

Business and human rights: from soft law to hard law?¹

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Abstract

Over the last decades the international community turned its attention towards the impact that businesses have on human rights, and the role they can play in furthering human rights protection, in light of the lead role they play in globalization, and the increasingly vocal allegations of human rights violations directed against some multinationals. These developments triggered some action at the United Nations, and at the European Union level, and led to the development of international soft law in this area, moving slowly towards binding instruments. This paper explores the evolution of business and human rights, presents the current international non-binding instruments, as well as some states' binding initiatives in this area, and highlights the tendency to move from soft law to hard law, to leave the realm of voluntary corporate responsibility for the one of pure accountability. In this context, several solutions are debated by scholars: from a binding treaty, or a series of narrower treaties focused on specific areas, to a Model Law which could be used by states to enact laws imposing obligations on businesses within their jurisdictions, or even adding human rights in the international investment agreements and making use of the international arbitration as an enforcement mechanism.

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JEL Classification: K10, K22

1. Introduction

Over the last decades the international community turned its attention towards the impact that businesses have on human rights and the role they can play in furthering human rights protection, in light of the leading role played by corporations in globalization, and the increasingly vocal allegations of human rights violations directed against some multinationals. This state of facts triggered some action at the United Nations, and at the European Union level and led to the development of international soft law, and even pieces of hard law requiring businesses to respect human rights.

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Traditionally there was a clear divide between human rights law, with a focus on the states' obligations, and business law, with a focus on economic aspects. Nowadays the borders between the two main areas are increasingly blurred, impacting tort law, criminal law, contract law, as well as investment and commercial arbitration.

Businesses can be involved in human rights violations either as primary perpetrators or as accomplices, aiding and abetting to human rights abuses committed of third parties (usually governments or State organs or entities). Most cases against businesses, which reach litigation, involve claims of corporate complicity³.

Besides the traditional domestic judicial fora where enterprises can be tried for human rights violations, new actors emerged in this area, like NGOs, financial institutions, OECD National Contact Points, and stock markets, which can eventually affect a company's reputation and its access to funding. Moreover, there seems to be a tendency towards creating or strengthening the mechanisms available at national and international level regarding corporate accountability for human rights violations.

This paper explores the United Nations and other international efforts to create non-binding, soft-law standards such as the OECD Guidelines for Multinational Enterprises, the UN Global Compact and the UN Guiding Principles on Business and Human Rights, as well as the states' initiatives in the area of business and human rights. Moreover, the paper highlights the tendency to move from soft law to hard law, to leave the realm of voluntary corporate responsibility for the one of pure accountability. In this context, several solutions put forward by scholars, are described: a binding treaty, a Model Law which could be used by states to enact laws imposing obligations on businesses within their jurisdictions, or even adding human rights in the international investment agreements and making use of the international arbitration as an enforcement mechanism.

In the end, it concludes that time is not ripe for hard law in the area of business and human rights, thus answering to the question put forward in the title by a blunt "Not yet".

This paper has involved desk-based research of the existing literature on the subject, the relevant international case law, the websites of the different actors involved, which enabled us to formulate a synthesis regarding the current status of the subject, while highlighting the initiatives that are looming, and reaching a conclusion on what the future holds with respect to business and human rights.

³ Dr. Jennifer Zerk, *Corporate liability for gross human rights abuses. Towards a fairer and more effective system of domestic law remedies. A report prepared for the Office of the UN High Commissioner for Human Rights*, 2016. Available online at: <http://www.ohchr.org/Documents/Issues/Business/DomesticLawRemedies/StudyDomesticLawRemedies.pdf>. Last accessed on 14.11.2016.

2. International soft law on business and human rights

2.1. *The Global Compact and UN Guiding Principles on Business and Human Rights*

A milestone in the development of business and human rights is the landmark speech made by former Secretary-General Kofi Annan at the World Economic Forum in 1999. There is no better way to convey his message than by quoting from his speech:

"I propose that you, the business leaders gathered in Davos, and we, the United Nations, initiate a global compact of shared values and principles, which will give a human face to the global market. [...] Specifically, I call on you - individually through your firms, and collectively through your business associations - to embrace, support and enact a set of core values in the areas of human rights, labour standards, and environmental practices. [...]"

There is enormous pressure from various interest groups to load the trade regime and investment agreements with restrictions aimed at preserving standards in the three areas I have just mentioned. These are legitimate concerns. But restrictions on trade and investment are not the right means to use when tackling them. Instead, we should find a way to achieve our proclaimed standards by other means. And that is precisely what the compact I am proposing to you is meant to do. [...]"

Many of you are big investors, employers and producers in dozens of different countries across the world. That power brings with it great opportunities -- and great responsibilities. You can uphold human rights and decent labour and environmental standards directly, by your own conduct of your own business. [...]"

I believe what I am proposing to you is a genuine compact, because neither side of it can succeed without the other. Without your active commitment and support, there is a danger that universal values will remain little more than fine words -- documents whose anniversaries we can celebrate and make speeches about, but with limited impact on the lives of ordinary people. And unless those values are really seen to be taking hold, I fear we may find it increasingly difficult to make a persuasive case for the open global market. [...]"⁴

Following informal discussions between the business community and the UN, the Global Compact was formally launched on 26 July 2000 bringing together 44 global companies, 2 labour and 12 civil society organisations, as well as 6 business associations. The launch triggered some critics from civil society accusing the UN for collaborating with companies that had been accused of severe human

⁴ Press Release SG/SM/6881 from 1 February 1999. Available online at: <http://www.un.org/press/en/1999/19990201.sgm6881.html> Last accessed on 14.11.2016.

rights abuses. UK and Swiss governments were the first to show their support for the initiative by providing the funding needed. The Global Compact was seen as an instrument to fill the governance voids by asking businesses, as main drivers and beneficiaries of globalisation, to integrate UN principles in their business strategy and operations⁵.

The Global Compact sets out ten principles on human rights, labour, environment and corruption⁶, which can be incorporated by businesses into strategies, policies and procedures.⁷ The Global Compact has now become the world's largest corporate sustainability initiative, with 9,000 participating companies and 3,000 non-businesses.⁸

During his 2005-2011 mandate, Professor John Ruggie, the Special Representative of the Secretary General on Human Rights and Transnational Corporations and Other Business Enterprises, drafted the UN Guiding Principles on Business and Human Rights⁹ (also called Ruggie's Principles), and in 2011, the United Nations Human Rights Council endorsed them.

Ruggie's Principles are built on a three pillar framework, and were designed to provide a global standard in preventing and addressing negative impacts of business activities on human rights.¹⁰ The three pillars¹¹ are:

1. States' existing obligations to respect, protect and fulfil human rights and fundamental freedoms;

⁵ Global Compact website <http://globalcompact15.org/report/part-i/un-history-a-giant-opens-up> Last accessed on 14.11.2016.

⁶ Principle 1: Businesses should support and respect the protection of internationally proclaimed human rights; and

Principle 2: make sure that they are not complicit in human rights abuses.

Principle 3: Businesses should uphold the freedom of association and the effective recognition of the right to collective bargaining;

Principle 4: the elimination of all forms of forced and compulsory labour;

Principle 5: the effective abolition of child labour; and

Principle 6: the elimination of discrimination in respect of employment and occupation.

Principle 7: Businesses should support a precautionary approach to environmental challenges;

Principle 8: undertake initiatives to promote greater environmental responsibility; and

Principle 9: encourage the development and diffusion of environmentally friendly technologies.

Principle 10: Businesses should work against corruption in all its forms, including extortion and bribery.

⁷ UN Global Compact website. Link to the principles: <https://www.unglobalcompact.org/what-is-gc/mission/principles> Last accessed on 14.11.2016.

⁸ UN Global Compact website. Link to the participants: <https://www.unglobalcompact.org/what-is-gc/participants> Last accessed on 14.11.2016.

⁹ Business and Human Rights Resource Center <https://business-humanrights.org/en/un-guiding-principles/background-history-of-guiding-principles> Last accessed on 14.11.2016

¹⁰ The UN Guiding Principles on Business and Human Rights. An Introduction. Available at http://www.ohchr.org/Documents/Issues/Business/Intro_Guiding_PrinciplesBusinessHR.pdf. Last accessed on 14.11.2016.

¹¹ The UN Guiding Principles on Business and Human Rights with Commentaries http://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf. Last accessed on 14.11.2016.

2. The role of business enterprises as specialized organs of society performing specialized functions, required to comply with all applicable laws and to respect human rights;
3. The need for rights and obligations to be matched to appropriate and effective remedies when breached.

The Guiding Principles set forth concrete actions for States to meet their duty to protect human rights, which include enacting and enforcing laws that require businesses to respect human rights; creating a regulatory environment that facilitates business respect for human rights; and providing guidance to companies on their responsibilities. Moreover, states should provide access to effective and appropriate judicial and non-judicial grievance mechanisms for human rights abuses. As regards the responsibility of business enterprises to respect human rights, the Guiding Principles set forth three components: instituting a policy commitment, undertaking ongoing human rights due diligence to identify, prevent, mitigate and account for their human rights impacts, and putting in place processes to enable remediation for any adverse human rights impacts they cause or contribute to. The human rights due diligence should be carried out both in respect of their activities, as well as in respect of their suppliers, prior to entering into a contract with them, and during the life of the contract¹².

2.2. OECD Guidelines for Multinational Enterprises

The OECD Guidelines are part of the OECD Declaration and Decisions on International Investment and Multinational Enterprises, and were first adopted in 1976. They have been updated five times, with the last update in 2011, which included in the Guidelines a new human rights chapter, consistent with the UN's Guiding Principles on Business and Human Rights. The OECD Guidelines are recommendations for responsible business conduct in areas such as employment and industrial relations, human rights, environment, information disclosure, combating bribery, consumer interests, science and technology, competition, and taxation.¹³ The Guidelines apply to all enterprises which operate in or have a mother company in any of the signatory states, even if the enterprises operate in non-signatory states.

Governments¹⁴ adhering to the Guidelines are obliged to set up National Contact Points whose main activities consist in promotional activities, handling enquiries, and contributing to the resolution of issues that arise from the alleged

¹² *Idem*

¹³ OECD Guidelines for Multinational Enterprises <http://www.oecd.org/corporate/mne/oecdguidelinesformultinationalenterprises.htm> Last accessed on 14.11.2016.

¹⁴ All 35 OECD countries, and 11 non-OECD countries have adhered to the Guidelines: Argentina, Australia, Austria, Belgium, Brazil, Canada, Chile, Colombia, Costa Rica, Czech Republic, Denmark, Egypt, Estonia, Finland, France, Germany, Greece, Hungary, Iceland, Ireland, Israel, Italy, Japan, Jordan, Korea, Latvia, Lithuania, Luxembourg, Mexico, Morocco, Netherlands, New Zealand, Norway, Peru, Poland, Portugal, Romania, Slovak Republic, Slovenia, Spain, Sweden, Switzerland, Tunisia, Turkey, United Kingdom, United States.

non-observance of the Guidelines in specific instances. National Contact Points are either a government department, or independent structures comprising government officials, trade unions, employers unions, and sometimes non-governmental organisations¹⁵.

The specific instances mechanism requires National Contact Points to provide a platform for discussion and assistance to stakeholders to help find a resolution for issues arising from the alleged non-observance of the Guidelines. Complaints may be submitted to National Contact Points by individuals or communities affected by a company's activities or, more frequently, by NGOs acting on their behalf. These complaints may be submitted either in the enterprises home country or any country in which the enterprise operates and which adheres to the Guidelines.¹⁶

Specific instances are not legal cases and National Contact Points are not judicial bodies. National Contact Points offer good offices and facilitate access to consensual and non-adversarial procedures (ex. conciliation or mediation). Three hundred specific instances have been considered since 2000 – and almost a quarter of that number represents specific instances raised between June 2010 and June 2012. Since the introduction of the human rights chapter in 2011, the number of human rights-related claims filed and deemed admissible has been gradually rising.¹⁷

Although the NCPs do not have the power to impose sanctions, the specific instance procedure gives some teeth to the Guidelines because adverse findings against a company may cause negative publicity affecting its reputation, and may be further used in civil litigation or criminal prosecution. Moreover, some governments have recently linked compliance with the OECD Guidelines to the provision of external trade assistance and export credit.¹⁸

Nevertheless, one cannot help but wonder whether such soft law instruments aren't only a means to avoid binding regulations with sanctions attached. In the end, they are just recommendations and enterprises are set up to make profits, not to promote human rights, they make foreign investments for profit reasons, not charity, and therefore when a conflict arises between pursuing profits, and observing human rights, soft law might be just a bit too soft to lean the balance in favor of human rights.

A new project in the business and human rights area, stemming from a collaboration between institutional investors, governments and civil society, is **the**

¹⁵ OECD Guidelines for Multinational Enterprises <http://mneguidelines.oecd.org/about.htm> Last accessed on 14.11.2016.

¹⁶ *Idem*

¹⁷ For examples regarding specific instances brought before National Contact Points please see <http://mneguidelines.oecd.org/mwg-internal/de5fs23hu73ds/progress?id=V3h6PyKQs3g0qSPxsBjR6pYJdcXEBjUVUHQgS5crEac>, Last accessed on 14.11.2016.

¹⁸ Antony Crockett, *Human rights complaints against multinationals increasing*, 29 October 2015. Available online at: <http://www.lexology.com/library/detail.aspx?g=15e8bb9f-657b-4464-a11d-5f6d67e71b67> Last accessed on 14.11.2016.

Corporate Human Rights Benchmark¹⁹ which attempts to assess and rank the world's largest publicly listed companies on their human rights performance. The first pilot ranking is expected by the end of 2016 and will rank the top 100 companies in the agricultural products, apparel, and extractive industries.²⁰

3. States' input in the business and human rights agenda

3.1. *United Kingdom*

In 2015 the UK Parliament passed the Modern Slavery Act²¹ which consolidates and clarifies the existing offences of slavery and human trafficking, increases the maximum penalty for such offences, provides for two new civil preventative orders, provides for new maritime enforcement powers in relation to ships, establishes the office of Independent Anti-slavery Commissioner, introduces a number of measures focused on supporting and protecting victims, including a statutory defence for slavery or trafficking victims and special measures for witnesses in criminal proceedings, and requires certain businesses to disclose what activity they are undertaking to eliminate slavery and trafficking from their supply chains and their own business.²²

Part 6 of the Act tackles the issue of transparency in supply chains, providing that companies, wherever incorporated, which carry on business in the United Kingdom, exceeding a turnover threshold (£36 million), must prepare a slavery and human trafficking statement for each financial year. Such statement would comprise the steps the organisation has taken during the financial year to ensure that slavery and human trafficking is not taking place in any of its supply chains, and in any part of its own business, or a statement that the organisation has taken no such steps. It may also include information about the organisation's structure, its business and its supply chains; its policies in relation to slavery and human trafficking; its due diligence processes in relation to slavery and human trafficking in its business and supply chains; the parts of its business and supply chains where there is a risk of slavery and human trafficking taking place, and the steps it has taken to assess and manage that risk; its effectiveness in ensuring that slavery and human trafficking is not taking place in its business or supply chains, measured against such performance indicators as it considers appropriate; the training about slavery and human trafficking available to its staff.²³

¹⁹ The website of the Institute for Human Rights and Business <https://www.ihrb.org/programmes/benchmarking/report-chrb-methodology-published> Last accessed on 14.11.2016.

²⁰ Business and Human Rights Resource Center <https://business-humanrights.org/en/corporate-human-rights-benchmark> Last accessed on 14.11.2016.

²¹ The official UK legislation portal <http://www.legislation.gov.uk/ukpga/2015/30/contents> Last accessed on 14.11.2016.

²² Explanatory Notes relating to the Modern Slavery Act 2015 <http://www.legislation.gov.uk/ukpga/2015/30/notes/division/2> Last accessed on 14.11.2016.

²³ The official UK legislation portal <http://www.legislation.gov.uk/ukpga/2015/30/part/6>; Last accessed on 14.11.2016.

If the organisation has a website, it must publish the slavery and human trafficking statement on that website, and include a link to the slavery and human trafficking statement in a prominent place on that website's homepage. If the organisation does not have a website, it must provide a copy of the slavery and human trafficking statement to anyone who makes a written request for one, and must do so before the end of the period of 30 days beginning with the day on which the request is received.²⁴

The duties imposed on commercial organisations are enforceable by the Secretary of State bringing civil proceedings in the High Court for an injunction or, in Scotland, for specific performance of a statutory duty.

The Modern Slavery Act 2015 also created the position of an Independent Anti-slavery Commissioner whose functions are to encourage good practice in the prevention, detection, investigation and prosecution of slavery and human trafficking offences; the identification of victims of those offences.²⁵ On 12 October 2016, the Independent Anti-Slavery Commissioner published its first Annual Report 2015-2016.²⁶

Moreover, corporate liability for modern slavery has already made case law in UK. In 2016 a court ruled in favour of six Lithuanian men who were trafficked to the UK to be exploited. The company has been found liable for the first time for modern slavery. The amount of compensation is still to be assessed.²⁷

3.2 France

Following the Rana Plaza disaster²⁸ and *Erika* oil spill case²⁹, in November 2013, a group of French Parliamentarians introduced the French bill on corporate

²⁴ *Idem*.

²⁵ The official UK legislation portal: <http://www.legislation.gov.uk/ukpga/2015/30/part/4> Last accessed on 14.11.2016.

²⁶ The Independent Anti-Slavery Commissioner's first Annual Report 2015-2016 <https://www.gov.uk/government/publications/independent-anti-slavery-commissioner-annual-report-2016> Last accessed on 14.11.2016.

²⁷ Chris Syder, *Combating modern slavery - the next steps for the UK's Government and businesses*, 21 October 2016. Available online at: <http://www.lexology.com/library/detail.aspx?g=a18b3d43-b63b-4e89-9360-2fb54dfcca05>; Last accessed on 14.11.2016.

Felicity Lawrence, *Court finds UK gangmaster liable for modern slavery victims*, 10 June 2016 <https://www.theguardian.com/global-development/2016/jun/10/court-finds-uk-gangmaster-liable-for-modern-slavery-victims-kent-chicken-catching-eggs> Last accessed on 14.11.2016.

²⁸ On 24 April 2013, Rana Plaza, a factory building in Bangladesh, producing clothing for European and American brands, collapsed, killing more than 1000 workers, and injuring over 2000 workers. For more information see reports in the media, please see: <https://www.theguardian.com/world/2013/apr/26/bangladesh-building-official-response-fury>; http://www.nytimes.com/2013/04/25/world/asia/bangladesh-building-collapse.html?pagewanted=all&_r=3& Last accessed on 14.11.2016.

²⁹ In September 2012, France's Cour de Cassation upheld a 2008 ruling against Total SA over a 1999 oil spill of 22,046 tons of crude oil, when the 24-year-old tanker *Erika* split apart in a storm off the northwest coast of France. For more information see media reports <http://www.reuters.com/article/us-france-erika-idUSBRE88O0LX20120925> Last accessed on

due diligence³⁰, which arrived before the *Assemblée Nationale* only in January 2015. **The first version of the bill was quite courageous providing for companies' obligation to prevent damages deriving from human rights violations, as well as from sanitary and environmental matters. In case a damage did occur from the operations of the mother company, its subsidiaries or its subcontractors, there was a presumption of responsibility for the company, which could be overturned only by proving that the company took all the necessary and reasonable measures to prevent the damage. Therefore the burden of proof was reversed in favour of potential claimants. This first version was sent by the *Assemblée Nationale* back to the committees where it was seriously modified.**

The second version no longer provided for companies' obligation to prevent damages, but only for an obligation to publish a due diligence report, incumbent on companies over a certain size, which should present the measures adopted by the company to identify and prevent human rights and environmental risks deriving from its activities, as well as the activities of its subsidiaries. The subcontractors and the suppliers are to be included in the report only if they have an established commercial relationship, thus excluding one off deals, irrespective of the value and quantity of the order.

In March 2015, this second version was adopted by the *Assemblée Nationale*, but the Senate rejected it and sent it back to the *Assemblée Nationale*, and from there, it was sent back to the committee. In March 2016, the *Assemblée Nationale* adopted the new version, but in the Senate it was further modified. Thus, on 13 October 2016, the Senate adopted a totally different third version of the bill, which mostly transposes the EU Directive on non-financial reporting. There is nothing left in the bill about corporate liability for human rights violations or remedies for their victims. Currently, since the Senate and the *Assemblée Nationale* adopted different versions of the Bill, a *Commission Mixte Paritaire* will be set up in order to find a compromise text.³¹

14.11.2016. It is important to highlight that Total was held liable for the acts of its subsidiary since Total had to control the boats of the subsidiaries. The judgment rendered by the Cour de Cassation can be downloaded from http://www.courdecassation.fr/img/crim_arret_3439_20120925.pdf Last accessed on 14.11.2016.

³⁰ Proposition de loi relative au devoir de vigilance des sociétés mères et des entreprises donneuses d'ordre, n° 1519 Available online at <http://www.assemblee-nationale.fr/14/ta/ta0501.asp> Last accessed on 14.11.2016

³¹ A very clear and coherent account of the process and the amendments through which the French bill on corporate due diligence passed is rendered by Dr Nadia Bernaz, *Unpacking the French Bill on Corporate Due Diligence: a presentation at the International Business and Human Rights Conference in Sevilla*, 21 October 2016. Available at <https://rightsasusual.appspot.com/?p=1087> Last accessed on 14.11.2016.

3.3. United States

In the United States, on the 27 July 2015, Rep. Carolyn B. Maloney introduced before the House of Representatives the Business Supply Chain Transparency on Trafficking and Slavery Act (2015)³², which should amend the Securities Exchange Act of 1934, empowering the Securities and Exchange Commission to issue regulations requiring any listed company that has annual worldwide global receipts in excess of \$100 million to include in its mandatory annual report a disclosure of whether it has taken any measures during the year to identify and address conditions of forced labor, slavery, human trafficking, and the worst forms of child labor within its supply chains.

Such information should be available on the company's website "*through a conspicuous and easily understandable link to the relevant information labeled Global Supply Chain Transparency*". Moreover, the Securities and Exchange Commission should make available on its website, in a searchable form, a list of the companies required to disclose such information, and a compilation of the information disclosed. The Business Supply Chain Transparency on Trafficking and Slavery Act aims to provide consumers information on products that are tainted by child labor, forced labor, slavery, and human trafficking in the supply chains, enabling them to sanction these crimes through purchase decisions.³³

In addition, the United States are already famous in the area of business and human rights for their Alien Tort Claims Act (28 U.S.C §1350) which provides that "*The Federal District Courts will have the power to try in first instance any action formulated by a foreigner regarding a tort liability for an act committed in violation of the laws of nations or of a treaty in which the US are a party*". Although the Alien Tort Claims Act dates back to 1789, its importance has grown in recent when the focus moved from individuals to multinational corporations.³⁴

In the case of *Kiobel v. Royal Dutch Petroleum*, 12 victims attempted to hold liable the companies involved in the exploitation and production of oil in Nigeria for being complicit in torturing and killing of environmental activists. Since there was no unitary practice in the Federal Courts of Appeal as to whether corporations can be held liable under the Alien Tort Claims Act, the claimants referred the case to the Supreme Court. The Supreme Court rendered its ruling in *Kiobel* on 17 April 2013. The Court analyzed under what circumstances the US courts can try a case initiated under the Alien Tort Claims Act for violations of the law of nations, which took place on the territory of another sovereign state. It ruled that the presumption against extra-territoriality also applies to claims under the

³² Business Supply Chain Transparency on Trafficking and Slavery Act (2015). Available online at: <https://www.congress.gov/bill/114th-congress/house-bill/3226/text> Last accessed on 14.11.2016.

³³ Summary of the Business Supply Chain Transparency on Trafficking and Slavery Act (2015). Available at: <https://www.congress.gov/bill/114th-congress/house-bill/3226> Last accessed on 14.11.2016.

³⁴ Felipe Gómez Isa; Koen de Feyter (Eds.), *International Human Rights Law in a Global Context*. University of Deusto, Bilbao, 2009, p. 21.

Alien Tort Claims Act, and therefore the Act does not apply to serious human rights violations committed on foreign territory if they lack a sufficient connection with the USA. The mere presence of a corporation on US territory is not sufficient to create such a link. Following this judgment, two opinions were expressed: some argued that this interpretation of the Alien Tort Claims Act is inconsistent with the previous interpretations, and that the US have turned their back on a global tendency to sanction human rights violations, while others agreed with the ruling arguing that it is not the duty of the United States to play the role of world police.³⁵

Since the Supreme Court did not rule on whether multinational corporations can be held liable for human rights violations, in the case of *Doe I v. Nestle USA, Inc.*, a federal Court of Appeal ruled that they can be held liable under the Alien Tort Claims Act. The case concerns allegations of forced child labor on the cocoa plantations from the Ivory Coast. Nestlé, Cargill, and Archer Daniels Midland were accused of having had knowledge of the conditions under which work took place on the plantations and still bought cocoa, thus being complicit in forced child labor and in breach of international law. In September 2015, the defendant companies petitioned the Supreme Court for certiorari asking:

“(1) Whether a defendant is subject to suit under the Alien Tort Statute for aiding and abetting another person’s alleged violation of the law of nations based on allegations that the defendant intended to pursue a legitimate business objective while knowing (but not intending) that the objective could be advanced by the other person’s violation of international law;

(2) Whether the “focus” test of Morrison v. National Australian Bank, Ltd. governs whether a proposed application of the Alien Tort Statute would be impermissibly extraterritorial under Kiobel v. Royal Dutch Petroleum Co.; and

(3) Whether there is a well-defined international-law consensus that corporations are subject to liability for violations of the law of nations.”³⁶

In January 2016 the Supreme Court denied the petition, and therefore the case continues before the lower court, where the plaintiffs submitted an amended complaint in July 2016.³⁷

³⁵ Vivian G. Curran, *Extraterritoriality, Universal Jurisdiction, and the Challenge of Kiobel v. Royal Dutch Petroleum Co.*, “Maryland Journal of International Law”, 28 (2013), pp. 77-89. Available online at <http://digitalcommons.law.umaryland.edu/mjil/vol28/iss1/6> Last accessed on 14.11.2016; Charles Kotuby, *New Alien Tort Statute Case at the United States Supreme Court: Kiobel, et al., v Royal Dutch Petroleum Petition Filed*, 8 June 2011. Available online at: <http://conflictoflaws.net/2011/new-alien-tort-statute-case-at--the-united-states-supreme-court-kiobel-et-al-v--royal-dutch-petroleum-petition--filed/> Last accessed on 14.11.2016; Marta Requejo, *Kiobel: No Role for the United States as World Police*, 19 April 2013, Available online at: <http://conflictoflaws.net/2-13/kiobel-no-role-for-the-united-states-as-world-police/> Last accessed on 14.11.2016.

³⁶ Supreme Court of the United States blog <http://www.scotusblog.com/case-files/cases/nestle-u-s-a-inc-v-doe/> Last accessed on 14.11.2016.

³⁷ For a chronological and detailed account of the case *Doe I v. Nestle*, please see the website of the Business and Human Rights Resource Center: <https://business-humanrights.org/en/nest1%C3%A9-cargill-archer-daniels-midland-lawsuit-re-c%C3%B4te-divoire> Last accessed on 14.11.2016.

3.4. European Union

The European Union adopted the Directive 2014/95/EU of the European Parliament and of the Council of 22 October 2014 amending Directive 2013/34/EU as regards disclosure of non-financial and diversity information by certain large undertakings and groups³⁸ (“*Directive on non-financial reporting*”), believing that “*disclosure of non-financial information is vital for managing change towards a sustainable global economy by combining long-term profitability with social justice and environmental protection.*”³⁹

The Directive on non-financial reporting provides that some undertakings should prepare a non-financial report containing information relating to at least environmental matters, social and employee-related matters, respect for human rights, anti-corruption and bribery matters. It should include:

- “[...] (a) a brief description of the undertaking's business model;
- (b) a description of the policies pursued by the undertaking in relation to those matters, including due diligence processes implemented;
- (c) the outcome of those policies;
- (d) the principal risks related to those matters linked to the undertaking's operations including, where relevant and proportionate, its business relationships, products or services which are likely to cause adverse impacts in those areas, and how the undertaking manages those risks;
- (e) non-financial key performance indicators relevant to the particular business.”⁴⁰

The obligation provided for in the Directive on non-financial reporting are incumbent only on large undertakings which are public-interest entities and to those public-interest entities which are parent undertakings of a large group, in each case having an average number of employees in excess of 500, in the case of a group on a consolidated basis.⁴¹

Member States must ensure the transposition of the Directive on non-financial reporting by 6 December 2016, and the companies must issue non-financial reports for the financial year starting on 1 January 2017 or during the calendar year 2017.⁴²

It is to be expected that the EU Member States will not be very creative when transposing this Directive on non-financial reporting. Most likely they will

³⁸ Directive 2014/95/EU of the European Parliament and of the Council of 22 October 2014 amending Directive 2013/34/EU as regards disclosure of non-financial and diversity information by certain large undertakings and groups. Available online at <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32014L0095> Last accessed on 14.11.2016.

³⁹ Recitals para. (3) Directive 2014/95/EU

⁴⁰ Art. 1 in Directive 2014/95/EU; Art. 19a in Directive 2013/34/EU.

⁴¹ Recitals para. 14 Directive 2014/95/EU.

⁴² Art. 4 Directive 2014/95/EU.

not go beyond the minimum requirements provided for in the Directive in order to maintain their competitiveness for attracting investments.

If the European legislative issued a Directive, the European Commission at its turn issued three Sector Guides on Implementing the UN Guiding Principles on Business and Human Rights: for employment and recruitment agencies, for ICT companies, and for oil and gas companies. Each Guide offers practical step-by-step guidance on how to ensure respect for human rights in day-to-day business operations. At each step, they explain what the UN Guiding Principles expect, and offer examples for how to put them into practice.⁴³

4. Solutions envisaged to move towards hard law

Further to the dissatisfaction expressed by some states and by NGOs in respect of the efficiency of the U.N. Guiding Principles for Business and Human Rights, and the pressure for an international binding instrument, in 2014, the UN Human Rights Council established an Intergovernmental Working Group on Transnational Corporations and Other Business Enterprises (IGWG) with respect to human rights, which was mandated to “*elaborate an international legally binding instrument to regulate, in international human rights law, the activities of transnational corporations and other business enterprises.*”⁴⁴

The initiative was launched by Ecuador and South Africa. From the 47 member states of the Council, 20 states voted in favour, 14 States opposed and 13 abstained. The European states in the Council⁴⁵, as well as the United States, Japan and Korea opposed.⁴⁶

Discussions on the content of an international legally binding instrument started with a session in 2015, and are currently ongoing with another session in 2016.⁴⁷

Nevertheless, considering the opposition expressed in the Human Rights Council to the establishment of the IGWG, it is expected that, even if there is going to be a treaty, the developed countries, where most multinational

⁴³ The Guides are available at https://ec.europa.eu/anti-trafficking/publications/european-commission-sector-guides-implementing-un-guiding-principles-business-and-hum-0_en Last accessed on 14.11.2016.

⁴⁴ Human Rights Council, *Elaboration of an international legally binding instrument on transnational corporations and other business enterprises with respect to human rights*, A/HRC/RES/26/9 (14 July 2014). Available at <http://www.ihrb.org/pdf/G1408252.pdf> Last accessed on 14.11.2016.

⁴⁵ Austria, France, Germany, Ireland, Italy, United Kingdom of Great Britain and Northern Ireland, Czech Republic, Estonia, Montenegro, Romania, The former Yugoslav Republic of Macedonia.

⁴⁶ Anita Ramasastry, *Corporate Social Responsibility versus Business and Human Rights: Bridging the Gap between Responsibility and Accountability*. *Journal of Human Rights*, Vol. 14, No. 2, 2015, pp. 237-59. Available online at <https://ssrn.com/abstract=2705675> Last accessed on 14.11.2016.

⁴⁷ For detailed reports about the UN Treaty talks please see the website of the European Coalition for Corporate Justice <http://corporatejustice.org/news/329-un-treaty-talks-day-5-morality-cannot-be-legislated-but-behaviour-can-be-regulated> Last accessed on 14.11.2016.

corporations have their headquarters, will not ratify a treaty which puts too much burden on the corporations' shoulders. Therefore there would be either a treaty which will never apply, or a treaty empty of any content, where obligations are seriously diminished in order to gain widespread approval.

One should not forget that there was another passing initiative for a binding instrument regarding business and human rights which failed. In 2003 the UN Sub-Commission on the Promotion and Protection of Human Rights (the predecessor of the UN Human Rights Council) issued for discussion the Draft Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights.⁴⁸ The Draft Norms were mainly a collection of the existing human rights obligations from various treaties applied to corporations. The civil society supported the Norms, and the business community opposed them. Finally the Human Rights Commission did not adopt them. Against this background, the UN Secretary-General Kofi Annan appointed Professor Ruggie as special representative on human rights and transnational corporations and other business enterprises.⁴⁹

Another solution put forward by scholars was that of having a Model Law on Business and Human Rights, which could be both a standard setting instrument and a source of inspiration for states when and if they decide to enact laws imposing human rights obligations on the corporations within their jurisdictions. This is presented as a better option than negotiating and adopting a treaty that invariably implies prolonged negotiations and most likely the refusal of ratifications by developed countries.⁵⁰

Yet another approach is to incorporate business and human rights provisions into international investment agreements. In this respect, it was argued that adapting international investment agreements in order to include human rights obligations for investors would ensure a display in parallel of investors' rights and their obligations concerning human rights protection.⁵¹ States are required to protect and promote foreign investments, and investors would be required to

⁴⁸ Sub-commission on the Promotion and Protection of Human Rights, *Draft Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights*, E/CN.4/Sub.2/2003/12 (26 August 2003).

⁴⁹ Anita Ramasastry, *Closing the Governance Gap in the Business and Human Rights Arena: Lessons from the Anti Corruption Movement* in Surya Deva; David Bilchitz (eds.), "Human Rights Obligations of Business", Cambridge University Press, 2013, pp. 162-90. Available online at: <https://ssrn.com/abstract=2736813p.8> Last accessed on 14.11.2016.

⁵⁰ Rashid Dumbuya, *Corporate Responsibility to Respect Human Rights: Is the Un Guiding Principles on Business and Human Rights Up to the Task or is There a Need for a Treaty on Business and Human Rights?*, 10 September 2014. Available online at: <https://ssrn.com/abstract=2541420> or <http://dx.doi.org/10.2139/ssrn.2541420> Last accessed on 14.11.2016

⁵¹ Barnali Choudhury, *Spinning Straw into Gold: Incorporating the Business and Human Rights Agenda into International Investment Agreements*, 10 May 2016, Forthcoming in the "University of Pennsylvania Journal of International Law". Available online at: <https://ssrn.com/abstract=2778076> Last accessed on 14.11.2016.

protect and promote human rights. Such an approach would be easier to implement than a Treaty since it involves the consent of fewer states.⁵²

Moreover, this approach would ensure access to a neutral dispute resolution mechanism with which investors are already familiar. While currently investment arbitration is the mechanism by means of which investors seek remedies for breaches of treaty standards, the same mechanism could be adapted in order to establish liability and offer compensation for breaches of human rights by the same investors.⁵³

There are several options as regards the reconfiguration of the dispute resolution mechanism in the international investment agreement, namely it could set forth that individual claimants or their states are entitled to pursue claims against the investor for failure to comply with the human rights obligations provided in the treaty either before the arbitral tribunal, be it as a claim or a counterclaim, or before the courts of the home state of the investor.⁵⁴

Moving the focus on the supply chains, and considering the spread use of UN Convention on Contracts for the International Sale of Goods (**CISG**), it was also put forward that integrating some human rights provisions in the **CISG would ensure better compliance with human rights by suppliers worldwide.**⁵⁵ **Amending the UN Convention on Contracts for the International Sale of Goods** in order to insert human rights standards and obligations might prove quite a daunting endeavor, but instead nothing stops international buyers to insert human rights standards in the commercial contracts with their suppliers.

For instance, in July 2015, the *Fédération Internationale de Football Association* (FIFA) announced that it recognises the provisions of the UN Guiding Principles on Business and Human Rights and will make it compulsory for both contractual partners and those within the supply chain to comply with these provisions.⁵⁶

5. Conclusions

Against a background of public outrage towards companies involved in human rights violations, various initiatives were launched at international level, but also within the European Union and at national level. The most prominent instruments remain the UN Global Compact, the UN Guiding Principles on Business and Human Rights, and the OECD Guidelines for Multinational

⁵² *Ibidem*, p. 43

⁵³ *Ibidem*, p. 33

⁵⁴ *Ibidem*, p. 40

⁵⁵ Stéphane Brabant, *Setting human rights standards through international contracts*, 24 June 2016. Available online at: <http://www.lexology.com/library/detail.aspx?g=3c5f5e02-b911-4674-8d47-cd9c505b4cb7> Last accessed on 14.11.2016.

⁵⁶ John Gerard Ruggie, John F. Sherman, *Adding Human Rights Punch to the New Lex Mercatoria: The Impact of the UN Guiding Principles on Business and Human Rights on Commercial Legal Practice*, 8 September 2015. Available online at: <https://ssrn.com/abstract=2657885> Last accessed on 14.11.2016.

Enterprises, all of them soft law instruments. The specific instance procedure in the OECD Guideline became just slightly more relevant lately because adverse findings against a company may cause, besides reputation damages, difficulties in obtaining external trade assistance and export credit.

At national level, the paper analyses the UK Modern Slavery Act, the French bill on corporate due diligence, the US Business Supply Chain Transparency on Trafficking and Slavery Act, as well as the already famous Alien Tort Claims Act. On top of that, The European Union adopted the Directive on non-financial reporting, whose effects will be visible in the financial year starting on 1 January 2017 or during the calendar year 2017.

The actions taken so far are either mere recommendations, a lack of compliance exposing the companies to bad publicity, or at most they impose clear reporting obligations. The victims' access to remedies remains clearly confined to the diversity of national law systems, which have different approaches towards corporate liability for human rights violations, piercing the corporate veil or extraterritoriality.

Lately pressure increased for advancing towards an international binding instrument regarding business and human rights, or finding other solutions to give some teeth to the soft law instruments created so far. Various solutions were put forward: a UN Treaty, a Model Law, incorporating business and human rights provisions into international investment agreements or in the UN Convention on Contracts for the International Sale of Goods.

Small steps towards a Treaty were made in 2014, when the UN Human Rights Council established an Intergovernmental Working Group on Transnational Corporations and Other Business Enterprises (IGWG), which was mandated to elaborate an international legally binding instrument. Nevertheless, there is a high degree of skepticism that an agreement will be reached on the content of such a treaty. Even if finally there will be a treaty, it is expected to be either a phantom treaty, which will lack ratification from the part of the developed countries where most multinational corporations have their headquarters, or a treaty empty of any content, where obligations are seriously diminished in order to gain widespread approval.

Although some states already stepped on the treaty path, from all the solutions put forward, the model law and the incorporation of business and human rights standards into international investment agreements appear to be better options, or, at least, faster paths. Nevertheless, both of them lack the capacity to level the playing field for all corporation globally. More precisely, in the absence of a global instrument imposing unified human rights standards, there is a risk that some states will lower the standards in order to attract investment, triggering a race to the bottom with precarious effects on the human rights protection.

Despite the public pressure for a binding international instrument, for clear sanctions imposed on corporations and eased access to fora and remedies for the victims, the time does not seem to be ripe for a binding instrument of global reach. Leaving aside the lack of political will and the strong opposition from the part of

the business community, there are also many technicalities as regards the burden sharing in ensuring respect for human rights between states and non-states actors that require clarification before being able to reach a widespread agreement at international level. There is a fundamental unsolved controversy as regards how extensive can be human rights obligations imposed on corporations, and until this is clarified, any edifice will be raised on shaking ground.

Ruggie's Principles clearly distinguish between the states' duty to protect human rights and the business responsibility to respect human rights. Therefore, primarily it is the states' obligation to put in place proper legislation and to allow access to proper mechanisms to remedy human rights violations. A strong state should have in place the proper system to identify and sanction any corporate abuse on its territory. One could wonder why business should step in and fill the gaps left by a state which fails to take proper action. In an ideal world this would be the case, a perfect split between state duties and business obligations, where a business is focused on profit making while respecting state laws and regulations. Nevertheless, in our world, given the fast paced globalization, out of which corporations reap the most benefits, a global business environment governed by impunity and abuse must be avoided to the largest extent possible.

Something must be done. This was accepted by all stakeholders involved, including by business representatives. At this moment, that "something" around which agreement could be reached is the obligation to issue due diligence reports: a form of corporate introspection into its activities and its supply chains in order to ensure that human rights are respected. Reporting is only in its infancy, therefore its impact, benefits or futility cannot be properly assessed yet. Should reporting prove inefficient, a next step will follow naturally. Meanwhile, there is a feeble trend among states to deal more seriously with business and human rights in their own jurisdictions.

To conclude, an answer to the question put forward in the title of the paper – From soft law to hard law? – would be: "Not yet".

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