence? According to the Global Compact’s Annual Review 2011, less than 20% of the participating companies carry out human rights impact assessments.²⁷¹ Companies that face significant scrutiny from civil society organisations are more likely to take on due diligence procedures to protect their reputation and business.²⁷² Where they exist, business practices vary considerably, in part because ‘due diligence’ is a new, not yet fully developed, concept which has only been around since 2008,²⁷³ and also because one size does not fit all.

²⁶⁸ A/HRC/14/27, para. 83.

²⁶⁹ See John F. Sherman III & Amy K. Lehr ‘Human Rights Due Diligence: Is It Too Risky?’ The CSR Journal 6 (January 2010) (a publication of the ABA Section of International Law).

²⁷⁰ Catá Backer above note 231, 53

²⁷¹ UN Global Compact Annual Review 2011, above note #, at 14 (‘Human Rights Actions’).

²⁷² N. Janz ‘Human Rights Obligations of Multinational Corporations in Developing Countries: What drives CSR?’ The 14th Annual European Business Ethics Network Conference (April 2010), 101, at <<http://www.eben-uk.org/downloads/eben-uk-2010-proceedings.pdf#page=88>>.

²⁷³ ‘Business Ethics’, Business and Human Rights Interview with John Ruggie, at <<http://business-ethics.com/2011/10/30/8127-un-principles-on-business-and-human-rights-interview-with-john-ruggie/>>.

Due diligence calls for a differentiating, sector and context specific approach. What is relevant for extractive industries may be of less importance for companies in the financial services, media or transport. Companies operating in countries with weak governance where corruption is rampant may be expected to implement ‘enhanced due diligence’ measures as a cost of doing business in such countries.²⁷⁴ These could include supporting efforts to strengthen local government, seeking to ensure that resources are allocated fairly within the company’s area of operations and being transparent about tax and royalty payments.²⁷⁵ Alternatively, for companies operating in countries where labour standards are low, it is important to advocate and support improvements in the business environment and to use affirmative action in recruitment.²⁷⁶ Generally, due diligence is described as an on-going process,²⁷⁷ entailing both an investigative and evaluative component²⁷⁸ and including measures such as reporting (internal and/or external), impact assessments, stakeholder consultations and transparency, among many others.²⁷⁹

The European Commission has already started to develop sector-specific guidance relating to oil and gas, employment and recruitment agencies as well as information and communication industries (ICT). A draft guide for small and medium-sized enterprises (SMEs) on human rights has already been made available for public consultation until 26 September 2012.²⁸⁰ Since this guidance is being developed with European business in mind, ECHR standards should be taken into account. In particular when the ECtHR reviews domestic court decisions in private law disputes between individuals and companies, it has developed principles that are directly relevant for business enterprises, for example regarding the conciliation of certain competing human rights (e.g. privacy and media freedom).²⁸¹

²⁷⁴ Institute for Human Rights and Business ‘From Red to Green Flags: The corporate responsibility to respect human rights in high-risk countries’ (2011), 5, at <http://www.ihrb.org/pdf/from_red_to_green_flags/complete_report.pdf>.

²⁷⁵ *Ibid.*, at 9.

²⁷⁶ *Ibid.*, at 10.

²⁷⁷ *Ibid.*

²⁷⁸ M. Taylor, L. Zandvliet & M. Forouhar ‘Due Diligence for Human Rights: A Risk-Based Approach’ Corporate Social Responsibility Initiative Working Paper No. 53 (October 2009), 3, at <http://www.hks.harvard.edu/m-rcbg/CSRI/publications/workingpaper_53_taylor_etal.pdf>.

²⁷⁹ *Ibid.*, at 13-16. See also the project ‘Human Rights Due Diligence: Developing a Global Standard and Building Domestic and Regional Accountability Frameworks’ initiated by the International Corporate Accountability Roundtable (ICAR), the European Coalition for Corporate Justice (ECCJ) and the Canadian Network on Corporate Accountability (CNCA), information available at <<http://accountabilityroundtable.org/campaigns/human-rights-due-diligence/>>.

²⁸⁰ Available at <http://www.global-csr.com/fileadmin/Our_Approach/120823_Full_Guide_SMEs_Draft.pdf>.

²⁸¹ See text accompanying notes 52 et seq.

The SRSB closely associates due diligence with internal grievance mechanisms. Interestingly, he imports traditional rule of law (*Rechtsstaat*) notions to ensure process legitimacy:²⁸²

*“legitimacy, accessibility, predictability, equitability, rights-compatibility and transparency. A seventh principle specifically for company-level mechanisms is that they should operate through dialogue and engagement rather than the company itself acting as adjudicator.”*²⁸³

As on many other questions, the devil is in the detail. Translating these principles into the reality of individual company-based grievance mechanisms will require further elaboration.

Transparency

The SRSB underlined repeatedly the importance of reporting. *“Encouraging or requiring corporations to report on their human rights policies and impacts enables shareholders and other stakeholders to better engage with business, assess risk and compare performance within and across industries. It also helps corporations to integrate human rights and environmental protection as core business concerns.”*²⁸⁴ Nevertheless, the SRSB’s corporate law project has shown that while financial reporting is generally tightly regulated, human rights-related risks are generally not considered ‘material’ for the purposes of such reporting.²⁸⁵ Writing about the situation in the United States of America, Faith Stevelman observed in 2009, *“[t]o this day, the SEC’s scheme of mandatory reporting allows companies to omit most of the information about its political and charitable expenditures and its compliance history regarding workers’ safety, consumer safety, and adherence to environmental standards. In most instances, only if gross problems develop in these areas, or if the problems yield large-scale litigation or penalties, is disclosure required.”*²⁸⁶

Despite initiatives in several jurisdictions,²⁸⁷ no consistent patterns for human rights impact reporting have emerged. Governmental policies on CSR reporting, including

²⁸² L. Catá Backer ‘On the Evolution of the United Nations’ ‘Protect-Respect-Remedy’ Project: The State, the Corporation and Human Rights in a Global Governance Context’ *Santa Clara Journal of International Law* 9 (2010), at 138.

²⁸³ A/HRC/14/27 (2010), para. 94; see also A/HRC/8/5 (2008), para. 99.

²⁸⁴ Business and Human Rights: Further steps toward the operationalisation of the “protect, respect and remedy” framework, A/HRC/14/27 (2010), para. 36.

²⁸⁵ *Ibid*, at para 38; see further the SRSB’s Corporate Law Tools Project, at <<http://www.businesshumanrights.org/SpecialRepPortal/Home/CorporateLawTools>>.

²⁸⁶ Stevelman, above note 267, at 850-851.

²⁸⁷ See the examples given by R. Mares ‘Business and Human Rights After Ruggie: Foundations, the Art of Simplification and the Imperative of Cumulative Progress’ in R Mares (ed.) *The UN Guiding Principles on Business and Human Rights – Foundations and Implementation* (Martinus Nijhoff Publishers Leiden, Boston 2012), at 11-12.

human rights, vary widely.²⁸⁸ Legislation, unilaterally enacted in particularly powerful jurisdictions, may be imposed on businesses worldwide. Compliance with such standards generates important costs for those companies. As long as they have regular contractual relationships with clients in the jurisdiction that has enacted the transparency legislation in question, they will be under pressure to comply, possibly having to seek advice from lawyers and consultants from exactly this jurisdiction. It is therefore crucial that any such legislation be agreed in a transparent and truly inclusive stakeholder process, referring, as far as possible, to internationally agreed standards.

A pertinent example is the United States' 'Dodd–Frank Act' (2010),²⁸⁹ which includes a provision - section 1502 – aimed at stopping the national army and rebel groups in the Democratic Republic of Congo (DRC) from illegally using profits from the minerals trade to fund their fight. The legislation has been described as one of the first examples where a country developed binding legislation pertaining to human rights due diligence.²⁹⁰ Adoption of an overdue²⁹¹ rule of implementation by the Securities and Exchange Commission (SEC) on 22 August 2012²⁹² was closely followed by business enterprises all over the world. Companies are required to disclose whether their products are 'DRC conflict free' or not, and to apply due diligence mechanisms in the supply chain using stringent audit and certification requirements. Under the rule adopted on 22 August 2012, the "*due diligence measures must conform to a nationally or internationally recognized due diligence framework, such as the due diligence guidance approved by the Organisation for Economic Co-operation and Development (OECD).*"²⁹³ Already before the adoption of the implementing rule, the law affected both the region concerned and businesses worldwide, in particular in the electronics and IT sector, which rely on imported minerals from the region covered by the Act (tin, tantalum, tungsten and gold). The legislation's impact is contested and hard to evaluate given the volatile situation in

²⁸⁸ A/HRC/14/27 (2010), at para. 37.

²⁸⁹ Dodd–Frank Wall Street Reform and Consumer Protection Act (2010).

²⁹⁰ M. Taylor 'Defining Compliance: Developments in Law and Policy to the Corporate Accountability Movement, International Corporate Accountability Roundtable', at <<http://accountabilityroundtable.org/analysis-and-updates/defining-compliance-why-recent-developments-in-law-and-policy-should-matter-to-the-corporate-accountability-movement/>>, at 2.

²⁹¹ Rules on how companies are to report and audit their activities should have been ready by April 2011, but were only released on 22 August 2012.

²⁹² 'SEC Adopts Rule for Disclosing Use of Conflict Minerals' (22 August 2012), at <<http://www.sec.gov/news/press/2012/2012-163.htm>>. See also the debate before the SEC issued its detailed rules with diverging submissions asking the SEC to require detailed data, as NGOs and some institutional investors prefer, or more aggregated data, as the industry argues. All submissions are available on the SEC website, 'Specialized Disclosures: Title XV Provisions of the Dodd-Frank Wall Street Reform and Consumer Protection Act', at <www.sec.gov/comments/df-title-xv/specialized-disclosures/specialized-disclosures.shtml>.

²⁹³ Fact sheet 'Disclosing the Use of Conflict Minerals', at <<http://www.sec.gov/news/press/2012/2012-163.htm>>. The relevant OECD Recommendation is referred to in note 161.

the region. While some welcomed its potential to make a significant impact on the ground,²⁹⁴ others claim that it has put anywhere between tens of thousands up to 2 million Congolese miners out of work in the eastern Congo while doing little to improve the security situation.²⁹⁵ What is certain however, is that its implementation will generate substantial costs for companies worldwide, which will have to implement traceability reforms throughout the supply chain, from the mine to final product manufacturing. The SEC estimated implementation costs to be \$71.2 million, while an independent Tulane University economic impact assessment came up with the figure of \$7.93 billion dollars, almost half of the total cost – \$3.4 billion – would be met with in-house company personnel time, and the rest – \$4.5 billion – comprising outflows to third parties for consulting, IT systems and audits.²⁹⁶

Responsibility of parent companies regarding subsidiaries and contractors

The SRSG recognised that “[t]he worst alleged corporate-related human rights abuses typically have involved third parties connected to a company’s operations, such as security forces or suppliers, with the company being accused of complicity in whatever act was committed by that third party. In a number of cases the allegations have included war crimes and crimes against humanity.”²⁹⁷ However, on the questions of complicity and business operations in conflict-affected zones or in oppressive States, the UN Guiding Principles do not provide a principled approach to establish responsibility of the core company or to avoid complicity.²⁹⁸ The SRSG reports cover existing case-law and legislation extensively, though in a purely descriptive manner, noting the complexity of the issues involved and the differences of approach. In 2010, the SRSG noted:

²⁹⁴ Global Witness ‘The Dodd Frank Act’s Section 1502 on conflict minerals’ (10 August 2011), at <<http://www.globalwitness.org/library/dodd-frank-acts-section-1502-conflict-minerals>>.

²⁹⁵ L. Seay ‘What’s Wrong with Dodd-Frank 1502? Conflict Minerals, Civilian Livelihoods, and the Unintended Consequences of Western Advocacy’ Center for Global Development Working Paper 284 (January 2012), at <<http://www.cgdev.org/content/publications/detail/1425843/>>; for a more positive assessment see Global Witness ‘The Dodd Frank Act’s Section 1502 on conflict minerals’ (10 August 2011), at <<http://www.globalwitness.org/library/dodd-frank-acts-section-1502-conflict-minerals>>.

²⁹⁶ Chris Bayer & Elke de Buhr (Tulane University Law School Payson Center for International Development) ‘A Critical Analysis of the SEC and NAM Economic Impact Models and the Proposal of a 3rd Model in View of the Implementation of Section 1502 of the 2010 Dodd-Frank Wall Street Reform and Consumer Protection Act’ (October 2011), at <<http://inec.usip.org/resource/critical-analysis-sec-and-nam-economic-impact-models-and-proposal-3rd-model-view-implementation>>.

²⁹⁷ J. Ruggie ‘Engaging Business: Addressing Respect for Human Rights’ Keynote Address to the U.S. Council for International Business, U.S. Chamber of Commerce, International Organization of Employers (Atlanta, 25 February 2010) at <www.reports-and-materials.org/Ruggie-keynote-address-in-Atlanta-25-Feb-2010.pdf>.

²⁹⁸ Mares above note 287, at 35; Deva above note 146, at 108; see also Catá Backer, above note 281, at 149-153.

“One legal challenge is the attribution of responsibility among members of a corporate group. Many corporate-related human rights violations also violate existing national civil or criminal law, but applying those provisions to corporate groups can prove extremely complex, even in purely domestic cases. A range of legal arguments has been advanced in cases involving the responsibility of parent companies for harm caused by subsidiaries. Some rely on the parent company’s alleged ‘negligence’ with respect to its subsidiary (primary liability), focusing, for example, on whether the parent has established key systems or processes, such as those dealing with hazardous activities. Other arguments invoke ‘complicity’ (secondary liability) or the concept of ‘agency’ (vicarious or third party liability), which are found in both common and civil law jurisdictions. The responsibility of partners in joint ventures and other contract-based relationships raises even more complex questions, though the theory of multi-agency liability has gained traction in some jurisdictions. In short, far greater clarity is needed regarding the responsibility of corporate parents and groups for the purposes of remedy.”²⁹⁹

This clarity is still missing. To be fair with the SRS, it must be emphasised that not only are there no internationally recognised standards, but even within EU member States common rules addressing the issue of corporate criminal liability for subsidiaries operating as independent legal entities are lacking.³⁰⁰ Certain guidance may, however, be drawn from international anti-corruption treaties where the UN, OECD and the Council of Europe Conventions commit Parties to criminalise the participation of parent corporations in offences committed by their subsidiaries.³⁰¹

Radu Mares deplores the absence of guidance by the SRS, arguing that *“when policy pronouncements endorsing Ruggie’s RtR [responsibility to respect] reach the ground, the RtR becomes atomised in the RtR of separated companies with no imperative on the core company to oversee and influence affiliates.”*³⁰² At the same time, he notes that the issue may be brought back to the forefront on a voluntary basis through multi-stakeholder, public-private governance arrangements, for example in the case of supply chains.

²⁹⁹ Business and Human Rights: Further steps toward the operationalization of the “protect, respect and remedy” framework, A/HRC/14/27 (2010), paras. 105–106.

³⁰⁰ Edinburgh report, above note 4, para. 180.

³⁰¹ Pursuant to Article 27 § 1 UN Convention, “[e]ach State Party shall adopt such legislative and other measures as may be necessary to establish as a criminal offence, in accordance with its domestic law, participation in any capacity such as an accomplice, assistant or investigator in an offence established in accordance with this Convention.” Pursuant to Article 1 § 2 OECD Convention, “[e]ach State Party shall take any measures necessary to establish that complicity in, including incitement, aiding and abetting, or authorisation of an act of bribery of a foreign public official shall be a criminal offence.” Pursuant to Article 15 of the Council of Europe Convention, “[e]ach Party shall adopt such legislative and other measures as may be necessary to establish as criminal offences under its domestic law aiding or abetting the commission of any of the criminal offences established in accordance with this Convention.”

³⁰² Mares above note 287, at 36.

Supply chain issues

A major concern is the responsibility for workers' rights throughout the supply chain. Some progress has been made, but stories continue³⁰³ about resort to sweatshop practices in factories producing for famous global brands. A seminar convened by the SRSG identified some elements of a more comprehensive strategy including empowering workers, building the capacity of suppliers, changing policies and practices of buyers, and building the capacity of labour inspectorates.³⁰⁴

Regarding rights violations in the value chain, some pressure can be brought by boycotts, such as the 'Kimberley Process', a joint governments, industry and civil society initiative to prevent conflict diamonds from reaching international markets.³⁰⁵ The impact of such schemes should, however, not be overestimated. It seems that the 'Kimberly Process' influenced only marginally the outcome of conflicts in Angola, Sierra Leone or Liberia.³⁰⁶ More importantly, traceability schemes work well in relatively strong States with functioning institutions, while their implementation faces serious difficulties in zones of conflict and weak governance. Concerted approaches involving all stakeholders in the countries concerned are likely to have more chances of success. One example cited in this context is Indonesia, where labour unions, major supplier factories and key sportswear brands have agreed to guarantee freedom to form unions and bargain collectively.³⁰⁷

Business itself can make a major contribution by translating the responsibility to respect into concrete due diligence and reporting duties of suppliers and distributors which are made binding through their contractual relations, contract law being another important area for the development of further guidance.

Contract law³⁰⁸

Contract law has a great potential as a vehicle to promote and implement human rights standards in the private sphere. The SRSG himself emphasised the importance of

³⁰³ See Mares, *ibid.*, at 37 with further references. Recent examples include Zara ('Fashion chain Zara acts on Brazil sweatshop conditions', BBC 18 August 2011, <www.bbc.co.uk/news/world-latin-america-14570564>) and Samsung being accused to use child labour in China (Le Monde 10 August 2012, <http://mobile.lemonde.fr/asia-pacifique/article/2012/08/10/samsung-accuse-de-faire-travailler-des-enfants-en-chine_1744710_3216.html>).

³⁰⁴ See <<http://www.kimberleyprocess.com/>>.

³⁰⁵ Summary of five multi-stakeholder consultations, Addendum 1 to the Report, A/HRC/8/5/Add.1 (2008), at para. 246.

³⁰⁶ See above note 295, at 22-23.

³⁰⁷ O.Tudor 'Adidas, Nike and Puma sign up with unions on Indonesian textile worker rights', Blog, 7 June 2011. The text of the signed Freedom of Association Protocol is available at <play-fair.org/media/wp-content/uploads/FOA-Protocol_English-translation_May-20112.pdf>.

³⁰⁸ See Mares above note 287, 17-19.

contracts incorporating CSR provisions.³⁰⁹ Several different types of contract can be distinguished, some of which are already the subject of initiatives with a view to integrating human rights standards. A group of European universities has created a project called the ‘Global Law Academy’ to carry out further research in this field.³¹⁰

If States themselves make use of civil law, they will remain bound by human rights obligations. In areas such as public procurement, export credit guarantee schemes, state-owned enterprises or joint ventures, where state authorities act as commercial partners of business, they can directly influence corporate behaviour. Respect for human rights should inform the negotiation process and, where appropriate, appear in specific contractual clauses.³¹¹ Though we are still far from a comprehensive approach, some interesting developments can be observed. In particular, public procurement can set standards that apply throughout the whole production chain, including also third country subsidiaries and suppliers.³¹² Governments have immense power as purchasers and should take responsibility for human rights impacts. In the United States, all contractors doing significant business with the federal government must certify that they have compliance programmes rooted in ethical and legally compliant cultures, based on those required in the Sentencing Guidelines.³¹³ Public federal procurement shall include special provisions in contracts to the effect that the contractor has to certify that a good faith effort was made to determine whether forced or indentured child labour was used, and to cooperate in providing access to the contractor’s records, documents, persons or premises.³¹⁴ In the European Union, public procurement accounts for around 15% of GDP in most member States.³¹⁵ The European Union has already adopted standards for timber (Forest Law Enforcement, Governance and Trade Scheme - FLEGT)³¹⁶ and wider measures are being considered.

³⁰⁹ See Principles for responsible contracts: integrating the management of human rights risks into State-investor contract negotiations: guidance for negotiators, Addendum 3 to the Report, A/HRC/17/31/Add.3 (2011).

³¹⁰ Its first meeting ‘Promoting human rights through contract’ will take place from 20 to 26 July 2013 in cooperation with the International University College of Turin (www.iuctorino.it).

³¹¹ Copenhagen conference report above note 169, at 10.

³¹² Edinburgh report, above note 4, para. 146.

³¹³ United States Federal Register, Vol. 73, No. 219, 12 November 2008.

³¹⁴ Executive Order 13126 Prohibition of Acquisition of Products Produced by Forced or Indentured Child Labor (12 June 1999). For the effects of this regulation, see R. Woodard, *Sourcing: US labour ‘blacklisting’ a wake-up call to India?*, 20 July 2010, <www.just-style.com/analysis/us-labour-blacklisting-a-wake-up-call-to-india_id108351.aspx>; ‘US Sees Big Drop in Child Labour Use by Indian Carpet-Makers’, *Sify News*, 20 July 2010, <sify.com/news/us-sees-big-drop-in-child-labour-use-by-indian-carpet-makers-news-international-khunacfgihg.html>.

³¹⁵ Copenhagen conference report above note 169, at 9.

³¹⁶ Edinburgh report, above note 4, para. 119

CSR provisions are also increasingly incorporated in export credit guarantees.³¹⁷ The IFC performance standards were updated in 2012, making now direct reference to the SRSG's due diligence recommendations.³¹⁸ EU member States agreed that they will submit yearly reports explaining how effectively their national export credit agencies (ECAs) assess the environmental and human rights risks of the commercial ventures they back.³¹⁹

Human rights are also directly relevant for contracts between private companies themselves. Human rights due diligence and reporting duties of suppliers and distributors need to be formalised through contractual arrangements. CSR provisions have already found their way into contracts through which one party communicates its codes of conduct and expectations, outlines due diligence measures and provides that non-compliance can be a ground for termination of contract.³²⁰ There has been a certain inflation of codes of conduct which are used by suppliers, buyers and distributors alike. The question which standard will prevail in any given contractual relationship appears to depend more on the respective economic power of the partners than the intrinsic value of the code as such.

Finally, codes of conduct that business enterprises adopt internally to set standards for employee behaviour also raise human rights issues. Even codes that are intended to implement ethical behaviour may be too intrusive of employee rights. The corporate code of ethics of the Wal-Mart Corporation banned "romantic involvement" between employees of the company with co-workers who could have an influence on their professional development. In the United States, such provisions may be intended to protect against claims of sexual harassment. In Germany, they were held to violate constitutional rights to human dignity and personality because they disproportionately interfere with the private life of Wal-Mart's employees.³²¹

Responsibilities of financial actors and institutions³²²

The financial crisis which started in 2008 has shown the immense influence of the financial markets' operations on national economies and their welfare systems, with immediate adverse impacts on social and economic rights in particular. The World Bank estimates that 71 million additional people will remain in extreme poverty until 2020 and

³¹⁷ Business and Human Rights: Further steps toward the operationalization of the "protect, respect and remedy" framework, A/HRC/14/27 (2010), at para. 29.

³¹⁸ IFC 'Assessment and Management of Environmental and Social Risks and Impacts, Performance Standard 1' (January 1, 2012), available at <http://www1.ifc.org/wps/wcm/connect/3be1a68049a78dc8b7e4f7a8c6a8312a/PS1_English_2012.pdf?MOD=AJPERES>.

³¹⁹ Amnesty International, ECA-Watch and Eurodad 'Giving human rights credit: EU countries agree to toughen export loan scrutiny' *Press release*, 29 June 2011.

³²⁰ Mares, above note 287, at 18-19 with further references.

³²¹ Higher Labour Court (*Landesarbeitsgericht*) Düsseldorf, decision of 14 November 2005, 10 TaBV 46/05.

³²² Mares, above note 287, at 32-34.

predicts an additional 1.4 to 2.8 million infant deaths by 2015. The United Nations reports a further 100 million more people were left hungry and malnourished because of the crisis.³²³ No other than Graydon Carter, editor of *Vanity Fair*, who cannot be suspected of anti-business bias, exposed the logic of a business model that rewards transactions but rejects responsibility for their consequences:

*“It can fairly be said that the chain of catastrophic bets made over the past decade by a few hundred bankers may well turn out to be the greatest nonviolent crime against humanity in history. They’ve brought the world’s economy to its knees, lost tens of millions of people their jobs and their homes, and trashed the retirement plans of a generation, and they could drive an estimated 200 million people worldwide into dire poverty. In other words, never before have so few done so much to so many. And has there been even one major, voluntary resignation by an ... financial executive? One sincere apology? One jail sentence?”*³²⁴

There have been some CSR initiatives regarding financial institutions, such as the UN-backed ‘Principles for Responsible Investment Initiative for Institutional Investors’ (2006)³²⁵ and the ‘Ecuador Principles’ (2003).³²⁶ The latter is a risk framework for identifying, assessing, and managing environmental and social risks in project finance transactions. They are currently being revised with a view to giving greater emphasis on human rights and due diligence, in line with the UN framework.³²⁷

The SRSR reports cover issues such as export credit agencies, stock exchanges, financial products such as socially responsible investment (SRI) indices, financial regulations requiring transparency, company law and securities law aspects. However, existing analysis and standards remain largely descriptive and tentative, except maybe for the case of project finance, where the direct relationship between the financier and the specific project can be apprehended with the traditional notions of complicity.³²⁸

The idea of ‘shared responsibility’ has been suggested as a useful concept for the wider framework of financial services. For example, Keenan and Ochoa argue in favour of a ‘shared duty to protect’, meaning that “*states, private actors, and international institutions should share the duty to protect those rights that are violated in connection*

³²³ Quoted by L King ‘Business, human rights and the economic crisis’ (27 January 2012), available at <<http://www.amnesty.org.au/poverty/comments/27734/>>.

³²⁴ Editor’s letter June 2009, available at <<http://www.vanityfair.com/magazine/2009/06/graydon200906>>

³²⁵ See <<http://www.unpri.org>>.

³²⁶ See <<http://www.equator-principles.com>>.

³²⁷ ‘Draft of updated Ecuador Principles (EP III) released for stakeholder consultation and public comment’ (13 August 2012), at <<http://www.equator-principles.com/index.php/all-news-media/ep-association-news/289>>.

³²⁸ Mares, above note 287, at 32-33.

with business and financial activity.”³²⁹ But we are still far away from a matrix for corporate responsibility which would adequately grasp the complexities characterising financial markets’ operations and their impacts on human rights. And yet, there appears to be both an urgent need and the capacities for serious human rights risk assessment in the financial sector. Reality in the banking world has been characterised as “*structural irresponsibility*“, where one actor accuses the other of having been responsible for the crisis with the end result that nobody is held accountable.³³⁰ As Catá Backer pertinently observed

*“There is something of a disjunction between the SRSB’s discussion of supply chain obligations of corporations, and the discussion of the obligations financial institutions involved in the financing of corporate activity ... It seems odd to suggest that an industry with such a sophisticated approach to the monitoring and control of borrowers would be incapable of adding another layer of monitoring and review – that centered on human rights – to an already well-established list of risk assessment protocols. Indeed, it would seem that banks are in a better position to monitor compliance from their borrowers than companies might be able to monitor the conduct of their down chain supply chain partners.”*³³¹

Is it really exaggerated to think that human rights impact assessments of even the most rudimentary form would have exposed the unsustainability of many of the business practices that led to the financial crisis?

Civil and criminal liability of corporations

As a matter of principle, the case for some form of corporate liability for human rights abuses is compelling. Corporations enjoy rights under international law, including human rights.³³² They should also be held accountable for abuses. With power comes responsibility.³³³ Moreover, human rights treaties oblige States to provide effective remedies, including compensatory relief, to victims of human rights violations whoever the actual perpetrator is.³³⁴ The ECHR in particular requires States to put into place effective criminal and civil remedy mechanisms for human rights abuses by private actors. Regarding the right to life, the ECtHR held:

“The positive obligation to take all appropriate steps to safeguard life for the purposes of Article 2 entails a duty for the State to ensure, by all means at its disposal, an adequate response – judicial or otherwise – so that the legislative

³²⁹ P. J. Keenan & C. Ochoa ‘The Human Rights Potential of Sovereign Wealth Funds’, *Georgetown Journal of International Law* 40 (2009), at 1158

³³⁰ Claudia Honegger, Sighard Neckel & Chantal Magnin (eds.) *Strukturierte Verantwortungslosigkeit: Berichte aus der Bankenwelt* (Frankfurt edition suhrkamp 2011).

³³¹ Catá Backer above note 231, at 80-81.

³³² E.g. under Article 1 (Protection of property) of the (first) Protocol to the ECHR.

³³³ D. Kinley & J. Tadaki ‘From Talk to Walk: The Emergence of Human Rights Responsibilities for Corporations at International Law’ *Virginia Journal of Int’l Law* 44 (2004), at 1021.

³³⁴ See the examples cited in note 122.

*and administrative framework set up to protect the right to life is properly implemented and any breaches of that right are repressed and punished.”*³³⁵

The legal status of the perpetrator should be irrelevant for the purposes of providing redress. A whole variety of judicial procedures and mechanisms have been put in place both at national and international level to hold States accountable for human rights violations. Why should corporate responsibility go unpunished? In particular when it comes to the most egregious crimes, why “*should corporations have more leeway to kill than people do?*”³³⁶ In certain areas, such as discrimination or data protection, it is already widely accepted that victims can directly sue private actors. Following the universally welcomed adoption of the UN framework, the time may be ripe to consider the introduction of civil and/or criminal liability of corporations for human rights abuses in a more general way. These would certainly be effective means to address the generally perceived implementation gap.³³⁷

However, when it comes to the details of regulation at either national or international level, both civil and criminal liability of corporations raise a number of difficult questions which can only be enumerated here. In the particularly important cases of human rights abuses occurring in third countries, these difficulties are compounded by issues of jurisdiction, liability for subsidiaries or suppliers and applicable law. In his speech at the EU Presidency Conference in November 2010 in Stockholm, the SRSG emphasised that “*the subject of extraterritorial jurisdiction is enormously complex and needs to be handled with great care.*”³³⁸

For the purposes of establishing civil liability, it will be necessary to define in particular:

- The grounds for corporate liability (by reference to human rights or tort law or a combination of both?);
- the applicable law;
- the liability of parent corporations for acts or omissions committed by subsidiaries, suppliers and/or subcontractors;³³⁹
- the relationship between the liability of the corporation and the liability of the individuals within that corporation who are directly responsible for injury or damages suffered;

³³⁵ *Öneryildiz v Turkey*, judgement of 30 November 2004, § 91. See also, *Osman*, cited above, p. 3159, § 115; *Paul and Audrey Edwards*, cited above, § 5; *İlhan v. Turkey* [GC], no. 22277/93, § 91, ECHR 2000-VII; *Kılıç v. Turkey*, no. 22492/93, § 62, ECHR 2000-III; and *Mahmut Kaya v. Turkey*, no. 22535/93, § 85, ECHR 2000-III.

³³⁶ Peter Weiss, NY Times 24 February 2012 commenting on the *Kiobel* case currently pending before the US Supreme Court, see above at notes 81 et seq.

³³⁷ See above text accompanying notes 261 et seq.

³³⁸ J. Ruggie ‘Keynote Presentation at EU Presidency Conference on the “Protect, Respect and Remedy” Framework’ (Stockholm, 10–11 November 2009).

³³⁹ See Edinburgh report, above note 4, paras. 188 et seq.

- the conditions under which jurisdiction would extend to cover foreign subsidiaries or contractors.³⁴⁰

Against the introduction of new grounds of corporate liability it will probably be argued that respect for human rights is already sufficiently ensured through the provisions of general statutes, such as labour, equal opportunities or consumer protection legislation. Such statutes do, however, not always provide effective remedies for all rights and all kinds of abuses. Even for countries with a highly developed legal system, it may still be useful to have general provisions on corporate liability for human rights abuses which would apply subsidiarily, in the absence of specific legislation.

As regards criminal liability, it will be necessary to consider in particular:

- the norms, the violation of which should lead to criminal sanctions (which should be narrowly defined by reference to internationally recognised crimes such as torture and inhuman and degrading treatment, extrajudicial killings, enforced disappearances, genocide, war crimes and crimes against humanity);
- the liability of parent corporations for criminal offences committed by subsidiaries and subcontractors;
- the relationship between the liability of the corporation and the liability of the individuals within that corporation who are directly responsible for the violations which have been committed;
- the conditions under which jurisdiction over extra-territorial human rights abuses should be exercised.

As regards extraterritoriality, it has already been recalled that international law affords States some discretion regarding the scope of criminal jurisdiction.³⁴¹ The international criminal regime governing corruption offences, notably the OECD, Council of Europe and UN conventions, provides some useful precedents in this respect.³⁴² As the discussion and the briefs by different governments in the *Kiobel* case show, it may be reasonable to limit criminal jurisdiction to a number of universally accepted norms and to require that foreign plaintiffs demonstrate that they have no possibility to pursue their case in another jurisdiction capable of providing effective redress for the alleged violations.³⁴³

³⁴⁰ See Edinburgh report, above note 4, paras. 209 et seq.

³⁴¹ Above note 105.

³⁴² Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (21 November 1997); Criminal Law Convention on Corruption (CETS 173, 27 January 1999); UN Convention against Corruption (9 December 2003). See also Edinburgh report, above note 4, paras. 170 et seq.

³⁴³ See above text accompanying notes 98 et seq.

Conclusions and recommendations

Conclusions

The adoption of the UN framework constitutes a watershed in the development of human rights protection. Whereas in the past, attempts to introduce some form of corporate responsibility to respect human rights have been flawed by ideology and differences between developing and developed countries, we now have a worldwide consensus among major stakeholders on a series of key principles. The three pillar framework acknowledges the roles of both States and economic actors. It constitutes an authoritative reference point, providing benchmarks for State and business practice. Far from being comprehensive or perfect, the UN Guiding Principles remain deliberately basic, universal and fundamental. As the SRSG himself emphasised repeatedly, they are only “*the end of the beginning*”,³⁴⁴ a “*common foundation from which thinking and action of all stakeholders would generate cumulative progress over time.*”³⁴⁵

In a certain sense, the UN framework brought about a paradigm shift. The international discussion on human rights and business focuses no longer on the question of whether corporations have human rights obligations, but on practical steps towards implementing the corporate responsibility to respect human rights.

Critics may object that the existing international human rights regime has done little to prevent sometimes egregious human rights abuses by corporations, often acting in complicity with undemocratic governments, in particular in zones of conflict and weak governance. What has happened in Nigeria or Myanmar constituted flagrant violations by the governments in question of their human rights obligations under the applicable UN and ILO conventions. Are there any guarantees that the new approach will be more effective, considering in particular that it relies almost exclusively on soft law instruments without meaningful implementation mechanisms? Probably not; and yet, the various initiatives taken by the UN, ILO, ISO and OECD bear witness to the international community’s determination to have human rights standards against which corporate conduct can be measured.³⁴⁶

What is needed is more guidance to increase the UN framework’s value to individual States and businesses, be it sector or context specific.³⁴⁷ The challenge will be to come up with principles that are precise without being over-prescriptive. Too much complexity may overwhelm the system. But there is no need to start from scratch. Many of the procedural and substantive standards of protection developed under the existing human rights protection mechanisms, such as the ECHR, can be used to develop normative standards on business and human rights. Such standards could be used to clarify in more detail not only the obligations of States (1st pillar of the UN framework), but also what is

³⁴⁴ *Guiding Principles on Business and Human Rights: Implementing the United Nations ‘Protect, Respect and Remedy’ Framework*, A/HRC/17/31, 2011, para. 13.

³⁴⁵ Ruggie above note 153, at 178.

³⁴⁶ See also Kinley & Tadaki above note 333, at 951-952.

³⁴⁷ See above text accompanying notes 268 et seq.

expected from business enterprises as regards their responsibility to respect human rights (2nd pillar of the UN framework).³⁴⁸ Whatever initiatives are taken, it will be important to ensure coherence between the three pillars of the UN framework and measures adopted to implement them further. Otherwise, there is a real risk that a business enterprise will be unable to comply with competing obligations from the host country (through domestic law), home State (through the extraterritorial application of home State law) and international human rights norms.³⁴⁹

Moving “*from vague notions of corporate social responsibility applied in an ad hoc basis by individual corporate and state actors to the elaboration of a multi-level system of polycentric governance*”³⁵⁰ will require considerable efforts by all concerned. It will have to involve both States and business. “*The coordination of these two sources of authority, and their development of systems of behavior control will be the great challenge for the emerging system of economic globalization in the coming decades.*”³⁵¹ Beyond governments and business, it will be essential to associate all stakeholders, including also NGOs and national human rights institutions (NHRIs). The UN Guiding Principles recognise NHRIs functions as providers of independent expertise in highlighting, under the corporate responsibility to respect human rights, that companies may turn to NHRIs for advice regarding “*issues of context.*”³⁵² Some NHRIs have indeed built considerable expertise in the field and will be most valuable partners.³⁵³

What is most encouraging for future activities is the active participation of the business community in both the formulation and implementation of corporate human rights standards. Various major companies throughout the world are prepared to work in partnership with a wide range of stakeholders, including at the local level in developing countries. Business itself has a lot to gain, not only in terms of reputation and consumer confidence, but also in terms of employee satisfaction. While little data is available on the actual impact of human rights impact assessment on companies business performance, several studies have been made on the impact of environmental, social and sustainability efforts. Their results concord in finding that such initiatives result in improved employee morale, more efficient business processes, stronger public image, increased employee loyalty, and increased brand recognition.³⁵⁴

³⁴⁸ See Edinburgh report above note 4, para. 92 , mentioning however only the second aspect.

³⁴⁹ Catá Backer, above note 282, 145.

³⁵⁰ Catá Backer, above note 282,126.

³⁵¹ *Ibid.*

³⁵² A/HRC/17/31 (2011), Commentary to principle 23.

³⁵³ See e.g. the Danish Institute for Human Rights with its Human Rights and Business Department, see <<http://www.humanrightsbusiness.org/>>.

³⁵⁴ See studies by Hewitt & Associates (22 April 2010) at <https://ceplb03.hewitt.com/bestemployers/canada/pdfs/HewittTheGreen30_eng.pdf>; Society for Human Resource Management (4 October 2011), at <<http://www.shrm.org/Research/SurveyFindings/Articles/Pages/AdvancingSustainabilityHR%E2>

The high levels of commitment by some leadership companies as well as the capacity for innovation shown by a range of international CSR initiatives are strengths of the CSR agenda.³⁵⁵ Japan is a particularly interesting example in that respect. With its deep-rooted experience of socially responsible business and worldwide operating corporations, Japan has a lot to contribute to bring the CSR agenda forward. This agenda is becoming more global and will have to incorporate ideas from Japan and other Asian countries.

A challenge for the CSR agenda lies in a certain over-proliferation of initiatives and lack of clarity about how these initiatives relate to each other.³⁵⁶ Laura Seay gives the example of traceability of ‘conflict minerals’ in Africa’s Great Lakes Region.³⁵⁷ At this moment, not only are the SEC,³⁵⁸ the OECD, the International Conference of the Great Lakes Region and the International Tin Research Institute³⁵⁹ all actively pursuing traceability regulations and schemes, there are also initiatives such as the creation of trading centres by MONUSCO,³⁶⁰ an Extractive Industries Transparency Initiative scheme, and the German Federal Institute for Geosciences & Natural Resources programme. The problem is compounded in that traceability is relatively easy with some commodities (e.g. diamonds), but extremely difficult with others (e.g. gold). Despite all these initiatives, which sometimes work in consultation with one another and sometimes not, credible monitoring and verification mechanisms are still lacking, be it at international, regional or, with a few possible exceptions, at national level.

The role of States will remain crucial. They will have to show greater involvement and investment in international CSR initiatives. In the short-term, we need more capacity-building and training, especially in developing countries. However, events on CSR and corporate governance whether in Europe or Asia where experts parachute in with set piece presentations are no substitute for result-oriented activities with those directly involved, especially policymakers, companies, and investors from developing countries.³⁶¹ Through meaningful dialogue and tangible results in poverty reduction in the South, we must counter a perception that CSR is simply an extension of western standards or operating as a non-tariff barrier to trade. This is an especially sensitive issue for export-oriented nations in Asia. As the Department for International Development (DFID, UK) noted already in 2003, “*inappropriate codes of conduct become a form of protectionism that prevents goods from the South being sold in the North. Exporters in developing countries can find the proliferation of regulations and standards hard to*

%80%99sRole.aspx>; as well as surveys by the Reputation Institute, at <<http://www.reputationinstitute.com/index>>.

³⁵⁵ Zaman in Corporate Social Responsibility Report above note 179, at 74-75.

³⁵⁶ Zaman, *ibid.*, at 71-74.

³⁵⁷ Seay above note 295, at 20-21.

³⁵⁸ See above text accompanying notes 290 et seq.

³⁵⁹ A tin industry organisation.

³⁶⁰ United Nations Organization Stabilization Mission in the Democratic Republic of the Congo.

³⁶¹ Zaman in Corporate Social Responsibility Report above note 179, at 74.

comply with. They often fear that ‘process standards’ on the way products are made (such as the standards on labour, the working environment, or animal welfare) will lock their products out of developing country markets.’³⁶²

In the long term, the effectiveness of voluntary CSR commitments and self-regulation by business may well lie in the public recognition of their limits, leading them to be complemented by more effective national and international public regulations.³⁶³ One crucial issue, the lack of effective redress mechanisms for victims and communities adversely affected by human rights abuses, can in any case only be addressed effectively by regulatory State action.

Recommendations

- Future activities relating to human rights and business should build on the work of the SRSG taking the ‘protect, respect, remedy’ framework as a common baseline;
- Any new guidance or standards should be developed in an open multistakeholder process, associating business, governments, national human rights institutions and civil society;
- Further guidance should be developed setting out clearly what is expected from business to implement the UN framework effectively, in particular on the requirements of corporate due diligence, the responsibility of parent companies regarding their subsidiaries and supply chains, the role of financial actors and institutions;
- Due diligence requirements should be formulated as sector and context specific, taking existing human rights standards into account, while avoiding being over-prescriptive;
- The issue of access to justice for victims of corporate human rights abuses should be taken up as a matter of priority, which may require the establishment of civil and/or criminal liability of corporations.

Annex - Bibliography

Articles and books

Andrews, Lori: *I Know Who You Are and I Saw What You Did. Social Networks and The End of Privacy* (Free Press New York 2011)

Cassel, Doug: ‘Corporate Aiding and Abetting of Human Rights Violations: Confusion in the Courts’ *Northwestern Journal of International Human Rights* 6 (2008), 304

³⁶² *DFID and Corporate Social Responsibility* (2003).

³⁶³ D. Vogel ‘Private Global Business Regulation’ *Annual Review of Political Science* 11 (2008), at 274-275.

Castermans, A.G. & van der Weide, J.A.: *The legal liability of Dutch parent companies for subsidiaries' involvement in violations of fundamental, internationally recognised rights* (15 December 2009)

Catá Backer, Larry: 'On the Evolution of the United Nations' "Protect-Respect-Remedy" Project: The State, the Corporation and Human Rights in a Global Governance Context' *Santa Clara Journal of International Law* 9 (2010) 101

Catá Backer, Larry: 'The United Nations' "Protect-Respect-Remedy" Project: Operationalizing a Global Human Rights Based Framework for the Regulation of Transnational Corporations', Conference Paper, Symposium: Corporations and International Law, Santa Clara University, 12–13 March 2010, at <<http://law.scu.edu/corplaw/file/Santa-Clara-Symposium-Larry-Cata-Backer-Paper-Draft.pdf>>.

Clapham, Andrew: *Human Rights in the Private Sphere* (Oxford University Press 1993)

Clapham, Andrew: 'The question of jurisdiction under international criminal law over legal persons' in T. Kamminga & S. Zia-Zarifi (eds) *Liability of Multinational Corporations Under International Law* (The Hague Kluwer 2000), 139

Clapham, Andrew: *The Human Rights Obligations of Non-State Actors* (Oxford University Press 2006)

De Schutter, Oliver: 'The Accountability of Multinationals for Human Rights Violations in European Law' Center for Human Rights and Global Justice Working Paper 01/04 (2004)

Deva, Surya: 'Principles on Business and Human Rights: Implications for Companies' *European Company Law* 9 (2012) 101

EBASHI Takashi, LEE Won Jae & YANG Bin (eds.): *Being Responsible in East Asia CSR Practices of Global Compact Members in China, Japan and Korea* (Hosei University Press 2011)

Ejima, Akiko: 'Simultaneous Codification of the Constitution of Japan and the International Human Rights Treaty' *Journal of Law and Politics* (Tokyo University) forthcoming

Fukukawa, Kyoko: 'Corporate Social Responsibility in Japan: A Local-Global Perspective' Working Paper No 10/03 (May 2010)

Fukukawa, Kyoko & Moon, Jeremy: 'A Japanese Model of Corporate Social Responsibility? A study of online reporting' Bradford University School of Management Working Paper No 03/10 (May 2003).

Fukukawa, Kyoto & Teramoto, Yoshiya: 'Understanding Japanese CSR: The Reflections of Managers in the Field of Global Operations' *Journal of Business Ethics* (2009) 133

Fura-Sandstrom, E.: 'Business and human rights – who cares?' in L. Caflisch (ed.), *Human Rights: Strasbourg Views* (N.P. Engel Verlag, Kehl, 2007) 159

Institute for Human Rights and Business: *From Red to Green Flags: The corporate responsibility to respect human rights in high-risk countries* (2011), at <http://www.ihrb.org/pdf/from_red_to_green_flags/complete_report.pdf>

International Commission of Jurists *Access to Justice: Human Rights Abuses Involving Corporations - Poland* (Geneva, 2010)

International Federation of Human Rights (FIDH) ‘Corporate accountability for human rights abuses – A guide for victims and NGOs on recourse mechanisms’ (2012)

IWASAWA, YUJI: *International Law, Human Rights, and Japanese Law. The Impact of International Law on Japanese Law* (Clarendon Press Oxford 1998)

JOSEPH, SARAH: *Corporations and Transnational Human Rights Litigation* (Hart Publishing Oxford 2004)

Keenan, P.J. & C. Ochoa: ‘The Human Rights Potential of Sovereign Wealth Funds’ *Georgetown Journal of International Law* 40 (2009) 1151

Kinley, David & Tadaki, Junko: ‘From Talk to Walk: The Emergence of Human Rights Responsibilities for Corporations at International Law’ *Virginia Journal of Int’l Law* 44 (2004) 933-1023

Kobrin, Stephen J.: ‘Private Political Authority and Public Responsibility: Transnational Politics, Transnational Firms, and Human Rights’ *Business Ethics Quarterly* 19 (2009) 349

Kremnitzer, Mordechai: ‘A possible case for imposing liability on corporations in international criminal law’ *Journal of International Criminal Justice* 8 (2010), 909

Leader, Sheldon: ‘Human Rights, Risks, and New Strategies for Global Investment’ *Journal of International Economic Law* 9 (2006) 657-703

Mares, Radu: ‘Business and Human Rights After Ruggie: Foundations, the Art of Simplification and the Imperative of Cumulative Progress’ in R Mares (ed.) *The UN Guiding Principles on Business and Human Rights – Foundations and Implementation* (Martinus Nijhoff Publishers Leiden, Boston 2012) 1-50

McCorquodale, Robert: *International human rights law and transnational corporations*, in *Coexistence, cooperation and solidarity* 1 (2012) 453

Parker, Brian Seth: ‘Applying the doctrine of superior responsibility to corporate officers’ *Hastings International and Comparative Law Review* 35 (2012) 1

Port, Kenneth L.: ‘The Japanese International Law “Revolution”’: *International Human Rights Law and Its Impact in Japan* *Stanford Journal of Int’l Law* 28 (1991) 139

Management Forum: *Corporate Social Responsibility Report of the APO Top Management Forum on Corporate Social Responsibility* (Asian Productivity Organization Tokyo 2006)

Ruggie, John Gerard: ‘Reconstituting the Global Public Domain – Issues, Actors, and Practices’ *European Journal of International Relations* 10 (2004) 499

Ruggie, John Gerard: 'Business and Human Rights – The Evolving International Agenda' *American Journal of International Law* 101 (2007) 819

Seay, Laura E.: 'What's Wrong with Dodd-Frank 1502? Conflict Minerals, Civilian Livelihoods, and the Unintended Consequences of Western Advocacy' Center for Global Development Working Paper 284 (January 2012)

Slawotsky, Joel: 'Corporate Liability in Alien Tort Litigation' *Virginia J. Int'l L. Online* 1 (2011) 27

Stevelman, Faith: 'Globalization and Corporate Social Responsibility: Challenges for the Academy, Future Lawyers, and Corporate Law' *New York Law School Law Review* 53 (2008/2009) 817

Stigall, Dan E.: 'International Law and Limitations on the Exercise of Extraterritorial Jurisdiction in U.S. Domestic Law' *Hastings Int'l and Comp. L. Rev* 35 (2012) 323

Suenaga, Kunitoshi: 'A Written Will and Admonition by an Ohmi Merchant Nakamura Jihei in Edo Period: A Historical Study on Sampo Yoshi' *Doshisha Shogaku* 15 (1999), 25

Tateishi, Hiroko: 'L'impact du droit international sur la Constitution japonaise : du point de vue de la protection des droits de l'homme' *Hogaku-Shirin Review of Law and Political Sciences* 109 (2012) No 762 1-28

Tsunoda, Taro, Anderson Mori & Tomotsune 'Global Business and Human Rights – Japan' (18 March 2011), at http://www.europeanlawyer.co.uk/referencebooks_26_496.html

Vázquez, Carlos M. 'Alien Tort Claims and the Status of Customary International Law' *American Journal of International Law* 106 (2012), 531-546

Wells, Louis T. & Tsuchiya, Chieko: 'Japanese multinationals in foreign disputes' *Yearbook on international investment law & policy* 2009 (2012) 715

Wouters, J. and Ryngaert, C.: 'Litigation for overseas corporate human rights abuses in the European Union: the challenge of jurisdiction' *The George Washington International Law Review* 40 (2009) 939

University of Edinburgh: 'Legal framework for human rights and the environment applicable to EU enterprises when they operate outside the EU' (2010) (report prepared for the European Commission, available at http://ec.europa.eu/enterprise/policies/sustainable-business/files/business-human-rights/101025_ec_study_final_report_en.pdf).

Vogel, D.: 'Private Global Business Regulation' *11 Annual Review of Political Science* (2008) 262

Zaman, A.: 'Made in Japan—Converging Trends in Corporate Responsibility and Corporate Governance' Royal Institute of International Affairs, London, 2003. Available at <http://www.riia.org/pdf/research/sdp/MadeInJapan.pdf>

Reports by the SRSG

Interim Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, E/CN.4/2006/97, 2006.

Business and Human Rights: Mapping International Standards of Responsibility and Accountability for Corporate Acts, A/HRC/4/035, 2007.

State responsibilities to regulate and adjudicate corporate activities under the United Nations core human rights treaties: an overview of treaty body commentaries, Addendum 1 to the Report, A/HRC/4/35/Add.1, 2007.

Corporate responsibility under international law and issues in extraterritorial regulation: summary of legal workshops, Addendum 2 to the Report, A/HRC/4/35/Add.2, 2007.

Human Rights Policies and Management Practices: Results from questionnaire surveys of Governments and Fortune Global 500 firms, Addendum 3 to the Report, A/HRC/4/35/Add.3, 2007.

Business recognition of human rights: Global patterns, regional and sectoral variations, Addendum 4 to the Report, A/HRC/4/35/Add.4, 2007.

Human rights impact assessments – resolving key methodological questions, Companion report, A/HRC/4/74, 2007.

Protect, Respect and Remedy: a Framework for Business and Human Rights, A/HRC/8/5, 2008.

Clarifying the Concepts of “Sphere of influence” and “Complicity”, Companion report, A/HRC/8/16, 2008.

Summary of five multi-stakeholder consultations, Addendum 1 to the Report, A/HRC/8/5/Add.1, 2008.

Corporations and human rights: a survey of the scope and patterns of alleged corporate-related human rights abuse, Addendum 2 to the Report, A/HRC/8/5/Add.2, 2008.

Business and human rights: Towards operationalizing the “protect, respect and remedy” framework, A/HRC/11/13, 2009.

Business and Human Rights: Further steps toward the operationalization of the “protect, respect and remedy” framework, A/HRC/14/27, 2010.

Guiding Principles on Business and Human Rights: Implementing the United Nations “Protect, Respect and Remedy” Framework, A/HRC/17/31, 2011.

Piloting principles for effective company/stakeholder grievance mechanisms: A report of lessons learned, Addendum 1 to the Report, A/HRC/17/31/Add.1, 2011.

Human rights and corporate law: trends and observations from a crossnational study conducted by the Special Representative, Addendum 2 to the Report, A/HRC/17/31/Add.2, 2011.

Principles for responsible contracts: integrating the management of human rights risks into State-investor contract negotiations: guidance for negotiators, Addendum 3 to the Report, A/HRC/17/31/Add.3, 2011.

Business and human rights in conflict-affected regions: challenges and options towards State responses, Companion report, A/HRC/17/32, 2011.



Jörg Polakiewicz

Jörg Polakiewicz, PhD, Professor of Law.

Was born in Berlin in 1961. He is head of the human rights policy and development department in the Council of Europe, overseeing the Council's intergovernmental and cooperation work related to human rights. He is also a professor at the Europa-Institut of the University of the Saarland in Saarbrücken. In addition to numerous articles on international, European and constitutional law, he is co-editor of *Fundamental Rights in Europe* (Oxford University Press 2001), author of *Treaty-making in the Council of Europe* (Council of Europe Publishing 1999) and *The Obligations of States arising from the Judgments of the European Court of Human Rights* (Springer) which was his doctoral thesis.

He joined the Council of Europe in 1993. During his career in the organisation, he worked on constitutional reform in Eastern and Central Europe (with the European Commission for Democracy through Law - Venice Commission), judicial co-operation, cybercrime and data protection as well as in the Council's legal service.

From July to August 2012, he was invited to the Center for Asian Legal Exchange (CALE) at Nagoya University, Japan as a Visiting Professor and conducted the research project "Corporate Responsibility to Respect Human Rights – Challenges and Opportunities for Europe and Japan".

CALE Discussion Paper No.9

Corporate Responsibility to Respect Human Rights – Challenges and Opportunities for Europe and Japan

Author Prof. Jörg Polakiewicz

Published by Center for Asian Legal Exchange (CALE)
Nagoya University
464-8601 Furo-cho, Chikusa-ku, Nagoya, JAPAN
Tel: +81 (0)52-789-2325 Fax: +81 (0)52-789-4902
<http://cale.law.nagoya-u.ac.jp/>

Issue date 31 October, 2012

Printed by Nagoya University Co-operative Association

© All rights reserved. No part of this publication may be reproduced, stored in a retrieval system or transmitted in any form or by any means, electronic, mechanical, photocopying, recording or otherwise without the prior permission of the publisher.

CALE Discussion Paper No.9 (October, 2012)

CALE Nagoya University
Center for Asian Legal Exchange