Human rights and TNCs:

need for increased regulation to enforce CSR

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Contents

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Executive summary

The analysis showed that while transnational companies are increasingly directly or indirectly involved in serious abuses, they still enjoy substantial impunity. International law, nowadays, does not offer valid legal instruments to be used to enforce CSR. The attempts to regulate the international activities conducted by multinationals have materialised in a series of instruments that are not legally binding. The codes established by International Organizations, aimed to regulate the conduct of business multinationals, have limitations that profoundly affect their effectiveness. The absence of monitoring mechanisms, the impossibility of imposing penalties to enterprises which violate the rules, the vagueness of the definitions of the obligations to protect, are among the main causes of inability of international codes to make responsible and punishable TNCs for violations perpetrated during their activities.

Of similar deficiencies suffer the voluntary codes that many multinational companies have increasingly adopted due to the pressure of public opinion, which, through boycotts and information campaigns, wants to encourage transnational companies to act on a more responsible way both on the social and on the environmental level[1].

Host States are usually developing Countries, for them the foreign investments are a necessary condition for their economic growth. In addition, they are often Countries without an adequate legislation on human rights and whose access to justice is incredibly difficult. In many instances, the host Countries are ruled by governments directly involved in abuses. They are frequently, Countries in conflict or under dictatorship or military regime, from which we cannot realistically expect a respect for human rights, being themselves the first to violate them. For these reasons, an effective monitoring could be carried-out, by the States of origin of transnational corporations. These are Countries that have the necessary technical competence to impose appropriate standards for the protection of human rights and that have a judicial system suited to judge any violations. There is unanimous consensus

[1] See: Redmond, (2003-1: 91-95)

on the admissibility of the exercise of extraterritorial jurisdiction by the State of origin, if exercised in accordance with the principle of non-interference in the internal affairs of a foreign Country.

However, few States have legislation governing extraterritorial activities of transnational corporations and that, consequently, provides the possibility to make them accountable and punishable by local courts for any unlawful conduct. There are different reasons that make the majority of the States reluctant to establish a legal framework regulating the extraterritorial jurisdiction: the interest of creating an international system which is as favourable as possible for investments rather than protective of human rights; the influence that powerful multinational companies could exercise on some Countries, the complicity of the same States in the violations perpetrated by TNCs. In addition, the two basic principles of company law, namely the principle of limited liability and the principle of separation of legal personality together with the doctrine of *forum non conveniens*, have proven to be powerful tools in the hands of transnational companies.

It would be therefore desirable to adopt a new international instrument with the aim to clarify and to extend the scope of the obligations of human rights protection against possible violations by multinational companies, which Countries would be required to observe. This legal framework should introduce an obligation on the State of origin to require that parent companies of multinational groups, respect human rights universally recognized and not only the ones contained in the local legislation of the countries in which they operate. The proposed international instrument should also enable to sue the company in the State of origin in case it would not be possible to obtain compensation for damages suffered in the country where the violations were committed.

In this way, there would be good chances to overcome the barrier represented by the doctrine of *forum non conveniens* in the common law legal systems. Starting a legal proceeding against the parent company for its own actions rather than acts committed by the subsidiary, there would be a closer

connection with the *locus fori*. A regulatory framework would also help to avoid possible positive conflicts of jurisdiction if the extraterritorial application of the law by the State of origin would be perceived as interference in its internal affairs by the host State. In fact, the proposed international instrument could provide the obligation for the State of origin, to adopt certain measures relating to serious violations of human rights, in case the host State had not acted for their protection.

In addition to this mechanism of international regulation of extraterritorial jurisdiction, as mentioned in the previous paragraph, a direct involvement of the World Trade Organization in the control of multinational companies would be desirable. The WTO has, in fact, although unintentionally, liberalised limits incumbent on TNCs concerning their obligations to protect human rights. Member States are required to comply with some key rules of free trade, whose principles are potentially adverse to the protection of human rights. The non-tariff barriers to trade liberalisation, that the WTO tends to eliminate scientifically, often coincide with the law prepared by the states to protect social and environment rights of host communities. Faced with a situation where the international system of human rights protection and the WTO system have developed in total isolation from each other, it would be desirable that social considerations began to play a more significant role in the rules of free trade.

Some scholars are firmly convinced that the best way to go, in order to make companies effectively responsible and punishable for their actions, it is to adopt an universally recognized instrument, that would be legally binding and which would impose directly the obligations of human rights protection on TNCs . This action would therefore, involve a direct responsibility of the same for any violations. A solution could be offered by the UN "*Norms on the responsibilities of transnational corporations and other business enterprises with regard to human rights*", the most promising initiative in the field of corporate social responsibility. The UN Norms appear to have managed to overcome the limits of the OECD and ILO Guidelines. In fact, they introduce the principle of legal liability of TNCs for violations of international human

rights rules, providing that they can also respond for abuses committed by their suppliers and customers.

Socially responsible business practices would improve the efficiency of production and the workers' satisfaction[2]. A more efficient production would contribute to economic development, which in turn would tend to a greater promotion of civil and political rights and greater dissemination of democratic regimes. As a consequence, a greater political and economical stability would be beneficial for the global economy and the investments[3]. The adoption of globally binding standards would also oblige everybody to respect the same rules, avoiding the competitive advantage offered by the current legislative vacuum.

Human rights are universal, indivisible and interdependent and as such should be imposed on all actors without distinction. Skogly[4], in this regard, stresses that these binding instruments could make reference to a set of minimum international standards, describing the basic minimum conditions that should be guaranteed to all human beings. In other words, it should be ensured that host communities enjoy the same protection ensured to civil society of the majority part of OECD Countries.

States whose primary task it is to ensure the respect of human rights can not remain indifferent to the long list of documented abuses committed by transnational corporations.

Despite the fact that the States and the multinational companies do not always share the idea that socially responsible conduct may be extremely advantageous, most authors believe it is only a matter of time before this idea will be generally accepted.

[2] Skogly S. I. (1999: 256)
[3] Joseph S. (1999: 88)
[4] Skogly S. I. (1999: 254)

In the eyes of many, the acceptance of United Nations Norms represents a promising step towards the general acceptance by States of the need for legally binding standards for multinational enterprises.

1. Inadequacy of existing international instruments regulating the social responsibility of TNCs

Recently, the attention to the social and environmental impact of activities of transnational corporations (TNCs) in host Countries has increased considerably. This is a result of pressure and information seeking campaigns conducted by civil society organisations at the international level. Non-governmental organisations, academics and consumer associations have been stressing the need to establish effective control over of TNCs and to broaden the spectrum of responsibilities that these new players have towards host communities, the environment and the community in general. In fact, in a high number of widely publicised cases, although TNCs are involved either directly or indirectly in serious violations of human rights, they still enjoy total impunity.

At present international law does not offer valid legal regulations in the field of Corporate Social Responsibility (CSR). There are no international rules that impose the obligation to protect human rights directly on businesses and consequently, there is no direct responsibility of the TNCs for any committed violations. All the instruments available at an international level in the field of CSR that could effectively contribute to the effective regulation of TNC conduct belong to soft law[5] and therefore, are not automatically legally binding.

[5] Soft law consist of rules issued by law-making bodies that do not comply with procedural formalities necessary to give the rules legal status yet nonetheless may influence the behavior of other law-making bodies and of the public. In the context of international law, the term "soft law" covers such elements as: Most Resolutions and Declarations of the UN General Assembly (for example, the Universal Declaration of Human Rights); Elements such as statements, principles, codes of conduct, codes of practice etc. (often found as part of framework treaties); Action plans (for example, Agenda 21); Other non-treaty obligations.

At present, the most important tools to control the conduct of TNCs at international level are the OECD Guidelines, the ILO Tripartite Declaration, the United Nations Norms[6] and the initiatives adopted within the EU[7] However, in addition to their non-legally binding nature[8], these instruments have additional and substantial limitations.

Too much emphasis is given to dialogue and cooperation as a means to encourage multinationals to respect the human rights of persons involved directly or indirectly in their activity.[9] One almost has the impression that human rights are no longer rights, since compliance is left to the free choice of cooperation of TNCs. In other words, one has the perception that human rights are almost the subject of negotiation when they are related to TNC conduct. They lose their very nature of being rules to be observed by anyone, at any time. Such an approach, therefore, is inevitably doomed to fail if the multinational companies have no intention to cooperate and if they are not encouraged to do so.

[6] UN doc. "Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights, Sub-Commission on the Promotion and Protection of Human Rights" E/CN.4/Sub.2/2003/12/Rev.2

[7] Resolution on EU standards for European enterprises operating in developing countries: towards a European Code of Conduct, Adopted by the European Parliament on 15/01/1999, A4-0508/1998, Rapporteur Mr. Richard Howitt, MEP; Jaegers N.M.C.P.;
- Promoting a European framework for corporate social responsibility (The Green Paper), http://ec.europa.eu/employment_social/soc-dial/csr/greenpaper_en.pdf;
- Communication from the Commission concerning Corporate Social Responsibility: a business contribution to Sustainable Development (The White paper), http://ec.europa.eu/employment_social/soc-dial/csr/csr2002_en.pdf;

[8] Some authors have pointed out that, although the rules contained in international codes are not binding, they can not be considered without any authorities and real impact. It is not excluded, in fact, that they can have an 'anticipatory' impact, resulting in binding international standards when translated into customary rules, through the uniform and consistent compliance by the States. In support of this idea see: Akehurst (1996: 54); Vogelaar (1980: 127-139, 135-136). Of a different opinion: van Eyk (1995: 146); Jägers (2002: 115), Baade (1980:12).

[9] Deva (2003: 20)

The system is still too state-centric and focuses too much on the role of Governments in imposing obligations to protect human rights to TNCs[10]. But as claimed by several authors, any approach that relies excessively or exclusively on the sole desire of States to impose requirements on TNCs has failed in the past and has good chances to fail in future[11].

A further weakness of the current international codes lies in the monitoring tools provided. Failure to comply with the obligations of protection of human rights therein is not accompanied by any penalty: civil, criminal, or social[12]. Except for the Norms of the United Nations[13], the OECD Guidelines, the ILO Tripartite Declaration and the Global Compact do not contain any reference to the possibility of imposing penalties to TNCs or the possibility that the same may be the subject of public complaint[14].

Human rights covered by international codes are also too vague and general[15] and often refer to other conventional instruments. Unfortunately, the ambiguous wording of the international provisions, as outlined by various authors, is common practice to all instruments of human rights protection, not only to those expressly addressed to TNCs. It is even more difficult to identify the obligations that the TNCs have to respect because there is no consensus on their interpretation[16].

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[10] The United Nations norms seem to go behind this indirect approach. In fact they state: "*Transnational corporations and other business enterprises shall be subject to periodic monitoring and verification by United Nations, other international and national mechanisms already in existence or yet to be created, regarding application of the Norms*." "*Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights, Sub-Commission on the Promotion and Protection of Human Rights*", Res. 2003/16, E/CN.4/Sub.2/2003/12/Rev.2 (2003). http://documents-dds-ny.un.org/doc/UNDOC/GEN/G03/160/08/pdf/G0316008.pdf?OpenElement

[11] Deva (2003: 21)

[12] A social sanction could be, for example, the listing of guilty TNCs in a blacklist or forms of condemnation by the consumer associations, media, and non-governmental organisations.

[13] UN doc. "*Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights, Sub-Commission on the Promotion and Protection of Human Rights*" E/CN.4/Sub.2/2003/12/Rev.2

[14] Kamminga and Zia-Zarifi (2000: 84)

[15] For example: The Global Compact principle n. 8 calls on enterprises to *"[Businesses should] undertake initiatives to promote greater environmental responsibility"*.

[16] Tistounet (2000: 395)

As suggested by Surya Deva[17], to overcome the ineffectiveness of the rules contained in the codes, due to lack of clear and concrete obligations, a special document should be prepared and annexed to the actual codes. That document should include a clear description of obligations derived from treaties on human rights protection, and how it can be applied toTNCs as well as local business.

A further strand of initiatives, less organic but equally significant, is represented by the adoption of voluntary Codes of Conduct by the same multinational companies, this is done mainly to respond to the pressure exercised by public opinion in industrialised countries. Their substantial limit is seen in the absence of an external and independent monitoring, in their specificity and in their non–binding nature.

In addition to the long list of the above-mentioned limits we have to add, that at present, except in certain rare cases[18], international law does not require that the Country of origin verify that the activities of TNCs are conducted in full respect of human rights rules.

The rules on international responsibility of the State do not support, in fact, the allegation that any damage caused to foreign states, on whose operates territory affiliates or subsidiaries of the group, is giving rise to the International liability of the State of origin. The obligation incumbent on States to adopt all necessary measures to prevent and punish any violations to human rights perpetrated by multinationals, remains, at present and in general, circumscribed within the national territory. The current system of international responsibility of the State requires some connection between responsibility

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[17] Deva (2003: 19).

[18] Olivier De Schutter, Extraterritorial Jurisdiction as a tool for improving the Human Rights Accountability of Transnational Corporations, 2006, pp. 7, http://www.reports-and-materials.org/Olivier-de-Schutter-report-for-SRSG-re-extraterritorial-jurisdiction-Dec-2006.pdf. "*In certain (…) cases, the exercise of extraterritorial jurisdiction has consisted in providing that national courts will be competent to apply rules of international law (as implemented in the national legal system) to the activities of corporations abroad,* (…) *complementing in this respect the work performed by international tribunals and in particular that of the International Criminal Court.*"

and territorial control. It follows that State responsibility can be correlated to acts committed on national territory, assuming that the State has effective control over the territory subjected to its jurisdiction. The obligation to monitor the operations of TNCs, therefore, remains primarily an obligation incumbent on the host Country, which often, however, is not in a position to monitor their conduct effectively.[19]

This is the case of Countries where the government is corrupt, which often lacks adequate human rights legislation and whose access to justice is incredibly difficult. The TNCs are often much more powerful than their hosting Countries, that need the foreign capitals for their economic growth[20].
It is very likely that these States have no interest in imposing excessive restrictions on human rights to companies that operate on their territory. In this optic, TNCs could easily use their economic power to deter vulnerable or corrupt governments, to adopt legislations that will create a problem for them[21]. They could, for example, discourage hosting Countries from adopting strict norms, by threatening them to move and invest elsewhere, on more favourable terms. Moreover, transnational companies operate frequently in Countries where governments are directly involved in abuses. They are often Countries in conflict or under dictatorship or military regime that in many cases, are the first to non-comply with human rights. Therefore, we can not count on the fact that the State ensures and guarantees the respect for human rights on their territory when the same State is the first to violate them. But even when the host Country is not deliberately involved in violations of human rights, it almost certainly will not have the technical expertise nor the resources to monitor the effective conduct of firms operating on its territory. In this optic, an effective monitoring could be done, at present, only by the State of origin of the multinational.

The State of origin, usually defined as the Country where the company is registered, certainly has the most appropriate technical competence, for the

[19] Jaegers (2002: 216).
[20] Kamminga and Zia-Zarifi (2000: 78).
[21] On this subject see: Lippman (1985: 545)

imposition of appropriate security standards and a judicial system suited to judge possible violations, giving the possibility to those who have suffered to obtain justice. Nevertheless, as repeatedly stated, a general obligation of surveillance by the Country of origin of multinational companies operating abroad, in order to prevent and repress any acts prejudicial, is not yet established at international level[22]. The adoption of rules designed to prevent and repress any violations committed by TNCs is left at present to the discretion of the States of origin[14]. However, few Countries have a legislation that regulates the extraterritorial activities of transnational corporations and consequently, the national courts can not intervene in cases of violations committed abroad.

The most relevant example is the Alien Tort Claims Act, a USA Federal Statutes adopted in 1789, which allows foreign citizens to turn to National Federal Courts to denounce wrong doings committed in violation of the right of Nations or of international treaties concluded by United Nations. USA Courts currently interpret the law as conferring jurisdiction on both, companies registered in the United States, and companies that conduct business in the USA permanently and continuously. The action may be promoted by foreigners for alleged violations of international law rules, whether they have been directly committed by companies or that have been perpetrated in complicity with local governments[23].

At European level, the Brussels Convention of 1968, now consolidated into Regulation 44/2001, on jurisdictional competency, recognition and enforcement of judgments in civil and commercial matters, has the potential to provide the basis for the extraterritorial responsibility of TNCs. On the basis of the interpretation that most States reserves to the Brussels Convention, there is the obligation for EU Member Countries to recognise the jurisdiction of National Courts on the actions against persons, natural or legal entities, domiciled in the territory of the State, wherever the violation suffered has

[22] Kamminga and Zia-Zarifi (2000:80)
[23] See on the subject: Wiwa v. Royal Dutch Petroleum Co., 2002 WL 319887 (S.D.N.Y., 2002) where it has been established the complicity of Shell Nigeria, of the English mother company Shell and of Royal Dutch on the violations committed by the Nigerian police forces.

occurred and whatever the nationality of the claimant, including situations in which an alternative forum would seem more appropriate to deal with the case. This Convention may well be invoked, therefore, in the case of human rights violations which occur abroad, particularly in developing countries, where European multinational companies usually operate.

Also at European level, Great Britain has established important trials against British TNCs, for human rights violations committed abroad. The English Courts acknowledged the possibility to sue TNCs registered in Great Britain, for violations committed by their subsidiaries abroad, where the latter had adopted weaker legal standards than those adopted in England.
The common element to all remedies provided at State level, consists in having established the jurisdiction of the domestic courts for activities carried out by multinational companies outside the *locus fori*. Different are, however, the links between illegal activities, carried out by enterprises taken to Court and the *locus fori*, as legal basis for the exercise of extraterritorial jurisdiction of civil law. In most cases, the connection was identified in the nationality of the defendant or on the fact that it was domiciled in the territory of *locus fori*, thus justifying the exercise of extraterritorial jurisdiction according to the principle of active personality. In some cases, the exercise of extraterritorial jurisdiction consisted in applying rules of international law to activities carried out by multinational companies abroad, where, in others, it led to the extensive application of national law.

However, civil proceedings already established in several States against TNCs for violations committed outside the *locus fori* offered the basis for sensitive observations. Considering that the Country of origin is the only one that has effective means to submit the TNCs to an effective monitoring, it would be appropriate to assess whether and to what extent, the Country of origin is entitled, by extra-territorial jurisdiction, to prosecute transnational corporations for violations committed in another Country[24]. The question is of

[24] The concept of extraterritorial jurisdiction is common to both legal systems of common law and civil law. It seems, therefore, appropriate to check is applicability at corporate social responsibility level.

crucial importance especially where the host Country is unable or has no interest in protecting human rights in relation to activities undertaken by enterprises on its territory. Once the limits of international law on the exercise of extraterritorial jurisdiction by of the Country of origin are analysed it must verify its validity as a tool for strengthening the legal responsibility of TNCs for violations committed outside the Country of origin[25].

[25]The State of origin is in principle the State in which the parent company is registered, and the host country or the territorial is the State in which the subsidiary operates and is registered. We will focus on prescriptive extraterritorial jurisdiction, namely the powers of the State to enact rules that apply to persons or activities locate outside the State territory. This concept differs from the jurisdiction covered by certain rules of private international law under which the *locus fori* will apply the law of another State.
For a more detailed explanation of extraterritorial jurisdiction see: "*Corporate responsibility under international law and issues in extraterritorial regulation: summary of legal workshops*" UN doc. A/HRC/4/35/Add.2, 2007
http://documents-dds-ny.un.org/doc/UNDOC/GEN/G07/108/45/pdf/G0710845.pdf?OpenElement

2. Can the use of extraterritorial jurisdiction be a tool to strengthen the social responsibility of TNCs?

The extraterritorial jurisdiction could offer a good possibility to strengthen corporate social responsibility. However, relying exclusively on States, this exercise, suffers the inevitable limits consisting in the nature, structure and modus operandi of transnational companies. Some authors, who have stressed its limits, have highlighted the unlikelihood that a significant number of States actually give life to a legal framework of regulation for extraterritorial jurisdiction[26].

The reasons could easily be identified: with the political unwillingness to create such a mechanism[27], with the interest of creating an international system which is as favourable as possible for investment rather than human rights, with the influence that TNCs particularly powerful might exercise on some Countries[28] and not least with complicity of the same Countries in violation of human rights committed by TNCs in Third Countries[29].

The doctrine of *forum non conveniens*[30], often invoked by TNCs, and the two main principles of Corporations law, namely the principle of limited liability and the principle of separation of legal personality, are powerful tools in the hands of TNCs to elude the application of extraterritorial jurisdiction in the Country of origin[31]. In addition, multinational enterprises operate in an organizational network so complex that they can escape national regulatory mechanisms quite easily, transferring their resources in other Countries[32]. Furthermore, as pointed out by some authors, knowing the lack of continuity of States in the

[26] Joseph (1999: 181)
[27] Joseph (1999: 187)
[28] Peet (2003: 15)
[29] Deva (2003: 8).
[30] F*orum non conveniens* means essentially that there a more appropriate forum for it.
[31] Duval-Major (1992: 650).
[32] Grossman and Bradlow (1994: 8)

strict observance of human rights, it would seem unrealistic to expect them to impose the latter to TNCs[33].

On the basis of considerations so far developed, the adoption of a new international instrument appears in the eyes of some experts an appropriate solution if not inevitable. Its aim should to be to clarify and to extend the scope of obligations to protect human rights from possible violations perpetrated by multinational companies and that the States should monitor. This instrument should, in fact, represent the obligation for the State of origin to give the possibility, to victims of abuse, to obtain compensation, where it would not be possible in the State where the violations have been committed. Although not reflecting, therefore, the actual status of international law, this instrument should contemplate such an obligation, for the State of origin, to exercise extraterritorial jurisdiction on illegal activities that parent company (which possesses its 'nationality'), have conducted in third Countries[34].

That obligation would be justified by the responsibility of the State of origin to control effectively the parent company which, sequentially, would be required to monitor the compliance by its subsidiary and its business partners, of their obligations to protect human rights in Countries in which they operate[25]. This would facilitate overcoming the 'corporate veil' problem by the imposition of due diligence[35] obligations on the parent company, whose liability could potentially be engaged once it appears that the subsidiary, affiliate or business partner has committed human rights abuses or has been complicit in such abuses, and that the parent has not adopted all measures which could have prevented the risk from materializing.[36]

The main value of such an instrument would consist in establishing a clear division of responsibilities between the host Country and the State of Origin in the regulation of TNCs. The primary responsibility of the host Country, on the

[33] Baez C. et al (1999–2000: 220)
[34] De Schutter (2006: 51)
[35] A traditional definition of due diligence is "the diligence reasonably expected from, and ordinarily exercised by, a person who seeks to satisfy a legal requirement or discharge an obligation" (Ruggie A/HRC/8/5, 2008, p.9)
[36] De Schutter (2006: 52)

territory of which the TNC conducts its activities, should be reaffirmed. But the State of Origin of the transnational corporation should be imposed a subsidiary responsibility to exercise control on the TNC over which it may have jurisdiction on the basis of the principle of active nationality. A clarification of the division of tasks would thereby be achieved. This would not only ensure that the transnational corporations committing human rights abuses will not be left unpunished, and that the victims will not be left without remedies[37].

The proposed conventional instrument could foresee that responsibility of the parent company may be criminal, civil or administrative so that all the different approaches that States adopt on the issue of criminal liability of legal persons will be taken into consideration[38]. This would enable to go beyond the limit that in many Countries preclude the possibility of challenging businesses violating human rights, in fact many national legislations do not contemplate the criminal liability of legal persons[39]. The exercise of jurisdiction, moreover, is based on a legal basis, under a bilateral or multilateral agreement and would not be exercised unilaterally by the State of origin of the parent company. From this perspective, control over the companies could not be perceived as a source of a competitive disadvantage by the State of origin. In the presence of standards uniforms, will obviously be more difficult for the company to move and invest elsewhere on more convenient terms[40].

The extraterritorial jurisdiction exercised by the State of origin of parent company could give rise to positive conflicts of jurisdiction[41], if perceived by host Countries as interference in their internal affairs. This is why, the

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[37] De Schutter (2006: 52).
[38] Stephens (2002: 1)
[39] See, for example, the "*International Convention for the Suppression of the Financing of Terrorism"* Adopted by the General Assembly of the United Nations in resolution 54/109 of 9 December 1999. Art. 5 para 1 states: '*Each State Party, in accordance with its domestic legal principles, shall take the necessary measures to enable a legal entity located in its territory or organized under its laws to be held liable when a person responsible for the management or control of that legal entity has, in that capacity, committed an offence set forth in article 2. Such liability may be criminal, civil or administrative'.* http://www.un.org/law/cod/finterr.htm
[40] Stephens (2002: 82).
[41] Positive conflicts of jurisdiction: several States claim jurisdiction at the same time; negative conflicts: no State claims jurisdiction.

adoption of bilateral or multilateral instruments containing provisions concerning the jurisdiction, respectively by the State of origin and the host Country in terms of multinational companies, could be the best solution to avoid any positive conflicts of jurisdiction.

Such a multilateral instrument could provide, for instance, that the State of origin is obliged to take such measures as may be necessary, in accordance with its legal principles, to establish the liability of legal persons for certain serious violations of human rights, unless the host State has acted in order to protect these rights under its jurisdiction and victims have access to effective remedies in that State. In addition, it could provide for consultations between both States where the home State intends to exercise extraterritorial jurisdiction in order to ensure that the transnational corporation which it may control will not commit human rights abuses or be complicit in such abuses. It could also include provisions allowing a State on whose territory certain violations have taken place in which a transnational corporation is implicated, to request the home State of the parent company to file proceedings against this company[42].

However, supporting the viability of extraterritorial jurisdiction by the State of origin should not lead us to believe that it is the only or the best solution to the ineffectiveness of national and international CSR instruments for violations committed in third Countries. On the contrary, the evolution of extraterritorial regulation on TNCs should be conceived as one of the instruments that can be adopted in a broader legal framework, combining different regulatory mechanisms[43].

According to some authors, it would be not only appropriate but necessary, that a regulatory mechanism set up at international level accompanies the national initiatives of extraterritorial regulation of TNCs activities[44]. It would seem equally essential, that the international mechanism would be based not

[42] De Schutter (2006: 51).
[43] Deva (2003: 13).
[44] Deva (2003: 48-49).

only or primarily on States to impose TNCs obligations to protection human rights. Only in this way, would it be possible to overcome weaknesses embedded in a state-centric legal framework for the regulation of corporate social responsibility.

One of the most controversial issues, in an effort to develop valid alternatives for a legal framework of stronger international corporate responsibility, concerns the possibility of a direct involvement of the World Trade Organization (WTO) in the control of multinational companies. This organization could indeed help to create a supra-national mechanism that can effectively impose obligations of human rights protection in chief to TNCs[45]. The World Trade Organization has, in fact, a system of disputes which is commonly considered extremely efficient[46]. In case a Member State fails to comply, in fact, upon decision of the resolution of disputes body, the latter may legitimize the applicant Country to apply trade sanctions to the non-compliant State. The possibility of applying retaliation measures could therefore be an effective deterrent for multinationals companies doing business prejudicial to human rights[47].

As pointed out by Ruggie in its report to UN Human Rights Council: "*the permissive conditions for business-related human rights abuses today are created by a misalignment between economic forces and governance capacity. Only realignment can fix the problem. In principle, public authorities set the rules within which business operates. But at the national level some governments simply may be unable to take effective action, whether or not the will to do so is present. And in the international arena states themselves compete for access to markets and investments, thus collective action problems may restrict or impede their serving as the international community's*

[45] The involvement of the World Trade Organization in promoting human rights is the subject of a heated academic debate. An example is provided by Petersman-Alston dispute, the first great advocate of the need to integrate the issue of human rights in the regulatory system of international trade organisations, the second of opposed opinion. See in this regard Petersamnn (2002) and Alston (2002).
[46] ICHRP "*Beyond Voluntarism: Human rights and the developing international legal obligations of companies*", (2002: 112)
[47] Virginia Journal of International Law, "*Human rights and Corporations*" Vol 44, n.4 (2004: 935-936)

“public authority.” The most vulnerable people and communities pay the heaviest price for these governance gaps."[48]

According to the opinion of some scholars[49], therefore, an opportunity to strengthen corporate social responsibility could be offered by commercial agreements. Notwithstanding the possibility that such agreements can play a role regarding the conduct of transnational corporations on human rights, the more efficient system of imposing the obligations to respect on TNCs would seem the incorporation of these measures into all commercial agreements. The mechanism for disputes settlement covered by such agreements could be used as tool to impose the obligations to protect human rights to TNCs. In addition, if these obligations would be balanced by rules that could facilitate and protect the activities of enterprises, it could result in an incentive for them to observe the obligations which would be required.

[48] “*Business and Human Rights: Mapping International Standards of Responsibility and Accountability for Corporate Acts*” Report of the Special Representative of the Secretary-General (SRSG) on the issue of human rights and transnational corporations and other business enterprises, A/HRC/4/035, 02/2007, p. 23

[49] In support of the thesis on the use of economic sanctions in order to protect and promote protection of human rights see: Cleveland (2001: 199)

3. Conclusion

The debates started in the '70s on the necessity of establishing a UN code of conduct for multinationals, in order to stop corporate human rights violations, ended up some 30 years later with the creation of the Global Compact, based on a self-regulation and voluntary approach.

Even though a large number of Transnational Corporations (TNCs) have joined the GC a serious of critics have been raised to it: it provides ample space for companies to engage in window-dressing and cherry pick among standards; it is characterized by weak implementation of agreed standards throughout corporate structures and supply chains; reporting standards and procedures are weak; there are no significant penalties for non-compliance; global corporations gain undue influence in the public policy arena and unfair competitive advantages through their association with the United Nations and public-private partnerships; and key issues that explain why corporate capitalism and its institutions fuel underdevelopment or unsustainable development are often ignored.

There are also concerns that CSR in general, and the Global Compact in particular, are a means of diverting attention from harder regulatory alternatives.
In this climate of concerns and mistrust John Ruggie, the UN Special Representative on Human Rights and Business, has released his report calling for a new 3-step international policy framework to govern corporate accountability in the area of human rights. This framework, has to make "*a singular contribution to closing the governance gap in business and human rights*[50]", includes further promoting the State duty to **protect**, the corporate sector's responsibility to **respect**, and the strengthening of mechanisms for **remedy** for victims of human rights abuses perpetrated by corporations.

[50] . "*Protect, Respect and Remedy: a Framework for Business and Human Rights*" Report of the Special Representative of the Secretary-General (SRSG) on the issue of human rights and transnational corporations and other business enterprises, J. Ruggie, A/HRC/8/5, 04/2008

Most of the actors involved in the corporate accountability and human rights debate would probably agree that these three areas need much more work from the highest global agencies that protect human rights and guide corporate behaviour. Perhaps one of the most important implications that stems from the report is that a high UN official is making the critiques about an incoherent corporate accountability system, which we often hear from non-governmental and academic groups, but which many states and corporations are unwilling to acknowledge. The question many are probably asking as they read through Ruggie's report is how the UN will take Ruggie's framework suggestion forward (if at all) and how States, which were extremely reluctant to engage in a corporate accountability discussion under the previous draft Norms era, will react.

As Ruggie remind "*the United Nations is not a centralized command-and-control system that can impose its will on the world - indeed it has no "will" apart from that with which Member States endow it*[51]*".*
The question is if Member States will accept to "a*ddress obstacles to access to justice, including for foreign plaintiffs - especially where alleged abuses reach the level of widespread and systematic human rights violations",* and if they will follow Ruggis's suggestion to *"strengthen judicial capacity to hear complaints and enforce remedies against all corporations operating or based in their territory, while also protecting against frivolous claims"*. [52]

A lot of questions remain for the future. Will the Human Rights Council work towards binding legislation? Will States come together in a collective manner to strengthen national corporate compliance? Will more work be done to bring greater collective harmony and coherence to a highly un-articulate global corporate accountability system?

[51] Ruggie, A/HRC/8/5 (2008 :28)
[52] Ruggie, A/HRC/8/5 (2008 :23)

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