

# SHORTCOMINGS AND DISADVANTAGES OF EXISTING LEGAL MECHANISMS TO HOLD MULTINATIONAL CORPORATIONS ACCOUNTABLE FOR HUMAN RIGHTS VIOLATIONS

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**Resumen:** Este artículo enumera las principales razones por las que las Empresas Multinacionales son una amenaza para los derechos humanos, así como para otros derechos muy importantes, individuales y colectivos. El artículo llama entonces la atención sobre los defectos y desventajas de los mecanismos existentes de protección de los derechos humanos frente a las Multinacionales.

**Palabras clave:** empresas multinacionales, empresas transnacionales, derechos humanos, códigos de conducta, tribunales nacionales, tribunales internacionales, ATCA.

**Abstract:** This paper lists the main reasons why Multinational Corporations (MNCs) pose a threat to human rights (HRs) as well as other very important rights of groups and individuals. The paper then draws attention to the shortcomings and disadvantages of existing HRs protection mechanisms *vis à vis* MNCs.

**Key words:** multinational corporations, transnational corporations, human rights, codes of conduct, national courts, international courts, ATCA.

**Sumario:** I. Transfer of Powers Without Transfer of Accountability: difficulties to regulate and police MNCs. II. Disadvantages and Shortcomings of Traditional HRs Protection Mechanisms. 1. International conventions. 2. Granting international legal personality to MNCs. 3. International agencies with regulatory and enforcement powers. 4. International Human Rights Courts. 5. «Externa» codes of conduct. 6. Internal codes of conduct and guidelines. 7. The «Protect, Respect and Remedy» Framework and the UN Guiding Principles on Business and Human Rights. 8. The United Nations Working Group on the issue of human rights and transnational corporations and other business enterprises. 9. National Criminal Courts. 10. Human Rights Litigation before National Civil Courts. III. Conclusions.

## I. Transfer of Powers Without Transfer of Accountability: difficulties to regulate and police MNCs

1. Citizens of modern States have been increasingly enabled to obtain satisfaction from their Governments for violations of their civil rights / constitutional rights and/or Administrative law<sup>1</sup>. Nevertheless, the Leviathan envisaged by Hobbes, which showed all its deadly power during the 20<sup>th</sup> century, is rapidly shedding its might to a new breed of creatures, equally powerful, to some extent, but which cannot be identified, located or tamed so easily: Multinational Corporations.

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<sup>1</sup> The theory of the *Drittwirkung der Grundrechte* («the effects of Fundamental Rights *vis à vis* third parties»), put forward by NIPPERDEY and DÜRIG, has enabled the Supreme and Constitutional Courts of some countries such as Spain to accept the existence of violations of Fundamental Rights (civil rights) carried out by individuals and not just by the State. Still, this theory has not been developed on an international level yet.

2. It has often been noted that some MNCs have «more control over human, natural and financial resources» than some of the states in which they operate and/or in which they are incorporated<sup>2</sup>. Their immense power, coupled with the difficulties of regulating these omnipresent entities which defy traditional notions of territorial application, may have given birth to a sense of impunity. Attempts to manipulate or overthrow foreign governments<sup>3</sup>, environmental tragedies such as the *Exxon Valdez*, the *Prestige*, the *Bhopal* case or the *Doe v Unocal* litigation, are but a few examples. It has also been said that MNCs can violate HRs in a variety of ways: directly, assisting in violations, failing to prevent violations, remaining silent or simply operating in States that systematically violate HRs.<sup>4</sup> Murder, torture, rape, environmental degradation, forcible relocation of populations, forced labour, health hazards<sup>5</sup> and the like may go unpunished and victims without due compensation if the ultimate perpetrator is just an abstract legal entity, domiciled in a tax haven and whose real owners and/or managers are nowhere to be found.

3. Therefore, this transfer of powers may not have been accompanied by a corresponding transfer of accountability<sup>6</sup>. In the early 1970s, DETLEV VAGTS wrote that there was no «coherent body of law governing the affairs of the global corporation.» At most, there was a «haphazard melange made up of scraps of national rules stuck together after a fashion by a few conventions and some more or less tacit understandings about the reach of nations' powers»<sup>7</sup>. Today, notwithstanding the widespread acceptance of market economy principles, national governments hardly ever relinquish their legal grip on Corporations. On the contrary, more and more sectors of human economic activities are increasingly regulated and calls have been made to reclassify corporations as «social enterprises» in order to allow the State to intervene «to safeguard the public interest and to ensure compliance with publicly acceptable ethical standards»<sup>8</sup>. This interventionist understanding may gain strength if the current economic crisis does not recede and Governments try new (or, for some, old) formulas. Nevertheless, too much regulation can choke business and deter investors, and both developed and developing countries agree that foreign investment is a necessary instrument for development<sup>9</sup>.

4. Compliance with regulations by legal entities is achieved via the imposition of very high fines, (theoretical) threats of un-chartering the corporation or even criminal charges against top executives. Still, even if national corporate regulations can have extraterritorial effects, as it is the case with anti-trust legislation, national legislation concerning human or labour rights cannot be so easily applied to foreign subjects or events which take place abroad<sup>10</sup>. «Host-States are not capable [...] of adequately policing MNC activity regarding HRs issues»<sup>11</sup>, local legislation cannot always regulate violations of HRs, environmental damage or labour rights of groups and individuals without impinging upon the prescriptive jurisdiction of the Government of the country where the MNC operates. It can also be hard for shareholders to control MNCs because of the «upsurge of central management at the expense of the

<sup>2</sup> B. J. KIESERMAN, «Profits and Principles: Promoting Multinational Corporate Responsibility by Amending the Alien Tort Claims Act», *Catholic University Law Review*, number 48, Spring 1999, p. 881, cited in J. E. ARLOW, «The Utility of ATCA and the "Law of Nations"» in *Environmental Torts Litigation...*, *Wisconsin Environmental Law Journal*, number 7, 2000, p. 93.

<sup>3</sup> P. MUCHLINSKI, *Multinational Enterprises and the Law*, Oxford, UK, Cambridge, Mass., Blackwell Publishing, 2005, p. 6.

<sup>4</sup> A. CLAPHAM, & S. JERBI, «Categories of Corporate Complicity in Human Rights Abuses», *Hastings International & Comparative Law Review*, number 24, 2001, pp. 342-349, where they identify three types of corporate complicity: direct, indirect and silent.

<sup>5</sup> P. SUKANYA, «And Justice for All? Globalization, Multinational Corporations and the Need for Legally Enforceable Human Rights Protections», *University of Detroit Mercy Law Review*, 2003-2004, pp. 490 and 503.

<sup>6</sup> S. DEVA, «Human Rights Violations by Multinational Corporations and International Law: Where from Here», *Connecticut Journal of International Law*, 2003-2004, p. 56.

<sup>7</sup> D. F. VAGTS, «The Global Corporation and International Law», *Journal of International Law and Economics*, number 6, 1971-1972, p. 247.

<sup>8</sup> J. E. PARKINSON, *Corporate Power and Responsibility*, Oxford, Clarendon Press, 1993, p. 24.

<sup>9</sup> UNCTAD, *Dispute settlement, International centre for settlement of investment disputes*, 2.1 Overview, 2003, at 5. (<http://r0.unctad.org/disputesettlement/course.htm>) and M. SORNARAJAH, *The Settlement of foreign investment disputes*, The Hague, Boston, Kluwer Law International, 2000, p. 225.

<sup>10</sup> J. C. ANDERSON, «Respecting Human Rights: Multinational Corporations Strike Out», *University of Pennsylvania. Journal of Labor and Employment Law*, number 2, 1999-2000, p. 491.

<sup>11</sup> P. SUKANYA, *id.*, p. 499.

owners»<sup>12</sup>. There are few incentives to make corporations less opaque, so long as shareholders receive profits. Banning and punishing monopolies via the extraterritorial effect of anti-trust law may at times offer an indirect way of preventing the harmful potential of MNCs, but competition rules protect market freedom, not HRs. Finally, national regulations do not, as a rule, properly address the issue of redress and compensation for victims of HRs abuses.

5. Moreover, MNCs can sometimes easily escape from the embrace of home Governments, simply by moving to States where regulation is less developed or where the Government is desperate to attract foreign investment and therefore willing to compromise with «minor» issues, such as the protection of workers, ethnic communities or the environment<sup>13</sup>. Beyond physical relocation, MNCs also manage to employ highly sophisticated corporate structures which, hiding behind the corporate veil, make it difficult to ascertain the jurisdiction under which they operate. Otherwise said: national entities are trying to regulate non-national ones and failing to adequately enforce those regulations against them.

6. There are also attempts to place victims of gross violations against HRs at the centre of the stage. The UN Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law<sup>14</sup> set out standards of reparation that embrace notions of proportionality concerning the gravity of the harm suffered and remedies such as restitution, public apology, etc. They also declare that, in case the harm is caused by a «legal person or other entity» and not by a State, it should be the former that provides reparation. Prior to these Principles, the UN Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power had already foreseen that «when compensation is not fully available from the offender», compensation should be achieved by the State or national funds<sup>15</sup>.

7. The abovementioned UN Basic Principles and Guidelines are non-binding although they can give birth to other binding conventions. Furthermore, they are only concerned with gross violations of HRs<sup>16</sup>, which leaves out many other very important rights. UN member states are supposed to make available to victims the institutions and proceedings necessary to demand such compensation. Nevertheless, this Resolution does indeed call for new ways in which victims or groups of victims can claim for their rights without having to rely on the State, NGOs or international institutions<sup>17</sup>.

## II. Disadvantages and Shortcomings of Traditional HRs Protection Mechanisms

### 1. International conventions

8. From a classical perspective, international conventions regulating MNCs would only be binding on States, which would in turn have the obligation to regulate the activities of MNCs chartered in

<sup>12</sup> J. ROBINSON, *Multinationals and Political Control*, Surrey, Gower Publishing, 1983, p. 225.

<sup>13</sup> R. VERNON, *Sovereignty at bay: the multinational spread of U.S. enterprises*, New York, New York, Basic Books, 1971, pp. 7-11; S. ZIA-ZAFIRI, «Suing Multinational Corporations in the US for Violating International Law», *UCLA Journal of International Law and Foreign Affairs*, number 4, 1999, p. 86.

<sup>14</sup> UN Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, General Assembly Resolution 60/147, of 21 March, 2006.

<sup>15</sup> Declaration of Basic principles of justice for victims of crime and abuse of power emanating from the deliberations of the UN Congress on the prevention of crime and the treatment of offenders: General Assembly resolution 40/34 of 29 November 1985, paragraph A-13.

<sup>16</sup> Genocide, war crimes, crimes against humanity. S. RATNER, and J. ABRAMS, *Accountability for Human Rights Atrocities in International Law*, Oxford, Oxford University Press, 2001.

<sup>17</sup> «13. In addition to individual access to justice, States should endeavour to develop procedures to allow groups of victims to present claims for reparation and to receive reparation, as appropriate». Furthermore, international law does not grant standing to sue to groups before international tribunals.

their territories, or at least regulate the activities they carry out within their borders<sup>18</sup>. This way, the reality of MNCs as global players would not be tackled and the problem of an increasingly unified global market would be left unsolved. Furthermore, developed states are definitely unwilling to be bound in this area. They prefer flexibility in dealing with MNCs, in order to protect these attractive sources of employment and tax revenue.

**9.** There is indeed a broad consensus on the fact that certain acts such as genocide, torture, forced labour and slave trading are prohibited by international conventions or universal rules of *ius cogens*<sup>19</sup>. Nevertheless, there are other equally harmful acts, easily committed by MNCs, that may not come under the scope of HRs treaties and customary rules: manslaughter or accidental deaths (Bhopal), environmental harms (Exxon Valdez), cultural oppression (such as actions undertaken against Amazon's indigenous populations), etc. These types of violations deserve to be treated in a single forum, instead of having different kinds of courts for (i) violations of HRs and for (ii) more general or «classic» torts. Otherwise, the same line of events may be split among proceedings concerning violations of labour rights before the national courts of the place where the workers perform their duties, mass claim litigation before the courts of the place where the parent company is domiciled, and certain international crimes or HRs violations being adjudicated before an international tribunal, with the undesirable prospect of contradictory decisions. Furthermore, a single type of dispute resolution mechanism may achieve a relatively uniform case law concerning these kinds of violations, thus avoiding different standards of HRs protection across the globe.

**10.** International conventions imposing immediately enforceable economic duties on countries are difficult to negotiate and to ratify. Even if an appropriate international convention for the regulation (at State level) of MNCs were ever ratified by a reasonable number of states, there would still be hurdles to face, both theoretical and practical, such as (i) uniform interpretation of its rules, principles and guidelines, and (ii) conflicts of courts, because several states would feel entitled to exert their adjudicative power over the same MNC. Furthermore, such a convention would very likely contain obligations that would not carry enforceable sanctions, thus depriving the obligation of some of its force.

## 2. Granting international legal personality to MNCs

**11.** Some authors claim that it is necessary to confer international legal personality upon MNCs, so they are made subject to the obligations imposed by international norms and standards for the protection of HRs<sup>20</sup> and perhaps can be made to stand trial before traditional interstate courts, too.

**12.** Nevertheless, MNCs can be said to have been vested with international legal personality for quite some time. At least, attempts have been made to codify the international law of state responsibility for injuries to aliens,<sup>21</sup> and mechanisms have been devised to allow foreign investors to claim against host states on the basis of international rules of law. Thus, international law has actually been «privatized». Arbitral practice of ICSID<sup>22</sup> and NAFTA<sup>23</sup> panels, mixed arbitrations governed by the UNCITRAL rules, and the existing network of more than 2000 Bilateral Investment Treaties (*BITs*) are examples of this. Effectively, this means that MNCs can make use of international treaties, customs and

<sup>18</sup> S. DEVA, *id.*, p. 48.

<sup>19</sup> §702 Restatement of the Law Third, Foreign Relations Law of the United States, St. Paul, Minn., American Law Institute Publishers, 1989-1990.

<sup>20</sup> S. DEVA, *id.*, p. 52.

<sup>21</sup> J. CRAWFORD, *The International Law Commission's Articles on State Responsibility: Introduction, Text and Commentaries*, Cambridge, Cambridge University Press, 2002 and Conference for the Codification of International Law, Responsibility of States for Damage Caused in their Territory to the Person or Property of Foreigners, League of Nations Doc. C.75 M. 69 1929. V., reprinted in 24 *American Journal of International Law*, number 46 (Supp. 1930).

<sup>22</sup> International Center for Settlement of Investment Disputes, created by the Washington Convention of 18 March, 1965.

<sup>23</sup> North American Free Trade Agreement, of 17 December 1992.

principles while at the same time, individuals and groups cannot claim against MNCs before international tribunals for the violations of similar rights and principles.

**13.** In the same way that diplomatic protection gave way to international investment arbitration, because foreign investors were not suitably protected via national or international courts, alternative a-national *fora*, such as arbitration tribunals, could be designed for the protection of individuals *vis à vis* the damage caused by MNCs. More research needs to be done in order to analyse if such mechanisms could be modelled after BITs and ICSID arbitration/conciliation rules and tribunals which, *de facto*, have had the effect of making international law available to non-state actors, such as MNCs.

### 3. International agencies with regulatory and enforcement powers

**14.** Proposals have been made to confer prescriptive, as well as adjudicative jurisdiction on supranational bodies. In this regard, Surya Deva has called for a UN-WTO partnership, that could prescribe and enforce HRs standards<sup>24</sup>. According to this scholar, the Dispute Settlement Board of the WTO could be vested with power to award damages, both compensatory and punitive. There would also be social sanctions, like a prohibition to have business relationships with a delinquent MNC. Actually, this enforcement measure might be useless because the delinquent MNC could be wound up and its assets transferred to another company, so that third parties would still be able to do business with it. On the other hand, Pillay Sukanya argues that it is unreasonable to demand that international financial institutions and multilateral trading regimes serve as custodians of HRs because it may suggest that HRs are subordinated to economic and trading considerations<sup>25</sup>. In this regard, the debate between Alston and Petersmann also suggests the existence of two very different tendencies in the protection of HRs: direct enforcement—as ordinary rights may be enforced in court by ordinary citizens—and indirect enforcement, by making HRs one of the goals of national or international agencies, whose main objectives may be quite different<sup>26</sup>.

**15.** The World Bank's Inspection Panel<sup>27</sup> can only investigate violations of HRs suffered in the context of projects funded by the Bank, and only after receiving complaints. In fact, the Inspection Panel mostly provides a mechanism to hold the World Bank accountable, not MNCs or borrowing States. It does not grant remedies and is, therefore, not victim-centred. Its efficacy comes from the publicity and pressure it may manage to achieve through its investigations and reports, but it may provide a model for future initiatives<sup>28</sup>.

**16.** Other proposals include linking trade and labour rights, as in the HRs and democracy clauses included in international agreements concluded by the EU with third countries. However, developing nations oppose this strategy, which they regard as an imperialist device to impose standards not accepted by them<sup>29</sup>.

**17.** A universal regulatory and enforcement agency is possibly utopian. On the one hand, international law is still largely based on the principle of national sovereignty, its two main sources being customary law, «evolving from the practice of states», and interstate conventions<sup>30</sup>. Respect for national

<sup>24</sup> S. DEVA, *id.*, p. 22.

<sup>25</sup> S. PILLAY, *id.*, p. 496.

<sup>26</sup> E. PETERSMANN, «Time for a United Nations «Global Compact» for Integrating Human Rights into Law of Worldwide Organisations: Lessons from European Integrations», *European Journal of International Law*, volume 13, number 3, 2002 and P. ALSTON, «Resisting the Merger and Acquisition of Human Rights by Trade Law: A Reply to Petersmann», *European Journal of International Law*, volume 13, issue 4, 2002.

<sup>27</sup> World Bank Resolution Inspection Panel, Resolution No.93-10 IBRD, *International Legal Materials*, number 34, 1995, p. 520.

<sup>28</sup> See <http://www.ciel.org/Publications/citizensguide.pdf>.

<sup>29</sup> J. C. HONG, «Enforcement of Corporate Codes of Conduct: Finding a Private Right of Action for International Laborers Against MNCs For Labor Rights Violations», *Wisconsin International Law Journal*, volume 19, issue 41, 2000-2001, p. 47.

<sup>30</sup> Art. 38(1) of the Statute of the International Court of Justice; P. MALANCZUK, *Akehurst's Modern Introduction to International Law*, London, 7<sup>th</sup> ed. Routledge, 1997, pp. 35-36.

sovereignty means respect for the State's prescriptive and adjudicative jurisdiction concerning non-State actors such as MNCs operating within their borders. On the other hand, it would be paradoxical that, after having witnessed the terror that a single nation state can unleash, leaders and citizens alike agreed to create some sort of really supranational state or, for that matter, a truly universal regulatory and enforcing agency.

**18.** The power of an international regulatory agency may be undemocratic, non-transparent and contrary to subsidiarity<sup>31</sup>. It would be useless if it did not have enforcement power, which it would allegedly never have. It might also end up being as bureaucratic as a national government. Local corporations—sometimes equally harmful—may escape this global regulator, with competence limited to global enterprises. It may be useful, though, as an information-gathering agency or consultative body for host governments, acting as mediator or arbitrator of differences between host governments and MNCs or as an agency for the development of standards of behaviour<sup>32</sup>.

#### 4. International Human Rights Courts

**19.** It has been said that «where internationally recognized rights are concerned, juridical protection, to be effective, should emanate from an international organ»<sup>33</sup>. Nevertheless, HRs tribunals are, as a rule, courts of last resort, where all other mechanisms of justice have failed. They follow the fourth instance formula and cannot be used as appellate courts, which, in addition to the obligation to exhaust local remedies, reduces their jurisdiction to a significant degree. They may be used to provide some sort of comfort where all available national tribunals have turned their backs on the claimant (or defendant), but they do not provide for real mechanisms of redress, their decisions merely implying an exhortation to the country of origin of the decision.

**20.** International courts with jurisdiction to hear claims for violations of HRs, like the European Court of Human Rights (ECHR) and the Inter-American Court of Human Rights, are mainly focused on violations of HRs by member states and are based upon the principle of subsidiarity.

**21.** The margin of appreciation doctrine—also present in litigation before international tribunals—implies that «[e]ach society is entitled to certain latitude in resolving the inherent conflicts between individual rights and national interests or among different moral convictions»<sup>34</sup>. International tribunals also have a self-imposed deference towards the decisions of domestic courts. This effectively means that, no matter how universal a HRs convention is, if the enforcement of such rights continues to be done on a purely national sphere, HRs will never enjoy the same universal standard of compliance.

**22.** International courts do not have as sophisticated enforcement mechanisms as the ones available in domestic courts. International HRs courts do not always offer redress for victims and accord no punishment for perpetrators, either. The International Criminal Court (ICC) is in fact centred in the punishment of the perpetrator and does have the power to imprison those it convicts, but it only has jurisdiction to hear cases involving gross HRs violations and only against individuals, not corporations.

<sup>31</sup> D. VAGTS, «The Governance of the Multinational», *Wisconsin International Law Journal*, number 23, 2005, p. 537.

<sup>32</sup> GOLDBERG & KINDLEBERGER, «Toward a GATT for Investment: A proposal for supervision of International Corporations», *Law & Policy in International Business*, 1970, p. 295.

<sup>33</sup> Ninth International Conference of American States, Final Act XXXI, in *International Conferences of American States, Second Supplement, 1942-1954*, p. 270 (Pan American Union ed., 1958. Cited in J. BOUNNGASENG, «Adjudication of International Human Rights Claims in the European Court of Human Rights and...», *Georgia Journal of International and Comparative Law*, volume 33, 2004-2005, p. 484.

<sup>34</sup> B. EYAL, «Margin of Appreciation, Consensus, and Universal Standards», *New York University of International Law and Politics*, 1999, number 31, p. 843, cited in J. BOUNNGASENG, «Adjudication of International Human Rights Claims in the European Court of Human Rights and...», *Georgia Journal of International and Comparative Law*, volume 33, 2004-2005, p. 490.

**23.** Finally, international tribunals face a massive backlog and litigation before them is so lengthy a process that victims may not have the impression that justice is being done and may suffer emotionally. All of these drawbacks lead to the conclusion that international tribunals may not be an appropriate solution in order to make MNCs accountable for HRs violations<sup>35</sup>.

## 5. «External» codes of conduct

**24.** Guidelines and codes of conduct<sup>36</sup> are meant to be adopted by States, to inspire their legislation, to be incorporated into collective bargaining agreements or to be taken into account by courts and administrative tribunals in order to interpret national legislation.<sup>37</sup> External codes of conduct may be drafted and approved within international organizations, individual governments<sup>38</sup> or NGOs<sup>39</sup>. They require no ratification and no consensus to be adopted but, on the other hand, they do not create internationally binding obligations on States and much less on MNCs. In order to achieve any effectiveness, they need a lot of publicity of the violations assessed under the codes. In fact, they may even operate as a curtain to disguise further abuses<sup>40</sup>. So far, no initiative of this kind has been completely satisfactory—in the sense that the problem they were trying to solve remains alive—and some of the most ambitious ones have not even come into being.<sup>41</sup>

**25.** The observance of the revised OECD Guidelines for Multinational Enterprises is voluntary, limited to OECD countries, plus some other non OECD countries which have also declared that they would observe the Guidelines.<sup>42</sup> The foreseen enforcement mechanism consists of consultations made by member states, companies, employee organisations and NGOs, before National Contact Points, which act as mediators and whose performance before 2000 was clearly disappointing. If the conflict is not resolved, it can be referred to the Committee on International Investment and Multinational Enterprises. Neither body can ultimately issue a pronouncement as to whether a particular firm has or has not respected the Guidelines in a given case<sup>43</sup>. Most National Contact Points cannot reveal firms' names to the public, either. They simply clarify and interpret the Guidelines. Last of all, the Guidelines have lost much of their initial appeal, partly due to the new positive attitude towards foreign investment.

**26.** The International Labor Organization (ILO) sets labour standards, which eventually may turn into conventions, provides technical assistance to countries, and disseminates information<sup>44</sup>. Nev-

<sup>35</sup> J. BOUNNGASENG, «ATCA suits, the better alternative», *Georgia Journal of International and Comparative Law*, number 33, 2004-05, p. 473.

<sup>36</sup> N. HORN (ed). *Legal Problems of Codes of Conduct for Multinational Enterprises. Studies in Transnational Economic Law*, vol. 1. Deventer, Kluwer, 1980. J. F. PÉREZ-LÓPEZ, «Promoting International Respect for Worker Rights Through Business Codes of Conduct», *Fordham International Law Journal*, number 17, 1993-1994.

<sup>37</sup> A. A. FATOUROS, «On the implementation of codes of conduct», *American University Law Review*, number 30, 1980-1981, p. 959.

<sup>38</sup> For instance, President Clinton's Model Business Principles, put forward in order to separate HRs issues from American trade policy. Actually, they were too vague and did not foresee any follow up system or reinforcement mechanism.

<sup>39</sup> Some examples are the Sullivan Principles for US companies operating in Apartheid's South Africa, the McBride Principles for US companies operating in Northern Ireland, the Rugmark Foundation for South Asia, the Apparel Industry Partnership Workplace Code of Conduct.

<sup>40</sup> J. C. HONG, p. 51.

<sup>41</sup> E.g: UN Code of Conduct for Transnational Corporations, UN Commission on Transnational Corporations: A Code of Conduct, Formulations by the Chairman, UN Doc. E/C.10/AC.2/8(1978). See too Development and International Economic Cooperation: Transnational Corporations, UN ESCOR 2d Sess., Agenda Item 7(d), UN Doc E/1990/94 (1990).

<sup>42</sup> OECD Declaration to which the OECD Guidelines are annexed: OECD Doc. C(76)99 (1976), reprinted in 15 Int'l Legal Materials 967 (revised in 2000).

<sup>43</sup> See J. HUNTER, *The OECD Guidelines and the MAI. In Institutional and Procedural Aspects of Mass Claims Settlement Systems. The International Bureau of the Permanent Court of Arbitration*, The Hague, Kluwer Law International, 2000, p. 201.

<sup>44</sup> In 1998, the ILO adopted the Declaration on Fundamental Principles and Rights at Work. The Declaration committed members to respect the principles and rights in four categories, including: freedom of association and collective bargaining, elimination of forced and compulsory labour, elimination of discrimination in respect of forced and compulsory labour, elimination of discrimination in respect of employment and occupation, and abolition of child labour. Each of these areas is supported by two ILO conventions, which together make the eight ILO Core Labour Standards (The Corporate Responsibility to Respect

ertheless, its conventions only bind ratifying states, and the ILO itself has no enforcing power. Some labour rights included in ILO's conventions are the prohibition of forced labour, discrimination, child labour and freedom of association<sup>45</sup>. With the exception of forced labour, which is assimilated to slavery by most scholars, the remaining rights and prohibitions are not part of international customary law, because they lack universal acceptance and are contingent on the specific situation of each country<sup>46</sup>. As with the OECD guidelines, requests for clarification of the ILO's Tripartite Declaration can be made, but the names of the multinationals are not revealed.

**27.** The Global Compact<sup>47</sup> was meant to fill the void between binding regulatory regimes and codes of conduct<sup>48</sup>. It addressed HRs, labour and environmental issues. It made a call to promote initiatives such as private-public partnerships, engage in policy dialogues with MNCs and the creation of a learning forum for labour and civil society organisations. Nevertheless, it suffered from unclear implementation measures: it required companies embracing it to submit an annual report to show their commitment, which may just be a public relations exercise.

**28.** The Norms on Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights, approved by the Sub-Commission on the Promotion and Protection of Human Rights in August 2003, «still fall short of what is required for evolving and effective international regulatory regime of corporate human rights responsibility»<sup>49</sup>. The Norms, which are not and have never been binding, do represent a step forward over their predecessors but, as it is usually the case, lack efficient enforcement mechanisms. These mechanisms basically consist of the obligation to adopt codes of conduct, give appropriate training to managers and workers, ensure that business partners comply with HRs obligations, provide for periodic monitoring by international bodies and an obligation of States to put in place the necessary framework to ensure compliance by the MNCs.

**29.** Generally speaking, it can be said that too much emphasis has been put on listing MNCs obligations in the field of HRs, without giving much thought to the way to enforce those obligations.

## 6. Internal codes of conduct and guidelines

**30.** «Internal codes of conduct» and guidelines can be said to be those drafted and endorsed internally, within one company or group of companies. Standards of protection contained in the aforementioned codes may lack the necessary uniformity and consistency. This lack of precision draws a blurred line between what can and cannot be done, in accordance with the code. They are not compulsory for the corporations that adopt them. The follow up, monitoring, independent audits and report mechanisms that may be set up can be avoided or the reports withheld<sup>50</sup> and effective monitoring entails costs, which is an incentive to monitor minimally or not to adopt the code<sup>51</sup>.

**31.** Moreover, monitoring mechanisms may deprive victims of their right to claim directly against the perpetrators, having to put their trust in the honesty and diligence of auditors and members of

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Human Rights. An Interpretive Guide; Office of the High Commissioner for Human Rights; November 2011, Annex A).

<sup>45</sup> International Labor Organization, Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy, ILO Doc. GN 204/4/2 (1978), reprinted in «International Legal Materials», number 49, 1978 at 423 and Declaration on Fundamental Principles and Rights at Work 1998, adopted at the ILO's 86<sup>th</sup> Session, Geneva, June 1998.

<sup>46</sup> M. TORRES, «Labor Rights and the ATCA: Can the ILO's Fundamental Rights be Supported through ATCA litigation?», *Columbia Journal of Law and Social Problems*, number 37, 2003-2004, p. 464.

<sup>47</sup> Put forward in 1999 by Kofi Annan (<http://www.globalcompact.org>).

<sup>48</sup> S. DEVA, p. 13.

<sup>49</sup> S. DEVA, «UN's Human Rights Norms for Transnational Corporations and Other Business Enterprises: an Imperfect Step in the Right Direction?», *ILSA Journal of International and Comparative Law*, number 10, 2003-2004, p. 495.

<sup>50</sup> As was the case with Nike and the report drafted by Ernst & Young; see J. LOBE, «Labor-U.S.: Nike Brought to Court over False Ads», *Inter Press Service*, April. 21, 1998.

<sup>51</sup> J. ANDERSON, id., pp. 489-490.



the follow-up boards, as well as in the corporations, which have to apply the decisions or reports issued by the boards<sup>52</sup>. Inevitably, there are conflicts of interest if MNCs have to do the monitoring themselves or if the auditors are paid by the MNC. Such auditors, on the other hand, may not be experts in HRs, industrial relations or environmental issues<sup>53</sup>.

**32.** On the other hand, MNCs may have limited power to stop subcontractors from violating HRs, although this may too often be an excuse, because MNCs may simply not want to strain relationships with them. Nevertheless, in this regard, it may be disputed whether MNCs have a moral or legal obligation not to do business with HRs violators. Finally, such codes and reports may simply be used to increase public approval, as well as sales.

**33.** Although some authors believe that litigation based on the Alien Tort Claims Act (ATCA)<sup>54</sup> may also provide, in some cases, a mechanism to enforce labour rights contained in codes of conduct<sup>55</sup>, the fact is that codes of conduct remain voluntary and do not provide a completely effective protection for workers of those enterprises, let alone other citizens who may suffer because of the operations of any given enterprise.

## **7. The «Protect, Respect and Remedy» Framework and the UN Guiding Principles on Business and Human Rights**

**34.** After the failure of the UN Norms on Transnational Corporations and Other Business Enterprises, the UN Commission on Human Rights established a mandate in 2005 for a Special Representative of the Secretary-General. During the first phase of his mandate, the Special Representative —Harvard Professor JOHN RUGGIE— identified and clarified existing standards and practices regarding business and human rights worldwide.

**35.** In the second phase, Prof. RUGGIE presented, and the UN Council for Human Rights endorsed, the «Protect, Respect and Remedy» Framework. «The Framework rests on three 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 in essence means to act with due diligence to avoid infringing on the rights of others; and greater access by victims to effective remedy, judicial and non judicial. The three pillars are complementary in that each supports the others»<sup>56</sup>.

**36.** In the third phase, the Special Representative was asked to operationalize the Framework, which he did by drafting and proposing the UN Guiding Principles, which were endorsed by the UN Council. As the Special Representative has put it: the Guiding Principles «will mark the end of the beginning: by establishing a common global platform for action, on which cumulative progress can be built, step-by-step, without foreclosing any other promising longer-term developments. The Guiding Principles' normative contribution lies not in the creation of new international law obligations but in elaborating 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»<sup>57</sup>.

<sup>52</sup> G. ALFREDSSON, et. al., *International Human Rights Monitoring Mechanisms. Essays in Honour of Jakob Th. Möller*, Leiden/Boston, Martinus Nijhoff Publishers, 2001.

<sup>53</sup> J. C. HONG, p. 56.

<sup>54</sup> Also known as Alien Tort Statute (ATS).

<sup>55</sup> J. C. HONG, id., p. 67.

<sup>56</sup> Report of 22 April 2009 of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other Business enterprises, A/HRC/11/13.

<sup>57</sup> Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, John Ruggie. Guiding Principles on Business and Human Rights: Implementing the United Nations «Protect, Respect and Remedy» Framework, 21 March 2011, A/HRC/17/31, pg. 5.

## 8. The United Nations Working Group on the issue of human rights and transnational corporations and other business enterprises

37. The United Nations Working Group for human rights and transnational corporations and other business enterprises was created by the UN Human Rights Council on 16 June 2011<sup>58</sup>. It formally took up its role on 1 November 2011<sup>59</sup>. The Working Group is made of five independent experts of balanced geographic representation. These experts bring diverse skills and experience in order to promote business respect for human rights across a wide range of countries, issues, and sectors.

38. This new expert body is charged with promoting respect for human rights by businesses of all sizes, in all sectors, and in all countries. The new expert body commenced its activities focusing on the UN Guiding Principles, which provide for the first time a global standard for preventing and addressing the risk of negative human rights impacts connected to business activity.

39. Besides promoting and disseminating these Guiding Principles, the Working Group must ensure that they are effectively implemented by both governments and business, and that they lead to improved results for individuals and groups around the world whose rights have been endangered by business activity.

40. The new expert body is also charged by the Human Rights Council with identifying and promoting good practices and lessons learned on the implementation of the Guiding Principles, advise governments on the development of domestic legislation relating to business and human rights, building the capacity of all relevant actors to address business-related human rights impacts, and working to enhance access to effective remedies for those whose human rights have been affected by businesses. They will also conduct country visits and identify and promote good practices.

41. The Working Group will also guide the work of a new annual UN Forum on Business and Human Rights, which will provide an arena for the discussion of trends and challenges in implementing the UN Guiding Principles on human rights and business, including challenges faced in particular sectors, country contexts and in relation to specific human rights and business issues and rights-holding groups.

42. The UN Working Group on Human Rights and Transnational Corporations and Other Business Enterprises invited governments, companies, trade unions, international agencies, national human rights institutions and NGOs to share their thoughts to help it establish its work programme. The Working Group took into account proposals by all relevant actors before its first session (16-20 January 2012), during which its five independent experts determined the Group's key thematic priorities and activities: global dissemination of the Guiding Principles, promoting their implementation and embedding them in global governance frameworks<sup>60</sup>.

## 9. National Criminal Courts

43. Criminal liability of legal entities is only available in a few legal systems.<sup>61</sup> Furthermore, not all legal systems allow criminal judges to award damages to the victim of a criminal offense<sup>62</sup>. On the

<sup>58</sup> Resolution 17/4 (A/HRC/RES/17/4), 16 June 2011.

<sup>59</sup> Report of the Working Group on the issue of human Rights and transnational corporations and other Business enterprises (A/HRC/20/29), 10 April 2012.

<sup>60</sup> Report of the Working Group on the issue of human Rights and transnational corporations and other Business enterprises (A/HRC/20/29), 10 April 2012.

<sup>61</sup> See. Art. 121.2 French Criminal Code, H. DE DOELDER/K. TIEDEMANN (eds.), *La Criminalisation du Comportement Collectif/Criminal Liability of Corporations*, The Hague, Kluwer Law International, 1996 and A. CLAPHAM, «MNCs Under International Criminal Law», in *Liability of Multinational Corporations under International Law*, edited by M. T. KAMMINGA & S. ZIA-ZARIFI, The Hague, Kluwer Law International, 2000, p. 139 et seq.

<sup>62</sup> Articles 109 et seq. Spanish Criminal Code, 100 et seq., 615 et seq. Spanish Code of Criminal Procedure.

other hand, national courts only have universal jurisdiction in a handful of cases like genocide<sup>63</sup> and it is well known that the principle of universal criminal jurisdiction is being contested by national supreme courts and parliaments<sup>64</sup>.

**44.** Making enforcement of HRs dependent upon national courts and national statutes also has the drawback that the differences between those statutes and case law would lead to different standards for the protection of HRs.

## 10. Human Rights Litigation before National Civil Courts

**45.** National civil (non-criminal) courts do have the potential to provide appropriate remedies and redress for victims of HRs abuses caused by MNCs but, many times, they lack jurisdiction or adequate procedural rules. The most common jurisdictional principles in tort cases call for the jurisdiction of the courts of the country where the tort took place<sup>65</sup>. Certain situations of massive HRs violations, armed conflicts or institutional discrimination that may have taken place in that country, may have also led to an inadequate, biased or easily manipulated judiciary. Furthermore, the applicable law will probably be the «the local law of the state where the injury occurred»<sup>66</sup> or «the law of the country in which the damage occurs»<sup>67</sup>. Again, in the case of HRs violations perpetrated in the context of armed conflicts or authoritarian regimes, it may well be the law of a country that condones the violations or does not offer proper compensation.

**46.** HRs, labour and environmental violations by MNCs often take the form of mass torts against communities or groups of individuals, for the adjudication of which not all national courts are well prepared. National procedural rules often cannot modify their standards of proof or case management to account for hundreds of claims, basically based upon the same facts and applicable rules. This results in intolerable delays that add to the emotional and physical pain of the victims. Furthermore, national rules for the protection of HRs, labour, cultural or environmental rights vary considerably from one country to another, and so do rules on liability and causal nexus.

**47.** Despite some examples of HRs litigation before national courts in the UK, Australia and Canada<sup>68</sup>, the most successful legislative instrument towards achieving accountability for corporate violations of HRs before national courts is the Alien Tort Claims Act (ATCA or ATS)<sup>69</sup>. Thanks, partly, to this act, plus the availability of contingent fees, punitive damages, pre-trial discovery, trial by jury and certain other jurisdictional rules and procedural mechanisms, the US is at the moment the preferred forum for HRs litigation. In fact, ATCA is a unique piece of legislation, without an equivalent in other jurisdictions<sup>70</sup>.

**48.** The decision rendered by the Supreme Court in *Sosa v Álvarez Machain*<sup>71</sup> clarified the controversy around ATCA, to a certain extent. It now seems clear that the concept of the «law of nations»

<sup>63</sup> Article 23.4 Spanish Organic Judiciary Law (Ley Orgánica del Poder Judicial).

<sup>64</sup> See German Federal Supreme Court decisions of 30-04-1999 and 21-02-2001 and Spanish Supreme Court decisions of 25-02-2003 and 21-06-2007; Belgian law of 16-06-1993, amended by law of 24-04-2003.

<sup>65</sup> Vid. article 5.3 Council Regulation (EC) 44/2000 (not applicable outside the EU).

<sup>66</sup> Vid. §146 Restatement of the Law Second, Conflict of Laws, St Paul (Minn.), The American Law Institute, 1969.

<sup>67</sup> Vid. article 4.1 Council Regulation (EC) 864/2007 on the law applicable to non-contractual obligations (Rome II).

<sup>68</sup> Beyond voluntarism, Human Rights and the Developing Legal Obligations of Companies, International Council on Human Rights Policy, at 105 ([http://www.ichrp.org/files/reports/7/107\\_report\\_en.pdf](http://www.ichrp.org/files/reports/7/107_report_en.pdf)).

<sup>69</sup> § 1350 of Title 28 U.S.C.

<sup>70</sup> Beyond voluntarism, Human Rights and the Developing Legal Obligations of Companies, International Council on Human Rights Policy, at 104 ([http://www.ichrp.org/files/reports/7/107\\_report\\_en.pdf](http://www.ichrp.org/files/reports/7/107_report_en.pdf)).

<sup>71</sup> Vid. *Sosa v. Álvarez-Machain*, 542 U.S. 692, 731 (2004).

must be understood dynamically<sup>72</sup> and, therefore, international law may be applicable, but it will be difficult to expand ATCA jurisdiction beyond violations of *jus cogens* norms<sup>73</sup>. It may be said that the violations that may find their way into the concept of the «law of nations» may be equated with those in paragraph 702 of *Restatement of the Law Third on Foreign relations*: torture, prolonged and arbitrary detention, summary execution, cruel inhuman or degrading treatment, genocide, war crimes, disappearance and wrongful death. With such strict requisites, many rights and wrongs are left without proper protection, such as labour or environmental rights, or a general right to physical integrity, such as may be violated by reckless behaviour caused by the officials of a corporation. For instance, TORRES declares that ATCA cannot support all four of ILO's fundamental labour rights<sup>74</sup>, and HONG believes that environmental harm and cultural destruction of peoples (cultural genocide) are not yet the subject of binding law<sup>75</sup>. Third generation rights would thus be left unprotected<sup>76</sup>.

49. *Sosa* does not eliminate all doubts, either, about the availability of an independent right of action and about the availability of ATCA jurisdiction against non-sovereign entities<sup>77</sup>. Nevertheless, several ATCA cases have shown that MNCs can indeed violate international law<sup>78</sup>. In this regard, after the *Flick* case<sup>79</sup>—in the German forced labour cases—liability has hinged on cooperation and participation in the violations.

50. Other features of US law show that ATCA is not the perfect weapon for the enforcement of HRs. Consider, for example, the doctrine of separation of powers, the act of state doctrine, the political question, sovereign immunity and international comity considerations, as well as *forum non conveniens*. The *Tel-Oren* decision first drew attention to the Act of State doctrine as a possible impediment to the application of ATCA<sup>80</sup>. Concerns have also been raised about the national interest of the United States and the separation of powers, stating that federal courts are not in a position to determine the international status of terrorist acts and risk becoming a forum for political propaganda. Thus, a common criticism is that federal courts may be seen as meddling in the executive's foreign and trade policy agenda<sup>81</sup>. Various interest groups have requested the US Congress to repeal the statute and the US Justice Department has argued (in an *amicus curiae* brief it filed on behalf of Unocal<sup>82</sup>) that ATCA suits could have a potentially serious adverse impact on significant interests of the United States, including interests related directly to the on-going struggle against international terrorism. The political question doctrine also tries to keep the judiciary from deciding matters that belong to other

<sup>72</sup> F. C. OLAH, «MNC Liability for International Human Rights Violations under the Alien Tort Claims Act», *Quarterly Law Review*, number 25, 2006-2007 at 769 - 771.

<sup>73</sup> «[F]ederal courts resist justifying decisions solely on the basis of customary HRs law unless it meets the most stringent substantive requirements», G. A. CHRISTENSON, «Federal Courts and World Civil Society», *Journal of Transnational Law and Policy*, number 6, pp. 438-439, cited in L. RUTHERFORD, id., p. 814.

<sup>74</sup> M. TORRES, id., p. 464.

<sup>75</sup> J. C. HONG, at 67. For the opposite view, see J. E. ARLOW, «The Utility of ATCA and the 'Law of Nations' in Environmental Torts Litigation: *Jota v. Texaco, Inc.* and Large Scale Environmental Destruction», *Wisconsin Environmental Law Journal*, number 7, 2000, p. 138.

<sup>76</sup> Right to economic and social development, a healthy environment, natural resources, etc, as reflected in the 1972 Stockholm Declaration or the 1992 Rio Declaration.

<sup>77</sup> G. PINILLA, «Corporate Liability for Human Rights violations on Foreign soil», *St. Thomas Law Review*, number 16, 2003-2004, p. 702; L. RUTHERFORD, «Redressing U.S. Corporate Environmental Harms Abroad through Transnational Public Law Litigation: Generating a Global Discourse on the International Definition of Environmental Justice», *Georgia International Environmental Law Review*, number 14, 2001-2002, p. 812.

<sup>78</sup> See *Kadic v Karadzic*, 70 F.3d 232 (2d Cir. 1995) and *Presbyterian Church of Sudan v Talisman Energy, Inc.* 244 F. Supp. 2d 289 (S.D.N.Y.2003).

<sup>79</sup> *United States v. Friedrich Flick et al.*; see <http://www.mazal.org/archive/nmt/06/NMT06-C001.htm> (last visited on 7 October 2007).

<sup>80</sup> *Tel-Oren v Libyan Arab Republic*, 726 F.2d 774 (2d Cir. 1984).

<sup>81</sup> D. BETZ, «Holding Multinational Corporations Responsible for Human Rights Abuses...», *DePaul Business Law Journal*, number 14, 2001-2002, p. 163.

<sup>82</sup> *Vid. Doe v Unocal Corp.*, 248 F.3d 915 (9th Cir. 2001).

branches of the Government. Finally, *Aguinda v Texaco*<sup>83</sup> has also provided evidence that *forum non conveniens* may be a major hindrance towards bringing US MNCs before federal US courts since most contacts and factual nexus lie outside the US<sup>84</sup>.

**51.** Part of ATCA case law has been codified by Congress in the Torture Victims Protection Act (TVPA), which effectively expands ATCA by creating a statutory cause of action for crimes such as torture or extrajudicial killing, committed under colour of law of any foreign nation, and providing a right to bring a cause of action both for Americans and aliens. Nevertheless, the TVPA may have little success against MNCs, because it does not consider corporations as individuals against which a case can be brought.

**52.** J.C. ANDERSON has called for a Foreign Human Rights Abuse Act<sup>85</sup>. According to this author, such an act should make it unlawful for any company or its agents to induce, authorize, participate, assist, utilize, engage in, or accept the benefits of HRs abuse, which, in fact, may make it very difficult for any MNC to maintain business relationships with many legitimate governments<sup>86</sup>. Nevertheless, such an act may never be enacted and, in order to provide effective protection worldwide, other countries would have to pass similar acts. Another attempt has been Prof. BAREMBERG's proposal of a bill, which would amend the *Fair Labor Standards Act* of 1938, to make US government manufacturers legally accountable for sweatshops conditions abroad, imposing civil penalties and private enforcement. Again, such an act may never come into existence. In the US, proposals of state laws addressing labour rights abroad have been pre-empted by federal legislation, such as the national Labor Relations Act or federal trade legislation<sup>87</sup>.

**53.** Many ATCA cases remain pending and most cases resolved satisfactorily for the plaintiffs have led solely to settlements between the parties. Even if ATCA were interpreted in such a way that all the above-mentioned obstacles were removed, and even if the US Congress passed legislation codifying ATCA case law, as it did with the Torture Victims Protection Act, US courts could not become the world's HRs main forum. There would be a real risk of judicial imperialism<sup>88</sup>, as Judge BORK indicated in the *Tel-Oren* case. Still, it may be argued that strengthening the scope and usefulness of ATCA and similar non-American pieces of legislation could be instrumental to forcing MNCs to submit to arbitration and other ADR mechanisms in order to avoid the publicity, disadvantageous procedural rules and millions in punitive damages. Finally, the *Kiobel* case<sup>89</sup>, still pending before the US Supreme Court, may do away with the possibilities of waging ATCA against multinationals, if the latter are declared not to be able to infringe international law norms.

### III. Conclusions

**54.** MNCs are legal entities which defy traditional notions of territoriality and extraterritoriality. Therefore, traditional mechanisms to exact responsibility from them may not be entirely suitable when it comes to preventing the violation of human rights in the countries where they operate or when activists and victims try to hold them accountable in their country of origin. Other tools, different from litigation, partly national and partly international, such as arbitration, mediation and other grievance mechanisms may be useful.

<sup>83</sup> *Aguinda v Texaco, Inc.*, 945 F. Supp. 625 (S.D.N.Y. 1996).

<sup>84</sup> K. L. BOYD, «The Inconvenience of Victims: Abolishing Forum Non Conveniens in US Human Rights Litigation», *Virginia Journal of International Law*, number 39, Fall 1998, pp. 41 and 53.

<sup>85</sup> J. C. ANDERSON, *id.*, p. 500.

<sup>86</sup> Several members of the Spanish Government have been condemned by criminal courts for the torture and extra-judicial killing of suspected Basque terrorists. Should no foreign MNC do business with the Spanish Government or, at least, not provide the Spanish police forces with law enforcement supplies for that reason or for fear that those supplies may be used for HRs violations?

<sup>87</sup> M. TORRES, *id.*, p. 473.

<sup>88</sup> W. GLABERSON, «US Courts Become Arbiters of Global Rights and Wrongs», *New York Times*, June 21, 2001(<http://www.nytimes.com/2001/06/21/us/us-courts-become-arbiters-of-global-rights-and-wrongs.html?pagewanted=all&src=pm>)

<sup>89</sup> *Kiobel v. Royal Dutch Petroleum*, 621 F.3d 111 (2d Cir. 2010).